From the Editor-in-Chief
Tim Iglesias

From the Chair
George Weidenfeller

Heard from HUD
Consistency and Clarity: Transformation at the Office of Insured Housing and Multifamily Housing Programs
Cynthia Langelier Paine and Schuyler Armstrong

From the Reading Room
Collaborative Capitalism in American Cities: Reforming Urban Market Regulations
Review by Nestor M. Davidson

Digest of Recent Literature
Shanellah Verna, Theresa Omansky, and Jessica Cassella

Symposium: Community Economic Development Is Access to Justice
Introductory Overview: Community Economic Development Is Access to Justice
Scott L. Cummings

Thematic Overview: Race, Place, and Pedagogy in Achieving Access to Justice through Community Economic Development
Edward W. De Barbieri

Mind the Gap: The Story of People with Ideas and an Economy
Christyne J. Vachon

Community Economic Development and the Concept of Justice
Steven H. Hobbs

Community Economic Development Is Access to Justice
Brian Krumm

Access to Justice Requires Access to Opportunity Infrastructure
Anika Singh Lemar
Interdisciplinary Projects-Based Community Entrepreneurship Courses  
Anthony J. Luppino and Brandon Weiss ............................................................... 491

Creating Sustainable Economic Development on Indian Reservations  
Is an “Access to Justice” Issue  
Robert J. Miller .................................................................................................. 493

Balancing Political Power: Community Economic Development  
and Institutional Design  
K. Sabeel Rahman ............................................................................................. 497

A Rural State Perspective on Transactional Skills in Legal Curricula  
and Access to Economic Opportunity  
Alexandra P. Everhart Sickler ............................................................................ 499

Social Justice Implications for “Retail” CED  
Paul R. Tremblay ............................................................................................... 503

Articles  
Changing the Paradigm: Creating Scale and Keeping Local Expertise in  
Nonprofit Affordable Housing Development—How to Stop Competing  
with Fellow CDCs and Embrace a Joint Ownership Structure  
David A. Goldstein, Jason Labate, and Nadya Salcedo ...................................... 511

Infrastructure and Poverty: Removing Urban Freeways to Rectify  
a Planning Disaster  
Jenna Steiner ........................................................................................................ 527

Judgment-Based Lawyering: Working in Coalition  
Mark Neal Aaronson ............................................................................................ 549
As I write this column in late October 2018, the nation is reeling from the aftermath of the Kavanaugh nomination, recovering from several natural disasters (most recently Hurricane Michael), and anxiously anticipating the midterm elections. Some of these events focus our nation’s attention on affordable housing, community development and discrimination, but rarely in ways that highlight or support our work. Still, we must continue our multitasking—doing our work as best we can and letting others know what we do, why we do it, and its results. The Journal aims to serve that second task.

This issue will be in your hands in 2019. So, welcome to the New Year. While I cannot tell you what the New Year will bring for affordable housing, fair housing, and community development, I am happy to tell you what this issue of the Journal offers you.

First, however, I want to correct the record. In our last issue in the Annual Meeting Update we honored Bob Kenison as this year’s winner of the Michael S. Scher Award. We also included a list of the prior award recipients. Due to an unfortunate omission, one awardee was not listed. William (“Bill”) Kelly, Jr. received the inaugural award in 2006. We sincerely regret this inadvertent error. When Bill was honored with the award, his citation read in part: “Bill Kelly has been a leading force in the world of affordable housing for three decades and counting.” Thankfully, some things never change. Bill continues to give himself to this work as the Strategic Adviser to the Stewards of Affordable Housing for the Future. Congratulations (again), Bill!

In “Heard from HUD,” Schuyler Armstrong and Cynthia Langelier Paine of Katten Muchin Rosenman LLP engage Amy Brown, the newly minted Associate General Counsel for HUD’s Office of Insured Housing. Amy shares her own goals and initiatives, updates on the effects of the Multifamily for Tomorrow Transformation, HUD’s efforts to improve efficiencies in underwriting approvals and closings, and more.

In our From the Reading Room feature, Professor Nestor Davidson of Fordham Law School reviews Collaborative Capitalism in American Cities: Reforming Urban Market, an important new book by Professor Rashmi Dyal-Chand of Northeastern Law School. Professor Davidson lucidly summarizes the
book’s thesis and analysis: challenging the traditional top-down economic development investment model with a new and proven alternative—empowering homegrown businesses committed to improving the welfare of employees and their communities directly. This model involves sharing in a profoundly collaborative sense, where risk and resources are spread to advance a common set of goals around economic growth and social stability in low-income communities. The model crystallizes a distinctive variety of capitalism in which networked social enterprises dedicated to multiple bottom lines grow up from within the urban core. Importantly, Rashmi identifies the particular roles that law and lawyers play in this model.

Our Digest feature aims to provide readers with brief summaries of articles, studies and reports that are important to our work. Journal Associate Editors Emily Blumberg and Sara Silverstein Ferrara, both of Klein Hornig LLP, regularly shepherd this feature. This issue’s contributions concern a wide array of critical topics: the cost of developing affordable housing; residential segregation and interracial marriages; climate gentrification; and preservation of affordable housing in two distinct types of communities, emerging markets and rural areas. The contributions come from Shanellah Verna of Ballard Spahr LLP, Theresa Omansky of Emmet Marvin & Martin LLP, and Jessica Cassella of Klein Hornig LLP.

Under the expert editing of Assistant Professor Ted De Barbieri of Albany Law School and the Journal’s own Associate Editor Brandon Weiss, the Journal is privileged to share abstracts and essays from a symposium on the theme “Community Economic Development Is Access to Justice.” The introduction by Scott Cummings of UCLA School of Law provides important historical background and context for the symposium. Symposium organizer Ted De Barbieri frames the contributions with a brief thematic overview. They address the familiar but critical themes of racial and economic justice, equality, community economic development outside the urban core, and teaching transactional lawyering. Ted opines, “By all accounts, it’s a great time to be a community economic development scholar and practitioner.” I think you’ll agree as you learn about the thoughtful, creative, and hopeful work that the community economic development practitioners and scholars are performing.

The title of the article “Changing the Paradigm: Creating Scale and Keeping Local Expertise in Nonprofit Affordable Housing Development: How to Stop Competing with Fellow CDCs and Embrace a Joint Ownership Structure” pretty much says it all. In this piece, David Goldstein, Jason Labate, and Nadya Salcedo, all associated with Goldstein Hall, share a new successful model of joint ownership structures exemplified by Joint Ownership Entity NYC (JOE NYC). First, they offer an insightful overview of the historical evolution of nonprofit community development corporations in New York City. Then they describe how this new model of collaborative asset management model works, what problems this model was meant to
solve, and what attributes it needs to function. They conclude by describing some initial successes, and they consider how the model can be applicable to other jurisdictions.

While most of us are now familiar with the disastrous economic and racial consequences of federally subsidized urban freeway construction, Jenna Steiner of Wake Forest University School of Law addresses an issue many may not have considered: cities’ current decisions regarding repairing or removing urban freeways. In “Infrastructure and Poverty: Removing Urban Freeways to Rectify a Planning Disaster,” Jenna explores these decisions specifically as a means to address urban poverty. Using the experience of City of Rochester as a case study, she draws lessons and promotes a “highways to boulevards” approach in the hope that other cities can use such infrastructure projects to remedy prior racial segregation and help alleviate racial disparity.

In “Judgment-Based Lawyering: Working in Coalition,” Professor Emeritus Mark N. Aaronson of UC Hastings College of the Law reflects deeply upon a long-standing and multidimensional collaboration between the Community Economic Development Clinic at the University of California Hastings College of the Law and a diverse, authentic (i.e., messy) grassroots coalition of community groups to address critical healthcare needs in San Francisco, especially in its impoverished Tenderloin neighborhood. Much of the work focused on California Pacific Medical Center (CPMC) as a developer of multiple San Francisco hospital sites. The coalition substantially shaped a development agreement that addressed the sizes of CPMC’s proposed hospital construction projects as well as providing for almost seventy-four million dollars in negotiated cash benefits for affordable housing, community-based workforce development programs, a healthcare innovation fund, public works projects, and transportation and rapid transit fees, with many of the benefits redounding to the benefit of the Tenderloin community. The coalition continues to monitor CPMC’s compliance with the development agreement. Mark combines an in-depth narrative of the coalition’s work with astute reflections on community lawyering. In particular, he explores how community lawyers are challenged to cultivate a self-reflective and critical understanding of three fundamental attributes of their roles and relationships to their clients: accessibility, responsiveness, and judgment.

So many people do a tremendous amount of work behind the scenes to make the Journal possible. Please join with me in thanking all the other editors, our regular contributors, and Forum Manager Dawn Holiday whenever you have the opportunity. In particular, at this time I want to thank our former Managing Editor Wendy Smith who has retired after working tirelessly on the Journal for many years. We deeply appreciate all of the work she did. Please welcome our new Managing Editor, Julie Furgerson, who is both an attorney and an editor. We’re thrilled to have her on the team.
In addition to expressing sincere gratitude for all of the people who generously share their experience, expertise, and wisdom with the Journal, I conclude with two invitations. First, I want to invite readers to contribute to the Journal and to highlight a new way to contribute. Upon the suggestion of Forrest Milder of Nixon Peabody, the Journal is adding a new occasional feature called Best Practices—short, rather technical contributions on topics that regularly come up in practice for which there are not clear legal answers, but for which there are relatively well-identified “best practices” that it would be helpful to share. Glenn Graff’s essay “Why Does My Tax Lawyer Keep Saying We Need Nonrecourse Debt for My Low-Income Housing Tax Credit Project” (Vol. 27, No. 2) is a perfect example. Please think about what you know that could help your colleagues in the field avoid reinventing the wheel. Second, I encourage readers to contact me directly at iglesias@usfca.edu with any feedback about the Journal.
Happy 2019! As I draft this statement it is of course still 2018 and with recent controversy surrounding judicial appointments, revisions to the membership model, and changes to its fee structure, these have been interesting and some would say challenging times for the American Bar Association (ABA). As usual, challenges bring opportunities, and I hope that the ABA will emerge stronger and even more effective. Of course, these times are not just challenging for the ABA. With highly anticipated midterm elections over by the time this piece is read, the rumblings of 2020 will be getting louder.

During such challenging times, the Forum on Affordable Housing and Community Development Law (Forum) continues to do what it does best, by educating attorneys and by providing an opportunity for collaboration, interaction, and networking. The recent Boot Camp in Boston provided basic training for young lawyers, in-depth discussion on cutting edge issues for more senior attorneys, and emphasis on the importance of collaboration—not only by attorneys but also by government officials administering important programs.

Crystal Kornegay, the Executive Director of Mass Housing, and Sheila Dillon, the Chief of Housing & Neighborhood Development for the City of Boston addressed the pressing need for affordable housing in Boston and the state of Massachusetts and described the goals and efforts of both the governor and the mayor. Their discussion clearly focused attention on the difficulties of developing affordable housing in otherwise economically thriving communities. Growing construction costs associated with labor shortages, materials cost increases, regulatory impediments, and the multiplicity of governing structures add to the complexity. Transportation-oriented developments are encouraged but made difficult by competing demands for scarce land and conflicting priorities.

Paul Compton, the HUD General Counsel, spoke of the continuing effort by HUD to streamline program operations by eliminating overly burdensome regulations. He also engaged in a panel discussion on ways to enhance the already strong relationship between HUD and state Housing Finance Agencies (HFAs). Members are once again encouraged to take

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advantage of the unique opportunity being presented by HUD to address regulatory barriers. One example of such action includes members of the Forum HUD Practice Committee recently meeting with the General Counsel and senior HUD housing staff, along with members of the Mortgage Bankers Association, to suggest improvements in FHA closing process procedures. That undertaking will be continued in an effort to incorporate suggestions into anticipated revisions to the HUD Closing Guide and Closing Checklists that are now being drafted.

Steve Coyle, the recently retired CEO of the AFL-CIO Housing Investment Trust, reflected on his lifetime of service in affordable housing and his frustration that so much more work is left to be done. Steve also encouraged those starting their career to appreciate the importance of each individual achievement.

In keeping with the encouragement of young attorneys in the field of affordable housing and community development, a law school Initiative held at Suffolk Law School was well attended by students from a variety of law schools. Further, for the first time, the Forum welcomed two new Fellows, who will have an opportunity to participate directly in the Forum’s work and to start a long relationship with the Forum. The Fellows, selected from a highly competitive group of applicants, will become actively involved in at least one substantive project and work with the Young Lawyers liaison to engage other young attorneys.

The Strategic Planning effort described in this Chair’s first message continues, albeit at a slower pace than anticipated. The questions and issues to be addressed that were identified in the Chair’s earlier message remain. Notwithstanding the timing of the plan, Forum initiatives are being actively pursued, including outreach to other entities to broaden diversity opportunities, consideration of ways for the Forum to be instrumental in establishing uniform documentation for affordable housing transactions, and engagement to assure that Forum activities are documented and retained for the benefit of future leadership and members.

With the Boston Boot Camp completed, planning for the annual conference in Washington D.C. on May 22–24, 2019, is well underway. Suggestions for topics to be discussed are still welcome. We anticipate that some of the themes from the Boston conference will be further discussed at the annual conference, including the exceptional session on Housing and Healthcare. The Forum is very appreciative of the collaborative relationships that it has fostered over many years with governmental entities—especially HUD and the IRS—and very much looks forward to assuring and continuing such positive interaction.
Consistency and Clarity: Transformation at the Office of Insured Housing and Multifamily Housing Programs

Cynthia Langelier Paine and Schuyler Armstrong

The Office of Insured Housing (Office) at the U.S. Department of Housing and Urban Development (HUD) performs legal work as “program counsel” for the Assistant Secretary for Housing/Federal Housing Commissioner. The Office has the responsibility for providing legal advice for Federal Housing Administration (FHA) programs authorized under the National Housing Act (NHA) and the Mark-to-Market program authorized under the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA). These programs include HUD’s Single Family, Multifamily, and Healthcare Insured Mortgage Programs, in addition to the Housing Counseling and Manufactured Housing programs. Among other tasks, the Office oversees the interpretation of legislative and regulatory requirements for loan origination, loan servicing, and payment of FHA insurance benefits on multifamily and single family mortgages.

Amy Brown is the Associate General Counsel for the Office of Insured Housing, a role she took on in October 2018 after serving in an acting capacity for two years. Amy previously worked as the Assistant General Counsel for the Single Family Mortgage Division, a position that she held for almost seven years, and, before that, as the Assistant General Counsel for Administrative Proceedings in the Office of Program Enforcement. Amy began her career at HUD in 2000, and she graciously agreed to answer questions about the future of the Office of Insured Housing and Multifamily Housing Programs.

_Amy Brown, Associate General Counsel for the Office of Insured Housing at the U.S. Department of Housing and Urban Development, spoke with Cynthia Langelier Paine and Schuyler Armstrong, active members in the Forum of Affordable Housing & Community Development. Ms. Paine is Special Counsel in the Washington, D.C., office of Katten Muchin Rosenman LLP. Ms. Armstrong is an Associate in the Washington, D.C., office of Katten Muchin Rosenman LLP._
AB: First, I would like to start by thanking the ABA Forum for inviting me to answer a few questions for their Affordable Housing Forum members. I look forward to working with the Affordable Housing Bar and our industry stakeholders as we work to achieve the Department’s mission.

JAHCD: HUD’s Multifamily Office has changed significantly since the Multifamily for Tomorrow Transformation (Transformation) was completed. (See https://www.hud.gov/transforming_hud/multifamily_transformation.) What have been the biggest benefits and the biggest problems the Office of Multifamily has seen from the Transformation? Have there been any big surprise effects that the Office of Multifamily Housing was not expecting?

AB: Transformation was a major undertaking for the Department, and, in any major project like that, there are of course unanticipated outcomes. HUD’s Office of Multifamily Housing (Multifamily) is continuing its efforts to improve the coordination between the underwriter and closing coordinator and to deploy account executives more effectively. As Multifamily continues to clarify the roles of its staff, the goal is to make more seamless the interactions between Multifamily and the Office of General Counsel (OGC). For example, Transformation has required less emphasis to be placed on the geographic locations of Multifamily staff, which has changed plans for interactions with OGC. There is a greater emphasis on standardization and reliance on technology when attorneys and Housing staff are not co-located. Our offices continue to react to changes brought about by Transformation and advances in the industry as we serve our customers and stakeholders. I hope that the completion of Transformation is not the end of progress, but rather a benchmark to be celebrated as we continue to seek ways to improve efficiency and effectiveness in our programs and processes.

JAHCD: What are your goals as the new Associate General Counsel? What new initiatives are you excited about pursuing?

AB: I am very grateful to have the opportunity to lead the Office of Insured Housing. Having spent eighteen years with the Department, the last seven years with the Single Family Mortgage Division, I am excited to expand my focus to include Multifamily and Healthcare programs.

I have learned a great deal about the importance of consistency and clarity in our programs. To that end, I have spent considerable time helping bring consistency and clarity to the Department’s Single Family Insured Mortgage Programs through the consolidation of their policies into the Single Family Housing Policy Handbook (available at https://www.hud.gov/program_offices/housing/sfh/handbook_4000-1). As part of that, we have revised certifications and made revisions to their enforcement
processes. I want to bring that focus on consistency and clarity to Multifamily and Healthcare as well. Over the next several months, I plan to spend time with Multifamily staff, as well as with our headquarters, regional, and field counsel, learning what issues they confront and where there are best practices that should be used more widely. I also want to hear from our industry stakeholders and customers on how we are doing and where we can improve. I have already attended one industry meeting and received some good feedback. I look forward to future opportunities for such engagement.

Additionally, I would like to spend some time exploring areas in which Multifamily, Healthcare, and Single Family might learn lessons from each other where their needs and authorities are similar. For example, Single Family successfully rolled out a full e-signature policy for insured transactions that permits borrowers and lenders to engage with the Department in new ways that embrace the best technological advances. I look forward to exploring ways that similar policies could be made available in other areas.

Finally, I have seen firsthand the efficiencies created by some of the additional legal authorities available to Single Family in terms of loss mitigation, claims, and asset disposition that are not currently available for use in the Multifamily and Healthcare contexts. While Single Family has benefited from several important statutory amendments in the last decade, much of the legal authority underpinning our Multifamily and Healthcare programs has remained largely unchanged for many decades. As advances in technology and the industry itself take place, we need to review our legal authorities with fresh eyes and look for ways to interpret them in light of the evolving housing finance system around us. If a fresh look cannot move the programs forward, we may decide that our statutes need refreshing. We should be prepared to seek the authorities necessary to ensure viability of Multifamily Housing and Healthcare and Real Estate programs into the future.

JAHCD: It appears that the timing for underwriting approval has decreased and is, most times, taking less than forty-five days. Does HUD have any plans it intends to take to keep the timing of underwriting down, or even make it faster?

AB: I know that our new Multifamily Deputy Assistant Secretary is committed to providing the best customer service possible to our stakeholders. I believe Multifamily remains committed to streamlining its processes wherever possible without sacrificing prudent risk-management practices.

JAHCD: We often hear of the closing process as slowing down FHA transactions. We also understand that different offices handle closings in different ways. What steps is HUD taking to reduce the timing between underwriting and closing, and creating consistency among HUD offices?
AB: With Transformation, Multifamily production has changed. We believe that processes have been streamlined and bottlenecks in the closing process reduced. Like our Multifamily clients, our General Counsel is committed to improving the customer experience wherever possible. As part of the current Administration’s focus on regulatory reduction, we are specifically looking at how we can reduce the burden and delay. We will continue to look for ways for HUD Counsel and Multifamily staff, working closely with our industry stakeholders, to streamline the closing process, including review of timelines and processes associated with reviewing closing packages and scheduling of closing dates, as well as reducing the burden associated with environmental related provisions, without diminishing actual environmental protection. With greater standardization and reduced regulatory burden, our intent is to ensure greater consistency in application across the country and increased efficiencies in the closing process.

JAHCD: It has been suggested that closing dates be set sooner, like when a legal package is submitted for review. It has been suggested that HUD attorneys be engaged in transactions sooner—maybe even at concept meetings—to address legal issues sooner, rather than later. What are your thoughts on these ideas?

AB: I am a firm believer in open and continuous communication between our client program office and the Office of General Counsel. One of the key changes I made in Single Family was to make our attorneys available at the earliest stages of policy development because I believe you get a better product more quickly when the program office and OGC are aligned from the very beginning. That said, there are many instances where early involvement of HUD attorneys is not necessary and would not increase efficiencies in these transactions. I think the key is to strike that delicate balance that is often transaction-specific. I look forward to working with our clients and other OGC leadership to develop best practices for early interaction with HUD attorneys, with an eye towards facilitating the most efficient process possible.

In addition, I believe it is vital that the industry and counsel work simultaneously to improve their processes. It is very helpful and much appreciated when the more difficult and complex details of a transaction are flagged early and HUD Counsel involvement is sought. Also, I know our HUD closing attorneys greatly appreciate receiving closing packages that are finalized and ready to go without the need for significant revisions by HUD Counsel. Some packages received have clearly been through quality control checks, but, unfortunately, that is not always the case. Emphasizing quality-control checks over documents before submission would go a long way towards reducing delays in processing times and provide the ability to consider setting closing dates at an earlier time.
JAHCĐ: We understand that revisions of the Closing Guide are underway. What items would you most like to see addressed in the revised Closing Guide? How can industry members help provide feedback?

AB: Efforts to revise the Closing Guide are ongoing. Prior to my start, a committee of attorneys and Housing program staff commenced the process to revise the Closing Guide to incorporate policy and process changes made to the Multifamily Accelerated Processing Guide. Further revisions will be made upon finalization of the revisions to the Multifamily Housing loan closing documents, which we expect to occur shortly.

We are always open to hearing from the industry and receiving feedback on our processes. We regularly accept letters and even phone calls and seek to meet with attorney and industry groups on a regular basis.

JAHCĐ: One HUD handbook that has been under revision for a long time is HUD Handbook 4350.1. What is the latest timing for the published revision of the whole handbook?

AB: Multifamily continues to make progress towards revising HUD Handbook 4350.1. They have taken a comprehensive, chapter-by-chapter approach to revising the handbook. As they push towards completion of their efforts, I anticipate that further chapters will be posted on the Multifamily Drafting Table, https://www.hud.gov/program_offices/housing/mfh/MFH_policy_drafts, for public feedback.
Introduction

In 2017, federal tax legislation quietly, somewhat surprisingly, ushered in a new and potentially quite significant program to spur investment in areas of concentrated poverty.1 Opportunity Zones are designed to incentivize long-term private investment in designated low-income census tracts by allowing investors to defer certain gains and eventually receive a step-up in basis for qualified investments.2 Predictably, although the Internal Revenue Service is only beginning to provide regulatory guidance,3 commentators and market participants eager to capitalize on the program are already moving to define strategies to deploy the new resources that the program would generate.4

It is at this timely juncture that Rashmi Dyal-Chand’s prescient new book, Collaborative Capitalism in American Cities: Reforming Urban Market Regulations, Cambridge University Press (2018) 283 pages. $110

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Nestor Davidson holds the Albert A. Walsh Chair in Real Estate, Land Use, and Property Law at Fordham Law School.

2. Id. at 2184–85.
Regulations, has hit the shelves. Told through deep, qualitative research on several enterprises that have thrived in what was once called the “inner city,” as well as a sophisticated analysis of the legal infrastructure needed to support and replicate those successes, the book’s message at this moment is simple and clear. The investment capital that the new Opportunity Zones (not to mention similar programs) generate would best be invested not in top-down city-led revitalization plans or investor-driven blueprints for drawing traditional for-profit companies to occupy the economic niche that Michael Porter identified decades ago, in the hope that spillovers from such investments will eventually improve the lives of those living in poverty. Rather, investors and policymakers should focus on empowering homegrown businesses committed directly to improving the welfare of employees—and their communities.

Dyal-Chand, a law professor at Northeastern Law School and an expert on community economic development and consumer law, identifies an intriguing model for this kind of poverty-focused, multiple bottom-line enterprise. Building on case studies of a worker-owned home healthcare cooperative, a pioneering community lender, and a nonprofit/for-profit social-enterprise cluster, Dyal-Chand argues for the advantages of networked affiliates and supportive intermediary institutions sharing resources and local knowledge to advance their missions. This option is not, Dyal-Chand is clear to point out, the more familiar “sharing economy,” in which considerations of the economic stability of those engaged in its work are tangential at best. Rather, her model involves sharing in a different, more collaborative sense, where risk and resources are spread to advance a common set of goals around economic growth and social stability in low-income communities.

To Dyal-Chand, fostering these distinctive business networks requires reform across a swath of property, contract, business, labor, employment, and finance law. Relevant legal structures developed, Dyal-Chand argues, to regulate—and support—more traditional single-bottom-line for-profit companies, constraining the choices available to residents of low-income communities seeking employment and entrepreneurial activity. The current regulatory landscape has required collaborative enterprises dedicated to employee well-being to adapt, often with some difficulty. Dyal-Chand accordingly provides a detailed roadmap of local, state, and federal measures centered on creating a more conducive legal environment for her cooperative model.

The book’s ambition, ultimately, is not limited to identifying the underlying logic of a new approach to revitalizing what Dyal-Chand calls the urban core and to determining how law can help. For Dyal-Chand, her

model crystallizes nothing less than a distinctive variety of capitalism. This counterpoint to the paradigmatic (if inconsistent) American form of laissez-faire capitalism is more familiar in countries like Germany that actively facilitate worker democracy and sectoral support for industry-focused economic empowerment goals. The politics of adopting anything like a German approach at scale in the United States are challenging—although by no means impossible, especially at the local level. But at a particular moment when significant new investments are likely to start flowing to some of our most impoverished communities, having a detailed roadmap for a genuinely different and promising alternative path could not be more timely.

I. Revitalizing the Urban Core from the Inside Out

Dyal-Chand begins Collaborative Capitalism with an examination of a cluster of home health companies that have thrived in the Bronx for decades. In 1985, Rick Surpin and Peggy Powell, two members of a local community economic development nonprofit seeking ways to create sustainable employment opportunities, founded Cooperative Home Care Associates (CHCA). The idea was to develop a worker-owned company that could provide high-quality care by investing in long-term relationships with clients—a kind of stability that would allow the company to create quality jobs. As CHCA began to grow in its early years, its leaders came to understand that training for care workers was critical to the model, but training for CHCA alone would not have been viable. So in 1991 they founded a nonprofit organization called the Paraprofessional Healthcare Institute, to focus on training, research, and consulting for the home healthcare industry more broadly. The next barrier to growth that CHCA’s founders encountered was the rise of a managed care model that disfavored home healthcare services, so they started their own managed-care company, Independence Care System. Through these collaborations, CHCA grew to be the largest worker-owned cooperative in the country, with more than 2,000 employees, and has been replicating the model, starting with a cooperative in Philadelphia.

For her second case study, Dyal-Chand revisits the well-studied rise (and eventual fall) of ShoreBank, the pioneering Chicago community lender, unearthing aspects of ShoreBank’s model that offer new insights into what made it a success. Starting in 1973, the founders of ShoreBank—Ronald Grzywinski, Mary Houghton, Milton Davis, and Jim Fletcher—established a bank holding company that would not just be a lender, but also act directly as a community development corporation itself. That organization allowed the founders to take a more holistic approach to their work on the South Shore of Chicago, directly developing real estate through a wholly owned subsidiary, making equity investments where lending was not feasible because of creditworthiness, and, like CHCA, establishing a nonprofit affiliate, in ShoreBank’s case to focus on community services related to their lending and investments. The local expertise that the bank developed through all of this work allowed it to foster several networks of related
businesses, starting with local rehabbers and then replicated with fast-food franchise owners, other local businesses, and even a targeted small manufacturing hub. Not all of these networks thrived, but, when they did, they rewarded not only local entrepreneurship but also brought an intentional focus on neighborhood stability and individual employee advancement.

Dyal-Chand’s final paradigm example moves her analysis from New York and Chicago to East Austin, Texas, the birthplace of a cluster of entities under the umbrella of Southwest Key. Founded in 1987 by Dr. Juan Sanchez, Southwest Key began with nonprofit educational and related programs in immigrant communities. As with the other case studies, Southwest Key grew by expanding its mission, in this case adding shelters for unaccompanied immigrant children and opening a charter school, and then developing related social enterprises to complement these nonprofits. Today, the Southwest Key cluster includes everything from a seasonal florist to a café to a construction company to a major workforce development enterprise, and the larger network of for-profit and nonprofit entities has grown to include activities in eight states. The social enterprises in the network collaborate to provide opportunity for low-income workers while advancing Southwest Key’s larger nonprofit mission with both their services and with revenue.

What Dyal-Chand draws from these case studies, and several other examples to which she alludes, is nothing short of a new, distinctive approach to social enterprise in the urban core. Each of these businesses, for example, is involved in a discrete and manageable market or industry niche that facilitates long-term coordination and collaboration among community insiders able to leverage distinctly local knowledge. Each also involves intermediary institutions of various kinds to aid in their collaboration as well as to serve as a conduit for worker participation. Coordination, in turn, lowers the cost of doing business while spreading risk and facilitating creative approaches to common challenges, such as workforce development and finance. All of this development, ultimately, is designed in each case not just to generate profit but also explicitly to support social goals such as local hiring and neighborhood revitalization. The proverbial lifting of boats is not—in Dyal-Chand’s telling—the result of a rising tide or even a pull from the surface by some traditional for-profit company. Rather, it results from intentional, focused, collaborative efforts to foster businesses that prioritize workers and their communities.

Dyal-Chand is a legal scholar, and, not surprisingly, law reform is central to her narrative. Throughout Collaborative Capitalism, Dyal-Chand highlights the reality of a legal infrastructure that makes it difficult for the kinds of collaborative social enterprises that she has studied to make their model work. Together, these represent regulatory choices that developed blithely unaware of their consequences for social enterprise in low-income communities—communities that tend to take the blame for market failures, as though law does not matter. This perspective leads Dyal-Chand to ask, “Could the problem be with the way current policies address inner-city...
difference rather than with inner-city difference itself? That is the central puzzle that this book examines."

Her short answer is yes, but her longer answer, taken up over the course of several chapters, is nothing less than a call for sweeping reform of laws that affect every aspect of business practice. For example, Dyal-Chand would reform the options available for business forms to reflect the values and needs of collaborative social enterprises, allowing for something akin to a holding company to tie together related entities with common missions but varied roles. She would have states that do not allow them yet to provide for worker-owned cooperatives. She would change zoning and state and local permitting to encourage these networks. She would reform crowdfunding regulation. She would clarify that the kind of inter-enterprise collaboration that she has identified does not raise antitrust concerns. And so much more—this list hardly scratches the surface of a comprehensive vision that would support the intermediary institutions, protect the market niches, develop the human capital infrastructure, and help generate the financing that these companies need.

Dyal-Chand also nods to more fundamental structural reforms in areas such as minimum wage and general infrastructure investments in the urban core. These broader policy reforms would take to heart the lessons of her collaborative enterprises, with their emphasis on workers’ economic advancement and stability as well as the reforms’ focus on community revitalization driven by local priorities. That takes her a little afield of her core focus on the legal infrastructure for social enterprise, but, as Dyal-Chand notes, her model enterprises have also taken to advocacy for law reform to advance their goals, so not all that far afield.

The book’s larger ambition, ultimately, is more than just enterprise ethnography and law reform. Rather, drawing on rich theoretical literature on “varieties of capitalism,” Dyal-Chand argues that her collaborative capitalism model represents a genuine alternative to the prevailing approach to markets in the United States. She supports this assertion with a comparative examination of Germany’s approach, where cities work alongside industry to provide targeted vocational training with costs shared across the relevant sector, work councils and supervisory boards in even the largest companies protect workers’ voice and worker rights, and companies coordinate their approach to work conditions as well as finance, governance, and asset development. Dyal-Chand does not present Germany as some workers’ paradise, but rather as an empirical answer to the question whether the model she claims as a distinctive form of capitalism actually operates outside the particular examples that she has studied.

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The book, or at least its prescriptive case for the advantages of collaborative capitalism, is convincing and impressively researched. It is not without its limitations, however, particularly in considering Dyal-Chand’s call to reform the legal system to replicate her model broadly. By her account, for example, the success of each of the three core case studies seems to rely heavily on a personal, visionary style of leadership and on the ability of individual connectors to make their local collaborative networks work. This emphasis on leadership is not unheard of in more traditional business contexts; indeed, we seem to have an entire industry devoted, for better or worse, to highlighting executive leadership as the lynchpin for the success of companies. But in reading Dyal-Chand’s case studies, the emphasis on individual initiative to hold the networks together is notable nonetheless and raises a question about how—in whatever legal and regulatory environment we might adopt—it is possible to expand collaborative capitalism without the right people at the helm.

More generally, there is a risk in the kind of in-depth qualitative research on which Dyal-Chand bases her model of collaborative capitalism—research that provides wonderfully nuanced details about the history and strategies of the businesses she profiles, to be sure—that unique features of each of the networks that she studies may make the collaboration hard to generalize. It is, again, striking in the interviews she relates how much the enterprises grew and adapted through a process of trial and error, at times with some intentionality, but often as a by-product of hard lessons learned in operation. Perhaps this evolutionary process, witnessed three times over, is enough to identify a truly new species, but, at times, the book’s broad extrapolation from its small sample size seems aspirational.

These are minor quibbles, however, about a book that has so much to offer for policymakers, for lawyers working in community economic development, and, more directly, for those seeking to adopt the model that Dyal-Chand crystallizes so well. As we will turn to now, it is to that last audience that the book is perhaps most timely.


10. Moreover, many of the challenges—and solutions—that Dyal-Chand highlights are not limited to the urban context, as she briefly acknowledges. Rural collaborative economies have a long history, and, as scholars have increasingly recognized, the problems long associated with so-called “urban” dysfunction are all too common in rural America today. See, e.g., Ann Eisenberg, Rural Blight, 12 Harv. L. & Pol’y Rev. (forthcoming 2018). It would be fruitful in future work for Dyal-Chand to expand her lens beyond the urban core.

11. However, the book’s exploration of international models, notably the German example in Chapter 7, even if they do not resemble the book’s domestic case studies entirely, lends convincing support to the broad claim for an identifiable variety of capitalism.
II. The Timeliness of Dyal-Chand’s New Approach

Dyal-Chand has not just provided an abstract scholarly exegesis of a compelling variety of capitalism—although the book does provide that. She has also offered a strong normative case for the right way to approach economic development in the urban core at precisely the moment when, as noted, a significant new federal incentive for that very purpose is about to emerge.

It is something of a wonder that with so many generations of federal and state programs targeted at generating private capital in distressed low-income communities yet another variety would emerge in our current environment.12 But, as noted, 2017’s federal tax legislation included a new Opportunity Zone program.13 The Opportunity Zone program is a community development tool designed to unlock long-term private investment to facilitate economic growth and revitalization in low-income communities—identified by individual states14—throughout the United States.

In exchange for certain federal tax benefits, such as temporary tax deferrals, investors can roll passive, unrealized capital gains into flexible Opportunity Funds, which act as a type of aggregated private investment vehicle. A broad array of projects may be funded—from affordable housing to start-up businesses to transit—so long as a minimum of 90% of the assets in the Opportunity Fund are invested in Opportunity Zones.15 Because capital is pooled through this fund structure, a variety of investors throughout the country can participate in the program. An eye-popping estimated

12. Other similar efforts have included Empowerment Zones, Enterprise Communities, and Renewal Communities, see Cong. Research Serv., Empowerment Zones, Enterprise Communities, and Renewal Communities: Comparative Overview and Analysis (Feb. 11, 2011), https://www.everycrsreport.com/files/20110211_R41639_b18ae5b0fb6e9950b744676124b9ed.pdf; the Community Development Financial Institutions Fund, see Cong. Research Serv., Community Development Financial Institutions (CDFI) Fund: Programs and Policy Issues (Jan. 25, 2018), https://fas.org/sgp/crs/misc/R42770.pdf; the New Markets Tax Credit Program, see Cong. Research Serv., New Markets Tax Credit: An Introduction (Aug. 31, 2016), https://fas.org/sgp/crs/misc/RL34402.pdf. These programs all have different criteria and funding mechanisms, but all have the same basic mission of incentivizing private capital in low-income communities.

13. The concept of the Opportunity Zones Program has been attributed to a report from a public policy consulting firm called the Economic Innovation Group, work that led originally to a bipartisan bill called the Investing in Opportunity Act. A version of that Act was then enacted in the Tax Cuts and Jobs Act of 2017. See Carroll, supra note 4.

14. Using low-income community census tracts to determine which areas are eligible for an Opportunity Zone designation, governors are ultimately responsible for determining which tracts qualify. Up to 25% of the total number of census tracts that qualify as Opportunity Zones can then be designated as an official Opportunity Zone per state or territory. See id.

15. Id.
$6.1 trillion of potential capital is eligible for reinvestment in Opportunity Zones, which, even if the actual amount of capital deployed is likely to be much, much more modest, could create an impressive potential market.

