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### How Do You Formalize a Tamale?: How to Ease Street Vendors' Transition out of the Shadow Economy

Elizabeth Kregor

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#### Recommended Citation

Elizabeth Kregor, "How Do You Formalize a Tamale?: How to Ease Street Vendors' Transition out of the Shadow Economy," 7 UC Irvine Law Review 453 (2017).

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# How Do You Formalize a Tamale?: How to Ease Street Vendors’ Transition out of the Shadow Economy

Elizabeth Kregor\*

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When a city outlaws the most affordable way to earn a living selling food, it builds inequity into the local food economy. It holds back people who could sell healthy, affordable, innovative, or culturally significant food, but who don’t have the budgets to finance brick-and-mortar businesses. It holds back people who could create jobs or start businesses that become pillars of the community. It forces small-budget entrepreneurs to choose between selling against the law at great risk or giving up on entrepreneurship because it is unaffordable.

By removing excessive regulatory barriers to start a pushcart food business, reformers expand economic liberty for people. We free them to bring culture, cuisine, and commerce to the street corner. We narrow the gap between the shadow economy and the formal economy. We allow vendors the dignity of so-called legitimacy.

Or do we?

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Legalizing an activity is not always freeing it. Legalizing food businesses involves regulating them. The new laws may make business harder for vendors than it was in the days without legal options. Lawyers and activists who advocate for legalization must take care to do more good than harm.

This Essay presents a case study of a campaign to legalize pushcart food vendors in Chicago in order to explore the interaction of law reform and the shadow economy. In this Essay, I will introduce the need for expanding economic liberty and the challenges of crafting helpful legal reform to structure that liberty when regulating rather than deregulating. I will share lessons learned about how to close the gap between the informal economy and the formal economy. I will tackle the question of how legal advocates for informal entrepreneurs can help, rather than hurt, their cause. How can we structure our laws to optimize liberty for new food producers?

In writing this Essay, I aspire to follow closely in the footsteps of Jane Larson's essay *Informality, Illegality, and Inequality*.<sup>1</sup> Larson described the areas known as "colonias," the unregulated settlements outside of Texas cities near the Mexico border, where people buy land and build homes with the materials and skills they can acquire, and where homes are neither required to comply with a building code nor connected to basic physical infrastructure, like water, sewage, and roads.<sup>2</sup> Larson used the colonias as a case study to explain the deep conundrum of the informal economy and to propose an approach to legal reform that might be both workable for the residents of the colonias and compatible with the lawyerly demand for the rule of law.<sup>3</sup> Her work did not go so far as to test the practicality of lobbying and legislating her proposed reforms into action.<sup>4</sup> In this Essay, I will offer a corrective based on the case study of the vendors in Chicago and the experiences of passing laws through the legislature with the blessing of the Department of Public Health.

While discussing the "informal economy" or "shadow economy," I will apply the definition provided so succinctly by John Cross: "Informal economic activity comprises those economic strategies that contravene laws regulating *how* business should be conducted, but not laws specifying *what* business may be conducted."<sup>5</sup> In doing so, I am tracking most scholarship in law and urban planning, but take a distinct approach from the highly influential sociological study of the underground economy in Chicago, *Off the Books* by Sudhir Alladi Venkatesh.<sup>6</sup> Venkatesh declined to demarcate licit and illicit activities in his in-depth investigation of inner-city

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1. Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137 (2002).

2. *Id.* at 140.

3. *Id.* at 144.

4. *Id.* at 182.

5. JOHN C. CROSS, INFORMAL POLITICS: STREET VENDORS AND THE STATE IN MEXICO CITY 29–30 (1998).

6. SUDHIR ALLADI VENKATESH, OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR (2006).

economics.<sup>7</sup> Since I am not primarily focused on the relationships among the people in these businesses, but their relationships to the law itself, I will make the distinction. My task here is to study the merits and techniques behind legalization, which will likely be different when legalizing a *bow* than when legalizing a *what*.

Like Larson's, this Essay will struggle with the basic conundrum for American lawyers trying to think about the shadow economy. Our fundamental belief that everyone should be treated equally under the law is tough to reconcile with our belief that poor people should not be punished for meeting their basic needs in an honorable but noncompliant way. Institutionalizing a system where the law does not apply to all, or accepting laws that are broader than we mean to implement, impairs the rule of law. For activists and public interest lawyers taking on the task of writing the law, these questions take on an urgency. In this Essay, I hope to give my fellow activists some inspiration for how to proceed into the conundrum.

In Part I, I will provide background on a campaign to legalize vendors in Chicago. The campaign was successful in getting a reformed ordinance passed, but vendors have not taken advantage of the new license in the first year. In Part II, I explore the several reasons why it is important to push to legalize vending. In Part III, I look to the other side and examine the arguments against pushing for legal regulation of an occupation in the shadow economy. Lastly, in Part IV, I introduce strategies aimed at maximizing the benefits of legalization while minimizing the costs.

### I. SIDEWALK VENDORS IN CHICAGO

Until recently, almost all food carts were illegal in Chicago. A vendor could get a license to be a peddler selling whole, uncooked fruits and vegetables on the go; a produce merchant selling whole, uncooked fruits and vegetables from a temporary stand (as long as half the business operations were in an area underserved by grocery stores); or a mobile frozen desserts vendor selling packaged frozen desserts from a nonmotorized vehicle.<sup>8</sup> Since it is illegal to operate a business in Chicago without a license,<sup>9</sup> the absence of a license category made all other food carts illegal.<sup>10</sup>

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7. *Id.* at 11.

8. CHI., ILL., MUN. CODE §§ 4-8-010, 7-38-130, 7-38-140 (1990) (amended Sept. 24, 2015), [https://chicago.legistar.com/LegislationDetail.aspx?ID=2321146&GUID=14EB1A4A-849A-4502-B254-E9D19E6EADF0&Options=Advanced&Search=\[https://perma.cc/6JML-5X7S\]](https://chicago.legistar.com/LegislationDetail.aspx?ID=2321146&GUID=14EB1A4A-849A-4502-B254-E9D19E6EADF0&Options=Advanced&Search=[https://perma.cc/6JML-5X7S]) (concerning mobile vendors).

9. CHI., ILL., MUN. CODE §§ 4-4-010, -020 (1990).

10. Please note that the focus of this Essay is on the legal status of nonmotorized food carts, such as old-fashioned pushcarts or bicycle trailers. Food trucks are governed by different laws in Chicago and have followed their own twisted history. Trucks can be licensed and operate legally, but there are significant restrictions on them. They are not allowed to stay in place more than two hours, and they are not allowed to park within 200 feet of a business selling food unless they are at one of a few specially designated parking spots for food trucks. CHI., ILL., MUN. CODE § 7-38-115 (1990). The Institute for Justice is presently suing the City of Chicago due to the protectionist and unconstitutional proximity restriction. Leonor Vivanco, *Food Fight*, CHI. TRIB., Nov. 15, 2012, 2012 WL 24307804.

