POWER AND LAW, BAIT AND SWITCH: DEBUNKING “LAW” AS A TOOL OF SOCIETAL CHANGE The Disappearing Act of Affordable Housing in the District of Columbia

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The Disappearing Act of Affordable Housing in the District of Columbia

by

Samuel L. Jefferson, Jr. 1

I. Introduction

“It was a typical sunny, hot and hazy July afternoon in Washington, D.C. when I, as a 17-year-old, walked down the hill towards my apartment complex. As I approached, I noticed people gathered in the street in front of my apartment building. I also noticed that someone had been evicted. As I moved closer, I noticed that the belongings were mine and my family’s. That’s when, at least after the numbness, the reality of being homeless set-in. Ironically or appropriately, shortly thereafter, I was flown-off to the U.S. Olympic Festival to represent the United States. A homeless person from the nation’s Capitol officially representing the United States – there’s an icon, tragically fitting for America that is not found at most Independence Day parades.” 2

Housing is among the most basic of human needs. 3 Accordingly, many lawyers have spent their entire careers advocating for and securing affordable housing for that segment of American society generally referred to as low-income or the working poor. 4

Theoretically, with each unit of affordable housing preserved, homelessness or some

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3 Educational Psychology Interactive, http://chiron.valdosta.edu/whuitt/col/teg/sys/maslow.html (“Abraham Maslow (1954) . . . posited a hierarchy of human needs . . . 1) Physiological: hunger, thirst, bodily comforts, etc.; 2) Safety/security: out of danger [. ]; see also, Janet A. Simons, Donald B. Irwin and Beverly A. Drinnien, Psychology - The Search for Understanding, (West Publishing Company 1987); United Nations Committee on Economic, Social and Cultural Rights. General Comment No. 4, paras. 1, 6 and 7. (“The right to adequate housing, ... derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.... The right to adequate housing applies to everyone.... [I]ndividuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status.... [T]his right must ... not be subject to any form of discrimination.... [T]he right to housing should not be interpreted in a narrow or restrictive sense.... Rather it should be seen as the right to live ... in security, peace and dignity....”), available at http://http://www.pdhre.org/rights/housing.html (last accessed Feb. 5, 2010).
other housing-related tragedy is averted or at least delayed. The benefits of these efforts can be seen in the expressions of joy and relief on their clients’ faces, and tangibly experienced by their clients achieving the “American Dream” of homeownership.

Yet, affordable housing lawyers in the District of Columbia (“DC”) face a conundrum. Isolated victories are not adding up to maintenance of, or increased, affordable housing inventory. In fact, as discussed below, DC’s affordable housing inventory continues to disappear.

As recently as 2009, the percentage of homeless families increased by 19.8% and the percentage of homeless children by 24.1%. These percentages represent 703 families, including 1,426 children. The National Coalition for the Homeless attributes a shortage of affordable housing a major cause of the rise in homelessness. A recent report by the DC Fiscal Policy Institute examining the city's rental housing market found that "there were 23,700 fewer apartments that cost $750 or less a month in 2007 than in 2000, a decrease of more than 33%.” During that period, the number of units that cost in excess

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4 For purposes of this paper, no distinction is made between those considered low-income and the working poor. For a discussion of the differences between low-income and the working poor, see Herbert J. Gans, *The War Against Poverty*, (Basic Books 1995).

5 This article focuses on affordable homeownership inventory; the data, arguments and conclusions herein may not be applicable to rental housing inventory. Some commentators argue that it is outdated and erroneous to assume that homeownership is superior to rental housing. For a discussion of the benefits of homeownership as opposed to renting see Lynne Dearborn, *Homeownership: The Problematics of Ideals and Realities: Contextualizing Homeownership*, 16 J. Affordable Hous. & Cmty. Dev. L. 40 (2006-2007) (“Research supports these purported benefit[s] of homeownership. Evidence suggests that owner-occupied housing is in better physical condition than housing occupied by renters . . . [and] that the move from renting to ownership often has produced a more stable and well-adjusted household.”).

6 The DC Fiscal Policy Institute tracks affordable rental inventory in DC and has concluded that affordable rental housing has significantly decreased over the period from 1980 to 2000; and a continued decrease in affordable rental housing from 2000 thru 2008. See infra, f.n. 10.


8 *Why Are People Homeless?* Published by the National Coalition for the Homeless, July 2009.
of $1,500 more than doubled, from 12,200 to 27,400." The magnitude of the problem is evident to the casual observer and painfully conspicuous to those who have unfortunately experienced homelessness, shattered families, other hardships and catastrophes as a result of the lack of affordable housing.10

This paper examines this affordable housing disappearing act through the lens of a landmark law designed, and amended, to preserve affordable housing -- the Rental Housing and Conversion and Sale Act of 198011, more commonly referred to as the Tenant Opportunity to Purchase Act ("TOPA").12 Although this paper examines TOPA, the "phenomenon" at work -- (i) an identifiable societal problem, (ii) the passing of a law

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10Recently, the devastating effects of the loss of affordable housing in DC has impacted those diagnosed with HIV/AIDS. In November 2009, the U.S. Department of Housing and Urban Development, threatened to cut off $12.2 million in AIDS housing funds to DC. In 2008, DC was forced to return more than $600,000 in AIDS housing money. Debbie Cenziper, Hud threatens to cut off D.C. AIDS funding next year. Washington Post, available online at http://www.washingtonpost.com/wp-dyn/content/article/2009/11/11/AR2009111117109_2.html?sid=ST2009111208316 (last visited Feb. 5, 2010).

11D.C. CODE ANN. §3401.01 et seq., as amended (2005). The statutory purposes are: "(1) To discourage the displacement of tenants through conversion or sale of rental property, and to strengthen the bargaining position of tenants toward that end without unduly interfering with the rights of property owners to the due process of law; (2) To preserve rental housing which can be afforded by lower income tenants in the District; (3) To prevent lower income elderly and disabled tenants from being involuntarily displaced when their rental housing is converted; (4) To provide incentives to owners, who convert their rental housing, to enable low income non-elderly and non-disabled tenants to continue living in their current units at costs they can afford; (5) To provide relocation housing assistance for lower income tenants who are displaced by conversions; (6) To encourage the formation of tenant organizations; (6a) To balance and, to the maximum extent possible, meet the sometimes conflicting goals of creating homeownership for lower income tenants, preserving affordable rental housing, and minimizing displacement; and (7) To authorize necessary actions consistent with the findings and purposes of this chapter." D.C. CODE ANN. § 42-3401.02 (emphasis added).

The Act is remedial in character, aimed at "strengthening the legal rights of tenants or tenant organizations to the maximum extent permissible under law." D.C. CODE ANN. § 42-3405.1. While the courts have made clear the "overarching purpose [of the statute] is to protect tenant rights." 1618 Twenty-first St. Tenants' Ass'n, Inc. v. The Phillips Collection, 829 A.2d 201, 203 (D.C. 2003), the language of the statute expresses some balance among competing interests by providing "incentives to owners."

12TOPA (D.C. CODE ANN. § 42-3404.02) was among the first statutes of its kind, creating a statutory right that provided low-income tenants with an opportunity to purchase their dwellings should the owner attempt to sell the dwelling to a third-party. See Richard C. Eisen, A Practitioner's Roadmap to Tenant Ownership, D.C. Land Title News (1999). Currently, only a handful of jurisdictions have followed suit by passing legislation similar to TOPA. Id.
to remedy the problem, and (iii) the problem’s continuation or exacerbation -- is not unique to TOPA, DC, or the affordable housing context. Rather, it is not a phenomenon at all. It is the normal dynamic that functions at the intersection of power and law in American society.\footnote{There is an abundance of examples where esteemed legal scholars, academicians and others feign perplexity as to why the law fails to remedy a given social problem. Multitudes of hypothesis are generated. Yet, the hypotheses fail because they do not address the power dynamic. A typical example from an accomplished legal scholar is “[a]s an African-American woman . . . I have long wondered why the law has only minimally improved the quality of life of African-Americans relative to whites since the abolition of Black enslavement [then the author goes on to hypothesize that] the answer, I began to think, might lie in an often-cited maxim of unknown origin: The [captor’s] tools cannot be used to dismantle the master’s house.” Magee, Rhonda, \textit{The [Captor’s] Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse}, 79 Va. Law Rev. 863, 864 (1993). The answer to the author’s query is not just an exploration of whose tools to use, there is the key issue of power which is often omitted.} As discussed below, this interdisciplinary analysis of the dynamic in the context of affordable housing debunk\'s, or at a minimum calls into question, the notion of law as the tool for societal change.\footnote{Charles Hamilton Houston, \textit{inter alia}, famously said, “[l]awyers are either social engineers or parasites on society.” However, it may be that they are neither. Legal scholars have commented upon the perils of reliance upon law as a means of social engineering for justice. For a comprehensive look at the complexities and challenges facing law as a mechanism for effectuating social change, see Peter Schuck, \textit{The Limits of Law: Essays on Democratic Governance} (2000); \textit{The International Human Rights Movement: Part of the Problem?}, David Kennedy, Harvard Human Rights Journal Vol. 15; \textit{A Critical Reflection on Law and Organizing}, 48 U.C.L.A. L. Rev. 443, 460 (2001) (discussing various arguments}

Part II provides brief necessary background information about the DC and TOPA. Part III examines the empirical data with respect to the inventory of affordable housing. Part IV sets forth and dispels alternative theories and explanations for the disappearance of affordable housing. Part V considers the possibility that TOPA is functioning to protect affordable housing inventory. Part VI explores power, law, and their workings in American society. Part VII applies that understanding to explain the post-TOPA disappearance of affordable housing. Part VIII proposes and advocates for power-based approaches and strategies by, and for, low-income tenants and their allies in order to move towards a just and humane society.
PART II

II. The District of Columbia and the Tenant Opportunity to Purchase Act

1. Brief History of DC

In 1801 Congress created DC.\(^{15}\) The multi-faceted African genius Benjamin Banneker contributed significantly to DC’s planning and design.\(^{16}\) The labor of enslaved Africans largely built DC.\(^{17}\) Originally, DC was a 10-mile by 10-mile square situated on the Potomac River and several tributaries.\(^{18}\) Virginia reclaimed a portion of the original ceded land; thus, giving DC its boundaries today.\(^{19}\)

As a federal district and not a state, DC, despite efforts at Home Rule and statehood, is ultimately governed by Congress. Congress imposed a height restriction on

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\(^{15}\) The District of Columbia Organic Act of 1801 incorporated the District of Columbia and placed it under the exclusive control of Congress. An Act of Feb. 27, 1801, ch. 15, 2 Stat. 103 (concerning the District of Columbia); see also U.S. Const., Article 1, section 8; see also Anthony T. Browder, *Egypt on the Potomac*, pgs. 21-26, IKG (2004).

