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TRUCKS, AND SIDEWALK FRUIT VENDORS**

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# HEALTHY FOOD OUTSIDE: FARMERS' MARKETS, TACO TRUCKS, AND SIDEWALK FRUIT VENDORS

*Alfonso Morales<sup>1</sup> and Gregg Kettles<sup>2</sup>*

## ABSTRACT

This paper explores the many dimensions of street vending and public markets, the multiple intersections vending and markets have with food regulation, and the historical connection markets have with other policy problems. We develop the article in four parts, following the introduction found in section one the article touches on three elements of law and public policy. The second section considers markets and merchants in public goods with their associated dilemmas. Our approach is to reconfigure the emphasis on public space as transportation by justifying the use of the street and sidewalk for street vending. The importance of public space for commerce and other creative activities bridges the second and third sections of the article. The third section chronicles the history of law and regulation around street and public markets. Here we emphasize how cities historically used public markets as public policy tools to address food security, employment, and to help those growing cities accommodate new immigrants. The fourth section focuses on public health by examining the law of outdoor food sold on the street. Through our analysis we set forth numerous suggestions for advocacy, policy, and legal reform.

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## INTRODUCTION

One hundred years ago street vendors shouted “Apples, get your apples!” in cities across the United States. Today, “*Manzanas deliciosos!*” shouted from the street represents a renaissance of street commerce—with merchants and municipalities painting the canvas of city life for many of the same reasons as they did 100 years ago. Street merchants and public markets have been essential to public health in cities across the United States. Markets helped produce health through reducing food insecurity and making food easier to regulate. Over the last century, the transformation of agriculture, and of streets, curbs, and other public spaces into transportation corridors, have helped produce the grocery store industry and pushed merchants and markets into odd corners of big cities. More recently, however, the rapid growth of farmers’ markets, swelling numbers of street vendors, and increasing attention to public health concerns, such as diabetes and obesity, particularly among children, minorities, and the poor residents of urban “food deserts,” has produced a growing interest in open air food marketing.<sup>3</sup> A century ago street vendors and markets helped make cities healthy. Today, we should enable them again as a tool for fostering healthy citizens.

We rely on private enterprise to feed us, and for the past half-century we neglected the street vendor and market in favor of the grocery store. As a consequence, our view of streets has become one-dimensional as well. We view them as a way to get to the grocery store, rather than as a place to buy food in its own right. Returning streets to multiple uses will help improve public health, thus we provide a strong theoretical justification for allowing private buyers and sellers of food to meet and trade in the public street. Section II uses public goods theory to ground thinking on contemporary street retail.

The theoretical justification for markets is backed up by real world experience, as discussed in Section III. Over the last century public markets played a prominent role in economic and social development.<sup>4</sup> The section

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3. J. ROBIN MOON, PUBLIC MARKETS AND COMMUNITY HEALTH: AN EXAMINATION, 1 (Project for Public Spaces 2000); L. MIKKELSEN ET AL., HEALTHY EATING AND PHYSICAL ACTIVITY: ADDRESSING INEQUITIES IN URBAN ENVIRONMENTS, 1 (Prevention Institute 2007); V. LEE ET AL., PROMISING STRATEGIES FOR CREATING HEALTHY EATING AND ACTIVE LIVING ENVIRONMENTS, Preface (Prevention Institute 2008); L. DIXON ET AL., A REPORT ON STATE ACTION TO PROMOTE NUTRITION, INCREASE PHYSICAL ACTIVITY AND PREVENT OBESITY 5 (Balance 2007); G. Collins, *Customers Prove There’s a Market for Fresh Produce*, N.Y. TIMES, June 11, 2009, at A24; I.T. Walker, *Carpinteria Beats Back an Epidemic: How One Small City Took a Stand Against Childhood Obesity*, SANTA BARBARA INDEP., Apr. 2, 2009, at 4.

4. Alfonso Morales, *Peddling Policy: Street Vending in Historical and Contemporary Context*, 20 J. SOC. AND SOC. POL’Y 76, 76-99 (2000); Helen Tangires,

begins by showing how markets promoted health by helping establish food security. Though nutrition was an important aspect of public health served by the use of streets and sidewalks, markets also facilitated food regulation and were essential links between producers and consumers in regional food systems. Thus, markets not only helped preserve the physical health of the people, but also the social and economic health of the community. By mid-century the public market was eclipsed by grocery stores, especially suburban supermarkets supplied by a burgeoning industrial food system. Despite the decreased costs associated with system efficiencies, food insecurity increased in the 1970s, especially in inner cities. Furthermore, changes in diet produced new food-related health problems. Ironically, farmers' markets were swiftly increasing in number as some segments of the population took advantage of the healthier offerings found on the street. However, the law was unevenly prepared for markets and merchants to resume their role in food security and to take new roles in advancing public health.

Section IV describes how these roles are recovering and shows how the law can enable merchants and markets to contribute again to the nation's health. Assisting street merchants to fulfill their promise for improving public health requires a new understanding of the street that involves recovering old uses and creating new enabling ordinances. Furthermore, locating merchants and markets in the web of relationships from producer to consumer implies weaving together a variety of ordinances fully to realize the potential of the market in promoting public health. Importantly, there is ample opportunity for legal reform to help increase the scale of experimentation and diffuse the practice beyond particular localities. Our prescriptions are detailed in four sections.

One section makes suggestions for changes in right of way rules to give street vendors the flexibility and stability that make them useful to so many public purposes. Restrictions on the use of public streets by farmers' markets, sidewalk fruit vendors, and catering ("taco") trucks should be relaxed. A second section addresses similar restrictions that apply to private property. Zoning ordinances that leave little room for outdoor food marketing, and then only as conditional uses, should be modified to give fresh food marketing more space to sprout and security to grow. Besides determining where a market may be established, the law also impacts street markets by subsidizing the consumption of food.<sup>5</sup> A third section highlights how federal food programs, such as the Supplemental Nutrition Assistance

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*Public Markets And Civic Culture In Nineteenth-Century America* (THE JOHNS HOPKINS UNIVERSITY PRESS 2003).

5. USDA, Food and Nutrition Service, Supplemental Nutrition Assistance Program, <http://www.fns.usda.gov/snap/snap.htm> (last visited Nov. 26, 2009).

Program (SNAP),<sup>6</sup> formerly known as the Food Stamp Program, and one known simply as Women, Infants, and Children (WIC) send consumers to fixed, indoor markets. More work needs to be done to extend these benefit programs to farmers' markets and other sellers of fresh food on the street. A fourth section focuses on regulation of retail food sales by county health departments. Long-focused on preventing food poisoning, retail food regulation has inadvertently made it more difficult to sell non-industrially processed, fresh food on the street, as discussed further in this article.<sup>7</sup> We call for a more balanced approach, through changes in the letter, interpretation, and enforcement of retail food law.

Street food today is the synthesis of the American pastoral ideal and modern technology. Law is being repurposed to address the health crisis produced, in part, by the industrial food society that modern technology made possible over the past fifty years. Street vending and public markets are decisive vehicles in this new synthesis, and this article indicates how.

#### ECONOMICS AND MARKETS IN PUBLIC SPACE<sup>8</sup>

In the United States, most markets, such as supermarkets, shopping malls, and the New York Stock Exchange, are on private property. In light of this one might ask why food should ever be available for sale on the public sidewalk? To answer this, it is helpful to step back and consider the more general question of why we have public streets and sidewalks at all. One reason given by economists is that they are "public goods." They are articles and objects that most can access freely. They are "public" because it is not practical to exclude people who have not paid for them. In theory, we could privatize streets with a tollbooth at every corner, but the costs of doing so would be exorbitant. Unable to recoup the costs of their investment in building streets and sidewalks, private actors will not bother to build them in the first place, thus, transportation corridors are provided publicly.<sup>9</sup> This makes economic sense. Privately held properties are made more valuable

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6. *Id.*

7. See e.g., L.A., Department of Public Works, <http://dpw.lacity.org/dpwhome.htm> (last visited Dec. 4, 2009).

8. This section builds on an argument made in Gregg W. Kettles, *Day Labor Markets and Public Space*, 78 UMKC L. REV. 139, 148-51 (2009).