Chicago was one of the only major cities in the country that banned all food carts selling prepared foods on the sidewalks.<sup>11</sup>

Notably, food carts are legal on land owned by the Chicago Park District. The Park District in Chicago has its own independent governing body.<sup>12</sup> It has privatized concessions in the parks and beaches, and the private company approves vendors of many kinds to operate in the parks (in exchange for a fee and a cut of the revenues).<sup>13</sup> So a vendor might be perfectly acceptable at the edge of a park, but not on the sidewalk that borders the park.

Nonetheless, there has been an extensive industry of food carts operating in Chicago.<sup>14</sup> The numbers are uncertain but significant. While food vendors are often studied by scholars investigating the shadow economy because they are so visible and so exposed to penalties, they are notoriously difficult to count.<sup>15</sup> They work varied hours and varied days, depending on their customer demand and the demands of other obligations.<sup>16</sup> They move. They are not registered because there is no registry for them. (For all these same reasons, vendors are hard to organize for grassroots activism.) Vendors and reporters have estimated 1500 to 2000, but the methodology of reaching that number is unclear.<sup>17</sup>

Chicago's vendors are predominantly Mexican immigrants.<sup>18</sup> They sell traditional Mexican street food, like tamales, *elotes*, *chicharron*, and cut fruit dressed in lime juice and chili pepper. They are easy to find in Chicago's neighborhoods with significant Mexican populations. They are most dense in the neighborhood of Little Village, especially along Twenty-sixth Street.<sup>19</sup> Twenty-sixth Street offers a literal and figurative taste of Mexico, and the Mayor has lauded the business strip

11. ERIN NORMAN ET AL., INST. FOR JUSTICE, STREETS OF DREAMS: HOW CITIES CAN CREATE ECONOMIC OPPORTUNITY BY KNOCKING DOWN PROTECTIONIST BARRIERS TO STREET VENDING 23 (2011).

12. *Concession Program*, CHI. PARK DISTRICT, <http://www.chicagoparkdistrict.com/doing-business/concession-program/> [https://perma.cc/CK8Q-ZCM8] (last visited Oct. 2, 2016).

13. *Id.*

14. See Robin Peterson, *Taking It to the Streets*, IN THESE TIMES (Sept. 23, 2009), [http://inthesetimes.com/article/4911/taking\\_it\\_to\\_the\\_streets](http://inthesetimes.com/article/4911/taking_it_to_the_streets) [https://perma.cc/KL9A-ZGHZ]; Aixa Velez & Araceli Pedroza, *Chicago's Latino Street Vendors Look for Justice*, GAPERS BLOCK (Mar. 19, 2010), [http://gapersblock.com/drivethru/2010/03/19/chicagos\\_latino\\_street\\_vendors\\_look\\_for\\_justice/](http://gapersblock.com/drivethru/2010/03/19/chicagos_latino_street_vendors_look_for_justice/) [https://perma.cc/LTT2-3HGS].

15. Larson, *supra* note 1, at 158 ("No one can say with certainty how many people work, buy, and find shelter within the informal economy in this country.")

16. See NORMAN ET AL., *supra* note 11, at 9; Mike Sula, *The Great Tamale Migration*, CHI. READER, Sept. 19, 2013, 2013 WL 34248736.

17. See, e.g., Hal Dardick, *Chicago a Step Closer to Licensing Food Carts, and Some Vendors Happy*, CHI. TRIB. (Sept. 16, 2015), <http://www.chicagotribune.com/news/local/politics/ct-chicago-food-carts-met-20150916-story.html> [https://perma.cc/NF3C-XHWE].

18. Michael Lucci & Hilary Gowins, *Chicago's Food-cart Ban Costs Revenue, Jobs, Special Report*, ILL. POL'Y INST. (Aug. 2015), [https://files.illinoispolicy.org/wp-content/uploads/2015/08/Foodcart\\_Paper1.pdf](https://files.illinoispolicy.org/wp-content/uploads/2015/08/Foodcart_Paper1.pdf) [https://perma.cc/BUX9-73TY].

19. Fran Spielman, *The "2nd Mag Mile"?*, CHI. SUN TIMES, Mar. 16, 2012, 2012 WL 5644145.

as the second-highest grossing in sales tax revenues, after the tony Magnificent Mile.<sup>20</sup>

Not all vendors operating in Chicago's shadow economy are Mexican immigrants,<sup>21</sup> and there are certainly many African American vendors who set up tables and carts selling food, including a man who has acquired a bit of fame for selling Mississippi Delta tamales.<sup>22</sup> I am less familiar with their story and their experiences. They have not been historically organized as activists for vending rights in Chicago, and they were not a part of our legalization campaign in the end.

The Institute for Justice Clinic on Entrepreneurship and I got involved in a campaign to legalize Chicago's sidewalk vendors in 2011.<sup>23</sup> The initial strategy was to ride the wave of food truck popularity, but Chicago passed tough, expensive, and restrictive laws for food trucks in 2012.<sup>24</sup> The Street Vendors Justice Coalition (SVJC) came together to push Chicago to be friendlier to vendors. The founding members were the IJ Clinic on Entrepreneurship (legal advocates for economic liberty), AVA (a vendors association), and representatives from community organizations in Little Village.<sup>25</sup> The Coalition aimed to change the law and also to develop the community resources and infrastructure that would allow vendors to comply with likely regulatory requirements.<sup>26</sup>

SVJC pursued an incremental approach to reform. Because tamale vendors were receiving the most pointed penalties from local police, even arrests, we focused on relief for them. We drafted amendments to the code that expanded an existing license (changing language that allowed vendors to sell packaged frozen desserts that were prepared in a licensed facility to language that allowed vendors to sell packaged food that was prepared in a licensed facility), thinking that would be easier to pass. Our strategy was reinforced by policy officials who told us that the Health Department would not support an ordinance that allowed food preparation—even slicing fruit—on the carts. We planned that the next phase of reform would allow vendors to prepare food on their carts.

It took several years to put the fire out for the *tamalleros*. We waged a multifaceted campaign, with outreach (or attempts at outreach) to vendors across the city; public relations yielding favorable editorials in major papers and repeated coverage in Spanish-language media;<sup>27</sup> and a petition signed by thousands and sent to City Council in a barrage of emails. We worked steadily with policymakers in the

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20. *Id.*; Ronald Brownstein, *Why the Time is Finally Right for "Amnesty,"* THE ATLANTIC (Apr. 18, 2013), <http://www.theatlantic.com/politics/archive/2013/04/why-the-time-is-finally-right-for-amnesty/439218/> [<https://perma.cc/J2R4-4NK4>].

21. VENKATESH, *supra* note 6, at 119–20.

22. Sula, *supra* note 16.

23. *See* Press Release, Inst. for Justice (Aug. 17, 2011).

24. *See* Vivanco, *supra* note 10.

25. *See Our Coalition*, STREET VENDORS JUSTICE COALITION, <https://streetvendorsjustice.org/our-coalition/> [<https://perma.cc/B5B6-EGXE>] (last visited Sept. 16, 2016).

26. *See id.*

27. *See News*, STREET VENDORS JUSTICE COALITION, <https://streetvendorsjustice.org/coalitionnews/> [<https://perma.cc/YKQ3-E8ZA>] (last visited Sept. 16, 2016).

