

Refocusing Food Regulation: Regulatory Roadblocks to Innovation and Entrepreneurship

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Abstract

In the past few decades, local food movements have gained a strong momentum. The potential of these movements to revive local economies and connect consumers with local food producers and farmers is immense. However, the highly industrialized food system has taken over the supply chain and has erected legislative barriers for small scale producers, making it difficult to take advantage of this burgeoning movement. While the cottage food laws have created a conducive environment for food microentrepreneurs, this paper shows that they do not go far enough to support the needs of consumers and stimulating local economies. This paper provides policy recommendations to create jobs, improve food safety, and evolve the food regulatory framework for small producers.

Problem Statement

All across the country, Americans are cooking food in their own kitchens and selling it in their communities. Specifically referred to as the “cottage food” industry, the sale of such foods primarily through farmers markets has risen exponentially in the past decade (AFDO, 2012). This increase has allowed micro entrepreneurs to earn an income and enter into the formal economy. While the cottage food laws, in states across the US, have provided the means for several home chefs to sell cottage food prepared in their kitchens; the food codes and laws across the US remain restrictive, overly complicated and excessively regulated, effectively hampering entrepreneurship and thus state economies.

In the past decade, a majority of states have adopted cottage food laws allowing small scale producers to sell “non potentially hazardous” foods like jams, jellies, cakes and cookies directly to consumers. In support of the “artisanal food revolution”, many states widely adopted bills for incentivizing artisanal chefs, allowing them to bypass regulations and ease the financial burden of investing in a commercial kitchen. The laws were meant to stimulate the local economy and at the same time provide communities access to local products. Despite the convenience, however, the laws require food entrepreneurs to “register with their respective county health departments, pay a fee, and attend food safety courses” (Camp, 2013) as well as cap the saleable amount, forcing their home based food businesses to stay as a side business or a hobby. The burdensome hygiene regulations, mostly designed for mass production, have essentially outlawed small-scale production methods. With an increased focus on stimulating local food economies through artisans, food laws (specifically cottage food laws) need to be broadened in order to allow the small scale food entrepreneurs to turn their home operations into viable businesses (Condra, 2013).

The food regulations vary from state to state and sometimes from county to county. They place restrictions on food preparation conditions, require significant investment in kitchen infrastructure and licensing, limit the type of foods that can be sold by restricting who and where food can be sold, and provide a blanket, “one-size fits all” regulation for food safety (Condra, 2013). The nature of such laws creates significant barriers to small-scale producers and discourages entrepreneurs, immigrants, low income food service workers, and practiced home cooks to enter into the formal economy. The post modern food system has created several barriers to entry for food microentrepreneurs to capitalize upon honed in skills, like home cooking, by actively denying access to resources like education and food safety training. The high barriers to entry like oligopolistic supply chains and closed markets have restricted the utilization of an important lever in economic empowerment. There is, thus, a need to have “scale-appropriate laws” (Condra, 2013) that provide a balance between maintaining food safety, and allowing food entrepreneurs to enter the food market while accommodating the way we want to eat today.

Background

Food is the most essential fabric of our social structure, and yet many Americans are disenfranchised and disassociated with how their food is produced and consumed. Consumers today are however becoming more and more interested in the who, what, where, and how of the food they are consuming. A growing criticism of the loss of connection between ourselves and the food we consume has led to the rise of various movements like organic production and more recently artisanal and local food movements (“locavores”). In fact, the organic food sales totaled around 47 billion dollars in 2016, accounting for more than five percent of total food sales in the US¹. This indicates a growing demand among consumers to understand food origins. Other examples include Community Supported Agriculture (CSAs), Farm-to-Table, Farm-to-Fork and Farm-to-School - all indicating an increased interest in local food. Organic and other such movements - which focus on “reconnecting people to their food supply and reinvigorating the values (and relationships) inherent in community through the production, purchase, and consumption of local food” (Delind, 2006, p. 123) - are not only a response to supporting sustainable agriculture and local farmers livelihoods but also a response to personal development through healthy eating and community building.

Beginning in the 1960s and continuing into the 1970s, the “counter-cuisine” movement supported the non industrialized, non conformist food system and is continuing to this day in some form or another. These movements are important not only because they provide several benefits to producers, consumers and local communities but it also stands up against the

¹ <https://ota.com/resources/organic-industry-survey>

industrial agriculture and the “Big Food” that has essentially taken over households. Indeed, the local food movement has been defined in several forms as “a purposeful effort by consumers to buy food products from farmers and producers in cities, regions, and states in which they live” (Johnson & Endres, 2011, p. 56) to make better food choices. The fundamental shift in food consumption from a “transactional model” of consuming food in the postmodern era to a “relationship model” of getting to know the farmer (as evidenced in the increase in farmers markets, CSAs, farm direct-to-consumer operations) has been a key success of local food movements against industrialized food (Johnson & Endres, 2011).

Cottage food laws began in support of such movements in order to allow the sale of low-risk, low production food items. These include foods with low acidity levels like fruits, jams, jellies, cookies, pickles etc. Unlicensed home kitchens can produce these foods without an inspection of their home kitchens and can sell them directly from their homes or in farmers’ markets (Forrager, 2017). Since these foods are exempt from licensure and food codes, they are limited to only low risk foods which excludes dairy, meats, eggs etc. that have a high risk of transporting food borne illnesses.

