

Pace University

DigitalCommons@Pace

---

Pace Law Faculty Publications

School of Law

---

2018

## Beyond Corporate Form: A Response to Dan Depasquale, Surbhi Sarang, and Natalie Bump Vena's Forging Food Justice Through Cooperatives in New York City

Jonathan Brown

*Elisabeth Haub School of Law at Pace University*

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Business Organizations Law Commons](#), [Food and Drug Law Commons](#), [Nonprofit Organizations Law Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Jonathan Brown, Beyond Corporate Form: A Response to Dan Depasquale, Surbhi Sarang, and Natalie Bump Vena's Forging Food Justice Through Cooperatives in New York City, 45 Fordham Urb. L.J. 1121 (2018), <http://digitalcommons.pace.edu/lawfaculty/1093/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

**BEYOND CORPORATE FORM: A RESPONSE  
TO DAN DEPASQUALE, SURBHI SARANG,  
AND NATALIE BUMP VENA’S *FORGING FOOD  
JUSTICE THROUGH COOPERATIVES IN NEW  
YORK CITY***

*Jonathan Brown*\*

Introduction .....	1121
I. Distinguishing and Categorizing Policy Objectives and Types of Cooperatives .....	1122
II. The Limitations of Legal Forms .....	1124
A. New York Cooperative Corporation Law .....	1125
B. The Risk of Making Policy Based on Cooperatives as a Legal Form .....	1127
III. Beyond Cooperatives: The Role of Other Enterprise Models .....	1130
A. The Unique Advantages and Disadvantages of the Cooperative Structure .....	1131
B. The Role of For-Profit Businesses .....	1133
C. The Role of Charitable Non-Profit Organizations.....	1135
Conclusion.....	1138

**INTRODUCTION**

In their article, *Forging Food Justice Through Cooperatives in New York City*, Dan DePasquale, Surbhi Sarang, and Natalie Bump Vena (the “Authors”) argue that consumer-owned and worker-owned cooperatives hold promise as a means for advancing policy objectives associated with “food justice,” namely building community wealth

---

\* Adjunct Professor of Law and Director of the Food and Beverage Law Clinic, Elisabeth Haub School of Law at Pace University. I am extremely grateful for the helpful comments of Edward De Barbieri, Emily Kenyon, and Margot Pollans. Special thanks go to Cara Kaplan and the staff of the *Fordham Urban Law Journal* for excellent editing assistance.

and power and providing more affordable access to healthy food in low-income and minority communities.<sup>1</sup> Looking to examples of legislation and policies in other jurisdictions, they advocate for a wide range of policies to promote the viability of cooperatives in New York City, including reforms to cooperative corporation laws and strategies for better allocating funding and technical assistance to cooperatives.<sup>2</sup>

I largely agree with the Authors' argument and support their effort to identify practical policy solutions that would help food cooperatives in New York City overcome barriers to success. This Response makes three observations about their proposals. First, this Response observes that food access and economic development are distinct objectives and that consumer and worker cooperatives may have different roles to play in food justice strategies depending on how these objectives are defined and prioritized. Second, the significance of cooperative corporation statutes may be overstated, both because a variety of legal entity forms are available to cooperative organizations (mitigating the impact of potential reforms to New York's cooperative corporation law) and because the legal form itself does not guarantee adoption of many of the values and principles commonly associated with cooperatives. Third, this Response argues that the role of other, non-cooperative organizational models should not be overlooked in shaping policy in this area. This Response advocates for a more comprehensive strategy that promotes a wide range of community-based businesses and organizations, including but not limited to cooperatives, and that allocates resources according to the identity of organizations' stakeholders and the degree of their community impact, rather than relying on their legal form.

#### I. DISTINGUISHING AND CATEGORIZING POLICY OBJECTIVES AND TYPES OF COOPERATIVES

This Part briefly parses the policy objectives and categories of cooperative models identified in the Author's article, before proceeding with an analysis of the Authors' proposals in Parts II and III. The objectives of the "food justice movement" identified by the Authors can be categorized into two central goals: the first, to "redress food insecurity as well as other inequities throughout the food system," by such means as establishing "alternative pathways for

---

1. See generally Dan DePasquale et al., *Forging Food Justice Through Cooperatives in New York City*, 45 FORDHAM URB. L.J. 909 (2018).

2. See generally *id.* at 937-49.

bringing healthy food” to underserved communities,<sup>3</sup> and the second, “the economic development and revival of communities and the creation of sustainable livelihoods.”<sup>4</sup> They observe that in both cases, the “food justice” approach emphasizes community-driven solutions to structural inequities.<sup>5</sup>

It is worth noting that food access and economic development are related, but nevertheless distinct, policy objectives. Further, “food access” itself is a loaded term, connoting a much-disputed narrative that lack of physical proximity to healthy food causes food insecurity and diet-related health disparities.<sup>6</sup> Scholars have persuasively argued that the root causes of such disparities are in fact poverty and other socioeconomic factors, and have observed that “food access” strategies aimed at increasing proximity to healthy food in low-income neighborhoods—in particular, efforts to bring supermarkets to perceived “food deserts”—have largely been ineffective in changing health outcomes.<sup>7</sup> Law professor Nathan Rosenberg and public health professor Nevin Cohen criticize food policy that has “emphasized subsidizing conventional food retailers to increase food access while shifting attention from the more fundamental upstream causes of malnourishment and health disparities: social inequality, race, gender, class oppression, and poverty.”<sup>8</sup> Similarly, law

---

3. *Id.* at 915–16.

