

REAL ESTATE MARKET MELTDOWN, FORECLOSURES AND TENANTS' RIGHTS

ALEATRA P. WILLIAMS*

INTRODUCTION

The nearly unparalleled levels of foreclosures resulting from the current real estate market meltdown reveal a significant gap in laws that address residential tenant rights. There exists a misconception by the general public that foreclosures only affect single family, owner-occupied homes, but foreclosures have also occurred on multiple family units and non-owner occupied homes in alarming numbers.¹ Until recently, tenants who lived in foreclosed properties typically had no legal recourse (or viable legal remedies) when confronted with eviction or ejectment proceedings precipitated by foreclosure actions against their landlords and/or property owners. These proceedings occurred notwithstanding compliance with lease agreements and other public policy obligations, thus potentially burdening already strained social programs for the homeless and impoverished. Therefore, foreclosures have been gut wrenchingly devastating for tenants and have especially hit hard tenants in vulnerable low-income and in minority communities.

In May 2009, the federal government took an unprecedented step into the landlord-tenant arena, which is traditionally and exclusively governed by state legislatures, when President Obama signed into law the Protecting Tenants at Foreclosure Act of 2009 (the "Act" or PTFA).² This step by the federal government manifestly indicates that the ills tenants face when their leased premises are foreclosed upon are indeed grave and that tenants do warrant protection.³ The Act applies to all foreclosures of federally-related mortgages

* Assistant Professor, Charleston School of Law; B.A., Purdue University; J.D., University of Oklahoma; LL.M., University of California, Berkeley. I would like to thank the Real Estate Transactions and Property Sections of the American Association of Law Schools for the opportunity to present this Article at the 2010 Annual Meeting in New Orleans, Louisiana. I also wish to express my gratitude to Kerry Hegarty Webb (Charleston School of Law, Class of 2011) and Jenna M. Peyser (Charleston School of Law, Class of 2012) for their research assistance.

1. See generally JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., AMERICA'S RENTAL HOUSING: THE KEY TO A BALANCED NATIONAL POLICY 14 (2008) (estimating that twenty percent of all foreclosure filings in the United States were on non-owner occupied premises in 2007).

2. Pub. L. No. 111-22, Div. A, Title VII, 123 Stat. 1660 (2009).

3. According to Vicki Been, Director of the Furman Center for Real Estate and Urban Policy, New York University, sixty percent of the 2007 foreclosures in New York City were on two- to four-family or multi-unit buildings. See *Neighborhoods: The Blameless Victims of the Subprime Mortgage Crisis: Hearing on H.R. 5818 Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Government Reform*, 110th Cong. 31-58, 381 (2008) (statement of Vicki Been, Director, Furman Center for Real Estate and Urban Policy) [hereinafter *Neighborhoods*], available at <http://oversight.house.gov/images/stories/documents/20080522105505.pdf>; see also Danilo Pelletiere & Keith Wardrip, *Renters and the Housing Credit*

and other mortgages foreclosed after May 20, 2009.⁴ The Act provides some protections to tenants not currently incorporated under schemes. To the extent that any state law limits the protections, they are overturned.⁵ However, states are free to implement any additional tenant protections than the Act provides.⁶

Before the PTFA, states had three primary approaches to dealing with the rights of tenants in foreclosure actions. First, a large number of jurisdictions permit foreclosure purchasers to summarily evict or eject tenants without notice.⁷ Second, some jurisdictions require that foreclosing parties provide tenants with notices of foreclosure actions or require that tenants be made parties to the foreclosure proceedings.⁸ Third, a few jurisdictions require the owner to show “good cause” or “just cause” before a tenant is evicted or ejected, under which foreclosure does not fall.⁹

Although ignored in many jurisdictions, the Act has tackled the imminent injury of eviction by providing a “stay of eviction” if the requirements are met.¹⁰ On the other hand, the Act equally overlooks other critical harms tenants face when their landlords’ mortgages are foreclosed upon. States are now poised to adopt protections for tenants that address all of the harms tenants face in addition to the federal law. The Act has set up a foundation of tenant protection upon which states must now build.

Part I of this Article discusses this present financial crisis and its effect on tenants and revisits the idea of security of tenure, the rights afforded to tenants and its benefits. Part II of the Article reviews the PTFA and examines the qualifications for protections and the application of the Act. Part II also critiques the Act based on the core values of the landlord/tenant relationship. Part III analyzes the normative framework of the three major approaches to tenants’ rights in foreclosures and offers a critique of each based on the three fundamental principles of the landlord/tenant relationship: privity of contract, security of the

Crisis, 4 POVERTY & RACE 3, at 3 (July-Aug. 2008) (stating that half to more than half of all persons living in foreclosed building were tenants); John Leland, *As Owners Feel Mortgage Pain, So Do Renters*, N.Y. TIMES, Nov. 18, 2007, at A1 (recognizing in Nevada that twenty-eight percent of the mortgages in foreclosure were not owner-occupied).

4. See Pub. L. No. 111-22, Div. A, Title VII, § 702, 123 Stat. 1660.

5. See *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002) (noting that should there be a conflict between state and federal laws, federal law preempts state law pursuant to the Supremacy Clause of Article VI, Clause 2 of the U.S. Constitution).

6. See, e.g., *Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 933 (N.D. Iowa 2003) (stating that federal law “establishes a floor, not a ceiling” and that “states are free to grant more protection than federal law provides”).

7. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY AND NAT’L LAW INCOME HOUS. COAL., WITHOUT JUST CAUSE: A 50-STATE REVIEW OF THE (LACK OF) RIGHTS OF TENANTS IN FORECLOSURE 7 (2009), available at http://www.nlchp.org/content/pubs/Without_Just_Cause1.pdf [hereinafter 50-STATE REVIEW].

8. *Id.*

9. *Id.*

10. Pub. L. No. 111-22, Div. A, Title VII, § 702, 123 Stat. 1660.

property interest, and equity. I argue that state legislatures must take affirmative steps to protect tenants from injury due to foreclosure of their leased premises. To that end, a legislature has one of two ways to safeguard tenants' rights during foreclosure: (1) amending a state's evictions laws; or (2) modifying a state's foreclosure processes. In Part IV, I contend that tenant rights in foreclosure can be more effectively and comprehensively addressed under customary eviction processes as incorporated under states' Residential Landlord and Tenant Acts. The Article concludes by recommending that states amend their Residential Landlord and Tenant Acts to provide tenants with more security upon foreclosure, before the sunset of the PTFA on December 31, 2012.

I. HISTORY REVISITED: THE SECURITY OF TENURE DILEMMA

A. *History Revisited*

U.S. officials have acknowledged that the United States has not faced a more serious financial crisis since the Great Depression.¹¹ Although it is true that the cataclysmic financial event of the 1930s had a profound effect on both the economic and real estate markets in America, the financial meltdown beginning around 2006 has had a greater catastrophic effect on several aspects of the financial market than the historical downturn. Certain characteristics of this current economic catastrophe make it particularly worrisome. The consequence of the current real estate market collapse and the resulting foreclosures and their effect on the tenant market is unparalleled in history.

Today's economists have blamed the rise in the subprime lending market and securitization of these mortgages for causing this current real estate market meltdown.¹² In its heyday, subprime loans comprised almost thirteen percent of the mortgage origination market.¹³ According to Ben S. Bernanke, Chairman of the Federal Reserve Board:

Subprime mortgages are loans made to borrowers who are perceived to have high credit risk, often because they lack a strong credit history or have other characteristics that are associated with high probabilities of

11. Barack H. Obama, President of the United States, Remarks by the President to the Business Roundtable (Feb. 24, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-business-roundtable>; Ben S. Bernanke, Chairman, Fed. Reserve Bd., Four Questions about the Financial Crisis (Apr. 14, 2009), *available at* <http://www.federalreserve.gov/newsevents/speech/bernanke20090414a.htm> (stating that "[t]he financial crisis, the worst since the Great Depression, has severely affected the cost and availability of credit to both households and businesses").

12. *See, e.g.*, Ben S. Bernanke, Chairman, Fed. Reserve Bd., The Subprime Mortgage Market (May 17, 2007), *available at* <http://www.federalreserve.gov/newsevents/speech/bernanke20070517a.htm>.

13. Harold L. Bunce et al., *Subprime Foreclosures: The Smoking Gun of Predatory Lending?*, HOUSING POLICY IN THE NEW MILLENNIUM, 257, 257 (2001), <http://www.huduser.org/portal/publications/pdf/brd/12Bunce.pdf>.

default. Having emerged more than two decades ago, subprime mortgage lending began to expand in earnest in the mid-1990s, the expansion spurred in large part by innovations that reduced the costs for lenders of assessing and pricing risks.¹⁴

Subprime loans are not wretched mechanisms;¹⁵ they allow those with limited or otherwise impaired credit to have purchasing power.¹⁶ The largest asset in an individual's or family's financial portfolio is typically a home. Subprime mortgages permitted those who would have been shut out of the market decades ago the possibility to accumulate such wealth.¹⁷ Thus, in normal situations, subprime loans served a tremendous function. However, in order to make credit more readily available, mortgage brokers, lenders, and loan underwriters engaged in questionable behavior, i.e., aggressive "credit peddling."¹⁸ This aggressive behavior launched subprime mortgages into the economic bomb in today's market.¹⁹ What resulted from this behavior, at least partly, is this current economic crisis. Chairman Bernanke stated: "The credit boom began to unravel in early 2007 when problems surfaced with subprime mortgages—mortgages offered to less-creditworthy borrowers—and house prices in parts of the country began to fall. Mortgage delinquencies and defaults rose, and the downturn in house prices intensified, trends that continue today."²⁰

The subprime mortgage fiasco affected tenants as well as mortgagors. When the mortgagor defaulted on these subprime mortgages due to the mortgagor's inability to pay the exorbitantly high mortgage payments, the mortgagee typically foreclosed.²¹ Consequently, foreclosures affected tenants in alarming numbers.²²

14. Bernanke, *supra* note 12.

15. Anne-Marie Motto, Note, *Skirting the Law: How Predatory Mortgage Lenders are Destroying the American Dream*, 18 GA. ST. U. L. REV. 859, 863 (2002) (stating that not all subprime loans are predatory).

16. See Kenneth C. Johnston et al., *The Subprime Morass: Past, Present, and Future*, 12 N.C. BANKING INST. 125, 126 (2008); see also *In re First Alliance Mortgage Co.*, 471 F.3d 977, 984 (9th Cir. 2006) (noting that subprime loans allow people to borrow who "might otherwise be denied credit").

17. See generally *Protecting Homeowners: Preventing Abusive Lending While Preserving Access to Credit*, Hearing Before the Subcomm. on Housing and Community Opportunity and the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services, 108th Cong. 3 (Nov. 5, 2003) (statement of Allen J. Fishbein, Director of Housing and Credit Policy, Consumer Federation of America) (explaining that predatory and subprime lending has allowed minority and low-income groups to acquire wealth through owning a home and refinancing).

18. *Id.* A credit peddler is one who uses aggressive actions to push credit onto a consumer.