\(^{16}\) Benjamin Banneker was profoundly influenced and educated by his Malian Grandfather of the family name of African origin Bamana; that name was corrupted to Bannaky; and the name Bannaky was further corrupted to Banneker. Mali, of course, was a premier center of knowledge, education, civilization and commerce in the years immediately preceding the devastation launched by Europeans commonly referred to as the Atlantic Slave trade. Mali as the home of some of the world’s first institutions of higher learning, provided the education to his Grandfather which was then passed down to Benjamin, including astronomical, mathematical, mechanical, logic, linguistic and surveying knowledge. See Dr. Hassimi Maiga, *Notes on Classical Songoy Education and Socialization: The World of Women and Childrearing Practices*, Muhehm Books (2002); Dr. Hassimi Maiga, *Balancing Written History with Oral Tradition The Legacy of the Songhoy People*, Routlege (2009); see also Robinson, Battle and Robinson, *The Journey of the Songhai People*, Pan African Federation Organization 2ed. (1987); Anthony T. Browder, *Egypt on the Potomac*, pgs. 21-26, IKG (2004). The true history of Mali and Africa is obscured, twisted and denied the current descendants of the enslaved Africans in America, who fail to realized that during the trans-Atlantic enslavement period Caucasian Euro-Americans enslaved African law professors, comptrollers, scientists, university presidents, philosophers, meteorologists, accountants, nurses, mathematicians, botanists, doctors, engineers, lawyers, physicists, architects, chemists, etc. *Id.* An accurate understanding would highlight the fact that Africans in American today are in no better position to stop their re-enslavement, should Caucasians decide to do so, than their ancestors were in the 15th thru 19th centuries. *Id.*

\(^{17}\) *Id.* at n. 15.

\(^{18}\) *Id.*
all construction in DC, the Height of Buildings Act of 1910, to ensure that “among the most attractive features of our Nation’s Capital is its skyline Rep. Fortney "Pete" Stark (D-Calif.).” In great part, this gives DC a unique feel absent the skyscrapers one might encounter in New York, Chicago or San Francisco. It also limits the space available for construction of housing.

2. A Brief History of TOPA

In 1980, TOPA was enacted. TOPA classically embodied the possibilities of how law can be used to protect the interests of less powerful segments of society through the creation of statutorily-mandated rights. TOPA explicitly recognized that less powerful segments of society were in need of protection or assistance:

“Lower income tenants, particularly elderly and disabled tenants, are the most adversely affected by conversions since the after conversion costs are usually beyond their ability to pay, which results in forced displacement, serious overcrowding, disproportionately high housing costs . . . The threat of conversion has caused widespread fear and uncertainty among many tenants, particularly lower income, elderly, and disabled tenants . . . [The] housing assistance plan shows that 43,521 renter households and 14,215 homeowner households are in need of housing assistance in the District[.]”

A key feature of TOPA, designed to prevent displacement, is the statutorily-mandated right of first refusal that tenant(s) or tenant organizations are granted when an owner of a rental dwelling attempts to sell a property. Indeed, TOPA is quite ground breaking, taking into account many competing interests including the proverbial tension

19 Id.
21 D.C. CODE ANN. § 42-3401.01.
22 The statute does not draw a distinction between owners that are natural persons or corporate entities. D.C. Code § 42-3404.02
23 D.C. CODE ANN. § 42-3404.08.
between market functioning (the owners’ right to sell property) and the public interest (the need for citizens of DC to have affordable housing).

In scope, TOPA’s breath is exhaustive, applying in quantitative measure to a single renter in single-unit dwelling as well as to tenants living in 50+ unit apartment complexes. Further, it grants statutorily-mandated rights to renters regardless of income and imposes restrictions on the eviction of elderly or disabled tenants.

All of TOPA’s provisions and features are intended to support its purposes and realize its goals, including the preservation of affordable housing and creation affordable homeownership in DC. In 2006, a study was commissioned on improving TOPA and several recommendations were proffered. It is unclear as to which, if any, of the improvements have been implemented. Nevertheless, TOPA has functioned and continues to function in DC, as evidenced by periodic news stories in the Washington Post detailing various properties where tenants have been able to purchase and convert the building they formerly lived in as renters into affordable homeownership.

3. Procedural Framework

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24 D.C. CODE ANN. § 42-3401.03(16) & (17)
25 D.C. CODE ANN. § 42-3404.05(a-2)
26 D.C. CODE ANN. § 42-3404.08
By way of example, the following is a general description of the TOPA framework for purchase of an apartment building with 5 or more units. Upon the owner’s decision to sell, the owner must notify a government agency and place a standard notice in English and Spanish conspicuously in the common areas of the building. This standard notice informs tenants of the owner’s intention to sell and of their right to purchase, and provides phone numbers to government offices that can provide tenants with assistance. Next, typically, the tenants would organize a tenants’ association, and notify the owner that the tenant’s association intends to purchase the building. Then, TOPA sets forth several deadlines for due diligence, negotiation, a good-faith deposit, and closing. The entire process can take approximately one year to complete.

The purchase price, pursuant to TOPA, can be the same as any bona fide offer that the owner previously received, thus ensuring that the owner gets the same market value from the tenants’ association with its statutorily-mandated right as it would from a private actor in the market. If all goes well, the tenants’ association purchases the building and begins operating it; typically, this would involve renovation and conversion from a rental apartment to a cooperative or condo regime. Often a mission-driven lender or the DC government provides financing for the project; included may be a requirement that the new regime – e.g. rental, cooperative, or condo -- impose some type

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29 The process described herein is for an apartment building with five or more residential units. D.C. CODE ANN. § 42-3404.011 Accommodations With Five or More Units [formerly § 45-1640]. The process and deadlines are different for buildings with less than five residential units. D.C. CODE ANN. § 42-3404.10 (2 to 4 units); D.C. CODE ANN. § 42-3404.09 (single family accommodation).
30 D.C. CODE ANN. § 42-3402.03(a).
31 D.C. CODE ANN. § 42-3402.03(b).
32 D.C. CODE ANN. § 42-3404.11.
33 D.C. CODE ANN. § 42-3404.05.
34 D.C. CODE ANN. § 42-3404.02(a).
of affordability restriction to ensure the long-term preservation of affordable housing inventory.  

4. Common Issues in the Operation of TOPA

Certainly, on a number of levels TOPA has been a success. Nevertheless, there have been occasions of landlords failing to inform the tenants that the building is being sold, landlords engaging in bogus sales, and landlords utilized the widely criticized “95-5” loophole.

The 95-5 loophole allowed owners to sell a 95% interest in their property to a party, and then, after waiting a year, sell the remaining 5% to the same party; thus, effectively, selling the building without triggering TOPA (and notifying the tenants) because such action taking place over the course of a year was not considered a “transfer” or “sale” under TOPA's statutory language. The 95-5 loophole was closed in May 2005, prompted, in significant part, by the Twin Towers litigation.

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36 Affordability restrictions raise issues in and of themselves; as there is a tension between preservation of affordability housing inventory and the renter-turned-homeowner’s potential desire to sell their property at the highest price possible at some point in the future.
37 3511 13th St. Tenants’ Ass’n v. 3511 13th St., N.W. Residences, LLC, 922 A.2d 439 (D.C. 2007).
38 Columbia Plaza Tenants’ Ass’n v. Columbia Plaza L.P., 869 A.2d 329 (D.C. 2005) (holding that a 28% sale of interest in apartment complex was not a sale under TOPA because there was no change in fundamental control of ownership); West End Tenants Ass’n v. George Washington Univ., 640 A.2d 718 (D.C. 1994) (holding neither “master lease struck between the university and the owners nor an option clause included in it constituted a ‘sale’ within the meaning of the Sale Act”)
40 The D.C. Council amended TOPA in May 2005. The amendment, which went into effect in July 2005, classifies 95-5 transactions and any variant thereof as a sale for the purposes of TOPA. For those cases that predated the new law, the D.C. Court of Appeals decided in March, in Twin Towers Plaza Tenants Association Inc. v. Capitol Park Associates, L.P., that the 95-5 tactic does not constitute a sale under the older version of the act; see.
There have also been issues on the tenant’s side. Occasionally, tenants are not able to work together to form a tenants’ association or to have a functioning tenants’ association, thus causing either the purchase to fail, or the subsequent operation of the building to fail. Nevertheless, generally speaking, TOPA has operated procedurally as its advocates have intended.