Commentators and investors are already trying to define the best approach to this program, even though its operational and programmatic details are yet to be detailed by the IRS. One leading example comes from Bruce Katz and Jeremy Nowak, as part of their work on the “New Localism.” Katz and Nowak argue that investments through Opportunity Zones should be guided by four principles: social-needs index and job cluster data should be combined with a screen for equitable development potential through additional employment and transportation access data to target the right areas for investment; capital investment and human capital strategies should be linked; investments should be part of a comprehensive long-term leveraging strategy across the public, private, and independent sectors; and a data feedback loop should be deployed to continually improve operations and ensure accountability.

There is much to commend in Katz and Nowak’s appreciation for the need for cross-sectoral support and emphasis on data in the service of benefiting low-income communities. But reading their prescriptions in light of Collaborative Capitalism underscores what more might be accomplished if Dyal-Chand’s model were at the center of these investment efforts. Dyal-Chand argues convincingly for prioritizing the economic stability of workers through democratic participation, vocational training focused on long-term individual growth, and strong wages and benefits. She likewise argues for businesses to find niches that would allow for multiple bottom-line approaches, tools for connecting to broader markets and sources of finance, and collaborative structures to spread risk and leverage management expertise. These parallel employee and enterprise principles could work within the Katz and Nowak framework and others emerging, but would begin with a very different premise from much outside-in economic development. Dyal-Chand would instead urge that investors and policymakers seek homegrown, local expertise, dedicated to using the tools of economic development to open long-term pathways for workers and

17. Jennifer Pryce, There’s a $6 Trillion Opportunity in Opportunity Zones; Here’s What We Need to Do to Make Good on It, FORBES (Aug. 14, 2018), https://www.forbes.com/sites/jenniferpryce/2018/08/14/theres-a-6-trillion-opportunity-in-opportunity-zones-heres-what-we-need-to-do-to-make-good-on-it/#475eb7316ff9 (explaining that estimates of the total unrealized capital gains held by American households and corporations are not the same thing as the actual serviceable market for Opportunity Zone investment funds, indeed, “likely not even close”).
deeper revitalization for neighborhoods, built on a model that has succeeded—and could, under the right conditions and with the right support, be replicated.

Conclusion

In *Collaborative Capitalism*, Dyal-Chand has provided an important contribution to the literature and practice of community economic development. Her model of networked social enterprises dedicated to multiple bottom lines, growing up from within the urban core—rather than imposed on it—is promising, not the least because it is drawn from a number of long-standing examples of the model actually working. This empiricism in the service of law reform holds important lessons as yet another round of capital is set to make its way into our most distressed communities, with lawyers playing a critical role in implementation. That capital is welcome, but everyone involved in making the Opportunity Zone program, as well as other similar predecessors, a success would do well to heed Dyal-Chand’s call for a new collaborative, mission-driven approach to opportunity.
Proven Local Strategies for Expanding the Supply of Affordable Homes and Addressing Cost Challenges

Ahmad Abu-Khalaf
Enterprise Community Partners (June 2018)

Expanding upon previous research conducted by Enterprise Community Partners and the Urban Institute, this white paper offers possible solutions to affordable housing development challenges by highlighting certain strategies that jurisdictions with the highest costs of living have taken to preserve and increase the supply of affordable housing units: (1) leveraging existing public and private assets, (2) creating new funding sources, (3) utilizing land control mechanisms, and (4) improving the approval process for affordable housing developments.

Leveraging existing assets can take many forms, such as selling or leasing public property sites at a discounted or nominal value for affordable housing developments; financing incentives for the acquisition of underutilized or vacant private properties to transform them into affordable housing; preservation of existing but unsubsidized affordable housing through low-cost acquisition or rehabilitation loans; or offering low-interest loans to individual residents or resident groups exercising a right of first purchase for their unit or building. Jurisdictions can establish new financing sources for affordable housing outside of the standard budget appropriations process through developer linkage fees, the establishment of housing trust funds, and public ballot measures.

With respect to land controls, the author highlights various inclusionary zoning measures whereby jurisdictions encourage or mandate affordable unit set-asides in new market rate developments. Examples of inclusionary zoning incentives include density bonuses in areas with high demand for market rate units, and the reduction or waiver of certain parking requirements, particularly in areas where alternative transit options abound. Lastly, the author explains that streamlining development approval processes for affordable housing proposals can reduce regulatory barriers—making affordable housing development more attractive. Shortened approval timelines may also help reduce not only development costs but also the likelihood of development delays due to local opposition.

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Residential Segregation and Interracial Marriages

Rose Cuisin Villazor


In commemoration of the fiftieth anniversary of the 1967 Supreme Court decision Loving v. Virginia, this essay urges further exploration of the laws and practices that reinforce residential segregation and housing inequality and deter interracial marriage. In addition to antimiscegenation laws that explicitly prohibited interracial marriage, property laws have also impeded interracial relationships and marriage. This essay argues for the continuing examination of the correlation between residential segregation and low rates of interracial marriages, reasoning that residing in segregated neighborhoods reduces the opportunity for and amount of interracial interaction and perpetrates racial and economic hierarchies. It explores the impact that factors such as city diversity, proportion of racially segregated neighborhoods (often with concentrated areas of poverty), and social acceptability of interracial marriage have on the cities with the highest rates of interracial marriage (Honolulu, Las Vegas, and Santa Barbara) and the cities with the lowest rates of interracial marriage (Jackson, Mississippi, and Birmingham, Alabama).

This essay goes on to examine current and historical initiatives aimed at addressing residential segregation and housing inequality in cities with varying rates of interracial marriage. The essay compares the recent efforts of Jackson and Birmingham (which both have low rates of interracial marriage) and Santa Barbara (which has a higher rate of interracial marriage) to address residential segregation. Jackson and Birmingham have both conducted assessments identifying the significant housing challenges that racial minorities face and issued reports with recommendations. In contrast, Santa Barbara has implemented programs to reduce residential discrimination and address housing inequality, including a density bonus program for developers, an affordability control covenant to maintain affordable prices, and an inclusionary housing ordinance that requires fifteen percent of all housing developments with more than ten units be affordable to low-income individuals. As an example of the successes and challenges of private initiatives to address residential segregation, the essay looks back at the integrated planned community that real estate developer James Rouse established in 1967 in Columbia, Maryland, which became home to many interracial families then and remains a comparatively racially and economically diverse city today, though not without its own challenges.

Climate Gentrification: From Theory to Empiricism in Miami-Dade County, Florida

Jesse M. Keenan, Thomas Hill, and Anurag Gumber

2018 Environmental Research Letters 13

This article examines the parameters of “climate gentrification,” which is the theory that climate change impacts property values and markets.
Using Miami-Dade County, Florida, as its model, the article first describes several pathways that may manifest in climate gentrification and then presents an empirical analysis. Overall, this article looks at the impact that exposure to environmental conditions and resilience functionality will have on property values and vulnerable populations.

The “Superior Investment Pathway” focuses on the pattern of real estate investment in a geography offering superior risk-adjusted returns. This pathway suggests that properties in locations with less geographic exposure and/or nearby to natural resources are likely to experience long-term price appreciation. Patterns consistent with this theory were found in Miami-Dade County, where high-elevation properties have or will experience price appreciations due to their relatively low risk of nuisance flooding and rising sea levels. (An exception to this pattern is the City of Miami Beach, where close proximity to the water could be considered an amenity.) The second pathway to climate gentrification—the “Cost-Burden Pathway”—relates to the deterioration of environmental conditions, which results in higher carrying costs (such as insurance, taxes, or repairs) that can only be borne by wealthier people, such as in Venice, Italy. Third, the “Resilience Investment Pathway” reflects the unintended consequences of public investments in buildings or infrastructure, where sustainability concepts that demonstrate long-term efficiencies and performance can result in increased property valuations, leading to the displacement of the existing and often lower-income population.

Proactive Preservation of Unsubsidized Affordable Housing in Emerging Markets: Lessons from Atlanta, Cleveland, and Philadelphia

Matt Schreiber
Joint Center for Housing Studies of Harvard University Working Paper
(March 2018)
(http://www.jchs.harvard.edu/research-areas/working-papers/proactive-preservation-unsubsidized-affordable-housing-emerging)

This paper discusses how policymakers and mission-driven organizations can anticipate real estate price appreciation and proactively preserve unsubsidized, naturally occurring affordable housing. The author states that naturally occurring affordable housing loses its affordability in two main ways: through renovations (“upward filtering”) and through deterioration (“downward filtering”). By contextualizing these challenges in Atlanta, Cleveland, and Philadelphia, the paper documents common characteristics of emerging markets (i.e., a significantly larger presence of one-to four-unit properties), identifies potential areas of future gentrification based on current data, and summarizes challenges for affordable housing preservation generally.

In response to these challenges, the author also evaluates three promising approaches to proactively preserve housing affordability in emerging markets: (1) robust partnerships between land banks and land trusts, (2) long-term lease purchase (i.e., rent-to-own) programs, (3) and
low-interest renovation financing loans with affordability requirements. The author concludes that the impact of land trusts remains limited and scaling challenges exist, but that coordination between land banks and land trusts can be effective when implemented. The author also describes how some long-term lease purchase programs have demonstrated initial success (especially when combined with financial literacy and homeownership counseling), but acknowledges the importance of long lease terms and adequate financing. Finally, the author discusses several state and local household renovation grants for low-income households and the potential benefit of low-interest renovation loans for owners of one- to four-unit properties in exchange for certain affordability restrictions. The author concludes that emerging markets in cities like Atlanta, Cleveland, and Philadelphia create unique opportunities for the implementation of comprehensive, long-term affordable housing preservation strategies.

**Rental Housing for a 21st Century Rural America: A Platform for Preservation**

*Housing Assistance Council (September 2018)*

Using data from the U.S. Department of Agriculture (USDA) and stakeholder input, this report discusses the drastic and impending loss of USDA’s Section 515 direct loan multifamily rental housing units in rural communities nationwide. Specifically, the report concludes that nearly all of USDA’s Section 515 units (approximately 415,000 units in 13,000 properties nationwide) are expected to lose their affordability restrictions through mortgage maturity and prepayments by 2048. The report anticipates a significant increase in the loss of this rural housing in 2028, with a peak in 2040. In addition, the report notes that no new USDA direct-financed rental housing has been developed in recent years.

Additionally, the report describes how USDA Section 515 loans are tied directly to USDA Section 521 rural rental assistance and have not yet been decoupled. Therefore, when a Section 515 loan ends, the property also loses its Section 521 rural rental assistance for low-income tenants. Without restrictive use provisions in place and with a demand for higher-rent units, the report indicates that owners can convert their properties to market rents and displace existing tenants. The report also identifies and describes “high-risk” counties based on the local economy and rental market, as well as counties where Section 515 properties make up the majority of project-based federally subsidized units.

The report concludes with several preservation strategies and policy recommendations to respond to these challenges. These approaches include additional public data and education about the loss of rural affordable housing, owner incentives to remain in the Section 515 program and simpler processes to support preservation, improved utilization of USDA rural vouchers, increased private lender involvement, re-amortization of Section 515 loans, and decoupling of rural rental assistance from the Section 515 loan.
I want to start by saying how thankful I am to Ted De Barbieri and CJ Vachon for organizing this January 2018 discussion group. For me, building and sustaining a community of scholars and practitioners who care deeply about these issues, and who put them front and center in their scholarship and their teaching, feels more essential now than ever. Without having these meetings, Community Economic Development (CED) and access to justice issues can wither away and die. I am gratified and inspired to see people from different stages in their careers and from different perspectives coming together and having this conversation.

Building community is what motivated our first discussion in January 2017 at the AALS Annual Meeting in San Francisco, which I helped to organize with two of my heroes: Peter Pitegoff from Maine and Rashmi Dyal-Chand from Northeastern.1 We decided to bring together people to take stock and collect information about what was happening in the world of CED theory and practice, since there hadn’t been that many opportunities in the previous decade to do so. We started from the premise that CED is a broad umbrella concept. What does it mean now? Lots of people had done important work and made foundational contributions both in scholarship and in practice, but we believed that the time was ripe to bring scholars and practitioners together to have a new conversation. When we started to organize in early 2016, we imagined the San Francisco meeting as an exciting chance to assess the state of the field and share innovations. As it turned out, the meeting fell on the eve of Trump’s inauguration and thus became an opportunity to reclaim hope in the face of what people felt as

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1. The proceedings of the 2017 AALS Annual Meeting were published by the Journal of Affordable Housing and Community Development Law. Peter Pitegoff et al., Community Development Law and Economic Justice—Why Law Matters, 26 J. AFFORDABLE HOUS. & CMTY. Dev. L. 31 (2017).
catastrophic despair. And so there was a change in the tenor of the conversation from what we imagined when we organized it to what actually ended up happening on the day that we convened.

Coming out of that conversation were a lot of energy and inspiring stories about resistance to inequality and discrimination at the grassroots level, which made us excited to keep the momentum going. That happened through the leadership of Brandon Weiss, who took the papers that came out of the 2017 meeting and had them published in this Journal. That issue has received a quite positive reaction. And we are fortunate this year to have the leadership of Ted and CJ, who have built on this foundation by bringing us together again.

They asked me to begin by describing what came out of last year’s conversation as a segue into the important themes that are raised in the abstracts and comments offered for the discussion group this year.

The central contribution of last year’s conversation, to which I already alluded, was a new compendium of stories of resistance and innovation at the grassroots level. For instance, Alicia Alvarez offered an inspiring account of CED lawyers and activists challenging foreclosures in Detroit. Other contributors discussed the movement to promote so-called “tiny homes,” creative housing preservation projects, and the relationship between economic development and community opportunity through social enterprise.

A critical theme of those stories was that CED scholars and practitioners need to be attuned to leveraging opportunities where they present themselves in different sites. Along these lines, last year we had folks talking about classic CED strategies in big urban centers. But we also had people breaking out of that framework by exploring cutting-edge CED initiatives in rural areas and smaller post-Rust Belt cities experiencing ongoing economic challenges—but also presenting opportunities for renaissance.

Additionally, last year’s contributors talked about rethinking the relationship between federal, state, and local governments in CED—particularly at a moment when the federal government had turned aggressively hostile. Because CED is built upon the idea of leveraging opportunities and incentive programs, contributors asked: What do you do when that opportunity structure changes dramatically? How do we mobilize CED initiatives at the local level to scale up to challenge larger structures of inequality in order to promote systemic reform?

Cutting across these conversations was the question of how lawyers can best help build local power. We discussed different forms of CED lawyering—from transactional legal services to strategic planning and counseling for mobilized organizations—and explored how to translate the different skill sets of CED practice into lessons that we can teach our students.

2. Id.
This background is a transition into our discussion for today. It is crucial that we are moving forward by reframing the relationship of CED to access to justice. In this respect, I had two quick comments before handing the discussion back to the moderators. Reading the abstracts for this meeting reminded me of how important it is to reframe the idea of access to justice away from the traditional notion of access to law and lawyers within the legal system. We need to shift away from the dominant emphasis on helping individuals resolve legal problems through courts (although this remains critically important) to focusing on how to redesign systems to promote better access to economic opportunities and economic fairness in what Anika Singh Lemar aptly refers to as the “age of extreme inequality.”

In this regard, last year’s participants kept coming back to the critical pragmatic question: “What is the pathway for change?” And it is here that I took inspiration from the papers circulated for today’s meeting, which laid out powerful new accounts of lawyers and community organizations struggling to redesign local markets to be more accountable to community members, while also engaging in political mobilization to build a more robust progressive vision of law and society. I took hope from stories of community-led initiatives to rebuild private markets in distressed cities and promote access to capital controlled by community residents. I was energized by descriptions of lawyers representing mobilized groups in designing community-benefits programs and challenging the unfairness of existing economic rules. It is this energy, in the end, that we must sustain and build to continue confronting the enormously difficult—and enormously important—struggle for economic justice ahead. With that, I now look forward to learning from all of you, whose work provides the essential vision that guides us forward.
Thematic Overview:
Race, Place, and Pedagogy in Achieving Access to Justice through Community Economic Development

Edward W. De Barbieri

Introduction

By all accounts, the mainstream economy is booming approaching the end of 2018. A sweeping corporate tax cut in 2017 has led to surging corporate earnings. Major stock market indices are at historic highs. Interest rates are near historic lows. Home prices, recently battered by the Great Recession, are stable, and increasing, in most areas.

But that’s not the full story. Wages are stagnant, despite near zero unemployment. Schools are now more segregated than they were at the time of Brown v. Board of Education. Drug addiction, the opioid epidemic, and other public health emergencies destroy lives and families. Patrick Sharkey characterizes the current moment as an “uneasy peace,” contrasted with earlier periods of violence. Grassroots movement organizations are working to address inequality, discrimination, and equity, in both urban and rural areas.

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It’s been seventeen years since Bill Simon’s book *The Community Economic Development Movement* and Scott Cummings’s article “Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice” were published. Since then, scholars and practitioners have advanced the conversation about CED methods and efficacy. And many have created space for that conversation to continue. Through discussion groups at the AALS Annual Meetings in 2017, 2018, and 2019, the annual Transactional Clinics Conference, and elsewhere, scholars and practitioners have advanced the conversation in a meaningful way. What follows here is a brief thematic overview of the discussion that occurred in January 2018, and a synopsis of the abstracts that follow.

**Racial and Economic Justice, Equality**

Specific papers in this collection raise important issues related to racial and economic justice. Steven Hobbs’s return to Marcus Garvey addresses key points in any serious look at community economic development and the concept of justice. Hobbs argues that any CED movement must involve a holistic approach to solving economic, social, and political issues that have plagued poor communities. To support his argument, he looks to Garvey’s efforts at black enterprise.

Hobbs’s discussion addresses issues also described at length in Mehrsa Baradaran’s recent book, *The Color of Money: Black Banks and the Racial Wealth Gap*. In *The Color of Money*, Baradaran discusses the history of black banks and how federal policy, deliberately in many cases, failed to support their flourishing. Hobbs’s paper, and works like *The Color of Money*, remind readers of vast racial inequities manifest in industries like financial services. Such inequities are massive barriers to achieving just ends.

Hobbs touches on issues like gentrification too. Relatively, Anika Singh Lemar, in her paper, discusses exclusion from opportunity infrastructure as a barrier to individual wealth accretion. For Lemar, community economic development law fails when it loses sight of how individuals access economic opportunity. Economic opportunity itself leads to the amassing of wealth. Thus, we should treat as suspect CED strategies that fail to increase economic opportunity.

Also in this vein, Sabeel Rahman addresses the concept of sharing of community economic benefits. For Rahman, considering how the community shares in the economic benefits of development connotes an institutional shift in governance and design. Novel approaches to development, such as community benefits agreements, give community economic benefits agreements, give community economic

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development scholars and practitioners a way into designing institutions to be more responsive to community needs.

Rahman’s observations about the institutional shift in community equity are astute. They present an opportunity, and a challenge, for CED scholars and practitioners to address. Residents, especially in urban areas, have the drive, and ability, to weigh in on decisions that affect their lives, including on matters of local development.11 Community benefit agreements (CBAs) can and do benefit communities when negotiated by an inclusive and representative coalition of community organizations.12

The specter of gentrification looms large in any conversation about community economic development and inequality. Courts are reluctant to overturn state or local government efforts to regulate development because of gentrification claims. One recent opinion on this topic, issued by a court in New York State, is worth mentioning.

In *Ordonez v. City of New York*,13 a state court judge combined two separate challenges to zoning approvals brought by longtime residents of rent-regulated housing in East Harlem and Brooklyn. In both instances, residents challenged the city’s analysis of socioeconomic impacts of zoning approvals on longtime, low-income renters. In each case, city officials followed environmental assessment guidelines in analyzing how zoning decisions would impact the various areas.

Because the city followed the guidelines, the court would not overturn the city’s final approval of each zoning application based on claims that new development would have significant harms on longtime residents. Such a decision reveals the challenges that gentrification places on residents, and the reality that state and local government agency decisions are likely to be upheld by state courts.

A different, but related, area is the issue of state and local government approval of economic development activities. Courts have been reluctant to apply the public purpose doctrine to limit state or local economic development projects. Similarly, state constitutional prohibitions on gifts, loans, or extension of government credit for the benefit of private corporations are unlikely to successfully limit government giveaways to private companies.

The prioritizing of private interests over communities and community wealth-building assets is a problem to sustained community economic development. The impacts are far-reaching. If not addressed, neighborhood segregation, and the wealth gap that follows racial segregation, will only increase.

Community Economic Development Outside the Urban Core

The notion of place is closely linked with racial and economic justice themes. Robert Miller’s paper discusses economic development, and its absence, on Indian reservations. He explores reasons for the lack of locally owned businesses on reservations. He points to a lack of access to savings, banks, and home equity as a barrier to new business development. He also discusses legislative efforts to require a greater percentage of goods and services bought and sold on reservations be purchased from reservation-based businesses.

Alex Sickler’s paper, though focused mainly on teaching law students to serve clients in areas of rural economic activity, also has an element of place—namely, the rural—in addressing issues of economic opportunity. Both Sickler and Miller look at economic opportunity outside of the urban core and find unique features to community economic development practices based in non-city areas. Miller locates prospects to increase economic development opportunities on reservations, while Sickler reminds us of the importance to the legal profession of proper training of attorneys to practice law in areas of rapid economic expansion, like in the instance of Bakken oil development in western North Dakota.

Teaching Transactional Lawyering

Several contributors explore issues of course design, and client selection, as relevant to the ideas of community economic development in addressing access to justice. Tony Luppino and Brandon Weiss discuss one such course offered at the University of Missouri—Kansas City School of Law. Paul Tremblay looks at client selection as an access to justice issue in transactional clinics. And Brian Krumm examines Tremblay’s claims in detail.

How we teach community economic development to the next generation of students and lawyers will significantly impact economic opportunity. Luppino and Weiss explore an interdisciplinary approach to curricular design. Tremblay shows how transactional community economic development clinics can address public interest ends—and how they cannot. All told, critically assessing the efficacy of community economic development programs is a key component of this pedagogical endeavor. By all accounts, it’s a great time to be a community economic development scholar and practitioner.
Mind the Gap: The Story of People with Ideas and an Economy

Christyne J. Vachon

I. Introduction

When Ted and I talked about this discussion group, both of us were directors of community economic development clinics at our respective schools, and both of us already had the relevant issues on our minds. We knew several colleagues were having similar discussions, and we wanted to bring them all to the table. Often, the concepts that come to mind when a conversation involves justice are the commonly known concepts of civil rights, incarceration, and unequal treatment based on gender, orientation, race, religion, color, disability, etc. My space—transactional law—often gets overlooked. In my mind, this oversight is a huge error by our community at-large. As an operational concept, the principle of “justice” implies universal principles that guide people to determine the difference between right and wrong. The reaction to a statement that justice includes “being able to start and run a business” triggers raised eyebrows and “what are you talking about” type of statements. Of the four types of justice,1 distributive justice (“the ethical analysis of the distribution of benefits and burdens in society”)2 is most relevant to the discussion and will not be achieved if, for instance, each person is “not given equal opportunity to acquire and enjoy the fruits of income-producing property.”3 Social justice, part of distributive justice, includes economic justice. Economic justice involves maneuvering through the law and institutions that affect how society’s members contract, earn income and otherwise sustain themselves, sell/buy goods and services, and bring funds and interest to their communities.4 As part of

1. The four types of justice are distributive justice, procedural justice, restorative justice, and retributive justice. See http://changingminds.org/explanations/trust/four_justice.htm
distributive justice, social justice guides communities in establishing institutions and necessitates community collaboration for personal and societal betterment. Economic justice encompasses social enterprise and community economic development. Where someone who may have been wrongly incarcerated can benefit from access to counsel, like a low bono or pro bono attorney who knows the legal steps, looks out for the strange concepts, and can advocate, so too can a person who tries to start and maintain a business with few means benefit economically from an attorney who knows the concepts, can write the necessary documents, explain, and advocate. Here is the gap that we must mind and to which we must respond. What are we doing for those who have the ideas and drive but not the access? This gap is for pro bono, clinics, and others to fill.

Looking at community development through the lens of transactional law, economic justice seems to get short shrift from a publicity standpoint. Studies exist about the impacts that access to legal advice has for someone trying to figure out the legal system and law jargon of courts. But the concept has not been equally adopted for those people, businesses, and communities that need transactional assistance—the part of legal work that represents the greater percent of practicing lawyers non-litigation work.

7. For relevant examples, see National Center for Access to Justice, The Justice Index 2016: Measuring Access to Justice (2018), https://justiceindex.org; California Commission on Access to Justice, Language Barriers to Justice in California: Report of Commission on Access to Justice 1–2 (2005), http://www.calbar.ca.gov/Portals/0/documents/accessJustice/2005_Language-Barriers_Executive-Summary.7.2.12.pdf; Johnathan Silver, Lawmakers Look for Ways to Help People Who Can’t Afford Lawyers, Texas Trib. (Sept. 15, 2016), https://www.texastribune.org/2016/09/15/lawmakers-mull-legal-advice-people-who-cant-afford; Matthias Kilian, Address to International Bar Ass’n in Astana, Kazakhstan: Representation in Court Proceedings—Comparative Aspects and Empirical Findings (2016), http://europeanlawyersfoundation.eu/wp-content/uploads/2016/10/Kilian_Representation-In-Courts.pdf (referencing two German studies, including a study from the 1980s that showed that “[r]epresentation by a lawyer leads to significantly more activities of the judge hearing the case[,] . . . [r]epresentation by a legal professional bridges the problem of asymmetrical knowledge of the parties on one side and the court on the other side and allows, to some extent, control of the court[,] . . . [and a] successful outcome of litigation depends extremely on representation by a member of the bar as far as defendants are concerned”; and noting British studies that showed that “[r]esearchers also found that lawyers obtain significantly better results in tried cases than unrepresented litigants, [with one] research project [finding] that cases involving fully unrepresented litigants were much more likely to be resolved by withdrawal, abandonment, default judgment or dismissal, rather than agreement between the parties or by judgment following a trial or appeal hearing”).
8. For instance, between 30–35% of lawyers in large firms are involved in litigation. See Ed Wesemann & Melissa Hogan, The New Litigation Practice in
The Department of Justice’s Office of Access to Justice sets forth these standards of justice: accessible to all, fair to all, and efficient. This mantra is equally applicable to understanding legal concepts in the transactional setting. With this in mind, during the fall semester of 2017, students in the Community Development Clinic of the University of Massachusetts School of Law (Clinic) witnessed the challenges brought to them by their clients and, in light of those challenges, saw the gap. Minding that gap, they conducted a robust analysis of the websites of all fifty states to determine accessibility for all people who may want to form and maintain a business. The students started to reach some conclusions about the community around them, including that one of the larger obstacles blocking people from starting a business is that they have no idea where to start. As Isabel V. Sawhill, an economist at the Brookings Institution, stated, “The U.S. does not have as much mobility as most other advanced countries.” Recognizing that each business client had been formed under a state’s law and realizing that nonlawyers without access to a lawyer really only have the state’s website to fully rely on as accurate (as compared to some consolidator websites like LegalZoom), the students began to ask themselves in case rounds whether some of their clients’ problems were attributable to the presentation of content on each state’s website.

These students created a query list that they applied to every state’s website that included approximately 1,217 questions. These questions covered general accessibility issues, such as ease of locating based on a common Google search, translators, legalese, and use of images, along with comparison charts of corporations, limited liability companies, partnerships, and nonprofits. After carefully crafting the questions, conducting test-runs to catch problematic areas and ensure that they were similarly interpreting the questions and website content, and creating overarching questions, the students collaboratively analyzed the websites of 50 states and created an information source with over 60,000 data points. While

10. These industrious students, now graduates, were Paolo Corso, Anthony Doss, Amanda Quigley, Michael Ryan, and Anthony Senerchia. Additional assistance came from Zachary Devlin and Kristina Prete, also now graduates of UMass School of Law. Katelyn Golsby conducted follow-up analysis of the results.
12. The state websites the students accessed were the website of each state’s secretary of state. There were, at times, other options that either had the potential to increase or decrease confusion for the users. For instance, some states opted to outsource the information packaging to third-party resources.
13. The students conducting the study looked at each state’s website, with attention to detail, but may have missed some information that was not easily accessible.
mostly qualitative in nature, the study still provides valuable and interesting insight into the access to information and, therefore, access to economic justice. With interest from the Progressive Policy Institute in Washington, D.C., the UMass students packaged some of the results from their study and presented that snapshot to the Progressive Policy Institute in Washington, D.C. A snapshot of that information has been provided in Section III below.

II. The Stories

While the types and situations of clients vary in a community development clinic or other pro bono transactional service provider, the stories below set the tone for the types of stories that inspired the UMass students.

A Tale of Two Clients

A Nonprofit

In the 1970s, Leslie founded a tax-exempt nonprofit—Building Rescue Nonprofit—to rescue a building and the related institution in that building that represented a historic part of the community in which Leslie grew up, lived and would, eventually, retire. She filed the necessary paperwork with the state and the Internal Revenue Service. For many years, Leslie ran the ship. But, of course, as time goes by and an established nonprofit survives, additional people help and may often take over. As is the story for many organizations without expertise in governance and compliance, when someone new takes over or a change in requirements occurs, things fall through the cracks. This was the case for Building Rescue Nonprofit. The organization had limited resources, did not have a lawyer or accountant in its volunteer retinue, and did not have the network to reach out and find one. Leslie developed health issues and other volunteers took over the heavy work of the organization. Unknown to them, twelve years before receiving assistance from the Clinic, federal and state regulatory agencies terminated the organization’s status as a tax-exempt nonprofit due in part to its failure to file annual reports. During the twelve-year time period, donors had made donations to the organization believing that it was tax-exempt and, therefore, that donations were tax-deductible. The reason that the organization found out there was a problem was through the town government grapevine. Not the state.

When the students met with the board and other leaders of Building Rescue Nonprofit, they learned that the leaders had tried to comply with the requirements to maintain the organization’s status. Starting more than twelve years before, the leaders had sought information on how to comply and maintain the status from the state with phone calls, going into the state regulatory office, and searching on the state’s website. And, clearly, the leaders had not received the necessary information, including that the status had lapsed. They found the website to be confusing and unhelpful. At a minimum, they had not known that they had to proactively file annual reports. And the state did not send them a notice.
A For-Profit

One year before coming to the Clinic, Betsy thought that she founded a start-up corporation to protect herself from liability for the small health business she runs. She came to the Clinic for assistance setting up a board of directors and, as it turns out, figuring out how to maintain minutes and the corporate records book. Once again, this information was not available through the state’s office or website. She was not aware at the time she signed up with the Clinic that she needed to have at least an annual board meeting and maintain minutes. However, Betsy had a bigger problem. She had looked on her state website to find out what she needed to do to form her corporation. The information was thin and not in plain English. Based on what she read and understood, Betsy took action and thought that she had created a corporation. After meeting with the client, the Clinic student dug in and tried to find the information for the company on the state’s website and found nothing. The student asked for the necessary records from the client. The client was unfamiliar with the terms for the documents, articles of incorporation and bylaws, for instance. Instead, the client sent the student proof of the employee identification number. The client had understood that she had to file to receive an employee identification number for the business. Once she did that, she thought she had formed her corporation and was done. As the student discovered, the only step that the client had taken to form the entity had, indeed, been filing to receive an EIN and had, consequently, been operating her business without an actual entity to shield her.

Lest anyone lose sleep over the concerns of these clients, the Clinic set them on a path to survival.

III. Results

The study focused on issues of accessibility, exploring such issues as whether:

- the state’s website used legalese or plain English;
- the state’s website user had to click-through multiple times to get to the necessary information, gathering as she goes, or hunt in one place with few click-throughs;\(^\text{14}\)

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\(^{14}\) Based on the team’s research, the students analyzed how many clicks from the landing page were required to access the key information, for instance, on how to form a corporation. Various research had shown that website users lose momentum/interest after a certain number of clicks. See Shari Thurow, *User Experience Myth or Truth: The Three Click (or Tap) Rule*, MKTG. LAND (Oct. 24, 2014), at https://marketingland.com/user-experience-myth-truth-three-click-tap-rule-104760; Bitsy Knox, *How Many Seconds Does Your Website Have to Capture User Attention*, EYEQUANT, http://www.eyequant.com/blog/2013/04/08/how-many-seconds-does-your-website-have-to-capture-user-attention.
• the state’s website had a translator;\textsuperscript{15}
• the state’s website had no information versus very clear and helpful information;
• the state’s website was found top-ranked in the results of a Google search;\textsuperscript{16}
• the state’s website was smartphone friendly;\textsuperscript{17}

\textsuperscript{15} The students determined the number of states with translators on the website. Data from 2013 showed that one in five Americans do not speak English at home. Forty-four percent of those people were born in the United States. About half of those people self-identified as not speaking English “very well” or worse. As one student in the Clinic pointed out, if there is no translator that is a problem. If it is in legalese, that’s a whole other issue.

\textsuperscript{16} In the United States, using a search engine is the second most common activity among Internet users. RALPH SCHROEDER, SOCIAL THEORY AFTER THE INTERNET: MEDIA, TECHNOLOGY, AND GLOBALIZATION 101, 104, http://discovery.ucl.ac.uk/10040801/1/Social-Theory-after-the-Internet.pdf (citing to 2012 Pew study, http://www.pewinternet.org/2012/03/09/search-engine-use-2012). Search engines inadvertently serve as gatekeepers to information, and, as a result, the public’s reliance on them causes websites like Google to shape what information users have available to them. Id. at 109. The states where people most frequently use a Google search related to starting a business are Mississippi, Georgia, Alabama, Louisiana, and South Carolina. https://trends.google.com/trends/explore?geo=US&q=how%20to%20start%20a%20business (based on Google search queries for the twelve months preceding March 24, 2018). Note that this search can be updated to reevaluate at any time. Id.

\textsuperscript{17} The team relied on a few studies, such as the Pew Study of Smartphones, Pew Research Center, Mobile Fact Sheet (2018), http://www.pewinternet.org/fact-sheet/mobile; see also Pew Research Center, Internet/Broadband Fact Sheet (2018), http://www.pewinternet.org/fact-sheet/internet-broadband. If all people should have access to forming a business, then those who rely mostly or exclusively on smartphones for Internet access may be at a disadvantage if the majority of states’ websites are not smartphone friendly. As the Pew study showed, one in ten Americans only use smartphones to access the Internet. Twenty-one percent of those people make $30,000 or less. Twenty-seven percent of those people have a high school education or less. Twenty-three percent of those people are Hispanics, and fifteen percent are African American. Consequently, if states’ websites are not useful to these individuals to assist in forming and maintaining a business, there is a problem in economic justice. A website that can be accessed by a mobile phone is accessible to more people who do not have or cannot afford other methods of accessing web pages. A website’s ability to be read and understood when accessed by a smartphone is not measurable by an exact formula, but one feature that helps significantly is a website’s ability to respond to a mobile user by automatically resizing the website’s content and allowing the site to be read in portrait and landscape view. Marcus Banks, GET RESPONSIVE: MAKING SURE YOUR LIBRARY’S WEBSITE IS MOBILE FRIENDLY, AM. LIBRARIES, Nov.–Dec. 2017, at. 24, https://link.galegroup.com/apps/doc/A514513476/AONE?u=mlin_s_umass&id=AONE&xid=9bf7d69e (last visited Mar. 14, 2018). Without the ability of a website to change depending on what device is accessing it, a website may be extremely difficult to read due to the need for excessive scrolling, disappearing...
the state’s website provided a variety of means of payment;\textsuperscript{18} and

• Other concerns.

Since individuals without resources would rely largely on what is available to them in common circulation, the students sought out the secretary of state’s website for each state. The study sought to answer, among others, questions related to why the gap continues to exist:

• Does the website include enough information for laypeople to understand how to start and maintain a business?

• Does the website include enough information for laypeople to understand what it means to form a business and the responsibilities that they are taking on?

• Is the information presented in a way that laypeople could understand and make decisions, for example among entity types?

• Is the information readily accessible?\textsuperscript{19}

The following information from the study represents a snapshot of the data collected, presented in the sequence that an entrepreneur might need it as she makes decisions to form an entity. Initially, an entrepreneur may want to know what, if any, entity fits her situation. That entrepreneur may or may not be aware that she should be thinking about, among other things, structure, cost to form and maintain, method of taxation, for-profit versus nonprofit, liability exposure, and future possibilities. The UMass study in 2017 found that slightly over sixty percent of the states provided descriptions of limited partnership, corporations, and limited liability companies.\textsuperscript{20} Of those definitions, over fifty percent of the states only provided text, and extremely small font sizes or pictures. \textit{Id.} These issues can make the website difficult, frustrating, or near impossible to understand if a user’s only means of access is a mobile phone.

18. States that provide noncredit alternatives to online payment systems provide more people from economically disadvantaged groups access to pay the fees necessary to open and operate a business. In 2015, approximately nine million households did not have a bank savings or checking account. \textit{Federal Deposit Insurance Corp., FDIC National Survey of Unbanked and Underbanked Households (2015), https://www.fdic.gov/householdsurvey/2015/2015report.pdf}. In the same study, in three-quarters of these households, no member had a credit card. \textit{Id.} at 32–33. Reasons that many low-income people are not able to obtain a bank account include the instability of their income and the requirements and fees that many banks impose. Fumiko Hayashi, \textit{Access to Electronic Payments Systems by Unbanked Consumers}, \textit{Econ. Rev. (Kansas City)}, Summer 2016, at 51, https://link.galegroup.com/apps/doc/A470870499/AONE?u=mlin_s_umass&sid=AONE&xid=d3bc5657 (last visited Mar. 14, 2018).

