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An Excerpt of Iniquity: How court systems, attorneys, and legal aid organizations cheated homeowners in foreclosure

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**AN EXCERPT OF INIQUITY:
HOW COURT SYSTEMS, ATTORNEYS, AND LEGAL AID ORGANIZATIONS
CHEATED HOMEOWNERS IN FORECLOSURE**

*Kelli Dudley**

Abstract: The following is an excerpt from INIQUITY (forthcoming 2019). Inequity explores the legal problems often faced by the author's homeowner clients and foreclosure bar colleagues alike, including the provision of bad information, inadequate due process, incompetent representation and scams within the foreclosure context. Inequity draws attention to these issues and proposes changes to remedy them. The excerpt chosen focuses on dispelling myths surrounding foreclosure that may contribute to these problems, including the assumption that foreclosures are indefensible, a misconception that the author argues is often fueled by classism and racism.

* Kelli Dudley, DePaul University College of Law Professor, housing law attorney, and Director of the Resistance Legal Clinic. Dudley was a 2015 recipient of the DePaul University ENGAGE Award. She has practiced law privately for over 15 years, providing vigorous defenses to foreclosure actions, litigating fair housing matters, filing affirmative lawsuits against lenders, and assisting tenants facing eviction actions. Dudley has also published a law review article, *The Last Thing We Do, Let's Scare All the Lawyers: How Fair Housing Violators Are Intimidating Fair Housing Advocates Instead of Defending Cases and Why It Is Illegal*, 8 DEPAUL J. FOR SOC. JUST. 71 (2014) www.via.library.depaul.edu/jsj/vol8/iss1/5. Dudley's article has been cited in an Ohio case, and she has received calls and notes about the article from around the country.

I. FORECLOSURES ARE NEITHER INDEFENSIBLE NOR UNAVOIDABLE

Most lawyers believe foreclosures are not defensible. Rather than working to save a home, most lawyers acting in good faith advise clients to sell their homes. These lawyers see selling the home and using the cash to pay off the mortgage as one of few options. For clients with good jobs and credit histories, lawyers may suggest refinancing the loans. Very few lawyers carefully read the foreclosure complaint, listen to the client's side of the story, and work to defend the foreclosure through litigation. Clients are usually advised that they can pay what the bank claims is owed, refinance the home, sell the home, or declare bankruptcy.

Even when given in good faith, this is poor advice. Many foreclosures can be defended. In addition, the alternatives are imperfect. Selling a home and paying off what the bank says is owed may mean paying thousands in unjustified (illegal) late fees, court costs, and attorney fees. Refinancing may mean incorporating these unjustified charges into a new loan. The new loan itself may be unfair; a homeowner facing foreclosure is unlikely to be able to negotiate a good deal when desperate to save the home. And, of course, the foreclosure itself will reflect badly in any credit report pulled at that time.

Many lawyers work with variants of the above, including deeds in lieu or short sales. Many homeowners do not understand the implications of these options, and some lawyers are unable or unwilling to ensure they do and to protect them from future ramifications. For options that include giving up the home, many homeowners do not realize they have agreed to relinquish the home until the Sheriff shows up at the door with an eviction order. Other homeowners miss Chapter 13 bankruptcy payments without communication from their attorney since the bankruptcy stay is lifted as the foreclosure case progresses to eviction. Even well-intentioned attorneys sometimes make errors. For example, some think a home will fall within a bankruptcy exemption when it does not and are ill-equipped to rectify the situation. The results for the homeowner are disastrous: loss of the home and possible personal liability for the remaining debt in addition to the bankruptcy costs and fees.

"No defense to foreclosure" is the rallying cry of incompetent or inexperienced counsel. Often, this cynical claim is invoked by attorneys who advertise the ability to "save your home" and find themselves confronted with malpractice allegations. Some lawyers take a monthly payment from a "foreclosure defense client" for a year or more (amassing \$18,000 or more per client) yet do nothing to defend the foreclosure or assist the homeowner.

Foreclosures are neither inevitable nor indefensible.

There are real defenses to foreclosure.