5. Selected TOPA Litigation

Given the scope of policy considerations and competing interests at work regarding TOPA, litigation is no surprise. Three general areas form the bulk of the litigation stemming from the statute: (1) right of first refusal, (2) bargaining in good faith, and (3) whether a transaction is a bona fide sale or a transaction designed to undermine tenants’ rights.

Right of First Refusal Litigation

TOPA seeks to strengthen the legal rights of tenants or tenant organizations “to the maximum extent permissible under law” primarily through the tenant’s right of first refusal. TOPA’s legislative history leaves no doubt that the rights of the tenants are
paramount in relation to those of others, including subsequent owners. Also, "an owner is prohibited from requesting and a tenant may not grant a waiver of the [right of first refusal] . . . and [an owner] is precluded from requiring waiver of any other right under [TOPA] except in exchange for consideration which the tenant, in the tenant's sole discretion, finds acceptable."  

_Bargaining in Good Faith_

Tenants and owners are expected to bargain in "good faith." The tenant is entitled to the opportunity to negotiate in good faith with the seller, along with other tenants, for the statutory period, but he or she is not entitled to dictate the outcome. Although no definition of "good faith" is provided in TOPA, good faith has been required of owners as central to meeting the policy requirements underlying the TOPA. "Although this statute is in derogation of the common law and therefore must be strictly construed, good faith on the part of the Owners must be deemed to be implied lest the statute become illusory."  

_Bona Fide Offer of Sale_

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46 D.C. Code § 42-3404.05.
TOPA does provide guidance as to what is not considered "good faith": “The following constitutes prima facie evidence of bargaining without good faith: (1) The failure of an owner to offer the tenant a price or term at least as favorable as that offered to a third party, within the periods specified in §§ 42-3404.09(4), 42-3404.10(4), and 42-3404.11(4), respectively, without a reasonable justification for so doing; (2) The failure of an owner to make a contract with the tenant which substantially conforms with the price and terms of a third party contract within the time periods specified in §§ 42-3404.09(4), 42-3404.10(4), and 42-3404.11(4), respectively, without a reasonable justification for so doing; or (3) The intentional failure of a tenant or an owner to comply with the provisions of this subchapter.” D.C. Code § 42-3404, et. seq. The D.C. Court of Appeals noted in _West End Tenants Ass'n v. George Washington Univ._, 640 A.2d 718, 726 (D.C. 1994), it is the absence of good faith that provides the interpretive starting point for interpreting the language of the statute.
Perhaps the most significant arena for TOPA litigation, especially in recent years, involves attempts to transfer or sell property without providing tenants the opportunity to purchase. For example, in *2315 Champlain St., N.W., Tenant Ass'n v. O'Brien,* confronted with a less than arms-length transaction, the U.S. District Court for the District of Columbia concluded that the sale of a fifty-percent tenancy-in-common interest in a housing accommodation did not trigger a tenants association's right of first refusal to purchase that interest:

“The Sale Act defines 'housing accommodation' as a *structure* in the District of Columbia containing 1 or more rental units... It is hard to square the definition of housing accommodation as 'a structure' with a transaction in which a fifty-percent interest in the structure is conveyed. In such a transaction the *structure* is not conveyed, but rather an *interest* in that structure.” *Id.*

Two years later, in *Columbia Plaza Tenants' Ass'n v. Columbia Plaza L.P.*, the D.C. Court of Appeals found that an agreement was not a sale under the statute. *Id.* Because the agreement covered only a partial interest, the Court reasoned, the partnership did not relinquish possession of the complex. *Id.* Thus, there was no change in fundamental control of ownership. *Id.* The Court’s determination of a failure to meet TOPA’s statutory factors for a sale meant the agreement was not a “master lease” within the meaning of TOPA and, thus, not a “sale.” *Id.*

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50 Defendant Lucy O'Brien and her former husband, Mario Lumpuy, purchased 2351 Champlain Street, N.W., a multi-unit apartment building in 1978. *Id.* In 1993, Lumpuy transferred his half interest in the property to their son, Carlos Lumpuy. *Id.* As a result of this transaction, O'Brien held a fifty-percent interest in the property as a tenant-in-common with Carlos Lumpuy. *Id.* In March 2001, Lucy O'Brien and her new husband, Michael O'Brien, sold Ms. O'Brien's entire fifty-percent interest in the property to Dennis Lee for $345,000. *Id.* Two weeks later, Lee presented the tenants of 2351 Champlain Street with an "Offer of Sale and Tenant Opportunity to Purchase Without a Third Party Contract" for $1.6 million. *Id.*

52 In *Columbia Plaza,* a local university sold approximately 28 percent of its interest in an apartment complex where association's members lived. *Id.* The association filed a complaint, alleging that the deal
The following year, in *Wallasey Tenants Ass'n v. Varner*, the D.C. Court of Appeals carved out an exception for some transactions which appeared to meet TOPA's definition of a sale but which the court held did not trigger the tenants' opportunity to purchase a building.

A month later, in *Twin Towers Plaza Tenant Ass'n v. Capitol Park Assoc.*, the infamous 95-5 loophole was allowed by the Court, thus, effectively, selling the building without triggering TOPA (and notifying the tenants) because such action was not considered a “transfer” under TOPA's statutory language. *Twin Towers* was handed down in the wake of amendments to TOPA, enacted the previous year, to close precisely the loophole authorized by this holding. Because the statute was applied prospectively, the *Twin Towers* "non-sale" was upheld.

constituted a "master lease" under TOPA and thereby violated tenants' opportunity to buy the property before the sale. *Id.*


54 In *Varner*, Mr. Fairbairn, the property owner, had transferred an apartment building from himself to entities wholly owned by him. *Id.* Although "the conveyance took the appearance of a sale," *id.* at 1141, the court held that it did not trigger a right of the tenants to purchase the property. *Id.* “The conveyance directed by Mr. Fairbairn to a *de facto* wholly owned corporation was effectuated for no purpose other than to legitimately limit Mr. Fairbairn's liability and to simplify his future estate planning.” *Id.* at 1141. The court found there had been no arms' length bargaining between the grantor and the grantee. *Id.* “Finally, and most significantly, Mr. Fairbairn remained in ultimate control of the Wallasey at all times. . . . [T]his conveyance was a restructuring not a sale.” *Id.* In other words, the right of first refusal under the Sale Act "is simply not available when closely related parties who do not engage in arms' length dealings convey property for the purposes of estate planning, tax restructuring, limiting liability, or general property management.” *Id.* at 1141. n. 3.


56 Since that time a number of similar cases have come before the Court, all involving transactions that were structured as "step transaction" involving two key steps. First, the seller forms a new corporate entity and transfers 100% fee-simple title to the new entity. In the second step, the seller then transfers ownership of the new corporation (including the title to the property) to the purchaser, all in an effort to avoid the tenant purchase provisions of TOPA. In *Gomez v. Independence Mgmt. of Delaware, Inc.*, 967 A.2d 1276 (D.C. 2009), decided in March 2009, nearly two years after argument before the D.C. Court of Appeals, the court determined that a step-transaction could be deemed a sale under the Act and thus subject to tenants' rights. Yet, in *The Alcazar Tenants' Ass'n., Inc. v. Smith Property Holdings L.P.*, --- A.2d ---, 209 WL 2957800 (D.C. 2009), the transfer of a residential apartment building by deeding it to trust to be held for benefit of limited liability company, owned by transferor, was held not to be a "sale," but rather only a change in the "form" of ownership. The discrepancy between *Gomez* and *Smith Property Holdings* may be resolved as the appellants in *Smith* have recently petitioned the court for a rehearing, *en banc*, asking the
Finally, the absence of a third-party offer does not necessarily mean that there is no bona fide offer of sale pursuant to TOPA. The DC Court of Appeals has held that a non-profit corporation's offer of sale without any third-party contract was deemed a "bona fide offer of sale" because it was an objectively good faith, honest offer based on a fair analysis of the value of the property to the corporation based on intended use.\textsuperscript{57}

Affordable housing advocates have (i) worked on the tenant side to overcome the common issues in the operation of TOPA, (ii) achieved some success in TOPA litigation, and (iii) secured a major victory when TOPA was amended to close the 95-5 loophole. Their efforts, for the most part, have consisted of traditional lawyerly activities (e.g. litigation, legislative amendments, raising awareness of rights, etc.). As discussed in detail below, these traditional lawyerly activities have not prevented the overall reduction of the affordable housing inventory because these efforts do not sufficiently account for the power dynamic.

PART III

III. An Analysis of Population, Income and Housing Cost Data

The United States Census Bureau collects census data on a rotating schedule. In the modern era, every twenty years the bureau conducts a Level One process, which is the most exhaustive data collection process.\textsuperscript{58} Every decade the Bureau conducts a Level Two process, which is a scaled down collection process. Under either a Level One or

\textsuperscript{57} 1618 Twenty-First St. Tenants' Ass'n v. Phillips Collection, 829 A.2d, 2003 (D.C. 2003).
\textsuperscript{58} See “About Us”, \url{http://www.census.gov/aboutus/} (last visited on October 13, 2009).
Level Two process, sufficient data exist to examine population, income and housing
trends in the U.S. and, more importantly for our purposes, in DC.\textsuperscript{59}

This analysis considers census data starting in 1980, the year TOPA was enacted,
and ending in the year 2000 (hereinafter the “Target Period”)\textsuperscript{60} to provide an objective
basis upon which to consider the effectiveness of TOPA in “generating or preserving”
affordable housing in DC. In addition, it examines and cross-references data collected by
other entities and repositories likely to possess relevant data.\textsuperscript{61}

A. Population

In 1980, the Population of the District of Columbia was 638,333. (see Graph 1-A). By 1990, the population of the District decreased by 5% to 606,900. (see Graph 1-A). By 2000, the population of the District decreased even further by 6% to 572,059 (see Graph 1-A). Thus, during the Target Period there was an overall 11% decrease or loss of 56,274 in the population of DC.

