TRANSACTIONAL CLINICAL SUPPORT FOR MUTUAL AID GROUPS: TOWARD A THEORY OF TRANSACTIONAL MOVEMENT LAWYERING

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INTRODUCTION

In response to the global spread of the COVID-19 pandemic in the spring and summer of 2020, thousands of grassroots, participatory, and often social movement-connected community efforts to help feed and care for one another through the crisis were launched, many of which identified their projects as "mutual aid."[1] In *Mutual Aid: Building Solidarity During This Crisis (and the Next)*, Dean Spade defines mutual aid as comprised of three elements: (1) it works to meet people's basic needs while simultaneously building shared political understandings about why people do not already have those basic needs met; (2) it mobilizes people, encourages community solidarity, and helps build and expand social movements; and (3) it is collective and participatory, not reliant on managers or "saviors" for leadership or direction.[2]

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1. *See* Michael Haber, *COVID-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*, 67 LOYOLA L. REV. 115 (2021); Rebecca Solnit, *'The Way We Get Through This is Together': The Rise of Mutual Aid Under Coronavirus*, GUARDIAN (May 14, 2020), https://www.theguardian.com/world/2020/may/14/mutual-aid-coronavirus-pandemic-rebecca-solnit [https://perma.cc/9Q8S-XXHZ]. By one count, more than 6,000 mutual aid projects around the world have been active through the pandemic. *COVID-19 Mutual Aid Map*, REACH4HELP, https://map.reach4help.org/ [https://perma.cc/H7CJ-LLDG].

2. DEAN SPADE, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) 9–16 (2020).

This Article tells the story of the work the Hofstra Law School Community Economic Development ("CED") Clinic has done to provide legal support and information to hundreds of COVID-19 mutual aid projects. It also tells the story of our collaboration with Prof. Spade and briefly reviews his 2020 book on mutual aid, contrasting it with a legal guide for mutual aid groups that I wrote.[3] Finally, it describes this work in the context of recent scholarship on "movement lawyering," exploring some potential affinities between the practices analyzed in this scholarship and CED. Section I begins with an overview of the public interest goals of transactional law clinics and how the Hofstra CED Clinic fits within them. Section II discusses how the Hofstra CED Clinic's past work led us to begin to field questions from mutual aid groups formed early in the pandemic, and how we came to write our legal guide for mutual aid groups. It also details how the creation of that legal guide changed the nature of our legal work for mutual aid groups and describes some of the practical and ethical issues that arose as we tried to support the groups seeking our help. Section III outlines the development of my collaboration with Spade and reviews his book on mutual aid.[4] Section IV surveys recent scholarship on movement lawyering and notes some of the connections between CED as practiced in the Hofstra CED Clinic and movement lawyering, arguing that CED lawyers could deepen our impact through a more meaningful engagement with movement lawyering principles.

3. *See* Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide*, HOFSTRA UNIV. LEGAL STUD. RES. PAPER NO. 2020-06, 1 (June 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736 [https://perma.cc/8U3U-P4GH].

4. SPADE, *supra* note 2.

I. THE PATCHWORK OF PUBLIC INTEREST RATIONALES FOR TRANSACTIONAL LAW CLINICS AND HOW THE HOFSTRA CED CLINIC BECAME INVOLVED WITH MUTUAL AID

Clinical legal education largely developed in the U.S. in the late 1960s and early 1970s and, even in those early years, aimed to both train students in lawyering skills and teach them "important lessons about the role of law and lawyers, and about social justice."[5] Transactional law clinics would only become popular decades later.[6] They came in two waves: an initial group of CED clinics grew out of the poverty law tradition in the 1990s, and a second group of business law and entrepreneurship clinics developed in the 2000s, inspired by a new interest in producing more "practice ready" corporate lawyers, the potential availability of external funding to support these programs, and growing interest from students, faculty, and the small business sector.[7]

While this history may make it seem like there is a sharp division between CED and entrepreneurship clinics, many transactional clinicians see more similarities than differences. Both CED and entrepreneurship clinics train students in core transactional lawyering skills, including interviewing, counseling, case planning, drafting, and negotiation.[8] There is also significant overlap between the legal entities these different clinics represent: many CED clinics represent some conventionally-structured businesses, and many entrepreneurship clinics represent some non-profits or economic development programs.[9] There are also clinics that describe their work as both CED and focused on entrepreneurship or small business

5. Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1933–35 (2002).

6. Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 203–04 (1997); Praveen Kosuri, *Impact in 3d—Maximizing Impact Through Transactional Clinics*, 18 CLINICAL L. REV. 1, 7–8 (2011).

7. Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U.J.L. & POL'Y 85, 96 (2013). *See* ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE 17 (2013) (noting the influence of the 2007 Carnegie Report and its focus on graduating "practice ready" lawyers on the growth of transactional clinical education).

8. ALVAREZ & TREMBLAY, *supra* note 7, at 6–12; Kosuri, *supra* note 6, at 11.

9. *See, e.g.*, Kosuri, *supra* note 6, at 31–32 (describing commonalities between traditional CED work and that done in the Entrepreneurship Legal Clinic at University of Pennsylvania Law School).

law.[10] More importantly, the division between "business" and "social justice" is itself contested and not always clear, as social enterprises, benefit corporations and flexible purpose corporations, cooperatives, affordable housing developers, community development financial institutions, and other groups represented by transactional clinics do not always fit neatly into that binary.[11] Finally, while lawyers in the CED tradition are sometimes skeptical of the impact of this work,[12] many transactional clinics that represent entrepreneurs and conventional businesses—especially clinics that target their services to low-income entrepreneurs, entrepreneurs of color, and small businesses in low-income communities—consider their work to serve the public interest as well.[13]

While the "public interest" that transactional clinics serve cannot easily be measured along a straight line from benevolence and the pursuit of social

10. *See, e.g.*, *Entrepreneurship and Community Development Clinic*, COLUM., https://www.law.columbia.edu/academics/experiential/clinics/entrepreneurship-and-community-development-clinic [https://perma.cc/5WZ5-9GAW]; *Entrepreneurship and Community Development Clinic*, U. TEX. AUSTIN SCH. L., https://law.utexas.edu/clinics/ecdc/ [https://perma.cc/3GN3-T7RP]; *Small Business & Community Economic Development Clinic*, GEO. WASH., https://www.law.gwu.edu/small-business-community-economic-development-clinic [https://perma.cc/HUV4-7L7F].

11. *See* Jones & Lainez, *supra* note 7, at 105–12 (describing social enterprises, low-profit limited liability companies, benefit corporations, and flexible purpose corporations). Even just among CED practices there are a variety of different viewpoints and emphases, from conventional market-based development work to "out of the mainstream" ideas for "a noncoercive society where production and distribution are organized on a basis other than exchanges maximizing self-interest"—and yet even those different emphases within CED are "not so readily distinguished. Nor are they mutually exclusive." Peter Boothroyd & H. Craig Davis, *Community Economic Development: Three Approaches*, 12 J. PLAN. & EDUC. RES. 230, 238 (1993).

12. *See, e.g.*, Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 437–58 (2001) (criticizing "market-based" CED); Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217, 246 (1999) (arguing that an increasing focus on private investment and public-private partnerships has led CED practices to shift their missions from "community empowerment" to "individual empowerment").

13. *See* Jones, *supra* note 6, at 200–01 (asserting that small business support is "essential to urban recovery and for creating 'sustained' change in low-income neighborhoods"); Kosuri, *supra* note 6, at 30–32 (discussing the public good that comes from representing low-to-moderate income entrepreneurs and "double bottom line" businesses); Lynnise E. Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS L.J. 419, 453 (2018) (describing how building capacity for entrepreneurs of color through tools including law clinics can help address the racial wealth gap); Paul R. Tremblay, *Rebellious Strains in Transactional Lawyering for Underserved Entrepreneurs and Community Groups*, 23 CLINICAL L. REV. 311, 325–32 (2016) (arguing that Gerald López's "rebellious lawyering" framework can largely be reconciled with models of transactional lawyering for underserved small businesses).

justice to strictly cold-hearted business law, this is not because there are no differences between transactional clinics' political visions. In fact, a consideration of transactional clinics' emphases and client bases reveal a patchwork of irreconcilable political rationales: transactional clinics represent traditional entrepreneurs who are unable to afford private representation based on access to justice principles, on arguments that racial justice is promoted by representing underserved entrepreneurs of color, on ideas of local community service, and on economic arguments about the benefits of local growth;[14] they represent social enterprises, which aim to improve the business sector by maximizing profits while also pursuing corporate social responsibility and seeking to mitigate their impact on the environment;[15] they represent worker-owned cooperatives, which ultimately aim to remake the workplace into a more democratic and equitable realm;[16] they represent community organizations that provide important social services even though, critics charge, such organizations ultimately do little more than smooth over some of the rough edges of a fundamentally exploitative economy, providing education, housing, childcare, and other programs only funded to push people to participate more fully in the labor force;[17] they represent non-profits that actively work

14. Kosuri, *supra* note 6, at 30–32; Jones, *supra* note 6, at 200–01; Tremblay, *supra* note 13, at 325–32; Brian Krumm, *Community Economic Development is Access to Justice*, 27 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 485, 485–86 (2018).