9. BRADLEY R. SCHILLER, ESSENTIALS OF ECONOMICS 215-16 (6th ed. 2007); see Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L. J. 1165, 1173 (1996).

because there are transportation corridors to access them. Plus, there are additional benefits as well. The purchase of automobiles, running shoes, and other items for the use of those spaces is encouraged. By the same logic, if we promote health by providing public trails for exercise, why not promote it by enabling merchants to sell healthy food?

There is a second reason given by economists for the public provision of streets and sidewalks: market power.<sup>10</sup> This refers to the situation where a single property owner has the ability to change the market price of a particular piece of property they own. The owner of a parcel of land might be tempted to hold out for a higher price when confronted with an offer from a party seeking to assemble a number of contiguous parcels to build a road.<sup>11</sup>

The theories of public goods and market power help explain why streets and sidewalks are public, at least as long as we view them solely as transportation corridors. To assert a toll on every street is impractical because users are transient—they are on the move. Similarly, the costs imposed by hold outs will seem especially high when a user is seeking the shortest route from point A to point B and the hold out's property is in the way. In both cases, it is the fact that the user is moving that helps justify making streets and sidewalks public. In other words, mobility justifies public streets and sidewalks as transportation corridors.

The trouble with the conclusion of this contemporary analysis is that it ignores renascent uses of these public spaces. More broadly, its emphasis on mobility and transportation reduces important public spaces to single purposes, disabling (re)emergent purposes, and incompletely comprehending the processes involved with those purposes.<sup>12</sup> For instance, before making a sale, a street food vendor might use some combination of street and sidewalk to arrive at a place to sell. He might stay on the sidewalk for a few minutes or he might remain there selling food all day long. The longer the vendor lingers, the less difficult it would be to impose a fee on his use. As a place to stand and sell food for hours on end, the sidewalk begins to look less like a public good and more like a private good, even if as a

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10. SCHILLER, *supra* note 9, at 215-16.

11. SCHILLER, *supra* note 9, at 215-16; see Carol Rose, *The Comedy of the Commons, Custom, Commerce, and Inherent Public Property*, 53 U. CHI. L. REV. 711, 753 (1986) (privatization of roads was considered dangerous because of the risks of hold outs and monopolies).

12. Renia Ehrenfeucht and Anastasia Loukaitou-Sideris, *Constructing the sidewalks: municipal government and the production of public space in Los Angeles, California, 1880-1920*, 33 J. HIST. GEOGRAPHY 104, 116-19 (2007) (on the multiple historic uses of streets and sidewalks in Los Angeles).

place to access healthy food, this private good has a potentially public purpose.<sup>13</sup> So, from the public goods perspective, the vendor employs the street as transportation corridor, but transforms it into a place of business. From the market power perspective the street vendor's mobility reduces the risk of hold out as well. If the food vendors are *sedentary*, they would appear to be at the mercy of rents charged by that landowner, who could hold-out for a high price for permission to use her property. But assuming the vendor is mobile, if a landowner demanded from a vendor more than market rate for permission to stand on her property, the vendor could simply go bargain with another landowner. With so many substitutes, no landowner would have the market power necessary to enable her to hold out for higher rents.<sup>14</sup>

Contemporary economic theory justifies the public provision of streets and sidewalks as transportation corridors. But can it also justify the public provision of those things with respect to semi-sedentary uses, like those of street side food vendors? In her article, *The Comedy of the Commons*,<sup>15</sup> Carol Rose raises a similar question in her examination of a series of judicial decisions that upheld public claims to otherwise private lands for purposes that had little to do with transportation. In the 19th Century, English courts relied on custom to grant the public a right to use private property for horse races, dances, and cricket matches.<sup>16</sup> On this side of the pond, United States courts similarly recognized that public squares and beach access for

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13. Not to neglect the variety of other purposes the vendor serves, e.g. small business entrepreneur, eyes on the street, or Jane Jacobs argued that public responsibility emerges from reflection on interaction. She writes,

In real life, only from the ordinary adults of the city sidewalks do children learn—if they learn it all—the first fundamental of successful city life: People must take a modicum of public responsibility for each other. . . This is a lesson nobody learns by being told. It is learned from the experience of having *other people without ties of kinship or close friendship or formal responsibility to you* take a modicum of public responsibility for you.

(1961:82 her italics). In short, sidewalks are a source of socialization and increase public responsibility and it is difficult to disaggregate the multiple uses street markets and merchants serve.

14. The question of a sidewalk as “property” with resulting negotiations is addressed by Gregg Kettles, *Legal Responses To Sidewalk Vending: The Case Of Los Angeles, California*, in *STREET ENTREPRENEURS: PEOPLE, PLACE, & POLITICS IN LOCAL AND GLOBAL PERSPECTIVE* (John Cross and Alfonso Morales, eds., London, Routledge 2007).

15. See generally Rose, *supra* note 11.

16. *Id.* at 759.

swimming could be found on otherwise private property.<sup>17</sup> In each of these cases, the use was an end in itself (recreation, business), not a means to an end (transportation), and the users, though mobile, were semi-stationary.

These uses still justified making these lands public because of the customary nature of those uses. The customary nature of a use creates an emotional attachment to a place. This emotional attachment is signaled to the landowner through repeated use.<sup>18</sup> In other words, customary use by the public not only makes each subsequent use emotionally more valuable, it also reveals to the landowner the increasing value the public puts on that *particular* piece of property. The landowner now has market power and would be tempted to hold out. Thus, economic theory justifies public provision of space even for uses that are stationary where, as in the case of rising emotional value through custom, the owner acquires market power.

Public provision of streets and sidewalks for use by food vendors to solicit business is justified for similar reasons. Individual vendors may form emotional attachments to the sidewalk where they have been regularly standing for months on end. But that relationship, of person to place, is not the basis of our argument.<sup>19</sup> Rather, it is the fact that vendors use a particular corner that makes that place increasingly valuable as a place for vendors to sell food and for customers to find vendors. Recurrent use of a place constitutes it as a market and enables consumers to find vendors.<sup>20</sup> As more and more people learn that a street or sidewalk is the place to go to find food vendors, the more valuable that particular sidewalk becomes. Potential hold out problems that would accompany private ownership of the sidewalk food market could be avoided by publicly providing that space.

Some may still be concerned about the risk of over-use. If we open up the sidewalk to street vendors, so the argument goes, there is a danger that too many buyers and sellers will meet there, leading to the kind of congestion already familiar on automobile-choked city highways at rush hour. In the language of economics, should we not fear that providing an open access sidewalk will lead to negative externalities? In the language of Garrett

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17. *Id.* at 753, 757. *See also* Baker v. Johnson, 21 Mich. 319, 350 (1870).

18. Rose, *supra* note 11, at 759; STEPHEN MUNZER, A THEORY OF PROPERTY *passim* (1995).

19. *See* ALFONSO MORALES, MAKING MONEY IN THE MARKET (1993) (chapter four provides for the variety of emotional and relational attachments merchants create in establishing rights to vending space in the absence of stable legal expectations).

20. It is important to recognize that market organization can vary by place, participants, and purpose. No predeterminations are suggested here.

Hardin, should we not fear a “tragedy of the commons?”<sup>21</sup> The answer is not necessarily. Sidewalk markets facilitate commerce. As Carol Rose observed, drawing on Adam Smith, commerce is an interactive practice whose exponential return to increasing participation runs without limit. The more who trade, the better. Not only must locations of trade and commerce be held open to the public, but the cost of using such locations should be kept at a minimum, and perhaps borne by the community as a whole.<sup>22</sup> Thus, we conclude that public provision of streets and sidewalks for food markets is supported by economic theory.