19. See, e.g., EDWARD M. GRAMLICH, *SUBPRIME MORTGAGES: AMERICA'S LATEST BOOM AND BUST* (2007).

20. Bernanke, *supra* note 11.

21. See Vicki Been et al., *The High Cost of Segregation: Exploring Racial Disparities in High-Cost Lending*, 36 FORDHAM URB. L.J. 361, 362-63 (2009) (explaining that foreclosure rates

The American dream of fame, prosperity, and home ownership has been a part of the American landscape for decades. It is generally accepted that we may not all become rich or famous, but owning a home is the exception. Most Americans believe that homeownership is not only possible, but likely.²³ However, for some, the American dream may never become reality. For these people, the American dream may be delayed if not entirely misplaced during their lifetimes. The attainment of a home is highly unlikely to the destitute; they are destined to be lifelong tenants. Thus, their rental property is their “home” for all intents and purposes.

Most would agree that times have changed since the real estate market heyday. More people are renting instead of buying, causing the rental market to increase exponentially.²⁴ Today, because of the market downturn, there is a credit crunch. It is simply more difficult to qualify for loan products in order to purchase a home. There are multiple explanations as to why banks will say “no” to a credit application. Some consumers will not qualify due to their impaired creditworthiness or solvency; others may not qualify because financial institutions have revamped their qualification requirements, requiring larger down payments. On the other hand, some consumers are saying no to mortgages even though they qualify for financing. Many consumers are skeptical of financial institutions, having been “burned” by foreclosure or the real estate market meltdown.²⁵ Thus, regardless of whether the reason for renting is based on choice or lack thereof, tenants who will rent for extended periods of time need physical, social, economic, and emotional stability. The most effective way to cater to these needs is to enact laws, which protect such tenants from landlords and mortgagees.

Foreclosures typically wipe out all interests in the foreclosed premises, including leasehold interests, which are subsequent to the recordation of a mortgage.²⁶ A large number of tenants, much to their chagrin, quickly learned

were increased for subprime and adjustable rate mortgages and were mainly in racial minority communities).

22. See, e.g., JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 1; see also *Neighborhoods*, *supra* note 3.

23. See Charles Feldman, *Fannie Mae Survey: Americans Still Believe in Home Ownership*, WALLET POP, Apr. 8, 2010, available at <http://www.walletpop.com/blog/2010/04/08/fannie-mae-survey-americans-still-believe-in>.

24. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 1, at 2 (stating that the “number of renter households jumped by 2.8%” to one million households from 2003 to 2006).

25. Raymond H. Brescia, *Trust in the Shadows: Law, Behavior, and Financial Re-Regulation*, 57 BUFF. L. REV. 1361, 1362 (2009) (arguing that an “aspect of this crisis is the relative lack of trust in our financial institutions: the very institutions that helped to inflate a speculative real estate bubble, the collapse of which has brought about the greatest economic crisis in eighty years”); see also Thomas J. Sugrue, *The New American Dream: Renting*, WALL ST. J., Aug. 14, 2009, available at http://online.wsj.com/article_email/SB10001424052970204409904574350432677038184-1MyQjAxMDA5MDEwOTExNDkyWj.html.

26. See generally *Effect of Foreclosure of Mortgage as Terminating Lease*, 14 A.L.R. 664

that their leaseholds would soon be terminated due to no fault of their own. Tenants, facing eviction, discovered that many of them were without legal remedies. These tenants typically had thirty days to find alternate, affordable housing. Not only was housing more competitive because the number of renters grew with the addition of foreclosed owners, but tenants now had a negative rental history, eviction, due to mortgagee's desire to gain possession of the purchased property. The perfect economic storm created by the mortgage and housing market crash has created this common result in many cities.

B. The Security of Tenure Question

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, *housing* and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.²⁷

The Universal Declaration of Human Rights recognizes the "right to adequate housing as essential to an adequate standard of living."²⁸ Security of tenure offers protection to tenants against removal from the leased premises by landlords who might remove (evict) them or arbitrarily increase rent except for exceptional reasons.²⁹ Scholars have described security of tenure as "a critically important human need."³⁰ Tenants vested with security of tenure have certain benefits, such as a sense of community and roots.³¹

The U.S. position is in accord with the Universal Declaration of Human Rights. The Housing Act of 1949 first set forth a housing policy that included "the realization as soon as feasible of the goal of a decent home and suitable living environment for every American family."³² The U.S. Department of Housing and Urban Development's mission is to increase homeownership, support community development, and increase access to affordable housing free from discrimination.³³ This mission extended the aim of the 1949 Housing Act.

(1921).

27. Universal Declaration of Human Rights, G.A. Res. 217A, art. 25(1), U.N. GAOR, 3d Sess., 1st Plen. Mtg. 1 U.N. Doc. A1810 (Dec. 10, 1948).

28. UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME, THE STATE OF THE WORLD'S CITIES 32-33 (2001), available at <http://www.un.org/ga/Istanbul+5/32.pdf>.

29. See generally Florence Wagman Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C. L. REV. 817 (2008).

30. *Id.* at 817.

31. Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV. 483, 530 (1985).

32. Pub. L. No. 81-171, 63 Stat. 413 (codified in scattered sections of 42 U.S.C.).

33. U.S. Dep't of Housing and Urban Dev., Mission Statement, <http://portal.hud.gov/portal/page/portal/HUD/about/mission>.

Thus, housing is a fundamental American right.

If one considers shelter as an imperative need, then the law should guard residential tenants against forfeiture of their home without good or just cause. Of course, tenants with bargaining power may negotiate protections in their lease agreements which provide them with security of tenure. However, tenants are not likely to seek tenure security because they may be unaware of this possibility and may not have the necessary bargaining power to do so.³⁴ If tenants are unable to protect themselves, governmental action may be crucial.

Protecting a tenant's tenure is not a foreign concept or unusual action for federal and/or state governments. Both have taken steps to shelter tenants from unmerited ejections by landlords. Many states have enacted "just cause" or "good cause" eviction statutes.³⁵ In these states, tenants are shielded from termination of their leaseholds by landowners unless the reason is enumerated.³⁶ The federal government has also enacted a "just cause" eviction statute for Washington, D.C.³⁷

For many years, jurisdictions have struggled to provide protection to tenants against the whims of their landlords. Jurisdictions have focused on: (1) eviction³⁸—being physically or constructively evicted; (2) rent³⁹—preventing tenants from capricious rent increases; and (3) discrimination⁴⁰—protecting classes of tenants from discrimination in obtaining housing. Because the landlord's actions must be justified, tenants already have some form of tenure security in their leasehold interests.

However, the modern mortgage crisis shows the extent of the deficiencies in tenure security. Today, because of this current financial crisis, tenants again struggle with security of tenure. The present financial crisis also illustrates how extensively security of tenure is threatened by an actor not typically made the focus in this debate, the mortgagee. Because foreclosure wipes out landlords and tenants' interests in leased premises, mortgagees are the actors who evict tenants from the leased premises. Likewise, the lease, to which the landlord and tenant were bound, is also unenforceable against a mortgagee in most jurisdictions absent an attornment and non-disturbance agreement.⁴¹ Thus, a tenant has no

34. Roisman, *supra* note 29, at 817-18 (stating that most tenants "are not wealthy enough to obtain security of tenure by agreement with the landowner, and therefore rely upon the government to assure them some protection against arbitrary terminations of occupancy by the landowner").

35. *See, e.g.*, N.H. REV. STAT. ANN. § 540:2 (2007); N.J. STAT. ANN. § 2A:18-61.1 (Supp. 2010).

36. N.H. REV. STAT. ANN. § 540:2; N.J. STAT. ANN. § 2A:18-61.1.

37. D.C. CODE § 42-3505.01 (Supp. 2009).

38. N.H. REV. STAT. ANN. § 540:2; N.J. STAT. ANN. § 2A:18-61.1.

39. *See, e.g.*, CONN. GEN. STAT. § 47a-20 (2006); MASS. GEN. LAWS ANN. ch. 186, § 18 (West 2003 & Supp. 2010); OHIO REV. CODE ANN. § 5321.02 (West Supp. 2009); WASH. REV. CODE. § 59.18.240 (2004).

40. *See, e.g.*, 42 U.S.C. §§ 3601-3629, 3631 (2006).

41. Robert D. Feinstein & Sidney A. Keyles, *Foreclosure: Subordination, Non-Disturbance and Attornment Agreements*, 3 PROBATE & PROPERTY 38 (1989) (noting that under an attornment

contractual basis to assert any rights of continued tenancy.⁴² Also, the protections of tenure afforded to tenants are generally enforceable against the landlord, not the mortgagee.⁴³

Typically, the parties who are bound to comply with “just cause” statutes are landlords.⁴⁴ This not only applies to the one whom entered into the contractual relationship with tenant, but it has a broader meaning. The term “landlord” is simply defined as the individual with legal title to the leased premises.⁴⁵ As the purchaser of the foreclosed property, a mortgagee or third party purchaser is the “landlord” for the purposes of the “just cause” statutes.⁴⁶ Should state landlord-tenant acts prohibit mortgagees or third parties from interfering with tenants’ tenure without good or just cause, there is no element of surprise; it is simply an iteration of existing laws in this area.

Mortgagees must comply with the PTFA, which provides short-term security of tenure to tenants.⁴⁷ The Act unequivocally applies to mortgagees or purchasers at a foreclosure sale.⁴⁸ However, the protections are short-term, ending in December 31, 2012.⁴⁹ The right to adequate housing, a national concern, is inextricably linked to legal security of tenure. Evictions due to foreclosures of leased premises result in unjust consequences for tenants. Federal or state intervention is required to eradicate this injustice for the long-term.

II. FEDERAL TREATMENT OF TENANTS’ RIGHTS IN FORECLOSURE

A. Protecting Tenants at Foreclosure Act of 2009

On May 20, 2009, President Barack Obama signed the PTFA into law.⁵⁰ The Act recognizes the disturbing lack of tenant rights in foreclosures and offers temporary protections to tenants who live in residential properties that are sold at a foreclosure sale on or after May 20, 2009, the Act’s effective date.⁵¹ Before the Act was signed into law, tenants were subject to the laws of their jurisdictions, a majority of which permitted immediate eviction upon

agreement that a lease will not be extinguished, but will continue as between the mortgagee and tenant).

42. *O’Brien Props., Inc. v. Rodriguez*, 576 A.2d 469, 472 (Conn. 1990) (stating that foreclosure extinguishes the lease and makes tenant a tenant at sufferance).

43. *First Fed. Bank, FSB v. Whitney Dev. Corp.*, 677 A.2d 1363 (Conn. 1996).

44. N.H. REV. STAT. ANN. § 540:2 (2007); N.J. STAT. ANN. § 2A:18-61.1 (2000 & Supp. 2008).

45. N.H. REV. STAT. ANN. § 540:2; N.J. STAT. ANN. § 2A:18-61.1.

46. *First Fed. Bank, FSB*, 677 A.2d at 1368.

47. Pub. L. No. 111-22, Div. A, Title VII, § 701, Stat. 1660.

48. *Id.* § 703.

49. *Id.* § 704.

50. *Id.* § 702.

