

**FAKERS, BREACHERS, SLACKERS, AND DECEIVERS:
OPPORTUNISTIC ACTORS DURING THE FORECLOSURE
CRISIS DESERVE CRIMINAL SANCTIONS**

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I. INTRODUCTION

The subprime mortgage foreclosure crisis was the spark that ignited the current economic crisis.¹ Although experts claim that the Great Recession² has ended, a number of continuing economic conditions, such as high unemployment, underemployment, and tightened lending standards have resulted in a persistently high number of foreclosed and vacant residential properties.³ Consequently, the housing market continues to be ripe for opportunistic criminal behavior.⁴ This behavior is rampant among several bad actors, including con artists who swindle security deposits from prospective tenants who think the con artists are legitimate landlords,⁵ devious property owners who take rent checks from innocent tenants lacking notice of pending foreclosures,⁶ and foreclosure relief companies that steal money from homeowners via false claims to save them from

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¹ Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761, 832 (2010) (“The subprime crisis precipitated the worst economic decline since the Great Depression.”).

² *Id.* (stating that current economic crisis “has earned the sobriquet ‘the Great Recession’”).

³ CRAIG K. ELWELL, CONG. RESEARCH SERV., ECONOMIC RECOVERY: SUSTAINING U.S. ECONOMIC GROWTH IN A POST-CRISIS ECONOMY 3–4 (2011), available at <http://www.fas.org/sgp/crs/misc/R41332.pdf>.

⁴ See FED. BUREAU OF INVESTIGATION, 2010 MORTGAGE FRAUD REPORT, YEAR IN REVIEW 5 (2010), available at <http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010/mortgage-fraud-report-2010>.

⁵ See *infra* Part II.A.

⁶ See *infra* Part II.B.

foreclosure.⁷ Although some may disagree with the characterization of these opportunistic actors as criminals, they have one thing in common: They convince vulnerable consumers to part with limited funds to obtain or maintain roofs over their heads.

Consider the story of Shalamar Daniels, who responded to an ad posted on Craigslist for a two-bedroom apartment in her price range.⁸ She met with David Flores, the person who had posted the ad and claimed to be the landlord.⁹ He appeared to be legitimate because he had keys that he used to show her the apartment.¹⁰ Furthermore, he had her sign a written lease and gave her a receipt for the \$2,650 cash she paid as a security deposit and first month's rent.¹¹ By the time she was scheduled to move in, she used the keys to open the door to her new apartment and, to her surprise, discovered a young woman and her baby living there.¹² After confronting the woman, Ms. Daniels realized that she had been duped because Mr. Flores had rented the same apartment to the other woman, Mrs. X, who had paid Mr. Flores \$2,700 to rent the same apartment.¹³

Tragic consequences arose from the fake landlord's fraudulent behavior.¹⁴ Ms. Daniels, who was five months pregnant at the time, only had twenty-four cents in her bank account after paying Mr. Flores.¹⁵ Ms. Daniels also wound up going to the hospital because her blood pressure skyrocketed after realizing she had been scammed.¹⁶ Similar to Ms. Daniels, Mrs. X was also a victim because the utility company shut off services, and she got a notice from the true owner demanding that she move.¹⁷ She and her baby ended up living in a homeless shelter.¹⁸ In an

⁷ See *infra* Part II.C.

⁸ *Fake Landlord Scam* (My Fox News N.Y. television broadcast May 20, 2009), available at http://www.myfoxny.com/dpp/news/shame/09520_Fake_Landlord_Scam [hereinafter *Fake Landlord Scam*].

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* Mrs. X stated that Flores told her utilities were free because he had the "homeboy hookup," but he either was stealing utility services or had failed to pay the utility bills. *Id.*

¹⁸ *Id.*

undercover hidden-camera investigation, a reporter discovered that Mr. Flores claimed to be the owner and landlord of multiple properties, but in reality, real-estate records demonstrated that others owned these properties.¹⁹ One of the owners told the reporter that he knew tenants were living unlawfully in one of the properties that he purchased in a foreclosure sale.²⁰

The story above highlights three opportunistic actors that are discussed in this article. Mr. Flores is a “Faker” to the extent he is a complete con artist. He is also a “Breacher” to the extent he appears to be the owner-landlord of record because he is deviously misleading tenants into paying rent for properties that may be subject to foreclosure. The true owners are “Slackers” to the extent they fail to properly monitor and maintain properties they have purchased via foreclosure proceedings.²¹ Their failure leaves open the doorway to foreclosed properties being used by other criminal wrongdoers, including a fourth opportunistic actor, the “Deceiver.” Foreclosure rescue companies are Deceivers when they falsely represent that they can save homeowners from losing their homes to foreclosure.²²

The Fakers, Breachers, Deceivers, and Slackers should be subjected to criminal prosecution under state law. Part I of this article describes these opportunistic actors and the victims they harm. Part II explains to what extent the opportunistic actors are treated as criminals under applicable laws and how frequently they are prosecuted. Where state law already identifies the misconduct as a crime, Part III of this article argues that wrongdoers should be zealously prosecuted. Because the Breachers and Slackers are rarely ever prosecuted under generic criminal statutes, Part III asserts that states need to pass laws that explicitly make conduct by these actors a crime. Part IV argues that judges need to impose sentences that have creative shaming components to deter future misconduct and educate consumers about various crimes perpetrated against homeowners, renters, buyers, communities, and taxpayers. One suggested shaming punishment would be for convicted wrongdoers to be required to pay for billboard advertisements containing their photo, identifying their crime, and providing consumers with information about their rights and where they can obtain legitimate help.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See infra* Part II.D.

²² *See infra* II.C.

II. OPPORTUNISTIC ACTORS HAVE NO REGARD FOR THEIR VICTIMS

In this article, the author identifies the opportunistic actors as the Fakers, the Deceivers, the Breachers, and the Slackers. The Faker has no legal interest in the residential property but pretends to be the owner or landlord and defrauds prospective buyers and renters by wrongfully selling or renting the property to them.²³ The Breacher is the owner-landlord who is in foreclosure proceedings for defaulting on the mortgage payments, but continues to accept rental payments from an unsuspecting tenant who dutifully pays rent.²⁴ The Deceiver contacts desperate homeowners fearful of losing their homes, promises to rescue them from foreclosure, but then defrauds them of money or steals their homes.²⁵ The Slackers are the banks and real-estate speculators who obtain ownership of the properties after foreclosure, but fail to properly monitor or maintain them, causing the properties to become a haven for criminals and a financial burden to the community.²⁶

Below is a table identifying the opportunistic actors discussed in this article.²⁷

Label:	Fakers	Breachers	Deceivers	Slackers
Perpetrators:	Fake Landlords Fake Owners	Devious Landlords	Foreclosure Rescue Companies	Banks and Other Purchasers of Foreclosed Properties

²³ See *infra* Part II.A.

²⁴ See *infra* Part II.B.

²⁵ See *infra* Part II.C. The category of Deceivers also includes banks and mortgage servicing companies that engage in fraudulent and deceptive practices designed to speed up the foreclosure process and force the homeowners out of the home. See *infra* Part II.C. These practices are pervasive and include robo-signing, where a bank's employee or agent signs thousands of affidavits, eventually filed in court, to speed up the foreclosure process. This occurs even though these people lack personal knowledge purporting to support the foreclosures and do not review the loan documents or verify any amounts claimed owed. See *infra* Part II.C.

²⁶ See *infra* Part II.D.

²⁷ The author has compiled additional evidence regarding the prevalence of bad acts committed by the opportunistic actors discussed in this article at the following website: www.houseoffrauds.com.

A. The Fakers Pose as Owners or Landlords

The Fakers are the first group of opportunistic criminals and, perhaps, the most dangerous because they have no legal interest in the residential properties they assert control over, and they turn their victims into squatters lacking any right to possess the properties. Fake landlords and owners have a large inventory of vacant houses from which to perpetrate their scams.²⁸ Because the number of foreclosures is expected to increase in 2012 and beyond,²⁹ the problem of fake landlords and owners is not going away anytime soon.

The Fakers pretend to be owners or landlords, but in reality they are scamming innocent consumers who are in search of homes to buy or rent. The Fakers are often aggressive and convincing, and the tactics they employ can be very sophisticated. This section discusses some of the most prevalent tricks these Fakers use to trap their victims. These range from scams that raise several red flags to scams that are sophisticated enough to trick even cautious consumers.

1. Gullible Prospective Renters Succumb to Web-based Fraud

Some fake landlord scams are completely web-based in that the scammer promises to send the renter the keys after receiving a wire transfer of money.³⁰ In Jaffrey, New Hampshire, a beautiful vacation

²⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, VACANT PROPERTIES: GROWING NUMBER INCREASES COMMUNITIES' COSTS AND CHALLENGES 25 (2011), available at <http://www.gao.gov/assets/590/586089.pdf> [hereinafter GAO VACANT PROPERTIES REPORT]. The states with the largest percentage increases in non-seasonal vacant units over the last decade were Nevada (126.3%), Minnesota (99.8%), New Hampshire (99.3%), Arizona (91.8%), and Florida (89.5%). *Id.* at 24.

²⁹ See, e.g., Alex Veiga, *Foreclosure Activity Edges Higher in January*, USA TODAY (Feb. 16, 2012, 11:58 AM), <http://www.usatoday.com/money/economy/housing/story/2012-02-16/january-foreclosure-rate/53114256/1> (stating that RealtyTrac predicts that foreclosures will rise 25% in 2012, thereby bringing the total estimated foreclosures in 2012 to one million).

³⁰ See *New E-Scams & Warnings, Rental and Real Estate Scams*, FED. BUREAU OF INVESTIGATION (Mar. 10, 2012), <http://www.fbi.gov/scams-safety/e-scams>. Many times the scammer will tell the prospective tenant that the scammer can only accept payment via wire transfer because the scammer is out of the country. *Id.* For good measure, the scammer may include missionary work as the reason for the trip. *Id.* The Internet Crime Complaint Center, an organization that works with the FBI to help victims of online crime, created a report after compiling all of their complaints of online crime. INTERNET CRIME COMPLAINT
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destination, a family arrived at a four-bedroom home ready to move in themselves and their belongings after they had wired about \$3,000 to a person in the United Kingdom to rent the house sight unseen.³¹ The family soon discovered a couple was already living in it.³² The family wound up homeless because they had used all their savings to pay the \$3,000 rent.³³

Victims of these web-based scams may seem to deserve little sympathy at first glance. However, the reader needs to be aware of the lengths to which some fake landlords will go to achieve their purpose. Sophisticated web-based Fakers pirate photos of homes that are actually listed for sale or rent on a real property website, and then use the photos and property descriptions to post advertisements on wildly popular websites such as Craigslist.³⁴ These fake landlords also copy the name of the agent selling or renting the home, but they create a different email address and phone number so that they can impersonate the agent.³⁵ Ms. Beth Smith, a real-estate agent in Atlanta, had this done to her.³⁶ She has no idea how many people fell prey to the scam and wired money to the fake Ms. Smith.³⁷ The real Ms. Smith was made aware of the scam by a

CTR., 2010 INTERNET CRIME REPORT (2010), available at http://www.ic3.gov/media/annualreport/2010_ic3report.pdf. Although not specific to rental scams, the report found that outside the United States, the United Kingdom and Nigeria were home to the highest number of Internet crime perpetrators. *Id.* at 11. The top five countries include: United States (65.9%), United Kingdom (10.4%), Nigeria (5.8%), China (3.1%), and Canada (2.4%). *Id.*

³¹ See Meghan Pierce, *Craigslist Scam Using Jaffrey Home for Bait*, N.H. UNION LEADER, Jan. 20, 2012, at 9, available at 2012 WLNR 1451947.

³² *Id.*

³³ *Id.*

³⁴ See FTC Consumer Alert, *Rental Listings May Be Red Herrings*, FED. TRADE COMM'N (May 2009), <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt002.pdf> [hereinafter *Rental Listings May Be Red Herrings*]; Betty Lin-Fisher, *Rental Scams on Internet Can Take on Life of Their Own: Thieves Use Craigslist, Zillow.com to Pose as Owners Offering Deal on West Akron House*, AKRON BEACON J., Oct. 2, 2011, at D1, available at 2011 WLNR 20346740 (stating that the fake landlord copied the photo and description of a house that was actually for sale and then advertised the house for rent between \$600 and \$800 per month on several websites such as Craigslist and Zillow.com).

³⁵ See *Rental Listings May Be Red Herrings*, *supra* note 34.

³⁶ Christopher Quinn, *Scam Artists Prey on Renters*, ATLANTA J. CONST., Sept. 2, 2011, at B1, available at 2011 WLNR 17390221.

³⁷ *Id.*

prospective tenant, who conducted a web search to find the real Ms. Smith after being spooked by the fake Ms. Smith's over-eagerness to persuade the tenant to wire her money.³⁸ Unfortunately, there are numerous stories of people who arrive at their new home only to discover someone else living there or that the property was never for sale or rent.³⁹

2. *Clever Scammers Use Online Ads and Traditional Tricks to Lure Renters*

The more clever Fakers use a combination of Internet ads⁴⁰ and old-fashioned tricks and are, therefore, even more convincing and better able to dupe prospective renters into parting with their limited funds. Recall that Mr. Flores posted an ad online of an actual vacant apartment, possessed keys to the apartment, and showed the apartment to the prospective tenant—the very same things a legitimate landlord would do.⁴¹ He also gave the tenant a written lease, a receipt, and keys to the apartment.⁴²

These fake landlords are often able to persuade the tenants to pay in cash. For example, in the video of Mr. Flores, he tells the undercover news reporter that he “doesn’t trust checks, not even his own.”⁴³ Other reasons claimed by Fakers for accepting only cash include avoiding a paper trail for tax purposes or the lack of a bank account.⁴⁴ Many consumers are unbanked; therefore, they would not be concerned by a landlord’s request to pay in cash to get keys to the premises.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Growing Online Scam Uses Legitimate For-Sale Home Listings to Trick Renters*, DES MOINES REG., June 6, 2011, at A1, available at 2011 WLNR 11259907.

