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# The New Activist Non-Profits: Four Models Breaking from the Non-Profit Industrial Complex

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# **The New Activist Non-Profits: Four Models Breaking from the Non-Profit Industrial Complex**

MICHAEL HABER\*

*Twenty-first century activists—inspired by recent social movements and criticisms of the “non-profit industrial complex”—have increasingly sought to avoid pursuing their activism through the hierarchical, professionally managed non-profit corporations that have been the norm for social justice organizations since the 1970s. While many of these activist groups have chosen to remain unincorporated, some activists have been experimenting with new, innovative structures for non-profit organizations, structures that aim to better align activists’ organizations with their values. This Article presents four models of activist non-profits: (1) sociocratic non-profits, (2) worker self-directed non-profits, (3) hub-and-spoke counter-institutions, and (4) swarm organizations. It describes how these approaches increase volunteer participation, deepen organizational democracy, connect more closely with social movements, and aim to maintain accountability among and between organizational members and other stakeholders. It presents legal con-*

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*straints on the governance structures of these new organizations and concludes with a description of some best practices for these groups and their lawyers.*

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## INTRODUCTION

From the early nineteenth century through the 1950s and 1960s, American civic life was dominated by membership-led organizations that made little distinction between charity, civic participation, political activities, religious events, opportunities for socializing, and mutual aid and support for fellow members.<sup>1</sup> For over a century,

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<sup>1</sup> The earliest colonial settlers of North America formed associations ranging from large, quasi-governmental bodies to all sorts of local charitable and voluntary associations, including hospitals, fire departments, orphanages, and other groups. Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, STAT. INCOME BULL. 105 (2008), <https://www.irs.gov/pub/irs-soi/tehistory.pdf>; see THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE 30–40 (2003); see, e.g., PETER DOBKIN HALL, A HISTORY OF NONPROFIT BOARDS IN THE UNITED STATES 4 (2003) (ebook), <http://beech.ait.fredonia.edu/nfp/ReadingRoom/PDFs/BoardSource-AHistoryOfNonprofitBoardsInTheUnitedStates.pdf> (describing the Massachusetts Bay Company, a quasi-governmental corporation formed to help govern the new Massachusetts colony) [hereinafter HALL, NONPROFIT BOARDS].

By the 1830s, immigrants new to the United States from countries like Germany and Ireland formed their own social and voluntary associations, and the Roman Catholic Church began a network of churches, schools, orphanages, and other institutions to serve members. Peter Dobkin Hall, *Historical Perspectives on Nonprofit Organizations in the United States*, in THE JOSSEY-BASS HANDBOOK OF NONPROFIT LEADERSHIP AND MANAGEMENT 8 (David O. Renz ed., 4th ed. 2016) [hereinafter Hall, *Perspectives*]. Women's groups—commonly focused on funding missionary work, engaging in local charity, promoting temperance, distributing Bibles, and providing basic education, clothing and shoes to working children—appeared in towns and cities across the country, often led by the women of the most prominent local families. ANNE FIROR SCOTT, NATURAL ALLIES: WOMEN'S ASSOCIATIONS IN AMERICAN HISTORY 12–13 (1991) (describing women's associations). These associations were so prominent in U.S. civic life in the 1830s that the French statesman Alexis de Tocqueville would famously write:

Americans of all ages, all conditions, and all dispositions, constantly form associations. They have not only commercial and

it would not have been unusual for a single organization to provide charity for the poor, promote temperance in its local community, fund missionary work abroad, sponsor dinners and social events, support candidates for local office, and provide mutual aid to help members in need.<sup>2</sup> The groups organizing these diverse activities took a variety of forms: professionals and wealthy elites participated in business leagues and professional associations; workers joined labor unions and, sometimes, socialist or communist leagues; veterans joined veterans' groups; men across social and economic classes joined fraternal organizations including the Elks, Masons, Moose, and others; women joined women's federations and temperance groups; and African-Americans, Jews, Catholics, recent immigrants, and others joined fraternal, sororal, and religious associations that brought together members of their racial, ethnic, religious, or other identity group for varied activities and purposes, crossing later-hardened boundaries between charity, mutual benefit association, civic organization, social club, and political alliance.<sup>3</sup>

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manufacturing companies, in which all take part, but associations of a thousand other kinds, — religious, moral, serious, futile . . . . Whenever, at the head of some new undertaking, you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.

<sup>2</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 129–30 (Francis Bowen ed., Henry Reeve trans., Cambridge Univ. Press: Sever & Francis 1864) (1835).

<sup>2</sup> See SKOCPOL, *supra* note 1, at 78, 84–85, 112–13 (describing voluntary associations as places for socializing, building community, providing charity for widows and orphans, as well as mutual aid for the families of members, and as outlets for political involvement); see, e.g., SCOTT, *supra* note 1, at 13 (describing varied activities of women's voluntary associations).

<sup>3</sup> SKOCPOL, *supra* note 1, at 173. Skocpol largely overlooks the history of socialist and communist organizations that parallels the historical rise and fall of many of these other organizations between the late nineteenth century and the mid-twentieth century. This ignores the important history of labor and left-wing political organizations that also faded in prominence in the decades after World War II. See HARVEY KLEHR, *THE HEYDAY OF AMERICAN COMMUNISM: THE DEPRESSION DECADE* 384–85 (1984) (describing how the International Workers Order developed a membership of about 150,000 people, in addition to the membership of the Communist Party USA and the Socialist Party of America, which together had close to another 100,000 members).

But since the 1950s and 1960s, this universe of civic- and community-minded, multipurpose member-driven organizations has nearly disappeared.<sup>4</sup> There are multiple reasons for the decline of these groups: suburbanization;<sup>5</sup> women's entry into the workforce in greater numbers;<sup>6</sup> in the case of socialist and communist groups, the Second Red Scare of the 1940s and 1950s<sup>7</sup> and, by the 1970s, a growing disillusionment with the radical leftist party as a vehicle for social change;<sup>8</sup> the rapid decline of labor unions in the United States since the 1960s;<sup>9</sup> the feelings of anxiety, instability, and financial

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<sup>4</sup> SKOCPOL, *supra* note 1, at 174 (arguing that “[a] new civic America has thus taken shape since the 1960s, as professionally managed advocacy groups and institutions have moved to the fore, while representatively governed, nation-spanning voluntary membership federations—especially those with popular or cross-class memberships—have lost clout in national public affairs and faded from the everyday lives of most Americans”). There are a few notable exceptions of voluntary groups with local chapters that remain influential to some degree, like the National Rifle Association and Veterans of Foreign Wars. *Id.* at 153, 157.

<sup>5</sup> ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 210 (2000). Following World War II, many white people left cities for suburban communities, and, with that shift, tended to shift from commuting by mass transit to isolated transportation in cars, and from public entertainment like going to the movies and participation in civic life to private entertainment, especially watching television. Hall, *Perspectives*, *supra* note 1, at 21; PUTNAM, *supra*, at 211–14, 223.

<sup>6</sup> SKOCPOL, *supra* note 1, at 198–99; PUTNAM, *supra* note 5, at 194–95. Women, especially highly-educated women, were an important part of many voluntary associations, both those with all-women members and those open to both men and women. *Id.* at 203. As these women entered the private workforce in greater numbers, national civic organizations lost much of their skilled volunteer labor and, quickly, their power. *Id.*

<sup>7</sup> M.J. HEALE, *MCCARTHY'S AMERICANS: RED SCARE POLITICS IN STATE AND NATION, 1935–1965*, at 6 (1998) (describing the impact of the Second Red Scare).

<sup>8</sup> JODI DEAN, *CROWDS AND PARTY* 22–23 (2016) (arguing that “by the 1970s and ‘80s, . . . wide swathes of the Left had become convinced that the party form was no longer adequate to left aspirations” and attributing this change to “the stagnation and authoritarianism of the party-states of the former East; the complicity and betrayals of communist and socialist parties in the former West; [and] the failure of class analysis to address and include the politics of identity, particularly with respect to sex and race”).

<sup>9</sup> MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED*

pressure that increasingly became the norm for American working families since the 1970s and 1980s;<sup>10</sup> a generational shift in interest away from civic organizations among people coming into adulthood in the 1970s and later;<sup>11</sup> organizations tied to the civil rights movement, feminist movement, and other social movements of the 1960s moving away from mass-membership advocacy models;<sup>12</sup> the rise of private foundations and the related shift toward the dominance of more sophisticated, centralized non-profit management;<sup>13</sup> changes

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STATES 17 (1987) (noting that while some public sector unions have made gains, there was a “substantial absolute decline . . . in union membership in the private sector during the two decades from 1960 to 1980”); NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 16 (2002) (describing organized labor as one-third as strong as it was in 1953, and only one-fourth as strong in the private sector).

<sup>10</sup> PUTNAM, *supra* note 5, at 189.

<sup>11</sup> *Id.* at 255.

<sup>12</sup> Hall, *Perspectives*, *supra* note 1, at 21 (citing SKOCPOL, *supra* note 1, at 136–38). The civil rights movement, feminist movement, and other social movements of the 1960s were the efforts of new alliances between grassroots protesters, radical activists, and progressive, policy-oriented groups. *Id.* at 138. Often, the organizations playing leading roles in these movements “were not membership associations at all. They were small combinations of nimble, fresh-thinking, and passionate advocates of new causes.” *Id.*

<sup>13</sup> Hall, *Perspectives*, *supra* note 1, at 19–20. Even before this, Andrew Carnegie, one of the richest men in America, was deeply concerned about socialist and other radical activism in the 1870s and 1880s, including the rise of labor union militancy, the national railroad strike, the riots of 1877, and the 1886 campaign for a ten-hour workday that culminated in the Chicago Haymarket bombing that killed twelve policemen. Hall, *Perspectives*, *supra* note 1, at 11–12. Carnegie wrote a series of influential articles in the 1880s that urged his fellow industrialist millionaires to reinvest their money in social goods to help eliminate this economic strife, writing that these new capitalist elites were men with a “genius for affairs” who should use that genius to help ameliorate social ills, rather than funding traditional charity. *Id.*; see ANDREW CARNEGIE, *The Gospel of Wealth, in THE GOSPEL OF WEALTH, AND OTHER TIMELY ESSAYS* 15 (1901). As more and more of the new class of incredibly wealthy industrialists formed charitable trusts and, later, private foundations, it became increasingly common for businesspeople to dominate the Boards of Directors of universities, private foundations, and the new, large charities that formed in the early twentieth century like the Red Cross and Community Chest (which later became United Way). HALL, NONPROFIT BOARDS, *supra* note 1, at 18–19; Hall, *Perspectives*, *supra* note 1, at 12.



in non-profit law and regulation that required additional sophistication from non-profit Boards;<sup>14</sup> a new attention to the mechanics of how to lead a successful non-profit, which led to a greater focus on having education and sophistication among non-profit leadership,<sup>15</sup> and the growth of a unique welfare state that increasingly relied on state-funded non-profit organizations to provide social safety net

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<sup>14</sup> Groups that were “organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which insures to the benefit of any private stockholder or individual” had been exempt from tax since the Revenue Act of 1909, and deductions for charitable contributions had been offered since the Revenue Act of 1917. Arnsberger et al., *supra* note 1, at 107. But by the 1950s and 1960s, a struggle over the business activities of non-profits resulted in both a liberalizing of state non-profit corporate laws and an increased emphasis on regulation through the IRS. *Id.* Federally, through the Revenue Act of 1950, which limited tax-exempt organizations in their abilities to earn unrelated business income, and the Tax Reform Act of 1969, which created a new regime of registration, reporting, and accountability for non-profits, tax law created a new need for tax-exempt entities to hire lawyers and accountants to manage their legal and fiscal compliance. *Id.* at 107–08; HALL, NONPROFIT BOARDS, *supra* note 1, at 21. At the same time, state law began to allow for new business activities. The influential Model Nonstock Corporation Statute was first released by the American Bar Association in 1964 and “permitted the establishment of nonprofits for any legal purpose – rather than restricting them to charitable, educational, and religious” purposes. HALL, NONPROFIT BOARDS, *supra* note 1, at 22. Both in states that adopted the model statute and in others that were simply influenced by the general trend toward liberalizing the rules on permitted non-profit practices, it became increasingly the norm that non-profits could engage in almost any activity that a business could, except for the distribution of their profits to owners. *Id.* Whether a non-profit was seeking to engage in business-like activities to enhance its revenue or simply trying to continue as a traditional charity in this new regime, this new regulatory landscape required additional sophistication from non-profit leadership. *Id.*

<sup>15</sup> During the Great Depression, President Herbert Hoover promoted voluntary organizations and helped to popularize citizen participation in chambers of commerce, trade associations, service clubs, and other civic groups. HALL, NONPROFIT BOARDS, *supra* note 1, at 19–20. This emphasis led to a new interest in efforts at educating Boards of Directors to improve their governance, leading to a “virtual explosion of interest in governance in specialized journals” and a new focus on managerial professionalism for non-profits. *Id.* at 20–21.

services, which led to the expansion of professional staff to manage those programs.<sup>16</sup>

By the 1970s, a more centralized and hierarchical model emerged as the new standard for non-profit organizations.<sup>17</sup> The new model would come to be marked by several common features: a reliance on grants, contracts, and earned income, rather than member contributions to fund operations;<sup>18</sup> a diminished role for members, or the elimination of members entirely, with organizational direction set by small and commonly self-perpetuating Boards of Directors;<sup>19</sup> a sophisticated, professional staff, led by professional non-profit managers typically supported by policy experts, communications specialists, fundraising professionals, and lobbyists;<sup>20</sup> a shift in power from members and Boards to staff as non-profits looked to business management models in which insider Boards often rubber-stamp the decisions of sophisticated employee leadership;<sup>21</sup> and a focus on providing specific services or engaging in advocacy, lobbying, and public education on specific social or political issues, rather than on broadly promoting socializing, mutual support, and civic participation among group members.<sup>22</sup> As this new, professionalized model came to dominate the non-profit sector, it became increasingly easy or desirable to start U.S. non-profit organizations, and even as participation in membership-driven organizations dwindled, the number of U.S. non-profit organizations skyrocketed.<sup>23</sup>

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<sup>16</sup> Following World War II, the American welfare state began to expand, but did so not through centralized bureaucracies coordinating universal programs, but largely through providing funds to state and local programs, direct grants to organizations, and indirect subsidies for charitable giving, increasing the need for trained managers, skilled in budgets and staffing, and able to meet the complex demands of external funders. *Id.* at 21.

<sup>17</sup> *Id.* at 21–22.

<sup>18</sup> *Id.*; James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 665 (1985).

<sup>19</sup> See HALL, NONPROFIT BOARDS, *supra* note 1, at 21–22; Fishman, *supra* note 18, at 669–70.

<sup>20</sup> SKOCPOL, *supra* note 1, at 224.

<sup>21</sup> HALL, NONPROFIT BOARDS, *supra* note 1, at 22.

<sup>22</sup> SKOCPOL, *supra* note 1, at 224–26.

<sup>23</sup> The number of secular, charitable tax-exempt organizations grew from

Just as this professionalized non-profit model came to dominate non-profit organizations in general, it has become the dominant model for social justice and activist organizations since the 1960s or 1970s, both for organizations that engage in strategic advocacy through lobbying, litigation, and other systemic change initiatives,<sup>24</sup> and for community-based organizations that work to make bottom-up change through service provision, community organizing, and grassroots advocacy.<sup>25</sup> But by the early 2000s, grassroots activists started to become increasingly vocal in their criticisms of the professionalized non-profit model as the vehicle for social justice activism, coming to label the entire framework of these organizations—from their corporate hierarchy to their treatment of staff, fundraising models, and lack of robust community participation—the “non-profit industrial complex.”<sup>26</sup> These activists argue that professionalized non-profits cannot meaningfully engage in confrontational grassroots community activism and politicized service provision aimed at social change while also fundraising, complying with government regulations, and appeasing grantors.<sup>27</sup> They argue that a series of interrelated structural problems doom professionalized non-

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50,000 in 1950 to more than 250,000 by the mid-1960s, and more than 1 million by the mid-1980s. HALL, *NONPROFIT BOARDS*, *supra* note 1, at 21. By 2010, there were an estimated 2.3 million non-profit organizations in the United States. AMY S. BLACKWOOD ET AL., *THE NONPROFIT SECTOR IN BRIEF: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING*, 2012, at 1 (2012), <https://www.urban.org/sites/default/files/publication/25901/412674-The-Nonprofit-Sector-in-Brief-Public-Charities-Giving-and-Volunteering-.PDF>.

<sup>24</sup> See *supra* notes 12–21 and accompanying text.

<sup>25</sup> Michael Haber, *CED After #OWS: From Community Economic Development to Anti-authoritarian Community Counter-institutions*, 43 *FORDHAM URB. L.J.* 295, 307–09 (2016).

<sup>26</sup> *Id.* at 316; SYLVIA RIVERA LAW PROJECT, *FROM THE BOTTOM UP: STRATEGIES AND PRACTICES FOR MEMBERSHIP-BASED ORGANIZATIONS* 3 (2013), [https://srlp.org/wp-content/uploads/2013/05/SRLP\\_From\\_The\\_Bottom\\_Up.pdf](https://srlp.org/wp-content/uploads/2013/05/SRLP_From_The_Bottom_Up.pdf) [hereinafter *SRLP, FROM THE BOTTOM UP*]. See generally Andrea Smith, *Introduction* to *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX* 8–13 (INCITE! ed., 2007) [hereinafter *THE REVOLUTION WILL NOT BE FUNDED*].

<sup>27</sup> Haber, *supra* note 25, at 316. See generally *THE REVOLUTION WILL NOT BE FUNDED*, *supra* note 26.

profits to fail in their social justice missions<sup>28</sup>: (1) their corporate structures necessitate leadership by full-time, professional staff, which leads to a need for grant funding that rewards depoliticized service provision and disfavors mass mobilization, civil disobedience, and public support for issues that could be controversial for the donor class;<sup>29</sup> (2) their reliance on foundation funding forces organizations to shift their attention and resources from organizing for social change to compliance and appeasing grantors;<sup>30</sup> (3) their need for professional staff to raise funds and satisfy grantors ends up minimizing community control over their own struggles;<sup>31</sup> and (4) their deep dependence on 501(c)(3) tax exemption for building their programs reflects complicity with federal policies that principally aim to benefit the wealthy and powerful, not low-income communities of color or other disenfranchised groups.<sup>32</sup>

The activists launching these criticisms come out of different contexts, but they are generally connected by a set of three shared “anti-authoritarian”<sup>33</sup> beliefs that have become influential political values among twenty-first century activists: (1) *autonomy*, a commitment to freedom and democratic governance, and an opposition

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<sup>28</sup> Haber, *supra* note 25, at 316; Smith, *supra* note 26, at 9.

<sup>29</sup> Haber, *supra* note 25, at 316; *see generally* Paul Kivel, *Social Service or Social Change?*, in *THE REVOLUTION WILL NOT BE FUNDED*, *supra* note 26, at 148.

<sup>30</sup> Haber, *supra* note 25, at 316; *see* Ruth Wilson Gilmore, *In the Shadow of the Shadow State*, in *THE REVOLUTION WILL NOT BE FUNDED*, *supra* note 26, at 47.

<sup>31</sup> Haber, *supra* note 25, at 316; *see* Christine E. Ahn, *Democratizing American Philanthropy*, in *THE REVOLUTION WILL NOT BE FUNDED*, *supra* note 26, at 66–68.

<sup>32</sup> Haber, *supra* note 25, at 316; *see* Dylan Rodriguez, *The Political Logic of the Non-Profit Industrial Complex*, in *THE REVOLUTION WILL NOT BE FUNDED*, *supra* note 26, at 37.

<sup>33</sup> The term “anti-authoritarian” is only occasionally used by these activists themselves but is a useful label for describing a broad philosophical trend among social change activists. Haber, *supra* note 25, at 320.

to authoritarianism and hierarchy, including an opposition to extractive capitalism and authoritarian government power;<sup>34</sup> (2) *horizontalism*, a commitment to opposing and overcoming the marginalization of people of color, women, LGBTQ people, people with disabilities, and other marginalized groups, and a belief that social structures, relationships, and communication must strive to be more inclusive, democratic, and horizontally organized;<sup>35</sup> and (3) a belief that activism must be *prefigurative*, that the processes used in organizing and building a social movement and its infrastructure must already be constructing the world they want to see.<sup>36</sup>

The turn of the twenty-first century has seen a flowering of interest in new conceptual frameworks for social change activism

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<sup>34</sup> *Id.* at 322. Anti-authoritarian activists use the term autonomy to distinguish themselves from the government, corporations, and other institutions that are centralized and hierarchical; the term implies self-organization, direct democracy unmediated by representatives, and the principle that no person, group, or political party should mandate what another person must do. *See* GEORGY KATSIAFICAS, *THE SUBVERSION OF POLITICS: EUROPEAN AUTONOMOUS SOCIAL MOVEMENTS AND THE DECOLONIZATION OF EVERYDAY LIFE* 6–7 (2006); MARINA SITRIN, *Introduction to HORIZONTALISM: VOICES OF POPULAR POWER IN ARGENTINA* 4 (2006).

<sup>35</sup> Haber, *supra* note 25, at 322–23. Anti-authoritarian activists believe that interpersonal relationships are affected by the power dynamics of hierarchy and that these power dynamics impact how people relate to one another in their everyday lives. *See* SITRIN, *supra* note 34, at 3–4. Horizontalism describes efforts to structure relationships, both interpersonal relationships and the relationships among members of an organization or social movement, in ways that fight against hierarchy so that people can work toward a truer solidarity. CHRIS DIXON, *ANOTHER POLITICS: TALKING ACROSS TODAY’S TRANSFORMATIVE MOVEMENTS* 88–89 (2014).

<sup>36</sup> Haber, *supra* note 25, at 323–24. “Unlike past [social] movements, social change is not deferred to a later date by demanding reforms from the state” until bigger changes can come when the time is finally right. SITRIN, *supra* note 34, at 4. The goal is to change the world by making changes to ourselves and our ways of relating to each other, the slow creation of a culture of true democracy. *See* DAVID GRAEBER, *THE DEMOCRACY PROJECT: A HISTORY, A CRISIS, A MOVEMENT* 196 (2013). It is finding a way to “[c]hange the world without taking power.” *See generally* JOHN HOLLOWAY, *CHANGE THE WORLD WITHOUT TAKING POWER* 10 (2002).

springing out of a variety of theoretical, political, or practical perspectives influenced by these anti-authoritarian principles: the Occupy Movement and important parts of the Movement for Black Lives,<sup>37</sup> the solidarity economy movement,<sup>38</sup> “transformative” organizing models,<sup>39</sup> activist efforts to protect and expand the commons and the related rise in interest in the economist Elinor Ostrom, known for her analysis of the commons,<sup>40</sup> and experiments with libertarian-socialist municipalism and confederalism.<sup>41</sup>

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<sup>37</sup> Haber, *supra* note 25, at 338–45, 352–59.

<sup>38</sup> See Michelle Williams, *The Solidarity Economy and Social Transformation*, in *THE SOLIDARITY ECONOMY ALTERNATIVE: EMERGING THEORY AND PRACTICE* 46, 43–51 (Vishwas Satgar ed., 2014) (distinguishing the “social economy,” non-profits, social enterprises, and cooperatives that “seek to achieve limited, progressive change within the confines of the current social order by ameliorating the effects of market failure, unemployment and poverty” from the “solidarity economy” that is defined by its “transformative vision of society based on democratic self-management, redistribution, solidarity and reciprocity”).

<sup>39</sup> See STEVE WILLIAMS, *DEMAND EVERYTHING: LESSONS OF THE TRANSFORMATIVE ORGANIZING MODEL 2* (Stefanie Ehmsen & Albert Scharenberg eds., 2013), [http://www.rosalux-nyc.org/wp-content/files\\_mf/williams\\_transformative\\_organizing.pdf](http://www.rosalux-nyc.org/wp-content/files_mf/williams_transformative_organizing.pdf) (describing community organizing efforts that aim to foreground structural political problems and promote internal organizational democracy instead of relying on transactional concessions on local issues).