15. Jones & Lainez, *supra* note 7, at 105–08; Alicia Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 223–27 (2013).

16. Carmen Huertas-Noble, *Promoting Worker-Owned Cooperatives as a CED Empowerment Strategy: A Case Study of Colors and Lawyering in Support of Participatory Decision-Making and Meaningful Social Change*, 17 CLINICAL L. REV. 255, 266–68 (2010); Gowri J. Krishna, *Worker Cooperative Creation as Progressive Lawyering? Moving Beyond the One-Person, One-Vote Floor*, 34 BERKELEY J. EMP. & LAB. L. 65, 97–98 (2013).

17. For descriptions of CED lawyers representing groups that provide social services, see, for example, Brian Glick & Matthew J. Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience*, 23 N.Y.U. REV. L. & SOC. CHANGE 105, 108 (1997); Roger A. Clay, Jr. & Susan R. Jones, *A Brief History of Community Economic Development*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 257, 258 (2009). For criticisms of social service non-profits, see Paul Kivel, *Social Service or Social Change*, in THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX 129–30 (INCITE! Women of Color Against Violence ed., 2007); Joan Roelofs, *The Third Sector as a Protective Layer for Capitalism*, MONTHLY REV., Sep. 1995, at 16 n.1. This critique of the work of the charitable sector long predates transactional law clinics, of course. *See* KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY 76 (S. Moore, trans., 2008) (1848) (criticizing "philanthropists, humanitarians . . . [and] organisers of charity" who take small steps to work on social problems, but only "in order to secure the continued existence of bourgeois society").

against the economic interests of traditional business owners by fighting for workers' rights and living wage jobs;[18] and, in the Hofstra CED Clinic and some other transactional clinics, we often represent activist groups that define their goals and tactics through the language and principles of social movements. Our movement group clients describe their missions in terms of Black and LGBTQ+ liberation, police and prison defunding or abolition, radical feminism, democratic socialism, and other radical goals, and they commonly view the profit-maximization aims of typical business clients as the very antithesis of their social visions—and the half-measures of many social enterprises and social service non-profits as not much better.

Although roughly half of the Hofstra CED Clinic's clients are aligned with the social movement part of this patchwork, our work for these clients is only sometimes about direct support for street protests, community organizing, or similar activities. Instead, much of our work aims to help these groups develop the necessary organizational and project infrastructure to grow their projects in keeping with their visions and political principles—while making it as difficult as possible for governmental or other external forces to shut them down, curb their impact, or lure them away from their goals with the Faustian bargain of grant funding and its commonly attendant restrictions and political concessions. While our legal work does not always fit neatly into scholarly definitions of movement lawyering,[19] these clients are not apolitical non-profit service providers, social enterprises, small

18. Transactional clinics sometimes do this through providing transactional legal support to workers' rights organizations. *See, e.g.*, Alicia Alvarez et al., *Teaching and Practicing Community Development Poverty Law: Lawyers and Clients as Trusted Neighborhood Problem Solvers*, 23 CLINICAL L. REV. 577, 589–90 (2017) (describing a CED clinic that represents a group engaged in an anti-wage theft campaign that is also developing a worker center and supporting cooperative development). In other cases, transactional clinics do this through legal work on campaigns for Community Benefits Agreements, efforts by coalitions of community groups to secure private contracts with real estate developers in which community stakeholders agree to support a proposed development only in exchange for enforceable commitments by the developer to provide benefits, commonly including "living wage requirements, first source (i.e., local) hiring and job training programs, [and] minority [sic] hiring minimums." Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 113, 114 (2008). For discussions of transactional clinics engaged in this work, see, for example, Mark Neal Aaronson, *Judgment-Based Lawyering: Working in Coalition*, 27 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 549, 559–68 (2019); Scott L. Cummings, *Clinical Legal Education and Community Development*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 208, 210 (2005); Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999, 2016 (2007).

19. *See infra* Section IV.

businesses, or worker-owned cooperatives; these are groups that identify before all else as being part of broader movements for social change, and to ignore their deep roots in social movements would be to lose sight of what inspired their activities and to fundamentally misunderstand their missions and political visions.

A brief overview of a few recent Hofstra CED Clinic clients shows the relationships between these groups and current social movements, the breadth of these movement group clients' activities, and the complexity of the legal questions they confront. We represent Latinos Unidos,[20] a non-profit organization that advocates for the rights of undocumented workers with paid organizers in five states and volunteer organizers in another five states. We helped the group assess the benefits and risks to incorporating a group largely led by undocumented immigrants and helped it develop a strategy for incorporation and employment law compliance that aims to protect and support its undocumented members. We helped the group obtain 501(c)(4) tax-exempt status to house its legislative advocacy, and later helped it form a 501(c)(3) affiliate to maximize its flexibility to partner with larger immigrants' rights organizations. We currently help the group manage its lobbying and political activity compliance across those two entities, and we counsel it on managing risks to its members arising from civil disobedience and direct actions[21] they help coordinate at ICE detention centers and at the U.S.-Mexico border. We helped the group navigate IRS recordkeeping issues that arose when it launched a mutual aid fund for undocumented workers, and we are now collaborating with it to start a project to promote worker cooperatives in undocumented communities.[22]

20. Client name changed to preserve confidentiality.

21. Direct action and civil disobedience are sometimes conflated and while there are similarities, civil disobedience often involves an implicit petition to the government to change its policies, while direct action aims to achieve a goal, even if temporarily, in defiance of unjust government policies. For instance, civil disobedience could involve a tactic like burning a flag as a symbolic statement addressed to the government, while direct action looks more like blocking a road that leads to an immigrant detention facility, keeping people out of a detention facility, even if just for just a few hours. *See* DAVID GRAEBER, DIRECT ACTION: AN ETHNOGRAPHY 201–11 (2009).

22. Case law is somewhat unsettled regarding the ability of undocumented immigrants to be lawfully paid for their labor as owners of a worker-owned cooperative, although it is a tool that some lawyers and immigrant groups have been using or promoting. Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 181, 203 n.104 (1999); Reyna Ramolete Hayashi, *Empowering Domestic Workers Through Law and Organizing Initiatives*, 9 SEATTLE J. FOR SOC. JUST. 487, 520 (2010); Minsun Ji & Tony Robinson,

We represent Ujima Farm,[23] a worker-owned cooperative formed by Black activist farmers who met each other through their involvement in the Movement for Black Lives and who view their ownership of farmland as a project of land reparations.[24] We helped the group with conventional business law questions around the repayment of lenders and with cooperative issues around taxation, the distribution of profits, and member exits. We are also doing legal research to support its visioning process as the group seeks to imagine ways to make its land a sustainable, noncommercial resource for all Black people. We represent the TPOC Cooperative Fund,[25] a collective of Black trans activists raising capital to create a retreat space specifically for trans activists of color. We helped them form an LLC, develop an operating agreement that reflects their consensus decision-making structure, and assess their debt and equity finance options. We plan to represent them when they purchase property and begin to develop their retreat facilities. We represent Whiskey, Bread & Roses,[26] a bar and restaurant formed by a group of activists that met when they were active in Occupy Wall Street. It is a space where activists around New York City gather to eat and drink, socialize and strategize, inspired by the radical activist cafés in Madrid.[27] We have helped them negotiate vendor and employment contracts, advised them on buying out their original equity investors to move toward worker ownership, counseled them on insurance questions and employment law, helped them develop a conflict resolution process based on transformative justice principles, and helped them apply for Paycheck Protection Program[28] funds.