In the US, States, rather than the federal government, are responsible for their residents health and well being. Although the Food and Drug Administration establishes a food code on a federal level, local health departments have free reign in implementing and adapting it. This means that safety protocols can get overly complicated as they change from state to state. States can also decide the definition of “food establishments”², what foods can and cannot be made and sold from such establishments, and what foods can be cooked at home vs. in a certified commercial kitchen (Condra, 2013). Unfortunately, states have written laws and regulations in a way that presumes a large scale production of food and requires heavy capitalization which is in stark contrast to the means and needs of today’s food entrepreneurs. As Kennedy (2016) says it:

Expensive permits and licenses, routine inspections, industrial kitchen spaces complete with stainless steel surfaces, multi-basin sinks, and extensive record keeping are just a few of the burdens food producers face in the name of good health.

The regulations have severely hampered microentrepreneurs³ by making it prohibitively expensive to enter the market. This is especially unfortunate as most foods can be safely prepared on a small scale without the intervention of heavy handed regulations, written in response to rapid agricultural industrialization (Read, 2013). In fact, several critics have argued

² Food establishment means an operation that “stores, prepares, packages, serves, vends food directly to the consumer, or otherwise provides FOOD for human consumption such as a restaurant; satellite or catered feeding location”. See: <https://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM595140.pdf>

³ Defined here as someone who runs a very small enterprise with fewer than 5 employees with very little investment. Micro Entrepreneurs could be immigrants with an authentic recipe from their home country and would like to try it out in the kitchen and sell directly to consumers. They are food entrepreneurs who want to expand their hobby into a business venture.

that a more nuanced approach to food regulation will foster entrepreneurship, thereby stimulating local economies (Coit, 2008; Tarr, 2011; Johnson and Endres, 2011; McCabe, 2010).

Commercial Kitchens

Food incubators, also known as commercial kitchens, have sprung up rapidly and have grown over 50 percent between 2013 and 2016 (Wodka, 2016, p.2). They provide a good alternative to the burgeoning industry of food entrepreneurship. The rise of such establishments, which provide services from business development to food safety training to financing support (Stucker, 2017, p.1), are an indicator of increased demand of artisanal, small production, locally-grown and prepared food. More and more consumers today are looking towards high quality, healthy meals and the artisanal industry, which has seen a growth of over 15 percent in 2017 (SFA, 2017), has responded well to that demand.

Food incubators, accelerators, or commercial kitchens may have found a niche in the nexus of a growing artisanal food movement, culinary entrepreneurship and the idea of a ‘meal sharing’ economy. Despite that, the barriers to entry for culinary entrepreneurs still remain high. Surveys carried out by Gregory Heller in 2013 and Adam Wodka in 2016 showed that even though there has been a rise in the numbers of commercial kitchens, more than half (52 percent) are located in urban areas with a majority concentrated near major cities (Wodka, 2016, p.4). 61 percent of them are for-profit with only 12 percent focusing on strengthening the local food economy, 5 percent on helping low income communities, and only 5 percent focusing on building a community (Wodka, 2016, p.5). These kitchens also charge an average of \$21.50 per hour with several other built in fees, further raising the barrier for food entrepreneurs with a low starting resource pool. Commercial kitchens may be ideologically aligned with the objectives of the modern food movement to advance equity, sustainability and prosperity within the food sector, but they are still an extremely restrictive and expensive option for food entrepreneurs who are looking to increase their scale of operations in food production.

Retrofitting a kitchen, for producers who would like to do so, is also not a viable option. For example, in hearing for Cottage Food Laws in Michigan, it was estimated that “setting-up a commercial kitchen to produce jams and jellies for local sale can cost as much as \$30,000 - an amount that meets requirements for commercial sized ovens, compartmentalized sinks, plumbing, industrial appliances such as refrigerators, separated storage areas, water testing, handicapped accessibility, local health department inspections, and state licensure” (House Fiscal Agency, 2010, p. 2.). Not only are the costs exorbitant, but the enforcements required by the inspectors and regulators keep changing, making it difficult for entrepreneurs to invest (Laforge, Anderson, and McLachlan, 2017). Moreover, the inspection creates a hostile surveillance culture exasperated by the fear of an inspector showing up unannounced, complaint from a neighbor, or an inspector disguising as a potential customer (Serna, 2016). Most small scale producers and

farmers, thus, prefer to stay under the radar, instead of asking for clarifications on confusing and overly complicated regulations, for the fear of attracting attention to themselves. They remain in a conundrum of taking on business risks, to attract more customers, and at the same time avoiding the hostile regulatory environment (Laforge, Anderson, and McLachlan, 2017). Small-scale food entrepreneurs, hence, have very limited choices which include grassroots movements to fight back against the regulations or opt out of the regulatory processes and operate underground.

Shadow Economy

A burgeoning local food movement has given rise to a wave of culinary entrepreneurs and has made food one of the most important tools for economic development and job creation. Local consumers today are not only demanding for more sustainable options and food choices but are also looking for different avenues to obtain it. Evident from the growth of farmers markets, which have risen from 1,775 in 1994 to over 7,500 in 2015 (Morath, 2016, p. xix) as well as the rise of artisanal products and movements like “farm to fork”, consumers have a growing interest in knowing where their food has come from and who produced it.