⁴¹ *Fake Landlord Scam*, *supra* note 8.

⁴² *Id.*

⁴³ *Id.* Unfortunately, these sorts of arguments are likely to seem reasonable to low-income individuals who may also have a distrust of checks after being burned by the high fees that often affect those consumers the most. Further, prospective tenants seeking low-cost housing may feel that they will lose the “good deal” if they protest.

⁴⁴ While this argument may seem absurd to the individuals who use a bank for their everyday needs, for the nine million unbanked or underbanked people, the excuse becomes more reasonable and believable. See *FDIC National Survey of Unbanked and Underbanked Households*, FED. DEPOSIT INSURANCE CO. (Dec. 2009), <http://www.fdic.gov/householdsurvey/> (“An estimated 7.7 percent of U.S. households, approximately 9 million, are unbanked. These households do not have a checking or a savings account.”).

How do the fake landlords get keys to the premises? Mr. Flores is suspected of being previously employed by the true owner in Brooklyn, New York, and, therefore, had keys to the rental properties.⁴⁵ One fake landlord in Indianapolis used to be a licensed real-estate agent and, as a result, had possession of a master key to foreclosed homes owned by the Department of Housing and Urban Development (HUD).⁴⁶ Other scammers simply break into the properties and change the locks.⁴⁷

3. *Phony Owners File False Documents Claiming Ownership to Fool Buyers*

In addition to breaking and entering, some Fakers amplify their ability to trick consumers by filing false documents in the real-estate records to claim ownership of vacant properties.⁴⁸ For example, one Faker, who

⁴⁵ *Fake Landlord Scam*, *supra* note 8.

⁴⁶ Deanna Dewberry, *Fake Landlord Scams Several Out of Rent*, WISH TV (Mar. 9, 2010, 7:14 PM), <http://www.wishtv.com/dpp/news/crime/fake-landlord-scams-several-out-of-rent>.

⁴⁷ See Carl MacGowan, *Prison Sentence for Fake 'Landlord'*, NEWSDAY, Oct. 7, 2009, at A37, available at 2009 WLNR 19732931 (reporting that the defendant changed the locks at two homes, made repairs to them, rented them to tenants, and was sentenced to prison for up to twelve years); Darcy Spears, *What's Bank of America's Role in Alleged Rental Scam?*, CHANNEL 13 ACTION NEWS (Nov. 14, 2011), <http://www.ktnv.com/news/local/133832138.html>.

⁴⁸ See Carrie Wells, *Rental Strategy a Service or Fraud?*, SARASOTA HERALD-TRIB., Nov. 23, 2010, at A1, available at 2010 WLNR 23384140. McNair, sixty years old, told police he was simply taking advantage of a Florida statute called the adverse possession law, which allows people to claim the abandoned homes of others if they pay taxes and act like the owners for seven years. *Id.* See also CAL. DEPT. OF REAL ESTATE, CONSUMER ALERT: BEWARE OF IMPOSTER LANDLORDS 1 (2010), http://www.dre.ca.gov/pdf_docs/ca/ConsumerAlert_WarningOnRentScam11_2010.pdf. This report warned:

The [scammers] download and complete the Preliminary Change of Ownership Report document, sometimes obtaining a 'filed' stamp, and then offer the document as evidence that they own the property to be rented. This might also make a prospective tenant believe that the person(s) he or she is dealing with is legitimate. Another scenario like this is where a bogus landlord makes payment of a small tax lien on a house not owned by them, and then provides evidence of that payment as so-called proof that he or she owns the house.

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obtained paralegal training while in prison, filed phony quitclaim deeds for multiple properties, thereby forcing the true owners to take steps to clear title.⁴⁹ He even had the true owners of one home evicted after they had spent \$60,000 to renovate their home.⁵⁰

As a result of this criminal behavior, people all around the country have been convinced that fake landlords or owners were legitimate and have given them money.⁵¹ Some purchasers have moved into the properties, but were ordered to leave when the police or the true owner appeared.⁵² Although Craigslist and other websites contain warnings about housing scams, they appear to be insufficient to prevent some consumers from falling for these scams.⁵³ This is understandable given the lengths to which the Fakers will go to create the appearance of being legitimate.

Regardless of how the scam is perpetuated, the fake landlords and owners have not only harmed their victims financially, but they have also harmed them emotionally. Their victims are evicted by law enforcement personnel, sometimes in the presence of neighbors, or leave without a fight once the true owner appears.⁵⁴ In either scenario, the victims suffer great shame and embarrassment as they quickly vacate the premises. Moreover, if the victims have to move in with friends or relatives, or into a shelter, they have to endure all the inconvenience and stress associated with living in cramped and unpleasant conditions. Perhaps the greatest emotional harm is feeling foolish for having been deceived. The victims' feelings are

Id.

⁴⁹ See David Hammer, *Man Guilty in Land Grab Case*, NEW ORLEANS TIMES-PICAYUNE, Feb. 20, 2009, at 1, available at 2009 WLNR 3325314 (reporting that Nathaniel Dowl was found "guilty on three counts of filing and maintaining false public records").

⁵⁰ *Id.* He had previously owned the property but lost it due to his failure to pay property taxes, and he was able to persuade the judge to issue an eviction order in his favor. *Id.*

⁵¹ See, e.g., Lise Olsen, *Homes Illegally Taken and Sold in Scam*, HOUSTON CHRON., May 8, 2011, at A1, available at 2011 WLNR 9221221.

⁵² See, e.g., Dewberry, *supra* note 46.

⁵³ See *Scams*, CRAIGSLIST, <http://columbus.craigslist.org/about/scams> (last visited Mar. 13, 2012). The warning provides a list of "common-sense rules" users should follow to avoid getting scammed, including, among others, to deal with people locally, not to rent a place without visiting it first, not to wire money, and never to give out financial information. *Id.*

⁵⁴ See Creola Johnson, *Renters Evicted En Masse: Collateral Damage Arising From the Subprime Foreclosure Crisis*, 62 FLA. L. REV. 975, 982 (2010) [hereinafter Johnson, *Renters Evicted En Masse*].

important, because this article proposes that criminal sentences imposed on the Fakers should have a shaming component meant to deter future criminal behavior by the Fakers.

B. The Breachers Are Owners Facing Foreclosure Who Mislead Current Tenants into Continuing Rental Payments

Media reports about the criminal prosecution of fake landlords and owners abound, but reports are lacking about the prosecution of owner-landlords who, while losing their properties through foreclosure, deceived their tenants into continuing to pay rent. Government agencies have, however, taken notice and have begun offering training and technical assistance to state agencies and local organizations that need help in their efforts to investigate, prosecute, and prevent mortgage fraud and crimes associated with vacant properties.⁵⁵

This article increases the awareness about the victims of devious owner-landlords so that state lawmakers will realize they continue to be victimized during the foreclosure crisis and do more to protect them. Consider, for example, Sonya Croft, a tenant who paid a security deposit and rent to lease a home in Acworth, Georgia.⁵⁶ One week later, she found a notice posted on her door from Fannie Mae ordering her to vacate the premises.⁵⁷ When the reporter contacted the former owner, the owner claimed to be doing a workout with the bank and that the tenant should continue paying rent to him.⁵⁸ However, Fannie Mae told Ms. Croft that it was to receive the payments.⁵⁹

⁵⁵ *Mortgage Fraud and Home Foreclosures: Community Impacts and Collaborative Responses*, BUREAU OF JUST. ASSISTANCE, https://www.bja.gov/ProgramDetails.aspx?Program_ID=101 (last visited Apr. 1, 2012). The Bureau of Justice Assistance has established a consortium of experts to assist with these efforts. The consortium consists of the National Crime Prevention Council, the National District Attorneys Association, the National White Collar Crime Center, and the St. Petersburg College Center for Public Safety Innovation. *Id.*

⁵⁶ *Renters Face Eviction only Weeks After Moving into Foreclosed Home*, WSBTV 2 (Dec. 31, 2011), <http://www.wsbtv.com/news/news/local/family-faces-eviction-weeks-after-moving-unknowing/nGCKW/>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

Another homeowner, Dynnaro You, lost all of his interest in one of his properties in a foreclosure proceeding filed by the bank.⁶⁰ His victim, Wanda Johnson, moved into the foreclosed home with her family in March of 2009, and paid monthly rent until August of 2009, when a sheriff's deputy appeared with a written notice demanding that she vacate the property. Even though Mr. You lost all rights to the property in April, he did not tell Ms. Johnson to stop making rental payments to him and to start making them to the bank.⁶¹ Because Ms. Johnson had no reason to suspect her landlord no longer owned the property, she was unfortunately put in the heartbreaking position of having to immediately move her family in with a relative just days before her two minor children were expected to start school.⁶²

Tenants should rarely be placed in this situation because foreclosure is never a surprise to the owner. In fact, the duration of the foreclosure process can be significant. One study found that the time between the date of the last mortgage payment and the date of the foreclosure sale ranged from 423 to 453 days for judicial foreclosures.⁶³ Although shorter, even non-judicial foreclosures can last three to six months.⁶⁴

C. The Deceivers Make Empty Promises to Rescue Homeowners Facing Foreclosure

While the Fakers and the Breachers take advantage of those in need of rental housing, the Deceivers take advantage of desperate homeowners facing foreclosure. The Deceivers are individuals and companies that promise to rescue homeowners from foreclosure, but instead defraud homeowners using spurious foreclosure relief services such as "forensic loan audits"⁶⁵ or deceptive purchase agreements such as "land grant

⁶⁰ Jessica Cejnar, *Landlord Accused of Taking Rent from Tenant After Home Is Foreclosed*, DESERT DISPATCH (Aug. 14, 2009, 5:07 PM), <http://www.desertdispatch.com/articles/rent-6704-accused-taking.html>.

⁶¹ *Id.*

⁶² *Id.* (depicting a picture of her and her son moving furniture out of the home and into a rental truck).

⁶³ GAO VACANT PROPERTIES REPORT, *supra* note 28, at 23.

⁶⁴ *Id.*

⁶⁵ See Press Release, Arizona Attorney General's Office, AG Horne Warns Homeowners: Mortgage Lawsuit Scam Hits Arizona (Aug. 22, 2011), *available at* http://www.azag.gov/press_releases/aug/2011/110822%20MORTGAGE%20LAWSUIT%20OSCAM.html; Press Release, California Attorney General's Office, Brown Files \$60
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transfers”⁶⁶ and sale-lease-back contracts.⁶⁷ These rescue companies troll the foreclosure filings and notices looking for desperate homeowners fearful of losing their homes.⁶⁸

Million Lawsuit Against Fraudulent Forensic Audit Loan Modification Scam (Oct. 6, 2010), available at http://oag.ca.gov/news/press_release?id=1998 (stating that con artists “sell ‘forensic loan audits’ to homeowners, who pay thousands of dollars in up-front fees for a dubious computer-generated review of their mortgages” that supposedly “will give them ‘legal leverage’ [by filing lawsuits] to obtain a loan modification and prevent lenders from foreclosing or collecting monthly mortgage payments” but in reality “[h]omeowners who filed these lawsuits have lost thousands of dollars and placed themselves in greater danger of losing their homes”).

⁶⁶ See, e.g., Dana Littlefield, *Man Gets 46 Years in Prison for Fraud, Victims Had Hoped to Avert Foreclosure*, SAN DIEGO UNION TRIB., May 22, 2010, at B1, available at 2010 WLNR 10687433 (reporting that the ringleader of a foreclosure relief company that defrauded hundreds of residents in San Diego County out of more than \$2 million received a forty-six year prison sentence after the ringleader and the ringleader’s accomplices convinced homeowners to use their “land-grant program,” where “[t]hey could either pay a one-time fee of \$10,000 to put their property in a land grant or transfer their property to the defendants and rent it back through monthly payments”); *Four Indicted in \$13M Mortgage Scam*, CINCINNATI ENQUIRER, Aug. 19, 2011, at C1, available at 2011 WLNR 16449240 (reporting that four individuals living in Cincinnati were indicted for running a \$13 million scam where the defendants promised homeowners that they could remain in their homes after selling them because they would be renters with the option to buy their homes back after a company called American Equity Group would help them repair their credit); *Information Issued by U.S. Attorney’s Office for Maryland on Dec. 10: Maryland Mortgage Fraud Task Force Announces Plans*, *Progress*, U.S. FED. NEWS, Dec. 14, 2009, available at 2009 WLNR 25173277 (stating that Michael Lewis was “sentenced in U.S. District Court to 78 months in prison for conspiracy and bankruptcy fraud arising from a scheme he orchestrated in which he aired TV ads offering to help financially vulnerable individuals” via his “lease/buy-back program”); *United States v. Lewis*, 405 F. App’x 736, 737–38 (4th Cir. 2010) (affirming Michael Lewis’s seventy-eight month sentence after he pleaded guilty to wire and bankruptcy fraud).