Immigrant Worker Owned Cooperatives: A User's Manual (2012), https://resources.uwcc.wisc.edu/Worker/ImmigrantWorkerCoop.pdf [https://perma.cc/72EV-H9EF].

23. Client name changed to preserve confidentiality.

24. For a more detailed discussion of land reparations, see Gregory S. Alexander, *The Complexities of Land Reparations*, 39 L. & SOC. INQUIRY 874 (2014).

25. Client name changed to preserve confidentiality.

26. Client name changed to preserve confidentiality.

27. *See* Gilda Haas, *Spain's Insurgent Social Centers*, DR. POP (July 24, 2015), https://drpop.org/spains-insurgent-social-centers/ [https://perma.cc/BM7W-YPPQ]. Spain's early 2011 Indignados or M-15 Movement was a significant influence on Occupy Wall Street, which started later that year. Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 FORDHAM URB. L. J. 295, 329 n.176 (2016).

28. Coronavirus Aid, Relief and Economic Security Act, 15 U.S.C.A. § 636(a)(36) (West 2020).

II. THE BEGINNINGS OF OUR MUTUAL AID PRACTICE, WRITING A MUTUAL AID LEGAL GUIDE, AND THE GROWTH OF OUR MUTUAL AID WORK

Due to the Hofstra CED Clinic's ties to local social movement groups, as new mutual aid projects were being launched in spring 2020, we began to receive calls and emails from clients, former clients, and friends-of-clients from across New York about this work. This began very informally, with the kinds of calls and emails transactional clinicians routinely field from our communities: What are the risks of starting this project? How do we open a bank account? Do we need to worry about incorporation? Should we try to partner with an existing community group or run this ourselves? What happens if someone gets sick or injured? Is it worth the time and expense to apply for tax exemption?

Although my initial goal was to take on no more than a few mutual aid groups as clients in order to prioritize family and other commitments,[29] by early May, the calls and emails from new mutual aid groups became increasingly frequent and compelling. New mutual aid groups were being formed all around: a Hofstra Law student was starting one, a non-profit on whose board I serve was starting one, some neighbors were starting one, a few activist groups I belong to as a member were starting them, and five or six current or former clients were starting them. It was becoming clear that these groups had many similar questions, but I had no capacity to provide direct representation to all of them. I began to explore the possibility of providing mutual aid groups with limited scope "advice only" services.[30] Such limited scope relationships are used routinely in some law clinics and civil legal services programs, and I used them myself when I led Hofstra Law School's Disaster Recovery Clinic after Hurricane Sandy in 2013-14,[31]

29. Like many law schools, Hofstra does not run a summer clinic or have staff attorneys, fellows, or other summer support, so any new clients we took on late in the spring semester would be additional uncompensated work beyond the roughly 20-25 other clients I was responsible for over the summer, along with my other research and writing, service, community, and family commitments—which would soon be substantially expanded without daycare or in-person school for my two young children.

30. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 7 (AM. BAR ASS'N 1983) (allowing "substantial latitude" to limited representation as long as "reasonable under the circumstances" and the client gives informed consent).

31. *See generally* Michael Haber & C. Benjie Louis, *Skills Pedagogy and Legal Ethics in a Law School Disaster Recovery Clinic*, *in* MEETING THE LEGAL NEEDS OF DISASTER SURVIVORS: THIRD RESPONDERS 17 (David Hoa K. Nguyen ed., 2021).

but we had never done this in the Hofstra CED Clinic. Unlike in the Disaster Recovery Clinic, where many of our clients were individuals and families who sought limited help navigating flood insurance and government programs to raise the funds needed to rebuild their homes, limiting how we would support a social movement organization was not something I was particularly comfortable with in our CED practice. It felt as though we were not in solidarity with these groups in a meaningful way if, at the outset, we agreed to only advise them on a few issues but not support them any further. This may be an unfamiliar way of thinking about clients to many lawyers, but it is not particularly unusual for CED practitioners. As Susan Bennett has described CED lawyers' "frightening" mindset, we tend to see our clients as "clients for life," who never reward us with the "nice, satisfying snap [that comes from] 'closing a case.'"[32]

In this moment of triage, the Hofstra CED Clinic wrestled with the same questions about the allocation of our limited resources that civil legal services lawyers and other lawyers for lower-income people have confronted for decades.[33] After considering other approaches, I decided that limiting our services to only counseling clients on the major issues confronting mutual aid groups might be the best way to help the most groups, and we aimed to structure these relationships in keeping with the best professional practices, trying to be as clear as possible about the limits of our services, conducting diagnostic interviews to make sure that we had sufficient facts about each group before counseling them, and taking care to comply with ethical rules around confidentiality, conflicts, and competence.[34]

Within just a few weeks, the questions the Hofstra CED Clinic was fielding from our limited scope clients were becoming repetitive. Mutual aid groups operating in the early months of the pandemic wanted to avoid the hierarchy and formalities they associated with starting a corporate entity,

32. Susan D. Bennett, *On Long-Haul Lawyering*, 25 FORDHAM URB. L. J. 771, 774 (1998).

33. *See, e.g.*, Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978); D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013); Colleen F. Shanahan et al., *Can a Little Representation be a Dangerous Thing?*, 67 HASTINGS L. J. 1367 (2016); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990).

34. *See Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 FORDHAM L. REV. 1751, 1776–77 (1999) (describing best practices for limited scope representation).

but they recognized that if this crisis was going to continue for many months, their projects could turn into large operations with dozens or hundreds of volunteers and tens of thousands of dollars being received and distributed. They wanted to know about crowdfunding platforms and any legal issues with using them to support mutual aid projects. They wanted to know about their risk of liability if someone contracted COVID-19 and was able to trace their exposure to their participation in the mutual aid group. Some groups with more experience in the non-profit world were asking about fiscal sponsorship, contractual relationships through which a 501(c)(3) tax-exempt organization receives funds on behalf of an unincorporated association or non-exempt non-profit entity, typically for a fee.[35] Groups that were already formalized as incorporated, tax-exempt entities were wondering whether to do this work within those entities or spin off their mutual aid projects. Some groups asked about food storage and safety regulations, and two or three mutual aid groups doing large-scale food preparation sought help negotiating commercial leases. There were a lot of repeat questions, and I started to think about writing a legal guide to put answers to these questions all in one place.

May and June 2020 were challenging and sometimes frightening months. New York City, where I live, had become an epicenter of the pandemic,[36] and increasing numbers of friends, colleagues, and acquaintances had gotten sick with COVID-19 for long stretches of time, a few for months, and one colleague was hospitalized. Schools and daycare providers were suddenly closed or moved online.[37] Adding to the stress and sense of danger were constant ambulance sirens and nightly fireworks that became unbearable as they kept children and pets scared and awake until 2 or 3 a.m. many nights.[38] My young kids, like many others, were showing

35. *See* GREGORY L. COLVIN & STEPHANIE PETIT, FISCAL SPONSORSHIP: 6 WAYS TO DO IT RIGHT (3d ed., 2019); Michael Haber, *Two Questions on Fiscal Sponsorship and Mutual Aid*, BIG DOOR BRIGADE (Apr. 15, 2021), http://bigdoorbrigade.com/2021/04/15/two-questions-on-fiscal-sponsorship-and-mutual-aid/ [https://perma.cc/HXU4-6CGU].

36. Centers for Disease Control and Prevention, *COVID-19 Outbreak – New York City, February 29-June 1, 2020*, https://www.cdc.gov/mmwr/volumes/69/wr/mm6946a2.htm (last visited Jan. 19, 2022).

37. *New York Closes Schools Through End of Academic Year*, N.Y. TIMES (May 1, 2020), https://www.nytimes.com/2020/05/01/nyregion/coronavirus-new-york-update.html [https://perma.cc/6946-VNSH].