\textsuperscript{59} The data has been limited to DC proper, as opposed to the Washington, D.C. greater metropolitan area. The data referencing monetary figures are all in nominal dollars and have not been adjusted for inflation.

\textsuperscript{60} This paper was completed in 2009. At a future date, a supplemental analysis is necessary to examine the period from 2000 thru 2010. Given that a housing bubble was created, rose and met its demise causing a global recession, banking, credit and wall street debacle, one may expect that affordable housing disappeared at an amazing rate during the bubble, and reappeared when the bubble burst. However, since the bubble has burst, immediately following there was either no credit available for mortgages or underwriting guidelines had sufficiently changed to effectively denying low income residents of DC from qualifying for a mortgage. More troubling is the fact that low income people disproportionately lost their jobs during the global economic recession, and have yet to either find new employment or reclaim lost income. According to a report released Sep. 10, 2009, by the U.S. Census Bureau, 39.8 million people lived in poverty in 2008, a one-year increase of 2.6 million people and 6.85%. Even more troubling was the rise in the number of people in deep poverty. Those in households earning less than half of the federal poverty threshold rose by 7.69%, or 1.2 million people, to more than 17.0 million people. See Natl. Low Income Housing Coalition, \textit{As Predicted, Recession Increases Deep Poverty}, available online at http://www.nlihc.org/detail/article.cfm?article_id=6401&id=48 (last visited Dec. 27, 2009) (“The increase in the poverty rate, especially deep poverty, gives a new urgency to the need for a substantial increase in federal housing assistance. People in deep poverty are at high risk of homelessness; methodology developed by the National Alliance to End Homelessness shows that an increase of this magnitude translates to potentially 123,000 to 269,000 more people becoming homeless”).
B. Income During the Target Period

In 1980, the median household income ("MHI") was $16,211 and accordingly the corresponding affordable housing cost ("AHC"), calculated at three times MHI, was $48,633 (see Graph 1-B). By 1990, the MHI was $30,727 and AHC was 92,181. Id. By 2000, the MHI was 40,127 and the AHC was $120,381. Id. Thus, over the Target Period the MHI almost doubled, increasing by 49%, and affordable housing cost almost tripled, increased at a rate of 61%.

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61 (ie... newspapers, think tanks, non-profit organizations, etc...). Washington Post, Washington Times, City Paper, DC Fiscal Policy Institute, Harrison Institute, etc., Urban Policy Institute

62 Some advocate calculating AHC at five times MHI, instead of three time MHI. Even assuming a five time MHI for AHC the inventory of affordable housing decreased during the Target Period.
C. Housing Cost During the Target Period

In 1980, there were 40,798 mortgaged homes in DC and 20,455 of them were affordable (see Graph 1-E and 1-D), thus fifty-percent of all mortgages homes were affordable. By 1990, there were 46,967 mortgaged homes in DC and 14,732 of them were affordable (Id.), thus thirty-one percent of all mortgaged homes were affordable. By 2000, there were 55,138 mortgaged homes in DC and 16,709 of them were affordable (Id.), thus thirty-percent of all mortgaged homes were affordable.
In summary, during the Target Period, although the total number of mortgaged homes increased from 40,798 to 55,138, the percentage of mortgaged homes that were affordable dropped from 50% to 30%. In 1980, the median household income was $16,211, the median home price (MHP) was $68,800, and the difference between the MHI and the MHP was $20,167. (See Graphs 1-C and 1-E). By the end of the Target Period, the difference between the MHI and the MHP had increased to $36,819. (See Graph 1-C and 1-E).  

The data support several conclusions about the housing dynamics taking place in the District during the Target Period. First, the District lost residents during the Target Period. Second, the residents that remained or moved into the District were of a higher income level than those residents that left the District. Third, the price of homes in the District increased dramatically during the Target Period. Finally, the number of affordable homes during the Target Period decreased dramatically.

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63 According to the District of Columbia’s task force on affordable housing: [INSERT paragraph from report and other sources on MHI, MHP].
PART IV

IV. Causation and the Loss of Affordable Housing Inventory

Many reasons may account for the loss of affordable housing inventory during the Target Period. Certainly, it could be argued that home prices are impacted by an inordinate number of factors across an expansive matrix including factors as diverse as oil prices, pregnancy rates, interest rates, employment rates and election results. However, as discussed below, any explanation that does not explicitly address the power dynamic as the underlying cause ultimately is inadequate.

Voluntary Choice

Perhaps the approximately 70,000 low-income residents that migrated from DC during the Target Period did so voluntarily. The expenditure of resources to track down and interview them all is prohibitive, even if it were possible. Yet, it is plausible that some did leave for voluntary reasons like marriage or seeking a change of scenery. It is equally plausible that some low-income residents were subjected to power dynamics and left DC pursuant to pseudo-voluntary choice.\(^\text{64}\)

Since 1980 there have been numerous anecdotal accounts of building owners employing force, threats, manipulation, etc. against low-income residents, causing the low-income residents to leave “voluntarily” their long time residences. Their evacuation would then open the door for the building owner to sell or convert the building into luxury condominiums.\(^\text{65}\) Because of the sheer number of residents that left DC during the Target Period, and because of the actions of building owners towards low-income residents

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\[^{64}\text{See infra pgs. __ thru __ discussing typology of power force as power, coercion as power, influence as power, competent and legitimate authority as power or manipulation as power.}\]

residents, voluntary choice causing a decrease in demand is not an accurate or satisfactory explanation for the loss of affordable housing inventory.

**Market Forces**

Market forces are often a euphemism for any number of activities. Generally, market forces are described as rational actors interacting with supply and demand. Hence, during the Target Period, because low-income residents were leaving DC, the demand for affordable housing decreased. Consistent with that premise is the fact that the median income rose for DC residents during the Target Period, suggesting that the “new” residents sought housing more luxurious than the typical affordable housing and thus, further drove down affordable housing demand. Therefore, market forces arguably can explain the drop in affordable housing inventory during the Target Period.

However, such a conclusion may be erroneous. The language and legislative history of TOPA state that 43,521 renter and 14,215 homeowner households were in dire need of affordable housing which, in part, prompted the creation and enactment of TOPA. Certainly, this evidences a demand for affordable housing.

Included within a “market forces” explanation for the loss of affordable housing inventory is the desire to acquire profit, which at one point in popular culture was encapsulated by the phrase “greed is good.” If a building owner purchased a building before 1980 for $800,000, and in 1995, was able to sell the building for $2-million dollars, then it makes sense (according to western societal norms) for the building owner to sell the building and take a $1.2 million profit. Some economist may go even further and contend that the building owner, with the newly received profit, would now be in a better position to reinvest some or all of that profit back into the economy. This
reinvestment would benefit larger societal goals (create jobs, etc.), including low-income residents who would have been displaced by the sale of the building, effectively creating a win-win for building owners and low-income residents.

Of course, if the building owner sought to sell his building in 1985 it would have triggered TOPA and the statutorily-created rights provided for the tenants. Specifically, the tenants would have the right of first refusal to purchase the building at the same price as a third-party offer for the building. If successful, the tenants would purchase the building and the building owner would receive a $1.2 million profit. Thus, if the TOPA process were used, building owners could receive profit and the low-income residents would have preserved affordable housing inventory.

However, in some cases building owners have engaged in various “unfair” or “improper” tactics, including the usage of bogus or inflated third-party offers, to receive a windfall – obtaining more money from the tenant group than it could have in the open market. This is an example of a powerful group (building owners) exploiting the statute in order to manipulate the market and thereby wrongly benefit from the provisions of TOPA intended to fairly balance competing interest among groups. In such instances, “market forces,” or the drive for profit, effectively decrease affordable housing inventory and market forces are merely a proxy for powerful groups (building owners, developers, etc.) pursuing their interests without regard to “fair play” or larger societal needs.

Rather than exploring each and every possible cause for the loss of affordable housing inventory, it is more useful to consider the larger phenomenon in a different

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67 *Columbia Plaza Tenants’ Ass’n v. Columbia Plaza L.P.*, 869 A.2d 329 (D.C. 2005), *supra* note __
68 Recall that at page __, I asserted that, “although this article examines TOPA, it is also my contention that the “phenomenon” at work -- (i) an identifiable societal problem, (ii) the passing of a law to remedy the
context. By shifting context, the quagmire of multi-variable explanation gives way to the
dynamic of the interaction of power and law as a better explanation for societal
dilemmas.

A Football Story

Non-discrimination and civil rights laws have been around since emancipation of
the enslaved Africans in America. Yet, racial discrimination persists to this day despite
a plethora of well-known anti-discrimination statutes and Constitutional Amendments.
Recently, the NCAA released statistics relating to its membership’s failure to hire head
football coaches who are descendents of the enslaved Africans. Despite the fact that their
membership has no problem finding descendents of enslaved Africans to “play” on their
football teams, the membership cannot seem to employ them in the coveted position of
head coach after their NCAA playing eligibility expires: “Not counting historically black
colleges and universities, there are 582 football programs throughout all three [NCAA]
divisions and only 21 (2.7 percent) have minority head football coaches. The Football
Bowl Subdivision, where nine out of 120 positions are held by minorities, commands the
most media attention, but attendees at Monday’s meeting treated the matter as an
Association-wide concern.”