Department of Health, pressing the argument that vendors could help ease food deserts. We marshaled the city's many strategic plans related to culture, pedestrian life, healthy food, and immigration, as evidence that legalizing vending fit into the city's vision for itself.<sup>28</sup> We introduced data that demonstrated sidewalk vendors are not an extraordinary health risk<sup>29</sup> and that they are a potential source of significant tax revenue.<sup>30</sup>

The SVJC ordinance was introduced in City Council in May of 2014, but it did not get a hearing.<sup>31</sup> We were informed by the ordinance's sponsor that some City Council members refused to handle the issue in an election year. It seemed as though aldermen did not want to take a public stand on the issue of legalizing vendors when voters and donors were most attentive. The ordinance was reintroduced in May of 2015 and passed in September.<sup>32</sup> In the end, no opponents spoke out, and the vote was unanimous.<sup>33</sup> Vendors rallied and celebrated in City Hall.

In the months after the ordinance was passed, many vendors have grown anxious and discouraged about the law. The law does not allow food preparation on the cart, and *eloteros* and *fruteros* do not know how to or whether to change the way they have always sold their food. Some vendors cannot comply, because they do not have access to affordable, nearby licensed kitchens. Others are scared that the law will be enforced against license holders in unpredictable ways. Some have tried and failed to take the sanitation manager test, which the city has said is required for any vendor using a shared kitchen.<sup>34</sup> Others had trouble pulling together the money for the licenses required for cart and kitchen use, which amounted to nearly \$1000.<sup>35</sup> In the first months after the law went into effect, no licenses were issued.<sup>36</sup> A year later, five licenses had been issued, none to the members of AVA, the vendors association in Little Village that led the campaign to create the license.<sup>37</sup> Two years later, there was more hope but still few licenses. The vendors association

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28. See STREET VENDORS JUSTICE COALITION, *supra* note 25.

29. ANGELA ERICKSON, INST. FOR JUSTICE, STREET EATS, SAFE EATS: HOW FOOD TRUCKS AND CARTS STACK UP TO RESTAURANTS ON SANITATION 11 (2014).

30. Lucci & Gowins, *supra* note 18.

31. CITY OF CHI., OFFICE OF THE CITY CLERK: LEGIS. DETAILS (May 20, 2015), <https://chicago.legistar.com/LegislationDetail.aspx?ID=1804150&GUID=203DE101-08DC-4A0D-A286-ECBF17509F8F> [https://perma.cc/5SLE-5K7H].

32. CITY OF CHI., OFFICE OF THE CITY CLERK: LEGIS. DETAILS (Sept. 24, 2015), <https://chicago.legistar.com/LegislationDetail.aspx?ID=2321146&GUID=14EB1A4A-849A-4502-B254-E9D19E6EADF0> [https://perma.cc/7JZ9-6DD6].

33. *Id.*

34. CHI., ILL., MUN. CODE 4-8-036(a)(2) (1990).

35. CHI., ILL., MUN. CODE 4-5-010(15) (1990) (amended Dec. 14, 2016).

36. *Chicago Data Portal: Business Licenses*, CITY OF CHI., <https://data.cityofchicago.org/Community-Economic-Development/Business-Licenses-Current-Active/uupf-x98q> [https://perma.cc/62DB-XYTC] (using the "Business Activity" filter with the following language: "Sales of Previously Prepared Food That is Enclosed or Wrapped in Individual Portions From a Mobile Food Vehicle").

37. *Id.*

rented a space to build out as their own shared kitchen, which takes capital and expertise that they do not have, and City Council lowered the total licensing fees for a cart and a shared kitchen user license to one hundred dollars.<sup>38</sup>

## II. REASONS TO CAMPAIGN FOR LEGALIZATION OR WHY NOT LEAVE WELL ENOUGH ALONE?

An activist's or reformer's first question must necessarily be, "What is the problem that I will invest resources to solve?" Before attempting to intervene in the delicate equilibrium (such as it is) of the shadow economy, one should explore whether it is a needed and important intervention. In this Part, I will explore reasons to intervene in the system that leaves sidewalk vendors in the shadows of the economy, without a license or any way to get on the books.

### A. *Dignity and Desire*

The most fundamental reason for me to campaign for legalization was the fact that vendors asked me to. The leaders of a vendors association, centered in the neighborhood of Little Village where many vendors operate, contacted me to tell me about their plight and ask for my assistance. Many vendors in Little Village had received tickets for selling without a license; they had appeared in administrative hearings and received varying fines. They had been told that there was no license for them to obtain. More poignant still, several tamale vendors had been arrested. I heard the story of a woman who was arrested for selling her homemade tamales from a table in front of her home. When her teenager asked why the officer was arresting her, the fifteen-year-old was arrested too.

The stories of arrested tamale vendors are revealing. In an interview captured on film, Claudia Perez tells how police officers gestured dismissively toward the food she made by hand before the sun rose and said, "Throw away all this . . . garbage." "How can you call food 'garbage?'" she asks and adds, "I cried hard."<sup>39</sup> The treatment of her hard work was demeaning and hurtful. The insult to her food is an insult to her skills, her cleanliness, and her labor. Echoing Perez's narrative, a vendor in Los Angeles said that the police "pick us up and move us, just like bits of trash."<sup>40</sup> The penalties for their hard work are an indignity.

The gruff enforcement described only compounds the indignity of the illegality itself. Outlawing the sale of food from carts denies people's freedom to

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38. CHI., ILL., MUN. CODE §§ 4-5-010, 4-8-041 (amended Dec. 14, 2016) (provided in CITY OF CHI., OFFICE OF THE CITY CLERK: LEGIS. DETAILS 16 (Feb. 24, 2017), <https://chicago.legistar.com/LegislationDetail.aspx?ID=2908291&GUID=1E650B27-A1C7-4EC5-8BB6-A20EC5BCFF8A&Options=Advanced&Search=> [https://perma.cc/PZ5D-QHYX]).

39. Ill. Pol'y Inst., *Una Mujer y Su Carrito*, YOUTUBE (Feb. 13, 2015), <https://www.youtube.com/watch?v=bajmdHt-Dyc> [https://perma.cc/7HRK-B6LK].

40. Gregg W. Kettles, *Legal Responses to Sidewalk Vending: The Case of Los Angeles, California*, in STREET ENTREPRENEURS: PEOPLE, PLACE AND POLITICS IN LOCAL AND GLOBAL PERSPECTIVE 58, 73 (John Cross & Alfonso Morales eds., 2007) [hereinafter STREET ENTREPRENEURS] (citations omitted).

choose how to earn a living using their talents and their time. Freedom to earn a living is fundamental to human dignity and autonomy and is a key component of the pursuit of happiness.<sup>41</sup> Telling people that their livelihood is illegitimate runs the risk of conveying to them that they are illegitimate.<sup>42</sup> The message is even harsher when that livelihood is tied to a cultural identity that is particularly dear to immigrants serving food from home in the fashion of home.