As mentioned above, the regulations, have not kept up with the rise of such movements. Owing to the stringent laws, outfitting a home kitchen to comply with them could cost approximately \$40,000 to \$80,000 (Tribune Wire Reports, 2016). Renting a space out of a commercial kitchen, as described above, can be expensive and can cost upwards of \$1,000 a month (Tribune Wire Reports, 2016). Added onto the expenses of fixed infrastructure is insurance and health department inspections which could together exceed \$100,000 in up front investment, making it difficult for small food producers and entrepreneurs to enter the market (Mazurek, 2012). Furthermore, current cottage food laws place a cap on allowable sales⁴, further restricting the prospects of home chefs to turn their hobby into a viable business or a platform for launching a traditional food business. These high costs and barriers have left many home cooks with no choice but to enter an informal, underground food economy.

The advent of Facebook and other social media apps have allowed several home chefs to take to online platforms where regulations are lax, easing the cost of doing business. In fact, the same survey that Adam Wodka carried out in 2016 also showed that prepared meals, in kitchen incubators, had risen from 48 percent to 64 percent from 2013 to 2016, with 75 percent of them selling the prepared meals online (Wodka, 2016). Although the cottage food laws have allowed home food producers to sell food items labelled as “non potentially hazardous”, such as jams, jellies, cakes, dry fruits, honey, pickles or other foods with a pH level of 4.6 or below; these food items are not nearly enough to either supplement an income or provide a food entrepreneur a base to start their own commercial enterprises. Moreover, most laws and regulations are put in

⁴ <http://www.mda.state.mn.us/cottagefood> (Max. allowable sales is \$18,000 yearly)

place to avoid food borne illnesses and health scares (see case studies in British Columbia)⁵ but do not take cultural, social and economic consequences into consideration. These laws severely impede the local food sustainability efforts, especially in rural and remote communities (Miewald, Hodgson, Ostry, 2013) and the cost of regulations, which cannot easily be passed on to consumers, make already vulnerable livelihoods even more tenuous. So, even though the introduction of cottage food laws in several states over the past decade has reduced the number of entrants into the informal economy, the restrictions on the sale of kind of foods and the cap on the saleable amount has left several home chefs looking for alternatives.

For example, in 2011, bread businesses in the San Francisco bay area were on the rise (Brown, 2011; Read, 2013). Operating without licenses and permits, several of the bread bakers were cracked down upon by the local health departments and forced to shut down their businesses. Opening up their business again would mean taking on an exorbitant cost and operating from a commercial kitchen. Similarly, a burgeoning underground market in San Francisco which Brown (2011) referred to as “civil disobedience on a paper plate” (p. A16) arose as part of a desire to taste local, made-on-the-spot food. The Forage SF market provided a central location for several small scale vendors who were all selling homemade products but were sidestepping the legal requirements (and saving at least \$1000 by doing so) (Brown, 2011). The market eventually shut down due to food handling violation and lack of food source identification (Read, 2013). Although such empirical evidence exists to describe the extent of the underground economy, the under reporting of such evidence is what makes it difficult to quantify the economic impact.

Food Jurisdictions

As the popularity of cottage food laws and farmers markets have increased, many foods that previously could only be bought through “formal” outlets are now available through more “informal” outlets like farmers markets. In a study done by Bellemare et al. (2017) established that even though there has been an increase in the farmers markets, there is “no a priori reason to believe there is any systematic relationship between farmers markets and food-borne illness, and even if there is such a relationship, it is not a priori obvious whether it should be positive or negative” (p. 3). Nonetheless, the increase in the number of products sold from home kitchens has led to the adoption of different safety standards, regulations, training and the type of permit required. These changes have keenly intertwined food consumption with local and federal law, which has made it difficult for small scale producers to navigate the space. In fact, the federal food safety system is so highly complex, that the US General Accounting Office in 2004 published a report criticizing the government’s highly fragmented food safety system:

⁵ Tracing the unintended consequences of food safety regulations for community food security and sustainability: small-scale meat processing in British Columbia (<https://doi.org/10.1080/13549839.2013.840567>)

“[the federal food system] has emerged piecemeal, over many decades, typically in response to particular health threats or economic crises. The result is fragmented legal and organizational structure that gives responsibility for specific food commodities to different agencies and provides them with significantly different authorities and responsibilities.” (US General Accounting Office, 2004, p. 1)

This fragmented, outdated, labyrinthine, duplicative and complex food safety system, unfortunately applies to everyone including small scale producers who must first find a way to wade through the system and then overcome the regulatory hurdles before they can respond to the local food demands of consumers.

As food production became a critical part of the US economy, numerous food regulations were written and passed to accommodate the needs of big agribusinesses. Indeed, the Commerce Clause frames food production “for interstate and national markets, and not necessarily the local community and family” (McCabe, 2010, p. 158), thereby diminishing the role that ordinary citizens can play in shaping food policy. The multi regulatory agencies and jurisdiction silos among agriculture, environment and health departments have made it not only harder to wade through the complexities of a system designed mostly to protect the national economy (through big agri industries) over the interests of small players (Johnson & Endres, 2011) but has also severely impeded the ability to assess the unintended consequences of wide policies on production as well as consumption patterns. The local food movement and system, thus, has a very uneasy existence within a larger food production system.

Food Safety

Food safety and food borne illnesses have always troubled American consumers. The first study of food and water borne illnesses carried out by A.H. Hauschild and Frank L Bryan in 1980 revealed an estimated 1.4 to 3.4 million cases of food and waterborne illnesses occurred in the US every year (Thayer, 1999). This was followed by several other studies including FDA’s study in 1993 that claimed “foodborne diseases cause approximately 76 million illnesses, 325,000 hospitalizations, and 5,000 deaths in the United States each year” (Mead et al., 1999, p. 607). This is a large number considering that the restaurant industry is heavily regulated and inspections, at least according to the policies, are supposed to be carried out on a regular basis. The FDA study and several others since then have dramatically revised their numbers to be much lower, however, it remains difficult to estimate the exact number as food borne illnesses are usually under reported and under diagnosed.