19. “Accessible” was understood to be a broad term. Consequently, the students explored issues of language, click-throughs, Google searches, etc.

20. General partnership and limited liability partnership were just above fifty percent.
the definition from the statute. As law students the world-over would probably attest, having a chart that compares entities is incredibly helpful—arguably best practices. In the Clinic, students would create charts for their clients, if relevant, and receive great appreciation for their work. The study found that only five states overall provide an entity comparison chart or table.21

If the entrepreneur opted to form a corporation, she would find that forty percent of the states do not have a description of how to form a corporation. Sixty-four percent of the states do not describe the requirements to qualify as a corporation. Eighty percent of the states do not identify that certain titled-positions must be filled (e.g., president, secretary, treasurer and director). Eighty percent of the states either do not mention, or define, a shareholder. Another aid that entrepreneurs (and students alike) find helpful is a step-by-step guide on formation or completion of a form. Just over ten percent of states had any kind of step-by-step guide related to formation.

More in depth, the entrepreneur may want to know about liability protection. The study found that only thirty percent of the states identify for her who is liable for the entity’s debts. But sixty-three percent of the states reference corporate liability in some capacity. Another concern for our intrepid entrepreneur may be raising capital. Nine percent of the states reference raising capital. None of the states mentions insolvency and what the entrepreneur should do for filings. As many lawyers know, another important aspect of forming a business becomes the tax treatment. Just under sixty percent of the states do not mention corporate taxation. Only seven percent of the states either mentioned double-taxation (or the equivalent), and only thirty-four percent describe an S-Corporation.22

An entrepreneur without resources to hire an attorney will have to wade through the decision-making and complete the formation documents. Twenty-three percent of the states had a clear link to where the formation documents could be found on the state website. Only fifty-five percent of the states described the articles of incorporation (or equivalent document), twenty-five percent had an annotated version,23 and only one state had a completed sample of articles of incorporation.24 Further, ninety-three percent of the states mention filing fees for the formation document, but only thirty-four percent clearly indicate how to make those payments.

21. Those states are Delaware, Georgia, Hawaii, New York, and Rhode Island.
22. The states that mention the S-corporation are Alaska, Arkansas, Delaware, Georgia, Hawaii, Indiana, Maine, Montana, New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, and Virginia.
23. The states that provided the annotated version of the articles of incorporation are Alabama, Alaska, Arkansas, California, Colorado, Maryland, Minnesota, Missouri, New Mexico, North Carolina, and North Dakota.
24. Utah provided the completed sample of articles of incorporation.
More generally, if an entrepreneur did a search on Google such as “form a business in [state]” (inserting the state’s name), only four percent of the states were listed in the first place on the Google results page. The majority of states were the third listed on the results page. Further, the study found that under fifty percent of the states had some form of translator, and under five percent were truly smartphone friendly.

IV. Why the Gap Matters

Before a business enterprise starts, the issue of unequal access begins. The poor quality of, or complete lack of information on, choices, necessary steps to start and maintain an entity, the reasons to have an entity, and other issues stymy individuals who may otherwise add to our community by, for example, creating jobs. The massive hurdle to understanding the law and implementing the steps mostly gets conquered by money, a network, or both.25 Without either, a gap arises. A state that provides access to resources and information for its residents to understand the requirements to form and maintain a business supports the local and national economy. More and more, people are relying on the Internet to which states need to respond. For example, in 2017, thirty-nine percent of farms in the United States relied on a smartphone or tablet to conduct business.26

Those pro bono service providers who help fill the gap would serve as excellent advisors about website content to create accessibility. Features of a website that make it “user friendly” provide universal access to it for people who are looking for important information. A website that is user-friendly should be built with the consideration that it must be able to help any user regardless of his or her education level or experience to find the necessary information within a reasonable time.27 The most important indicators of a user-friendly website are that the website is easy to use, easy to understand, and easy to find information on.28 A website’s address should be appropriate to reflect its content and easy to remember. 29 The importance of the UMass study shows how few states appreciate this issue and how they could respond to the gap.

28. Id.
29. Id. at 24.
In the United States, small businesses account for ninety-nine percent of all businesses.\textsuperscript{30} In 2014, small businesses employed almost half of the private workforce in the United States.\textsuperscript{31} Further, small businesses also accounted for ninety-seven percent of exports to other countries.\textsuperscript{32} Consequently, with a backbone of small businesses in the United States, states should provide entrepreneur accessibility in their websites that actually represents the population, not just the population that currently has access.

What is the population to which the states should respond, and, as the UMass study indicates do not do adequately? In 2017, the Small Business Association identified twenty-six million small businesses in the United States. Of those small businesses, minorities owned eight million.\textsuperscript{33} The median income for individuals who were self-employed at their own incorporated small business in 2015 was $49,804.\textsuperscript{34} For individuals who were self-employed in their own unincorporated firms, the mean income was $22,424,\textsuperscript{35} an income which would place a family of three or four near the 2017 federal poverty guidelines.\textsuperscript{36} With the cost of a small business lawyer ranging from $150 to $1000 per hour,\textsuperscript{37} many small business owners have little choice but to rely on themselves to bridge the gap.

Addressing this gap in access, each state could address poverty in lower-income areas. The cost of transportation affects lower-income people as they struggle to get to jobs outside of their communities since fewer small businesses operate in low-income areas than in other areas of the United States.\textsuperscript{38} And low-income entrepreneurs are less likely to incorporate their business, compared to their non-low-income counterparts.\textsuperscript{39}

\begin{thebibliography}{99}
\bibitem{31} Id.
\bibitem{32} Id.
\bibitem{33} Id.
\bibitem{34} Id.
\bibitem{35} Id.
\bibitem{36} HeathCare.gov, Federal Poverty Level (2018), https://www.healthcare.gov/glossary/federal-poverty-level-FPL.
\bibitem{38} https://www.sba.gov/sites/default/files/437-Entrepreneurship-in-Low-income-Areas.pdf. Significantly fewer people in low-income areas report being self-employed compared to other areas. Id.
\end{thebibliography}
Community Economic Development and the Concept of Justice

Steven H. Hobbs

The theme for this discussion group gave me a chance to reflect on the concept of Justice. I think that the ideal of justice should proceed and underpin any efforts at community economic development. Justice should shape and inform the choices that we make as we pursue community economic development. My hope is that this discussion group offers us an opportunity to consider notions of justice that can guide our work. Is it just about the chance for an entrepreneur to make money? Does the work actually improve a community? If so, how does one define community and measure improvement? What happens if community economic development ends up benefiting those who have money to invest in the development? Here I think of the issue of gentrification.

My idea is to go back and take a look at some historical examples of efforts at community development. The work of Marcus Garvey in the first part of the twentieth century provides an example of early economic community development. Garvey, who came from Jamaica to the United States in 1916, sought to uplift the race through his organization, the Universal Negro Improvement Association and African Communities League (UNIA). Inspired by Booker T. Washington and his work at Tuskegee Institute, Garvey initially sought to construct a similar school in the West Indies. However, as he traveled about the country raising funds, Garvey’s vision of the task ahead grew and became sophisticated and internationalized. In a concise statement reflecting self-determination he said:

And then I read *Up From Slavery*, by Booker T. Washington. And then my doom, if I may so call it—of being a race leader dawned upon me. I asked. . . . Where is the Black Man’s government? Where is his kingdom? Where

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1. To establish a Universal Confraternity among the race; to promote the spirit of race pride and love; to reclaim the fallen of the race; to administer to and assist the needy; to assist in civilizing the backward tribes of Africa; to strengthen the imperialism of independent African States; to establish Commissionaires or Agencies in the principle countries of the world for the protection of all Negroes, irrespective of nationality’ to promote conscientious Christian worship among the naïve tribes of Africa; to establish Universities, Colleges and Secondary Schools for the further education and culture of boys and girls of the race; to conduct a world-wide commercial and industrial intercourse.

is his President, his country and his ambassadors, his army, his navy, his men of big affairs? I could not find them, and then I declared, “I will help to make them!”

Garvey sought, among other objectives, to “promote the spirit of race pride and love; to reclaim the fallen of the race; . . . to strengthen the imperialism of independent African States; . . . to conduct a world-wide commercial and industrial intercourse.” Garvey’s movement for African redemption came as the world was emerging from the throes of a horrible war fought to preserve democracy. Garvey saw in the war and times a struggle by oppressed people to gain independence and self-determination. In early November 1918, Garvey announced a UNIA-sponsored conference to develop the “peace conference demands and belated war aims of the Negros." Nearly two thousand persons met in New York on November 10, 1918, and passed a resolution to be presented at the Paris Peace Conference. The resolution read in part:

(1) That the principle of self-determination be applied to Africa and all European controlled colonies in which people of African descent predominate.

(2) That all economic barriers that hamper the industrial development of Africa be removed. . . .

(9) That the captured German colonies in Africa be turned over to the natives with educated Western and Eastern Negroes as their leaders.

Garvey sought to promote the idea of equality for peoples of African descent. Garvey sought to instill dignity and pride in the race. He also sought to demand justice and freedom for his people. For Garvey, such a demand could only be asserted if blacks had a nation that could offer powerful protection of the full panoply of human rights. Among those rights as described in the Declaration of the Rights of the Negro Peoples of the World:

23. We declare it inhuman and unfair to boycott Negroes from industries and labor in any part of the world.

27. We believe in the self-determination of all peoples.

4. 1 Marcus Garvey and UNIA Papers, supra note 3, at 284.
5. Id. at 299.
50. We demand a free and unfettered commercial intercourse with all the Negro people of the world.\(^6\)

Garvey’s ideal of Justice encompassed freedom, equality, human dignity, and self-determination. The ability to freely engage in commercial enterprises was part of his vision of justice. To this end, Garvey and the UNIA established the Black Star Line, a steamship company that endeavored to trade between the United States, the Caribbean, and Africa. They also created the Negro Factories Corporation designed to create factories that were run by black people. The corporation included “a chain of cooperative grocery stores, a restaurant, a steam laundry, a tailoring and dress-making shop, a millinery store and publishing house.”\(^7\)

What I learn from Garvey is that we should approach community economic development as a fundamental human right that can be actualized by creating business opportunities that uplift the community. In other words, we need a holistic approach to solving the economic, social, and political inequities that plague too many communities. I am still working on the particulars, but my sense is that we have to start with the children’s fundamental needs, including the basics of education, healthcare, housing, and nutrition. Then we have to focus on entrepreneurial education in whatever venues are available. And, finally, we need institutions that will build enterprises that will generate the possibility of financial independence.

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My views on the questions raised in the original call for participation have been framed in large part by Professor Paul Tremblay’s article “Transactional Legal Services, Triage, and Access to Justice.” While he acknowledges that the traditional access-to-justice movement treats litigation legal services (LLS) as more critically important than transactional legal services (TLS), he suggests that this view might be shortsighted. The provision of TLS is a way to address longer-term issues confronting underserved communities by helping to create businesses that, in turn, create economic opportunity.

Tremblay’s article addresses not only the provision of TLS services to underserved communities, but also those entrepreneurs who may come from more privileged backgrounds but still do not have the financial resources to obtain the necessary legal assistance to form a business entity or protect their intellectual property. He acknowledges the views of various commentators who question the lack of quantitative evidence related to the provision of TLS having a positive effect on the creation of economic opportunity and subsequently on “access-to-justice.” However, he concludes by recognizing that offering free transactional legal services to social entrepreneurs and to those in underserved communities is a justifiable use of scarce legal resources. He also recognizes that allocating resources to purely entrepreneurial efforts is harder to justify, but may be wise in individual circumstances.

I would suggest that history demonstrates that people from disadvantaged communities have risen out of those circumstances, not only from pursuit of education, but also from forming their own businesses and establishing organizations that would enhance the welfare of their community. As innovation makes the world increasingly more complex, entrepreneurs from all walks of life are in need of TLS. While some would argue that

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2. “TLS . . . refer[s] to free or very low-cost legal assistance to entrepreneurs and businesses (both for-profit and nonprofit, and individualized or community-based) intended not to resolve disputes in the way that litigators do, but to establish, organize, govern, and maintain the organization’s work.” See Alicia Alvarez & Paul R. Tremblay, Introduction to Transactional Lawyering Practice 1–10 (2013) (describing the scope of transactional work).
there is an abundance of online resources available to those entrepreneurs that need legal assistance, my experience suggests that such resources often introduce more legal problems for the entrepreneur than they solve. Without the provision of free or low-cost TLS, only the wealthy and corporations will be able to effectively innovate and compete in the marketplace, thus further widening the gap between the haves and have-nots.

I will be prepared to discuss some examples of entrepreneurs with whom my clinic has worked that both directly served disadvantaged communities, as well as those entrepreneurs whose products or services have benefited those communities.
Access to Justice Requires Access to Opportunity Infrastructure

Anika Singh Lemar

In a few sparse sentences, a vignette in Isabel Wilkerson’s book about the Great Migration describes for me the relationship between community economic development (CED) and access to justice. Wilkerson tells the story of Robert Joseph Pershing Foster, a successful surgeon in Los Angeles, who grew up in a segregated Monroe, Louisiana, in the 1930s. As an adult, Foster regretted that he never learned to roller skate. His parents, both schoolteachers, could have afforded to buy him roller skates. But, as Foster told Wilkerson, they “couldn’t buy sidewalks.” The dirt roads in their segregated neighborhood did not provide the infrastructure that he needed to skate. And no individual could build that infrastructure. Building sidewalks would have required government investment. There was no such investment in Foster’s African-American neighborhood. Segregation was designed and operated to ensure that African-Americans did not benefit from “public goods” that were available to white families. As we all know, separate never was equal.

The vignette is powerful because it neatly presents the problem of segregation and differential access to public resources. In many ways, Foster lived a middle-class childhood. But differential access to communal resources—the opportunity infrastructure necessary for a child to access economic mobility—nevertheless put him at a disadvantage. The United States, by design, provides lower-quality public goods in low-income neighborhoods and neighborhoods disproportionately occupied by people of color. Sidewalks, public parks, clean air, and schools with adequate supplies and staffing are all underfunded in the places where they are most needed to advance mobility.

Compare Foster’s story to Richard Rothstein’s account of the development of Levittown, New York. In the late 1940s, white families could purchase homes in Levittown, Long Island, for $8,000.3 They could do so because the Federal Housing Administration (FHA) subsidized the

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3. Id. at 70–71. Per Rothstein, that purchase price is equal to $75,000 in 2017 dollars. Id. at 202.
construction of Levittown. The FHA also expressly mandated that homes in Levittown be sold and occupied only by whites.4 Today those homes sell for about $400,000, and Levittown remains disproportionately white. In fact, Levittown’s population is less than one percent African-American. It is no surprise that an astronomical racial wealth gap persists and that a component of that wealth gap is a massive discrepancy in the amount of home equity held by whites versus that held by African-Americans.5

Mid-twentieth century home-ownership subsidies enabled the development of the American middle class, but only for white families, and they operated in a way that is fundamentally different from today’s subsidized home-ownership programs: there were no limitations on how much equity one could accrue. Interestingly, contemporary CED policies and practices shy away from the type of wealth transfers that built Levittown and the exclusively white middle-class families that came to occupy it. Chasing available resources, largely governmental subsidies and foundation support, CED practice often imposes restrictions on individual wealth accretion. CED practitioners will lock themselves into tax-exempt structures because, whatever the limitations on these entities are, tax-exempt status unlocks grant and governmental funding not available to for-profit entities. While other subsidy programs have dwindled, federal tax expenditures for housing development survive. As a result, CED practitioners often pursue subsidized housing strategies simply because there are available subsidies. Subsidized affordable housing, including subsidized home ownership models, imposes caps on equity accretion.6 These limitations on individual wealth accretion reappear in much of CED practice, which some would argue is a feature, not a bug.7 Consider, for example, worker cooperatives where members cannot amass a profit by selling their stake in the entity. I worry, however, that we are providing lesser property rights to low-income people and limiting their ability to access economic opportunity and mobility.

These CED practices undoubtedly result in community resources in the form of locally owned businesses, rehabilitated housing, and efficacious social services organizations. But do they result in justice? What would justice for young Robert Joseph Pershing Foster have looked like? It would have required not just sidewalks, but roller skating. Does justice

4. Id. at 70–71.
6. Notably, the home ownership subsidies available to middle-class and wealthy people—for example, the mortgage interest deduction, the exclusion of imputed rent from taxable income, capital gains exclusions, and property tax deductions—are effectively cash transfers with no strings attached.
for a low-income homeowner hoping to join the middle class manifest as a house or as home equity, available to be tapped for college tuition or to start a small business? Constrained property rights, where individual wealth accretion is limited, result in communal goods. I posit instead that the “community” in CED should refer to inputs—the communal efforts required to build opportunity infrastructure—rather than the outputs—constraints on individual economic mobility. CED’s contribution to the pursuit of justice ought to be creating new opportunity infrastructure that results in individual mobility.

In the Community and Economic Development Clinic at Yale Law School, we are building and expanding upon a practice oriented around opportunity infrastructure. On behalf of various clients, we seek to make it easier to develop both rental housing and starter homes, subsidized and unsubsidized, in towns with lots of opportunity infrastructure. These towns use zoning and other regulations to exclude low- and moderate-income families. Our mission is to break down those barriers. We have worked with the New Haven Promise to deploy community resources to provide pure grants for college for a wide swath of students in New Haven’s public schools. We have long represented a neighborhood community development corporation that owns and manages a supermarket-anchored shopping center, then uses its cash flow to subsidize early childhood education in a high-quality Montessori preschool in a low-income neighborhood. We seek to decrease barriers to entry for low-income entrepreneurs. Our clients train would-be entrepreneurs and farmers from diverse backgrounds, develop kitchen incubators, and train family daycare providers. We work with community-based clients in an effort to ensure that landlords, homeowners associations, and housing authorities do not put home-based businesses out of business. The Clinic has advocated on behalf of low-income entrepreneurs facing zoning, licensure, and other regulatory barriers. We have worked on various projects to develop equitable access to financial products, from small business loans to DACA loans to checking accounts that meet the needs of individuals with mental illness. Across all of our work, in partnership with community-based clients, we seek to advance economic opportunity and mobility.

The need for a justice-oriented CED is greater than ever. Our urban and suburban landscape continues to be hyper-segregated. The wealthy, as a general matter, reside in segregated neighborhoods in which they are able to direct their taxes and other resources to their own segregated schools, parks, and other public resources. Separate is still not equal. This situation is a deep injustice. Our contribution, as CED scholars and practitioners, ought to be the development of an opportunity infrastructure that enables economic mobility.

8. I was privileged to inherit a practice and docket built, over the years, by many lawyers, most notably Bob Solomon and Jay Pottenger. The docket has evolved in recent years but remains informed and inspired by everything that came before.
Interdisciplinary Projects-Based Community Entrepreneurship Courses

Anthony J. Luppino and Brandon Weiss

Over the last approximately fifteen years, the University of Missouri—Kansas City (UMKC) School of Law has developed a multifaceted set of courses, including interdisciplinary courses, pro bono clinics, and other programs and events relating to for-profit entrepreneurship and economic development, and social and civic entrepreneurship. This presentation will describe two recent interdisciplinary additions to these offerings—the Law, Technology and Public Policy (LT&PP) course and the Entrepreneurial Urban Development (EUD) course. Both have strong elements of increased access to law and justice, with particular focus on presently disadvantaged and underrepresented individuals, groups, and communities. They significantly enhance the training of individuals to become effective community economic development and social justice advocates and facilitators. They deliver productive projects-based learning through multidisciplinary teamwork among faculty, students, and government officials and/or community activists, grounded in design thinking, and embracing the emphasis on empathy and constructing solutions responsive to the needs of various stakeholders that design thinking entails.

The LT&PP course grew out of the July 2014 Law Schools, Technology & Access to Justice Conference organized by UMKC School of Law with support from the Ewing Marion Kauffman Foundation. That event brought together champions of both law technology and access to justice from across the United States. The course concept was to build on the “legal hackathons” movement, often involving weekend events that challenge participants to create technology-assisted solutions to societal challenges, by instituting a semester-long course in which interdisciplinary teams seek to design and build problem-solving prototypes. UMKC has now offered the course eight times.

UMKC participants in the LT&PP course have come predominantly from the School of Law, the School of Management, and the School of Computing & Engineering at UMKC. Individuals from several other academic institutions (including Brooklyn Law School, Missouri Western State University, MIT Media Lab, Queen Mary University of London, and Vermont Law School) have also been involved with course design or mentoring on particular projects. Course teams have interacted with government

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officials in Kansas City, Missouri, and Kansas City, Kansas, representatives of the KC Chapter of Code for America, and leaders of several community organizations/initiatives. Examples of the course projects include creating streamlined and consumer-friendly online tools to apply for permits and licenses (more established/better resourced individuals/businesses can and do pay professionals to help them navigate through the complex web of current processes, but entrepreneurs of modest financial means struggle to do so); suggesting model policies for Smart City data collection (e.g., through sensors) and dissemination that can stimulate economic development and public safety, but must be tempered by attention to community perspectives and privacy concerns; and electronically mapping abandoned properties and developing means to predict when properties may be headed toward abandonment and to make redevelopment of such properties more accessible to developers and local tradespersons.

The new EUD course, offered for the first time in the 2017 spring semester, is one of the key components of an Urban Entrepreneurship Initiative co-organized by the UMKC Law School and the Lewis White Real Estate Center at the Bloch School of Management. The course consists of interdisciplinary teams of students, faculty, and community mentors providing analysis to local governments and nonprofits on real estate-based community development projects in the greater Kansas City area. Students receive instruction in real estate feasibility analysis, community economic development, tax incentives (federal, state, and local), principles of urban planning, public-private partnerships, zoning, and racial and environmental justice. Faculty are drawn from UMKC’s Law School, School of Management, Department of Architecture, Urban Planning and Design, Latinx and Latin American Studies Program, and Department of Geosciences.

In the course’s first year, student teams applied their classroom learning to provide advice to a wide variety of project providers, including a city government hoping to turn an investment in a downtown healthy campus into a catalyst for broader revitalization; a community development corporation considering establishing a community land trust and worker-owned housing rehab cooperative; a nonprofit founded by a historically Black sorority converting a historic athenaeum into a community space; and a city looking to connect racially and economically segregated neighborhoods via an innovative transit corridor.

The goals of both of the above-described courses include breaking down traditional interdepartmental barriers, exposing students to how professionals across fields collaborate on real-world projects, and, ultimately, leveraging the resources of the university to effect positive change in the surrounding communities. Challenges for future iterations of these courses include further shifting institutional incentives to reward interdisciplinary collaboration, refining project-provider and student-selection procedures to better leverage resources, and maintaining engagement with projects over multiple semesters for more sustained community impact. In our presentation, we will share reflections on lessons learned and suggestions on developing these types of courses.
Creating Sustainable Economic Development on Indian Reservations Is an “Access to Justice” Issue

Robert J. Miller

Very few of the 300 Indian reservations in the United States have functioning economies in which reservation residents can be employed, spend money, and find adequate housing. In contrast, almost all reservation residents have to travel to distant cities to find banks, businesses, higher education, livable wage jobs, and adequate housing. This situation creates economic and justice-related disasters on Indian reservations. American citizens, including Indians of course, deserve some minimum level of economic prosperity. Instead, dire conditions of poverty degrade and nearly destroy the possibility of creating reservation economies and community stability. Forcing Indian communities to live in dire poverty is an issue of justice and equality. American society at large, and specifically Indian governments and communities, need to find solutions to these problems.

I. Keeping Dollars on Reservations

Reservations rapidly lose the money that residents receive because of the absence of a variety of tribally and privately owned businesses where people can spend their money. This leads to an enormous loss of economic activity and employment that should occur in Indian country. Ideally, money should circulate five to seven times within a community, county, or state before it “leaks” away. The only solution to this problem on reservations is for tribal governments and communities to establish a significant number of privately owned businesses.

Keeping money circulating within a reservation implicates an economics principle called the “multiplier effect.” This concept defines a situation where every dollar that is spent by one person ends up as profit and salary in the hands of another person. This new person will then also spend that dollar and pass it on to another person who will also spend it, etc. In this fashion, one dollar “multiplies” throughout an economy and becomes pay, profit, and spending money for a greater number of people as long as that dollar stays within the local economy.

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II. Developing Entrepreneurial Businesses on Reservations

Governments play a crucial role in developing the private, free-market economic system. They protect the public interest, ensure fair competition, maintain law and order, and create laws and courts that help enforce contract and property rights. Governments create and enforce the rules that ensure a fair system that attracts investors to a community. The stability provided by government encourages people to work to acquire economic and property rights and to risk their investments. Tribal governments play this crucial role for reservation economies. It is important to note, however, that many tribal governments have not yet enacted the kinds of business and commercial codes that businesses and banks need before they can operate on reservations.

Tribal policymakers should also consider lobbying Congress for a stronger federal “Buy Indian” act. The 1910 Buy Indian Act, 25 U.S.C. § 47, grants the Secretary of Interior total discretion whether to spend federal funds on Indian labor and Indian-made products. In contrast, if the Secretaries of Interior and of Health and Human Services were legally required to spend a certain amount of the Bureau of Indian Affairs and Indian Health Service budgets on Indian labor and products, it would create an enormous incentive for Indian-owned businesses to provide these goods and services, and it would create more Indian-owned and reservation based businesses. Tribal governments should also enact their own “Buy Indian” acts and should purchase as many goods and services as possible from tribal, reservation-based, and Indian-owned businesses. Tribal governments can also create more Indian-owned businesses by creating an environment that assists reservation residents to start businesses. Tribal nations can work to remedy some of the reasons for the abysmal rate of private-business ownership among Indians. For example, the vast majority of privately owned businesses in the United States are started by using family savings, acquiring bank loans, or borrowing money against home equity. But most American Indians lack access to these avenues due to historic poverty and unemployment rates and rarely have home equity due to a nearly non-existent private housing market on most reservations. Consequently, seed money provided by tribal, private, state, and federal loan funds is crucial to alleviate this funding problem.

Reservations also rarely have role models of successful business owners from which others can learn, or on-reservation businesses where young people can get their first jobs and learn about work and business management. Tribal economic development departments can help address this situation by operating mentoring and training programs to develop entrepreneurs and to help them start businesses. Also, a few organizations already provide this training for individual Indians. Organizations such as the Oregon Native American Business and Entrepreneurial Network, the Four Bands Community Fund, and the Lakota Fund, train individual
Indians to learn about entrepreneurship and financial literacy, to draft business plans, to acquire financing, and to operate their business.\footnote{Id. at 128–29, 151–54.}

In conclusion, if American Indians are going to participate fully, and equally, in the “American dream,” the United States, Indian nations, and reservation communities must do everything that they can to develop more privately owned businesses in Indian country and to create functioning economies to make Indian reservations more sustainable, healthy, and viable.
Balancing Political Power: Community Economic Development and Institutional Design

K. Sabeel Rahman

Community Economic Development (CED) has been a central area of focus for practitioners, clinicians, and legal scholars, emphasizing questions of community benefits, affordable housing, access to justice, and much more. As the urban inequality crisis has continued to worsen, advocacy groups and practitioners have begun to experiment with more creative approaches to social change that lie at the intersection of traditional public-interest lawyering, social-movement organizing, and institutional design. These innovative approaches represent a potentially valuable area for practice and innovation in urban economic justice.

As scholars of law and social movements (including several on this panel) have rightly noted, an increasingly important overlap exists between strategies of legal change and grassroots organizing (e.g., Scott Cummings, Law and Organizing). In the community-development space, this turn to organizing has been further nuanced by a parallel turn to governance. In cities like Detroit, Oakland, and elsewhere, grassroots advocacy groups have begun to propose novel governance arrangements as a way to increase not only the substantive economic outcomes of city development deals but also the community participation in formulating and monitoring these deals. Thus, the Partnership for Working Families, for example, has developed a community oversight board with the City of Oakland, which empowers local constituencies to help oversee, implement, and hold accountable developers and the city itself to meeting local benefits benchmarks. Similarly, Detroit recently considered and narrowly rejected a grassroots-proposed, municipal-wide community-benefits ordinance.

While community-benefits agreements have a rightly fraught history of legitimizing inequitable urban development, these experiments suggest a valuable next wave of innovation that aims to create more systematic community empowerment.

This turn to institutional design and governance represents a return in some ways to some of the more radical origins of the welfare rights

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2. Detroit residents approved a narrower, compromised community-benefits ordinance.
movement, the grassroots war on poverty, and the early era of community economic development. For practitioners today, this institutionalist turn could be crucial to redressing the problems of urban inequality. At a systemic level, inequitable urban development is rooted in disparities of political power—particularly between communities and developers, and between communities and city officials. These disparities in economic and political power interact and are especially stark in the context of urban planning and development decisions. Efforts like the novel approaches to community benefit agreements (CBAs) offer some valuable insights into how social movements and practitioners can develop more systemic and institutionalized forms of power that can influence central processes of urban development. These insights can be adapted to a range of community development decisions, including the problem of privatization and governance of infrastructure, and city and regional zoning and planning decisions.
A Rural State Perspective on Transactional Skills in Legal Curricula and Access to Economic Opportunity

Alexandra P. Everhart Sickler

Teaching transactional skills to law students is an important component of furthering economic development and diversification in a sparsely populated, predominantly rural state like North Dakota in which energy and agriculture dominate the local economy. Rural states like North Dakota are geographically distant from larger commercial markets where financial, social, and human capital are relatively abundant. Entrepreneurs that want to reach markets beyond the state’s borders face the challenge of accessing these capital sources, either because they are scarce locally or because obtaining them from larger markets is too cumbersome and expensive. These start-ups need to be able to access the knowledge and skills that they do not have in-house, including legal expertise, without wasting their limited resources. Beyond the needs of larger business entities, North Dakota’s local communities also have small business owners that need legal services.

Thus, two dimensions to the need for transactional legal services exist in North Dakota. First, there is the entrepreneurship dimension, where innovation-focused businesses are entering and operating in markets for wind energy, biotechnology, unmanned aircraft systems, and precision agriculture and need legal advice. Second, there is the community economic development dimension, which speaks to the provision of legal services to small-business owners that intend to provide goods or services within a local community.1

But a lawyer shortage in North Dakota, particularly in its rural areas, is in tension with the demand for transactional legal services in the state.2 While the number of attorneys has been increasing, most of them live in the

1. See Lynnise E. Phillips Pantin, The Economic Justice Imperative for Transactional Law Clinics, 62 Vill. L. Rev. 175, 179–80 (2017) for a discussion of the CED clinic versus the transactional law clinic, as opposed to the CED clinic, that practices in the fields of business law and entrepreneurship law. She posits that “students can learn corporate skills in preparation for practice while accomplishing the social justice goals aligned with the missions of clinical education.” Id. at 179.

state’s metropolitan areas,3 and conversations with practitioners reveal that not many transactional lawyers practice in the state. A shortage of qualified local transactional lawyers can delay development as the few existing attorneys are overwhelmed with high workloads. Meanwhile, state residents and businesses using local counsel less experienced in transactional practice run the risk of entering into less advantageous transactions.

The Bakken oil development in western North Dakota highlights the need for qualified transactional lawyers. It is a tremendous strain on the rural region’s ability to support business development and provide community facilities, affordable housing, and utility infrastructure. But it is also an unprecedented opportunity for the state and its residents to generate massive economic benefits. During the oil boom,4 new businesses entered the North Dakota market, many existing businesses grew exponentially, and a myriad of new corporate enterprises were formed while workers connected to the oil-industry-inundated communities in western North Dakota.5 Existing businesses, schools, and hospitals struggled to expand to meet demand. Industrial, commercial, and residential infrastructure, including airports, roads, refineries, pipelines, and healthcare systems needed to be built or greatly expanded. Landowners were inundated with oil and gas exploration and production leases and easements for industrial infrastructure on their agricultural land. The transactional challenge faced by such landowners, beyond the obvious economic terms, was to balance reasonable oil and gas development while protecting ongoing surface land use and the environment. At the core of all of these challenges were transactions that needed lawyers familiar with North Dakota law and culture. As a result, there is ample opportunity and great need to incorporate transactional legal skills in the law school’s curriculum.

More broadly, the need for economic diversification in North Dakota has been clear since before statehood. North Dakota’s economy is mostly focused on producing raw commodities that are shipped and processed outside the state. In the wake of the agricultural downturn of the 1980s, efforts to promote innovation and entrepreneurship within the state became more intentional. The University of North Dakota (UND) launched its Center for Innovation in 1984, coaches regional entrepreneurs, and promotes innovative business ventures with the state while providing experiential learning opportunities for UND’s students. In 2007, North Dakota State University opened its Research & Technology Park, a business incubator, with the stated goal of creating an entrepreneurial culture that fosters innovation.

3. Id. (“Of the 357 towns in North Dakota, the North Dakota Supreme Court reports that only eighty-five have an attorney.”).
and encourages ingenuity. Changes to state tax law were made to encourage angel funds to invest in regional projects, most recently, precision agriculture and biotech. Current Governor Doug Burgum is a former Microsoft senior executive with extensive experience leading and advising technology start-up entities, with a stated goal of improving the entrepreneurial environment of North Dakota. Such efforts are in tandem with a larger national trend, as evidenced by recent actions of Steve Case and other large investors, to increase the availability of venture capital in rural parts of the United States, like North Dakota.  

With significant efforts currently underway by political and business leaders, along with additional in-state capital generated by the Bakken oil boom, North Dakota has a unique chance to lead this national trend while broadening its economy. Well-trained lawyers are critical to that economic diversification. Entity formation, capital financing, intellectual property rights, purchase and sale of goods and services, and risk management, specifically for start-ups, are just a handful of topics for which skilled lawyers are needed in the state.

Thus, building law students’ practice awareness in commercial and transactional law is critical to promoting economic development and entrepreneurship in North Dakota as well as keeping those legal services within the state. But the challenge is figuring out how to accomplish this broadly stated goal, which involves teaching concrete skills to help companies form, operate, and protect and value their innovations, along with teaching soft skills that transactional attorneys need to effectively represent their clients. In the entrepreneurial context, the challenge of teaching law students soft skills that may not predominate in traditional legal education is magnified. These skills include, for example, making sound decisions with imperfect information, shifting from a risk management mindset to an opportunity capture mindset, and the ability to pivot in the face of changed circumstances.

Many scholars recognize that these skills are best taught through experiential learning, most often in a clinical setting. UND does not have a community economic development clinic or transactional law clinic. Instead, it tries to provide students a concrete first experience either in a skills or doctrinal course. Clearly, the skills and exercises connect to any doctrinal focus of a course, but it is equally important to contextualize those skills and exercises in the North Dakota economic landscape, so that law students understand and appreciate the value that transactional lawyers add to economic development. The idea here is to emphasize that lawyers contribute to commercial growth and wealth building within their communities and

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7. *See Phillips Pantin, supra note 1, at 193 (discussing the importance of grounding students’ development of practical lawyering skills in the economic landscape).*
state by having students practice skills in simulated exercises that are connected to industries currently fueling economic growth within the state.

One such industry is wind energy. North Dakota is the sixth windiest state in the country and ranks eleventh for installed wind capacity. North Dakota’s potential for economic growth is not limited to the construction of wind farms or the generation of wind power. It extends to businesses that make equipment for the industry. Infrastructure leases with landowners, regulatory oversight issues, raising project capital, and entity formation are all legal topics relevant to successful development of the wind industry in North Dakota.

Another industry is unmanned aircraft systems (UAS). The Federal Aviation Administration has designated North Dakota as one of six federal UAS test sites tasked with determining how to safely integrate UAS into national airspace. This selection makes North Dakota a prime location for UAS-oriented businesses to develop and test technology in any number of areas, such as precision agriculture. What is touted as America’s first commercial UAS business and aviation park, Grand Sky, is located on the Grand Forks U.S. Air Force Base in eastern North Dakota. Its purpose is to allow tenants, like Northrup Grumman, to test new UAS technologies under extreme weather conditions in uncongested airspace. As the uses for UAS proliferates beyond military and agricultural applications into areas like the construction and design industries and utilities, transactional lawyers will be needed to establish the legal framework in which this infant industry operates, in areas like venture capital.

8. North Dakota has more than 3000 megawatts of wind energy capacity installed throughout the state, consisting of more than 1500 wind turbines on wind farms across the state. It currently obtains more than twenty percent of its power from wind resources. Am. Wind Energy Ass’n, North Dakota Wind Energy, https://www.awea.org (last visited Jan. 1, 2018).

9. LM Wind Power in Grand Forks manufactures wind turbine blades and ships them across the country by rail.

Social Justice Implications for “Retail” CED

Paul R. Tremblay

Introduction

Several years ago, I attended a faculty meeting where an item on our agenda called for some special treatment or consideration (I forget what it might have been) for a public interest initiative at the school. A veteran tenured colleague, a prominent scholar who published important work, questioned us about what warranted the “public interest” designation for this activist measure. He wrote law review articles that influenced public policy, he argued, so wasn’t his work just as entitled to be considered “public interest” as the initiative in question?