The expressive force of the proscription sends a message that poor people without enough money to buy a food truck or set up a restaurant cannot serve wholesome or desirable food. No matter how careful and clean they are, they cannot get a license without a motor or a building. (Indeed, dozens of vendors in the association had taken a food handling class and passed the test, but they were still not allowed to sell the food they made from carts.) Their businesses are rejected under the guise of a public health rule, without any actual screening or regard for the safety of their businesses, leaving the vendors to believe the city assumes the vendors themselves are impossibly unclean.

### B. Discrimination and Discretion

Chicago allows food carts to operate in the park district, in summer festivals, and in farmers markets, as well as food trucks to operate on the street, which suggests that the businesses can be acceptably safe. There is a puzzling double standard that allows the carts so many places but not on sidewalks. It is natural to question whether the discrimination against carts on the sidewalk is pretextual.

In this respect, the ban on food carts on the sidewalks of Chicago is reminiscent of the San Francisco ordinance in *Yick Wo*.<sup>43</sup> In that case, the city passed an ordinance stating that laundries needed special permission to operate, unless they operated in buildings made of brick or stone.<sup>44</sup> The commissioners could reject an application for any reason or for no reason, and there were no grounds to challenge or question their decision.<sup>45</sup> The distinction between brick and wooden laundries was classist and not particularly tied to fire safety. The commissioners granted permits for wooden laundries to white applicants and not to Chinese applicants.<sup>46</sup>

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41. See AMARTYA SEN, DEVELOPMENT AS FREEDOM 6 (1999); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 250 (1980); Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1089–90 (2013) (comparing economic liberty and occupational choice to the liberty interests protected in *Lawrence v. Texas*).

42. In contrast, community members urge cities to legalize vending to “recognize the value” of street food and its contributions to the culture. Mark Vallianatos et al., *Bringing People to Good Food and Good Food to People: Enhancing Food Access Through Transportation and Land Use Policies*, UEP FACULTY & UEPI STAFF SCHOLARSHIP, Mar. 2011, at 14.

43. *Yick Wo v. Hopkins*, 118 U.S. 356, 357 (1886).

44. *Id.*

45. *Id.* at 366.

46. *Id.* at 361.

The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital.<sup>47</sup>

A law that disallows the more affordable business structure, like the food cart, may well be discriminatory against those with small budgets, especially the immigrants and the historically poor. Historically, vendors have often been immigrants and have often been restricted and marginalized by the government.<sup>48</sup> Outlawing vendors can be a way to favor the established residents and keep the immigrants and the poor out of sight. Indeed, the two major U.S. cities that have maintained bans on traditional sidewalk food vendors in recent decades, Los Angeles and Chicago, are the two cities with the greatest Mexican populations.<sup>49</sup>

In *Yick Wo*, the Court held that it was unacceptable that the livelihoods of laundry operators in San Francisco could be decided arbitrarily by officials, saying that the laundry operators were “tenants at will, under the supervisors, of their means of living.”<sup>50</sup> The Court further stated:

[T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.<sup>51</sup>

Unlike the launderers in *Yick Wo*, vendors in Chicago could not apply for licenses hoping that the officials’ discretion would bend their way. Yet, their fates are similarly in the control of an unguided official. In a situation where there is a sizable industry operating in the open in the shadow economy, and a law outlaws the industry but is only occasionally enforced, there is a de facto grant of extreme discretion to the police, which is troubling for the same reasons raised in *Yick Wo*. The ban on food carts is so broad, in the context of a big city where many food

47. *Id.* at 362.

48. *See, e.g.*, FARLEY ELLIOT, LOS ANGELES STREET FOOD: A HISTORY FROM TAMALEROS TO TACO TRUCKS 19–24 (2015); ANDREW F. SMITH, FOOD AND DRINK IN AMERICAN HISTORY 871 (2013).

49. Tanvi Misra, *Why Chicago Is Still the No. 2 U.S. City for Mexican Immigrants*, CITYLAB (Oct. 9, 2014), <http://www.citylab.com/housing/2014/10/why-chicago-is-still-the-2-us-city-for-mexican-immigrants/381304/> [https://perma.cc/RE55-K46E]; *see* Dennis Romero, *Street Vendors Generate Half a Billion Dollars for L.A.’s Economy, Report Says*, L.A. WEEKLY (June 25, 2015), <http://www.laweekly.com/news/street-vendors-generate-half-a-billion-dollars-for-las-economy-report-says-5727233> [https://perma.cc/2EA3-DQR3].

50. *Yick Wo*, 118 U.S. at 368.

51. *Id.* at 370. The Court has not maintained the position in *Yick Wo* that the freedom to earn a living free of arbitrary or discriminatory restrictions is a fundamental liberty interest. Rather, it has deferred to legislatures and applied only the rational basis test. *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955). Yet, the work that we do is fundamentally tied to our human dignity, as well as our autonomy and identity. BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 250 (1980); Raynor, *supra* note 41, at 1089–90 (comparing economic liberty and occupational choice to the liberty interests protected in *Lawrence v. Texas*).

carts do operate, that it gives law enforcement the power to act arbitrarily and discriminatorily.<sup>52</sup> The authority of the police to jail some people for trying to earn a living and to destroy their businesses, not because their individual business practices fail to comply with health and safety standards, but rather because the law is so broad that police can arrest any vendor on a whim, is the kind of unfettered discretion that defies an old-fashioned notion of the rule of law.

It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbors; and, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being brought under cover of such a power, for that becomes apparent to everyone who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.<sup>53</sup>

In fact, in Chicago's neighborhood of Little Village, one police district commander and one officer did target street vendors, especially tamale vendors, while vendors in other districts operated without tickets or trouble.<sup>54</sup> The power of a police officer to act out of enmity or prejudice was absolute. And that power could drive vendors out of their livelihoods. Though vendors in many neighborhoods operated without reproach, the story of Little Village demonstrated that they were all vulnerable to a change in leadership or law enforcement strategy.<sup>55</sup> Without the law to protect them, they were at the mercy of discretion. Legalizing sidewalk vending was a strategy to restore the rule of law and allow vendors who met health requirements to ply their trade, regardless of the prejudices or vendettas of the local

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52. KATHLEEN STAUDT, FREE TRADE? INFORMAL ECONOMIES AT THE U.S.–MEXICO BORDER 152 (1998) (describing how police enforced vending ordinances against Latino people only); cf. William J. Stuntz, *Terry and Substantive Law*, 72 ST. JOHN'S L. REV. 1362, 1365 (2012) (describing how enforcement of drug laws leaves room for the police's broad discretion and, as a result, discrimination).

53. *Yick Wo*, 118 U.S. at 373 (quoting *City of Baltimore v. Radecke*, 49 Md. 217 (1878)).

54. Vendors told me that the officer who consistently ticketed or questioned vendors in Little Village even ticketed a tamale vendor who was sitting in a Dunkin' Donuts drinking a cup of coffee. Cf. John C. Cross & Marina Karides, *Capitalism, Modernity, and the "Appropriate" Use of Space*, in STREET ENTREPRENEURS, *supra* note 40, at 19, 20 (describing police officer's varied responses to street vendors).

