

COVID-19 MUTUAL AID, ANTI-AUTHORITARIAN ACTIVISM, AND THE LAW

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[E]ven before widespread workplace closures and self-isolation, people throughout the country began establishing informal networks to meet the new needs of those around them. In Aurora, Colorado, a group of librarians started assembling kits of essentials for the elderly and for children who wouldn't be getting their usual meals and school. Disabled people in the Bay Area organized assistance for one another. . . . Undergrads helped other undergrads who had been barred from dorms and cut off from meal plans. Prison abolitionists raised money so that incarcerated people could purchase commissary soap. . . . As the press reported on this immediate outpouring of self-organized voluntarism, the term applied to these efforts, again and again, was "mutual aid". . . . [S]uddenly, they seemed to be everywhere.¹

I was awestruck by the abundance . . . meal deliveries to the elderly in Paterson, New Jersey; the Twin Cities Queer and Trans Mutual Aid group in Minneapolis-Saint Paul; projects to aid the Hopi, Zuni and Navajo on reservations in the U.S. south-west; a Washington state project to support the undocumented; sex workers organising to raise emergency funds. I saw people stuck at home in isolation teach dance and

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1. Jia Tolentino, *What Mutual Aid Can Do During a Pandemic*, NEW YORKER (May 18, 2020), <https://www.newyorker.com/magazine/2020/05/18/what-mutual-aid-can-do-during-a-pandemic>.

drawing classes, tell stories, play music online to encourage others quarantining in place; Italians singing from their balconies and Iranians reciting poetry from theirs; a young native Nevadan going fishing to feed members of her Pyramid Lake Paiute tribe.²

INTRODUCTION

As the magnitude of the COVID-19 pandemic and its impact on everyday life were starting to become clear in the early spring of 2020, terms like “social distancing” and “flatten the curve” entered the public lexicon, and “mutual aid” went from a niche activist term to a topic of interest in the popular press.³ Some of these mainstream news articles briefly note that the term was popularized by the Russian anarchist and naturalist Peter Kropotkin,⁴ but they provide few details about the universal scope of his concept or the intellectual context in which Kropotkin developed his ideas.

Late nineteenth-century writers like Herbert Spencer, William Graham Sumner, and Thomas Huxley grew to great prominence as public intellectuals by providing pseudoscientific rationalizations for the brutality of European and American racism, colonialism, and industrial capitalism; modernity may have hardships, they argued, but this is natural, simply the modern forms of a universal Darwinian struggle, the “survival of the fittest.”⁵ In

2. Rebecca Solnit, *The Way We Get Through This is Together: The Rise of Mutual Aid Under Coronavirus*, THE GUARDIAN (May 14, 2020), <https://www.theguardian.com/world/2020/may/14/mutual-aid-coronavirus-pandemic-rebecca-solnit>.

3. *Id.* See, e.g., Tolentino, *supra* note 1; Cathy Free, *People Across the Country Are Delivering Groceries Free. It's 'Solidarity, Not Charity.'* WASH. POST (Apr. 27, 2020), <https://www.washingtonpost.com/lifestyle/2020/04/27/people-across-country-are-delivering-groceries-free-its-solidarity-not-charity/>; Lexi McMnamin, *What is Mutual Aid, and How Can it Help with Coronavirus?*, VICE (Mar. 20, 2020), https://www.vice.com/en_us/article/y3mkjv/what-is-mutual-aid-and-how-can-it-help-with-coronavirus; Charlie Warzel, *Feeling Powerless About Coronavirus? Join a Mutual Aid Network*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/opinion/coronavirus-aid-group.html>.

4. See, e.g., McMnamin, *supra* note 3; Solnit, *supra* note 2; Tolentino, *supra* note 1. Though Kropotkin popularized the phrase “mutual aid,” he credits the nineteenth-century zoologist Peter Kessler with coining the term. PETER KROPOTKIN, *MUTUAL AID: A FACTOR OF EVOLUTION* x (1902).

5. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 106 (rev. ed. 2006) (showing that human sciences in “Darwin’s century... regarded themselves as servants of their numbers, apostles of objectivity. And they confirmed all the common prejudices of comfortable white males—that blacks, women, and poor people occupy their subordinate roles by the harsh dictates of nature”); JOSEPH LOPREATO, *HUMAN NATURE AND BIOCULTURAL EVOLUTION* 8 (1984) (arguing that Social Darwinism was

direct response to the popularity of these writers, Kropotkin, who saw himself as the more serious Darwin scholar, spent years studying collaboration in nature, describing his findings in *Mutual Aid: A Factor of Evolution*.⁶ Kropotkin argues that competition is a part of evolution, but not the end of the evolutionary story; in both animal groups and human societies, sharing, solidarity, and collective group care have been essential tools for sociobiological survival throughout history and around the world.⁷ Looking broadly at Indigenous practices in Africa, Asia, Australia, the Americas, and among European “Barbarians,” Kropotkin recasts the story of world history as not one of endless conflict and war, but one where many of our societal advancements come from sociability, solidarity, and mutual aid.⁸

Kropotkin describes mutual aid among people as rooted in a “vague feeling or instinct of human solidarity and sociability.”⁹ It is “infinitely wider” than personal sympathy or love of one’s neighbor; mutual aid is a sense “of the close dependency of every one’s happiness upon the happiness of all; and the sense of justice, or equity, which brings the individual to consider the rights of every other individual as equal to his own.”¹⁰ Of course, Kropotkin was well aware that by the time of his writing, economics, politics, commerce, law, and most powerful European institutions embraced an all-encompassing laissez-faire philosophy, a belief that “men can, and must, seek their own happiness in a disregard of other people’s wants.”¹¹ Despite the tremendous power and pervasiveness of this

less a consistent philosophy than “to a large extent an ideology and an apologia for the worst form of capitalism, ethnocentrism, and racism”). Spencer introduced the phrase “survival of the fittest” in his 1864 text *Principles of Biology*, Darwin himself only used the phrase later. I.W. Howerth, *Natural Selection and the Survival of the Fittest*, 5(3) SCI. MONTHLY 253, 253 (1917). Historian Richard Hofstadter, who popularized the term “Social Darwinism” to refer to these figures decades after their prominence, points out that while imperialism “call[ed] upon Darwinism in defense of the subjugation of weaker races,” it would “nevertheless be easy to exaggerate the significance of Darwin for race theory or militarism either in the United States or in western Europe. . . . At the time when Darwin was still hesitantly outlining his theory in private, racial destiny had already been called upon by American expansionists.” RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 170-71 (rev. ed. 1955).

6. KROPOTKIN, *supra* note 4, at xiv-xvii.

7. *Id.* at xv-xvii.

8. *See generally* KROPOTKIN, *supra* note 4.

9. *Id.* at xiii.

10. *Id.* at xiii-xiv.

11. *Id.* at 228.

worldview, Kropotkin finds mutual aid sprouting up as a tool of resistance to this new order at the margins and in the cracks of laissez-faire modernity all around the world. He sees mutual aid in French, German, Austrian, and Belgian villages resisting the encroachment of the nation-state; in communal land ownership, peasant associations, and agricultural cooperatives in France, Switzerland, Germany, Italy, and Denmark; in the communal farming models gaining popularity in the late nineteenth century across Russia and Crimea; in the ancient traditions of mutual aid that persisted into modernity in Turkey, Persia, India, China, and parts of Africa; in European and U.S. labor unions and strike tactics; in cooperatives and Russian *artéls*;¹² and in various forms of fraternal societies, village and town clubs, and associations of workers.¹³

To Kropotkin, mutual aid is a universal, nearly-irrepressible and trans-historical instinct shared by humans and animals, a common thread between the lives of ants, bees, birds, Indigenous cultures, medieval and early modern European villages, and industrial labor unions. His framework is broad and inclusive, but most contemporary depictions of mutual aid focus on recent history, perhaps briefly mentioning friendly societies and the mutual aid projects of the Black Panther Party before turning to more recent disaster-response efforts.¹⁴ Other recent analyses try to define mutual aid inductively, and while they end up with more specificity, they can suffer from a far more limited political horizon: mutual aid becomes almost another form of social welfare program, distinguishable from charity, public assistance, social insurance, and social service programs only in that money is generally pooled among members and distinctions between helper and helped are somewhat minimized.¹⁵ This article takes a different analytic approach, situating today's mutual aid groups as connected to an ancient tradition of collective care, but more deeply imprinted by radical

12. Artéls ("associations") were a Russian form of collective ownership, "one of the oldest and most wide-spread institutions in Russia." Manya Gordon Strunsky, *Education and Self-Government in Russia*, 138 HARPER'S 274 (1918). Although often small forms of cooperative ownership, some were large-scale enterprises, like a fishing artél in Ural that had a membership of 15,000-20,000 men who collectively owned their equipment, shared access to fishing waters, and shared their expenses and profits. *Id.*

13. See KROPOTKIN, *supra* note 4, at 230-79.

14. See, e.g., McMenamin, *supra* note 3; Tolentino, *supra* note 1.

15. See, e.g., GERALD HANDEL, *SOCIAL WELFARE IN WESTERN SOCIETY* 287-88 (2d ed., 2009).

women-of-color feminism, an anti-authoritarian activist tradition that mostly dates to the 1970s.¹⁶

As mutual aid has become an increasingly common and sophisticated practice across a planet suffering the devastating consequences of climate change and, now, the COVID-19 pandemic, mutual aid groups have come to face new and complex legal questions. Many mutual aid groups question or reject conventional non-profit legal tools like incorporation, tax exemption, and grant-based fundraising, causing issues that might be easily settled for ordinary non-profits to become more legally complex.¹⁷

This article argues that, while mutual aid groups should reject the legal conventions of non-profit charities if that aligns with their political outlook, they would benefit from a deeper understanding of those legal norms and conventions—as well as the possible alternatives to those norms and conventions—before summarily rejecting them. It argues that mutual aid groups should be careful about whether or how to balance their overarching political principles against the potential advantages of legal tools that can provide more certain short-term protection for their operations, their members, and their communities. Ultimately, the article encourages mutual aid groups to make these decisions by focusing not only on mutual aid as a tool for community preservation and survival, but also as a strategy for building long-term grassroots power and community-based counter-institutions that can challenge systemic forces of exploitation and oppression.

Part I of the article presents a brief history of mutual aid practices in the context of U.S. history, and Part II describes COVID-19 mutual aid groups within the political context of anti-authoritarian activism. With an understanding of this historical and political context, Part III then presents an overview of some key legal issues confronting COVID-19 mutual aid groups. The article concludes by arguing that mutual aid groups should not limit their

16. For a more detailed consideration of anti-authoritarian activism, see Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 *FORDHAM URB. L. J.* 295, 322-24 (2016). As described in this article, anti-authoritarian activism is rooted in a set of three core political commitments: (1) a commitment to autonomy and individual freedom; (2) a commitment to egalitarian relationships and horizontal organizational structures; and (3) a commitment to prefigurative politics, the idea of using processes in organizing and building a social change movement that are, in themselves, already building a better world. *Id.* at 321-24. See *infra* notes 116-36 and accompanying text.

17. See *infra* Part III.

visions to short-term disaster response but instead try to maintain and grow their networks to build long-term community power.

I. MUTUAL AID IN THE U.S.

For Kropotkin and some of his intellectual followers, a real history of mutual aid among humans would need to describe the activities of thousands of years of Indigenous practices, stretching back to preliterate societies.¹⁸ Contemporary activists engaged in mutual aid do sometimes find inspiration in ancient and traditional cultural practices of Black and Indigenous people,¹⁹ and many—but not all—historians agree that mutual aid practices were widespread across these varied cultures.²⁰

18. See *supra* notes 7-8 and accompanying text. Kropotkin's thinking would influence other anthropologists and political theorists, like Murray Bookchin, who describes a past ecological world of "primordial equality" that disintegrated into "hierarchical systems of inequality, the disintegration of early kinship groups into social classes, the dissolution of tribal communities into the city, and finally the usurpation of social administration by the State," a process that "profoundly altered not only social life but the attitude of people toward each other[.]" MURRAY BOOKCHIN, *THE ECOLOGY OF FREEDOM* 44 (1982).

19. See, e.g., Regan De Loggans, *Let's Talk Mutual Aid*, INDIGENOUS KINSHIP COLLECTIVE (2020), https://dochub.com/rloggans/jo3xELpR3ZO8yz8wJBa7nr/loggans-mutual-aid-zine-pdf?dt=Ls_myQXhz6RrrzS59DVW&pg=4 (arguing that "[m]utual aid is [Indigenous] lifeways and sovereignty; it is Black thriving and power" and that activists "cannot allow Mutual Aid practices to be co-opted by nonprofits, white organizers, or other 'charity' based folk, who are not committed to understanding that Mutual Aid has been a practice by people of color for longer [than] they could even imagine"); *Bridge the City Podcast, Episode 81: Mutual Aid*, at 3:15 (May 25, 2020), <https://www.bridgethecitypodcast.com/listen/2020/5/25/episode-81-mutual-aid> (stating mutual aid has been around "since forever, and carried through generations by [Black, Indigenous, and People of Color], as well as women, femme, trans, and queer people").

20. For instance, while the Kwakwaka'wakw author Gord Hill argues that the Indigenous people of North America have always been primarily "classless and communitarian societies, with strong matrilineal features," historian Charles C. Mann argues against viewing the Indigenous people of the Americas as mostly living in harmony with the planet or one other. *Compare* GORD HILL, *500 YEARS OF INDIGENOUS RESISTANCE* 10 (2009) with CHARLES C. MANN, *1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS* 115 (2006). Remarkable examples of solidarity among Indigenous people in the Americas do exist, like the Haudenosaunee Confederacy, a decentralized democracy among the Seneca, Cayuga, Onondaga, Oneida, and Mohawk Nations based on collective stewardship of land and equitable distribution of corn to every family. ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES* 24 (2015).

Enslaved Black people in the colonies developed practices of informal mutual aid, in some cases building on traditions brought from Africa, necessary mechanisms to care for and protect one another through generations of chattel slavery, especially among women. DEBORAH GRAY WHITE, *AR'N'T I A WOMAN?: FEMALE SLAVES IN THE*

When European colonists came to a dangerous and unfamiliar “New World,” they too practiced forms of mutual aid.²¹ By the early eighteenth century, some of the first private organizations unaffiliated with established European churches in pre-revolutionary America were “friendly societies.”²² Friendly societies were social clubs that used membership dues to provide a modest financial safety net for members in times of sickness, injury, old age, and upon death.²³ The idea for this kind of shared fund is at least as old as the ancient Roman *collegia*, trade associations that pooled their members’ funds to help members in need.²⁴ Centuries later,

PLANTATION SOUTH 119-21 (2d ed. 1999); Pamela Q. Plummer, *Families Providing Care Across Generations: Pickle in the Middle*, 51, 54 in AFRICAN AMERICAN CAREGIVERS (Sandra Crewe & Charnetta Gadling-Cole, eds., 2015). In the nineteenth century, mutual aid was a significant tool in Black Americans’ fight to end their enslavement. JULIE WINCH, BETWEEN SLAVERY AND FREEDOM: FREE PEOPLE OF COLOR IN AMERICA FROM SETTLEMENT TO THE CIVIL WAR 112-15 (2014).

21. Early colonists struggled to survive widespread disease, war, and hunger, and records from Plymouth and other early colonies show “individual and institutional responses to need in the form of mutual aid obligations to family and kin, to other members of the community, and even to ‘all accessible people in trouble, whether they be kin, neighbors, or strangers.’” Judith A.B. Lee & Carol R. Swenson, *Mutual Aid: A Buffer Against Risk*, in MUTUAL AID GROUPS, VULNERABLE AND RESILIENT POPULATIONS, AND THE LIFE CYCLE 573, 577 (Alex Gitterman & Lawrence Shulman, eds., 3d ed., 2005).

In the centuries before the American Revolution, European colonists also built churches, schools, orphanages, and other organizations that provided aid to their communities, but these were generally more like charitable arms of the European state and the established churches than mutual aid. David C. Hammack, *Nonprofit Organizations in American History*, 45 AM. BEHAVIORAL SCIENTIST 1638, 1642 (2002) (noting that most of these groups were closely affiliated with the established church, as local churches, “their ministers, their ministers’ wives, their colleges, and their missionary efforts” provided these services, including education, libraries, “most of the efforts to ‘reform’ personal behavior, . . . [and] some of the most important efforts to aid the poor in the colonies”). The established churches—Congregationalist in New England, Anglican in the South—were the primary influences on the development of private, non-commercial institutions, and sixteenth and seventeenth century colonists formed private, religious or quasi-religious associations to help their colonies survive, developing hospitals, fire departments, orphanages, and other necessary community programs, as well as larger, quasi-governmental corporations to help them govern the colonies far from the crown. THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE 30–40 (2003); 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>.

22. HANDEL, *supra* note 15, at 289; Lee & Swenson, *supra* note 21, at 577-78.

23. HANDEL, *supra* note 15, at 289; Lee & Swenson, *supra* note 21, at 578.

24. HANDEL, *supra* note 15, at 289; Walter S. Nichols, *Fraternal Insurance in the United States: Its Origin, Development, Character, and Existing Status*, 70 ANNALS OF AM. ACAD. POL. & SOC. SCI. 109, 109 (1917) (noting that these societies were so common in Ancient Rome that they “call[ed] for regulation by the state”).

in early modern Europe, craft guilds continued to provide varied forms of mutual assistance or mutual insurance to members.²⁵ In seventeenth-century England, friendly societies emerged as a new form of, or successor to, British craft guilds,²⁶ and they were soon transported to the American colonies.²⁷

After the Revolutionary War, membership in American friendly societies continued to grow, but the groups themselves tended to remain local, community-based associations of working class wage-earners and artisans, rather than national bodies or groups for professionals or elites like the Freemasons.²⁸ Unlike *collegia* and craft guilds, friendly societies were not necessarily limited to workers in a particular industry; as waves of immigrants came to the U.S. across the nineteenth century, friendly societies came to be social homes for new immigrants connected by ethnicity or religion, like Jewish, Polish, and Bohemian immigrants.²⁹ Sociability was central to these groups, and many were more like social clubs than insurance companies, with some even affiliated with local pubs.³⁰ Soon after the Revolutionary War, Black communities in the North established mutualist groups modeled after both friendly societies and African traditions of mutual assistance.³¹ These Black societies had quite diverse political views,

25. Nichols, *supra* note 24, at 109; *see also* Patrick Wallis, *Guilds and Mutual Protection in England*, LONDON SCH. OF ECON. & POL. SCI., ECON. HIST. WORKING PAPERS, 2-18 (2018), <http://eprints.lse.ac.uk/90464/1/WP287.pdf> (distinguishing continental societies from less formal insurance programs in England). Wallis draws a useful distinction between other forms of mutual aid and mutual insurance, arguing that insurance “implies a clear *quid pro quo*. It is only discretionary to the extent that the insurer is able to question whether a claimant meets a set of mutually recognized terms under which disbursements should be made. Contributions are tied to the accumulation of rights. And benefits are pre-defined[.]” *Id.* at 6.

26. Wallis, *supra* note 25, at 19.

27. DAVID T. BEITO, FROM MUTUAL AID TO THE WELFARE STATE 7 (2000).

28. *Id.*

29. *Id.* at 21-24.