While foodborne illnesses are preventable, 3000 people die and more than 56,000 people (CDC, 2017) become ill from it annually (these numbers are contested and can vary from study to

study), leading to heavy economic costs and a loss of productivity (Byrd-Bredbenner, 2013). Despite the high outbreaks, traceback mechanisms for identifying the exact cause of the outbreak are very weak. To gain a better control over the system, the FDA, over the past several decades, has introduced a slew of federal regulations: Federal Food, Drug, and Cosmetic Act (FFDCA)⁶, the Egg Products Inspection Act (EPIA)⁷, the Federal Meat Inspection Act (FMIA)⁸ and the Food Code to name just a few. The Food Code, more specifically, provided the federal government broad jurisdiction authority over food including “restaurants, food vendors, automatic vending machines, and retail food stores in the United States” (as quoted in Johnson & Endres, 2011, p. 74). Although the federal government now shares the enforcement abilities with the state and local governments, it has mostly kept the Food Code as a standardized top down model of food regulations (Johnson & Endres, 2011).

The code, adopted by 48 of 56 US State and territories, is changed every four years (FDA, 2017), and is equally applied to big food agribusinesses as well as small food producers. Some of the regulations defined in the code are very cumbersome and can be difficult to comprehend and implement. For example, food establishments are defined in several ways⁹ with several restrictions on who the food can be sold to¹⁰; food prepared at home cannot be directly sold to the consumers¹¹; all foods (except raw foods and unprocessed agricultural commodities) must originate from a licensed facility¹²; all facilities must have extensive retrofitting for handwashing sinks, lighting equipment, flooring etc.¹³ Furthermore, the Food Code includes a Hazard Analysis and Critical Control Points (HACCP) guide which is 300-400 page booklet outlining a model for food safety management system (Bryan, 1990), which, even though set as voluntary, needs to be followed by even small food establishments as a proactive measure to ensure food served is safe. These are extensive measures that place huge burdens on small scale producers who are vying to make simpler foods to cater to local demands.

⁶ This act prevents misbranded and adulterated foods to enter the market: See <https://www.fda.gov/RegulatoryInformation/Guidances/ucm071379.htm>

⁷ This act allows USDA to inspect eggs and egg products to establish uniformity: See <https://www.fsis.usda.gov/wps/portal/fsis/topics/rulemaking/egg-products-inspection-act/EPIA>

⁸ This act allows USDA to inspect meat production facilities for interstate commerce: See <https://www.fsis.usda.gov/wps/portal/fsis/topics/rulemaking/federal-meat-inspection-act>

⁹ Food establishment means an operation that “stores, prepares, packages, serves, vends food directly to the consumer, or otherwise provides FOOD for human consumption such as a restaurant; satellite or catered feeding location”. See: <https://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM595140.pdf>

¹⁰ “relinquishes possession of FOOD to a CONSUMER directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers”. See: <https://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM595140.pdf>

¹¹ Refer to 3-201.11 Compliance with Food Law of the Food Code

¹² Refer to 8-301.11.1 Prerequisite for Operation

¹³ Refer to 6-4 of the Food Code.

In 2011, the Food Safety Modernization Act¹⁴ was passed mostly on the scare that food outbreaks happened due to lack of government regulation¹⁵. The final regulation, which was largely agreed upon by highly influential associations and groups in the food industry, was “to establish a uniform set of standards that would employ a so-called scientific, risk-based approach to regulation” (Hassanein, 2011, p. 578). Furthermore, it was argued that regulations should “apply to all food producers regardless of their scale of production and regardless of their geographic scope of distribution” (Ibid.). However, small scale producers, farmers and processors under the Make Our Food Safe Coalition rejected this idea and pushed for scale appropriate regulations under the “Tester Amendment”¹⁶, supported by Senator Jon Tester of Montana. This amendment backed the idea that pathogens and microbes tended to spread more with scale; implying that large scale production facilities were at a much higher risk than small scale operations (Koenig, 2011). Furthermore, proponents of the amendment brought up the existing unjustified regulatory burdens and the high costs for abiding by them as a way to push out small scale producers and risk further consolidation of the food industry. As one proponent pointed out:

Large industrial operations that threaten public health as a matter of course must be regulated robustly, but not in a way that wipes out smaller players and consolidates the food industry still more...Without the Tester amendment, S. 510 could end up only slightly reining in the ruinous practices of large players while clobbering these alternative food networks (Grist, 2010, para 7).

Laws promoting mass production have thus come to dictate food standards, where sterility and uniformity has become the norm and has essentially pushed out much of local food trade.

The health scare, however, has led to a greater neoliberalization of food safety policies where public health professionals and governments implement strict sanitary procedures by appealing to the logic of technology and science, whether or not those procedures actually make the food safer (Laforge, Anderson, and McLachlan, 2017). In a survey carried out by LaForge, Anderson and McLachlan (2017), 70 percent of farmers identified food safety regulations as a strict barrier to widening the local food movement. The regulations were also viewed as the biggest impediment for innovation in local food systems, were impractical and unaffordable, complex and hard to understand, took up valuable time to implement, and had a one-size-fits-all approach that placed small scale producers at a further disadvantage.