55. See Ginny Browne et al., "Keep Your Wheels On": *Mediating Informality in the Food Cart Industry*, in THE INFORMAL AMERICAN CITY: BEYOND TACO TRUCKS AND DAY LABOR 257–58 (Vinit Mukhija & Anastasia Loukaitou-Sideris eds., 2014) ("Portland's vendors have benefited also from a supportive public and a tolerant approach to enforcement. However, these soft forms of regulation, not codified in law, are subject to change with the whims of the public and administrators, and could easily shift to constrain rather than support food carts.").

police officer. Legalizing sidewalk vending was a strategy to protect the fundamental liberty to earn a living under the same rules that apply to others in the industry.

The street vendors association operating in Little Village had tried to negotiate with the police, and the police in the district did agree not to ticket *frutereros*, but the police would not grant amnesty to the *tamalleros*. Vendors wanted to change the law so that they could get a license.<sup>56</sup> They wanted the dignity and security and equality that a license would represent.<sup>57</sup> And I tried to help achieve that goal.

### C. Economic Development Interests

Legalizing sidewalk vending, so that vendors who met health and safety requirements could obtain licenses to operate, had potential for significant economic benefits for individuals, neighborhoods, and the city, as well as protections for vendors' liberty interests.

Entrepreneurs in the shadow economy stay small. As John Cross points out, drawing heavily from Hernando de Soto, shadow entrepreneurs must weigh the costs of evading law enforcement against the costs of penalties if they are caught.<sup>58</sup> In our example, vendors in Little Village would regularly shut down their stands and lose business during the morning hours when the police officer who targeted them was on the beat. But they took the risk of operating in the open during other hours and sometimes received tickets with \$50 to \$500 fines (plus a day of lost earnings during the appearance at a hearing) or, as mentioned above, even arrests. Sometimes, law enforcement forces shadow entrepreneurs to move away from locations that are best for business.<sup>59</sup> They cannot risk investing heavily in the business.<sup>60</sup> Indeed, in a survey of vendors in Chicago that asked about the biggest impediment to their businesses, 45% answered legality and 36% answered law-enforcement harassment.<sup>61</sup> Seventy-nine percent said they would expand their businesses if they were legal.<sup>62</sup> Growing businesses would create jobs, circulate money in the local economy, and generate tax revenues.<sup>63</sup>

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56. In a survey of vendors in Los Angeles, 50% of vendors said they would pay up to \$100 for a permit if one were available; 16% said they would pay for a permit "no matter its cost"; only 4% said they would not pay for a permit. Vallianatos et al., *supra* note 42, at 11.

57. Vallianatos, *A More Delicious City: How to Legalize Street Food*, in *THE INFORMAL AMERICAN CITY*, *supra* note 55, at 218 ("The desire for a permit by most surveyed vendors is notable. Allowing vendors to transition to legal sales would help relieve them of the stress of facing inspectors, confiscation of their vehicles, and fines.").

58. CROSS, *supra* note 5, at 32–34.

59. Lucci & Gowins, *supra* note 18, at 11; see also Hannah Palmer Egan, *The Illegal Underground Economy Behind Churros*, *THE VILLAGE VOICE* (July 20, 2013), <http://www.villagevoice.com/restaurants/the-illegal-underground-economy-behind-churros-6438892> [https://perma.cc/D9C4-EXSF] (describing multiple arrests of churro vendors in New York).

60. CROSS, *supra* note 5, at 34.

61. Lucci & Gowins, *supra* note 18, at 10.

62. *Id.* at 12.

63. *Id.*; Browne et al., *supra* note 55, at 248–49 (describing how the Portland government's interpretation of the law to allow food carts has made it possible for vending "to be a successful economic development tool, providing jobs and entrepreneurial opportunities to those with limited

In addition, permitting vendors to flourish would encourage many other public goods. It would open the opportunity for small businesses to sell groceries and wholesome prepared meals at affordable prices in neighborhoods that have few large-scale grocery stores.<sup>64</sup>

Legal sidewalk vending can also improve the vitality and walkability of cities by giving people a reason to walk and be outside. Increasing the number of people on city sidewalks can also make neighborhoods safer by ensuring more eyes on the street, and may have a positive spillover effect on local stores as more people are out strolling and shopping.<sup>65</sup>

Legalizing an affordable business model would allow for more diversity among entrepreneurs and would create more consumer choice. “Street and mobile food also reflect the region’s cultural diversity and have become an increasingly popular way for residents of all backgrounds to sample diverse cuisines and to experience a vibrant street scene.”<sup>66</sup> In particular, entrepreneurs who would not operate illegally might join the industry after legalization and start promising new businesses.<sup>67</sup> Vendors operating in the shadow economy are often people who are not able to find other acceptable work, often due to discrimination: poor people, immigrants, women, and people of color.<sup>68</sup> For want of alternatives, they may be willing to accept the constraints and indignities of operating against the law. But if the city legalized the business model, other creative entrepreneurs might view it as an opportunity to start a small business that reaches urban customers face to face and conducts very affordable market research for new recipes or a new concept.

For one example, an entrepreneur named Sara Travis had a business plan for a vending business in Chicago.<sup>69</sup> She had commissioned designers to construct a bicycle trailer equipped with kegs from which a vendor could dispense iced coffee or iced tea.<sup>70</sup> She planned to have a fleet of the bicycles selling throughout the city.<sup>71</sup> Because the city had no license or body of regulations for the business, and because there was no assurance that the investment in growing the business in Chicago would be secure, the entrepreneur moved her business to Austin, Texas.<sup>72</sup> If Chicago had adopted a license structure for nonmotorized vendors quickly, the

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resources”); cf. Nicholas R. Johnson & A. Bryan Endres, *Small Producers, Big Hurdles: Barriers Facing Producers of “Local Foods,”* 33 HAMLIN J. PUB. L. & POL’Y 49, 98 (2011) (describing the economic benefits of food sales in farmers markets).

64. Vallianatos, *supra* note 57, at 218.

65. *Id.*

66. Vallianatos et al., *supra* note 42, at 21.

67. Cross & Karides, *supra* note 54, at 30.

68. Manuel Castells & Alejandro Portes, *World Underneath: The Origins, Dynamics, and Effects of the Informal Economy*, in *THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES* 26 (Alejandro Portes et al. eds., 1989); Larson, *supra* note 1, at 141.

69. *Entrepreneur: Sara Travis’ Brew Hub, Interview by Bill Moller with Sara Travis*, WGN RADIO (Aug. 31, 2013), <http://wgnradio.com/2013/08/31/entrepreneur-sara-travis-the-brew-hub/> [<https://perma.cc/5NGB-J8BF>].

70. *Id.*

71. *Id.*

72. *Id.*

Brew Hub might have created jobs and revenues and a spark of innovation in the city. It might have even been a major corporate citizen someday.

Opening a city to entrepreneurs with plans for mobile food without a motor makes economic sense. It allows more people to give business a try. It allows people to test the market with their recipes and services. It allows people to spend and earn money locally. It allows a few businesses to start small and eventually grow big. Our campaign to legalize food carts was a campaign to build the entrepreneurial ecosystem in Chicago.