38. Amateur fireworks have long been common in neighborhoods like mine on weekends in the height of summer, but in 2020, they started being set off nearly every night in May. Over the first two weeks of June 2020, there was a 4,000 percent increase in fireworks-related noise complaints compared

signs of trauma.[39] By late May, when the world saw video of the Minneapolis police killing George Floyd in the street, the pain was just too much. Even knowing the health risks, it felt like everyone in my neighborhood, like in cities across the country, took to the streets.[40]

In the midst of all this trauma, noise, and chaos, I found great inspiration in the blossoming of mutual aid all around, in the work of our clients, and in the humanity and solidarity I saw as nightly demonstrations crisscrossed my neighborhood. With the help of a small team of 2L and 3L research assistants and input from colleagues, I spent a few weeks drafting a guide to the common legal issues facing mutual aid groups. The guide, *Legal Issues in Mutual Aid Operations: A Preliminary Guide*, is primarily geared to New York law, but speaks to broader questions faced by all mutual aid organizations: the benefits and risks of operating as an unincorporated association; the potential protections available through incorporation, safety policies, liability waivers, and insurance; a description of the critique of the "non-profit industrial complex"[41] and options for group decision-making, both with and without an entity; issues related to banking, taxation, fiscal sponsorship, and crowdfunding; and general information about food storage and safety laws.[42] To distribute the legal guide quickly, I posted it on

to the first two weeks of June 2019, leading New York Mayor Bill de Blasio to create a multiagency task force to investigate the issue and spawning conspiracy theories that the fireworks were an intentional tactic of psychological warfare by police against communities of color in response to that summer's uprising. Brian Mahoney & David Klepper, *Are You Hearing Fireworks Every Night? You're Not Alone.*, CHRISTIAN SCI. MONITOR (June 25, 2020), https://www.csmonitor.com/USA/2020/0625/Are-you-hearing-fireworks-every-night-You-re-not-alone [https://perma.cc/9M5K-3PJF]; Jake Offenhartz et al., *"Louder, Longer and Crazier": Complaints About Illegal Fireworks Soar in NYC*, GOTHAMIST (June 15, 2020), https://gothamist.com/news/illegal-fireworks-soar-nyc-complaints-2020 [https://perma.cc/HBF7-MQE6]; Hannah Gold, *What's Up With All the Fireworks?*, N. Y. MAGAZINE (June 25, 2020), https://www.thecut.com/2020/06/why-are-so-many-fireworks-going-off.html.

39. *See The Traumatic Impact of COVID-19 on Children and Families: Current Perspectives from the NCTSN*, NAT'L CHILD TRAUMATIC STRESS NETWORK (Mar. 2021), https://www.nctsn.org/sites/default/files/resources/special-resource/traumatic-impact-covid-childrenfamilies.pdf [https://perma.cc/HZX5-A247].

40. Amy Harmon & Rick Rojas, *A Delicate Balance: Weighing Protest Against the Risks of the Coronavirus*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/2020/06/07/us/Protest-coronavirus-george-floyd.html [https://perma.cc/6DQM-XU3E].

41. *See* THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX (INCITE! ed., 2007); Michael Haber, *The New Activist Non-Profits: Four Models Breaking from the Non-Profit Industrial Complex*, 73 U. MIAMI L. REV. 863 (2019).

42. *See* Haber, *Legal Issues*, *supra* note 3.

SSRN[43] and I emailed the mutual aid groups the Hofstra CED Clinic had been in contact with to let them know about it. Posting a guide targeted to activists and the general public on a dry academic website was surely not the best method of distribution, but thanks to the robust spirit of sharing within mutual aid circles, to widespread questions and concerns about a lot of these topics, and to the re-publication of the guide on a popular mutual aid website,[44] the guide became widely read by mutual aid groups.[45]

After publishing the legal guide, more and more calls and emails came in, and the questions we received became more complex: Does it make sense to pursue 501(c)(10) status for a statewide mutual aid group with local chapters? What are the safest ways for a small private foundation to directly fund unincorporated, non-exempt mutual aid groups? If a mutual aid group receives donations through a third-party payment processor[46] account that is linked to one group member, what are the tax ramifications for the unincorporated group and that individual member?

Further complicating this situation was that these questions were now coming in from across the country. Multijurisdictional practice is the uneasy norm for many transactional lawyers, and commentators have noted that Model Rule 5.5 is out of step with quite ordinary transactional law practices, its ethical mandates often only "honored in the breach."[47] The ethical

43. SSRN, formerly known as the Social Science Research Network, is a website where many academics in law and other disciplines put drafts of their writing, chiefly for other academics and researchers. *See* SSRN, https://www.ssrn.com/index.cfm/en/ [https://perma.cc/E4ST-6MF3].

44. *Legal and Security*, MUTUAL AID DISASTER RELIEF, https://mutualaiddisasterrelief.org/legal-security/ [https://perma.cc/99NB-F3JL].

45. It has been downloaded more than 2,000 times from SSRN, plus many more times from the Mutual Aid Disaster Relief website. *See* Haber, *Legal Issues*, *supra* note 3.

46. Third-party payment processors are companies, like PayPal and Square, that process payments without requiring a merchant account with a specific banking institution.

47. James Geoffrey Durham & Michael H. Rubin, *Multijurisdictional Practice and Transactional Lawyers: Time for a Rule that is Honored Rather than Honored in Its Breach*, 81 LA. L. REV. 679 (2021). *See* Anthony E. Davis, *Multijurisdictional Practice by Transactional Lawyers – Why the Sky Really is Falling*, PROF. LAW., Winter 2000, at 18; Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something Has to Give*, 2012 MICH. ST. L. REV. 415 (2012); Carol A. Needham, *Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 U. ILL. L. REV. 1331 (2003); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 671–72 (1995). Although there is a narrow exception to the ABA rules on multijurisdictional practice that permits pro bono service in the aftermath of a major disaster, it has not been adopted by many states and requires supervision by a locally licensed attorney. See MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 14 (AM. BAR ASS'N 1983) (permitting pro bono legal services on a temporary basis in a jurisdiction affected by a major disaster when consistent with ABA Model Court

boundaries of what I could do for mutual aid groups based in states where I am not licensed to practice are discussed in Model Rule 5.5(c)(4) and Comment 14 to Model Rule 5.5, which allow for temporary practice in matters that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice,"[48] including matters related to "the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law."[49] Of course, not all states have adopted Model Rule 5.5 in its entirety, and some states have more restrictive versions of the rule.[50] In addition, there appears to be no authority that would permit Hofstra CED Clinic students to practice outside of New York under New York Judiciary Law, which permits limited forms of student practice in law clinics in New York under attorney supervision.[51] Feeling uncertain about declaring myself to have "recognized expertise," but also seeing few other resources for mutual aid groups to turn to, I reviewed the unauthorized practice rules in states from which mutual aid groups had contacted me, informed all groups I spoke to that I could not advise them on any non-New York state law issues and limited my already-limited scope advice to general information on federal exempt-organization tax law and other federal law issues. With those restrictions, I gave limited scope counseling to dozens of mutual aid groups across fifteen states on federal law issues from June 2020 to June 2021.

Although mutual aid became widely known across the U.S. because of COVID-19, the groups we counseled on mutual aid were not all narrowly focused on pandemic relief. Instead, they reflect all the hardships, trauma,

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Rule on Provision of Legal Services Following Determination of Major Disaster); MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER (AM. BAR ASS'N RECOMMENDATION 2007) (permitting temporary pro bono practice for lawyers authorized to practice law in another U.S. jurisdiction only when supervised by a lawyer licensed in that jurisdiction and assigned through an established pro bono program). As of October 2019, this rule has only been adopted in twenty states. See A.B.A., *State Implementation of ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster* (Oct. 2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart.pdf .

48. MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS'N 1983).

49. *Id.* at r. 5.5 cmt. 14.

50. *See, e.g.*, N.Y. RULES OF PRO. CONDUCT r. 5.5 (2010).