¹⁴ For details and summary of the bill, see <https://www.congress.gov/bill/111th-congress/senate-bill/510/text>

¹⁵ Salmonella outbreak in egg operations in an Iowa farm led to 1500 reported illnesses. 550 million eggs were recalled from 22 states causing a huge public outcry. See more at: https://www.nytimes.com/2010/08/25/business/25eggs.html?ref=contamination_and_recall

¹⁶ For details and summary of the bill, see <http://tester.senate.gov/Legislation/index.cfm>

These laws have taken an even more stringent stance when applied on the state level. Each state has its own food regulation policy and leaves the discretion of sanitation and enforcement on local health departments (Tarr, 2011). State laws and regulations could differ from county to county and sometimes from city to city to ensure that health standards are being met and diseases are being consequently suppressed. In general, vague regulations and inconsistent binding guidance leaves a lot of room for local health inspectors to interpret the law differently. Most inspectors end up following a “one-size-fits-all” approach instead of individualizing the inspections, creating inconsistent directives that can lead to frustrating results across borders. The resulting web of regulations and the variable health inspections make it extremely challenging to sell produce in farmers’ markets, creating extreme inefficiencies in the business models of these small producers.

Criteria Selection, Trade offs and Projected Outcomes

The following policy alternatives stand out in terms of their potential impact on small scale food producers, consumer demand, and food safety regulations. The alternatives are listed on the left while impediment criteria (blue) and outcome criteria (green) are on top:

	Cost	Administrative Complexity	Political Feasibility	Food Safety	Small Business/Microenterprise Development
Education Programmes, Training and Inspector Interactions	Low	High	Low	Medium	High
Scale Appropriate Laws	Medium	Low	Low-Medium	High	Medium
Encouraging and Incentivizing Craft Industry	High	Medium	Medium	Not Applicable	High

Policy Alternatives

Education Programmes, Training and Inspector Interactions

Small scale producers and food entrepreneurs can benefit greatly from education and training that is directed towards reducing the barriers for entering the market. Small scale food entrepreneurs have limited knowledge about rules and regulations that surround their businesses (Johnson & Endres, 2011). Instead of emphasizing wide adoption of universal practices, trainings and programs can be tailored to consider the size and scale of operations. A guide that consolidates state level rules and regulations and provides extension services like webinar presentations can prove to be very effective. Furthermore, a new small scale “food processor” training curriculum could be developed and made available and constant feedback on such a curriculum should be gathered to further improve it. Surveying the regulated community to identify areas of confusion and their needs could also provide invaluable insight. Outreach efforts such as these can focus on business development as well as legal education about the regulatory environment specific to each state and locality. Furthermore, local field research, can provide insight into any further barriers and develop recommendations that prioritize consumer health and safety while addressing the needs of small producers. The development of these resources will require significant investments and follow up from government agencies which will lead to higher administrative costs. This effort could begin with questioning assumptions about food safety issues and how to best address them with the local tools at hand.

Beyond the outreach and education efforts, it is important to note that laws and regulations are not enforced consistently (Johnson & Endres, 2011). Health inspectors usually exercise what Buckley (2013) describes as “interpretive flexibility”. In fact, studies of some regulative enforcement suggests that “outcomes are the products of discretion and interpretive flexibility that inspectors exercise, interactions between inspectors and regulated parties, and the experiences that each brings to inspection situations” (Buckley, 2013, p. 71). While enforcement of regulations is fairly understudied, it can be safely assumed that the state and local laws leave a lot of room for inspector discretion. For example, in Illinois, the Department of Health has left up to the health inspectors to decide when to implement the regulations as well as carrying out “sanitary investigations and inspections as [they] deem necessary for the preservation and improvement of the public health” (as qtd. in Tarr, 2011, p. 46). The disconnect between discretion of health inspectors, the actual policies laid down by state and local authorities, and compliance enforcement leaves small scale food entrepreneurs unclear about the existence of certain rules and places them in a legal limbo. Thus, it is essential to train inspectors and use

what Hutter (1989) calls the “accommodative” approach where inspectors explain to regulated parties, in this case small scale food entrepreneurs, on why regulations are being enforced and several ways to become compliant.

The role of inspectors in imparting education to create a more business friendly environment has also been underestimated. Inspectors can be imparted training to better understand the jobs of small food processors and build a rapport with them so they can work collaboratively towards food safety compliance. Inspectors can be trained to understand the needs of small food processors, the equipment they use, the space they work in, and other characteristics that are unique to small scale facilities. This would allow inspectors to explain regulations that are more dependent upon the context thus making it less burdensome and more purposeful for the food entrepreneur to comply with.

Scale Appropriate Laws

A 2017 report released by Ottawa based ETC Group highlighted that the industrial food chain uses 75 percent of the world’s resources to feed 30 percent of the population (ETC, 2017). In contrast, small scale producers¹⁷ (or as the report calls them “peasant food web”) feed 70 percent of the population with 25 percent of the world’s resources. It goes on to say that for every \$1 that the consumer pays into the Big Industry, society pays another \$2 for health and environmental damages (ETC, 2017). Large industries have taken over the food chain and the presumption that they feed the entire population remains unchallenged. The political clout of the Big Industry leads the government to apply rules and regulations to favor large producers at the expense of small scale producers and the local food movement.