⁶⁷ In a sale-lease-back contract, the homeowner sells property to the rescue company, or someone affiliated with it, then rents the homeowner’s home from the purchaser but retains an option to buy back the home a year or so after signing the contract. See Creola Johnson, *Stealing the American Dream: Can Foreclosure-Rescue Companies Circumvent New Laws Designed to Protect Homeowners from Equity Theft?*, 2007 WIS. L. REV. 649, 654–55 (2007) [hereinafter Johnson, *Stealing the American Dream*]. Because of the onerous provisions in the contract, the homeowner winds up defaulting and being evicted if the

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Those foreclosure relief services that do not involve the transfer of homeowners' property are referred to as consulting services. These so-called consulting services take various forms.⁶⁹ The major difference between these so-called foreclosure consultants and legitimate foreclosure relief organizations is that the fraudulent consultants charge very large upfront fees, which violates a recently-adopted rule by the Federal Trade Commission (FTC) and numerous state statutes that prohibit upfront fee collection.⁷⁰

The most common consulting service is where the company claims to be able to negotiate with lenders to modify mortgage payments so that the homeowners can avoid foreclosure and stay in their homes.⁷¹ These

homeowner is unsuccessful in getting a court to declare the contract unlawful. *Id.* (describing the plight of one homeowner who signed a sale-lease-back agreement where her rental payments exceeded her mortgage payments, and she was required to make a balloon payment of \$165,000 at the end of the first year to repurchase her home or forever lose the option to buy).

⁶⁸ While this paper focuses on non-bank Deceivers, another group of Deceivers are the lenders and mortgage servicers that take advantage of homeowners through robo-signing, dual tracking, and other deceptive practices designed to speed up the foreclosure process and collect excessive fees. See *Hearing Before the H. Comm. on Fin. Servs. Subcomm. on Ins., Hous., and Cmty. Opportunity*, 111th Cong. 111–116 (Nov. 18, 2010) (written testimony of Julia Gordon, Senior Policy Counsel, Center for Responsible Lending), available at <http://financialservices.house.gov/Media/file/hearings/111/Gordon111810.pdf>; Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 263, 265 (2011) (stating that the term robo-signing was popularized after it was discovered that “Chase and GMAC, in their zeal to process hundreds of thousands of foreclosures as quickly as possible and get those properties on the market, employed people who could sign documents” that were filed with the court but not verified).

⁶⁹ For a more thorough discussion on foreclosure rescue companies, see Johnson, *Stealing the American Dream*, *supra* note 67, at 652–55.

⁷⁰ FED. TRADE COMM’N, MORTGAGE ASSISTANCE RELIEF SCAMS: ANOTHER POTENTIAL STRESS FOR HOMEOWNERS IN DISTRESS 1, 4 (2011), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre42.pdf> (stating that legitimate foreclosure relief help is available from non-profit organizations, including the Homeownership Preservation Foundation, which offers free assistance via a national hotline telephone number); 16 C.F.R. § 322.5 (2011).

⁷¹ See Johnson, *Stealing the American Dream*, *supra* note 67, at 681; Letter from Nat’l Ass’n of Attorneys Gen. on Mortgage Assistance Relief Services Rulemaking, Rule No. (continued)

consultants cannot prove they have a track record of being able to save homeowners from foreclosure even though they mislead consumers into believing they have such a record.⁷² Consider, for example, Mario Watkins who found his “customers” from a list of foreclosure lawsuits filed against homeowners in Franklin County, Ohio, and sent them direct mailings under the name “Global Services Of Ohio Corp.”⁷³ Mr. Watkins, the sole operator of a business called Global Services of Ohio, Inc., charged homeowners as much as \$3,500 for his negotiation services.⁷⁴ In letters he sent to homeowners, he claimed that “our firm has now been providing *solutions for homeowners nationwide since 1991.*”⁷⁵ However, when sued by the Ohio Attorney General for allegedly violating numerous consumer protection statutes, he admitted in a deposition that he had been in the business of doing school admissions and recruiting most of his life.⁷⁶ When he was asked explicitly about what training and experience he had prior to starting his foreclosure relief company in 2006, his own deposition answers showed that he had no prior training or experience assisting homeowners in foreclosure.⁷⁷

Mr. Watkins settled the lawsuit filed against him by the Ohio Attorney General.⁷⁸ Although his settlement is not technically an admission of wrongdoing, his own deposition answers and letters provide evidence that he violated numerous provisions of state consumer statutes.⁷⁹ As discussed later, Mr. Watkins and individuals like him should be prosecuted under criminal theft statutes.

R911003, to the Federal Trade Commission (July 15, 2009) (“[T]he [loan modification] consulting business model is dominating the marketplace. Consultants are by far the most common source of consumer complaints received by our offices in the area of mortgage assistance services.”).

⁷² See Johnson, *Stealing the American Dream*, *supra* note 67, at 681.

⁷³ Plaintiff’s Motion for Summary Judgment Against Defendants at Exhibit 4, *State v. Watkins*, No. 08 CV 016464 (Franklin Cnty. Ct. C.P. Sept. 15, 2009).

⁷⁴ *Id.* at 2, 8.

⁷⁵ *Id.* at Exhibit 4.

⁷⁶ *Id.* at Exhibit 3 (admitting that he was employed at truck driving schools).

⁷⁷ *See id.*

⁷⁸ Agreed Final Entry and Order at 1, *State v. Watkins*, No. 08 CV 016464 (Franklin Cnty. Ct. C.P. Dec. 6, 2010).

⁷⁹ See generally Plaintiff’s Motion for Summary Judgment Against Defendants, *supra* note 73 (describing a host of violations, including charging upfront fees as high as \$3,500 when state law prohibits the charging of a fee in excess of \$75).

In addition to the Deceivers who claim to perform foreclosure consulting services, some Deceivers end up transferring title to the homeowner's property to themselves or others. These transfers cause the homeowners to lose title and ultimately possession, and both results are contrary to what the homeowners thought they were accomplishing by dealing with the foreclosure company.⁸⁰ Numerous individuals nationwide have been either charged with or convicted of various crimes involving foreclosure scams that strip the owner of title.⁸¹

Whether homeowners fall prey to a foreclosure consultant or purchaser, they frequently lose their most cherished and valuable possession forever. Therefore, perpetrators of foreclosure rescue scams deserve long-term incarceration. Instead, the sentences imposed on foreclosure rescue scammers often involve little jail time and, therefore, do not approximate the magnitude of the harm inflicted on innocent homeowners and their families. Some of these families could have been helped, had they known how to find a legitimate foreclosure counselor. Consequently, the punishment imposed on the Deceivers needs to be increased to fit the crime.

D. The Slackers Intentionally Fail to Monitor or Maintain Unoccupied Properties

The Slackers are the banks and real-estate speculators who have obtained ownership of the properties after the foreclosure process is completed, but who intentionally fail to monitor or maintain their properties. Many of these speculators buy properties in bulk in hopes of flipping them for an immediate profit but fail to correct problems at these properties.⁸² Because of the banks' foreclosure threats, many homeowners abandoned their properties, leaving them to become nuisances before the foreclosure process was completed.⁸³ Consequently, a toxic title situation

⁸⁰ See Johnson, *Stealing the American Dream*, *supra* note 67, at 651–52.

⁸¹ See *supra* text accompanying note 66.

⁸² See, e.g., *This Old House Speculators Should Not Profit from Neglect*, PITT. POST-GAZETTE, Nov. 28, 2011, at B6, available at 2011 WLNR 24601514 (identifying as a culprit an entity called Res Distressed Asset Fund XXI LLC as “one of innumerable private funds in operation across the country” involved in aiding other companies in bulk buying and flipping of troubled properties).

⁸³ See, e.g., Shareholder Derivative Complaint at 5–10, *Am. European Ins. v. Moynihan*, No. 11 CIV 6851, 2011 WL 4500583 (S.D.N.Y. Sept. 29, 2011) (supporting the claim that
(continued)

arises where the homeowners think that abandonment transfers ownership to the bank, and where the bank fails to record its deed identifying it as the new owner and the party responsible for the abandoned properties.⁸⁴ Whether the unoccupied property is in good or bad shape, there are victims when lenders and property speculators fail to properly monitor or maintain their properties.

If the properties are unoccupied but are in marketable condition, then fake landlords or fake owners gain access, albeit unlawfully, to defraud unsuspecting prospective tenants and buyers.⁸⁵ As a result, the failure of banks and real-estate speculators to monitor valuable housing allows other opportunistic actors to use such housing to inflict great harm on consumers.

If the properties owned by the Slackers are unoccupied and plagued by code violations, then the properties harm the nearby neighbors and become a haven for criminal activities.⁸⁶ Drug dealers, copper thieves, sex workers, and homeless people use these abandoned residences to their advantage and to the detriment of the neighboring properties.⁸⁷ It is no longer safe for children living close by because of this criminal activity.⁸⁸ The homes near these seemingly abandoned properties lose value.⁸⁹ These properties become an eyesore for the community and pose health risks as they become the sites of unexplained fires⁹⁰ and infested with rats and other animals.⁹¹

Bank of America is a Slacker not just for failing to maintain its properties but for putting homeowners in the position of giving up and abandoning the properties).

⁸⁴ See Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1186 (2008) [hereinafter Johnson, *Fight Blight*].

⁸⁵ See *infra* Part II.A (discussing how fake landlords and owners invade unoccupied properties and rent or sell them to those in need of housing).

⁸⁶ See Johnson, *Fight Blight*, *supra* note 84, at 1182 (explaining the economic and non-economic harm inflicted on communities from the presence of abandoned properties).

⁸⁷ See *id.* at 1183 n.78.

⁸⁸ See *id.* at 1182 (stating that blighted homes increase gang activity and murder).

⁸⁹ *Id.* at 1181.

⁹⁰ See, e.g., Gabriel Baird, *Explosion on Cleveland's West Side*, THE PLAIN DEALER (Jan. 25, 2010, 4:58 PM), http://blog.cleveland.com/metro/2010/01/explosion_on_clevelands_west_s.html (reporting on an explosion at an abandoned property and the damage it did to surrounding properties).

⁹¹ See Johnson, *Fight Blight*, *supra* note 84, at 1183 n.78.

Anger directed at Wall Street has inspired a few communities to shed the garments of victimization and act to force the banks to clean up and maintain their properties.⁹² For example, in several cities across Ohio, community residents protested against banks for leaving properties abandoned, thus negatively affecting the protestors' communities.⁹³ Residents of one Cleveland neighborhood collected trash from abandoned houses and took the trash bags to one of the banks believed to be the owner.⁹⁴ Residents also posted signs in front of the abandoned houses that identified the grossly negligent banks responsible for the damage.⁹⁵

While criminal enforcement is rare, one Ohio municipality has been active in criminally prosecuting banks and speculators for refusing to repair and maintain their unoccupied properties.⁹⁶ As discussed in Part III, legal remedies used by the City of Cleveland should be adopted in other cities with a large number of unoccupied properties owned by Slackers.

III. CURRENT STATE OF CRIMINAL ENFORCEMENT AGAINST THE OPPORTUNISTIC ACTORS

The degree to which opportunistic actors are criminally prosecuted depends on state laws as well as whether law enforcement agencies deem prosecution of these actors to be a priority. The owner-landlords, as Breachers, and the banks, as Slackers, are similar in that they seem to commit wrongdoing with impunity even though many in the general public would perceive their misconduct as criminal. As discussed in Part IV, states should pass laws that explicitly make misconduct by Breachers and Slackers a criminal offense.

The Fakers and the Deceivers are similar in that one can find numerous cases where these wrongdoers are subject to criminal prosecution.⁹⁷ However, sentences for their crimes are often light, and the wrongdoers

⁹² See Rick Nagin, *Residents Deposit Trash on Ohio Banks*, PEOPLE'S WORLD (Oct. 3, 2011), <http://www.peoplesworld.org/residents-deposit-trash-on-ohio-banks>.

⁹³ See, e.g., Julie Courtwright, *Occupy Cleveland Fights Foreclosures*, WTAM-LOCAL NEWS (Nov. 13, 2011), <http://www.wtam.com/cc-common/news/sections/newsarticle.html?feed=122520&article=9388566>.

⁹⁴ See Olivera Perkins, *Cleveland Residents Say Banks Burdening City by Not Maintaining Foreclosed Properties*, CLEVELAND.COM (Sept. 28, 2011 6:43 AM), http://www.cleveland.com/business/index.ssf/2011/09/cleveland_residents_say_banks.html.

⁹⁵ See Nagin, *supra* note 92.

⁹⁶ See discussion *infra* Part III.D.

⁹⁷ See *supra* Parts II.A, II.C.

sometimes reoffend.⁹⁸ Therefore, as discussed in Part IV, their sentences need to have some type of shaming component to deter future wrongdoing.