30. HANDEL, *supra* note 15, at 289.

31. WINCH, *supra* note 20, at 53-58; Eric Zaklukiewicz, *The Radical Past and Present of Mutual Aid*, FOUNDATION BEYOND BELIEF (May 7, 2020), <https://foundationbeyondbelief.org/the-radical-past-and-present-of-mutual-aid/> (arguing that these societies drew inspiration from the West African concept of Sou-Sou, a form of mutual savings association that funds care for members in need). These groups were initially mostly for Black men, including the African Union Society, founded in 1780; the Free African Society, founded in Philadelphia in 1787; and the Brown Fellowship Society, founded in the 1790s. Wilma Peebles-Wilkins, *Effectively Teaching African American Social Welfare Historical Developments*, 21 J. OF SOCIO. & SOC. WELFARE 139, 145 (1994). Similar groups for Black women would not be founded until 1838. *Id.*

from contemplating a return to Africa, to promoting forms of respectability politics, to advocating for Black property ownership and real estate investment.³²

In the nineteenth century, church-affiliated groups and friendly societies were joined by a great flowering of other organizations, many with ambitions to scale beyond their local communities: labor unions and socialist and communist leagues; professional associations and trade groups; groups of immigrants of various countries and ethnicities, and religious and cultural groups for growing Catholic and Jewish populations; groups of formerly-enslaved people, abolitionist groups, and other associations of Black people; and women's federations and temperance groups.³³ In this context, one organizational model that spread widely was the fraternal society, a new form of national organization influenced by the nation's project of federalism.³⁴ Organizers of a fraternal society chose a national name and concept, promoted them across the country, and encouraged local groups to form and link together into state branches, which, in turn, would send representatives to a national body.³⁵ Over the course of the nineteenth and early twentieth centuries, fraternal societies became a central feature of American civic life, with nearly one-third of adults

32. The Newport (Rhode Island) African Union considered relocating to Africa, while members of the Free African Society pledged to live with "thrift and piety, temperance, charity, neighborliness, faithfulness, and respect for authority because adhering to those values would benefit them all, and because it would prove to doubting whites that all black people . . . deserved freedom and equal treatment." WINCH, *supra* note 20, at 57-59. The New York Society for Mutual Relief helped widows and orphans and paid burial expenses for members, but also acted as a real estate broker, encouraging Black people in New York to invest in real estate. James Sullivan, *The New York African Society for Mutual Relief* (1808-1860), BLACK PAST (Jan. 22, 2011), <https://www.blackpast.org/african-american-history/new-york-african-society-mutual-relief-1808-1860/>.

33. Michael Haber, *The New Activist Non-Profits: Four Models Breaking from the Non-Profit Industrial Complex*, 73 U. MIAMI L. REV. 863, 866-67 (2019). It was during this era that the French statesman Alexis de Tocqueville would famously observe: "Americans of all ages, all conditions, and all dispositions, constantly form associations. . . 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." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 129-130 (Francis Bowen ed., Henry Reeve trans., Cambridge Univ. Press: Sever & Francis 1864) (1835).

34. SKOCPOL, *supra* note 21, at 23 (citing Arthur Schlesinger, *Biography of a Nation of Joiners*, 50 AM. HIST. REV. 24 (1944)).

35. *Id.*

belonging to a fraternal society by 1920.³⁶ Fraternal societies were controlled by their members and governed in a semi-decentralized manner, through local lodges.³⁷ Many of these groups avoided the formality of written insurance contracts, but provided significant mutual assistance for fellow members in times of need; members helped each other find employment, pay for medical expenses and funerals, and sometimes created facilities to care for elderly members, their spouses, and their orphaned children.³⁸ Other groups, sometimes called fraternal insurance societies, offered more formal, written insurance policies.³⁹

Fraternal societies were an opportunity for bonding between men across classes,⁴⁰ but they typically were not open to women, African-Americans, Jews, or immigrants. These groups formed their own fraternal and sororal societies that provided similar forms of mutual aid among members, and which soon became quite popular as well.⁴¹ Thousands of immigrants joined Cuban mutual aid societies in Florida, Mexican *mutualistas* in Texas, and associations of Latino miners in the West and Southwest in the late nineteenth and twentieth centuries.⁴² The National Ex-Slave Mutual Relief, Bounty, and Pension Association, the largest mutual aid

36. David T. Beito, *Mutual Aid for Social Welfare: The Case of American Fraternal Societies*, 4 CRIT. REV. 709, 711 (1990); see SKOCPOL, *supra* note 21, at 74-75 (noting that this once-significant part of U.S. life has all but disappeared, but “[g]o into any slightly junky antique store, and you will find the material traces from lifetimes of membership. . . tiny, well-worn booklets spelling out the constitutions, procedures, programs, and ceremonies of associations like the Odd Fellows [and] the Federated Women’s Clubs.”)

37. Beito, *supra* note 36, at 712.

38. *Id.*

39. *Id.* at 713.

40. SKOCPOL, *supra* note 21, at 173.

41. *Id.* at 179 (describing how Jewish people and women were often not permitted to join fraternal organizations); Beito, *supra* note 36, at 717-18 (describing racial segregation in fraternal societies). Immigrant fraternal societies commonly provided insurance, housing and employment assistance, and English lessons. *Id.* at 717. African-American fraternal societies often provided insurance and employment assistance, and some funded orphanages and homes for the elderly. *Id.* at 718. Many prominent Black leaders were active in fraternal societies; members of the Prince Hall Masonic Order included Booker T. Washington, W.E.B. DuBois, Oscar DePriest, Adam Clayton Powell, Jr., and Thurgood Marshall. *Id.*

42. See JOSÉ AMARO HERNANDEZ, *MUTUAL AID FOR SURVIVAL: THE CASE OF THE MEXICAN AMERICAN* (1983); Andrew Gomez, *Jim Crow and the Caribbean South: Cubans and Race in South Florida, 1885-1930s*, 36 J. OF AM. ETHNIC HIST. 25, 30-31 (2017); Susan D. Greenbaum, *Economic Cooperation Among Urban Industrial Workers: Rationality and Community in an Afro-Cuban Mutual Aid Society, 1904-1927*, 17 SOC. SCI. HIST. 173, 174, 177 (1993).

organization comprised of formerly-enslaved Black people, had a membership in the hundreds of thousands and both provided mutual aid for its members and led the first major organized fight for financial reparations for formerly-enslaved Black people in the nineteenth and early twentieth centuries.⁴³ The Bureau of Prisons, Post Office Department, and Justice Department harassed the group for years in an ultimately-successful effort to destroy the organization, its mutual aid programs, and its campaign for reparations.⁴⁴

Because of their appeal to immigrants, people of color, and the working class, these societies sometimes overlapped with the labor and socialist movements.⁴⁵ Many fraternal societies formed affiliated labor groups that later became part of the Knights of Labor, which aimed to create a form of organized labor that combined the benefits of a mutual aid society with the protections of a trade union.⁴⁶ By the time of the Great Depression, widespread unemployment and poverty, along with the Roosevelt Administration's New Deal response—especially the passage of the 1935 Social Security Act, which provided aid similar to that provided by many fraternal organizations—dramatically shrank participation in fraternal society-based insurance.⁴⁷ One notable exception to this trend was

43. Margaret F. Berry, *Reparations for Freedmen, 1890-1916: Fraudulent Practices or Justice Deferred?*, 57 J. OF NEGRO HIST. 219, 220-23 (1972); Miranda Booker Perry, *No Pensions for Ex-Slaves: How Federal Agencies Suppress Movement to Aid Freedpeople*, 42 PROLOGUE (2010), <https://www.archives.gov/publications/prologue/2010/summer/slave-pension.html>.

44. See Berry, *supra* note 43, at 228-30. After years of investigation by these federal agencies, the group's leader Callie House and thirteen alleged co-conspirators were indicted on a charge of conspiracy to defraud because the group asked for money for mutual aid, which prosecutors argued may have tricked "ignorant, illiterate" Black people into thinking that the letter was a promise of funds from the government. No such promise was made. House was convicted and sentenced to one year and one day in prison in 1917, while charges against all alleged co-conspirators were dropped. The investigations and House's conviction were enough to destroy the group. Just five years later, Marcus Garvey would be convicted on a similar mail fraud charge based on his soliciting funds for the Black Star Line, the shipping company organized by the Universal Negro Improvement Association that was central to Garvey's Back-to-Africa plan. *Id.*

45. Maya Adereth, *The United States Has a Long History of Mutual Aid Organizing*, JACOBIN (June 14, 2020), <https://www.jacobinmag.com/2020/06/mutual-aid-united-states-unions>.

46. *Id.*

47. Lisa Hix, *When Secret Societies Sold Life Insurance*, ZÓCALO PUBLIC SQUARE (Mar. 22, 2016), <https://www.zocalopublicsquare.org/2016/03/22/secret-societies-sold-life-insurance/chronicles/who-we-were/> (arguing that the Depression caused many to be unable to pay dues to fraternal organizations, and the New Deal's Social Security

the International Workers Order, which continued to grow during and after the 1930s; the International Workers Order was a racially-integrated, anti-fascist, Communist Party-affiliated fraternal society that grew into one of the largest fraternal organizations in the country with 184,000 members by 1947.⁴⁸ Like the National Ex-Slave Mutual Relief, Bounty, and Pension Association, the International Workers Order was effectively broken up by the federal government, in this case through attacks by the House Special Committee on Un-American Activities.⁴⁹

Although the National Ex-Slave Mutual Relief, Bounty, and Pension Association and the International Workers Order were both silenced by the federal government, their mutual aid models would be passed down to 1960s U.S. activities. One of the biggest twentieth-century influences on contemporary mutual aid practices were the mutual aid programs of radical 1960s groups, especially those of the Black Panther Party.⁵⁰ Formed in 1966 in Oakland, the early Black Panthers saw themselves as revolutionary

program provided aid similar to that provided by fraternal organizations, making fraternal societies less attractive to potential members). More generally, there was a shift away from civic organizational life in the mid-twentieth century, caused by a variety of historical trends: suburbanization, the Second Red Scare, the decline of labor unions, financial anxiety and instability, a generational shift away from civic organizations, a trend among advocacy organizations starting in the 1960s to move toward expert-led advocacy rather than mass membership models, changes in non-profit law and regulation that led to a perceived need for more sophistication among non-profit leadership, and the expanding role of the welfare state. Haber, *supra* note 33, at 869-71.

48. ROBERT M. ZECKER, "A ROAD TO PEACE AND FREEDOM": THE INTERNATIONAL WORKERS ORDER AND THE STRUGGLE FOR ECONOMIC JUSTICE AND CIVIL RIGHTS, 1930-1954 1 (2018); Roger Keeran, *National Groups and the Popular Front: The Case of the International Workers Order*, 14 J. AM. ETHNIC HIST. 23, 23 (1995). The International Workers Order branched off of the socialist Jewish mutual aid group Workmen's Circle (*Der Arbeter Ring*) in 1930 to create a multi-ethnic, interracial fraternal order aligned with the "language division" of the Communist Party. But the language division and the ex-Workmen's Circle communists, along with new members from the Hungarian Workers' Sick Benefit and Educational Federation, the Slovak Workers Society, and a growing membership of African-Americans, cared far more about racial equality and building a militant industrial union than the Bolshevik party line. ZECKER at 9-10.

49. ZECKER, *supra* note 48, at 4-5. As the International Workers Order grew into a truly multi-ethnic, interracial leftist fraternal body in the 1940s, the racial and ethnic diversity of its members and leadership was as much of a reason for its repression by the federal government as its Communist Party affiliation. *Id.* at 9-10.

50. DEAN SPADE, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) 9-10 (2020) [hereinafter SPADE, MUTUAL AID]; Dean Spade, *Solidarity Not Charity: Mutual Aid for Mobilization and Survival*, 142 SOC. TEXT 131, 136-37 (2020) [hereinafter Spade, *Solidarity*].

anti-capitalists who were using mutual aid—what they called “survival programs pending revolution”—as an organizing tool, as Black Panther leader Huey P. Newton explained:

[People] can do anything they desire to do, but they will only take those actions which are consistent with their level of consciousness and their understanding of the situation. . . . We recognized that in order to bring the people to the level of consciousness where they would seize the time, it would be necessary to serve their interests in survival by developing programs which would help them to meet their daily needs. . . . [T]he survival programs are not answers or solutions, but they will help us to organize the community around a true analysis and understanding of their situation.⁵¹

The Black Panther Party developed a wide range of free community programs, including an elementary school, a community learning center that provided adult education and an arts program, a non-denominational place of worship and community forum, senior services, a medical research and health clinic, a program to research sickle-cell anemia, a free ambulance service, a program providing free food to children, a news service, a landbanking program, a Black Student Alliance, a cooperative housing program, and programs that provided free shoes, clothing, pest control, and plumbing and building maintenance.⁵² These programs were all free to the community and financially supported by foundation

51. HUEY P. NEWTON, TO DIE FOR THE PEOPLE 103-04 (1972). The effort to create these programs as a tool to organize and build power came about in part as a response to early Black Panther leaders' personal experiences with governmental War on Poverty programs, and in part as a response to their studies of Frantz Fanon, Che Guevara, and Mao Zedong. ALONDRA NELSON, BODY AND SOUL: THE BLACK PANTHER PARTY AND THE FIGHT AGAINST MEDICAL DISCRIMINATION 55-66 (2011). But early Black Panther leaders in California were the children of parents who had moved West in the Great Migration during or soon after the era of the National Ex-Slave Mutual Relief, Bounty, and Pension Association and the United Negro Improvement Association. *See id.* at 52 (discussing the parents of the Black Panther leaders). The traditions of “mutual aid societies and other indigenous establishments devoted to strengthening the viability of southern black communities during and after Reconstruction” were, at the very least, “antecedents” to the Black Panther Party’s survival programs, sharing the goal of organizing and helping their communities through performing “quasi-governmental functions.” RUSSELL RICKFORD, WE ARE AN AFRICAN PEOPLE: INDEPENDENT EDUCATION, BLACK POWER, AND THE RADICAL IMAGINATION 14 (2016).

52. *See generally* THE DR. HUEY P. NEWTON FOUNDATION, THE BLACK PANTHER PARTY: SERVICE TO THE PEOPLE PROGRAMS (David Hilliard, ed.) (2008).

grants and donations from wealthy individuals and the community.⁵³

The work of the Black Panther Party inspired dozens of other radical groups in the 1960s and early 1970s.⁵⁴ Like both the International Workers Order and the National Ex-Slave Mutual Relief, Bounty, and Pension Association, the Black Panther Party and many groups they inspired were weakened or destroyed by the

53. Funding for the Intercommunal Youth Institute came from the Economic Opportunities Corporation, the Daniel J. Berstein Foundation, Pacific Change, The Third World Fund, and wealthy individuals including activist the Stanley Sheinbaum and the actor Candice Bergen. *Id.* at 9. Funding for the Son of Man Temple came primarily from collections at weekly services held on Sundays, along with the “hostess committee,” which coordinated bake sales, car washes, and similar fundraisers, and soliciting tax-deductible donations from local community businesses. *Id.* at 16. Seniors Against a Fearful Environment was an affiliated nonprofit that provided services to seniors and applied for government funding. *Id.* at 19. The People’s Cooperative Housing Program pressured the City of Oakland to pass a tax increment financing package to divert future city revenues to fund community-controlled, collectively-owned affordable housing development. *Id.* at 54.

54. The Young Lords fought for the rights of Puerto Ricans, Latinos, and other colonized peoples, developing their own significant mutual aid programs, including free breakfast programs, health and dental clinics, clothing drives, classes in Puerto Rican history, and tuberculosis and lead poisoning testing programs. Jakobi Williams, “We Need to Unite with as Many People as Possible”: *The Illinois Chapter of the Black Panther Party and the Young Lords Organization in Chicago*, in CIVIL RIGHTS AND BEYOND: AFRICAN AMERICAN AND LATINO/A ACTIVISM IN THE TWENTIETH-CENTURY UNITED STATES, 105, 110-11 (Brian D. Behnken, ed., 2016). In 1970, the group even briefly occupied an unused hospital building in the Bronx and offered free community medical care there. *The Lincoln Hospital Offensive: July 17, 1970*, LATINO EDUC. NETWORK SERV., <http://palante.org/04LincolnOffensive.htm> (last visited Dec. 26, 2020). The American Indian Movement, which drew inspiration from Indigenous traditions and the Black Panther Party, used militant tactics to fight for treaty and legal rights. *See generally* Mícheál Daniel Cronin, Ph.D. Thesis, National University of Ireland (Galway), THE AMERICAN INDIAN MOVEMENT AND BLACK PANTHER PARTY COMPARED: VIOLENCE, THE STATE AND SOCIAL MOVEMENTS IN THE USA, 1966 TO 1976 (2020), <https://aran.library.nuigalway.ie/bitstream/handle/10379/15925/PhD%20M%3%adce%3%a11%20Daniel%20Cronin.pdf?sequence=4&isAllowed=y>. The Chinatowns in both New York and San Francisco were home to radical Asian-American groups inspired by the Panthers. WILLIAM WEI, THE ASIAN AMERICAN MOVEMENT 207-17 (1994) (describing the Red Guard Party and I Wor Kuen). In Los Angeles and the Southwest, the Brown Berets were a radical Chicano organization, also inspired by the activism of the Black Panthers. ERNESTO CHÁVEZ, MI RAZA PRIMERO, MY PEOPLE FIRST: NATIONALISM, IDENTITY, AND INSURGENCY IN THE CHICANO MOVEMENT IN LOS ANGELES, 1966-1978 46-47 (2002). Militant white working-class organizations also expressed “revolutionary solidarity” with the Black Panther Party, including the Young Patriots Organization in Chicago, the October 4th Organization in Philadelphia, and White Lightning in New York. AMY SONNIE & JAMES TRACY, HILLBILLY NATIONALISTS, URBAN RACE REBELS, AND BLACK POWER: COMMUNITY ORGANIZING IN RADICAL TIMES 66-67, 130-33 (2011).

federal government, often through the FBI and its anti-social movement COINTELPRO program.⁵⁵

The weakening or destruction of these radical social movement groups in the 1960s and early 1970s, in some cases because of concerted government tactics, led to a contraction of the left's power and a shift away from large-scale politics built around the masses and toward "the local and the particular, single issues, questions of identity, politics on a manageable scale. This tendency . . . reflected the feminist embrace of the small group, as a way of safeguarding radical ideals of participation, egalitarianism, and self-expression."⁵⁶ Many radicals turned their focus to building community-based "counter-institutions."⁵⁷ Feminist and Afrocentric bookstores, food co-ops, women's shelters and music festivals, recycling centers, LGBTQ+ newspapers, and other movement projects became anchors of what some called the "new social movements," a grouping distinguished in its political vision from the mostly white, male, and hierarchical socialist left that often failed to consider race, gender, sexual orientation, gender identity, the environment, or other issues outside of a narrow framework.⁵⁸

While socialists criticized the new social movements as "single issue" groups, their most committed activists "invariably had a broader vision and critique . . . [and] tended, moreover, to migrate from one movement to the next, creating deep political, tactical, and strategic continuities between what superficially appeared as disconnected issue-oriented campaigns."⁵⁹ One influential group, the Boston-based Combahee River Collective, built their experiences as feminists, lesbians, Marxists, and Black women into an intersectional politics⁶⁰ that should be viewed as quite the opposite of "single issue" politics: they were "in essential agreement with Marx's theory," but were "not convinced . . . that a socialist revolution that is not also a feminist and anti-racist revolution will

55. Spade, *Solidarity*, *supra* note 50, at 136; L.A. KAUFFMAN, DIRECT ACTION: PROTEST AND THE REINVENTION OF AMERICAN RADICALISM 39 (2017). *See generally* WARD CHURCHILL & JIM VANDER WALL, AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT (2002); BRIAN GLICK, WAR AT HOME: COVERT ACTION AGAINST U.S. ACTIVISTS AND WHAT WE CAN DO ABOUT IT (1989).

56. KAUFFMAN, *supra* note 55, at 39.

57. *See generally* Haber, *supra* note 16.