Of course, this leaves open the question of prioritizing uses. Transportation routes appear to be just as important to commerce as markets. A market’s value, on the other hand, likely will be eroded by traffic congestion that overwhelms access. Likewise, the value of transportation routes would appear to be enhanced if they provide access to a market. Whose claim is superior? The food vendor on the sidewalk selling food to passing motorists and pedestrians or the passerby whose commute is slowed by the vendor’s presence next to the roadway? Furthermore, and more broadly, why judge only these uses for such public spaces? Why not bring such uses into relationship with other important roles for street commerce? In answering these questions, a little history may serve as a useful guide to developing a more balanced view.

#### HEALTH AND STREET VENDING IN HISTORICAL CONTEXT

Historically public markets and street vendors dominated food distribution in the United States into the early 20th Century.<sup>23</sup> According to the 1918 census of public markets, the United States population was about 105 million and in 128 cities with populations above 30,000 there were 237 municipal markets.<sup>24</sup> These markets had 17,578 open air stands and 7,512 stands enclosed by market structures. The total value of market property in 1918 was estimated at \$28,000,000.<sup>25</sup> Street vendors were so numerous they

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21. SCHILLER, *see supra* note 9, at 216.

22. Rose, *supra* note 11, at 769-70.

23. ARTHUR E. GOODWIN, *MARKETS: PUBLIC AND PRIVATE* 28-34 (1929).

24. Caroline B. Sherman, *Markets, Municipal*, 9 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 139-43 (Edwin R.A. Seligman ed., 1937).

25. U.S. Bureau of the Census, *Municipal Markets in Cities Having a Population of Over 30,000, 1918* (1919); Sherman, *supra* note 24, at 139-43.

had their own census occupation category (until 1940).<sup>26</sup> How many markets and merchants have we today? This deficiency is unaddressed since neither is enumerated. However, the USDA began a biannual enumeration of farmers' markets in 1996 and we know that in the intervening decade the number of markets has more than tripled with about 5,000 farmers' markets around the country today.<sup>27</sup>

Vending was an important occupation. It socialized new immigrants from rural areas and foreign lands, employed the temporarily unemployed, generated significant economic mobility, and for our purposes, provided food security in burgeoning urban areas.<sup>28</sup>

#### A. *Markets, Transportation, and Access to Food*

From early colonial history to the early 20th Century, public markets were among the dominant food purveyors to the American urban public. In urban centers of the eastern United States, they appear likely to have been the preferred food option.<sup>29</sup> This carried on the tradition of public markets brought by European settlers to North America and may have fulfilled the obvious need for meeting places to conduct trade.<sup>30</sup>

Municipalities had a vested interest in providing reliable access to food, among other things, for their population. Helen Tangires, a noted author in the area of public markets, places the public market in the context of other public works:

In addition to building wharves, docks, bridges, and roads, local government was expected to provide facilities for buying and selling food. These facilities were more than a mere convenience; it was a

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26. Morales, *supra* note 4, at 79-84.

27. USDA, Food and Nutrition Service, Farmers Markets and Local Food Marketing, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateS&navID=WholesaleandFarmersMarkets&leftNav=WholesaleandFarmersMarkets&page=WFMFarmersMarketGrowth&description=Farmers%20Market%20Growth&acct=frmdirmkt> (last visited Nov. 16, 2009).

28. Morales, *supra* note 4, at 79-84.

29. JAMES M. MAYO, *THE AMERICAN GROCERY STORE* 1 (1993).

30. GOODWIN, *supra* note 23, at 19.

duty of the state to ensure that the urban populace would have an adequate, wholesome, and affordable supply of necessities.<sup>31</sup>

Food independence for cities was strictly impossible. Thus, cities provided markets by which food could be distributed, and by doing so markets addressed problems associated with food regulation and public health.

Markets served a public good by fulfilling social, economic, and political purposes. However, the advent of motor vehicles required a reassessment of street markets in the early 20th Century.<sup>32</sup> Chicago exemplifies the experience of cities across the United States when, in 1912, a city commission found that street business coexisted well with “ordinary” business and traffic. More importantly, that comparative research “at home and abroad” showed that street markets enhanced the public health and simplified health inspections and the enforcement of health related ordinances.<sup>33</sup> Market design<sup>34</sup> and governance<sup>35</sup> were sufficiently flexible to accommodate business and changes in transportation, and indeed flexibility is one hallmark of markets. In this neutral, and occasionally supportive early 20th Century political-regulatory context, cities created new markets, as Chicago’s Maxwell Street, or rehabilitated old markets to incorporate new refrigeration technologies.<sup>36</sup> Thus, markets were cornerstones of food security in rapidly urbanizing areas.

Though once at the heart of local and regional systems, markets were steadily supplemented and then gradually supplanted by chain grocery stores.<sup>37</sup> Whether supplied by national and international production, and distribution fostered by increasingly efficient production and transportation systems, these chain stores eventually pushed street markets into near-

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31. HELEN TANGIRES, PUBLIC MARKETS AND CIVIC CULTURE IN NINETEENTH-CENTURY AMERICA 3 (2003).

32. MAYO, *supra* note 29.

33. Morales, *supra* note 4, at 79-84.

34. J.F. Carter, Public Markets and Marketing Methods, AM. CITY, Feb. 1913, at 121.

35. C.L. King, *Municipal Markets*, in ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 50, 102 (1913).

36. *Id.*

37. MAYO, *supra* note 29, at 4-8.

extinction. Conflict over the street appears likely to have transformed street and sidewalk into a more sterile public space.<sup>38</sup> By the 1930s, changes in agricultural production, refrigeration technology, and intermodal transportation unified the national market for food, birthed a nascent international market, and, along with other social changes, slowly transformed the larger food system.<sup>39</sup>

*B. Contemporary Health Problems and Access to Healthy Food*

Over the last forty years, two interrelated factors dominate the food/health integument: diminished access to healthy food and the rise of industrial food. Taken together, the two are believed to produce serious health problems, such as obesity and Type II diabetes.<sup>40</sup> Contemporary initiatives in street vending and street markets that reintroduce vendors to the city will improve public health among food-isolated populations.

Today “food deserts” result from the market-driven decisions of major corporations.<sup>41</sup> During the 1970s, grocers fled the inner-city for profits in the suburbs.<sup>42</sup> For instance, between 1968 and 1984, Hartford, Connecticut, lost eleven out of its thirteen grocery chains.<sup>43</sup> Between 1978 and 1984, Safeway closed more than 600 stores around the country, many in inner-city neighborhoods.<sup>44</sup> Low-income and minorities suffered this inequality

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38. Renia Ehrenfeucht & Anastasia Loukaitou-Sideris, *supra* note 12, at 116-19.

39. *See generally* HARVEY BLATT, *AMERICA’S FOOD: WHAT YOU DON’T KNOW ABOUT WHAT YOU EAT* (Cloth Press 2008).

40. CDC, *THE BURDEN OF CHRONIC DISEASES AND THEIR RISK FACTORS: NATIONAL AND STATE PERSPECTIVES 2004*, 29 and 44 (2004), *available at* <http://www.cdc.gov/nccdphp/burdenbook2004>.

41. Neil Wrigley, ‘Food Deserts’ in *British Cities: Policy Context and Research Priorities*, 39 *URBAN STUDIES* 2029, 2029-31 (2002) (discussing “food deserts” as a common but not yet universally accepted term); *see also* Elizabeth Eisenhauer, *In Poor Health: Supermarket Redlining and Urban Nutrition*, 53 *GEOJOURNAL* 125, 127-29 (2001).

42. BLATT, *supra* note 39.

43. Eisenhauer, *supra* note 41, at 128. (“it makes no sense to serve distressed areas when profits in the serene suburbs come so easily”).