51. *Id.*

foreclosure.⁵²

The crux of the PTFA's protection is that it allows covered tenants to remain in their leased premises until the foreclosure purchaser (the immediate successor in interest) gives the tenant at least ninety days advance notice to vacate.⁵³ Tenants with unexpired lease terms may be permitted to remain in the leased premises until the lease terminates on its terms.⁵⁴ However, if the buyer or some subsequent purchaser intends to move into the home and make it a primary residence, the tenant will be required to vacate after at least ninety days advance notice.

Not all tenants affected by foreclosures are qualified to receive relief under the PTFA. In order to qualify for protection, there are two requirements. First, the Act applies to any foreclosure on a "federally-related mortgage loan or on any dwelling or residential real property" after the law's enactment date.⁵⁵ Per the PTFA, the term "federally-related mortgage loan" has the same meaning as defined under the Real Estate Settlement Procedures Act of 1974 (RESPA).⁵⁶ Under the RESPA, the term "federally-related mortgage loan" encompasses "any loan (other than temporary financing such as a construction loan)" which is "secured by a first or subordinate lien on residential real property . . . designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property."⁵⁷ It is clear from the RESPA definition that tenants of mortgagors who purchased a multi-unit apartment complex, condominium, or cooperative are not protected by the PTFA.⁵⁸

Second, a tenant must be a "bona fide tenant"⁵⁹ for protection under the PTFA.⁶⁰ Under the PTFA, a tenancy is bona fide if:

- (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;
- (2) the lease or tenancy was the result of an arms-length transaction; and
- (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the

52. 50-STATE REVIEW, *supra* note 7, at 7.

53. Pub. L. No. 111-22, Div. A, Title VII, § 702(a)(2)(B), 123 Stat. 1660.

54. *Id.* § 702(a)(2)(A) (stating that a bona fide tenant whose lease was entered into before the notice of foreclosure may be permitted to occupy the premises until the "end of the remaining term of the lease").

55. *Id.* § 702(a).

56. *Id.* § 702(a)(2)(c); *see also* 12 U.S.C. § 2602 (2006). RESPA is a consumer protection statute designed to require disclosure of certain financial matters in clearer terms to mortgagors. 12 U.S.C. § 2602.

57. 12 U.S.C. § 2602.

58. *Id.*

59. Pub. L. No. 111-22, Div. A, Title VII, § 702 (a)(2), 123 Stat. 1660. The date to determine whether a tenant is bona fide is presumably as of the date of the notice of foreclosure, a point on which the PTFA is unclear.

60. *Id.* § 702(b).

property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.⁶¹

Enacting the PTFA is a great step in the right direction. However, there are several shortcomings of the PTFA, which must be addressed in order to provide adequate protection to tenants who face eviction upon foreclosure. First, though the PTFA is self-executing,⁶² meaning that no action is required by the government to be effective, the protections of the PTFA appear to be invoked only upon litigation by the tenant or as a defense to an eviction action.⁶³ Once an action has been instituted, the tenant must prove that he or she is qualified for protection under the PTFA.⁶⁴

To defend against eviction, a tenant must prove that his or her landlord's mortgage loan is a "federally-related mortgage loan" and that his tenancy is a bona fide tenancy.⁶⁵ When tenants are evicted, a great majority of tenants are unrepresented by legal counsel. Proving that the PTFA applies may be an enormous and expensive burden for tenants to carry. Furthermore, because of the PTFA's newness, tenants, landlords, judges, and attorneys are uninformed of its application.

Second, other certain classes of tenants will not be isolated from foreclosure under the PTFA: (1) uninformed and unsophisticated tenants; (2) unrepresented tenants; and (3) lower class and/or indigent tenants. Because tenants are not granted automatic protection, only those groups of tenants who know of the law and can afford litigation will receive protection. Already financially strained consumer advocacy groups will be charged with informing tenants of these rights.

Third, the PTFA was enacted only to provide temporary relief; the protections cease on December 31, 2012.⁶⁶ On and after January 1, 2013, the pre-emptive nature of the PTFA halts, possibly allowing foreclosure purchasers to summarily evict or eject tenants. If there is a problem with the recognition of tenant rights in foreclosure, then the problem will not disappear at a later time. Thus, tenants in the future should be guaranteed protection as well.

Fourth, the fundamental purpose of the PTFA is to provide tenants with ninety days notice before seeking alternative housing.⁶⁷ The main concerns of

61. *Id.* § 702 (b)(1)-(3).

62. Letter from Sandra F. Braunstein, System Director, Division of Consumer & Community Affairs to the Officers and Managers in Charge of Consumer Affairs, Board of Governors of the Federal Reserve System (July 7, 2009), <http://www.federalreserve.gov/boarddocs/CALETTERS/2009/0905/caltr0905.htm> (noting that "[t]he law is self-executing; no federal agency has authority to issue regulations implementing the law or to interpret the law").

63. Pub. L. No. 111-22, Div. A, Title VII, 123 Stat. 1660.

64. *Id.*

65. *Id.* § 702.

66. *Id.* § 704.

67. If a tenant's lease is current, then the tenant may be permitted to continue his or her lease to its termination date per the lease agreement, unless the new purchaser intends to make the leased

tenants, the immediate economic loss associated with eviction and the prospect of social and cultural instability arising from displacement from their communities, are not adequately addressed by the Act. In rental markets where housing is scarce, particularly affordable housing, ninety days is simply not enough time. Therefore, many tenants may end up homeless.⁶⁸

Fifth, most foreclosures in this current market meltdown are the result of the subprime mortgage debacle which began to skyrocket in the late 1990s.⁶⁹ The recipients (or victims) of subprime mortgages were largely African Americans and Hispanics.⁷⁰ Typically, these racial groups have been historically leery of the legal process. Therefore, when an eviction action is presented, these groups are not likely to defend. Thus, requiring litigation before protection under the PTFA will continue to target and isolate these racial groups. Further, foreclosures based on the subprime/predatory lending practices would result in fragmentation of these communities.

Sixth, the newness of the Act leaves the door wide open for interpretation of key issues and several questions remain unanswered on the face of the statute. For example, is the notice to vacate similar to an eviction notice? If so, the stain of eviction remains on a tenant's record. Similarly, what are the terms of the parties' agreement during the ninety-day periods? Who has the duty to repair and maintain the premises? Also, what happens to tenants' security deposits? What happens if the tenant is in default or defaults during the ninety-day period? Similarly, does the PTFA apply to holdover tenancies? Other questions include: Is the landlord's immediate successor in interest required to return the security deposit to the tenant? Must one fill in the gaps with a state's version of the Residential Landlord and Tenant Act?

Additionally, the PTFA applies only to the immediate successor at the foreclosure sale.⁷¹ Suppose that an investment trust, one created to take advantage of distressed property, purchases the property at a foreclosure sale. The trust's intent is not to hold on to the property but sell it as soon as possible. Would this transfer void the application and protections of PTFA? Furthermore, does it create a loophole for foreclosure purchasers by permitting a subsequent sale to a third party (straw man)? Finally, what happens if the tenant is in default? Is the ninety-day stay shortened?

Although the PTFA has made tremendous strides in providing tenants with safeguards after foreclosure, there are more efficient ways to protect tenants

premises his or her primary residence. *Id.* § 703(1)(i). If so, the tenant must be given ninety days notice to vacate. *Id.* § 703(1)(ii).

68. Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUS. POL'Y DEBATE 461, 468 (2003). See U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 13-15 (2008) (noting an increase in homelessness as a result of the foreclosure crisis in 2008).

69. Bunce et al., *supra* note 13.

70. See Been et al., *supra* note 21, at 361-64 (asserting that Hispanics and African Americans are more likely to have financed their homes using subprime mortgages).

71. Pub. L. No. 111-22, Div. A, Title VII, § 703(2), 123 Stat. 1660.

more—through reformation of a state’s iteration of the Residential Landlord and Tenant Act. The Act states that, “nothing under this section shall affect . . . other additional protections for tenants.”⁷² Accordingly, state law could give further protections to tenants than the PTFA, but not less. Therefore, now is an opportune time for modifications to state Residential Landlord and Tenant Acts.

III. STATE TREATMENT OF TENANTS’ RIGHTS IN FORECLOSURE

The National Law Center on Homelessness & Poverty and the National Low Income Housing Coalition (collectively referred to as NLCHP) recently assembled a report which reviews tenant rights upon foreclosure in all fifty states.⁷³ Presumably upon the sunset of the PTFA, and if states have not modified their landlord and tenant acts, the following are three major approaches to tenants’ rights in foreclosure actions.⁷⁴ First, and in most instances, tenants have no rights in the foreclosure action and are evicted from the premises.⁷⁵ Second, some jurisdictions do not terminate the tenancy, but allow the tenancy to survive.⁷⁶ Third, some jurisdictions require that tenants be made a part of the foreclosure as a party and/or must be provided notice of the foreclosure.⁷⁷ Thus, when faced with foreclosure, a tenant must first determine what the law of his/her jurisdiction entails.

A. Tenancy Terminated Upon Foreclosure

1. “*First in Time, First in Right.*”—Eviction is “a summary court proceeding to remove a tenant or occupant from or otherwise recover possession of real property.”⁷⁸ Before the PTFA, several jurisdictions permitted foreclosure purchasers to terminate any tenancies and evict tenants without notice.⁷⁹ Whether a tenancy survived or was terminated upon foreclosure usually depended on the priority of the leasehold compared to the mortgage, i.e., was the lease “first in time”?⁸⁰ If the tenant executed the lease before the landlord-

72. *Id.* § 702(a)(2).

73. 50-STATE REVIEW, *supra* note 7.

74. *Id.* at 6.

75. *Id.*

76. *Id.* at 6-8.

77. *Id.*

78. MINN. STAT. ANN. § 504B.001 (West 2002).

79. These jurisdictions include: Alabama, Arizona, Arkansas, Georgia, Hawai’i, Kentucky, Michigan, Mississippi, Nebraska, New Hampshire, New Mexico, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, and Virginia. 50-STATE REVIEW, *supra* note 7, at 7 n.3.

80. Low-income tenants, section 8 tenants, unlike other tenants, have extensive protections from eviction. *See, e.g.,* Carter v. Md. Mgmt. Co., 835 A.2d 158, 163-64 (Md. 2003) (recognizing that “[a] new owner who acquires the building by virtue of a foreclosure or the existing owner . . . may not evict or terminate the leases of low-income tenants, other than for good cause”). Certain classes of tenants are shielded from evictions. For discussion on those typically protected, see

mortgagor executed the mortgage, then the tenancy is unaffected by the foreclosure.⁸¹ On the other hand, if the tenant executed the lease, subsequent to when the mortgagor executed the mortgage, then the tenancy is terminated by the foreclosure.⁸² For example, if a tenant is in possession of the mortgaged property, a foreclosure purchaser may be deemed to have at least inquiry notice of the tenant's prior right.