4. *Id.* at 916 (quoting ROBERT GOTTLIEB & ANUPAMA JOSHI, *FOOD JUSTICE* 227 (2013)).

5. *Id.* at 916.

6. In assessing links between poverty and diet-related health outcomes, policymakers have often focused on the presence of “food deserts”—“communities, both urban and rural, with severely limited access to healthy and affordable food”—and framed the issue largely as one of proximity. Deborah Archer & Tamara Belinanti, *We Built It and They Did Not Come: Using New Governance Theory in the Fight for Food Justice in Low-Income Communities of Color*, 15 SEATTLE J. FOR SOC. JUST. 307, 308, 312–13 (2016). Based on that diagnosis, in recent years there have been significant subsidies and incentives allocated to the development of grocery stores in communities considered food deserts, most notably the federal Healthy Food Financing Initiative. *Id.* at 312–13. However, several recent studies have found that the food choices people make are driven primarily by food preference rather than proximity to supermarkets. A National Bureau of Economic Research Study found that “[p]articipants who were low-income and had lower levels of education but who lived in wealthier communities with proximity to healthy foods made food choices that were similar to the choices made by low-income people living in low-income neighborhoods with less physical access to healthy food.” *Id.* at 313–14.

7. See Archer & Belinanti, *supra* note 6, at 311–12. See generally Nathan A. Rosenberg & Nevin Cohen, *Let Them Eat Kale: The Misplaced Narrative of Food Access*, 45 FORDHAM URB. L.J. 1091 (2018).

8. Rosenberg & Cohen, *supra* note 7, at 1120.

professors Deborah Archer and Tamara Belinanti criticize interventions that embrace a “myopic narrative of food access . . . centered around problems of proximity,” arguing that “true access” to food is largely an issue of its affordability and cultural appropriateness.<sup>9</sup> These critiques suggest that, in crafting policy around food justice-related concerns, policymakers should prioritize wealth creation and should take a broader and more nuanced approach to “food access.”

As a related point, consumer cooperatives and worker cooperatives are inherently different structures and consequently may have different roles to play in policy strategies. Quite simply, consumer cooperatives are organized for the benefit of consumers and worker cooperatives are organized for the benefit of workers.<sup>10</sup> As the Authors observe, these structural features indicate that consumer cooperatives have the potential to increase affordable food access and worker cooperatives have the potential to create sustainable community wealth.<sup>11</sup> Of course, neither model is homogeneous; consumer cooperatives may adopt policies focused on community job creation just as worker cooperatives may adopt policies focused on food access. Further, hybrid or “solidarity” cooperatives, like the Central Co-op in Seattle, may feature both consumer and worker ownership.<sup>12</sup> Nevertheless, the core structural differences between the two cooperative models imply different policy considerations, and it therefore may not be effective to group the two together in all strategies.

## II. THE LIMITATIONS OF LEGAL FORMS

The Authors recommend improving the New York Cooperative Corporations Law (“NYCCL”) as one solution for overcoming barriers to the success of both consumer and worker cooperatives (and, by extension, furthering food justice objectives), but this strategy may overstate the significance of a cooperative’s legal form for two reasons.<sup>13</sup> First, the constraints of the NYCCL are relatively insignificant as a practical matter because, quite simply, cooperative organizations in New York are not limited to incorporating under the

---

9. Archer & Belinanti, *supra* note 6, at 311–12.

10. DePasquale et al., *supra* note 1, at 918–19.

11. *Id.* at 922, 924–25.

12. *Co-op Governance*, CENTRAL CO-OP, <https://www.centralcoop.coop/governance.php> [<https://perma.cc/GP5Z-GCQK>].

13. *See generally* DePasquale et al., *supra* note 1, at 942, 944–45.

NYCCL.<sup>14</sup> Rather, they can employ the same cooperative principles and enjoy the same favorable treatment under federal law by taking advantage of more flexible legal entity forms such as the limited liability company (“LLC”).<sup>15</sup> Liberalizing the NYCCL presents only a limited upside and comes with a risk of eroding the signaling power of “cooperative” as a corporate name. Second, and more importantly, adopting the cooperative corporation legal form does not guarantee that an organization will embody all of the principles that are often cited as benefits of cooperatives. Therefore, policy solutions that focus entirely on legal form, rather than on how an organization operates or whom it benefits, risk missing the mark.

### A. New York Cooperative Corporation Law

To support their proposal to improve the NYCCL as a means of supporting consumer and worker cooperatives, the Authors look to other domestic and international cooperative legal regimes as examples. They primarily focus on reforms that would make the cooperative corporation a more flexible legal entity.<sup>16</sup> As an example of a more flexible state statute, they cite Minnesota’s cooperative corporation law, which permits non-patron investors to hold equity in cooperative corporations coupled with limited voting rights.<sup>17</sup> As an international example, they cite the Quebec Cooperatives Act, which provides the option of forming a “solidarity cooperative,” a hybrid form of cooperative with multiple classes of stakeholders as members.<sup>18</sup>

While there are certainly other legal regimes that provide more flexibility than the NYCCL, loosening the constraints of the NYCCL may have limited practical benefits for a simple reason: organizations that wish to operate as cooperatives in New York are not limited to the cooperative corporation statute.<sup>19</sup> As noted by the Authors,<sup>20</sup>

---

14. Edward W. De Barbieri & Brian Glick, *Legal Entity Options for Worker Cooperatives*, 2 GRASSROOTS ECON. ORGANIZING NEWSL. (2011), <http://geo.coop/node/628> [<https://perma.cc/79JP-WAZ8>].