I knew that he simply had to be wrong (although I did not say anything at the time), but his argument has stayed with me over all of the intervening years. His curiosity about what “counts” as public interest is not frivolous, and it resembles the question presented in this discussion about what counts as “justice” in community-based transactional work. As I seek to explain in this brief overview, sometimes community economic development (CED), and the related transactional practice, will serve the needs of justice, and at other times it probably does not. For those critics who worry

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1. While my colleague’s question may not represent a serious internal debate on law school campuses touting their public interest commitments, variations of that question have led to intriguing definitional uncertainties among scholars. As Susan Carle has written,

Today, people use the term “public interest” law as a gloss for a wide range of sometimes contradictory lawyering categories. Some people define “public interest” law as lawyering for the poor. Some define it as “cause” lawyering. Others think of it as lawyering specifically with a left wing or politically progressive agenda. Still others define the term as encompassing jobs in the public and nonprofit sectors.

Susan D. Carle, Re-Valuing Lawyering for Middle-Income Clients, 70 Fordham L. Rev. 719, 729–30 (2001); see also Scott L. Cummings, The Pursuit of Legal Rights—and Beyond, 59 UCLA L. Rev. 506, 517 (2012) (“[F]orty years after the invention of public interest law, we no longer have a working definition of what exactly it is.”); Deborah L. Rhode, Public Interest Law: The Movement at Midlife, 60 Stan. L. Rev. 2027, 2029 (2008) (“[T]here are no] rigorous, widely accepted criteria for determining what constitutes a ‘public interest’ legal organization . . . .”).
that, for instance, transactional clinics in law schools will diminish the traditional commitments of law schools to justice-driven education, there are encouraging responses.

I want to focus here on what I might call “retail” CED—transactional work performed for businesses or social enterprises that need it to survive or succeed. It seems to me that two related dimensions exist on which to assess the relationship between the transactional lawyering found in CED work and notions of social justice. First is the nature of the work itself: Does representing this client achieve a recognizable social-justice aim beyond what any lawyering at all, for any client, might achieve? Second is the triage implication of the chosen work, aside from its individual quality. Given the needs of distressed and historically disadvantaged or overlooked communities, is transactional CED work the best use of the lawyer’s services? In both instances, the answer will be “It depends,” and the interesting consideration is what accounts for the difference. And, as we shall see, the two questions connect in important ways.

I. Transactional Lawyering and Access-to-Justice Goals

Imagine that a local nonprofit law firm has an opening for a new client, and the following three prospective clients have requested help:

Karen is a low-income, disabled victim of domestic violence whose controlling partner, Bill, through his lawyer, has filed a petition in family court for full custody of the couple’s six-year-old child. A motion for temporary custody has been scheduled for next week. Karen is 35 years old and white.

Gillian is a 25-year-old, white MBA student at a university, located in a nearby leafy suburb, which has built its reputation on fostering entrepreneurship. She has considerable educational debt. Her MBA curriculum includes encouragement for startup business development. Gillian has developed a web-based program that would facilitate sharing, Airbnb-style, of canoes, kayaks, sailboats, and motor craft. She needs help with corporate filings, trademark protection, liability concerns, and employment issues.

Soyoung lives with her family in a largely-Korean neighborhood of the local metropolitan area. Her parents are immigrants from Korea. She has started a business out of her home, catering functions with Korean cuisine.

2. See, e.g., Amber Baylor & Daria Fisher Page, Developing a Pedagogy of Beneficiary Accountability in the Representation of Social Justice Non-Profit Organizations, 45 Sw. L. Rev. 825, 827 (2016) (“Notably, not all clinics representing organizational clients are engaged in social justice lawyering, particularly considering the rise of transactional clinics in recent years, many of which have eschewed a social justice mission . . . .”).


4. For the sake of this admittedly implausible thought experiment, I assume that the nonprofit firm has adequate expertise to address any one of the three client projects.
The business could expand to a food truck, she hopes. Soyoung needs legal help with corporate organization, local permitting, liability protection, and trademark registration.

Each of these prospective clients has a significant need for legal help and cannot afford to obtain that help except through a program like this nonprofit firm. In choosing which client to accept, the firm no doubt will be concerned about the social justice implications of its selection. If it chose to offer its scarce and finite time to Karen, no observer would be surprised or criticize the agency. Indeed, one of the more prominent social policy endeavors in recent years has been the organized effort to craft systems to increase the availability of legal help to persons just like Karen. The accepted shorthand for the collective efforts is “access to justice.”

By contrast, no one would plausibly argue that, of the three prospective clients, the agency should accept Gillian’s matter. Like Karen, Gillian has an array of legal needs, having access to a lawyer will matter, and she will not find a lawyer on the private market. And, if her web program succeeds, she will have contributed to the general economy, likely have added jobs and tax revenue, and satisfied a societal need. But there is no implication of justice in Gillian’s enterprise. Like with the public-interest definition debate referenced earlier, and my tenured colleague’s faculty meeting comment, while it is right and fair for Gillian to have support for her entrepreneurship, the stakes for her not having a lawyer, by comparison to Karen, are simply not that significant.

So, where does that leave Soyoung? Her legal needs resemble Gillian’s far more than they do Karen’s, and like Gillian the stakes are not nearly as dire. This simple thought experiment shows why observers question whether transactional legal services deserve to be included in the access-to-justice conversation. Should available free lawyers turn down a client like Karen in order to offer services to small businesses like Gillian’s or Soyoung’s? It may be hard to imagine why.

Of course, the answer is considerably more complicated. While no one would argue for Gillian, some will argue for Soyoung. For lawyers work-
ing at this retail level, there are good reasons to support entrepreneurs, and especially entrepreneurs of color, working in underserved communities seeking to make businesses succeed. Aiding a client like Karen helps in a short-term (if invaluable) way, but leaves her as short of power as before, and just as vulnerable.\textsuperscript{10} Aiding a client like Soyoung, by contrast, collaborates with a client in ways that support her power and autonomy growth. When the relationship ends she has less need for professional help than when it began (and she might be able to afford what she needs).\textsuperscript{11} Respecting the limits of lawyer capacity to effect longer-term social change at the retail level,\textsuperscript{12} there are justifiable, persuasive reasons to offer those services to entrepreneurs whose missions might make a difference both to the founders themselves, and, more speculatively but if so valuably, to the neighborhoods in which they work. In this way, one can conclude that in this setting, transactional lawyering, as part of modest CED, represents a commitment to social justice. The choice to offer that service is a justified, justice-driven allocation of resources.

Before I move to the larger perspective on the lawyer’s role, I need to highlight one more important consideration for the retail triage choices made by the nonprofit agency among Karen, Gillian, and Soyoung. Thoughtful critics have argued, with impressive support, that for low-wealth and historically disadvantaged community members, entrepreneurship is most often a false hope.\textsuperscript{13} Success is rare, and the absence of social, political, and (of course) financial capital makes the challenge all the greater.\textsuperscript{14} Better, the critics argue, for poverty lawyers and progressive activists to support employment opportunities rather than startup businesses.

I know of no commentators who disagree with that discouraging empirical analysis. Let us assume it is valid. The puzzle for street-level actors


\textsuperscript{12} See Scott L. Cummings, \textit{Law and Social Movements: Reimagining the Progressive Canon}, 2018 Wis. L. Rev. 441.


like the lawyers here, making triage choices among the three prospective clients, is whether that empirical data ought to deprive Soyoung of the opportunity to try to succeed in this business at this time. It is hard to criticize the agency for its support of Soyoung notwithstanding the odds.

II. Transactional Lawyering and Community-Building Goals

Let us accept for the moment the proposition that a local neighborhood nonprofit offering retail legal services to residents with pressing legal needs can justifiably offer such services to entrepreneurs of color who have a reasonable shot at establishing a successful small for-profit business. Let us accept that, using the access-to-justice metric, such a choice is plausibly defensible. We then encounter the powerful argument that asserts that we’re asking the wrong question from the beginning. Should the agency in question be operating at a retail level at all? Perhaps the agency should not only turn away Soyoung and Gillian, but Karen as well. Its mission ought to be different from individualized, bespoke legal services. It ought to be community-based and system-changing, and the triage choice from Part I is none of that.

Much of the most prominent CED literature operates at that level. From Scott Cummings’s early critiques of market-based CED15 and Sameer Ashar’s advocacy for community and movement lawyering16 to Michael Haber’s recent assessments of transactional lawyering,17 the message is clear: this kind of work “cannot seriously challenge the hegemony of liberal capitalism.”18 The emergence of demosprudence—“the study of the dynamic equilibrium of power between lawmaking and social movements”19—anchors serious rethinking of the role that lawyers play, and especially CED lawyers, in effecting social change, and advancing social justice. As Haber writes, consistent with many critical observers, “leading CED programs too often to fail to aggressively challenge the structural drivers of inequality.”20

20. Haber, supra note 17, at 361.
The debates among the CED critics and movement lawyers are rich and provocative, and we’d all agree—the critics are essentially right, aren’t they? The work that our fictional nonprofit agency might perform for Soyoung, or for Karen, will be what Gerald López describes as essentially regnant (although I have argued that the lawyering for Soyoung is less regnant than that for Karen). It affects the larger community barely at all, and has questionable transformative benefit to the clients the agency chooses to serve. The puzzle, though, is what that reality means for lawyers like those offering retail representation to clients like Karen and Soyoung.

As long as lawyers continue to offer retail representation to individual clients in need, choices like that between Karen and Soyoung will persist. And while some critical scholarship implies that the street-level, single client lawyering model ought not to be an available model, most would likely agree that at a minimum a division of labor makes sense from a policy perspective, with both retail and movement/organizing work performed by those who hope to advance social justice. As Alizabeth Newman notes, the clients who are not yet aligned with mobilization campaigns have important legal needs that warrant attention from the legal services community.

Once (or if) we accept the division of labor conception, and the reality of retail legal practice, then we return to the access-to-justice question, with choices like those presented in the thought experiment that introduced this essay. If we imagine a triage assessment—of the choice between Karen, who needs family law and domestic violence-related representation in court, and Soyoung, who has transactional legal needs that will help her emerging neighborhood-based business have a greater chance to succeed—applying the most helpful triage standards for allocation of scarce

23. See Tremblay, supra note 11.
legal services, we see that offering services to Soyoung would satisfy many of the principles involved. Applying Glenn Cohen’s “rationing principles” scheme, the “best outcomes,” “aggregation,” and “instrumental” factors all would support assistance to a prospective client whose long-term success would decrease needs in the future and offer some likely improvement in the lives of others beyond the client served. By contrast, aiding Gillian fares far less well in that kind of scheme.

To be sure, this work is, to use Barbara Bezdek’s phrase, “small-ball.” It does little, and certainly nothing “serious,” to “challenge the hegemony of liberal capitalism.” But it makes some modest progress to “reconstruct legal-political lessons of inner-city advocacy and organizing in alliance with the communities [the lawyers] serve.” And that’s not a bad thing.

30. See note 18 supra.
31. Alfieri, supra note 8, at 1462.
I. Introduction

Over the past forty years, New York City’s nonprofit Community Development Corporations (CDCs) have rebuilt some 100,000 units of housing, helping to transform many disadvantaged communities from slums to thriving, vibrant, and safe places to live and work. However, today the
The pendulum has swung the other way: communities that were once plagued by blight are now facing gentrification. In the context of a bullish real estate market, the housing options for many households at the bottom of the economic ladder have worsened. While housing prices have risen, the income of many New Yorkers has declined. According to Coalition for the Homeless, homelessness in New York City has reached its highest levels since the Great Depression of the 1930s. And according to City officials, there are 700 applicants for every unit of affordable housing. 

With regards to housing, we are witnessing a serious market failure. Even those that can “afford” housing are severely rent burdened. Nearly one-third of all New York renters, and almost two-thirds of low-income New Yorkers, spend more than half of their incomes on housing.

New York City government has recognized the insufficient supply of affordable housing, with Mayor Bill de Blasio declaring in 2014 that we have “a crisis of affordability on our hands” and setting forth a comprehensive plan to build and preserve 200,000 affordable units over ten years to support New Yorkers with a range of incomes. Yet, even with a comprehensive plan to tackle this issue, the reality is that we are losing affordable housing every day. Regulatory restriction periods for many affordable housing projects are expiring while market pressures and opportunities are pushing these projects to go to market rate. At the same time, tax reform has lowered the federal corporate tax rate and subsequently cut the subsidy created by Low Income Housing Tax Credits (LIHTC). With more market demand and lower public subsidy, the maximization of profit motivates developers to drop the “affordable” from their housing plans. The market need for and the pressures against affordable housing have crashed head-on, leaving low-income individuals out in the cold. But we remain hopeful. We believe that by merging market realities with mission in a smart—dare we say a paradigm-shifting way—a solution can be found. We are already seeing heartening success.

A critical player to ensuring that New York City has sufficient affordable housing is the city’s nonprofit community-based development sector. The recently formed The Joint Ownership Entity New York City Corp. (JOE NYC), a joint ownership and management structure for property owned by nonprofit CDCs, leverages the mission-driven community-based knowledge of CDCs and brings it to a citywide scale. Developed after a two-year

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process by a working group of some of New York City’s leading CDCs known as the CDC 4G Initiative, JOE NYC now serves as a vehicle to enhance the viability of CDCs to help them address the pressing need to preserve long-term affordability within existing projects, and to develop new projects and opportunities for nonprofit ownership of affordable housing. JOE NYC intends to achieve long-term affordability by improving operating margins of projects through economies of scale and other measures designed to increase the economic efficiency of projects. JOE NYC also seeks to create liquidity across its portfolio in the use of operating reserves that are currently segregated by project. JOE NYC has the balance-sheet strength required by lenders, syndicators, and governmental agencies to allow it to acquire, refinance, and recapitalize projects, without the need to joint venture with a for-profit development partner, and has the ability to act as a co-guarantor for its members on new affordable housing transactions, freeing members from the current necessity of joint venturing with for-profit development partners on new transactions. Finally, JOE NYC helps to create asset management standards for property management by which projects in the JOE NYC portfolio may be measured.

In this article, we explain how we are helping and empowering some of New York City’s leading mission-driven organizations to leverage their local expertise and group capacity to compete in the market to create more affordable housing at greater levels of affordability, for longer, even permanent, periods of time. We will explain how this new model works, what problems this model was meant to solve, and what attributes it was required to have. We will close with some initial successes, and what might be applicable to other jurisdictions.

II. The Evolution of CDCs in NYC Affordable Housing

Charitable and philanthropic organizations have been helping house those in need since the need began. Predating government involvement, these organizations played an integral part aiding the evolution of government involvement once it started. CDCs came into existence in New York City in response to “white flight” and the fiscal crises of the 1960s and 1970s that followed. CDCs individually filled the market failures in their local communities nearly fifty years ago, and today, by banding together, CDCs can again fill the market failures in their communities and beyond.

In New York City, studies have shown that CDCs that develop affordable housing create a longer-lasting community impact and are more prone to preserve affordability past regulatory-restriction periods than their for-profit colleagues. Conducting a qualitative and quantitative analysis on the impact of CDCs on urban neighborhoods, the Urban Institute found that physical redevelopment of neighborhoods by CDCs, and their efforts to involve community residents in that change, produced lasting effects on neighborhood quality. Researchers cited a litany of positive effects resulting

from CDC investment in a neighborhood, which include (1) demonstrating the potential market to outside investors by making leading investments in communities; (2) increasing property values; (3) raising the living standard for those occupying CDC homes and apartments or for those who work in CDC-supported economic development investments; and (4) stimulating community activism that endures beyond the specific development project and that becomes available for other community change efforts. By becoming the intermediary within neighborhoods between their community actors and citywide sources of financial, technical, and political support, CDCs lead citizen involvement in neighborhood improvement, which is “an extremely important contribution . . . unlikely to have been made by public agencies or private for-profit, developers.”[6] CDC-owned housing has also been found to offer longer durations of affordability than for-profit privately-owned affordable housing. A recent paper published in the Journal of Housing Economics concluded that community-based housing is less vulnerable to expiring-use risk than for-profit, privately-owned affordable housing. Over time, this choice provides a greater investment return on City capital dollars.[7]

The history of community-based housing development through CDCs is a story of several generations, each arising out of the challenges and opportunities presented at that particular time. Each generation represents an innovation to the fundamental concept that local stakeholders are crucial to true sustainable development in poor areas. Essentially, in New York City, there have been three eras or generations of CDCs: (1) the early years when CDCs served as community leaders, bringing social and economic programs to neighborhoods; (2) the middle years when CDCs grew to become neighbor-based developers and landlords preserving abandoned private housing stock; and (3) the late 1980s to the present, which saw the advent of LIHTC and the ascension of private developers and mega-projects in affordable housing.

A. CDC 1G—Pioneers and Activists

The first generation of CDCs took off in the 1960s when the “notion that community residents could define and control development in their communities was considered radical.”[8] Tired of the social service-oriented “war on poverty” narrative promulgated by the federal government, neighborhoods, churches, and community activists mobilized philanthropists and politicians to focus programs and funding on building new economic bases for development. The Bedford Stuyvesant Restoration Corporation in Brooklyn pioneered the CDC model by combining community control

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6. Id. at 58.
7. Vincent Reina & Jaclene Begley, Will They Stay or Will They Go: Predicting Subsidized Housing Opt-Outs, 23 J. Hous. Econ. 1 (2014).
and economic development to build and rehabilitate housing in the neighborhood, spur job creation, and generate local businesses, while continuing to deliver social programs for its residents.9

B. CDC 2G—Scrappy and Sophisticated

The second generation of CDCs flourished in the 1970s and mid-1980s despite, and perhaps even because of, government austerity and major inner-city disinvestment. With New York City near bankruptcy and the Reagan administration’s withdrawal of support for community development, new groups formed and organized in direct response to the effects of the economic and political environment at the time—landlord abandonment, resident flight, blight, crime, and arson. As described by Harold DeRienzo in his recounting of community development in the Bronx, “When conditions were truly terrible, many residents fled, but many others organized and fought back.”10 The innovation of the CDC movement in this second generation was not only its resilience in hard times, but the sophistication with which they pieced together complicated deals out of the matrix of banking, corporate, philanthropic, and public funding available to support community economic development as a vehicle to help poor communities. In doing so, CDCs became prolific housing producers in the city and across the country, replacing public agencies as the cornerstones of the low-income housing industry.

C. CDC 3G—Rise of the For-Profit Developer

The third generation of CDCs has seen their housing development efforts joined and often eclipsed by for-profit developers, whose involvement was spurred in large part by the implementation of the LIHTC. These tax credits are supply-limited: they are allocated by the Internal Revenue Service to states and local housing agencies, which then allocate them in a competitive process to for-profit developers or nonprofit organizations. Over time, nonprofits, at least in New York City, have witnessed a decrease in the proportion of tax credits allocated to them as compared to for-profit developers, in large part because for-profit developers propose larger-scale projects. Reporting on the proportion of affordable housing development between the for-profit and nonprofit sectors under Mayor de Blasio’s housing plan, one reporter concluded that “[m]ost indications are that nonprofits play a considerable role, though for-profit firms generally dominate.”11 With the private financial incentives baked into LIHTC and other public-private partnership development initiatives, major for-profit real estate

developers have made affordable housing a substantial component of their overall real estate development strategy. These for-profit developers frequently bring broader scope, larger balance sheets, and more experience with large-scale projects. As a result of their proliferation into the affordable housing field, CDCs are struggling to stay competitive in the New York City affordable housing market.

With all of the countervailing forces, CDCs in New York City realized that they were at a crossroads. They could continue to try to compete one-on-one against the large, multi-borough, multi-state, for-profit real estate companies that have achieved the operational and economic scale to dominate. Or CDCs could change the paradigm.

III. CDC 4G—The Next Generation—JOE NYC

In a sense, the arrival of for-profit development in the affordable housing sector is born out of the success of the CDC movement. CDCs proved the concept that for-profit developers have perfected. The combination of seed investment, sophistication with funding options, and decades of sweat equity and community building by CDCs proved that investment in poorer neighborhoods can be profitable. In pursuit of this profit, for-profit developers have come to dominate the affordable housing market. Unfortunately, we are seeing the limits of for-profit dominance. When other options are more profitable than affordable housing, profit-maximizing firms will take those options. It now seems clear that CDCs are just as necessary in boom times as they are in bust times. With uncertain federal policies and market forces that favor abandoning affordability, CDCs must adapt to market demands. To compete in the affordable housing marketplace, and to serve their local communities, CDCs must collaborate.

In 2014, New York City’s nonprofit community-based housing sector led an effort called “CDC 4G Initiative,” in acknowledgment of their history and the need for a new generation of CDCs. Comprised of Bedford Stuyvesant Restoration Corporation, Cypress Hills LDC, Fifth Avenue Committee, IMPACCT Brooklyn, Ridgewood Bushwick Senior Citizens Council (now Riseboro Community Partners), St. Nicks Alliance, Banana Kelly Community Improvement Association, MBD, Ecumenical Development Organization, Project FIND, West Harlem Group Assistance, Mutual Housing Association of New York, and Community-Assisted Tenant Controlled Housing, the Working Group retained a consultant team, which included Goldstein Hall, to assist in a two-year process to develop a mechanism to enhance the viability of CDCs, to help them preserve long-term affordability within existing projects, and to develop new projects.

Through the CDC 4G Initiative, the Working Group identified several challenges impacting their ability to compete in the affordable housing market, specifically:

• **Geographic Limitations.** CDCs in New York City are often limited to community development activities within a certain neighborhood largely due to organizational history, reputation and roots in a neighborhood, and, more formally, purposes clauses. While a redrafting of the purposes clause is possible, the organizational pivot goes beyond the print. Major donors, foundations, and public grants or subsidies to the organization were, and are still, secured in many cases because of the organization’s unique history and position in and among the community. To shift its purposes beyond the neighborhood that gave rise to the CDC is a major decision that involves an in-depth cost/benefit assessment, institutional will, and stakeholder support. Simply put, it is very difficult for a CDC that has had limited scope for decades to morph into a citywide institution. Furthermore, an expansion in mission from a neighborhood to a city may come at the cost of local expertise, attention, and support.

• **Underwriting Challenges and Diseconomies of Scale.** The new underwriting standards have made it almost a necessity for CDCs to joint venture. A mix of funding sources—philanthropic organizations, private banks, national intermediaries, and government agencies—have tightened underwriting standards and lowered tolerance for risk. The standards set have stacked against smaller developers like CDCs, requiring impossible, and to some arbitrary, levels of financial heft and experience to be considered for limited development funds. For example, in a bid opened for a project site in East New York, the City’s housing agency, the New York City Department of Housing Preservation and Development (HPD), required the developer to have built a 150-unit building in the last seven years. Most members of the Working Group had never worked on a project with greater than 100 units, and, therefore, they were automatically excluded from the bidding process unless they joint-ventured with a larger developer.

Furthermore, over time, geographic limitation and community preservation have undercut CDCs’ competitiveness in the market. In pursuit of maintaining affordability in their communities, CDCs have saved portfolios of older, smaller buildings that no one else wanted. Non-CDC developers, without the burden of a community mission, typically own citywide portfolios consisting of larger, newer buildings. In general, larger buildings and larger portfolios bring economies of scale and are, on a per unit basis, cheaper to operate and more profitable to own. Most CDCs lack the scale necessary to achieve the economy of their non-CDC peers. The CDCs’ smaller, more scattered, less profitable portfolios make for weaker balance sheets.

• **Scarcity.** Unlike decades past, and through sustained efforts, the stock of vacant city-owned land has all but evaporated. Development is no longer driven by free land, but by the ability to raise significant amounts of cash to acquire properties. What is still available by the City are smaller
scattered sites, resulting in more challenging and expensive projects. In addition, City policies distributing tax-exempt bonds and tax credits increasingly favor denser and bigger projects, narrowing the scope of funding sources available to developers with smaller-scale projects.

- **Silos.** While some projects are very profitable, others struggle to stay above water. Nevertheless, each project with public financing requires its own fixed level of reserves, which can only be used for that project. These siloed reserves eliminate any flexibility in the pooling or use of those funds to gain strength across a portfolio.

- **Reputational Damage.** Over the last decade, waste and abuse by a handful of organizations have smeared the reputation of all CDCs and eroded the scale of the sector. The reputational damage of a few actors has tarnished the sector despite evidence showing the value of nonprofit development to their communities.

As to the outcome by the working group, the working group examined the various alternatives from land trusts and revolving loan funds to mutual property management companies and real estate investment trusts (REITs) but found that no existing model could simultaneously address the challenges that they faced while maintaining mission, support, and subservience to the CDC4G members. Therefore, the Working Group decided to create its own model.

What resulted from these efforts in the spring of 2016 was JOE NYC, a new framework for CDCs to centralize and optimize the acquisition, management, financing, and refinancing of affordable housing projects citywide (and beyond) on behalf of CDCs, while CDCs themselves continue to focus on their own communities and stakeholders. In short, JOE NYC is a nonprofit membership organization that owns and manages the affordable multifamily properties that CDCs contribute to the JOE. In exchange for assigning ownership interests and properties to JOE NYC, CDCs receive a membership interest, a seat on JOE NYC’s board, and a proportional share of net revenue. The umbrella ownership allows JOE NYC to drive efficiencies in asset and property management across the portfolio, while the shared scale and financial resources provides balance sheet strength to more favorably finance, refinance, and recapitalize contributed projects without having to joint venture with larger developers that they do not control. In addition, JOE NYC serves as a guarantor for CDC acquisitions.

**IV. How JOE NYC Works**

The framework proposed by the Working Group was new. The main innovations of JOE NYC that allow it to overcome the competitive challenges facing CDCs while meeting CDC members’ organizational demands are the following:

- **No Geographic Limitations.** For JOE NYC to succeed and achieve the scale necessary to be a viable entity, JOE NYC does not have the
geographical limitations or focus, unlike many of its CDC members. Instead, it is an entity that owns and controls property throughout New York City. By extension, the members that are not citywide organizations are now able to be citywide in scope without sacrificing their local expertise, mission, or support. Additionally, JOE NYC’s expanded scope and culture of collaboration have produced ancillary benefits to its members. Because of their interactions in JOE NYC, member organizations working with JOE NYC that have overlapping jurisdictions are partnering to bid for projects together.

The danger of JOE NYC having citywide scope, however, is that it could become a competitor to each of its CDC members (much like the big developers that JOE NYC was created to combat). It was therefore extremely important to JOE NYC’s members that, in addition to being organized as a membership and a supporting organization, JOE NYC explicitly has a non-compete provision in its corporate documents prohibiting JOE NYC from competing against its members. JOE NYC is therefore designed (and required) to support and enhance its members and their activities, not to replace them.

- Consolidating to Achieve Economies of Scale, Underwriting Strength, and Cross-Subsidization. By contributing properties to JOE NYC, the CDC members appoint JOE NYC as the owner of the property to the extent permitted by law, for a minimum of ten years.

By consolidating asset management for a broad portfolio of projects, JOE NYC can achieve the economies of scale and efficiencies in, for example, the bulk purchase of energy, goods, and services that the individual members were not able to on their own. JOE NYC creates and implements asset-management standards that support best practices across the portfolio and limit regulatory and other compliance risks that organizations individually might find challenging to address.

It is important to note that JOE NYC serves as an asset manager and not the property manager, which the CDC can continue to manage on the local level. However, in its oversight of property management as a component of its management of its portfolio assets, the board of directors can decide to replace a failing manager in consultation with JOE NYC’s staff and the Asset Management Committee of the board. This level of oversight aims to correct reputational issues caused by bad actors in the management of affordable housing that has negatively affected the entire sector.

Furthermore, by amassing a large citywide portfolio, JOE NYC and its contributing CDCs can achieve the strength and size now required by lending agencies and institutions to acquire and recapitalize existing projects, obviating the need to joint venture with a larger unrelated, likely for-profit, developer. JOE NYC can also use the portfolio assets to support guarantees for further acquisitions and recapitalizations, either for member CDCs or for JOE NYC itself, a requirement that most CDC members cannot meet on their own. JOE NYC also
becomes responsible for the administration of the project’s reserves and can elect to create a tier of portfolio-wide reserves, which allows for flexibility and deconstructs the silos of project financing to which affordable housing development often falls prey.

Finally, in acquiring CDC assets, JOE NYC is typically only acquiring the beneficial ownership of the projects and leaving fee title in the name of the titleholder, any entity solely controlled by the JOE NYC member. This option permits local control, recognition, and continued involvement of the local CDC to the project in addition to the local CDC’s control over property management.

• **Mission-Based Membership.** Setting up JOE NYC as a not-for-profit corporation was an essential requirement of the Working Group as the members wanted to use a structure that reflected their own. Making JOE NYC a membership organization was also critical to ensure that the CDCs always had the reigns of this new giant and potentially competitive beast.

Furthermore, the members insisted that JOE NYC be organized as a supporting organization for federal tax exemption purposes, requiring it to be organized and operated exclusively for the benefit of its members. As a Type I supporting organization, JOE NYC must be operated, supervised, or controlled by its supported organizations, in this case by providing each supporting organization with the ability to appoint a director to the board.

• **Balancing Democracy, Decision-Making Efficiency, and Equity.** As stated, JOE NYC is a membership corporation. It has four classes of members—Classes A through D. Class A members are nonprofit organizations who have contributed housing assets to JOE NYC in exchange for a seat on the board and full economic benefits of membership. Class A members are essentially CDCs. Class B members are nonprofit organizations that contribute projects to JOE NYC and do not desire to be active participants in governance, but that do desire the economic benefits of being a member. Class B members are houses-of-worship and nonprofits that are not typically engaged in housing work but that have acquired affordable housing over time, which has occurred frequently with HUD 202 projects. Class C members are nonprofit organizations that have signed a contribution agreement, pledging assets to JOE NYC, but have yet to transfer any of these assets to JOE NYC. Class C members will become either Class A or Class B members once any asset is transferred to JOE NYC. Class C members have the rights to appoint a non-voting member to the board, but, because they have not yet contributed any assets to JOE NYC, they receive no economic benefits. Class D members are mutual housing associations, community land trusts, or tenant
association-controlled buildings organized or managed by a member of JOE NYC. Class D members only have advisory rights.

At the core of JOE NYC’s structure is the requirement that each Class A member receives one vote on the board, regardless of the number of units or the value of the properties contributed. This arrangement ensures that no one group dominates the governance of JOE NYC and preserves the democratic nature that existed in the CDC 4G Working Group, which strove for consensus and, whenever possible, unanimity. The members realize, however, that unanimity is not always practical or even possible. In creating JOE NYC, the members recognized one of the complaints, and perhaps a competitive weakness, of nonprofit entities is the speed—or lack thereof—with which nonprofits make decisions. JOE NYC thus has created a decision-making process and uses committees to make major decisions in a timely fashion. The JOE NYC membership agreement spells out in detail which decisions require unanimous consent and which decisions do not.

While each member receives just one seat on the board regardless of how many properties they contribute, members receive a pro-rated share of the net cash flow of projects contributed to JOE NYC, which they can use to fund other community development projects or operational expenses. The formula for proration is not one-size-fits-all and is based on a matrix of factors including the contributed property’s debt burden, operating income, reserves, and other liabilities. The tailored proration approach ensures that each contributor is remunerated according to the quality and value of the properties put in.

• **Flexible Legal Structure.** The Working Group was intrigued by the concept of a REIT because the central components of a REIT—pooled assets, diversified risk, distributed income, and strong corporate governance—provide a strong counterbalance to individual CDCs owning and operating their own units. However, as stated, the Working Group wanted an entity that emphasized the mission of long-term affordable housing preservation over profit. Additionally, from a practical viewpoint, the startup costs and the ongoing legal and accounting costs for maintaining a REIT, as well as the practicality of attracting outside investors, seemed daunting and not the best use of the Working Groups resources. Furthermore, because JOE NYC is a tax-exempt nonprofit AND because the CDC members are tax exempt, the tax benefits of a REIT, which make it most attractive to investors, were of no benefit to the CDCs. However, the CDC members wanted to leave the door open for private investment, as with a REIT, in the future. To accommodate a future private investment, or even integration of a REIT, JOE NYC is the sole member of a limited liability company, and it is that limited liability company that is the owner of the affordable housing projects.
V. JOE NYC’s Successes to Date

Since JOE NYC’s inception, JOE NYC has acquired over 1,000 units of housing. Some of these units have come from CDC members, and some units were units from private developers that were at risk of turning to market-rate. The goal by the end 2019 is to acquire another 2,000 units. Here is an example of how JOE NYC has been effective in preserving affordable housing to date.

- The Jefferson and Watkins Cluster—Preserving a LIHTC Partnership from Going Market Rate

JOE NYC closed its first deal in early 2017: the purchase of 43 buildings (248 apartments) in Central Brooklyn known as the Jefferson and Watkins Cluster. JOE NYC partnered with one of its members, St. Nick’s Alliance (St. Nick’s), which will continue managing the apartments that were previously owned by a for-profit developer as part of a tax-credit arrangement, the first-ever such deal in New York City.

When the owner of the project decided to retire, she wanted to make sure her housing assets wound up in good hands, but she also wanted top dollar. Normally, a nonprofit would not have been able to muscle the financial resources and agency support necessary to close on an acquisition of 248 units, particularly in an area of Brooklyn that is experiencing a substantial real estate boom, but, because of grant resources and support of JOE NYC, St. Nick’s and JOE NYC were able to acquire the project in February 2017, ensuring the 248-unit portfolio will be maintained as affordable over the long term in a gentrifying area of Brooklyn.

In a hot real estate market, the Jefferson and Watkins Cluster was the first deal of its kind in New York City where a nonprofit purchased the general partner interest of a private developer’s interest in an expiring LIHTC partnership. This development demonstrates how JOE NYC has become a game changer, allowing nonprofits to preserve expiring LIHTC units that for-profit owners may want to turn to market-rate projects. The Jefferson and Watkins Clusters became a model that JOE NYC used later to purchase the general partner interest in another for-profit developer’s LIHTC deal, known as the Intervale Cluster. The private developer who controlled the general partner in the Intervale LIHTC partnership put the property on the market looking for the highest bidder. Here, JOE NYC with two of its members stepped in and put together a financial bid that bested any of the private bidders.

It is uncommon for nonprofits to consider purchasing a private developer’s interest in a LIHTC partnership because it is often challenging for nonprofits to muster the necessary financial resources that it requires. However, JOE NYC has enabled its members to gather the necessary financial resources to be competitive and outbid for-profit developers for the Jefferson and Watkins and the Intervale Clusters. Additionally, JOE NYC was
able to marshal the support of the City’s housing regulatory agencies and tax-credit investors in those deals because of its commitment to extending affordability beyond the current regulatory periods. Lastly, JOE NYC is now using the Jefferson and Watkins Cluster and combining it with other JOE NYC members’ portfolios in a major restructuring of LIHTC projects with expiring use requirements to preserve over 500 units of affordable long-term housing.

VI. Applicability to Other Jurisdictions

While JOE NYC is a model that was designed to address the competitive challenges that CDCs faced in an overheated big-city real estate market, the model of collaboration, resource pooling, risk-sharing, and scale is equally applicable to real estate markets with inadequate market activity. The applicability and replicability of the JOE NYC model in other large cities is obvious: scale creates financial strength necessary to compete. But in struggling financial markets, scale and collaboration can create the financial strength and risk diversification needed to keep individual projects afloat and individual CDCs solvent. CDCs, like many nonprofits, are increasingly competing against each other for limited dollars and are under constant pressure to merge or consolidate. A joint-ownership can satisfy funders and stakeholders’ desire for collaboration and merger while maintaining the individual existence, history, and expertise of the individual CDCs.

Critical to JOE NYC’s success has been support from foundations and other supporters. JOE NYC has at least three attributes that are attractive to donors: (1) JOE NYC is seen as an innovation and a new take on CDCs that impacts low-income people on a citywide scale, with donors willing to fund start-up costs during JOE NYC’s infancy period until the entity acquires and controls a sufficient number of units for it to generate positive cash flow and support itself; (2) the funds invested by donors leverage other dollars, largely from public sources, to support JOE NYC and to create affordable housing; and (3) the team was impressive—the member CDCs, JOE NYC directors, and consultants to JOE NYC are a virtual who’s who of affordable housing. Start-up capital/donations/grants are likely to be necessary for any joint-ownership model, and assuring these three attributes is likely to be essential.

Also critical to JOE NYC’s success has been its scale. In New York City, a citywide scope made sense to the City’s affordable housing regulatory agency. The market pressures in the City are largely the same, as well as the mission and vision of the CDC members. A citywide or metro-area scope, like that invoked for JOE NYC, may make sense for other metro areas such as Boston, Chicago, Austin, or Los Angeles. For less dense areas of the country, a joint-ownership entity’s scope may need to include an entire region, state, or even multiple states. What matters in determining
the scope of the joint-ownership entity is a commonality of challenges faced by the CDCs, a willingness and ability (frequently logistical) to work together and meet for the creation and operation of the joint-ownership entity, and the buy-in and support from stakeholders including affordable housing regulatory agencies, boards of directors of individual CDCs, and philanthropic supporters.