II. “DEADBEATS”: THEY DON’T MATTER ANYWAY

Inherent in lawyers’ refusal to try to defend foreclosure cases are deep-seated prejudices against homeowners who fall into foreclosure. It is easy for lawyers to ignore the needs of those whose woes they believe are partially brought on by poor choices or bad behavior. Like most consumers, homeowners make bad budgeting choices. From racism to poor daily financial decisions to knowing people contribute to their problems by choosing homes driven by vanity, there are lots of reasons lawyers feel no sympathy for many of those in foreclosure. Even those driven into debt by medical bills or job loss beyond their control easily share some culpability, by choosing a high-priced home that required a mortgage rather than finding a less expensive one based on a need for shelter rather than giving into silly notions that some neighborhoods are “safer” and more worthy than others (those who stay in the old ‘hood be damned) or that a two-car garage (soon to be overflowing with junk and unavailable for parking anyway) is nirvana.

...

Given the above, it makes sense for some attorneys to turn away clients or to withdraw from cases after representation agreements are not honored. After all, no one is expected to work for free. Even an attorney who is performing *pro bono* work or being paid by a non-profit organization has a right to insist rules be followed (truthfulness, providing documents on request, paying out-of-pocket costs if agreed, etc.). What is stunning, however, is the number of lawyers willing to take advantage of clients—taking large sums of money and then failing to help. Turning a client away is one thing; actively putting them in a worse position just to receive an unearned legal fee is another. However, foreclosure “defense” attorneys most often put the client in a worse position than if the client did not hire any lawyer at all. At very least, a client who loses a home but has some savings can obtain substitute housing. If that same client hires a lawyer who makes no real effort to save the home (or, worse, files paperwork that hastens the loss of the home), then the client ends up broke—having spent money on legal fees for illusory service—and more likely to be homeless. In addition, the client may face misinformation from the foreclosure “defense” lawyer. For example, the lawyer may lie about the likely date of an eviction, causing the homeowner to be caught unawares. In Cook County, this more often than not means personal belongings are placed on the curb by the Sheriff. Items are then stolen or ruined by the elements as the homeowner seeks the means to move.

A. Race

The failure to help those in foreclosure, the erection of systemic barriers to effective help, and the willingness to steal from those in foreclosure—taking money under a false pretense that a foreclosure “defense” will be tendered (and doing so with impunity)—is not primarily rooted in the behavior of foreclosure defendants. It is largely rooted in their identity, as yet another way of decimating the black middle class. While the prevalence of subprime loans to African Americans

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is fairly widely recognized,¹ courts are all too willing to gloss over the racial ramifications of predatory behavior toward foreclosure defendants by the foreclosure “defense” bar.

Those who preyed on homeowners often focused on factors protected by the Fair Housing Act (FHA). Example include race, ethnicity, national origin and religion.

The African American community was hardest hit by foreclosure rescue scammers. Several advertised aggressively on billboards in black communities and on radio stations serving the black community. One hosted an “informational” radio show (purchased advertising in large chunks of time) on WVON in Chicago. Not only did WVON’s advertising rate sheet show a 95% black listening audience, the call letters originally stood for “Voice of the Negro” when it was established in 1963 to empower black people. It now has changed its name to “Voice of the Nation” per its website.²

I represented a homeowner-victim of a WVON advertiser. Though my client eventually secured a judgment against the scammers, it was a lengthy battle. They tried to stymie my client’s FHA case against them by getting a restraining order to prevent me from talking to my client for nearly 16 months.³ The Order was so broad it seemed to prohibit me from talking to virtually anyone about the FHA. From the get-go, the Order was illegal, entered by a state court while the case was pending before a Federal Court. Situations like this, where a case is removed to Federal Court, result in a “stay” of the state court case, and the state court is supposed to refrain from doing anything until the Federal Court is done with its action. Of course, state court judges count on lawyers to be candid with them about matters. In an action one judge later characterized as “dumb and dumber,” the attorneys wrote to me acknowledging the case was stayed but stating they would go forward anyway. They were eventually sanctioned.

...

Some targeted the black community through religious programming. This could include speaking at churches, advertising in church bulletins or advertising (hosting or contributing to a “show”) on a religious broadcasting station targeting African Americans. One scammer who did this faced discipline from the Illinois Attorney Registration and Disciplinary Commission (IARDC) but kept going. The Illinois Attorney General also filed suit, finding out of 90 victims, 58 were African American, 22 were Latino, one was white and the race and national origin of the others were unknown.⁴ Despite the litigation against him, he continued advertising aggressively on a radio station targeting African Americans and Christians, ending only when the IARDC finally

¹ Ira Goldstein, *Subprime Lending, Mortgage Foreclosures and Race: How far have we come and how far have we to go?*, THE REINVESTMENT FUND, http://www.prrac.org/projects/fair_housing_commission/atlanta/SubprimeMortgageForeclosure_and_Race_1014.pdf.