15. *Id.*

16. The other legal features that the Authors identify in other jurisdictions as potential improvements include a host of benefits bestowed on cooperatives in Italy, including certain income tax and banking law exemptions. DePasquale et al., *supra* note 1, at 940–41. A cross-border comparative analysis of cooperative regulatory exemptions would be a worthwhile endeavor, but is outside the scope of this Response.

17. *Id.* at 938–39.

18. *Id.* at 941.

19. De Barbieri & Glick, *supra* note 14.

cooperatives may be formed as New York LLCs or potentially other business entities that incorporate cooperative principles into their constitutive documents, rather than forming as cooperative corporations under the NYCCL.<sup>21</sup> LLC statutes offer a highly flexible form, wherein LLCs can incorporate cooperative principles while also permitting non-patron equity investments and can accommodate any permutation of hybrid cooperative structures with multiple stakeholders.<sup>22</sup> In fact, many cooperative organizations in New York choose to form as LLCs.<sup>23</sup> The principal benefit under federal law of operating as a cooperative—the exemption of patronage dividends from the cooperative’s income tax pursuant to Subchapter T of the Internal Revenue Code—does not depend on an entity’s designation under state law.<sup>24</sup> Rather, it applies if an entity that is considered a corporation for federal tax purposes is “operating on a cooperative basis.”<sup>25</sup> An LLC that elects to be considered a corporation for tax purposes is eligible to be taxed as a cooperative so long as it is operating in a way that satisfies the Subchapter T requirements.<sup>26</sup> An LLC that elects to be considered a partnership for tax purposes qualifies for pass-through taxation, generally making exemption under Subchapter T unnecessary.<sup>27</sup> Therefore, forming a cooperative under the NYCCL does not provide any particular tax advantage, and in fact provides less flexibility in tax treatment, as compared to forming as an LLC.

The principal advantage of incorporating under the NYCCL rather than as an LLC is that only NYCCL cooperative corporations are

---

20. DePasquale et al., *supra* note 1, at 932.

21. De Barbieri & Glick, *supra* note 14.

22. *Id.*

23. In the New York City food sector, cooperatives formed as LLCs include Brooklyn Packers LLC, a worker cooperative that sources, portions, and packages food, and Bed-Stuy Fresh and Local LLC. See *The Brooklyn Packers*, BECOMING EMPLOYEE OWNED: DEMOCRACY AT WORK INST., <http://becomingemployeeowned.org/projects/the-brooklyn-packers/> [<https://perma.cc/3WUE-CS6F>]; Oscar Perry Abello, *Brooklyn Grocery Proving Cooperative Business Works*, NEXT CITY (Jan. 26, 2016), <https://nextcity.org/daily/entry/bed-stuy-organic-grocery-proving-cooperative-business-works> [<https://perma.cc/LY93-2CX5>].

24. I.R.C. § 1381(a)(2) (2017).

25. *Id.*

26. Thomas Earl Geu & James B. Dean, *The New Uniform Limited Cooperative Association Act: A Capital Idea for Principled Self-Help Value Added Firms, Community-Based Economic Development, and Low-Profit Joint Ventures*, 44 REAL PROP. TR. & EST. L.J. 55, 91–94 (2009) (citing I.R.S. Priv. Ltr Rul. 01-39-020 (Sept. 28, 2001)).

27. Elaine Waterhouse Wilson, *Cooperatives: The First Social Enterprise*, 66 DEPAUL L. REV. 1013, 1040 (2017).

permitted to use the term “cooperative” or any variations thereof in their legal name.<sup>28</sup> This prohibition was designed to preserve the integrity of special words used in corporate names and avoid confusion.<sup>29</sup> Depending on the organization, this distinction may be significant—particularly in the context of consumer food cooperatives, the inclusion of the word “co-op” may play an important role in marketing to consumers. But the restriction is limited to an organization’s corporate name and does not prohibit a non-NYCCL organization from otherwise publicizing that it employs cooperative principles.<sup>30</sup>

While liberalizing the NYCCL to afford greater structural flexibility creates a limited benefit, there is potential downside to doing so as well. As noted by the Authors, the introduction of outside equity investors, as exemplified by Minnesota’s cooperative law, may result in the diminishment of patron members’ earnings.<sup>31</sup> The more flexible a cooperative statute becomes, the less it will conform to traditional notions of how cooperatives operate. Indeed, some members of the cooperative community have voiced concern about “new generation cooperatives” that raise outside equity capital, with one commentator observing that “some new generation businesses appear to have adopted more of an ‘investor’ rather than ‘user’ culture.”<sup>32</sup> It is unsettled where to draw the line for how far an organization can depart from a traditional cooperative format before it should no longer be considered a “cooperative.” Nevertheless, there is good reason to draw a line somewhere. As long as organizations have the option of adopting creative and unorthodox structures through flexible legal forms like LLCs, the primary function of the NYCCL is to ensure that when an organization identifies itself as a cooperative, it comports with a common understanding of what that word means.

### **B. The Risk of Making Policy Based on Cooperatives as a Legal Form**

There is a further risk in tying policy entirely to the legal form of cooperatives. As noted by the Authors, cooperatives often embody values and principles associated with “food justice,” including

---

28. N.Y. COOP. CORP. LAW § 3(j) (McKinney 2017).

29. 1970 N.Y. Op. Att’y Gen. No. 31 (N.Y.A.G.), 1970 WL 197708, at \*1.