A. The Fakers: Unquestionably Criminals

States can charge fake owners or landlords for committing several crimes. One common crime is theft by deception or aggravated theft.⁹⁹ In Ohio, for example, aggravated theft is a fifth degree felony and a person can be convicted if the prosecutor proves that that the defendant intentionally deprived the owner of property by using deception.¹⁰⁰ “‘Deception’ means knowingly deceiving another or causing another to be deceived by any false or misleading representation . . . [which] creates . . . a false impression in another . . . [regarding an] objective or subjective fact.”¹⁰¹ This is what the fake landlord or owner does. The fake landlord and fake owner falsely represent that they are the real owner or landlord and intentionally create the impression that they have the authority to lease or sell the residential property. They deprive at least two victims and, therefore, should be charged with at least two counts of theft. One count should be for depriving the true owner of the ability to generate rental income from the property and of the ability to use and enjoy the property as a residence. The fake landlord or owner should also be charged with a second count of theft from depriving the tenant of the money used to pay the security deposit and first month’s rent. Sometimes, however, the defendant is indicted only for theft from the true owner.¹⁰² This minimizes the victimization of tenants and buyers, who will

⁹⁸ See, e.g., Press Release, Fed. Trade Comm’n, Settlement Orders Ban More than a Dozen Marketers from Selling Mortgage Relief Services; Repeat Offender Ordered to Pay \$11.4 Million for Contempt (June 17, 2010), available at <http://www.ftc.gov/opa/2010/06/loanmods.shtm> [hereinafter Settlement Orders].

⁹⁹ See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 373–74 (3d ed. 1982) (explaining Model Penal Code definition of theft by deception); OHIO REV. CODE ANN. §§ 2913.01(A), (A)(3) (West 2011) (defining Ohio’s theft by deception and aggravated theft codes).

¹⁰⁰ See *State v. Burrell*, No. 96123, 2011 WL 5320668, at *1–2 (Ohio Ct. App. Nov. 03, 2011); OHIO REV. CODE ANN. § 2913.02(A)(3) (“No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services . . . by deception.”).

¹⁰¹ OHIO REV. CODE ANN. § 2913.01(A).

¹⁰² See, e.g., *Burrell*, 2011 WL 5320668, at *6 (upholding conviction for aggravated theft from the true owner).

eventually have to vacate because they have no legal rights in the property. This eventuality should not obscure the fact that the Faker has stolen money from unsuspecting tenants and buyers because Fakers do not refund security deposits and down payments.

In addition to the lack of indictments for stealing from unsuspecting tenants and buyers, the fake landlords and owners are sometimes given minimal sentences even though tougher sentences are available. For example, Paul Bakovich, a fake landlord who used Craigslist to scam prospective tenants, received a prison sentence of only three months for three counts of theft even though he could have been sentenced to a longer period of time.¹⁰³ Although he had a long criminal history,¹⁰⁴ he was given concurrent sentences for the theft crimes, and because he was already in county jail, he was immediately released for time served.¹⁰⁵ A year later, Mr. Bakovich was sentenced to six months of work release for the same crimes against new victims.¹⁰⁶ As explained in Part IV of this article, prosecutors need to seek and judges need to impose the harshest possible sentences. These Fakers are harming the most vulnerable citizens and defrauding them out of large amounts of money. If current statutes do not allow for tough sentences, they need to be amended to do so. Otherwise, a few months in jail merely give the Faker a short respite and time to create more elaborate schemes.

B. The Breachers: Devious Landlords Act with Impunity from Criminal Prosecution

Just like the consumer duped by a Faker is the victim of crime, a current tenant deceived by a Breacher is the victim of a crime. Recall Dynnaro You, who entered into a lease agreement with Wanda Johnson when a foreclosure action had already been filed against the property.¹⁰⁷ He continued to accept rental payments even after he lost the home in

¹⁰³ See Molly Rosbach, *Fake Landlord Going to Jail, Must Repay Scammed Renters*, SEATTLE TIMES, Nov. 14, 2009, at B3, available at 2009 WLNR 23112744 (reporting that he pleaded guilty to three counts of theft crimes).

¹⁰⁴ See Jennifer Sullivan, *Man Charged with Running Bogus-Landlord Scam Again*, SEATTLE TIMES, Aug. 26, 2010, at B1, available at 2010 WLNR 17083948 (reporting that Bakovich's criminal history dates back to 1992 and "includes 12 arrests and 23 warrants").

¹⁰⁵ See Rosbach, *supra* note 103.

¹⁰⁶ See Sullivan, *supra* note 104.

¹⁰⁷ Cejnar, *supra* note 60.

foreclosure proceedings.¹⁰⁸ Mr. You evidently convinced Ms. Johnson to continue making payments, because when the actual property manager representing the bank who had legal ownership of the property contacted her, she rebuffed his efforts to work out an amicable departure.¹⁰⁹ As a result, she had to suffer the hardship and embarrassment of being evicted when the sheriff arrived.¹¹⁰ Mr. You owned other residential properties, at least one of which was also in foreclosure.¹¹¹ He was never charged with a crime.¹¹²

It may seem harsh to argue that owner-landlords facing foreclosure should be charged with a crime. However, what the author is asserting is that the deceptive owner-landlord who misleads tenants into continuing to make rental payments should not enjoy a favored position. This wrongdoing is no different than the fake landlord or the fraudulent foreclosure rescuer. These owner-landlords cause renters to part with limited funds even though they know the renters will eventually have to move and even though they know they will not refund the renters' security deposits.¹¹³ Consequently, the Breachers rob tenants of money needed to find alternative housing. Part IV of this article will demonstrate that the Breachers, i.e., devious owner-landlords, are committing the crime of theft by deception.

C. The Deceivers: Foreclosure Rescue Defendants Sometimes Face only Civil Liability

Like the Breachers, foreclosure rescue defendants should be subject to criminal prosecution but often they face only civil liability for their actions. One can find numerous cases involving civil enforcement actions brought by the FTC and state attorneys general against foreclosure rescue companies and their operators.¹¹⁴ It appears that civil enforcement actions

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (reporting that when the agent for Wells Fargo Bank approached Ms. Johnson, she told the agent to contact Mr. You because she thought he was still her landlord).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ *See Johnson, Renters Evicted En Masse, supra* at 54, at 983 (stating that innocent tenants who suffer foreclosure-based evictions rarely recover their security deposits).

¹¹⁴ *See, e.g.,* Complaint at 1, *State v. U.S. Loan Auditors, Inc.* (Cal. Super. Ct. Oct. 6, 2010), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1998_document_6.pdf (noting that former California Attorney General Jerry Brown filed a lawsuit on October 6, (continued)

are the norm and criminal actions are not common at the state level.¹¹⁵ Regardless of whether the Deceivers are held civilly or criminally responsible, liabilities imposed on them are not enough to deter some repeat offenders and others from perpetrating foreclosure rescue fraud, as it remains one of the most common scams.¹¹⁶

Perhaps the lack of criminal cases against individuals offering dubious foreclosure rescue services is due to a perceived difficulty in proving a crime has been committed beyond a reasonable doubt. A prosecutor's

2010 against attorneys Gregg Stein, Sharon Lapin, and others for their perpetration of foreclosure rescue scams where borrowers were persuaded to file a predatory lending lawsuit to prevent foreclosure and collection of payments); Complaint at 1, *Commonwealth v. Greene*, No. 11-0209, 2011 WL 290461 (Mass. Super. Ct. Jan. 19, 2011); Complaint at 1–2, *Fed. Trade Comm'n v. Home Assure, LLC*, No. 8:09-cv-547-T-23 TBM, 2010 WL 1779310 (M.D. Fla. Mar. 24, 2009).

¹¹⁵ Several criminal cases were brought by the FBI against defendants operating foreclosure rescue companies, but very few criminal cases were brought by state and local law enforcement agencies. *See, e.g.*, Press Release, Fed. Bureau of Investigation, Phoenix Man Pleads Guilty to Defrauding 1,800 Victims in Foreclosure Rescue Scam (Oct. 17, 2011), *available at* <http://www.fbi.gov/phoenix/press-releases/2011/phoenix-man-pleads-guilty-to-defrauding-1-800-victims-in-foreclosure-rescue-scam>. For press releases about criminal cases involving foreclosure rescue crimes, type “foreclosure rescue” in the search box at <http://www.fbi.gov/>. A recent report appears to confirm the author's observation that criminal cases are being initiated primarily by FBI investigations, not state or local law enforcement agencies. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, HOMEOWNERSHIP PRESERVATION: FEDERAL EFFORTS TO COMBAT FORECLOSURE RESCUE SCHEMES ARE UNDERWAY, BUT IMPROVED PLANNING ELEMENTS COULD ENHANCE PROGRESS 3, 10, 12 (2010), *available at* <http://www.gao.gov/new.items/d10787.pdf> [hereinafter GAO REPORT, FEDERAL EFFORTS] (stating that it is difficult to distinguish data involving foreclosure rescue fraud and other types of fraud related to the mortgage crisis).

¹¹⁶ *See, e.g.*, Settlement Orders, *supra* note 98; Press Release, Fed. Trade Comm'n, Federal and State Agencies Target Mortgage Foreclosure Rescue and Loan Modification Scams (July 15, 2009), *available at* <http://www.ftc.gov/opa/2009/07/loanlies.shtm>; FIN. CRIMES ENFORCEMENT NETWORK, LOAN MODIFICATION AND FORECLOSURE RESCUE SCAMS: EVOLVING TRENDS AND PATTERNS IN BANK SECRECY ACT REPORTING 10 (2010), *available at* http://www.fincen.gov/news_room/rp/files/MLFLoanMODForeclosure.pdf (“Reports of foreclosure rescue scams increased substantially in the last eight months of calendar year 2009.”); GAO REPORT, FEDERAL EFFORTS, *supra* note 115 (citing several attorneys general as stating that foreclosure rescue fraud were at the top or near the top of complaints made by consumers).

ability to prove criminal fraud or theft is easy when a purported consultant takes the homeowner's money and does nothing in return, or when a Deceiver tricks the homeowner in transferring title. Given how criminal deception statutes are worded, it should not be difficult to prove that a foreclosure consultant or purchaser has committed a crime.

D. The Slackers: Subject to Criminal Sanctions only in Cleveland

Like the Breachers, the Slackers appear to enjoy impunity from criminal prosecution. It is rare to find cases involving criminal liability being imposed on Slackers, i.e., banks and real-estate speculators who refuse to abate nuisances at properties they own.¹¹⁷ However, the City of Cleveland has found ways to deter this type of behavior by entities that have apparently made a business decision to shift the cost of repairing and maintaining foreclosed properties onto communities.¹¹⁸

Under Cleveland's codified ordinances, business entities, including banks and real-estate speculators, can be charged with crimes for failing to correct housing code violations at properties they own.¹¹⁹ The City of Cleveland had to overcome the challenge of compelling corporate defendants to appear in Cleveland Municipal Housing Court.¹²⁰ For a while, presiding Judge Raymond Pianka overcame this challenge by holding trials against the banks and real-estate speculators in absentia, the result of which was criminal sentences with hefty fines.¹²¹ This tactic was successful in getting corporate actors to abate nuisances at their abandoned properties sometimes.¹²² However, in 2010, the Supreme Court of Ohio upheld an appellate court's decision overturning a \$100,000 fine Judge Pianka issued against then-titan Washington Mutual Bank. Based on this decision, the court also overturned a \$140,000 fine he issued against Destiny Ventures, an Oklahoma-based company. Both these companies

¹¹⁷ See Nagin, *supra* note 92.

¹¹⁸ See CLEVELAND, OH., CODE §§ 367.04, 367.99 (2011).

¹¹⁹ *Id.*

¹²⁰ Sandra Livingston, *Cleveland Housing Court Judge Gets Tough, Holds Absentee Landlords in Contempt Who Fail to Appear*, CLEVELAND.COM (June 18, 2009, 10:28 PM), http://blog.cleveland.com/metro/2009/06/cleveland_housing_court_judge.html.

¹²¹ *Id.*

¹²² *See id.*

owned numerous abandoned and blighted properties in Cleveland.¹²³ In a concurring opinion, Justice Maureen O'Connor agreed with the majority opinion, but chastised Washington Mutual and other banks for failing to take responsibility for their properties, thereby suggesting to Judge Pianka that if he employed other legal measures to make them responsible, these measures would be upheld.¹²⁴

Perhaps inspired by Judge O'Connor, and determined to use every legal means available to hold corporate Slackers responsible, Judge Pianka now uses civil contempt to compel the Slackers response to housing code violations at their properties.¹²⁵ Judge Pianka holds companies in contempt for failing to appear in criminal cases and issues fines of \$1,000 per day.¹²⁶ Currently, he has issued orders with contempt fines exceeding \$2.5 million, although collecting that money may be difficult.¹²⁷ The same appellate court that overturned the trial-in-absentia practice¹²⁸ recently upheld Judge Pianka's practice of assessing civil contempt fines for failing to appear in criminal cases.¹²⁹ The mounting civil contempt fines have been successful in encouraging some banks and companies to appear and

¹²³ *City of Cleveland v. Destiny Ventures, L.L.C.*, 929 N.E.2d 1038, 1038 (Ohio 2010). See also generally *City of Cleveland v. Wash. Mut. Bank*, 929 N.E.2d 1039 (Ohio 2010); Livingston, *supra* note 120.

¹²⁴ *Wash. Mut. Bank*, 929 N.E.2d at 1043 (O'Connor, J., concurring). Justice O'Connor stated:

I am aware that many lenders are now inundated with foreclosed properties. But . . . as the lawful property owners, [they] must now address the problem. They may choose to do so through cooperative efforts with city leaders. But ignoring the problem will only contribute to it, a result that is not legally, fiscally, or morally acceptable.

Id.