<sup>40</sup> See DAVID BOLLIER, *THINK LIKE A COMMONER: A SHORT INTRODUCTION TO THE LIFE OF THE COMMONS* 14 (2014) (stating that the revived commons movement is important as “a practical paradigm for self-governance”); DEREK WALL, *ELINOR OSTROM’S RULES FOR RADICALS: COOPERATIVE ALTERNATIVES BEYOND MARKETS AND STATES* 15–16 (2017) (arguing that economist Elinor Ostrom, while not a political radical, “was unambiguously an advocate of deeper democracy, ecological concern and social equality” and that her scholarship on the effective management of the commons “points to a practical politics that can focus our efforts to change society for the better”).

<sup>41</sup> See generally KALI AKUNO & AJAMU NANGWAYA, *Foreword* to JACKSON RISING: THE STRUGGLE FOR ECONOMIC DEMOCRACY AND BLACK SELF-DETERMINATION IN JACKSON, MISSISSIPPI, at xiii (2017) (describing the efforts of Cooperation Jackson to develop grassroots municipalism in Jackson, Mississippi); JOHN MICHAEL COLÓN ET AL., *COMMUNITY, DEMOCRACY, AND MUTUAL AID: TOWARD DUAL POWER AND BEYOND* 2 (2017), [https://thenextsystem.org/sites/default/files/2017-07/Symbiosis\\_AtLargeFirst-corrected-2.pdf](https://thenextsystem.org/sites/default/files/2017-07/Symbiosis_AtLargeFirst-corrected-2.pdf) (presenting a model for activism designed to encourage the development of participatory community institutions); Alexander Kolokotronis, *Is America Ready for a Municipalist Movement?*,

These activists do not universally want or need tax exemption or non-profit corporate entities through which to conduct their work, but—informed by anti-authoritarian principles, inspired by the growth of the solidarity economy and commons movements, and attuned to the critiques of the non-profit industrial complex—when their projects could benefit from incorporation or tax exemption, they have started to build organizations that reimagine the professionalized non-profit, creating corporate forms that pose conceptual shifts no less substantial than the mid-twentieth century shift away from the multipurpose, member-driven organizational model.

The groups adopting these new non-profit corporate structures share the belief that professionalized non-profits fail to be as open, egalitarian, or cooperative as they should be, and that groups that aim to make the world a better place should care about operating in ways that are consistent with their visions for the world they want to see. These new organizations face the unique legal, practical, and philosophical challenges of seeking to remain true to their principles—often including their skepticism about non-profit corporate forms—while simultaneously navigating the issues facing any non-profit start-up: how to define their work, how to structure their organizations, how to fund their programs, questions about tax exemption, and concerns about liability and risk. As they have started to navigate these challenges, these organizations have developed new models for non-profit structures and procedures, models that turn away from the professionalized non-profit, both looking back to the earlier tradition of multipurpose, membership-driven organizations and looking ahead to a more democratic and inclusive future.

This Article describes four organizational structures for non-profit organizations that depart radically from the professionalized non-profit framework. Part I describes non-profits embracing *sociocracy*, first developed as a practical organizational form at a Dutch

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ROAR (Nov. 27, 2016), <https://roarmag.org/essays/us-anti-fascism-municipalism/> (describing a model of collective self-governance based on the thinking of “communalist” writer Murray Bookchin, in which directly democratic neighborhood assemblies provide local coalitions a measure of self-government and leverage their collective power in a federation).

engineering firm in the 1970s before coming to influence innovative businesses and non-profits around the world since the late 1990s. Part II analyzes *worker self-directed non-profits*, which developed out of the recent surge in interest in worker-owned cooperatives and the broader solidarity economy movement. Part III describes *hub-and-spoke* or *spokescouncil governance*, which grew out of anti-authoritarian political organizing models that become popular among activists in the late 1990s and early 2000s. Part IV describes non-profit *swarm organizations*, a model largely influenced by the tech entrepreneur who founded the Swedish Pirate Party. Part V describes some of the primary legal concerns for groups adopting these new models, and Part VI concludes by proposing some best practices for activists and lawyers when considering these models.

### I. SOCIOCRATIC NON-PROFITS

Non-profits have been experimenting with sociocracy since the 1990s, although the concept of sociocracy is not at all new. The term “sociocracy” was first used in the mid-nineteenth century by the French positivist philosopher Auguste Comte and then expanded on at the turn of the twentieth century by pioneering U.S. sociologist Lester Frank Ward; both used the term to refer to forms of self-governance among groups of people who share social bonds.<sup>42</sup> Decades

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<sup>42</sup> JOHN A. BUCK & GERARD ENDENBURG, *THE CREATIVE FORCES OF SELF-ORGANIZATION* 3 (4th ed. 2012), [http://thesociocracygroup.com/wp-content/uploads/2014/12/CreativeForces\\_9-2012\\_web.pdf](http://thesociocracygroup.com/wp-content/uploads/2014/12/CreativeForces_9-2012_web.pdf); *A Brief History*, SOCIOCRACY 3.0, <https://sociocracy30.org/a-brief-history/> (last visited Mar. 21, 2019). Comte described sociocracy as a perfect society not led by monarchs or the church, but by a central government of social scientists with the participation of all in a society. *See id.* at 3–4. Ward was influenced by Comte’s social positivism, but, like Thomas Hobbes and Herbert Spencer, he understood the state through an analogy, as a living organism akin to an individual human. *See* LESTER FRANK WARD, *THE PSYCHIC FACTORS OF CIVILIZATION* 121–24 (1892) (describing and distinguishing his thinking from the work of Spencer and Comte). Ward argues that democratic states rely on a majoritarian fiction, the idea that the will of the people is somehow expressed by “the majority of qualified electors, no matter how small that majority may be” and believed that a sociocratic government could eliminate partisanship by having government always do “under the same circumstances just what an intelligent individual would do.” *Id.* at 327.



later, Kees Boeke, a Dutch polymath influenced by Comte and Ward, tried to implement their theories in an educational setting when he founded a private Quaker school called *Werkplaats Kindergemeenschap* (the Children's Community Workshop) in 1926.<sup>43</sup> Although influenced by the earlier theorists of sociocracy, Boeke's model departs little from traditional Quaker practices of self-governance, aiming for groups within his school to collectively and unanimously make decisions that would then bind all members of the group to honor and act in furtherance of those decisions.<sup>44</sup> One of the young students at the school was Gerard Endenburg, who, decades later, would develop his childhood experience at Boeke's school into the four principles that form the core of sociocratic organizations today.<sup>45</sup>

Section I.A presents a brief history of Endenburg's career and how he came to develop modern sociocracy at his engineering firm, and introduces the four principles of sociocracy that Endenburg developed as the core of sociocratic governance. With that background, Section I.B describes some of the varied ways that the sociocratic model has been modified and experimented with by different non-profit organizations, and highlights how sociocracy has been implemented by one member-driven activist non-profit.

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<sup>43</sup> JOHN A. BUCK & SHARON VILLINES, *WE THE PEOPLE: CONSENTING TO A DEEPER DEMOCRACY* 34–36 (2007). The school was organized around Boeke's interpretation of sociocratic principles and Quaker practices; it would become a hub of Dutch resistance to Nazi Germany, educating Jewish teenagers fleeing Germany and helping to smuggle Jews out of Nazi-occupied territory. *Id.*

<sup>44</sup> Kees Boeke, *Sociocracy: Democracy as It Might Be*, in BUCK & VILLINES, *supra* note 43, at app. B at 191, 193 (2007); see BUCK & VILLINES, *supra* note 43, at 36–38 (describing the influence of Quaker practices on his school). In Boeke's framing of sociocracy, there were three core rules for decision-making: (1) the interests of all members must be considered, with individual members deferring to the interests of the group; (2) decisions must be ones that all members can accept, or else no action can be taken; and (3) all members must be ready to act in furtherance of a decision when unanimously made. *Id.*

<sup>45</sup> See BUCK & VILLINES, *supra* note 43, at 39–47.

A. *Gerard Endenburg and the Development of the Four Principles of Sociocracy*

Endenburg was the son of Dutch pacifists who founded a successful Rotterdam-based engineering firm, Endenburg Electrotechniek B.V. (“Endenburg Electric”).<sup>46</sup> After attending Boeke’s school, going to college, and serving in the military, Endenburg worked as an engineer at Philips Electronics, where he was far more focused on technology and the applied sciences than pacifism, Quakerism, or the theories of Comte and Ward.<sup>47</sup> But when his parents invited him to become the new general manager of Endenburg Electric in the late 1960s, Endenburg began an intensive, systematic analysis of management techniques, bringing his interests in cybernetics, systems thinking, and game theory to understanding firm management.<sup>48</sup> He chose to cap the company’s growth in order to turn attention away from profit-maximization and toward innovation, promoting entrepreneurialism among the workers, and experimenting with business structures.<sup>49</sup> He considered turning Endenburg Electric into a worker-owned cooperative, but felt that cooperatives were inherently bound to struggle with management and capitalization, so he instead developed an employee compensation and profit-distribution structure that involved both fixed and variable compensation for the company’s workers, managers, and investors, a model that aimed to weaken the power of outside investors<sup>50</sup> while encouraging workers to be entrepreneurial and take responsibility for the success of the business.<sup>51</sup>

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<sup>46</sup> JACK QUARTER, *BEYOND THE BOTTOM LINE: SOCIALLY INNOVATIVE BUSINESS OWNERS* 54 (2000).

<sup>47</sup> BUCK & VILLINES, *supra* note 43, at 38.

<sup>48</sup> *Id.* at 40–41.

<sup>49</sup> A. Georges L. Romme, *Domination, Self-Determination and Circular Organizing*, 20 *ORG. STUD.* 801, 810 (1999).

<sup>50</sup> *Id.* at 815–16.

<sup>51</sup> BUCK & VILLINES, *supra* note 43, at 41–42. After more than a decade leading Endenburg Electric, Endenburg ultimately transferred his ownership stake in the company to a holding company to be purchased by the company’s workers over a ten-year period, and became the director of an organization called *Socioc-*

Most influentially,<sup>52</sup> Endenburg sought to promote more democratic group decision-making within the firm through what he called

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*ratisch Centrum* (Sociocratic Center), which promotes the sociocratic model internationally. QUARTER, *supra* note 46, at 55–56. Notably, one reason for his departure was his frustration with Endenberg Electric’s unionized labor force, which he felt harmed the entrepreneurial spirit of the company’s workers, and he sought to make all of the workers into owners in part to change this dynamic. *Id.* at 55.

<sup>52</sup> Beyond the dozens of businesses and non-profits that have adopted sociocratic principles, Endenburg’s model would be a major influence on more popular management trends, and the four principles form the backbone of some of the most widely discussed trends in management theory of the 2010s, including Teal Organizations and Holacracy. Teal Organizations aim to have their business structures operate like ecosystems, based on the principles of: (1) *self-management* rather than top-down hierarchy or consensus; (2) personal *wholeness* of workers, inviting workers to not come to the workplace with only a narrow “professional” self but also to remain in touch with their emotional and intuitive selves; and (3) *evolutionary purpose*, recognizing that the group entity has a direction of its own that it wants to serve. FREDERIC LALOUX, *REINVENTING ORGANIZATIONS: A GUIDE TO CREATING ORGANIZATIONS INSPIRED BY THE NEXT STAGE OF HUMAN CONSCIOUSNESS* 55–57 (2014). Teal Organizations also developed the idea of the “advice process,” an influential variation on Consent processes. The idea is that for certain kinds of decisions, a person can make a decision on his or her own, but only after seeking advice from both people who will be meaningfully affected by the decision and from people with expertise in the matter; advice must be sought, but it is up to the decision-maker whether or not to modify her approach based on that advice. *See Decision Making*, REINVENTING ORG. WIKI, [http://www.reinventingorganizationswiki.com/Decision\\_Making](http://www.reinventingorganizationswiki.com/Decision_Making) (last visited Feb. 1, 2019); *Rebellious Practices: Make Better Decisions with the Advice Process*, CORP. REBELS (Jan. 11, 2017), <https://corporate-rebels.com/advice-process/>.

Holacracy has received significant attention from the business press and has been implemented by Zappos.com and, for a period of time, the online publishing platform Medium. *See, e.g.,* Ethan Bernstein et al., *Beyond the Holacracy Hype*, HARV. BUS. REV., July–Aug. 2016, at 38, 40, <https://hbr.org/2016/07/beyond-the-holacracy-hype>; Andy Doyle, *Management and Organization at Medium*, MEDIUM (Mar. 4, 2016), <https://blog.medium.com/management-and-organization-at-medium-2228cc9d93e9>; Adam Pisoni, *Here’s Why You Should Care About Holacracy*, FIRST ROUND REV., <https://firstround.com/review/heres-why-you-should-care-about-holacracy> (last visited Feb. 25, 2019); Marcus Wohlsen, *The Next Big Thing You Missed: Companies That Work Better Without Bosses*, WIRED (Jan. 7, 2014), <https://www.wired.com/2014/01/holacracy-at-zappos>. Holacracy has proven influential with certain high-tech firms, as it aims to mirror the

the “four principles” of sociocracy: (1) policy decisions are made by Consent, “the absence of any ‘reasoned objections’” to a proposal by members of a decision-making group; (2) Consent decisions are made largely in self-managed, semi-autonomous groups called Circles; (3) while the decision-making process within a Circle aims to be egalitarian, the Circles themselves are in a hierarchical relationship with one another, connected up and down the hierarchy through “double links,” representatives from lower and higher Circles who participate in the Circle; and (4) people within a Circle are selected for specific functions and tasks by the Consent of the members of the Circle after an open discussion.<sup>53</sup>

### 1. CONSENT

Influenced by his experience at Boeke’s school, but recognizing that obtaining unanimous consensus<sup>54</sup> in large groups can be nearly

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flexibility of the trend toward Agile software development through bringing together elements of Agile development and sociocracy, including sociocracy’s hierarchy of Circles and double-linking between those Circles. Pepijn van de Kamp, *Holacracy—A Radical Approach to Organizational Design*, in ELEMENTS OF THE SOFTWARE DEVELOPMENT PROCESS—INFLUENCES ON PROJECT SUCCESS AND FAILURE 13, 19–20 (2014). See generally BRIAN J. ROBERTSON, *HOLACRACY: THE NEW MANAGEMENT SYSTEM FOR A RAPIDLY CHANGING WORLD* 3, 12–13 (2015); *Holacracy Constitution*, *HOLACRACY* (June 2015), <http://www.holacracy.org/constitution>.

Less popular than Teal Organizations and holacracy is another management model called Sociocracy 3.0, which expands Endenburg’s four principles into a new list of seven principles: (1) effectiveness (devoting time only to your objectives); (2) consent (asking for and resolving any objections before approving decisions); (3) empiricism (“test[ing] all assumptions through experimentation”); (4) continuous improvement (“chang[ing] incrementally to accommodate steady empirical learning”); (5) equivalence (allowing people affected by decisions to influence and change them); (6) transparency (making information available to all in the organization absent reasons for confidentiality); and (7) accountability (responding and taking ownership for the course of the organization as a whole). BRIAN BOCKELBRING ET AL., *SOCIOCRACY 3.0 – A PRACTICAL GUIDE* 20–21 (2019) [http://sociocracy30.org/\\_res/s3-all-patterns-explained.pdf](http://sociocracy30.org/_res/s3-all-patterns-explained.pdf).

<sup>53</sup> QUARTER, *supra* note 46, at 53–54; BUCK & VILLINES, *supra* note 43, at 44–46.

<sup>54</sup> Romme, *supra* note 49, at 810 (stating that Endenburg believed “consen-

impossible, Endenburg developed a process for collaborative decision-making based on what he saw as a technical or quasi-scientific idea of “Consent.”<sup>55</sup> For Boeke, the pacifist Quaker, once members of a group have trust and respect for one another, decisions can be made peacefully and with unanimity; in contrast, Endenburg’s idea of Consent looked at decision-making in his business as machine-like—rather than grounding decision-making on mutual trust and respect, the firm-as-machine needs only to have all parts working well enough that the machine does not break down.<sup>56</sup> Where the Quaker consensus model requires all participants to affirmatively agree in order to take group action, Endenburg’s Consent process simply requires that no participant give a “reasoned objection” to a proposal.<sup>57</sup> The process is meant to foster a dialogue in which the participants attempt to arrive at a position all can accept, rather than forcing those who would lose a majority vote to acquiesce to a position they find intolerable.<sup>58</sup> In Endenburg’s model, sociocratic organizations do not need to go through a Consent process for routine decisions, but there must be Consent for decisions on larger policy issues.<sup>59</sup>

The Consent process follows a series of formal steps. First, a person or group will generate a proposal, typically in a written draft prepared and circulated for comment prior to the meeting at which it is to be discussed. At that meeting, the group goes through four steps: (1) *presentation* of the proposal; (2) a *clarifying round*, in which only clarifying questions are asked about the proposal; (3) a

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sus” meant the Quaker principle of “full agreement to consent,” or the total “absence of any argued objection”). The division between consensus and Consent articulated by Endenburg is no longer such a clear distinction. Many activist groups today use the term consensus to mean something close to what Endenburg calls Consent. See Haber, *supra* note 25, at 334 (describing the consensus process used in the Occupy Wall Street movement, in which consensus was supposed to be blocked only in the rare situation where a participant had a serious moral, ethical, or safety concern about a proposal).

<sup>55</sup> BUCK & VILLINES, *supra* note 43, at 42–43.

<sup>56</sup> See *id.* at 43; QUARTER, *supra* note 46, at 57.

<sup>57</sup> BUCK & ENDENBURG, *supra* note 42, at 6; Romme, *supra* note 49, at 810.

<sup>58</sup> QUARTER, *supra* note 46, at 57; Romme, *supra* note 49, at 811.

<sup>59</sup> BUCK & ENDENBURG, *supra* note 42, at 6.

*quick reaction round*, in which quick feedback is solicited about the proposal, and adjustments made based on these reactions if all agree; and (4) the *Consent* process, in which all members of the group are asked if they have any reasoned objections and, if so, listing them in writing and then seeking to resolve each one through dialogue and amendments to the proposal, or else rejecting the proposal.<sup>60</sup>

## 2. CIRCLES

Endenburg also moved away from a conventional governance and management structure to spread authority to a broader range of workers through the use of “Circles,” decision-making bodies for people from different job functions and levels of seniority to make joint policy decisions in their areas of responsibility.<sup>61</sup> Although Circles are democratic forums when making decisions on the matters before them, in the sociocratic model, the Circles themselves are set in a hierarchy.<sup>62</sup>

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<sup>60</sup> *Id.* at 9.

<sup>61</sup> BUCK & VILLINES, *supra* note 43, at 43. The term “Circle” is an imperfect translation of the Dutch word *kring*, which literally translates as “ring” or “circle,” but which also has the connotation of the English word “arena”—a place where meaningful events happen. *Id.* at 43–44. The term Circle has, in the years since Endenburg developed his model, become quite popular among groups ranging from discussion circles to businesses that are interested in collaborative decision-making, and today is commonly associated with group-process tools like World Café, Open Space, and the Art of Hosting. See *The Many Faces of Circles*, CTR. FOR DYNAMIC COMMUNITY GOVERNANCE: BLOG, <http://www.dynamic-governance.org/the-many-faces-of-Circles> (last visited Apr. 10, 2019). Although some in the “circle movement” appear to be influenced by sociocracy, many writers, including leading voices within the “circle movement” such as Christina Baldwin and Ann Linnea, trace the concept to ancient indigenous practices, not 1970s management innovations. See CHRISTINA BALDWIN & ANN LINNEA, *THE CIRCLE WAY: A LEADER IN EVERY CHAIR* 4–10 (2010) (describing the circle as an important symbol of, and archetype for, group processes since the Late Paleolithic era or earlier).

<sup>62</sup> QUARTER, *supra* note 46, at 58.

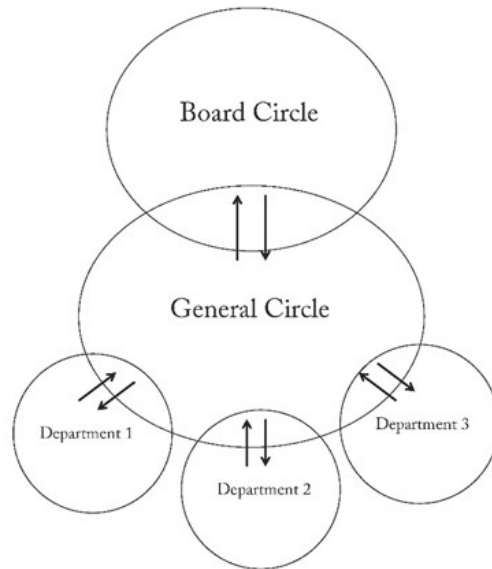


Figure 1. A basic organizational chart of a sociocratic firm showing double-links between Circles

At Endenburg Electric, the lowest-level Department Circles ranged in size from six to twenty-five people, with each Circle tasked with setting policy for a particular area of the business, like manufacturing, electronics, personnel, or accounting.<sup>63</sup> Every employee of the company belonged to at least one of these Department Circles.<sup>64</sup> The middle-level General Circle is made up of around twenty-five people and formulates policy for the entire company; it is comprised of senior management, department heads, and representatives selected by each Department Circle to represent their interests in the General Circle.<sup>65</sup> The highest-level Circle operates somewhat like an independent corporate Board of Directors; it is comprised of four people, neither employees nor owners, who have experience in fields like finance, law, and government.<sup>66</sup> Along with

<sup>63</sup> *Id.*

<sup>64</sup> Romme, *supra* note 49, at 808.

<sup>65</sup> QUARTER, *supra* note 46, at 58–59.

<sup>66</sup> *Id.* at 59.

representatives from the General Circle, this Board Circle oversees the organization, plans for its future, and manages corporate shares.<sup>67</sup>

Circle meetings typically follow the following steps: (1) *an opening round*, a time to “attune” and get settled; (2) *administrative concerns*, including announcements, times for upcoming meetings, Consent approval of minutes of the prior meeting, and acceptance or amendment of the planned agenda; (3) a discussion of all *agenda items* using the Consent process; and (4) *a closing round*, a time to reflect on the meeting and discuss how it could have been better or more efficient, and to discuss potential matters for future meetings.<sup>68</sup>

### 3. DOUBLE-LINKING

As part of this Circle structure, Endenburg created the concept of “double-linking,” the idea that rather than having a manager as the sole, top-down link from organizational leadership to the workers, each Circle has two links: the Operations Leader of the Circle is a manager or supervisor, selected by the higher Circle to lead the next-lower Circle, but the lower Circle also selects one of its members to act as a Representative of its members, bringing their perspectives to the next-higher Circle.<sup>69</sup> Endenburg’s Circles were capped at twenty-five people in order to encourage meaningful participation within each Circle, and relied on these double-links for communication between the different Circles.<sup>70</sup>

### 4. SELECTION BY CONSENT

Endenburg’s fourth principle flows out of the first three: each Circle uses a Consent process to select people to lead on particular tasks, to serve as Representatives to the next-higher Circle, and sometimes for the selection of workers for managerial positions.<sup>71</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> BUCK & ENDENBURG, *supra* note 42, at 7.

<sup>69</sup> *Id.* at 6; BUCK & VILLINES, *supra* note 43, at 44; Romme, *supra* note 49, at 808.

<sup>70</sup> QUARTER, *supra* note 46, at 59.