Support from the local regulatory authorities, lenders, and investors is also critical. The JOE NYC structure is complicated and unprecedented. Transferring assets to JOE NYC requires the approval of mortgagees on those assets, HPD, and frequently LIHTC investors. These stakeholders will not approve a transfer to an entity that they do not understand or for which they see no value. While we have been successful in gaining support from these parties, the mechanics of gaining approval has taken much longer than expected and has therefore affected the timeline to self-sufficiency. Any future joint-ownership endeavors should account for this “on-boarding” time for the assets and involve these stakeholders as early as possible.

Also, while JOE NYC is a nonprofit membership organization, which provided familiarity and comfort to its member CDCs and their boards, the commitment that JOE NYC requires from its members (and their boards) is substantial, maybe even unprecedented. JOE NYC requires that CDCs contribute assets that they currently own to JOE NYC for at least ten years. Even though many New York CDCs face an existential crisis (even if it is many years off), and many of their assets are troubled, convincing members to transfer their assets can be a herculean effort. While we addressed many of the members’ fears by providing for local control over their projects, equal representation on the board and a non-compete clause, ceding ownership and asset management to an entity in which they are only one vote among many was a tough sell. Convincing CDC members and their boards required an appeal not only to their sense of survival, but also to their commitment to CDCs as a sector and their overall commitment to permanent affordable housing at deeper levels of affordability throughout the City. Ultimately, however, CDC members and their boards had to understand what was in it for them. They had to understand the business case and value proposition for the CDC itself. In short, we found that no matter how egalitarian a CDC and its board may be, they still have an obligation to that CDC and that community, and they will not join a joint-ownership entity or contribute their assets unless it is in the self-interest of that CDC.

Notwithstanding the trepidation of CDC members and their boards, JOE NYC is about as full of a collaborative commitment as they can make while preserving their individual existence and interest in affordable housing. We realize that this model may not be right for all CDCs. There are many models between no collaboration and joint-ownership that CDCs could employ to strengthen themselves, their sector, and affordable housing. For example, as discussed previously, the CDC 4G members considered a collaborative asset manager and bulk-purchasing cooperative.
While this solution was abandoned by the CDC 4G members because it ultimately did not create the balance-sheet strength needed to address the underwriting needs of the CDC members, a collaborative asset manager and bulk-purchaser could meet the needs of CDCs that do not have those constraints. For instance, in sunny, dry places in the country where solar power is prevalent like Arizona, a collaborative asset manager and bulk-purchaser would be able to negotiate solar installation and power purchaser agreements on a scale and terms that individual CDCs could not achieve.

VII. Conclusion

The challenges faced by CDCs in New York City today are not unique. But neither is the set of tools available to them through a collaborative asset-management model like a joint-ownership entity. Where scale and financial heft are increasingly becoming the deciding factors in how funding is distributed, community-based developers must unite assets and management to achieve the goal of sustained affordability in CDC target communities.

But the relevance of JOE NYC is not limited to major metropolitan areas. JOE NYC can be a model for any group of CDCs that are struggling to further their mission—whether it be the result of an economic boom or bust. While we think the applicability and replicability of JOE NYC to other major metropolitan areas is clear, we also believe that collaboration among CDCs in any region will strengthen CDC members and increase affordable housing. The coming together of community-based nonprofits, either in joint ownership or in other collaborations, can (1) foster collaboration between members that did not exist in the past; (2) create economies of scale that will allow CDCs to achieve better cash flow; (3) diversify risk and create more income; and (4) preserve and increase affordable housing units, particularly those with expiring rent restrictions. Where CDCs engage in joint ownership, as with JOE NYC, they can also create a stronger balance sheet that will allow members to compete more aggressively for limited affordable housing funds and projects. The success of these CDC collaborations, however, requires a clear understanding of the market challenges, an identification of the control needs of CDCs, a detailed explication of how control and money are to be allocated, and a simple explanation of the value proposition for local CDCs. It must also have early stakeholder—lender, investor, regulator, donor—support. In sum, JOE NYC and other forms of collaboration are the next evolution for CDCs, which are necessary to make CDCs more competitive, more profitable, and more able to meet the affordable housing needs of their communities and beyond.
Infrastructure and Poverty: Removing Urban Freeways to Rectify a Planning Disaster

Jenna Steiner

I. Introduction ............................................................................................. 527
II. Infrastructure and Poverty ....................................................................528
III. Rochester’s Struggle with Poverty and Infrastructure .....................531
   A. Poverty in Rochester .......................................................................531
   B. History of Rochester’s Inner Loop ................................................533
   C. The Inner Loop East Project: Rectifying a Decades-Old Problem ..................................................535
      1. Restoring Connections and Increasing Mobility ...............536
      2. Economic Competitiveness ..............................................538
      3. Ancillary Benefits ................................................................538
   D. How Did the Inner Loop East Project Come to Fruition? ..........539
      1. Government Support, Coordination, and Collaboration ....540
      2. Federal, State, and City Funding.....................................541
      3. Cost-Benefit Analysis......................................................542
      4. Traffic Alternatives ......................................................542
      5. Community Involvement...............................................543
   E. The Future for the Remaining Segments of the Inner Loop ......543
IV. Conclusion ...............................................................................................548

I. Introduction

This paper aims to explore the removal of urban freeways as a way of addressing urban poverty. First, the paper explores generally the relationship between infrastructure and poverty. Next, the paper focuses on Rochester, New York, as a case study by looking at the problem of poverty in Rochester, the history of Rochester’s urban freeway, and a recent project to remove a segment of Rochester’s urban freeway. This paper explores both the benefits of removing a segment of Rochester’s urban freeway and the factors that allowed for the urban freeway removal project to come to fruition there. The hope is that this paper will allow for other cities facing the decision whether to repair or remove urban beltways to learn from

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Rochester’s experience. These urban beltway removal projects have the potential to act as a remedial measure against historical practices of racial segregation and, in turn, help to alleviate the racial disparity in poverty experienced in many urban areas.

II. Infrastructure and Poverty

In the United States, poverty tends to be concentrated in certain areas, whether it be at the regional, county, or neighborhood level. The limited economic opportunities that exist in persistently poor areas lead to a poverty that is essentially self-perpetuating. These persistently poor areas are often reflective of economic inequalities in our “built environments.” These built environments include our homes, schools, workplaces, and even our roads. Since these built environments are constructed by humans, they reflect human biases. In the same way that restrictive covenants and redlining in the early and mid-twentieth century played a major role in the isolation of poor blacks, the design and construction of infrastructure has also played a major role, particularly in cities in the North and Midwest. Although only roughly 15% of “persistent-poverty counties” are metro counties, and only 15% of “persistent-poverty countries” are located outside the South, it is interesting to investigate what has contributed to high rates of urban poverty in many cities in the North and Midwest, as contributing factors may be quite different than in the rural South. While a detailed analysis of all potential factors contributing to poor urban communities in the North and Midwest falls far outside of the scope of this paper, it is worth explaining that after the Civil War, many Northern and Midwestern cities experienced massive migrations of blacks who moved north looking for job opportunities, particularly along the Rust Belt. Racial segregation in the early and mid-twentieth century in these cities was implemented through redlining, filtering, arbitrage, segregation, and/or blockbusting.

At this same time, the popularity of the automobile was exploding, and many cities were struggling with how to alleviate traffic congestion on city streets and to make the city more accessible to the new suburbs. In the 1950s, the federal government began pouring money into an interstate highway

system, which today costs $105 billion a year to maintain. While this interstate highway system connects millions of citizens, it has also isolated and destroyed many black communities. A stunning example of isolation and destruction of a black community exists in West Baltimore, where State Route 40, essentially a giant ditch, bisects West Baltimore into north and south. Denise Johnson, a community organizer in West Baltimore, stated that, as a result of the building of State Route 40, “[w]e lost families, we lost homeowners, we lost businesses, and we lost churches. And we lost people. People who were stable. People who didn’t plan to leave the community.”

With businesses lost, people need to go outside of their community to spend money, meaning that it never gets recirculated in the community.

While some may view the decision to build an interstate as a morally neutral decision, the decision regarding where to build these interstates was arguably influenced by human bias, in the same way the rest of our “built environment” is influenced. To build the interstate, land needed to be taken, buildings and homes condemned, and residents forcibly relocated, and it is no surprise that these actions often occurred in black communities, many of which were viewed as “slums,” at least in part due to the population who lived there. Moreover, because most of the urban beltways were constructed before the Voting Rights Act, black residents had little to no legal recourse through which to oppose the construction plans, whereas more affluent white residents may have been successful in challenging interstate plans that would divide and/or isolate their neighborhood.

While some may reject the idea that the building of a freeway could have such detrimental effects on a community, research has long supported the idea that inner-city poverty is attributable, at least in part, to “a long historical process of segregating poor and minority populations . . . that resulted in a spatial mismatch between workers and jobs when employment decentralized.” Studies have shown that the “[d]ecentralization

6. Id.
7. Id.
8. Future research should further explore the relationship between urban planning policies in the 1950s and the disenfranchisement of black voters leading up to the passing of the Voters Right Act of 1965. See Sophie Schuit & Jon C. Rogowski, Race, Representation, and the Voting Rights Act (Oct. 23, 2016), http://scholar.harvard.edu/files/rogowski/files/vra_and_representation.pdf (discussing the lack of incentive, generally, for elected officials to represent minority constituents’ interests prior to the Voters Right Act); see also id., n.60 (referencing Obama-era TIGER program as a drastic policy shift in urban planning, potentially as a consequence of the enfranchisement of minority voters).
of employment and increasing residential segregation work in tandem to limit the accessibility of jobs for inner-city residents, thereby isolating them and trapping them in poverty.” One study concluded that segregation itself can cause poverty because it increases by as much as 33% the probability that a young black man does not work.11 Another study concluded that a one standard deviation decrease in segregation would eliminate one-third of the black-white differences in life experiences, such as dropping out of high school, being unemployed, or becoming a single parent.12 It is therefore not surprising that West Baltimore is an “exceptionally bleak area,” especially considering that the freeway does a great job of connecting the city and the suburbs, but there is a “conspicuous” lack of entrances to the freeway from the black communities.13

We have entered a time where the problems associated with U.S. infrastructure must be addressed. We have seen the ravaging effects urban freeways have had on our cities. Moreover, much of the interstate highway system, and, in particular, many of the urban freeways built in the 1950s and 1960s are beginning to need substantial and costly repairs. In fact, the Trump administration has pledged to create a $1.5 trillion infrastructure renewal plan.14 Policymakers are trying to revamp the nation’s infrastructure, but the question that many cities are facing today is whether to repair urban freeways or remove them.

The United States Department of Transportation (USDOT) has started a program with Congress for the New Urbanism (CNU) called the Every Place Counts Design Challenge, which aims to study situations where infrastructure divides communities.15 CNU has been championing “Highways to Boulevards” for over fifteen years and lists six American “model cities” on its website for completing a “highways to boulevards” project. While several of these projects will be discussed in more detail herein, at least some of these projects were not undertaken until the freeways had been irreparably damaged, generally by an act of nature. What will be interesting to see in the coming years is whether more cities will be deciding to remove fully functional urban freeways.

Raymond Mohl, in his 2012 article “The Expressway Teardown Movement in American Cities: Rethinking Postwar Highway Policy in Post-Interstate Era,” interpreted recent interest in urban freeway removal “as a contemporary response to some of the now perceived failures of mid-century urban

transportation planning and policy," which represents “a fundamental shift in the nation’s transportation politics.” Of the six American cities that have removed at least portions of urban freeways, Mohl notes that these portions were “expendable,” such as remnants of never-finished freeway projects or portions irreparably damaged. He does not envision the day where “mainline expressways that carry heavy auto and truck traffic through metropolitan areas will get torn down.” Rochester, New York, recently completed a partial freeway removal project in December 2017, and it is looking to continue the removal based on the positive results of the first project. While the portion of the freeway removed in Rochester was underutilized, it was still fully functional and servicing thousands of cars per day. Cities contemplating freeway removal can learn a lot from the experiences of Rochester and the freeway removal process undertaken.

III. Rochester’s Struggle with Poverty and Infrastructure

A. Poverty in Rochester

The City of Rochester (City) is a designated Economically Distressed Area (EDA). EDA’s are geographic areas that have significantly deficient economic conditions relative to unemployment or personal income. This designation is important because, under the American Recovery and Reinvestment Act of 2009 (ARRA), one of the priorities for the allocation of ARRA funds is whether the proposed project is in an EDA. The Federal Highway Administration (FHWA) allows states to “self-assess” whether a city or county within the state is an EDA based on the criteria set forth in the Public Works and Economic Development Act (PWEDA) of 1965, as amended, 42 U.S.C. § 3161. PWEDA section 301(a)(1) provides that an area is economically distressed if it has a per capita income of 80% or less of the national average, and section 301(a)(2) provides that an area is economically distressed if it has an unemployment rate that is at least 1% greater than the national average unemployment rate. Rochester’s unemployment rate was above 9% in 2013, putting it more than 1% above the national unemployment average of 7.5% for 2013. While the City of Rochester is an EDA, the surrounding county, Monroe County, is not. Demonstrably, the City’s poverty rate is 32%, as compared to 10–16% in the region’s counties. The rate of child poverty is 47% in the City, as compared to 12–26% in the surrounding counties.

17. Id. at 99.
18. Id. at 100.
Notably, this poverty falls strongly along the lines of race, with more than half of African American and Hispanic children in the City living in poverty, 51% and 55%, respectively. A recent study concluded that economic gaps between racial and ethnic groups are greater in the Rochester region than in the United States or New York State as a whole. This racial disparity in poverty is attributed at least in part to both historical and current segregation. A review of the federal Home Owners’ Loan Corporation’s assessment of neighborhoods in and around Rochester from the 1930s demonstrates a practice of racial discrimination (i.e., redlining). Then, much like the experience in Baltimore, one of the few thriving African American neighborhoods in Rochester in the 1950s was demolished in order to build a highway. Today, the remnants of this segregation are still felt, with only 10% of Rochester City School District students being white and with Rochester being ranked among the highest in the country for district border segregation.

Rochester has struggled to address the issue of poverty. The Rochester-Monroe Anti-Poverty Initiative (RMAPI) is a “community-informed strategy developed to coordinate and align resources, policies, and practices in an effort to reduce poverty in the Rochester and Monroe County Region.” The initiative utilizes collaboration among “local leaders, local and state government, service providers, the faith community, volunteers and people impacted by poverty.” The goal of the initiative is to reduce poverty by 50% in 15 years. One of the RMAPI’s three guiding principles is to build and support the community by rebuilding struggling neighborhoods to make them safe, healthy, and livable. The United Way of Greater Rochester, an integral member of the RMAPI, hired CGR Management Consultants to develop strategies to reduce poverty in Rochester. The CGR report recommends that the United Way of Greater Rochester and the larger community be guided by a number of principles, one of which is that “any poverty-reduction solutions must incorporate economic development/job

27. Id.
expansion strategies in order to create more job opportunities to help lift families out of poverty.\textsuperscript{28} This is precisely what the removal of a portion of the freeway in Rochester aims to achieve. By reconnecting neighborhoods and clearing land for redevelopment, the hope is to create livable communities with access to economic opportunity for residents.

\textbf{B. History of Rochester’s Inner Loop}

As mentioned in Section I, with the rapid increase in automobile popularity in the early to mid-twentieth century, many U.S. cities built urban freeways in the hopes of addressing traffic issues. In Rochester in the 1940s and 1950s, the increase in automobile popularity met an exponential increase in Rochester’s population, mostly due to the booming of industry, notably Eastman Kodak. The City was left looking for a way to reduce traffic congestion on city streets and improve access to the City,\textsuperscript{29} and it turned to the prevalent city planning policy of the time: urban freeways. In Rochester, this freeway, known as the Inner Loop, took the form of a three-mile long deep trench, encircling what is known as Rochester’s Central Business District (CBD). A map of the Inner Loop can be seen in Figure 1, and a picture of the “trench” can be seen in Figure 2.\textsuperscript{30}

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\caption{Figure 1}
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\textsuperscript{28} Pryor & Rosenberg, \textit{supra} note 21.
\textsuperscript{29} Inner Loop East Reconstruction Project, \textit{supra} note 20.
\textsuperscript{30} Id.
In deciding to build the Inner Loop, Rochester acquiesced to the auto-centrism of the time, increasing capacity for vehicular traffic rather than providing alternatives to it. To complete this project, “huge swaths of land had to be acquired and [hundreds] of buildings had to be condemned and destroyed.” On the east side of the Genesee River alone, 160 houses were condemned. Since the Inner Loop was completed in 1965, it has acted as an “inner noose,” dividing neighborhoods for decades and cutting off neighborhoods from downtown businesses and arts and entertainment destinations resulting in a “distressing effect” on the City and those adjacent neighborhoods. Additionally, the Inner Loop made it easier for residents of Rochester to work in the City but live in the suburbs, contributing to suburban sprawl. In fact, the City’s population peaked at over 330,000 in 1950 and, as of 2012, the population was only 210,000. The mayor of Rochester, Lovely Warren, has stated that the Inner Loop is viewed as “a convenient way to exit our City,” rather than the City being viewed as “a convenient place to live, work and play.”

33. Inner Loop East Reconstruction Project, supra note 20.
35. Inner Loop East Reconstruction Project, supra note 20.
This suburban sprawl combined with job loss in the City, starting with the decline of Kodak, exacerbated by the 2001–2003 recession, and crippled by the 2007–2009 recession, means that the Inner Loop has never carried the traffic that it was built to serve.\textsuperscript{37} As of 2012, the eastern portion of the Inner Loop, known as Inner Loop East, was being used by only 6,000 vehicles per day. In its grant application for federal funding to remove a portion of the Inner Loop, the City states that the Inner Loop is widely viewed as a detriment to the City, which hinders overall economic vitality of the area. The issues of poverty that have developed in the City over the last fifty years are addressed in Section A. Moreover, the Inner Loop is a significant barrier to pedestrian and bicycle mobility within the heart of the City of Rochester.\textsuperscript{38} In fact, pedestrian access in the Inner Loop East is limited to four street crossings, with the largest gap at just over one third of a mile, as seen in Figure 3.\textsuperscript{39}

C. The Inner Loop East Project: Rectifying a Decades-Old Problem

With the Inner Loop never servicing the traffic it was intended to, the infrastructure beginning to require costly repairs, and the acknowledgment of the distressing effect the Inner Loop had on the City and adjacent neighborhoods, Rochester first began to consider removal of at least the Inner Loop East portion of the expressway in the early 1990s in their \textit{Vision 2000, A Plan for Downtown}.\textsuperscript{40} In 2001, the City used the funding from a small grant to study traffic patterns on the Inner Loop to evaluate whether

\begin{itemize}
\item \textsuperscript{37} Inner Loop East Reconstruction Project, supra note 20.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id.
\item \textsuperscript{40} Garrick, supra note 31.
\end{itemize}
removal of any portion of the Inner Loop would be feasible. In 2005, Rochester received a $2.4 million grant, which it used for a preliminary engineering design for filling in the Inner Loop East. In 2011, Rochester applied for, but did not receive, a federal Transportation Investment Generating Economic Recovery (TIGER) grant. Rochester subsequently conducted a more in-depth Inner Loop Scoping Study, which considered the project’s scope, the project context, alternatives to the project, and social, economic, and environmental concerns and considerations. After nearly two decades of studying and planning, in 2013 Rochester received a TIGER grant from the USDOT of over $17 million, and the filling in of the Inner Loop East began in 2014.

Broadly speaking, the City believes that this Project will reconnect neighborhoods, encourage walking and biking, create a more livable community, and free up over nine acres of land for mixed-use redevelopment, which will create jobs, grow the tax base, and generate private investment. In their TIGER grant application, the City emphasized heavily that, with Rochester being an EDA, with higher than average unemployment and poverty rates, “transformative investments which create jobs and enhance long-term economic competitiveness are sorely needed.” The benefits that the Inner Loop East Project offer can generally be grouped into three categories: (1) those that restore connections and increase mobility, addressing issues of isolation and segregation; (2) those that boost economic competitiveness, addressing the issues of unemployment and poverty; and (3) those that have ancillary benefits, such as increased safety and environmental sustainability, that may not directly impact poverty but that certainly contribute to a more livable community.

1. Restoring Connections and Increasing Mobility

The Central Business District has been cut off from adjacent neighborhoods for over fifty years, and the City believes that the high-quality at-grade boulevard will better meet the community’s needs for access and neighborhood cohesion, while also restoring historic neighborhood connections and the City’s “sense of place.” The Project will tear down barriers which have “stifled growth, hindered neighborhood cohesion, and depressed urban vitality.” The limited pedestrian crossings in Figure 3 are being replaced by pedestrian crossings at every city block, for a total of

41. Id.
43. GARRICK, supra note 31.
44. Inner Loop East Reconstruction Project, supra note 20.
45. Id.
46. Id.
The City plans to add “pedestrian amenities” along the new streets, including wide sidewalks, benches, trees, and lighting. Increased mobility means that adjacent employment, cultural destinations, educational institutions, retailers, restaurants, etc. will be more readily accessible to a larger population. The Inner Loop East essentially cut off downtown from the very residents that could sustain its business. It is likely that the increased mobility of the more than 15,000 residents within a half mile of the project area will increase economic activity at local shops and restaurants. The layout for the new at-grade city boulevard is shown in Figure 4.

Moreover, per Rochester’s “Complete Streets Policy,” adopted in November of 2011, this Project will result in a complete street, incorporating an “innovative physically separated two-way cycle track.” The City will also add bicycle amenities such as bicycle parking and signage. The City also believes that the change to a two-way complete street will improve the efficiency and reliability of the City’s transportation system by reducing the circuitous routing caused by one-way streets. The City claims that as Americans spend an average of 18 cents of every dollar

47. Mary Stone, If We Build It, Rochester Post (July 2014), http://postrochester.com/if-we-build-it.
48. Inner Loop East Reconstruction Project, supra note 20.
49. Id.
50. Id.
51. Id.
on transportation, with the poorest fifth of families spending more than double that figure, the increased opportunities to walk, bike or take transit have the potential to save individuals thousands in transportation costs. Additionally, the increased mobility will be a step in the right direction in rectifying the issues of isolation and segregation caused, at least in part, by the Inner Loop.

2. Economic Competitiveness

The initial filling-in project created a little over 300 jobs, but it is estimated that the freeing up of the nine acres of land will create roughly 1,000 constructions jobs and that the private redevelopment would create thousands of long-term jobs. Rochester’s TIGER proposal emphasized creating a “mixed-use” fabric that restores urban vitality. As of the completion of the Inner Loop East Project in late 2017, Mayor Warren was suggesting the City approve the following three projects: (1) the Strong Museum of Play’s $105 million investment in the Neighborhood of Play project, including an expansion to the museum, a hotel, and residential and retail space; (2) the construction of a multistory, multibuilding development with residential, retail, and office options; and (3) the construction of “affordable” housing.

While this redevelopment will undoubtedly create jobs and grow the tax base, it is important that Rochester get this redevelopment right. Large-scale homogenous development leading to gentrification could certainly have the effect of exacerbating poverty in some areas of Rochester as residents may become priced out of their neighborhoods. For instance, the “market rate” apartments scheduled to be developed by Home Leasing will have a monthly lease rate between $1,450 and $2,780 for one, two, and three-bedroom apartments. The townhouses being built will be sold at roughly $385,000. There will be forty-nine “mixed-income affordable apartments” developed as well. The chief executive officer of Home Leasing claims that this mix of apartments for “people with high incomes and people with more modest incomes” will be “good for the city.” Whether or not this planned development pans out will be closely followed in the years to come.

3. Ancillary Benefits

Rochester’s TIGER application cites both environmental and safety benefits from the Project. The shift from auto-centrism to walking, biking, and public transit is expected to improve air quality by reducing greenhouse

52. Id.
53. Id.
55. Schneider, supra note 34.
56. Id.
gas emissions and also reduce dependence on foreign oil. Green infrastructure practices such as energy efficient lighting and innovative storm water management systems were integrated into the Project as well. Overall, Rochester believes that the at-grade boulevard will be more environmentally friendly and will improve sustainability. Additionally, safety benefits are expected in the shift from a freeway to a low-speed city street. While the overall number of accidents may not decrease, it is expected that their severity will be reduced. Moreover, with so few pedestrian crossings in the past due to the Inner Loop, many pedestrians crossed the Inner Loop illegally, creating huge safety concerns. The designated crosswalks are hoped to rectify this unsafe practice.

D. How Did the Inner Loop East Project Come to Fruition?

Research has previously looked at the elements required for the successful removal of freeways. For instance, Kim Tucker Henry identified five factors in his master’s thesis. A successful freeway removal project: (1) would have strong business support; (2) would originate from the public sector and be “sold” to various constituencies; (3) would promise to “do no harm” by imposing few (if any) costs to constituencies or local neighborhoods; (4) would greatly mitigate any negative impacts; and (5) regardless of federal funding, would be pursued to accomplish local goals with little concern for national objectives.

Certainly, the Inner Loop East Project satisfies many of these broad elements, but this analysis narrows and recategorizes these elements. First, a successful freeway removal project will not happen unless there is broad-based government support, coordination, and collaboration at all levels. Second, as Henry identifies, federal funding is absolutely necessary, but a federal grant program like TIGER requires a local match of 20% for urban projects, so state and city funding are required as well. Third, a big picture cost-benefit analysis needs to come out in favor of freeway removal. In the case of the Inner Loop East, the Inner Loop had greatly deteriorated and was becoming structurally deficient in many portions. That freeway repairs would likely cost more than freeway repairs combined with the creation of new lands for private investment made the Inner Loop East Project fiscally beneficial and, consequently, successful. The fourth element is that the city demonstrate that traffic congestion will not be greatly exacerbated. If a freeway is utilized at capacity on most days, it is highly unlikely that the freeway would be removed unless the city can demonstrate traffic alternatives that are at least nearly as capable of accommodating the traffic. Last, it is important to highlight broad-based community support, not just

57. Inner Loop East Reconstruction Project, supra note 20.
business support. When local officials, businesses, residents, neighborhood associations, and nonprofit organizations all come together, the project will be more likely to be successfully completed; or, alternatively, if the local community is strongly opposed to a project, it can certainly interfere with the success of the project. Each of these elements and how they applied in the Inner Loop East Project are discussed below.

1. Government Support, Coordination, and Collaboration

As would be expected, the City of Rochester spearheaded the campaign for the Inner Loop East Project. However, support from and collaboration with a number of governmental agencies were crucial for the success of the Inner Loop East Project. First, the New York State Department of Transportation (NYSDOT) was integrally involved in the Project from nearly the beginning. Since NYSDOT owns and maintains a portion of the Inner Loop, NYSDOT benefited from the removal of this portion of the Inner Loop from its infrastructure inventory. NYSDOT provided technical guidance and served as a member of the Technical Advisory Committee at various stages of the project. Because the Monroe County Department of Transportation provides traffic engineering services to the City, the Department was also involved in technical advising throughout the project. Moreover, the Genesee Transportation Council (GTC) unanimously passed Resolution 11-132, endorsing the Project. The GTC is responsible for transportation policy, planning, and investment decision-making in the region, and consequently provided significant assistance and advice as well. The Rochester City Council also passed the following legislative approvals required for the projects: (1) award of construction and engineering contracts; (2) jurisdictional and maintenance changes with the New York State; and (3) roadway width adjustments for the new city street.59

Government at the federal level was also integral in the successful completion of the Project. President Barack Obama signed into effect the American Recovery and Reinvestment Act on February 17, 2009.60 This Act designated $26.6 billion to over 12,000 infrastructure projects, but it also created the Transportation Investment Generating Economic Recovery (TIGER) Grant program. Since 2009, Congress has dedicated over $5.6 billion for the USDOT to award in the form of TIGER grants,61 and responsibility for the oversight of these projects is allocated to the Federal Highway Administration and the Federal Transit Administration. More details of the TIGER grant are discussed below in Subsection 2.

A freeway removal project requires not only a great deal of collaboration among local, state, and federal transportation agencies, but it also requires

59. Inner Loop East Reconstruction Project, supra note 20.
coordination with environmental agencies and state preservation agencies. In terms of environment, the Inner Loop East Project naturally needed to comply with the National Environmental Policy Act (NEPA). During the preliminary engineering phase, the City conducted a preliminary assessment of environmental impact and ultimately met the requirements of a Categorical Exclusion with Documentation, meaning no environmental impact report was required for NEPA or under the State Environmental Quality Review Act (SEQRA). The City also needed to obtain a State Pollutant Discharge Elimination System (SPDES) permit for purposes of storm-water management. In terms of preservation, the City completed a Phase I investigation into cultural resources as required by the NYS Office of Parks, Recreation, and Historic Preservation. Phase I “Reconnaissance” is designed to determine the presence or absence of cultural resources in the project’s potential impact area by conducting a literature search and sensitivity, followed by field investigations. Rochester completed both these stages, and a “no effect” determination was granted.

2. Federal, State, and City Funding

According to the City of Rochester website, the total cost of the Inner Loop East Project ended up being $20,995,036, with the TIGER grant providing $16,781,036, New York State providing $3,800,000, and the City of Rochester providing $414,000. The TIGER grant was mentioned briefly above, but it is worth expounding a bit on the goals of the TIGER grant program. The TIGER Discretionary Grant program is designed so that the USDOT can “invest in road, rail, transit, and port projects that promise to achieve national objectives.” Specifically, the program supports innovative projects, including multi-modal and multi-jurisdictional projects which would otherwise be difficult to fund.

The City did not mince words in its application for a TIGER grant when it stated that considering the “unique nature of this project and the growing backlog of delayed projects in the region due to declining levels of transportation funding, receipt of TIGER funding is the only funding source available to fund the construction phase.” As stated, to be eligible


64. ABOUT BUILD GRANTS. supra note 61.

65. Future research should focus on the policy behind the TIGER program. The TIGER program looks to six criteria under the long-term outcomes of any project: state of good repair, economic competitiveness, livability, sustainability, safety, and project readiness. By prioritizing the economic competitiveness, livability, and safety, in particular, of any proposed project, the Obama-era TIGER program seems to mark a stark departure from the urban planning policies of the 1950s, which embodied the auto-centrism and suburbanism of the time.
for the TIGER grants, the City is required to fund 20% of the cost of the project locally for a project located in an urban area. New York State allocated roughly $4 million to help fund the project, with the funds coming equally from Governor Andrew Cuomo’s office, the New York State Senate, and the New York State Assembly. With the City of Rochester funding the final nearly half million dollars, the City’s local match obligation was fulfilled.

3. Cost-Benefit Analysis

The cost-benefit analysis of repairing versus removing the Inner Loop East was likely a major contributor to the broad-based support the Project received. Two of the three bridges that would be removed through the Project were structurally deficient, requiring regular costly repairs, and were predicted to need to be replaced in the near future. Moreover, the pavement on the Inner Loop was going to require “major rehabilitation or full depth reconstruction” in the near future. The City based their analysis on thirty-year lifecycles to show that the cost to maintain the Inner Loop East would be more costly than to remove it and replace it with an at-grade city street. This reduction in lifecycle costs would benefit the FHWA, NYS-DOT, Monroe County, and the City of Rochester, all of which contribute to at least a portion of the maintenance of the Inner Loop, street cleaning, and snow plowing. Undoubtedly, the ability to show that the Project would actually save money in the long run, before even considering the revenue generated from the nine acres of “new” land discussed above, was a deciding factor in the decision to remove the Inner Loop East.

4. Traffic Alternatives

With the Project likely to save money in the long run when compared to repairing the Inner Loop, one of the few remaining concerns would be whether traffic congestion would be exacerbated. Based on the traffic studies conducted in 2001 and 2005, along with the Inner Loop Scoping Study in 2011, the City claims the removal of the Inner Loop East will only add a 2.2 second-delay per vehicle during the evening peak travel period through the year of 2035. The City claims that this relatively low amount

68. Inner Loop East Reconstruction Project, supra note 20.
69. Id.
70. Id.
71. Id.
of traffic volume can easily and more efficiently be handled on a standard city street.\textsuperscript{72}

5. Community Involvement\textsuperscript{73}

Interestingly, the first sentence of the City of Rochester’s application for TIGER funding for the removal of Inner Loop East reads, “With broad-based community support, Rochester is seeking . . . funds to complete the Inner Loop East Reconstruction.”\textsuperscript{74} Indeed, the Inner Loop East Project had deep and varied community support. In support of the application for the TIGER grant for funding to remove the Inner Loop East, local neighborhood associations, business associations, elected officials, property developers, and nonprofit organizations wrote letters to the United States Secretary of Transportation. Notably, Reconnect Rochester has been one of the most vocal advocates for the Inner Loop East Project. Reconnect Rochester envisions a community “connected by a robust transportation network that makes it easy for everyone, regardless of physical or economic ability, to get around.”\textsuperscript{75} The organization believes that the completion of the Inner Loop East Project will help accomplish this goal. Last, this Project required the City obtain easements on sixteen properties totaling nearly 37,000 square feet. All of these property owners donated the requested land, rather than receive monetary compensation.\textsuperscript{76}

E. The Future for the Remaining Segments of the Inner Loop

Rochester should be proud of the strides that the City has made to remove physical barriers to economic development of the Central Business District and some of the adjacent neighborhoods, most notably the neighborhoods east of the Inner Loop. Businesses along the Inner Loop have already reported seeing more pedestrians walking around and attribute this change to the area being much more connected and accessible.\textsuperscript{77} An owner of a brewery that was previously on the east side of the Inner Loop reported that the regular “Party in the Park” Thursday night concert series in downtown was one of his worst nights for business because everyone “was stuck on the other side of the Inner Loop.” Now, he states that these nights are one of the establishment’s biggest nights, with customers stopping by for a drink before heading to the concert. He notes that, with this

\textsuperscript{72.} Id.


\textsuperscript{74.} Inner Loop East Reconstruction Project, supra note 20.

\textsuperscript{75.} RECONNECT ROCHESTER, https://reconnectrochester.org.

\textsuperscript{76.} Stone, supra note 47.

\textsuperscript{77.} Taddero, supra note 54.
new influx of people coming downtown, “business has boomed.”78 Moreover, Christ Development, a local company, has announced plans to move its headquarters to downtown Rochester from the suburb of Victor.79

However, Rochester must not stop with the completion of the Inner Loop East Project. While the removal of this portion of the Inner Loop is a step in the right direction, some of the most impoverished neighborhoods along the Inner Loop remain cut off from the new development that the Inner Loop East Project is bringing to the Central Business District. While the entire City of Rochester has poverty rates above the national average, the area north/northwest of the Inner Loop experiences poverty and unemployment rates at nearly twice that of the City as a whole.80 This area has been referred to as the “Crescent of Poverty” (the “Crescent”) for the crescent shape formed by the impoverished neighborhoods along the Inner Loop (Figure 5).81

In the Crescent, poverty rates average around 60%, and unemployment rates around 29%.82 Many people attribute these figures to the southeastern neighborhoods being predominantly residential and remaining vibrant in spite of the Inner Loop, while the Crescent neighborhoods were largely industrial in nature, with most nearby residents relying on industry for employment. In the post-industrial era, these industrial complexes shut down, and the residents remained physically separated from what few employment opportunities existed in the Central Business District, in particular for those residents who were unable to afford cars.

Filling in the north/northwest portion of the Inner Loop could bring much needed investment to the neighborhoods in the Crescent, resulting in increased economic opportunities for residents. Mayor Warren has started to push the City Council and residents to move forward on a project to fill in a mile-long segment of the northern Inner Loop.83 On April 13, 2016, Mayor Warren, in her State of the City address, told the audience that the “neighbors to the north deserve the same attention, and thus we must insist that the Inner Loop North be filled in next.”84 She also announced that the City has applied for a grant to study filling in the northern portion of the Inner Loop.

However, the Inner Loop North Project will continue to face a number of challenges that the Inner Loop East Project did not face. First, whereas the eastern portion of the Inner Loop was one of the most underutilized portions of the Inner Loop, the northern portion is one of the most utilized portions, and many are concerned about the effects on traffic if the

78. Id.
79. Schneider, supra note 34.
80. Petti, supra note 32.
81. Id.
82. Id.
83. Schneider, supra note 34.
Figure 5
northern portion of the Inner Loop is removed. In 2001, the City studied filling in both the northern and eastern portion of the Inner Loop and found that filling in the northern portion would “add additional travel time and inconvenience to the existing and future use of this segment” because the northern portion of the Inner Loop “services a high volume of traffic and is considered a major link in the overall mobility of the area.”

Again, in 2009, the City considered filling in the northern portion but justified the “No Go” decision based on all proposed scenarios resulting in an increase in delays, with queue lengths likely to extend into adjacent intersections, potential safety issues with increases in high-speed rear-end accidents, and increased difficulty for pedestrians traversing through the area due to the introduction of more intersections and lanes. Additionally, with these added challenges, the Inner Loop North Project would undoubtedly be dramatically more expensive than the just over $20 million Inner Loop East Project.