51. N.Y. JUD. L. § 478 (2014) and N.Y. JUD. L. § 484 (2014) govern the practice of law students in law school clinics, and the New York Appellate Division must issue an order authorizing the work of a law school clinical program pursuant to those statutes before students may practice under attorney supervision.

and activism of 2020 and 2021: Black Lives Matter groups feeding protesters in the streets; prison abolitionists and groups providing aid to prisoners through shocking pandemic prison conditions; groups working at the intersection of mutual aid and reparations; a group supporting adjunct and contingent faculty who suddenly lost their primary sources of income as colleges and universities slashed personnel costs; a group in southern Oregon helping families after late summer 2020 wildfires destroyed hundreds of homes and more than 1,000,000 acres of land;[52] groups responding to the February 2021 Texas power crisis;[53] and a group coordinating aid in the Asian-American community in Atlanta after eight people were killed by a racist attacker.[54] Many projects worked across issues as they are commonly framed, viewing their projects as simultaneously pandemic relief, racial justice work, and part of the response to climate change, emphasizing that these struggles are all connected. This reflects mutual aid groups' roots in anti-authoritarian activism, an approach to social change less concerned with mitigating narrow harms and petitioning the government for change than with seeking to broadly restructure our lives away from hierarchy and exploitation and toward an ethic of solidarity, participatory democratic structures, and prefigurative politics—a mode of activism in which activists aim to use processes in organizing and building a social change movement that are, in themselves, already starting to construct a more equitable, livable, liberated future.[55]

III. OUR COLLABORATION WITH DEAN SPADE AND *MUTUAL AID*

One reader of my legal guide was Dean Spade. Spade is a professor at Seattle University School of Law, but he may be better known in activist circles as the founder of the Sylvia Rivera Law Project, a radical trans law

52. Emma Newburger, *At Least 33 Dead as Wildfires Scorch Millions of Acres Across Western U.S. – 'It is Apocalyptic'*, CNBC (Sep. 15, 2020), https://www.cnbc.com/2020/09/12/fires-in-oregon-california-and-washington-spread-death-toll-rises.html [https://perma.cc/NQB8-V5LH].

53. Center for Homeland Defense and Security, *2021 Texas Power Crisis*, https://www.hsdl.org/c/tl/2021-texas-power-crisis/ [https://perma.cc/68DP-GV9C].

54. Kate Brumback & Angie Wang, *Man Charged with Killing 8 People at Georgia Massage Parlors*, ASSOC. PRESS (Mar. 17, 2021), https://apnews.com/article/georgia-massage-parlor-shootings-leave-8-dead-f3841a8e0215d3ab3d1f23d489b7af81.

55. *See* Haber, *CED After #OWS*, *supra* note 27, at 322–24.

and organizing project in New York, and for his writings on activism, social change, and LGBTQ+ politics in social science journals and anthologies, popular left-leaning periodicals, and traditional journals of legal scholarship.[56] Like me, Spade had been involved with mutual aid in different ways for years prior to the pandemic, and in the spring of 2020, he was in the process of writing a book on the subject.

Spade had been recommending my guide to mutual aid groups that came to him with legal questions, and following the October 2020 publication of his Verso Press book *Mutual Aid: Building Solidarity During This Crisis (and the Next)*, the number of mutual aid groups coming to him with questions exploded. We decided to collaborate on a webinar in the winter to discuss some of the common legal issues that had emerged. With support from the Barnard Center for Research on Women and my colleague Robert Caserta from Hofstra's Federal Tax Clinic, we held an online "teach-in" on money-handling and taxes for mutual aid groups.[57] Focused principally on options for corporate structure, opening a bank account, the tax consequences and other challenges of simply using one member's personal account to handle funds, and how money received through a third-party payment-processor is taxed, the video was watched by hundreds of mutual aid groups across the country and beyond. We followed this effort with further collaboration: Spade referred certain legal questions from mutual aid groups to me, and I wrote a few blog posts for a mutual aid blog that Spade helps to operate called Big Door Brigade.[58]

Spade's book, meanwhile, became the most widely read contemporary book on mutual aid,[59] deservedly reaching a far broader universe of mutual aid groups than the subset of them focused on legal questions. It is a lucid, plain-language introduction to mutual aid, full of practical, everyday guidance for mutual aid groups. Rather than framing mutual aid in terms of its historical development or political anthropological theories of the role of

56. *See* Dean Spade, *Other Writing*, DEAN SPADE, http://www.deanspade.net/writing/ [https://perma.cc/32BN-RDEH].

57. Barnard Center for Research on Women, *Money-Handling and Taxes for Mutual Aid Groups*, YOUTUBE (Feb. 9, 2021), https://www.youtube.com/watch?v=q43G0ml4Z4c.

58. *See* Michael Haber, *Author: Mike Haber*, BIG DOOR BRIGADE, http://bigdoorbrigade.com/author/mikehaber/ [https://perma.cc/Q9HS-XLWX].

59. The only meaningful comparison as far as readership would be Peter Kropotkin's seminal 1902 text *Mutual Aid: A Factor in Evolution*. For more on Kropotkin and his influence on contemporary mutual aid practices, see Haber, *COVID-19 Mutual Aid*, *supra* note 1, at 62–65.

the state in society, Part I of the book concisely defines mutual aid in broad strokes that should be easily understood by activists yet hard for even nit-picky academic readers to find lacking.[60] Part II digs into everyday guidance for operating a mutual aid group, but, interestingly for a book by a law professor, largely avoids discussing legal issues. Spade describes how mutual aid groups should work to avoid creating hierarchies of need, paternalism, and co-optation, and he presents ideas for ways to organize meetings, make decisions using consensus, build a strong group culture, avoid burnout, and on other topics that are essential for many mutual aid groups. Spade's guidance seems especially important for newer activists and for mutual aid groups that come out of the non-profit world, for whom hierarchy and decision-making by majority vote may seem like neutral, commonsense norms, rather than choices that deserve to be considered against more inclusive and egalitarian alternatives.

Although he is a law professor, Spade's intent is clearly to guide everyday activists, not write a dense legal text. Yet the lack of focus on legal topics leads Spade's guide, for all its clarity and theoretical sophistication, to become less sure-footed when it gets to questions about how mutual aid groups relate to money, law, and organizational longevity—at exactly the point where transactional lawyers do our work, and where so many mutual aid groups have come to the Hofstra CED Clinic seeking help. After multiple sections distinguishing mutual aid principles from charity and non-profits, Spade devotes just a few pages to issues related to money, and he does not meaningfully answer the central legal issue that has led mutual aid groups to the Hofstra CED Clinic dozens of times: how can mutual aid groups raise money and distribute essentials in their communities while maintaining their radical, movement-aligned mutual aid focus on the one hand, and yet protect their members from lawsuits, government interference, and massive tax bills on the other? Given that so much of *Mutual Aid* praises informal structures, this is an important omission: movement groups deserve a detailed understanding of not only the downsides of non-profit structures and norms, but also of the risks of remaining unincorporated when it comes to questions of members' personal liability, the ability to raise and manage funds, the potential for tax liability, and the potential for government or private interference in their activities.

60. *See supra* note 2 and accompanying text.

Despite that omission, Spade's book is a rich, readable text for activists considering their approaches to decision-making, organizational form, group conflict, and the non-profit industrial complex. It is a significant contribution both to the literature on mutual aid specifically and to the broader world of popular texts for and about anti-authoritarian activists of the last decade, its mix of political sophistication and plain language guidance very much deserving to stand alongside more theoretical works like *Undoing Border Imperialism* and *Emergent Strategy*, and denser histories like *Another Politics*, *Direct Action*, and *Direct Action: An Ethnography*.[61]

IV. TOWARD A THEORY OF TRANSACTIONAL MOVEMENT LAWYERING

If Spade's book of mostly non-legal advice for mutual aid groups on questions related to group structure, decision-making, and navigating group conflict is an important movement project, is the Hofstra CED Clinic's work giving legal advice on similar topics to those same groups an example of "movement lawyering"?

Over the past decade, movement lawyering has emerged as a popular term for lawyers and legal academics on the political left.[62] To contextualize the concept of movement lawyering, the term can be understood as influenced by, but ultimately a break from, the set of lawyering practices for poor and marginalized people that Gerald López famously termed "rebellious lawyering."[63] López depicts rebellious lawyers as less concerned

61. *See generally* HARSHA WALIA, UNDOING BORDER IMPERIALISM (2013); ADRIENNE MAREE BROWN, EMERGENT STRATEGY: SHAPING CHANGE, CHANGING WORLDS (2017); CHRIS DIXON, ANOTHER POLITICS: TALKING ACROSS TODAY'S TRANSFORMATIVE MOVEMENTS (2014); L. A. KAUFFMAN, DIRECT ACTION: PROTEST AND THE REINVENTION OF AMERICAN RADICALISM (2017); GRAEBER, *supra* note 21.

62. Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1646 (2017). Though newly popular, the term is not new, but has re-emerged after decades of little use. *Id.* at 1648 (*citing* THE RELEVANT LAWYERS 19-38 (Ann Fagan Ginger ed., 1972)).