<sup>71</sup> BUCK & VILLINES, *supra* note 43, at 41–46; QUARTER, *supra* note 46, at



Sociocratic organizations conduct these elections by Consent as follows: (1) the relevant Circle first *reviews the role*, describing the position and its responsibilities; (2) it then has a *nomination process*, with each member of the Circle asked to nominate a person in writing; (3) the Circle then has an *explanations round*, with each member of the Circle explaining the reasons for their proposals; (4) there is a *change round*, in which the facilitator asks all Circle members if they want to change their nomination based on the arguments heard in the prior round; and, finally, (5) the Circle has a *Consent round*, in which the facilitator proposes the nominee with what he or she believes are the strongest arguments in support of him or her and asks each person, including the proposed nominee, if he or she has any reasoned objection to the proposed nomination.<sup>72</sup>

### B. *Sociocracy in Non-Profit Organizations*

Today, sociocratic governance is used internationally by manufacturing and technology firms, local government agencies, and by a variety of non-profit organizations.<sup>73</sup> This Section will describe how non-profits have implemented sociocracy, focusing on the following considerations: (1) how non-profits use Circles; (2) the role of the Board of Directors and corporate officers in sociocratic non-profits; (3) the role of non-profit members, volunteers, and other stakeholders in sociocratic non-profits; and, finally, (4) an analysis of one activist group that has developed a member-driven sociocratic non-profit structure.

#### 1. THE USE OF CIRCLES IN SOCIOCRATIC NON-PROFITS

At the core of the sociocratic corporate structure is the hierarchy of double-linked Circles.<sup>74</sup> An analysis of a widely-used template for non-profit sociocratic corporate by-laws shows the hierarchy of

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62 (noting that in some cases managers are selected through this process, but in others, managers are selected by the next-higher Circle).

<sup>72</sup> BUCK & ENDENBURG, *supra* note 42, at 7–8.

<sup>73</sup> See *Sociocracy Today*, SOCIOCRACY, <http://www.sociocracy.info/about-sociocracy/sociocracy-today/> (last visited Apr. 10, 2019).

<sup>74</sup> BUCK & ENDENBURG, *supra* note 42, at 6.

Circles in a non-profit sociocratic organization to function similarly to the hierarchy of Circles in any sociocratic entity: the Board Circle is made up of the Board of Directors and a Representative from the General Circle; the General Circle is made up of the Executive Director or Chief Executive Officer and other organizational leaders, an Operations Leader chosen by the Board of Directors, and Representatives to the Circle chosen by lower Department Circles; and the Department Circles are comprised of staff within one program area, along with an Operations Leader chosen by the General Circle.<sup>75</sup> In cases where there is a hierarchy among Department Circles, a lower Department Circle has an Operations Leader chosen by the higher Department Circle, and the lower Department Circle selects a Representative to the higher Department Circle.<sup>76</sup>

Although this model does not completely eliminate organizational hierarchy, the Circle model and Consent process may allow staff within each Circle to have more autonomy and control over their work than in conventional non-profit structures. While a Circle must stay within the limits imposed on it by the next-higher Circle, it has the freedom to select and execute its own projects and develop policies in furtherance of the purposes set by that higher Circle.<sup>77</sup> Sociocratic non-profits may grant Department Circles autonomy to determine how they will staff, execute, and evaluate their own projects.<sup>78</sup> Department Circles also may establish their own procedures for certain administrative and managerial responsibilities, including: setting Circle-level recordkeeping policies; providing professional development opportunities for members; selecting Representatives to the next-higher Circle; developing a budget and choosing how to spend funds allocated to the Circle; creating lower Circles as it deems appropriate; selecting the Operations Leader of the next-

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<sup>75</sup> See John Buck & Sharon Villines, *Bylaws for a Sociocratic Organization*, SOCIOCRACY, <http://www.sociocracy.info/bylaws-for-a-sociocratic-organization/> (last visited Apr. 1, 2019) [hereinafter Buck & Villines, *Bylaws*]. This form for sociocratic non-profit by-laws was originally written for a membership non-profit incorporated in Washington, D.C. *Id.*

<sup>76</sup> *Id.* art. 3.

<sup>77</sup> *Id.* art. 4.

<sup>78</sup> *Id.*

lower Circle; and deciding whether lower Circles should be subdivided, combined, or dissolved.<sup>79</sup>

Circles do not have complete autonomy, however. Sociocratic non-profits balance Circle autonomy with rules designed to ensure accountability to the overall organization and to promote efficient work processes and decision-making. The system of double-links, for instance, encourages the accountability of the Circle to the organization by requiring each Circle to give oversight to the next-lower Circle and to report its operations to the next-higher Circle.<sup>80</sup> Sociocratic non-profits also impose recordkeeping rules designed to promote accountability, requiring that Circles keep substantial notes in a logbook that documents budgets, policy decisions, and meeting notes, as well as the individual Circle members' aims, roles, responsibilities, and development plans.<sup>81</sup> Finally, sociocratic non-profits may establish a back-up process that can be triggered if a Circle process fails to produce Consent on a critical issue.<sup>82</sup>

## 2. THE ROLE OF THE BOARD OF DIRECTORS AND CORPORATE OFFICERS IN SOCIOCRATIC NON-PROFITS

The Board of Directors of a sociocratic non-profit is, of course, ultimately responsible for ensuring compliance with all applicable corporate, tax, regulatory, and contractual responsibilities, and sociocratic Board Circles usually approach those responsibilities similarly to the Boards of professionalized non-profits.<sup>83</sup> The Board Circle of a sociocratic non-profit may be responsible for setting and

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<sup>79</sup> *Id.* The only decisions exempted from a regular Circle governance process are decisions regarding Circle elimination or redefinition, when the Operations Leader and Representatives of the lower Circle may participate in the discussion but are not part of the Consent process, and personnel decisions, when a member who is the subject of the decision may participate in the decision-making but may not participate in granting or blocking Consent to those decisions. *Id.* § 4.2.

<sup>80</sup> *Id.* § 4.3. In addition to the Operations Leader, Circles generally select a facilitator to lead all Circle meetings, who may be asked to ensure that the Circle is complying with its mission and functioning in accordance with sociocratic principles. *Id.* art. 4.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* § 5.7.

<sup>83</sup> *Id.* §§ 6.1, 6.2.

overseeing the execution of a strategic plan; ensuring fiscal responsibility and long-term viability; generating new ideas and directions; and maintaining connections with external persons, organizations, agencies, and any other necessary bodies.<sup>84</sup>

The Board Circle of a sociocratic non-profit typically consists of the following positions: the Executive Director, Chief Executive Officer, or similar staff leader; Representatives from the General Circle; and three or more “expert” directors, usually selected for their experience with sociocratic governance or their legal, operations, fundraising, or accounting expertise.<sup>85</sup> Like other non-profit directors, the directors of a sociocratic non-profit are treated as fiduciaries, may be indemnified for acts conducted in good faith and in pursuit of work duly approved by the organization, and are typically uncompensated for their work as directors.<sup>86</sup> Directors are selected through a Consent election.<sup>87</sup> Sociocratic non-profits do not allow Board Circles to dissolve their organizations without the approval of their other Circles, and sociocratic non-profit Boards Circles use the Consent process rather than a majority or super-majority vote to make decisions.<sup>88</sup> Like other Circles, when a Board Circle fails to obtain Consent, it may foresake internal democracy and refer the matter to a single director with expertise in the relevant subject area and agree to follow his or her judgement.<sup>89</sup>

Corporate officers in sociocratic non-profits are chosen by a Consent election and usually mirror conventional non-profit corporate officers. Officers may include a President responsible for overseeing staff, monitoring compliance with internal and external rules, and speaking for the organization, a Treasurer responsible for oversight of the organization’s finances, and a Secretary responsible for

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<sup>84</sup> *Id.* § 6.2.

<sup>85</sup> *Id.* §§ 6.3, 6.5.

<sup>86</sup> *Id.* §§ 6.6, 6.7, art. 13.

<sup>87</sup> *Id.* art. 7. For a description of the Consent election process, see *supra* note 72 and accompanying text.

<sup>88</sup> Buck & Villines, *Bylaws*, *supra* note 75, § 5.6.

<sup>89</sup> *Id.*

taking minutes at meetings and keeping accurate corporate records.<sup>90</sup>

### 3. ROLES FOR VOLUNTEERS, MEMBERS, AND OTHER STAKEHOLDERS IN SOCIOCRATIC NON-PROFITS

Sociocratic non-profits generally aim to be more inclusive of volunteers in their governance processes than professionalized non-profits do.<sup>91</sup> Volunteers may be brought into corporate governance through a Volunteer Circle double-linked to the Board Circle or General Circle, or they may be distributed by function or department across a variety of Department Circles.<sup>92</sup>

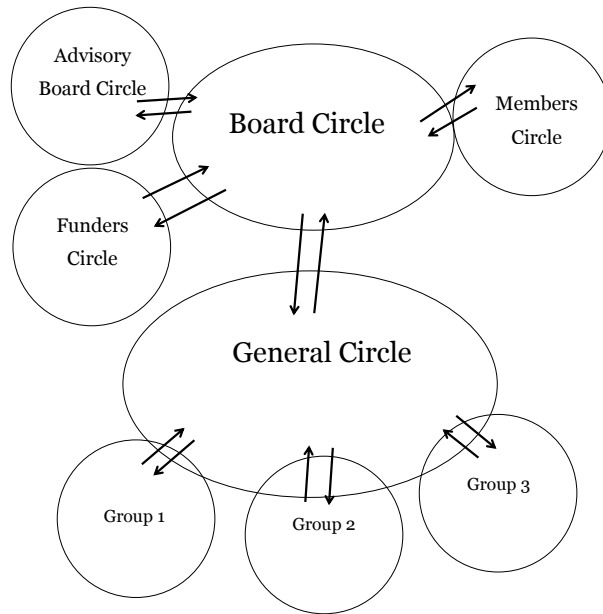


Figure 2. A sociocratic non-profit with members, advisory board, and funders Circles<sup>93</sup>

<sup>90</sup> *Id.* § 6.4.

<sup>91</sup> JOHN A. BUCK & JERRY KOCH-GONZALEZ, DYNAMIC GOVERNANCE FOR NONPROFIT ORGANIZATIONS 2 (2014), <http://sociocracyconsulting.com/wp-content/uploads/2016/04/DG-for-Nonprofits-v1-11-14.pdf>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 4.

Sociocratic non-profits may take other stakeholders into their governance structures as well: people who receive direct organizational services, like students in a school or homeless families in a shelter; those who indirectly receive the benefits of those direct services, like the parents of students in a school; and sometimes even donors or grantors who contribute funds to an organization may be included in its governance structure.<sup>94</sup> A sociocratic non-profit may put all of these stakeholders into one “Client’s Circle,” or may put them in different Circles based on their roles and connections to the organization.<sup>95</sup>

The sociocratic model can be used quite differently in different contexts. Some sociocratic non-profits, consistent with the professionalized non-profit model, have no members, or have members with very limited rights, and use Endenburg’s model to democratize governance and decision-making only among Board and staff.<sup>96</sup> But other sociocratic non-profits use sociocracy as a mechanism for structuring and sharing decision-making powers with members. Some groups offer members a limited voice in organizational matters by double-linking a Circle of members and other stakeholders to the Board, giving members a voice at the Board level and allowing the Board to convey information to members, but not allowing members much functional control over the Board or staff.<sup>97</sup>

Other groups use the four principles of sociocracy to more fully integrate members into organizational governance and decision-making. Sociocracy has been particularly popular with non-profit intentional communities<sup>98</sup> like ecovillages, student cooperatives, co-housing groups, monasteries, ashrams, and communes, groups of

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<sup>94</sup> *Id.* at 3.

<sup>95</sup> *Id.*

<sup>96</sup> See, e.g., Buck & Villines, *Bylaws*, *supra* note 75, art. 9 (establishing that members of the organization do not have voting rights); see also BUCK & ENDENBURG, *supra* note 42, at 5.

<sup>97</sup> See BUCK & KOCH-GONZALEZ, *supra* note 91, at 4–6.

<sup>98</sup> See Diana Leafe Christian, *Transparency, Equivalence, and Effectiveness: How Sociocracy Can Help Communities, Part I*, 160 COMMUNITIES 59, 63 (2013) (listing eleven intentional communities using sociocracy across North America

people who have chosen “to live together with a common purpose, working cooperatively to create a lifestyle that reflects their shared values.”<sup>99</sup> Many of these groups are philosophically inclined toward democratic, non-hierarchical decision-making and had previously relied on inefficient unanimous consensus rules, so the Consent process spread quickly among these groups between the 1990s and 2010s, even as these groups sometimes sought to modify other elements of the sociocratic structure to grant more rights to members, make sociocratic processes more efficient for groups of different sizes, or make members’ experiences of sociocratic processes feel less hierarchical.<sup>100</sup>

#### 4. THE MULTIPURPOSE, MEMBER-DRIVEN SOCIOCRATIC ACTIVIST NON-PROFIT

Influenced by these non-profit sociocratic models, the North Bay (California) Chapter of the Democratic Socialists of America

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and Europe).

<sup>99</sup> *Intentional Communities*, FELLOWSHIP FOR INTENTIONAL COMMUNITY <http://www.ic.org/wiki/intentional-communities/> (last visited Apr. 29, 2019).

<sup>100</sup> See, e.g., Anamaria Aristizabal, *Sociocracy to the Rescue at Aldeafeliz Ecovillage: How Sociocracy Can Help Communities, Part V*, 166 *COMMUNITIES* 55 (2015) (describing how an ecovillage “made the methodology our own, not always following the Sociocratic method to the letter”); Diana Leafe Christian, *Consensus and the Burden of Added Process: Are There Easier Ways to Make Decisions?, Part I*, 158 *COMMUNITIES* 56, 58 (2013) (describing frustrations with the Consent process and rising interest in newer methods, including “Sociocracy, Holacracy, and the N Street Consensus Method”); Diana Leafe Christian, *Self-Governance with Circles and Double Links: How Sociocracy Can Help Communities, Part II*, 161 *COMMUNITIES* 61–64 (2013) [hereinafter Christian, *Self-Governance with Circles and Double Links*] (describing changes from the original Endenburg model, including changing the concept of Circles that are higher or lower in hierarchy to Circles that are “larger,” more abstract or long-term and “smaller,” more concrete or focused on short-term goals); Tena Meadows O’Rear & John Buck, *Going Dutch: Sociocracy at EcoVillage of Loudoun County*, 109 *COMMUNITIES* 38, 39 (2000) (describing how the frustration and inefficiency of consensus governance of an ecovillage was greatly improved after changing to sociocracy). Despite the relatively widespread interest in sociocracy within intentional communities, most such groups still groups use other decision-making processes. Christian, *Self-Governance with Circles and Double Links, supra*, at 61.

(“North Bay DSA”) selected a sociocratic non-profit model to structure its membership non-profit that focuses on politicized community- and member-organizing.<sup>101</sup> This model looks to a degree like other sociocratic non-profits, but by transforming the sociocratic structure from a system for empowering employees within an organization’s governance to a model for organizing a membership-led, activist group, the sociocratic structure becomes significantly more aligned with the anti-authoritarian principles of autonomy, horizontalism, and prefigurative politics,<sup>102</sup> which North Bay DSA expressly aims to do.<sup>103</sup>

Like other sociocratic non-profits, the North Bay DSA generally follows the four sociocratic principles, and its decision-making is

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<sup>101</sup> See *Bylaws for the Democratic Socialists of America, North Bay Chapter*, DEMOCRATIC SOCIALISTS AM., at art. IV (Oct. 2017), <https://www.dsa-northbay.org/s/DSA-North-Bay-Bylaws.pdf> [hereinafter *North Bay Bylaws*]. The Democratic Socialists of America (“DSA”) is a national organization of socialists that, following the 2016 presidential campaign of Senator Bernie Sanders, grew to become the largest socialist organization since the 1950s, claiming more than 50,000 members by 2018. See Alexi McCammond, *By the Numbers: Democratic Socialist Victories in the 2018 Midterms*, AXIOS (Sept. 14, 2018), <https://www.axios.com/democratic-socialist-candidates-who-have-won-in-2018-midterms-6bf604a3-ee98-4ab3-9e63-349aec324c43.html> (discussing 50,000 members as of 2018); Joseph M. Schwartz, *A History of Democratic Socialists of America 1971-2017*, DEMOCRATIC SOCIALISTS AM. (July 2017), <https://www.dsausa.org/about-us/history/>. The national DSA has fairly few staff and a delegate-elected Board. *Leadership and Structure*, DEMOCRATIC SOCIALISTS AM., <https://www.dsausa.org/about-us/structure/> (last visited Jan. 30, 2019). As of early 2019, the DSA had 189 state and local chapters. See *Chapters*, DEMOCRATIC SOCIALISTS AM., <https://www.dsausa.org/chapters/> (last visited Jan. 30, 2019). The structure of the North Bay DSA is considerably different from the structure described in the model bylaws for local chapters that were promulgated by the Steering Committee of the DSA’s National Political Committee, which look much more like conventional professionalized non-profit bylaws with most organizational power concentrated in a centralized Board of Directors elected by membership. This model was criticized by many DSA members for both procedural and substantive reasons. DSA Accountability, *Proposal for Sample Chapter Bylaws*, MEDIUM (Mar. 13, 2018), <https://medium.com/@dsa.acctability/proposal-for-sample-chapter-bylaws-83124652978e>.

<sup>102</sup> See *supra* notes 33–36 and accompanying text.

<sup>103</sup> See *North Bay Bylaws*, *supra* note 101, art. II.



done by Consent.<sup>104</sup> North Bay DSA's lowest-level Departmental Circles include all people who have a "significant role" in particular projects, and the group allows each Circle to self-define who meets that standard.<sup>105</sup> Disputes over such decisions are referred to a member-selected Conflict Resolution Circle, which serves as a neutral arbiter in the event of internal conflicts.<sup>106</sup>

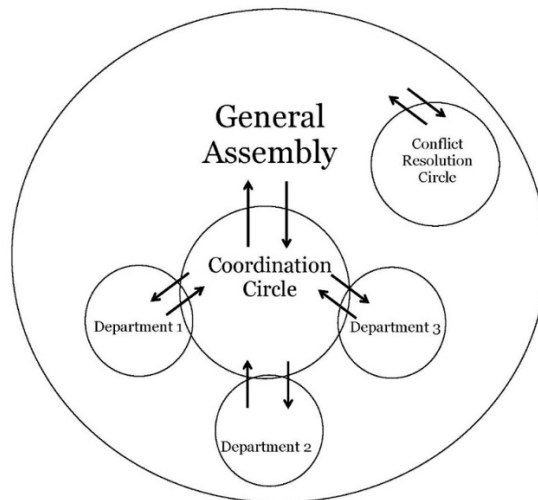


Figure 3. A sociocratic non-profit with a General Assembly of all members as its Top Circle<sup>107</sup>

North Bay DSA's middle-level Circle is its Coordination Circle, which manages the operations of the group within the limits set by the Top Circle, but its Top Circle, rather than consisting of a conventional Board of Directors, is a General Assembly made up of all

<sup>104</sup> *Id.* art. IV, § 3; art. VII, § 2. Circles may choose, by Consent, to use another method of decision-making. *Id.* art. VII, § 2.

<sup>105</sup> *Id.* art. V, § 4(a).

<sup>106</sup> *Id.* art. V, § 10.

<sup>107</sup> With all members in the Top Circle, that Circle graphically comes to envelop the other Circles, as substantially all of the Coordination Circle and Departmental Circles are comprised of members of the General Assembly. *See id.* art. V.

members of the chapter in good standing.<sup>108</sup> By elevating its membership to this Top Circle, the North Bay DSA is making clear that its membership holds the ultimate power in the organization, and that the Coordination Circle, which manages certain operational tasks that might typically be reserved for a non-profit Board, answers to the membership.<sup>109</sup> Officer duties, similarly, are largely within the control of the General Assembly, which elects a treasurer to manage organizational finances, as well as between one to three secretaries to do much of the coordination of meetings of the General Assembly.<sup>110</sup>

These Circles are all double-linked together, with autonomy for each Circle to choose how it will pursue the goals set for it by the next-higher Circle.<sup>111</sup> The Circles self-select their Circle-level officers, which include: a Leader, who is tasked with ensuring that the work of the Circle is done in a timely way; a Facilitator, who facilitates Circle meetings; a Secretary, who coordinates minutes and meeting announcements; a Logbook Keeper, who maintains a logbook detailing the activities of the Circle; and a Representative, who participates in the next-higher Circle.<sup>112</sup>

North Bay DSA explains that it developed this adaptation of the sociocratic non-profit model in order to build a socialist organization that aligns closely with the three anti-authoritarian principles: autonomy and self-governance, which it argues its sociocratic model promotes among members;<sup>113</sup> horizontalism and the commitment to

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<sup>108</sup> *Id.* art. V, §§ 5, 9. The concept of the General Assembly is associated with anti-authoritarian activism and implies that all can participate, speak, and make proposals as full participants in a meeting. Haber, *supra* note 25, at 334. General Assemblies often do not function as a decision-making body that takes large group votes, but rather as a forum that hears the perspectives of members of the group and then allows “individuals and subgroups . . . [to] act autonomously, respecting the assembly while sparing it the burden of micromanagement.” NATHAN SCHNEIDER, THANK YOU, ANARCHY: NOTES FROM THE OCCUPY APOCALYPSE 19 (2013).

<sup>109</sup> See *North Bay Bylaws*, *supra* note 101, art. V, § 9.

<sup>110</sup> *Id.* art. VIII, § 3.

<sup>111</sup> *Id.* art. IV, § 3; art. VI, § 1.

<sup>112</sup> *Id.* art. VI, § 3.

<sup>113</sup> *Id.* art. IV, § 2(b) (listing among the purposes of its sociocratic governance model “self-governance, self-organization, and cooperation”).

equality, intersectionality, and opposition to the marginalization of all who have been marginalized in society, which it presents as at the very core of both its vision of socialism and its organizational structure,<sup>114</sup> and prefigurativism, contending that their version of sociocracy is itself already helping to build the world they want to see, “prefigure[ing] a more radically egalitarian socialist future.”<sup>115</sup>

## II. WORKER SELF-DIRECTED NON-PROFITS

The concept of the worker self-directed non-profit was developed by the Oakland-based non-profit law firm Sustainable Economies Law Center (“SELC”),<sup>116</sup> echoing economist Richard Wolff’s term “Worker Self-Directed Enterprises” (“WSDEs”), meaning businesses in which workers are the lead decision-makers for their enterprises.<sup>117</sup> The idea of the WSDE might sometimes be confused with that of the worker-owned cooperative, but the two are distinct. The worker-owned cooperative is defined by worker ownership of the firm, from which a more egalitarian management of the firm flows: “the ownership of capital by labor and labor’s resulting management of capital.”<sup>118</sup> Conversely, the idea of the WSDE is fundamentally about governance of the firm:

[It is] not primarily a matter of workers as owners of these enterprises (fine, but not required), nor primarily as managers (likewise fine, but not required). It is

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<sup>114</sup> *Id.* art. II, § 1 (asserting that “our socialism must be intersectional in nature. . . . We are committed to fighting transphobia, racism, homophobia, ableism, and imperialism, both in the world and in our own ranks”).

<sup>115</sup> *Id.* art. IV, § 2.

<sup>116</sup> See Sustainable Economies Law Center, *Webinar on Worker Self Directed Nonprofits: Workplace Democracy in Nonprofit Organizations*, YOUTUBE (June 2, 2015), <https://www.youtube.com/watch?v=uU1w9uXGGLY> [hereinafter SELC, *Webinar on Worker Self Directed Nonprofits*] (discussing the SELC’s adoption of its worker self-directed nonprofit model at 17:54–18:01).

<sup>117</sup> See RICHARD WOLFF, *DEMOCRACY AT WORK: A CURE FOR CAPITALISM* 117 (2012).

<sup>118</sup> FRANK T. ADAMS & GARY B. HANSEN, *PUTTING DEMOCRACY TO WORK: A PRACTICAL GUIDE FOR STARTING AND MANAGING WORKER-OWNED BUSINESSES* 1 (2d. ed. 1992).

the tasks of direction—the decision making now assigned usually and primarily to corporate boards of directors and only secondarily to the major shareholders who choose them—that must be transferred to the workers collectively.<sup>119</sup>

With this distinction in mind, the sometimes-discussed idea of a “non-profit worker co-op” is muddled, as Boards of Directors of most tax-exempt non-profits are barred from distributing non-profit corporate revenues to their directors, staff, or others, outside of reasonable compensation for work performed.<sup>120</sup> On the other hand, the concept of a non-profit WSDE could describe any non-profit in which staff set the general direction for the organization with little guidance from the Board. While the name may imply a broader concept, the model of the worker self-directed non-profit developed by SELC is unique, inspired by the principles of the commons movement<sup>121</sup> and parts of the sociocratic governance model.<sup>122</sup> Although

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<sup>119</sup> RICHARD D. WOLFF, NEXT SYS. PROJECT, START WITH WORKER SELF-DIRECTED ENTERPRISES (2016), <https://thenextsystem.org/sites/default/files/2017-08/RickWolff.pdf>.