58. KAUFFMAN, *supra* note 55, at 44.

59. *Id.* at 44-45.

60. *Id.* at 45-48.

guarantee our liberation.”⁶¹ Their point was critical: “[Y]ou cannot expect people to join your movement by telling them to put their particular issues on hold for the sake of some ill-defined ‘unity’ at a later date. Solidarity was the bridge by which different groups of people could connect on the basis of mutual understanding.”⁶² This kind of attention to building stronger interpersonal solidarity and an inward-looking focus on small activist groups departed sharply from the mainstream 1960s New Left and would go on to take “a strong hold on activist culture” for years to come.⁶³

Following this shift in the early 1970s, as activist groups devoted more attention to developing a culture of solidarity and deeper forms of internal democracy, Kropotkin might see much of late twentieth and early twenty-first century activism as mutual aid. Anti-nuclear groups of the 1970s and 1980s, like Clamshell Alliance, organized through small affinity groups, used consensus decision-making and direct action, and saw themselves as living out theories of nonviolence in their daily lives, “building a community of mutual appreciation with our neighbors . . . and support and love among ourselves.”⁶⁴ In the 1980s, LGBTQ+ and AIDS activists, influenced by the structures of the anti-nuclear movement, launched ACT UP New York, which used small, non-hierarchical affinity groups, consensus decision-making,⁶⁵ and forms of mutual assistance among members in its activism.⁶⁶ Starting in Boston in

61. *The Combahee River Collective Statement*, COMBAHEE RIVER COLLECTIVE, <http://circuitous.org/scraps/combahee.html> (last visited Jan. 25, 2021).

62. Keeanga-Yamahtta Taylor, *Until Black Women are Free, None of Us Will Be Free*, NEW YORKER (July 20, 2020), <https://www.newyorker.com/news/our-columnists/until-black-women-are-free-none-of-us-will-be-free> (describing the impact of the Combahee River Collective).

63. KAUFFMAN, *supra* note 55, at 64.

64. VICTORIA L. DAUBERT & SUE ELLEN MORAN, SANDIA NAT'L LABS., ORIGINS, GOALS, AND TACTICS OF THE U.S. ANTI-NUCLEAR MOVEMENT 43 (1985), <https://www.rand.org/content/dam/rand/pubs/notes/2005/N2192.pdf> (citing Micha Etain Cohen, Ideology, Interest Group Formation and Protest 136 (1981)) (Doctoral Dissertation, on file with Harvard University).

65. Nancy Alach, *Civil Disobedience Training*, ACT UP, <https://actupny.org/documents/CDdocuments/Affinity.html> (last visited Dec. 3, 2020). (describing affinity group structures). See Haber, *supra* note 16, at 325-33 (presenting affinity group organizing and a history of anti-authoritarian activism generally). See *infra* note 168 and accompanying text for a discussion of consent and consensus decision-making.

66. Matthew Rodriguez, *Early AIDS Activism Was So Much More Diverse than Media Depicts It*, OUT (May 23, 2019, 10:37 AM), <https://www.out.com/activism/2019/5/23/early-aids-activism-was-so-much-more-diverse-media-depicts-it/> (describing the influence of not only the queer liberation movement and Stonewall, but radical elements within the feminist and antiwar movements); Ruth Finkelstein, *Opinion: A*

the 1980s and growing internationally in the 1990s, veterans of the anti-nuclear and radical pacifist movements established local, autonomous Food Not Bombs groups that gave away food to anyone who wanted it, not as charity, but with the explicit goal of building solidarity and mutual aid.⁶⁷ Later in the 1990s and the 2000s, mutual aid projects developed alongside and within the anti-globalization movement; decentralized, often leaderless projects like Direct Action Network, Really Really Free Markets, free bike repair programs, and Books Through Bars mixed radical politics and mutual aid in new ways.⁶⁸ Building on these activist models, the 2011 Occupy Movement might also be seen as consistent with mutual aid, as participants in Occupy encampments taught one another skills, participated in free political education workshops, shared food, engaged in decentralized organizing, and tried to learn all the things necessary “to live in the world we are trying to create—a world shaped by practices of collective self-determination.”⁶⁹

Mutual aid became most prominent in twenty-first century activism in the context of crises and disasters, especially in the aftermath of increasingly-frequent, catastrophic, climate change-fueled extreme weather events. In the wake of Hurricane Katrina in 2005, the former defense minister for the New Orleans Black Panther Party, Malik Rahim, his partner Sharon Johnson, and the Austin-based organizer Scott Crow launched Common Ground Collective.⁷⁰ Building on the principles of the Black Panther Party, anarchism, and the Zapatistas,⁷¹ Common Ground Collective created a

Lesson from the AIDS Crisis for Dealing With COVID-19, CITY LIMITS (May 7, 2020), <https://citylimits.org/2020/05/07/opinion-a-lesson-from-the-aids-crisis-for-dealing-with-covid-19/> (arguing that the HIV/AIDS crisis taught ACT UP and other groups that the most effective response in the face of government inaction is to first focus on meeting the needs of one’s own community, “to care for [our] own”).

67. Food Not Bombs, *The Three Principles of Food Not Bombs*, <https://foodnotbombs.net/principles.html> (last visited Dec. 26, 2020); Haber, *supra* note 16, at 327.

68. See David Spataro, WE WORK, WE EAT TOGETHER: ANTI-AUTHORITARIAN MUTUAL AID POLITICS IN NEW YORK CITY, 2004-2013 45-47 (2014) (Ph.D. Thesis, City University of New York), <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1113>; see also Haber, *supra* note 16, at 327-29 (describing decentralized projects in the 1980s through the early 2000s).

69. Spade, *Solidarity*, *supra* note 50, at 138.

70. SCOTT CROW, BLACK FLAGS AND WINDMILLS: HOPE, ANARCHY, AND THE COMMON GROUND COLLECTIVE 65-67, 87-92 (2011).

71. *Id.* at 68 (2011). The Zapatista Army of National Liberation seized seven cities in Chiapas, Mexico in 1994, building a political agenda that blended Indigenous traditions, feminism, anti-globalization, and more traditional leftist thought, using the newly-popular internet as an organizing tool. Haber, *supra* note 16, at 328.

major mutual aid program structured through small affinity groups that achieved extraordinary results. They hosted more than 10,000 volunteers; served more than 100,000 local residents; gutted 1,200 houses, twelve schools, and four churches; established the first health clinic after Katrina in the Lower Ninth Ward; established a legal clinic; created distribution centers, a women's shelter, and various community centers; distributed thousands of free bicycles; created community gardens and soil restoration programs; and created an independent media center to provide the local public with information and document the recovery process.⁷² The group used "Solidarity Not Charity" as its slogan and governing philosophy: Common Ground Collective was not aiming to provide merely temporary relief from the impact of the storm, but to work on deeper injustices in New Orleans and the broader society.⁷³ They also sought to "create permanent and sustainable solutions with and for those who were the most affected. . . . Both activists from afar and locals could see firsthand, through the struggle, how they mattered to each other."⁷⁴ Common Ground Collective had a number of setbacks, including when an FBI informant and agent provocateur embedded himself in the group and tried to incite members to violence. As a result, the group ultimately chose to bring in outside professional managers and became a more conventional 501(c)(3) charitable relief organization.⁷⁵

The model developed by Common Ground Collective was modified and recreated after subsequent climate-related disasters around the country. After Hurricane Sandy hit New York in October 2012, the Occupy Movement, which had been largely pushed out of its public spaces over the winter, reconstituted itself as Occupy Sandy.⁷⁶ Drawing on its existing social media networks, its experience coordinating the feeding and shelter of large numbers

72. CROW, *supra* note 70, at 201-06; Don Paul, *Common Ground's Eighth Anniversary: A Model of Volunteer-Driven Rebuilding in New Orleans*, TRUTHOUT (Sept. 16, 2013), <https://truthout.org/articles/common-grounds-eighth-anniversary-a-model-of-volunteer-driven-rebuilding-in-new-orleans/>.

73. CROW, *supra* note 70, at 98-99.

74. *Id.* at 99.

75. *See id.* at 166, 188 (describing the activities of Brandon Darby, who was paid by the FBI to collect information on members of the Common Ground Collective and who "tried to incite people into acts of arson or violence in New Orleans and Austin," along the way damaging relationships between Common Ground Collective and local organizations, failing to fulfill projects, and repeatedly engaging in offensive and misogynist behavior).

76. Haber, *supra* note 16, at 343.

of people during the encampments, and the efficiency of the decentralized, autonomous affinity group structure, Occupy Sandy brought more than 60,000 volunteers together to provide food, water, shelter, medical care, mold remediation, rebuilding assistance, legal help, and more in the wake of the storm.⁷⁷ Also adopting “Solidarity Not Charity” as its slogan, Occupy Sandy collaborated with existing community organizations and sought to develop long-term projects, like incubating worker-owned cooperatives and leading a community benefits agreement campaign.⁷⁸

Other groups would soon follow the examples from New Orleans and New York, as increasingly-frequent climate-fueled disasters led to new, locally-developed mutual aid projects being launched in their wake: Austin Common Ground Relief was started after the Austin floods of 2013;⁷⁹ OpOK Relief began after a series of earthquakes in Oklahoma in 2013;⁸⁰ West Street Recovery was created after Hurricane Harvey hit Texas in 2017;⁸¹ Proyecto de Apoyo Mutuo was launched in 2017 after Hurricane Maria struck Puerto Rico;⁸² and Mutual Fire Brigade started after the Northern California wildfires in 2018.⁸³

These projects were often well-known locally, but mutual aid only became a mainstream term and an essential day-to-day support for millions of Americans across the country during the COVID-19 pandemic.⁸⁴ As the pandemic spread, thousands of relief efforts around the world were launched, some identifying as mutual aid and some not.⁸⁵ In the U.S., some COVID-19 relief

77. *Id.*

78. *Id.* at 344.

79. Austin Common Ground Relief, FACEBOOK, <https://www.facebook.com/atxcommongroundrelief/> (last visited July 14, 2020).

80. OpOK, FACEBOOK, <https://www.facebook.com/OpOKRelief/> (last visited July 14, 2020).

81. W. ST. RECOVERY, <https://www.weststreetrecovery.org/> (last visited July 14, 2020).

82. Arvind Dilawar, *Puerto Rican “Anarchistic Organizers” Took Power into Their Own Hands After Hurricane Maria*, NEWSWEEK (Sep. 11, 2018), <https://www.newsweek.com/puerto-ricans-restore-power-after-hurricane-maria-1114070>.

83. See Cindy Millstein, *Mutual Fire Brigade*, MUT. AID DISASTER RELIEF, <https://mutualaiddisasterrelief.org/wp-content/uploads/2020/04/Mutual-Fire-Brigade-zine-formatted.pdf> (last visited July 14, 2020).

84. Solnit, *supra* note 2.

85. See, e.g., MUTUALAID.WIKI, <https://mutualaid.wiki/> (last visited Jan. 18, 2021) (listing more than 5,000 mutual aid groups in winter 2020-21); *COVID-19 Mutual Aid Map*, REACH FOR HELP, <https://map.reach4help.org/> (last visited Jan. 18, 2021).

projects developed out of existing community programs run by non-profits, religious groups, activist organizations, and coalitions of community-based organizations, but many were started by just a few neighbors who joined together to start helping out others in their communities.⁸⁶ Many of these groups, even if they developed out of larger non-profits or did not identify as doing mutual aid, built up their member networks using the “pod” organizing model, in which people join together with small groups of others they already personally know.⁸⁷ Other groups sought out people who have special skills or access to special resources in order to start their

86. See generally *supra* notes 1-2 and accompanying text. For example, in New York State, major efforts to provide food and basic services were provided by groups ranging from large, conventional charities like Catholic Charities and City Harvest, to community-based organizing groups like Equality for Flatbush and PUSH Buffalo, to activist groups like Democratic Socialists of America and local Food Not Bombs groups. See *Coronavirus*, CATH. CHARITIES N. Y., <https://catholiccharitiesny.org/coronavirus> (last visited July 20, 2020); *Need Help Finding Food?*, CITY HARVEST, <https://www.cityharvest.org/food-map/> (last visited July 20, 2020); *#Brooklyn Shows Love Mutual Aid Project*, EQUALITY FOR FLATBUSH, <http://www.equalityforflatbush.org/brooklyn-shows-love-mutual-aid-project/> (last visited July 20, 2020); PUSH MUTUAL AID COMMUNITY NEEDS, PUSH BUFFALO, <https://www.pushbuffalo.org/mission/> (last visited July 20, 2020); *COVID-19 Mutual Aid & Organizing Response*, N.Y.C. DEMOCRATIC SOCIALISTS OF AMERICA https://gdoc.pub/doc/e/2PACX-1vTgSRxlXg-dc3qdHfU56zXX9BUVz1zFBz_MkcplxC4N7zHHvZQgfEqN2jeN9oR2FrkTq8Mv6gcaVm2u (last visited July 20, 2020); *Combating Coronavirus*, COMMUNITY SOLIDARITY, <https://communitysolidarity.org/combating-coronavirus> (last visited July 20, 2020). Other mutual aid groups formed out of coalitions of smaller community groups. See, e.g., COOP. LONG ISLAND, <https://www.cooperationli.org/> (last visited July 20, 2020); KINGSTON MUT. AID, <https://www.kingstonmutualaid.org/> (last visited July 20, 2020). But dozens of mutual aid groups formed as independent associations of neighbors and community members without any organizational affiliations to unite them. See, e.g., BED-STUY STRONG, <https://bedstuystrong.com/> (last visited July 20, 2020); CROWN HEIGHTS MUT. AID, <https://crownheightsmutualaid.com/> (last visited July 20, 2020); SUNNYSIDE & WOODSIDE MUT. AID, <https://swma.nyc/en/> (last visited July 20, 2020); WESTCOTT MUT. AID, <https://www.westcottmutualaid.org/> (last visited July 20, 2020).

87. This model is usually attributed to the Bay Area Transformative Justice Collective. See Mia Mingus, *Pods and Pod Mapping Worksheet*, BAY AREA TRANSFORMATIVE JUSTICE COLLECTIVE (2016), <https://batjc.wordpress.com/pods-and-pod-mapping-worksheet>; MUT. AID MEDFORD AND SOMERVILLE (MAMAS), *How to Neighborhood Pod*, https://docs.google.com/document/d/1j8ADhLEuKNDZ1a_opmzudywJPKMXcNKu01V1xY2MiIA/edit (last visited July 20, 2020). The pod model became widely used, at least in part, because of a very popular training led by Congressmember Alexandria Ocasio-Cortez and prison abolition activist Mariame Kaba on March 18, 2020, just as many mutual aid groups were starting to organize, which discussed the basics of forming a mutual aid group using the pod model. See Alexandria Ocasio-Cortez & Mariame Kaba, *Toolkit: Mutual Aid 101 #WeGotOurBlock*, TINYURL, <https://tinyurl.com/MutualAidToolkit101> (last visited July 20, 2020).

projects,⁸⁸ or began by doing outreach to their neighborhoods through door-to-door leaflets and neighborhood flyers.⁸⁹ Organizing through a mix of virtual and in-person gatherings, small teams of two or three people were able to grow, in some cases, into large, sophisticated relief organizations with hundreds of volunteers.⁹⁰

COVID-19 relief groups offer a broad variety of free assistance to their communities, including: rideshares and transportation help; childcare; laundry service; emotional and spiritual support; direct financial assistance and help paying rent; help with errands; prescription medicine delivery; dog walking; making or providing masks, hand sanitizer, and other protective equipment; and connecting people with social service agencies or helping them to navigate government benefits programs.⁹¹ Above all, the most common

88. See *Mutual Aid Coordination Toolkit (DRAFT!)*, VERMONT MUTUAL AID, https://docs.google.com/document/d/1UUyYMst2xJqq_EPCigc6Bph_vihIZ5MI7mmq6f6UDPs/edit (last visited Jan. 18, 2021); AARP Community Connections, *How to Start a Mutual Aid Group*, <https://aarpcommunityconnections.org/start-group/> (last visited Jan. 18, 2021) (recommending people starting a mutual aid group begin by connecting with both people one knows in their community, and also with people who have helpful skills or resources, like experience managing money, technology skills, or access to a vehicle).

89. See, e.g., Keith Kahn-Harris, *A Neighborly Invitation Regarding Coronavirus*, https://docs.google.com/document/d/1waIh2V3ziWUCXgrBW9O4UaYu8u5oPWx8vvhTeGng_GA/edit?fbclid=IwAR0kJlyPsBoXyH0xnOrR927s5-dwsgl5tLdKfFpZBEDWSjsS_FYpDTg-z1E (last visited Jan. 18, 2021) (attributed to Kahn-Harris in Katherine Cusumano, *How to Start a Neighborhood Association*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/06/smarter-living/how-to-start-a-neighborhood-association.html>); *Adaptable Building/Block Coronavirus Solidarity Flier* [sic] – ENGLISH & SPANISH, MAYDAY SPACE https://docs.google.com/document/d/1yty6ZmeA_27yKvyFR3Vfjj40DOEmNkLQgseMR7lQaNU/edit (last visited Jan. 18, 2021).

90. See, e.g., Free, *supra* note 3 (noting a network of 750 volunteers that grew in Berkeley from an initial pod of two women, a group of 500 volunteers that grew from two women in Miami, and a network of more than 12,000 volunteers across New York and New Jersey); Diana Budds, *Can a Neighborhood Be a Network?*, CURBED (Jun. 23, 2020), <https://www.curbed.com/2020/6/23/21294321/mutual-aid-societies-nyc-pandemic> (noting that 1,000 people have volunteered for the Astoria Mutual Aid Network). Smaller cities also have been able to create substantial mutual aid projects. See, e.g., Carly Berlin, *Neighbors Helping Neighbors: A List of Coronavirus Mutual Aid Efforts in the South*, SCALAWAG (Mar. 20, 2020), <https://www.scalawagmagazine.org/2020/03/covid19-community-aid/> (noting over 1,000 members of a Facebook group for a Gainesville, Florida mutual aid group); Bill Shaner, *Mutual Aid Worcester Helps Worcesterites Help Each Other*, WORCESTER (Mar. 22, 2020), <https://www.worcestermag.com/entertainmentlife/20200317/mutual-aid-worcester-helps-worcesterites-help-each-other> (describing a Worcester, Massachusetts mutual aid Facebook group with more than 1,400 members).

91. See, e.g., ASTORIA MUT. AID, <https://www.astoriamutualaid.com/> (last visited July 21, 2020) (describing its assistance as including grocery shopping, picking up

and substantial services provided by COVID-19 relief groups involve food distribution.⁹²

Early in the COVID-19 crisis, food pantries, food banks, soup kitchens, and more traditional non-profit relief groups tended to rely on their established models, which often faltered; there were shortages of food because of disruption to their supply chains, struggles to find staff and volunteers due to their reliance on stalled corporate volunteer initiatives, and a lack of infrastructure to find or make deliveries to people in need who were unable to travel safely to their facilities.⁹³ Unlike traditional food pantries and soup kitchens, COVID-19 relief groups, perhaps especially those that identify as mutual aid, have developed individually-tailored mechanisms that allow them to get much more specific about the needs of their communities.⁹⁴ These groups developed mechanisms for: identifying, locating, and interviewing people in need, often by email, through social media platforms, or through a voicemail system; shopping for, procuring through donations, or growing, cooking, or preparing food and readying it for distribution; coordinating financial contributions from members and others to fund the costs of food and other essential goods and, in some cases, other overhead costs; and delivering food and other essentials to people in need.⁹⁵ These relief groups updated the models of friendly societies and fraternal societies for a quarantined, socially-distanced, and sometimes—but not always—online public

prescriptions, transportation, friendly conversation, running errands, dog walking, and accessing verified health information); COOP. HUMBOLDT, <https://cooperationhumboldt.com/covid-response/> (last visited July 21, 2020) (describing some of their work as running errands, delivering supplies, offering financial support, making hand sanitizer, cleaning supplies, and face masks for distribution, and offering mental health assistance); *How Can We Help You?*, GNO CARING COLLECTIVE, <https://www.gnocaringcollective.org/how-we-help> (last visited July 21, 2020) (offering delivery of food, supplies, and school lunches, laundry service, rent assistance, and a hotline for information on other neighborhood resources); LOWELL LLAMA, <https://lowell-mutual-aid.com/> (last visited July 21, 2020) (describing members as being able to offer delivery of food and supplies, childcare, housing for students at closed schools, and immigrant and refugee support); MUT. AID MEDFORD & SOMERVILLE, <https://mutualaidmamas.com/> (last visited July 21, 2020) (offering financial resources, rideshare and transportation, childcare, emotional and spiritual support, connections to other resources).

