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# Shadowed by the Shadow Inventory: A Newark, New Jersey, Case Study of Stalled Foreclosures and Their Consequences

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# Shadowed by the Shadow Inventory: A Newark, New Jersey, Case Study of Stalled Foreclosures and Their Consequences

Linda E. Fisher\*

Introduction .....	1265
I. Judicial and Nonjudicial Foreclosure: The New Jersey Example .....	1269
II. Foreclosures and the Shadow Inventory Depress Communities .....	1271
III. Foreclosure Stalling and Abandonment: The Previous Studies .....	1274
IV. Background on Newark and Upper Clinton Hill Demographics .....	1278
V. Methodology .....	1282
A. Findings .....	1286
B. Analysis and Significance of Findings .....	1290
Conclusion .....	1293

## INTRODUCTION

Since 2007, approximately four million Americans have faced foreclosure.<sup>1</sup> This is cause for concern not only to affected homeowners, but more broadly as well. Research has demonstrated that foreclosures generate a host of adverse ripple effects, including declines in home prices and new home construction.<sup>2</sup>

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1. Jessica Silver-Greenberg, *Despite Aid, Borrowers Still Face Foreclosure*, N.Y. TIMES, Feb. 22, 2013, at B1 (“As of early 2012, roughly four million Americans were in foreclosure since the start of 2007 . . .”).

2. *See infra* notes 37–46; *see also* Atif Mian et al., *Foreclosures, House Prices, and the Real Economy* 30 (Nat’l Bureau of Econ. Research, Working Paper No. 16,685, 2011), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1740314](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1740314) (reporting on an empirical study demonstrating that

Lately, foreclosure activity has dropped in many areas of the country, though a number of states, such as Florida, New Jersey, and Illinois, showed increases in 2012.<sup>3</sup>

Meanwhile, the national inventory of homes in foreclosure or owned by banks (REO, or real estate owned) climbed nine percent in 2012, to 1.5 million homes.<sup>4</sup> The stock of homes with mortgages in default, foreclosure, or purchased by the bank after a foreclosure sale and not put back on the market is called the shadow inventory.<sup>5</sup> Economists generally believe that housing prices will not fully recover until the bulk of the shadow inventory has been disposed of.<sup>6</sup> Lower-income neighborhoods of color have been particularly affected,<sup>7</sup> although

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foreclosures have a large negative impact on house prices, residential investment, and durable consumption).

3. Tom De Poto, *Homeowners Got a Bit of Help from Lenders*, STAR-LEDGER (Feb. 24, 2013), <http://njcitizenaction.org/news/cra463.html> (“A survey by the Mortgage Bankers Association . . . showed the number of homeowners delinquent on their mortgage payments was at the lowest level since 2008. But in New Jersey, the percentage increased from 16.7 to 17.9 percent.”); Tom De Poto, *New Jersey Plays Catch-Up in Foreclosure Market*, STAR-LEDGER (Jan. 17, 2013, 4:45 PM), [http://www.nj.com/business/index.ssf/2013/01/new\\_jersey\\_plays\\_catch-up\\_in\\_f.html](http://www.nj.com/business/index.ssf/2013/01/new_jersey_plays_catch-up_in_f.html) [hereinafter De Poto, *New Jersey Plays Catch-Up*] (reporting that RealtyTrac data shows a national drop in foreclosures, but an increase in a number of states, particularly New Jersey, Florida, and Illinois); see also Christina Mlynski, *Judicial Foreclosure States Continue to Clog Inventory Pipeline*, HOUSINGWIRE (Feb. 1, 2013, 2:50 PM), [www.housingwire.com/articles/judicial-foreclosure-states-continue-clog-inventory-pipeline](http://www.housingwire.com/articles/judicial-foreclosure-states-continue-clog-inventory-pipeline) (reporting that foreclosure activity increased in 2012 in twenty states using a primarily judicial foreclosure process). *But cf.* Atif Mian et al., *Foreclosures, House Prices, and the Real Economy*, prefatory materials, 3 (IMES Discussion Paper No. 2011-E-27, 2011), available at <http://www.imes.boj.or.jp/research/papers/english/11-E-27.pdf> (“[T]here is indeed a very strong negative correlation between actual foreclosures and whether a state requires a judicial foreclosure. States that require judicial foreclosure have a rate of foreclosures per homeowner during 2008 and 2009 that is 3 percentage points lower than states without, which translates to a 2/3 standard deviation and is more than half of the mean (4.5% homeowners in foreclosure).”).

4. De Poto, *New Jersey Plays Catch-Up*, *supra* note 3; see also Amrita Jayakumar, *Home Prices Up 9.3%—Fastest Increase Since 2006*, WASH. POST, May 1, 2013, at A9 (graphic showing that as of March 2013, Florida, at 9.7%, had the highest foreclosure inventory in the nation as a percentage of all mortgaged homes; New Jersey was second at 7.3%).

5. While definitions of the shadow inventory vary somewhat, the term frequently is used to encompass these categories. Note that this definition does not include bank-owned homes on the resale market. See Brian Browdie, *Shadow Inventory Falls to Lowest in More than Three Years: Report*, AM. BANKER (Oct. 9, 2012, 2:23 PM), [http://www.americanbanker.com/issues/177\\_195/nations-shadow-inventory-fell-in-july-corelogic-reports-delinquent-homes-1053335-1.html?zkPrintable=true](http://www.americanbanker.com/issues/177_195/nations-shadow-inventory-fell-in-july-corelogic-reports-delinquent-homes-1053335-1.html?zkPrintable=true) (reporting on a recent CoreLogic report and stating that the homes included in the shadow inventory using this definition has fallen. “Overall, 45% of distressed properties in the U.S. are in California, Florida, Illinois, New Jersey and New York . . .”).

6. See Mark Fleming, *Shadow Inventory: Influence of Mortgage Modifications and State Laws*, CITYSCAPE, 2012, at 175, 175–78; Eric Rosenblatt & Vincent Yao, *Shadow Inventory: Holding Down Home Values in Multiple Ways*, CITYSCAPE, 2012, at 179, 179–81; Conor Dougherty, *Help for Underwater Homes: Short Sales Forestall Foreclosures, Buoying Property Prices as Recovery Plays Out*, WALL ST. J., Mar. 6, 2013, at A3 (“[M]illions of homeowners . . . are in some form of pre-foreclosure distress—a ‘shadow inventory’ that could hit the market and spell trouble for the housing recovery. Ivy Zelman . . . estimates the market needs to absorb about three million homes before the shadow inventory is reduced to its [previous] level . . .”).

7. See Morgan Brennan, *The Foreclosure Crisis Isn't Over Just Yet*, FORBES (Dec. 1, 2012, 10:37 AM), <http://www.forbes.com/sites/morganbrennan/2012/12/01/the-foreclosure-crisis-isnt-over>

investors have bought up foreclosed properties in more prosperous areas, driving down inventory and contributing to an upswing in housing prices.<sup>8</sup>

Yet, in states like New York and New Jersey with judicial foreclosure and a large backlog of cases, foreclosures are currently taking an average of more than two-and-a-half years to complete (though recent cases are taking considerably less time).<sup>9</sup> Lately, judicial foreclosure regimes have been blamed: critics argue that judicial review creates lengthy processes that in turn only delay the inevitable.<sup>10</sup> Since few borrowers can cure their arrears, some economists argue that costs outweigh benefits.<sup>11</sup> Additionally, some blame borrowers who strategically default, although studies have found borrowers are averse to walking away, with the result that the percentage of strategic defaulters tends to be relatively low.<sup>12</sup>

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-just-yet/ (stating that “[h]ousing is local and . . . market health—including foreclosures—breaks down by state, city, neighborhood and in some places, even street. The wave of foreclosures has been manifesting at these more local levels—even while national-level data reflects a recovery.”); *see also infra* note 46.

8. *See* Michael A. Fletcher, *Big Firms Scooping Up Home Bargains*, WASH. POST, Apr. 22, 2013, at A1; Tom De Poto, *Foreclosures in New Jersey Still Up, but Correcting Course*, STAR-LEDGER (Apr. 11, 2013, 4:49 PM), [http://www.nj.com/business/index.ssf/2013/04/foreclosures\\_in\\_new\\_jersey\\_sti.html](http://www.nj.com/business/index.ssf/2013/04/foreclosures_in_new_jersey_sti.html).

9. *See* Mlynski, *supra* note 3 (reporting that states dealing with backlogs, like Illinois, New Jersey, and Ohio, are “more susceptible to continued processing delays”). More recent New Jersey foreclosures, however, are taking less than seven months to complete. *See* Lisa Prevost, *Uproot of the Foreclosure Backlog*, N.Y. TIMES, Dec. 9, 2012, at RE6 (quoting Kevin M. Wolfe, assistant director of the Civil Practice Division of the New Jersey Administrative Office of the Courts).

10. *See* Kristopher Gerardi et al., *Do Borrower Rights Improve Borrower Outcomes? Evidence from the Foreclosure Process* 1–3 (Nat’l Bureau of Econ. Research, Working Paper No. 17,666, 2011).

11. *See id.* at 2 (comparing states that allow power-of-sale foreclosures with states that do not, and finding that preventing power-of-sale foreclosures extends the foreclosure timeline dramatically but does not lead to fewer foreclosures. Borrowers are no less likely to cure and no less likely to renegotiate their loans); Kristopher Gerardi et al., *Foreclosure Externalities: Some New Evidence* 34 (Fed. Reserve Bank of Atl. Working Paper Series, Working Paper 2012–11, 2012) (prolonging foreclosures exacts costs on nearby homeowners and society); Jaison R. Abel & Richard Deitz, *Foreclosures Loom Large in the Region*, LIBERTY STREET ECON. (Apr. 10, 2013, 3:40 PM), <http://libertystreeteconomics.newyorkfed.org/2013/04/foreclosures-loom-large-in-the-region.html> (“The reason foreclosures take so long to complete in New York and New Jersey is because both states use a judicial foreclosure process . . . . While the judicial process affords protection to homeowners, it also extends the amount of time that homes typically stay in foreclosure. States with a non-judicial foreclosure process have generally been able to work through the backlog of foreclosures faster . . . . This difference is the main reason that our region now has a larger share of properties currently in foreclosure than is typical in other parts of the country. . . . Time is also a factor; the longer a home is in foreclosure in judicial states like New York and New Jersey, the greater the potential for homes to deteriorate and prices to decline.”). *But cf.* Mian et al., *supra* note 3, at Abstract (“[S]tates that require judicial process for a foreclosure sale have significantly lower rates of foreclosures relative to states that have no such requirement.”).

12. *See* EXPERIAN-OLIVER WYMAN MARKET INTELLIGENCE REPORTS: STRATEGIC DEFAULT IN MORTGAGES: Q2 2011 UPDATE 4 (2011), *available at* <http://www.experian.com/decision-analytics/strategic-default.html> (follow “Get The 2011 Strategic Default Report” and fill out personal information to download report) (“Overall, strategic defaults—as a percentage of all mortgages . . . [in] default in Q2 2010—remained high at 17% for the first half of 2010, compared with 16% for the second half of 2009.”); Brent T. White, *Underwater and Not Walking Away: Shame, Fear and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 976

Others identify banks as primarily responsible for delays, explaining that servicers have failed to acquire the capacity to adequately modify mortgages and have committed widespread errors undermining foreclosure-alternative programs.<sup>13</sup> Moreover, banks also intentionally delay or abandon foreclosures at times—so-called bank walkaways—leaving homes in legal limbo.<sup>14</sup> In a falling or low-value real-estate market, the cost of foreclosure can exceed the value of the property, particularly when maintenance costs are factored in.<sup>15</sup> Moreover, few buyers bid on foreclosed properties in stagnant, low-value markets; plaintiff banks therefore end up purchasing back unwanted properties.<sup>16</sup> One option is not to file or complete foreclosures, forestalling acquisition of additional REO homes, though that imposes significant social costs.<sup>17</sup>

This project tests the extent to which bank stalling has contributed to foreclosure delays and property vacancies in Newark, New Jersey. Previous studies conducted by the U.S. General Accounting Office, researchers at the Federal Reserve, and additional studies in Cleveland and Chicago uncovered considerable evidence of stalled or abandoned foreclosures.<sup>18</sup> Several found that abandoned

(2010) (“[L]ess than one-fourth of homeowner defaults have been strategic, with the other three-fourths triggered by job loss, divorce, or other financial difficulty, which when combined with negative equity give homeowners no option but to let go of their homes.” (footnotes omitted)); Neil Bhutta et al., *Consumer Ruthlessness and Mortgage Default During the 2007–2009 Housing Bust* 1, 33 (Dec. 2011) (working paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1626969](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626969).