<sup>120</sup> Prohibitions on private inurement are found in section 501 of the Internal Revenue Code. I.R.C. § 501(c)(3), (4), (6), (7), (9), (11), (13), (19) (2012). A similar prohibition is applied to section 501(c)(5) organizations by regulation. Treas. Reg. § 1.501(c)(5)-1.

<sup>121</sup> See Janelle Orsi, *Three Legal Principles for Organizations Rebuilding the Commons*, in LAW AND POLICY FOR A NEW ECONOMY: SUSTAINABLE, JUST, AND DEMOCRATIC 119, 120–23 (Melissa K. Scanlan ed. 2017) (describing the principles for developing the organizational structure of SELC as grounded in the commons movement). Orsi argues that the worker self-directed non-profit model aims for three goals: caring instead of competing, sharing instead of bidding and buying, and sufficiency instead of acquisition and accumulation. *Id.* at 121 (citing KABIR SANJAY BAVIKATTE, STEWARDING THE EARTH: RETHINKING PROPERTY AND THE EMERGENCY OF BIOCULTURAL RIGHTS (2014)).

<sup>122</sup> SELC describes itself as having a “SELCoCratic” governance structure, one “adapted in part from Holacracy, Sociocracy, and other governance models.” SUSTAINABLE ECON. LAW CTR., INTRODUCTION TO SUSTAINABLE ECONOMIES LAW CENTER’S GOVERNANCE STRUCTURE & ORGANIZATIONAL CULTURE 1 (2016), [https://docs.google.com/document/d/1jsN-Ti43vv286gt0CUfEYrYTI\\_ayQLfBR3j34LqgD1Y/edit#](https://docs.google.com/document/d/1jsN-Ti43vv286gt0CUfEYrYTI_ayQLfBR3j34LqgD1Y/edit#) [hereinafter SELC INTRODUCTION].

there appear to be few organizations that identify themselves specifically as worker self-directed non-profits, SELC has encouraged other organizations to consider adopting its model, offering trainings to non-profits on the model, creating a community of practice for organizations experimenting with the worker self-directed non-profit model, and sharing significant portions of its own governance documents with the public online.<sup>123</sup> Section II.A describes the structure and decision-making process of worker self-directed non-profits, as articulated and implemented by SELC. Section II.B then describes the roles of the Board of Directors, corporate officers, and volunteers in the worker self-directed non-profit model.

#### A. Core Features of Worker Self-Directed Non-Profits

SELC's worker self-directed non-profit model is built around three organizational features: (1) semi-autonomous Circles; (2) "moveable roles," a framework for workers to serve the organization in multiple ways; and (3) a Consent process modeled after that of holacracy, a business management tool that was itself deeply influenced by sociocracy.<sup>124</sup>

##### 1. SEMI-AUTONOMOUS CIRCLES

SELC is structured using a Circle model somewhat like a socio-crat non-profit.<sup>125</sup> Each Circle has a purpose defined by the General Governance and Strategy Circle (the "General Circle"), but retains a "fair degree of autonomy to carry out activities that fall within their scope."<sup>126</sup> Once created by the General Circle, a Circle

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<sup>123</sup> *Worker Self-Directed Nonprofits*, SUSTAINABLE ECON. L. CTR., [http://www.theselc.org/worker\\_selfdirected\\_nonprofits](http://www.theselc.org/worker_selfdirected_nonprofits) (last visited Mar. 21, 2019). SELC has created a publicly accessible shared drive where many of its documents may be downloaded. Sustainable Econ. Law Ctr., *[Public] Worker Self Directed Nonprofits*, GOOGLE DRIVE, [https://drive.google.com/open?id=0B\\_btGhy3TWfmFaM1dpRi1RNGpTVDJSODAzZk52RXhpQUtuUG9ZWwi1RMnNVWWNLclZ4MTQ](https://drive.google.com/open?id=0B_btGhy3TWfmFaM1dpRi1RNGpTVDJSODAzZk52RXhpQUtuUG9ZWwi1RMnNVWWNLclZ4MTQ) (last visited Apr. 10, 2019).

<sup>124</sup> SELC INTRODUCTION, *supra* note 122, at 1–2; *see also supra* note 52 and accompanying text (describing the influence of sociocracy on holacracy).

<sup>125</sup> SELC INTRODUCTION, *supra* note 122, at 1.

<sup>126</sup> *Id.*

may define its own internal projects, create sub-Circles, add new members to the Circle, and make other decisions about how to best accomplish the mission it was given by the General Circle.<sup>127</sup> While the General Circle meets several times each month, the organization tries “to devolve decision-making to the ‘loalest’ scale possible, meaning more decision[s] are made within smaller circles, rather than the General Circle.”<sup>128</sup> Circles are required to notify the General Circle of certain important changes, including the creation of new projects, changes in priorities or strategies, or the creation of new roles for staff, but they are not required to get permission from the General Circle as long as they act in furtherance of their missions.<sup>129</sup> This Circle-level semi-autonomy and the goal of giving groups of workers control over their own labor may not be substantially different from the sociocratic non-profit model, but the worker self-directed non-profit model makes a number of important changes from the sociocratic framework.<sup>130</sup>

Unlike most sociocratic non-profits, where the General Circle has only *representatives* from staff-level Departmental Circles, the General Circle at SELC is made up of all staff, who collectively manage the smaller Circles.<sup>131</sup> In other words, staff are not near the bottom of the Circle hierarchy with managers above them and the Board at the top, but instead management—and even governance—decisions are made by all organizational staff collectively, with only limited Board oversight.<sup>132</sup> While all SELC “core staff” are part of the General Circle, SELC acknowledges that in a larger worker self-directed non-profit, the General Circle would have to be made up of

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<sup>127</sup> SUSTAINABLE ECON. LAW CTR., SUSTAINABLE ECONOMIES LAW CENTER ORGANIZATIONAL POLICIES 2–3 (2016), <https://drive.google.com/open?id=16VifeegSk6CEjBQLHEciydDKpHSWGJI3kXrd2MxynR4> [hereinafter SELC ORGANIZATIONAL POLICIES].

<sup>128</sup> SELC INTRODUCTION, *supra* note 122, at 1.

<sup>129</sup> SELC ORGANIZATIONAL POLICIES, *supra* note 127, at 3.

<sup>130</sup> SELC INTRODUCTION, *supra* note 122, at 1.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* For a discussion of how SELC’s Board delegates some of its governance obligations to the General Circle, see *infra* notes 169–76 and accompanying text.

representatives selected by the smaller Circles, perhaps more like a sociocratic non-profit.<sup>133</sup> At SELC, smaller Circles are tasked with both back-office job functions (like operations or communications) and with public-facing programming (providing legal services in their various program areas), but the performance of each Circle is reported back to the General Circle and, through the General Circle, the staff collectively review the work of smaller Circles and set new directions and policies for each Circle's work.<sup>134</sup>

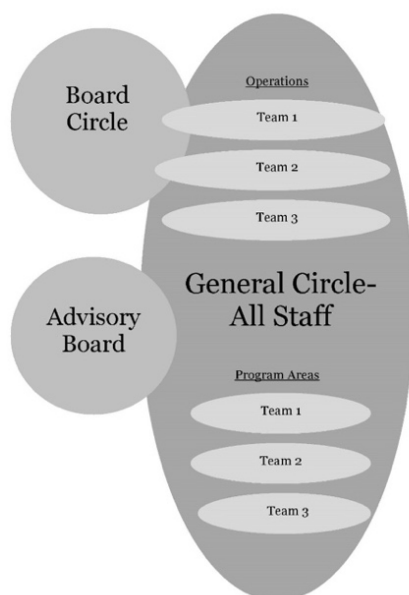


Figure 4. A worker self-directed non-profit<sup>135</sup>

<sup>133</sup> SUSTAINABLE ECON. LAW CTR., LEGAL GUIDE FOR BOARDS OF DIRECTORS OF WORKER SELF DIRECTED NONPROFITS 5, <https://drive.google.com/open?id=1hVrM1BmZnzjvWScvs4kxLd0isXnip1b> (last visited Apr. 28, 2019) [hereinafter SELC LEGAL GUIDE FOR BOARDS] (noting that “instead of delegating all of the power to a single Executive Director who then exercises the power through hierarchical structured departments, the Board delegates it to the staff as a collective”). “Core staff” are all staff who are expected to work more than twenty hours per week for more than six months. SELC ORGANIZATIONAL POLICIES, *supra* note 127, at 2, 15.

<sup>134</sup> SELC ORGANIZATIONAL POLICIES, *supra* note 127, at 2–3.

<sup>135</sup> For a more detailed model of SELC’s worker self-directed non-profit struc-

Worker self-directed non-profit Circles are structured differently from those of sociocratic non-profits in other ways as well. SELC's Circles are generally made up of only employees—not independent contractors, volunteers, or members, as they might be in some sociocratic non-profits.<sup>136</sup> In addition, most staff participate in multiple Circles, unlike in most sociocratic non-profits, where staff units are largely traditional ones, and most workers who are not managers participate in only one or a very few Circles.<sup>137</sup> In the worker self-directed non-profit structure, a Board of Directors and Advisory Board overlap with the General Circle, but a majority of the Board of Directors are not employees and there is a more complicated division of management and governance duties between the Board Circle and the General Circle than in the more hierarchical sociocratic model.<sup>138</sup>

## 2. MOVEABLE ROLES

One significant difference between professionalized non-profits and the mostly volunteer, member-driven civic organizations they largely supplanted is that professionalized non-profits rely, like most businesses, on specialized, skilled workers: a non-profit's

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ture, see SUSTAINABLE ECON. LAW CTR., SUSTAINABLE ECONOMIES LAW CENTER: THE BIG PICTURE (2016), <https://drive.google.com/open?id=0B6eGM Dg0J27kZmttb2ZSdmg1V0k>.

<sup>136</sup> See *id.* (identifying membership of all Circles).

<sup>137</sup> See *id.*

<sup>138</sup> See *infra* notes 169–76 and accompanying text. The majority of the Board at SELC is made of non-employees because of a provision in the California Corporations Code that requires no more than forty-nine percent (49%) of the Board of any California corporation to be made up of interested persons, including employees, independent contractors, and their families. CAL. CORP. CODE § 5227 (West 2019); see SELC, *Webinar on Worker Self Directed Nonprofits*, *supra* note 116 (discussing California's requirement to include disinterested parties on the Board at 49:13–49:22). For a discussion of directors' duty of care in these organizations and an analysis of the rules regarding employees of a non-profit serving on its Board, see *infra* Section V.A. There is little discussion of the advisory board in the SELC literature; this may be because it plays a role similar to other non-profit advisory boards.



grantwriter specializes in grantwriting, its web team has expertise in web design, its program staff have experience in their programmatic areas, and all grow their skills in their areas of expertise as they continue to work in those roles.<sup>139</sup> SELC argues that such specialization tends to promote “hierarchy, bureaucracy, and pay differentials.”<sup>140</sup> At SELC, workers are asked to fill a variety, perhaps even dozens, of different roles.<sup>141</sup> This improves organizational flexibility and resiliency, and promotes greater equality and fairness among workers.<sup>142</sup> For example, when a need for additional staffing arises, SELC workers are often able to quickly fill the need because some of them are already experienced in the role.<sup>143</sup> This approach also encourages staff to play an active role in their own professional development, letting them learn the new skills they wish to pursue.<sup>144</sup> It decreases assumptions about status and worth that come from fixed job titles, and allows for workers to improve organizational workflow and understand the organization’s operations, “from the administrative to the visionary.”<sup>145</sup>

Despite that goal, SELC’s moveable roles cannot completely mean that staff have no specialization or focus. It seems that many staff have core responsibilities that attach to them as individuals: non-lawyers cannot simply take over the work that requires a licensed attorney, and, even beyond that, the Housing & Cooperatives Attorney who leads the Housing program area and the Food & Farm Attorney who leads the Food and Farm program area likely cannot swap jobs without a substantial loss of subject-matter expertise.<sup>146</sup>

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<sup>139</sup> See *supra* notes 19–23 and accompanying text.

<sup>140</sup> SELC INTRODUCTION, *supra* note 122, at 1. All SELC employees must also be categorized as exempt employees for purposes of state and federal overtime requirements.

<sup>141</sup> See *id.* at 1–2.

<sup>142</sup> See SELC LEGAL GUIDE FOR BOARDS, *supra* note 133, at 13.

<sup>143</sup> See *id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See *SELC Staff*, SUSTAINABLE ECON. L. CTR., <https://www.theselc.org/staff> (last visited Apr. 28, 2019) (describing staff titles and responsibilities).

Still, many administrative roles and secondary or tertiary responsibilities can rotate, allowing workers to pursue their individual interests, and allowing them to avoid feeling trapped in undesirable roles—or roles they cannot perform well—for too long.<sup>147</sup>

SELC has twenty-four Circles and, within each Circle, there may be anywhere between two and fifteen specific roles.<sup>148</sup> A SELC employee may be responsible for many roles in a Circle, so a particular Circle may be made up of only four people, but have fifteen different roles.<sup>149</sup> Some roles are assigned by Consent to a proposal from a Circle member, while others are filled through an election process.<sup>150</sup> Any individual employee in a worker self-directed nonprofit will have an overall workload that is made up of many different roles.<sup>151</sup> SELC's staffing model also includes many other innovations designed to promote employee satisfaction and work-life balance, including a thirty-hour work week, flexible scheduling, robust “upskilling” and professional development opportunities, and equal pay for all workers—from the most junior to the Executive Director.<sup>152</sup>

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<sup>147</sup> SELC LEGAL GUIDE FOR BOARDS, *supra* note 133, at 13 (describing the flexibility allowed workers through the moveable roles); SELC INTRODUCTION, *supra* note 122, at 2 (noting that if a worker is not a good fit for a certain role, he or she could be moved to another role without the need to terminate his or her employment).

<sup>148</sup> *Assigning Responsibilities in a Worker Self-Directed Nonprofit*, SUSTAINABLE ECON. L. CTR., [http://www.theselc.org/assigning\\_responsibilities](http://www.theselc.org/assigning_responsibilities) (last visited Apr. 1, 2019).

<sup>149</sup> For example, SELC's Worker Cooperative Circle has four people in it, with more than fifteen different roles, including a legal research steward, who tracks all outstanding research projects, an intern steward, who operates a summer internship program focused on cooperatives, and a Co-opLaw.org Web Master who manages the technical aspects of one of SELC's websites. *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Cat Johnson, *7 Ways to Create a More Democratic Nonprofit*, SHAREABLE (July 14, 2015), <https://www.shareable.net/blog/7-ways-to-create-a-more-democratic-nonprofit>.

### 3. CONSENT DECISION-MAKING PROCESSES

SELC uses a decision-making process based largely on holacracy's meeting process, framing Consent slightly differently than in sociocratic organizations: instead of asking whether any Circle members have a "reasoned objection," SELC has Circle members ask themselves a more plain-language version of that question: "can I live with this?"<sup>153</sup> SELC's meeting process aims to be democratic and flexible: any employee is permitted to bring topics up for discussion in their Circle; meetings have no pre-set agenda, permitting an openness to different possibilities; and feedback is given by all members of the Circle.<sup>154</sup>

The specific procedures used in SELC's Consent process are somewhat different from those of sociocratic non-profits. The General Circle has two kinds of meetings: governance meetings are held twice monthly for making decisions on issues that affect the organization's mission, policies that impact all staff, or the work or existence of any Circles;<sup>155</sup> tactical meetings are held monthly for monitoring ongoing tasks that require regular oversight or action, having Circles provide updates to the General Circle on ongoing work, and discussing matters that involve coordination between multiple Circles.<sup>156</sup>

Governance meetings begin with the appointment of a facilitator and note-taker, followed by a *personal check-in*, with each member of the Circle sharing a high and low from his or her past week<sup>157</sup> in an effort to create a culture of connectedness among Circle members.<sup>158</sup> The rest of the meeting is structured around *proposals*, re-

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<sup>153</sup> SELC INTRODUCTION, *supra* note 122, at 2 (distinguishing this question from "is this perfect and do I agree completely?").

<sup>154</sup> *Id.*

<sup>155</sup> SELC ORGANIZATIONAL POLICIES, *supra* note 127, at 3.

<sup>156</sup> *Id.* at 5.

<sup>157</sup> *Id.* at 3.

<sup>158</sup> See *Meeting Processes and Decision Making*, SUSTAINABLE ECON. L. CTR., [http://www.thesehc.org/meeting\\_processes](http://www.thesehc.org/meeting_processes) (last visited July 27, 2018).

quests to take some action, subject to a sociocracy-like Consent process, and *triage items*, requests for feedback, coordination, information, and discussion.<sup>159</sup>

Tactical meetings also begin with the appointment of a facilitator and note-taker and a personal check-in.<sup>160</sup> The facilitator then goes through a list of *checklist items*, items that need regular action or oversight from most or all staff, with staff asked to respond with a “thumbs up” or “thumbs down” to indicate whether they have acted on each item.<sup>161</sup> The facilitator goes through a list of currently active projects to get updates from the group and discuss whether projects have the appropriate resources.<sup>162</sup> Circle members may then propose new topics for discussion; when such an item is proposed, the Circle follows a modified-sociocratic process in which all Circle members ask one clarifying question or offer one reaction on the topic before returning to the proposer, who may offer a response.<sup>163</sup> After all such agenda items have been discussed or the time allocated for the meeting runs out, the facilitator leads the group in a closing activity and closes the meeting.<sup>164</sup>

B. *The Role of the Board, Corporate Officers, Volunteers, and Members in a Worker Self-Directed Non-Profit*

Some sociocratic non-profits permit members, volunteers, and other stakeholders into their decision-making Circles, but retain ultimate governance power in a relatively small Board Circle;<sup>165</sup> the North Bay DSA model, on the other hand, elevates members to the highest Circle, but it has no organizational staff.<sup>166</sup> SELC’s worker self-directed non-profit model takes a third approach, carefully

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<sup>159</sup> *Id.*

<sup>160</sup> SELC ORGANIZATIONAL POLICIES, *supra* note 127, at 5.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 5–6.

<sup>163</sup> *Id.* at 6.

<sup>164</sup> *Id.*

<sup>165</sup> *See supra* notes 83–89 and accompanying text.

<sup>166</sup> *See supra* notes 108–10 and accompanying text.

granting greater organizational control to staff, retaining some important work for its Board and volunteers, but offering few structured roles for volunteers or members.<sup>167</sup>

### 1. THE ROLE OF THE BOARD OF DIRECTORS AND “STAFF TRUSTEES”

In many professionalized non-profits, the Board of Directors limits its work to legally mandated governance matters, and delegates routine management of organizational activities to staff leadership.<sup>168</sup> In the worker self-directed non-profit, the Board goes beyond that to carefully delegate governance powers to a collective of self-governing workers, and then provides oversight to ensure that the self-governance system is functioning to advance the best interests of the nonprofit.<sup>169</sup> Procedurally, this may be done through either organizational bylaws or a Board resolution stating that the Board believes that it is in the best interest of the organization to have staff govern themselves.<sup>170</sup> In either case, any delegation of governance powers is limited: the Board retains statutory authority to rescind or modify such a resolution or bylaw provision, and the Board has ongoing fiduciary obligations to monitor the organization.<sup>171</sup> SELC argues that this limited delegation of governance powers moves the Board from the hierarchical top of the organization to “the periphery of the organization. . . . [The directors] do not concern themselves with programmatic or strategic activities, they function only to create accountability and support.”<sup>172</sup>

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<sup>167</sup> See SELC INTRODUCTION, *supra* note 122, at 1–2 (stating that, at SELC, “every staff person is a center of power,” that “employees [are] primary sensors of the organization’s needs,” and that the Circle process involves “receiving reactions and for feedback from ALL coworkers” but not delineating a specific governance role for members or other stakeholders in its Circles).

<sup>168</sup> See *supra* note 21 and accompanying text.

<sup>169</sup> See SELC LEGAL GUIDE FOR BOARDS, *supra* note 133, at 5 (noting that “instead of delegating all of the power to a single Executive Director who then exercises the power through hierarchical structured departments, the Board delegates it to the staff as a collective”).

<sup>170</sup> *Id.* at 9–10.

<sup>171</sup> See SELC, *Webinar on Worker Self Directed Nonprofits*, *supra* note 116.

<sup>172</sup> SELC LEGAL GUIDE FOR BOARDS, *supra* note 133, at 13.

SELC staff use a variety of processes to keep its Board informed about their work: staff report their activities to the Board at quarterly Board meetings; they give the Board access to an online document listing monthly accomplishments; staff give most or all Directors access to SELC's internal information and task-management platform to monitor activities and current proposals; and the Board is given quarterly updates on the organization's budget and finances, plus ongoing access to organizational budgetary information.<sup>173</sup> This model aims to permit meaningful self-governance by SELC staff while providing SELC's Board with a robust ability to monitor the staff's work. The Board, in turn, is asked to do significant monitoring of the organization: they closely monitor SELC's activities, regularly review financial information and budgets, ensure the organization's compliance with applicable laws, review internal policies and ensure that the staff are properly using the Circle process, review and approve compensation, and intervene when the Board believes that the staff have made, or are considering making, a decision that is "overly risky, illegal, threatening to the Law Center's tax exempt status, or contrary to the mission of the Law Center."<sup>174</sup>

SELC describes this model as a "Staff Trusteeship," likening its staff to trustees, who "manage the organization in fulfillment of its mission and in trust for the benefit of society and the planet," and its Board to a guardian, "overseeing the activities of the organization and ensuring that staff-initiated projects and policies are effectively advancing the mission and remaining accountable to the community."<sup>175</sup> Despite this unique and perhaps imprecise nomenclature, the shifting of some elements of governance from Board to senior staff may not be an entirely radical departure from the trend toward professionalized non-profits, where it is common for Boards to play a limited role in the day-to-day practices of the organization beyond providing a measure of general fiduciary oversight.<sup>176</sup>

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<sup>173</sup> SELC ORGANIZATIONAL POLICIES, *supra* note 127, at 8.

<sup>174</sup> SUSTAINABLE ECON. LAW CTR., BOARD HANDBOOK AND ORIENTATION GUIDE 6 (2016), [https://drive.google.com/open?id=1512BQ-BP0\\_nouWsl3LVWcO9rPUdcPk9q](https://drive.google.com/open?id=1512BQ-BP0_nouWsl3LVWcO9rPUdcPk9q).

<sup>175</sup> *Id.* at 5.

<sup>176</sup> *See supra* note 21 and accompanying text. Indeed, SELC's Board seems to

## 2. THE ROLE OF CORPORATE OFFICERS

The worker self-directed non-profit also has specific oversight roles that the Board assigns to individual directors, who SELC calls “owls” and who play roles somewhat like those of traditional corporate officers.<sup>177</sup> SELC’s four owls are a Financial Owl, a Worker Governance Owl, a Legal Compliance Owl, and a Mission Owl.<sup>178</sup> The Financial Owl, sometimes simply referred to as the Treasurer, monitors and communicates quarterly with the SELC Circle responsible for managing SELC’s budget and expenditures.<sup>179</sup> The Worker Governance Owl reviews proposals and policies adopted by the staff, reviews all staff self-assessment forms, and is responsible for ensuring that the worker self-governance model is still in the best interest of the organization.<sup>180</sup> The Legal Compliance Owl, sometimes referred to as the Secretary, ensures that the organization is operating in compliance with all relevant laws, including reviewing a legal compliance checklist with the organization’s staff.<sup>181</sup> The Legal Compliance Owl also is responsible for reviewing concerns that have been raised by SELC staff through SELC’s whistleblower and grievance protocols.<sup>182</sup> Finally, the Mission Owl is responsible for reviewing the monthly list of organizational accomplishments to ensure that SELC’s operations continue to be in conformity with the organization’s mission.<sup>183</sup> All of the owls aim to resolve any questions or concerns that arise in the course of their oversight with the

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have far more information regarding the day-to-day budget and quarterly staff accomplishments than many non-profit Boards, which often do not understand their organizations or their obligations as fiduciaries, and are commonly not meaningfully engaged in their Board service. *See* DAVID F. LARCKER ET AL., STAN. GRADUATE SCH. OF BUS., 2015 SURVEY ON BOARD OF DIRECTORS OF NON-PROFIT ORGANIZATIONS 1–2 (2015), <https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-survey-nonprofit-board-directors-2015.pdf>.