### III. CHALLENGES AND RISKS OF LEGALIZATION STRATEGY

A campaign to legalize street vendors is tortuously fraught. Unlike a campaign to deregulate an occupation or industry so entrepreneurs have more flexibility and freedom to operate or innovate, a legalization campaign is in essence a campaign to regulate. There is no practical hope that the government will grant legal amnesty to unregulated preparation and service of food, even if they decline to enforce the laws against street vendors for the most part. Activists advocating for legalization must be sensitive to the possible negative effects that the regulation might have (and where it might make no difference at all) for the lives of vendors in the shadow economy.

If the rule of law requires that all businesses meet the same standards of health precautions and equipment specifications, and that the law be enforced equally against all people, the rule of law is awfully tough on poor and marginalized people.<sup>73</sup> It may not in the end provide them with dignity and legitimacy but rather taunt them with unattainable standards. Meanwhile, the amnesty that they might desire would legalize substandard, dangerous businesses. This is what Larson calls the conundrum of informality.<sup>74</sup> “[U]nder conditions of economic inequality, do ambitious and absolute regulatory standards advance or frustrate social justice?”<sup>75</sup> And she points out that American lawyers are ill-equipped to deal with the confounding problem.<sup>76</sup>

Regulation imposes a cost on all businesses, but the cost can be unbearable for microbusinesses or individuals operating without strong networks or resources.<sup>77</sup> Indeed, the costs of compliance are often the reasons that businesses operate in the shadow economy in the first place. Building up a set of regulations will not, on its own, allow entrepreneurs to move out of the shadow economy into the formal economy. “[U]nless the legislation can be implemented, it is doing no

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73. Larson, *supra* note 1, at 144 (“To hold to formal equality in economic regulatory standards and enforcement will harshly burden those already hardest pressed to survive the new economic order.”).

74. *Id.* at 143.

75. *Id.*

76. *Id.* at 159.

77. Richard Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103 YALE L.J. 2157, 2165 (1994).

more than encouraging civil disobedience.<sup>778</sup> And it might destroy some informal businesses if they tried to convert.<sup>79</sup>

Health and safety regulations for food businesses are particularly complicated and costly, and they are difficult to eliminate.<sup>80</sup> At the barest minimum, Chicago would require food to be prepared in an inspected, licensed facility, whereas almost all vendors in the shadow economy prepare their food in their home kitchens.<sup>81</sup> The cost of renting time in a commercial facility that meets all the myriad requirements of a commercial kitchen could put vendors out of business. Here is a striking and realistic assessment:

As one would-be cake baker in Texas noted: Say you are making a \$50 cake, which most people consider to be a lot for a birthday cake. It takes you three hours to make the cake and you pay \$15 an hour for the kitchen. How does that work out? It doesn't. You end up owing money on every cake you make.<sup>82</sup>

If the regulations of food vendors are unaffordable for the vendors currently operating in the shadow economy, they are still faced with a choice between noncompliance and exit. In other words, they are in no different situation than they are when there is no license at all.

Even more discouraging to the activist or public interest lawyer with an eye toward reform, there is a risk that unlicensed vendors would be in a worse situation with a license framework on the books than when their businesses were flatly illegal. It is possible that a new law passed with the imprimatur of the current legislature would give law enforcement a clearer directive to enforce the law. The police might not be so fractured in their approach to the vendors, and they might not be sympathetic to vendors who could get a license but did not.<sup>83</sup> In a case like ours, where the legislation passed covers only some vendors because the workable lobbying strategy was to take an incremental approach, then some vendors might

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78. Claire Moore Dickerson, *Informal-Sector Entrepreneurs, Development and Formal Law: A Functional Understanding of Business Law*, 59 AM. J. COMP. L. 179, 208 (2011).

79. John C. Cross & Alfonso Morales, *Introduction: Locating Street Markets in the Modern/Postmodern World*, in STREET ENTREPRENEURS, *supra* note 40, at 1, 9 (“Policy designed to develop the informal sector tends to ignore or minimize the potential or the benefits of street merchants and underestimate the difficulties of making micro-businesses bear the development burden of formal enterprises . . . . [T]hey potentially undermine the very factors that make many informal enterprises successful while imposing formal rules that they are unable to deal with. From engaging in a flexible and evolving economic activity focused on family subsistence needs (and often involving the avoidance of control by authorities), they are sucked into a rigid set of rules that they can barely understand and even less likely to be able to challenge or manipulate. While their businesses may be more ‘accountable’ they may in fact be less successful.”); CROSS, *supra* note 5, at 3 (“[I]t was often their ability to avoid regulations and the payment of taxes and fees that made people in the informal economy profitable, and this seemed to pose a political and moral dilemma: They were surviving largely because they were breaking the rules.”).

80. Nina W. Tarr, *Food Entrepreneurs and Food Safety Regulation*, 7 J. FOOD L. & POL’Y 35 (2011).

81. *Id.*

82. Johnson & Endres, *supra* note 63, at 108.

83. Cross & Karides, *supra* note 54, at 20.

be in the worst possible situation where enforcement is harsher, but they have no way yet to obtain a license to protect themselves.

Finally, there is the concern that vendors who do try to comply with the rules and obtain licenses will still be cited and fined and harassed and constrained in their growth. The registration of vendors could make them easy to find, and the rules they could violate would multiply.<sup>84</sup> Instead of a citation for vending without a license, vendors could be cited for multiple violations if they break rules about where, when, and how to vend.<sup>85</sup> Sidewalk vendors in New York City, many of whom have licenses, are ticketed all the time, especially for violations of administrative rules about where they can be and for how long.<sup>86</sup> Indeed, the tickets for administrative or spatial violations outnumber the tickets for violations of the health code three to one.<sup>87</sup> If the costs of enforcement are as high or higher after getting a license, vendors will still try to evade law enforcement and they will not invest in the business, either in growth or in the equipment and safeguards required to get a license.<sup>88</sup>

If the well-resourced entrepreneurs, who did not operate as vendors when it could be done only in the shadow economy, are the only ones who can survive after legalization, then many of the goals of legalization are thwarted. “One of the great challenges of formalization is that it can displace the most vulnerable residents of an informal settlement. . . . [F]ormalization can be a moment when inequality is deepened.”<sup>89</sup>

Scholars have argued that activists and reformers should focus efforts on minimizing the enforcement of regulatory standards on entrepreneurs in the shadow economy, rather than on trying to change the laws.<sup>90</sup> They praise development experts and economists who understand “that the informal sector is a healthy and adaptive response to existing realities.” Meanwhile, they deride those who engage in “magical thinking” by indulging a belief “that a government can create an effective legal system by merely waving the legislative wand.”<sup>91</sup> Yet, entrepreneurs in the informal economy are highly vulnerable in the absence of a

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84. STAUDT, *supra* note 52, at 153 (“The newly invented arrangement offered striking surveillance capabilities, should the police use their time to monitor compliance.”).

85. *Cf.* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–23 (2001) (explaining how prosecutors’ ability to “stack” charges for overlapping crimes alarmingly increases their leverage over defendants).

86. Gregg Kettles, *Crystals, Mud, and Space: Street Vending Informality*, in *THE INFORMAL AMERICAN CITY*, *supra* note 55, at 227, 229.