70 In January 2009, Barak Obama was sworn in as President of the United States. Some have contended
that this signaled the end of discrimination and the ushering in of a post-racial America. However, it is too
soon in the Obama Presidency to have sufficient data to adequately support that conclusion.
wide/dungy+offers+to+help+with+minority+coaching+hires_11_03_09_ncaa_news&utm_source=delivra
&utm_medium=email&utm_campaign=NCAA+News+Direct (“Dungy offers to help with minority
coaching hires by Greg Johnson The NCAA News A group of experts, including former Indianapolis Colts
coach Tony Dungy, began an effort Monday to integrate presidents and chancellors into improving the
percentage of minority college football coaches.”)
In the face of such overwhelming statistics, commentators engage in ad-nauseam mental gymnastics in their rationalizations and discussions of the causes. Perhaps there are many reasons why the NCAA is having problems with hiring head football coaches that are descendants of enslaved Africans, but at bottom it occurs because of the operation of power dynamics. Descendants of enslaved Africans are subject to the lesser side of a power disparity and do not have or do not exert the requisite power upon the NCAA membership necessary to acquire the coveted positions of head football coach.

Similarly, perhaps there are many reasons why the affordable housing inventory in DC has decreased during the Target Period. At bottom, the affordable housing inventory in DC decreased because the low-income residents in DC did not exert sufficient power to increase the inventory, and more powerful groups used their power to cause the loss of inventory.

PART V

V. *Can’t See the Forest Because of the Trees! -- Did TOPA Work?*

Data, like everything else, can be considered from various perspectives. Evidence exist to support the contention that TOPA is in fact working to maintain and preserve affordable housing in the District of Columbia. Despite the fact that the overall inventory of affordable housing has decreased since the enactment of TOPA, it is tenable to assert that TOPA has worked because it slowed the rate of loss of affordable housing inventory. In other words, without the protections of TOPA there would have been an even greater

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72 Often the opening salvo centers around whether or not racial discrimination is present, and even when agreement is reached that racial discrimination exist, somehow there is no perpetrator. Academicians engage in their own mental gymnastics to avoid identifying an actor and create concepts out of thin air like “unconscious racism” to locate a good actor that just happens to be unintentionally engaged in racial discrimination. [cite Lawrence article or some critical race legal scholar].
loss of affordable housing inventory and at a greater rate than has actually occurred during the Target Period. This is plausible on its face.

However, assuming that without TOPA from 1980 to 2000 there would have been an even greater decrease of affordable housing inventory and at a more rapid pace, it would still be fallacious to conclude that TOPA has worked to achieve its stated purposes. TOPA’s stated purpose is to maintain and increase affordable housing inventory – not prevent catastrophic loss of, or create a slow rate of decrease of, affordable housing inventory.

In addition, the contention that TOPA worked is problematic because under that theory jurisdictions that lacked a statute like TOPA should have suffered because there was no similarly strong legal protection for low-income residents in that jurisdiction. However, when you compare DC with its closest comparable jurisdiction -- Baltimore, Maryland -- it is apparent that low-income residents of Baltimore, without TOPA, fared better than those in DC. Indeed, middle and low-income residents of DC moved to Baltimore (a non-TOPA jurisdiction) to find affordable housing. This is exactly the opposite finding that one would expect if TOPA’s statutorily-created rights were effective in the social engineering tasks of maintaining or increasing affordable housing inventory in DC.

Finally, it is critical to consider that if TOPA did indeed slow the amount and rate of affordable housing inventory loss, it merely prevented a greater societal outcry in response to the displacement of low-income residents in DC. It is this slow palatable rate of loss that fits within the concept of TOPA as an exercise in “competent and legitimate
authority” as power. Low-income residents and other segments of society can rest assured that the low-income residents have the law and rights to protect them from wrongful displacement. The low-income residents come to believe that the legal system will protect their TOPA rights, and that if they appeal to the legal system they are effectively “fighting” back. Indeed, when a low-income group achieves a victory by following TOPA’s procedures or thru litigation, it effectively reinforces future reliance on TOPA and the legal system. This increasing reliance effectively masks the macro-picture which shows that after twenty-years a great number of low-income residents have been displaced and building owners have realized windfall profits.

Moreover, the inequitable and disparate power relationship between the two groups is sustained by this delusion, ensuring that low-income residents remain subjected to the power wielded by building owners in the future.

PART VI

VI. Exploring Power and Law: the Muscle of the Invisible Hand

A. Power

“Power is nothing but the ability to achieve purpose. It’s the ability to effect change.” -Dr. Martin Luther King, Jr.

It is not necessary to generate a universally accepted definition of power. That is a task perhaps better left to philosophers. Indeed, numerous individuals, from Fanon to

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73 See discussion infra at Part VI.
74 “Term used by Adam Smith to describe the natural force that guides free market capitalism through competition for scarce resources.”
Foucault,\textsuperscript{75} have commented on, and attempted to define, power.\textsuperscript{76} “Rather than starting with [and getting bogged down in the mire of] questions of what is power, [Foucault] instead asked how is power exercised[.].”\textsuperscript{77} Nevertheless, it remains helpful to have a basic shared understanding of the answer to the question what is power.\textsuperscript{78} Accordingly, for our purposes, it will suffice to think of power in a dichotomous manner.

Power can be defined as a state of being. For example, a person has power when he or she is in an “alive” state or a battery has power when it is in a “charged” state. Conversely, when a person is dead he or she has no power, or when a battery has lost its charge it has no power.

Alternatively, as evidenced by the above Dr. King quotation, power can be defined as ability. For example, Usain Bolt has the power to run 100-meters in under 9.5 seconds or a bulldozer has the ability to move one ton of bricks. Conversely, an infant does not have the power to run 100-meters in under 9.5 seconds, or a go-cart does not have the power to haul one ton of bricks.

\textsuperscript{75} Foucault has influenced “progressive lawyers to reshape their lawyering practices to collaborate more closely with clients and community groups. Proponents of this model of activist law practice have often invoked Foucault and acknowledged that his ideas about power underlie and inform their visions of lawyering.” \textit{Foucault’s Approach to Power: Its Allure and Limits for Collaborative Lawyering}, 2004 Utah L. Rev. 395 (2004).


\textsuperscript{78} “While there is great divergence [among social scientist in defining power] there is general agreement . . . that social power is ‘some form of energy’.” Diamond, Michael, \textit{Community Economic Development: A Reflection on Community, Power and the Law}, 8 J. Small & Emerging Bus. L. 151 (2004).
While there is overlap between power as a state of being and power as ability, the distinction is useful in allowing an exploration of power among groups in society.\textsuperscript{79} From the above examples, it is apparent the definition of power as an ability easily lends itself to distinguishing between items. Additionally, because all groups of living people in society have power as a state of being, that definition of power is not the key consideration. Instead, it is power as ability that is central. Thus, for a group accessing, maximizing and implementing power as ability is paramount and is utilized as the sole definition of power for the exploration herein.

While remaining cognizant of the individual, it is group analysis that elucidates the societal dynamics and consequences in a power analysis.\textsuperscript{80} Foucault acknowledges the importance of groups in contemplating power; his “approach to understanding power [was] as a process in which . . . groups strategically manage the conduct of others and of themselves. . . his primary focus was on relations and relationships rather than power in and of itself.”\textsuperscript{81} Some commentators have gone so far as to take the position that “all power is social power,”\textsuperscript{82} further emphasizing the import of group power analysis.\textsuperscript{83}

\textsuperscript{79} For an alternative dichotomous analysis of the issue of power, power as an inventory of assets as opposed to power as a function of dependence, see Diamond, Michael, \textit{Community Economic Development: A Reflection on Community, Power and the Law}, 8. J. Small & Emerging Bus. L. 151 (2004).
\textsuperscript{80} Indeed from various traditional African cultural perspectives, their deep-thought and quantum physics acknowledges that there is no such thing as an individual. See generally Dr. Buseka Fu-Kiau, \textit{Old Teachings from Africa}. This is in marked contrast to the hyper-emphasized “individual” in Euro-American culture and western societies. See generally Dr. Marimba Ani, \textit{Yurugu An Analysis of European Culture and Thought}.
\textsuperscript{81} \textit{Foucault’s Approach to Power: Its Allure and Limits for Collaborative Lawyering}, 2004 Utah L. Rev. 395 (2004); “Power is never the property of an individual; it belongs to a group and remains in existence only so long as the group keeps together. . . [A]ll power is social power.” \textit{The Power Thing}, 82 Va. L. Rev. 721 (1996), citing \textsuperscript{______}.
\textsuperscript{82} \textit{The Power Thing}, 82 Va. L. Rev. 721 (1996).
Typology of Power a Tool for Illumination of Group Power Dynamics

In contemplating the issue of the intersection of power and law by focusing on how power works among groups in society several questions arise. How is power wielded by powerful groups? How does power operate and impact society? How is power used to maintain power differentials?