44. Joe Kane, *The Supermarket Shuffle*, *MOTHER JONES*, July 1984, at 7.

disproportionately to the rest of the population.<sup>45</sup> Kimberly Morland, in her 2002 multi-state study of food stores and food services, found four times as many grocery stores in predominantly white neighborhoods as in predominantly black neighborhoods.<sup>46</sup> The typical inner-city corner store has higher prices and a smaller selection of fresh, wholegrain, nutritious foods than stores in wealthier neighborhoods.<sup>47</sup>

The food system behind these inequalities produces increasing rates of obesity and diabetes.<sup>48</sup> Poor nutrition is a risk factor for four of the six leading causes of death in the United States—heart disease, stroke, diabetes, and cancer.<sup>49</sup> We assume that individuals exercise unrestricted choice and discretion in what they eat,<sup>50</sup> but clearly neighborhood food environments call this into question.<sup>51</sup> Street vendors once increased access to fresh produce because of their lower overhead and greater flexibility—they made money selling fresh food where stores did not.<sup>52</sup> Food policy advocates have established farmers' markets in progressive communities for the last forty years, but those benefits are spreading slowly to low-income communities.<sup>53</sup> Now, vendors should repopulate food deserts to provide affordable, nutritious foods as a more effective long-term strategy for improving urban

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45. David C. Sloane, *Bad Meat and Brown Bananas: Building a Legacy of Health by Confronting Health Disparities in Food*, PLANNERS NETWORK (Winter 2004). Reprinted in T. Angotti and A. Forssyth (Eds.), *PROGRESSIVE PLANNING*, 49-50 (2004).

46. Kimberly Morland et al., *Neighborhood Characteristics Associated with the Location of Food Stores and Food Service Places*, 22 *AM. J. PREV. MED.* 23, 27 (2001).

47. Sloane, *supra* note 45, at 50.

48. Eric A. Finkelstein et al., *National Medical Spending Attributable To Overweight And Obesity: How Much, And Who's Paying?*, *HEALTH AFFAIRS*, May 14, 2003, at 219; Press Release, U.S. Dept. of Health and Human Serv., Secretary Sebelius addresses CDC Weight of the Nation Conference (July 28, 2009), available at <http://www.hhs.gov/news/press/2009pres/07/20090728a.html>.

49. CDC, *supra* note 40, at 24-80.

50. Eisenhauer, *supra* note 41, at 125.

51. Sloane, *supra* note 45.

52. Morales, *supra* note 4, at 76-99 (discussing City of Chicago Reports of 1914).

53. LESLIE MIKKELSEN, ET AL., *HEALTHY EATING & PHYSICAL ACTIVITY: ADDRESSING INEQUITIES IN URBAN ENVIRONMENTS* 13-14 (Prevention Institute 2007).

health and food equity.<sup>54</sup> Slowly, organizations and cities are spreading these benefits to the underserved throughout their jurisdictions.<sup>55</sup> For instance, health care organizations recognize the benefits of healthy food. One effort, by the insurer Kaiser Permanente, has introduced more than twenty farmers' markets into parking lots at its health clinics in order to increase access to healthy food.<sup>56</sup> New York City established the "green cart" program, which created 1,000 street vendor licenses for merchants willing to sell produce in underserved areas.<sup>57</sup> In July 2009, San Francisco Mayor Gavin Newsome cut to the front of the line by reestablishing food, especially healthy food, as a city government, city-wide priority, recruiting mobile vendors to the task.<sup>58</sup> Comprehensive legal reforms indicated below will swiftly diffuse these initiatives.

Street vendors and markets support individual health. By promoting healthy eating and physical activity, markets are also beneficial for a person's psychological well-being.<sup>59</sup> But markets are multifaceted means to promote community health. By providing a place for social and leisure activity, physical well-being is enhanced.<sup>60</sup> Mental health, as an extension, also may be enhanced. Markets are a conduit for health and nutritional information, services, and products. Markets respond to local needs by incorporating activities and services that would otherwise never reach community members.<sup>61</sup> These services vary, but often include health

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54. LEE ET AL., *supra* note 3, at 6; DIXON ET AL., *supra* note 3, at 76-83.

55. DIXON ET AL., *supra* note 3, at 76-83.

56. MOON, *supra* note 3, at 26.

57. New York City Dep't of Health and Mental Hygiene, NYC Green Cart, [http://www.nyc.gov/html/doh/html/cdp/cdp\\_pan\\_green\\_carts.shtml](http://www.nyc.gov/html/doh/html/cdp/cdp_pan_green_carts.shtml) (last visited Nov. 30, 2009) [hereinafter NYC Green Cart].

58. Mayor of San Francisco, Exec. Directive 09-03, Healthy and Sustainable Food for San Francisco (July 9, 2009), *available at* <http://civileats.com/wp-content/uploads/2009/07/Mayor-Newsom-Executive-Directive-on-Healthy-Sustainable-Food.pdf>.

59. Project for Public Spaces (PPS), Benefits of the Markets, [http://www.pps.org/markets/info/markets\\_program](http://www.pps.org/markets/info/markets_program) (last visited Nov. 30, 2009).

60. MOON, *supra* note 3, at 26.

61. *Id.* at 30.

screenings, immunizations, cooking classes, and yoga.<sup>62</sup> Besides ameliorating class-related food/health problems, markets and merchants can promote health in particular populations, such as the elderly or the young.<sup>63</sup> Markets can promote individual health and well-being, however, the connection of markets to healthy food must extend beyond city boundaries to re-establish the regional food sheds once common in the United States.

Markets exist within a web of activities and relationships, each of which has unique implications for producers. Thus, law helps promote concrete links between community health, food access, and preserving farmland. In Ann Arbor, Michigan, this connection began by recognizing the importance of a public market. Ann Arbor ignored its public market for decades, but in the 1980s the city reframed the market as an asset, and began playing a greater role in market operations by hiring a market manager and sponsoring an advisory board to advise that new city position.<sup>64</sup> In the 1990s, the advisory board convinced the city that a vibrant market required protecting the region's farmland and so the city implemented a thirty-year tax increase to fund the purchase of farmland through the "purchase of development rights" (PDR) and a commission to advise on the purchases.<sup>65</sup> This visionary policy impacts the economic viability of farmers' and of the market.<sup>66</sup> Land trusts and other strategies are possible for visionary governments that see public health linkages and implications from producer to processor, to distributor, to consumer.

Thus, in the century ahead, the law should again legitimize the role of street vendors in addressing food system maladies by specifically enabling street merchants and markets. The law should further seek to produce a flexible, and stable regulatory infrastructure that enables broad,

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62. Benjamin Fried, *Farmers Markets Boost the Prospects of Low-Income Communities With Fresh, Wholesome Food*, For the Health of It, Project for Public Spaces (PPS), [http://www.pps.org/markets/info/markets\\_articles/markets\\_health](http://www.pps.org/markets/info/markets_articles/markets_health) (last visited Nov. 30, 2009).

63. MOON, *supra* note 3, at 15 (schematizes relationships between markets and health); LEE ET AL., *supra* note 3, at 6.

64. IMCA, COMMUNITY HEALTH AND FOOD ACCESS: THE LOCAL GOVERNMENT ROLE, 4 (2006), available at <http://bookstore.icma.org/freedocs/E43398.pdf>.

65. *Id.*

66. *Id.* at 7.

interconnected purposes, inclusive of individual and public health.<sup>67</sup> Next we will engage how to shape that infrastructure so that markets and merchants can help solve pressing public health problems.

#### THE LAW OF OUTDOOR FOOD MARKETS TODAY

Having described theoretical, historical, and health related justifications for allowing the sale of food on public space, it remains to be seen how the law is helping, or hindering, such activity. Today there are a number of government regulations and programs that impact outdoor food markets. Some of these are rules directly affecting the *where* of selling food—rules of right of way and zoning. Other government regulations and programs impact open air sales of food in terms of *what* and *how*. Certain federal programs increase and shape demand for food consumption, sometimes away from buying nutritious food outside. Other programs at the state and local level regulate the supply of food on the street. In their single-minded zeal to prevent food poisoning, these programs often result in the sale and consumption of less nutritious, industrially-processed foods. In this section, each of these categories of government involvement in outdoor food marketing will be examined, with suggestions for advocacy and reform.