If the common law principle of "first in time, first in right" is not abrogated by legislative or judicial action, tenants will be summarily evicted or ejected from the leased premises by foreclosure purchasers who are not contractually bound by any lease agreement. These tenants will be evicted even though they are not delinquent in the payment of rent or in default under the terms of the lease agreement.⁸³ In these jurisdictions, the tenancy can be automatically terminated upon foreclosure of the leased premises.⁸⁴ These jurisdictions view foreclosures and evictions as separate actions with no cross claims or complementary rights.⁸⁵

Previously, in common law jurisdictions, tenants found themselves in no-win situations because residential leases were not likely to have priority over mortgages for two reasons. First, most recording statutes did not require and/or permit residential leases to be recorded.⁸⁶ Second, most landlords had their mortgages in place before they leased to tenants. Also, tenants were not likely to ask for, and lenders are not likely to enter into, a subordination agreement with a tenant. Thus, most residential leases were subordinate to mortgages.⁸⁷ As such, a foreclosure sale served to wipe out any such leases, allowing the foreclosure purchaser to take the property free and clear of any subordinate

Joseph W. McQuade, Note, *O'Brien Properties, Inc. v. Rodriguez: Upholding Statutory Eviction Protection for Elderly, Disabled and Blind Tenants in Connecticut*, 24 CONN. L. REV. 599 (1992).

81. See, e.g., *First Nat'l Bank v. Welch*, 132 So. 44, 45 (Ala. 1930) (holding that "[t]he lease was subsequent to and subject to the mortgages, and by their foreclosure the lease under which the defendant held was abrogated and the tenant was subject to ouster at the will of the purchaser at the foreclosure sale, the landlord in the broad sense of ownership").

82. See generally Grant S. Nelson & Dale A. Whitman, *Foreclosure*, in REAL ESTATE FINANCE LAW 7.2 (2007).

83. John Leland, *The Rent Is All Paid Up, but Eviction Still Looms*, N.Y. TIMES, May 2, 2009, at A9, available at http://www.nytimes.com/2009/05/02/us/02renters.html?_r=2.

84. 50-STATE REVIEW, *supra* note 7, at 7.

85. *Id.* at 6-8.

86. Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1478 (2004) (pointing out that "[i]n most jurisdictions . . . leases that do not exceed some stated term . . . are not within the scope of recording acts"); see, e.g., CAL. CIV. CODE § 1214 (West 2007) (leases greater than a year); N.C. GEN. STAT. ANN. § 47-18(a) (West 2000 & Supp. 2009) (leases three years or longer); WASH. REV. CODE ANN. § 65.08.060(3) (West 2005) (leases greater than two years); W. VA. CODE ANN. § 40-1-8 (West 2002) (leases longer than five years).

87. See generally *Effect of Foreclosure of Mortgage as Terminating Lease*, *supra* note 26.

rights, including the right of possession of the tenant.⁸⁸

2. *Nature of the Landlord-Tenant Relationship.*—A property owner may carve out a portion of his estate to create a tenancy.⁸⁹ To create a tenancy, the property owner transfers the right of occupancy and use to the tenant for a length of time.⁹⁰ This transfer creates the landlord-tenant relationship. The landlord retains “ownership” of the property, but may not occupy the premises.⁹¹ The landlord impliedly or expressly agrees to not disturb the tenant’s use, occupancy, and enjoyment of the leased premises until the lease term terminates.⁹² If the landlord interrupts the tenant’s use, occupancy, and enjoyment of the leased premises, then the landlord may be liable for damages to the tenant.⁹³

On the other hand, when a landlord property owner signs a mortgage to a lender (mortgagee), the legal interest given to the lender depends on whether the property is in a “title theory” or “lien theory” state.⁹⁴ In a title theory state, the legal title, actual ownership, to the property is transferred to the lender until the mortgage is satisfied or foreclosed upon.⁹⁵ However, in a lien theory state, the lender merely retains a lien, or security, on the property but has no title.⁹⁶

What happens in common law jurisdictions when a mortgagor defaults on a mortgage? In both “title theory” and “lien theory” states, the lender is immediately vested with legal ownership in the mortgaged property.⁹⁷ Accordingly, the legal ownership permits the lender to take immediate possession and oust the mortgagor or other third parties in possession.⁹⁸ This means that

88. *Id.*; *West 56th & 57th St. Corp. v. Pearl*, 662 N.Y.S.2d 312 (App. Div. 1997) (finding that a *lis pendens* in foreclosure provides constructive notice to any tenancy created after the notice).

89. 52 C.J.S. *Landlord* § 2.

90. *Id.*

91. *Id.* § 506.

92. *Ianello v. Court Mgmt. Corp.*, 509 N.E.2d 1, 2 (Mass. 1987).

93. *Id.*

94. The following analysis does not apply to federally subsidized housing (section 8), rent stabilized, or rent controlled housing, or to situations where tenants have signed a subordination, non-disturbance, and attornment agreement with the mortgagee.

95. *Nelson & Whitman*, *supra* note 82, § 1.5. In a title theory state, the borrower actually conveys the title of the property to the lender typically through an instrument like a Security Deed. If the debtor defaults, the lender could technically demand possession of the premises through strict foreclosure, but will typically seek to foreclose. *See, e.g., In re Willette*, 395 B.R. 308, 316 (Bankr. D. Vt. 2008).

96. *Nelson & Whitman*, *supra* note 82, § 1.5. In lien theory states, the mortgagor has full ownership rights in the property until foreclosure. Thus, if the mortgagor defaults, a lender does not have any rights to any rents until a foreclosure is complete. *Id.* § 4.23.

97. *See, e.g., CONN. GEN. STAT. ANN.* § 49-17 (2006) (stating that “[w]hen any mortgage is foreclosed by the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed, the title to such premises shall, upon the expiration of the time limited for redemption and on failure of redemption, vest in him. . .”).

98. *See Malamut v. Haines*, 51 F. Supp. 837, 843 (M.D. Pa. 1943) (“The remedy of the mortgagee, after default of the mortgagor is to foreclose and extinguish the inferior lease or bring

lenders hold a superior right of possession, which is higher over any other parties', including tenants who have complied with their lease agreements. Tenants' rights are subordinate to the lender's rights because a tenant derives his right of occupancy and use from his or her landlord. If a landlord no longer has the legal right of occupancy and use in the leased premises, then his or her tenant's rights are nullified as well, allowing the foreclosure purchaser to evict tenants.

On the other hand, if tenants were prior in time, then a tenant's right of occupancy and use is superior to the lender.⁹⁹ In *Gorin v. Stroum*, the Massachusetts Supreme Judicial Court stated:

It is well settled . . . that the rights of a tenant in possession of real estate, under a lease given prior to the execution of a mortgage on the same premises, are not extinguished by a foreclosure of the mortgage, and that the purchaser at a foreclosure sale acquires no greater interest than the mortgagor had, and with the sale becomes the landlord of the lessee.¹⁰⁰

As the *Gorin* case illustrates, a tenant's right of possession does not prevent a lender's right to foreclose upon mortgagee default, but it creates a new relationship between the tenant and lender: landlord and tenant.¹⁰¹ Upon foreclosure, any purchaser at a foreclosure sale would take the purchased property subject to the tenant's rights as defined by the lease agreement.¹⁰² Thus, after the foreclosure, the tenant is required to pay rent to the lender upon notice.¹⁰³

A few courts have held that *lis pendens* is binding on tenants if the tenancy begins after the filing of the *lis pendens*.¹⁰⁴ Generally, most purchasers have a duty to diligently inspect the premises to discover physical defects and should conduct a title search to become aware of the state of the owner's title.¹⁰⁵ Tenants, however, do not have the same concerns as purchasers, such as

ejectment."); *Knickerbocker Oil Corp. v. Richfield Oil Corp.* of N.Y., 254 N.Y.S. 506, 511 (App. Div. 1931).

99. *Gorin v. Stroum*, 192 N.E. 90, 92 (Mass. 1934).

100. *Id.* at 92.

101. *Id.*

102. *Id.*

103. *See Malamut*, 51 F. Supp. at 842.

104. *Myers v. Leedy*, 915 N.E.2d 133, 138 (Ind. 2009); *15 West 56th & 57th St. Corp. v. Pearl*, 662 N.Y.S.2d 312 (App. Div. 1997) (finding that a *lis pendens* in foreclosure provides constructive notice to any tenancy created after the notice).

105. A tenant is most likely to take the word of an individual who holds himself out as a landlord that he has title to the real property and is authorized to rent the property. Landlords would probably turn away an application from a prospective tenant who demands proofs of ownership and non-default. However, local ordinances or state laws requiring landlords to provide such notice to tenants would afford tenants with the opportunity to act more prudently before entering into a lease agreement and face eviction because of their landlords' financial condition at a later date.

possessing marketable title. It is highly unlikely that a tenant will do more than a cursory inspection of the leased premises or search his or her prospective landlord's title. As such, a tenant is not likely to find any evidence of a pending foreclosure unless the landlord discloses the information. Also, much of the title work in property sales is prompted by a mortgage lender, who is not an actor in the landlord-tenant relationship. Therefore, permitting tenants to suffer the same consequences as a purchaser when it concerns notice of a pending foreclosure is unfair and produces an inequitable result.

3. *Tenants' Defenses to Foreclosure Action.*—In foreclosure actions, mortgagors have several defenses available to them. These defenses include: unconscionability, release, satisfaction, discharge, invalid lien, breach of contract, and prior payment.¹⁰⁶ When a mortgagor leases the mortgaged premises to tenants, he, as landlord, is merely transferring his right of possession, warranting that the possession will not be interrupted.¹⁰⁷ However, a mortgagor does not delegate any of its defenses against foreclosure to its tenant by virtue of the landlord-tenant relationship.

Some courts have rightfully noted that if tenants are joined in the foreclosure action, there are no common questions of law or facts.¹⁰⁸ That is, tenants have no bearing on whether the lender may foreclose upon the property. The biggest issue in a mortgage dispute is whether the mortgagor paid the debt when due. A tenant cannot argue or prove that his or her landlord had previously satisfied the mortgage or was discharged or released. In fact, the tenant may not be privy to such facts. Likewise, a tenant may not be aware that his landlord even has a mortgage on the property at all. The question of whether the mortgagee had foreclosed is another issue unless the tenant is a requisite, necessary party to the foreclosure action.¹⁰⁹

Similarly, the tenant may not have standing to assert his own rights, which vary from those of the landlord, in the foreclosure action. There are some defenses that a tenant may raise. For example, a tenant may rightfully challenge the mortgagee's right to foreclosure.¹¹⁰ If the mortgagee is unable to produce a

106. *Chase Manhattan Mortgage Corp. v. Machado*, 850 A.2d 260, 264 (Conn. App. Ct. 2004). Other legal defenses against foreclosure include arguing that the foreclosing party is not a real party in interest and that there was violations of the Fair Housing Act, Pub. L. No. 90-284, tit. VIII, 82 Stat. 81-89 (codified at 42 U.S.C. §§ 3601-31 (2006)), Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B) (2006), Home Ownership and Equity Protection Act, Pub. L. No. 103-325, §§ 151-58, 108 Stat. 2160, 2190-98 (codified as amended in shattered sections of 15 U.S.C.), and Fair Debt Collection Practices Act, 15 U.S.C. § 1640(a)(2)(B) (2006).