² Our History, WVON, <http://wvon.com/about-us/our-history/> (last accessed 3/30/2019).

³ *Ernest Fenton et al. v. Kelli Dudley et al.*, 761 F.3d 770 (7th Cir. 2014).

⁴ *People ex rel. Madigan v. Wildermuth*, 91 N.E. 3d 865 (Ill. 2017), (Brief of Plaintiff-Appellee People of the State of Illinois).

suspended him on other grounds. At that point, another attorney in the scammer's office took over the advertisements without repercussions.

Another frequent basis of targeting was ethnicity. Chicago is highly divided on ethnic grounds, so people who identify with a particular group are vulnerable. In a self-perpetuating cycle, they are shoved to the margins by the segregation and bigotry that prevails throughout the city and its surrounds. They then become increasingly reliant on people within their ethnic group—and vulnerable to anyone who speaks the same language or claims the same heritage or nationality. One infamous scammer aggressively advertises he will “save your home.” He works with an attorney who is not of the ethnic group but has little enough self-respect to make his credentials available as a tool to defraud unsuspecting people. This scam goes a bit deeper than most: victims are actually persuaded to sign the deed to their property over to the scammer. The scammer falsely tells the victim that the banks and courts will be unable to figure out how to foreclose if the deed is no longer in the name of the homeowner being foreclosed upon. (Of course, it is really a simple matter for the bank to substitute the name of the new “owner” and continue the foreclosure.) Adding insult to injury, the scammer charges the victim for this “service.” In variations of the scam, he may charge rent for the person to live in his or her own home, evict the homeowner, sell the home to a third party or simply let it go in the foreclosure—charging the homeowner for months or even years for an incompetent or non-existent “defense” to the foreclosure in court.

B. “Strategic” Default

Of course, some foreclosure defendants do not seem very sympathetic. Strategic default is a real phenomenon, though it was overly-trumpeted and misunderstood throughout the housing crisis. Strategic default, the idea that some homeowners intentionally missed payments to force their loan into default status or foreclosure, was bandied by many banks and judges as a reason to treat homeowners in a callous manner: They chose to miss payments and should not be rewarded with humane treatment in court or realistic options to save the home. Using a broader stroke, those who brought on their financial problems (for example, by rolling opulent medical bills into their mortgage as part of a refinance or by overspending on luxuries like food, medicine, and child care), also did not deserve pesky due process.⁵ Affording them such would create a “moral hazard” leading everyone to default.

In fact, a significant cause of “strategic default” was the banks themselves. Customer service representatives often trumpeted that the homeowner would not be considered for a modification or other relief while current. The homeowners would comply with the implicit suggestion that they withhold payment, only to find themselves standing in front of the freight train of foreclosure. The same banks would bluntness that the slightest consideration for “due process” would lead to the

⁵ Generally, all litigants in the United States are entitled to notice and an opportunity to be heard before their life, liberty, or property is taken. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). States generally have to take reasonable measures to be sure notice is actually served upon litigants. *Jones v. Flowers*, 547 U.S. 220, 235 (2006). While courts universally decline to set forth rigid formulae for adequacy of service, service reasonably calculated to give notice is indispensable. Personal service is a recognized standard. In foreclosure cases, the wholesale hand-off of service of process from the Sheriff, a public servant, to private process servers paid by the plaintiffs--and often only paid if service is "successful"--cases doubt on the adequacy of service."

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“moral hazard” of a virtual homeowners’ rent strike—masses of homeowners withholding payment for the joy of being tossed around a dirty, disorganized courthouse while begging for a day in court—or even a minute’s consideration of a completed loan modification application.

Strategic defaults were also urged by foreclosure “defense” attorneys. Those in distress—but not in foreclosure—would come to them, lured in by aggressive and misleading advertising. The attorneys would tell them to quit making mortgage payments, assuring a foreclosure would follow. The attorney would collect \$1,500.00 (or more) each month while doing nothing to save the home from the foreclosure caused by the “legal advice.” Meanwhile, the homeowner would know nothing of this until the Sheriff showed up to perform the eviction.

