

BRENNAN  

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FOR JUSTICE

FORECLOSURES:  
A CRISIS IN LEGAL  
REPRESENTATION

Melanca Clark  
with Maggie Barron

## ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Our work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism. A singular institution – part think tank, part public interest law firm, part advocacy group – the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

## ABOUT THE BRENNAN CENTER'S ACCESS TO JUSTICE PROJECT

The Access to Justice Project at the Brennan Center for Justice is one of the few national initiatives dedicated to helping ensure that low-income individuals, families and communities are able to secure effective access to the courts and other public institutions. The Center advances public education, research, counseling, and litigation initiatives, and partners with a broad range of allies – including civil legal aid lawyers (both in government-funded and privately-funded programs), criminal defense attorneys (both public defenders and private attorneys), policymakers, low-income individuals, the media and opinion elites. The Center works to promote policies that empower those who are vulnerable, whether the problem is eviction; predatory lending; government bureaucracy (including, in some instances, the courts themselves); employers who deny wages; abusive spouses in custody disputes or in domestic violence matters; or other problems that people seek to resolve in reliance on the rule of law.

## ABOUT THE AUTHORS

**Melanca Clark** is Counsel in the Justice Program at the Brennan Center for Justice. Prior to joining the Brennan Center, Ms. Clark was a John J. Gibbons Fellow in Public Interest and Constitutional Law where she litigated cases in the areas of civil rights, civil liberties, prisoners' rights, and criminal law. Before the Gibbons Fellowship, Ms. Clark was a Skadden Fellow at the NAACP Legal Defense and Education Fund, Inc. Ms. Clark has also worked as a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison, and was law clerk for Judge Joseph A. Greenaway, Jr., of the U.S. District Court for the District of New Jersey. She received her J.D. from Harvard Law School, and her B.A. from Brown University.

**Maggie Barron** arrived at the Brennan Center in September 2007 as a Communications and Strategy Associate. Prior to joining the Brennan Center, Ms. Barron was the Executive Assistant at the Alliance for a Healthier Generation, a joint initiative of the William J. Clinton Foundation and the American Heart Association, dedicated to fighting childhood obesity. She recently completed her masters degree at the London School of Economics in City Design and Social Science. Ms. Barron received her B.A. in History from Brown University in 2005.

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The statements made and the views expressed in this paper are solely the responsibility of the Brennan Center.

## EXECUTIVE SUMMARY

The nation's massive foreclosure crisis is also, at its heart, a legal crisis. Many homeowners are losing their homes because they lack the ability to navigate the landscape of our lending laws. The Legal Services Corporation ("LSC"), the major federal source of funding for civil representation for the poor, reports that nonprofit legal services programs across the nation are "besieged with requests for foreclosure assistance." Too few people are ever able to obtain qualified legal guidance. According to our findings:

- In Connecticut, over 60 percent of defendants facing property foreclosure in 2007-08 did not have counsel.
- In New York, 84 percent of defendants in proceedings in Queens County involving foreclosures on "subprime," "high cost" or "non-traditional" mortgages (which are mortgages disproportionately targeted to low-income and minority homeowners) proceeded without full legal representation. In Richmond County (Staten Island), 91 percent of such defendants were unrepresented, and in Nassau County, 92 percent were unrepresented.
- In Stark County, Ohio, heavily impacted by foreclosures, data suggests that 86 percent of defendants facing property foreclosure did not have counsel in 2008.

### **Why Having a Lawyer Matters**

Foreclosures may be inevitable for many individuals, but not for all. Legal representation can help many homeowners save their homes and, more broadly, help to stabilize neighborhoods at risk.

Many people have legitimate legal defenses that can halt foreclosure actions, or help open the door to alternative solutions, such as mortgage refinancing. But few homeowners and tenants are aware of their legal defenses. Among other important interventions, lawyers can identify violations of state and federal laws, enforce consumer protection laws, and advance defenses that can either inspire lenders to agree on sustainable loan terms, or slow foreclosure proceedings enough to create time in which to obtain alternative housing.

### **Barriers to Representation**

Our nation's civil legal aid system is ill-equipped to deal with increased demand for legal services. Civil legal aid, always underfunded, has suffered from acute shortages since federal funds were cut by one-third in 1996. Moreover, just as the need for legal representation has reached its apex, the recession has forced state and local governments and private charities to cut their support for legal services.

Further compounding the problem, federal restrictions imposed by the Congress on the Legal Services Corporation as an outgrowth of Newt Gingrich’s “Contract with America,” have undercut homeowners’ efforts to obtain protection from predatory lenders. Abusive lenders enjoy a full arsenal of legal tools, while homeowners relying on restricted legal aid attorneys are barred from joining class actions, claiming attorneys’ fee awards, or relying on their attorneys to advocate before legislatures and administrative bodies. Congress, through the 2008 Housing and Economic Recovery Act, provided one-time funding for lawyers to help foreclosure victims, but then explicitly prohibited the lawyers it had funded from engaging in any litigation.

Our underfunded and restricted civil legal aid system is critically important for African-American and Latino communities, which are more likely than other communities to be injured by predatory lending practices and to require the assistance of publicly funded counsel. Insufficient legal resources exacerbates the wealth divide between these communities and the rest of the nation and undermines the legitimacy of our justice system by perpetuating two systems of justice, one for people with means and another, inferior system for the poor.

## **Recommendations**

The Brennan Center offers the following recommendations:

1. **Increase funding for foreclosure legal representation** – Additional state and federal dollars should be dedicated to foreclosure legal assistance and directed to the hardest hit areas, often the areas with predominantly minority resident populations.
2. **Remove funding restrictions that undercut effective legal advocacy for homeowners and tenants** – Lifting the LSC funding restrictions, a cost-free fix, is among the easiest and most cost-effective ways to improve legal representation for foreclosure victims.
3. **Expand access to the courts and to other dispute resolution mechanisms for homeowners facing foreclosure proceedings** – States that allow foreclosures to proceed without according homeowners a day in court need reform. In every state, lenders should be required to participate in a mediation conference with homeowners before a foreclosure is permitted to proceed.
4. **Recognize a right to consult with a trained housing counselor and, as necessary, a lawyer** – Foreclosure proceedings should be deferred until the homeowner has consulted with either a trained housing counselor, or, where lending violations are suspected, a lawyer.

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