107. *Ianello v. Court Mgmt. Corp.*, 509 N.E.2d 1, 3 (Mass. 1987).

108. *See, e.g., Nomura Home Equity Loan Inc. v. Vacchio*, 864 N.Y.S.2d 834, 836 (Sup. Ct. 2008).

109. *See infra* Part III. Some jurisdictions do require tenants to be joined as a party to the foreclosure. *See, e.g., Vacchio*, 864 N.Y.S.2d at 836. Failure to do so will cause the leasehold to remain intact, even though the lease is subordinate to the mortgage.

110. Tenants may use the "Produce the Note Defense." However, this defense will only push back the start of the foreclosure action; it may not prevent the mortgagee from foreclosing. *See*

note or otherwise prove that he or she is entitled to foreclose, then foreclosure against the property is stalled until the mortgagee can produce the note or prove his or her right to foreclose.¹¹¹

“Any person who may have acquired any interest in the premises, legal or equitable, by operation of law or otherwise, in privity of title with the mortgagor, may redeem, and protect such interest in the land.”¹¹² Thus, tenants have the right to redeem the property from foreclosure.¹¹³ If a tenant pays the mortgagee the amount of the indebtedness plus costs related to the foreclosure, he or she extinguishes the mortgage and redeems the property.¹¹⁴ Redemption by residential tenants, however, is not likely to happen. Most residential tenants, unlike some commercial tenants, do not have the financial means to pay off the mortgagee. Not surprisingly, a byproduct of the real estate market downfall is more stringent lending practices by financial institutions.¹¹⁵ Thus, tenants may not qualify under the new mortgage standards to finance property redemption from foreclosure.

The most viable remedy is a breach of the covenant of quiet enjoyment against his or her former landlord.¹¹⁶ A breach of the covenant of quiet enjoyment arises when a landlord’s conduct interferes with a tenant’s right of possession, “depriving the lessee of the beneficial use of the demised premises.”¹¹⁷ If a landlord breaches the tenant’s quiet enjoyment, then a tenant is entitled to damages for the breach and injunctive relief.¹¹⁸ In a foreclosure situation, a landlord is likely insolvent. Thus, the pursuit of monetary damages will most likely be fruitless. Also, the remedy of injunctive relief is inapplicable

Vicki Been & Allegra Glashauser, *Tenants: Innocent Victims of the Nation’s Foreclosure Crisis*, 2 ALB. GOV’T L. REV. 1, 28 (2009) (rightfully asserting that “in the vast majority of situations, tenants have no defense if their property is sold at a foreclosure sale”).

111. On occasion, however, courts may deny an order of foreclosure due to insufficient proof of foreclosing rights. *See, e.g.*, *Bayview Loan Servicing, L.L.C. v. Nelson*, 890 N.E.2d 940, 944 (Ill. App. Ct. 2008) (reversing a judgment of foreclosure because mortgagee failed to produce evidence that he or she had an interest in the real property).

112. *Nelson & Whitman, supra* note 82, § 7.2 (citation omitted).

113. *Id.*

114. *Id.* (stating that under the Restatement tenants are primarily responsible as it pertains to payoffs because the classification “is not dependant on personal liability on the debt”).

115. Dina ElBoghady, *FHA Loans Emerge from the Sidelines*, WASH. POST, June 10, 2008, at D1 (noting a 126% increase in the first quarter of 2008 in FHA loans “because they do not require the hefty down payments or stellar credit scores that lenders have come to expect from borrowers”), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/09/AR2008060902645.html>. *See also* U.S. DEP’T OF HOUS. & URBAN DEV., *FHA SINGLE FAMILY ACTIVITY IN THE HOME-PURCHASE MARKET THROUGH NOVEMBER 2009* (2010), <http://www.hud.gov/offices/hsg/comp/rpts/fhamktsh/fhamkt1109.pdf> (estimating a 41.91% share of all new home loans).

116. *See, e.g.*, 74 N.Y. JUR. 2D, *Landlord and Tenant* § 236-37 (1999).

117. 1 AMERICAN LAW OF PROPERTY § 3.51, at 280 (1952).

118. *See, e.g.*, *Andrews v. Mobile Aire Estates*, 22 Cal. Rptr. 3d 832, 840 (Ct. App. 2005).

to the tenant's situation. Therefore, a tenant is left without any viable legal remedies because of the breach of the covenant of quiet enjoyment.

4. *The Bad News: Tenants' Losses.*—A tenant's most immediate losses associated with eviction are economic, social, and psychological. The economic harms tenants confront are the loss of relocation expenses, loss of security deposits or prepaid rents, injuries associated with being evicted, and competition for affordable housing. Moving may be extremely costly. For example, a tenant may have to hire a moving company and pay for packing materials, utility connection or transfer charges, and storage expenses. The evicted tenants might also have to miss work due to packing or moving or meeting utility companies for utility connection. In addition to these charges, the tenant may have to pay another security deposit, which is typically one month's rent or two months' rent (first and last month's rent). Due to the unexpected nature of these expenses, a tenant may not be able to afford to relocate. When a landlord is foreclosed upon, he or she takes with him or her the tenants' security deposit or prepaid rent. Presumably, a landlord may be judgment-proof or undiscoverable because the landlord was absentee or out of town.

After the foreclosure and subsequent eviction, some tenants will likely rent again. Most landlords require evicted tenants to fill out an application and will check the tenant's credit report and background, including any judgments filed against the tenant. Evictions will likely show up on one of these reports. If a tenant is evicted due to foreclosure, his or her rental history will show an eviction, but not the cause of the eviction. Prospective landlords would then assume that the eviction was due to the tenant's actions, not due to foreclosure. Consequently, the new landlord may reject the tenant's rental application. Thus, if most landlords use a reporting system to check a tenant's rental history, then the evicted tenant will have limited rental properties available to him or her.¹¹⁹

Also, due to the market meltdown, the construction of apartment complexes and condominiums has greatly decreased.¹²⁰ This leaves those who are in the greater pool of renters to contend for already built rental properties. Not only must the evicted tenants compete with other renters, they also compete with former homeowners whose homes were foreclosed.¹²¹ Another group of renters who compete with evicted tenants are also casualties of the real estate market meltdown—those who want to purchase homes, but due to the lack of mortgage lending, they are unable to do so. In tight rental markets, especially, the struggle

119. *But see* MINN. STAT. ANN. § 484.014 (West 2002 & Supp. 2010). Minnesota permits a court to expunge the eviction records for tenants whose tenancies are extinguished due to foreclosure. *Id.*

120. *See* E.S. Browning, *Stock Market Pullback Isn't Just 'Financial' Now*, WALL ST. J., Feb. 23, 2009, at C1; Jack Healy, *Investors Gloomy as January Disappoints*, N.Y. TIMES, Jan. 31, 2009, at B6; Louis Uchitelle, *Economic Dive Deepens, Giving Stimulus Urgency*, N.Y. TIMES, Jan. 31, 2009, at A1.

121. June Fletcher, *The Accidental Renters, After Losing Homes to Foreclosure, Tight Rental Market Poses More Indignities*, WALL ST. J., May 2, 2008, at W8, available at <http://online.wsj.com/article/SB120968084136860893.html>.

to find acceptable and affordable housing is nearly impossible.

Again, this current market has wreaked havoc in many ways. Many landlords entered the rental market unwillingly. When the market was “booming,” a great number of investors purchased real estate to “flip” the property.¹²² In a number of cases, investors had multiple pieces of property to flip for a quick profit. When the market cooled, investors found themselves in a quandary, holding several properties without the ability to flip the property quickly.¹²³ As a result, some investors unwilling entered into the rental market to preserve their economic integrity.¹²⁴ Because many of the investors were amateur flippers, the market had detrimental economic effects on these landlords. Thus, they were unlikely to have the necessary funds to preserve the condition of the rental properties.

The battle is not necessarily the giant, rich Goliath—the landlord—against the poor, puny David—the tenant. Not all landlords are rich and not all tenants are poor. However, what is true is that tenants are not wrongdoers in foreclosures, yet they are forced to sacrifice their “homes” due to another’s wrongdoing. One author stated that “Home Sweet Home didn’t lose its sweetness because someone else [holds] the title.”¹²⁵ A tenant has a legally recognizable interest in the property that allows him to exclude third parties and even the landlord.¹²⁶ Thus, he has all of the aspects of home ownership minus the title. To him, his rental property is his castle, his home. Therefore, loss of his home has psychological ramifications.

Sanctity of the home has been a powerful ideal in the American legal tradition. The home not only provides the basic necessity of shelter but is also central to an individual’s emotional and personal life. The intangible connection between an individual and her home is not limited to homeowners. For tenants as well an involuntary removal from the home can be devastating, depriving the tenant of both physical and emotional security.¹²⁷

Undoubtedly, tenants, like homeowners, become a part of the community in which they live. When tenants are involuntarily removed, the result may also include loss of their community. Many times, tenants also lose their privacy because their most personal belongings are exposed to the community if their personal property was placed on the street upon eviction. Additionally, families with school-aged children may have to change to a different school district, which creates a loss of stability.

Not only are tenants harmed, their neighbors may also be detrimentally

122. See Julia Dahl, *Flippers Sweat to Avoid Flop*, REAL DEAL, June 30, 2008, available at <http://therealdeal.com/newyork/articles/flippers-sweat-to-avoid-flop>.

123. *Id.*

124. *See id.*

125. Sugrue, *supra* note 25.

126. *See* 52 C.J.S. *Landlord* § 506 (2010).

127. Bell, *supra* note 31, at 483.

affected by foreclosures. Dan Immergluck and Geoff Smith say that, since the 1960s, “foreclosures of single-family homes (one- to four-unit) have been viewed as a serious threat to neighborhood stability and community well-being.”¹²⁸ Many communities being decimated by foreclosures due to abandoned homes are in African American and Hispanic communities.¹²⁹ “People instinctively understand that homeownership conveys good feelings about belonging in our society, and that such feelings matter enormously, not only to our economic success but also to the pleasure we can take in it.”¹³⁰

Most foreclosed properties remained abandoned for extended periods. Abandoned homes are more susceptible to vandalism, disrepair, and economic harm to the neighboring properties. Neighboring property values are reduced by .9% to 1.1% by each foreclosure.¹³¹ Additionally, foreclosures may create health risks to those within the vicinity of the foreclosure. Studies have shown that foreclosures increase the incidence of violent crimes in the area by six to seven percent.¹³² Similarly, foreclosed homes with swimming pools, ponds, or hot tubs have become breeding grounds for mosquitoes, which could potentially transmit the West Nile virus to neighbors.¹³³ To curtail the potential of devastating health epidemics, some states have attempted to address this issue via its mosquito abatement programs.¹³⁴

B. Tenancy Survives Foreclosure

Jurisdictions like New Jersey, New York, and the District of Columbia have strict eviction rules for landlords.¹³⁵ In these jurisdictions, tenants may not be

128. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUS. POL’Y DEBATE 57, 59 (2006), available at http://semcog.org/uploadedFiles/hpd_1701_immergluck.pdf.