13. See Prevost, *supra* note 9 (quoting Michael D. Calhoun, president of the Center for Responsible Lending, stating that “[t]he backlog is due to servicer errors and lack of capacity”).

14. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-93, *MORTGAGE FORECLOSURES: ADDITIONAL MORTGAGE SERVICER ACTIONS COULD HELP REDUCE THE FREQUENCY AND IMPACT OF ABANDONED FORECLOSURES*, at prefatory materials (2010), available at <http://www.gao.gov/new.items/d1193.pdf>.

15. See Patricia A. McCoy, *The Home Mortgage Foreclosure Crisis: Lessons Learned* 1 (May 7, 2013) (working paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2254672](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2254672) (“We know that investors take heavy losses on foreclosures: on average, 50% or more.”); see also U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 14, at 15 (“[Servicers] usually conduct an analysis of certain loans in their servicing portfolio . . . . These analyses . . . compare the projected value the property might realize in a subsequent sale against the sum of all projected costs associated with completing the foreclosure and holding the property until it can be sold . . . . [W]hen the costs of foreclosure exceed the expected proceeds from selling the property, servicers typically decide that foreclosure is not financially beneficial. . . . [and] cease further foreclosure-related actions, operationally charging off the loan from its servicing roles . . . .”).

16. See INGRID GOULD ELLEN ET AL., *THE FORECLOSURE CRISIS AND COMMUNITY DEVELOPMENT: EXPLORING REO DYNAMICS IN HARD-HIT NEIGHBORHOODS* 3–5 (2013), available at <http://furmancenter.org/research/publications/c/working-papers>; see also THOMAS J. FITZPATRICK IV & STEPHAN WHITAKER, *ECON. COMMENTARY, OVERVALUING RESIDENTIAL PROPERTIES AND THE GROWING GLUT OF REO* (2012) (reporting on a study of Cuyahoga County, Ohio real-estate-owned properties that found these properties tend to resell for significantly less than the bank paid at auction); Alan Mallach, *REO Properties, Housing Markets, and the Shadow Inventory*, in *REO & VACANT PROPERTIES: STRATEGIES FOR NEIGHBORHOOD STABILIZATION* 13, 13 (Fed. Reserve Banks of Bos. & Cleveland & Fed. Reserve Bd. eds., 2010) (reporting that REO properties sell at substantial discounts relative to individual homeowner sales).

17. See *infra* text accompanying notes 48–88.

18. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 14; Mallach, *supra* note 16.

foreclosures correlated positively with property vacancies.<sup>19</sup> This is the first study to trace the disposition of each property in the sample through both public and private sources, allowing highly accurate conclusions to be drawn.<sup>20</sup> I reach a similar conclusion to the previous studies: without legal excuse or ongoing workout efforts, banks frequently cease prosecuting foreclosures. The stalled foreclosures in my study, however, do not strongly correlate with property vacancies.

This study is small in scale, involving a random sample of one hundred foreclosures filed between 2007 and the first half of 2009 in a single neighborhood, but my results can be extrapolated to the City of Newark, and to some extent, similar lower-income urban neighborhoods in northeastern states with judicial foreclosure regimes. The national banks that securitized mortgages during the housing boom followed standard practices of targeting communities of color for the worst subprime loans.<sup>21</sup> They also followed national servicing and foreclosure practices adapted to each state's laws.<sup>22</sup> Further research can confirm the applicability of this hypothesis to other areas of the country. Nonetheless, there is no disagreement that indefinitely stalling foreclosures—without notice to those affected—is poor policy.

This Article proceeds as follows: first, it provides an explanation of judicial foreclosure, using New Jersey as a representative example. It next outlines the deleterious effects of foreclosures on communities. After that, it summarizes the previous studies on stalled foreclosures and limbo loans and gives background on Newark neighborhoods and demographics. Next, I explain the methodology of the study and report on my findings, after which I endorse a set of policy reforms in light of my findings and conclude.

## I. JUDICIAL AND NONJUDICIAL FORECLOSURE: THE NEW JERSEY EXAMPLE

There are two main types of foreclosure in this country—judicial and nonjudicial.<sup>23</sup> Approximately twenty states have some form of judicial foreclosure, which generally require the filing of a complaint in court, an opportunity to raise and litigate defenses, and the entering of a judgment before a home can be sold at auction.<sup>24</sup> The remaining states have primarily nonjudicial foreclosure regimes,

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19. See *infra* text accompanying notes 71 & 87.

20. The public sources were court case files and information in Register of Deeds databases. The private sources, all available online, include the database of the New Jersey Association of County Tax Boards and real-estate sites such as Zillow.com.

21. DANIEL LINDSEY ET AL., NAT'L CONSUMER LAW CTR., WHY RESPONSIBLE MORTGAGE LENDING IS A FAIR HOUSING ISSUE 2–4 (2012), available at [https://www.nclc.org/images/pdf/credit\\_discrimination/fair-housing-brief.pdf](https://www.nclc.org/images/pdf/credit_discrimination/fair-housing-brief.pdf); Linda E. Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J.L. & POL'Y 121, 124 n.6 (2009).

22. See *infra* note 165.

23. See generally Mlynski, *supra* note 3 (comparing judicial and nonjudicial states).

24. It is difficult to neatly classify all of the states into judicial or nonjudicial categories, since some states have hybrid foreclosure schemes, containing both judicial and nonjudicial elements. According to Dan Immergluck and Frank Alexander,

which ordinarily permit a home to be foreclosed without a court proceeding, though homeowners may file an affirmative lawsuit to contest the foreclosure.<sup>25</sup> Even in judicial-foreclosure states, cases may proceed to default judgment via a largely administrative process because borrowers are rarely able to contest or defend against foreclosure.<sup>26</sup> This Article focuses primarily on judicial foreclosure because New Jersey has that form, as do Florida, Illinois, and Ohio—states where research into stalled foreclosures has been conducted.<sup>27</sup>

The New Jersey foreclosure system provides a representative example of a judicial foreclosure regime, albeit one with heightened procedural protections for borrowers enacted by the state's Fair Foreclosure Act.<sup>28</sup> For instance, lenders must file a notice of intention to foreclose containing information about, *inter alia*, the lender, servicer, and amount required to cure, before filing a foreclosure complaint in court.<sup>29</sup> Once borrowers are served with process, they may file a contesting answer and litigate the matter,<sup>30</sup> as with any civil case. Because ninety-four percent of New Jersey foreclosures in a typical year are not contested, the process is largely administrative and handled through a statewide Office of Foreclosure.<sup>31</sup> Court personnel scrutinize bank evidence in support of default judgments.<sup>32</sup> Borrowers may file late answers, and are responsible only for curing arrears and paying foreclosure fees up until the time of judgment.<sup>33</sup>

After a chancery judge enters judgment and a writ of execution, the matter is transferred to the sheriff's office in the county where the property is located, to be

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Due to the particularities and variations in state foreclosure law, the distinction between "judicial" and "nonjudicial" states is not completely definitive and is subject to gray areas. For the purposes of this study, we chose to err on being over-inclusive when determining which states to classify as nonjudicial. As a result, we consider 33 states and the District of Columbia as nonjudicial, leaving 17 states classified as judicial.

Frank S. Alexander et al., *Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States*, 31 REV. BANKING & FIN. L. 341, 350 (2011). The National Consumer Law Center lists features of each state's foreclosure statutes and practices on its website. *State Foreclosure Laws*, NAT'L CONSUMER L. CTR., [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/state\\_laws/survey-foreclosure-card.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/survey-foreclosure-card.pdf) (last visited Nov. 15, 2014).

25. See Alexander et al., *supra* note 24, at 350, 360.

26. See *infra* text accompanying note 31.

27. See *State Foreclosure Laws*, *supra* note 24.

28. See N.J. STAT. ANN. §§ 2A:50-1 to 2A:50-21 and 2A:50-53 to 2A:50-62 (West, Westlaw through L.2014, c.60, and J.R. No. 3); *State Foreclosure Laws*, *supra* note 24. The heightened protections include a right to cure before an action is filed, and an extended right to cure, with payment of fees, until the time of judgment. N.J. STAT. ANN. §§ 2A:50-56, 57.

29. The notice of intent must contain the lender's and servicer's names and contact information, as well as an accurate statement of the amount required to cure the arrears to avoid foreclosure. See N.J. STAT. ANN. § 2A:50-56(e)(11); *U.S. Bank Nat'l. Ass'n v. Guillaume*, 38 A.3d 570, 574–75 (N.J. 2012).

30. See 30A MYRON C. WEINSTEIN, NEW JERSEY PRACTICE SERIES, LAW OF MORTGAGES § 30.32 (2d ed. 2000).

31. Interview with Kevin M. Wolfe, Assistant Dir. of the Civil Practice Div., N.J. Admin. Office of the Courts, Trenton, N.J. (July, 2010); see also 13B JOHN A. CELENTANO, JR. ET AL., NEW JERSEY PRACTICE SERIES, REAL ESTATE LAW AND PRACTICE §§ 41, 41.1 (2d ed. 2002).

32. Interview with Kevin M. Wolfe, *supra* note 31.

33. *Id.*; see also N.J. STAT. ANN. §§ 2A:50-56, 57.

sold at auction.<sup>34</sup> Borrowers are entitled by statute to two fourteen-day extensions of the sale, and may seek judicial approval of additional extensions; lenders, on the other hand, are statutorily entitled to an indefinite number of extensions.<sup>35</sup> A borrower's right to redeem the property continues for ten days following sale, though very few borrowers have the wherewithal to refinance at this point.<sup>36</sup>

## II. FORECLOSURES AND THE SHADOW INVENTORY DEPRESS COMMUNITIES

Homes in foreclosure and REO properties have myriad negative ripple effects on communities. By and large, people who cannot pay their mortgages are unable to maintain their homes.<sup>37</sup> Bank-owned homes also tend to be poorly maintained, particularly in communities of color.<sup>38</sup> In addition, foreclosed homes are frequently vacant, further contributing to neighborhood decline.<sup>39</sup> Surrounding homes are negatively impacted as the appearance and integrity of the

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34. See N.J. STAT. ANN. § 2A:50-64; N.J. CT. R. 4:65 (2014).

35. See N.J. STAT. ANN. § 2A:17-36 (providing for two fourteen-day extensions without reference to affected parties). *But see* Bankers Trust Co. v. Delgado, 787 A.2d 195, 198 (N.J. Super. Ct. App. Div. 2001) (holding that plaintiffs may make unlimited adjournment requests under section 2A:17-36).

36. See N.J. CT. R. 4:65-6; Brookshire Equities, LLC v. Montaquiza, 787 A.2d 942, 944-45 (N.J. Super. Ct. App. Div. 2002). It has been my experience, as a foreclosure litigator, as well as the experience of my colleagues, that almost no borrower who has gone through a foreclosure has the financial means to refinance to redeem the property after sale. There are some exceptions though, including my clients who won the lottery during litigation.

37. See Gerardi et al., *supra* note 11, at 26 (“[The investment externality effect] refers to the tendency of financially distressed borrowers and lenders that do not derive consumption services from foreclosed property to underinvest in property maintenance, leading to physical deterioration of the property and, in turn, causing a reduction in the value of nearby property to potential buyers.”).

38. See NAT'L FAIR HOUS. ALLIANCE, HERE COMES THE BANK, THERE GOES OUR NEIGHBORHOOD: HOW LENDERS DISCRIMINATE IN THE TREATMENT OF FORECLOSED HOMES 2 (2011) (“An investigation of REO properties in four metropolitan areas demonstrated that banks often maintain REO properties that are located in White and some racially and ethnically integrated census tracts better than properties located in predominately African-American and Latino neighborhoods in the same metropolitan area.”).

39. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-34, VACANT PROPERTIES: GROWING NUMBER INCREASES COMMUNITIES' COSTS AND CHALLENGES 1, 19-20 (2011) (“During the continuing foreclosure crisis and economic downturn, increased numbers of vacant residential properties are becoming vandalized or dilapidated, attracting crime, and contributing to neighborhood decline in many communities across the country. . . . Available data also indicate that high foreclosure rates are correlated to increased numbers of vacant properties. For example, states with high foreclosure rates in 2010, according to Mortgage Bankers Association data, also had relatively large increases in the numbers of vacancies as of April 2010, according to Census data. . . . Comprehensive data are not available on the number of properties in foreclosure that are vacant. However, representatives of some servicers and the GSEs told us that between 10 percent and 20 percent of the properties with loans in their portfolios are vacant at the time they initiate foreclosure; by the date of the completion of the foreclosure sale, they said, about 40 percent to 50 percent of properties are vacant. . . . In addition, properties that have completed foreclosure generally become vacant prior to resale. According to representatives at HUD, for example, which had an inventory of 51,000 residential, single-family properties that it acquired as a result of foreclosures on FHA-insured loans at the end of fiscal year 2010, FHA-insured lenders are required to convey foreclosed properties to HUD unoccupied to facilitate resale.” (citations omitted)).



neighborhood deteriorate.<sup>40</sup> Squatters may move into vacant homes, creating dangerous conditions that can result in fires and an increase in crime.<sup>41</sup> Unsurprisingly, home prices decline.<sup>42</sup> These consequences have been dubbed the foreclosure contagion effect; its existence is well documented.<sup>43</sup> The human cost

40. See G. THOMAS KINGSLEY ET AL., *THE URBAN INST., THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES* 16 (2009); Mallach, *supra* note 16, at 13 (“REO properties are often in poorer condition than properties with similar physical or locational features in the traditional market.”); Janet L. Yellen, Vice Chair, Bd. of Governors of the Fed. Res. Sys., Remarks at 2011 Federal Reserve Bank of Cleveland Policy Summit: Housing Market Developments and Their Effects on Low- and Moderate-Income Neighborhoods 2 (June 9, 2011).

41. See INGRID GOULD ELLEN ET AL., *DO FORECLOSURES CAUSE CRIME?*, at Abstract (2012), available at [http://www.communityprogress.net/filebin/pdf/new\\_resrcs/Ellen\\_Lacoe\\_Sharygin\\_ForeclosuresCrime\\_aug31\\_Furman\\_Copy\\_1.pdf](http://www.communityprogress.net/filebin/pdf/new_resrcs/Ellen_Lacoe_Sharygin_ForeclosuresCrime_aug31_Furman_Copy_1.pdf) (“[E]mpirical evidence demonstrated that] additional foreclosures on a blockface lead to additional total crimes, violent crimes and public order crimes. These effects appear to be largest when foreclosure activity is measured by the number of foreclosed properties that are on their way to an auction or have reverted to bank ownership.”); Elizabeth A. Duke, Member, Bd. of Governors of the Fed. Res. Sys., Remarks at the Conference on Distressed Residential Real Estate: Dimensions, Impacts, and Remedies: Addressing Long-Term Vacant Properties to Support Neighborhood Solutions 11 (Oct. 5, 2012); see also Lin Cui, *Foreclosure, Vacancy and Crime*, at Abstract (Univ. of Pitt., Working Paper Nov. 1, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1773706](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773706) (“[W]hile foreclosure alone has no effect on crime, violent crime increases by more than 15% once the foreclosed home becomes vacant. Effects on property crime are similar, but less precisely estimated.”).

42. W. Scott Frame, *Estimating the Effect of Mortgage Foreclosures on Nearby Property Values: A Critical Review of the Literature*, FED. RES. BANK ATL. ECON. REV., 2010, at 1, prefatory materials (“[F]oreclosed properties sell at a discount, likely because such properties are in worse condition than surrounding properties. What’s more, very nearby foreclosures appear to depress the sales prices of nondistressed properties, but this effect diminishes rapidly over physical distance and time.”). With respect to the New York/New Jersey region, see Abel & Deitz, *supra* note 11 (“There are a couple of reasons why the large and growing backlog of foreclosures might exert a drag on the region’s home prices going forward. When a home enters foreclosure, the incentive for homeowners to maintain or improve the home is significantly reduced. This is because homeowners won’t be selling the home and so will not be able to recoup their costs once ownership is transferred to the foreclosing bank. As a result, homes in foreclosure tend to deteriorate more rapidly than otherwise similar homes, diminishing their values. Also, once the foreclosure process has been completed, these bank-owned properties are typically put up for sale, and are often sold as distressed properties at reduced prices, in part because the foreclosing bank would prefer not to hold them for long. These sales can reduce their neighbors’ home values as well. Indeed, recent research suggests that reduced investment by homeowners in foreclosure creates a negative externality resulting in downward price pressure on nearby properties.”).

43. E.g., Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL’Y DEBATE 57, 58 (2006) (measuring “the impact of foreclosures on nearby property values by using a . . . database that combines data on 1997 and 1998 foreclosures with . . . neighborhood characteristics and more than 9,600 single-family property transactions in Chicago in 1999. Even after controlling for over 40 characteristics of properties and their respective neighborhoods, we find that foreclosures of conventional single-family [one- to four-unit] loans have a significant impact on nearby property values. Our most conservative estimates indicate that each conventional foreclosure within an eighth of a mile of a single-family home results in a 0.9 percent decline in . . . value.”); Ryan M. Goodstein et al., *Are Foreclosures Contagious?* 1 (Nov. 2011) (working paper), available at <http://ssrn.com/abstract=2024794> (“Using a large sample of U.S. mortgages observed over the 2005–2009 period . . . [and] controlling for . . . borrower and loan characteristics, local demographic and economic conditions, and changes in property values, the likelihood of a mortgage default increases by as much as 24% with a one standard deviation increase in the foreclosure rate of the borrower’s surrounding zip code.”); Charles Towe &

of foreclosures has also been documented. For instance, foreclosures can disrupt children's education as they are forced to move to new neighborhoods and schools.<sup>44</sup>

Unsurprisingly, foreclosures and REO inventory also depress broader housing markets, as the cumulative result of declines in local housing prices. The shadow inventory not only encourages the foreclosure contagion effect, but also increases a pent-up supply of homes that can deluge a market. Those REO homes that banks put on the market—taking them out of the shadow inventory—directly contribute to supply and thus tend to depress prices in an area, particularly when they are in poor condition.<sup>45</sup> As mentioned in the introduction, these effects have been pronounced in lower-income and minority neighborhoods.<sup>46</sup>

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Chad Lawley, *The Contagion Effect of Neighboring Foreclosures*, 5 AM. ECON. J.: ECON. POL'Y 313, 313 (2013) ("Using a . . . parcel-level dataset documenting residential foreclosures in Maryland for the years 2006–2009 and a highly localized neighborhood definition, based on 13 nearest neighbors, we find that a neighbor in foreclosure increases the hazard of additional defaults by 18%."). *But cf.* Gerardi et al., *supra* note 11, at 33 ("[H]ouses trade at slightly lower prices when there are homes nearby with delinquent homeowners, when there are homes nearby owned by lenders, and even when there are homes nearby recently sold by lenders in arm's length transactions. . . . [N]earby houses trade at lower prices when the lender-owned property is in below-average condition and at higher prices when it is in above average condition. . . . Perhaps the most important conclusion that one should take from this analysis is that the effects of foreclosure and distressed property in general on the prices of neighboring homes are fairly small.").

44. See Vicki Been et al., *Does Losing Your Home Mean Losing Your School?: Effects of Foreclosures on the School Mobility of Children 19–20* (Feb. 3, 2011) (furmancenter.org working paper), available at [http://furmancenter.org/files/publications/Does\\_Losing\\_Your\\_Home\\_Mean\\_Losing\\_Your\\_School\\_1.pdf](http://furmancenter.org/files/publications/Does_Losing_Your_Home_Mean_Losing_Your_School_1.pdf) ("[P]ublic school students in New York City living in buildings that entered foreclosure were more likely to move to different public schools in the City in the year after the foreclosure notice was issued and were especially likely to move when their building went all the way through the foreclosure process and was put up for auction.").

45. See ELLEN ET AL., *supra* note 16, at 4; Mallach, *supra* note 16, at 13–14 ("The market effect of REO properties is almost always negative. REO property sales pulled prices down in 31 of 34 states analyzed by the author. . . . The price-depressing effect of REO sales has a second impact on the real estate market. REO sales drive out non-REO sales."); see also FURMAN CTR., FORECLOSED PROPERTIES IN NYC: A LOOK AT THE LAST 15 YEARS 1 (2010), available at [http://furmancenter.org/files/publications/Furman\\_Center\\_Fact\\_Sheet\\_on\\_REO\\_Properties.pdf](http://furmancenter.org/files/publications/Furman_Center_Fact_Sheet_on_REO_Properties.pdf) ("[RE] properties can swamp already weak real estate markets, further pushing down home values . . . [S]ome investors in REO properties let the properties deteriorate further while they hold them for resale, or quickly resell the properties after making cosmetic repairs that may hide the properties' serious defects."); Abel & Deitz, *supra* note 11 ("Since there are now a fairly large number of homes in foreclosure in the New York-northern New Jersey region, we may see a dampening effect on regional home prices as these distressed properties work their way through to the market. In fact, to the extent that price declines are anticipated, some of this decline may already be priced into the market.").

46. See Victoria McGrane, *Bernanke: Low-Income Communities Struggle Despite Recovery*, WALL ST. J., REAL TIME ECON. (Apr. 12, 2013, 12:40 PM), <http://blogs.wsj.com/economics/2013/04/12/bernanke-low-income-communities-struggle-despite-recovery/> ("While the U.S. economy as a whole appears on the mend, low-income communities hit hardest by the recession continue to struggle and require multi-pronged strategies to recover, Federal Reserve Chairman Ben Bernanke said Friday. 'While employment and housing show signs of improving for the nation as a whole, conditions in lower-income neighborhoods remain difficult by many measures,' said Mr. Bernanke, in remarks prepared for delivery at a Fed conference on community development."); see also Duke, *supra* note 41, at 2 ("Housing markets differ greatly both across regions and within metropolitan areas, and the

### III. FORECLOSURE STALLING AND ABANDONMENT: THE PREVIOUS STUDIES

Foreclosure proceedings can stall—or even be abandoned—when the plaintiff lender files a case but then ceases to prosecute it or slows down prosecution by various means. The means can include failing to file a motion for judgment, voluntarily dismissing the case or vacating a judgment, repeatedly continuing or adjourning sheriff's sales, and the like.<sup>47</sup> These cases are often dubbed “bank walk aways”<sup>48</sup> or “zombie foreclosures.”<sup>49</sup> Defendant borrowers could also stall foreclosures—though they have fewer means at their disposal—by vacating the home without leaving a forwarding address, evading service, or seeking repeated adjournments of sheriff's sales.<sup>50</sup> In this study, there was copious evidence of plaintiff stalling but very little evidence of defendant stalling.

Various reasons exist why a foreclosure plaintiff would abandon or stall a foreclosure, leaving a home in “legal limbo.” Most prominent among these is that the cost to complete the foreclosure and maintain the property would exceed the market value, which can occur quickly in weak markets.<sup>51</sup> Moreover, in markets with little demand, the plaintiff bank is frequently the only bidder at auction, ensuring another REO property on its books.<sup>52</sup> Banks are leery of the maintenance costs of REO properties, which can be considerable and consume any gains.<sup>53</sup>

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positive signs in the aggregate data do not apply to all neighborhoods equally. For example, even within those metropolitan areas that have experienced rising average prices over the past year, one-fourth of ZIP codes saw a decrease in prices over the same period. Moreover, those ZIP codes with falling prices have also experienced rising vacancy rates more often than in other ZIP codes.” (footnote omitted); S. Mitra Kalita & Nick Timiraos, *Housing Prices Rise, but Not for Everyone*, WALL ST. J. (June 20, 2012, 1:10 PM), <http://online.wsj.com/news/articles/SB10001424052702303410404577464752659322254> (“‘The marginal neighborhoods won’t do well until the so-called desirable neighborhoods are completely fished out,’ [a realtor operating in numerous cities] said. Many of those communities also face the brunt of potential foreclosures—the ‘shadow inventory’ of homes—that haven’t yet been taken back and resold by banks.”).