#### A RIGHT TO SELL IN THE RIGHT OF WAY

The sale of food on the street or sidewalk is often heavily regulated by cities, if it is allowed at all. However, street food is recognized as an important source of healthy food in big cities.<sup>68</sup> The increasingly common belief is to recognize that the street, the food sold there, and public health are tied closely together.<sup>69</sup> Some cities, such as Portland, Oregon, enjoy a vibrant street food scene that contributes to quality of life by increasing opportunities for social interaction,<sup>70</sup> thanks in part to relatively relaxed

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67. LEADERSHIP FOR HEALTHY COMMUNITIES, *Action Strategies Toolkit*, Robert Wood Johnson Foundation (2009).

68. See generally DIXON ET AL., *supra* note 3; J.M. MIEDEMA, NEIGHBORHOOD MARKETS INITIATIVE: EVALUATION REPORT (Region of Waterloo Public Health 2008); Sloane, *supra* note 45, at 32, 45, 91; Glenn Collins, *Customers Prove There's a Market for Fresh Produce*, N.Y. TIMES, June 11, 2009, at 24; Isabelle T. Walker, *Carpenteria Beats Back an Epidemic*, SANTA BARBARA INDEPENDENT, April 2, 2009; MOON, *supra* note 3, at 25.

69. MOON, *supra* note 3, at 25.

70. Bagwell Shaw, *1983-2000*, 41 URBAN STUDIES 1987-1997 (2004) (comparing various ethnic districts in London); H. Kapell et al., *Food Cartology Rethinking Urban*

restrictions on vendors setting up in the right of way.<sup>71</sup> Sidewalk vendors may set up on the sidewalk, so long as they leave open at least eight feet of sidewalk width between their cart and the building line, and ten feet of open space between the cart and building entrances and street corners.<sup>72</sup> A vendor may sell from the sidewalk in any area zoned commercial,<sup>73</sup> so long as they have obtained, by consent or by payment, permission from the neighboring property owner.<sup>74</sup> New York City has similar rules on sidewalk vending,<sup>75</sup> but it limits vending to certain streets,<sup>76</sup> and, with the exception of the recently added “greencarts,” limits the total number of vending permits to 3,000,<sup>77</sup> which is far below the number demanded. Los Angeles, California, prohibits sidewalk vending altogether. Selling from the sidewalk is a misdemeanor, punishable by up to six months in jail and a \$1,000 fine.<sup>78</sup> Enforcement is lax, and thousands of sidewalk vendors operate outside the law anyway.<sup>79</sup>

Taco trucks and other motorized vehicles that sell food not from the sidewalk, but rather from the roadbed, are likewise subject to substantial regulation. Many cities require these vehicles to move periodically. In Dallas, Texas, vendors may stop for no longer than an hour at a time, and

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*Spaces as People Places*, 23-23 (URBAN VITALITY GROUP), available at <http://www.portlandonline.com/bps/index.cfm?a=200738&c=47477>; IMCA, *supra*, note 64, at 4.

71. Compare the restrictions found in Portland with those found in New York to discover how relaxed are Portland’s ordinances. Presentation by Gregg Kettles, American Planning Association Annual Conference, Las Vegas, NV (April 30, 2008).

72. PORTLAND OFFICE OF TRANSPORTATION, SIDEWALK VENDING CART PERMIT APPLICATION PACKET 5 (2006), available at <http://www.portlandonline.com/shared/cfm/image.cfm?id=163986>.

73. PORTLAND, OR., CODE § 17.26.070A (2009).

74. *Id.*

75. NEW YORK, N.Y., ADMIN. CODE § 17-315 (2009).

76. NEW YORK, N.Y., ADMIN. CODE § 2-314 (1995).

77. NEW YORK, N.Y., ADMIN. CODE § 17-307(b)(2)(a) (1985).

78. L.A., CAL. MUN. CODE § 42(b) (2004).

79. Anna Gorman, *Street Vendors Feel the Heat*, L.A. TIMES, April 1, 2007, at B1.

may sell from the same location no more than three hours in a twenty-four-hour period.<sup>80</sup> There are similar restrictions in place in San Jose, California,<sup>81</sup> and Phoenix, Arizona.<sup>82</sup>

There are, however, limits on the ability of local government to restrict open air retailing. Local solicitation ordinances may be constrained or pre-empted by state law.<sup>83</sup> For example, the California Vehicle Code contains a number of provisions regarding the use of streets that apply uniformly statewide.<sup>84</sup> Thus, state governments may seek to preempt local law by enacting legislation that expressly limits the ability of local authorities to enact or enforce similar ordinances. In *Barajas v. City of Anaheim*, the California Court of Appeal held that the California Vehicle Code preempted a local ordinance banning vending from vehicles parked on public streets in residential areas; the legislature, through the Vehicle Code, had withdrawn express authorization to local governments to prohibit street vending from vehicles.<sup>85</sup> In a well-publicized case, in 2008, Los Angeles County increased restrictions against the operation of taco trucks, only to have those restrictions invalidated in court on grounds that they were pre-empted by the state Vehicle Code and were unconstitutionally vague.<sup>86</sup> Similarly, a rule in the City of Los Angeles requiring taco trucks to move every hour was overturned this year.<sup>87</sup>

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80. DALLAS, TEX., CODE § 17-8.2(h)(2)(F)(iv) (2009).

81. SAN JOSE, CAL., CODE § 6.54.240(1) (2009).

82. PHOENIX, ARIZ., CODE art. XIV, § 31-24(1) (2009).

83. *See* *Envirosafe v. County of Owyhee*, 735 P.2d 998 (Idaho 1987) (overturning local hazardous waste management ordinance because it was pre-empted by less restrictive state law on same subject).

84. CAL. VEH. CODE § 21 (2009).

85. *Barajas v. City of Anaheim*, 15 Cal. App. 4th 1808 (1993). *See also* *People v. Ala Carte Catering Co.*, 98 Cal. App. 3d Supp. 1 (1979) (overturning local ordinance barring catering trucks from selling food near the entrance of a stationary restaurant as a naked restraint of trade lacking any public safety purpose).

86. *SaveOurTacoTrucks.org*, Viva!!! <http://saveourtacotrucks.org/2008/08/27/viva/> (last visited Aug. 27, 2008).

87. Phil Willon, *LA Taco Trucks Can Stay Parked For Business: A City of Los Angeles Law That Restricted How Long Mobile Food Vendors Could Stay in One Place*

Localities may also volunteer selectively to enforce their rules against open air markets. In Los Angeles, California, it is illegal to sell food from the roadway except from a motorized vehicle, presumably because they can be readily moved when called upon to do so.<sup>88</sup> Yet, farmers' markets are permitted to operate in the street—in one instance blocking automobile traffic completely—one day per week for several hours at time.<sup>89</sup> Localities acknowledge the benefits markets provide and should continue to explore ways to allow markets to flourish in the street, either through amendment of existing law, or through selective enforcement of its provisions.<sup>90</sup>

#### A RIGHT TO SELL IN THE MIDDLE OF THE BLOCK

Selling food on the sidewalk or roadbed is a right of way issue, under the purview of the city department responsible for maintenance of the streets and sidewalks.<sup>91</sup> Typically this is a different entity from the planning department, which regulates the use of land on the interior of blocks through the local zoning ordinance.<sup>92</sup> In many jurisdictions open air food markets are heavily restricted on the street and straight jacketed in the block interior. This is partly a reflection of the face of zoning generally. When it was first introduced, zoning had a relatively light touch.<sup>93</sup> Restrictions were cumulative in nature.<sup>94</sup> A commercial use like a market could not be

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*Has Been Overturned by a Court Commissioner*, L.A. TIMES, June 11, 2009, available at <http://www.latimes.com/news/local/la-me-tacotrucks11-2009jun11,0,4175990.story>.