30. N.Y. COOP. CORP. LAW § 3(j).

31. DePasquale et al., *supra* note 1, at 939.

32. Wilson, *supra* note 27, at 1038 (quoting Randall E. Torgerson et al., *Evolution of Cooperative Thought, Theory, and Purpose*, 13 J. COOPERATIVES 1, 13 (1998)).



empowerment of low-income communities, civic engagement, and environmental stewardship.<sup>33</sup> However, the cooperative corporation legal form required by the NYCCL itself does not dictate that an organization embody these principles. Therefore, there is a risk in tying policy entirely to the organizational form of a cooperative.

Commentators frequently associate certain values and principles with cooperatives that go beyond the core identifying elements that distinguish them from more traditional business forms.<sup>34</sup> The International Cooperative Alliance (“ICA”), a non-profit international association established in 1895 to advance the cooperative model, has adopted the following set of seven principles for cooperatives: (1) voluntary and open membership; (2) democratic member control; (3) member economic participation; (4) autonomy and independence; (5) education, training, and information; (6) cooperation among cooperatives; and (7) concern for community.<sup>35</sup> In an article exploring the opportunities for, and limitations of, worker cooperatives serving as platforms for grassroots political activism, law professor Gowri Krishna observes that of the ICA’s seven principles, only the second and third, democratic member control and member economic participation, are inherent features of the cooperative corporate form.<sup>36</sup> Certainly, the democratic nature of those two features creates a framework that is conducive to more outward-looking principles like education and concern for community. But as noted by Krishna, the cooperative’s foundational “one-person, one-vote” democratic structure merely sets a floor from which those outward-looking principles may be built, rather than guaranteeing they will be embraced.<sup>37</sup>

A cooperative may exist primarily to benefit its members without any larger, outward-facing, community value-oriented goals. Or, in what is perhaps a more typical scenario, a cooperative may pursue some value-oriented goals at the expense of other goals. In a case study of two urban food cooperatives in Philadelphia, Pennsylvania,

---

33. DePasquale et al., *supra* note 1, at 910–11, 924–25.

34. Gowri J. Krishna, *Worker Cooperative Creation as Progressive Lawyering? Moving Beyond the One-Person, One-Vote Floor*, 34 BERKELEY J. EMP. & LAB. L. 65, 83 (2013) (citing Kimberly Zeuli & Jamie Radel, *Cooperatives as a Community Development Strategy: Linking Theory and Practice*, 35 J. REGIONAL ANALYSIS & POL’Y 43, 44 (2005)).

35. Krishna, *supra* note 34, at 83–84; see also *Co-operative Identity, Values & Principles*, INT’L COOP. ALL., <https://ica.coop/en/whats-co-op/co-operative-identity-values-principles> [<https://perma.cc/6RWT-PBW4>].

36. Krishna, *supra* note 34, at 84.

37. *Id.*

urban studies professor Andrew Zitcer identifies a “paradox of exclusivity” facing consumer food cooperatives.<sup>38</sup> When food co-ops prioritize serving healthy, local, organic foods, prices tend to be high, in effect excluding low-income consumers.<sup>39</sup> When food co-ops require member labor, often with the express intent to be more inclusive by making food affordable to anyone willing to commit time, prices are lower but access is limited to those who can afford to take uncompensated time, again potentially excluding low-income people as well as single parents.<sup>40</sup> As a result, notwithstanding commonly espoused values of democratic inclusion, consumer food cooperatives are frequently perceived as elitist, white spaces.<sup>41</sup> As noted by the Authors, “[n]ew consumer food cooperatives” that have opened in historically low-income and minority communities, for example, have faced criticisms that they functionally “serve new, white, middle-class transplants to these areas and contribute to displacement of long-time residents,” rather than meeting their needs.<sup>42</sup>

How, then, can policy strategies better tap into the positive potential of cooperatives in addressing the issues identified by the Authors? As noted above in Part I, an important first step is recognizing that different policy objectives may call for different approaches, and that worker cooperatives and consumer cooperatives may serve different purposes. But even accounting for those differences, relying on basic categories of cooperatives may be insufficient. Different consumer food cooperatives, for example, may have widely different priorities regarding price of food, qualities of food (including organic, local, etc.), member labor requirements, and other inclusive practices.<sup>43</sup> A potential solution is for policy strategies to focus more on what a business does, and who benefits from that activity, than on its corporate form. Such an approach not only helps to identify the “right” cooperatives to support but also, as explored in the next section, widens the policy lens beyond cooperatives.

---

38. Andrew Zitcer, *Food Co-ops and the Paradox of Exclusivity*, 47 *ANTIPODE* 812, 813 (2015).

39. *Id.* at 820.

40. *Id.* at 818.

41. *Id.* at 813; see also Rachel Slocum, *Whiteness, Space and Alternative Food Practice*, 38 *GEOFORUM* 520, 531 (2007) (identifying “whiteness” as “an organizing feature of alternative food practices” more generally).