47. See Kate Berry, *Banks Halt Foreclosure Process to Save Costs*, AM. BANKER, Apr. 24, 2013, at 1, 10 (banks can “decide not to file, to rescind a notice of default, or to ask for continuances” to delay or prevent foreclosure).

48. Leoneda Inge, *Sometimes Even Banks Want to ‘Walk Away’ From a Home*, MARKETPLACE (Feb. 22, 2013, 2:32 PM), <http://www.marketplace.org/topics/wealth-poverty/sometimes-even-banks-want-walk-away-home>; Diana Olick, *When Banks Walk Away, Homeowners Don’t Always Win*, CNBC (Jan. 14, 2013, 12:16 PM), <http://www.cnbc.com/id/100377676>.

49. See Berry, *supra* note 47.

50. While I have seen little evidence of this in my many years as a foreclosure litigator at the Seton Hall Law School Center for Social Justice, I am aware that these possibilities exist and presumably are exploited by some.

51. See *supra* note 15.

52. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 14, at 1.

53. See ELLEN ET AL., *supra* note 16, at 6 (REO properties are likely to suffer the effects of deferred maintenance during a homeowner’s financial distress.); FITZPATRICK IV & WHITAKER, *supra* note 16, at 5 (In many REO sales, the sale price barely covers the cost of maintenance and transaction costs.); NAT’L FAIR HOUS. ALLIANCE, *supra* note 38, at 8 (“Once a bank repossesses a home, it assumes a fiduciary duty to the investor to dispose of the home, and takes on administrative responsibilities related to the entire property.”).

Four previous studies—one national, one from Florida, and two others from Chicago and Cleveland—have provided evidence that foreclosure plaintiff banks sometimes abandon or stall foreclosures.<sup>54</sup> The first study, conducted from 2008 to 2010 by the General Accounting Office, surveyed six servicers and two GSEs (government-sponsored enterprises, which include Fannie Mae and Freddie Mac), together responsible for approximately eighty percent of all mortgages in the country.<sup>55</sup> The servicers admitted “charging off,” or ceasing attempts to collect on a defaulted mortgage, if the costs of foreclosure and property maintenance exceeded the home value.<sup>56</sup>

Most of the time, charge-offs occurred before foreclosure activity began, but sometimes they occurred while a case was pending.<sup>57</sup> The latter were considered abandoned foreclosures if the home was also vacant at the time.<sup>58</sup> Using this definition, the study found that abandoned foreclosures were rare, comprising less than one percent of vacant homes, but that they tended to be concentrated in economically depressed communities where subprime lending was most prevalent.<sup>59</sup> Abandoned foreclosures also were more likely to occur in midwestern cities with low property values.<sup>60</sup> Finally, the report found that, to a statistically significant degree, homes with mortgages that were charged off during foreclosure were more likely to be vacant than those charged off preforeclosure.<sup>61</sup> The report’s authors surmised that confusion about foreclosure could have contributed to the increased incidence of vacancies of homes with abandoned foreclosures.<sup>62</sup>

The second study, a quantitative analysis by several economists from the New York Federal Reserve and two universities, examined a database covering all securitized mortgages that originated in Florida from 2004 to 2008 to determine the extent of “limbo loans.”<sup>63</sup> The term was defined as loans “delinquent for 90 days [that have] not progressed to property sale, refinancing or modification, or [with] an open (unresolved) foreclosure case outstanding” as of December 2010.<sup>64</sup>

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54. See generally MICHAEL SCHRAMM ET AL., STALLING THE FORECLOSURE PROCESS: THE COMPLEXITY BEHIND BANK WALKAWAYS 2–3 (2011), available at [http://blog.case.edu/msass/2011/02/07/CUPCD\\_2011\\_02\\_07\\_Stalling%20the%20foreclosure%20process-%20the%20complexity%20behind%20bank%20walkaway.pdf](http://blog.case.edu/msass/2011/02/07/CUPCD_2011_02_07_Stalling%20the%20foreclosure%20process-%20the%20complexity%20behind%20bank%20walkaway.pdf); GEOFF SMITH & SARAH DUDA, WOODSTOCK INST., LEFT BEHIND: TROUBLED FORECLOSED PROPERTIES AND SERVICER ACCOUNTABILITY IN CHICAGO 4 (2011), available at [http://www.woodstockinst.org/sites/default/files/attachments/leftbehind\\_jan2011\\_smithduda\\_0.pdf](http://www.woodstockinst.org/sites/default/files/attachments/leftbehind_jan2011_smithduda_0.pdf); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 14, at 14–16; Linda Allen et al., *Bank Delays in the Resolution of Delinquent Mortgages: The Problem of Limbo Loans*, J. REAL ESTATE RES. (forthcoming), available at <http://ssrn.com/abstract=2018948>.

55. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 14, at 3.

56. *Id.* at 15–16.

57. *Id.* at 17.

58. *Id.* at 17–18.

59. *Id.* at 14, 26.

60. *Id.* at 23–27.

61. *Id.* at 18.

62. *Id.*

63. Allen et al., *supra* note 54, at 3.

64. *Id.* at 3.

The researchers found that 21.79% of the loans in the sample fit into this category.<sup>65</sup>

Further empirical analysis of the limbo status yielded results consistent with the authors' "operational risk hypothesis," which "considers the possibility that banks are holding limbo loans and delaying the resolution of foreclosures because of the missing paperwork backing the loans. Lenders fear that either they will be challenged in foreclosure proceedings or that title will be clouded subsequent to the foreclosure proceeding."<sup>66</sup> To test this hypothesis, the researchers examined whether a lost note affidavit had been filed, since those documents indicate the original mortgage note was missing; they were also frequently signed by robo-signers (low-level employees who executed thousands of affidavits at lightning speed without reading them).<sup>67</sup> At the time of the study, "lost note affidavits were considered effective replacements for lost documentation, thereby indicating the importance of acceptable documentation in resolving delinquent mortgages."<sup>68</sup> In addition, the researchers used the presence of Mortgage Electronic Registration Systems (MERS)—an electronic system for transferring mortgages—as a party in the case as a proxy for operational issues: "In our analysis, we find that the presence of MERS significantly contributes to the incidence of limbo loans and constitutes operational risk."<sup>69</sup>

The third study, conducted by the Woodstock Institute in Chicago, compared data from the city's vacant buildings index for the third quarter of 2010, by address, to a list of Chicago foreclosures from 2006 through the first half of 2010.<sup>70</sup> Almost seventy percent of the vacant properties were associated with a foreclosure filing during the relevant period.<sup>71</sup> The report also identified potentially troubled "red flag" vacant properties where a foreclosure had been filed but no auction or property transfer had yet occurred.<sup>72</sup> In particular, "[r]ed flag properties associated with a foreclosure filed prior to 2009 [were] less likely to be entangled in the foreclosure process and [were therefore] more likely candidates to be considered servicer charge offs or walkaways."<sup>73</sup> These homes were disproportionately located in African American neighborhoods.<sup>74</sup>

The final study considered evidence of stalled and abandoned foreclosures in

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65. *Id.* at 7.

66. *Id.* at 6.

67. *Id.* at 5–6.

68. *Id.* at 6.

69. *Id.* at 7; *see also id.* at 37 ("[B]ack office problems such as MERS participation and lost documentation, are shown to contribute both to the likelihood that a delinquent loan will remain in limbo, as well as to the length of time the loan remains in the limbo state.").

70. SMITH & DUDA, *supra* note 54, at 5.

71. *Id.* at 6.

72. *Id.* "[R]ed flag" properties consisted of 1896 of 12,674 homes, or 10.3%. *Id.*

73. *Id.* Seven-hundred ninety, or forty-one percent, of red flag properties were associated with pre-2009 foreclosures. *Id.*

74. *Id.* at 7. The report also concluded that many likely REO properties were not registered with the City as vacant properties. *Id.* at 8.

Cuyahoga County, Ohio, where Cleveland is located.<sup>75</sup> Similar to this project, researchers from Case Western University examined a sample of docket entries and court files in foreclosure cases, and found significant evidence of bank stalling.<sup>76</sup> The study included a random sample of cases where judgment had been entered, but no sale had occurred within 180 days; this category represented fifteen percent of postjudgment cases.<sup>77</sup> All cases within this category had judgments entered between November 1, 2005, and April 15, 2009, and no confirmation of sale by October 15, 2009.<sup>78</sup>

The study divided the cases within the sample into five categories: (1) bankruptcy, representing sixteen percent of the sample;<sup>79</sup> (2) possible/probable workout (modification, forbearance, reinstatement, etc.), accounting for twenty-eight percent of the sample;<sup>80</sup> (3) plaintiff decision not to proceed (plaintiff had asked the court to set aside or dismiss or vacate without a reason), representing seventeen percent of the sample;<sup>81</sup> (4) ambiguous delay by plaintiff (including dismissal of an order of sale without a documented reason and passage of an unreasonable amount of time), accounting for forty percent of the sample;<sup>82</sup> and (5) unknown/other (e.g., death of the defendant), representing one percent of the total.<sup>83</sup> It concluded that fifty-six percent of the sample (the sum of the plaintiff decision not to proceed and ambiguous delay categories) of postjudgment, unsold cases involved plaintiff stalling or abandonment.<sup>84</sup> In Ohio, the plaintiff bank does not hold title and is not responsible for property maintenance unless the home became REO, which could supply one reason for the high percentage of apparently stalled cases.<sup>85</sup>

Finally, the study correlated its findings on stalling with vacancy rates by comparing city and postal vacancy data, as well as property demolition and tax delinquency records, with addresses in the foreclosure sample.<sup>86</sup> The stalled cases were significantly more likely (at fifty-three percent and fifty percent, respectively,

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75. SCHRAMM ET AL., *supra* note 54, at 2.

76. *Id.* at 11.

77. *Id.* at 5. The random sample consisted of 999 cases, out of a pool of 5211; researchers scrutinized each case file in the sample. *Id.* The study excluded cases where the lack of sale was apparently attributable to another, identifiable reason, such as: the case was dismissed with prejudice, there was a new mortgage or owner, or the property was currently in mediation. *Id.*

78. *Id.*

79. *Id.* at 6–7. A bankruptcy filing places an automatic stay on foreclosure, which can explain the sale delay in these cases. *Id.*

80. *Id.* at 7.

81. *Id.* at 7–8.

82. *Id.* at 8–9. Some of these mortgages apparently had been charged off. *Id.*

83. *Id.* at 9.

84. *Id.* The study's authors indicated that some of these cases might be refiled in the future. *Id.*

85. *See id.* at 3 (After a foreclosure judgment, the homeowner's loan is deemed satisfied, but the bank does not own the property until it accepts the deed prepared by the sheriff. Until the bank does so, the sold property is still owned by the original homeowner.); *id.* at 9 (foreclosing plaintiff not responsible for maintenance or taxes until title transfers).

86. *Id.* at 10.

for the plaintiff decision not to proceed and ambiguous delay categories) to be vacant than were cases in the overall sample (thirty-seven percent).<sup>87</sup> The report concluded by recommending that more detailed court records be kept.<sup>88</sup>

Taken together, these four studies strongly indicate the presence of foreclosure stalling across the country, but they do not completely document its incidence or thoroughly eliminate alternative explanations for delays. This study adds to the body of evidence by adding a more recent East Coast example and by tracing the ultimate disposition of each limbo loan in the sample.