129. See, e.g., Erik Eckholm, *Foreclosures Force Suburbs to Fight Blight*, N.Y. TIMES, Mar. 23, 2007, A1, available at <http://www.nytimes.com/2007/03/23/us/23vacant.html>; Patrik Jonsson, *Vacant Homes Spread Blight in Suburb and City Alike*, CHRISTIAN SCI. MONITOR, July 2, 2008, available at <http://www.csmonitor.com/2008/0702/p01s01-usgn.html>; Gene Sperling, *Subprime Mortgage Meltdown Renews Urban Blight*, BLOOMBERG, Mar. 19, 2008, http://www.bloomberg.com/apps/news?pid=newsarchive&refer=columnist_sperling&sid=ats13kQUUEBK.

130. Robert J. Shiller, *The Scars of Losing a Home*, N.Y. TIMES, May 18, 2008, at B05, available at <http://www.nytimes.com/2008/05/18/business/18view.html>.

131. Immergluck & Smith, *supra* note 128, at 68-69; but see Been, *supra* note 3, at 34 (stating that once there is a certain number of foreclosures in an area, the impact of subsequent foreclosures on property values is reduced).

132. Immergluck & Smith, *supra* note 128, at 59.

133. See David Streitfeld, *Blight Moves in After Foreclosures*, L.A. TIMES, at A1, Aug. 28, 2007 (stating that California’s mosquito abatement programs have treated vacant homes to prevent the spread of the West Nile Virus and noting that seven residents had died from the virus by the date of article publication).

134. *Id.*

135. See D.C. CODE § 42-3505.01 (Supp. 2009); N.J. STAT. ANN. § 2A:18-61.1 (West Supp.

evicted unless the landlord has “good” or “just” cause for the eviction. New Jersey’s Anti-Eviction Act¹³⁶ is the most comprehensive statute and provides the most protection to tenants. In New Jersey, “[n]o lessee or tenant . . . may be removed by the Superior Court from any house . . . or tenement leased for residential purposes . . . except upon establishment of one of the . . . grounds as good cause.”¹³⁷ The Anti-Eviction Act enumerates eighteen grounds as good cause for eviction.¹³⁸ If the landlord does not prove one of the enumerated causes, then the tenant may remain in possession. The New Jersey Supreme Court held in *Chase Manhattan Bank v. Josephson* that foreclosing mortgagees are subject to the Anti-Eviction Act.¹³⁹

Several cities in California have enacted “just cause” eviction laws to prevent foreclosing mortgagees or new owners from evicting tenants.¹⁴⁰ These cities include Berkeley, Beverly Hills, East Palo Alto, Glendale, Hayward, Los Angeles, Maywood, Oakland, Palm Springs, San Diego, San Francisco, Santa Monica, and West Hollywood.¹⁴¹ Thus, localities may join in guarding tenants against the injustice of foreclosure.

*C. Tenants Must Be Provided with Notice Prior to Foreclosure
and/or Made a Party to the Foreclosure Action*

The NLCHP found that seventeen states require that tenants be provided notice of the foreclosure proceedings or at least be provided with notice of the landlord’s default.¹⁴² These states include Alaska, California, Colorado, Idaho, Iowa, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nevada, New York, North Carolina, Oregon, Pennsylvania, and Washington.¹⁴³ The NLCHP also found that twelve states require that tenants be named as parties to the foreclosure action.¹⁴⁴ These states include Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Maine, Missouri, New York, Ohio, Vermont, and Wisconsin.¹⁴⁵ In these jurisdictions, tenants must be made a party of the foreclosure action or provided with notice in order to affect or terminate the tenancy.¹⁴⁶ If a tenant is

2010); 9 N.Y. COMP. CODES R. & REG. tit. 9, § 2104.6 (2010).

136. N.J. STAT. ANN. § 2A:18-61.1.

137. *Id.*

138. *Id.*

139. *Chase Manhattan Bank v. Josephson*, 638 A.2d 1301, 1309 (N.J. 1994); *see also* Sec. Pac. Nat’l Bank v. Masterson, 662 A.2d 588, 591 (N.J. Super. Ct. Ch. Div. 1994).

140. TENANTS TOGETHER, HIDDEN IMPACT: CALIFORNIA RENTERS IN THE FORECLOSURE CRISIS (Mar. 2009), available at <http://www.tenantstogether.org/downloads/ForeclosureReport.pdf>.

141. *Id.* at 8 n.9.

142. 50-STATE REVIEW, *supra* note 7, at 7.

143. *Id.* at 7 n.1.

144. *Id.* at 7.

145. *Id.* at 7 n.2.

146. *Id.* at 7.

not named as a defendant in the foreclosure action, then the tenancy survives.¹⁴⁷ Likewise, “[t]he interest of an occupant of the mortgaged premises who is not served remains unaffected by the foreclosure.”¹⁴⁸

The reason these jurisdictions required the foreclosing mortgagee to join tenants to, or supply tenants with, notice of the foreclosure is because of due process concerns. “Due process requires that one be given notice and an opportunity to be heard before one’s interest in property may be adversely affected by judicial process.”¹⁴⁹ Wisconsin requires plaintiffs in foreclosure actions to provide tenants in possession with notice of: (1) filing of foreclosure action, not later than five days after commencement of the foreclosure action; (2) judgment of foreclosure, not later than five days after judgment of foreclosure is entered; and (3) date and time of hearing, when the confirmation of sale is scheduled.¹⁵⁰

The rule that tenants should be joined is not a compulsory rule:

Although it was not incumbent upon [a foreclosing party] to join this tenant whose tenancy began after the foreclosure action commenced . . . by not doing so, [the tenant’s] interest is not affected by the judgment of foreclosure and the purchase[r] takes title subject to any rights, title or interest which the tenant is able to establish.¹⁵¹

There may be reasons why a foreclosing party would want to exclude a tenant from the foreclosure. The main reason is that the foreclosing party wants to

147. See *Nomura Home Equity Loan Inc. v. Vacchio*, 864 N.Y.S.2d 834, 836 (Sup. Ct. 2008); *SI Bank & Trust v. Sheriff of City of N.Y.*, 751 N.Y.S.2d 794, 794 (App. Div. 2002) (stating that in order to terminate the interest of one who is an occupant of a property prior to the foreclosure, that occupant must be named as a defendant and if not so named, the tenancy survives the foreclosure); *Mortgage Elec. Registration Sys., Inc. v. Anuforo*, No. 137181106, 2007 WL 1191626, at *2 (N.Y. App. Div. Apr. 17, 2007); *Nationwide Assocs., Inc. v. Brunne*, 629 N.Y.S.2d 769, 769 (App. Div. 1995); see also *Myers v. Leedy*, 915 N.E.2d 133, 137 (Ind. 2009); *Ellveeay Newspaper Workers’ Bldg. & Loan Ass’n v. Wagner Mkt. Co.*, 166 A. 332, 333 (N.J. 1933); *Prudence Co. v. 160 West Seventy-Third St. Corp.*, 183 N.E. 365, 367 (N.Y. 1932); *Metro. Life Ins. Co. v. Childs Co.*, 130 N.E. 295, 297 (N.Y. 1921); *Bushe v. Wolff*, 171 N.Y.S. 253, 255 (1918); *Greenwald v. Schustek*, 169 N.Y.S. 98, 99 (1918); *Virges v. E. F. Gregory Co.*, 166 P. 610 (Wash. 1917); *Zimmermann v. Walgreen Co.*, 255 N.W. 534, 537 (Wis. 1934) (finding that termination of a lease by a foreclosure action depends “on the joinder of the lessee as a party to the foreclosure action”).

148. *Genuth v. First Div. Ave. Realty Corp.*, 387 N.Y.S.2d 793, 794 (Sup. Ct. 1976); *Empire Sav. Bank v. Towers Co.*, 387 N.Y.S.2d 138, 139 (App. Div. 1976) (citing *Douglas v. Kohart*, 187 N.Y.S. 102, 105 (App. Div. 1921)); see also *In re Comcoach Corp.*, 698 F.2d 571, 574 (2d Cir. 1983); *Scharaga v. Schwartzberg*, 540 N.Y.S.2d 451, 452-53 (App. Div. 1989); *Polish Nat’l Alliance of Brooklyn, USA v. White Eagle Hall Co.*, 470 N.Y.S.2d 642, 648 (App. Div. 1983).

149. *Gibbs v. Kinsey*, 566 N.Y.S.2d 117, 117 (App. Div. 1991).

150. WIS. STAT. ANN. §846.35(1)(a) (West Supp. 2009).

151. *Green Point Sav. Bank v. Defour*, 618 N.Y.S.2d 169, 171 (Sup. Ct. 1994) (citation omitted).

preserve the tenancy. After the foreclosure, and upon notice, the tenant would be required to pay rent to the new owner, the purchaser at the foreclosure sale.¹⁵²

Many times tenants are unaware that their landlords are foreclosed upon. They quickly find out when their utilities are turned off or when the sheriff knocks on the door with a notice of eviction.¹⁵³ In jurisdictions where tenants are obligated to give notice to or join tenants as parties, the element of surprise is eliminated. Tenants have potentially more time to find alternative housing during the pendency of the foreclosure. Assumedly, however, most tenants knowing that a foreclosure sale is imminent feel the urgency to move as soon as possible instead of remaining on the property waiting to be kicked out.

IV. REFORMATION CHOICES

A. Modification of the Eviction Processes Under Residential Landlord and Tenant Acts

Most state residential landlord and tenant acts set forth numerous rights and duties that exist between a landlord and tenant.¹⁵⁴ For example, tenants have the right to a habitable dwelling, privacy, quiet enjoyment, and return of security deposits. Should a landlord or party with superior rights interfere with any of the above rights, a tenant may have a remedy to vacate the premises or withhold rent. However, a vast number of jurisdictions do not set forth any legal remedies that tenants would have against a foreclosing purchaser for disturbing tenants' rights because a foreclosing purchaser is not a party to the contract with the tenant, and the landlord-tenant acts do not apply to these types of relationships.¹⁵⁵

The current foreclosure crisis demonstrates that there is a critical need to revolutionize the "step-child" of the law, landlord-tenant law. The revolution could include the definition or expansion of the rights and duties of the parties in the aftermath of the foreclosure of rental property. The PTFA leaves open the question of which rights, if any, are enforceable after the foreclosure sale.¹⁵⁶ Assuming that tenants are permitted to remain in the leased premises until the end of the lease term, then tenants have a duty to pay rent to foreclosing purchasers and not commit waste. However, because the PTFA does not explicitly state that tenants have these rights and duties, the ability to enforce is questionable at best. Reforming residential landlord-tenant acts would benefit both tenants and new owners because it would outline both parties' rights and duties and provide an avenue for enforcement.

152. The purchaser at the foreclosure sale is typically the lender/mortgagee. After the purchase, the mortgagee becomes the tenant's landlord.

153. See generally Leland, *supra* note 83 (suggesting that most renters say they never knew their buildings were heading for foreclosure).

154. Tenants Rights, http://portal.hud.gov/portal/page/portal/HUD/topics/rental_assistance/tenantrights (last visited June 10, 2010).