In regards to Rochester residents’ concerns regarding traffic congestion, looking to the several “highways to boulevards” projects already completed is informative. For instance, the San Francisco Embarcadero Freeway Project removed the Embarcadero Freeway, which was never completed as designed and was only removed after being damaged beyond repair in an earthquake in 1989. It is worth noting that while the city experienced initial traffic congestion, the city streets were able to absorb a large amount of traffic given that they were previously underutilized, and the use of public transportation increased 15%. The same can be said for the San Francisco Octavia Boulevard Project, also begun after damage from the 1989 earthquake. The Milwaukee Park East Freeway is a more recent project, with demolition of the underutilized freeway beginning in 2002. A case study on the changes in travel patterns due to freeway teardown focused on the two San Francisco freeway projects and the Milwaukee projects determined that many of the fears involved with removing freeways are unwarranted, and ultimately concluded that “freeway removal has very little downside for cities.”

One final point is that some people may not want to see residents from the Crescent neighborhoods have greater access to a revitalized downtown. It can be seen in Figure 5 that past the neighborhoods immediately east of the Inner Loop, the eastern area of Rochester is actually quite prosperous,
with some of the lowest poverty rates. Despite those neighborhoods immediately east of the Inner Loop having some of the highest violent crime rates, (Figure 6),\textsuperscript{91} a perception exists that where there is poverty, there is a crime, and some people may fear removing the barrier between the CBD

and the Crescent. While violent crime is undeniably a problem in the City of Rochester, with 87.6 violent crimes per 10,000 residents, the third highest in New York State, the violent crime rates as of 2006 were generally higher within the northern portion of the Central Business District than in the neighborhoods just north of the Inner Loop.

IV. Conclusion

With the privilege of hindsight, U.S. cities faced with either repairing or removing their freeways should learn from “highways to boulevards” projects that are aiming to rectify city planning disasters of the past. We now know the devastating effect these urban freeways have had on communities. We also now know that, in many cases, fears of exacerbated traffic congestion from freeway removal are unfounded. Local communities should come together with their officials and advocate for urban freeway removal in cases where the freeway has hindered economic vitality in the city and adjacent neighborhoods, especially where the freeway is underutilized and/or in need of costly repairs. The hope is that these “highways to boulevards” projects will act as a remedial measure against historical practices of racial segregation and, in turn, help to alleviate the racial disparity in poverty experienced in many urban areas.

Judgment-Based Lawyering: Working in Coalition

Mark Neal Aaronson

I. Introduction............................................................................................. 549
II. The Political and Professional Context................................................552
III. Working in Coalition..............................................................................559
   A. The Hastings CED Clinic................................................................559
   B. Who Is the Client?............................................................................560
   C. Mobilization and Collaboration ....................................................562
   D. The Development Agreement’s Terms .........................................580
   E. Implementation Monitoring—Dilemmas and Opportunities ....585
IV. Accessibility, Responsiveness, and Judgment ....................................592
V. Conclusion: Internal Dynamics and External Circumstances ..........596

I. Introduction

Having spent considerable time over the last fifty years working with grassroots groups on social justice issues, I underscore in this article three attributes that for me are crucial to good lawyering. They are accessibility, responsiveness, and judgment. While professionally relevant across-the-board, these attributes are especially important when one counsels and represents individuals or groups who seek to act collectively in coalitions and who themselves are not paying for the legal services.

In this lawyering context, there are two important differences from the stereotypic client and lawyer relationship. First, assisting a coalition usually involves interacting with multiple individuals who have different backgrounds, affiliations, and points of view. Typically, the coalition does not operate hierarchically, and most decisions get made by consensus. In one way or another, all of the individuals are clients or in client-like positions. Second, meaningful external mechanisms, such as a fee, do not exist to help hold lawyers accountable to those being assisted. In my experience in California, it is also rare to have a written retainer agreement, which is not a professional rule requirement when legal services are provided for free.1 In short, when lawyers work with grassroots coalitions, formal accountability to the client group often is weak or non-existent.

As a result, lawyers working with coalitions specifically, and not infrequently with grassroots groups generally, have to assume a heightened responsibility for developing not only an appropriate role conception but

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also the self-discipline needed to keep their actions aligned or reconciled with the range of varying interests and goals within the client group. In my view, the key guideposts for internalizing such a sense of role and duty, and then shaping one’s actions accordingly, lie in cultivating a self-reflective and critical understanding of the considerations involved in being accessible to clients, in being responsive to their concerns, and in using knowledge and experience with good judgment.

To provide substantive grounding for presenting my ideas, I describe at some length work done since 2007 by students and faculty in the Community Economic Development (CED) Clinic at the University of California Hastings College of the Law. Most of this work has been done in close collaboration with grassroots coalitions seeking to influence the plans for and community benefits from a major development project in San Francisco. The developer was California Pacific Medical Center (CPMC), which has multiple San Francisco hospital sites. CPMC’s original plans included building a new hospital campus adjacent to the Tenderloin, a diverse low-income neighborhood in the center of San Francisco, and closing St. Luke’s Hospital, a relatively recently acquired campus located in the low-income but gentrifying Mission District. St. Luke’s had a well-known 150-year history of providing hospital and healthcare services to the poor.

The Hastings CED Clinic provides law students with experience in navigating the intersections and overlapping nature of law, politics, and public policy in an advocacy but non-litigation setting. The prospect of litigation is relevant as a potential threat, but if litigation ever were necessary, it would be referred to other attorneys. Similarly, the Clinic has no hesitation in reaching out and drawing on the experience and expertise of outside attorneys and consultants in addressing substantive and institutional issues. Most importantly, Clinic students and faculty constantly learn from the clients themselves. Given the spread of issues that can come up, especially when interacting with a broad-based coalition, the Clinic always has new fields to learn and fresh insights to glean. One of the complicating responsibilities, yet an important advantage, of providing legal help through a law school clinic is that student learning is an equal priority with providing high-quality legal services. Scholarly as well as activist attention needs to be explicitly paid to lawyering issues often left unaddressed, particularly those concerning attorney roles and varying societal contexts.

The CED Clinic’s involvement regarding CPMC’s hospital construction plans began with raising the prospects of obtaining a Community Benefits Agreement (CBA) from CPMC as part of the development process. While there was not in the end a CBA, there was a Development Agreement.

2. This article presents a first-person account of what happened. The narrative information presented is mostly based on my own notes and observations. I have file copies of documents for which I have not provided specific citations.

3. For an explanation of CBAs and their use, see Julian Gross, Community Benefits Agreements, in Building Healthy Communities: A Guide to Community Economic
Judgment-Based Lawyering: Working in Coalition

(DA) negotiated by three members of the San Francisco Board of Supervisors, who substantially relied on an agenda of major issues set by the Clinic’s clients. Along with other provisions intended to benefit the public and to meet community needs, the DA addressed the respective sizes of CPMC’s proposed new hospital adjacent to the Tenderloin and a replacement hospital on the St. Luke’s campus, something which CPMC initially had no plans to build. The DA also set forth almost $74 million in negotiated cash benefits. These benefits included $40.64 million for affordable housing; $4 million for community-based workforce development programs; $8.6 million for a healthcare innovation fund, including support for community health clinics especially in the Tenderloin; $9 million for public works projects, including $4.45 million for Tenderloin streetscape and pedestrian safety improvements; and $11.5 million for transportation and rapid-transit fees.6

The second stage of the CED Clinic’s involvement has concerned monitoring CPMC’s compliance with and San Francisco’s enforcement of the DA. While no problems have arisen pertaining to CPMC meeting deadlines for transferring cash payments, its performance in meeting non-cash DA terms has required continuing attention. The issues raised concern such matters as the expanded delivery of healthcare services to the Tenderloin poor, promoting employee use of public transportation and carpooling, and meeting employment targets for hiring and retaining healthcare workers from low-income neighborhoods in San Francisco. Monitoring the implementation of the DA’s terms is an ongoing process. In doing so, other issues outside the DA terms arise regarding not only CPMC’s provisions of healthcare services but also healthcare needs in San Francisco generally. These other issues have comprised an additional dimension in the assistance and representation provided by the CED Clinic.7

Before providing additional information about the CED Clinic’s work with grassroots activists and using this material to spell out what I mean by accessibility, responsiveness, and judgment as lawyering attributes, I


6. Id. at 3 & Exh. G at 1.

7. Because of publication limitations, there is not space in this article to discuss these matters, a leading example of which was CPMC’s initial decision to close the last skilled nursing facility with a subacute care unit in San Francisco, which was on the St. Luke’s Campus. Subacute care units are for individuals who need long-term, life-support services, such as a ventilator to breathe. After community and political pressure largely generated by the Clinic’s clients in alliance with families of the affected patients, CPMC backed off and decided to open temporarily a subacute care unit on another of its hospital campuses until the remaining patients died or otherwise left.
set forth in somewhat broad strokes a number of intertwined political and professional considerations to position my own perspectives on lawyering for social change.

II. The Political and Professional Context

In the United States, a neat separation does not exist between law and politics in the promulgation, enactment, and implementation of public policies. Rooted in our constitutional form of government and commitment to the rule of law, lawyers and judges in a professional capacity play inordinately central roles in the political process, whether the issues concern the structure of government or substantive public policy. For lawyers professionally, their participation in governance or policy matters is mostly as part of their representation of interest groups, including incorporated businesses and unions, and various associations, coalitions, or movements, of which some are highly organized, while others are more loosely coordinated.

In this section, I call attention to three key factors that complicate lawyering when representing groups with limited resources as compared to well-funded entities. The first has to do with the inherently conservative nature of legal counseling and representation and the long-term effects of who most benefits from lawyer involvement in public affairs. The second has to do with power imbalances in the lawyer-client relationship and how that affects the dynamics of providing legal assistance in group advocacy situations. The third has to do with the fluid nature of political circumstances and the difficulties in sustaining over time advantages and benefits for non-establishment client groups.

In 1831 following his travels in the United States, Alexis de Tocqueville commented on the special place of the bar and the bench in American politics. He famously observed: “If I were asked where I place the American aristocracy, I should reply without hesitation that it is not composed of the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.” De Tocqueville considered lawyers “a conservative interest” within American political culture—a “counterpoise to the democrat element”; specifically, he expected the legal profession as “qualified by its powers, and even by its defects, to neutralize the vices which are inherent in popular government.” For de Tocqueville, in light of the absence of an entrenched social aristocracy in the United States, the legal profession’s attraction to regularity, order, and stability was a present and necessary source of conservative constraints in the unfolding of American democratic politics.

De Tocqueville was correct in what has been the dominant historical role played by American lawyers and judges in response to changing social and economic circumstances. The reasons are twofold: one has to do with professional habits and commitments as emphasized by de Tocqueville; the other, not underscored by him, has to do with who has access to lawyers for what purposes.

8. 1 Alexis de Tocqueville, Democracy in America 288 (1954).
9. Id. at 288–89.
As part of the education and socialization of lawyers, professional values and approaches are intended to channel and constrain individual behavior. Reflecting often long-standing traditions, their impact strongly tends to be cautionary and conservative. One example is the pivotal place of precedent in legal reasoning. Another fundamental professional commitment is the duty of loyalty to a client. Professional values are crucial in lawyering, but, in recognizing how those values play out, so too is identifying who are the clients and the kind of interests that are advanced and protected.

Both in the past and now, American lawyers in public policy matters overwhelmingly assist and represent wealthy individual and corporate interests. While the rich are not monolithic in their views, their financial ability to pay lawyers on a sustained basis means that ready pools of lawyers are available to represent their interests. In policy advocacy, lawyers most often are the handmaidens of the wealthy. The extent to which various interests converge or diverge and the extent to which a lawyer's personal views correspond with those of a client are peripheral considerations. While law and politics are not static and progressive developments arise, the on-balance impact of the professional work done by lawyers representing group interests has been and continues to favor those who historically have most benefited from the existing legal and political order.

Those attorneys working with non-establishment groups are a relatively small minority. Moreover, the dispositions, values, and methods of the legal profession, as de Tocqueville well-understood, mainly promote conservative decision-making. The underlying paradox for lawyers who seek to use legal advocacy for progressive social change, including when invoking constitutional ideals such as equality, is that so much of what comprises legal professionalism and what eventually results legally and politically reinforces the status quo. Nonetheless, there are choices in how lawyers work with client groups on progressive issues and causes that can make a difference in the degree to which lawyer involvement contributes to or distracts from the likelihood of success in facilitating the empowerment of traditionally marginalized groups and in obtaining desired policy outcomes.

This examination leads me to my second point, which pertains to the effects of power imbalances within the lawyer/client relationship on how professional responsibilities are carried out, specifically when formal accountability to clients is weak or non-existent. In these circumstances, my concerns are with what else needs to happen to further accountability or to mitigate the effects of such weakness or absence. When the opposite is the case, for example the payment of a hefty fee, the most likely professional relationship problem is not about accountability but about encouraging lawyers to exercise independent judgment and not avoid telling clients what they do not want to hear.

The academic literature analyzing what lawyers have done and prescribing what they should do when working with groups seeking progressive social change is voluminous and mostly the product of scholarship undertaken after the mid-1970s. These works include both social science
analyses of the impacts of using law in furtherance of social justice\textsuperscript{10} and texts and studies in legal professionalism that address ideas about the roles of lawyers and lawyering as a process.\textsuperscript{11} While some of these works heavily criticize the efficaciousness of progressive efforts, others concentrate on what can be learned from past shortcomings, mistakes, and successes.

The descriptions and critiques presented in this literature are especially rich in new terminology, which has had an impact within the academy and in practice. Certain terms that did not exist before are now fairly ubiquitous. One prominent example is “lawyering” as a word to describe generally what lawyers do professionally.\textsuperscript{12} Another is “client-centeredness” as a concept for underscoring that clients, not lawyers, are the ultimate decision-makers and for emphasizing the need to inquire explicitly and not make assumptions about the perspectives, values, understandings, and goals of clients.\textsuperscript{13} Related to client-centeredness are notions of “rebellious” or “collaborative” lawyering, which has an additional pivotal emphasis on working in partnership with clients, whether they be individuals or groups.\textsuperscript{14} The most frequent catch-all term for describing legal advocacy for groups seeking progressive social change has been “cause lawyering.”\textsuperscript{15}

Two breakthrough events in American legal and political history are the catalysts for much of the development of this literature. The first is the NAACP’s trailblazing campaign starting in the 1930s to end racial


\textsuperscript{12} One of the earliest uses of the term, if not the first, was in Bellow & Moulton’s The Lawyering Process, 10 Clinical L. Rev. No. 1 (Fall 2003).


\textsuperscript{14} Ascanio Piomelli, Appreciating Collaborative Lawyering, 6 Clinical L. Rev. 427 (2000); Gerald P. López, Rebellious Lawyering: One Chicano’s View of Progressive Law Practice (1992). López’s conception of legal practice has had a widespread impact on the academic literature regarding progressive lawyering in individual and group situations. See Symposium: Rebellious Lawyering at 25, 23 Clinical L. Rev. No. 1 (Fall 2016) and No. 2 (Spring 2017).

\textsuperscript{15} Cause Lawyering: Political Commitments and Professional Responsibilities (Austin Sarat & Stuart Scheingold eds., 1998); Cause Lawyers and Social Movements (Austin Sarat & Stuart Scheingold eds., 2006). For an analysis of lawyers from the other side of the ideological spectrum, see Ann Southworth, Lawyers of the Right: Professionalizing the Conservative Coalition (2008).
segregation, which began with actions and cases setting the stage for the litigation in *Brown v. Board of Education*. The campaign’s climax was the landmark *Brown* decision in 1954, but the legal struggle encompassed as well the frustrated course of implementation that followed.\(^{16}\) While the clients represented by the NAACP were highly courageous, it was the NAACP lawyers who made the crucial strategic and tactical decisions. The attorneys were the leading actors in what was institutionally a court-focused approach.

The NAACP campaign became the model for much social cause lawyering that occurred afterwards for a variety of constituent groups and across a wide range of issues.\(^{17}\) Such lawyer-centered and judicially dependent strategies for achieving social change have come under much critical scrutiny. When the focus is on lawyer and client relationships, the chief criticisms are that this type of approach is too top-down and not mindful enough about differences of opinion, concerns, and goals among the represented group.\(^{18}\) When such strategies are criticized as not sufficiently efficacious, or even counterproductive, in achieving concrete benefits for the intended constituencies, the main arguments stress that too much credence was given to judicial decision-making as an instrument for social change and not enough attention was given to other political and societal means for garnering long-term support and acceptance.\(^{19}\)

The second key catalytic event was the federal government’s funding of legal services for the poor in 1965 as part of President Lyndon Johnson’s War on Poverty. The pivotal development was the decision of Office of Economic Opportunity (OEO) administrators not only to expand the provision of individual legal representation but also to push for “law reform”—a multipronged approach utilizing legal assistance and representation of individuals and grassroots groups to promote and enforce policies beneficial to poor persons overall.\(^{20}\) In terms of lawyer-client relationships, the


\(^{17}\) See, e.g., Silverstein, supra note 10.


crucial consequence was the untethering of a substantial amount of legal services funding from direct control by individual and group clients.

Previously, the budgets of legal aid societies were small, and work on policy advocacy was relatively rare.21 Some foundation-funded demonstration programs served as a model for federal legal services funding, but these programs too involved limited numbers of attorneys.22 Prior efforts to reform the law and have a political impact largely were undertaken by lawyers employed by or associated with organizations, such as the NAACP and the ACLU, which had meaningful constituent-based organizational controls over attorney actions and activities. For the first generation of OEO Legal Services lawyers, considerably more individual attorney discretion existed than in other practice settings, especially in policy advocacy matters, to determine on what projects to work, whom to assist, and how to relate to client groups. Lawyers assisting and representing the poor were often on their own in figuring out how to exercise professional discretion responsibly in politically charged contexts.

The third background factor of particular relevance for this article is the continually changing nature of the political environment underlying and circumscribing social cause lawyering. The specific circumstances in the late 1960s and early 1970s were unique in our history for using legal advocacy to advance progressive causes. Among the key factors were recent cultural changes, not universally but widely shared, that challenged conventional traditions and norms; active protest movements over civil rights, poverty, and the Vietnam War; the coming of age of a generation of lawyers who had participated in protest movements; and most significantly the staffing and dispositions of the judiciary.

Blowback was not long in coming. It peaked in the 1980s when Ronald Reagan was president. One early major example was the enactment at his behest of the Omnibus Budget Reconciliation Act (OBRA) of 1981,23 which was a 600-page bill that among other matters cutback dramatically benefits for families receiving public assistance. OBRA’s passage was the first time the federal budget process had been used in a sweeping manner to make programmatic legislative changes, and it was a key step in the federal government’s retrenchment from supporting progressive New Deal social welfare legislation. With respect to the provision of legal assistance for the poor, the Reagan administration in seven of its eight annual appropriation proposals recommended the total defunding of the Legal Services Corporation, which since 1975 has been the successor agency to OEO Legal Services. Congress pared back federal funding and began to impose

21. Id. at 5–19; Note, Neighborhood Law Offices: The New Wave in Legal Services for the Poor, 80 Harv. L. Rev. 805, 806–09 (1967).

22. In the mid-1960s, the Ford Foundation was the leading philanthropic funder supporting demonstration legal services for the poor projects. Johnson, supra note 20, at 22–35.

significant limitations on the provision of legal services for the poor with such funds but rejected providing no funding. A conservative backlash is now again here, in potentially even more devastating ways, with Donald Trump as president.

Priorities get made, and strategies and tactics get tailored in light of such changing circumstances. Criticisms of the efficaciousness of past progressive cause lawyering, especially the use of litigation, are at times overblown. Lawyers involved in those efforts were not oblivious about the importance of other approaches and co-courses of action. The choices made not infrequently reflected what they regarded as potentially most advantageous given the limited resources available, the extent of organization and mobilization of affected constituencies, and the then existing political and legal opportunities and limitations.

Accentuated by the place money plays, our political and legal systems are not symmetrical in how claims are raised and benefits are dispensed. Outcomes not surprisingly by and large tilt conservatively in that well-heeled groups usually have their say and get meaningful concessions, not just specifically but also systemically. It is the unusual reform effort that disturbs underlying social and economic power relationships. Viewed structurally, positive changes for non-establishment groups are rarely other than incremental, which is not to say that they are unimportant.

Because seeking progressive change is always an uphill battle, it is risky to generalize from specific incidents of group representation. So much depends on particular conditions and players. Usually, however, three important functions are involved in social-cause lawyering for marginalized groups. The first concerns influencing and shaping policy making; the second involves the ongoing need to monitor or police implementation or enforcement of the policy or practice changes obtained; and the third pertains to the empowerment of those represented, which at its core involves how lawyers and lay activists working together in specific circumstances optimize their distinct skills and powers in complementary ways.

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practice, these functions are not independent of one another: they overlap and when most effective reinforce each other.

In a 2017 article, Scott Cummings provides a thought-provoking and comprehensive review of the role of lawyers in progressive social change, primarily since 1970 but also with background information dating back to the early twentieth century.\(^\text{27}\) In developing his own ideas, he focuses on what he calls “movement” lawyering. He uses the term to emphasize two key features for effective social cause lawyering: “the representation of mobilized clients and the use of integrated advocacy.”\(^\text{28}\)

Cummings defines movement lawyering as “the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define.”\(^\text{29}\) The definition is a mouthful. I use it to highlight some similarities and differences that I have regarding the roles and responsibilities of lawyers in seeking progressive social change and to place in a contemporary scholarly context my discussion of the Hastings CED Clinic’s work with grassroots coalitions and what I mean by accessibility, responsiveness, and judgment as professional attributes.

I agree with the importance of viewing the strategies available for affecting social change as multiple and as involving law-related and non-legal activities. Although the combination of strategies varies in different situations, they need to be highly coordinated when jointly deployed. Litigation is not always appropriate. When appropriate, it is seldom if ever sufficient in itself. Support needs to be built through media and grassroots activities. Furthermore, there is almost always a need for legislative and administrative work, either as a basis for obtaining policy changes or as necessary follow-up action to promote compliance with law and avoid the erosion of gains already obtained. Additionally, there are situations where the primary strategy requires transactional legal skills, such as the negotiating and drafting of a contract.

I also agree with Cummings that the clients set the goals and make the pivotal decisions. However, to not overly influence client group decision-making can be difficult, particularly when one shares the concerns and goals of the group. For both the lawyer and group members, reasoning and emotions are at play. In group discussions, there is a premium on lawyer self-awareness about one’s own feelings and about the dynamics of the group.\(^\text{30}\) How lawyers tailor what they say or do is significant. Their

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27. Scott Cummings, Movement Lawyering, 2017 Univ. Ill. L. Rev. 1645.
28. Id. at 1689.
29. Id. at 1690.
comments and actions need to be sensitive to their lawyering role as well as substantively understandable and helpful.

Where I disagree with Cummings is in his presumptions about the extent of mobilization and organization of marginalized constituencies and the likelihood of meaningful formal accountability in the absence of a strong external mechanism, such as a fee. The two matters are tied together. With a relatively well-organized and well-funded group, for instance a labor union or federation, attorney accountability is not likely to be much different from traditional lawyer-client relationships. The lawyers work for and are paid by the group. When constituencies are inchoate or in early or quiescent stages of organization or are still in informal and fluid states of organizational development and have no actual funding, conventional agency-like accountability is problematic. Differences exist in what attorneys have to do to help such groups realize their objectives and further their empowerment. In these less-developed organizational circumstances, even more than in other situations, lawyers need to be highly self-reflective and self-disciplined in how they interact with client groups and carry out their professional role responsibilities. From my perspective, much rests on their abilities to develop and utilize certain inner dispositions, habits, or mindsets that enhance how they acquire and apply knowledge and their character as a lawyer.

III. Working in Coalition

A. The Hastings CED Clinic

I begin this article’s narrative with brief background information about the Hastings clinical program and its location on an urban campus bounded by San Francisco’s Civic Center and Tenderloin neighborhood. The location is ideal for clinical legal education and learning from working on real cases and projects. It is very near local, state, and federal political offices and state and federal courts at both the trial and appellate levels. And it borders one of San Francisco’s poorest neighborhoods and all sorts of unmet needs for quality legal services.

The Tenderloin is a neighborhood with serious drug-dealing and related criminal problems, a host of concerns regarding social service and health-care delivery for both housed residents and homeless individuals on the streets, a continuing need for additional quality affordable housing and jobs for neighborhood residents, and issues of economic and community development generally. The Tenderloin is home to families with children as well as single adults and couples from diverse backgrounds. The largest groups of residents are Southeast Asian and Latin American immigrants and refugees.

The typical Tenderloin building is four to six stories high with non-residential uses on the ground floor and residential units above. Most of the residential units are studios or one-to-two bedroom apartments or in Single Room Occupancy (SRO) hotels. The non-residential uses are mainly small commercial establishments, particularly family-owned, ethnic cuisine
restaurants and neighborhood-serving retail stores. Close to half of the residential buildings in the heart of the Tenderloin are now owned or long-term master leased by well-established and responsible nonprofit organizations. Unlike anywhere else in San Francisco, the likelihood in the Tenderloin of widespread gentrification and the dislocation of low-income tenants is very low. The reasons are both the high degree of nonprofit property control and favorable zoning laws that limit the height of buildings.31

In addition to nonprofit housing organizations, the Tenderloin has a large number of nonprofit service organizations. Among both types of organizations are designated community organizers on staff. For those who reside or work in the Tenderloin, there is much room for improving its livability. But there also is a significant grassroots organizing infrastructure for seeking social change.

Toward the end of 1999, several Tenderloin community activists contacted me about having Hastings students, under clinical faculty supervision, assist in a proposed development project that was still in the talking stage. The community activists knew me because, prior to coming to Hastings in 1992 to start its in-house clinical program, I had worked with a number of Tenderloin grassroots organizations on community development and homelessness issues.32 After consulting with my clinical colleagues, our response was to start a Community Economic Development Clinic as an in-house clinic that would focus on projects affecting the Tenderloin and its low-income residents, mainly by working with various nonprofit social service, affordable housing, and community development organizations. The CED Clinic would undertake non-litigation matters covering operational and programmatic concerns of the different organizations and, in conjunction with those organizations, policy impact advocacy directed at improving the quality of life in the Tenderloin. I welcomed the opportunity to refocus my main teaching and lawyering responsibilities on directing the CED Clinic.

B. Who Is the Client?

In 2007, through the Clinic’s ongoing work in the Tenderloin, I became aware of a proposed large hospital development on the Tenderloin’s western boundary. The project sponsor was California Pacific Medical Center, the San Francisco affiliate of Sutter Health—a large nonprofit hospital conglomerate in Northern California. The original proposal before the San Francisco Planning Department not only covered the construction of a new hospital campus bordering the Tenderloin but also anticipated the closing of St. Luke’s Hospital. In large part because of community opposition


32. For thirteen years, I was the executive director of the San Francisco Lawyers’ Committee for Urban Affairs, a civil rights and antipoverty legal services organization now known as the Lawyers’ Committee for Civil Rights of the San Francisco Bay Area.
to CPMC’s plans regarding St. Luke’s, CPMC had put on hold its initial land-use applications. The near-Tenderloin campus, which was referred to as the Cathedral Hill campus in project documents, was intended to be a huge hospital facility replacing two other CPMC hospital campuses located in wealthy San Francisco areas. Unlike St. Luke’s, CPMC’s other campuses have a relatively sorry record in serving low-income individuals and families. The threatened closure of St. Luke’s became a hot button political issue in San Francisco.

Given the magnitude of CPMC’s development proposal, I thought that it was a project for which it made sense to seek a Community Benefits Agreement (CBA). A CBA is an agreement between a developer and community groups, where the developer agrees to provide a range of community or public benefits beyond what is legally required. The quid pro quo for the developer is a promise by the community groups to support or at least not oppose the project. The terms of a CBA are directly enforceable by the community groups. At the time, CBAs had not been much used as part of the politics involved in land-use permitting in San Francisco.

Instead, for large and potentially controversial projects, the more common method for obtaining enforceable but not necessarily statutorily required public or community benefits entailed the negotiation of a Development Agreement (DA) between the developer and a San Francisco governmental agency, with the bargaining taking place prior to final consideration of a land-use permitting request. With DAs, community groups may be able to influence the terms and conditions, but they rarely directly participate in the negotiations or the drafting.

33. San Francisco is a unique local governmental body in California in that it is both a city and a county, which means that its public policies purview is broader than other cities. Most relevant for this article, it has not only city but also county public health responsibilities, which include both operating a public hospital and oversight functions regarding private hospitals. Structurally, there is a mayor and a board of supervisors rather than a city council.

34. California law requires hospitals to meet new highly stringent seismic standards. Cal. Health & Safety Code § 130050 et seq. To do so, virtually all California acute care hospitals have to be retrofitted or rebuilt within a statutorily fixed time period.

35. See infra pp. 572–73.

36. Among the matters that I worked on at the Lawyers’ Committee was a precursor to what later would be called a CBA. In the early 1980s, along with pro bono counsel, I represented the North of Market Planning Coalition (NOMPC), a now defunct organization, in negotiations with three hotel developers who sought to expand or build new tourist hotel facilities on the Tenderloin side of the Union Square district. The results were payments by the developers of non-statutorily required cash benefits for low-income housing and community services. An important follow-up action was NOMPC’s successful lobbying for the downzoning of the Tenderloin, which included lowered height limitations sufficient to discourage both the destruction of existing low-income housing buildings and the construction of high-rise buildings for higher income residential and commercial uses. See Shaw, supra note 31, at 181–93.
For both CBAs and DAs, the objective is to get significant concessions from the developer, whether a private party or a public entity. When the target is a private developer, the process is still highly political, as most of the community group’s leverage comes from the private party’s interest in getting a favorable governmental decision. For grassroots organizations, getting a meaningful CBA or affecting the shaping and writing of a DA involves effectively influencing public agency decision-making.

After gathering some preliminary information, I contacted a number of Tenderloin activists about the CPMC project. Knowing how busy they and their organizations were, I told them that the Clinic would monitor the planning process and that I would let them know when San Francisco’s review of the project became active and, thus, when it would be timely for them to decide what, if any, actions to take. For the next two years, two different paired teams of students spent part of their Clinic time gathering information about CPMC and the project, healthcare needs and services in the Tenderloin, applicable land-use requirements, and the nature and use of CBAs. The students prepared several memoranda and made several informational presentations to Tenderloin social service providers and activists regarding the project plans and the potential utility of seeking a CBA. In doing this preliminary work, the students puzzled over who was the client.

The work being done was in anticipation that the project in some form would go forward and would be of major concern for Tenderloin residents and activists. Such engagement reflected both the Clinic’s evolving role in the neighborhood as a resource on community development matters and a not uncommon reliance on lawyers to be principal monitors of projects and policies of likely strong interest to a particular constituency. The differences in this instance were that the Clinic was not being paid and was not acting pursuant to any formal retainer agreement. The bond was a shared commitment with local activists and residents to improving the quality of life in the Tenderloin. At this stage, to the extent there was a client, it was the Tenderloin itself.

C. Mobilization and Collaboration

In June 2009, as required by the California Environmental Quality Act (CEQA), the San Francisco Planning Department held a scoping hearing for an Environmental Impact Report (EIR) to be prepared for CPMC’s recently revised Long Range Development Plan (LRDP) to restructure and rebuild its multi-campus presence in San Francisco. The centerpiece was a new 555-bed hospital abutting the Tenderloin. The size of the hospital was slightly scaled-down from previous plans. As part of the same hospital campus site, CPMC additionally planned to construct a separate medical office building across the street from the hospital. Because the dividing street was Van Ness Avenue, a major San Francisco automobile and bus
thoroughfare, the plans further specified the construction of a tunnel to provide underground passage between the two buildings. In an apparent concession to past opposition, the revised LRDP also included a rebuilt but much smaller hospital of 80 beds on the St. Luke’s site.38 There were contingent but not firm plans for constructing a new medical office building adjacent to the rebuilt St. Luke’s Hospital. The total estimated LRDP development and construction costs were $2.2 billion. Following the scoping hearing, I informed Tenderloin community organizers that it was time to begin organizing if, indeed, sufficient neighborhood interest existed in responding to the revised proposal before the Planning Commission.

Shortly thereafter, the organizers convened several Tenderloin community meetings providing information about the project. Among the lead organizers were staff members at Community Housing Partnership (CHP) and Tenderloin Neighborhood Development Corporation (TNDC), two highly respected nonprofit affordable housing organization with multiple properties in the Tenderloin. They invited to these meetings not only Tenderloin activists and residents but also grassroots activists from the Mission and Bernal Heights neighborhoods adjacent to St. Luke’s Hospital, specifically from the Bernal Heights Neighborhood Center, and representatives from two healthcare worker unions—the California Nurses Association (CNA) and the National Union of Healthcare Workers (NUHW). The two unions between them had 1,600 members employed at CPMC campuses and were engaged in protracted collective bargaining with CPMC’s leadership. At the time, CPMC was the second largest non-public employer in San Francisco with more than 6,000 employees.

Most of the non-Tenderloin participants in these first meetings were associated with the Coalition for Health Planning-San Francisco and had been involved for several years in the effort to prevent the closing of St. Luke’s. The first reaction of the citywide healthcare activists was that the proposed 80-bed hospital on the St. Luke’s site would not be economically sound and would be abandoned within a relatively short period of time after being built. Rebuilding a hospital that CPMC’s leadership did not want was likely to be a small price to pay to get the land-use entitlements for the showcase hospital that they did want to build.

Also in attendance at these summer meetings was a long-time community activist from the Council of Community Housing Organizations (CCHO), a San Francisco-focused association of nonprofit affordable housing development organizations. This particular person had decades of experience in San Francisco land-use planning politics. Another early attendee with relevant political experience was from the Chinese Community Development Corporation (CCDC), which had several affordable housing projects in the Tenderloin, though the organization is primarily based in San Francisco’s Chinatown neighborhood. I too attended these meetings, as did a student who was enrolled in the CED Clinic for the coming 2009–10 academic year.

As part of the initial organizing effort, the Tenderloin activists conducted a poll of 800 Tenderloin tenants about what they most hoped would happen as a result of the proposed nearby new hospital. The priority concerns of the polled tenants were access to healthcare services, jobs for low-income residents, support for additional affordable housing, and minimizing traffic impacts. By the time the other Clinic students began the school year in late August, there was within the Tenderloin community a functioning coalition with which to work and a set of issues around which to advocate that was grounded in and legitimated by a poll of residents. In addition, the Tenderloin organizers had forged an alliance with citywide healthcare advocates and had begun working with a network of affordable housing groups and two unions. Each of the two unions had continuing interests in furthering and protecting CPMC worker rights and benefits and advancing access to quality healthcare across-the-board.

During the school year, the student who voluntarily attended the summer meetings teamed with another student to serve as the Clinic’s main liaisons to the newly organized Tenderloin coalition and its citywide group allies. Working with employees of the constituent organizations and other volunteers, the students functioned as an additional staffing resource. The students participated in group meetings and worked on a variety of specific research and writing projects involving land use, environmental review, and healthcare delivery issues. A part of their work involved interacting with lay participants on developing and explaining specific demands based on both priority issues identified by Tenderloin residents and related concerns about CPMC raised by other associated groups. Most of this work was directed at the drafting of a comprehensive policy platform to be used politically, in the media and with policy decision-makers. The discussions were not just about substantive policy and law. Looking down the road, these discussions with community and labor organizers also were firsthand lessons for the students on the centrality of politics, particularly lobbying for and lining up votes at the Planning Commission and eventually the Board of Supervisors.

By the end of 2009, the Tenderloin coalition consisted of twenty-three organizations and had a name—the Good Neighbors Coalition (GNC). The organizations all endorsed the GNC’s positions, but not all were active
participants. Usually six to eight individuals from Tenderloin groups attended regular meetings, among them staff members from Tenderloin nonprofit affordable housing organizations and the chief organizer for the Central City SRO Collaborative—a Tenderloin tenants’ organization. Other active participants were from San Francisco neighborhoods near the Tenderloin, specifically the Cathedral Hill Neighbors Association to the west and the South of Market Community Action Network to the east. Individuals associated with groups that were part of the Coalition for Health Planning-San Francisco, including labor organizers from CNA and NUHW, also regularly participated in these weekly or biweekly meetings. In discussions and planning, initial coalition affiliations rarely were a salient matter. Late in 2010, the chief staff person for Jobs with Justice SF, a coalition of mostly progressive local labor unions, became another core union-affiliated participant.

While changes would occur over time in who among the various participants were most active, the lead activists throughout have been highly sophisticated organizationally and politically. Internally, meetings were run informally, although with an agenda. Preliminary work was often done in committees, usually organized on an ad hoc basis. In addition, those attending meetings would enlist, if available and as needed, support from other staff in their respective constituent organizations. Almost all final decisions were arrived at by consensus after open discussions and without taking interminable amounts of time. Externally, the lead participants were very adept at using individual and organizational connections to get access to San Francisco politicians and administrators. They also were skillful in using the media and in structuring public events. At various governmental hearings and occasional demonstrations on the steps of City Hall, they continually relied on members of the different constituent groups, mainly Tenderloin and other low-income San Francisco residents and rank-and-file union workers, not only to attend but also to speak about what was at stake for them. San Francisco’s political system is unusually open and responsive to progressive causes, but not without significant and visible grassroots support.