#### IV. BACKGROUND ON NEWARK AND UPPER CLINTON HILL DEMOGRAPHICS

Newark, New Jersey, is a city of 277,140 inhabitants located thirteen miles west of New York City.<sup>89</sup> It is the largest city in New Jersey.<sup>90</sup> Although the city lost more than 160,000 residents during the last half of the twentieth century, its population grew slightly between the 2000 and 2010 censuses.<sup>91</sup> Newark is located in Essex County.<sup>92</sup> The median household income in that year was \$43,726, low by New York metropolitan area standards and reflecting, in part, the high 2010 citywide unemployment rate, which the census listed as 20.35%.<sup>93</sup> Educational levels are also low: in 2010, only 5.6% of Newark residents held bachelor's degrees and 21.8% had completed high school.<sup>94</sup>

Fifty-two percent of residents listed their ethnicity as black alone, while 33.8% indicated they are Latino or Hispanic.<sup>95</sup> Twenty-six percent indicated they were white alone; most of these people are likely of Portuguese or Brazilian extraction and live in the Ironbound section of east Newark.<sup>96</sup> Family households

87. *Id.*

88. *Id.* at 12.

89. 1 CITY OF NEWARK, NEWARK'S MASTER PLAN: OUR CITY, OUR FUTURE 12 (2012). For the distance from New York City, see *Newark Transportation*, BRICK CITY DEV. CORP., <http://bcdnewark.org/business-development/business-climate/newark-transportation-airport-train> (last visited Mar. 12, 2014).

90. *Culture and Sports*, CITY OF NEWARK, N.J., [http://www.ci.newark.nj.us/residents/places\\_activities](http://www.ci.newark.nj.us/residents/places_activities) (last visited Mar. 12, 2014).

91. See 1 CITY OF NEWARK, *supra* note 89.

92. See *id.* at 86.

93. See *American FactFinder*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited Mar. 25, 2014) (search for "Newark City, New Jersey").

94. Of the Newark residents, 2.6% hold associates' degrees, and only 2% hold graduate or professional degrees. *Id.*

95. *Id.*

96. See Clifford J. Levy, *A Portuguese Village in Newark*, N.Y. TIMES, Oct. 6, 1995, at C1. Most Portuguese and Brazilian Americans consider themselves white, not Latino or Hispanic. As the Pew Hispanic Center explains:

Q. . . . But isn't there something in U.S. law that defines Hispanicity?  
A. Yes. In 1976, the U.S. Congress passed the only law in this country's history that mandated the collection and analysis of data for a specific ethnic group: "Americans of Spanish origin or descent." The language of that legislation described this group as "Americans who identify themselves as being of Spanish-speaking background and trace their origin or descent from Mexico, Puerto Rico, Cuba, Central and South America and other Spanish-speaking countries." Standards for collecting data on Hispanics were

made up sixty-five percent of Newark households.<sup>97</sup> The percentage of owner-occupied Newark housing was only 22.1%; the vast majority of residents were thus renters.<sup>98</sup>

This study focuses on three census tracts in one neighborhood in Newark, Upper Clinton Hill. Tracts 41, 42, and 54 had a total population of 9926 in 2010.<sup>99</sup> According to the 2012 Newark Master Plan: “Upper Clinton Hill is primarily residential in character, with a mix of housing types and styles. Well-maintained, detached single-family residences built in the early 20th century predominate throughout the neighborhood, with two- and three-family conversions more common proximate to the neighborhood’s commercial thoroughfares.”<sup>100</sup> Many of the properties, however, are not well maintained; the Master Plan also identifies abandoned and foreclosed properties as an issue in the community.<sup>101</sup> In addition, “[h]igh crime rates and perception of crime make investment difficult.”<sup>102</sup> The Master Plan’s recommendations for the neighborhood include “[c]ontinu[ing] to address abandoned properties and foreclosures through aggressive property rehabilitation, foreclosure prevention, and marketing of the neighborhood to future renters and buyers.”<sup>103</sup>

These photos, which appear in the Master Plan, convey a sense of the variety of better-maintained housing and institutional buildings in Upper Clinton Hill.<sup>104</sup>

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developed by the Office of Management and Budget (OMB) in 1977 and revised in 1997. Using these standards, schools, public health facilities and other government entities and agencies keep track of how many Hispanics they serve (which was a primary goal of the 1976 law).

However, the Census Bureau does not apply this definition in counting Hispanics. Rather, it relies entirely on self-reporting and lets each person identify as Hispanic or not.

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Q. What about Brazilians, Portuguese, and Filipinos? Are they Hispanic?  
A. They are in the eyes of the Census if they say they are, even though these countries do not fit the official OMB definition of “Hispanic” because they are not Spanish speaking. For the most part, people who trace their ancestry to these countries do not self-identify as Hispanic when they fill out their Census forms. Only about 4% of immigrants from Brazil do so, as do just 1% of immigrants from Portugal or the Philippines. These patterns reflect a growing recognition and acceptance of the official definition of Hispanics. In the 1980 Census, about one in six Brazilian immigrants and one in eight Portuguese and Filipino immigrants identified as Hispanic. Similar shares did so in the 1990 Census, but by 2000, the shares identifying as Hispanic dropped to levels close to those seen today.

Jeffrey S. Passel & Paul Taylor, *Who's Hispanic?*, PEWRESEARCH HISPANIC TRENDS PROJECT (May 28, 2009), <http://www.pewhispanic.org/2009/05/28/whos-hispanic> (citations omitted).

97. See *American FactFinder*, *supra* note 93.

98. *Id.*

99. *Id.*

100. 2 CITY OF NEWARK, *supra* note 89, at 195.

101. *Id.* at 198.

102. *Id.*

103. *Id.* at 200.

104. *Id.* at 198.

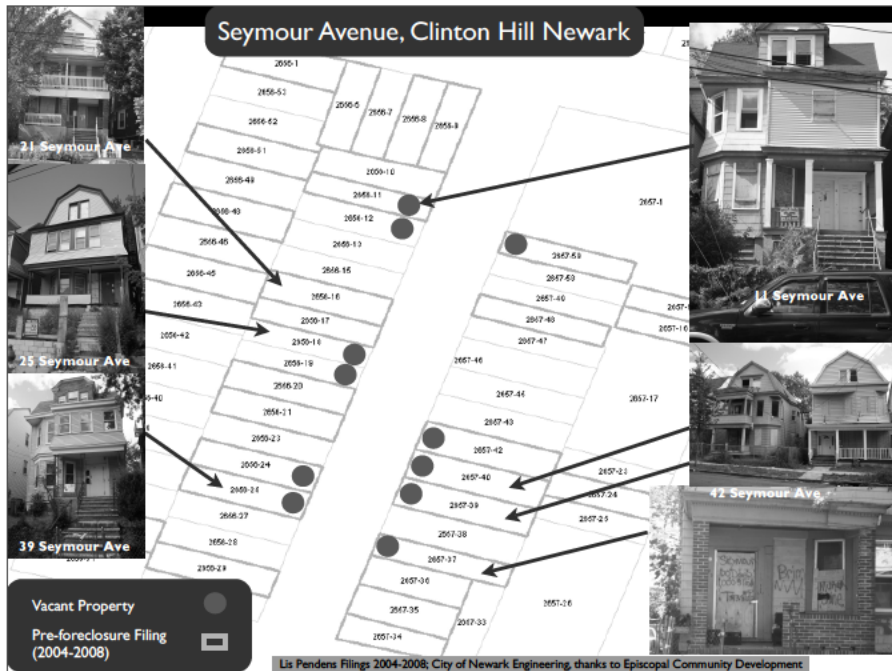


Figure 1: Housing and Institutional Buildings in Upper Clinton Hill



The following photos of vacant homes on Seymour Avenue in Upper Clinton Hill display the condition of typical vacant properties in the neighborhood.<sup>105</sup> Some vacant homes are relatively well maintained, but others are in deplorable shape.

Figure 2: Vacant Properties in Upper Clinton Hill



105. Slide created by Prof. Kathe Newman, Rutgers Univ., Edward J. Bloustein Sch. of Planning & Public Pol’y (Dec. 2008) (on file with author).

The demographics of the neighborhood—and, more particularly, the three census tracts I studied—largely resemble those of Newark as a whole. For instance, the median income of the census tracts in 2010 was \$39,882.<sup>106</sup> Family households comprised 69.5% of the neighborhood, the owner-occupancy rate was 22.5%, and the unemployment rate was 20.9%.<sup>107</sup> Educational levels also resembled those of the entire City of Newark.<sup>108</sup> In a few respects, though, Upper Clinton Hill differs from the entire City of Newark: 89.3% of Upper Clinton Hill residents of the three census tracts identified their ethnicity as black only, while only 9% identified as Latino or Hispanic, and 4.54% as white only.<sup>109</sup> Mobility rates were also lower, as 40.4% of residents of these tracts had moved since 2005, while 69.9% of the entire City's residents moved during that same period.<sup>110</sup> Finally, the population density is higher than that of the entire city, but the location of Newark Liberty Airport and various industrial facilities within the city contribute to the lower figure for the city.<sup>111</sup> Two- and three-family conversions of former single-family homes are common throughout the city.<sup>112</sup>

As was the case with majority-minority areas around the country, Newark experienced a very high incidence of subprime lending.<sup>113</sup> According to the City's Master Plan: "In 2006, during the peak of subprime lending, 54% of all new loans in Newark were subprime, versus 26% in New Jersey."<sup>114</sup> Unsurprisingly, many of these loans ended up in foreclosure, as also occurred across the country.<sup>115</sup> These foreclosures have contributed to widening of the racial wealth gap.<sup>116</sup>

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106. See *American FactFinder*, *supra* note 93.

107. *Id.*

108. For example, 20.7% have a high school education, 2.75% have an associates degree, 6.1% a bachelors degree, and 1.65% a graduate or professional degree. See *id.*

109. *Id.*

110. *Id.*

111. The density is 26,121 people per square mile in the three tracts versus 11,461 for the entire City. See *id.*

112. *Clinton Hill, Newark*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Clinton\\_Hill,\\_Newark](http://en.wikipedia.org/wiki/Clinton_Hill,_Newark) (last visited Nov. 11, 2014).

113. See Kathe Newman & Elvin K. Wyly, *Geographies of Mortgage Market Segmentation: The Case of Essex County, New Jersey*, 19 HOUS. STUD. 53, 59 (2004); see also Fisher, *supra* note 21, at 125; cf. MARVIN M. SMITH & CHRISTY CHUNG HEVENER, FED. RESERVE BANK OF PHILA., SUBPRIME LENDING OVER TIME: THE ROLE OF RACE 22 (2010) (finding that race may have played a role in patterns of subprime lending in New Jersey, Pennsylvania, and Delaware).

114. See 1 CITY OF NEWARK, *supra* note 89, at 96 n.9.

115. See Newman & Wyly, *supra* note 113; see also DEBBIE GRUENSTEIN BOCIAN ET AL., LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES 10 (2011); Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375, 381 (2010).

116. See Annie Lowrey, *Recession Worsened Wealth Gap for Races*, N.Y. TIMES, April 29, 2013, at B1.

## V. METHODOLOGY

The New Jersey Office of Foreclosure did not dismiss cases for want of prosecution at the time this research was conducted,<sup>117</sup> requiring me to determine the extent of stalling exclusively from foreclosure case files. I obtained data from Rutgers University listing, by address, parties, and docket number, 259 residential foreclosures that were filed in the three Upper Clinton Hill census tracts from 2007 through May 2009.<sup>118</sup> I generated a random sample of 100 of these cases, and scanned copies of each case file at the Essex County courthouse and the Court Records Center in Trenton. Over three thousand pages were scanned between late fall of 2010 and early winter of 2011. Nine cases were then excluded from the sample: four contested cases, where stalling would be nearly impossible to determine; three bankruptcies, because a bankruptcy filing automatically stays foreclosure proceedings;<sup>119</sup> and three tax foreclosures, because those proceedings are in rem and thus subject to different legal requirements.<sup>120</sup> The sample ultimately consisted of ninety uncontested foreclosure cases.

I created a spreadsheet with fields for each step in the foreclosure process: filing, service, default, motion for default judgment, judgment and writ of execution, sheriff's sale or adjournments of sale, stipulation of dismissal (if any), sheriff's sale and report of sale, refiling (if applicable), and private sales (in the absence of a sheriff's sale). My research assistants and I analyzed each case file, pulling dates and filling them into the spreadsheet as appropriate. Because the postjudgment history of a case is not contained in the court case file (except for reports of sale), the students collected relevant file information on this group of cases from the Essex County Sheriff's Department during the summer of 2011.