Several studies have pointed out the burdensome nature of regulations on small scale producers (Kaplowitz & Ten Eyck, 2006; Laforge, Anderson, and McLachlan, 2017), indicating that they dampen the artisanal trend; standardize production methods; are costly investments and favor large scale producers; are unnecessary as small scale operations are inherently safer with shorter supply chains and closer producer-consumer relations (Buckley, 2013). Scale is essential in risk assessment and very few studies have been done in relation to it. Increasing exemptions for small scale producers will open up doors for increased scrutiny over the relationship between locally sourced food, the scale of food operations and food safety. Thus, regulations should be put in place based on science and not hysteria and so further studies that carry out scientific based risk analysis to study the direct proportionality of food safety with scale of operation are needed.

¹⁷ Defined by the report as “small-scale producers, usually family- or women-led, that include farmers, livestock-keepers, pastoralists, hunters, gatherers, fishers and urban and peri-urban producers” (p. 8). See further at http://www.etcgroup.org/sites/www.etcgroup.org/files/files/etc-whowillfeedus-english-webshare.pdf_.pdf

It is essential to note here that this alternative is not advocating for reduced regulations. Even though food regulations can be stifling for many small scale food entrepreneurs, there are several advantages to strictly following these regulations as well, which mostly relate to consumer perception. For example, a small business can increase its sales by complying with all food regulations, thus assuring customers of the safe preparation and assuaging any concerns. Complying by the regulations can also prevent any competitors who may be cutting corners by ignoring food safety, obtaining a lower price, and ultimately selling less safer food in the eyes of the consumer. And finally, if the business runs into a food safety problem, following all the regulations may save it from legal liability or a public image problem (Kaplowitz & Ten Eyck, 2006). However, it is also important to note that decentralized local food systems dissipate the food safety risks such that even the worst case scenarios tend to have a very small impact (Katz, 2006). So, while the current stringent regulations are essential to control the event of contamination with food produced and processed at large scale, the same do not and should not apply to small scale producers.

So, this policy option focuses on the scale appropriateness of the food laws that exist today and their impact on small scale producers and their local economies. The current food standards are inflexible and do not adapt as easily to local producers conditions. In general, there is a lack of support for small scale production and a complex web of regulations, that is often expensive to implement and is often targeted towards big businesses, adds further impediments. The onus of food safety and foodborne illnesses is usually left with the producer but policy makers rarely scrutinize the framework and the lens through which they are developing safety standards. Yes, sanitation and safety is important but expensive facilities do not guarantee it. Needless to say, there is a pressing need for the government to reacquaint itself with the needs of small scale businesses. While education and training programmes as well as reducing some of the economic barriers mentioned above is most certainly a step in the right direction, it is not nearly enough to create a robust ecosystem that allows these producers, processors and microentrepreneurs to survive.

This policy option advocates following the lines of cottage food laws, that allow home processors certain exemptions. The Food Safety Modernization Act passed in 2011 has allowed small scale farmers and producers certain exemptions when production falls within sale and market limits. The further expansion of these laws to allow concrete changes like maneuvering of recipes; allowing self certification; easing on zoning laws; a sliding scale for licensing fees; in some cases, fee waivers; discounted kitchen spaces; and providing training to efficiently manage the potential dangers of higher risk foods, especially when they are being produced on a small scale, can severely reduce the barriers for entry. Some of these exemptions are already in place in California which allow, for example, zoning law changes so cottage food operations can operate

legally¹⁸. Capping the gross annual sales to \$50,000¹⁹ (as implemented in California²⁰) and the number of employees to less than 5 could allow the operation to remain on a “cottage” scale. Alternatively, it also provides an option for micro food entrepreneurs to grow a small business with lower start up costs. These restrictions would ensure that the regulations specifically target small scale, home based businesses and do not encourage a loophole in food safety regulations.

In 2012, the Department of Public Health in California had estimated \$200,000²¹ for statewide response to food borne illnesses through cottage and small scale food operations. However, anecdotal data from states where cottage laws have existed for many years may provide the necessary evidence for low occurrence and lower costs. For example, Pennsylvania’s Department of Agriculture’s Home Food Processing Program provides exemptions similar to the one proposed here and has had no reported outbreaks of tainted products from cottage food kitchens in the past 40 years (Read, 2013). Moreover, producers are inclined to self regulate as they are sufficiently motivated by market incentives and competition and realize the consequences of selling tainted products. Legislators should thus allow some latitude in regulations to adjust to the changing conditions in the food industry²². As Tarr (2011) expresses: “the design and implementation of rules and regulations should be precisely calibrated to avoid over-regulation that unduly burdens the consumers who want to buy directly from local producers and those food entrepreneurs who want to sell to them” (p. 68).