42. DePasquale et al., *supra* note 1, at 937.

43. Zitcer, *supra* note 38, at 817–21.

### III. BEYOND COOPERATIVES: THE ROLE OF OTHER ENTERPRISE MODELS

Cooperatives may be well suited as vehicles for reducing economic and health disparities in food systems, as argued by the Authors, but they are not alone in this respect. The benefits cited by the Authors include both the opportunities for job and wealth creation associated with the commercial aspects of cooperatives and the opportunities for education, civic engagement, environmental impact, and affordability associated with the value-oriented aspects of cooperatives.<sup>44</sup> In some cases, a cooperative may serve as the perfect organizational model for combining business with more value-oriented purposes in order to achieve the policy objectives identified by the Authors. However, while cooperatives are unique in their democratic business structure, they are far from the only type of enterprise that can achieve these goals. Sometimes a non-cooperative enterprise may be a natural and effective fit for the stakeholders involved. As explored below, there is an important role that entrepreneurs starting more traditional for-profit businesses, as well as non-profit organizations, can play in reducing economic and health disparities in food systems.<sup>45</sup> This is not to say that policymakers should not find ways to promote cooperatives. Rather, this Part makes the case that to combat the inequities associated with excessive corporate consolidation in the food system, they should promote a wide range of community-based businesses and organizations, with allocation of resources based on criteria beyond an organization's legal entity type.

Before proceeding with an analysis of the role of cooperative and non-cooperative enterprises in addressing disparities in food systems, it should be acknowledged that attempting to address these issues through the promotion of business enterprise—whether cooperative or otherwise—is a decidedly market-based solution. Scholars have critiqued market-based food policies as “perpetuating the neoliberal logics that underlie many of the structural problems we have in today's food system.”<sup>46</sup> This Response does not suggest that

---

44. DePasquale et al., *supra* note 1, at 910–11, 923.

45. See *infra* Sections III.B, III.C.

46. Michaela Oldfield, *Farmers' Cooperatives to Regionalize Food Systems: A Critique of Local Food Law Scholarship and Suggestion for Critical Reconsideration of Existing Legal Tools for Changing the U.S. Food System*, 47 ENVTL. L. 225, 256 (collecting sources); see also Kate Meals, *Nurturing the Seeds of Food Justice: Unearthing the Impact of Institutionalized Racism on Access to Healthy Food in Urban African-American Communities*, 15 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 97, 128 (2012).

promoting certain business enterprises is the only solution, or even the primary solution, to the economic and health disparities that the food justice movement seeks to redress. Rather, it suggests that these strategies have a part to play in complementing broader policy initiatives seeking to reform the food system. In part, this is a pragmatic response that acknowledges deeper structural reform may be less politically viable. But it is also an approach that is consistent with the food justice ethos of seeking community-based alternatives to the conventional food system rather than relying on state or large corporate actors to intervene.<sup>47</sup>

### A. The Unique Advantages and Disadvantages of the Cooperative Structure

In assessing the role that cooperatives can play in furthering food justice objectives, their unique corporate structure cuts two ways. On the one hand, their democratic structure arguably makes them ideal vehicles for building wealth in a manner that keeps jobs, income, and profits in the community in which they are rooted, particularly in the case of worker cooperatives.<sup>48</sup> On the other hand, depending on the objectives and resources of the stakeholders involved, the unique structure of a cooperative may not always be the best fit. As noted by the Authors, starting any enterprise requires a great deal of time, energy, and resources, but a cooperative's democratic self-management structure in many ways requires more.<sup>49</sup> In the case of a worker cooperative, members' roles as owners require them to invest more time in work-related matters than they would if they were merely employees.<sup>50</sup> Consumer cooperatives take a wide range of approaches regarding membership commitments—in particular, as to whether member labor is required—but in any case, members have a financial commitment and a role in governance that is not at play

---

47. Garrett Broad observes that many community organizers and food justice advocates have “some paradoxical commonalities with limited government conservatives, having long ago given up on the dream that the federal government would one day intervene to fully remedy their predicament.” See Garrett M. Broad, *After the White House Garden: Food Justice in the Age of Trump*, 13 J. FOOD L. & POL'Y 33, 37 (2017).

48. See 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 (2010).

49. See DePasquale et al., *supra* note 1, at 932–35.

50. See Krishna, *supra* note 34, at 95 (“Ongoing trainings, education, committee activities, and other business responsibilities require attention from members.”).

when a consumer anonymously purchases from a conventional food store.<sup>51</sup> Further, due to their complex structure, both models typically require technical assistance beyond what is needed for a more traditional business.<sup>52</sup> Success, therefore, requires the presence and commitment of members who can put in the necessary time, energy, and resources, which may present a limiting factor to the widespread adoption of cooperative structures.

In addition to purely practical limitations, a cooperative's essential nature as neither entirely profit-maximizing nor entirely value-oriented may not always fit the goals of the relevant stakeholders or, from a broader policy perspective, the relevant policy objectives. A cooperative inhabits a dual identity as both a commercial business and an association of cooperative members pursuing value-oriented goals—two identities that by their nature are in tension.<sup>53</sup> Even when cooperatives do not adopt outward-facing, value-oriented goals such as improving the surrounding communities or the environment, their democratic structure itself implies values beyond pure wealth maximization. Accordingly, a cooperative's structure and governing documents typically limit the return a member can make on his or her equity.<sup>54</sup> Low-income entrepreneurs who wish to create wealth for themselves may be better served by forming traditional for-profit businesses than cooperatives. Conversely, both the commercial aspect of cooperatives and the fact that profits inure to the benefit of their members indicate that they are not committed purely to outward-facing, value-oriented goals. A founder focused solely on value-oriented goals may find a non-profit organizational model to be more appropriate. From a broader policy perspective, in those instances when the cooperative model is not the best fit, the policy objectives identified by the Authors may instead be served by promoting more traditional for-profit entrepreneurship and non-profit organizations.