That summer, we also conducted a vacancy survey, walking each block of the three Upper Clinton Hill census tracts and noting indicia of vacancy or abandonment for each building and parcel.<sup>121</sup> We did not subdivide buildings by unit because the number of units was frequently not observable: many of the buildings were once single-family homes that had been converted to two or three units.<sup>122</sup> This survey was necessary because the City of Newark does not maintain

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117. See Interview with Kevin M. Wolfe, *supra* note 31.

118. While all of this information was publicly available in individual paper or electronic case files located at the courthouse, it was not available online or in an aggregated form. Even now, electronic versions of the case files are not online and cannot be accessed remotely.

119. See 11 U.S.C. § 362(a) (2012).

120. See In Rem Tax Foreclosure Act, N.J. STAT. ANN. §§ 54:5-104.29 to -104.75 (West, Westlaw through L.2014, c.60, J.R. No. 3).

121. Factors noted included boarded up windows and doors, the presence of utility boxes, apparently functional mailboxes and doorbells, the condition of the yard and front porch, whether the gutters and siding were stripped, whether there was a car in the driveway, whether there had been a fire in the building, and the like.

122. Note that this method differs from that of the U.S. Census, which computes vacancy rates based on the number of housing units in a census tract. See *American FactFinder*, *supra* note 93; *Definition: Homeowner Vacancy Rate, Frequently Asked Questions*, U.S. CENSUS BUREAU, <https://ask.census.gov/faq.php?id=5000&faqId=6629> (last visited Mar. 25, 2014). Moreover,

an updated vacancy list, nor does publicly available Postal Service, Housing and Urban Development (HUD), or census data break down vacancies by street address. Address-level data was necessary in order to correlate individual vacancies and foreclosures. We recorded the number of vacant parcels as well because uninhabitable vacant homes are often demolished, with the land remaining vacant.<sup>123</sup>

The following summer, we updated the data and traced the ultimate disposition of each property in the sample that had not reached sheriff's sale as of August 2012 by conducting searches at the Essex County Register of Deeds office, online at the New Jersey Association of County Tax Boards website,<sup>124</sup> and at a real-estate website such as Zillow.com. These searches helped determine whether a property had been privately sold. The students also checked the court database to determine whether foreclosure cases that apparently were stalled had instead been refiled with a new docket number. Last, we finalized the 2011 vacancy survey, driving through Upper Clinton Hill to clarify ambiguities concerning particular properties.

Only a third of the cases in the sample had reached sheriff's sale by mid-August 2012, though it had been over five-and-a-half years since the earliest cases were filed. After excluding those cases that settled or were dismissed (which could indicate settlement), sold privately, refiled, or that had files too ambiguous to draw conclusions, a high proportion of the cases remained. I next determined the number of cases that had not proceeded beyond each stage in the litigation process, to ascertain where stalling might have occurred. Cases that remained stuck at a particular step without explanation or subsequent progression were likely candidates for stalling or abandonment: I designated these as "legal limbo" cases.

It should be noted that the "limbo" category does not include mortgages that were in default for extremely long periods before foreclosures were filed, since there is no publicly accessible data providing that information in New Jersey. Still, my experience—and that of others in the field—has been that lenders were

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different entities use varying definitions of vacancy. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 39, at 9–10 & n.13 ("According to Census and USPS officials, and representatives of one local government, nongovernmental organization, and mortgage servicer, the primary difficulty in accurately determining the total number of vacant properties is identifying whether a property is truly vacant. Methods these entities use generally rely on physical inspection of property exteriors to identify indicators of vacancy, such as broken windows or broken/missing doors, high grass, or uncollected mail. In some cases, Census enumerators or other inspectors may obtain information about the occupancy status of a property from neighbors . . . . Various entities define the term 'vacant' differently. For example, the decennial census defines a vacant housing unit as one in which no one is living on Census Day. The USPS defines a vacant address as an unoccupied address where mail has not been deliverable for 90 days or longer.")

123. *See* Duke, *supra* note 41, at 11 ("Unfortunately, in some cases, vacant homes are beyond repair and will never be habitable again. In these instances, demolition is often the best solution . . . .")

124. *See* *Welcome to the NJACTB*, N.J. ASS'N CNTY. TAX BDS., <http://www.njactb.org> (last visited Dec. 18, 2014).

waiting far longer than the usual three months before filing notices of intent to foreclose during the relevant period.<sup>125</sup> As the Newark Master Plan notes:

[I]n parts of Newark with particularly weak markets, some lenders wait unreasonable amounts of time before initiating foreclosure proceedings—because the cost of doing so is not justified by what the property is worth at sale. This results in prolonged cases of abandonment, with no party taking full responsibility for the upkeep of the building.<sup>126</sup>

Nor does the limbo category include REO properties that banks have delayed putting back on the market after purchasing at auction, or that have been put on the market but listed at unreasonable prices, though this appears anecdotally to be the case. Studies have shown that this phenomenon sometimes occurs.<sup>127</sup>

In some instances, it was challenging to ascertain whether stalling that occurred in late 2010, 2011, or early 2012 was attributable to an individual decision not to proceed, or rather to servicers' collective responses to two New Jersey court proceedings. On December 20, 2010, the chancery court overseeing the Office of Foreclosure issued an order to show cause to six large national bank servicers and high-volume foreclosure filers, requiring them to demonstrate that their foreclosure practices were not impermissibly tainted by document irregularities such as robo-signing.<sup>128</sup> Although the court did not formally stay

125. Anecdotally, lenders were typically not engaging in workout efforts during this time, either. These reports come from the experiences of local foreclosure counsel, including my own experiences litigating foreclosures through Seton Hall Law's Center for Social Justice. *See also* 1 CITY OF NEWARK, *supra* note 89, at 84.

126. *Id.* New Jersey's Creditor Responsibility Act makes lenders legally responsible for maintenance of vacant homes in the foreclosure process, even though the borrower's name remains on the title. N.J. STAT. ANN. § 46:10B-51(b) (West, Westlaw through L.2014, c.60, J.R. No. 3) ("If the owner of a residential property vacates or abandons any property on which a foreclosure proceeding has been initiated or if a residential property becomes vacant at any point subsequent to the creditor's filing the summons and complaint in an action to foreclose on a mortgage against the subject property, but prior to vesting of title in the creditor or any other third party, and the exterior of the property is found to be a nuisance or in violation of any applicable State or local code, the local public officer, municipal clerk, or other authorized municipal official shall notify the creditor or the representative or agent of an out-of-State creditor, as applicable, which shall have the responsibility to abate the nuisance or correct the violation in the same manner and to the same extent as the title owner of the property, to such standard or specification as may be required by State law or municipal ordinance.").

127. *See* Dan Immergluck, *Holding or Folding? Foreclosed Property Durations and Sales During the Mortgage Crisis*, in REO & VACANT PROPERTIES: STRATEGIES FOR NEIGHBORHOOD STABILIZATION, *supra* note 16, at 33, 42–43 ("[S]ome . . . portion of high-value REO properties fails to sell for very long periods of time . . . . [L]enders may be increasingly likely to hold onto higher-value and, more recently, even moderate-value REOs for longer periods of time. This may reflect lenders' willingness to bet that the prices of higher-value homes may recover. Mortgagees may conclude that the possibility of such price recovery is worth the carrying costs entailed . . . ."); *see also* Duke, *supra* note 41, at 3 ("[M]any vacant homes are not on the market at all. These vacant units include properties that are in the foreclosure process, [as well as] bank-owned properties that are not yet for sale . . . .").

128. *See* Order Directing the Named Foreclosure Plaintiffs to Show Cause Why the Court

foreclosures, the servicers virtually halted foreclosure activity until they were cleared in the late summer and early fall of 2011.<sup>129</sup>

Even then, foreclosure activity remained at an almost complete standstill because the New Jersey Supreme Court was considering a challenge to the common servicer practice of including the name of the servicer, but not the “lender,” in notices of intent to foreclose.<sup>130</sup> These notices are a condition precedent to filing a foreclosure complaint under the New Jersey Fair Foreclosure Act.<sup>131</sup> The case, *U.S. Bank v. Guillaume*, was decided on February 27, 2012.<sup>132</sup> The court held that notices of intent must include not only the name and address of the servicer, but also that of the lender, i.e., apparent holder of the mortgage note.<sup>133</sup> With respect to remedy, the court decided that

dismissal without prejudice is not the exclusive remedy for the service of a notice of intention that does not satisfy N.J.S.A. 2A:50–56(c)(11). A trial court adjudicating a foreclosure complaint . . . may dismiss the action without prejudice, order the service of a corrected notice, or impose another remedy.<sup>134</sup>

Although servicers were not prohibited from prosecuting foreclosures during this period, filings and other activity in cases did not resume to any significant extent until later in 2012.<sup>135</sup> I identified each limbo case involving delays falling within this time period and dubbed the group “moratorium” cases. I did not categorically exclude this small group of cases from the limbo classification because the decision not to prosecute foreclosure cases was largely voluntary on the part of the servicers, particularly during the pendency of the *Guillaume* matter.

I also took into account possible alternative explanations for the stalling that occurred. For instance, homeowners and lenders might have been involved in workout efforts that delayed foreclosures. The likelihood that this occurred in more than a couple of cases is slight for several reasons. First, only owner-

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Should Not Suspend the Ministerial Duties of the Office of Foreclosure and the Superior Court Clerk’s Office Regarding the Processing of Certain Uncontested Residential Mortgage Foreclosure Actions, Stay Sheriffs’ Sales in Those Foreclosure Actions, Appoint a Special Master Pursuant to Rule 4:41-1 to Investigate Questionable Foreclosure Practices, and Appointing an Attorney to Appear in Support of the Proposed Relief, In the Matter of Residential Mortgage Foreclosure Pleading and Document Irregularities, No. F-59553-10 (N.J. Super. Ct. Ch. Div., Dec. 20, 2010), available at <http://www.judiciary.state.nj.us/notices/2010/n101220c.pdf>.

129. See *In the Matter of Residential Mortgage Foreclosure Pleading and Document Irregularities Superior Court of New Jersey, Chancery Division-General Equity Part, Mercer County Docket No. F-59553-10*, N.J. CTS., [http://www.judiciary.state.nj.us/superior/f\\_59553\\_10.htm](http://www.judiciary.state.nj.us/superior/f_59553_10.htm) (refer to orders issued by Judge Mary Jacobson, Aug. 15, 2011–Sept. 12, 2011) (last visited Mar. 12, 2014).

130. *U.S. Bank Nat’l. Ass’n v. Guillaume*, 38 A.3d 570 (N.J. 2012).

131. N.J. STAT. ANN. § 2A:50-56 (West, Westlaw through L.2014, c.60, J.R. No. 3).

132. *Guillaume*, 38 A.3d at 570.

133. *Id.* at 584.

134. *Id.* at 585.

