

Community Economic Development Lawyers and the New Democratic Economy
By Gowri J. Krishna¹

“What’s under way is an ownership revolution. It’s about broadening economic power from the few to the many and about changing the mindset from social indifference to social benefit.”² – Marjorie Kelly

Before “income inequality” became the latest political buzzword, Community Economic Development lawyers have recognized its effects on the communities we serve. Many of our clients have long been working to fight stagnating wages, diminished supplies of affordable housing, high under- and unemployment rates, piling debt with little savings, lack of access to affordable and quality education, and a political system that fails to represent the interests of the middle class and poor. The so-called recovery from the Great Recession amounts to the top one percent taking in 95 percent of total income growth.³ Overall, we see a middle class that is shrinking and a bottom whose numbers are increasing. These problems are deeply-rooted, systemic ones built into the way our political-economic world functions.⁴

A growing movement of alternative economic structures seeks to democratize wealth, foster a culture of collaboration, and create systemic change. Some attempts to label it are the New, Generative, Solidarity, Cooperative, and Sharing Economy. Many of these structures are not new, yet their resurgence is largely a concerted response to a perceived failure of capitalism and neoliberal policies. For many within the movement, the structures and practices start from the premise that capitalism necessarily brings a high degree of inequality.⁵ A key goal, then, is to democratize ownership and governance within workplaces and other fora that affect one’s life, to “end[] the capitalist division of producers from appropriators of the surplus, and replac[e] it with democratic cooperative decisions governing production and the social use of its fruits.”⁶ In some places, governments are giving serious consideration to these initiatives and looking for ways to foster them. This February, the Community Development Committee of New York City’s City Council held a hearing on worker cooperatives as a model to lift families out of poverty. A coalition of worker cooperative owners, incubators, workforce development organizations and academics presented joint testimony recommending policies such as issuing a proclamation in support of worker cooperatives in order to bring attention to coops as a tool to assist marginalized populations, adding a worker cooperative sector or subsector of the New York City Economic Development Corporation, and making worker cooperatives a preferred contractor for city agencies.⁷

As CED lawyers, we are uniquely positioned to support this growing movement, which I will refer to here as the new democratic economy.⁸ It presents exciting opportunities for us to expand our practice, work on novel questions of law, advance an equitable and sustainable model for CED, and be at the forefront of finding solutions to economic inequality. This piece provides a brief introduction to the new democratic economy, touching on its characteristics, goals, and types of issues and opportunities it presents for CED lawyers. It highlights in particular the work of two scholar/practitioners who are shaping the field, Marjorie Kelly and Janelle Orsi.

I. Features of the New Democratic Economy

Some of the phenomena and practices that are beginning to form the new democratic economy are cohousing communities, community gardens, social enterprise, community-owned enterprises, shared commercial kitchens, car-sharing groups, ecovillages, local currencies, barter networks, time banks, gift economies, community land trusts, grocery cooperatives, worker cooperatives, community-supported

agriculture, community-supported kitchens, credit unions, creative commons licensing, housing cooperatives, childcare cooperatives, renewable energy cooperatives, tool lending libraries, coworking spaces and collaborative consumption.⁹

A central feature of many of these practices that differs from traditional economic structures is democratized ownership, where governance follows a one person, one vote scheme. Governance is one of five components of ownership that Marjorie Kelly describes in her book, *Owning Our Future: The Emerging Ownership Revolution: Journeys to a Generative Economy*.¹⁰ Kelly, who is a journalist, corporate reformer and co-founder of *Business Ethics* magazine, sees ownership as the underlying architecture of our economy.¹¹ How ownership is framed, she posits, applies more to our daily lives than the shape of democracy; “[q]uestions about who owns the wealth-producing infrastructure of an economy, who controls it, whose interests it serves, are among the largest issues any society can face.”¹² She breaks down ownership into the following components: purpose, membership, governance, capital and networks.¹³ Kelly describes the dominant design of our economy today as one that is *extractive*—its focus is maximum physical and financial extraction.¹⁴ In the context of the five ownership components, an extractive economy has financial purpose (maximizing profits), absentee ownership (owners disconnected from the life of the enterprise), governance by markets (control by capital markets on autopilot), casino finance (placing bets, extracting wealth and getting rid of ownership over and over again), and commodity networks (goods are traded based solely on price).¹⁵

In contrast, the design of a *generative* economy is one that creates beneficial rather than harmful outcomes—its tendency is to be socially fair and ecologically sustainable.¹⁶ It has living purpose (creating the conditions for life), rooted membership (ownership held in human hands), mission-controlled governance (control by those focused on a social mission), stakeholder finance (capital becomes a friend rather than master), and ethical networks (offer collective support for social and ecological norms).¹⁷ Its relationships are primarily horizontal rather than vertical.¹⁸ Though Kelly claims that her ideas “are nothing like a blueprint for the redesign of capitalism...which will take many minds,” they capture the foundation of the new democratic economy.¹⁹