---

51. See Zitcer, *supra* note 38, at 817–18.

52. See DePasquale et al., *supra* note 1, at 932–34.

53. See Krishna, *supra* note 34, at 93 (citing Johannes Michelsen, *The Rationales of Cooperative Organizations. Some Suggestions from Scandinavia*, 65 ANNALS PUB. & COOPERATIVE ECON. 13, 13 (1994)).

54. See JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES 195 (2012).

### B. The Role of For-Profit Businesses

An essential element of the “food justice” objectives identified by the Authors is wealth and job creation in low-income communities.<sup>55</sup> As quoted by the Authors, Robert Gottlieb and Anupama Joshi argue that “[t]he food justice approach is centrally about jobs and communities and is inherently linked to the economic development and revival of communities and the creation of sustainable livelihoods.”<sup>56</sup> To that end, the potential for job and wealth creation presented by low-income entrepreneurs starting traditional for-profit businesses should not be ignored.

Small business development has played a large role in broader community economic growth strategies, with some scholars framing minority entrepreneurship as part of the quest for economic justice.<sup>57</sup> Without the same networks on which other entrepreneurs rely, entrepreneurs in low-income communities face additional challenges. For example:

All entrepreneurs need capital, access to credit, sound legal advice, and help with accounting, business planning, and marketing. Urban entrepreneurs, however, need something more. They need business coaching, entrepreneurial networks, accessible business education, and access to social and human capital.<sup>58</sup>

The success of entrepreneurs in low-income communities not only presents an opportunity for the creation of wealth as a general matter, but also comports with the value the food justice movement places on community-based alternatives to large corporate actors. In particular, food justice activists have criticized policies that subsidize the presence of large grocery chains in communities perceived as “food deserts” without providing an opportunity for community-based businesses to fill the need.<sup>59</sup>

---

55. See DePasquale et al., *supra* note 1, at 916.

56. See *id.* at 916 (quoting GOTTLEIB & JOSHI, *supra* note 4, at 227).

57. See Susan Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 199–200 (collecting sources).

58. See Susan Jones, *Supporting Urban Entrepreneurs: Law, Policy, and the Role of Lawyers in Small Business Development*, 30 W. NEW ENG. L. REV. 71, 73 (2007) (citing Willie Brown, *The Forgotten Type of Capital: Addressing the Social Capital Deficiency in the Inner City*, 11 GEO. J. ON POVERTY L. & POL’Y 527, 530–36 (2004)).

59. See, e.g., Tanya Fields, *End the Corporate Exploitation of ‘Food Deserts’*, EBONY (Apr. 3, 2013), <http://www.ebony.com/wellness-empowerment/food-justice-end-the-corporate-exploitation-of-food-deserts#axzz53RBc5lDG> [<https://perma.cc/F424-J947>] (“In the end, the term [food desert] masks the real harm of the U.S. corporate controlled food system by suppressing the ability of community entrepreneurs to develop and finance scalable community solutions.”); Meals, *supra*

However, a number of scholars have argued that “focused, individualistic, entrepreneurial strategies” have proved unsuccessful as a means of community economic development and poverty alleviation.<sup>60</sup> Some of these scholars have advocated for more political, broad-based, and collectivist strategies for community economic development, including “living wage campaigns, worker cooperatives, and jobs initiatives, not the creation of small startup businesses.”<sup>61</sup> But as observed by law professor Paul Tremblay, in the context of client selection for community economic development lawyers, even if assisting individual entrepreneurs falls short from the perspective of a broader social justice mission as compared to assisting more collectivist, community-building efforts, that does not mean doing so is without merit.<sup>62</sup> Tremblay notes that:

[Transactional legal services] on behalf of humbly-resourced entrepreneurs not only assists in the establishment of some tangible power that might otherwise elude low income clients, but, importantly, it is what the members of the community have requested. 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.<sup>63</sup>

A similar argument can be made in the context of policy-making around food systems more generally. It may be that a successful cooperative is the ideal mechanism for simultaneously growing wealth and furthering other value-oriented goals associated with food justice. But, as long as there are community members who prefer to build wealth through traditional entrepreneurship or instances where the cooperative model is simply not feasible, those opportunities for community wealth generation should not be ignored.

---

note 46, at 131–32 (“Even though funding initiatives, such as the U.S. Department of Health and Human Services’ Healthy Food Financing, are intended to support local food projects in practice, large corporations are beating out food justice advocates because they have the necessary capital to set up their stores quickly.”).

60. Paul R. Tremblay, *Transactional Legal Services, Triage, and Access to Justice*, 48 WASH. U. J.L. & POL’Y 11, 24–25 (2015) (collecting sources).

61. *Id.* at 26–27 (citing Scott L. Cummings, *Community Economic Development as Progressive Politics: Towards a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001)).

62. See Paul R. Tremblay, *Rebellious Strains in Transactional Lawyering for Underserved Entrepreneurs and Community Groups*, 23 CLINICAL L. REV. 311, 332 (2016).

63. *Id.*

### C. The Role of Charitable Non-Profit Organizations

Just as the collectivist, value-oriented aspects of the cooperative paradigm may not appeal to certain aspiring entrepreneurs, the commercial aspects of the cooperative paradigm may not serve those whose goals are entirely value-driven. To the extent a policy objective is to make the healthiest food available at the lowest prices to the people who need it most, in some cases a charitable non-profit organization may be the most effective vehicle for doing so. As noted above, the challenging issues that consumer food cooperatives face in reconciling membership priorities may result in excluding certain potential members, often the people who are in the most need. More generally, cooperatives operate primarily for the benefit of their members, which may limit the number of people they can impact.<sup>64</sup> In some cases “food access” objectives could be better advanced by non-profit organizations that serve a broad, public class of beneficiaries and are devoted exclusively to charitable purposes without balancing those purposes against the business imperatives of a cooperative.