87. *Id.* at 237.

88. CROSS, *supra* note 5, at 34.

89. Ananya Roy, *Urban Informality: Toward an Epistemology of Planning*, 71 J. AM. PLAN. ASS’N 147, 153 (2005).

90. CROSS, *supra* note 5, at 60.

91. Dickerson, *supra* note 78, at 182–83.

legal path, and many potential entrepreneurs will opt out of creating jobs because they are unwilling to invest in such uncertain circumstances.<sup>92</sup>

#### IV. STRATEGY FOR LEGALIZATION

For a legalization campaign to be successful meeting the goals set forth in Part II, as well as addressing the challenges set forth in Part III, the cost-benefit package of having a license has to make sense for the entrepreneurs who currently operate in the informal economy, as well as new entrants. Compliance has to be affordable and workable for entrepreneurs formerly in the shadow economy if the reform is to provide them the dignity, security, potential, and opportunity of converting to the formal economy. Here I will present some (hopefully) practical recommendations and strategies for designing such a campaign.

First, the regulations of the business must be minimal, so as not to impose unnecessary costs on compliance.<sup>93</sup> The license fee should be as low as possible and reformers should urge the lawmakers to consider the package of costs that license applicants must afford. In Chicago, the City Council helpfully lowered fees after recognizing the initial package was too costly. While the ordinance that was initially introduced set a license fee of \$100, equal to the license fee for a peddler's license,<sup>94</sup> the ordinance that passed set the license fee at \$350.<sup>95</sup> Vendors who wished to prepare their own food in a shared commercial kitchen also faced the cost of a shared kitchen user license, with a fee of \$330.<sup>96</sup> There is some uncertainty whether every shared kitchen user must also have a certified sanitation manager on staff.<sup>97</sup> The training, materials, and test for that certificate also usually cost around \$200.<sup>98</sup> Even after spending the money, many members of the Little Village vendors association have struggled to pass the test, given their limited schooling and literacy. With licensure costs approaching \$1000, even before accounting for upgrades to carts and rent for a shared kitchen space, legality was an overwhelming expense for

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92. Larson, *supra* note 1, at 177 (quoting SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY* 166 (1998)).

93. STAUDT, *supra* note 52, at 153 (describing a reform measure that increased the start-up costs for vendors by ten times).

94. Chi., Ill., Mun. Code Ordinance No. O2014-4212, 2014 Chi. City Council (Ill. 2014), <https://chicago.legistar.com/LegislationDetail.aspx?ID=1804150&GUID=203DE101-08DC-4A0D-A286-ECBF17509F8F&Options=Advanced&Search> [<https://perma.cc/7Q4H-VHTL>] (failed to pass).

95. CHI., ILL., MUN. CODE §§ 4-8-010, 7-38-130, 7-38-140.

96. CHI., ILL., MUN. CODE § 4-5-010(15) (amended Dec. 14, 2016)..

97. CHI., ILL., MUN. CODE § 4-8-039(e)(3) (1990) ("At all times that potentially hazardous food is being prepared, tasted, handled, packaged, prepared for storage, served or otherwise used at a shared kitchen by a shared kitchen user, such shared kitchen user shall have on site at the shared kitchen a person who holds a current sanitation certificate issued by the department of health.").

98. See, e.g., *Frequently Asked Questions*, AM. ACADEMY OF FOOD SAFETY, <http://www.afoodsafety.com/faq.html> [<https://perma.cc/NHH5-LHXB>] (last visited Sept. 16, 2016); *ServSafe Food Service Sanitation Manager Certification & Renewal*, ILL. RESTAURANT ASS'N, <http://www.illinoisrestaurants.org/?page=SanitationCertif> [<https://perma.cc/7FC7-WHN3>] (last visited Sept. 16, 2016).

many low-income entrepreneurs. Because licensure is not a guaranteed exemption from tickets and citations in the future (because, for example, some officials have told vendors they may not stay in place for any certain length of time), the cost is particularly discouraging. If a goal of reform is converting vendors from the informal economy to the formal economy, the price of conversion should be lower. Accordingly, Chicago lowered the cart license fee and waived the shared kitchen user license fee for vendors, so both licenses now cost \$100.<sup>99</sup>

In addition, regulatory requirements for vendors should be focused only on ensuring health and safety rather than placing extra burdens on entrepreneurs in the name of aesthetics or market engineering. Regulations that are not tied to such crucial public purposes raise questions about why they are there in the first place. As in *Yick Wo*, vendors might conclude that they are pretextual and are put in place for an improper purpose, such as protectionism or prejudice.<sup>100</sup> Vendors might get the sense that the law is there simply to present them with unattainable standards or to squeeze them out. Laws that reasonably require basic health standards are more likely to accrue respect for the rule of law.

If the new regulations avoid the nitty-gritty laws about where vendors can operate and focus on the health code, then it is quite possible that the costs of harassment will be low. Gregg Kettles analyzed over 100,000 citations issued to vendors in New York City and found that law enforcement is much more likely to cite people for violating “crystal” rules than “mud” rules and much more likely to cite people for violating spatial rules than health rules.<sup>101</sup> Vending laws that simply hold vendors to standards that they are safe, sanitary, and wholesome will hold them to the standard of care that we want to apply to all food businesses without giving law enforcement easy hooks for tickets.

This approach has the added benefit of being the constitutional one. The government should employ its police power and limit people’s economic liberty only in the public interest. Courts can and should strike down laws that restrict people’s ability to earn a living without any tie to a legitimate, public purpose.<sup>102</sup>

Lobbying successfully for simple regulations focused exclusively on food safety can be a challenge. Special interest groups might fight for caps or spatial rules or time limits out of protectionist or prejudiced motivations.<sup>103</sup> Meanwhile, the

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99. CHI., ILL., MUN. CODE § 4-8-041(c), 4-5-010(15) (amended Dec. 14, 2016).

100. *Yick Wo*, 118 U.S. at 373.

101. Kettles, *Crystals, Mud, and Space: Street Vending Informality*, in *THE INFORMAL AMERICAN CITY*, *supra* note 55, at 235.

102. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir. 2013); *Craigsmiles v. Giles*, 312 F.3d 220, 222 (6th Cir. 2002); *People v. Ala Carte Catering Co.*, 98 Cal. App. 3d Supp. 1, 9 (1979) (holding that a requirement that food trucks be 100 feet away from a restaurant entrance violated Fourteenth Amendment); Order Following Demurrer Hearing, *People v. Garcia*, Case No 8EA05884, \*7 (Cal. Supp. filed Aug. 27, 2008) (“Garcia Order”) (holding that time limits on food trucks were arbitrary as related to public safety and wholly lacking a rational basis as required by the Fourteenth Amendment’s Due Process Clause).

103. Regina Austin, “An Honest Living”: *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2121–22 (1993).

consumers who ought to care about food safety as well as diversity of choice are unlikely to participate in the political process that shapes the ordinance.