92. *See id.*

93. Kristin Schwab, *Food Pantries Struggle to Provide During COVID-19*, MARKETPLACE (March 31, 2020), <https://www.marketplace.org/2020/03/31/covid-19-food-pantries/>.

94. Tolentino, *supra* note 1; *see infra* note 96 and accompanying text.

95. Tolentino, *supra* note 1.

with tremendous and varied needs. To fund their activities, many of these relief groups developed web-based or other remote mechanisms to pool funds from many people, track requests and offers of assistance, and reimburse volunteers.⁹⁶

While there are some broad similarities among COVID-19 relief projects, they have different structures, different political outlooks, different relationships to traditional non-profits, and different activities relate to this mutual aid tradition.

II. COVID-19 MUTUAL AID AS ANTI-AUTHORITARIAN POLITICS

Thousands of COVID-19 relief projects were launched in 2020, but not all identify their work as mutual aid or connect their activities to the history described in Part I.⁹⁷ Section A of this Part discusses prior efforts to define mutual aid. Although often quite different, these definitions all have some degree of applicability to current mutual aid efforts. Building on these definitions, Section B argues that twenty-first century mutual aid projects are distinguishable from both other contemporary relief programs and many earlier mutual aid efforts because of the influence of women-of-color feminism and anti-authoritarian activism.

A. EFFORTS TO DEFINE MUTUAL AID AND CHANGING MUTUAL AID PRACTICES

For Kropotkin, mutual aid comes out of an innate, perhaps instinctual drive to support and be in solidarity with one's community.⁹⁸ Such a broad definition might mean that most or all COVID-19 relief efforts should be thought of as mutual aid, even if they do not see their own work through that lens, and irrespective of whether they are structured like conventional charities. Kropotkin

96. Some mutual aid groups just share information on social media sites, but groups often collaborate using shared spreadsheets made in Google Sheets or Airtable or coordinate their work through office collaboration software like Slack. Kaitlyn Tiffany, *Pandemic Organizers are Co-opting Productivity Software*, THE ATLANTIC (May 28, 2020), <https://www.theatlantic.com/technology/archive/2020/05/coronavirus-mutual-aid-groups-slack-airtable-google/612190/>.

97. See, e.g., Kay Dervishi, *Mutual Aid Networks Deliver Groceries with a Side of Social Change*, CITY & STATE (July 15, 2020), <https://www.cityandstateny.com/articles/politics/news-politics/mutual-aid-networks-deliver-groceries-side-social-change.html> (quoting a group that does "similar work" to mutual aid groups, but which distinguishes their group from mutual aid organizations that are "very political and very vocal").

98. See *supra* notes 9-13 and accompanying text.

did not view mutual aid as necessarily in direct opposition to charity, as many activists do today. Instead, he argues that mutual aid is an innate human desire that is in direct conflict with the state, and that it is the state that aims to control that sense of solidarity and sociability in order to foster dependence and loyalty, turning communities of people into government subjects.⁹⁹ Rather than seeing charity itself as the problem, Kropotkin believed that the conflict between mutual aid and state power was being fought on contested ideological terrains, like those of religion and charity.¹⁰⁰ Under Kropotkin's broad definition, the COVID-19 relief groups that consider their own projects to be charity or community service, not mutual aid, might be better classified as mutual aid to the extent that they are grounded in a desire for community self-care, rather than fealty to state power.¹⁰¹

Many decades after Kropotkin, some social scientists and historians, looking at the practices of groups like friendly societies and fraternal societies, came to define mutual aid as a form of a social welfare program in which members contribute money into a central fund that other members can draw from when they are in need, thereby minimizing distinctions between helpers and the helped.¹⁰² If Kropotkin's definition risks being so broad that it includes all sorts of groups and activities that seem politically or ideologically removed from mutual aid as the term is typically used today, this definition might be too narrow to accurately describe many of today's COVID-19 mutual aid groups, which do not always have centralized pools of money that others can draw from, and which usually do not limit their giving to group members.¹⁰³

Contemporary mutual aid groups often distinguish their activities from other relief work by reference to the slogan "solidarity

99. KROPOTKIN, *supra* note 4, at 262-63 (describing how European states abolished all mutual aid in rural villages, in town guilds, and in city-level self-government).

100. KROPOTKIN, *supra* note 4, at 283 (arguing that "early Christianity, like all other religions, was an appeal to the broadly human feelings of mutual aid and sympathy," but that organized religions had come to work with and through government powers to weaken "all standing institutions of mutual aid and support which were anterior to it, or developed outside of it. . . . [Nonetheless,] we certainly may consider the immense numbers of religious charitable associations as an outcome of the same mutual-aid tendency.")

101. *See supra* notes 91-96 and accompanying text.

102. *See supra* note 15 and accompanying text.

103. *See supra* notes 91-96 and accompanying text.

not charity.”¹⁰⁴ The phrase gets its potency by implicitly referencing criticisms of the “non-profit industrial complex” that have become well-known among grassroots activists in the twenty-first century.¹⁰⁵ Critics of the non-profit industrial complex argue that today’s increasingly professionalized non-profits cannot meaningfully engage in social change activism or pursue the kinds of programs that the Black Panthers and Young Lords did, in which activists connected the service provision necessary to support people’s material needs with the organizing necessary to change the world so that such supports would eventually become unnecessary.¹⁰⁶

Critics of the non-profit industrial complex make a series of important, interconnected arguments leading them to conclude that non-profits are deeply flawed vehicles through which to create meaningful change. They argue that non-profit organizations’ hierarchical corporate structures necessitate leadership by full-time staff, creating a need for grant funding to pay staff salaries; this, in turn, forces groups toward the kinds of depoliticized service provision that are most appealing to government and private grantors, pushing them away from confrontational tactics like direct action and active support for policy issues that could be controversial for the donor class.¹⁰⁷ As organizations come to rely on grants and fundraising, staff are required to have sophistication in managing budgets, grant writing, and soliciting wealthy people for donations, often leading non-profits to hire well-intentioned college graduates who have entered the non-profit sector by choice, rather than people with the most at stake in their organizational missions.¹⁰⁸

104. See, e.g., SPADE, MUTUAL AID, *supra* note 50, at 21; Ocasio-Cortez & Kaba, *supra* note 93. See generally Spade, *Solidarity*, *supra* note 50.

105. See INCITE! WOMEN OF COLOR AGAINST VIOLENCE, THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX (2017) [hereinafter THE REVOLUTION WILL NOT BE FUNDED]; Haber, *supra* note 16, at 316-20; Haber, *supra* note 33, at 872-73.

106. See NEWTON, *supra* note 51, at 104 (describing “survival programs”).

107. Paul Kivel, *Social Service or Social Change?*, in THE REVOLUTION WILL NOT BE FUNDED, *supra* note 105, at 148; Haber, *supra* note 16, at 316; Haber, *supra* note 33, at 872. Political scientist Megan Ming Francis, in her study of how grant funds shifted the goals and priorities of the National Association for the Advancement of Colored People (NAACP), names this process “movement capture.” Megan Ming Francis, *The Price of Civil Rights: Black Lives, White Funding, and Movement Capture*, 53 LAW & SOC’Y REV. 275 (2019).

108. Christine E. Ahn, *Democratizing American Philanthropy*, in THE REVOLUTION WILL NOT BE FUNDED, *supra* note 105, at 66-68 (2017); Haber, *supra* note 16, at 316; Haber, *supra* note 33, at 873.

These critics argue that non-profits' reliance on foundation and government funding forces them to shift an important part of their attention and resources away from organizing for social change to satisfying grantor and governmental compliance requirements.¹⁰⁹ Lastly, they argue that non-profits' dependence on 501(c)(3) tax exemption for operating their programs reflects a complicity with federal policies that principally aim to benefit the wealthy and powerful, not low-income communities of color or other marginalized or oppressed groups.¹¹⁰

Professor Dean Spade created a chart that builds on this critique of the non-profit industrial complex and connects it to twenty-first century mutual aid practices, elaborating on the distinction between “solidarity” and “charity.”¹¹¹ The chart shows a list of “qualities and tendencies” more likely present in “horizontalist and participatory” mutual aid projects, in contrast with “hierarchical, charitable non-profits and social service programs.”¹¹² These qualities and tendencies of mutual aid groups include:

- Their members are people who participate in organizational decisions, not people who donate money;
- They do “survival” work through volunteers, not “service” work through a professional staff;
- They “beg, borrow, and steal” supplies rather than rely on grants;
- They resist government efforts to regulate or shut down their activities, rather than strive to follow government regulations;
- They focus on deep issues like resistance to capitalism, imperialism, and racial and gender injustice, rather than on single-issue reforms;
- Their meetings are open, not limited to staff and Board;

109. Ruth Wilson Gilmore, *In the Shadow of the Shadow State*, in *THE REVOLUTION WILL NOT BE FUNDED*, *supra* note 105, at 47; Haber, *supra* note 16, at 316; Haber, *supra* note 33, at 873.

110. Dylan Rodriguez, *The Political Logic of the Non-Profit Industrial Complex*, in *THE REVOLUTION WILL NOT BE FUNDED*, *supra* note 105, at 37; Haber, *supra* note 16, at 316; Haber, *supra* note 33, at 873.

111. Dean Spade, *Mutual Aid Chart*, DEAN SPADE (Dec. 4, 2019), <http://www.deanspade.net/2019/12/04/mutual-aid-chart/>. The chart was later included with minor changes in Spade's book. SPADE, *MUTUAL AID*, *supra* note 50, at 61-64.

112. *Id.*

- They work to support people facing the most need instead of imposing eligibility criteria to qualify for assistance;
- They give things away without expectations, instead of requiring conditions like sobriety or a certain immigration status to participate;
- People participate out of passion, not for career advancement;
- They aim to be horizontal and consensus-driven, not hierarchical;
- They value self-determination and try to avoid paternalism;
- Their aid work is connected to tactics aimed at disrupting the root causes of the harm, not disconnected from politics and organizing; and
- They aim to have engagements with the group build solidarity and political mobilization, including around other struggles for justice, rather than limiting that engagement to receipt of aid alone.¹¹³

While not every one of these qualities and tendencies is embraced by every mutual aid group, many COVID-19 mutual aid groups resemble, or at least aspire to live up to, this “horizontalist and participatory” framework.¹¹⁴ This is sometimes true even when conventionally-structured community-based organizations

113. *Id.*

114. *See, e.g.*, N. TEX. MUT. AID, <https://ntxmutualaid.org/> (last visited Aug. 8, 2020) (describing mutual aid as “direct, neighbor-to-neighbor [help] rather than having a large organization as a barrier between people who have things to offer and people who have things they need. It is based on the equality of giving and receiving”); MUT. AID TOMPKINS, <https://mutualaidtompkins.com/> (last visited Aug. 8, 2020) (noting that they are volunteer-led, with no paid staff, prioritize the most vulnerable, that they work in “the spirit of solidarity to meet survival needs,” and are “political and anti-oppressive by nature, and focused on creating long-term, sustainable systems of interdependent community care that ultimately lead to a more resilient and self-reliant Tompkins County”); CENT. VALLEY MUT. AID & COLLECTIVE CARE NETWORK, <https://centralvalleymutualaid.org/> (last visited Aug. 8, 2020) (describing themselves as a “grassroots collective” that sees its work as not narrowly focused on COVID-19, but as part of a response to the systemic oppression of low-income communities of color in the San Joaquin Valley, including “the Prison Industrial Complex and its collaboration with ICE, the Medical Industrial Complex and its pervasive health disparities, contaminated drinking water, air pollution, and environmental racism, substandard housing, economic inequality and obstacles to education attainment, [and] weak to [non-]existent worker protections for valley workers”).

engage in mutual aid, as such efforts may be done outside of their existing non-profit structures.¹¹⁵

B. THE INFLUENCE OF ANTI-AUTHORITARIAN ACTIVIST PRINCIPLES ON COVID-19 MUTUAL AID GROUPS

The shift from hierarchical charity to “horizontalist and participatory mutual aid” that Spade describes aligns with the increasingly widespread influence of anti-authoritarian activist principles on twenty-first century activism and social change

115. In Washington, D.C., the Columbia Heights Village Tenants Association, a community-based 501(c)(3) non-profit that offers very traditional community-based programs—workshops in parenting and etiquette, health and nutrition, financial wellness, job training, and tutoring—launched The Mutual Aid Movement DC, a volunteer-led group providing 2,500 meals each week, coordinating volunteers driving community residents to medical appointments and emergency medical care, and delivering thousands of pounds of fresh produce to residents in Ward 1 in Washington, D.C., while emphasizing “the collective over the individual.” See MUT. AID MOVEMENT D.C., <https://themamdc.com/> (last visited Aug. 13, 2020) (describing their volunteer-led programs and emphasis on the collective); *Our Programs*, CHV TENANT ASSOCIATION, <https://chvta.com/our-programs/> (last visited Aug. 13, 2020) (describing the programs offered by the Columbia Heights Village Tenants Association); *Covid-19 Emergency Response Fund*, GREATER WASH. CMTY. FOUND., <https://www.thecommunityfoundation.org/covid-19-grant-recipients> (last visited Aug. 13, 2020) (listing a grant made to the tenants association to help it develop this mutual aid group). In New York, the Long Island Progressive Coalition, a 501(c)(4) progressive advocacy group, also sought to operate outside of its conventional Board-and-staff-driven model, convening and then spinning off a decentralized collective of individuals and organizations inspired by Cooperation Jackson and working on mutual aid, solidarity economy and economic democracy work, and food and climate justice, all while prioritizing the needs of Black and Indigenous Long Islanders. See *About*, COOP. LONG ISLAND, <https://www.cooperationli.org/about> (last visited Aug. 8, 2020); *Ciro Carrillo, #10: Ryan from Cooperation Long Island about Coalition Building, Working Across Differences, and Doing Mutual Aid During a Pandemic*, ANCHOR (May 16, 2020), <https://anchor.fm/ciro-carrillo/episodes/10-Ryan-from-Cooperation-Long-Island-about-Coalition-Building—Working-Across-Differences—And-Doing-Mutual-Aid-During-a-Pandemic>; see *Reimagine Long Island: Roadmap for a People’s Economy*, COOP. LONG ISLAND, <https://www.cooperationli.org/documents/reimagine-long-island> (last visited Aug. 8, 2020). The Fund for Democratic Communities, a community foundation based in Greensboro, North Carolina, eschewed “faster and bigger charity” and “more of the same” in response to the COVID-19 pandemic; instead, they collaborated with other donors, asked the YWCA to serve as an “operational backbone and fiscal sponsor,” and decided to fund unincorporated mutual aid programs in North Carolina, discovering that “[w]ell-resourced, empowered communities don’t need well-endowed institutional gatekeepers who control access to the society’s wealth. That wealth should be out in the community and facilitating ongoing development that allows communities to meet their needs and improve their quality of life.” Ed Whitfield, et al., *Beyond More: The Transformative Potential of Mutual Aid*, NONPROFIT QUARTERLY (May 21, 2020), <https://nonprofitquarterly.org/beyond-more-the-transformative-potential-of-mutual-aid/>.

organizations. The history of anti-authoritarian activism intersects with the modern history of mutual aid, but the two are distinct; while mutual aid might date back to friendly societies, earlier traditions of craft guilds, and even to ancient, preliterate societies,¹¹⁶ anti-authoritarian activism dates back most clearly to the 1970s.¹¹⁷ Anti-authoritarian activism developed out of the breakup of the New Left coalition, the theoretical interventions of women-of-color feminism, and the decentralized activist structures and decision-making models of the Movement for a New Society and the anti-nuclear movement.¹¹⁸ Even if we consider the radical framing of the Black Panther Party's survival programs, much about the political worldview of COVID-19 mutual aid groups is less a replication of the radicalism of the Black Panthers—who tended toward male-dominated hierarchy and militaristic symbolism, and who drew inspiration from armed revolutionary forces in Cuba and China—and seems more deeply imprinted by the impact of 1970s women-of-color feminism on anti-authoritarian activist culture.¹¹⁹

Women-of-color feminism evolved out of the experiences of radical women of color, often also lesbians, who came to view movements for the liberation of women and people of color, as well as leftist frameworks like Marxism and socialism, as insufficient to address the forms of their oppression, demanding that liberatory politics address the ways that economic exploitation, racism, sexism, and homophobia intersect and compound harms.¹²⁰ They were drawn to collectivity and interpersonal relationship-building more than the idea of building mass movements, although they never lost their radical activist aims.¹²¹ Other movements were developing similar models for organizing and frameworks of analysis at

116. *See supra* Part I.

117. Haber, *supra* note 16, at 325-26.

118. *Id.*

119. *See supra* notes 51, 56-69 and accompanying text.

120. CHRIS DIXON, ANOTHER POLITICS: TALKING ACROSS TODAY'S TRANSFORMATIVE MOVEMENTS 34-35 (2014); *see supra* notes 60-62 (discussing the views of the Combahee River Collective). Although legal scholar Kimberlé Crenshaw famously coined the term "intersectionality" to describe this, the Combahee River Collective are credited by some scholars for theorizing "the idea that multiple identities can be simultaneously present within one person's body. The experiences of Black lesbians could not be reduced to gender, race, class, or sexuality. The [Combahee River Collective] demanded politics that could account for all, and not just aspects of their identity." Taylor, *supra* note 62. *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

121. Haber, *supra* note 16, at 324-26.

this time, often influenced by the work of women-of-color and other feminists and LGBTQ+ activists, and this moment might be the dawn of what could collectively be called modern anti-authoritarian activism.¹²²

Anti-authoritarian activism is not tied to narrow political issues as they are commonly discussed, but is instead connected by a set of three ethical, movement-building principles that cut across specific political contexts: autonomy, horizontalism, and prefigurativism.¹²³

Autonomy is a commitment to individual freedom, direct democracy, and self-governance.¹²⁴ In striking contrast to most political orthodoxies, autonomy values individual freedom and takes as a first principle that no person or group should mandate what another is required to do, even if supported by a majority of the group.¹²⁵

Horizontalism is a commitment to equality and an opposition to the marginalization of people of color, women, people with disabilities, LGBTQ+ people, and all other marginalized people.¹²⁶ Horizontalism describes, at one level, a desire to break from the hierarchy of mainstream social justice non-profits, top-down community organizing, and the broadly Marxist-Leninist socialist left, which all share the need for a central body to set organizational priorities and tactics.¹²⁷ Instead, horizontalist groups aim to set goals together, among equal members engaged in participatory, democratic processes.¹²⁸ More deeply, horizontalism describes efforts to structure our interpersonal relationships in ways that are attentive to, and fight against, the hierarchies that can permeate our daily lives, freeing people to work toward a more truly equitable society.¹²⁹

122. *Id.* See KAUFFMAN, *supra* note 61, at 14-34 (presenting a history of activism after the 1971 Mayday Tribe protest, where decentralized, affinity group-based organizing spread from the feminist movement and LGBTQ+ activist groups to other social movements).