155. See generally *Effect of Foreclosure of Mortgage as Terminating Lease*, *supra* note 26.

156. Pub. L. No. 111-22, Div. A, Title VII, 123 Stat. 1660.

At present, a majority of eviction statutes do not refer to foreclosure specifically. The state eviction statutes that mention the term “foreclosure” are: Delaware,¹⁵⁷ Iowa,¹⁵⁸ Kansas,¹⁵⁹ Massachusetts,¹⁶⁰ Michigan,¹⁶¹ Minnesota,¹⁶² Missouri,¹⁶³ Nevada,¹⁶⁴ New Jersey,¹⁶⁵ New York,¹⁶⁶ Texas,¹⁶⁷ Virginia,¹⁶⁸ Wisconsin,¹⁶⁹ and Wyoming.¹⁷⁰ Of the state statutes that do mention foreclosure, Minnesota, New Jersey, and New York’s eviction statutes offer the most protection to tenants.¹⁷¹ Other states can learn from the successes of these three jurisdictions.

For example, the Minnesota legislature has set forth several defenses against eviction for tenants. The eviction process is limited in scope and summary in nature in Minnesota.¹⁷² It only allows a tenant to dispute a claimant’s “right to possession but not to litigate disputed issues of ownership.”¹⁷³ If a tenant desires to litigate issues relating to the foreclosure, he must initiate an independent action.¹⁷⁴ The foreclosing party is entitled to recover the mortgaged property by eviction after providing at least two months notice to vacate to a tenant after the expiration of the redemption period and if the foreclosure is not based on a retaliatory reason.¹⁷⁵

Along with stricter eviction procedures, these jurisdictions have set forth mechanisms, which provide maximum protections to tenants, which are potentially invaluable during the foreclosure process. The strict procedures and these stronger protections appear to go hand in hand. There are several recommendations to protect tenants through the eviction process based on public policy. First, states could create separate courts that deal solely with housing

157. DEL. CODE ANN. tit. 25, § 5702(6) (2006).

158. IOWA CODE ANN. § 648.1(4) (West Supp. 2010).

159. KAN. CIV. PROC. CODE ANN. STAT. ANN. § 60-1006 (West 2005).

160. MASS. GEN. LAWS ANN. ch. 186, § 13 (West Supp. 2010).

161. MICH. COMP. LAWS ANN. § 600.574 (West 1996).

162. MINN. STAT. ANN. § 504B.285 (West Supp. 2010).

163. MO. ANN. STAT. § 534.030 (West Supp. 2010); MO. ANN. STAT. § 530.070 (West Supp. 2010).

164. NEV. REV. STAT. ANN. § 40.255(1)(b) (West 2010).

165. N.J. STAT. ANN. § 2A:18-57 (West Supp. 2010).

166. N.Y. REAL PROP. ACTS § 721(3) (McKinney 2009).

167. TEX. PROP. CODE ANN. § 24.002(a), (b) (Vernon 2000).

168. VA. CODE ANN. § 8.01-129 (West Supp. 2007).

169. WIS. STAT. ANN. § 704.31 (West Supp. 2009).

170. WYO. STAT. ANN. § 1-21-1002(a)(11) (2007).

171. MINN. STAT. ANN. § 504B.285 (West Supp. 2010); N.J. STAT. ANN. § 2A:18-57 (West Supp. 2010); N.Y. REAL PROP. ACTS § 721(3) (McKinney 2010).

172. *JBI & Assocs., Inc. v. Soltan*, No. A05-1031, 2006 WL 1229484, at *3 (Minn. Ct. App. May 9, 2006).

173. *Id.*

174. *Id.*

175. MINN. STAT. ANN. § 504B.285(1) (West Supp. 2010).

concerns. Ohio, Massachusetts, Minnesota, and New York all have housing courts, which deal solely with landlord-tenant issues.¹⁷⁶ In New York City, one of the busiest cities dealing with landlord-tenant matters, a housing court may hear more than 300,000 cases annually.¹⁷⁷ The sheer number of cases would completely overwhelm a local civil court docket. As it stands now, the housing court judges are some of the busiest courts in the world.¹⁷⁸

Most tenants are unrepresented by legal counsel in a typical landlord-tenant case. These tenants might be intimidated by or untrusting of the legal process. Housing court judges will likely anticipate this lack of counsel and provide a supportive environment.¹⁷⁹ In Harlem, the stated purpose of the housing court is “to achieve speedier and more durable outcomes to housing litigation while simultaneously addressing many of the underlying problems that give rise to housing cases.”¹⁸⁰ A housing court helps accomplish these objectives because “the court is designed to help the judge gain a comprehensive understanding of local issues and concerns: it is staffed by a single judge and handles cases only from a limited geographic area. It also seeks to provide the judge with access to comprehensive and up-to-date information.”¹⁸¹

Foreclosure profoundly affects a community. Some communities are affected more than others. As stated earlier, a housing court is designed to help a judge understand the local issues and concerns. Housing courts will undoubtedly work hand in hand to improve local communities. A judge with his finger on the pulse of the community will be able to determine which remedy is best for all of the parties involved in the foreclosure aftermath, particularly tenants. Not only might tenants receive greater protections, even though they are not represented by legal counsel, but also the community as a whole stands to gain by preventing empty, abandoned homes.

Second, states could set up more local tenant resource centers to offer free counseling to tenants (and landlords) with rental issues. A resource center will

176. See FAQ's About Housing Court, http://www.Clevelandhousingcourt.org/hc_faq_a.html (last visited June 11, 2010); Housing Court Department, <http://www.mass.gov/courts/courtsandjudges/courts/housingcourt/index.html> (last visited June 11, 2010); Housing Court, <http://www.courts.state.mn.us/district/4/?page=128> (last visited June 11, 2010); New York City Housing Court, <http://www.courts.state.ny.us/courts/nyc/housing/index.shtml> (last visited June 11, 2010).

177. RASHIDA ABUWALA & DONALD J. FAROLE, JR., *THE EFFECTS OF THE HARLEM HOUSING COURT ON TENANT PERCEPTIONS OF JUSTICE 1* (2008), available at http://www.courtinnovation.org/uploads/documents/Harlem_Housing_Court_Study.pdf.

178. On its website, the New York City Civil Court Housing Part proclaims that it is one of the busiest courts in the world. It handles “over 300,000 residential cases” every year. New York Housing Court, <http://www.courts.state.ny.us/courts/nyc/housing/index.shtml> (last visited May 23, 2010).

179. ABUWALA & FAROLE, *supra* note 177, at 13 (reporting that most tenants surveyed felt that the process and judges in the housing court were fair and equitable).

180. *Id.* at 2.

181. *Id.*

serve to close the gaps of knowledge concerning leasing laws. So not to require additional financial resources, attorneys could be given pro bono credit for participating at these centers. Both landlords and tenants will be able to seek advice on their rights and responsibilities concerning their lease agreements. Resource centers will point tenants in the right direction concerning housing topics, including security deposits, rent, warranties, and evictions. Unlike those jurisdictions with no aid for tenants, tenants in these jurisdictions will be able to navigate the choppy waters of eviction with the aid and counsel of a resource center. After the eviction, if allowed to proceed, a resource center could also assist displaced tenants.

Third, legislatures could set up local housing trust funds. President George W. Bush created the National Housing Trust Fund as a part of the Home and Economic Recovery Act of 2008.¹⁸² The National Housing Trust Fund will “provide communities with funds to build, preserve, and rehabilitate [affordable] rental homes.”¹⁸³ Local housing trust funds could more effectively address local needs and issues.

Fourth, states could include tenants’ security deposits in the purchase price to be repaid by the mortgagee. When a mortgagee evicts a tenant after foreclosure, a tenant must not only face the heavy financial burden of finding alternative housing, but he or she also loses the financial investments made to the home and security deposits. A landlord under a state’s residential landlord and tenant act has the duty to refund a tenant’s security deposit beyond ordinary wear and tear.¹⁸⁴ However, when eviction based on foreclosure is the cause for the termination of the leasehold, tenants are usually unable to recoup their security deposits. The landlord is likely insolvent and would be judgment-proof should a tenant decide to sue. If a court provides in its eviction procedures that a foreclosure purchaser has to repay the security deposit, less costs for any impermissible damage, then a tenant may have the financial means to start another tenancy.

Fifth, in addition to the loss of their security deposits, tenants face other economic losses associated with eviction. Many times evictions do not occur at the end of a rental period. For instance, suppose that a tenant has paid rent for the month of July on July 1 and the party entitled to possession of the leased premises post eviction sends notice to vacate by July 13. Under these circumstances, the tenant is out of pocket at least half a month’s rent.

Suppose again that a tenant is aware that foreclosure is impending, but the landlord convinces the tenant that he or she is working with the lender to “clear this matter up” and the tenant continues to pay rent. If the tenant pays rent for July and August, the financial devastation to him or her upon eviction is undeniably great. In order to protect a tenant in this position, legislatures should

182. Pub. L. No. 110-289, 122 Stat. 2654 (2008).

183. See National Low Income Housing Coalition—National Housing Trust Fund, <http://www.nhtf.org/template/page.cfm?id=40> (last visited May 23, 2010).

184. Aleatra P. Williams, *Insurers’ Rights of Subrogation Against Tenants: The Begotten Union Between Equity and Her Beloved*, 55 DRAKE L. REV. 541, 578 (2007).

permit tenants to put rent in escrow if they are aware of the foreclosure and allow tenants to use these escrow funds to assist them in moving if they are not permitted to stay.

Sixth, as stated earlier, tenants are screened for criminal backgrounds and prior evictions.¹⁸⁵ If a mortgagee evicts a tenant based on foreclosure on the landlord's mortgage, then any background screening would show this eviction and would negatively impact the tenant's chances of being a qualified renter. To protect tenants, states should allow tenants to expunge the eviction from their rental record.

Seventh, reforming the eviction statutes permits a state to halt evictions after foreclosure until the end of the lease term so long as the tenant remains in good standing under the terms of the lease agreement. Mortgagees who are or should be aware of a tenancy will still be able to market and sell the premises, but the closing must be extended until the end of the lease term. It could also become regular practice to require mortgagors to disclose whether the property has a current tenancy. Mortgagees could also expressly prohibit mortgagors from leasing the premises during the life of the mortgage. If there is no prohibition against renting the property, upon foreclosure, a mortgagee or the foreclosure purchaser will be entitled to all rent payments under the lease agreement until the end of the lease term.

This solution makes all of the innocent parties winners. The lender wins because he or she maintains the right to transfer or dispose of the property, though it is somewhat restricted. The lender also is able to reap the benefits of receiving payment until the property is transferred. This is a definite advantage for lenders or mortgage purchasers considering that the average time to sell a home may take 172 days or more.¹⁸⁶

Finally, states could grant tenants the right to remain in the leased premises for at least six months after foreclosure. If the lease term just began, six months should be enough to give tenants adequate time to find comparable property, provided that there are other checks in place, such as counseling or relocation assistance from a housing trust.

B. Reformation of Foreclosure Procedures to Protect Tenants

Most foreclosure laws do not mention tenants. Thus, tenants typically do not have rights in the foreclosure action. Recently, however, because of the impact of foreclosure on tenants, several states have attempted to modify their statutes to provide tenants with some protection in the foreclosure process.¹⁸⁷ The basis

185. *See supra* Part II.A.