II. Legal Issues and Opportunities for CED Lawyers in the New Democratic Economy

Lawyers play a critical role in aiding this “epic reinvention of our economic system.”²⁰ One of the most visionary leaders in the field today is Janelle Orsi, lawyer and co-founder of the Sustainable Economies Law Center in the Bay Area.²¹ She is the author of *Practicing Law in the Sharing Economy: Helping People Build Cooperatives, Social Enterprise, and Local Sustainable Economies*. Orsi points out that “[t]he relationships, transactions, and organizations of the new economy are sometimes so unique that they cannot be classified within existing legal frameworks.”²² The main reason being, she says, is that “our laws were designed to regulate relationships in a competitive economy, not a collaborative economy.”²³

Creating entities or practices in the new democratic economy requires thinking outside the box of existing legal frameworks. Orsi comments that many current laws developed in order to manage economic relationships that were becoming polarized or exploitative.²⁴ These include employer/employee, landlord/tenant, developer/homebuyer, business/investor, and producer/consumer relationships.²⁵ An economy based on collaboration blurs these distinctions. In a worker cooperative where a worker is also an owner, does an employer/employee relationship exist? In a housing cooperative where tenants own the building, does a landlord/tenant relationship exist? Orsi identifies and discusses in detail nine areas where lawyers can help people set up and operate in the new democratic economy: designing and drafting agreements; choosing, forming and structuring

entities; advising on the legalities and taxation of exchange; navigating securities regulation; navigating employment regulations; navigating regulations on production and commerce; managing relationships with and use of land; managing intellectual property; and managing risk.²⁶ I touch on two of these areas—entities and capital.

A. Creating Entities in the New Democratic Economy

Conventional organizations typically fall into one of three categories—commercial (businesses carrying on commercial activities), public and charitable (providing a benefit to the public), and mutual and cooperative (providing benefits to members and patrons).²⁷ Organizations in the new democratic economy challenge these conventional legal categories.²⁸ They share decision-making, information, capitalization, profits/benefits, equity, risk and work in ways that differ from the norm.²⁹ What otherwise might be routine matters for CED lawyers, such as helping a client with choosing a type of entity, working out tax issues, structuring their governance, operations and finances, creating new democratic entities especially requires careful consideration. As Orsi and Jenny Kassan, co-founder of the Sustainable Economies Law Center and CEO of Cutting Edge Capital succinctly put it, “[t]he choices we make in structuring organizations are critical; the architecture of organizations will, essentially, be the architecture of a new economy.”³⁰

To form organizations that have rooted membership and mission-controlled governance, we must think about entity options and mechanisms that embed these values within the entity. Kassan and Orsi discuss a few ways that one can adapt a traditional entity to meet the goals of rooted membership and mission-controlled governance such as giving super-majority voting stock to the founders, regardless of the number of shares they own; incorporating provisions into a company’s charter that make mission drift more difficult; and creating voting structures that give greater control to employees and directors over outside investors.³¹ The number of states adopting new legal entities such as the low-profit limited liability company (L3C) and the benefit corporation is growing. These entities attempt to capture the gray area between profit-driven businesses and charitable non-commercial organizations.³² While the L3C and the benefit corporation build in mission-controlled governance, they do not mandate democratic governance. Cooperatives, on the other hand, are a type of structure designed to institutionalize governance by the workers and/or members, with voting rights not tied to the amount of one’s investment but instead limited to one vote per person. Cooperatives take many different forms and commonly refer to the way an entity operates rather than its specific legal choice of entity. Not all states have cooperative corporation laws, and even in states that do have a cooperative statute, many cooperatives choose more conventional forms of entity structure but operate based on cooperative principles.³³

B. Accessing Capital in the New Democratic Economy

Economist and lawyer Michael Shuman argues that “America’s investment system is broken.”³⁴ He states that less than one percent of the \$30 trillion invested by households and nonprofits in stocks, bonds, mutual funds, pension funds, and life insurance funds, goes to small businesses.³⁵ Put another way, “[i]f Americans shifted just 1% of the \$30 trillion they hold in long-term investments to small businesses, it would amount to more than 10 times the venture capital invested in all of 2011.”³⁶ Because local businesses are more profitable than corporations, Shuman says, this investment gap represents a huge market failure.³⁷

Nearly all of the new democratic economy structures are rooted in communities in which their owners, workers and/or members live—they are primarily local in nature. Yet, Kassan asserts, “there is virtually no investment vehicle that allows you to invest in your own community.”³⁸ She states that this is largely due to securities laws that make it prohibitively expensive for small businesses to offer securities to members of the community and to create local investment funds open to the general public.³⁹ Due in large part to the initiative of Shuman, and the Sustainable Economies Law Center, the CROWDFUND Act (Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act), passed in April 2012, will allow organizations to raise capital from the public using an SEC-registered crowdfunding intermediary.⁴⁰ The Act will make it easier for businesses in the new democratic economy to raise capital within their communities.