123. Haber, *supra* note 16, at 321.

124. *Id.* at 322.

125. *Id.*

126. *Id.* at 322-23.

127. *Id.*

128. *Id.*

129. *Id.* at 323.

Prefigurativism, or prefigurative politics, is a commitment to using processes in organizing and building a social change movement that are themselves already constructing the world activists want to see.¹³⁰ Unlike many earlier social movements, change is not deferred to some future date by demanding reforms from the state.¹³¹ Instead, social change is believed to happen through gradually making changes to ourselves, our communities, and our ways of relating to one another.¹³² Social change is viewed as the gradual creation of a culture of deep democracy and solidarity, a technology for changing the world without taking power.¹³³

Commitments to these anti-authoritarian principles, and their influence on twenty-first century activism more generally, underlie the organizational models, approaches to group decision-making, and political views of many mutual aid groups, and set the stage for the more specific organization-level shifts that Spade describes. When a mutual aid group refuses the perceived efficiency of hierarchical structures and insists that all community members have something to offer the group, that reflects the group's commitment to horizontalism.¹³⁴ When a mutual aid group makes decisions by direct democracy, consensus, or consent, and when the group operates without requirements on members to take any specific acts, that reflects the group's commitment to autonomy.¹³⁵

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*; see generally JON HOLLOWAY, CHANGE THE WORLD WITHOUT TAKING POWER (2002).

134. See, e.g., KINGSTON MUT. AID, <https://www.kingstonmutualaid.org/> (last visited July 20, 2020) (noting that “we all have needs and we all have ways we can support one another”); N. TEX. MUT. AID, *supra* note 114 (describing their belief that “everyone at some point is able to offer help of some kind and will need to receive it” at some time as well); *Our Guiding Principles*, BED-STUY STRONG, <https://bedstuystrong.com/principles/> (last visited Aug. 9, 2020) (writing that their members “are accountable, first to the neighbors in need we serve, and second to each other, as a horizontal network of neighbors supporting neighbors”); *MAMAS Vision + Agreements*, MUT. AID MEDFORD AND SOMERVILLE (MAMAS), https://docs.google.com/document/d/1681Q56zkBEjR7Zb4BtDPwT8mMQgklKvxN-3_iVCv4BY/edit (last visited Aug. 9, 2020) (stating that “everyone has something to offer and everyone has things that they need”).

135. Many mutual aid groups use consensus decision-making. See, e.g., *Mutual Aid Project (MAP)*, JEWISH YOUTH FOR CMTY. ACTION, <https://jycajustice.org/map> (last visited Aug. 10, 2020); Summit City Mutual Aid and Defense, FACEBOOK (Feb. 23, 2020), <https://www.facebook.com/SummitCityMutualAid/>; LANSING AREA MUTUAL AID, *Consensus Process Training*, <https://www.facebook.com/events/zoom/consensus-process-training/666945743888506/> (last visited Aug. 10, 2020). Dozens of Food Not

When mutual aid groups not only supported and built relationships with people stuck at home because of the pandemic, but also provided critical support for, and participated in, the street uprisings that developed after the Minneapolis police killed George Floyd in May 2020, that is not what a conventional non-profit food pantry would do; it reflects a commitment to prefigurative politics.¹³⁶

Bombs groups have been active in mutual aid responses to COVID-19, and the Food Not Bombs model generally relies on consensus decision-making. *Principles*, FOOD NOT BOMBS, [https://foodnotbombs.net/new_site/principles.php#:~:text=Each%20Food%20Not%20Bombs%20chapter,or%20directors%2C%20and%20no%20headquarters.&text=The%20process%20of%20consensus%20is,a%20majority%20determine%20the%20decisions.\(last%20visited%20Aug.%2010,%202020\).](https://foodnotbombs.net/new_site/principles.php#:~:text=Each%20Food%20Not%20Bombs%20chapter,or%20directors%2C%20and%20no%20headquarters.&text=The%20process%20of%20consensus%20is,a%20majority%20determine%20the%20decisions.(last%20visited%20Aug.%2010,%202020).) Other mutual aid groups responding to COVID-19 have sought to balance the principles of consensus decision-making with a limited amount of centralized coordination. *See, e.g.*, BED-STUY STRONG, *supra* note 134 (describing their decision-making model as seeking to “balance the value of distributed and decentralized leadership with the reality that for a high-stakes and complex operation, some centralized coordination is often necessary.”) *See infra* note 176 and accompanying text for a discussion of consent and consensus decision-making.

136. *See, e.g.*, Jean Hopfensperger, *In Minnesota, Mutual Aid Groups Surge in Wake of Floyd Death*, MINN. STAR TRIB. (Aug. 10, 2020), <https://www.startribune.com/in-minnesota-mutual-aid-groups-surge-in-wake-of-floyd-death/572060882> (discussing how mutual aid helped to sustain the Movement for Black Lives protests in Minnesota); Nick Mancall-Bitel, *Mutual Aid Groups Band Together to Feed Communities Through Crisis*, EATER (June 4, 2020), <https://www.eater.com/2020/6/4/21280367/mutual-aid-groups-food-donations-george-floyd-protests> (describing how the nationwide protests sparked by the killing of George Floyd in Minneapolis led to a converging of mutual aid groups and the Movement for Black Lives); *Justice for Shai'India Harris + The Wall of Moms + Mutual Aid*, DON'T SHOOT PDX (July 25, 2020), <https://www.dontshootpdx.org/2020/07/25/justice-for-shaiindia-harris-the-wall-of-moms-mutual-aid/> (describing mutual aid supporting the militant, controversial George Floyd protests in Portland in the summer of 2020); Claude Shaffer, *Here's Where You Can Donate to Help Protests Against Police Brutality*, ROLLING STONE (June 1, 2020) (noting that one way to support the Movement for Black Lives protests is to support “neighborhood relief efforts like Brooklyn’s Bed-Stuy Strong or NYC Black Mutual Aid . . . to make a long-term, grassroots impact beyond this week’s demonstrations; many of these mutual aid groups also go hand-in-hand with COVID-19 relief in underserved communities”).

Mutual aid was also central to the police-free “autonomous zones” that developed in Seattle, New York, Portland, and other cities coming out of these ongoing protests; these efforts aimed to create prefigurative spaces that operated in accordance with anti-authoritarian principles, and they were often shut down by law enforcement after days or weeks of controversy. *See* Hallie Golden, *Seattle Protesters Take Over City Blocks to Create Police-Free “Autonomous Zone,”* THE GUARDIAN (June 11, 2020), <https://www.theguardian.com/us-news/2020/jun/11/chaz-seattle-autonomous-zone-police-protest> (describing Seattle’s Capitol Hill Autonomous Zone as “a snippet of a reality the people can have”); Elly Belle, *Occupying Police-Free Space: Why Protesters Continue to Set Up Autonomous Zones*, REFINERY 29 (June 23, 2020), <https://www.refinery29.com/en-us/2020/06/9879362/seattle-black-house-autonomous-zone-protest-meaning> (noting the development of autonomous zones coming out of the

That so many twenty-first century COVID-19 relief groups embrace mutual aid and the commitments of anti-authoritarian activism is of critical importance to understanding them. This is not to say that today's mutual aid groups wholly reject the work of more established community-based organizations; there are too many ongoing relationships between COVID-19 mutual aid groups and decades-old community-based organizations for that to be true.¹³⁷ Ultimately, however, there are different visions for their work and, often, significantly different and more ambitious long-term goals.¹³⁸

Movement for Black Lives protests in Seattle, Washington, D.C., Portland, and Asheville); Ezra Marcus, *In the Autonomous Zones*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/style/autonomous-zone-anarchist-community.html> (noting how autonomous zones spread from Seattle to Richmond, Philadelphia, and New York, and citing Professor Kristin Ross, who describes the model as aiming to “live differently within the parameters of what’s possible . . . develop[ing] the collective capacity to take care of yourself”).

137. See, e.g., COVID-19 MUT. AID NETWORK LOS ANGELES, <https://www.mutualaidla.org/english> (last visited Jan. 27, 2021) (describing itself as organized by two previously-existing organizations); *Resources*, CROWN HEIGHTS MUT. AID, <https://crownheightsmutualaid.com/bch/> (last visited Aug. 10, 2020) (linking to resources from conventional non-profit groups); *Resources*, COOP. LONG ISLAND, <https://www.cooperationli.org/resources> (last visited Aug. 10, 2020) (linking to resources from conventional non-profit groups).

Indeed, mutual aid groups should remember that many well-established community-based organizations have roots in the radical movements of the 1960s and 1970s. See, e.g., Sam Roberts, *Luis Garden Acosta, Resuscitator of a Brooklyn Neighborhood, Dies at 73*, N.Y. TIMES (Jan. 11, 2019), <https://www.nytimes.com/2019/01/11/obituaries/luis-garden-acosta-dead.html> (describing how Luis Garden Acosta, a veteran of the Young Lords Party, co-founded El Puente, a Williamsburg, Brooklyn non-profit that fights gentrification, promotes arts and culture, fights for environmental justice, and runs an alternative public high school, the El Puente Academy for Peace and Justice); *From Black Panther to Nonprofit CFO*, BLUE AVOCADO (Dec. 8, 2014), <https://blueavocado.org/community-and-culture/from-black-panther-to-nonprofit-cfo/> (describing how Norma Mtume, a student member of the Black Panther Party and once the director of the Panther-affiliated Bunchy Carter Free Medical Clinic and the George Jackson People’s Free Medical Clinic co-founded a small Los Angeles non-profit called SHIELDS for Families that she led to grow into a \$28 million multi-service nonprofit).

138. See SPADE, MUTUAL AID, *supra* note 50, at 148 (arguing that mutual aid “has the potential to build the skills and capacities we need for an entirely new way of living at a moment when we must transform our society”); McMenamin, *supra* note 3 (describing mutual aid as filling in for absent governmental supports with the recognition that their absence is a system failure requires solidarity and a fight for systemic change); Mariame Kaba, *quoted in* Tolentino, *supra* note 3 (saying that mutual aid is not simply filling in for programs that should be provided by the state, but instead is inherently a form of political education and activism, addressing “real material needs” while also building “the relationships that are needed to push back on the state”); *Autonomous Groups are Mobilizing Mutual Aid Initiatives to Combat the*

III. LEGAL ISSUES FOR COVID-19 MUTUAL AID ORGANIZATIONS

With a deeper understanding of the history and political principles of contemporary mutual aid groups, lawyers should be better able to understand the complexity of the issues that can arise in representing these groups, even on fairly routine business law matters. Mutual aid groups operating in the high-risk environment of a viral pandemic are navigating questions around corporate form, liability, tax compliance, banking, insurance, and other routine business law issues with deep skepticism about, and reluctance to engage with, the tools ordinarily used to mitigate risk by traditional non-profit organizations. Part III presents an overview of some ways mutual aid groups can navigate legal issues related to (A) risk, liability, and entity formation and (B) raising funds, banking, distributing funds, and taxation, in ways that aim to be consistent with their political principles.

A. RISK, LIABILITY, AND CORPORATE ENTITIES FOR MUTUAL AID GROUPS

Most COVID-19 mutual aid groups begin as unincorporated associations, and many remain unincorporated, desiring to avoid the formalities, hierarchy, and perceived problems of the non-profit industrial complex.¹³⁹ When a mutual aid group operates without any sort of corporate entity, the unincorporated association, despite the technical lack of corporate personhood, could be found liable for the actions of its members in many states.¹⁴⁰ Additionally,

Coronavirus, WEAR YOUR VOICE (Mar. 19, 2020), <https://wearyourvoicemag.com/autonomous-groups-mobilizing-mutual-aid-coronavirus/> (describing the goal of mutual aid as not simply “bread and butter” material needs, but new “ways of meeting our needs, making decisions, and organizing ourselves and solving problems outside of the State structure and the capitalist system”).

139. See *supra* notes 104-115 and accompanying text.

140. Under the American Bar Association-approved Uniform Unincorporated Nonprofit Association Act (1996) and its revision (2014), unincorporated nonprofit associations can sue and be sued in their own name; 20 states have adopted one of these models. See *Unincorporated Nonprofit Association Act (1992)*, UNIFORM LAW COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=cbc066de-ba1d-4eb1-a6e2-9b6f45be9a98> (last visited Aug. 20, 2020); *Unincorporated Nonprofit Association Act (2008)*, UNIFORM LAW COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=40227d3a-8b5d-47c2-8cd0-b0ec12da97f9> (last visited Jan. 19, 2021). Under the more traditional view of unincorporated associations, courts found them to be neither corporation nor partnership, and required every member of an association to have unanimously agreed to an action before finding group liability. For example, in *Martin v. Curran*, 303 N.Y.

in contrast to 501(c)(3) non-profits in most ordinary situations, individual participants in the activities of an unincorporated mutual aid group are also at risk of being found liable for damages, including in cases where a member, volunteer, or someone receiving assistance is injured or contracts COVID-19 and is able to trace that exposure back to the mutual aid group or its members.¹⁴¹

276 (N.Y. 1951), the New York Court of Appeals held that unincorporated associations have no independent existence, and therefore suits against association officers for torts can only be upheld “where the individual liability of every single member can be alleged and proven.” *Id.* at 282. Multiple cases have distinguished or criticized the *Martin* holding as a policy, but it continues to be upheld in New York. *See* *Jund v. Town of Hempstead*, 941 F.2d 1271 (2d Cir. 1991) (describing exceptions to *Martin*); *Bldg. Indus. Fund v. Local Union No. 3, Intl. Bhd. Of Elec. Workers, AFL-CIO*, 992 F. Supp. 192, 195 (E.D.N.Y. 1996) (finding the *Martin* rule “a nearly impossible burden to meet”); *Palladino v. CNY Centro, Inc.*, 23 N.Y.3d 140, 12 N.E.3d 436 (N.Y. 2014) (noting that “the *Martin* rule has been criticized as essentially granting unions complete immunity from suit in state court”). Even prior to the creation of the Uniform Unincorporated Nonprofit Association Act, some state courts had already started to move away from this unanimity requirement. *See, e.g.,* *Donnelly v. United Fruit Co.*, 40 N.J. 61, 71, 190 A.2d 825, 830 (N.J. 1963), *overruled on other grounds by* *Sanginario v. Atty Gen.*, 87 N.J. 480, 435 A.2d 1134 (N.J. 1981); *Diluzio v. United Elec., Radio & Mach. Workers of Am., Local 274*, 386 Mass. 314, 319, 435 N.E.2d 1027, 1031 (Mass. 1982); *J.R. Norton Co. v. Gen. Teamsters, Warehousemen & Helpers Union, Local 890*, 208 Cal. App. 3d 430, 443, 256 Cal. Rptr. 246, 254 (Cal. 1989), *cert. denied*, 493 U.S. 894, 110 S. Ct. 242, 107 L. Ed. 2d 193 (1989).

141. Liability of individual members of an unincorporated association is governed by agency law, not partnership law, so there must be some causal direct harm, or authorization of that harm, for liability to attach. *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1284-85 (5th Cir. 1994) (requiring, in a contract claim, a member or officer to have “authorized, assented to, or ratified the contract in question” for personal liability). As of January 2021, it is not clear that any lawsuits have been brought against a mutual aid group for negligently spreading COVID-19, but lawsuits have already been brought in cases where an employer or other party is accused of causing someone to have been harmed by COVID-19. *See generally COVID-19 Employment Litigation Tracker*, FISHER PHILLIPS, LLP, <https://www.fisherphillips.com/covid-19-litigation> (last visited Jan. 20, 2021) (showing 1,426 total U.S. COVID-19 employment lawsuits brought between January 30, 2020 and January 18, 2021, of which 45 are classified as related to “negligence/wrongful death”); *see generally COVID-19 Liability: Tort, Workplace Safety, and Securities Law*, CONG. RESEARCH SERV. (Sep. 24, 2020), <https://crsreports.congress.gov/product/pdf/R/R46540> (describing potential sources of liability that could threaten businesses and other entities with financial losses). Congress has considered legislation to address these potential sources of liability, although those proposals have been controversial. *See* Stephen L. Carter, *Covid-19 Liability Shield is a Bad Idea*, BLOOMBERG OP. (Dec. 5, 2020), <https://www.bloomberg.com/opinion/articles/2020-12-05/a-stimulus-bill-poison-pill-covid-19-liability-shields-are-a-bad-idea>; Scott Horsley, *Lawmakers Split Over Liability Protections in Pandemic Relief Bill Negotiations*, NPR.ORG (Dec. 14, 2020), <https://www.npr.org/2020/12/14/946420756/lawmakers-split-over-liability-protections-in-pandemic-relief-bill-negotiations>; Kristina Peterson & Andrew Duehren, *GOP Leaders See Bipartisan Group’s Covid-Aid Effort Falling Short*, WALL ST. J. (Dec. 10, 2020),

This is a significant legal challenge for mutual aid groups operating in the high-risk COVID-19 era because any number of members of an unincorporated association could be sued in the event someone becomes sick after participating in an activity with the group. State courts have varied on how closely connected to a tort a member of an unincorporated association has to be for personal liability to attach to that person, but they generally require a proximate connection that goes beyond mere membership in the group.¹⁴² How this standard applies to a mutual aid group in which a participant becomes sick or is injured while engaging in mutual aid activities would depend on the specific situation, but where a member participated in an online discussion in which a mutual aid group plans to undertake some activity, and that activity causes someone to become seriously ill, incur hospital bills, or suffer any other kind of damages, participation in that online conversation may be enough for a court to find that member personally liable for the damages.¹⁴³

There are some limited forms of statutory protection that might partially shield members of COVID-19 relief groups from liability, but these often do not apply to unincorporated mutual aid groups. For instance, directors and officers of non-profit corporations are generally shielded from personal liability by the business judgment rule, which provides state-level protection for directors and officers if they acted in good faith, based on independent,

<https://www.wsj.com/articles/covid-19-aid-bill-negotiators-seek-compromise-on-liability-shield-11607627924>; Ana Swanson & Alan Rappeport, *Liability Shield is a Stumbling Block as Lawmakers Debate Relief*, N.Y. TIMES (Aug. 5, 2020), <https://www.nytimes.com/2020/08/05/us/politics/liability-shield-business-coronavirus.html>.

142. See, e.g., *Libby v. Perry*, 311 A.2d 527 (Me. 1973) (holding that a guest who slipped and fell at a party sponsored by an unincorporated association could recover from members of the group who helped to plan the party); *Guyton v. Howard*, 525 So. 2d 948, 957 (Fla. 1988) (holding that members of an unincorporated association with an initiation ritual that involved firing a shotgun loaded with blanks could not be found liable for injury “on the sole basis of their membership” in the group, and remanding for a jury to consider whether individual defendants “committed or participated in” tortious acts or omissions, “authorized, assented to or ratified” those acts or omissions, or “helped to set in motion the proceedings or agreed to the course of action” that culminated in those acts or omissions); *Marshall v. Delaware*, 1986 WL 11566 (Del. 1986) (finding that people who were injured in a fight at an unincorporated college fraternity could proceed with a case against only members of the fraternity who “authorized, planned, directed, or participated in the fight”); *Steuer v. Phelps*, 41 Cal. App. 3d 468, 116 Cal. Rptr. 61 (1974) (finding that members of an unincorporated association could be held liable for one member’s negligent driving if those members approved the decision for the member to drive).