¹²⁵ See Joan Mazzolini, *Corporate Owners Charged with Housing Violations Fined \$1,000 a Day for Missing Court*, CLEVELAND.COM (Jan. 16, 2010, 1:00 AM), http://blog.cleveland.com/metro/2010/01/corporate_homeowners_charged_w.html.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See *City of Cleveland v. Wash. Mut. Bank*, 903 N.E.2d 384, 386 (Ohio Ct. App. 2008) (overturning conviction in absentia trial against bank for violation of Cleveland's municipal codes).

¹²⁹ See *City of Cleveland v. Go Invest Wisely, L.L.C.*, No. 95973, 2011 WL 4978917, at *3 (Ohio Ct. App. Oct. 20, 2011).

address the criminal indictments pending against them for housing code violations.¹³⁰

In addition to civil contempt fines, Judge Pianka creatively uses the doctrine of clean hands to further encourage the Slackers to address the housing code violations.¹³¹ Using what he calls “clean hands” evictions, Judge Pianka prevents banks and other property owners from pursuing evictions of tenants in property deemed valuable if these Slacker entities have not responded to building and health code violations at their other properties.¹³² More than any other city, the City of Cleveland has fought to hold banks and other Slackers responsible for the glut of abandoned and blighted properties there.¹³³ Although some of its endeavors have been unsuccessful,¹³⁴ the City of Cleveland and Housing Court Judge Pianka have found a successful means of imposing criminal liability on Slacker entities.¹³⁵ Other cities should consider amending their laws to permit

¹³⁰ See Livingston, *supra* note 120 (noting that Judge Pianka has “reduced fines by as much as 90 percent” for “companies that are willing to cooperate”).

¹³¹ Stan Bullard, *Talking Tough; Housing Court Judge Turns Up by Another Notch the Pressure He Already Has Placed on Banks, Homebuyers in Foreclosure Epidemic*, ALLBUSINESS (May 11, 2009), <http://www.allbusiness.com/legal/trial-procedure-judges/12866171-1.html>.

¹³² *Id.*

¹³³ See generally Johnson, *Fight Blight*, *supra* note 84, at 1198–1232 (describing litigation efforts by several cities, including Baltimore, Cleveland, and Buffalo to hold banks responsible for their abandoned properties); Kermit Lind, *Can Public Nuisance Law Protect Your Neighborhood from Big Banks?*, 44 SUFFOLK U.L. REV. 89, 90–91 (2011) (describing Cleveland’s litigation and non-litigation efforts and explaining how some banks invested in the City but then turned around and engaged in “business practices [that] undercut the value and benefit of their investments”).

¹³⁴ See Lind, *supra* note 133, at 108–10 (describing unsuccessful litigation that eventually made its way to the United States Sixth Circuit Court of Appeals); *City of Cleveland v. Ameriquest Mortgage Sec., Inc.*, 621 F. Supp. 2d 513, 536 (N.D. Ohio 2009) (dismissing the city’s public nuisance lawsuit against twenty-one financial institutions blaming them for the epidemic of subprime foreclosures).

¹³⁵ See Johnson, *Fight Blight*, *supra* note 84, at 1227–32 (analyzing the limitations of a city’s strategy of suing an individual entity in a single case and urging that cities launch mass litigation efforts to hold multiple entities responsible for multiple abandoned properties). *But see Ameriquest Mortgage*, 621 F. Supp. 2d at 536 (dismissing the Cleveland’s subprime-mortgage-related public nuisance lawsuit against numerous banks for

(continued)

similar legal recourse. Otherwise, the Slacker entities will continue to shift the burden of dealing with their properties onto the taxpayers and the communities where these properties are located.

IV. EXPANDING CRIMINAL LIABILITY FOR OPPORTUNISTIC WRONGDOERS

More needs to be done to criminally prosecute the opportunistic actors who exploit consumers in need of housing, especially in light of predictions that depressed housing sales and the foreclosure crisis will continue.¹³⁶ What the wrongdoers all have in common is that they do a cost-benefit analysis that causes them to conclude that it is more profitable to do wrong than to do right.¹³⁷ Furthermore, the wrongdoers believe that their misconduct is unlikely to be detected and, if it is, that their punishment will likely be light; therefore, they are not deterred from doing wrong.¹³⁸ However, states should disabuse the wrongdoers of their perceptions and indirectly protect consumers by explicitly making some misconduct a criminal offense under state law, and district attorneys should zealously prosecute wrongdoers under the statute.

failing to show, among other things, “any direct relationship between its alleged injury and [d]efendants’ conduct” of financing subprime lending).

¹³⁶ See Meg Handley, *Report: 45 Months to Clear Distressed Housing Inventory*, U.S. NEWS & WORLD REP. (Nov. 23, 2011), http://www.usnews.com/news/blogs/home-front/2011/11/23/report-45-months-to-clear-distressed-housing-inventory_print.html (predicting that it will take forty-five months to clear the United States’ shadow inventory of houses currently in foreclosure proceedings as well as post-foreclosure bank-owned properties); Brady Dennis, *Housing Experts Warn of Long Road Despite ‘Signs of Life’*, WASH. POST, Nov. 25, 2011, at A21, available at 2011 WLNR 24428062 (noting a senior U.S. economist at Bank of America Merrill Lynch comment stating “the millions of foreclosures—those still working their way through the legal system or foreclosed homes that are vacant and awaiting sale—have slowed any potential recovery”).

¹³⁷ See Michael L. Rustad, *The Uncert-Worthiness of the Court’s Unmaking of Punitive Damages*, 2 CHARLESTON L. REV. 459, 500 (2008).

¹³⁸ See Albert Bandura, *Social Cognitive Theory of Moral Thought and Action*, in HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT: VOLUME 1: THEORY 45, 46 & 53 (William M. Kurtines & Jacob L. Gewirtz eds., 1991) (“[I]f the punishment is seen as avoidable or easily tolerable, it may be less restraining.”).

A. The Breaching Owner-landlords and Theft by Deception

As stated previously, the Breachers, i.e., owner-landlords who collect rent while in foreclosure proceedings, enjoy impunity, but this behavior should be viewed as criminal. This section explains under what circumstances the Breacher's conduct should be considered a crime, but note that the author has not found any case involving the criminal prosecution of a Breacher.

Generally, an owner-landlord is under no duty to take the rent collected and use it to pay the mortgage.¹³⁹ However, collection of rent should be viewed as a crime when the owner-landlord crosses the line and deceives the tenant into continuing to make rental payments. To view it as deception, one must first understand what the owner-landlord's implied covenant is. "The covenant of quiet enjoyment is implied in all lease agreements."¹⁴⁰ This covenant guarantees that tenants will not be disturbed in their possession of the leased premises by landlords or anyone with paramount title over the landlords.¹⁴¹ Although originally meant to protect tenants against being ousted by one claiming title superior to these landlords, the covenant of quiet enjoyment has been "expanded to include the right of the tenant to have the beneficial enjoyment and use of the premises for the agreed term."¹⁴² When owner-landlords are in foreclosure proceedings and know they lack a meritorious defense to the foreclosure, the owner-landlords are breaching the covenant of quiet enjoyment because they know the tenants will eventually have to vacate the premises. This is true even though innocent renters technically have the right to stay for a period of time under state or federal law. Consider again the example of Ms. Johnson and the Breacher, Mr. You.¹⁴³ He allegedly led her to believe that everything was okay and continued to accept her rental payments despite the fact that he had lost ownership several months before her eviction. When she had been contacted by the bank three months or so before the eviction, she incorrectly assumed she should trust Mr. You, whom she did know, and not a bank representative, whom she did not know. As a result, she unknowingly let the clock run out on her ninety-day

¹³⁹ See generally 1 MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 8.1 (3d ed. 1990).

¹⁴⁰ *Chapman v. Brokaw*, 588 N.E.2d 462, 467 (Ill. App. Ct. 1992).

¹⁴¹ See 3 MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 29.201 (3d ed. 1990).

¹⁴² See Mark Dennison, *Cause of Action for Breach of Implied Warranty of Habitability in Residential Lease*, 25 CAUSES OF ACTION 2D § 6 (2004).

¹⁴³ Cejnar, *supra* note 60.

period to stay in the property under federal law.¹⁴⁴ She was then abruptly evicted and, having no money to rent another place, she had to move in with relatives. Mr. You's deceptive acts caused Ms. Johnson to squander her ninety-day period to save money to secure alternative housing. Consequently, his actions constitute a breach of the covenant of quiet enjoyment.

Not only are the owner-landlords breaching the covenant of quiet enjoyment, but they are also engaged in criminal deception when they either passively deceive the tenants by omitting information critical to the tenants or actively deceive the tenants by making verbal misrepresentations. In Ohio, aggravated theft occurs when the defendant knowingly deprives the owner of property by using deception.¹⁴⁵

Deception' means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.¹⁴⁶

Based on this definition, owner-landlords who lack any meritorious defense to a pending foreclosure proceeding are, by their omission or misrepresentation, creating the false impression that the tenants will be able to enjoy the benefit of their bargain. The omissions or misrepresentations serve the intended purpose of making the tenants continue rent payments, thereby depriving the tenant of funds necessary to secure alternative housing. One may argue there is no theft by deception if the tenants are able to stay in the leased premises for the month because then they would have received value for the rent paid. However, this view is incorrect because it ignores the fact that tenants will lose their deposit as

¹⁴⁴ See The Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (2009) (codified mainly at 12 U.S.C. 5220, notes).

¹⁴⁵ See OHIO REV. CODE ANN. § 2913.02(A)(3) (West 2011) ("No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services . . . by deception.").

¹⁴⁶ OHIO REV. CODE ANN. § 2913.01(A).

tenants in foreclosure-based evictions usually never recover their deposits.¹⁴⁷

The case for criminal theft by deception is even stronger when owner-landlords enter into leases with new tenants without informing them about the pending foreclosure proceedings because they know the tenants will lose their deposits prior to entering into the new leases. If owner-landlords would permit the tenant to live rent-free to the extent of the deposit paid, only then should the owner-landlords' conduct not be viewed as theft by deception.¹⁴⁸

States should adopt a statute that makes it easy for the district attorney to determine if an owner-landlord has committed the crime of theft by deception. State lawmakers could impose a legal duty on owner-landlords to put any rent collected during a foreclosure proceeding in escrow pending resolution of the foreclosure, and impose a duty to notify tenants in writing and verbally about the pending foreclosure proceeding. If the owner-landlords cannot prove that they have notified the tenant of the foreclosure or that they have placed the rent money in an escrow account managed by an unrelated third party, then a theft has occurred.

If the proposal above is viewed as too draconian, states could adopt the Model Penal Code's (MPC) definition of theft by deception. Under MPC § 223.3(4), individuals commit theft by deception when they "fail[] to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which [they] transfer[] or encumber[] in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record."¹⁴⁹ Owner-landlords who are in foreclosure proceedings for failure to make mortgage payments know that the foreclosure lawsuit is an impediment to the tenant's enjoyment of the leased property, but they continue to collect rent from the tenant. As a result, prosecutors should charge these Breachers with theft by deception to send the message that this behavior is illegal.

¹⁴⁷ See Eloisa Rodriguez-Dod, *Stop Shutting the Door on Renters: Protecting Tenants from Foreclosure Evictions*, 20 CORNELL J.L. & PUB. POL'Y 243, 267 (2010) (explaining the economic hardships tenants endure when forced to move as a result of a foreclosure).

¹⁴⁸ This scenario assumes the owner-landlord is still the owner of record. If the owner-landlord has already lost ownership due the foreclosure process, the owner-landlord would then be a Faker and would have committed a crime.

¹⁴⁹ MODEL PENAL CODE § 223.3(4) (1985).

B. The Slackers and Organizational Criminal Liability

Besides asserting that the Breachers are committing crimes, the author asserts that the Slackers' failure to fulfill the legal duty of abating nuisances at properties they own should be viewed as a crime. Politicians and others support the assertion that those who caused the subprime foreclosure crisis should be prosecuted as criminals.¹⁵⁰ The City of Cleveland is in the minority of jurisdictions where a property owner's failure to properly maintain its property in compliance with applicable codes or ordinances can result in a criminal indictment.¹⁵¹ Cleveland's codified ordinances contain several provisions that require the property

¹⁵⁰ See, e.g., DANNY SCHECHTER, *PLUNDER, INVESTIGATING OUR ECONOMIC CALAMITY AND THE SUBPRIME SCANDAL* 23, 124, 165 (2008) (stating that subprime crisis constitutes a "white-collar crime wave" that has decimated neighborhoods with abandoned and blighted properties); Becky Quick, *Why No Jail Time for Wall Street*, CNN MONEY (June 23, 2010, 4:31 AM), http://money.cnn.com/2010/06/23/news/companies/prosecutors_ignoring_wall_street.fortune/index.htm; Jennifer M. Smith, *Mortgage Foreclosures, Mortgage Morality, and Main Street: What's Really Happening?*, 25 J. CIV. RTS. & ECON. DEV. 525, 557 (2011).

Crimes committed by mortgage brokers who originated loans to borrowers who did not comprehend the terms, could not afford to pay the loan, and should not have qualified; appraisers who overvalued property to obtain additional business from dishonest brokers; and banks and brokerage firms that originated or bought, packaged, and resold the mortgages for stiff fees.