135. See *Residential Mortgage Foreclosure Statistics*, DEP’T. BANKING & INS., STATE N.J., [http://www.state.nj.us/dobi/division\\_banking/foreclosedstats.htm](http://www.state.nj.us/dobi/division_banking/foreclosedstats.htm) (last visited Nov. 15, 2014) (available as quarterly or monthly reports).

occupants are eligible for workouts (with certain exceptions beginning June 1, 2012),<sup>136</sup> and the homeownership rate in the three census tracts is only twenty-two percent.<sup>137</sup> Second, mortgage modification efforts during the relevant period did not delay foreclosures.<sup>138</sup> Finally, only five to seven percent of New Jersey foreclosure cases were involved in the state's voluntary foreclosure mediation program,<sup>139</sup> and mediation does not delay foreclosure unless the homeowner specifically requests a stay of sale postjudgment.<sup>140</sup>

### A. Findings

Many cases in the sample remain mired at some point in the foreclosure process short of sale, without alternative explanation such as settlement, dismissal, refiling, or private sale:

1. Thirteen files contained no indication that the complaints were ever served on the defendants, though three of these cases settled before default was entered; two more were voluntarily dismissed (possibly indicating settlement); two were refiled with a new plaintiff; and one later sold privately. When personal service cannot be effectuated, substituted service by publication is not difficult to achieve,<sup>141</sup> and indeed was the mode of service in many of the sample cases. Still, I did not count the four unserved cases that did not settle, etc., toward the total of limbo cases. Lack of information made it difficult to determine why the complaints were not served, in part because foreclosure case files are fairly often incomplete. As a result, I may have undercounted the number of stalled or abandoned cases. An

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136. See U.S. DEP'T OF HOUSING & URBAN DEV., HUD'S LOSS MITIGATION PROGRAM, Mortgagee Letter 2000-05, at 8; 2008-43, at 2, available at [http://www.hud.gov/local/shared/working/faithbased/Panel\\_II-Hass.pdf](http://www.hud.gov/local/shared/working/faithbased/Panel_II-Hass.pdf); *Does HAMP Apply to Rental or Investment Property?*, NOLO, <http://www.nolo.com/legal-encyclopedia/does-hamp-apply-rental-investment-property.html> (last visited Feb. 26, 2014); Andrea Smolin, *Home Loan Modification?*, ZILLOW, <http://www.zillow.com/loan-modification> (last visited Feb. 26, 2014). Private loan modifications by banks not participating in federal programs are not obligated to comply with federal restrictions, but in practice, banks' proprietary programs have often followed the federal template and have been restricted to owner-occupants. See MORTGAGE BANKERS ASSOC., WHITE PAPER, RESIDENTIAL MORTGAGE SERVICING FOR THE 21ST CENTURY 8 (2011), available at <http://www.mortgagebankers.org/files/resourcecenter/servicingcouncil/residentialservicingforthe21stcenturywhitepaper.pdf>; NAT'L CONSUMER LAW CTR., FORECLOSURES §§ 2.1.2, 2.4.6, 2.8.2.1 (4th ed., 2012).

137. See *supra* text accompanying note 107.

138. The practice of "dual tracking," or the "simultaneously pursuing foreclosure while considering a homeowner's application for loss mitigation" has been standard among many mortgage servicers. See CTR. FOR RESPONSIBLE LENDING & CONSUMERS UNION, CLOSING THE GAPS: WHAT STATES SHOULD DO TO PROTECT HOMEOWNERS FROM FORECLOSURE 1 (2006), available at <http://www.responsiblelending.org/mortgage-lending/policy-legislation/states/Final-Servicing-Policy-Brief-4-8-2013.pdf>; see also Editorial, *Will Foreclosure Abuses Ever End?*, N.Y. TIMES, Oct. 23, 2012, at A22. I have heard many reports from litigators of foreclosure sales occurring even after borrowers obtained mortgage modifications.

139. Interview with Kevin M. Wolfe, *supra* note 31.

140. See N.J. COURTS, NEW JERSEY FORECLOSURE MEDIATION (2013), available at [http://www.judiciary.state.nj.us/civil/foreclosure/11290\\_foreclosure\\_med\\_info.pdf](http://www.judiciary.state.nj.us/civil/foreclosure/11290_foreclosure_med_info.pdf).

141. See N.J. R. CIV. P. 4:4-5(3) (2014), for requirements on service by publication.

additional two cases with no service were categorized as limbo cases, however, because the *lis pendens* in those cases were eventually dismissed after years of inactivity.

2. In all cases where service was achieved, default was requested and entered.
3. In twenty-two cases where default was entered, no motion for judgment was ever filed and no judgment was entered. Five of these cases settled, one was dismissed (with no clear indication of settlement), one was refiled, and one was sold privately. The fourteen remaining cases were put into the limbo category.
4. In four cases, judgment was requested but not entered. Two of these were sold privately, while the other two were placed in the limbo category.
5. Forty-six cases reached judgment—forty-four did not.
6. Fifteen postjudgment cases never reached sheriff's sale, though three of these settled; two sold privately (a third home may have sold privately, but the record is unclear and contradictory); and one was refiled. In an additional case, the plaintiff requested that the sale be cancelled before it occurred. Eight of these cases were categorized as limbo.
7. Thirty cases reached sheriff's sale; an additional three were stayed or vacated. The mean time to sale for these cases was twenty-four-and-a-half weeks. Four took so much longer than average to reach sale that they were classified as outliers, or limbo cases. Time to sale for these cases ranged from forty-five-and-a-half weeks to two years. Approximately ninety percent of the cases that were sold became REO; the few remaining properties were purchased at auction by small investors.
8. A total of twelve cases clearly settled during the foreclosure process, according to notations in case files. Additional cases that were dismissed or sold privately may also have settled, though that could not be determined.
9. Eight cases were dismissed, though two had mortgages reinstated, three later sold privately, one was refiled, and one involved miscellaneous procedural issues that were never resolved. One of these was classified as a limbo case.
10. I designated thirty-four cases, or 37.8% of the sample, as in legal limbo. The total would rise to thirty-eight cases if the four unserved cases with no further case history (see section one above) were counted. These are the cases that likely were stalled or abandoned by the plaintiff banks. Six may have been affected by the "moratorium" on foreclosures that banks observed for the approximately fourteen months that the two court challenges to robo-signing and foreclosure notice practices were pending. If those six cases were deducted from the total of limbo cases, the category would be reduced to twenty-eight (or thirty-two if the unserved cases were included).



11. The limbo category does not include mortgages that remained in default for unusually long periods before foreclosures were filed, because that data is private. Still, this practice is one means of stalling foreclosures and strong anecdotal evidence indicates it was done during the relevant time period. Therefore, the number of limbo cases probably understates the extent of the stalling phenomenon.<sup>142</sup>
12. It is possible that a small number of the limbo cases were the subject of workout efforts between borrowers and servicers, but the low owner-occupancy rate of twenty-two percent in the three census tracts made the large majority of borrowers ineligible for modifications. Further, “dual-tracking” of workout efforts and foreclosures means that modification negotiations do not delay foreclosures except at point of sale.<sup>143</sup>
13. Most of the plaintiffs in the limbo cases were national banks serving as trustees of securitized trusts or their servicing affiliates filing foreclosures in their own names.<sup>144</sup> For instance, BAC Home Loans Servicing (a division of Bank of America, which acquired Countrywide Home Loans, the largest subprime lender<sup>145</sup>) was the plaintiff in six of the limbo cases. Deutsche Bank filed four of the foreclosures, while U.S. Bank filed three, as did OneWest/Indymac. Wells Fargo, JP Morgan Chase/Chase Home Finance, and Bank of New York filed two each. Citibank and La Salle Bank each filed one of the limbo cases. Other large subprime lenders, such as Aurora, National City, HSBC, Wachovia, and World Savings FSB, also filed one limbo case each.

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142. See *supra* text accompanying note 126 (noting that this practice is common in Newark).

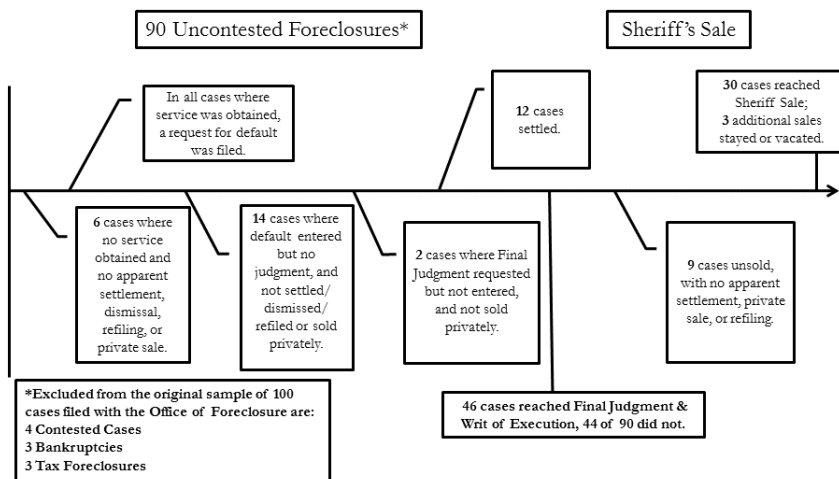
143. See CTR. FOR RESPONSIBLE LENDING & CONSUMERS UNION, *supra* note 138, at 1, 12.

144. See Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 22–23 (2011), for an overview of securitization and servicing.

145. See Gretchen Morgenson, *Fresh Questions Over a Bank of America Settlement*, N.Y. TIMES, Feb. 4, 2013, at B1; *The Top 25 Subprime Lenders*, BLOOMBERG BUSINESSWEEK (May 6, 2009), [http://www.businessweek.com/bwdaily/dnflash/content/may2009/db2009056\\_672318.htm](http://www.businessweek.com/bwdaily/dnflash/content/may2009/db2009056_672318.htm).

The following timeline graphically depicts the results described above:

**Figure 3:** Upper Clinton Hill Uncontested Foreclosures (January, 2007–May, 2009), Sample of 100 Cases from Filing to Sale, as of August 2012



1. The vacancy rate for the entire three census tracts was 16.4%, including vacant parcels, as of the summer of 2011. For the foreclosure sample it was 24.4%. The vacancy rate for stalled foreclosures—the limbo category—was 20.6%. The rate for completed foreclosures in the sample, on the other hand, was 39.3%, reflecting their REO status. Thus, REO properties were almost twice as likely to be vacant as the stalled cases. This figure could help explain why foreclosing banks failed to complete many foreclosures, since the costs of maintaining REO properties are quite high.<sup>146</sup>
2. Vacant properties were clustered, with some blocks particularly devastated, illustrating the “foreclosure contagion” effect. The condition of the homes tended to be worse than those of occupied homes.<sup>147</sup> Many vacant properties were occupied by squatters, which not infrequently resulted in fires and other dangerous conditions.
3. As noted in the methodology section above, the U.S. Census employs a different method for determining vacancy rates: among other things, each housing unit (as opposed to each building) is considered separately, and vacant parcels are not taken into account.<sup>148</sup> According to 2010 Census data, the three census tracts in this study had a combined vacancy rate of 26.4% for 4706 housing

146. See *infra* note 155 and accompanying text.

147. See *infra* note 155 and accompanying text.

148. *Definition: Homeowner Vacancy Rate, Frequently Asked Questions*, *supra* note 122.

units.<sup>149</sup> By contrast, Census data from 2000 showed a vacancy rate of 12.5% for 3874 units.<sup>150</sup> The vacancy rate skyrocketed during the decade that included both the housing boom and bust. It would be reasonable to conclude that the foreclosure crisis, as well as the recession, contributed significantly to these vacancies.

4. It is not immediately apparent why stalled foreclosure properties in Newark are vacant at lower rates than those in Cuyahoga County, Ohio.<sup>151</sup> Potential explanations include that most Upper Clinton Hill homes contain two—or sometimes three—units. Tenants can continue occupying their units after homeowners or other tenants vacate. New Jersey also has an extremely strong Anti-Eviction Act prohibiting evictions except for cause.<sup>152</sup> Foreclosure does not constitute good cause for eviction.<sup>153</sup> Combining these reasons, it is entirely plausible to conclude that tenants frequently continue living in homes that are in foreclosure. While conducting the vacancy survey, we observed numerous occupied properties with electrical lines running from neighboring homes. Evidently, tenants stayed on even after landlords cut utility service.

### B. *Analysis and Significance of Findings*

Unexplained delays remain for a large proportion of the sample cases even after accounting for alternative dispositions, such as private sales. The most reasonable conclusion to draw is that lenders and servicers deliberately chose to walk away from prosecuting these cases. The costs of foreclosure and property maintenance of the older homes in Upper Clinton Hill could easily have exceeded the expected resale value in a declining market. The banks were also likely reluctant to acquire additional REO properties before the market returns.<sup>154</sup> Further deterioration of homes tends to occur once they become vacant, and many of the REO properties in the sample were vacant.<sup>155</sup>

149. See *American FactFinder*, *supra* note 93.

150. *Id.*

151. See *supra* text accompanying notes 75–88.

152. N.J. STAT. ANN. 2A:18-61.1 (West, Westlaw through L.2014, c.60, and J.R. No. 3).

153. See N.J. DEP'T OF CMTY. AFFAIRS DIV. OF CODES & STANDARDS: LANDLORD-TENANT INFO. SERV., FORECLOSURES TENANT'S RIGHTS (2010), available at [http://www.state.nj.us/dca/divisions/codes/publications/pdf\\_lti/f\\_bulletin.pdf](http://www.state.nj.us/dca/divisions/codes/publications/pdf_lti/f_bulletin.pdf) (“Tenants should be aware that they retain their rights under landlord-tenant laws even in properties that are being or have already been foreclosed.”).