<sup>177</sup> SELC ORGANIZATIONAL POLICIES, *supra* note 127, at 8.

<sup>178</sup> *The Role of the Board*, SUSTAINABLE ECON. L. CTR., [http://www.the selc.org/role\\_of\\_the\\_board](http://www.the selc.org/role_of_the_board) (last visited Mar. 21, 2019).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

relevant staff Circles, but if any questions or concerns remain after those conversations, the owls bring those matters to the Board.<sup>184</sup> SELC also retains a traditional President, who serves the staff representative on the Board.<sup>185</sup>

### 3. LIMITED ROLES FOR VOLUNTEERS AND MEMBERS

Aside from volunteers serving on the Board or Advisory Board, the worker self-directed non-profit model as implemented by SELC does not offer much opportunity for governance or decision-making authority for volunteers or members, although SELC does have policies for volunteer management.<sup>186</sup> SELC acknowledges the importance of external stakeholders in the organization, but outside of service on SELC's Board or Advisory Board, does not appear to have a structural role for their input in governance or organizational decision-making.<sup>187</sup> As part of their role as staff trustees, staff are asked to "listen to the needs and ideas of [SELC's] stakeholders. . . . [and they have] heightened duties to respond to those needs and ideas, and, as such, heightened influence within the organization."<sup>188</sup> That may be an improvement on the professionalized non-profit model, which has been criticized for failing to respond to community members and other outside stakeholders,<sup>189</sup> but, ultimately, the focus on staff self-governance in the worker self-directed non-profit model creates a smaller role for non-staff stakeholders than the more hierarchical sociocratic non-profit model, in which members, volunteers, and other stakeholders may play a more meaningful role in organizational governance.

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<sup>184</sup> *Id.*

<sup>185</sup> See *Board of Directors*, SUSTAINABLE ECON. L. CTR., <https://www.theselec.org/board> (last visited Apr. 11, 2019).

<sup>186</sup> See SELC ORGANIZATIONAL POLICIES, *supra* note 127, at 18–19 (describing rules for volunteer management).

<sup>187</sup> Orsi, *supra* note 121, at 132.

<sup>188</sup> *Id.*

<sup>189</sup> See *supra* notes 24–32 and accompanying text.



### III. HUB-AND-SPOKE NON-PROFIT COUNTER-INSTITUTIONS

Where sociocratic non-profits trace their roots to an iconoclastic management innovator, and where worker self-directed non-profits were inspired by the solidarity economy and commons movements, the concept of the counter-institution came most directly out of radical activist practices.<sup>190</sup> New Left activists created the term “counter-institution” to describe projects rooted in activism but aspiring to a degree of permanence—not a short-term street protest or occupation, but a longer-term, typically community-based project aiming to fundamentally challenge the institutions, including the non-profit institutions, of the status quo.<sup>191</sup> Because the concept is closely linked with anti-authoritarian activism, the structures of counter-institutions are closely connected to autonomism, horizontalism, and prefigurativism: “counter-institutions . . . are directly democratic, are created and run by the people who benefit from them, and are independent of control by the State and capital alike.”<sup>192</sup> Part III focuses on one type of structure that has emerged for activists seeking

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<sup>190</sup> For a history of anti-authoritarian activism stretching from the fracturing of the New Left coalition and the rise of women-of-color feminism, through the anti-nuclear movement of the 1970s, the AIDS and radical LGBTQ and environmental movements of the 1980s, the anti-globalization movement of the 1990s and 2000s, and the Occupy Movement and Movement for Black Lives of the 2010s, see Haber, *supra* note 25, at 324–35.

<sup>191</sup> *Id.* at 345–46. Wini Breines, in her study of the New Left, provides the following definition of counter-institutions:

institutions outside the established order organized along radical egalitarian principles as a means of building the new society within the shell of the old . . . [that] were one of the most important new left efforts. . . . An emphasis on the political “means” in contrast to the political “end” was at their heart.

WINI BREINES, *COMMUNITY AND ORGANIZATION IN THE NEW LEFT, 1962–1968: THE GREAT REFUSAL* 52 (1982). Activist and scholar Carl Boggs called counter-institutions the “embodiment, within the ongoing political practice of the movement, of those forms of social relations, decision-making, culture, and human experience that are the ultimate goal.” Carl Boggs, *Marxism, Prefigurative Communism and the Problem of Workers’ Control*, *RADICAL AM.*, Winter 1977-1978, at 99, 100.

<sup>192</sup> Caucus Statement, *Dual Power: A Strategy to Build Socialism in Our Time*, DEMOCRATIC SOCIALISTS AM.-LIBERTARIAN SOCIALIST CAUCUS, (Dec. 31,

to develop non-profit counter-institutions, what this Article calls a “hub-and-spoke” structure.

Section III.A describes how the hub-and-spoke structure arose out of the common anti-authoritarian organizing tactic called the affinity group. Section III.B then details how activists have developed this organizing tool into a non-profit corporate structure.

#### A. *Affinity Group Structures*

For decades, anti-authoritarian activists have worked through small, decentralized, collaborative “affinity groups,” groups typically made up of five to fifteen activists that may collaborate with other individuals or groups, but that are fully free to take action without direction or guidance from some higher body or organization.<sup>193</sup> The model is a flexible one that has been used in different ways and in different contexts, but the ultimate goal of the affinity group structure is to maximize the autonomy of the small group while allowing it to remain connected to a broader community of activists through either General Assemblies, gatherings of all members of related affinity groups that coordinate their work through direct democracy,<sup>194</sup> or spokescouncils, gatherings of a reporter from all affinity groups connected to one another through a larger network of allied affinity groups.<sup>195</sup> Affinity groups commonly make decisions through a process activists call “consensus,” which operates somewhat like Consent does in the sociocratic model.<sup>196</sup> This activist

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2018), <https://dsa-lsc.org/2018/12/31/dual-power-a-strategy-to-build-socialism-in-our-time/>. These anti-authoritarian principles are more fully explored *supra* notes 33–36 and accompanying text.

<sup>193</sup> DAVID GRAEBER, *DIRECT ACTION: AN ETHNOGRAPHY* 288–89 (2009); URI GORDON, *ANARCHY ALIVE: ANTI-AUTHORITARIAN POLITICS FROM PRACTICE TO THEORY* 16 (2008).

<sup>194</sup> GORDON, *supra* note 193 at 15–16.

<sup>195</sup> GRAEBER, *supra* note 193, at 289.

<sup>196</sup> See Haber, *supra* note 25, at 334–35 (describing the intended use of “consensus” in the Occupy Movement, a process in which a General Assembly was asked to refine a proposal until no one blocked it, and blocks were only to be reserved for rare situations in which a person had a very serious ethical or safety-related about a proposal). In sociocratic organizations, the Consent process is

model of affinity groups managing their own semi-autonomous projects and reporting back to a collective body of all members from other affinity groups or, for larger bodies, designated reporters from each group, dates back to the 1970s network of nonviolent activist collectives called Movement for a New Society, and was adopted by several other movements and groups over time: the anti-nuclear movement; 1980s radical LGBTQ groups like ACT UP; radical environmental groups like Earth First! and the Earth Liberation Front in the 1980s and 1990s; the anti-globalization movement in the late 1990s; and the Occupy Movement in the 2000s.<sup>197</sup> This affinity group model was adopted by activists operating in a non-profit organizational context to form the core of the hub-and-spoke non-profit counter-institution model.<sup>198</sup>

#### B. *The Hub-and-Spoke Form at Activist Non-Profits*

In the hub-and-spoke non-profit corporate structure, a non-profit's constitutive elements—its committees, members, employees, and Board—are mapped onto an activist General Assembly or spokescouncil structure. Depending on the size of the organization, either all people affiliated with the organization or just delegates from each affinity group coordinate and collaborate through a central collective, hub, or steering committee that does not direct the work of the individual affinity groups but may help set the general direction for the organization with the input of all in the organization, and may help to coordinate activities between the different affinity groups.<sup>199</sup> In most versions of this model, the central hub is

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commonly intertwined with the Circle process itself, with each Circle member sequentially asked to speak on each proposal even if all would approve of the proposal without debate. *See supra* notes 52–60 and accompanying text. Consensus processes often work that same way, but in some activist groups, especially larger ones, meeting facilitators ask participants generally if anyone has any questions or concerns, or, especially, serious concerns that might lead them to block a proposal, but facilitators do not necessarily ask each member to speak on every proposal. Haber, *supra* note 25, at 334–35.

<sup>197</sup> Haber, *supra* note 25, at 326–29.

<sup>198</sup> *Id.*

<sup>199</sup> *The Spokescouncil (or Delegates' Meeting)*, SEEDS FOR CHANGE,

distinct from the non-profit Board, which is moved, at least symbolically, to the organizational periphery, as one affinity group among others—even if certain legal responsibilities continue to be the domain of that particular affinity group.

One of the first groups to look at ways to bring affinity group models into a non-profit corporate context was the Sylvia Rivera Law Project (“SRLP”).<sup>200</sup> SRLP was created in August 2002 to address the poverty and over-incarceration of low-income transgender people and transgender people of color.<sup>201</sup> Influenced by the service-provision models of the Black Panther Party and the Young Lords, as well as by critiques of the non-profit industrial complex, SRLP aims to provide legal assistance and other services to the transgender community in an explicitly politicized context.<sup>202</sup> Although the group was originally supported by law-fellowship funding and housed within the Urban Justice Center, a progressive but traditionally-structured legal services organization in New York, SRLP split from the Urban Justice Center in order to “create a fully trans organization governed in some way that would resist the typical race, gender, and class dynamics of poverty law organizations.”<sup>203</sup>

As it became an independent organization, instead of looking to the organizational models of larger non-profit LGBTQ groups for inspiration and guidance, SRLP members studied the structures of a variety of activist groups and collectives, and ultimately developed an organizational model that looks quite like a network of affinity groups that coordinates its work through a collective General Assembly of all members of those affinity groups.<sup>204</sup> The collective is built around six such co-equal affinity groups, which SRLP calls teams: (1) the Direct Services Team, which operates SRLP’s legal clinic and advocates for policy reform to change the institutions that

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<https://www.seedsforchange.org.uk/spokescouncil> (last visited Apr. 28, 2019).

<sup>200</sup> See Haber, *supra* note 25, at 348–49.

<sup>201</sup> *SRLP History*, SYLVIA RIVERA L. PROJECT, <http://www.srlp.org/about/srlp-history> (last visited Aug. 11, 2018).

<sup>202</sup> See Rickke Mananzala & Dean Spade, *The Nonprofit Industrial Complex and Trans Resistance*, 5 *SEXUALITY RES. & SOC. POL’Y*. 53, 63 (2008).

<sup>203</sup> *Id.* at 64.

<sup>204</sup> *Id.*

negatively impact low-income transgender people and transgender people of color; (2) the Public Education Team, which coordinates trainings, online resources, media, and publications; (3) the Fundraising and Finance Team, which fundraises and manages the organization's financial systems; (4) the Organizing Support Team, which links SRLP to other community-based organizations and connects SRLP members to other resources and opportunities for organizing on issues that affect them; (5) the Collective Development Team, which recruits new collective members and is responsible for internal anti-oppression work; and (6) the Board Team, the legally-responsible non-profit corporate Board that generally tries to limit its oversight to the minimum-required legal and financial duties for the organization.<sup>205</sup> Like affinity groups, these bodies work largely independently from each other, as the collective delegates decision-making and implementation power to those six teams as much as possible.<sup>206</sup> Coordination and accountability are encouraged through the creation of annual work plans that are used to make sure that the "broad strokes of programming" are approved by the broader collective.<sup>207</sup> The collective of all affinity groups meets twice each year to present their work for the year, give progress reports, discuss priorities, and coordinate their work.<sup>208</sup>

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<sup>205</sup> Haber, *supra* note 25, at 349 (citing SYLVIA RIVERA LAW PROJECT, SRLP COLLECTIVE MEMBER HANDBOOK 1–2, 12 (2009), <http://srlp.org/files/collective%20handbook%202009.pdf> [hereinafter SRLP COLLECTIVE MEMBER HANDBOOK]).

<sup>206</sup> *Id.* at 350.

<sup>207</sup> Mananzala & Spade, *supra* note 202, at 65.

<sup>208</sup> *Id.*

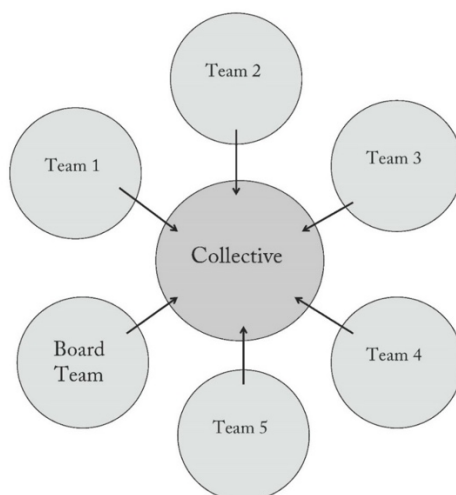


Figure 4. A hub-and-spoke non-profit counter-institution<sup>209</sup>

Consistent with anti-authoritarian activists' typical approach to affinity group decision-making, the teams and the larger collective all use consensus processes for decision-making.<sup>210</sup> Unlike in the worker self-directed non-profit model, most of the SRLP collective members are volunteers, not paid employees.<sup>211</sup> To help promote accountability among these different teams made up of largely volunteers, SLRP requires that each team have at least one full-time staff person on it.<sup>212</sup> Similarly, to further promote consistency and accountability, all collective members are asked to commit to working with the group for at least a year at a specified number of hours each month.<sup>213</sup> The Collective Development Team makes sure that

<sup>209</sup> See SRLP COLLECTIVE MEMBER HANDBOOK, *supra* note 205, at 5 (presenting a similar structure for their organization).

<sup>210</sup> *Id.* at 2, 14.

<sup>211</sup> *Cf.* Mananzala & Spade, *supra* note 202, at 65.

<sup>212</sup> SRLP COLLECTIVE MEMBER HANDBOOK, *supra* note 205, at 1; Mananzala & Spade, *supra* note 202, at 65.

<sup>213</sup> SRLP COLLECTIVE MEMBER HANDBOOK, *supra* note 205, at 21.

each team maintains a majority of people of color as well as a majority of trans, intersex, or gender-nonconforming people.<sup>214</sup> Volunteers, staff, and Board all participate in the twice-yearly collective meetings, and, like in a General Assembly, all have an equal say in decision-making for the collective.<sup>215</sup> Maintenance of their egalitarian, participatory structure is part of the core mission of the group,<sup>216</sup> as SRLP aims not just to provide legal services and organize around issues affecting low-income trans communities and trans communities of color, but to “create structures that model our vision of a more just society . . . [and] to use a non-hierarchical structure to support work that aims to redistribute power and wealth for a more just society.”<sup>217</sup>

Other non-profit groups have experimented with similar models. Inspired by SRLP and the Occupy Movement, Mayday Community Space (“Mayday”) is a community space and a home for community organizations and social movements in the historically low-income and predominantly Latino—but rapidly gentrifying—neighborhood of Bushwick, Brooklyn.<sup>218</sup> Mayday seeks to use the space to build connections between different groups of activists, different movements, and local community residents, to foster a “broader social justice community, allowing for the cross-pollination of ideas and relationships,”<sup>219</sup> all in a context of political solidarity and horizontalism.<sup>220</sup> The organizational structure developed by Mayday shares

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<sup>214</sup> Mananzala & Spade, *supra* note 202, at 65.

<sup>215</sup> SRLP, FROM THE BOTTOM UP, *supra* note 26, at 12–13.

<sup>216</sup> SRLP COLLECTIVE MEMBER HANDBOOK, *supra* note 205, at 1.

<sup>217</sup> *Id.*

<sup>218</sup> MAYDAY SPACE, MAYDAY SPACE HANDBOOK 3 (2018), [https://docs.google.com/document/d/1W5p9AKFbHGLUhZKY\\_zfGxVontKbvg2ZopSfIHQoaaSU/](https://docs.google.com/document/d/1W5p9AKFbHGLUhZKY_zfGxVontKbvg2ZopSfIHQoaaSU/)

<sup>219</sup> *Id.* at 4.

<sup>220</sup> To use the space, Mayday requires that individuals and groups agree to an anti-oppression statement, which includes commitments to, among other things, “a political culture grounded in solidarity, respect, listening, cooperation, kindness and non-dogmatism,” “prioritize conflict de-escalation over police involvement,” “ongoing awareness of our prejudices, the structures of oppression that affect our personal experiences, and our privileges (by virtue of being white, male,

much in common with SRLP, with a similar core collective that coordinates activities between different affinity groups and a preference for consensus decision-making.<sup>221</sup> The Mayday Collective is responsible for day-to-day project management and oversight of Mayday by consensus rules, although if consensus cannot be achieved, the collective accepts a fallback of a two-thirds supermajority to approve a proposal.<sup>222</sup>

#### IV. SWARM ORGANIZATIONS

Like sociocracy, the concept of the swarm organization was initially developed by one person who came to experiment with new organizational structures after working in the worlds of technology and entrepreneurship. Rick Falkvinge is a Swedish technologist whose opposition to copyright law norms led him to found the Swedish Pirate Party and develop the idea of the swarm organization in the process.<sup>223</sup> Section IV.A will focus on the core model of the swarm organization developed by Falkvinge, and Section IV.B will describe different ways that U.S. activist groups have been experimenting with that model in their organizations.

##### A. *The Pirate Party and the Birth of Swarm Organizations*

Falkvinge tells the origin story of the Swedish Pirate Party this way: he had the idea to create a political party that catered to the 1.2 million Swedish citizens who were violating copyright law through illegal file sharing; he made a “very rudimentary” website, and wrote a one-sentence post announcing the new site on a file-sharing website on January 1, 2006.<sup>224</sup> By the next day, the Swedish Pirate Party was national news, and by 2009 Pirate Parties had a presence

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cis-gendered, able-bodied, a U.S. citizen, wealthy, and/or straight, among other identities) in this society,” and “hearing each other and creating opportunities for all voices to be heard, especially those that have been historically marginalized or silenced.” *Id.* at 7–8.

<sup>221</sup> Haber, *supra* note 25, at 351–52.

<sup>222</sup> MAYDAY SPACE, *supra* note 218, at 6–7.

<sup>223</sup> RICK FALKVINGE, SWARMRISE: THE TACTICAL MANUAL TO CHANGING THE WORLD 13, 15 (2013).

<sup>224</sup> *Id.* at 13, 27–33.



in dozens of countries and received 225,915 votes in the European Parliamentary elections—a rate of growth “unlike anything the MBAs have seen.”<sup>225</sup>

To organize the new members and volunteers of the Swedish Pirate Party, Falkvinge sought to create a structure that allowed for maximizing scalability and rapid growth while retaining trust among group members—what he came to call a “swarm organization.”<sup>226</sup>

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<sup>225</sup> *Id.* at 13, 27–33, 187. Other notable Pirate Parties include the Pirate Parties of Germany and Iceland, both of which are built around new tools for large-group decision-making that allow individual members to vote through either representatives or direct-democratic voting on any one decision, including “liquid democracy” and “liquid feedback.” Alexander Kolokotronis & Sam Nakayama, *Groundwork to a Socialist Party: A Democratized Caucus Within the Democratic Party*, GRASSROOTS ECON. ORGANIZING, <http://www.geo.coop/blog/groundwork-socialist-party-democratized-caucus-within-democratic-party> (last visited Apr. 19, 2019). See Dominik Schiener, *Liquid Democracy: True Democracy for the 21st Century*, MEDIUM (Nov. 23, 2015), <https://medium.com/organizer-sandbox/liquid-democracy-true-democracy-for-the-21st-century-7c66f5e53b6f>; Melanie Sevcenko, *Pirate Party Docks at Berlin’s Parliament*, PAC. STANDARD (Jan. 31, 2012), <https://psmag.com/news/pirate-party-docks-at-berlins-parliament-39443>.

The social impact of these Pirate Parties has been very mixed. The Pirate Party of Iceland found parliamentary success in Iceland’s 2016 elections, campaigning for radical institutional reforms and more direct democracy. Agence France-Presse in Reykjavik, *Iceland’s Pirate Party Invited to Form Government*, GUARDIAN (Dec. 2, 2016), <https://www.theguardian.com/world/2016/dec/02/iceland-pirate-party-invited-form-government-coalition>. But the German Pirate Party’s original leadership left the party over a variety of scandals and the group’s tolerance for political amateurism and resistance to a clear ideological vision has been argued to have helped lay the groundwork for the rise of the far-Right Alternative für Deutschland party. Josephnie Huetlin, *The Rise and Fall of the Pirate Party*, NEW REPUBLIC (Sept. 29, 2016), <https://newrepublic.com/article/137305/rise-fall-pirate-party> (linking the disarray of the German Pirate Party, “part performance art, part cult, part prank,” to the rise of Alternative für Deutschland, “very much a party, with ideological convictions and a thirst for power”).

Similar experiments with online tools for participatory democracy at the level of the state have been proposed or experimented with in Argentina, Taiwan, and Spain. Kolokotronis & Nakayama, *supra* (describing the Net Party in Argentina and their platform DemocracyOS, online participatory voting tools developed by the Sunflower Movement in Taiwan, and the influence of social movements on city-level electoral politics in Barcelona and Madrid).

<sup>226</sup> FALKVINGE, *supra* note 223, at 57–58. Other organizations and businesses

The swarm organization “consists almost entirely of loosely knit activists,”<sup>227</sup> but—designed by Falkvinge with the specific goal of being more coordinated than leaderless activist groups like the Occupy Movement and Anonymous<sup>228</sup>—the swarm of activists is organized around a structure or a “scaffolding” of officers and organizational roles that support the activists.<sup>229</sup> The Swedish Pirate Party was organized by geography, so it was structured around small groups representing a county, city, or urban district, all arranged in a series of “mini-pyramids.”<sup>230</sup> The model is designed to be scalable, so a structure might initially only be filled at the county level, but, as the group grows, each level expands to have individuals populate each box of a sprawling organizational chart.<sup>231</sup>

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have used the “swarm” metaphor to describe their operations or management, including some that predate Falkvinge. See Vladimir Dimitrov, *Swarm-Like Dynamics and Their Use in Organization and Management* 12 COMPLEX SYSTEMS 413 (2000). Today, activist groups using the label are most closely inspired by Falkvinge. A renewed interest in how swarms in nature operate began within the field of artificial intelligence in the 1990s, which perhaps led to interest in the concept among technologists like Falkvinge. The term “swarm intelligence” was introduced by Gerardo Beni and Jing Wang in an influential 1989 paper, and the term has become widely used in the fields of robotics and artificial intelligence to describe collective behavior that acts with “intelligence” even if its individual, autonomous parts are unaware of the group’s purpose, like ants building a colony, the growth of bacteria, or certain artificial intelligence designs. See Gerardo Beni & Jing Wang, *Swarm Intelligence in Cellular Robotic Systems*, in *ROBOTS AND BIOLOGICAL SYSTEMS: TOWARDS A NEW BIONICS?* 703, 703–12 (Pablo Dario et al. eds., 1993).