Id. See also *City of Cleveland Sues Lenders over Foreclosures*, SACRAMENTO BUS. J. (Jan. 11, 2008, 2:42 PM), <http://sacramento.bizjournals.com/sacramento/stories/2008/01/07/daily58.html> (quoting Cleveland Mayor Frank Jackson as saying "[t]o me, this is no different than organized crime or drugs"); Steve Kastenbaum, *Cleveland Sues Lenders over Subprime*, CNN MONEY (Jan. 11, 2008, 2:38 PM), http://money.cnn.com/2008/01/11/real_estate/cleveland_lawsuit/ (Mayor Jackson stated that "[i]f you look at the end result of organized crime activity on neighborhoods, cities and individual lives, sucking equity out, you see the same thing here").

¹⁵¹ See generally 1 ARDEN H. RATHKOPF & DAREN K. RATHKOPF, *RATHKOPF'S THE LAW OF ZONING AND PLANNING* § 8:10 (4th ed. 2006) ("Many states and localities have adopted statutes or ordinances authorizing the abatement of or imposing civil penalties on activities that constitute a public nuisance.").

owners to maintain their properties internally¹⁵² and externally,¹⁵³ and to make certain repairs.¹⁵⁴ Moreover, to keep property owners from evading Cleveland law by transferring properties that have code violations, a property owner cannot transfer this property unless the owner first complies with other provisions of the ordinances.¹⁵⁵ Property owners who violate these ordinances are guilty of a misdemeanor¹⁵⁶ and can be fined for each violation.¹⁵⁷ Cleveland's ordinances explicitly state that organizations found to be in violation are also guilty of a misdemeanor and are subject to fines.¹⁵⁸ These violations are strict liability offenses, in that no *mens rea* needs to be established to convict.¹⁵⁹

Ohio appellate courts have upheld most of Judge Pianka's legal and equitable methods of holding the Slackers criminally responsible.¹⁶⁰ For example, Ohio appellate courts have upheld misdemeanor convictions against corporations that impose hefty fines, even though the commercial

¹⁵² See, e.g., CLEVELAND, OH., CODE § 3101.10(a) ("All structures and all parts thereof, both exterior and interior, shall be maintained in good repair and shall be capable of performing the function for which such structure or part or any feature thereof, was designed or intended to be used.").

¹⁵³ See, e.g., *id.* § 3103.09(c)(3). Under this section, if the property is declared a nuisance, "the owner[, after effectively boarding it,] shall monitor and maintain the structure and its surrounding premises in a safe, sanitary and secured condition." *Id.*

¹⁵⁴ See, e.g., *id.* §§ 3101.10(c) ("Broken window glass shall be replaced with glass or other suitable material that will effect a good appearance."), 3101.10(f) ("A building damaged by fire or other causes shall be repaired to its original condition and as may otherwise be accepted as good engineering practice.").

¹⁵⁵ See *id.* § 367.12 (prohibiting property owners from entering into a contract for sale "without furnishing to the purchaser a Certificate of Disclosure . . .").

¹⁵⁶ See *id.* § 3103.99(a) ("Whoever violates any provision of this Building Code for which no other penalty is provided or any rule or regulation or order promulgated thereunder, or any code adopted herein, or fails to comply with the lawful order issued pursuant thereto is guilty of a misdemeanor of the first degree.").

¹⁵⁷ See *id.* ("Each day during which noncompliance or a violation continues shall constitute a separate offense.").

¹⁵⁸ See *id.* § 3103.99(c).

¹⁵⁹ See *City of Cleveland v. GSX Chem. Servs. of Ohio*, No. 60512, 1992 WL 95735, at *7 (Ohio Ct. App. May 7, 1992); *City of Cleveland v. Stonecrest Invs., L.L.C.*, No. 09-CRB-34175 (Cleveland Municipal Ct., Housing Div. May 20, 2010).

¹⁶⁰ *But see* notes 122–24 and accompanying text (striking down trials in absentia).

property owners argued they were excessive and contrary to law.¹⁶¹ Courts have also upheld Judge Pianka's imposition of civil contempt fines that accrue at a rate of \$1,000 for each day the property owner fails to appear and respond to criminal charges for violating Cleveland's ordinances.¹⁶² Zealous prosecution by the city attorney and the imposition of just sentences and fines by Judge Pianka have resulted in Cleveland's codified ordinances being successfully used to get some banks and other commercial property owners to comply with the law.¹⁶³ Cities relying on civil laws alone will be unable to get some Slackers to engage in socially responsible behavior.¹⁶⁴ Therefore, other cities should look to Cleveland's codified ordinances as a model for getting Slackers to cease acting opportunistically and to assume responsibility for monitoring and maintaining their properties. These laws would be a valid exercise of the police power to protect the public health, safety, and general welfare of those living near unoccupied homes with housing code violations.¹⁶⁵

¹⁶¹ See, e.g., *City of Cleveland v. Go Invest Wisely, L.L.C.*, Nos. 95189–95206, 2011 WL 2671927, at *1, *4, *7 (Ohio Ct. App. July 7, 2011) (upholding Cleveland Municipal Court's imposition of \$90,000 in fines for commercial owner's violation of ordinance's restrictions on the transfer of property with code violations even though the owner asserted its gross profit on the sales transactions was only \$34,400); *City of Cleveland v. Go Invest Wisely, L.L.C.*, Nos. 95172–95177, 2011 WL 2476428, at *1, *4 (Ohio Ct. App. June 23, 2011) (upholding Cleveland Municipal Court's imposition of \$65,000 in fines against Go Invest Wisely, L.L.C., for its violations of probation conditions, including failing to produce lists and photographs of its properties located in Cleveland and failing to properly secure its unoccupied homes).

¹⁶² See, e.g., *City of Cleveland v. Paramount Land Holdings, L.L.C.*, Nos. 96180 et al., 2011 4978480, at *1, *3, *4 (Ohio Ct. App. Oct. 20, 2011) (stating that “[t]he Ohio Supreme Court has held that the power to punish for contempt is an inherent power of a court, which is not subject to legislative control” and upholding the Municipal Court's imposition of contempt fines totaling \$112,000).

¹⁶³ See, e.g., *Go Invest Wisely*, 2011 WL 2476428, at *4.

¹⁶⁴ See, e.g., *Oakland Faith Leaders Close Wells Fargo Accounts in Protest*, THE OAKLAND TRIB. (Aug. 10, 2011), <http://www.oaklandcommunity.org/media-coverage?id=0018> (stating that the City of Oakland has issued numerous fines against Wells Fargo for blighted and vacant properties but it continues to fight them).

¹⁶⁵ See Johnson, *Renters Evicted En Masse*, *supra* 54, at 999 (asserting that case law supports the conclusion that restrictions on the bank's use of foreclosed property is constitutional because it is being done “in furtherance of a valid governmental purpose,
(continued)

C. The Fakers and Imposition of Stiffer Criminal Sentences

All who understand criminal law would agree that fake owners and landlords have committed crimes, but here will be disagreement about whether the Fakers should be zealously prosecuted to the fullest extent of the law. The Fakers, who often break into unoccupied homes to perpetrate their scams, have been charged with and found guilty of numerous crimes, including grand theft,¹⁶⁶ larceny,¹⁶⁷ burglary,¹⁶⁸ fraud,¹⁶⁹ theft by deception,¹⁷⁰ and false pretenses.¹⁷¹

In addition to the state law property crimes, fake landlords and owners should also be subject to federal prosecution for wire fraud.¹⁷² To prove wire fraud, the government needs to show: (1) a scheme to defraud; (2) the use of interstate wires incident to the scheme; and (3) an intent to defraud.¹⁷³ Because fake landlords and owners use popular websites, such as Craigslist, and cell phones to bait and deceive consumers, they have used interstate wires for their scheme.¹⁷⁴ Conviction for wire fraud should

serve[s] the public interest and are considered a proper exercise of the police power even though they may result in some economic disadvantage” to the bank).

¹⁶⁶ See *Richmond Roundup*, SUNSET BEACON (Sept. 2011), <http://www.sunsetbeacon.com/archives/richmondreview/2011editions/Sept11/roundup.html> (stating that a fake landlord pleaded guilty to grand theft for taking in excess of \$100,000 from prospective renters in Richmond, California).

¹⁶⁷ See Carl McGowan, *Prison Sentence for Fake ‘Landlord’*, NEWSDAY, Oct. 7, 2009, at A37, available at 2009 WLNR 19732931 (grand larceny); Jonathan Bandler, *Worker Admits \$32G Theft*, THE JOURNAL NEWS (Westchester, N.Y.), Jan. 14, 2006, at A3, available at 2006 WLNR 25239085.

¹⁶⁸ See McGowan, *supra* note 167.

¹⁶⁹ See *Channel 6 News* (Miami NBC 6 WTVJ-FL television broadcast Jan. 21, 2011), available at 2011 WLNR 1336496.

¹⁷⁰ See *id.* (grand theft).

¹⁷¹ See *Morning News* (ABC 13 KTNV-NV television broadcast Sept. 5, 2008), available at 2008 WLNR 16889484.

¹⁷² Almost all cases uncovered in research involve prosecution of fake landlords or owners under state law. See *supra* notes 99–106 and accompanying text.

¹⁷³ See 18 U.S.C.A. § 1343 (West 2008).

¹⁷⁴ See Randall D. Eliason, *Surgery with a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 J. CRIM. L. & CRIMINOLOGY 929, 954 (2009) (stating that wire transmission “includes not only traditional land-line telephone calls, but cell phone calls, faxes, e-mails, text messages, and Internet transmissions (wired or wireless)”). Again,
(continued)

yield tougher sentences than conviction under state law, where fake landlords have received sentences as short as three months.¹⁷⁵ The Fakers should also be charged with multiple counts of wire fraud because they defraud the prospective renters or buyers who part with money, as well as the true owners who are deprived of that money and deprived of the right to enjoy their properties. Defrauding the renter or buyer should not be minimized because the Fakers rob these consumers of their security deposits and down payments.¹⁷⁶

D. The Deceivers and Imposition of Criminal Sentences Including Incarceration

Many Deceivers are guilty of crimes even when they claim to have acted on behalf of homeowners. The easy cases to establish are the theft crimes where the so-called foreclosure relief purchaser tricked the homeowner into transferring title away from the owner, or where the so-called consultant did nothing after taking the homeowner's money.¹⁷⁷ MPC Section 223.3, and state statutes like it, support the assertion that individuals claiming to rescue people from foreclosure are committing the crime of theft by deception even when they have made attempts to contact the mortgage company.¹⁷⁸ Subsection 223.3(1) provides that defendants are guilty of theft by deception if they "create[] or reinforce[] a false impression, including false impressions as to law, value, intention or other state of mind."¹⁷⁹

Consider how the MPC's crime of theft by deception applies to Mario Watkins.¹⁸⁰ One could conclude that he committed theft by deception when he created a false impression. Although he claimed that his "firm has now been providing *solutions for homeowners nationwide since 1991*,"

in most white-collar cases today there will be an abundance of these transmissions, each providing a potential jurisdictional hook for a federal criminal prosecution.

¹⁷⁵ See Rosbach, *supra* note 103 (reporting that Bakovich, a landlord who pleaded guilty to three counts of theft crimes, only received three months in jail time).

¹⁷⁶ See, e.g., State v. Burrell, No. 96123, 2011 WL 5320668, at *1, *3 (Ohio Ct. App. Nov. 3, 2011) (lacking any indictment against the defendant for defrauding the renter but upholding the defendant's conviction for aggravated theft from the true owner).

¹⁷⁷ See, e.g., *supra* notes 65–81 and accompanying text.

¹⁷⁸ MODEL PENAL CODE § 223.3(4) (1985).

¹⁷⁹ *Id.* § 223.3(1).

¹⁸⁰ See *supra* notes 73–79 and accompanying text (discussing the Ohio AG's lawsuit against Watkins for violating state consumer protection statutes).

his deposition testimony revealed that during this time he had been working in school admissions and that he had no training or experience assisting homeowners in foreclosure prior to starting his foreclosure relief company.¹⁸¹ The victims who were willing to come forward stated that he made oral representations promising to help them avoid foreclosure.¹⁸² He collected fees as high as \$3,500, far in excess of the \$75.00 fee permitted under state law.¹⁸³ In violation of several other provisions of state law, Watkins lacked insurance for his business,¹⁸⁴ and he commingled the fees collected with funds in his bank account and used them to finance his personal lifestyle.¹⁸⁵ Also, in violation of state law, he failed to refund to the homeowners the money they paid.¹⁸⁶ The entire case against Mr. Watkins leads to only one unmistakable conclusion—he intentionally created the false impression that he had the ability to save the homeowners’ property even though he knew that he lacked this ability. As a result, he could have been convicted of theft by deception if only he had been prosecuted.

As would be expected, Mr. Watkins claimed that he sent letters to the mortgage holders and contacted them by telephone to negotiate a modification.¹⁸⁷ Presumably, he would argue that this militates against a finding of intent to defraud. If someone claimed to have many years of experience as a doctor, but lacked any training or license to practice medicine, that individual would still be guilty of a crime designed specifically to cover this kind of wrongdoing.¹⁸⁸ However, a tailor-made criminal statute for foreclosure relief con artists does not exist; therefore, prosecutors must seek to convict people like Mr. Watkins under general theft statutes. It is insufficient to leave foreclosure relief con artists to civil prosecution by the state’s attorney general for several reasons, including the fact that some of these foreclosure con artists reoffend under new

¹⁸¹ Plaintiff’s Motion for Summary Judgment Against Defendants at Exhibit 3–4, *State v. Watkins*, No. 08 CV 016464 (Franklin Cnty. Ct. C.P. Sept. 15, 2009) (admitting that he was employed at truck driving school during this time period).