Encouraging and Incentivizing the Craft Industry

The craft brewing²³ industry is one of the most innovative in America. They are blending tradition with regional tastes and are providing consumers with some of the best beers, all while fitting into an outmoded regulatory framework. Approximately 6,266 craft breweries operated in 2017 (the highest total number at least since the 1880s), and in that same year the craft brewing industry grew 15.5 percent (Brewers Association). The craft beer industry has continued to grow by 5 percent while the rest of the beer volume was down by 1 percent (Brewers Association). As most of the industry in the food chain is consolidating, the craft beer industry is following an opposite trend. Between 2008 and 2016, the number of craft beer establishments have increased by a factor of six, and the number of brewery workers have increased by 120 percent

¹⁸ For further information, refer to Matthew Read, "Chapter 415: Big Help for Small Businesses," *McGeorge Law Review* 44, no. 3 (2013): 694-702

¹⁹ Some states have limited the sales to \$5000. See http://d3n8a8pro7vhmx.cloudfront.net/these/c/legacy_url/300/Summary-of-Cottage-Food-Laws-in-the-US-31.pdf?1392426351

²⁰ See Health & Safety Code 113758(a)

²¹ Assembly Appropriations Committee. Committee Analysis of AB 1616 (May 3, 2012)

²² The Tester-Haeger Amendment to FSMA accounts for the industry shift

²³ A craft brewery is defined as “traditional, small, and independent in nature: it must primarily brew with traditional ingredients using traditional techniques, must produce less than six million barrels of beer per year, and must not be more than twenty-five percent owned or controlled by a non-craft brewery” (Hawkins, 2015, p. 314).

(Thompson, 2018). The microbrewery industry now employs nearly 70,000, a figure that is three times what it was ten years ago (Thompson, 2018). The big monopolies in this business have seen their sales fall down by 14 percent and the small microbreweries have seen it increase by a larger share. The craft brewing industry thus holds a tremendous potential to stimulate the local economy much like local food entrepreneurs.

The tremendous boost to this small craft industry has in part been due to legislators embracing the burgeoning industry and recognizing the need to not only respond to current consumer preferences but also to the potential of the industry to stimulate local economies. Thus, several states, in the past few years, have passed laws that tremendously favor the small craft breweries. For example, Virginia passed House Joint Resolution No. 522 and after the revision of the law in 2012, breweries in Virginia were allowed to sell beer for on-site consumption which led to a 75 percent growth in the number of breweries and a \$623 million economic impact on the local economy (Gibson, 2014). The bill not only stimulated the economy by bringing jobs to rural parts of Virginia but also allowed for an increased tax revenue, tourism and preservation of farmland. Similarly, in January 2013 New York adopted a Farm Brewery License²⁴ which led to a 100 percent increase in the number of microbreweries in New York State and also allowed the agriculture sector to flourish (New York State, 2013). More recently in December 2017, the craft brewing industry passed the Craft Beverage Modernization and Tax Reform Act which helps reduce the federal excise tax to “\$3.50/barrel (from \$7/barrel) on the first 60,000 barrels for domestic brewers producing less than 2 million barrels annually” (Brewers Association, para 2). Furthermore, the law increases the federal excise tax to \$18 a barrel once the production limits increases from 60,000 - the same tax rate that a large brewer pays. This has essentially allowed small businesses to remain operational while spurring job creation and incentivizing continued growth of the brewing industry. Such targeted and tailored tax incentives, when applied to small food producers, could reduce barriers and allow entrepreneurs to turn their hobbies into profitable businesses.

Similar to other food entrepreneurs, craft brewers are small in size, driven by innovation, and devoted to methods as well as recipes steeped in century old traditions (Acitelli, 2013). In the case of microbreweries, the three tier licensing system²⁵ adopted by several states to sell beers and other alcohols provides states with a lot more control over what is sold, when it is sold, and who can buy it. Self distribution laws²⁶ have also allowed breweries to have direct control over their product sales and anecdotal evidence suggests that self distribution helps craft brewers to

²⁴ Under the law, farm brewers must source 20 percent of their hops and barley from within the state for five years, then 60 percent and eventually 90 percent within 20 years (New York State, 2013)

²⁵ The three tier licensing system requires manufacturers, retailers and wholesalers to be distinct entities which creates an unassailable buffer between producers and retailers by requiring independent wholesalers - making wholesalers very weak in this arrangement

²⁶ Hugely controversial, these laws allow breweries to open “tap rooms” for direct sale of alcohol to consumers.

promote growth by allowing unknown entrants to enter into the industry (Tamayo, 2010). Unfortunately, such laws do not exist for small scale food entrepreneurs, even though it has been shown that local farmers markets have played an immense role in stimulating local economies²⁷ (Johnson & Endres, 2011). A taxation system has been put in place that recognizes the different tiers in the brewing industry and thus allows for more targeted regulations - potentially allowing the smallest producers to gain the most. Such laws can be adopted for microentrepreneurs, where self distribution and selling directly to consumers can be encouraged and incentivized for entrepreneurs either operating from their homes or other food establishments.

As more and more consumers care about variety and quality over price, to apply the same successes of the craft industry to the rest of the small scale food industry does not seem to be a far outreach. For example, modeling the recent Craft Beverage Modernization and Tax Reform Act, in the context of small scale food production, would achieve job creation and modernize outdated regulations for craft food producers. Individual states can also take the initiative to modernize their own food codes and policies and embrace self distribution laws (similar to direct farm businesses) which allow direct sales to consumers as is done through “taprooms” in the case of microbreweries. Such changes and removal of arbitrary barriers (like one size fits all infrastructure requirements to attain food safety) can also lead to an increase in state revenue through tax collection as new businesses will be created and most of the underground food operations will have a chance to become legal. It is important to note that the tax laws would demand for additional resources to enforce the new regulations, adding burden on the enforcement agency. However, by providing such incentives to both the local food producers and states, we can achieve a balance between food safety as well as consumer demands.