A major assignment for Clinic students and faculty in 2010, prior to the start of the fall term, was to work closely with representatives from the nonprofit affordable housing community on developing an affordable housing position as part of the GNC policy platform.39 San Francisco has strong public policies requiring developers of major projects to pay in lieu fees for affordable housing or to include affordable housing units within proposed residential developments. CPMC repeatedly claimed that

39. In describing this assignment, I have relied not only on my own notes and observations but also a memorandum dated July 12, 2013, entitled “Report on Final Approved Development Agreement for the CPMC Project,” which was prepared for Council of Community Housing Organization Members by Calvin Welch, CCHO’s Representative in the Coalition.
no housing obligation was triggered by its planned construction of new hospitals, as the sites did not involve displacing residents. CPMC did not dispute that it had an obligation to provide for the replacement of 25 residential units in buildings to be demolished as part of the development of the medical office building to be built on the Tenderloin side of Van Ness Avenue as part of the Cathedral Hill campus. To meet this specific obligation, CPMC agreed relatively early to make an in lieu fee payment. The eventual amount agreed to was $4,138,620.49 Regarding anything more, CPMC vigorously resisted even discussing any other project-related affordable housing responsibilities. The challenge was to conceptualize a basis for demanding much more from CPMC given the magnitude and impact of its proposed project. The backdrop was the crisis in the available supply of housing in San Francisco, especially for low-income individuals and families.

Two provisions in the San Francisco Planning Code were most relevant but had to be linked together in an interpretively novel fashion, which also invoked Housing Element policies and objectives in San Francisco’s General Plan.41 The first was the Jobs Housing Linkage Program, which provided formulas for determining in lieu affordable housing fee payments for different types of major non-residential projects.42 The Program’s purpose was to obtain from developers the funds to help meet affordable housing needs of future end-use employees once a project was built. Within the Program, how to treat development plans for hospital campuses was not facially clear. The second was land-use legislation establishing the Van Ness Special Use District, which encouraged the development of high-rise residential buildings in the very area where CPMC planned to build its Cathedral Hill campus.43 CPMC needed an amendment to the use requirements for this District to construct a hospital, which otherwise was not permissible. While this legislation clearly established the construction of new housing as the highest priority, it was silent regarding the percentage of affordable housing to be included. A specific committee working on the GNC’s affordable housing position came up with a formula derived from the amount of housing not being constructed in the Special Use District as a result of the planned CPMC hospital campus; the high priority commitment to developing affordable housing interwoven throughout the San Francisco Housing Element; and an in lieu fee amount based on provisions

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40. Attorneys with the Chinese Community Development Corporation working with the Mayor’s Office of Housing negotiated this provision, which is noted in the final DA, as part of a parallel but separate agreement with CPMC. CPMC Development Agreement, supra note 5, Exh. G at 1-2.


42. S.F. PLANNING CODE § 413.

43. Id. § 243.
for determining the number of affordable housing units required by the Jobs Housing Linkage Program.

While the formula was far from statutorily straightforward, it made a credible case for getting a substantial affordable housing contribution from CPMC far in excess of anything initially anticipated by CPMC or City administrators. When the affordable housing group first met with the director of the Mayor’s Office of Housing regarding their approach, he expressed almost no interest, as he viewed the CPMC project as primarily a healthcare policy issue and not an affordable housing opportunity. A meeting in August 2010 with the director of the Planning Department drew a more positive but still noncommittal response.

To get the attention of CPMC and to further the attention of the Planning Department and other City administrators, the GNC with backing from its citywide allies proposed a resolution for the San Francisco Board of Supervisors supporting the housing requirements in existing area plans, such as the Van Ness Special Use District.44 A “whereas” provision explicitly referenced as a policy having affordable housing objectives in such area plans. The “resolved” section set forth as policy “discouraging new development projects [in specific area plans] that would seek an exception to housing requirements . . . unless that new development project shall substantially fulfill the underlying housing production goal.” In other words, without mentioning CPMC the resolution highlighted that if CPMC wanted approval for its hospital campus within the Van Ness Special Use District, the City was going to take seriously potentially applicable housing requirements, especially for affordable housing. On September 28, 2010, the resolution on a 7-3 vote was adopted by the Board of Supervisors.

Although the resolution was a statement of policy only, not binding law, it had its intended effect with City administrators. It was not until much later that the message got across to CPMC. Using the “blended” approach of applying the housing requirements of the Van Ness Special Use District and the in lieu affordable housing fee structure of the Jobs Housing Linkage Program, the GNC arrived at a figure of $140 million as an estimated CPMC affordable housing obligation in addition to all payments due to the loss of existing housing. Everyone within the group realized that this figure was high, but it was a justifiable place to start. It also was an attention-getter. After the resolution was passed, the affordable housing committee members met several times with Planning Department staff, who eventually accepted the group’s methodology if not its mathematics. The notion of a substantial CPMC contribution to affordable housing also came to be broadly accepted within the Mayor’s Office. Obtaining from CPMC a sizeable payment for affordable housing was now on the City’s agenda, not just the agenda of GNC and its allies.

For three years beginning with the 2010–11 academic year, all eight students in the CED Clinic worked on the CPMC project. Most of the student work during this period entailed researching and drafting background memoranda, factual reports, position papers, and formal filings with governmental agencies. Two examples are especially noteworthy. Each involved an entire Clinic cohort working together on a single assignment, and each had an important impact in advancing community objectives. The first pertained to the preparation of written comments on the Draft EIR for CPMC’s proposed Long Range Development Plan. The second, which I describe a bit later, concerned the production and distribution of a factual report comparing the profitability and charity care performance of San Francisco hospitals.

The overriding purposes of an EIR are “to provide public agencies and the public in general with detailed information about the effect that a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”45 An EIR is an informational document that has to be certified as having adequately discussed the environmental effects of a covered project before final decisions are made regarding major land-use entitlements and permit approvals. San Francisco procedures provide for review, public hearing, and action first at the Planning Commission and then, if there is an appeal, at the Board of Supervisors.46 After participating in and exhausting all San Francisco internal administrative procedures, an individual or a group objecting to the certification of an EIR as inadequate can file a judicial appeal. The EIR process is the single most important public opportunity for direct community participation in land-use decision-making.

Toward the end of July 2010, a little more than a year after the scoping hearing that triggered the GNC’s formation, the Planning Department released for public comment a Draft EIR for the entire long-range CPMC project. It was an enormous document involving thousands of pages, much of the analyses presenting highly technical information. Public comments were noticed as due by October 19. There would be a public hearing on the Draft EIR, after which the Planning Department would organize and prepare responses to the comments. The Draft EIR, the comments, and the responses comprise the Final EIR.47 While one need not be a lawyer to submit EIR comments, lawyers when available typically draft comment letters, in effect letter briefs, on behalf of concerned groups. The Good Neighbors Coalition looked to the Clinic to prepare a comment letter on the project expressing major grassroots concerns about the project and its environmental consequences. A new group of Clinic students starting in

47. Id. § 31.15.
the second half of August had less than two months to get up to speed about the project overall and about the EIR process.

The most important priority issues for the GNC concerned the social and economic effects of the project, which are EIR issues only to the extent they relate to the physical impacts of the project. In drafting the comments, the Clinic needed to be mindful of how to express credibly GNC concerns pushing the window but within the framework of EIR law. For example, healthcare delivery issues were not an easy fit. The EIR itself paid no attention to matters such as charity care and the accessibility of hospital services. The new proposed 555-bed CPMC hospital was less than a half-mile from another private hospital owned by a different nonprofit hospital chain, which had a far better record in providing charity care than CPMC. The argument made was that the EIR needed to analyze whether the new hospital posed a competitive threat to the existing hospital that could lead to the latter’s closure and, as a result, blighted conditions at the abandoned former hospital site. There was case precedent for such an environmental argument. The main purpose of the argument, however, was to underscore for decision-makers the importance of taking into account, when deciding whether to permit construction of the new hospital as proposed, the impact on the accessibility of in-patient care for poor individuals and families.

With a lot of hard work and hours spent, including many group sessions, the Clinic in mid-October submitted on behalf of the GNC, and after review by its members, a thirty-eight-page comment letter on a range of issues. The specific topics addressed were affordable housing, transportation and circulation, air quality and greenhouse emissions, local first-source hiring, healthcare delivery, and an analysis of project alternatives. As part of a coordinated effort, several other comment letters were submitted by organizations associated with the GNC but in their own names. The most substantial other comment letters were prepared by separate private law firms for, respectively, the California Nurses Association and several nonprofit affordable housing organizations. Those letters included and largely reflected the findings and opinions of environmental consultants, the most typical approach taken in serious EIR comment letters. Knowing what allied organizations were likely to say gave the Clinic room to prepare a comment letter that could focus heavily on the social and economic effects of the project without getting bogged down into too many technical details. The GNC’s comment letter immediately helped solidify its position as a major player in the review of the CPMC project by San Francisco public officials.

It would be another twenty-one months before the GNC comment letter, in a hearing before the San Francisco Board of Supervisors, would have its most important impact on the CPMC EIR process. In the interim, there

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were numerous private meetings and public hearings involving various San Francisco officials at the Planning Department and Planning Commission, at the Public Health Department and Health Commission, in the Mayor’s Office, and with the Board of Supervisors. In early 2011, two notable developments occurred that significantly affected the future course of events.

The first took place in February and early March and involved three meetings with CPMC that included both participants associated with the GNC and mayoral representatives. Although the hope was that productive negotiations would take place, CPMC had no interest at the time in making any concessions that would address community concerns. One clear indication was the absence at the table of anyone from CPMC’s decision-making leadership. Another was an *ad hominem* attack during the discussions by a CPMC publicist directed at CED Clinic students who had attended the meeting as observers. The sessions were not fruitful.

The second notable development originated immediately after the frustrating and futile negotiations with CPMC. It began with a meeting on March 15, 2011, attended by GNC members and allies and Mayor Ed Lee, newly in office as the interim successor to Gavin Newsom, who had been elected California’s Lieutenant Governor. The GNC had sent a copy of its platform to Mayor Lee the week before. At the meeting, he listened attentively. Two months later on May 17 was a second meeting with the Mayor to review and discuss a draft of the City’s proposed position regarding the CPMC project. On May 20, Mayor Lee announced publically the City’s position and sent to CPMC “A Request . . . for Community Benefits” which, in exchange for San Francisco’s approving CPMC’s project proposal without any changes in the building plans, spelled out various terms for a proposed Development Agreement. Though not as extensive, the benefits and conditions proposed were in line with those found in the Coalition’s platform. One prominent provision in the Mayor’s proposal was a request for $73 million as an in lieu affordable housing payment in accordance with the requirements of the Van Ness Special Use District. This amount was a little more than half the amount put forward by the GNC eight months before but, nevertheless, a striking change in position by the City’s executive branch. At a press conference in early June, CPMC slammed Mayor Lee’s proposal as “fiscally impossible.”

Two weeks later, CPMC’s chief executive announced that CPMC did not believe that continuing negotiations with the GNC was the best way to proceed. In previous GNC discussions, some tactical disagreement had arisen about whether to seek a CBA or a DA to structure and enforce the terms and conditions of any eventually reached agreement. The GNC platform could serve as a community-benefits agenda for either type of agreement. Instead of choosing one or the other, the decision was to leave open both prospects and to determine down the line, depending upon evolving circumstances, which type of negotiated agreement to get behind. In light of CPMC’s lack of good faith in the negotiation sessions and negative
public comment afterwards, though not giving up on the idea totally, no one within the GNC was optimistic about the likelihood of a CBA eventually being reached. If there were to be any meaningful concessions from CPMC, the more likely vehicle would be through a DA.

In early July, CPMC made a counteroffer to the Mayor’s “Request” regarding various community benefits at levels significantly less than he had proposed and substantially less than the GNC proposals. A month later, Mayor Lee turned his attention elsewhere as he decided to seek election as Mayor, something he had foresworn when appointed Interim Mayor. Officials within his administration, however, continued backroom discussions with CPMC. The City’s lead representative was from the Mayor’s Office of Economic and Workforce Development. Individuals associated with the GNC and allied groups were not directly or indirectly involved in these discussions. Nothing became public about even the general nature of these discussions until the end of the year after the voters in early November elected Mayor Lee for a full term.

At the beginning of the 2011 fall term, it was not clear what might be the major CPMC project assignment for the CED Clinic students. The Final EIR on the hospital rebuild was still in preparation at the Planning Department, which meant no further official actions on the project for some time. GNC members and allies were meeting regularly and were involved in various efforts directed at informing public officials and the public about the project and GNC’s positions. A major undertaking during the late summer and early fall was the production and citywide distribution of 10,000 tabloid newspapers outlining those positions. Specially targeted were Board of Supervisor districts with upcoming election races in 2012.

With respect to new Clinic work, one area for factual research was the gathering and organizing of comparative information and data about the charitable activities and financial positions of San Francisco hospitals, which is not an easy task because of differences in organizational structure and mission. San Francisco, like other localities, has experienced a major reduction in the number of independent acute care hospitals from closures and consolidations. The City has two relatively large nonprofit fee-for-service hospital groups, each with multiple campuses. The largest is CPMC, which at the time of the research had four campuses.49 The other is Dignity Health, which has two campuses—Saint Francis and St. Mary’s Hospitals. There is also a small nonprofit fee-for-service hospital serving the Chinatown neighborhood. Two other major fee-for-service hospitals are publicly supported—San Francisco General Hospital and the UCSF Medical Center, which now has two hospital campuses. There also is a federal Veterans’ Hospital. The only other San Francisco acute-care hospital is part of Kaiser Permanente, a

49. They were St. Luke’s in the low-income but gentrifying Mission District; the Davies Campus in the Dubose Triangle, an already gentrified middle income neighborhood; the Pacific Campus in the wealthy Pacific Heights area; and the California Campus in the almost as tony Laurel Heights area.
nonprofit membership-based healthcare provider serving a large number of Health Maintenance Organization (HMO) enrollees.

The students paired off in teams of two. Their initial research and drafting revealed that two students had unexpected and especially helpful skills. One was very comfortable in using computer software to produce highly polished reports with charts, tables, graphs, and photographs. The other, who prior to law school worked at an investment bank, was very skillful in identifying and analyzing online hospital financial and patient data collected by the State of California. After consulting with GNC participants, we decided to produce a report that would be professional in appearance and printed in color for use in advocacy efforts. The tone of the report would be objective, which meant just reporting the facts, not drawing the logical argumentative conclusions. The latter would be left to the reader. In working together on the drafting, one student in particular had a hard time not making explicit advocacy arguments as part of the text. The students got firsthand experience in the importance of tailoring language for different purposes and for different audiences, all in an effort to advance the objectives of a client group. Like the EIR comments, this assignment involved an enormous individual and group effort.

In early December 2011, the Clinic held a press conference at the Clinic’s office to announce publication of the report entitled Profits & Patients: The Financial Strength and Charitable Contributions of San Francisco Hospitals.50 The report’s lead student editor was the Clinic’s spokesperson and presided over the press conference, which was attended by a number of reporters including a reporter and photographer from the San Francisco Chronicle, the Bay Area’s main daily newspaper. The next day the Chronicle published a front-page story in the Bay Area section, which included a photograph of the student with a blown-up chart from the report behind him.51

The report’s facts clearly showed that CPMC was exceptionally profitable even when including St. Luke’s Hospital, which operated at a loss, and that the CPMC campuses other than St. Luke’s had an abysmal charity care record. For fiscal years 2006–2010, CPMC’s average annual net income was $149 million. As a comparison, Dignity Health’s hospitals struggled during this period. Saint Francis had average annual losses of $3 million, while St. Mary’s average annual net income was $4.5 million. The picture was quite the opposite with respect to amounts attributed to charity care. Charity care covers a number of matters, but the largest component is a write-off of the shortfall in governmental reimbursements, based on supposed market rates, for services provided patients covered by Medi-Cal (Medicaid)—the federal and state health insurance program for poor and other low-income individuals and families. In fiscal year 2010, St. Luke’s ratio of charity care to net patient revenue was 3.77 percent, while the three CPMC campuses

50. Copy on file with author.
wealthier San Francisco areas reported a joint charity care to net patient revenue ratio of 1.14%. For Saint Francis and St. Mary’s the ratios that same year were, respectively, 4.43% and 2.95%. In 2004, the San Francisco Board of Supervisors in a nonbinding resolution had called upon CPMC to increase the delivery of charity care at its campuses, which at the time did not include St. Luke’s, to 3% of net patient revenue.52 Despite unrivaled financial success during the years since 2004, the three CPMC campuses in wealthier San Francisco areas were far from doing their fair share in serving Medi-Cal and low-income patients generally. St. Luke’s was the exception, and CPMC’s initial position was to close the entire facility.

The GNC distributed copies of the report to the Mayor and members of his staff, members of the Planning and Health Commissions, and staff and members of the Board of Supervisors. It also was distributed to additional media representatives. The report became an important part of the campaign to rebuild St. Luke’s Hospital at a size that would further its permanent sustainability and to increase overall CPMC’s charity-care commitments and other community benefit contributions along the lines set forth in the GNC platform. CPMC’s public response to the report was an attempt to discredit it by asserting that it was prepared by law students working with groups opposed to its development plans. CPMC never disputed any of the report’s findings.

The publication of the report was timed to come out immediately before a Board of Supervisors Committee of the Whole Hearing on the CPMC project, which occurred on December 13, 2011. The hearing was convened by several supervisors, including the Board President, at the request of the GNC and its allies. It was not a common proceeding. GNC participants prepared briefing papers for the supervisors and met with a number of them ahead of time. The objectives were to educate the supervisors about the project and to get information about the status and general terms of the negotiations taking place between City administrators and CPMC.

The hearing began with presentations from City officials in the Mayor’s Office of Economic and Workforce Development, the Planning Department, the Department of Public Health, and the Mayor’s Office of Housing. Board of Supervisor members then questioned the City administrators. While not all specifics were presented, the topics covered a full range of project concerns, including charity care and Medi-Cal patient commitments, keeping a rebuilt St. Luke’s Hospital open long-term, maintaining hospital-based Skilled Nursing Facilities, affordable housing needs, permanent entry level jobs for low-income San Francisco residents, and transportation, traffic, and streetscape issues mainly related to the large, showcase hospital proposed for the new Cathedral Hill campus. Opportunities for community group participation also came up with one Board member.

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specifically asking about having a CBA, not only a DA. Board members were well aware of CPMC’s hostility to grassroots coalition involvement.

After the back-and-forth between City administrators and Board members, community participants as part of a GNC group presentation were allotted time to raise both specific substantive and general institutional concerns about the project and the negotiations. The GNC speakers were primarily a mix of neighborhood group and hospital labor-union representatives. The first speaker, however, was a CED Clinic law student who underscored and responded to a Board member’s question about CPMC’s poor charity care record and notably high net revenue. The Clinic’s Profits & Patients report was a crucial piece in the effort to get Board members to view skeptically CPMC’s representations about the structuring and effects of the multicampus hospital’s Long Range Development Plan and its good faith in negotiating DA terms.

In March 2012, the Tenderloin organizers of the Good Neighbors Coalition and citywide activists initially associated with the Coalition for Health Planning-San Francisco and Jobs with Justice SF explicitly acknowledged that they, in effect, had been operating as a coalition of coalitions. Since the initial organizing in summer 2009, neighborhood groups and labor unions to an unusual degree had planned and acted together in challenging CPMC’s hospital rebuilding plans not to stop the project but to advocate for a much more equitable and publicly beneficial project than otherwise was likely to be the case. Along with environmental matters, the primary substantive concerns involved healthcare, housing, and jobs issues. The organizers and activists chose San Franciscans for Healthcare, Housing, Jobs, and Justice (SFHHJJ or H2J2) as the new umbrella name and identity for their collective and joint advocacy efforts going forward. With now a citywide and not primarily a Tenderloin coalition as its client, the Hastings CED Clinic continued to provide legal assistance and representation.

Ironically that same month, Mayor Lee and CPMC announced that they had reached agreement on a DA. Although elected as a “can do” candidate the previous November, the mayor and his administration in early 2012 suffered two high-profile development losses not connected to the CPMC project. One consequence politically was that he was under considerable pressure to get a CPMC deal done.

The terms of this DA were significantly less costly and stringent for CPMC than those contained in Mayor Lee’s May 2011 “Request.” One example was that the $73 million initially requested by the Mayor for affordable housing was reduced to $58 million with half to be used for a “home ownership” program exclusively for CPMC employees (probably mostly for doctors and other professionals). This decrease meant that only $29 million would be available for affordable-housing purposes generally. Another example was a minimal local hire commitment for end-use jobs with CPMC. The goal was forty entry-level jobs annually for a five-year period. As a comparison, the City’s policy for construction jobs on targeted projects set a local-hire goal of fifty percent. A third example was
a provision that contained a complex formula allowing CPMC to close a rebuilt St. Luke’s Hospital in less than twenty years if it lost money. The Mayor’s representatives claimed that there was virtually no risk at all that this formula would result in allowing CPMC to shut St. Luke’s within twenty years—a troubling too-soon time period in its own right. A fourth example, one of particular concern to fiscal-minded supervisors allied with the Mayor, was the absence of any requirement that CPMC cap healthcare costs that affected group health insurance premiums paid by the City for its employees. The proposed DA also did not contemplate a change in the sizes of the two hospitals to be constructed. The plans still called for a 555-bed hospital near the Tenderloin and an 80-bed replacement hospital on the St. Luke’s site.

In early April, the Mayor sent the proposed DA to the Board of Supervisors. He did so before including it in the package of material to be considered by the Planning Commission as part of its environmental and permitting review of the CPMC project. A year and a half after comments had been submitted, the Planning Department at last had completed the Final EIR, which needed to be certified as adequate prior to consideration of the various land-use permitting applications and accompanying requests for necessary zoning legislative changes. Significantly, no member of the Board of Supervisors indicated support for the DA. Nonetheless, the Mayor’s Office pushed for full Planning Commission review of the CPMC project.

The CED Clinic on behalf of SFHHJJ and a private law office on behalf of the California Nurses Association (CNA) submitted written objections to certification of the Final EIR. The procedures established for the EIR process continued to provide the best opportunity for objecting to a major land-use project. At the Planning Commission hearing on April 26, SFHHJJ representatives and members of its constituent organizations expressed opposition to the Final EIR and the CPMC project. The objections focused on such issues as increased traffic, worsening air quality, insufficient affordable housing, and unsuitable sizes of the two hospitals—a too big Cathedral Hill hospital and a too small St. Luke’s replacement hospital. CPMC rallied support on its behalf, including from construction trade union leaders and members. The main arguments in support emphasized the creation of 1,500 construction jobs and 1,500 new permanent jobs. The contentious hearing lasted ten hours. On a 5-1 vote, the Planning Commission certified the Final EIR, approved the permitting applications and zoning changes, and recommended that the Board of Supervisors support the DA terms.53

In mid-May, SFHHJJ and CNA appealed the Planning Commission’s decision on the Final EIR to the San Francisco Board of Supervisors, the effect of which was to stop the process regarding all administrative approvals and legislative changes until the full Board of Supervisors held

its own EIR hearing and decided whether to uphold the appeal or affirm the Planning Commission’s Final EIR certification. Originally scheduled for June 12, the full Board of Supervisors hearing on the CPMC Final EIR was continued until July 17.

In the interim, at the request of SFHHJJ, the Chair of the Board of Supervisors Land Use Committee convened four Committee hearings on various aspects of the proposed DA. The first two hearings on June 15 and 25 were fairly routine. In early July, the San Francisco Chronicle reported that an anonymous whistleblower within CPMC had documents that indicated CPMC, under the formula included in the DA, could actually close St. Luke’s in less than four years after its opening, not twenty years as previously claimed by CPMC and the Mayor. The St. Luke’s issue dominated the third Land Use Committee hearing on July 9. At the hearing, CPMC representatives refused to share with Board of Supervisors members the data it used to determine when it would be able to close St. Luke’s under the DA formula. The Mayor’s representative at the hearing stated that his marching orders were to get a guarantee on St. Luke’s remaining open for a minimum of twenty years. It made no difference: CPMC still refused to budge. Issues also were raised at the hearing about the amount of charity care required under the DA, the provisions for permanent local jobs, and the potential effects on public and private healthcare costs if CPMC were not constrained from using its dominance in the San Francisco private fee-for-service hospital market to obtain increased fee reimbursements from insurance companies, thereby driving up health insurance premiums. At the last Committee hearing on July 16 attended by seven Board members, the main focus was on affordable housing and transportation issues not sufficiently addressed in either the DA or the Final EIR.

By the time the Final EIR appeal was heard on July 17, considerable skepticism arose within the eleven-member Board of Supervisors about the benefits for San Francisco of the overall project as then structured and spelled out in the DA negotiated by the Mayor’s Office. While the focus of the hearing was on the adequacy of the Final EIR, it was the merits and downsides of the underlying project that were of most concern. In preparing for the hearing, the CED Clinic and SFHHJJ leaders worked together in drafting backup material for sympathetic supervisors that highlighted

54. In preparing the appeal notice and supportive arguments, I enlisted the help of a graduating Hastings student who had taken the CED Clinic the year before. Prior to law school, she had worked for an environmental consulting firm. In preparing the Clinic’s original comments on the Draft EIR, she had been an enormous help in editing with me into a cohesive whole the various sections prepared by different student teams. We coordinated our written appeal with CNA’s appeal.
55. See CPMC Development Agreement, supra note 5, at 4.
significant legal flaws in the Final EIR and proposed specific lines of questioning. The main points covered transportation and traffic issues, the adverse impact on San Francisco’s housing policies, the need for a smaller Cathedral Hill hospital and a larger St. Luke’s hospital, and the rejection of environmentally superior alternatives. The full Board hearing began at almost 6:00 p.m. and ended just before midnight. Both CPMC and SFHHJJ supporters were present in sizeable numbers.

Legally, CPMC was represented throughout the land-use proceedings, including at the full Board of Supervisors hearing, by a law firm known for the high quality of its legal work and its political connections. At most proceedings, three or four attorneys from the firm were present, often including one of the firm’s named partners, a much respected Bay Area land-use lawyer. At public proceedings, the San Francisco City Attorney’s Office rarely played a visible role, leaving descriptions and explanations regarding the project and the City’s position to administrative personnel from the Mayor’s Office, the Planning Department, and the Public Health Department. While at most public hearings CED Clinic comments were integrated as part of coordinated testimony from SFHHJJ leaders and constituents, the EIR appeal was a formal administrative proceeding where attorneys when available usually assume a lead role.

In Final EIR administrative appeals, the hearing begins with presentations from and questioning of the appellant representatives. The plan was for the CNA attorney to be the primary lawyer speaking in support of the Final EIR appeal. I would provide backup support.\textsuperscript{58} Dating back to the preparation of Draft EIR comments, we had an open and cooperative relationship. As it turned out, when questions came up from members of the Board of Supervisors, the CNA lawyer motioned for me to respond. While she was an experienced environmental law attorney, I had greater familiarity with the project specifics and the political context and dynamics. She had been hired for her technical knowledge and apparently recognized that my having worked closely with SFHHJJ participants for almost three years would be a definite advantage in shaping what to say and represent. Following their questioning of me, the Board members heard comments from the public in support of the appeal.

The lead environmental officer on the project from the City Planning Department then presented the case for affirming the certification of the Final EIR. She was questioned by six supervisors, most critically by three supervisors with whom SFHHJJ representatives had met ahead of time. Only one supervisor in his questioning appeared supportive of the Final EIR.

Next to speak were representatives of the project sponsor. After a brief statement from CPMC’s chief executive, the general counsel associated

\textsuperscript{58} For almost two years in the early 1990s before assuming my professorship at Hastings, I had worked at an environmental law firm, so I had relevant prior legal experience responding to EIRs. Because it was mid-summer, no Clinic students were available to assist in the Board of Supervisors hearing.
with Sutter Health, its corporate parent, stepped in to indicate a willingness to continue the proceeding for two weeks during which, in his scenario, there would be further discussions with the Mayor’s Office. The idea of a two-week continuance was left hanging in the air. Instead, one of the supervisors questioned him about the early closing of a rebuilt St. Luke’s Hospital and pressed for full disclosure of relevant CPMC financial data. The hospital’s in-house attorney avoided definitively answering and sat down. Outside counsel for CPMC then provided a brief history of the project and offered arguments against various comments in opposition to certifying the Final EIR. His presentation was followed by public testimony in support of the CPMC project.

The public hearing was closed at 11:20 p.m., after which individual supervisors expressed their views regarding the adequacy of the Final EIR. Seven of the eleven supervisors clearly indicated that they would not support its certification. A number of them specifically referred to issues initially raised in the CED Clinic’s Draft EIR letter brief. The supervisors additionally indicated that they wanted to see further dialogue with community groups about the project and a reworked Development Agreement.

At the end of the hearing, there was a voting compromise: a motion for a two-week continuance passed without objection. Suggested by the general counsel for CPMC’s corporate parent as a short-term, face-saving measure, the two-week continuance wound up being almost a year. It would not be until June 25, 2013, that the Final EIR would come back before the Board of Supervisors for a final vote. In the interim, there would be a serious reworking of the Development Agreement—this time with the working agenda largely set by SFHHJJ. CPMC and Sutter Health had underappreciated and continued to underappreciate SFHHJJ’s political wherewithal, most especially the local government experience and contacts of its affordable housing and labor union members.

In August and September 2012, SFHHJJ members devised a plan for restarting negotiation discussions with CPMC. The objectives were to maximize the Board of Supervisors support for SFHHJJ’s positions on affordable housing; transit, traffic, and neighborhood impacts; permanent workforce hiring and retention; healthcare access; and the proposed respective sizes of the Cathedral Hill and St. Luke’s hospitals. Another objective not explicitly linked was to call attention to the separate collective bargaining negotiations pending between CPMC and both the California Nurses Association and the National Union of Healthcare Workers, each being an important SFHHJJ participant.

Because of federal preemption under the National Labor Relations Act, City officials cannot interfere in a private party labor dispute by withholding or appearing to withhold a governmental benefit.59 There would be no discussion of management and union bargaining issues as part of negotiating a revised Development Agreement. All interested parties, however,

were well aware that the three separate but parallel negotiations would be happening at roughly the same time, with CPMC and Sutter Health management as a common, central player.

Tactically, the SFHHJJ’s approach to renegotiating the DA involved a restructuring of who would be present at the negotiations. Rather than pressing for direct CBA negotiations given CPMC’s continuing intransigence and hostility, SFHHJJ came up with three complementary ideas for restarting Development Agreement discussions.

The first was to have Board members, not the Mayor’s Office, take the lead in representing the City. SFHHJJ members contacted first the two supervisors who were most active in questioning the adequacy of the Final EIR—David Chiu, who was the Board president and seen as a centrist within San Francisco’s Board politics, and David Campos, who was part of its progressive wing. They both agreed and suggested that Supervisor Mark Farrell, who was seen as a moderate on the Board, join them as a negotiating team for the City. Not having had much support from the Board of Supervisors regarding the DA put forward by his office, the Mayor expressed no public opposition to Board members taking over the lead for the City in future negotiations. Top officials within the administration would continue to provide staff support as would lawyers within the City Attorney’s Office.

The second idea was to encourage the supervisors to request representatives from Sutter Health to participate directly in the negotiations. The leaders of CPMC, its subsidiary, appeared to be attached to building a large showcase hospital and not much else and had shown themselves to be largely tone-deaf politically. Sutter Health was increasingly centralizing major decision-making within its hospital system, so Sutter Health leaders, not local CPMC executives, would likely make final decisions.

The third idea was to bring in a prominent private citizen as a mediator. One of the union representatives within the SFHHJJ coalition had a specific person in mind, who had previously played a role in past collective bargaining disputes with CPMC. Widely known politically in San Francisco, the individual proposed was a lawyer and business owner, an experienced mediator, a former City commission member, and a CPMC Foundation donor and social friend of top CPMC executives. He also was a pro-union employer and a donor to various nonprofit Tenderloin organizations. The supervisors agreed with SFHHJJ’s proposal to have a mediator and to ask the SFHHJJ-identified candidate to fill that role as a public service and without financial compensation. CPMC and Sutter Health executives at first were reluctant to having him as the mediator but then reversed course and acceded. Advocating in the background, SFHHJJ was

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60. Farrell later became San Francisco’s Interim Mayor for the first half of 2018 after the sudden death of Mayor Ed Lee in late December 2017. “Moderate” in San Francisco is usually a term for a more business-friendly public official, who, on the national political spectrum, probably would be viewed as a moderate liberal.
able to reconfigure who would be the key participants in putting the DA negotiations back on track.

In late September 2012, SFHHJJ members met with the mediator to lay out the Coalition’s framework of issues. He agreed to consider the issues presented as the outline for the mediation. He emphasized that the key was getting Sutter Health to send the right people. In early October, the mediation group had its first meeting. Over the next five months, the group had a series of meetings, some productive and some frustrating. Sutter Health had its own executives, not just CPMC’s, participate in the discussions. In several in-person meetings at his business office, the mediator discreetly provided SFHHJJ members with updates about the negotiations and got their reactions to certain proposals. Throughout, SFHHJJ provided information, usually upon request, to the negotiating supervisors and their staff.

On March 5, 2013, the Mayor announced the major terms of a new proposed DA reached as a result of the mediated negotiations. Also that day, the National Union of Healthcare Workers signed a collective bargaining agreement with CPMC that provided a two percent retroactive wage increase, a ban on subcontracting, job security at the new Cathedral Hill campus, and full employer-paid health insurance. A week later, the Board of Supervisors unanimously approved a nonbinding resolution endorsing the Term Sheet to be used in the final drafting of a second proposed Development Agreement. Though SFHHJJ had a few additional concerns, none of its members publicly objected to the Board’s action. On March 27, CNA reached a new contract for 800 nurses at CPMC hospitals, which gave them seniority rights and a six-percent wage increase over the twenty-four-month length of the contract. It had been a busy month.

D. The Development Agreement’s Terms

Substantively, the terms of the new Development Agreement provided most of the changes and community benefits sought by SFHHJJ, though some with conditions or in reduced compromise amounts. The most striking changes were the in-patient capacities of the proposed two new hospitals and the commitment to maintaining a hospital on the St. Luke’s campus. The showcase hospital planned for the Cathedral Hill campus was reduced in size from 555 beds to 274 beds, with shell space available to be developed for 30 additional beds depending upon future patient census data and state licensing authorization. This almost in-half reduction meant a significant lessening in long-term adverse environmental effects—

62. Id.
63. CPMC Development Agreement, supra note 5, at 4.
64. SFHHJJ Chronology, supra note 61.
65. CPMC Development Agreement, supra note 5, Exh. B-2 at 1.
Judgment-Based Lawyering: Working in Coalition

for instance, traffic and transportation impacts. With respect to St. Luke’s Hospital, the plans included in the DA called for the construction of a 120-bed rather than 80-bed hospital.66 This increase in size by fifty percent furthered the likely economic viability of the new hospital.67 The new DA also contained no provisions allowing CPMC to close the St. Luke’s replacement hospital within a short time frame, and it further provided that the construction and opening of the new hospital on the St. Luke’s campus had to be synchronized with the construction and completion of the Cathedral Hill hospital.68

Regarding purely financial obligations, CPMC as a hospital was not able to hide behind its nonprofit, tax-exempt status as a public charity. The $74 million in cash benefits set forth in the Development Agreement, and summarized at the beginning of this article, was an unprecedented amount for this type of project.69 In working out the details of the payments, an additional wrinkle arose for some of the funding allocations. Specifically, the DA contained provisions that enlisted the San Francisco Foundation, a well-respected local community foundation, in decision-making concerning the distribution of $8.6 million in innovative healthcare funding and of $4 million in workforce training money.70 A relatively late addition to the final benefits package was a specific commitment of $4.45 million for Tenderloin streetscape and pedestrian safety improvements—a matter of special concern to Tenderloin activists within SFHHJJ.71

With respect to the magnitude of the monetary payments overall, the most remarkable development was $36.5 million for affordable low-income housing as a mitigation measure for removing land zoned for housing within the Van Ness Special Use District.72 This amount was in addition to the $4,138,620 triggered by ordinances covering the displacement of residents from existing buildings to be demolished to make way for the proposed Cathedral Hill Medical Office Building.73 Given the almost one-half reduction in the number of licensed hospital beds planned for the Cathedral Hill campus, $36.5 million proportionately was in line with the $73 million figure first put forward by Mayor Lee in May 2011 as

66. Id., Exh. B-1 at 1.
67. In agreeing to these changes, CPMC may have had long-term business interests in mind. Neighborhoods proximate to the St. Luke’s campus were gentrifying. There also is a strong trend in medical care toward less hospitalization that might well have been a factor in support of CPMC’s decision to agree to a much reduced in size Cathedral Hill hospital. Even so, I am doubtful that CPMC would have made such changes in the absence of SFHHJJ’s advocacy and the negotiations carried out by S.F. Board of Supervisors members with the help of the selected mediator.
68. CPMC Development Agreement, supra note 5, Exh. C.
69. Id. at 3 & Exh. G at 1.
70. Id., Exh. F at 9–12 & Exh. E at 19.
73. Id., Exh. G at 1–2.
a response to SFHHJJ’s initial $140 million calculation, and in anticipation of CPMC’s then adamant view that it owed nothing. Seen in this light and the earlier lack of interest from City administrators in seeking any such funds at all, the unconditioned commitment by CPMC of $36.5 million for non-specified low-income affordable housing was an impressive turn of events.