154. See Berry, *supra* note 47 (“Housing experts speculate that banks are purposely refusing to take title of abandoned foreclosure as a strategic move to better manage their ballooning portfolios of real-estate owned or REO properties. If more properties were put on the market, it might dampen the nascent housing recovery, the thinking goes.”).

155. See FITZPATRICK IV AND WHITAKER, *supra* note 16 (“[P]roperty sitting in REO is expensive for lenders. Lenders must keep their REO properties secure, bring them up to local housing codes, maintain them, pay property taxes, and market them for resale. Meanwhile, neighborhoods wrestle with increased vacancy and its consequences, as the vast majority of REO properties are vacant. These problems are worse in weak housing markets, where the supply of housing exceeds the demand for it. Several factors combine to increase the odds that REO homes

Moreover, the “operational hypothesis” cited in the Florida study as a possible reason for foreclosure stalling can also partially explain the stalling in Newark.<sup>156</sup> The foreclosure documentation problems experienced there—and indeed, across the country—are the very problems that resulted in the New Jersey court’s robo-signing challenge to the servicers.<sup>157</sup> Concern about their ability to successfully prosecute foreclosure cases led the banks to temporarily cease their efforts.<sup>158</sup>

My findings concerning foreclosure stalling in Upper Clinton Hill can readily be extrapolated to the entire City of Newark because the demographics and housing stock are quite similar, as recounted previously.<sup>159</sup> Beyond that, the findings are also, to a degree, generalizable to similar urban areas in judicial foreclosure states, particularly in the Northeast, where property values tend to be high.<sup>160</sup> First, the subprime lenders that originated mortgages to Newark residents are the same national lenders that operated in lower-income areas across the country.<sup>161</sup> The overwhelming majority of these lenders also appear on lists of the top subprime lenders in the United States.<sup>162</sup>

Second, not only did national lenders originate Newark subprime loans, they also served as foreclosure plaintiffs in their capacities as trustees of the securitized trusts into which most subprime loans were placed, as plaintiffs in their own names for loans held in portfolio, or through their servicing affiliates, which frequently filed foreclosures in their own names.<sup>163</sup> As indicated in the findings section, a large majority of the plaintiffs in the limbo cases in my sample were national lenders operating in one of these capacities.<sup>164</sup>

Third, the trustees and other plaintiffs followed similar national servicing and

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will actually cost more to maintain than lenders can expect to sell them for. For example, carrying costs are likely to be higher. Homes entering foreclosure and lingering in REO in weak markets tend to be older and of lower quality than homes entering REO in strong markets. Property in weak markets is more likely to be vandalized while sitting in REO, and older housing stock tends to deteriorate more rapidly. To top it off, weak demand for housing depresses overall housing prices. In weak markets, lenders may be better served by not taking properties into REO in the first place . . . . Second, the homes may be rapidly deteriorating while the lenders own them. The lower-value homes in distressed neighborhoods are often vandalized and stripped of metals. Despite winterization, homes may suffer weather-related damage without an attentive occupant to immediately address problems when they arise.”)

156. See *supra* text accompanying notes 66–69.

157. See *supra* text accompanying notes 128–129.

158. See *supra* text accompanying notes 128–129.

159. See *supra* text accompanying notes 106–111.

160. See *US Home Prices and Heat Map*, TRULIA, [http://www.trulia.com/home\\_prices/](http://www.trulia.com/home_prices/) (last visited Mar. 12, 2014), for nationwide property value comparisons.

161. Not only has this been true in my own experience—and in other local foreclosure defense lawyers’ experiences—but loan counselors and other advocates working in Essex County and participating in the Newark-Essex Foreclosure Task Force have repeatedly confirmed it as well. See IRA GOLDSTEIN, MORTGAGE FORECLOSURE FILINGS IN NEWARK, NJ 24, 25 (2008) (listing lenders).

162. See *The Top 25 Subprime Lenders*, *supra* note 145.

163. See *supra* text accompanying notes 144–145.

164. *Supra* text accompanying notes 144–145.

foreclosure practices, adapted to each state's laws, so their decisions whether and how to foreclose would largely have been based on similar standards for judicial foreclosure states. For instance, a large majority of servicers in the United States used Lender Processing Services, Inc.'s (LPS) Mortgage Servicing Platform, which processed over fifty percent of all residential mortgages in 2007.<sup>165</sup>

Fourth, combining my findings with those of the previous four studies described above yields the conclusion that intentional foreclosure stalling has occurred across broad swaths of the country and in varying real estate markets. Still, the relatively higher property values in the Northeast result in cost-benefit foreclosure calculations different from those in lower-value markets: for instance, a Newark two-family house might be worth \$150,000, while a similar property in a midwestern city, such as Cleveland, could be worth less than \$50,000.<sup>166</sup> Higher market values can support higher foreclosure and maintenance costs before charge-off is financially justified, which could reduce stalling or abandonment. On the other hand, the foreclosure backlog in northeastern states like New York and New Jersey can itself lead to further stalling by providing additional time and opportunity to do so.<sup>167</sup>

Taken together, my findings and those of the previous studies present a bleak picture in which financial institution indefinite foreclosure stalling—generally without notice to borrowers or other affected parties—creates negative ripple effects on families and neighborhoods that exceed the bad effects of foreclosures in themselves. There are a number of reforms that could mitigate these effects. One reform that has already occurred is part of the national mortgage settlement that the Justice Department and forty-nine state attorneys general entered into in 2012 with five of the largest national mortgage servicers:<sup>168</sup> participating servicers are now required to notify borrowers, courts, and other local authorities after they have made a decision not to pursue a foreclosure.<sup>169</sup>

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165. *In re Taylor*, 407 B.R. 618, 621–22 n.2 (Bankr. E.D. Pa. 2009), *rev'd on other grounds*, 655 F.3d 274 (3d Cir. 2011). As the Third Circuit pointed out with regard to LPS: “[B]oth the accuracy of its data and the ethics of its practices have been repeatedly called into question elsewhere.” *In re Taylor*, 655 F.3d 274, 279 n.5 (citing *In re Thorne*, 466 B.R. 73, 75-78 (Bankr. N.D. Miss. 2011); *In re Doble*, No. 10-11296-MM13, 2011 WL 1465559, at \*4 (Bankr. S.D. Cal. Apr. 14, 2011); *In re Wilson*, No. 07-11862, 2011 WL 1337240, at \*9 (Bankr. E.D. La. Apr. 7, 2011) (imposing sanctions after finding that LPS had issued “sham” affidavits and perpetrated fraud on the court); *see also* Levitin & Twomey, *supra* note 144, at 4. (“Automated default administration . . . means that defaulted loans are referred to foreclosure with factory-like precision.”).

166. See TRULLA, *supra* note 160, to compare house prices in various cities.

167. See Prevost, *supra* note 9.

168. See Consent Judgment, *United States v. Bank of Am., Corp.*, No. 12-0361 (D.D.C. Apr. 4, 2012), for a description and terms of the settlement.

169. See section VIII.A.4 - B.2 of the National Mortgage Settlement Servicing Standards: When the Servicer makes a determination not to pursue foreclosure action on a property with respect to a first lien mortgage loan, Servicer shall: Notify the borrower . . . and inform borrower about his or her right to occupy the property until a sale or other title transfer action occurs and Notify local authorities . . . such as tax authorities, courts, or

The Federal Reserve also issued a guidance letter with similar terms.<sup>170</sup> After notification, a foreclosure action would presumably be dismissed and the homeowner could make other plans.

Beyond that, housing code enforcement should be stepped up to require better maintenance of vacant foreclosed properties. Vacant property registration ordinances<sup>171</sup> help alert authorities to the location of these properties and assist with enforcement efforts. Creditor responsibility acts, such as New Jersey's,<sup>172</sup> which make lenders legally responsible for property maintenance while foreclosure is pending, can also be helpful when enforcement resources are available.

Most importantly of all, servicers' compensation policies should be revised to provide substantial incentives to engage in workout efforts with borrowers.<sup>173</sup> Mortgage modifications should include meaningful principal write-downs where borrowers are able to make reasonable monthly payments.<sup>174</sup>

## CONCLUSION

Unnecessary foreclosure delays are bad for everyone—borrowers, banks, communities, and the housing market.<sup>175</sup> Judicial foreclosure systems provide due

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code enforcement departments, when Servicer decides to release the lien and not pursue foreclosure.

See also *Servicing Standards Spreadsheet*, OFF. MORTGAGE SETTLEMENT OVERSIGHT, <https://www.mortgageoversight.com/wp-content/uploads/2013/04/Servicing-Standards-Spreadsheet.xlsx> (last visited Mar. 10, 2014).

170. See Regulation Letter for Guidance on a Lender's Decision to Discontinue Foreclosure Proceedings from the Bd. of Governors of the Fed. Reserve Sys. to the Officer in Charge of Supervision at Each Fed. Reserve Bank (July 11, 2012), available at <http://www.federalreserve.gov/bankinforeg/srletters/sr1211.pdf>.

171. According to the Center for Community Progress, the purposes of these ordinances are: To ensure that owners of vacant properties are known to the city and other interested parties and can be reached if necessary; To ensure that owners of vacant properties are aware of the obligations of ownership under relevant codes and regulations; and To ensure that owners meet minimum standards of maintenance of vacant properties.

*Tool 1: Vacant Property Registration Ordinances (VPROs)*, CENTER FOR COMMUNITY PROGRESS, <http://www.communityprogress.net/tool-1--vacant-property-registration-ordinances--pages-257.php> (last visited Nov. 15, 2014). For Newark's ordinance, see section 2:10-1.4D of the Revised General Ordinances of the City of Newark, New Jersey (2011), <http://www.ci.newark.nj.us/userimages/Vacant%20Property%20Registration%20Ordinance%20Important%20Documents.pdf> (last visited Mar. 10, 2014).

172. See N.J. STAT. ANN. 46:10B-51(b) (West, Westlaw through L.2014, c.60, and J.R. No. 3).

173. See Levitin & Twomey, *supra* note 144.

174. See Andrew Haughwout et al., *Second Chances: Subprime Mortgage Modification and Re-Default*, 417 FED. RES. BANK N.Y. 24 (2010).

175. Gerardi et al., *supra* note 11, at 34:

Our results suggest that the key to minimizing the costs of foreclosure is to minimize the time that properties spend in serious delinquency and in REO. On one hand, this implies putting pressure on lenders to sell properties out of REO quickly. On the other hand, and perhaps much less palatably, it implies minimizing the time a borrower spends in serious delinquency, which means accelerating the foreclosure process. Put another way, our results suggest that delaying the foreclosure process exacts a cost on society as a whole that should be taken into account when making policy.

It should be evident that I do not endorse acceleration of the foreclosure process for homes that are occupied, as under normal conditions even judicial foreclosures can be completed in less than a year.

process protections for homeowners and may reduce the overall number of foreclosures,<sup>176</sup> but they can also be abused when parties engage in dilatory tactics to stall outcomes. This Article has addressed the phenomenon of bank stalling and the negative social consequences ensuing from it in one neighborhood. Although the neighborhood of Upper Clinton Hill in Newark, New Jersey, is in many ways a typical urban African American neighborhood in the Northeast—particularly in its having been targeted for subprime lending—it would be useful for future researchers to determine whether the results here can be replicated in other areas of the country that have not yet been studied.

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*See* David Kestenbaum, *How Long Does Foreclosure Take?*, NAT'L PUB. RADIO (OCT. 26, 2010, 12:57 PM), <http://www.npr.org/blogs/money/2010/10/26/130833818/foreclosure>.

176. *See* Mian et al., *supra* note 2 (“[S]tates that require judicial process for a foreclosure sale have significantly lower rates of foreclosures relative to states that have no such requirement.”).