Perhaps the most visible examples of charitable non-profit organizations engaged in “food access” work are food pantries, food banks, and soup kitchens that distribute food at no cost to eligible recipients, funded entirely by grants and donations of money and food.<sup>65</sup> While these emergency food providers certainly play an important role in combatting food insecurity,<sup>66</sup> they are not alternatives to conventional corporate food enterprise in the sense that cooperatives are alternatives (i.e. they are not self-sustaining models that can exist without donations or other subsidies) and are therefore not the focus of this section. Instead, this section examines the concept of charitable non-profits that sell food to paying customers at reduced costs.

Contrary to conventional wisdom that charities rely primarily on donations and the common misconception that non-profits cannot be profitable, fees for services and goods in fact constitute the majority

---

64. See Krishna, *supra* note 34, at 94.

65. See SAMUEL ECHEVARRIA ET AL., FEEDING AMERICA, FOOD BANKS: HUNGER'S NEW STAPLE 3 (2012), <http://www.feedingamerica.org/research/hungers-new-staple/hungers-new-staple-full-report.pdf> [<https://perma.cc/BC49-4U9X>].

66. See Elaine Waxman, *The Costs and Impacts of Rising Food Prices Among Low-Income Households*, 8 J. FOOD L. & POL'Y 213, 219–20 (2012) (“An analysis of client visits to Feeding America pantries shows that many Americans rely on food pantries month after month as a supplemental source of food, including those receiving SNAP benefits.”).



of revenue generation for charitable non-profit organizations.<sup>67</sup> A non-profit organization whose primary activity is selling food to low-income customers at reduced costs can obtain tax exemption under section 501(c)(3) of the Internal Revenue Code if it can prove that doing so serves a “charitable purpose” recognized by the IRS.<sup>68</sup> Several organizations have recently done just that, innovating the concept of a non-profit grocery store. A well-publicized example is the Daily Table, a tax-exempt non-profit retail store founded by former Trader Joe’s president Doug Rauch, which opened its doors in Dorchester, Massachusetts in 2015.<sup>69</sup> The store offers a free membership program and collects information from its members to validate to the IRS that a predominant number of customers live in low-income ZIP codes.<sup>70</sup> It is able to price its food at deep discounts by securing excess or overstocked items from other retailers, items that other retailers will no longer hold on the shelf but that still have a reasonable window of use past the “display code” date.<sup>71</sup> The food is secured either through donations, or deeply discounted purchases, from those retailers.<sup>72</sup> The organization also raises philanthropic funds from foundations and other donors, but it professes a goal of reaching a self-sustaining model where revenue from the sale of food covers costs entirely.<sup>73</sup> Other non-profit grocery stores include Fare & Square in Chester, Pennsylvania, opened in 2014 as a project of the tax exempt non-profit organization Philabundance,<sup>74</sup> and the Jubilee Food Market in Waco, Texas, opened in 2016 as a project of the tax

---

67. Fees for services and goods constituted about seventy-two percent of the total revenue for public charities in 2013. BRICE S. MCKEEVER, URBAN INST., *THE NONPROFIT SECTOR IN BRIEF 2015: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING 4-5* (2015); see also Lloyd Hitoshi Mayer, *The “Independent” Sector: Fee-for-Service Charity and the Limits of Autonomy*, 65 VAND. L. REV. 51, 104 (2012).

68. “Charitable purpose” is defined in Department of Treasury regulations both by reference to its “generally accepted legal sense” and by reference to a list of specific purposes that such term is understood to include. See 26 C.F.R. § 1.501(c)(3)-1(d)(2) (2017).

69. Susan Adams, *How Daily Table Sells Healthy Food to the Poor at Junk Food Prices*, FORBES (Apr. 26, 2017), <https://www.forbes.com/sites/forbestreptalks/2017/04/26/how-daily-table-sells-healthy-food-to-the-poor-at-junk-food-prices/2/#1b0b533a6a41> [https://perma.cc/ZG8Z-5UU8].

70. See *FAQs*, DAILY TABLE, <http://dailytable.org/faqs/> [https://perma.cc/34DX-BTKL].

71. *Id.*

72. *Id.*

73. *Id.*

74. Quinn O’Callaghan, *Desert Fare*, PHILA. CITIZEN (May 3, 2017), <http://thephiladelphiacitizen.org/fare-square-chester-pa/> [https://perma.cc/A4Z3-DWCJ].

exempt non-profit organization Mission Waco.<sup>75</sup> The non-profit approach to affordable food access is not limited to retail stores: charitable non-profit food hubs like the Corbin Hill Food Project, for example, seek to make fresh local produce more available in underserved communities by establishing and operating distribution networks.<sup>76</sup>

An obvious advantage of the charitable non-profit approach is that, if tax exempt under section 501(c)(3) of the Internal Revenue Code, non-profit grocery stores are eligible to receive tax-deductible donations, a powerful fundraising tool.<sup>77</sup> Indeed, all three of the non-profit grocers cited above have received support from large private foundations or donations.<sup>78</sup> But even without the benefit of philanthropic fundraising, for those focused solely on making food as affordable as possible, the non-profit approach provides a structural advantage: unlike a cooperative or a traditional for-profit business, a non-profit can be organized for the sole purpose of pursuing such a goal, without having to balance that goal with profitability for the benefit of owners.