<sup>227</sup> FALKVINGE, *supra* note 223, at 45.

<sup>228</sup> *Id.* at 11.

<sup>229</sup> *Id.* at 45–46.

<sup>230</sup> *Id.* at 54–56.

<sup>231</sup> *Id.* at 70–72.

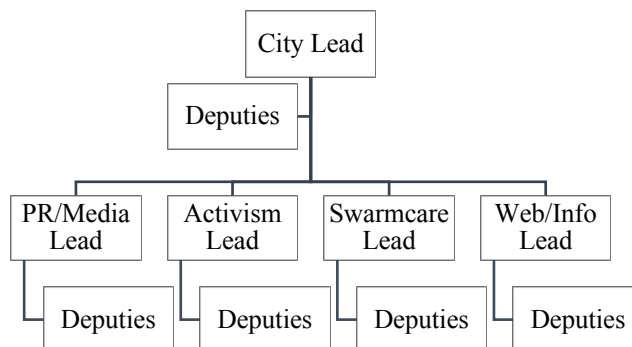


Figure 5. A section of a swarm organizational chart<sup>232</sup>

Like sociocracy, the swarm model is built around small groups, but there are not formal, coordinated links from one small group to the next; instead, “everybody communicates with everybody else all the time.”<sup>233</sup> The swarm structure is built around groups of no more than seven people, which Falkvinge argues is the maximum size for effective collaboration because larger groups require spending too much time and effort on relationship management.<sup>234</sup> Ultimately, in every part of these geographical groupings, there should be up to, but no more than, seven leaders, and each of those leaders could have a variety of sub-leaders and deputies.<sup>235</sup> For example, in Figure 5, a person coordinating city-level work may have one or two deputies and four “function officers”: a public relations or media person responsible for working with newspapers, television, and radio; an activism leader whose job is to support the practical details for activists in the swarm, like getting permits or obtaining loud-speaker equipment; a swarmcare leader responsible for welcoming new members and monitoring the swarm; and an information and web leader who maintains the online presence for the local work of the swarm.<sup>236</sup> Each of the function officers may have deputies, but most of the work should be coordinated in teams of no more than

<sup>232</sup> *Id.* at 56.

<sup>233</sup> *Id.* at 13.

<sup>234</sup> *Id.* at 54.

<sup>235</sup> *Id.* at 48–49.

<sup>236</sup> *Id.* at 61–63.

seven people, and when groups in the swarm start to outgrow that number, leaders should consider sub-dividing them, for instance, dividing the City into no more than seven neighborhoods or districts.<sup>237</sup> While leaders formally appoint volunteers to these roles, the goal is that people should be given these titles after they have already informally stepped into these roles: “the organizational chart should lag slightly behind the observed reality.”<sup>238</sup>

The leader and officer roles in swarm organizations may be less top-down than they sound. The swarm officers, for Falkvinge, should not be managers in a traditional sense, but rather should be responsible for making sure the swarm “has everything it needs to self-organize,” not telling people in the swarm what to do, but rather: (1) promoting speed by removing organizational bottlenecks; (2) improving trust among members of the swarm by maintaining strict transparency; and (3) improving scalability by building the scaffolding to its full size from the start of the swarm so that people can join and easily find a place for their work.<sup>239</sup>

In addition to all of these small groups that help to structure the activism of the swarm,<sup>240</sup> Falkvinge acknowledges that larger groups may sometimes be necessary for formal and informal communication and coordination among both officers and activists within the swarm. But in order to encourage the group to grow efficiently, he argues that leaders must aim to cap even informal large-group discussion at 150 people.<sup>241</sup> A more useful size for a larger group, he argues, is a group of no more than thirty people, an “extended family” who all know each other, but who do not typically collaborate closely.<sup>242</sup> This might include an assembled group of all officers and leaders for a certain function or a certain geography.<sup>243</sup> All of these numerical targets should be monitored by officers and leaders and when a group grows beyond those targets, it should be

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<sup>237</sup> *See id.* at 62.

<sup>238</sup> *Id.* at 63-64.

<sup>239</sup> *Id.* at 64-65.

<sup>240</sup> *Id.* at 55.

<sup>241</sup> *Id.* at 56-58.

<sup>242</sup> *Id.* at 59.

<sup>243</sup> *Id.*

split.<sup>244</sup> Officers and leaders must be willing to make and enforce such splits, to appoint other officers, delegate authority, take on deputies or assistants, and to do so without direction from any supervisor.<sup>245</sup>

From the perspective of an individual member of the swarm, the swarm should be decentralized and collaborative, with authority delegated “to the point where anybody can make almost any decision for the entire organization.”<sup>246</sup> It should be open to anyone and its operations should be transparent, with financial information and discussions of strategy and tactics open for the participation of all members.<sup>247</sup> The model encourages collaboration and communication among members of the swarm and aims for people working in one part of the swarm to learn from what others in the swarm are doing; toward that end, the swarm should have some kind of digital or physical work space for sharing ideas, slogans, campaigns, and any other information that falls within the overall vision of the swarm.<sup>248</sup>

The swarm organization model shares a number of elements in common with the other organizational models described in Parts I through III. The small coordinating groups call to mind sociocracy, although Falkvinge retreats from the Consent decision-making model of Sociocracy, instead arguing that small group decision-making should be done through what he calls a “consensus circle,” which requires the unanimity of all present in order to agree to any action.<sup>249</sup> Like in the hub-and-spoke counter-institution, there is great freedom for individuals in the swarm to choose their own activities, and to work toward goals in a self-managed way, allowing activists in the swarm to form their own projects and collaborate as they see fit.<sup>250</sup>

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<sup>244</sup> *Id.* at 59–60.

<sup>245</sup> *Id.* at 203. To facilitate that power, the swarm’s organizational chart should initially have “tons of empty boxes everywhere.” *Id.*

<sup>246</sup> *Id.* at 14.

<sup>247</sup> *Id.* at 19–20.

<sup>248</sup> *Id.* at 96.

<sup>249</sup> *Id.* at 165–67.

<sup>250</sup> *Id.* at 63.

While parts of the swarm organization parallel the other activist organization models, in other ways Falkvinge seems to have been unable to escape conventional corporate models and the start-up culture from which he emerged, as can be seen most clearly in the unique role he reserves for organizational founders. In his model, the founder should set the vision and specific goals for the swarm, as without one or more specific goals, the swarm could be lost to “discussing its purpose in life.”<sup>251</sup> Beyond that, because the participants in the swarm have substantial freedom to set their specific tasks toward the larger goal, he argues that it is essential that the founder establish the culture of the swarm, so that critical work processes do not become obscured by lengthy debates into processes, conflict resolution procedures, or similar discussions that can grind the swarm’s work to a halt.<sup>252</sup> There appears to be no mechanism for the organization to move away from the founder’s original vision, which risks entrenching internal hierarchy and founder’s syndrome<sup>253</sup> even more than “professionalized” non-profit organizations, where there is ordinarily some process by which an organization’s Board or members could amend corporate bylaws or modify the organizations’s purpose.<sup>254</sup>

This creep of hierarchy can be seen in other parts of Falkvinge’s model as well. While the swarm structure is described as non-hierarchical and autonomous, it is hard to imagine that a city-level of-

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<sup>251</sup> *Id.* at 87.

<sup>252</sup> *Id.* at 87–88.

<sup>253</sup> Founder’s syndrome is widely discussed among both business and non-profit start-ups and refers to organizational founders who are unable to delegate authority or allow investors or others to take any authority over an organization. See Noam Wasserman, *The Founder’s Dilemma*, HARV. BUS. REV. (Feb. 2008), <https://hbr.org/2008/02/the-founders-dilemma>; Stephen R. Block & Steven Rosenberg, *Toward an Understanding of Founder’s Syndrome: An Assessment of Power and Privilege Among Founders of Nonprofit Organizations*, 12 NON-PROFIT MGMT. & LEADERSHIP 353, 354 (2002).

<sup>254</sup> See, e.g., Joanne Fritz, *When and How to Legally Change Your Nonprofit’s Mission*, BALANCE SMALL BUS., <https://www.thebalancesmb.com/legally-change-your-nonprofits-mission-2502228> (last updated Nov. 18, 2018) (describing the process to amend a typical non-profit’s mission or purpose).

ficer who is invited by a county-level officer to attend a thirty-person coordination team meeting is not, at least in some ways, made to feel more central or more important to the organization than activists who are not invited to that meeting.<sup>255</sup> Even beyond that, Falkvinge is quite honest in his description of the need to take uncompromising, top-down action against internal critics.<sup>256</sup> He describes multiple strategies for dealing with “mavericks,” those who would go counter to “swarmthink,” including manipulative strategies like showering attention on a maverick’s allies for work that comports with the founder’s vision in order to isolate the dissenter and reduce his or her influence within the swarm.<sup>257</sup> While activist organizations may sometimes need to take steps to remove an agent provocateur or someone aiming to intentionally tear apart the group, Falkvinge’s embrace of strong-arm tactics toward “mavericks” points to his tendency to put efficiency and loyalty to the founder’s original vision above a deep commitment to prefigurative politics.

#### B. *Activist Groups Adopt the Swarm Organization Model*

Despite the presence of these hierarchical elements in Falkvinge’s swarm model, several noteworthy U.S. activist groups have looked to the idea of the swarm organization for inspiration. This Section will look at how U.S. groups have begun to experiment with the swarm model and the changes they have made to Falkvinge’s original vision. It will consider three groups that have embraced some version of the swarm organization, less to shed light on any of these specific groups than to show how this trend among activist organizations is emerging: IfNotNow, which organizes Jewish people in the United States to fight against the Israeli occupation

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<sup>255</sup> Indeed, having clear rules on how to progress up a hierarchy might well be preferable to a hierarchy that is obscured or invisible, thriving on friendship cliques, interpersonal power dynamics, and unwritten rules. *See generally* Jo Freeman, *The Tyranny of Structurelessness*, JOFREEMAN.COM, <https://www.jofreeman.com/joreen/tyranny.htm> (last visited Feb. 19, 2019).

<sup>256</sup> *See* FALKVINGE, *supra* note 223, at 180–81.

<sup>257</sup> *Id.* (reminding would-be founders to always “remember that an organization is people, and that attention is reward”).

of Palestine;<sup>258</sup> Movimiento Cosecha, a movement organization that fights for “permanent protection, dignity, and respect” for undocumented immigrants in the United States;<sup>259</sup> and Demand Utopia, a communalist group that aims for a “new imaginative order . . . that advance[s] images and ideals of a world beyond the shackles and social divides of this one.”<sup>260</sup> All three aim to be national organizations with active, decentralized memberships, and while none may be conventionally structured non-profits, IfNotNow is a non-profit corporation chartered in Washington D.C., and both IfNotNow and Movimiento Cosecha receive tax-deductible donations.<sup>261</sup> IfNotNow and Movimiento Cosecha share much in common, and both groups were shaped by participation in training programs run by a group called Momentum, a “training institute and movement incubator” that helps to launch activist groups using the swarm model.<sup>262</sup>

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<sup>258</sup> *Our Strategy*, IFNOTNOW, <https://ifnotnowmovement.org/about-us/our-strategy/> (last visited Feb. 19, 2019) [hereinafter *Our Strategy*, IFNOTNOW].

<sup>259</sup> *About Our Movement*, COSECHA, <https://www.lahuelga.com/about/> (last visited Feb. 19, 2019) [hereinafter *About Our Movement*, COSECHA].

<sup>260</sup> *About: Can We Build a New World in the Ashes of the Old?*, DEMAND UTOPIA, <https://demandutopia.net/about/> (last visited Feb. 19, 2019) [hereinafter *About*, DEMAND UTOPIA].

<sup>261</sup> IfNotNow has 501(c)(3) status. See *Tax Exempt Organizations Search, IfNotNow*, INTERNAL REVENUE SERV., <https://apps.irs.gov/app/eos/display-All.do?dispatchMethod=displayAllInfo&Id=649963&ein=475178715> (last visited Apr. 19, 2019). Both IfNotNow and Movimiento Cosecha receive tax-exempt donations through a fiscal sponsor, Act Blue Charities. See *Donate*, COSECHA, <https://secure.actblue.com/donate/cosecha?refcode=lahuelganavesp> (last visited Mar. 21, 2019); *Support IfNotNow in Fighting for Freedom and Dignity for All Israelis and Palestinians*, IFNOTNOW, <https://secure.actblue.com/donate/ifnotnow?refcode=Website> (last visited Feb. 12, 2019).

<sup>262</sup> MOMENTUM, <https://www.momentumcommunity.org/> (last visited Mar. 1, 2019); *Momentum Movements*, MOMENTUM, <https://www.momentumcommunity.org/movements> (last visited Mar. 1, 2019). In addition to Movimiento Cosecha and IfNotNow, Momentum has more recently worked with the climate-justice organization, Sunrise Movement. *Id.* IfNotNow credits Momentum and Movimiento Cosecha with teaching it “the swarm language.” *Healing Justice Podcast: Building Liberatory Movement Cultures – IfNotNow*, PODBEAN (Feb. 13, 2018), <https://www.podbean.com/media/share/pb-pp4ep-86fa2d>.



To look at how these groups have modified Falkvinge's model, elements of the swarm model will be divided into three sections: (1) parts of the swarm model that are consistent with anti-authoritarian values and in line with the previously described activist non-profit experiments; (2) parts of the swarm model that are inconsistent with those values, like the unique position Falkvinge reserves for the founder's vision for the group; and (3) parts of the swarm model that aim for efficiency but that may ultimately hold little value.

### 1. ANTI-AUTHORITARIAN ELEMENTS OF THE SWARM MODEL

The elements of the swarm model that are most in line with anti-authoritarian principles have been embraced by all three of these groups. IfNotNow, Movimiento Cosecha, and Demand Utopia each preserve or expand on member autonomy and self-management throughout the organization, and all highlight the ability of all members to communicate freely across parts of the broader swarm.<sup>263</sup>

In a series of videos showing a training session coordinated by a group called Ayni Institute, members of IfNotNow, Movimiento Cosecha, and other groups present an in-depth description of how they use the swarm model.<sup>264</sup> Although they do not always describe exactly how their specific groups may differ from each other or the degree to which they may have modified Falkvinge's model, they focus substantial attention on how their groups are structured autonomously, or, in one description of this model, how each operates as a "decentralized, self-organized smart network."<sup>265</sup> IfNotNow allows any three or more members to autonomously "decide to take an action, build a community event, hold a Shabbat dinner, [or do] anything that builds community and works to end the occupation."<sup>266</sup> Demand Utopia puts a similar emphasis on autonomy and

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<sup>263</sup> See generally *Our Strategy*, IFNOTNOW, *supra* note 258; *About Our Movement*, COSECHA, *supra* note 259; *About*, DEMAND UTOPIA, *supra* note 260.

<sup>264</sup> See, e.g., Ayni Institute, *SWARM 4: Self-Organizing Decentralized Networks, Part 1*, YOUTUBE (Sept. 10, 2016), <https://www.youtube.com/watch?v=sYkXsYMhHdA> [hereinafter Ayni Institute, *SWARM 4*].

<sup>265</sup> See *id.* (discussing the format of a "decentralized, self-organized smart-network" at 21:20–21:35).

<sup>266</sup> *Judaism Unbound Podcast: Episode 124: IfNotNow – Ilana Levinson, Jill*

freedom for its members, emphasizing “the three utopian rule”: “if three utopians agree on an action, they can act in the name of the organization . . . no permission is necessary!”<sup>267</sup> For Demand Utopia, the goal is to provide “creative agency” for members to develop their own activities in support of their organizational goals.<sup>268</sup> With that freedom comes the need for individual members to take responsibility for the overall organization’s work: “if you think something needs to be done, you just do it, without asking anybody. If other people think that your initiative is good, they will join in. . . . It is every activist’s right and responsibility to go where he or she feels he or she can contribute the most.”<sup>269</sup> Some IfNotNow members describe how they value that autonomy precisely because it departs from the failings identified by critics of the non-profit industrial complex: “[T]here’s not a staff hierarchy making all the key decisions. . . . [Decisions are] based on what we actually want and need and think is important, and not based on fundraising decisions which often [are] in the mix when you have a staff and board structure.”<sup>270</sup>

All three groups also underscore the importance of the free flow of information around their groups. IfNotNow and Movimiento Cosecha describe how communication does not go from the top down, but should circulate freely around throughout the swarm, as different seven-person groups get information from other seven-person groups on how they may have coordinated some action.<sup>271</sup> Demand Utopia, similarly, aims for “people [to] inspire one another across all levels and all geographies, with the only common factor being the overall goals of the Swarm.”<sup>272</sup>

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Raney, JUDAISM UNBOUND (June 22, 2018), <https://www.judaismunbound.com/podcast/2018/6/22/judaism-unbound-episode-124-ifnotnow>.

<sup>267</sup> DEMAND UTOPIA, HIVE BY-LAWS 3, [https://docs.google.com/document/d/1uwMhLN1iJcMHooHy5vKyoeRq06WuPY4I05pD\\_AZnyFs/edit](https://docs.google.com/document/d/1uwMhLN1iJcMHooHy5vKyoeRq06WuPY4I05pD_AZnyFs/edit) [hereinafter DEMAND UTOPIA BY-LAWS].

<sup>268</sup> *Coffee with Comrades Podcast: Episode 30: “A Life Cult” ft. Demand Utopia*, COFFEE WITH COMRADES (Jan. 28, 2019), <http://coffeewithcomrades.com/website/episode-30-a-life-cult-ft-demand-utopia>.

<sup>269</sup> *Id.*

<sup>270</sup> *Judaism Unbound Podcast*, *supra* note 266.

<sup>271</sup> See Ayni Institute, *SWARM 4*, *supra* note 264.

<sup>272</sup> See DEMAND UTOPIA BY-LAWS, *supra* note 267, at 1.

## 2. REGRESSIVE ELEMENTS OF THE SWARM MODEL

The swarm model presented by Falkvinge contains elements that seem inconsistent with anti-authoritarian principles, and out of step with the approaches taken by the other activist organizational models described in this Article. This is clear in both the substantial power reserved for the organizational founder such that there appears to be no realistic way for the organization to change direction or tactics without that individual, and in Falkvinge's willingness to launch top-down, even manipulative efforts to isolate those who would raise concerns about the overall workings of the group.<sup>273</sup>

Few of these attributes appear to be embraced by the activist groups considered in this Section, and in some cases, steps have been taken to modify Falkvinge's model to be more democratic. One helpful concept here is articulated by Carlos Saavedra, a founder of both the Ayni Institute and Momentum and a member of Movimiento Cosecha,<sup>274</sup> who distinguishes between a "decentralized organization with centralized design" and a "decentralized organization with decentralized design."<sup>275</sup> Movimiento Cosecha is clear that it has a centralized design and describes its process as one of "frontloading," with "rules, procedures, structure, vision established explicitly at the beginning of the process, so we can operate with as much autonomy as possible while retaining unity."<sup>276</sup> This sounds somewhat like the Swedish Pirate Party model, but Movimiento Cosecha also notes that its model did not spring forth from one sole founder, but was developed by a group of activists and organizers collaborating over the course of two years of planning.<sup>277</sup> The group

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<sup>273</sup> See FALKVINGE, *supra* note 223, at 180–81.

<sup>274</sup> *Our Team*, Ayni Inst., <https://ayni.institute/our-team/> (last visited Feb. 19, 2019); *Meet Our Team*, MOMENTUM, <https://www.momentumcommunity.org/team> (last visited Mar. 1, 2019).

<sup>275</sup> Ayni Institute, *SWARM 2: What is Decentralized Organization? Part 2*, YOUTUBE (Sept. 10, 2016), <https://www.youtube.com/watch?v=h7Q2-SgwBtg&> (distinguishing between decentralized organizations with centralized control and decentralized organizations with decentralized control at 15:20–16:28).

<sup>276</sup> *Id.* (discussing frontloading at 21:35–23:30).

<sup>277</sup> *Id.* (discussing the development of a "completely decentralized organization" from 20:55–21:15).

does not describe any efforts to manipulate or isolate members who do not go along with the founders' vision, but the "decentralized organization with centralized design" concept does raise the question of what should happen when members of the organization have concerns about the overall organization's design, goals, or culture.<sup>278</sup> Falkvinge answers this question with a top-down, authoritarian answer, but Movimiento Cosecha and other groups embracing the "decentralized organization with centralized design" framework do not appear to have publicly addressed this question yet.<sup>279</sup>

Demand Utopia takes a radically different approach, one that presents a clear path for members to change the overall organization.<sup>280</sup> While Demand Utopia retains the mini-pyramid structure of the Swedish Pirate Party, it upends the logic of the mini-pyramids when it gets to the highest levels of the structure.<sup>281</sup> Unlike in Falkvinge's original model, where the highest levels come closer and closer to the founder and, presumably, his or her deputies, allies, and others who are likely to share a common vision,<sup>282</sup> Demand Utopia makes the top level of the scaffolding a General Assembly, an annual gathering open to substantially all active organizational members, a group specifically tasked with assessing the strategic vision for the group and making changes to the goals or structure of the group if necessary.<sup>283</sup> Although this makes the largest decision-making body for the organization far more democratic, it remains partially restricted, as attendance at the General Assembly is only open to members who have reached the rank of "Green One," which is obtained by completing three tasks ("badges") that are aligned with the organization's mission and "being vouched for by at least two" other members.<sup>284</sup> In this approach, much depends on how these rules are enforced and how restrictive or unrestrictive members are at "vouching" for newcomers; still, Demand Utopia's model

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<sup>278</sup> *See id.*

<sup>279</sup> *See id.*

<sup>280</sup> *See* DEMAND UTOPIA BY-LAWS, *supra* note 267, at 5–9.

<sup>281</sup> *Id.* at 7.

<sup>282</sup> FALKVINGE, *supra* note 223, at 55–56.

<sup>283</sup> DEMAND UTOPIA BY-LAWS, *supra* note 267, at 4.

<sup>284</sup> *Id.*

attempts to balance preserving the group's original vision with allowing for meaningful membership control over even the fundamentals of the organization's goals, strategy, and structure.

### 3. ELEMENTS OF THE SWARM MODEL THAT SEEK EFFICIENCY WITHOUT HIERARCHY

Mission-driven organizations that grant autonomy to their members to undertake critical tasks for the organization without any top-down direction understandably tend to be very concerned with efficiency. Where the sociocratic model uses a hierarchy of Circles, and where both the worker self-directed non-profit and the hub-and-spoke models constrain their Boards, leaving some traditionally Board-led work to a collective of workers or members, swarm organizations highlight the autonomy of their small groups, even when some underlying hierarchy continues to exist, and without much discussion of a Board—even when one exists.<sup>285</sup>

Despite sometimes retaining Boards and officers, swarm organizations generally do not seem to rely on Board direction and top-down structures to impose efficiency like professionalized non-profits do. Instead, Falkvinge's model places significant faith in the power of small teams of no more than seven people to work efficiently. Interestingly, the groups described in this section seem, to some degree, to depart from Falkvinge's faith in the power of working in teams of seven people. Both Movimiento Cosecha and IfNotNow seem to identify less with the mini-pyramid scaffolding

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<sup>285</sup> IfNotNow, for instance, has a Board that seems to lead on certain administrative, governance, and fundraising matters, even if it remains relatively hands-off when it comes to programmatic oversight. *Judaism Unbound Podcast*, *supra* note 266 (“I was about to say we don’t have a Board, but for administrative and fundraising reasons we do actually have a 501(c)(3) status and a Board. But some very smart people put that Board together and by-laws together in ways that make that Board separate from our decision-making.”). Similarly, the Sunrise Movement, while using the swarm organization model for its organizing, is also built around affiliated 501(c)(3) and 501(c)(4) entities, each with Boards and officers. See *Tax Returns*, SUNRISE MOVEMENT, <https://www.sunrisemovement.org/tax-returns>; *Sunrise Movement Education Fund*, GUIDESTAR, <https://www.guidestar.org/profile/46-4773036>.

and more closely with a “decentralized, self-organized network,” which they depict as shaped more like a circle.<sup>286</sup> Demand Utopia does retain the scaffolding of mini-pyramids in its model,<sup>287</sup> but departs radically from the Swedish Pirate Party structure at its highest level by situating the group’s ultimate governance and decision-making authority in the hands of a General Assembly.<sup>288</sup> Unfortunately, none of these groups seem to directly challenge Falkvinge’s arguments about the importance of working in teams of seven, larger groups of thirty, and very large groups of 150 people, despite the very questionable pseudoscience underlying his claims.<sup>289</sup>

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<sup>286</sup> See Ayni Institute, *SWARM 5: Self-Organizing Decentralized Networks Part 2*, YOUTUBE (Sept. 10, 2016), <https://www.youtube.com/watch?v=B7bgNQRHbeQ>. IfNotNow and Movimento Cosecha are both affiliated with Ayni Institute and Movement Netlab. *About Us*, AYNi INST., <https://ayni.institute/about/> (last visited Mar. 21, 2019); *Collaborations*, MOVEMENT NETLAB, <https://movementnetlab.org/partners/> (last visited Mar. 21, 2019).