Securities may not be an area that CED lawyers immediately identify as prevalent in their current practices. Nonetheless, helping clients access capital from a broad section of the community will require CED lawyers to become familiar with state and federal securities laws. Kassan outlines some basic inquiries—what is the definition of a security; when does securities law apply; what has to be done before offering a security; what are the consequences of failing to comply; is it possible to create a community investment fund open to local residents; what are models for creative capital raising.⁴¹

III. Conclusion

As CED lawyers, we often prioritize projects that will effect positive systemic change. The work of Kelly, Orsi, Kassan, Shuman and others help us think about how we can create new structures and processes for our clients and facilitate local investment in order to create a generative, democratic economy that benefits all. As the recently deceased mayor of Jackson, Mississippi, Chokwe Lumumba, an advocate for cooperatives, said, “[t]he economic fate of everybody is in the hands of everybody.... The role of solidarity economics is central because it is the economic transition from what is to what must be.”⁴²

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² MARJORIE KELLY, *OWNING OUR FUTURE: THE EMERGING OWNERSHIP REVOLUTION: JOURNEYS TO A GENERATIVE ECONOMY* 12 (2012).

³ See Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States*, 1 (Sept. 3, 2013), <http://elsa.berkeley.edu/~saez/saez-UStopincomes-2012.pdf>.

⁴ See GAR ALPEROVITZ, *WHAT THEN MUST WE DO? : STRAIGHT TALK ABOUT THE NEXT AMERICAN REVOLUTION: DEMOCRATIZING WEALTH AND BUILDING A COMMUNITY-SUSTAINING ECONOMY FROM THE GROUND UP* xiii (2013).

⁵ See Center for Popular Economics, *Economics for the 99%*, 9, <http://www.populareconomics.org/wp-content/uploads/2012/06/EconomicsForThe99pct2014.pdf>.

⁶ Mark Karlin, *Is There an Alternative for Capitalist Economics and Politics? Richard Wolff Says Yes*, (Jan. 8, 2013), <http://truth-out.org/progressivepicks/item/13759-is-there-an-alternative-for-capitalist-economics-and-politics-richard-wolff-says-yes> (quoting Richard D. Wolff).

⁷ See New York City Network of Worker Cooperatives, Public Hearing, <http://www.nycworker.coop/#public-hearing>.

⁸ My colleague Sushil Jacob, founder of the Green-Collar Communities Clinic at the East Bay Community Law Center, puts forth the term “new *democratic* economy” in a work in progress. He says that using the term “democratic” emphasizes that a main goal of this movement is to democratize businesses. Professors Richard D. Wolff and Gar Alperovitz use the term economic democracy and new economy.

⁹ JANELLE ORSI, *PRACTICING LAW IN THE SHARING ECONOMY* 2-3 (2012).

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- ¹⁰ See generally KELLY, *supra* note 2.
- ¹¹ See *id.* 4.
- ¹² See *id.* at 4.
- ¹³ See *id.* at 4, 14.
- ¹⁴ See *id.* at 11.
- ¹⁵ See *id.* at 14, 62.
- ¹⁶ See *id.* at 11.
- ¹⁷ See *id.* at 14.
- ¹⁸ See ORSI, *supra* note 9, at 14.
- ¹⁹ See KELLY, *supra* note 2, at 214.
- ²⁰ ORSI, *supra* note 9, at 1.
- ²¹ See www.theselc.org/staff.
- ²² ORSI, *supra* note 9, at 13.
- ²³ *Id.*
- ²⁴ See *id.*
- ²⁵ See *id.*
- ²⁶ See *id.* at 16-20.
- ²⁷ See Jenny Kassan & Janelle Orsi, *New Kinds of Organizations*, in ORSI, *supra* note 9, at 155.
- ²⁸ See *id.* at 156.
- ²⁹ See *id.* at 153-54.
- ³⁰ *Id.* at 152.
- ³¹ See *id.* at 169-72.
- ³² See *id.* at 175.
- ³³ These principles are: (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. See International Cooperative Alliance, *Co-operative Identity, Values and Principles*, <http://ica.coop/en/whats-co-op/co-operative-identity-values-principles>.
- ³⁴ MICHAEL SHUMAN, *LOCAL DOLLARS, LOCAL SENSE* xix (2012).
- ³⁵ See *id.* at xix-xx.
- ³⁶ Chance Barnett, *Will Crowdfunding for Businesses Succeed or Fail?*, *Forbes.com*, Jul. 26, 2012, <http://www.forbes.com/sites/chancebarnett/2012/07/26/will-crowdfunding-for-businesses-succeed-or-fail/> (quoting Amy Cortese).
- ³⁷ See SHUMAN, *supra* note 34, at xx.
- ³⁸ See Jenny Kassan, *New Kinds of Capital*, in ORSI, *supra* note 9, at 300.
- ³⁹ See *id.*
- ⁴⁰ See *id.* at 332.
- ⁴¹ See *id.* at 301-02.
- ⁴² <http://www.yesmagazine.org/commonomics/remembering-lumumba>