A framework sufficient to answer these inquiries was developed by social scientist, Dr. Thomas Wattenberg, and expounded upon by the late Dr. Amos Wilson.84 This framework, referred to as a typology of power (“Typology”), illustrates, *inter alia*, how power is used by dominant groups to maintain and/or increase their power compared to weaker groups. The Typology is useful for examining group interactions of all types, including those surrounding the affordable housing context. According to the Typology there are five independent yet interrelated categories in which one may consider and examine power. The Typology is as follows:

(1) The force-as-power aspect is when physical exertion is used upon the subject to achieve the desired compliance: “[F]orce as power involves the exercise of biological and physical means to prevent another . . . group from doing what it prefers to do or ‘to get something to happen to the [group] that [it] would prefer [did not happen].’”85

(2) The coercion-as-power aspect is when the subject complies due to a threat by the actor. Coercion as power is not dependent upon whether the actor has the actual ability or intent to carry out the threat, as long as the subject perceives the threat as real and complies based upon that perception. “The coercive power of the powerholder may rest significantly less or not at all on his actual capacity to harm the subject, but may rest

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more or less completely on the subordinate subject’s belief that the powerholder can do so.”

(3) The influence-as-power aspect is when the subject complies to please the actor. Here, the subject acts with or without the actor’s knowledge and acts in a manner that the subject knows or believes is pleasing to the actor. “[The subject] acts in compliance with the wishes or directions or suggestions of another, based on his sheer positive regard for love and admiration of the other, or based on a desire to please or serve the other because of the other’s personal significance to him. . . . compliance out of a ‘conditioned habit of obedience’ in regard to the other.”

(4) The competent-and-legitimate-authority-as-power aspect is when the subject defers to the actor’s perceived expertise or knowledge and the subject suspends it’s thought or judgment. Here the actor is considered by the subject to be superior in the given or all important areas; the subject complies without exercising it’s independent thought, judgment or consideration.

“[It] involves the achievement and exercise of social power derived from knowledge and skill and where behavioral compliance is obtained from the subject in return for his receipt of some benefit or service awarded by the authority. . . . [it] is a power relation in which the subject obeys the directives of the authority out of belief in the authority’s superior competence or expertise to decide which actions will best serve the subject’s interests and goals . . . [It may be] used as a mask for social privilege and power exercised by one group over another. It hides social privilege and power because it appears to merely exist to advance the public interest.”

(5) The manipulation-as-power aspect is when the actor gains compliance without the subject’s knowledge of the actor’s effort. This aspect may be a single act that

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85 Id.
86 Id.
87 Id., citing ______.
88 Id., (emphasis added).
repeatedly causes compliance or acts by the actor for each act of compliance by the
subject. A crucial aspect is that the subject is unaware of the actor’s effort, and often the
subject believes he or she is acting of their own free will or with independent thought:

“[It] involves the attempt by the manipulator to elicit certain desired responses
from his subject while concealing his efforts to do so . . . the subject is unaware of
the effort [and] may think that the manipulator is exercising his influence to
achieve an end desired by both the manipulator and the subject himself, when in
actuality the subject is being influenced toward an end which may be detrimental
to himself and beneficial only to his manipulator [the] subject may be led to
perceive his own responses and behavior as expressions of his own free will and
choice.”

Consider the following hypothetical. Early one morning, Child is about to stick
her finger into an electrical outlet. Parent grabs the Child’s hand, smacks it, and moves
Child’s hand away from the socket. After breakfast, Child again looks at the electrical
outlet and starts to moves towards the outlet. Parent says, “Stop! Don’t go near that or I
will smack you.” Child stops her movement towards the outlet. After eating lunch Child
moves away from the table sees the electrical outlet, but moves in the other direction
towards the play area. Before supper Child is playing in the play area, Child sees Parent
and asks why she cannot play with the electrical outlet. Parent replies that the electrical
outlet will hurt Child. Child accepts the answer and continues playing in the play area.
Child then tells her sibling not to play with the electrical outlet because it can hurt the
sibling. At night, Parent tells Child to go to the Child’s room and Child can play with
whatever she wants to play with in the room. Child goes to their room and plays with
toys, walls, floor, bed etc. Child never considers playing with electrical outlets in their
room. Indeed, Child does not even notice that there are no electrical outlets in their room.

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89 Id.
90 For demonstration purposes, the hypothetical is presented in a basic format with a singular actor and
subject instead of groups; and the primary roles of actor and subject remaining consistent throughout.
While Child was still an infant Parent had all of the electrical outlets in the Child’s room removed.

It is apparent that these interactions cover the spectrum of the Typology. While there is not necessarily an order to the Typology, the preceding hypothetical moves from force to coercion to influence to competent and legitimate authority to manipulation. This movement also shows differing levels of resistance by the subject/child and efficiency by the actor/parent. Also the hypothetical shows the “good” and “necessary” employment of the various types of power. Power is often wrongly stigmatized with a negative connotation and of course groups with great power benefit from other potentially competing groups consuming such a negative connotation.

Also, it is in the aspect of competent and legitimate authority that Anglo-American law primarily resides. Causing the subject to believe “in the authority’s superior competence or expertise to decide which actions will best serve the subject’s interests and goals, [the law] serves as a mask for . . . power exercised by one group over another [and] appears to merely exist to advance the public interest.” Other legal scholars have reached similar conclusions: “[Anglo-American] law is a good example of symbolic violence [it] possesses the ‘magic effect of nomination.’ It also has the power to establish the official, the legitimate symbolic violence – monopolized by the State – which the State both produces and practices.” The interrelated nature of the Typology’s aspects becomes apparent when one considers that people often obey Anglo-American laws out of a sheer desire to please or out of a threat of punishment, and Anglo-American laws are ultimately backed up with a threat of physical violence.
C. Law

Humans are social creatures. The need for rules and laws arose to govern social interactions. In every known society there have been rules and laws. In most societies in the world, laws are sacred in that they have a spiritual component and preserve an order beneficial to the group. This is not necessarily the case with rules. Thus, laws are generally elevated over rules.

In Anglo-American society laws are merely rules. Contrary to many popular notions, law in America is not sacred or necessarily worthy of reverence. One need only consider, for example, the protections directly afforded slavery within the U.S. Constitution. In American society “laws are merely rules enforced by those with the power to do so” and function to maintain the status quo or power disparities among groups in society. “[Legal Consciousness Studies] accept that violence is exercised through law and that this violence favors hegemonic power.” Accordingly, the “law” does not change power relationships between societal groups by shrinking power disparities; it maintains or increases the disparities.

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92 [Cite sociology article.]
93 Id.
94 Laws can be split into two major types: natural and human-made. Gravity would be an example of natural law. A highway 55-mph speed limit is an example of a human made law. The focus of this paper is exclusively on human-laws and all of the following references to “law” are limited to human made laws.
95 “Anglo-American law [is] rooted in conflict.” An Anthropologist Examines the Lawyer Tribe, 17 Yale J. L & Human 291 (2005). This is not the case with the majority of the world’s people prior to Western imperialism and colonization.
96 See U.S. Const. Art. I, sec. 2 ("3/5 compromise"); Art. I. sec. 9 ("slave trade"); Art. IV, sec. 2 ("fugitive slave").
97 Cite Amos Wilson Speech.
99 To the extent that Charles Hamilton Houston was imploring lawyers to use the law to be social engineers instead of parasites on society, he meant social engineers to generate a change in these power disparities – not to become de facto maintenance social engineers of the status quo.
100 [cite a Foucault article]; “Classical Marxism views laws simply as a tool the ruling class uses to perpetuate an oppressive social system. . . . Scholars and practitioners alike argue that law reform has not and cannot bring about fundamental social change . . . the legal system cannot be used as a means for
Some of the greatest minds and leaders in American history have come to the realization that Anglo-American law maintains or increases power disparities among societal groups; preeminent among them is Ida B. Wells:

In 1884, she would sue the Chesapeake and Ohio railway, after being told to leave the first class ladies car. Can you imagine?!?! [S]he refused when the conductors came to her, and when two men came towards her, she just braced her feet under the seat of the [seat] in front of her, and grabbed on. And they tried to physically extricate her from the seat, which they finally did, but not before Wells took a big bite out of one of their hands. But she got thrown off that train. And in 1884, in Memphis, Tennessee . . . Wells would sue the Chesapeake and Ohio railroad. Becoming, by the way, the first African-American to challenge the recent overturning of the Supreme Court, this a familiar scenario the Supreme Court had just overturned [civil rights laws] . . . And, in fact, in the lower court she would win; but several years later [on] appeal she would lose in the Tennessee Supreme Court. And she was devastated by that decision, ‘I had firmly believed all along that the law was on our side’, she said, ‘and would when we appealed to [the law it] would give us justice. I feel shorn of that belief. And [if] it were possible would gather my race in my arms and fly away with them.’ The lost of faith in the law is pivotal to Wells . . . it was this loss of faith that would take us to the edge, then plunge us into the modern civil rights movement."

PART VII

VII. Crossroads: Power + Law = Loss of Affordable Housing Units

The affordable housing inventory in DC decreased by 30% during the Target Period. Given that TOPA contains the stated purpose of maintaining and creating affordable home inventory, what caused the loss of affordable housing inventory? The

achieving [social change in favor of less powerful groups].” Petitioning and the Empowerment Theory of Practice, 96 Yale L.J. 569, 577 (1987).

101 (emphasis added) Speech of Historian Paula Giddings, African-American Womens Conference; see also Paula Giddings, Ida a Sword Among Lions, Amistad (year)

102 Cite Chart, Figure _____; check reduction in homeownership affordable housing inventory.
ultimate cause and best overarching answer is the dynamic functioning of laws and power, a dynamic operating to maintain or increase the power disparity among groups.

Since TOPA’s enactment, the group most negatively impacted by the loss of affordable housing inventory has been low-income residents, one of the primary groups that TOPA was intended to protect. The building owners benefited from increased property values or rents or both for their buildings. Between the two groups (low-income residents and building owners) the building owners are the more powerful group. Thus, the power dynamic at play during the Target Period, effectively increased the power disparity between low-income residents and building owners despite the stated intentions, purposes and statutorily-created rights of TOPA.