<sup>287</sup> Demand Utopia uses something much more like the original model, with a series of pyramids structured from the smallest groups to the largest: at the bottom are the leaders of each Cypher (three to seven people); above them are the leaders of each Pod (three to five Cyphers, roughly thirty people); above them are the leaders of each Polis (three to five Pods, roughly 150 people); above them are the leaders of each Zona (three to five Polis, roughly 750 people). DEMAND UTOPIA BY-LAWS, *supra* note 267, at 5.

<sup>288</sup> See *supra* notes 282–84 and accompanying text.

<sup>289</sup> In an analysis of the Falkvinge model, it bears noting that his arguments on the efficiency of teams of seven, thirty, and 150 are very questionable. Falkvinge argues that teams of seven are efficient because for seven people to have a relationship with one another, there are a total of twenty-one relationships (A-B, A-C, A-D, A-E, A-F, A-G, A-H, B-C, B-D, etc.); among eight people, there are twenty-eight relationships. FALKVINGE, *supra* note 223, at 52–57. So, he reasons, adding an eighth person would add fourteen percent (14%) more work, but require thirty-three percent (33%) more time to manage the relationships. *Id.* at 54. Any empirical consideration of a social grouping would show that math to be flawed, and deeply dependent on the situation. See *id.* at 52–57. The idea that managing the relationships of players on a soccer team of eleven players (fifty-five relationships) would be so radically different from managing the relationships of players on a baseball team of nine players (thirty-six relationships) that it would take fifty-two percent (52%) more effort to manage the team’s interpersonal relationships seems more likely to be a mathematical quirk than a verifiable metric.

Falkvinge’s rationale for capping the larger group at 150 people is based on “Dunbar’s number,” a principle described by British anthropologist Robin Dunbar

## V. GOVERNANCE CONSTRAINTS ON THE NEW ACTIVIST NON-PROFIT MODELS

Informed and inspired by the solidarity economy and commons movements, the Occupy Movement and the Movement for Black Lives, anti-authoritarian principles of autonomy, horizontalism, and prefigurativism, and the critiques of the non-profit industrial complex, activists have been developing innovative non-profit structures that move away from the professionalized non-profit model to better reflect their political values. While the structures described in this Article, and their many potential variations, share certain similarities, there are important differences between these models that activist groups considering non-profit vehicles for their work and their lawyers should carefully consider in order to create appropriate structures for their projects. For activist groups that decide to form

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about how large a meaningful social network can be. *Id.* at 57. While it is not at all clear that the social network Dunbar describes is applicable in this context, even if it were, there are two substantial problems with how Falkvinge tries to do so. Falkvinge argues, somewhat in line with Dunbar, that because of the biology of the human brain, people can only relate to 150 people, and so that should be the top size of the group. But Dunbar's argument is that this number is an average, and people's actual ability to maintain a social network ranges between 100 and 230 people, and 150 people is a rough estimate of the average. *See id.*; R.I.M. Dunbar, *Co-Evolution of Neocortex Size, Group Size and Language in Humans*, 16 *BEHAV. & BRAIN SCI.* 681, 686–87 (1993). In other words, if we accept Falkvinge's application of Dunbar's study to the social movement large-group context, we have inhibited roughly half—the half of people whose brains permit them to have social networks smaller than the mean—of the group from meaningful participation. Even beyond that, Dunbar's studies have been criticized by other anthropologists for relying too much on biological determinants, and not taking into account social and cultural differences in groups. *See* Jan de Ruiter et al., *Dunbar's Number: Group Size and Brain Physiology in Humans Reexamined*, 113 *AM. ANTHROPOLOGIST* 557, 557–68 (2011). If anything, these questions seem more important in a group dealing with often-controversial issues tied up with questions of race, religion, and identity, like those worked on by Movimiento Co-secha and IfNotNow.

Falkvinge's argument for working in middle-sized groups of thirty people—which boils down to that number usually seeming to be manageable—may be his most compelling, despite not claiming any scientific or mathematical rationale. *Id.* at 155.

non-profit entities, in addition to the challenges of developing non-profit corporate structures that align with their political values and that are functional and effective vehicles for their work, these groups and their lawyers must also ensure that these structures comply with the requirements of non-profit law and, when applicable, the additional legal requirements that come from exempt-organization tax law, employment law, and other bodies of law that become more challenging to navigate the more a group departs from conventional structures and practices.<sup>290</sup>

Groups developing these new organizational structures must pay particular attention to ensuring that their structures permit directors to fully comply with their fiduciary duties, as it is here that these new structures make their riskiest departures from safe non-profit legal norms. Although it is clear that fiduciary duties require that corporate directors adhere to “something stricter than the morals of the market place[.]”<sup>291</sup> the specific standards of care owed by directors of non-profit organizations to those organizations have changed over time.<sup>292</sup> The long-term trend has seen non-profit directors inching toward being held to the same fiduciary standards as directors of business corporations,<sup>293</sup> but in the twenty-first century, standards

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<sup>290</sup> Some of these new activist non-profits have obtained tax exemption from the IRS, and there is no reason that innovative corporate structures would prevent successfully obtaining tax exemption, although the governance rules specific to exempt organizations are an additional regulatory hurdle. *See infra* Section V.B.3.

<sup>291</sup> *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

<sup>292</sup> *See* Linda Sugin, *Resisting the Corporatization of Nonprofit Governance: Transforming Obedience into Fidelity*, 76 *FORDHAM L. REV.* 893, 893–94, 905 (2007) (describing the trend toward imposing business standards on non-profit Boards and the costs of this trend on the charitable work of non-profits, noting that “there are many situations in which the rules applicable to for-profit organizations fail to capture the needs of nonprofits”). While nineteenth century non-profit governance relied heavily on stringent common law principles and charitable trust standards, by the second half of the twentieth century, governance standards appeared to come closer to paralleling those of business corporations. *See* Joseph Mead & Michael Pollack, *Courts, Constituencies, and the Enforcement of Fiduciary Duties in the Nonprofit Sector*, 77 *U. PITT. L. REV.* 281, 295–96 (2016).

<sup>293</sup> The idea that the members of the governing body of a charitable corporation would owe corporate fiduciary duties rather than the duties of the trustees of a charitable trust would develop slowly, over the course of more than a century.



of care owed by non-profit and business corporate directors may be growing apart again, as new federal laws have imposed additional governance requirements on business corporations that exempt non-profit corporations,<sup>294</sup> and, at the same time, a new governance regime has been imposed on tax-exempt non-profit Boards through the Internal Revenue Code.<sup>295</sup>

This Part V divides the legal issues related to governance structure and fiduciary duties that face the new activist non-profits into two sections. Section V.A describes the duty of care, the duty likely most at risk of being breached by the structural innovations of these new activist non-profit models. Section V.B describes the duties of loyalty and obedience and the governance rules that apply to tax-exempt organizations through the Internal Revenue Code, and discusses how these rules impact the new activist forms.

### A. *The Duty of Care*

#### 1. THE DUTY OF CARE AND THE NEW ACTIVIST NON-PROFITS

Non-profit directors are required to act with care in how they govern a non-profit corporation.<sup>296</sup> State laws vary in how they de-

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Fishman, *supra* note 18, at 655. In New York, for instance, the 1895 Membership Corporation Law held that directors could be personally liable for short-term debts and they had to obtain court approval for leases longer than three years. *Id.* at 649. It took until the adoption of the 1970 Not-for-Profit Corporation Law for New York to use virtually the same requirements for directors' standards of care and interested transaction rules as found in the New York Business Corporation Law. *Id.* at 649–50.

<sup>294</sup> The governance reforms that were instituted after the corporate scandals of the early 2000s, including The Sarbanes-Oxley Act of 2002, the Public Company Accounting Reform and Investor Protection Act of 2002, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 were largely limited to publicly-held business corporations. Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. PA. J. BUS. L. 347, 358 (2012).

<sup>295</sup> For a description of the governance rules that have been imposed through tax administration policies, see *infra* Section V.B.

<sup>296</sup> MODEL NONPROFIT CORPORATION ACT § 8.30 (AM. BAR ASS'N 2008).

scribe this duty, but most require that directors both act with reasonableness, judged by an “ordinarily prudent person in a like position” standard, and that they make their decisions based on a subjectively good faith belief that they are acting in the best interests of the corporation.<sup>297</sup> This duty is sometimes described as having two parts: (1) a duty of attention, a requirement that directors stay reasonably informed about the corporation, and (2) a duty of reasonable decision-making, a requirement that directors make decisions reasonably believed to be in the best interests of the corporation.<sup>298</sup>

There are multiple mechanisms that can shield directors from liability if they are found to have breached the duty of care. First, if directors are volunteers, as is typical for smaller non-profits, mere negligence may be insufficient to find a director personally liable, as courts do not want to discourage people from volunteering to serve on non-profit Boards.<sup>299</sup> Second, directors are protected by the business judgment rule, sometimes called the “best judgment rule” in the non-profit context, which provides that directors are not liable for harm to the organization caused by a mistake of judgment as long as the director was reasonably informed about the subject of the decision, there was no fraud or illegality in the decision, and the director was able to exercise independent judgment without a disabling

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<sup>297</sup> See, e.g., CAL. CORP. CODE § 5231(a) (West 2019) (“A director shall perform . . . in a manner that director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use in similar circumstances.”); MINN. STAT. § 317A.251 (2018) (“A director shall discharge the duties of the position of director in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.”); N.Y. NOT-FOR-PROFIT CORP. § 717(a) (Consol. 2019) (“Directors and officers shall discharge the duties of their respective positions in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.”).

<sup>298</sup> Hazen & Hazen, *supra* note 294, at 375.

<sup>299</sup> See, e.g., *La. World Exposition v. Fed. Ins. Co.*, 864 F.2d 1147, 1152 (5th Cir. 1989). However, this is not a complete bar, and directors have on occasion been found personally liable for negligent management of assets. See, e.g., *Lynch v. John M. Redfield Found.*, 88 Cal. Rptr. 86, 92 (Cal. Ct. App. 1970); *Vacco v. Diamandopoulos*, 715 N.Y.S.2d 269, 272 (N.Y. Sup. Ct. 1998).

conflict of interest.<sup>300</sup> Third, state and federal law offer protections to directors for violations of the duty of care. Many states provide statutory immunity from lawsuits based on allegations of the breach of the duty of care for directors of non-profit organizations, especially if they are serving without compensation.<sup>301</sup> Similarly, the federal Volunteer Protection Act of 1997 shields directors of 501(c)(3) tax-exempt non-profits who receive no cash compensation or noncash compensation of no more than \$500 per year from liability in many kinds of third-party lawsuits.<sup>302</sup> Fourth, many state non-profit laws permit or require non-profit organizations to indemnify directors in certain situations,<sup>303</sup> although such indemnification is only meaningful protection for directors of organizations with the financial resources to pay for the costs of indemnification. A non-profit may obtain directors' and officers' liability insurance to fund those costs, and such policies should cover both potential liability and the costs of defending directors against a lawsuit.<sup>304</sup>

All of these protections and officers provide a significant amount of safety for directors of non-profit organizations, making

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<sup>300</sup> *Janssen v. Best & Flanagan*, 662 N.W.2d 876, 883 (Minn. 2003); *Mahan v. Avera St. Luke's*, 621 N.W.2d 150, 154 (S.D. 2001); *Beard v. Achenbach Mem'l Hosp.*, 170 F.2d 859, 862 (10th Cir. 1948); PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 365 (AM. LAW INST. 2007).

<sup>301</sup> *See, e.g.*, D.C. CODE § 29-406.90 (2019) (providing immunity for uncompensated volunteers, including directors of non-profit organizations that maintain liability insurance); GA. CODE ANN. § 51-1-20.1 (2018) (providing immunity for uncompensated members, directors, trustees, and officers of non-profit hospitals and charities if they were acting in good faith and within the scope of their duties); 805 ILL. COMP. STAT. 105/108.70 (2018) (providing immunity for directors and officers of tax-exempt non-profits if the director earns under \$25,000 per year and the act or omission did not involve willful or wanton conduct). *See generally*, NONPROFIT RISK MGMT. CTR., STATE LIABILITY LAW FOR CHARITABLE ORGANIZATIONS AND VOLUNTEERS (2001), <https://www.nonprofitrisk.org/app/uploads/2017/01/state-liability-laws.pdf> (last updated 2009) (describing protections from liability for nonprofits in various states).

<sup>302</sup> 42 U.S.C. §§ 14503(a), 14505(6) (2012).

<sup>303</sup> *See, e.g.*, MASS. GEN. LAWS ch. 180 § 3 (2019); N.Y. NOT-FOR-PROFIT CORP. § 722 (2019); VA. CODE ANN. § 13.1-881 (Consol. 2019).

<sup>304</sup> AM. BAR ASS'N, NONPROFIT GOVERNANCE AND MANAGEMENT 16 (Victor Futter et al. eds, 2d ed. 2002).

service on a Board relatively low risk, even for directors who are not as active in providing oversight as might be ideal. Directors are generally permitted to rely on information prepared by employees, Board committees on which they do not serve, and on other competent persons without doing an independent investigation into the information reported to them.<sup>305</sup> In addition, directors are not required to manage the day-to-day work of a non-profit organization, only to set broad organizational policies, oversee corporate agents, and prudently select organizational managers.<sup>306</sup> Directors of conventionally structured, professionalized non-profits fail to live up to these standards somewhat routinely.<sup>307</sup> But the less conventionally structured an activist organization is, the more it may attract scrutiny, and these new activist non-profits should take steps to ensure their directors satisfy the duty of care.

## 2. BEST PRACTICES FOR THE NEW ACTIVIST NON-PROFITS TO SATISFY THE DUTY OF CARE

Some of the new activist corporate structures may come close to delegating Board authority beyond what is allowed by the permissive duty of care standard. In *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*,<sup>308</sup> patients of a non-profit hospital sued its individual directors for failing to supervise management of the hospital's investments, not even holding meetings of the relevant oversight committees for many years.<sup>309</sup> The court found that a "[t]otal abdication of the supervisory role" is

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<sup>305</sup> See, e.g., CAL. CORP. CODE §§ 5237, 7236, 9245 (2019); N.Y. NOT-FOR-PROFIT CORP. § 719; MODEL NONPROFIT CORP. ACT § 8.33 (AM. BAR FOUND. 2003).

<sup>306</sup> AM. BAR ASS'N, GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 31 (William L. Boyd, III & Jeannie Carmedelle Frey eds., 3d ed. 2012) [hereinafter AM. BAR ASS'N, GUIDEBOOK].

<sup>307</sup> *Id.* at 31–33. The failure of directors to live up to this standard is recognized as a common problem, and directors are rarely found liable for such a failure except in “the most egregious cases such as improper loans or distribution of corporate assets.” JAMES J. FISHMAN, STEPHEN SCHWARZ & LLOYD HITOSHI MAYER, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 138 (5th ed. 2015).

<sup>308</sup> 381 F. Supp. 1003 (D.D.C. 1974).

<sup>309</sup> *Id.* at 1008.

a violation of the duty of care and that “[a] director who fails to acquire the information necessary to supervise investment policy or consistently fails even to attend the meetings at which such policies are considered has violated his fiduciary duty to the corporation.”<sup>310</sup> Although directors are allowed to rely on the expertise of those to whom they have delegated responsibility, “such reliance is a tool for interpreting the delegate’s reports, not an excuse for dispensing with or ignoring such reports.”<sup>311</sup> This has become the standard for permissible delegation in most states and under the Model Nonprofit Corporation Act.<sup>312</sup>

Some of the activist models considered in this Article already take steps to meet this standard. In the worker self-directed non-profit model, the Board delegates governance power to “staff trustees,” but the Board still maintains an oversight role, meets regularly, and retains the power to rescind this delegation of authority.<sup>313</sup> This is likely permissible under the standards articulated in *Stern*, as the Board remains continuously involved in corporate oversight and retains the power to take action to correct the course of the organization, even if it would require a separate resolution to intervene.

In the hub-and-spoke non-profit counter-institution model, the Board becomes one of many spokes, with management functions conducted by a collective comprised of delegates from the various affinity groups that comprise the organization as a whole.<sup>314</sup> Although this structure aims to segregate Board-specific duties like budgetary oversight and compliance in that Board affinity group, there is a risk that if affinity groups self-manage their projects with oversight given only by the collective hub, not the Board, directors could be found to have breached their duty of care by failing to provide adequate oversight of the organization’s activities.

One way to mitigate that risk is demonstrated by SRLP. At SRLP, all teams meet twice yearly to present their work for the year

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<sup>310</sup> *Id.* at 1014.

<sup>311</sup> *Id.*

<sup>312</sup> MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 208 (2004).

<sup>313</sup> *See supra* Part II.

<sup>314</sup> *See supra* Part III.

and give progress reports, with the organization as a whole providing consensus approval to the “broad strokes” of programming.<sup>315</sup> If the Board is informed about the activities of the various affinity groups or spokes of an organization on a semi-annual basis, and if it has the ability, through the consensus process, to block an action it finds contrary to the best interests of the organization, that is likely a sufficient level of oversight for the directors to fulfill their duty of care.<sup>316</sup> This approach provides reasonable protection to their directors, and seems distinguishable from the total abandonment of Board involvement in *Stern*.

More generally, the new activist non-profits—even if they intentionally place their Boards at their organizational margins or strip them of many of their conventional powers—can take steps to minimize risk related to the duty of care. First, Boards should retain an ability to monitor organizational finances. Even if there is a substantial delegation of authority over programming decisions compared to the norms of professionalized non-profits, if the Board monitors organizational finances, or receives and meaningfully reviews reports from a committee or other group reasonably tasked with such monitoring, directors are likely to not be found liable for a breach of the duty of care, as directors are rarely found to have breached the duty of care except in cases of significant financial improprieties, such as “improper loans or distribution of corporate assets.”<sup>317</sup>

Similarly, Boards should meet at least annually to review all important organizational or governance matters that have been worked on by committees, Circles, spokes, members, or any other non-Board groups.<sup>318</sup> In that review, directors should make sure they are meeting the requirements of the business judgment rule: they have

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<sup>315</sup> See *supra* Section III.B.

<sup>316</sup> See *supra* Section III.B.

<sup>317</sup> FISHMAN, SCHWARZ & MAYER, *supra* note 307, at 138.

<sup>318</sup> There are many guides for non-profit directors that seek to explain their governance duties. For a detailed, book-length description, see AM. BAR ASS’N, GUIDEBOOK, *supra* note 306. For a brief overview of non-profit Boards’ annual requirements, see Michelle Berger, *What Issues Should a Nonprofit Board Consider Annually?*, NONPROFIT L. BLOG (Dec. 15, 2014), <http://www.nonprofitlawblog.com/issues-nonprofit-board-consider-annually/>.

made themselves reasonably informed about the subject of a decision, they have reviewed the decision to ensure there is no fraud or illegality, and they exercise independent judgment without a disabling conflict of interest in their review.<sup>319</sup> Groups considering paying their directors should also look at whether state or federal law would provide directors with additional protections if they are uncompensated.<sup>320</sup> Finally, like all non-profits, a non-profit experimenting with these new corporate structures should consider whether it must or should provide indemnification to their directors and whether to obtain directors' and officers' liability insurance to further protect their directors and officers.<sup>321</sup>

Such efforts to ensure that directors satisfy their duty of care not only serve to protect an organization and its constituents financially and legally, but can also provide an opportunity for a meaningful review of decisions made by a decentralized or non-hierarchical organization. Activist non-profits should work to structure such reviews so as not to be back-door efforts to reimpose hierarchy, but rather as mechanisms to bolster accountability within a decentralized, non-hierarchical group, protecting against the kinds of dramatic missteps that have sometimes occurred when organizations operate solely through affinity group structures.<sup>322</sup>

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<sup>319</sup> See *supra* note 300 and accompanying text.

<sup>320</sup> See *supra* notes 301–02 and accompanying text.

<sup>321</sup> See *supra* notes 303–04 and accompanying text.

<sup>322</sup> One cautionary example is the Common Ground Collective, an autonomous mutual aid group in New Orleans that provided substantial storm recovery and rebuilding services after Hurricane Katrina. See Haber, *supra* note 25, at 346–48 (citing SCOTT CROW, BLACK FLAGS AND WINDMILLS: HOPE, ANARCHY, AND THE COMMON GROUND COLLECTIVE (2011)). Members of the group began to manage a low-income housing development called the Woodlands Complex, which had fallen into serious disrepair after the storm, and spent hundreds of thousands of dollars to do repairs based on an oral promise to sell the building to them by the owner of the complex. See Haber, *supra* note 25, at 347–48. After the collective members made the repairs to the complex, the owner sold the building to a different owner and evicted the low-income tenants. *Id.*

B. *Duties of Loyalty and Obedience, and Governance Obligations Arising from the Internal Revenue Code*

In addition to the duty of care, non-profit directors owe other fiduciary duties to their organizations, including the duties of loyalty and obedience, and duties arising from the Internal Revenue Code for certain tax-exempt organizations.

1. DUTY OF LOYALTY

The duty of loyalty addresses situations in which a director has a direct or indirect conflict of interest, and includes prohibitions on self-dealing and the usurpation of corporate opportunity.<sup>323</sup> Loyalty should remain an important concern for the new activist non-profits. As with all non-profits, if a director or a family member of a director has a personal or financial interest in any matter coming before the Board or a committee of the Board, that director should disclose that interest and generally should not participate in any discussion of, or voting on, the possible approval of any transaction impacting that interest.<sup>324</sup> For organizations that authorize committees, Circles, spokes, or any other non-Board groups to make significant expenditures, the non-profit should consider crafting conflict of interest policies covering those bodies. As part of the duty of loyalty, directors have an obligation to protect the confidentiality of private organizational information,<sup>325</sup> and it may be that the more people who are permitted to participate in a decision-making process, the more likely it becomes that sensitive information may be disclosed; activist non-profits that permit many people to be involved in confidential deliberations should take steps to remind all such decision-makers of this duty, and should undertake measures to ensure that information, data, and documents are stored securely.

A related fiduciary duty that could arise as an issue in the context of activist organizations is what some call a “dual loyalty” or “di-

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<sup>323</sup> Hazen & Hazen, *supra* note 294, at 380–81.

<sup>324</sup> See AM. BAR ASS'N, GUIDEBOOK, *supra* note 306, at 43–48 (outlining best practices regarding the duty of loyalty).