¹⁸² *Id.* at 7–8.

¹⁸³ *Id.* at 12.

¹⁸⁴ *Id.* at 14.

¹⁸⁵ *Id.* at 13.

¹⁸⁶ *Id.* at 7–8.

¹⁸⁷ *Id.* at Exhibits 3–4.

¹⁸⁸ *See, e.g.*, OHIO REV. CODE ANN. § 4731.341 (West 2011) (making it a crime to practice medicine without a license).

names once they have been forced to shut down operations under their previous names. Publicized prosecution of people like Mr. Watkins is necessary to deter foreclosure relief scams.¹⁸⁹

In summary, the Fakers¹⁹⁰ and the Deceivers¹⁹¹ are for the most part the only opportunistic actors that are being criminally prosecuted for their misconduct. However, more prosecution is necessary because the Fakers and the Deceivers are able to handle the short sentences handed down to them, and after getting out of jail, continue to cheat consumers.¹⁹² Moreover, many Deceivers are not being criminally prosecuted at all,¹⁹³ and imposition of civil liability by the FTC and state attorneys general do not appear to deter some of them from continuing to defraud homeowners.¹⁹⁴ Except for the business entities that violate Cleveland's housing ordinances, Slackers¹⁹⁵ and Breachers¹⁹⁶ have been able to do wrong and suffer little or no consequences. States and cities should pass laws that criminalize this behavior and district attorneys should prosecute these criminals to the fullest extent of the law. Otherwise, Breachers and Slacker entities have no incentive to act in a morally and socially responsible way.

¹⁸⁹ Foreclosure con artists should be guilty under Model Penal Code § 223.3(2), which provides that a defendant is guilty if the defendant “prevents another from acquiring information which would affect [the defendant’s] judgment of a transaction.” MODEL PENAL CODE § 223.3(2) (1985). This crime occurs when the foreclosure consultant tells the homeowner to stop all communication with the mortgage company. *See, e.g.*, Complaint at 4, *State v. Schmidt*, No. 08 CV 976 (Wood Cnty. Ct. C.P. Oct. 14, 2008) (alleging that Schmidt told her clients to stop making mortgage payments and to refrain from contacting their lender because she would be handling the loan modification negotiations).

¹⁹⁰ *See supra* notes 99–106 (discussing crimes that fake landlords and owners are accused of having committed).

¹⁹¹ *See supra* notes 114–15 (describing crimes that foreclosure rescue consultants and purchasers are accused of having committed).

¹⁹² *See supra* notes 103–06 and accompanying text.

¹⁹³ *See supra* note 115 and accompanying text.

¹⁹⁴ *See supra* note 116 and accompanying text.

¹⁹⁵ *See supra* notes 117–35 (explaining that except in Cleveland, banks and other property owners shift the cost of maintaining their blighted unoccupied homes).

¹⁹⁶ *See supra* text accompanying note 113 (explaining why owner-landlords in foreclosure should be subject to criminal prosecution for taking tenants’ rental payments and deceiving them into believing everything is okay).

V. CRAFTING SENTENCES THAT DETER OPPORTUNISTIC WRONGDOERS AND EDUCATE CONSUMERS

Assuming that an opportunistic actor has pleaded guilty or has been convicted, courts may elect to impose fines, including restitution fines, and such fines will be sufficient to deter future opportunistic behavior. Courts, however, may have to impose prison sentences to deter other opportunistic wrongdoers. In light of overcrowding and other problems associated with sentences requiring incarceration,¹⁹⁷ shaming sentences may be an effective alternative to incarceration to deter housing-related fraud.¹⁹⁸

Shaming sentences “create a situation in which the public exposure of defendant’s crime and the public exposure of defendant to the victims of [the defendant’s] crime” help rehabilitate the offender, and thus protect the public.¹⁹⁹ Although many scholars have condemned shaming punishments as unnecessary humiliation and as cruel and unusual punishment,²⁰⁰ some scholars recognized that shaming sentences can be effective where they truly serve some legitimate purpose other than to humiliate the wrongdoer.²⁰¹ Moreover, courts have upheld shaming sentences as constitutional.²⁰²

¹⁹⁷ See, e.g., Jason S. Orduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 ELDER L.J. 173, 173–74 (1996) (discussing overcrowding, the long-term increase in prison populations, and the difficulties posed by an increasingly older prison population).

¹⁹⁸ See Jennifer Bellott, *To Humiliate or Not to Humiliate: Does the Sentencing Reform Act Permit Public Shaming as a Condition of Supervised Release?*, 38 U. MEM. L. REV. 923, 934 (2008) (discussing how “many judges believe they can deter or rehabilitate” offenders through the use of “shaming conditions as part of an offender’s sentence”).

¹⁹⁹ See *United States v. Gementera*, 379 F.3d 596, 602 (9th Cir. 2004), *cert. denied*, 126 S. Ct. 735 (2005).

²⁰⁰ See, e.g., Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2162–63 n.22 (2001) (treating shaming and humiliation as the same).

²⁰¹ See Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1061–63 (2009).

²⁰² *Gementera*, 379 F.3d at 609–10 (citing several courts upholding shaming sentences as constitutional and holding that a sentence requiring the defendant to wear for a limited time a signboard stating “I stole mail” did not violate the Eight Amendment of the United States Constitution). For a discussion asserting that a shaming sentence is legitimate so long as the shaming condition bears a reasonable relationship to the crime and to the defendant’s rehabilitation, see Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 (continued)

The Court of Appeals for the Ninth Circuit upheld a shaming sentence in *United States v. Gementera*.²⁰³ There, the trial court sentenced a defendant, who pleaded guilty to mail theft, to supervised release conditions requiring the defendant to stand outside a post office wearing a signboard stating, “I stole mail. This is my punishment.”²⁰⁴ Although the defendant was challenging only this condition of his supervised release as violating the Sentencing Reform Act, the Ninth Circuit focused on all of the supervised release conditions, which included: wearing the signboard during daylight hours, observing postal customers visiting the “lost or missing mail” window, writing letters of apology to the victims, and delivering lectures on mail theft at three local schools.²⁰⁵ The Ninth Circuit held that all of the conditions, taken together, served to primarily rehabilitate,²⁰⁶ and also to generally deter future wrongdoing and to protect the public.²⁰⁷ The defendant argued that wearing the sign would not serve a legitimate purpose because it would only humiliate him, not rehabilitate him.²⁰⁸ The court rejected this argument noting that nearly all criminal offenses and penalties “cause shame and embarrassment,” and that “a condition caus[ing] shame or embarrassment does not automatically render a condition objectionable; rather, such feelings generally signal the defendant’s acknowledgment of [the defendant’s] wrongdoing.”²⁰⁹ Therefore, the conditions served legitimate purposes and were reasonably related to the offense of mail theft.²¹⁰ The court also stated that the conditions, viewed comprehensively, were an example of re-integrative shaming, not stigmatizing shaming, because they provided the defendant

U. CHI. L. REV. 733, 794 (1998) (supporting shaming sentences that are designed to educate the offender and providing examples of sentences that do so, as well as sentences that backfire). See also Darren Azman, Note, *Don’t Tell Mom I Didn’t Pay My Taxes!: The Efficacy of State Shaming Campaigns on Taxpayer Compliance and Ideas for the Future*, 63 THE TAX LAW. 1157, 1269–77 (2010).

²⁰³ 379 F.3d 596 (9th Cir. 2004).

²⁰⁴ *Id.* at 598–99.

²⁰⁵ *Id.* at 599, 606.

²⁰⁶ *Id.* at 606.

²⁰⁷ *Id.* at 602.

²⁰⁸ *Id.* at 601.

²⁰⁹ *Id.* at 605.

²¹⁰ *Id.* at 607.

with an opportunity to seek forgiveness and repair the defendant's relationship with the community that the defendant harmed.²¹¹

Finally, the Ninth Circuit rejected the defendant's argument that the condition was cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.²¹² Relying on other cases with similar challenges, the court stated that "it would stretch reason to conclude that eight hours with a signboard, in lieu of incarceration, constitutes constitutionally cruel and unusual punishment."²¹³

A. Shaming Sentences for Slackers Serves Both a Rehabilitative and an Educational Purpose

The *Gementera* case is relevant to the shaming sentences proposed in this article. Convicted Slackers should be required to pay for billboard advertisements with legitimate purposes. For instance, Go Invest Wisely, a Utah-based bulk property purchaser,²¹⁴ would be an ideal candidate for reintegrative shaming. Go Invest Wisely was not only convicted for violating numerous provisions of Cleveland's housing ordinances,²¹⁵ but it has also been embroiled in litigation in other states for misconduct.²¹⁶ Assume that Judge Pianka sentenced Go Invest Wisely by requiring it to pay for a billboard advertisement placed at a well-known corner in the neighborhood where it owned several abandoned, blighted properties. The

²¹¹ *Id.* at 606–07 (quoting JOHN BRAITHWAITE, CRIME, PUNISHMENT AND REINTEGRATION 55 (1989)).

²¹² *Id.* at 610. See also U.S. CONST. amend. VIII.

²¹³ *Gementera*, 379 F.3d at 610.

²¹⁴ *City of Cleveland v. Go Invest Wisely, L.L.C.*, Nos. 95189–95206, 2011 WL 2671927 (Ohio Ct. App. July 7, 2011).

²¹⁵ Go Invest Wisely violated numerous probation conditions when it failed to produce lists and photographs of its properties located in Cleveland, and when it failed to properly secure several blighted properties. See, e.g., *Go Invest Wisely*, 2011 WL 2671927, at *6 (upholding \$90,000 in fines against Go Invest Wisely for violation of the ordinance's restrictions on the transfer of property with code violations). See also *City of Cleveland v. Go Invest Wisely, L.L.C.*, Nos. 95172–95177, 2011 WL 2476428 (Ohio Ct. App. June 23, 2011) (holding that the trial court's imposition of fines was not excessive because of Go Invest Wisely's "long history of noncompliance with Cleveland's building and housing codes").

²¹⁶ See, e.g., *Sharma v. Freedom Inv. Club, Ltd.*, No. C 10-01172 JW, 2010 WL 4065616 (N.D. Cal. 2010); *Wolverton v. Cass Cnty. Treasurer*, No. 296002, 2011 WL 149980 (Mich. Ct. App. 2010).

billboard could contain a picture²¹⁷ of Go Invest Wisely's President and Financial Officer, Brad Hess, and state his name as well as the company's name. It could contain the following statements:

My company, Go Invest Wisely, was convicted of several crimes for refusing to repair and maintain abandoned houses in this community. My company was fined over \$100,000. We now intend to comply with all applicable laws. You have the right to live near safe and properly maintained homes. If you see a house that appears to be abandoned, report it to a Cleveland housing inspector at 216-664-2282.

The billboard advertisement described above would serve the legitimate purpose of rehabilitation. First, the admission of wrongdoing has to be part of the rehabilitation.²¹⁸ Slacker entities usually plead no contest, but a criminal sentence requiring billboard advertisements like the one proposed above would force the Slacker property owner to admit wrongdoing. Second, as noted in *Gementera*, shaming sentences serve to rehabilitate if the condition makes the defendant acknowledge the seriousness of the defendant's crime and harm to the victims.²¹⁹ As the Ninth Circuit Court of Appeals stated in *Gementera*,

[T]he humiliation or shame [the defendant] experiences should serve the salutary purpose of bringing [the] defendant in close touch with the real significance of the crime [the defendant] has acknowledged committing.

²¹⁷ The author proposes using billboard advertisements as a shaming punishment because all people living in the affected community can see them. A mug shot photo is the preferred photo identification because a picture of an actual person will draw the attention of members of the community. See, e.g., Donna Miller, *Most-Wanted Fugitives to Appear on Digital Billboards*, CLEVELAND.COM (Feb. 15, 2010, 2:28 PM), http://blog.cleveland.com/metro/2010/02/marshals_services_most_wanted.html (reporting that an FBI spokesperson stated that “[w]e have been featuring fugitives, missing persons and unsolved crimes [on billboards] for several years in the Cleveland and Akron area through Clear Channel” and that this use of billboards “has been a real success, resulting in the arrest of many of our most wanted”).

²¹⁸ See *Gementera*, 379 F.3d at 603 (citing to *Gollaher v. United States*, 419 F.2d 520, 530 (9th Cir. 1969) (“It is almost axiomatic that the first step toward rehabilitation of an offender is the offender’s recognition that he was at fault.”).

²¹⁹ *Gementera*, 379 F.3d at 601–02.

Such an experience should have a specific rehabilitative effect on defendant that could not be accomplished by other means, certainly not by a more extended term of imprisonment.²²⁰

A shaming condition is also a reasonable rehabilitative measure if the defendant appears to lack an appreciation that the defendant's offenses have harmed real victims. The Ninth Circuit upheld the lower court's conditions that were "aimed [at] break[ing] the defendant of the illusion that [the defendant's] theft was victimless or not serious," and even though "[m]ail theft is an anonymous crime . . . [it] has palpable significance to real people within [the defendant's] community."²²¹ Likewise, the Slacker banks and corporations that refuse to abate nuisances at their properties need to be disabused of the illusion that their crimes are trivial or victimless. Even though these Slackers tend to be located out of state and therefore are oblivious to the damage their inaction causes, the harm and danger that abandoned and blighted properties inflict on nearby residents and the community is pervasive and well-documented.²²² Besides being a public acknowledgement of wrongdoing, the billboard advertisement would be rehabilitative because it displays the Slacker's commitment to obeying the law and to protecting communities.