63. *See* Veryl Pow, *Rebellious Social Movement Lawyering Against Traffic Court Debt*, 64 UCLA L. REV. 1770, 1801–03 (2017) (describing commonalities and differences in these models); Purvi H. Shah & Ellen Yaroshefsky, *Movement Lawyering Reading Guide*, 47 HOFSTRA L. REV. 99, 99 (2018) (describing López as helping to define movement lawyering by having "contributed significantly to scholarly discussions on how transformative theories can influence the practice of law itself"). *See generally* GERALD LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992).

with courtroom victories—which might leave clients alienated and relatively powerless despite "winning" at trial—than they are focused on problem-solving, connecting clients to others facing similar situations in their communities to see their shared interests so they might work together to grow their collective power, and valuing clients' own "lay" solutions to their problems.[64] Despite some degree of skepticism about the benefits of litigation, the rebellious lawyering model was firmly entrenched in a litigation-centered worldview, and López's model never fit easily with transactional CED practices.[65] Like López, movement lawyering scholars depict movement lawyers as giving primacy to growing their clients' power, rejecting the view that litigation victories are always essential to legal support for social change efforts; movement lawyers are described as viewing the role of the lawyer still more holistically than López, at times seemingly open to practices outside of litigation entirely.[66] Yet despite that openness, movement lawyering scholars have written little about what a movement lawyering that grows out of transactional practice and support for movement infrastructure—rather than out of advocacy campaigns that are somewhat likely to involve litigation—might look like.

Scholarly efforts to delineate what distinguishes movement lawyering from other forms of cause lawyering are in general agreement on its three primary elements. First, movement lawyers have an "integrated" or "multimodal" approach to advocacy, which usually involves following the lead of movement groups in defining their goals and strategies, with lawyers

64. LÓPEZ, *supra* note 63, at 30-38.

65. *See* Tremblay, *supra* note 13, at 312 (noting that López "wrote for, to, and about the litigators among us, and at the time he wrote the model of a public interest or legal services lawyer was primarily as a litigator"); Janine Sisak, *If the Shoe Doesn't Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 FORDHAM URB. L. J. 873, 886–89 (1998) (finding that López's model does not fit transactional CED practices without modifications); Ann Southworth, *Taking the Lawyer Out of Progressive Lawyering*, 46 STAN. L. REV. 213, 232 (1993) (arguing that López's view "may be unnecessarily bleak" because he ignores that "today's most interesting and important lawyering is neither litigation nor political organizing, but rather general counsel or transactional work for community organizations").

66. *See, e.g.*, Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. Rev. 1464, 1496 (2017) (distinguishing "establishment lawyers . . . operating within a superstructure set by preexisting distributions of political power" from lawyers who "challenge the superstructure through the support of activist capacity building" and noting that both groups of lawyers do both "litigation and non-litigation advocacy"); Alexi Nunn Freeman & Jim Freeman, *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLINICAL L. REV. 147, 164–65 (2016) (describing work done by movement lawyers in the fight against the "school-to-prison pipeline," with the largest contributions in political advocacy, communications and media, and "grassroots support").

less focused on identifying a litigation strategy than on providing legal support to a broad, multi-faceted campaign: supporting policy advocacy, community education, organizing efforts, and media campaigns, in addition to the possible use of litigation or other traditional legal tools; providing criminal defense support if activists are arrested during a protest or action; and providing legal support for organizational growth.[67] Integrated advocacy also can involve movement lawyers helping movement groups brainstorm and develop ideas through which movements have the potential to shift legal and cultural norms.[68] Second, movement lawyers are not narrowly focused on winning victories within the legal system, but they instead seek to build the power of movements of subordinated groups of people.[69] They focus on structural inequities that are deeper than simply bad policies or reactionary laws, and they see their role as collaborating with movement groups to build counter-power to challenge those structural inequities at a more systemic level.[70] Part of the work of helping movements build power involves supporting activist capacity building and helping activists develop movement infrastructure.[71] Finally, and most fundamentally, movement lawyers focus on representing or partnering with politically-engaged actors, typically groups rather than individuals, that have the goal of influencing or disrupting political norms in some way.[72] Movement lawyers' clients may serve a representational role for the broader constituency of the movement, a role that requires movement lawyers to be accountable to their movement group clients and requires those clients to have legitimacy in the eyes of the broader movement.[73]

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67. Cummings, *supra* note 62, at 1695–1711; Alexi Freeman, *Teaching for Change: How the Legal Academy Can Prepare the Next Generation of Social Justice Movement Lawyers*, 59 HOW. L. J. 99, 114–15 (2015); William P. Quigley, *Ten Ways of Looking at Movement Lawyering*, 5 HOW. HUM. & C.R.L. REV. 23, 26 (2020). Cummings argues that while movement lawyers defer to movement actors in setting broad goals and strategies, specific tactics may be directed by movement lawyers themselves. Cummings, *supra* note 62, at 1703–04.

68. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 473–79 (2018); Ashar, *supra* note 66, at 1497.

69. Cummings, *supra* note 62, at 1691; Freeman, *supra* note 67, at 110–11.

70. Alexi Freeman & Lindsey Webb, *Yes, You Can Learn Movement Lawyering in Law School: Highlights from the Movement Lawyering Lab at Denver Law*, 5 HOW. HUM. & C.R. L. REV. 55, 60 (2020); Freeman & Freeman, *supra* note 66, at 150–55; Quigley, *supra* note 67, at 26.

71. Ashar, *supra* note 66, at 1496–97.

72. Cummings, *supra* note 62, at 1691–95; Freeman, *supra* note 67, at 108–15.

73. Cummings, *supra* note 62, at 1692; Tifanei Ressl-Moyer et al., *Movement Lawyering During a Crisis: How the Legal System Exploits the Labor of Activists and Undermines Movements*, 24 CUNY L. REV. 91, 118 (2021).

CED practices have quite varied political visions, most of them quite different from those of movement lawyers as depicted in this body of scholarship. However, for CED practices that target their work to support movement groups, like the Hofstra CED Clinic, there are important affinities between these models. Through a consideration of these three elements of movement lawyering, the sections below put the CED and movement lawyering models into conversation, revealing ways that the CED tradition might be an underutilized resource for movement lawyers, but primarily focusing on how CED practices might draw on movement lawyering to deepen our impact and clarify our political vision, moving our work toward a form of movement lawyering grounded in transactional practice.

A. Movement Lawyers Use "Integrated" or "Multimodal" Advocacy, which CED Lawyers Already Routinely Use.

There is no reason to think that transactional lawyers are less able to do the kind of integrated lawyering described in the scholarship on movement lawyering than litigators or other lawyers—other than the somewhat widespread misunderstanding of what transactional lawyers do. There is a common misperception among lawyers that transactional practice is formulaic or somehow inherently apolitical. That misperception comes from the bias against transactional law in law school curricula,[74] the influence of law and economics in legal academic understandings of transactional law,[75] and the pervasiveness of legal liberalism narratives, which present lawyers as fighting for social change when bringing lawsuits,[76] thereby leading many to assume that lawyers who work outside of the courtroom, and at somewhat greater distance from state institutions

74. Kosuri, *supra* note 6, at 6; Robert Illig, *The Oregon Method: An Alternative Model for Teaching Transactional Law*, 59 J. LEG. ED. 221, 221 (2009).

75. Influential scholarship on transactional lawyering that comes out of the law and economics field has tended to frame transactional lawyers as, in Ronald Gilson's famous phrase, "transaction cost engineers," rather than as strategists, trusted collaborators, and problem solvers. *See generally* Praveen Kosuri, *Beyond Gilson: The Art of Business Lawyering*, 19 LEWIS & CLARK L. REV. 463 (2015); Ronald Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

76. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 265–72 (2005) (noting the complex interplay between activists, organizations, and lawyers that help to shape social change, in contrast to legal liberalism narratives, where lawyers seem like sole leaders of social change efforts).

entirely, must be doing something other than working toward social change.[77]

This view is mistaken. In fact, CED lawyers are arguably in a better position to do this kind of integrated lawyering than litigators: CED lawyers have a long history of building lawyer-client relationships rooted in humility and collaboration;[78] transactional lawyers generally, even when first learning to practice in law school clinics, are trained to approach issues with broad, forward-looking problem-solving skills and to embrace "mixed" questions that are not narrowly legal, rather than to narrow a universe of client experiences into discrete causes of action; transactional lawyers have specialized understandings of group dynamics, decision-making processes, and inter-group conflicts; and experienced transactional lawyers should have a broad familiarity with non-litigation counseling on organizational strategy.[79] Indeed, when movement lawyers seek to support organizational growth and the development of movement infrastructure, they can look to a whole history of CED scholarship for guidance on topics like representing loosely-structured groups, navigating internal group conflicts, and structuring democratic, egalitarian, and non-hierarchical entities.[80]

77. Paradoxically, it is also a mainstream liberal view that large firm corporate lawyers are powerfully deleterious agents who, despite not litigating, provide an almost-unfair advantage to large corporations. Robert A. Kagan & Robert E. Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 405–09 (1985).