_Cooptation Through Competent and Legitimate Authority_

During the Target Period, when threatened with the prospect of losing their homes, the low-income residents may have sought protection from the legal system. Typically, the legal system is viewed by low-income residents as competent and legitimate authority. When the low-income resident group relies upon the legal system and TOPA, it often views this effort as fighting back or exercising their rights. This misplaced reliance upon the legal system and TOPA fits squarely within the building owners group effectively employing influence as power and competent and legitimate authority as power.

103 By more powerful group, I am referring to the building owners’ ability to effectively employ for their benefit the five types of power pursuant to the Typology.
104 It is not unheard of for abandonment to occur, this can be fairly attributed to influence as power or coercion as power where the low-income resident group is the subject.
105 This may be done directly through a legal service provider such as Neighborhood Legal Services that specializes in services to the LIRG, or through other community-based organizations (like a church or grass-roots organization) which then directs them to a legal services provider.
The low-income residents group acts, or reacts, from a conditioned form of obedience following the channels that are approved of by the building owners. Low-income residents actually rely upon the protections of TOPA not in the public interest, but rather in the interest of the dominant building owner group. Thus, the low-income resident group becomes effectively cut off from exercising "force as power" or "coercion as power" in their interest and against building owners. Their actions effectively co-opt the low-income resident group and create a pseudo-alignment of interests being pursued.

Some low-income clients I have represented over the years have attempted to use "coercion as power" or "competent and legitimate authority as power" against building owners by seeking or threatening to obtain media coverage of what they perceive to be wrongful actions by building owners. However, when the building owners group is complying with the mandates of TOPA, there is simply no story for the media to cover. Thus, TOPA even limits the low-income residents group’s avenues within the realms of coercion and competent and legitimate authority.

Several commentators recently have written on the topic of co-optation. David Kennedy, in his HARVARD LAW REVIEW article, *The Human Rights Movement – Is it Part of the Problem*, essentially argues that the successful passing of human rights laws lessened or eliminated agitation that otherwise would have occurred, and that would have generated “better” outcomes for less powerful group.

“There is no question that the international human rights movement has done a great deal of good . . . but there are other ways of thinking about human rights . . . I thought it useful to pull together a short list of some of the questions that have

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106 Rarely, can the low-income resident group effectively employ manipulation as power against the building owners because the low-income resident group often lacks the requisite surplus of resources necessary to employ manipulation as power.
been raised about international human rights by people, including myself, who worry that the human rights movement might, on balance, and acknowledging its enormous achievement, be more part of the problem . . . than part of the solution.”

Professor Kennedy goes to great lengths to point out the tremendous good done by human rights and to avoid being seen as overly polemical. Similarly, it is important to note that TOPA and my colleagues in the DC affordable housing community have done a tremendous amount of good for the low-income residents of DC, and I share Professor Kennedy’s concern with appearing overly polemic. Accordingly, this article is not an attack on TOPA, affordable housing advocates, or building owners. Rather, it offers a different way of thinking about the affordable housing situation in DC, one that looks at power and power disparities in an effort to generate thinking about alternative solutions and different outcomes.

Numerous legal scholars have expressed critiques regarding the law as a vehicle to generate social change for less powerful groups in American society:

“Handler, argued that public interest litigation was an incrementalist reform strategy that could not ‘disturb the basic political and economic organization of modern American society’ . . . [Abel, White, and Gordon] offered a stronger argument against litigation-centered strategies. They contended that litigation was not only ineffective, but also potentially dangerous . . . Abel argued that litigation undermined social change movements by reinforcing poor clients’ feelings of powerlessness and dispersing social conflict into individualized legal claims. White contended that litigation was experienced as a ‘hostile cultural setting,’ which effectively ‘silenced’ poor people . . . Gordon claimed that litigation undermined organizing efforts by reinforcing reliance on lawyers and co-opting potential community leaders by paying them off with a settlement or judgment award. These scholars were joined by others who agreed that litigation ‘contribut[ed] to the very subordination it purport[ed] to remedy.’”

108 [In the 1960s or 70s there was an affordable housing shortage in DC, there were rent strikes in DC, and in the Dupont Circle area -- try to find anything written about it in law reviews or newspapers].
Distinguished legal scholar Professor Edgar Cahn, of the David A. Clarke School of Law, has long advocated looking outside of the law for solutions to societal problems and to build capacity for less powerful segments of society in part because of the problem of cooptation.\textsuperscript{110} Cooptation is exactly what has happened, and continues to happen, in the case of TOPA. A law was passed and it maintained the power relationships in the District regarding affordable housing – it did not change them. It failed to change the power disparities, and it did not effectuate societal change. One also observes this dynamic at play with respect to other statutes and programs.

For another example in the affordable housing context, consider that United States Department of Housing and Urban Development’s widely publicized HOPE VI program which has been criticized for nationally reducing affordable housing inventory and hurting low-income citizens despite its stated goals of providing “housing that will lessen isolation . . . of very low income families.”\textsuperscript{111} The Clean Water Act was passed and enacted in 1980, the same year as TOPA. However, recently Frontline broadcast an episode focusing on two major water ways, Puget Sound and the Chesapeake Bay, both of which are suffering from greater pollution than in 1980.\textsuperscript{112} The same can be said of the Clean Air Act -- from its enactment until today the air quality in several major areas, including DC, has not improved. The Endangered Species Act was passed in 1973. Today, species have gone extinct and the list of animals needing protection has grown to over 17,000 animals, up from \_

\begin{footnotesize}
\begin{enumerate}
\item [\textsuperscript{110}] CITIZEN PARTICIPATION: EFFECTING COMMUNITY CHANGE (Edgar S. Cahn & Barry A. Passett eds., 1971)
\item [\textsuperscript{112}] Go through transcript and pull out key quotes and language: 
http://www.pbs.org/wgbh/pages/frontline/poisonedwaters/etc/tapes.html
\end{enumerate}
\end{footnotesize}
that were listed when the Act was enacted.\textsuperscript{113} Congress passed the Adoption Assistance and Child Welfare Act of 1980\textsuperscript{114} to remedy societal problems related to the foster care system and child welfare. Today, problems persist, and some would say the systems have continued to deteriorate.\textsuperscript{115}

Power is ubiquitous. Thus, it is no surprise that the “phenomenon” cuts across statutes and various legal disciplines.

PART VIII

VIII. A Way Out of the Conundrum -- Power-Based Solutions

No magic button to push and secret weapon to deploy will instantly restore affordable housing to DC or decrease power disparities among groups. Traditional approaches like legislation and litigation have not worked on the macro-level. Amendments to TOPA, like the amendment closing the 95-5 loophole, have not been enough to protect less powerful groups. Litigation with outcomes successful for low-income tenants like \textit{Van Ness}, \textit{Wilson Courts}, \textit{Medrano}, and \textit{Columbia Plaza}, have proven to be isolated victories while the majority of low-income tenants in DC were displaced. Therefore, power-based analysis and solutions are necessary and may achieve over time better results for marginalized groups in society.

\textsuperscript{113}“Over 17,000 species threatened by extinction  GENEVA (AP) — A rare Panamanian tree frog, a rodent from Madagascar and two lizards found only in the Philippines are among over 17,000 species threatened with extinction, a leading environmental group said Tuesday. The Rabb's fringe-limbed tree frog, only discovered four years ago, is one of 1,895 amphibian species that could soon disappear from the wild because of deforestation and infection, the International Union for Conservation of Nature said.”

\textsuperscript{114}Pub. L. No. 96-272

\textsuperscript{115}PROTECTING CHILDREN FROM UNNECESSARY FOSTER CARE PLACEMENTS BY REVIVING THE “REASONABLE EFFORTS” REQUIREMENT, by Matthew I. Fraidin, UDC-David A. Clarke School of Law.
Role of the Lawyer

Community lawyering is a concept pioneered by Gerald Lopez and Lucie White, among others, which was substantially influenced by Foucault’s concepts and ideas regarding power:

“[There was] considerable influence that French philosopher Michel Foucault’s conceptualization of power has had on U.S. theorists of lawyering for social change. Led by Professors Gerald Lopez [and] Lucie White [a] substantial literature has emerged in the past two decades urging progressive lawyers to reshape their lawyering practices to collaborate more closely with clients and community groups. Proponents of this model of activist law practice have often invoked Foucault and acknowledged that his ideas about power underlie and inform their visions of lawyering.”116

The movement in favor of community lawyering is in direct response to practitioners seeing the power dynamic play out over time against less powerful groups in society. It encourages a client-centered empowerment approach arguing for “lawyers, clients, and other community members [to] work together in non-hierarchical relationships to challenge existing systems of power.”117

Community lawyering is a step in the right direction. However, further steps are needed toward non-legal and power-based solutions. Lawyers that advise their client base that the legal system can’t solve their problems, and that the ability to use alternative problem solving or power-based solutions (force, coercion, influence, competent and legitimate authority or manipulation) may provide superior assistance to their client base. This does not negate the role of the community lawyer to help less powerful segments navigate the rules, regulations and laws of American society and inform the client base of their rights; rather, it calls for an expanded role that includes, as a priority, imparting an

understanding to the client base that the client base must seek to build its capacity to use power in their own interest.