88. LOS ANGELES, CAL., MUN. CODE § 80.73 (2009).

89. Farmer Net, Hollywood Farmers' Market, [http://www.farmernet.com/events/one-cfm?venue\\_id=587](http://www.farmernet.com/events/one-cfm?venue_id=587) (last visited Nov. 30, 2009); Los Angeles Downtown Farmers' Market on 5th Avenue between Flower and Grand (witnessed by author Gregg Kettles, Fall 2008-Spring 2009).

90. On the benefits of markets see Morales, Alfonso et al., *The Value of Benefits of a Public Street Market: The Case of Maxwell Street*, 9 ECONOMIC DEVELOPMENT QUARTERLY 300, 304-20; see also Project for Public Spaces (PPS), *supra* note 59.

91. See USDA, *supra* note 5.

92. *Id.*

93. ROBERT C. ELICKSON AND VICKI L. BEEN, LAND USE CONTROLS 86 (3d ed. 2005).

94. *Id.* at 90.

operated in an area assigned a higher classification, such as an area zoned residential, but was permitted in an area assigned a lower classification, such as an industrial area.<sup>95</sup> Today restrictions tend to be exclusive.<sup>96</sup> Commercial uses are permitted only in their own zones, and not in areas either “higher” or “lower.”<sup>97</sup> The net result has been not only to segregate all types of uses, but also to reduce the areas where higher uses, including markets, can operate.

If that were not enough, open air vending is further hampered by the increasing detail of zoning ordinances. In the beginning, zoning ordinances were fairly general.<sup>98</sup> The list of use districts was relatively short, and each district came with few restrictions.<sup>99</sup> Over the years, the number of districts and the restrictions in each have multiplied,<sup>100</sup> and, today, finding a legal place for an open air market is a difficult task indeed. One new restriction has proven particularly nettlesome—the temporary, or conditional, use. Activities designated as conditional uses are not allowed as a matter of right, but must instead be authorized by permit from a governmental authority.<sup>101</sup> For some conditional uses the permit is only temporary, and ongoing uses must continually be re-approved by application.<sup>102</sup> The uncertainty of continuing to gain approval discourages investment in markets. In Los Angeles, California, the zoning ordinance permits markets only in a few areas, including parking lots, and there only as a temporary use.<sup>103</sup>

Pressure for sustainable and livable cities, and demands from food policy advocates, is compelling cities to reorganize right of ways and zoning. For

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95. *Id.* at 88-90.

96. *Id.* at 90.

97. *Id.*

98. *Id.*

99. ELLICKSON, *supra* note 93, at 90.

100. *Id.*

101. *Id.* at 91.

102. *E.g.*, TULARE, CAL., MUN. CODE § 10.116 (2009).

103. L.A. Dep’t of Bldg. and Safety, Temporary and Special Events (2009), *available at* [http://www.ladbs.org/forms/inspection\\_forms/IN-App.08.pdf](http://www.ladbs.org/forms/inspection_forms/IN-App.08.pdf).

instance, in Oakland, the Oakland Food System Strategy seeks to make multiple food distribution modalities available to residents.<sup>104</sup> The Food System Strategy has involved partnerships between organizations, neighborhoods, and government. In the past, police frequently cited Mexican-American merchants selling fruits and vegetables and prepared foods from pushcarts for violating various ordinances.<sup>105</sup> An alliance of vendors and organizations lobbied for a change in the ordinances and raised funds for a commercial kitchen to bring prepared food vendors into compliance, resulting in improvements in business conditions and neighborhood access to food.<sup>106</sup> Additionally, the federal government now permits farmers' markets on federal property,<sup>107</sup> and many other organizations concerned with public health recognize the need for the street, and street vending in particular, to help realize their goals.<sup>108</sup>

General plans and zoning ordinances should be reviewed and amended to make it clear that markets are compatible with a variety of use districts, and should be allowed as a matter of right. Cities starved of parks and plazas often are likely to have abundant parking lots, many of which may be situated near schools, government offices, and places of worship, frequently sit empty some days of the week and may prove to be good locations for markets.

#### SHAPING AND CHANNELING DEMAND: SUBSIDIZING CONSUMPTION

The emergence and operation of open air food markets is directly influenced by government policy through rules on the rights of way and

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104. C.S. MOTT GROUP, *Healthy Food For All: Building Equitable and Sustainable Food Systems in Oakland and Detroit 5* (Policy Link 2009).

105. APHA, Public Health and the Environment, Fruterios organizing project: An innovative approach to reducing an environmental health hazard by using principles of asset-based community development, [http://apha.confex.com/apha/132am/techprogram/paper\\_89734.htm](http://apha.confex.com/apha/132am/techprogram/paper_89734.htm) (last visited Nov. 30, 2009).

106. *Id.*

107. USDA, HOW TO ESTABLISH A FARMERS' MARKET ON FEDERAL PROPERTY, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3010362&acct=wdmgeninfo>.

108. ROBERT WOOD JOHNSON FOUNDATION, BALANCE: A REPORT ON STATE ACTION TO PROMOTE, NUTRITION, INCREASE PHYSICAL ACTIVITY AND PREVENT OBESITY 107 (2008); LEE ET AL., *supra* note 3, at 6.

zoning. Government policy also indirectly impacts street food vending. For years, the federal government has subsidized food consumption through a variety of programs, including SNAP, formerly known as the Food Stamp Program.<sup>109</sup> This thirty billion-dollar per year program serves twenty-six million people across the country.<sup>110</sup> Program beneficiaries receive their benefits through an electronic benefits transfer (EBT) system.<sup>111</sup> Beneficiaries use an ATM-like card to access benefits at participating locations,<sup>112</sup> and may use those benefits to buy food intended to be eaten at home.<sup>113</sup>

The federal government also delivers nutrition assistance through WIC. This six billion dollar per year federal grant program provides food, education, and health care referrals through participating state agencies in all the states.<sup>114</sup> Most state agencies provide WIC beneficiaries with checks or vouchers to purchase specific foods designed to supplement their diets.<sup>115</sup> While SNAP allows the beneficiary great freedom in deciding what to eat, WIC does not. Beneficiaries are allowed to buy set quantities of specific items, such as eggs, milk, cheese, and bread.<sup>116</sup>

SNAP and WIC are important food security programs, but their infrastructure favors supermarkets, convenience stores, and other stationary, indoor retailers. Storefront businesses are relatively easily wired into SNAP's EBT system. Even though WIC is not wired into EBT, there is

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109. USDA, Supplemental Nutrition Assistance Program, <http://www.fns.usda.gov/snap/snap.htm> (last visited Nov. 30, 2009).

110. *Id.*

111. Family Health Administration, WIC on the Web Monthly Status Report, [http://www.fns.usda.gov/apd/Handbook\\_901\\_2007/App\\_E\\_v1.1.pdf](http://www.fns.usda.gov/apd/Handbook_901_2007/App_E_v1.1.pdf), at p. 4 (last visited Dec. 7, 2009).

112. *Id.*

113. USDA, *supra* note 109.

114. USDA, WIC THE SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMAN, INFANTS AND CHILDREN (2009), <http://www.fns.usda.gov/wic/WIC-Fact-Sheet.pdf> (last visited Dec. 5, 2009).

115. *Id.*

116. ROBERT WOOD JOHNSON FOUNDATION, *supra* note 108, at 107.

growing pressure to make it so.<sup>117</sup> As it is, WIC retailers must first attend state certification and training classes<sup>118</sup>—things that a street corner fruit vendor (who often may be just getting by) may not be able to afford. Efforts are underway to enable farmers' markets to participate in these programs. For example, the federal Farmers Market Promotion Program (FMPP) is allocating ten percent of its 2009 budget for EBT projects that apply federal nutrition programs (such as SNAP) at farmers' markets.<sup>119</sup> WIC Farmers' Market Nutrition Programs (FMNPs) have been established in many states,<sup>120</sup> enabling WIC participants to use their benefits at farmers' markets.<sup>121</sup> But these efforts are incomplete, as they do not yet reach mobile vendors or lone street corner vendors of fresh produce and other nutritious food. Small steps have been taken to extend service to individual vendors: the government is providing fifteen fresh produce vendors in New York City with \$1,000 all weather wireless terminals for EBT transactions.<sup>122</sup> Further work needs to be undertaken to explore how benefits may be accessed through low cost infrastructure, such as cell phones, and in ways that require minimal training. In this way, we are more likely to ensure a level playing field for itinerant vendors and their customers participating in these programs.