In addition to a rehabilitative purpose, the proposed billboard advertisement would serve the legitimate purposes of general deterrence and public protection. It would deter some property owners from similar wrongdoing because it would serve as notice that wrongdoing is likely to be detected and punished with stiff fines. Scholars have recognized that white-collar criminals commit crimes because they decide it is more beneficial to do wrong, and they believe their wrongdoing will not be discovered or punished.

The proposed billboard advertisement would also protect the general public because it would be educational. Unlike the victims in *Gementera*, who knew that mail stealing is a crime, the victims of the bank and corporate Slackers might not know that the failure to repair a blighted property is a crime. The billboard would inform residents of their right to be free from public nuisances and would inform them about what actions

²²⁰ *Id.* at 602.

²²¹ *Id.*

²²² See Johnson, *Fight Blight*, *supra* note 84, at 1180–83 (explaining the economic and non-economic harm inflicted on communities from the presence of abandoned and blighted properties).

they can take if they notice abandoned and blighted properties in their neighborhoods.

For those concerned that this type of a billboard advertisement would be too stigmatizing, consider the numerous protests over the last few years aimed at Wall Street and big banks. These institutions have been blamed for partially causing the Great Recession and continuing the foreclosure crisis. Furthermore, many believe these institutions were not deserving of the taxpayer bailouts they received. Therefore, a billboard containing an admission to their wrongdoing and a commitment to obey the law in the future is likely to help them repair their image in the communities they have harmed. Consequently, the billboard would serve a re-integrative function. The length of time a billboard advertisement remains up could depend on a number of factors, including the number of violations committed by the Slacker entity, the duration of the unabated nuisance, and the number of properties the Slacker owns in the community. Although billboards can be costly, they appear to be very inexpensive when compared to the types of fines that have been imposed on Slacker entities.²²³ Moreover, once the Slacker has addressed its code violations, it would be free to pay for advertising that would repair any damage done to the Slacker's image.²²⁴

²²³ Compare Chelsea Phua, *Billboard Seeks Help in Sacramento Homicide Case*, THE SACRAMENTO BEE, July 12, 2010, available at 2010 WLNR 13939476 (stating that the "typical cost of renting a billboard for advertisements in midtown Sacramento is about \$2,000 a month") with *City of Cleveland v. Go Invest Wisely, L.L.C.*, Nos. 95189–95206, 2011 WL 2671927, at *6 (Ohio Ct. App. July 7, 2011) (upholding Cleveland Municipal Court's imposition of \$90,000 in fines for commercial owner's violation of an ordinance that restricts the transfer of any property with code violations).

²²⁴ See, e.g., John Deighton & Leora Kornfeld, *United Breaks Guitars*, HARV. BUS. REV., Aug. 25, 2010. Musician Dave Carroll was angry when United Airlines' baggage handlers broke his guitar and then refused to pay for it. *Id.* at 3. He made a video that he posted on YouTube which went viral, with over ten million views and international media attention. *United Breaks Guitars*, YOUTUBE.COM (July 6, 2009), <http://www.youtube.com/watch?v=5YGc4zOqozo> (singing "United you broke my Taylor guitar, you broke it you should fix it, United breaks guitars"). The negative attention caused United Airlines' reputation to take a significant hit, and reviews of the stock prices showed a 10% drop after the video was released, costing shareholders \$180 million. Deighton & Kornfeld, *supra*, at 1. Despite this negative attention, United Airlines was able to utilize social media to apologize and begin rehabilitating its image. *Id.* at 4–7. The airline donated money to a music school and promised to do better. *Id.* at 5. This example illustrates the power of
(continued)

B. Shaming Punishments Would Also Be Effective in Deterring Breachers' Bad Behavior and Alerting Potential Victims of These Scams

Like re-integrative shaming sentences for the Slackers, these sentences should be imposed on Breachers. Owner-landlords who mislead unsuspecting tenants into signing leases or continuing to pay rent even though the property is in foreclosure are ideal candidates for re-integrative shaming punishments.²²⁵ Imposing restitutionary fines may be sufficient to get some Breachers to comply with the law. However, like the Slackers, some Breachers will continue to view wrongdoing through the prism of a cost-benefit analysis and conclude it is more beneficial to continue collecting rent even though losing the rental property to foreclosure is imminent.

If the Breacher is the owner of multiple residential rental properties like Dynnarou You,²²⁶ a shaming billboard advertisement would be suitable punishment, in addition to restitutionary fines (e.g., fines for failure to return security deposits). Besides containing the owner-landlord's admission of guilt and commitment to obey the law, the shaming billboard would apprise tenants of their right to know about a pending foreclosure, provide the name and number of a local tenant advocacy organization, and direct tenants to the telephone number and website for the local court where foreclosure complaints are filed. Also, it would inform tenants of their right under the Protecting Tenants at Foreclosure Act (PTFA)²²⁷ to remain in foreclosed property for at least ninety days after receiving notice of the completed foreclosure

Because a Breacher may be an individual instead of a corporate property owner, some judges may be reluctant to require the Breacher to pay for a shaming billboard identifying the individual. It is nevertheless necessary to make an example out of some individuals for educational purposes. Unlike the defendant and the victims in the *Gementera* case, Breachers and their victims are unlikely to know that this type of housing

shaming because it was not until millions of people witnessed United Airlines' bad behavior that the company decided to apologize and change it.

²²⁵ See Johnson, *Renters Evicted En Masse*, *supra* note 54, at 976–77 (asserting that some of the harm inflicted on renters during this foreclosure crisis is from speculators who thought they could buy and then quickly sell at a profit, mistakenly believing that housing prices would continue to rise).

²²⁶ Cejnar, *supra* note 60.

²²⁷ See The Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (2009) (codified mainly at 12 U.S.C. 5220, notes).

fraud constitutes the crime of deception. Owner-landlords tempted to deceive tenants into continuing to pay rent need to learn that this opportunistic behavior is a crime. Upon seeing a shaming billboard identifying a Breacher, some owner-landlords will realize that not only is this behavior a crime, but also that it may be detected and they may be prosecuted. This may cause them to abandon this behavior. Moreover, even if the owner-landlord chooses not to do right, a shaming billboard will make renters aware of this type of housing fraud and let them know about their limited right to stay in accordance with the PTFA. Furthermore, the billboard will let renters know how to discover whether the property they are living in is the subject of a foreclosure proceeding. This information is extremely valuable, as the average tenant will not know where to find it. In summary, the temporary stigma the Breacher suffers is substantially outweighed by the educational purposes advanced by the shaming billboard requirement.

C. Sentences for Fakers Should Include Longer Jail Time and a Shaming Component that Also Educates

As with the Breachers, criminal fines may not be enough to deter some Fakers from posing as landlords or owners. Therefore, assuming they are convicted of crimes, they should receive the longest jail sentences possible. If overcrowding of jails makes longer jail time impractical, then their sentences should include a re-integrative shaming component. The convicted landlords and owners could be required to advertise their crimes on the sides of city buses, as many renters are dependent on public transportation, and this method of advertisement may be an effective way to reach them with the message that warns them about fake landlords. The sign should contain a message similar to the following: “Before renting any place, contact this # __ or visit this website __ to find out who really owns the property. Know before you owe!” If an advertisement on the side of a city bus is too costly for some Fakers, then a shaming billboard advertisement would be a suitable punishment if it is placed in a neighborhood with a high concentration of residential rental properties.

D. Shaming Is a Better Alternative than Incarceration for Deceivers Because It Rehabilitates and Educates

A criminal sentence requiring a billboard advertisement like that proposed above could also be imposed on convicted Deceivers, those individuals who claim to be able to rescue homeowners from foreclosure. Deceivers range from relatively small-time sole proprietors like Mario Watkins operating out of a single county, to organizations involving

several co-conspirators operating in multiple cities and inflicting harm on hundreds of victims.²²⁸ Convicted small-time operators should be given fines and ordered to pay for shaming billboard advertisements. As stated in *Gementera*, this type of sentence is a better alternative than incarceration as it allows the defendant to enter the labor market and engage in lawful employment.²²⁹

However, Deceivers who have harmed a large numbers of consumers in multiple cities deserve prison sentences, in addition to paying for shaming billboard advertisements. The billboard advertisements for convicted Deceivers should contain a photo of the Deceiver and the Deceiver's name, and should be placed in or near the neighborhood with the largest number of victims.

Similar to the sentencing condition imposed on *Gementera*, the Deceivers should also be required to conduct lectures warning consumers about foreclosure rescue scams at foreclosure seminars held by HUD-approved counseling organizations. These lectures should be closely supervised; otherwise, they could prove to be fertile ground for the Deceivers to find more victims.

E. The Proposed Shaming Sentences Are Distinguishable from Those Condemned by Scholars

Opponents of shaming have fairly criticized some punishments imposed by courts. Making a mail thief wear a poster board announcing the thief's crime in a public place could be viewed as stigmatizing and could possibly lead the wrongdoer to engage in further criminal behavior due to the thief's ensuing isolation in the community. Yet courts have upheld such punishments, which continue to be popular, especially given prison overcrowding. In contrast to punishments like the one in *Gementera* that arguably served only a stigmatizing purpose, the proposed shaming billboard advertisements actually serve an educational purpose and are likely to deter some wrongdoing. Offenders convicted of mail theft, DUIs, and the like know they are committing crimes and so do their victims. However, many Breachers, Slackers, and Deceivers are unaware that their behavior constitutes a crime, and most of their victims will also be unaware. Therefore, a shaming billboard advertisement would serve to educate both potential wrongdoers and potential victims. The victims of fake landlords and owners will recognize a crime has been committed, but

²²⁸ See *supra* Part II.C.

²²⁹ *United States v. Gementera*, 379 F.3d 596, 602–03 (9th Cir. 2004).

these realizations will come too late. Incredibly, even some fake landlords and owners claim that they have not committed crimes because they incorrectly believe adverse possession and other legal maneuvers can be used to take any unoccupied real property.²³⁰ The educational purpose served by a shaming billboard advertisement is even more compelling given that the majority of victims of the fake landlord-owners do not know how to avoid becoming a victim in the first place.

The proposed shaming billboard advertisement is mild in comparison to other shaming punishments. Some argue that a shaming punishment should force the offender to understand the harm caused to victims to deter future wrongdoing by the offender. To serve that end, the Chief Executive Officer of Go Invest Wisely, a convicted Slacker, could be required to sleep overnight in one of Go Invest Wisely's boarded-up and blighted homes, or could spend a full day removing trash at the blighted property. Although it is true that the Slacker would get a sense of the harm the Slacker and the Slacker's company have inflicted, this punishment would do nothing to educate the wider community about what to do if they live near blighted property. Likewise, making a convicted Slacker, Breacher, or Deceiver spend the night on the floor in a boarded-up home, or even a homeless shelter, does nothing to educate the consumers living in the community about their rights under various consumer protection statutes or about where they can find accurate information or legitimate help.

Billboard advertisements should be placed in the neighborhood where the victims, not the wrongdoers, reside. The latter billboard placement would be more stigmatizing, but the former placement would serve educational and deterrence purposes. Potential wrongdoers and victims will learn that various types of housing deception constitute a crime and consumers will learn that legitimate help is available and where they can find it.

VI. CONCLUSION

Persistent unfavorable economic conditions have resulted in a glut of vacant foreclosed homes and in thousands of owners falling behind on their mortgage payments. Such conditions continue to make the housing market ripe for opportunistic actors to exploit others. The Fakers see the glut of vacant homes as an opportunity to pretend they own them or have the right to lease them so that they can dupe prospective buyers and renters. The Slackers—banks and real-estate speculators—also have a glut

²³⁰ See, e.g., Wells, *supra* note 48 and accompanying text.

of residential properties that they have obtained through foreclosure. However, the Slackers frequently pretend they do not own them and shift to communities the burdens of dealing with blighted foreclosed properties. Meanwhile, the Deceivers troll real-estate records looking for homeowners facing foreclosure and defraud them by making empty promises to rescue them. The Breachers cannot maintain mortgage payments on both their own homes and their rental properties, so they stop making mortgage payments on the rental properties and mislead the tenants into continuing rental payments even though loss of these properties is imminent. The Breachers and the Slackers are similar in that they commit wrongdoing with impunity because they are rarely criminally prosecuted. Because generic criminal statutes may be a factor in the dearth of prosecutions against Breachers and Slackers, states should pass laws that explicitly make misconduct by Breachers and Slackers a criminal offense. Although Fakers and Deceivers are often criminally prosecuted, sentences imposed on them for their crimes are frequently light and some of these wrongdoers re-offend. Therefore, law enforcement officials need to aggressively pursue prosecution of them to send the message that such wrongdoing will not be tolerated. After the opportunistic actors have been convicted, judges need to impose sentences that have creative shaming components to deter future misconduct. One suggested shaming punishment would be for convicted wrongdoers to be required to pay for billboard advertisements containing their photos, identifying their crimes, and providing consumers with information about their rights and where they can obtain legitimate help. Such informative billboards will not only warn potential wrongdoers that they could be prosecuted if they break the law, but also will decrease the victimization of homeowners, renters, homebuyers, neighbors, and taxpayers.