Activists can try to provide information to lawmakers and policymakers that support a light touch for regulation. They can harness the grassroots lobbying power of the consumers through petition campaigns and public media. Stories abound of cities' efforts to over-regulate vendors and the failures that ensued;<sup>104</sup> they should be wielded as cautionary tales. And the lure of revenue from license fees and taxes should be clearly conditioned on regulations that make formalization affordable.<sup>105</sup>

Some health and safety regulations are unavoidable. The question becomes how to make them affordable. Larson suggests an approach of regularization, in which the law requires everyone to do the most he can toward safety standards.<sup>106</sup> Regularization has the advantage of uniformity—the same law applies to everyone—while giving poor people the permission to do only what they can manage. It also moves people gradually toward full compliance, with the assumption that they will continue to improve safety features as they spend what they can afford each year.

Regularization is hard to square with health requirements for businesses, particularly food businesses. Larson does not specify how officials would figure out the proper percentage of assets that constitutes one's "realistic capacity" to make one's home safe.<sup>107</sup> That would be difficult to do, but it is likely even harder to do in the context of entrepreneurship. We assume that people need housing, but we do not assume that people need to be self-employed. We might accept that people do the best they can for themselves, but we might reasonably determine that there is a threshold level of food safety that we require of people who are selling food to others.

Larson's legal specification for regularization is impractical in the context of underground food businesses, but it is useful to think of legal structures that would allow people to start small and with a lower standard of regulatory compliance. Such laws would form a background context that could make the formalization of businesses more plausible.

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104. See, e.g., Nate Berg, *How to Stop the Over-Regulation of Street Vendors*, THE ATLANTIC CITY LAB (June 12, 2012), <http://www.citylab.com/work/2012/06/enabling-street-vendors-become-small-businesses/2254/> [<https://perma.cc/XS2E-X6JN>]; *Controversy Erupts Over Regulating Mobile Food Vendors*, ENID NEWS & EAGLE (Mar. 5, 2015), [http://www.enidnews.com/news/controversy-erupts-over-regulating-mobile-food-vendors/article\\_fe184bc8-c2ef-11e4-9ef0-af2de944a239.html](http://www.enidnews.com/news/controversy-erupts-over-regulating-mobile-food-vendors/article_fe184bc8-c2ef-11e4-9ef0-af2de944a239.html) [<https://perma.cc/8W7Q-7PKZ>].

105. This strategy might have an added advantage of sowing sympathy for vendors in the minds of policymakers (or at least a healthy respect or fear of public relations problems if they are perceived as harsh). Even if explicit amnesty is not feasible, policymakers may provide flexibility and a grace period so vendors can comply with new regulations. Chicago officials have communicated that they will wait to enforce the new law against vendors so that they have time to comply. I am unaware of citations for violations of the new law after six months.

106. Larson, *supra* note 1, at 180.

107. *Id.*

There are examples and models for regulatory structures that lessen the costs of regulatory compliance for small businesses or service to the poor, even in the realm of sensitive areas of public health and safety. Cottage food laws allow people to prepare nonhazardous foods in their home kitchens, often capped by a limit on the revenues they can make there.<sup>108</sup> These laws allow people to start small and push them to move to inspected kitchens with commercial-grade equipment only if they reach some level of success.<sup>109</sup> There is evidence that the relaxed health standards do result in more businesses (or at least more registered businesses).<sup>110</sup> Some states similarly eliminate or reduce regulatory burdens on food service operations run out of houses of worship, especially related to soup kitchens.<sup>111</sup> Analogies can be drawn to home-based day cares, which do not have to meet all the same building requirements as day cares in commercial locations.

Even if states or municipalities refuse to sanction preparation of hazardous foods in home kitchens, they might allow food businesses to prepare food in existing community kitchens without applying all the same requirements of a commercial kitchen. One supervisor with the proper training and sanitation certificate could oversee the activities of multiple vendors, so that each vendor would not have to pass a rigorous test. Rent would be more affordable to use a kitchen that was not so expensive to build out and license, and the requirement might move food preparation out of home kitchens where there are pets and residents who are disconnected from the business. If the legislature wants to push businesses toward higher standards as they grow, the permission could be granted only for kitchen users of a certain size or only for nonmotorized vendors. The measure would help entrepreneurs transition gradually to the formal economy.

One of the most affordable small kitchens might be the cart itself. Reformers should push lawmakers to allow preparation of food on the cart. Chicago's incremental approach, allowing the sale of pre-packaged food only, exacerbates the cost of compliance. When all the corn and mayo and butter and cheese and pepper (the ingredients for *elotes*) must be mixed and packaged in advance, vendors have to pay more for rent in a shared kitchen, pay more for packaging, and lose more money in waste because they cannot prepare the food to the customer's order. Indeed, food

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108. ALLI CONDRA, HARVARD LAW SCHOOL FOOD LAW AND POLICY CLINIC, COTTAGE FOOD LAWS IN THE UNITED STATES 14–15 (Aug. 2013), [http://www.chlpi.org/wp-content/uploads/2013/12/FINAL\\_Cottage-Food-Laws-Report\\_2013.pdf](http://www.chlpi.org/wp-content/uploads/2013/12/FINAL_Cottage-Food-Laws-Report_2013.pdf) [https://perma.cc/KEM9-H5GW]. For a helpful digest of cottage food laws around the country, see *Cottage Food Laws*, FORRAGER.COM, <http://forrager.com/laws/> [https://perma.cc/WEZ8-545B] (last visited Sept. 16, 2016).

109. *Id.*

110. *Is Lemonade Legal? Testing the Limits of Silliness in East Texas*, THE ECONOMIST (July 11, 2015), <http://www.economist.com/news/united-states/21657409-testing-limits-silliness-east-texas-lemonade-legal> [https://perma.cc/YF4U-YRKD].

111. *See, e.g.*, 3 PA. CONS. STAT. ANN. § 5703 (2012) (exempting churches from retail food establishment license requirements); CONN. GEN. STAT. § 19a-36 (2015) (exempting volunteer-based soup kitchens); N.H. REV. STAT. ANN. § 143-A:5-a (1995) (allowing for a license exemption for soup kitchens).

preparation at the cart has added health benefits. The food is fresher, and the customer can examine the conditions of its preparation more critically than most food from a restaurant. If the business is small enough to contain its inventory and food preparation activities on the cart, it should be allowed to do so.

Finally, after lobbying for laws that make compliance workable for poor vendors, activists and reformers can help the vendors comply. The legal changes will not be enough to allow vendors to succeed, and they may even make survival harder at first. But communities and collectives can join forces to build the resources that vendors will need. In Chicago, the vendors association has begun to plan for its own commercial kitchen and its own program to assist vendors in obtaining licenses. If regulators are accepting of creative new approaches to build safe kitchens, then the change in the law will finally be worth celebrating.

#### CONCLUSION

Laws that broadly outlaw honest entrepreneurship in its most affordable forms are degrading to vulnerable people and foolishly limiting for the economy. Yet, the path for public interest lawyers and activists advocating for entrepreneurs' economic liberty can be tricky. By focusing on real people whose livelihoods are on the line, we can design a strategy for law reform that is workable. To allow vendors to transition successfully to the formal economy, fees must be low, regulations must be limited to issues related to health and safety, and options for microbusinesses to start in spaces without all the refinement of restaurant kitchens must be available.