During the 1990s “poverty law scholars and practitioners [engaged] in a lively debate about the relationship between law and social change. What [emerged was] a new community-based approach to progressive lawyering that combines legal advocacy and grassroots action [called law and organizing (LO lawyers)].”\textsuperscript{118} LO lawyers correctly “moved away from litigation strategies[.]”\textsuperscript{119} However, they did so to “focus on community based efforts[,]” specifically grassroots organizing campaigns and increasing the “primacy of mass mobilization and popular protest as the basis for political and economic change.”\textsuperscript{120} This tactic has “generated concrete benefits for poor communities[,]”\textsuperscript{121}

Yet, what LO lawyers have successfully leveraged is the concentrating characteristic of organization. Organization acts like a lens which concentrates, intensifies and focuses power. Accordingly, organization is a prerequisite for optimal efficiency in the usage of power. However, organization is not power. Therefore, while organization is very useful and is necessary, organization alone is not sufficient.\textsuperscript{122}

\textit{Role of Community Organizations}\textsuperscript{123}

\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} The distinction between community lawyers and LO lawyer while useful for this discussion in practice is usually false, and is better considered as a continuum on a spectrum towards a just society. In practice, there is overlap and both approaches are mutually supportive, not mutually exclusive.
\textsuperscript{123} Included in community organizations are “advocacy organizations within marginalized communities [or] Agencies of Transformational Resistance.” Agencies of Transformational Resistance, 55 Fla. L. Rev. 459 (2003).
With respect to power-based approaches, there has to be an understanding of how power is used by powerful groups in the United States and how less powerful groups can use their power to effectively bring about change in their interests. This understanding necessarily requires educational outreach that community and grass roots organizers can undertake with the ultimate goal of pointing less powerful groups and their advocates toward the road of amassing power, not just changing the law.\textsuperscript{124} This education component requires a shift in the way the law and legal rights are viewed, breaking away from the idea that the law is "the answer" for solving low-income residents’ problems; and explicitly moving towards the premise that the law may not always be useful in helping to solve problems. The shifting of the focus away from legal efforts towards power-based solutions is critical.\textsuperscript{125}

**Examples of Power-Based Approaches**

When considering power-based solutions, it is important to remember that once less powerful groups go down this path they will generate and implement self-originated power-based solutions. Lawyers must avoid leading client-generated solutions or run the risk of acting as co-opting agents hindering their clients.

**A. Economic Models**

\textsuperscript{124} Typically, lawyers are poorly suited for these task because “[a]ttorneys are usually not trained to deal with the non-legal aspects of social or economic problems or, for that matter, with any form of multi-dimensional problem-solving.” Community Lawyering: Revisiting the Old Neighborhood, 32 Columbia Human Rights Law Rev. 67, (2000).

\textsuperscript{125} The educational efforts would be in addition to the role community organizers play in the act of organizing itself; see generally, Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies, 28 N.Y.U. Rev. L. & Soc. Change 397 (2004).
Claud Anderson, former advisor to President Jimmy Carter, called for a power-based approach of vertically-integrated and community-controlled economics to bring about a more just society.\textsuperscript{126} Vertical integration is a concept closely linked with ethno-aggregation wherein a group employs an economic approach that requires its members to conduct business with each other and control every level of a product or service chain from accessing the raw material to consumer purchase of the finished product: “There is a commonly accepted rule in sociology that when ethnic groups are wedged in hierarchies of wealth, power, and privilege, competitive conflicts are inevitable . . . Vertical integration enables less powerful groups to be territorial and vertically mobile, placing their collective interests first and has the additional benefit of propelling them in an upward economic direction[].”\textsuperscript{127}

The vertical integration concept creates an alternative structure within which less powerful groups can collectively compete in a capitalist society. Additionally, “vertical integration serves as a mechanism for controlling every layer of business within that industry.”\textsuperscript{128} Anderson provides a basic example to illustrate this concept:

“…if Black manufacturers of Black hair care products form a vertical industry, it will be possible for them as well as other Black entrepreneurs to move up or down in the production, distribution and retail processes. They will be able to protect themselves by establishing control over the raw materials and manufacturing, and by building their own suppliers, distributors and retail outlets. They will also be able to collectively encourage and support independent Black suppliers and retail outlets.”\textsuperscript{129}

Other examples of economic power-based solutions are evidenced by some of the African groups in DC. Specifically, the Ethiopian community used a collective approach

\textsuperscript{126} CLAUD ANDERSON, ED.D. POWERNOMICS—THE NATIONAL PLAN TO EMPOWER BLACK AMERICA (2001).
\textsuperscript{127} CLAUD ANDERSON, ED.D. POWERNOMICS—THE NATIONAL PLAN TO EMPOWER BLACK AMERICA (2001).
\textsuperscript{128} Id.
\textsuperscript{129} Id.
called an *Esu-su* to finance several businesses between 9th and 11th and U streets N.W.; and the Nigerian community used a similar approach to finance several businesses on the Georgia Avenue, N.W. corridor. These undertakings involved a collective sharing of resources and rotating distribution. Influence as power was used within each respective group to ensure compliance with their financing rules. In addition, the organizations refused to view federally chartered and insured banks as the competent and legitimate authority for providing large sums of financing for business ventures. The businesses are still standing and functioning today, despite the gentrification of the prime real estate upon which both areas are located.

The Ethiopian area along DC’s famous U street corridor has had so much success that Ethiopians have been able to have the area officially designated as “Little Ethiopia.” “This neighborhood is our place, a place we can be proud of,” says Yared Tesfaye, who moved here with his brother from the Ethiopian capital Addis Ababa in 1994.130 Tesfaye and his brother started a restaurant for their mother at the corner of 9th and U St., NW, right in the heart of “Little Ethiopia.”131

B. Other Models

Examples of power-based approaches related to housing have transpired recently. One example is the use of coercion as power by a group of ordinary citizens against a more powerful group of corporate executives. In March of 2009, after American International Group (AIG) received a massive federal bailout, AIG executives awarded

129 *Id.*
131 *Id.*
themselves millions of dollars in bonuses. When this was announced, outraged citizens took to the streets demanding that these executives give the money back. While some protests were staged at AIG’s headquarters in New York City, several protesters hired buses and went directly to the lavish homes of the AIG executives in Fairfield County, Connecticut. The impact of taking the protests directly to the homes of the executives proved to be very effective. "It's scary," one executive said, speaking on condition of anonymity because he feared retribution. "People are very, very nervous for their security." The citizens’ effectiveness was almost instantaneous, when only days later, New York Attorney General Andrew Cuomo announced that 9 of the top 10 bonus recipients at AIG had given the money back. “Those bonuses will be returned in full,” he said. Using the power-based approach of coercion, ordinary citizens were successful in convincing executives to give back their bonuses, something that the executives were not legally obligated to do. Had the citizens instead petitioned the Attorney General to take legal action it is unclear as to their likelihood of success.

Another group was also successful in using coercion as power as a power based solution to a problem. Low and middle income homeowners have used their power to take on powerful bankers who are seeking to foreclose and evict them from their homes. In this case, a community organization has played an important role in the homeowners’ success. The Neighborhood Assistance Corporation of America (NACA) launched a Save the [American] Dream Tour. NACA is a non-profit, community advocacy and homeownership organization whose primary goal is to build strong, healthy neighborhoods in urban and rural areas nationwide through affordable homeownership.

132 Kathie Kroll, AIG bonus outrage has employees living in fear (2009), http://blog.cleveland.com/business/ 2009/03/aig_bonus_outrage_has_employee.html
Since the beginning of the ongoing sub-prime mortgage crisis, NACA has helped, and continues to help, thousands of people refinance predatory loans with far better terms than those provided even in the prime market. Bruce Marks, CEO of NACA, has used “guerilla tactics” to bring lenders to the table. Examples of guerilla tactics include dumping furniture on Greenwich Financial CEO William Frey's front lawn to make him feel the embarrassment of foreclosure. Marks and NACA have even gone so far as protesting at the schools of some executives' children. Summing up these guerilla tactics, Marks said, “We go into their gated communities, we go and we knock on their door and we say, we want you to meet the homeowners whom you're throwing out of their homes.”

NACA’s historic Save the Dream Tour has been incredibly successful, with over 350,000 participants in eleven cities and many thousands of homeowners receiving same day solutions. Most people have had their mortgage payments permanently reduced by over $500, and many by over $1,000, a month often with interest rates reduced to 3% or 2%, sometimes accompanied by a principal reduction. All of NACA’s services are free. These “guerilla tactics”-- using a coercive based power approach and not using the law -- have proven to be very successful in the wake of the recent financial crisis.

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133 Id.
134 Id.
136 See also, Petitioning and the Empowerment Theory of Practice, 96 Yale L.J. 569 (1987).
IX. Conclusion

It would be overreaching to state that the law does not matter or that the law has no role in social engineering to end oppression and injustice. The law does matter; it can have impacts that help less powerful individuals and it may even be an exercise of a groups’ power to get a law enacted. However, when less powerful groups rely upon the law or legal system they will discover that the law functions to increase the power of the more powerful group they were challenging. “[Ida B. Wells] didn’t last very long in the NAACP, and when you think about it, she would be a little suspect of an organization who would depend solely on the reform of law. She knew about the law. She was in Mississippi when the laws changed in front of her eyes.”137

TOPA, while not a “bad” law, is merely another in a long line of examples of the dynamic of the intersection of power and law at work in American society. If this society is to move towards a just society, less powerful groups must be encouraged to acquire power -- not just rights, laws, money, businesses, or political office – but most importantly power: “The goal for community lawyers should include assisting clients to create power [rather] than solely the creation or enforcement of rights or providing legal remedies[.]”138