186. *See, e.g.*, BARB SCHWARTZ, *STAGING TO SELL: THE SECRET TO SELLING HOMES IN A DOWN MARKET*, at xiii (2009) (noting that un-staged homes can take 187 days or more to sell, if they sell at all).

187. *See, e.g.*, Illinois, H.R. 3863, 96th General Assem., Reg. Sess. (Ill. 2009) (amending Code of Civil Procedure by providing mortgagors with instructions in the residential mortgage foreclosure summons to homeowner to give written notice to any tenant about the pending

of these protections is to provide notice to tenants before the foreclosure sale or eviction.

Over the last two years, a majority of states have attempted to implement legislation to determine what kind of notice and how much notice a tenant should receive.¹⁸⁸ There exist various types of notice that one could provide to a tenant

foreclosure action and to notify the tenant of his/her right to remain on the premises); Indiana, H.R. 1081, 116th General Assem., 1st Reg. Sess. (Ind. 2009) (recommending that the mortgagee provide tenant with notice of the foreclosure action no later than ten days after the filing of the foreclosure complaint); Massachusetts, S.B. 1609, 186th Gen. Assem., Reg. Sess. (Mass. 2009) (enumerating just cause for tenant evictions, excluding foreclosures); and Nevada, S.B. 140, 75th General Assem., Reg. Sess. (Nev. 2009) (requiring landlords to notify potential tenants if a property is subject to foreclosure, provides notice to tenants that a property is subject to notice of sale, allows a tenant to remain on a foreclosed property for up to sixty days after the foreclosure sale, mandates tenants pay rent to the new owner, and permits new owner/landlord to negotiate a new lease with an occupying tenant).

188. S. 245, 2009 Legis., Reg. Sess. (Ala. 2009) (providing tenants with ninety days notice before the foreclosure sale); H.R. 108, 26th Legis., 1st Sess. (Alaska 2009) (advocating that tenants be notified ten days after recordation of notice of default); S. 1108, 48th Legis., 2d Reg. Sess. (Ariz. 2008) (supporting thirty days notice before notice of eviction is filed); S. 1646C1, 2009 Legis., Reg. Sess. (Fla. 2009) (supporting thirty days notice before notice of eviction is filed); H.R. 443, 25th Legis., Reg. Sess. (Haw. 2009) (suggesting that the landlord should notify tenant of foreclosure and notice should be given thirty days before foreclosure sale); L.D. 148, 124th Legis., 1st Reg. Sess. (Me. 2009) (endorsing a plan which mails notice to tenant no later than fourteen days after commencement of foreclosure action); S. 823, 2009 Gen. Assem., Reg. Sess. (Md. 2009) (advancing a system of notice to tenant no later than thirty days before the foreclosure sale); S. 32, 95th Legis., Reg. Sess. (Mich. 2009) (suggesting that an occupant be given notice within fifteen days of first publication of notice of foreclosure); H.R. 753, 95th General Assem., 1st Reg. Sess. (Miss. 2009) (attempting to implement a rule of ninety days notice of eviction to tenant before foreclosure sale date); H.R. 4063, 213th Leg., Reg. Sess. (N.J. 2009) (proposing that new owner give tenant five days notice after foreclosure sale); H.R. 2703, 2009 General Assem., 2009-10 Reg. Sess. (N.Y. 2009) (recommending that tenants receive notice ten days after commencement of non-judicial action and not less than ten days before first notice of sale); S. 13, 128th General Assem., Reg. Sess. (Ohio 2009) (advocating that the court clerk alerts a resident within seven days of issuing a summons for service); S. 952, 75th Legis. Assem., 2009 Reg. Sess. (Or. 2009) (stating that the landlord must provide a tenant with notice of a foreclosure within the lease); S.B. 952, 75th Legis. Assem., Reg. Sess. (Or. 2009) (requiring sixty days notice to month to month tenants who lived in the residence for more than one year); H.R. 5137, 2009 General Assem., Jan. Sess. (R.I. 2009) (preventing new owners from evicting tenants for at least sixty days after foreclosure sale); H.R. 5177, 2009 General Assem., Jan. Sess. (R.I. 2009) (proposing that plaintiffs provide notice at least thirty days prior to first publication of foreclosure); H.R. 1394, 2009 Gen. Assem., Reg. Sess. (Tenn. 2009) (recommending that the mortgagee notify the tenant at least thirty days before foreclosure sale); H.R. 2080, 2009 General Assem. (Va. 2009) (proposing that the landlord give notice of default, acceleration of mortgage debt or notice of foreclosure sale within five business days of written notice from lender); S. 5810, 61st Leg., 2009 Reg. Sess. (Wash. 2009) (advocating a scheme of providing tenant with notice of foreclosure by trustee); S. 78, 2009-10 Leg. Sess. (Wis.

who lives in property undergoing foreclosure. One could provide tenants with either the notice of the default by their landlord, notice of the foreclosure sale date, notice of new ownership, or notice of eviction. Jurisdictions have grappled with which notice offers the most protection to tenants.¹⁸⁹

Legislators have three parties from which to choose who should supply notice to a tenant. First, legislatures could require the landlord to provide the notice to the tenant. This is optimal because the tenant's adversity is due to his relationship with the landlord. The landlord also best knows how to get in contact with the tenant based on the lease agreement. Additionally, the landlord will receive notice of default and foreclosure from the lender. These events should prompt the landlord's duty to disclose this information to the tenant.

Second, a legislature may also require the plaintiff/mortgagee to give the tenant notice of the impending foreclosure sale or eviction. Many foreclosure statutes require the mortgagee to provide notice to his or her mortgagor or persons of interest in the real property.¹⁹⁰ This notice requirement does not necessarily extend to tenants.

Third, legislatures may require the purchaser at the foreclosure sale to provide notice to the tenant of the sale and impending eviction. However, the foreclosure purchaser should not be required to provide notice of an imminent sale because he or she was simply a bystander until the sale. If the lender/mortgagee is also the foreclosure purchaser, then his or her duty to provide notice of the foreclosure sale to the tenant is under that role.

What does notice do for a tenant? Notice may eliminate the surprise of eviction. However, notice does not provide any palpable remedies to a tenant. Notice does not give a tenant any economic benefit, such as a return of his or her security deposit, investment in the property or lost rent payments. Additionally, notice does not help a tenant afford the costs associated with the displacement from one's community or storage fees from being evicted. Likewise, notice does not preserve a tenant's reputation as a good, paying tenant. It is not the foreclosure that directly harms the tenant. What harms the tenant is the consequences and sting of eviction. Therefore, notice will not eliminate these penalties.

There are three possible modifications of state foreclosure laws to increase tenant protections. First, the laws could allow tenants to dispute eviction or foreclosure when the mortgage holder's status is uncertain. Second, laws could be drafted to require increased communication between tenant and lender. Third, laws could be reformed to require the joinder of any tenants of foreclosed

2009) (providing that owner and plaintiff must notify tenant of foreclosure); A.B. 107, 2009 Leg. (Wis. 2009) (requiring that the plaintiff provide tenants with notice of the initial foreclosure action, foreclosure judgment, date when redemption period expires, and notice of the date and time of the confirmation hearing to confirm the foreclosure sale).

189. See, e.g., CAL. CIV. PROC. CODE § 1161b(a) (West 2008) (giving tenants sixty days notice to vacate after property is sold at foreclosure); OR. REV. STAT. § 90.310 (2003) (requiring landlord to disclose any notice of default to tenant before signing lease).

190. See generally Nelson & Whitman, *supra* note 82, at 604-08.

property. However, none of these options buffer tenants against eviction; they simply make a tenant more aware of what is going to befall him. More must be done.

CONCLUSION

Since the 1930s, the United States has been concerned with affordable, decent housing for every American.¹⁹¹ However, affordable, decent housing has eluded many Americans. Homeownership rates for Asian, African, and Hispanic Americans lag far behind those of their non-minority counterparts.¹⁹² Additionally, African and Hispanic Americans were most likely unable to obtain financing, being more likely to be rejected when seeking home loans.¹⁹³

Moreover, the dynamics of American society has changed in multiple ways. Americans are not paying with cash, or seeking mortgages for a multitude of reasons. As a result, the number of tenants affected by foreclosure may reach alarming numbers, which makes security of tenure an imperative need. Therefore, now is an opportune time for state legislatures to act to provide tenants with safeguards against eviction or ejection due to no fault of their own, particularly after December 31, 2012 when the federal scheme fades into the sunset.¹⁹⁴

When dealing with a property owner's right to exclude others from his or her property through eviction, states must engage in a balancing act weighing those firmly rooted property rights against the developing needs of society for fair and affordable housing. The balancing act may require a jurisdiction to re-evaluate and modify the controlling law of foreclosure and eviction to ensure that those who need protection actually receive it. There are limited bases, policy or legal, for including tenants in the foreclosure process; residential tenants simply do not have a recognizable defense to foreclosure actions as their claims do not bear on whether a mortgagee can foreclose on the property.

On the other hand, however, what affects tenants most is the immediate economic loss associated with eviction and the prospect of social and cultural instability arising from displacement from their communities. Residential Landlord and Tenant Acts, in their various state law iterations, can be reformed to accommodate the social and economic costs arising from displacement, while assuring that the fundamental principles of due process, equity, and privity of contract that resonate most significantly in the public policy purposes underlying

191. JOSEPH B. MASON, HISTORY OF HOUSING IN THE U.S. 1930-80, at 14 (1982).

192. John Leland, *Homeownership Losses Are Greatest Among Minorities, Report Finds*, N.Y. TIMES, May 13, 2009, at A16 (pointing out that only 59.1% of Asian Americans, 47.5% of African Americans and 48.9% percent of Hispanic Americans owned homes compared to 74.9% of white Americans as of 2008).

193. *Id.* (noting that in 2007, 26.1% of applications from Hispanic Americans and 30.4% of applications from African Americans were rejected compared to only 12.1% of applications from whites).

194. Pub. L. No. 111-22, Div. A, Title VII, 123 Stat. 1660.

the landlord/tenant relationship remain intact. Although the PTFA as a federal law ultimately preempts state law, state laws, like a Residential Landlord and Tenant Act, may provide for greater protection and rights to tenants. Because the PTFA only provides tenants with baseline protections, Residential Landlord and Tenant Acts might be the best vehicle to supply tenants with ultimate safeguards upon foreclosure. Whether a tenant is rich or poor should not be a huge consideration, security of tenure is a human need. Although eviction is most devastating to the poor, disabled, or elderly, it should be the mission to provide *all* Americans with adequate housing.

This Article does not advocate a European-style Anti-Eviction System where it is nearly impossible to evict tenants; it simply seeks a framework from which tenants are protected and societal burdens are lessened. Reformation of state residential landlord and tenant acts would be in line with other current laws that curtail one's ability to evict for specified reasons, namely the Fair Housing Act of 1968.¹⁹⁵ Thus, no new burdens are created by these reforms. Conversely, affordable, decent housing might be an actuality instead of a dream.

195. 42 U.S.C. § 3601 (2006).