<sup>325</sup> *Id.* at 49.



vided allegiances”—not a conflict between a director’s personal financial interest and that of the non-profit, but a conflict between a director’s involvement with multiple organizations that may cause that director to have loyalties to both groups or causes.<sup>326</sup> Because people who participate in one activist organization sometimes have allegiances to multiple activist groups, activist non-profits should consider addressing the possibility of such conflicts in an organizational conflict of interest policy and ask directors to be sensitive to the potential for such conflicts.<sup>327</sup>

## 2. DUTY OF OBEDIENCE

The duty of obedience requires that directors ensure that corporate acts are lawful and not ultra vires, beyond the specified purpose and mission of the organization.<sup>328</sup> Although this duty rarely comes up in court cases and is not codified in all state non-profit corporation statutes, state attorneys general with enforcement responsibilities may monitor compliance with organizational purposes and missions, chiefly at moments of major corporate transitions, like mergers and acquisitions, changes of corporate purpose, or upon dissolution.<sup>329</sup> When a donor to an organization places restrictions on the uses of donated funds, the duty of obedience requires that directors make reasonable efforts to ensure compliance with those restrictions,<sup>330</sup> and, in states that have adopted the Uniform Prudent

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<sup>326</sup> See generally CLIFFORD S. GOLDFARB, DUAL LOYALTIES ON NON-PROFIT BOARDS: SERVING TWO MASTERS (2011), [https://www.grllp.com/publications/Goldfarb\\_Dual\\_Loyalties\\_On\\_NonProfit\\_Boards\\_Final.pdf](https://www.grllp.com/publications/Goldfarb_Dual_Loyalties_On_NonProfit_Boards_Final.pdf).

<sup>327</sup> See, e.g., *Policy Concerning Conflict of Interest and Divided Allegiance*, AM. CTR. PHILANTHROPY BOARD 1–3, <https://www.americancp.org/pdf/ACP-Conflict-Interest-Statement.pdf> (last visited Mar. 21, 2019) (distinguishing conflict-of-interest and divided allegiance policies).

<sup>328</sup> Hazen & Hazen, *supra* note 294, at 388.

<sup>329</sup> *Id.* at 389–90; see Sugin, *supra* note 292, at 899 (noting that even though the New York not-for-profit corporation law does not describe a duty of obedience, the state attorney general finds that the duty “may be inferred” from other provisions of the statute).

<sup>330</sup> Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1131 (2005).

Management of Institutional Funds Act, directors must also consider certain additional economic considerations.<sup>331</sup>

The new activist non-profits may have cause to be more concerned about the duty of obedience than conventionally structured non-profits. In a governance model where decisions may be made or new programs may be launched without close Board oversight, how can an organization ensure that it does not act ultra vires—outside of the organization’s corporate purpose and mission? The new activist non-profits may find some relief in the generally permissive trend in the law around non-profit corporate purposes: although corporations are still not permitted to operate outside of the corporate purposes listed in their charters, it has become increasingly common for state non-profit statutes to permit the incorporation of a non-profit for any lawful purpose, raising the issue of whether anything lawful could ever be ultra vires for an entity with such a broad corporate purpose.<sup>332</sup> Like in the context of business corporations where similarly permissive incorporation statutes have existed since the nineteenth century, concern about acting outside of an organization’s corporate purposes may be an old paradigm, eclipsed by judicial deference to the business judgment rule.<sup>333</sup> For the new activist

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<sup>331</sup> UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2006) (requiring the Board to consider investment decisions in relations to the organization’s overall portfolio, the economic circumstances at the time, and the charitable purposes of the organization and the fund).

<sup>332</sup> Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 510 (1981) (noting that the trend, even in the early 1980s, was toward permitting non-profit incorporation for any lawful purpose); Alan R. Palmiter, *Duty of Obedience: The Forgotten Duty*, 55 N.Y. L. SCH. L. REV. 457, 469 (2010) (arguing that the duty of obedience for non-profits “has come under attack for limiting non-profit adaptability”). For this reason, the Model Nonprofit Corporation Act, since its 1987 revision, has not recognized a non-profit duty of obedience separate from the duties of care and loyalty. Palmiter, *supra*, at 469.

<sup>333</sup> For discussions of the decline of the doctrine of ultra vires in business corporations, see, for example, JAMES D. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 4:7 (3d ed. 2018); CHARLES R.T. O’KELLEY & ROBERT B. THOMPSON, *CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS* 671 (4th ed. 2003). Still, most states continue to have ultra vires rules in their corporate codes, permitting shareholder suits or action by a state Attorney General to enjoin

non-profits, the duty of obedience may require a degree of reporting the activities of relatively autonomous groupings like Circles or affinity groups to the larger body or Board and an attentiveness to the risks of breaching this duty.

The duty of obedience also may include a general prohibition against directing the organization to engage in illegality.<sup>334</sup> Although this may sound like a concern for some activist non-profits, the duty of obedience likely does not prevent an activist organization from taking a principled stand against unjust laws or an unjust system of laws, just as the duty of loyalty for business corporations does not prevent a corporation from openly disobeying a law in order to challenge its validity or application.<sup>335</sup> In the activist non-profit context, the decision to openly disobey a law as part of a campaign of civil disobedience or direct action that supports the organization's goals should similarly not be considered a breach of the duty of obedience.<sup>336</sup> Still, it is a good practice for an organization interested in endorsing such acts to make it clear to members or others that participation in such activities is always optional and that members might, depending on the context, risk arrest or other serious consequences for actions they decide to take.

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a corporate act or dissolve a corporation, and such actions continue to be at least periodically litigated. Adam J. Sulkowski, *Ultra Vires Statutes: Alive, Kicking, and a Means of Circumventing the Scalia Gauntlet in Environmental Litigation*, 24 J. ENVTL. L. & LITIG. 75, 103–07 (2009).

<sup>334</sup> Palmiter, *supra* note 332, at 460 (noting that corporations, since their beginnings, were only allowed to engage in lawful business and that the duty of obedience has therefore always “called on fiduciaries to not permit corporate illegality”). While this approach to the duty of obedience would make illegal acts also ultra vires, Palmiter notes that, like the rest of the ultra vires doctrine, the duty to not permit corporate illegality has largely “wilted away.” *Id.*

<sup>335</sup> AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01, cmt. g, 60–61 (1992).

<sup>336</sup> There are surely limits to such an interpretation of the law: no matter how noble an organization's mission, a non-profit could not use “civil disobedience” as a shield to protect efforts to fraudulently induce people to donate to the organization.

### 3. GOVERNANCE OBLIGATIONS ARISING FROM THE INTERNAL REVENUE CODE

The Internal Revenue Code has an additional impact on non-profit corporate governance rules for organizations that maintain federal tax exemption. Organizations exempt from income tax pursuant to Internal Revenue Code 501(a), including most organizations (other than private foundations and black lung benefit trusts) described in any provision of 501(c), 527, or 4947(a)(1), must submit an annual information filing to the IRS on Form 990, 990-EZ, or 990-N.<sup>337</sup> Starting in 2008, the IRS redesigned Form 990, adding a series of new questions concerning corporate governance, some derived from legislation, and others that “place[d] new and undefined burdens on organizations.”<sup>338</sup> These new provisions on Form 990 ask organizations about how they make governance and other documents publicly available, conflicts of interest and interested director transactions, independent directors, document retention and destruction policies, Board review of the Form 990, whistleblower policies, and they impose additional documentation requirements.<sup>339</sup>

Of these new provisions, the ones that may cause concern for the new activist non-profits are related to independent directors. To be considered an independent director by the IRS, a director must not be compensated in any way—including for employment—by the same or a related organization, must not receive total compensation or other payments of \$10,000 during the organization’s tax year as an independent contractor, and neither that person nor any of his or her family members may be involved in a transaction with the organization.<sup>340</sup> State corporate law in only a very few states require

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<sup>337</sup> See *2018 Instructions for Form 990 Return of Organization Exempt from Income Tax*, INTERNAL REVENUE SERV., <https://www.irs.gov/pub/irs-pdf/i990.pdf> (last visited Apr. 28, 2019).

<sup>338</sup> James J. Fishman, *Stealth Preemption: The IRS’s Nonprofit Governance Initiative*, 29 VA. TAX L. REV. 545, 568 (2010) [hereinafter Fishman, *Stealth Preemption*].

<sup>339</sup> *Id.* at 569–78.

<sup>340</sup> *Id.* at 570.

that a majority of non-profit directors meet this degree of independence.<sup>341</sup> But while the IRS does require disclosure of interested directors, it only hints that it may be moving toward a Sarbanes-Oxley-style regulatory regime that more closely regulates interested directors—nowhere does the IRS limit non-profits from having a Board comprised of non-independent directors.<sup>342</sup> Indeed, for organizations chartered in most states, the worker self-directed non-profit model developed by SELC could have been simplified; without the independent director requirement imposed by California law,<sup>343</sup> there is no legal need to have a majority-independent Board Circle in addition to an all-staff General Circle and Advisory Board, as SELC does.<sup>344</sup>

#### VI. CONCLUSION: BREAKING FROM THE NON-PROFIT INDUSTRIAL COMPLEX

The criticisms of the non-profit industrial complex may be at their most compelling when made by activists who have been pressured to shoehorn their radical, anti-authoritarian, prefigurative politics into today's dominant professionalized non-profit model.<sup>345</sup>

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<sup>341</sup> *Id.* at 572; *see* CAL. CORP. CODE § 5227(a) (West 2019); ME. STAT. tit. 13-B, § 713-A(2) (2007); N.H. REV. STAT. ANN. § 292:6-a (2018); N.D. CENT. CODE § 10-33-27(2) (2018); VT. STAT. ANN. tit. 11B, § 8.13(a) (2018).

<sup>342</sup> Scholars have criticized the IRS for even hinting at undertaking this change without a statutory mandate to do so. Fishman, *Stealth Preemption*, *supra* note 338, at 572; *see generally* Dana Brakman Reiser, *Director Independence in the Independent Sector*, 76 *FORDHAM L. REV.* 795, 797–98 (2007) (critiquing imposition of independent director reforms on non-profits).

<sup>343</sup> CAL. CORP. CODE § 5227(a).

<sup>344</sup> *See* SELC, *Webinar on Worker Self Directed Nonprofits*, *supra* note 116, (arguing at 50:46–51:21 that “Board independence is considered a key safeguard against corruption, but can it actually undermine the nonprofit’s efficacy and advancing its mission? The people with the most interest in the organization’s success are also most likely to be ‘interested persons’”).

<sup>345</sup> *See, e.g.*, Smith, *supra* note 26, at 1–2 (describing how INCITE! Women of Color Against Violence had a grant award revoked by the Ford Foundation because someone on Ford Foundation’s Board objected to a statement of support for the Palestinian people on their website).

Understandably, these activists' criticisms of the non-profit industrial complex sometimes conflate all possible versions of non-profit vehicles with the current norms of the professionalized non-profit sector in the United States.<sup>346</sup> It is important to understand U.S. non-profit norms in their historical context. The professionalized non-profit model—with its hierarchy, employee leadership, dependency on grants and donations to such a degree that grantors and donors overly influence programmatic decision-making, and tendency to grow increasingly separate from the communities with the most at stake in their advocacy—may be the dominant form of non-profit organization, but this is not due to any inherent legal requirements of the form. In fact, the non-profit corporation in the United States developed in an earlier era, when non-profit groups were commonly member-led, community-driven, staffed by volunteers, and—while politically more often civic- or community-minded than radical—often more democratic and participatory than many ostensibly “social justice” non-profits are today.<sup>347</sup>

Since the rise in prominence of the activist criticisms of non-profit norms that followed the development of the “non-profit industrial complex” label, activist skepticism of the non-profit corporate form has continued to grow. While some activists have chosen to work entirely outside of non-profit vehicles, such approaches are not always ideal. Other activists have experimented with new models for non-profit organizations, aiming to take advantage of the benefits of the corporate form—limited liability, increased likelihood of obtaining tax exemption, greater ability to enter into contracts like commercial leases or to obtain funding like grants or loans—while at the same time departing from professionalized non-profit norms to try to be responsive to the criticisms of the non-profit industrial complex.

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<sup>346</sup> See Paula X. Rojas, *Are the Cops in Our Heads and Hearts?*, in *THE REVOLUTION WILL NOT BE FUNDED*, *supra* note 26, at 197, 207 (arguing that “it is important to be critical of the non-profit system, [but] we do not necessarily need to get rid of it all together. Revolutionary movements around the world use non-profits (NGOs) as well, but they have a different relationship with them”).

<sup>347</sup> See *supra* notes 1–3 and accompanying text.

Section VI.A briefly describes seven best practices for these groups and, if they have them, their lawyers when considering how to structure activist organizations in line with the models described in this Article. Section VI.B concludes with a consideration of how these groups fit into larger questions about prefigurative politics and social movements.

*A. Seven Best Practices for the  
New Activist Non-Profits and Their Lawyers*

There are activist groups experimenting with new organizational structures around the country, and many are undertaking this work without legal counsel or, when fortunate enough to have access to a lawyer, without legal counsel who have thought in detail about either the variety of potential structures that activists have been developing or all the legal ramifications that result from the changes these groups are seeking to make. Although this Article has largely focused on presenting some of the existing options for organizational structure for these new activist non-profits, representing these groups well requires going beyond simply counseling them on the flexibility of non-profit corporate law and hammering out corporate structures that seem to meet their goals. To conclude, this Article offers seven considerations that the new activist non-profits and their lawyers should bear in mind when working to plan and develop these groups.

1. PLAN AHEAD FOR GROWTH

It is hard for any group to predict future growth, but because the different structures described in this Article grow to scale very differently, it is critical to do both short- and longer-term planning. It would likely be impossible for a worker self-directed non-profit to have all workers meet to discuss fairly routine matters in an organization with 10,000 employees.<sup>348</sup> Conversely, the great strength of the swarm organization structure is its scalability, and organizations structured using that model have the potential to become large.<sup>349</sup>

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<sup>348</sup> See *supra* Section II.A.3.

<sup>349</sup> See *supra* notes 226–31 and accompanying text.

The swarm organization model, however, is driven by volunteers or members, not employees, so it is not a great choice for every group. The new activist non-profits should try to realistically anticipate how they think their project should grow and plan ahead to support that expansion as they decide on organizational structures.

## 2. DON'T GET BOGGED DOWN IN TERMINOLOGY AND METAPHOR

Too many activist groups get sidetracked with debates over terminology, like whether to make decisions by “consent,” “consensus,” or “modified consensus,” or whether to have a “Board,” “hub,” or “core collective.” These labels matter, but they ultimately matter less than the specific rules and policies the group adopts. Spend more time defining specific processes than debating abstract labels that quite often come with different connotations for different people. Similarly, do not dedicate too much time to metaphorical thinking: it is not always a good use of time to debate whether to call a group a swarm or a hive, or to discuss whether a group that might be part of a social movement ecosystem is more like a root or a vegetable or fertilizer. Metaphors can help people understand complicated topics at times, but developing specific goals and plans are often a better use of a group’s time than elaborate metaphors.

## 3. MONITOR FIDUCIARY DUTIES

As described in Part V, groups that are exploring these new models should make sure that their Boards satisfy their fiduciary duties. For all of the corporate forms described in this Article, one of the commonalities that carries some legal risk is the marginalizing or minimizing of the role of the Board. In each model, there are mechanisms that can be used to try to ensure that directors are fulfilling their duties, but organizations should not lose sight of the importance of following through on those steps. The following are some good practices for all of these groups to implement: having a mechanism for Board monitoring of organizational finances; holding at least one annual Board meeting to review important organizational matters that may have been worked on by others in the organization; making sure to be reasonably informed about the subjects of



decisions without a disabling conflict of interest; and being careful with confidential information.<sup>350</sup>

#### 4. GOOD STRUCTURES ARE NOT SUBSTITUTES FOR MUTUAL RESPECT

The real-world interior lives of social change organizations can fluctuate and be messy, driven by specific personalities and conflicts that arise from specific contexts.<sup>351</sup> Whatever structure a group pursues, there needs to be a focus not only on structure, but also on having those interpersonal relationships be healthy ones, built on collaboration, respect, and solidarity. While helping groups to manage those relationships might not always be the right role for a lawyer doing this work, lawyers for these groups must be attentive to just how essential healthy, collaborative relationships can be to organizational strength and success. There are activist texts that discuss developing these relationships that are good starting points for any of these groups to consult.<sup>352</sup>

#### 5. CONSENSUS DECISION-MAKING IS IMPERFECT TOO

Activists have long considered consensus to be a better decision-making tool than majority voting because consensus aims to maximize individual autonomy and the participation of all members of a group.<sup>353</sup> But consensus decision-making comes with downsides as well. First, consensus can lead a group to inaction if members are thinking of the process as more like a unanimous vote than a procedure for soliciting group feedback in order to modify plans so that

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<sup>350</sup> See generally Part V.

<sup>351</sup> For a thoughtful reminder of the need to balance democratic processes and the immediate material aims of communities in crisis, see generally Barbara Bezdek, *Digging into Democracy: Reflections on CED and Social Change Lawyering After #OWS*, 77 MD. L. REV. ENDNOTES 16 (2018).

<sup>352</sup> See generally, e.g., SEEDS FOR CHANGE, A CONSENSUS HANDBOOK: CO-OPERATIVE DECISION-MAKING FOR ACTIVISTS, CO-OPS AND COMMUNITIES (2013); DELFINA VANNUCCI & RICHARD SINGER, COME HELL OR HIGH WATER: A HANDBOOK ON COLLECTIVE PROCESS GONE AWRY (2010).

<sup>353</sup> VANNUCCI & SINGER, *supra* note 352, at 19.

they become reasonably acceptable to all group members.<sup>354</sup> When blocks are not reserved for very rare occasions, a consensus or Consent process can destroy a group's ability to work with any efficiency at all.<sup>355</sup> Second, consensus decision-making can sometimes lead to groupthink: group members may withhold good-faith objections to a proposal because they do not want to block something that most members of the group support; the good thing about a simple up-or-down vote is that it allows a member to quickly and easily express doubts about a proposal without derailing something supported by nearly everyone else.<sup>356</sup> This is not to say that majority or supermajority voting is better than consensus, but rather that no model for decision-making is perfect, and activist groups should think carefully about what will work best for them and their members.

#### 6. LEARN FROM OTHER GROUPS AND DON'T THROW OUT THE GOOD WITH THE BAD

Activist groups that are committed to building non-profit structures that align with their values can sometimes feel like they are starting from scratch, without any effective models on which to build. But models for these organizations do exist; the structures described in this Article present some starting points for activist groups exploring these frameworks. Activists should share their experiments and takeaways with one another, as many of the groups described in this Article have done. Beyond that, some of the practices of conventionally structured, professionalized non-profits might be revisited within the context of these new experiments with structure: just because elected corporate officers are sometimes symptoms of a problematic organizational hierarchy does not mean that having a person who is elected by a majority vote to take notes at group meetings is somehow an inherently flawed idea.

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<sup>354</sup> See Haber, *supra* note 25, at 335.

<sup>355</sup> *Id.*

<sup>356</sup> VANNUCCI & SINGER, *supra* note 352, at 19–21.

## 7. LAWYERS, REMEMBER MOVEMENT LAWYERING

Since the early 2000s, lawyers committed to social change lawyering have increasingly come to frame their work as “movement lawyering,” the “representation of *mobilized clients* and the use of *integrated advocacy* . . . [a] version of cause lawyering in which the cause is defined and advanced by social movement leaders and constituents in dynamic processes of grassroots organization building and community engagement.”<sup>357</sup> This Article describes the representation of mobilized clients but a mode of lawyering that could be interpreted to be actually quite traditional: providing legal assistance to an organization considering whether to incorporate and how to structure that corporate entity to meet the organization’s goals. Activist organizations do sometimes engage corporate lawyers on such a limited, transactional basis—likely to the detriment of an organization that could benefit from a lawyer with a deeper understanding of their activist values and political vision.

While movement lawyers can and do engage in traditional forms of advocacy on behalf of mobilized clients, the core of the advocacy model of movement lawyers is to break down barriers between lawyers and non-lawyers, litigation and other forms of advocacy, toward the ultimate goal of “producing more democratic and sustainable social change.”<sup>358</sup> Movement lawyers with the corporate and transactional legal expertise that is essential to helping movement groups navigate these issues should not limit their work narrowly, but should look for opportunities to further collaborate with these groups toward precisely those goals.

### B. *The New Activist Non-Profits, Prefigurative Politics, and Law and Social Movements*

The relationships between non-profit organizations, social movements, and prefigurative politics can be complicated, and arguments about them too often rely on overgeneralizations. Some un-

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<sup>357</sup> Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1689–90.

<sup>358</sup> *Id.* at 1695.

critically accept the conventional wisdom that participatory democracy, prefigurative politics, and non-hierarchical or decentralized organizations are, at best, good-on-paper theories that ignore the real needs of low-income communities and communities of color.<sup>359</sup> Similar criticisms have been around since at least the 1960s.<sup>360</sup> In the mid-1960s, African-American activists within the Student Non-violent Coordinating Committee (“SNCC”) did indeed challenge white organizational leaders who focused on internal participatory democracy while retaining their privileged leadership roles—criticizing endless debate among the mostly-white “children of the middle class with the middle class intellectual penchant for nuance[.]”<sup>361</sup> But to draw a straight line from SNCC to the Occupy Movement and write off prefigurative politics entirely as disconnected from the real struggles of communities in crisis erases the entire tradition of women-of-color feminism, 1980s AIDS activists, 1990s Zapatistas,<sup>362</sup> and recent environmental activism led by indigenous North American communities,<sup>363</sup> and ignores the work of some of the greatest leaders of the Civil Rights Era, figures like Ella Baker and Myles Horton, who sought to focus on local organizing while maintaining a radical, national vision for social change, and who always “treated participatory decisionmaking both as a strategy and as an end in itself.”<sup>364</sup>

Of course, the debates over the merits of participatory democracy that occupied many within SNCC and the New Left are more

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<sup>359</sup> FRANCESCA POLLETTA, *FREEDOM IS AN ENDLESS MEETING: DEMOCRACY IN AMERICAN SOCIAL MOVEMENTS 1–2* (2002).

<sup>360</sup> Within the mid-1960s New Left, “many charged that those most committed to . . . prefigurative politics, intended a ‘moral gesture’ and little else. Or that their embrace of participatory democracy crippled other more significant efforts.” BREINES, *supra* note 191, at 59.

<sup>361</sup> POLLETTA, *supra* note 359, at 104 (quoting Washington SNCC member Mike Thelwell).

<sup>362</sup> Haber, *supra* note 25, at 325–28.

<sup>363</sup> Molly Larkey, *From Occupy to Standing Rock: Paths Forward*, L.A. REV. BOOKS (Apr. 2, 2017), <https://lareviewofbooks.org/article/from-occupy-to-standing-rock-paths-forward/>.

<sup>364</sup> POLLETTA, *supra* note 359, at 199.

than fifty years old, and our political context today is radically different. In comparison to the 1960s, for even many activists in today's political climate, the idea of a movement for meaningful social change feels naïve: "the elevated language of hope in a *systemic* alternative 'rings oddly in our ears.'"<sup>365</sup> Today, we do not only need "structures to more effectively organize and mobilize struggles . . . but transcending pessimism . . . needs an animating vision as well, a utopia that is both dream and possible reality."<sup>366</sup> The experiments described in this Article may be some early efforts toward such a vision, ways of developing new structures for both mobilization and developing a community that point toward that possible future. Movement lawyers familiar with the models described in this Article—and all of their benefits, challenges, risks, and areas of concern—can collaborate with activist groups experimenting with these models to not only support the shaping of effective organizational structures that meet the visions of these groups, but do so in a way that causes the fewest legal challenges for those groups as they grow.

While many activists rightfully remain skeptical about non-profit corporations, compliance, and tax-exemption in light of the important criticisms of the non-profit industrial complex, innovative activist groups around the country have been engaged in a long series of radical experiments, exploring ways that groups can take advantage of the benefits of the non-profit corporate form while avoiding many of its most problematic effects. The non-profit corporation—that old relic of our grandparents' dusty civic association meetings and the well-meaning community-based organizations that grew to scale out of the radical 1960s only to sometimes become so focused on fundraising that they lost perspective on the most essential need for political vision and community mobilization—may be, after all, the shell in which we begin to build the new world.

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<sup>365</sup> Sam Gindin, *We Need to Say What Socialism Will Look Like*, JACOBIN, <https://jacobinmag.com/2019/03/sam-gindin-socialist-planning-models> (last visited Mar. 26, 2019).

<sup>366</sup> *Id.*