143. See *id.*

reasonably informed judgment, and in a manner reasonably believed to be in the organization's best interest.¹⁴⁴ The federal Volunteer Protection Act of 1997 provides protection from negligence claims to volunteers with nonprofit organizations if they do not receive compensation or "any other thing of value in lieu of compensation" in excess of \$500 per year.¹⁴⁵ This protection only applies to organizations recognized by the IRS as 501(c)(3) tax-exempt organizations and other groups that are "organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes."¹⁴⁶ The similarity of this language to the "organizational test" in 26 C.F.R. § 1.501(c)(3)-1 makes it likely that a court would require a mutual aid group without 501(c)(3) status to have a charter that "limit[s] the purposes of such organization to one or more exempt purposes."¹⁴⁷ Presumably most unincorporated mutual aid groups, which by definition lack corporate charters, would not meet the requirements of this test. Similarly, some states limit liability for volunteers of charitable organizations, but these laws vary significantly from state to state and, again, may only provide protection to volunteers for 501(c)(3) groups.¹⁴⁸

Given the high likelihood that there will be no corporate liability protection for members of an unincorporated mutual aid group, mutual aid groups can try to take other steps to protect their members from the risk of such liability, including: (1) adopting a written safety policy describing steps that members are expected to take to keep one another safe and updating that policy as more becomes known about the transmission of COVID-19; (2) using liability waivers; (3) obtaining appropriate insurance when it is possible; and (4) exploring models for forming corporate entities that might better align with their political views than conventionally-structured non-profit corporations.

144. See, e.g., MASS. GEN. LAWS CH. 180, § 6C (1989); 15 PA. CODE § 5712 (1990); TENN. CODE ANN. §48-58-301 (2015); VA. CODE ANN. § 13-870 (2007).

145. 42 U.S.C. § 14501-14505 (1997).

146. 42 U.S.C. § 14505(4) (1997).

147. 26 C.F.R. § 1.501(c)(3)-1(b)(1)(i)(A) (1960).

148. Nonprofit Risk Mgmt. Cent., *State Liability Laws for Charitable Organizations and Volunteers*, PRO BONO P'SHIP (2009), <https://www.probonopartner.org/wp-content/uploads/2016/01/stateliabilitylawsforcharitiesandvolunteers.pdf>.

1. SAFETY POLICIES

Mutual aid groups may provide some protection for their members by adopting a safety policy based on the guidance of governmental public health and safety experts, like the Centers for Disease Control and Prevention and state and local health agencies.¹⁴⁹ Creating a mechanism that requires members to follow these best practices should help a mutual aid group keep its community as safe as possible. Legally, adopting a safety policy should provide some amount of protection for a mutual aid group and its members against claims of negligence, as long as its policy was chosen carefully, applied consistently, and updated as experts' understanding of the virus progresses.¹⁵⁰

2. LIABILITY WAIVERS

Mutual aid groups may also protect themselves and their individual members, volunteers, or participants from tort liability by asking their members, volunteers, or participants to sign a liability waiver or exculpatory agreement. Courts can hold unincorporated associations liable for the actions of their members or agents, although a few states adhere to an older rule that required a

149. The Centers for Disease Control and Prevention has guidelines for community and faith organizations, businesses and workplaces, and other groups on its website. *Coronavirus Disease 2019 (COVID-19): Community Organizations and Gatherings*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/index.html>.

150. In tort law generally, a defendant may provide evidence of compliance with relevant government regulations as evidence of its exercise of due care, though it does not necessitate that a jury find that the defendant was reasonable. RESTATEMENT (SECOND) OF TORTS § 288C (AM. L. INST. 1965); *Dorsey v. Honda Motor Co. Ltd.*, 655 F.2d 650, 656 (5th Cir. 1981), *modified*, 670 F.2d 21, *cert. denied*, 459 U.S. 880, 103 S. Ct. 177, 74 L. Ed. 2d 145 (1982); *Smith v. Atlantic Richfield Co.*, 814 F.2d 1481, 1487 (10th Cir. 1987). However, the Centers for Disease Control and Prevention ("CDC") guidelines have been credibly accused of being politicized by the Trump Administration. See Richard Besser et al., *Former CDC Directors: Trump Has Politicized Science More than Any Past President*, WASH. POST (July 14, 2020), <https://www.washingtonpost.com/outlook/2020/07/14/cdc-directors-trump-politics/> (describing President Trump as "attempting to undermine" the CDC); *Surveying the Centers for Disease Control and Prevention: Scientist Voices Under President Trump*, UNION OF CONCERNED SCIENTISTS (Aug. 2018), <https://www.ucsusa.org/sites/default/files/2019-09/science-under-trump-cdc.pdf>; Amna Nawaz et al., *CDC's Politicization "Extremely Dangerous" for Americans, Says Its Former Head*, PBS NEWSHOUR (July 14, 2020, 6:40 PM), <https://www.pbs.org/newshour/show/cdcs-politicization-extremely-dangerous-for-americans-says-its-former-head>. This politicization of the CDC could lead courts to question how reasonable the actions of a licensor or employer have been if they relied solely the CDC guidelines to develop their policies, without also considering other sources of authority.

unanimous decision by all members of an unincorporated group to find the association as a whole liable.¹⁵¹ However, in all states, without corporate protection, individual members of an unincorporated association may be held liable if they participated in, expressly or impliedly authorized, or ratified acts that gave rise to tort liability.¹⁵² Most state courts will enforce liability waivers if they state, in unequivocal terms, that the parties to the contract intended to excuse the party protected by the waiver from liability for its negligence.¹⁵³ However, liability waivers do not protect groups or their members in cases of gross negligence or intentional torts.¹⁵⁴ Courts often narrowly construe liability waivers,¹⁵⁵ and states vary on how they apply unconscionability doctrine to these contracts.¹⁵⁶ Courts have refused to enforce liability waivers if the intent to waive liability is not made in clear and conspicuous

151. See *supra* note 140 and accompanying text.

152. See *supra* notes 141-142 and accompanying text.

153. DOYCE J. COTTON & MARY B. COTTON, *WAIVERS & RELEASES OF LIABILITY* 10 (9th ed. 2016) (stating that a “well-written waiver” can “protect a service provider from liability for injuries resulting from provider negligence in 45 or more states”); Ryan Martins et al., *Contract’s Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. 1265, 1282 (2020) (finding that the trend of the twentieth century is “from mid-century unenforceability to late century enforceability”). Some states do not enforce liability waivers, finding them to be against public policy. See, e.g., *Johnson’s Adm’x v. Richmond & Danville R.R.*, 86 Va. 975 (Va. 1890); *Hiett v. Lake Barcroft Cmty. Ass’n*, 418 S.E.2d 894 (Va. 1992).

154. *Pratt v. W. Pac. R. Co.*, 213 Cal. App. 2d 573, 29 Cal. Rptr. 108 (1st Dist. 1963); *Shelby Mut. Ins. Co. v. City of Grand Rapids*, 6 Mich. App. 95, 148 N.W.2d 260 (Mich. 1967); *Feleccia v. Lackawanna College*, 215 A.3d 3, 370 Ed. Law Rep. 318 (Pa. 2019); *Holzer v. Dakota Speedway, Inc.*, 2000 S.D. 65, 610 N.W.2d 787 (S.D. 2000). The Restatement (Third) of Torts, however, diverges from this view, stating that contractual limitations on liability may apply “to claims based on a defendant’s intentional or reckless conduct.” RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY. § 2, cmt. (g) (2000).

155. See, e.g., *Heil Valley Ranch v. Simkin*, 784 P.2d 781, 784 (Colo. 1989) (noting that courts in all jurisdictions strictly construe liability waivers against the drafter, but they are “split on whether ‘negligence’ must be specifically mentioned, or whether more inclusive and general terms may be employed”); *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982) (finding that even though the court has upheld liability waivers, “they are not favored in the law. A clause exonerating a party from liability will be strictly construed against the benefited party. If the clause is either ambiguous in scope or purports to release the benefited party from liability for intentional, willful or wanton acts, it will not be enforced”).

156. James F. Hogg, *Consumer Beware: The Varied Application of Unconscionability Doctrine to Exculpation and Indemnification Clauses in Michigan, Minnesota, and Washington*, 2006 MICH. ST. L. REV. 1011 (2006).

language,¹⁵⁷ or if there is a significant disparity in bargaining power between the parties, such as between an employer and an employee.¹⁵⁸

3. INSURANCE

Non-profit corporations routinely obtain Commercial General Liability insurance to protect their groups from the risk of lawsuits, and, often, they obtain Directors' and Officers' Liability insurance to protect their directors and officers from liability in any lawsuits brought against them for their actions as individuals in those roles.¹⁵⁹ As unincorporated associations and their members may be found liable in tort,¹⁶⁰ ordinary commercial insurance should be available to insure against the risk of liability, but this is not necessarily the case. Insurance companies often do not offer commercial insurance coverage to unincorporated associations at commercially reasonable rates.¹⁶¹

When a mutual aid group can get it, Commercial General Liability coverage is broad, but it is not a complete safety net. For example, Commercial General Liability policies do not protect against injuries to volunteers or employees caused by fellow

157. See, e.g., *Nat'l & Int'l Bd. of Street Racers v. Superior Court*, 264 Cal. Rptr. 44, 46-47 (Cal. Ct. App. 1989); *Turnbough v. Ladner*, 754 So. 2d 467, 469 (Miss. 1999); *Yauger v. Skiing Enter.*, 557 N.W.2d 60, 64 (Wis. 1996).

158. See, e.g., *Eder v. Lake Geneva Raceway, Inc.*, 523 N.W.2d 429 (Wis. Ct. App. 1994); *Broemmer v. Abortion Serv. Of Phoenix, Ltd.*, 840 P.2d 1013, 1016 (Ariz. 1992); *Jordan v. City of Baton Rouge*, 529 So. 2d 412, 415 (La. Ct. App. 1988); *Gross v. Sweet*, 49 N.Y. 2d 102, 400 N.E.2d 306 (N.Y. 1979). In *Richardson v. Island Harvest, Ltd.*, 89 N.Y.S.3d 92 (N.Y. App. Div. 2018), a New York court invalidated a volunteer liability waiver, extending the refusal to enforce a liability waiver protecting an employer against an employee because of differences in their bargaining power to relations between an employer and a "volunteer employee" of a non-profit because if employers were able to contract away this responsibility, it could encourage indifference to employee and volunteer safety. This logic seems most applicable to mutual aid contexts where volunteers are more like employees who work regular shifts and do specified work tasks than occasional volunteers who set their own schedules and perform whatever voluntary activities they choose, in any manner they choose.

159. *What Basic Insurance Coverage Should a Nonprofit Consider?*, NONPROFIT RISK MGMT. CENT., <https://nonprofitrisk.org/resources/e-news/what-basic-insurance-coverage-should-a-nonprofit-consider/> (last visited Aug. 21, 2020).

160. See *supra* note 140-142 and accompanying text.

161. George E. Constantine et al., *Considerations for Determining Whether Association Chapters Should Incorporate*, VENABLE LLP (1999), <https://www.venable.com/insights/publications/1999/01/considerations-for-determining-whether-association>.

volunteers or employees.¹⁶² Workers compensation insurance is generally required by state law for non-profit employees,¹⁶³ although some states exempt charitable or other non-profit groups from this requirement.¹⁶⁴ Volunteers who receive no compensation of any sort, whether monetary or non-monetary, are typically exempt from mandatory workers' compensation coverage, although mutual aid groups may be able to obtain such coverage to help defray the costs of any volunteer's work-related injuries.¹⁶⁵

4. Incorporation

Of all the tools available to mutual aid groups that may be used to avoid liability, incorporation may be the easiest, cheapest, and broadest form of liability protection for their members. Incorporation may also be the most politically fraught and problematic option for many mutual aid groups because of their commitments to anti-authoritarian politics and concerns about being unavoidably sucked into the non-profit industrial complex.¹⁶⁶ However, not all corporate structures are equally hierarchical, and not all non-profits are equally trapped by the requirements of grantors, restrictions on lobbying, and norms of the professionalized non-profit

162. See, e.g., Insurance Services Office, *Commercial General Liability Coverage Form*, CG 00 01 04 13 (2012), § II.2.a(1) (exclusions on coverage for bodily injury and personal and advertising injury on leading commercial general liability form policy).

163. See, e.g., *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 676 F. Supp. 799 (S.D. Ohio 1987), *aff'd*, 911 F.2d 1203 (6th Cir. 1990); *State Subsequent Injs. Fund v. Indus. Acc. Comm'n*, 16 Cal. Rptr. 323 (Cal. Dist. Ct. App. 1961); *Meyers v. Sw. Region Conference Ass'n of Seventh Day Adventists*, 230 La. 310, 88 So. 2d 381 (La. 1956); *Smith v. Lincoln Memorial University*, 202 Tenn. 238, 304 S.W.2d 70 (Tenn. 1957).

164. See, e.g., *Wright v. Fowler*, 459 N.E.2d 386 (Ind. Ct. App. 1984); *Spokane Methodist Homes, Inc. v. Department of Labor and Industries*, 483 P.2d 168 (Wash. Ct. App. 1971), *judgment aff'd*, 81 Wash. 2d 283, 501 P.2d 589 (Wash. 1972); *Dewey v. Merrill*, 124 Idaho 201, 858 P.2d 740 (Idaho 1993); *Ponca City Welfare Ass'n v. Ludwigsen*, 882 P.2d 1062 (Okla. 1994); *Dixon v. Salvation Army*, 360 Ark. 309, 201 S.W.3d 386 (Ark. 2005).

165. See, e.g., KAN. STAT. ANN. § 44-508(b) (2019) (specifying that a "workman," "worker" or "employee" under the workers compensation act includes volunteers "if the employer has filed an election to extend coverage to such volunteers"); WIS. STAT. ANN. § 102.07(11) (2019) (authorizing the creation of classes of "volunteer workers" who may, "at the election of the person for whom the service is being performed," be covered by workers compensation coverage). However, some states only allow such volunteers to be brought within their workers compensation statutes when they volunteer for an incorporated non-profit entity. See NEV. REV. STAT. § 616A.130 (1995) (permitting volunteers in any "formal program" to obtain coverage only for state and local public organizations, federally-assisted organizations, and any "private, incorporated, nonprofit organization which provides services to the general community").

166. See *supra* Part II.

sector.¹⁶⁷ Groups that are able to dedicate the time to developing a corporate structure that allows members to participate as equals, uses decision-making tools like consensus or consent, and that avoids top-down organizational controls may be able to align much about their group structures with their values.¹⁶⁸ That said, some mutual aid groups will decide that no corporate form would be satisfactorily consistent with their political commitments and prefer to continue as unincorporated associations.

B. RAISING FUNDS, SPENDING OR DISTRIBUTING FUNDS, AND THE TAXATION OF MUTUAL AID GROUPS

Mutual aid groups also face unique challenges in raising, saving, and spending money, as well as in navigating potential taxation issues. Of course, the more a mutual aid group is structured like a conventional tax-exempt non-profit, the more familiar those issues will be for tax-exempt organization lawyers. However, many mutual aid groups—even if they choose to incorporate and obtain tax exemption or contract for tax exemption through a fiscal sponsor—will seek to continue operating through decentralized or horizontal corporate structures, using forms of consent or consensus decision-making, and structuring their operations in ways that avoid bright-line distinctions between non-profit members, donors and donees.¹⁶⁹ These models pose potentially-significant legal

167. For a longer discussion of some of the ways activist groups have been experimenting with non-profit forms, see Haber, *supra* note 33.

168. See generally *id.* Cooperative and non-profit corporations can design structures that make decisions not through majority vote, but through the participatory and democratic tools like consent or consensus. *Id.* at 881-83, 911-12. For detailed discussions of decision-making using consent and consensus processes, see TED J. RAU & JERRY KOCH-GONZALEZ, *MANY VOICES ONE SONG: SHARED POWER WITH SOCIOCRAZY* (2018); C.T. BUTLER & AMY ROTHSTEIN, *ON CONFLICT AND CONSENSUS: A HANDBOOK ON FORMAL CONSENSUS DECISIONMAKING* (1987).

169. See, e.g., *Mutual Aid Legal Toolkit Case Study #3*, SUSTAINABLE ECON. L. CENT., https://www.thesecl.org/mutual_aid_network_la (last visited Jan. 21, 2021) (describing Mutual Aid Network LA, a project of a 501(c)(3) and 501(c)(4) which operates “semi-independent[ly]” of those entities using a “horizontalist structure”); Anna Zolotor, *After Distributing Nearly \$22,000 in Aid, Duke Mutual Aid Members Look to Restructure*, THE CHRONICLE, <https://www.dukechronicle.com/article/2020/05/duke-university-distributing-22000-mutual-aid-members-look-restructure> (last visited Jan. 21, 2021) (outlining plans to use a fiscal sponsor in order to “avoid creating a top-down structure”); *Consensus-Based Decision-Making*, KENSINGTON-WINDSOR TERRACE MUT. AID, <https://www.kwtmutualaid.com/about-us/consensus-based-decision-making> (last visited Jan. 28, 2021) (describing consensus process); *Decision-Making Process*, LANE COUNTY MUT. AID, <https://lanemutualaid.org/decision-making-process/> (last visited Jan. 28, 2021) (describing their use of both consensus

challenges to navigate, especially with respect to financial and tax-related legal matters, including: (1) decentralized giving and barter taxation; (2) the use of a tax-exempt entity or fiscal sponsor for mutual aid; (3) giving funds to individuals as a disaster relief or emergency hardship fund; and (4) crowdfunding, income tax, and IRS 1099-K forms.

1. DECENTRALIZED GIVING AND BARTER TAXATION

The mechanisms that mutual aid groups have been using to fund their projects are quite diverse. Many mutual aid groups use a centralized bank account or have an account with an online payment processor like Venmo or PayPal, either in the name of an individual member of the group or in the name of their group as an entity or an unincorporated association.¹⁷⁰ Other groups have experimented with models of decentralized or person-to-person fundraising, rather than directly operating a bank account. Some of these groups create forms of online “exchanges,” through which people with goods or services they wish to share can post offers of those goods or services, and people with needs can contact them to receive or exchange goods or services directly.¹⁷¹ Other groups might have a somewhat more centralized mechanism for receiving requests for help, but still operate in a semi-decentralized manner; such models might involve receiving requests for funds or other assistance through a centralized voicemail box, online form, or a shared email account, forwarding them to volunteers to fulfill, and then having those volunteers seek reimbursement directly from donors within the mutual aid group.¹⁷²

process as well as a somewhat-related organizational decision-making process called advice process).

170. See *infra* Section III.B.4.

171. See, e.g., Ally Markovich, *Need Money? Exasperated by the Pace of Government Help? Person-to-Person Mutual Aid Funds Fill a Gap in Berkeley*, BERKELEYSIDE (Apr. 20, 2020), <https://www.berkeleyside.com/2020/04/20/need-money-exasperated-by-the-pace-of-government-help-person-to-person-mutual-aid-funds-fill-a-gap-in-berkeley> (describing an online spreadsheet that allows anyone to donate and anyone in need to sign up to receive money directly from donors). Mutual aid groups sometimes use Facebook or shared Google Drive documents that offer a place for individual community members to connect and exchange or share resources. See, e.g., Gainesville COVID-19 Mut. Aid, FACEBOOK, <https://www.facebook.com/groups/243135496869312/> (last visited Aug. 26, 2020); Mut. Aid Worcester, FACEBOOK, <https://www.facebook.com/groups/MutualAidWorcester/> (last visited Aug. 26, 2020); *Rutgers Mutual Aid Spreadsheet*, <https://docs.google.com/spreadsheets/d/1aa5SfBvPJFshrX12iFfegU7Ykfqow3bPsYoedrWDrRo/edit?usp=sharing> (last visited Aug. 26, 2020).