78. *Compare* Quigley, *supra* note 67, at 31–33 (describing respectful relationships with movement groups rooted in lawyers' humility) *with* Sisak, *supra* note 65, at 886 (describing the CED practice at Brooklyn Legal Services Corp. A as collaborative, "supportive rather than domineering," tending to "follow the agenda set by community groups," and "characterized by trust and mutual respect").

79. *See* ALVAREZ & TREMBLAY, *supra* note 7, at 4 (defining the work of the transactional lawyer as to "assist clients to produce effective and workable plans for the future. . . . [Y]our work is collaborative, forward-looking, and imaginative"); Kosuri, *supra* note 75, at 483 (arguing that transactional lawyers are using "optimal" skills when they bring a deep understanding of business, people, and a broad problem-solving skillset to legal questions).

80. *See*, *e.g.*, Alvarez, *supra* note 18; Bennett, *supra* note 32; Glick & Rossman, *supra* note 17; Haber, *The New Activist Non-Profits*, *supra* note 41; Huertas-Noble, *supra* note 16; Michael Diamond & Aaron O'Toole, *Leaders, Followers, and Free Riders: The Community Lawyer's Dilemma When Representing Non-Democratic Client Organizations*, 31 FORDHAM URB. L.J. 481 (2004).

B. Movement Lawyers Seek to Build Power for Movements, but CED Can Suffer From a Lack of Clarity in its View of Power. A Transactional Approach to Movement Lawyering Would Embrace a Concept of Power That Responds to Deeper Injustices Than CED Has Historically Done.

Movement lawyers do not view advocacy as limited to winning court cases, but instead aim to support the growth of grassroots movements' power.[81] Somewhat similarly, CED is often described as not only supporting the creation of affordable housing, community infrastructure, and small businesses, but also creating "empowerment," some sort of "a discernable transformation—a quantum of influence that can be cultivated by active participation in local community life."[82] But CED practitioners and legal scholars have used the term empowerment inconsistently, with different scholars framing the term, seemingly so central to CED's theory of social change, as a change in material conditions, a measure of relative social power, a question of individual or group consciousness, or a combination of all those factors.[83] In the broader world of elected officials, lenders, non-profit leaders, and government agencies involved in CED, the term has proven to be even more malleable: conservatives view empowerment as tied to private ownership of property and social mobility; liberals view empowerment as a feeling of personal comfort and control over one's

81. *See supra* notes 69–71 and accompanying text.

82. Cummings, *supra* note 12, at 444.

83. Shah, *supra* note 12, at 218–19 (arguing that the term has shifted to fit the thinking of the most powerful within the CED sector, sliding from social mobility and integration in the 1960s to neighborhood-level self-sufficiency in the 1970s to citizen participation in outside economic investment in the 1980s and 1990s). Some CED scholars describe empowerment as a material process of low-income communities taking control over land, buildings, and community institutions. *See, e.g.*, Glick & Rossman, *supra* note 17, at 108. Other CED scholars frame it as a matter of relative social or political power. *See, e.g.*, Barbara Bezdek, *Digging into Democracy: Reflections on CED and Social Change Lawyering After #OWS*, 77 MD. L. REV. 16, 23 n.16, 29 n.33 (2018) (describing empowerment as a community growing in "political influence, communications/media control of the narrative, grassroots influence, or legal impact, relative to their opponents"). Other CED scholars describe it a sort of class consciousness, a growing awareness about or feeling of control over one's community. *See, e.g.*, Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 666–70 (1987) (describing empowerment as the development of a "critical consciousness"). Still others describe it as taking place "on a variety of different planes—political, social, and psychological . . . both the expression of individual capacity and group political strength." Cummings, *supra* note 12, at 444–45.

individual situation, perhaps backstopped by access to a social safety net; and the left generally views empowerment as related to collective community control over resources and growing class consciousness.[84]

Although movement lawyering scholars might do more to define their view of power as well, their approach seems more consistent, broadly structuralist and informed by critical legal theory and critical race theory, and focused less on specific laws or policies than "the systems of oppression that produce unjust laws and policies."[85] Where movement lawyers aim to look beyond individual injustices to try to identify and disrupt the structural factors underlying them, CED lawyers tend to move in the opposite direction: even as many recognize how systems of oppression like structural racism and economic exploitation underpin the problems of low-income communities of color, they often represent individual Black- or immigrant-owned small businesses or small-scale community service or development projects that seem inappropriate to the scale of these issues, justifying those choices on rationales like access to justice or service to a specific community.[86]

The slippery rhetoric of empowerment provides political cover for this approach, as it allows CED to dance back and forth between an ideal of community empowerment, traceable to the 1960s movements for Black

84. WILLIAM PETERMAN, NEIGHBORHOOD PLANNING AND COMMUNITY-BASED DEVELOPMENT: THE POTENTIAL AND LIMITS OF GRASSROOTS ACTION 35 (Rodger W. Caves et al. eds., 1999). The limitations of the concept of empowerment in real-world practices are not limited to the community development context. When faculty in the Health Sciences Department at Simon Fraser University interviewed presenters at the 2010 International Union for Health Promotion and Education conference about what twenty-five years of "the language of empowerment" has meant to the field of global health, they found that "empowerment" was "seen as a powerful catalyst for positive change," and yet there were significant questions over "what the word actually meant," a sense that the term failed to reflect the reality of the field, inconsistent understandings of the term in different countries and languages, and feelings that the term was "too 'opaque'" or just a "'buzz word' that has lost meaning through overuse." Nicole S. Berry et al., *Empowerment in the Field of Health Promotion: Recognizing Challenges in Working Toward Equity*, 21 GLOBAL HEALTH PROMOTION 35, 37–38 (2014).

85. Freeman & Freeman, *supra* note 66, at 150.

86. *See, e.g.*, Bezdek, *supra* note 83, at 36 (arguing that giving priority to groups that are "committed to building power through collective action" may require "working with groups who are relatively sophisticated," which "sounds like an injunction to eschew the less-empowered"); Tremblay, *supra* note 13, at 331–32 (acknowledging that representing entrepreneurs from underserved communities "inherently involves assisting in individual economic gain," but arguing that "it is a challenging posture, in the pursuit of rebellious lawyering, to resist what some members of a client community need because the lawyer understands that other avenues would be more fitting of a larger mission").

Power and Black nationalism that set the stage for some early CED efforts,[87] and the logic of individual empowerment for any one person or business that meshes quite easily with even conservative economic development frameworks.[88] This is a dance that mystifies, presenting capitalism as neutral or even a tool that can meaningfully fight against racism under the right circumstances, rather than engaging with arguments that racism has always been historically interlinked with European capitalism, what Cedric Robinson termed racial capitalism.[89] In their seminal text *Racecraft*, Barbara and Karen Fields argue that social relations will remain largely the same as long as liberals are allowed to substitute "the neutral shibboleths *difference* and *diversity*"—and we might well add individual empowerment to that list—for a real reckoning over the material relations of slavery, extraction, and exploitation.[90] After all, they argue, those who profit from exploitation will remain largely unthreatened as long the "most radical goal of the political opposition remains the reallocation of unemployment, poverty, and injustice, rather than their abolition."[91]

The Hofstra CED Clinic aims to represent clients whose projects work toward the abolition of injustice rather than its more equitable allocation. But relying on client selection to achieve this goal may be insufficient to call our work transactional movement lawyering. Among our mutual aid clients, for example, some had far more political, movement-aligned visions for their work than others. In some cases, clients with a deeply movement-aligned vision ultimately felt forced to make significant concessions to mainstream non-profit practices to meet some of their short-term goals. To develop a real transactional movement lawyering, we should be attuned to the potential need to balance the interests and needs of our organizational clients with the values and visions of the broader movements from which they come, and we should look for opportunities where it could benefit those specific organizational clients to confer with or get support from those

87. JAMES DEFILIPPIS, UNMAKING GOLIATH: COMMUNITY CONTROL IN THE FACE OF GLOBAL CAPITAL 43–45 (2004); Ronald F. Ferguson & William T. Dickens, *Introduction* to URBAN PROBLEMS AND COMMUNITY DEVELOPMENT 1, 17–18 (Ronald F. Ferguson & William T. Dickens eds., 1999).