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117. *E.g.*, Federal Grants Wire, WIC Grants to States (WGS) (10.578), <http://www.federalgrantswire.com/wic-grants-to-states-wgs.html> (last visited Nov. 30, 2009).

118. NEIL HAMILTON, *THE LEGAL GUIDE FOR DIRECT FARM MARKETING* 80 (1999).

119. USDA AGRICULTURAL MARKETING SERVICE, 2009 FARMERS MARKET PROGRAM PROMOTION GUIDELINES 9 (2009), *available at* <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5075760>.

120. ROBERT WOOD JOHNSON FOUNDATION, *supra* note 108, at 107; [www.cdfa.ca.gov/is/docs/CFMAC\\_Minutes102908.pdf](http://www.cdfa.ca.gov/is/docs/CFMAC_Minutes102908.pdf) - 2009-03-11. Ironically the progressive era ushered in the interest in public markets as policy tools as described above in section II.

121. HAMILTON, *supra* note 118, at 39.

122. G. Collins, *Customers Prove There's a Market for Fresh Produce*, N. Y. TIMES, June 11, 2009, at A24.

## SHAPING AND CHANNELING SUPPLY: PERMITS AND PROCESSING

The sale of food on the street is further shaped and channeled by a body of health-oriented rules that apply to the retail sale of food generally, whether indoors or out in the open air. Rulemaking in this area has its roots in the Progressive Era, when federal investigation into origins and spread of typhoid fever “encouraged the establishment of county health departments.”<sup>123</sup> The United States Public Health Service then turned its attention to the role of food in the spread of disease. This work culminated in the publication of a Model Food Code to help state and local governments prevent food borne illness.<sup>124</sup> The first such code was published in 1934,<sup>125</sup> and the Model Food Code (the Food Code or Code) has been updated more than fifteen times since then.<sup>126</sup> It has been very influential, with each revision in the Code being followed by revisions to state and local retail food codes.<sup>127</sup> Now under the purview of the United States Food and Drug

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123. John L. Parascandola, *Public Health Service*, in *A HISTORICAL GUIDE TO THE U.S. GOVERNMENT* 487 (George Thomas Kurian, ed. Oxford University Press 1998), available at [http://lhncbc.nlm.nih.gov/apdb/phsHistory/resources/phs\\_hist/pub\\_phs04.html](http://lhncbc.nlm.nih.gov/apdb/phsHistory/resources/phs_hist/pub_phs04.html).

124. U.S. Food and Drug Administration, FDA Food Code 1999 – Table of Contents, <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode1999/default.htm> (last visited Dec. 5, 2009).

125. *Id.*; U.S. Food and Drug Administration, Current Initiatives for Food Code Implementation and Foodborne Illness Risk Factor Reduction (July), <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FederalStateCooperativePrograms/ucm110178.htm> (last visited Dec. 7, 2009).

126. U.S. Food and Drug Administration, FDA 2005 Food Code – Table of Contents, <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode2005/default.htm> (last visited Dec. 7, 2009).

127. National Restaurant Association, Health & Safety Backgrounder, FDA Model Food Code, The NRA supports a Model Food Code that is uniform, based on sound science and workable for the restaurant industry, <http://www.restaurant.org/healthsafety/foodcode.cfm> (last visited Nov. 30, 2009).

Administration, and most recently revised in 2005,<sup>128</sup> some version of the Code has been adopted by every state and hundreds of localities.<sup>129</sup>

Besides regulating the safety of food at the time of sale, the Food Code has also regulated the food preparation process since 1993.<sup>130</sup> Following what are known as Hazard Analysis Critical Control Point, or HACCP, principles, these process-oriented regulations cover such things as cooking and holding temperatures, refrigeration, dishwashing, and inspection regimes for retail food establishments.<sup>131</sup>

Notwithstanding the uniformity promised by the food code, local authorities appear to us to enjoy wide discretion in implementing it. Much of this discretion is built into the Food Code itself. Rather than being limited to bright line rules that can be applied objectively, the Code is filled with flexible standards that can only be applied subjectively. Rules governing mobile food facilities, such as catering trucks and fruit carts, are apt examples of this flexibility. Facility surfaces, for example, must be “*easily cleanable*,” allowing for the “*effective removal of soil, food residue, or other organic or inorganic materials by normal cleaning methods.*”<sup>132</sup> A mobile facility must be operated “within 200 feet” of toilet and hand washing facilities—precise enough—but those facilities must also be “readily available” or otherwise approved by local health department officials as conforming to law or “current public health principles, practices, and *generally recognized* industry standards that protect public health” to ensure they are “available” to employees.<sup>133</sup> Proprietors of mobile vending carts are required to “develop and follow written operational procedures” for handling food and keeping the cart and utensils clean. They must have those procedures reviewed and approved by the local health department.<sup>134</sup> No

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128. *Id.*

129. U.S. Food and Drug Administration, Real Progress in Food Code Adoptions, <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FederalStateCooperativePrograms/ucm108156.htm> (last visited Dec. 12, 2009).

130. National Restaurant Association, *supra* note 127 (emphasis added).

131. *Id.*

132. CAL. RETAIL FOOD CODE, HEALTH AND SAFETY §§ 113767, 114301(g) (emphasis added).

133. CAL. RETAIL FOOD CODE, HEALTH AND SAFETY §§ 113734, 114315 (emphasis added).

134. CAL. RETAIL FOOD CODE, HEALTH AND SAFETY § 114303(d).

further description is made regarding what those procedures are supposed to look like.<sup>135</sup>

Rules for stationary vending, such as certified farmers' markets, are even less certain. Food samples may be distributed in a "sanitary manner."<sup>136</sup> Farmers' markets must have toilet and hand washing facilities within 200 feet "or as approved by" the local health department.<sup>137</sup> Mobile food vendors operating under the management of the market are free from the rules that would otherwise apply to them as mobile vendors. Instead they may operate "in a manner approved" by the local health department.<sup>138</sup>

Vague language in the Food Code is only one reason for local discretion. The Code also provides for the issuance of variances.<sup>139</sup> The local health department is authorized to permit the use of an "alternative practice or procedure" so long as it is "equivalent to the existing requirements, and that a health hazard will not result from the alternative practice or procedure."<sup>140</sup> Beyond the language of the Code, the local government has discretion in deciding when and under what circumstances to enforce the Food Code, and when to turn a blind eye when it is violated. In Los Angeles, California, for example, the health department and local police have investigated, and arrested in some circumstances, unlicensed vendors of bacon-wrapped hot dogs,<sup>141</sup> but unlicensed vendors of other fare seem to get a pass.<sup>142</sup> The

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135. *Id.*

136. CAL. RETAIL FOOD CODE, HEALTH AND SAFETY § 114371(b)(1).

137. CAL. RETAIL FOOD CODE, HEALTH AND SAFETY § 114371(c).

138. CAL. RETAIL FOOD CODE, HEALTH AND SAFETY § 114371(f).

139. *See* FDA 2005 Food Code, Chapter 3 Food, *available at* <http://www.fda.gov/downloads/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode2005/ucm123970.pdf>.