However, those same structural features of non-profit organizations may thwart one of the central objectives associated with “food justice,” which is empowering communities and seeking grassroots, ground-up solutions to inequities in the food system. Both scholars and activists have critiqued the non-profit sector as a “Non-profit Industrial Complex” that dampens more radical grassroots community activism.<sup>79</sup> One of the criticisms is that the demands of complying with regulations, fundraising, and appeasing grantors leads “non-profits to become increasingly professionalized and divorced from low-income communities, with boards consisting of donors and elite professionals, sometimes with tokenistic community membership, and with senior staff typically coming from relatively privileged backgrounds.”<sup>80</sup> As with other options, the

---

75. See Mike Copeland, *Jubilee Food Market Holds Grand Opening*, WACO TRIB.-HERALD (Dec. 2, 2017), [http://www.wacotrib.com/news/nonprofits/jubilee-food-market-holds-grand-opening/article\\_ac2df8c2-6a92-562d-819a-baa8e8c7cb9f.html](http://www.wacotrib.com/news/nonprofits/jubilee-food-market-holds-grand-opening/article_ac2df8c2-6a92-562d-819a-baa8e8c7cb9f.html) [<https://perma.cc/5MA4-4WRR>].

76. See *The Corbin Hill Story*, CORBIN HILL FOOD PROJECT, <http://corbinhill-foodproject.org/our-story/> [<https://perma.cc/9FEB-VQW7>].

77. I.R.C. § 170 (West 2018).

78. Copeland, *supra* note 75; O’Callaghan, *supra* note 74; *FAQs*, *supra* note 70.

79. See Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 FORDHAM URB. L.J. 295, 316–20 (2016).

80. *Id.* at 319.

appropriateness of a non-profit approach depends on a number of variables, including which “food justice” objectives and values are prioritized.

### CONCLUSION

The Authors present a compelling case for promoting consumer and worker cooperatives as a means of building community wealth and power and redressing inequities in “food access” in low-income and minority communities. This Response does not dispute that argument, but instead seeks to widen the scope of the Authors’ proposals and poses the question: why stop at cooperatives? While acknowledging that cooperatives possess certain distinctive characteristics that make them well-suited as vehicles for reducing economic and health disparities in food systems, this Response has made the case that there are limits to relying on corporate form in crafting policy, and that strategies in this area should look not only to cooperatives but to a range of organizational models.

What, then, does a more comprehensive strategy look like? It could involve allocating funding and technical assistance to food projects primarily on the basis of the identity of the participants and the nature of the community impact, rather than solely on the basis of corporate form. For example, the USDA’s Community Food Projects (“CFP”) Competitive Grant Program awards grants to projects in part based on alignment with stated goals that include “[meeting] the food needs of low-income individuals” and “[increasing] the self-reliance of communities in providing for the food needs of the communities.”<sup>81</sup> While grant applicants are required to be non-profit organizations, the projects themselves are not limited by corporate form: applicants are encouraged to partner with for-profit businesses and preference is given to proposals that “[s]upport the development of entrepreneurial projects” or “[d]evelop innovative connections between the for-profit and nonprofit food sectors”—with the common thread that all projects must serve low-income participants.<sup>82</sup> A consumer cooperative is one of many potential project structures the USDA cites as potentially serving the CFP goals.<sup>83</sup> As another example, the New York City Housing Authority’s (“NYCHA”) Food

---

81. NAT’L INST. OF FOOD & AGRIC., U.S. DEP’T OF AGRIC., COMMUNITY FOOD PROJECTS COMPETITIVE GRANT PROGRAM: 2018 REQUEST FOR APPLICATIONS 4 (2017) [hereinafter COMMUNITY FOOD PROJECTS], [https://nifa.usda.gov/sites/default/files/rfa/18\\_CommunityFoodProjectsRFA.pdf](https://nifa.usda.gov/sites/default/files/rfa/18_CommunityFoodProjectsRFA.pdf) [<https://perma.cc/YL4H-BJR6>].

82. *Id.* at 5.

83. *Id.*

Business Pathways program provides training and resources to food entrepreneurs, with eligibility based not on organizational form but on the requirement that participants are NYCHA or NYCHA Section 8 residents.<sup>84</sup> Finally, the Hot Bread Kitchen's HBK Incubates program serves as a business incubator for a wide range of food entrepreneurs but with subsidized rates for low-income participants, who comprise thirty percent of all members.<sup>85</sup>

This is not a comprehensive list and is by no means intended to suggest that existing resources are sufficient to meet the need in this area. For example, the anticipated amount of funding available for the CFP program in 2018 is approximately \$8.64 million, a relatively modest amount for a nationwide program.<sup>86</sup> Rather, these programs illustrate a promising approach to build upon, complementing strategies focused on cooperatives, to remove barriers to entry for community-based food businesses and organizations of all varieties.

---

84. See *NYCHA Food Business Pathways*, N.Y.C. ECON. DEV. CORP., <https://www.nycedc.com/program/nycha-food-business-pathways> [<https://perma.cc/2GSP-6LK8>].

85. See *Become a Member, HBK Incubates NYC*, HOT BREAD KITCHEN, <https://hotbreadkitchen.org/incubates/#become-a-member> [<https://perma.cc/2MWB-WZQR>].

86. COMMUNITY FOOD PROJECTS, *supra* note 81, at 6.