There were several other noteworthy substantive provisions. One significant change affected CPMC’s permanent hiring practices. Earlier, CPMC had indicated that it would give first-priority to hiring individuals from San Francisco low-income neighborhoods for forty positions annually for five years. The DA set the commitment as at least forty percent of all available entry level jobs for a ten-year period.\(^7\)\(^4\) Other provisions concerned commitments to providing healthcare and hospital services for low-income individuals and families. An especially important CPMC obligation pertained to meeting an annual unduplicated patient baseline for providing services to Medi-Cal and charity care beneficiaries.\(^7\)\(^5\) Another involved targeting hospital and specialty care services at CPMC campuses for 1,500 Tenderloin residents on Medi-Cal.\(^7\)\(^6\) In another subject area, augmenting the mitigation measures included in the Final EIR, the DA specifically obligated CPMC to subsidize public-transit monthly passes for employees to reduce traffic, pollution, and greenhouse gas production.\(^7\)\(^7\) These provisions were performance-based. They involved more than just writing a check, and they required ongoing, diligent monitoring.

Having obtained much of what it wanted substantively, SFHHJJ still had several procedural concerns. Starting in April and until a week before the Board of Supervisors on June 25 took definitive action on the CPMC project, SFHHJJ sought two changes regarding the DA’s implementation. The first concerned obtaining a guarantee from the City that it would provide for a specific role for SFHHJJ in monitoring developments under the DA. The second concerned the public review process if any future amendments occurred to the DA, altering its terms.

With respect to the first, the San Francisco ordinance authorizing Development Agreements anticipated participation by community groups in carrying out DA provisions. Such participation could be provided through a “collateral agreement” between the community group and any one of the parties to the DA either at the time of the DA or at a later time.\(^7\)\(^8\) The stated purpose for having collateral agreements was to permit the use of community groups to “provide for and implement social, economic, or

\[^7\) Id., Exh. E at 16.
\[^8\) Id., Exh. F at 1–4.
\[^9\) Id., Exh. F at 8.
\[^10\) Id. at 3 & Exh. K at 5.
\[^11\) S.F. ADMIN. CODE §§ 56.2, 56.3(c), 56.11.
environmental benefits or programs” set forth in the DA.\textsuperscript{79} Giving a formal monitoring role to a community coalition was a novel but not unsupportable interpretation if one liberally construed the meaning of “benefits or programs” and took into account the ordinance’s strong language regarding community group participation. SFHHJJ’s main concern was the potential for problematic implementation of nonmonetary provisions of the DA, such as those covering commitments regarding charity care and healthcare services, transportation and traffic mitigations, and permanent jobs for San Francisco residents. It was felt that a formal role for SFHHJJ in gathering and assembling information on certain key matters, not just as an outside advocate, would provide additional community leverage and better insure that both CPMC and the City would live up to the DA’s terms.

City administrators and the City Attorney’s Office were adamant in their opposition to having the City in any way entering into a collateral agreement with SFHHJJ regarding the CPMC Development Agreement. At the Planning Commission meeting on May 23, prior to a vote on a resolution recommending to the Board of Supervisors the adoption of the CPMC DA, a deputy city attorney made the legally preposterous argument that any collateral agreement would “guarantee successful litigation” against the City. The effect was that four members of the Planning Commission, who had previously spoken in favor of entering into a collateral agreement with SFHHJJ, backed down.

In the weeks that followed, SFHHJJ leaders pressed the need for a collateral agreement with the mediator. On June 14, he reported by telephone to SFHHJJ participants assembled together in a meeting that he had been unsuccessful in obtaining the support of City administrators and the City Attorney’s Office. They did not want to establish a precedent for having a collateral agreement covering the monitoring of a DA’s provisions. The mediator further explained that while a number of supervisors were willing to hold out for a commitment by the City to enter into a collateral agreement with SFHHJJ, CPMC and Sutter Health representatives would back out of the deal if there were such a commitment. They would regard any commitment to a collateral agreement with SFHHJJ as a change in the terms of the DA and would demand a re-opening of negotiations on key issues. SFHHJJ leaders made the decision not to make a collateral agreement a do-or-die matter. Too much was at stake, and the prospect of a collateral agreement was still open to be raised at a later date. Had SFHHJJ obtained the guarantee from the City that it wanted, the Development Agreement in its implementation would have functioned much more as though it were a Community Benefits Agreement.

Contrastingly, SFHHJJ did prevail on the second procedural issue regarding the public process for reviewing amendments to the DA. The draft before the Planning Commission limited the review by the Planning Commission and the Board of Supervisors of nonmaterial amendments

\textsuperscript{79} Id. § 56.3(c).
and established an exception to the standard notice and review procedures for amendments provided in the San Francisco Development Agreements ordinance.\(^80\) Shortly before a June 17 Board of Supervisors Land Use Committee hearing on the CPMC project, the mediator contacted the SFHHJJ to report that both the City and Sutter/CPMC agreed to a revision proposed by SFHHJJ that would restore in full the DA ordinance amendment procedures.\(^81\) Though not stated by the mediator or anyone else, this change may have been an attempt at a concession for SFHHJJ having backed away from insisting on a collateral agreement guarantee. The end result was important, as it avoided potential future disputes over what might be a minor or material amendment. It also insured that any DA amendment would be publically noticed and could come before the Planning Commission and the Board of Supervisors for approval.

The Land Use Committee meeting was the final step before full Board of Supervisors review of all the documents required to authorize the CPMC project. With public comments, the Committee meeting lasted several hours. SFHHJJ participants did not object to the enactment of any authorizing actions. On June 25, the Board of Supervisors certified the final EIR, initially approved the DA, and authorized several ministerial land-use decisions.\(^82\) Several of the supervisors publically acknowledged the key role played by SFHHJJ in the San Francisco's review of the CPMC project. On July 9, the Board enacted the land-use ordinance amendments needed and an ordinance giving final approval for the Development Agreement and authorizing the City Planning Director to execute the DA on behalf of the City.\(^83\)

Four years before in early summer 2009, Tenderloin community organizers had brought together San Francisco neighborhood activists and healthcare union organizers to work in coalition to reshape CPMC’s Long Range Development Plan, to improve low-income patient access to its healthcare services, and to obtain other project-related community benefits. It was a long and hard haul. Throughout, the effectiveness of such coalition work reflected the political and policy astuteness of those in the leadership core and their ability to garner visible and notable grassroots support.

In providing legal assistance from the start, the Hastings CED Clinic’s role was integral. It involved doing factual and legal research, participating regularly and continually in internal discussions and external meetings with public officials, and collaborating in the development and refinement of public positions, including as needed taking the lead in the preparation and presentation of backup material and arguments. The Clinic’s involvement has not been as intense in subsequent years, but it has been similarly supportive and complementary.

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80. Id. § 56.15.
81. CPMC Development Agreement, supra note 5, at 42–43.
82. Id. at 4.
83. Id. at 5.
E. Implementation Monitoring—Dilemmas and Opportunities

The changes made in the Development Agreement were a climactic achievement. The City and CPMC set the final DA’s effective date as August 10, 2013.84 The DA’s term of applicability is ten years.85 A follow-up task for SFHHJJ has been and continues to be monitoring the implementation of the DA’s community benefits provisions.

While no issues regarding CPMC’s payment of its financial obligations have arisen, the monitoring of its performance-based obligations has been dilemma-ridden. Participating in the annual compliance-review process has been frustrating yet also opportune. The chief dilemmas are rooted in the DA itself and who has direct responsibility for its implementation and enforcement. The opportunities lie in calling attention not only to CPMC’s performance under the DA but also to related healthcare service issues not covered by the DA.

As a first matter, the DA spells out a far-from-ideal process for annual reviews. A main underlying problem has to do with delays in receiving information and then obtaining a final decision from City decision-makers. Most reporting is on a calendar-year basis with CPMC’s report not due until the end of May of the following year.86 With time built-in for public comments, which have been almost exclusively from SFHHJJ, and a multistep review process that involves a joint hearing before the Planning and Health Commissions, it is not until near the end of the year, and sometimes even into the next year, that the City issues a final decision on compliance, at which time pressuring for specific remedial actions comes across as off-kilter.87 The principal reason is that CPMC shortly thereafter begins, or already has begun, preparing its report for the recently ended year. Anyone criticizing CPMC at that time in the review process, whether with the City or from the community, is in a paradoxical position. There is, practically speaking, a mootness and a ripeness problem. It is too late to feel comfortable taking decisive action regarding lack of full compliance based on information a year old not knowing where things now stand, and it is too early to know fully what happened during the about-to-end or just-ended year and therefore what corrective actions are still needed.

84. Letter from CPMC attorneys to S.F. Director of Planning, Confirmation of “Effective Date” and “Finally Granted” Date as Defined in the California Pacific Medical Center Development Agreement” (Nov. 19, 2013).
85. CPMC Development Agreement, supra note 5, at 14.
86. Id. at 32.
87. Copies with dates of CPMC’s Compliance Statements, the City’s Annual Reports, Certificates of Compliance, and the Third Party Monitor Letters re: Compliance with DA Obligations are available online at http://sf-planning.org/cpmc-annual-compliance-statements. All these written documents are part of the annual review process. The Third Party Monitor Letters so far have been prepared by the mediator who facilitated the negotiations leading up to the final DA and have been filed after issuance of the Certificates of Compliance.
Additional exasperating factors are that the standard for review is not "actual compliance" but "material compliance," and that performance-based public benefits require only "good faith" efforts. In short, the DA's performance review process is structurally awkward and formally toothless. At the very least, it would have been helpful had the DA provided for earlier and interim reporting of relevant data and information.

The second dilemma involves ritualistic compliance from CPMC and City officials, which is not to say that the process from their standpoints has not been time consuming and labor intensive. Rather, it means that they have viewed narrowly their roles in the review process. In particular, opportunities for detailed factual breakdowns of the data presented or for spelling out pro-active corrective measures and remedial steps have been disregarded. For CPMC, the paperwork provided mainly comes across as a checking-the-box process, notwithstanding all sorts of attachments. While not surprising, CPMC rarely acknowledges in its reports the shortcomings in its performance or what it intends to do to rectify any problems. The statements and actions from City officials, for the most part, have had a similar feel. Some pointed comments have been directed at CPMC’s performance by City officials but almost never in the City’s annual reports and final compliance decisions, which have been largely devoid of any suggestions for remedying deficiencies in CPMC’s implementation of DA terms. The City Planning and Health Directors are charged with making the final decisions. For the four review cycles so far concluded, CPMC has been found each time to have met its DA obligations.

The third dilemma relates to the previous two dilemmas. It concerns problematic DA enforcement procedures, which are unlikely to be invoked and, as directed at CPMC, are at best only a very weak threat. The legal remedy for a breach of the Development Agreement is specific performance, with provisions for liquidated damages if a CPMC breach involves a performance-based, not a financial, obligation. The DA includes a provision that explicitly prohibits any enforcement action by third-party beneficiaries, which consequently means that any legal action to enforce the DA’s terms only can be instituted by the City or CPMC. SFHHJJ or anyone else has no standing to seek remedies. Furthermore, with respect to certain pivotal healthcare delivery obligations, there is an arbitration provision, which requires that any such dispute be brought before a mutually agreed private arbitrator. Arbitrations are not public proceedings, and the grounds for judicial review of an arbitration award are nar-

88. CPMC Development Agreement, supra note 5, at 34.
89. For example, these factors relate to compliance with permanent workforce hiring goals. See id. at 16.
90. Id. at 34.
91. Id. at 36–37.
92. Id. at 35.
93. Id. at 40–41.
row and usually require corruption, fraud, or comparable misconduct. Additionally, the greater flexibility in an arbitration as compared to a court proceeding likely leaves even more room for downplaying performance deficiencies as meeting standards of “good faith” and “material compliance.” In the absence of CPMC flagrantly acting in bad faith, the chances of the City invoking or even threatening to use the DA’s enforcement provisions are next to nil.

A fourth dilemma is internal to SFHHJJ and dynamics of grassroots organizing, though to date it has not been an impediment. The dilemma involves two related components: the first is how to sustain over time sufficient grassroots engagement, especially when issues are less high profile; the second is how to manage inevitable changes in the group’s leadership core.

Challenging CPMC’s reconfiguring of its hospitals involved a series of actions that were highly visible publically, required San Francisco governmental approvals, implicated both neighborhood and labor interests, affected access to healthcare services, and centered attention on a common target whose record in serving the poor and bargaining with workers in a union-supportive city was questionable and provocative. During the period leading up to the final DA, the organizations that banded together in coalition maintained throughout a high degree of unity. This unity reflected a deeply understood sense among the participants that much could be gained by supporting each other. The mutually shared enhancements in advocacy effectiveness mainly came from sharing internal organizing responsibilities and reaching a pre-public consensus on issues and how to proceed, a heightened capacity for generating and applying policy expertise covering a fairly broad range of issues, and a greater capability in turning out mass support when needed from affected neighborhood residents and labor union membership. Over time, however, sustaining the same broad level of grassroots engagement, without a calamitous event, is a near impossible task.

A coalition without its own staff and financial resources depends, although not exclusively, on the time-pressured availability of staff and the limited financial means of its constituent organizations, which most often make decisions based on immediate priorities. There are also constraints on how hard to push issues so as not to lose credibility with public officials, the media, and a coalition’s own past, present, and potential supporters. Not all concerns call for a full-court press. Specifically with respect to CPMC, the monitoring of the DA has been a more pedestrian and less inclusive undertaking than the concerted effort to shape and affect its terms. In particular, there has been a drop-off in active participation from nonprofit affordable housing and other neighborhood organizations. The main reason is that from their standpoint the DA benefits of most interest involved cash benefits, most prominently the $36.5 million for affordable housing, over which there have not been implementation issues regarding CPMC’s compliance.
Since summer 2013, those most active in SFHHJJ mainly have been associated with the labor movement or have ongoing interests in San Francisco healthcare policies and CPMC’s performance as a healthcare service provider. Labor union continuing involvement is structurally tied to the representation of workers at CPMC campuses. For the participating labor organizations, such involvement also corresponds with long-standing concerns regarding healthcare policies and practices as they affect patients as well as workers. Both the California Nurses Association and the National Union of Healthcare Workers have a substantial history of engagement in San Francisco healthcare policy advocacy, and Jobs with Justice SF, the other major labor component to SFHHJJ, self-identifies as the progressive arm of the organized San Francisco labor movement on economic and social policy issues. In terms of non-labor union participation since the DA’s effective date, the most steady nonprofit staff involvement has come from a few community organizations, for instance, most recently San Francisco Senior and Disability Action and, since the beginning, the Council of Community Housing Organizations (CCHO).

Along with changes in the dynamics of organizational participation have been internal changes in organizational personnel regarding who functions as the staff representative in SFHHJJ’s core leadership, as well as changes in staff participation from the most active unions and from CCHO. Until summer 2018, the director of Jobs with Justice SF filled a key role as SFHHJJ’s coordinator. At that time, he resigned his labor-affiliated position to seek a seat on the San Francisco Board of Supervisors and reduced his involvement with SFHHJJ, which totally ended after he was elected in November. In his place, others have stepped up to schedule meetings, to set agendas, and to serve as SFHHJJ’s contact person.

In light of constituent organization staffing changes, a saving grace for SFHHJJ has been that among its most engaged participants have been volunteer activists, some unaffiliated and some associated with grassroots groups with a history of healthcare advocacy, such as the Grey Panthers and the Older Women’s League. Most of the volunteer activists are near or more than 70 years-old. For much of SFHHJJ’s history, three volunteers stand out—a retired public health administrator and activist with decades-long ties to San Francisco groups working with homeless and low-income individuals, a retired doctor who spent much of his career at St. Luke’s Hospital, and a CCHO founder and long-term, now retired, staff member. Since 2017, a retired geriatric physician has been highly active with SFHHJJ in the focus on subacute care beds and other post-acute care services in San Francisco.

There have been both continuity and fluidity within the SFHHJJ core leadership, which has varied between a half dozen and dozen people at any given time. Unquestionably, the experience and intelligence of the aging volunteers has been especially valuable. Looking to the future however, it is hard to envision that SFHHJJ survives without an influx of
younger individuals from the staffs of participating organizations or as highly engaged volunteers. An additional constant in SFHHJJ’s work has been the Hastings CED Clinic. In the nine years since community organizers created a coalition to challenge CPMC’s Long Range Development Plan, relatively few meetings and plans for actions have taken place without the participation of Clinic law students or lawyers. Like other organizational involvements, there have been shifts in personnel. While the institutional reason for Clinic participation rests on giving students hands-on lawyering experience, student direct involvement is not always feasible when providing long-term representation. Crucial moments occur when classes are not in session. Curricular staffing and enrollment also affect law school clinic offerings. At those times, clinic faculty have had to assume the primary role.

In summer 2013, I formally retired and became an emeritus professor. Fortunately, my colleague Ascanio Piomelli decided to take on the directorship of the CED Clinic. I have continued to participate in SFHHJJ work as a pro bono Clinic lawyer. In terms of what has needed to be done, Piomelli has taken the lead in working with SFHHJJ on the monitoring of the Development Agreement and on miscellaneous assignments.94 Whenever opportunity, he has involved two-person or three-person teams of law students. I have served as legal backup and for the last few years as lead lawyer on the various issues that have arisen around post-acute care services in San Francisco.

For SFHHJJ, monitoring the DA has not been just about the implementation of its terms. It also has been an opportunity for seeking to affect CPMC’s healthcare service delivery practices in other ways and for calling attention to citywide healthcare service delivery problems generally. SFHHJJ’s credibility and visibility as a community-based advocate leading up to the DA have carried over into the post-DA period. While direct interactions with CPMC’s administrative staff have been erratic, SFHHJJ has had a constructive continuing relationship with San Francisco Department of Public Health officials, including meetings with the director and other high level administrators, and has maintained strong ties with members...

94. In our respective writings on community and social justice lawyering, Piomelli and I have tended to focus on somewhat different issues and analytic concerns. For Piomelli, see, e.g., Ascanio Piomelli, Rebellious Heroes, 23 CLINICAL L. REV. 283 (2016); Ascanio Piomelli, The Challenge of Democratic Lawyering, 77 FORDHAM L. REV. 1383 (2009); Ascanio Piomelli, The Democratic Roots of Collaborative Lawyering, 12 CLINICAL L. REV. 541 (2006); Ascanio Piomelli, Foucault’s Approach to Power: Its Allure and Limits for Collaborative Lawyering, 2004 UTAH L. REV. 395 (2004); Ascanio Piomelli, Appreciating Collaborative Lawyering, 6 CLINICAL L. REV. 427 (2000). For Aaronson, see, e.g., sources cited infra note 100. From my observations in our working with SFHHJJ, he and I have varied little in how we have approached lawyering roles and have carried out counseling and representational responsibilities.
of the San Francisco Board of Supervisors even as the Board’s composition changes. SFHHJJ also has served as a fulcrum for healthcare advocacy for others in San Francisco, particularly patient groups targeted for service cutbacks by CPMC. On the downside, SFHHJJ has not been able as part of the annual review process to persuade the City to agree to a collateral agreement, where SFHHJJ would have a contractual role in monitoring aspects of the DA’s implementation. Strong opposition has continued to come from the City Attorney’s office.

Focusing on explicit DA provisions, the problematic implementation issues of primary concern to SFHHJJ have involved both healthcare and non-healthcare matters. As to non-healthcare issues, CPMC was slow in establishing a public transit subsidy program for its employees and in meeting the local hire target goals for permanent entry level positions. The former did not begin until January 2017, rather than two years earlier as set forth in the DA. Suggesting lackluster promotion of the program, only eighteen percent of CPMC’s workforce so far has taken advantage of the subsidy.95 Regarding its permanent workforce, CPMC did not meet the forty percent local hire target goal the first year but has exceeded it in subsequent years. An unexpected twist is that CPMC’s overall hiring for new entry level positions, as computed for the 2017 annual report, was lower than was assumed it would be during the DA negotiations. There were only fifty-eight new employees hired, of which thirty-three (fifty-seven percent) came from targeted low-income San Francisco neighborhoods.96 Neither CPMC nor the City has provided an explanation for the reported downturn in hiring.

With respect to healthcare, the main DA implementation issues have concerned provisions directed at increasing access for Medi-Cal and other low-income individuals to CPMC hospital facilities. One example is a provision requiring that CPMC provide hospital-based services to 1,500 new Medi-Cal patients living in the Tenderloin. There have been practical complications due to both a lack of a qualified medical clinic in the Tenderloin to make Managed Medi-Cal coverage referrals and the distance from the Tenderloin to the existing CPMC campuses. The campus on the border of the Tenderloin, now named the Van Ness Campus (not Cathedral Hill Campus), is scheduled to open in March 2019. As of May 2018, only 176 Tenderloin beneficiaries had enrolled in the specific program.97 Another example involves the baselines and targets set for providing services to unduplicated Medi-Cal and charity care patients from throughout San Francisco. Specific problems raised by SFHHJJ concern whether a countable service includes outpatient treatment, not just inpatient hospitalliz-
tion, and the sampling methodology used for determining the number of patients being served. Other areas of concern have been changes in staffing at the Diabetes Center on the St. Luke’s (now Mission Bernal) Campus that have resulted in no bilingual professionals, or even a receptionist, being permanently assigned to serve a substantial Spanish monolingual patient population; the lack of advanced planning for Senior and Community Health Centers of Excellence at the new Mission Bernal Hospital; and major reductions in hospital-based Skilled Nursing Facilities on CPMC campuses.

During each annual compliance review period, SFHHJJ submits written comments in response to CPMC’s Compliance Statement and critically reviews the City’s subsequent Annual Report regarding CPMC’s compliance. A joint Planning and Health Commissions hearing is held at least thirty days after the publication of the City’s Report and prior to a final compliance decision by the directors of the Planning Department and Department of Public Health. At the hearing, SFHHJJ members in an organized presentation provide public testimony highlighting shortcomings and oversights in the two formal reports. In consultation with SFHHJJ activists, the CED Clinic director prepares and submits SFHHJJ’s written comments and usually joins in providing oral testimony at the hearing. Because of insufficient attention to or resolution of problems identified by SFHHJJ, its comments and testimony each year have a familiar and recurring ring.

Although direct gains for SFHHJJ’s constituents from its participation in the compliance review process have been limited, its perseverance has not been misdirected. The chief benefits and advantages have been institutional. Such participation legitimates on a regular basis SFHHJJ’s position as a major advocate for grassroots concerns in interactions with CPMC. By not backing away after the DA negotiations, SFHHJJ has remained a thorn in CPMC’s side. At the very least, CPMC has had to take into account that SFHHJJ’s ongoing scrutiny could lead to unwanted public attention and consequent costs, politically and economically. SFHHJJ’s persistence also has meant that City officials have continued to take its positions seriously. SFHHJJ has been able to nudge public officials to pressure CPMC, and to place and frame issues on the public healthcare agenda, in ways that otherwise might not have happened. Lastly, SFHHJJ’s ongoing public visibility has meant that concerned individuals and groups not previously active in its advocacy know where to seek support or to join as a participating member.

On August 24, 2018, Sutter Health/CPMC heralded the opening of its new Mission Bernal Campus with a Blue Ribbon Cutting Ceremony. As reported to me, a former CPMC executive, who ran into a retired physician activist at the Blue Ribbon Ceremony, said, “I wanted to close this place down. You wanted to keep it open. You won.” A hospital that CPMC at first had no interest in building, and then questionable interest in keeping open, was now lauded as a major step forward in healthcare service
delivery in San Francisco. SFHHJJ activists had mixed feelings. There still was a viable hospital on the St. Luke’s site. Yet, there was every reason to be skeptical about whether the services provided would be as accessible and as tailored to meet the needs of a low-income patient population as they were at the old St. Luke’s Hospital.

IV. Accessibility, Responsiveness, and Judgment

Functionally fulfilling a role similar to an in-house counsel, the Hastings CED Clinic was an active participant in almost all of the advocacy planning and actions described in this article. Sometimes the Clinic took the initiative in identifying a not-obvious assignment and carrying it out. Good examples were the Clinic’s keeping tabs on CPMC’s Long Range Development Plan during a quiescent period prior to 2009 and the preparation of the Profits & Patients report. Other times the Clinic took on a major assignment that lawyers, if available, ordinarily would handle, for instance, the extensive work undertaken as part of the Environmental Impact Report process and the principal drafting of SFHHJJ’s comments on the annual CPMC Compliance Statement. Much of the time, the Clinic’s and SFHHJJ’s interactions were interwoven into a single fabric of advocacy. A notable example of the distinctive contribution of lawyers, though still working closely with other SFHHJJ participants, was the formulation of the legal basis for seeking an affordable housing mitigation fee from CPMC. No matter what the task and circumstances, the Clinic’s effectiveness in working with SFHHJJ and the predecessor coalitions owed much to the political, policy, and organizational sophistication of their lead activists.

Equally important, however, was the Clinic’s approach to lawyering for progressive social change. As I noted earlier in this article, much rests on a lawyer’s sense of role and self-discipline in role performance. The key attributes that I emphasize are accessibility, responsiveness, and judgment. They are not skills per se but instead are inner dispositions, habits, or mind-sets that bear on how one exercises various skills and seeks to achieve client goals. In my conception of good lawyering, they are pivotal underlying virtues. Their cultivation orients lawyers on what to do to complement and supplement actions of grassroots activists in ways that are supportive and not undermining in achieving short-term and long-term objectives.

Accessibility is not a usual term in the lawyering literature, but it is not an out-of-place idea. Indeed, in terms of client complaints about lawyers, one of the most common, and probably the most common, is that “my lawyer won’t get back to me or return my phone call.”98 Accessibility also fully resonates with conceptions of client centeredness, which in the shaping of understandings about best practice client relationships has become the single most dominant idea in contemporary clinical legal education. The touchstone for client centeredness is a profound respect for the

perspectives, viewpoints, and autonomy of others. The notion of accessibility adds a dimension that goes to a lawyer’s genuine openness and actual availability to clients in ways that enhance meaningful professional relationships. Telling the group to “call me when you need me” will not do the job.

If one structural element in the Clinic’s working relationship with SFHHJJ has mattered the most, it was the regular attendance by students and faculty members at coalition meetings and their capabilities in listening attentively to what others had to say. In grassroots coalitions, lawyers need to convey a strong sense of presence, but not in a dominating manner if they strive to be viewed as genuinely accessible. An especially important benefit of such presence is the furtherance of mutual trust.

Responsiveness and judgment lie at the core of what it means to act responsibly and effectively with or on behalf of others. They are complementary concepts whose development and application are contextually specific and largely dependent on learning from practical experience. As I have written extensively elsewhere about each, I provide here only brief summary descriptions. My own ideas heavily draw on concepts from normative political theory.

Responsiveness involves paying attention to big-picture issues and telling details. As a lawyer, responsiveness begins with a shared appreciation of purpose with those represented. The lawyer has to understand the priority values, interests, concerns, and goals of clients and commit to seeking their accomplishment. The strength of this bond of understanding greatly depends on the integrity of the lawyer—that is, his or her continuing willingness to act consistently with the encompassing reason for the representation. The overarching shared sense of purpose then needs to be formulated into concrete objectives that address particular problems. This narrowing of focus raises questions of substance and means. There are always choices to be made about what issues to address and what approaches or techniques to use to advance the interests of those assisted.

101. See, e.g., Hanna Fenichel Pitkin, The Concept of Representation 209 (1967). Drawing on ideas from traditional normative political theory, Pitkin in this seminal book presents a conceptual analysis of modern democratic representation. While she was not addressing lawyering, strong parallels exist from her writings to what it means to provide responsible legal representation and assistance. In describing the purpose of her analysis, Pitkin states, “Learning what ‘representation’ means and learning how to represent are intimately connected.” Id. at 1. There are also here strong parallels to the need for critical self-reflection to best learn from one’s lawyering experiences.
In a word, the lawyer has to be resourceful and flexible and always be mindful of what matters the most to the client.

Rigidity is the bane of responsive lawyering. The resourcefulness and flexibility associated with responsiveness continually call for critical assessment of situational factors and one’s own role. Determinations about the appropriateness of actions undertaken have to take into account direct and indirect effects and consequences that both further and push back against the client’s objectives. Being responsive requires anticipating and adjusting to what needs to be done, to having a sense of proportion, and to not being doctrinaire or just reactive. In what is a reiterative process, the responsive lawyer is ever alert to the need to adapt and to make adjustments in light of changing circumstances and new insights.

The Clinic’s involvement with CPMC started with my sensing an opportunity to obtain a Community Benefits Agreement (CBA). Several initial Good Neighbors Coalition and then SFHHJJ participants were skeptical about the feasibility of a CBA. They favored a Development Agreement (DA), an approach to binding private parties that had been successfully used in the past in San Francisco. The downsides of a DA are that community groups typically do not have a seat at the table and the benefits negotiated by governmental agencies are more likely to be weak and more symbolic than real. For CBAs to happen, the private party needs to be willing to negotiate in good faith with a grassroots coalition. With respect to CPMC, that never was the case. An idea that might have been feasible in other circumstance was not in the cards. SFHHJJ with the full backing of the Clinic, rightly focused on setting the stage for a DA that did make a difference and did provide real community benefits.

By judgment, I mean “practical judgment,” which is a process of reasoning directed at action or policy, not abstract theoretical issues. The crux of practical judgment is what the political theorist Hannah Arendt translating from the French le bon sens called “the good sense.”

Effective exercises of judgment ultimately depend on the ability to persuade others of the good sense of one’s position. The idea of “good” in good sense speaks to the importance of an individual’s moral as well as intellectual development. In lawyering, both are essential. Lawyers can problem-solve and manipulate information and situations shrewdly. Too often, however, such behavior can belie what it means to say someone has good practical judgment. Losing or burying a document in discovery might cleverly work, but no one is going to say that a lawyer who has so acted has good judgment.

Arendt characterized applying good sense to influence decision-making as a process of wooing. Her idea of wooing is highly respectful of the autonomy of others. It is about educating, not manipulating, people. While

103. Id. at 222.
the notion of wooing sounds awkward in a lawyering context, Arendt’s description actually fits quite well, especially when trying to help someone else make a decision—for example, a lawyer’s role in counseling. To do this well, an attorney has to know the client’s concerns and values, to have the trust of the client, and to convey information and advice in ways most likely to be heard and understood.

No one can teach good judgment. It is something that develops, if at all, with experience. Making mistakes and learning from them are a crucial part of the experience. It is possible, however, to help law students and lawyers to exercise better judgment than they otherwise might have. One constant factor is to examine critically one’s experiences—to be explicitly self-reflective. Another is patience because developing judgment involves a deep internalization of past knowledge and experience, which does not happen overnight. An especially important step is learning what is involved in exercising judgment.

In this regard, I have emphasized five key characteristics as central to the kind of judgment needed in lawyering. They are (1) the contextual tailoring of knowledge and experience, (2) a dialogic form of reasoning that accounts for multiple points of view, (3) an ability to be empathetic and detached at the same time, (4) the intertwining of intellectual and moral concerns, and (5) an instrumental and equitable interest in human affairs. These descriptive features are overlapping, rather than distinct and separate. All were at play in how the CED Clinic worked in coalition.

The background details provided in this article’s narrative section set a context for understanding why particular decisions were made and specific courses of action were pursued. There were judgment calls, and they were not made precipitously. The strategies and tactics involved the targeted tailoring of collective knowledge and experience and were the product of thoughtful group discussions that took into account the views and interests of constituent organizations, allies, public officials, and adversaries. Attorney expertise and initiative had a role but in a highly collaborative and integrative manner. The extent to which SFHHJJ was able to influence major terms of the DA was unusual. It would not have happened without lay leaders exercising sound practical judgment. The key to effective lawyering was fully appreciating specific circumstances and knowing when, in what ways, and how much to contribute to the group decision-making process.

104. For how I have sought to accomplish this objective, see Mark Neal Aaronson, Judgment-Based Lawyering: Structuring Seminar Time in a Non-Litigation Clinic, in Susan Bryant, Elliott S. Milstein & Ann C. Shalleck, Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy 81–90 (2014).

105. For background sources and a full explication of my reasons for emphasizing these characteristics, see Aaronson, We Ask You to Consider, supra note 100, at 250–85.
The critical dynamic in developing good lawyering judgment is the ability to be both empathetic and detached. For everyone, it is always hard to put oneself in someone else’s shoes. It requires imagination and compassion. It is never done perfectly. But it is absolutely necessary in helping others make decisions in light of what matters most to them. Detachment is also challenging, especially for a lawyer committed to the cause of a client group. One has to distance oneself not only from feelings for others, which are at the heart of empathy, but also from one’s own feelings. The distancing is essential because it is important to account for the whole picture—both supportive and opposing information and aspects. Because empathy and detachment are in tension with one another, reconciling the two is difficult.

As a lawyer for SFHHJJ, I cared strongly about a lot of the issues. As part of my sense of role conception, I chose not to vote the few times there was an actual vote. I also refrained from explicitly joining in any consensus decision. Though what I was doing was probably more symbolic than tangible, not voting kept me alert to the value of providing professional counseling and not getting overly caught up in the emotions of a situation. It also lowered the prospect of my inadvertently jeopardizing the trust and confidence of those within the coalition who viewed matters differently.

Public policies have both intellectual and moral content. To get things done politically, groups need to act instrumentally. But fairness and equity also count, even during dark political times. Healthcare is the kind of issue where moral claims have political appeal. SFHHJJ well understood this connection. In the San Francisco political arena, CPMC found itself on the wrong side. Its bottom-line financial interests were too evident. Not wholly but importantly because of the moral appeal of its positions, SFHHJJ was able to outmaneuver CPMC. The San Francisco political order responded far more favorably than anyone would have expected at the beginning of the struggle, especially when SFHHJJ was able to utilize favorable land-use and environmental laws. In the end, however, grassroots pressure and public official outcries had limitations. With respect to healthcare policies, CPMC had and still has the law on its side and full autonomy to decide what healthcare services to provide.

V. Conclusion: Internal Dynamics and External Circumstances

For almost a decade, a coalition of neighborhood and citywide groups, nonprofit affordable housing organizations, labor unions, and individual activists, which came to be known as San Franciscans for Healthcare, Housing, Jobs, and Justice (SFHHJJ), generated sufficient political pressure to cause the largest fee-for-service private hospital chain in San Francisco to alter substantially its development plans and to be called, repeatedly and publically, into account for its failure to do its fair share in meeting

the healthcare needs of San Franciscans, especially low-income residents. While there were fluctuating levels of involvement depending upon the specific issue, SFHHJJ throughout maintained enough constituent group support and accompanying cohesiveness to be a credible, repeat player in San Francisco politics. A potential source of division—differences in union and neighborhood priorities—turned out to be a political strength. SFHHJJ's core participants early on recognized that much could be gained by sticking together and working in mutual alliance. There was more political and policy expertise to draw on and a greater ability to turn out mass supporters when needed.

SFHHJJ is a successful example of diverse groups working in coalition for progressive social change. But the future is fraught with uncertainty. Particularly for an informally structured coalition like SFHHJJ, survival is fragile.

The ever-present internal challenges are to be continually responsive to issues affecting ordinary and especially low-income San Franciscans and to sustain, rekindle, broaden, and deepen neighborhood, labor, and citywide organizational involvement in its activities. The assistance and support of the CED Clinic have been productive and have provided a stabilizing presence. How and what the Clinic does going forward is a work in progress, with the exact roles and assignments for lawyers and law students still to be determined.

There are, as well, external challenges. SFHHJJ has to contend with always changing political and social circumstances. During the past decade, changes in the national economy and politics and, specifically, in healthcare policies and practices have been especially dramatic. The nation's economy has gone from a deep recession to a substantial recovery but with striking inequalities. Politically, rarely have changes in presidencies had such a pervasive and, at the moment, disruptive impact on the entire society. For healthcare policies and practices, the prime example is the unsettling effects of the ups and downs of Obamacare and shifting expectations about federal involvement and financial support.

Local circumstances are overwhelmingly important. In San Francisco, factors such as a large immigrant population, homelessness, housing costs, and traffic congestion all have major effects on the delivery of healthcare services. In terms of local politics, so much depends on personal relationships, and constant changes in office have occurred. Since 2008, the City has had four different mayors, and, come January 2019, there will be a complete turnover in who sits on the Board of Supervisors. A recent surprising development has been the late summer 2018 resignation of the Public Health Director with whom SFHHJJ had a constructive relation-ship.107 Such changes set new opportunities and new obstacles for grassroots activists.

All of this is to say that social-cause lawyering is highly circumstantial. It is why I chose to provide a detailed narrative of the Hastings CED Clinic’s work with SFHHJJ. It is also why I emphasize as lawyering virtues the importance of accessibility, responsiveness, and judgment. Good lawyering encompasses much more than the law. In progressive lawyering especially, the decisive factors are how one interacts with client groups and what in addition to the law one takes into account in a specific context.

Particularly at this time, when partisan divisions are extreme, a striking need exists to bring constituent groups together in coalition to transcend tribalism and negative aspects of identity politics, to fight for progressive social change, and to resist an onslaught of authoritarian challenges to our constitutional ideals and commitment to the rule of law. In such efforts, lawyers who are accessible, responsive, and capable of good judgment are the ones who will be most valuable.