140. CAL. RETAIL FOOD CODE, HEALTH AND SAFETY § 113936.

141. Nicole Dailo, *USC Fan Favorite Hot Dogs May Be Numbered*, 2008 DAILY TROJAN, September 16, 2008, at 1.

142. KATHERINE GOETZ AND JOELLE WOLSTEIN, STREET VENDORS IN LOS ANGELES: PROMOTING HEALTHY EATING IN LA COMMUNITIES 15 (Applied Policy Project, UCLA School of Public Affairs, Department of Public Policy 2007), *available at* [http://lewis.spa.ucla.edu/publications/studentreports/Final42006IG-StreetVendors\\_](http://lewis.spa.ucla.edu/publications/studentreports/Final42006IG-StreetVendors_)

result is that, when it comes to deciding how food should be sold on the street, local government enjoys ample discretion.

This puts local government in a position to use the retail food code, along with rules of zoning and right of way, to help bring about the sale of food that is not only safe, but also nutritious. Some communities are taking steps to do just that. Besides the Oakland example described above, Kansas City, Missouri, offers discounted licenses to mobile vendors who offer healthy food, such as plain nuts, low fat yogurt, and fruit, as well as beverages with no added sugar.<sup>143</sup> In 2008, New York City authorized the issuance of 1,000 new permits for street vendors to sell raw fruits and vegetables.<sup>144</sup> In Los Angeles, California, where right of way rules prohibit sidewalk vending of any kind, vendors of sliced fruit who comply with health department rules are often openly allowed to sell from the sidewalk unmolested.<sup>145</sup> Umbrellas shade raw fruit kept on ice until a customer arrives, when it is sliced to order by a vendor wearing an apron and plastic gloves.<sup>146</sup>

There is still much more that these cities and others can do to encourage vending of healthy food on the street. In Los Angeles, mobile sidewalk vendors converge on elementary school campuses shortly before classes begin and again at the end of the school day.<sup>147</sup> Some of the food sold consists of relatively nutritious food, such as tamales, corn on the cob, and fruit.<sup>148</sup> But, according to a 2007 survey by Katherine Goetz and Joelle Wolstein, these better choices are outsold by less healthy alternatives: chips, ice cream, candy, and soda.<sup>149</sup> New legislation is not required to allow the

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pdf.pdf; Co-author Gregg Kettles has observed unlicensed food vendors operating on a daily basis from the same locations around the city of Los Angeles over a period of several months in early 2009.

143. KANSAS CITY PARKS AND RECREATION VENDING POLICY 3-5 (2008).

144. NYC Green Cart, *supra* note 57; G. Collins, *Customers Prove There's a Market for Fresh Produce*, N.Y. TIMES, June 11, 2009, at 24.

145. Co-author Gregg Kettles has observed sliced fruit vendors operating on the sidewalk on a daily basis from the same locations around the city of Los Angeles over a period of several months in early 2009.

146. *Id.*

147. KATHERINE GOETZ AND JOELLE WOLSTEIN, *supra* note 142, at 13.

148. *Id.* at 13-14, 20.

149. *Id.* at 20.

vending of healthy food near elementary schools. Sidewalk vending is already prohibited. Even vending from vehicles, such as catering trucks (which are generally allowed to operate in other areas),<sup>150</sup> are barred within 500 feet of any school.<sup>151</sup> However, these rules are often ignored due to small fines—typically thirty-five dollar per infraction—and infrequent enforcement.<sup>152</sup> Selective enforcement of the right of way laws against vendors of healthy food might play a part in helping children choose healthy snacks after school. New research is underway in California to address the role street vendors can play in improving children's snacking behavior and the subsequent health outcomes associated with the food within their access.<sup>153</sup>

Cities could also relax their interpretation and enforcement of the Food Code against vendors who offer relatively healthy food. For three decades, vendors have sold tacos, pupusas, and huaraches at a soccer field in the Red Hook area of the borough of Brooklyn in New York City. The food was served from simple, traditional food stands that reflected the Central American roots of the vendors and their patrons. When the broader community discovered the food, the health department of New York City took an interest.<sup>154</sup> To be allowed to continue to operate, vendors were required to purchase catering trucks at an average cost of \$40,000 each.<sup>155</sup> Some vendors could not afford to stay in business.<sup>156</sup> By taking traditional

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150. L.A., CAL., MUN. CODE § 80.73 (2009).

151. L.A., CAL., MUN. CODE § 80.73(b)(2)(A)(5) (2009).

152. KATHERINE GOETZ AND JOELLE WOLSTEIN, *supra* note 142, at 15.

153. National Policy and Legal Analysis Network to Prevent Childhood Obesity, Where We Focus: Built Environment, <http://nplanonline.org/focus/community-environment> (last visited Nov. 30, 2009); UCSF Center for Obesity Assessment, Study & Treatment, The Role of Street Vendors in the After-School Food Environment, [http://chc.ucsf.edu/COAST/research\\_street\\_vendors.htm](http://chc.ucsf.edu/COAST/research_street_vendors.htm) (last visited Nov. 30, 2009).

154. MIKE McLAUGHLIN, *Hook Vendors in the Red: City Rules, Delays Cause Lo\$\$es*, THE BROOKLYN PAPER, July 15, 2008, [http://www.brooklynpaper.com/stories/31/27/31\\_27\\_mm\\_rh\\_vendors.html](http://www.brooklynpaper.com/stories/31/27/31_27_mm_rh_vendors.html); The Pork Chop Express, <http://www.porkchop-express.com/search/label/Red%20Hook> (Aug. 22, 2007, 8:19 EST – June 3, 2008, 1:21 EST).

155. *Id.*

156. *Id.*

and relatively nutritious food off the street, what will take its place? The health department does not object to the sale of chips and soda. The department is confident that such foods are free from pathogens. But they have little nutritional value. By focusing on food safety more than on food value or nutrition, communities risk ending up with less nutritious street food.<sup>157</sup>

#### CONCLUSION

The street may be the ultimate public space in American life—the classic hot rod, the lowrider, the custom import, and all manner of other vehicles express our identities and purposes on the street. These same roads, however, are public health disasters, whether from drunk driving or due to other misuses. In the same way, food expresses our social and cultural identities. But, by abandoning some markets and by selling questionable “foods,” the industrial food system has become a public health nightmare. In this vein, the combination of food and street embodied in street vendors are much more than a source for recreation; street vendors have a practical role to play in improving social life.

Cities once embraced markets to provide healthy food and employment, and to help regulate economic activity. Street vendors, the markets they populate, and the practices they establish provide access to healthy food, accommodate the stranger, and create opportunities for economic mobility. Markets are important tools for creating a sense of place, and such merchants render stale streets more livable. Some authors argue that markets and merchants are barometers of food security.<sup>158</sup> Others argue that markets and merchants are “remoralizing” our economy.<sup>159</sup> Whether or not, and by what method, merchants and markets will again come to play these roles is unclear, but recent work indicates the answers will vary by social

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157. See IMCA, *supra* note 64, at 4.

158. MICHELLE COMPANION, *The Under-Utilization of Street Markets as a Source of Food Security Indicators in Famine Early Warning Systems: A Case Study of Ethiopia*, in *STREET ENTREPRENEURS: PEOPLE, PLACE, & POLITICS IN LOCAL AND GLOBAL PERSPECTIVE* 399, 402 (John Cross and Alfonso Morales, eds. London, Routledge 2007).

159. COLIN SAGE, *Trust in Markets: Economies of Regard & Spaces of Contestation in Alternative Food Networks*, in *STREET ENTREPRENEURS: PEOPLE, PLACE, & POLITICS IN LOCAL AND GLOBAL PERSPECTIVE* 147, 149 (John Cross and Alfonso Morales, eds. London, Routledge 2007).

and, importantly, legal context.<sup>160</sup> The mid-century period, in which the merchants' role in industrial societies was reduced, is coming to an end. Vendors are starting to play a central role in repainting the canvas of sidewalks and streets in a variety of experiments around the United States and with various purposes around the world. Now is the time to embrace this experimental attitude and provide it the regulatory infrastructure to fulfill its promise.

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160. Papers presented by Alfonso Morales, Am I in a Legal Place? Workshop on Urban Street Vending: Economic Resistance, Integration or Marginalization? Center for Metropolitan Studies, Technical University of Berlin (May 15-16, 2009).