III. WILMA L: A FAMILY HOME SAVED

I have no idea how one gets papers from the 1970s, stuffed into an even older valise, on top of more recent papers so that pending foreclosure pleadings and current insurance papers stick to the mildewed bottom. However, that is the package Wilma Lowe, an otherwise-elegant woman who owned a stately Victorian in a peaceful neighborhood on Chicago’s South Side brought with her to her first appointment. It was my first client appointment as a real attorney. Telling the receptionists at the Chicago Legal Clinic that I wanted to try my hand at a “few” foreclosures opened the floodgates, but Wilma was the first client to appear.

Wilma’s story seemed as long and uncertain as foreclosures in Chicago are said to be, but it held up over time.⁶ Her troubles began with a foreclosure notice received years before we met. At that time, a lawyer “friend” offered to help her avoid foreclosure by having her sign her deed over to him and pay him rent. (The story goes, according to foreclosure scammers, that the foreclosing bank and the judge will never figure out what to do if this kind of title transfer takes place. Of course, the mechanisms for continuing a foreclosure with almost no disruption in such cases are well established, but the scammers’ stories and promises are consistently compelling to those facing the loss of their homes.)

The loss of the home would have been doubly tragic. It was filled with treasures like vintage dining sets and cocktail glasses, elegant vintage furniture and original touches that had lasted for more than a century. Most importantly, Wilma’s mother lived with her, and Wilma was adamant that Momma die in the home. Wilma herself was likely in her 60s (going on 35) at the time, so Momma was not young. Wilma was ill and rarely came down to visit but knowing she would have to leave the home if it was lost spurred me on.

As time went on, Wilma by hook or by crook (and she doubtlessly had a right hook that could make a crook think twice when justified) got her home back from the first scammer. However, within months, another scam took root. This time, the idea of signing over her title and paying rent did not seem so bad. For one thing, the scammer made his way to Wilma through a trusted friend. In addition, he offered a little up-front cash and a dossier of “saved” properties.

⁶ For more about Wilma, see Marilyn Kennedy Melia, Rescue rip-offs: Foreclosure scams leave drowning homeowners high and dry, Chi. Trib. (July 25, 2005).

Scammer Two had a unique twist: because judges will fairly quickly restore the rightful owner to title in these schemes, he recruited people—mostly young African American men with steady jobs and good credit—to be his “mentees.” In teaching them the business, he would offload properties like Wilma’s onto an unsuspecting young mentee, characterized as an investor. The investor, a second victim, would become frustrated when the homeowner did not pay rent. Though there were thousands of variations, the investor would, under the guiding hand of the “mentor,” file an eviction or sell the property to another investor—usually another “mentee.” Title quickly became clouded beyond comprehension, causing homeowners to lose hope, to be unable to effectively fight the foreclosure and eviction, to be unable to refinance (because of the clouded title), or to otherwise give up. Many left the homes, and the mentees—falsely promised large profits—were left with unproductive properties that could not be legitimately sold. Many young African American men lost money, ruined their credit rating, and even faced jail time because of the wranglings of the “investor” “mentors,” many of whom were attorneys.

I filed a quiet title action on Wilma’s behalf and succeeded in having her eviction case consolidated with her foreclosure. I filed an answer, affirmative defenses and counterclaims to her foreclosure. Now, a patient and long-suffering Chancery (foreclosure) judge could hear the case. Indeed, he did. The Judge got involved in the case, urged the parties toward settlement and even retained it on his docket when he got a new judicial assignment.

After about three years, the investment scammer’s mentee relented and executed a quit-claim deed, putting Wilma back in title on her home. Momma got to pass away quietly at home, and her children had a lovely funeral and repast. It was good to know Wilma did not have to face a move as the end of her life approached.

However, the bank was determined to collect its due. In 2015, after I quit working for the Chicago Legal Clinic and exited my formal involvement in the case, Wilma received clear title to her home. Her fight had lasted nearly 15 years, and it drug on for 12 years after I was admitted as an attorney and first became involved.

Wilma remains happily in her home and is as strong, independent and elegant as ever. Her case could not have been more complex. The difference between losing and saving her home was a competent, determined foreclosure defense.