Policy Recommendation

Several states, including Massachusetts, have already passed some version of the cottage food laws which allows micro food entrepreneurs to sell non potentially hazardous foods directly from their residential kitchens. Massachusetts in particular has adopted a version of FDA’s 1999 Model Food Code which allows food (as long as it is “low risk”) to be sold directly from Farmers Markets or through an online platform with no sale limits (Forrager, 2017). Nearly all states have adopted cottage food laws indicating that there is a will to encourage and support food entrepreneurs. Even the FDA in 2011 decided to pass the Food Safety Modernization Act - a major regulatory overhaul in 70 years - indicating the willingness to make changes in our current food system. I recommend that activists and advocates should harness this momentum to

²⁷ For example, researchers found that each dollar spent at farmers' markets in Iowa generated 58 cents in induced' 89 and indirect' 90 income in the surrounding community, and that each full-time equivalent job created by a farmers' market supported almost half (multiplier of 1.45) of a full-time equivalent job in other sectors of the economy (Johnson & Endres, 2011, p. 98).

continue working on changing and supporting policies that ensure safe food, respond to consumer preferences, create jobs to stimulate local economies, support public health and encourage legislators to engage in what Stephen Vogel calls as “market craft”²⁸. Ensuring the safety of the food we eat while increasing competition in the market, is an inherently political task and thus government involvement is imperative.

Specifically, then, I recommend a policy to maximize social and economic benefit for small scale food entrepreneurs through scale proportionate laws. This policy will apply to individual states and keep food safety and public health consistent with the existing food system. Furthermore, it will leverage the unique legal powers of the state and local governments through passage of laws that can be designed to incentivize innovation, improve food safety and encourage the craft food industry.

This combined recommendation stresses upon not only providing a more conducive environment for innovation but also utilizing concrete measures like providing tax incentives to the smallest food entrepreneurs so they can start and grow their businesses; introducing the concept of special licensing to benefit both the entrepreneur and the local economy; and allowing policy innovation and experimentation to maintain food safety. These measures will not only promote the culture and spirit of the local food movement but will also allow food entrepreneurs to expand and grow; resulting in increased sales, greater employment opportunities, invigorating local economies and thus boosting the revenue flowing back to the state.

This policy is aiming for a shift in how the government views the small scale industry today. With the exception of a few industries (namely microbreweries, speciality coffee and cheesemaking), FDA and other regulatory agencies view the food industry with a “one-size-fits-all” regulatory lens. Supporting and encouraging exceptions such as Virginia’s House Joint Resolution No. 522 mentioned above will allow for direct sale of food to consumers (such as, through online platforms, as in the case of Massachusetts), providing a chance for small food entrepreneurs to turn their hobbies into viable businesses. Modeling the Craft Beverage Modernization and Tax Reform Act, as detailed above, would recognize the needs, requirements and operational capabilities of the small scale food producers by targeting tax incentives to their scale of operation. Furthermore, incentivizing local food producers to trade with each other would stimulate the local communities as well as ensure that the scale of operations remains small throughout the supply chain, leading to a cohesive and local food safety framework. While drafting the policy, however, lawmakers must decide who will be exempt from what and where.

²⁸ An idea that governments needs to be involved more not less in crafting a market and that competition in markets is generated with more competition and not less. See more at <https://economicsociology.org/2018/03/11/marketcraft-as-the-new-statecraft/>

This will further clarify the benefits and boundaries to which small scale food entrepreneurs can abide by, allowing them to contribute positively to their local community and economy.

Recognizing the needs of smaller businesses and making the effort to improve upon necessary areas would be a step away from standardization and a step towards recognizing consumer tastes and preferences to shorten the supply chain. The local food movement has shown that food transactions in the modern society are “also about community, identity, pleasure, and, most notably, about carving out a new social and economic space removed from the influence of big corporations on the one side and government on the other” (as qtd in Johnson & Endres, 2011, p. 56). The policy recommendation provided here would ensure that the consumers involved in making conscious decisions about how and why they eat particular foods are heard. If incremental changes to the existing laws is pursued, then the costs associated with creating such an environment would be low. This recommendation would require state legislature support and therefore investment in lobbying and political capital will be high. However, the policy will balance out the costs due to increased economic activity, increased revenue back to the state, increased entrepreneurial activity, better food safety due to increased number of small food producers, and keeping the local food movement alive.

Conclusion

As more and more consumers are supporting their local food movements, it is essential to ensure that small food businesses survive and thrive. This requires a balancing of the needs of small scale producers with the needs of consumers, all within the context of protecting the social fabric of society and the environment. Our regulations should strive to promote and accommodate the emerging changes in the local food movement and in people’s tastes. The transition will be especially challenging given the long history of centralized control over food systems and the underlying politics and policies; it nonetheless is essential to not treat the entire food industry with broad strokes of the law. The regulatory framework, designed for large conglomerates and big businesses, is preventing small food entrepreneurs and microenterprises from entering into the market and thereby stifling growth of the local and national economy. It will, however, be imperative that policymakers find a fine balance between consumer safety and openness to smaller food businesses. Laws, like the Food Safety Modernization Act, despite certain provisions, can prove to be overly burdensome for small players. On the other hand, policy innovation and experimentation on the state level can provide a framework for national policymakers to work within the centralized regulatory system to accommodate smaller businesses while maintaining consumer safety. Effective and balanced solutions that discourage monopolization and instead allow competition to thrive should be promoted. New innovations will continue to disrupt the food industry and the industry’s true potential cannot be reached without certain, commonsense changes to the regulatory environment. Without these legislative

changes, the world will miss out on a movement that has the potential to change the entire fabric of our society.

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