172. See, e.g., *Get Help*, ASTORIA MUT. AID NETWORK, [https://www.astoria mutualaid.com/get-help/#Get-Help-Form](https://www.astori mutualaid.com/get-help/#Get-Help-Form) (last visited Jan. 22, 2021) (providing an

One issue posed by these decentralized fundraising models is the risk of fraud or theft. These issues might arise when one person applies repeatedly to one or more groups for assistance beyond what they need, perhaps misrepresenting who they are or where they live. Some mutual aid groups have structured their operations in ways that aim to mitigate this risk, such as by limiting direct cash assistance.¹⁷³ Beyond that, the primary legal issue posed by decentralized fundraising models is the extent to which these activities are taxable, and how barter taxation rules apply to online exchange transactions.

When one person gives another person goods or performs a service in exchange for money, whether at an ordinary storefront business or between two private individuals, that is a taxable transaction.¹⁷⁴ When two people trade non-cash goods or services—a hand-made mask for a bottle of hand sanitizer or the service of picking up a prescription from a local drug store—the IRS sees both parts of that trade as bartering income that should be listed on each person’s income tax filing.¹⁷⁵ Both sides of such transactions are taxed on the value of the goods or services received.¹⁷⁶ These kinds of transactions are commonplace: a neighbor shares

online form and a voicemail number through which to request help); *Request Help*, N. BROOKLYN MUT. AID, <https://northbrooklynmutualaid.org/Request-help> (last visited Jan. 22, 2021) (providing an online form, a voicemail number, and an email address through which to request help). Some groups use a platform called Covaid that helps to coordinate requests for mutual aid. *See, e.g., Covaid Requests*, PITTSBURGH MUT. AID, <https://www.covaid.co/pgh-request> (last visited Aug. 26, 2020).

173. *See* Abigail Savitch-Lew, *Mutual Aid Movement Playing Huge Role in COVID-19 Crisis*, CITY LIMITS (Apr. 3, 2020), <https://citylimits.org/2020/04/03/mutual-aid-movement-playing-huge-role-in-covid-19-crisis/> (describing Brooklyn mutual aid cash grants limited at \$150, “no verification documents required”); *Learn About and Join a Coronavirus Mutual Aid Group*, SEATTLE INDIVISIBLE (Apr. 2, 2020), <https://www.seattleindivisible.com/daily-actions/2020/4/2/learn-about-and-join-a-coronavirus-mutual-aid-group> (describing emergency cash grants limited to \$50); *Philly Mutual Aid – Neighbors Helping Neighbors*, PHILLYWERISE, <http://phillywerise.com/blog/aid/philly-mutual-aid-neighbors-helping-neighbors/> (last visited Aug. 31, 2020) (describing cash grants limited to \$50).

174. *See* 26 U.S.C. § 61(a) (1954) (defining gross income as include “all income from whatever source derived,” including income from providing a service, from business, and from the sale of property); Rev. Rul. 2007-19, I.R.B. 2007-14 (2007) (affirming that compensation received in exchange for personal services is taxable income).

175. INTERNAL REVENUE SERV., PUBLICATION 525 (rev. ed. 2019), <https://www.irs.gov/publications/p525>. Depending on the situation, this may be reported as “Other Income” on IRS Form 1040, on Form 1040, Schedule C, or, for business entities, on returns like Form 1065 or Form 1120.

176. INTERNAL REVENUE SERV., GROSS INCOME; BARTER TRANSACTIONS, Rev. Rul. 79-24, 1979-1 C.B. 60, 1979 WL 50765 (1979).

some vegetables from her garden with her neighbor, who reciprocates with a bottle of wine; a homeowner lets a friend stay in her house while she is on vacation for a week in exchange for feeding and walking her dog. When these kinds of transactions are done “informally and directly between taxpayers, there may be a high level of noncompliance in reporting the income received.”¹⁷⁷

For mutual aid groups that coordinate programs of barter and exchange among entire communities, however, this may not be just a minor individual tax matter. Mutual aid groups that coordinate, promote, or help their members exchange goods or services with one another or with the group may be engaged in activities that trigger filing requirements for the mutual aid group as a “barter exchange.”¹⁷⁸ Barter exchanges are typically business entities that facilitate exchanges among people, often for a fee, and they are required to report on IRS Form 1099-B all the exchanges taking place through them.¹⁷⁹

There are two important exceptions to the barter exchange rules that could apply to mutual aid groups that coordinate such exchanges between community members. First, a group’s activities do not constitute a barter exchange if the group arranges “solely for the informal exchange of similar services on a noncommercial basis.”¹⁸⁰ The IRS gives little guidance on exactly how similar services have to be to qualify for this exception, but the example they give is of essentially identical services: a group of three people, each of whom is responsible for driving a carpool every third day, does not constitute a barter exchange.¹⁸¹ Exchanges among members of mutual aid groups organized in this way seem unlikely to be protected by this exception if it is interpreted narrowly. Second, if there are fewer than 100 exchanges during a calendar year, a group that otherwise would be classified as a barter exchange is not required to report on those exchanges.¹⁸² This exception may be relevant for some mutual aid groups, but groups that facilitate decentralized exchanges as an important part of their operations

177. Bryan T. Camp, *The Play’s the Thing: A Theory of Taxing Virtual Worlds*, 59 HASTINGS L. J. 1, 32-33 (2007).

178. See 26 C.F.R. §§ 1.6045-1(a)(4) (2020) (defining barter exchanges as persons or entities “with members or clients that contract either with each other or with such person to trade or barter property or services either directly or through such person”).

179. 26 C.F.R. §§ 1.6045-1(a)(4), 1.6045-1(e), 1.6045-1(f) (2020).

180. 26 C.F.R. § 1.6045-1(a)(4) (2020).

181. 26 C.F.R. § 1.6045-1(b) (2020).

182. 26 C.F.R. § 1.6045-1(e) (2020).

may exceed this number and be subject to the reporting requirements on barter exchanges.

2. THE USE OF A TAX-EXEMPT ENTITY OR FISCAL SPONSOR FOR MUTUAL AID

When a tax-exempt organization receives a donation, that revenue is generally exempt from taxation, unless it is subject to unrelated business income tax.¹⁸³ Unrelated business income tax could be a concern for tax-exempt mutual aid groups that offer goods or services unrelated to their tax-exempt purposes in exchange for contributions, but the tax does not apply in situations where group activities are substantially performed by volunteers,¹⁸⁴ as is the case for most mutual aid groups.

Of the different kinds of federal tax exemption, exemption pursuant to section 501(c)(3) of the Internal Revenue Code is generally considered to be the most advantageous form because it allows donors to deduct a portion of their donations from their own income tax.¹⁸⁵ This makes 501(c)(3) organizations more attractive to potential donors,¹⁸⁶ especially to wealthy potential donors, who are most likely to itemize deductions on their taxes.¹⁸⁷ However, 501(c)(3) status comes with restrictions that may be problematic for mutual aid groups, including a prohibition against participation or intervention in a political campaign on behalf of, or in opposition to, a candidate for public office,¹⁸⁸ and limitations on lobbying, including “attempting to influence legislation by propaganda or otherwise” and “proposing, supporting, or opposing . . . legislation” before Congress, or state, or local

183. 26 U.S.C. § 501(a)-(b) (2019).

184. 26 C.F.R. § 1.513-1(e) (2020).

185. 26 U.S.C. § 170 (2020).

186. Oliver A. Houck, *With Charity for All*, 93 YALE L. J. 1415, 1429 (1984); See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 (1983) (noting that the difference between 501(c)(3) and 501(c)(4) organizations is simply that “Congress chose not to subsidize [501(c)(4) organizations] as extensively”).

187. See Tax Policy Cent., *What Are Itemized Deductions and Who Claims Them?*, <https://www.taxpolicycenter.org/briefing-book/what-are-itemized-deductions-and-who-claims-them> (last visited Feb. 19, 2021).

188. 26 C.F.R. § 1.501(c)(3)-1(c)(3)(iii) (2020); INTERNAL REVENUE SERV., EXEMPT ORGANIZATIONS; POLITICAL CAMPAIGNS, Rev. Rul. 2007-41, 2007-25 I.R.B., 2007 WL 1576989 (2007).

legislatures.¹⁸⁹ These additional restrictions on 501(c)(3) organizations also make them more attractive to government and private foundation grantors.¹⁹⁰ This is a key factor underpinning concerns about the depoliticization of activist groups that choose to become 501(c)(3) non-profits; the lure of grant funds and their potential ability to pay for hiring staff and increasing operating budgets may be too great for organizations to resist, leading activist groups that choose to incorporate for simple liability protection or easier access to banking to find themselves pushed down a path toward the non-profit industrial complex.¹⁹¹

COVID-19 mutual aid groups concerned about these restrictions on forms of lobbying and political activities by 501(c)(3) organizations could pursue other exempt classifications, such as the 501(c)(4) exemption for civic leagues operated for the promotion of social welfare.¹⁹² 501(c)(4) organizations are permitted to engage in unlimited lobbying related to the organization's exempt purpose,¹⁹³ and may engage in some amount of political activities, as long as they are not the primary activity of the organization.¹⁹⁴ Mutual aid groups might explore other, less-widely used exemption categories as well, like 501(c)(10), which provides tax exemption to fraternal societies that provide benefits to their members and their communities, although that exemption can be more complicated to obtain than 501(c)(3) or 501(c)(4) tax exemption.¹⁹⁵ While many of these non-501(c)(3) exempt classifications allow for greater amounts of lobbying and political activities, they might make a mutual aid group less attractive to certain donors and

189. 26 C.F.R. § 1.501(c)(3)-1(c)(3)(ii) (2020). Organizations engaging in lobbying may be subject to the “no substantial part test” or may elect to be governed by a bright-line expenditure test pursuant to IRC § 501(h) and § 4911.

190. See Matthew J. Rossman, *Evaluating Trickle Down Charity*, 24 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 59, 100 (2015) (noting that the “ripple effect” of 501(c)(3) status includes “eligibility for many types of grants and contracts and, as at the federal level, a wide array of other exceptions, exemptions, and privileges”).

191. See *supra* notes 105-110 and accompanying text.

192. 26 U.S.C. § 501(c)(4)(A) (2019).

193. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) (2017); INTERNAL REVENUE SERV., CIVIC ORGANIZATIONS AND LOCAL ASS'NS OF EMPS., Rul. 71-530, 1971-2 C.B. 237, 1971 WL 26734 (1971).

194. INTERNAL REVENUE SERV., SOCIAL WELFARE ORGANIZATION; POLITICAL CAMPAIGN ACTIVITIES, Rev. Rul. 81-95, 1981-1 C.B. 332, 1981 WL 166125 (1981). See Roger Colinvaux, *Social Welfare and Political Organizations: Ending the Plague of Inconsistency*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 481, 487 (2018); Daniel Halperin, *Tax Exemption Under I.R.C. § 501(c)(4)*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 519, 524 (2018).

195. 26 U.S.C. § 501(c)(10) (2019); 26 C.F.R. § 1.501(c)(10)-1 (2020).

government or foundation grantors, if those are potential interests of the group.

For many mutual aid groups, a common alternative to obtaining tax-exempt status is to enter into a fiscal sponsorship agreement with a tax-exempt non-profit. Fiscal sponsorship is commonplace in the non-profit sector, but the term does not have a precise legal definition and can describe a few different types of relationships between a group with tax exemption (the “fiscal sponsor”) and a “project,” any other incorporated or unincorporated group that agrees to comply with the rules imposed by the fiscal sponsor in a contract.¹⁹⁶ In such a contract, the fiscal sponsor agrees to receive donations and grants on behalf of the project, which allows the project to take advantage of the sponsor’s tax-exempt status.¹⁹⁷ Fiscal sponsors may also provide some amount of support in bookkeeping, legal compliance, or other areas.¹⁹⁸

One way this is done, sometimes called “Model A” fiscal sponsorship, is to have the mutual aid project absorbed into the sponsor entity.¹⁹⁹ Typically, in this model, all gross project receipts are put into the bank account of the sponsor and paid out of the bank account of the sponsor for the purposes of the project.²⁰⁰ The sponsor frequently handles tax, accounting, and legal compliance issues for the project, and any project employees become employees of the sponsor.²⁰¹ A second way this is commonly done, sometimes called “Model C” fiscal sponsorship, involves a similar relationship, but with the project remaining independent from the sponsor.²⁰² The sponsor still receives funds reserved for the project’s purposes, but then distributes them to the project for approved purposes.²⁰³ The sponsor may require reports showing how the money was spent, would likely charge a fee for their work, and may make other requests of the project.²⁰⁴ Similar to the “Model A” fiscal sponsorship,

196. Gregory L. Colvin, *Fiscal Sponsorship: 6 Ways to Do It Right – A Synopsis*, 7 EXEMPT ORG. TAX REV. 604, 604-05 (1993), <https://www.adlercolvin.com/wp-content/uploads/2017/12/Fiscal-Sponsorship-Six-Ways-To-Do-It-Right-A-Synopsis.pdf>.

197. *Id.*

198. *Id.*

199. *Id.* at 605.

200. *Id.*

201. *Id.*

202. *Id.* at 607-08.

203. *Id.*

204. *Id.*

the sponsor might handle tax, bookkeeping, and basic compliance matters for the project.²⁰⁵

Fiscal sponsors are not just banks that take money in and then redistribute it. Sponsors have their own exempt purposes and their own compliance issues to monitor, and they are responsible for exercising a level of control over how the money passing through their accounts is spent.²⁰⁶ Fiscal sponsors are often used by mutual aid groups that do not want to incorporate or open a centralized bank account, because fiscal sponsorship allows mutual aid groups to take advantage of the benefits of tax-exemption and easy access to a centralized organizational bank account without some of the downsides those might be seen to have for groups concerned about the non-profit industrial complex. This might be symbolic more than anything: the terms of many fiscal sponsorship agreements will not only provide the benefits of 501(c)(3) status, but will also require the mutual aid group to adhere to the obligations and requirements of that status as well.²⁰⁷ The main difference becomes that those obligations and requirements will be enforced by a hopefully somewhat mission-aligned non-profit organization, rather than by the IRS. Still, for mutual aid groups that can find no other way to open a group bank or credit union account or groups where members are divided over whether or not to pursue incorporation and tax exemption, fiscal sponsorship can be an uncomplicated way to balance those concerns.

3. INDIVIDUAL GIVING PROGRAMS BY 501(C)(3) MUTUAL AID GROUPS—DISASTER RELIEF OR EMERGENCY HARDSHIP FUNDS

Many COVID-19 mutual aid groups, irrespective of their corporate and tax status, collect funds from members and the public, and use those funds to provide cash, food, and other necessities to individuals in their communities.²⁰⁸ When that work is done through a 501(c)(3) entity in the context of a disaster or crisis, the IRS calls these activities a “disaster relief” or “emergency

205. *Id.*

206. *Id.* at 605.

207. See Erin Bradick, *Fiscal Sponsorship: What you Should Know and Why You Should Know it*, 2015-May BUS. L. TODAY 1, 3 (2015) (advising that any fiscal sponsorship agreement “should include . . . limitations on such uses [of funds] pursuant to the requirements under Section 501(c)(3)”).

208. See *supra* notes 91-92 and accompanying text.

hardship” fund.²⁰⁹ A 501(c)(3) public charity may set up a disaster relief or emergency hardship fund even if those activities were not originally approved as organizational activities in its Form 1023 tax-exemption application.²¹⁰ The entity would not need to obtain prior approval from the IRS, but it would be required to report the new activity on its annual Form 990 informational tax filing.²¹¹

The IRS imposes significant requirements on disaster relief or emergency hardship funds,²¹² so most mutual aid groups that have applied for, obtained, or plan to apply for 501(c)(3) tax exemption must meet these criteria: (a) they must have a proper charitable class; (b) they must satisfy the requirements of the “needy or distressed” test; and (c) they must maintain substantial records of their activities.

a. Requirements for a Charitable Class

A 501(c)(3) organization operating a disaster relief or emergency hardship fund should ensure that it is set up to serve a public interest and be able to show that it has not been formed to benefit specifically-designated individuals.²¹³ The people that the 501(c)(3) organization seeks to help must be a charitable class, a group “large enough or sufficiently indefinite”²¹⁴ that it would help a

209. See generally INTERNAL REVENUE SERV., U.S. DEP’T OF TREASURY, PUB. NO. 3833, DISASTER RELIEF (2014), <https://www.irs.gov/pub/irs-pdf/p3833.pdf> [hereinafter *Disaster Relief*].

210. *Id.* at 3.

211. See *id.*

212. These requirements are derived in large part from the reading of 26 U.S.C. § 501(c)(3) as it applies to individual recipients of charity in INTERNAL REVENUE SERV., Rev. Rul. 56-304, 1956-2 C.B. 306, 1956 WL 10799 (1956). See generally *Disaster Relief*, *supra* note 209, at 3; Ruth Rivera Huetter & Marvin Friedlander, IRS Exempt Organizations Continuing Professional Education Articles, *K. Disaster Relief and Emergency Hardship Programs*, <https://www.irs.gov/pub/irs-tege/eotopick99.pdf> (1999).

213. 26 CFR § 1.501(c)(3)-1(d)(3)(ii) (2017).

214. To be considered an indefinite class, the relief program must be open-ended and benefit an indefinite number of persons impacted by the disaster. *Thomason v. Comm’r*, 2 T.C. 441, 443-44 (1943).

community of some kind, not pre-selected individuals.²¹⁵ Similarly, donors may not earmark funds for a specific individual or family.²¹⁶

b. The “Needy or Distressed” Test

When a disaster first strikes, a 501(c)(3) entity is permitted to provide immediate aid—blankets, shelter, food, clothing, medicine, transportation, and small amounts of money—without pausing to conduct needs assessments or collect detailed information from recipients of that aid.²¹⁷ But this is a narrow exception, and, longer term, charitable funds cannot be given out to people simply because they are victims of a disaster.²¹⁸ As time passes between the immediate disaster and the provision of aid, it becomes mandatory for a 501(c)(3) organization operating a disaster relief or emergency hardship fund to assess the financial need of each person coming to it for assistance and to keep detailed records of those decisions and who received aid.²¹⁹

Exactly when the requirements for conducting needs assessments and maintaining detailed records begins is not clearly defined by the IRS. The IRS provides that “the scope of the assessment required to support the need for assistance may vary depending upon the circumstances,” but advises that providing financial assistance to families for three-to-six months of housing does require a needs assessment.²²⁰ The IRS expects 501(c)(3) organizations to make determinations about how their money will be spent “based on an objective evaluation of the victims’ needs at the time the grant is made.”²²¹

This insistence on objectivity, evaluation, and recordkeeping is intended to serve reasonable goals, like preventing fraud, private inurement, and self-dealing. However, it also imposes significant compliance requirements on often-small community groups

215. *Id.*; see *Russell v. Allen*, 107 U.S. 163, 167 (1883) (“[A charitable trust] may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity”).

216. Victoria B. Bjorklund & David Shevlin, *Responding Promptly to Needs for Disaster Relief: Experienced Exempt Organizations Advisers Share Their Playbook*, CV018 ALI-CLE 159 (2013).

217. *Disaster Relief*, *supra* note 210, at 11.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

operating in a context of tremendously widespread need. This exemplifies one of the chief criticisms of the non-profit industrial complex: to do this mandatory compliance properly, an organization is required to question people seeking help and take attention away from its core mission.²²² Even at the height of a terrible pandemic, without any particular evidence of widespread fraud or waste, U.S. tax policy for 501(c)(3) organizations seems more focused on policing the line between those deserving and undeserving of help, rather than on maximizing the provision of life-saving food, medicine, and housing assistance as a first priority.