88. *See* Shah, *supra* note 12, at 246.

89. CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 2–3, 9–28 (1983).

90. KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE 147 (2012) (emphasis in original).

91. *Id.*

broader movements. This sense of accountability to the broader movements that helped give rise to or inspire a movement group client is an important step toward the kind of movement accountability that movement lawyering scholarship has appropriately emphasized.[92]

C. Movement Lawyers Represent Groups Committed to Systemic Change, but Some CED Practices Are Ambivalent about Systemic Change. A Transactional Movement Lawyering Would Have a More Robust Theory of Change.

Movement lawyers represent groups that have a political vision, often a well-developed one, "not the vulnerable or disorganized clients emphasized in the legal liberal model."[93] In contrast, with its focus on local grassroots efforts and physical neighborhood redevelopment, CED has never had a particularly compelling theory of broad, systemic change.[94] CED first emerged in the 1960s, when activists in low-income communities of color fought for local residents to have a direct leadership role in efforts to revitalize those neighborhoods, and, in an era of widespread protest and civil unrest, private foundations and the federal government began to provide funding to community-based non-profits to support community-controlled projects for "bottom up" change.[95] In contrast to more radical and often socialist or communist Black Power groups, CED appealed to elite institutions like the Ford Foundation and to government and private sector leaders at the highest reaches of U.S. political power; men like Robert F. Kennedy and McGeorge Bundy saw in CED a mechanism to improve conditions in low-income communities of color "without any fundamental social, economic, or political disruption."[96] CED's focus on community-based, community-controlled job and business creation managed to resonate

92. *See* Cummings, *supra* note 62, at 1692; Ressl-Moyer, *supra* note 73, at 118.

93. Cummings, *supra* note 62, at 1692.

94. Cummings, *supra* note 12, at 455–56 (finding that much "market-based" CED favors local incrementalism over structural reform efforts); Randy Stoecker, *The CDC Model of Urban Redevelopment: A Critique and an Alternative*, 19 J. URB. AFF. 1, 4 (1997) (noting that CED scholarship is unclear on how this model intersects with the "contradictions of urban capitalism" and that critics have charged that practitioners are "good people with bad theory" and that the model is "socialistic-sounding [but] the socialistic aspect is more apparent than real" (internal quotations omitted)).

95. Clay & Jones, *supra* note 17, at 258–60; Cummings, *supra* note 12, at 414–16.

96. KAREN FERGUSON, TOP DOWN: THE FORD FOUNDATION, BLACK POWER, AND THE REINVENTION OF RACIAL LIBERALISM 213 (2013).

with "[B]lack [P]ower's call for both self-determination and an end to a colonial relationship with the state and capital" while simultaneously appealing to white liberals, who were concerned about racial integration and deeply committed to the idea that "hard work and self-reliance were a universal path to upward mobility and assimilation."[97]

Of course, CED practitioners and community-based organizations have diverse political views, and to frame all of CED as a tool of the Ford Foundation and governmental agencies comes too close to stripping low-income communities of color of their agency. A more complete view of CED would understand it as the set of practices that emerged from the tension between the interests of the powerful governmental and private funders that sought to simultaneously fund and control CED programs, on the one hand, and the interests of community activists and community organizations seeking to leverage those funds in support of community visions while bending as little as possible to the interests of capital and the state they found to be incompatible with those visions, on the other. Helping community clients navigate the complexities of this dynamic is central to the role of the CED lawyer. Still, it remains hard to find in this tension a coherent theory of change beyond the neighborhood level.[98]

The sociologist Erik Olin Wright argues that there are three basic types of social transformation: *ruptural change*, where there is a radical disjuncture in institutional structures, like armed revolutionaries who envision a "rapid transformation of the structures of the state and the foundations of economic structures";[99] *symbiotic change*, where changes that help the less powerful in society are accepted because they also help solve problems faced by the powerful; and *interstitial change*, which aims to "build new forms of social empowerment in the niches, spaces and margins of capitalist society, often where they do not seem to pose any immediate threat to dominant classes and elites," and which, while not as confrontational or potentially violent as ruptural change, cumulatively "can not only make a real difference in the lives of people but potentially constitute a key component of enlarging the transformative scope for social empowerment in the society as a whole."[100]

97. *Id.* at 214–15.
98. Cummings, *supra* note 12, at 458; Haber, *CED After #OWS*, *supra* note 27, at 312–13.
99. ERIK OLIN WRIGHT, ENVISIONING REAL UTOPIAS 211 (2009).
100. *Id.* at 211–12.

At least since the 1980s, much of CED has been closely aligned with a symbiotic model of community change, one where the needs of low-income communities of color can only be met when they are paired with benefits for the wealthy. We see the symbiotic model at work in government initiatives like the Low-Income Housing Tax Credit[101] and Opportunity Zone[102] programs, which provide benefits simultaneously to low-income communities and investors or corporations, in private funding models like Community Benefits Agreements, where community goods are funded only if private real estate developers also get approval for their highly-profitable development projects,[103] and in community non-profit programs that rely heavily on grants from private foundations, vehicles that exist to shield family wealth from taxes for generations while preserving their family legacy and minimally funding—and to a degree controlling—the work of their charitable grantees.[104]

But this has never been all there is to CED legal practice. CED scholars and practitioners have a long history of trying to distinguish between conventional and more activist approaches to CED, a history that shows many CED lawyers have experimented with, and hunger for, a deeper vision for change—one connected to organizing, to movements, to community projects that have a vision for change that stretches across invisible, often racialized neighborhood borders.[105] A transactional movement lawyering

101. *See generally* I.R.C. § 42 (2020); Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211 (2003). *See also* CONG. BUDGET OFF., THE COST-EFFECTIVENESS OF THE LOW-INCOME HOUSING TAX CREDIT COMPARED WITH HOUSING VOUCHERS: A CBO STAFF MEMORANDUM, 56 TAX NOTES 493, 493 (1992) (arguing that "the housing that is subsidized through tax credits is more suited to the needs of investors than poor renters").

102. See I.R.C. § 1400z (2018); Edward W. De Barbieri, *Opportunism Zones*, 39 YALE L. & POL'Y REV. 82 (2020); Bre Jordan, *Denouncing the Myth of Place-Based Subsidies as the Solution for Economically Distressed Communities: An Analysis of Opportunity Zones as a Subsidy for Low-Income Displacement*, 10 COLUM. J. RACE & L. 65 (2020).

103. *See generally* Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35 (2008); Alejandro E. Camacho, *Community Benefits Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOK. L. REV. 355 (2013).

104. Haber, *CED After #OWS*, *supra* note 27, at 319–20.

105. *See generally, e.g.*, Cummings, *supra* note 12 (arguing for models of CED that move beyond "market-based CED"); Huertas-Noble, *supra* note 16 (arguing for models of CED that promote "community empowerment" over economic profit and institutional development); Shah, *supra* note 12 (arguing for a CED focused on helping groups build strong foundations rather than lawyer- and government-driven programs for material improvements).

would more fully align our political vision with that of clients working toward interstitial or even ruptural change, and the Hofstra CED Clinic's work with mutual aid groups is just one example of a CED practice trying to move in this direction.

CONCLUSION

Despite the close ties of some CED practices to social movement groups and the desire among many movement groups to explore questions around organizational structure, growth, funding, and decision-making, there has been much more attention in the movement lawyering scholarship to questions around support for advocacy campaigns than to questions around legal support for movement infrastructure and sustainability. These are precisely the kinds of matters in which CED lawyers have expertise. The mutual aid work done in the Hofstra CED Clinic points toward one model for a transactional approach to movement lawyering that could provide deeper support to movement organizations on these questions. CED lawyers interested in developing our practices in this direction should look at ways to balance our support for individual movement group clients with upholding the visions of the broader movements those groups come from when those fall out of alignment. We should look more critically at the ways that CED models understand—and often reproduce—existing relations of social power. And we should question whether the symbiotic approaches to change common to many CED practices are realistic ways to create the changes that our families, our communities, and our planet desperately need.