C. LONG-TERM RECORDKEEPING

In the earliest stage of an emergency relief effort, a 501(c)(3) organization needs to keep records of only “the uses to which the funds were put.”²²³ Quite soon, however, while still “in the initial stages of a relief effort,” 501(c)(3) groups should start keeping a significant amount of information about the recipients of aid, including, according to 1999 IRS guidance, “names, addresses, telephone numbers, social security numbers, a brief description of the loss suffered, and the type and amount of assistance needed and granted.”²²⁴ Notably, in its updated 2014 guidance, the IRS no longer lists social security numbers among the data it advises 501(c)(3) organizations to track, but it adds the recommendation that groups maintain records of all of the following: the “objective criteria” for providing aid; how recipients were selected and who comprises the selection committee making those decisions; and any relationships between recipients of aid and the officers, directors, key employees of, or substantial contributors to, the organization.²²⁵

Because some federal disaster relief programs have specifically excluded undocumented immigrants, there is great need for assistance among undocumented immigrants,²²⁶ and a number of

222. See *supra* note 109 and accompanying text.

223. Huetter & Friedlander, *supra* note 212, at 228.

224. *Id.*

225. *Disaster Relief*, *supra* note 210, at 13.

226. See Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act), 26 U.S.C. § 6428 (2020) (excluding anyone who does not have a social security number, anyone whose spouse does not have a social security number, or anyone whose child does not have a social security number from CARES Act benefits, with limited exceptions for children placed for adoption and active duty members of the military); Ashley Morey, *No Shelter from the Storm: Undocumented Populations and Federal Disaster Aid*, 11 SEATTLE J. SOC. JUST. 257 (2012); Nicole Narea, *For Immigrants*

city and state governmental and private non-profit funds have been established to help undocumented communities.²²⁷ Although the Internal Revenue Code clearly restricts information-sharing between the IRS and other agencies,²²⁸ some non-profits remain reluctant to track this data because of recent federal efforts to break with past norms in order to punish undocumented immigrants.²²⁹ Some mutual aid groups serving undocumented communities have even opted to avoid using a 501(c)(3) fund entirely to avoid any recordkeeping requirements that might put undocumented immigrants at greater risk from hostile federal agencies.²³⁰

4. CROWDFUNDING, INCOME TAX, AND 1099-K FORMS

Many mutual aid groups are neither tax-exempt nor fiscally-sponsored organizations; they do their mutual aid either as an unincorporated association or through an entity like an LLC, cooperative corporation, or a non-profit corporation that does not have tax exemption. To analyze the tax ramifications of the receipt of contributions by such a group, the first question to consider is whether the funds the group receives are deposited into an account—whether a conventional bank account or an account with an online payment processor like PayPal or Venmo—controlled by an individual member of the group, or whether they are received by the group in a business account controlled by the group as an incorporated entity or unincorporated association.²³¹ Of course,

Without Legal Status, Federal Coronavirus Relief is Out of Reach, VOX (May 5, 2020), <https://www.vox.com/2020/5/5/21244630/undocumented-immigrants-coronavirus-relief-cares-act>.

227. See *Coronavirus/COVID-19: Immigrant Response Funds*, GRANTMAKERS CONCERNED WITH IMMIGRANTS AND REFUGEES, <https://www.gcir.org/coronavirus/immigrant-response-funds> (last visited Aug. 27, 2020).

228. 26 U.S.C. § 6103 (2020) (listing limited exceptions to the general rule that returns and return information must be kept confidential by the IRS).

229. Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 316-17 (2018) (describing the Trump Administration's immigration policy "harsher than the 'mainstream' Republican approach to immigration, which was strict but not purposefully spiteful," an intentional effort to disrupt the lives of immigrants by spreading "confusion and chaos").

230. See, e.g., *Undocumented Worker Fund*, MOVIMIENTO COSECHA, <https://www.lahuelga.com/undocumented-worker-fund> (last visited Aug. 27, 2020) (describing their "important choice" to keep their funds in a 501(c)(4) entity "because it allows us to limit information sharing of undocumented families receiving funds to the federal government").

231. Like business entities, unincorporated associations are eligible to open Federal Deposit Insurance Corporation-insured bank accounts. 12 C.F.R. § 330.11(c) (2006).

whether an individual or the group as a whole might be ultimately responsible for any tax liability is an important concern for mutual aid groups and the members who help manage their finances.

From the perspective of the IRS, the funding of mutual aid will often look like crowdfunding, both when mutual aid groups use conventional crowdfunding platforms and when they do not. There are five basic types of crowdfunding: *donative crowdfunding*, where contributors give money to a project without receiving anything in exchange; *rewards-based crowdfunding*, where contributors receive some good or service (but not a financial security) in exchange for their money; *pre-purchase crowdfunding*, where contributors may receive a copy of the final funded product before it is released publicly; *debt crowdfunding*, where contributors make a loan in anticipation of being repaid, typically with interest; and *equity crowdfunding*, where contributors get a security interest in the firm soliciting investments, like shares of stock.²³²

Through the lens of crowdfunding, the typical financial transactions of many mutual aid groups look like donative crowdfunding, as most mutual aid groups do not provide any direct material or financial benefit to contributors in exchange for their contributions, and many have relied on popular donative crowdfunding platforms like GoFundMe to process these transactions.²³³ By itself, this does not tell us much about how mutual aid groups might be taxed, as the IRS has only given brief, advisory guidance on

Banking institutions may impose certain requirements to open these accounts, which might include obtaining an Employer Identification Number from the IRS and adopting some form of governance documents. See, e.g., *Unincorporated Associations*, BROOKLYN COOP. CREDIT UNION, <https://www.brooklyn.coop/bank-with-us/unincorporated-associations/> (last visited Jan. 29, 2021); *Starting Your New Chase Relationship, Business Account Opening Information: Unincorporated Business Association or Organization*, CHASE BANK, N.A. <https://www.chase.com/content/dam/chasecom/en/business-banking/documents/unincorporated-business-checklist.pdf> (last visited Jan. 29, 2021). Many online payment processors also offer both individual and business services. See, e.g., *Business Profiles FAQ*, VENMO, <https://help.venmo.com/hc/en-us/articles/360043677373-Business-Profiles-FAQ> (last visited Feb. 20, 2021); *For Small-to-Medium Business*, PAYPAL, <https://www.paypal.com/us/business> (last visited Feb. 20, 2021).

232. C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 14-27 (2012).

233. See Natalie Delgadillo, *D.C. Organizers Raised Thousands for Neighbors in Crisis. But Some Have Struggled to Get the Money from GoFundMe*, DCIST, (March 31, 2020), <https://dcist.com/story/20/03/31/d-c-organizers-raised-thousands-for-neighbors-in-crisis-but-some-are-now-struggling-to-get-the-money-from-gofundme/> (describing the heavy reliance on GoFundMe by D.C. area mutual aid groups, and a delay in receiving payment from the site).

crowdfunding, mostly cautioning that general tax principles apply and that “the income tax consequences to a taxpayer of a crowdfunding effort depend on all the facts and circumstances surrounding that effort.”²³⁴

Under the Internal Revenue Code, all income, irrespective of its source, is taxable unless there is an exception within the Code.²³⁵ The Code says that gross income “does not include the value of property acquired by gift,” but it never defines what a gift is, leaving it to the courts to determine.²³⁶ The leading case on the issue, *Commissioner v. Duberstein*, 363 U.S. 278 (1960), says that a gift must be made with “detached and disinterested generosity, out of affection, respect, admiration, charity or like impulses.”²³⁷ To determine whether a donation was made out of generosity, affection, or charity, the most important consideration is the donor’s intent.²³⁸ In many cases, people who give to a mutual aid group should be considered to be “contributing money not for a reward or a quid pro quo but rather to express gratitude or because they feel sympathetic for the . . . beneficiary.”²³⁹ Still, because of mutual aid groups’ political desire to minimize the distinctions between donor and recipient, risk remains for mutual aid groups, especially for groups whose models might be viewed by the IRS as giving donors some benefit, like an increased likelihood of receiving benefits themselves in return.

In addition, not all mutual aid groups conduct purely donative crowdfunding. Some mutual aid groups might seem closer to rewards-based crowdfunding, where contributors receive a small benefit in exchange for a donation, like a t-shirt or sticker. This can be complicated if the “reward” is not clearly a small token of appreciation. If a mutual aid group accepts contributions of \$10 in exchange for coffee mugs that cost them \$8 to buy, that may be an ordinary commercial transaction, potentially subject to both state-level sales tax and income tax, because the “reward” has a value

234. IRS INFO 2016-0036 (2016).

235. 26 U.S.C. § 61 (2017).

236. 26 U.S.C. § 102 (1986).

237. *Comm’r v. Duberstein*, 363 U.S. 278, 285 (1960) (citing *Comm’r v. LoBue*, 351 U.S. 243, 246 (1956)); *Robertson v. United States*, 343 U.S. 711, 714 (1952) (internal quotations omitted).

238. *Duberstein*, *supra* note 237, at 285.

239. *Id.*

closely comparable to the amount of the payment.²⁴⁰ Conversely, if a mutual aid group offers that same ordinary \$8 mug as a token of appreciation for a contribution of \$200, that should be evidence that the funds were not given as part of an ordinary commercial transaction.²⁴¹ If the donative intent of the \$200 payment satisfies the *Duberstein* standard, that contribution can be classified as a gift and not count as gross income, although some argue that this should be treated as two transactions, an ordinary business transaction for the fair market value of the reward, with the balance of the payment treated as a gift.²⁴²

Even for mutual aid groups that believe that all funds going to them meet the *Duberstein* gift standard, gifts may still have to be reported to the IRS by taxpayers who receive a Form 1099-K from their bank or online payment processor. Under 26 U.S.C. § 6050W(d)(3), third-party payment processors such as Venmo and PayPal are required to issue a Form 1099-K when a person receiving money provided goods or services in exchange for those funds.²⁴³ While most mutual aid groups do not provide goods or services in exchange for contributions, 26 U.S.C. § 6050W(e) requires that third-party payment processors file a Form 1099-K with the IRS for any campaigns—including purely donative crowdfunding campaigns—that receive both over \$20,000 in revenue and over 200 donations, and that they send a copy of this Form 1099-K to the organizer of the campaign.²⁴⁴ In addition, a number of states have begun to impose stricter requirements for the issuance of 1099-K forms under state law, and in those states, as little as \$600 or \$1,000 in revenue will cause an online payment processor to issue a Form 1099-K.²⁴⁵

240. See *U.S. v. Am. Bar Endowment*, 477 U.S. 105, 116-18 (1986) (finding that where a non-profit offers a service in exchange for a donation, a taxpayer may receive “only a nominal benefit in return” or else it fails to be a contribution or gift).

241. See *id.* at 117 (noting, in the exempt-organization context, that the “*sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration”).

242. Joyce Beebe, *Tax Considerations of Crowdfunding* 3, BAKER INST. FOR PUB. POL’Y ISSUE BRIEF (March 5, 2020), <https://www.bakerinstitute.org/media/files/files/e3d63e9c/bi-brief-030520-cpf-crowdfunding.pdf>.

243. 26 U.S.C. § 6050W(d)(3) (2018).

244. 26 U.S.C. § 6050W(e) (2018).

245. Liz Farmer, *Gig Workers Could Get a Nasty Surprise This Tax Filing Season—Particularly on State Returns*, FORBES (Jan. 25, 2021), <https://www.forbes.com/sites/lizfarmer/2021/01/25/the-new-rules-every-gig-worker-should-know-for-tax-season/?sh=4ee9cc4e470a> (listing Arkansas, Illinois, Massachusetts, Maryland, Mississippi, Missouri, New Jersey, Vermont, and Virginia, plus Washington, D.C.); David Dobbins,

If an online payment processor submits a Form 1099-K to the IRS, a copy should be sent to the person or entity responsible for the crowdfunding campaign, though taxpayers are required to properly report their income, whether or not they receive a Form 1099-K.²⁴⁶ The wide variety of mutual aid funding models make it hard to conclude much about how mutual aid groups' Form 1099-Ks will be treated by the IRS beyond their own guidance that crowdfunding taxation will "depend on all the facts and circumstances surrounding that effort."²⁴⁷ But at least for many mutual aid groups that receive a Form 1099-K or that otherwise need to report their crowdfunded revenue to the IRS, there are strong arguments that contributions made to their projects should be excluded from their gross income because they meet the standard for gifts articulated in *Duberstein*.²⁴⁸

CONCLUSION

The year 2020 will long be remembered for the global COVID-19 pandemic that has killed hundreds of thousands and the attendant disruptions to the global economy. It will be remembered for the Trump Administration's efforts to downplay the importance and seriousness of the virus,²⁴⁹ while simultaneously casting doubt on some of the fundamental institutions of the country.²⁵⁰ It will be remembered for the protests and uprisings demanding accountability for police officers who killed Black people without provocation or punishment and the brutality of the police response to those

Prepare for New 1099-K Reporting Requirements Across the U.S., SOVOS (May 14, 2020), <https://sovos.com/blog/2020/05/14/prepare-for-new-1099-k-reporting-requirements-across-the-u-s/>.

246. See, e.g., *Lakew v. Commissioner*, T.C. Summ. Op. 2020-27 (2020) (holding that petitioners' failure to properly note the amount of income listed on a 1099-K, even though the 1099-K was not received by petitioners, is not a reason to reduce the IRS penalty for underpayment).

247. See *supra* note 237 and accompanying text.

248. See *supra* note 191 and accompanying text.

249. See David Leonhardt, *A Complete List of Trump's Attempts to Play Down Coronavirus*, N.Y. TIMES (March 15, 2020), <https://www.nytimes.com/2020/03/15/opinion/trump-coronavirus.html>.

250. See, e.g., Besser, *supra* note 150 (describing President Trump as "attempting to undermine" the CDC); William Cummings, *A "Despicable Strategy: Al Gore Slams Trump for Casting Doubt on Election Results in Advance*, USA TODAY (Aug. 26, 2020), <https://www.usatoday.com/story/news/politics/elections/2020/08/26/al-gore-trump-election-concerns/3444062001/>; Sam Levine, *Trump Admits He is Undermining USPS to Make it Harder to Vote by Mail*, THE GUARDIAN (Aug. 13, 2020), <https://www.theguardian.com/us-news/2020/aug/13/donald-trump-usps-post-office-election-funding>.

demonstrations.²⁵¹ Just below those headlines, perhaps slightly under the surface, 2020 also brought a flowering of grassroots mutual aid projects building the infrastructure necessary to try to support their communities through these crises.

Mutual aid may be ancient and instinctual, as Kropotkin argued, but it is not always identical in different contexts. Just as the structures of solidarity among ants, Indigenous tribes, early modern villages, and nineteenth-century labor unions are all quite different in their details, twenty-first century mutual aid groups are confronted with questions of how to care for their communities and live out their commitments to personal autonomy, to real democracy, and to building a social change movement that is already constructing the world that activists want to see.

Andrej Grubačić and Denis O’Hearn, building on the work of Fernand Braudel, James Scott, Pierre Clastres, and Kropotkin, describe mutual aid as an example of what they call “infrapolitics.”²⁵² When compared to radical tactics like street protests, demonstrations, strikes, and uprisings, infrapolitics aims to be unobtrusive, almost invisible. This quietude affords the space to develop prefigurative infrastructure for political action, “the cultural and structural underpinning” necessary for deep and lasting change.²⁵³ This is very much the project of mutual aid at its best; it is not only delivering groceries, picking up prescriptions, and helping with rent payments; it is doing the often harder work of developing the relationships within our communities necessary to build the infrastructure of a better world. It is this building process that is critical to the bigger goals of mutual aid, as Spade writes: “Our movements must contend with the structures in place in order to dismantle the weapons they use against our communities, and simultaneously build new ways of surviving that are based in our principles of liberation and collective self-determination.”²⁵⁴

251. Kim Parker et al., *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RESEARCH CTR. (June 12, 2020), <https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/>.

252. ANDREJ GRUBAČIĆ & DENIS O’HEARN, *LIVING AT THE EDGES OF CAPITALISM: ADVENTURES IN EXILE AND MUTUAL AID* 15 (2016).

253. *Id.*; see JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE* 183-84 (1990).

254. SPADE, *MUTUAL AID*, *supra* note 50, at 148.

Perhaps the best-developed theory of exactly how this better world will come about is the idea of “dual power.” Although the term dates to the Russian Revolution, activists today use it following the influential writings of the American theorist Murray Bookchin.²⁵⁵ Bookchin uses the term to mean a confederation of local, municipal-level direct democracies that, through their local power, exert a form of counter-power that can ultimately challenge forces of oppression, including the power of police, capital, and the state.²⁵⁶ Mutual aid groups, organized as horizontal, deeply democratic, community-responsive counter-institutions that have begun to confederate into networks are already starting to build that power.

This is where issues about the relationship between mutual aid and questions around tax, incorporation, and risk are most philosophical. It is perfectly understandable that mutual aid groups committed to this kind of infrastructural politics are inclined to reject things like forming non-profit corporations and obtaining insurance. Yet mutual aid groups have not abandoned the use of government-backed currency, government-built roads, or government and corporation-backed technologies like the internet and cell phones as part of their work. Indeed, many rely on the ease of corporate tools like Venmo and PayPal instead of working with credit unions or exploring alternative systems like community currencies.²⁵⁷ Perhaps at some point, a refusal to engage with today’s tools and technologies devolves into a juvenile counterculture of symbolic protest, what Bookchin derided as “lifestyle anarchism.”²⁵⁸ At the same time, a deep commitment to anti-authoritarian principles is what gives mutual aid its radical potency, and the ability of the non-profit industrial complex to capture and co-

255. See, e.g., John Michael Colón et al., *Community, Democracy, and Mutual Aid: Toward Dual Power and Beyond*, SYMBIOSIS RESEARCH COLLECTIVE 9 (April 2017), https://thenextsystem.org/sites/default/files/2017-07/Symbiosis_AtLargeFirst-corrected-2.pdf.

256. MURRAY BOOKCHIN, *THE NEXT REVOLUTION: POPULAR ASSEMBLIES & THE PROMISE OF DIRECT DEMOCRACY* 26-29 (2015).

257. See THOMAS GRECO, JR., *MONEY: UNDERSTANDING AND CREATING ALTERNATIVES TO LEGAL TENDER* 57-68 (2001) (presenting an overview of community and local currencies).

258. See generally MURRAY BOOKCHIN, *SOCIAL ANARCHISM OR LIFESTYLE ANARCHISM: AN UNBRIDGEABLE CHASM* (1995).

opt movements is indisputably an ever-present threat to this model of social change.²⁵⁹

This article takes no position on how mutual aid groups should decide difficult questions like those around incorporation and managing risk of liability other than this: mutual aid groups should consider these questions thoughtfully and in the context of their broader political vision. To disengage from these important questions because they seem complicated or tedious is to betray the importance of the project of mutual aid for the sake of convenience. Even more importantly, ignoring these questions leaves mutual aid projects vulnerable to external lawsuits, agents provocateurs, and aggressive state crackdowns, as has happened to mutual aid projects repeatedly for over a century—from the National Ex-Slave Mutual Relief, Bounty, and Pension Association and the International Workers Order to the Black Panthers, Common Ground Collective, and Occupy Wall Street. There is an important role for movement lawyers to play in supporting mutual aid groups, helping them understand these legal issues in a way that balances activist principles with the potential benefit of available legal tools, while centering and giving priority to mutual aid values, culture, and decision-making processes. If mutual aid groups are serious about the project of building sustainable counter-institutions that last beyond any one short-term crisis and instead start to address our ongoing, systemic crises, digging into these technicalities and developing thoughtful, principled answers to these difficult questions is an essential step toward building dual power.

259. SPADE, MUTUAL AID, *supra* note 50, at 50-59; *see generally* Francis, *supra* note 107.