Creating Community Owned Food Systems Through Homemade Food Policy

A Proposal by the Sustainable Economies Law Center

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Background

In 2012 the Sustainable Economies Law Center, along with numerous active partners, successfully advocated for the passage of the California Homemade Food Act (AB 1616, Gatto), also commonly known as California’s “cottage food law.” Thousands of small food businesses were formed under the law during just its first year of implementation. However, the Homemade Food Act only allows certain “non-potentially hazardous” foods such as breads, pies, fruit jams, and dried foods to be made in a home kitchen and offered for sale. Selling more perishable homemade foods including hot meals, green salads, and frozen foods, among others, is not allowed under the current law. Such perishable foods must be made in an inspected commercial kitchen if they are offered for sale or public consumption. The California Retail Food Code (found within the Health and Safety Code) does not allow a home kitchen to be used as a commercial kitchen except under the parameters of the Homemade Food Act. Many consumers and food producers alike would prefer a more permissive homemade food law that would allow sales of hot meals and other perishable foods.

Despite the restrictive law, numerous technology start-ups have developed web-based platforms that advertise home cooked meals for sale. Some offer consumers the chance to dine at the cook’s home, while others invite consumers to pick up a take-out meal from the cook’s home. Some tech platforms are focused on providing deliveries of food in general, especially food from popular restaurants, however, under a new homemade food law these companies could enter the homemade food market (examples: Uber Eats, Postmates). The Sustainable Economies Law Center has received about a dozen inquiries from entrepreneurs seeking legal assistance to develop web platforms for selling homemade food.

Some have called these platforms “the Airbnb of food” or “the Uber for food.” Many of these start-ups have received large investments from private investors who likely hope to receive large profits from the enterprise.

In spring 2016 home cooks using one such web platform, at Josephine.com, received cease and desist letters from local health regulators, as did Josephine the enterprise. Many stakeholders have identified the need to rethink the law around homemade food in California, and representatives of the California Conference of Directors of Environmental Health (the association of environmental health department directors in California) have been engaging in numerous discussions around this topic.

The Sustainable Economies Law Center supports the growth of small-scale enterprises in the food system as a means for providing localized economic empowerment and increasing the availability of locally produced, fresh foods from diverse sources. Yet, many examples of technology-based approaches to scaling up “gig economy” activities do not achieve these goals. The service models of online platforms such as Airbnb, Uber, and Lyft have raised serious questions about exploitation of service providers, unfair competition with established businesses, evasion of safety, tax, and employment laws, and inadequate safety mechanisms to protect users and the community, among other concerns. A 2015 article in the East Bay Express offers an in-depth discussion of these questions arising out of the so-called “sharing economy” and contrasts the so-called "sharing economy" or "gig economy" to a "true sharing economy" which would be one based heavily on cooperative enterprises.

In February 2017, California State Assemblymember Eduardo Garcia introduced Assembly Bill 626, a bill to greatly expand the scope of legal sales of homemade food. The bill is sponsored by tech company Josephine.

In response, the Sustainable Economies Law Center proposes a policy solution that will allow home-based businesses and web platforms to operate in ways that ensure consumer protection and truly local economic opportunities while mitigating some of the huge income disparities and exploitation
we’ve seen emerging in other parts of the tech economy and in our food systems. We propose a regulatory scheme that will not only promote food safety and economic opportunity for home cooks, but also ensure that tech platforms do not wield excessive control over our rapidly changing food system.

Certified Farmers’ Markets in California: A Model for Building Transparent and Community-Serving Food Systems

The policy proposal below was inspired in part by the flourishing of farmers’ markets in recent decades. The USDA tracks farmers’ markets, nationally, and indicates that there has been an increase in the number of farmers’ markets in operation over the last two decades, from 2,410 in 1996 to 8,476 in 2015. As of this writing, the USDA’s National Farmers’ Market Directory lists 765 farmers’ markets in California.

In California, farmers’ markets are regulated to ensure food safety, to ensure a certain level of transparency, and to ensure direct, farmer-to-consumer transactions. Among numerous rules in California, a “certified farmers’ market may only be operated by one or more certified producers [e.g., farmers who sell at the market], by a nonprofit organization, or by a local government agency.” (See California Code of Regulations Title 3 section 1392.2 (a).) In other words, the central organization or enterprise that manages a certified farmers’ market must be a government agency, a nonprofit, a farmer, or a group of farmers. No other entities are allowed to operate a certified farmers’ market in California.

This policy proposal includes a regulatory scheme for sales of homemade foods inspired in part by the community-driven nature of farmers’ markets in California. In summary, the proposal below calls for state legislation that greatly expands the scope of homemade foods that can be sold in California, while also restricting what kinds of third parties may engage in advertising and facilitating transactions of homemade foods.

Policy Proposal For Legalizing Sales of Homemade Food in California

Without altering the regulatory framework already established by the California Homemade Food Act for “cottage food” enterprises, the state Health and Safety Code could additionally allow homemade food to be offered for sale under a separate but similar regulatory framework designed for sales of hot meals and other more perishable foods as discussed in Part A below. In addition, the state would
regulate and provide permits to third party web platforms that exist primarily to facilitate transactions of homemade food as discussed in Part B below.

Part A: Regulating Sales of Homemade Food

Like under the existing "cottage food law," environmental health departments would provide permits to home cooks that would ensure any cook has undergone safe food handling training and that their home kitchen is maintained in a sanitary condition. This regulatory oversight would ensure the following:

Food Safety Training: Each home food enterprise owner-operator would be required to complete the Food Safety Manager course before selling any food, and if the home cook has any family or household members helping out in the kitchen, helpers would need to obtain the simpler Food Handlers' Card. This requirement is parallel to regular restaurant and other retail food facility kitchens. The Food Safety Manager training requirement is a step above current Cottage Food Operations, which only need the simpler Food Handler Card.

Sanitation Requirements: The sanitation requirements of the current “cottage food law” would apply to home cooks under this new law. These requirements include basic sanitation practices such as hand washing, utensil washing, keeping food in covered containers during storage, regularly disposing of garbage, and ensuring the kitchen is free of pest infestations, among other requirements.

Kitchen Inspections: Prior to selling home cooked meals, the local environmental health department may choose to require that the cook submit to a home kitchen inspection to ensure compliance with the sanitation requirements. This inspection procedure would be very similar to the process that already exists for home kitchens under the "cottage food law."

Allowed Foods: This new class of home food preparation would allow any foods to be prepared, with just a few exceptions. Certain especially risky foods and processing practices, such as whole animal butchering and canning of acidified foods or low acid foods, would be prohibited.

Selling through web platforms: If a home cook sells meals through a third-party web platform, it must be one that is permitted and described in the following part (B).

Part B: Regulating Web Platforms

Create a new type of environmental health permit for each web platform or other third party enterprise selling meals or tickets to attend meals. Note: these restrictions and requirements would apply to web platforms designed specifically for the promotion, payment processing, or other facilitation of sales of food. This section would not apply to home cooks using all web-based communications platforms or devices to spread the word about their home food enterprise. For example, if a home cook writes a post on her facebook wall announcing that she will be offering food for sale at a certain time, facebook would not be responsible for following the proposed policy below because the website facebook is not specifically designed to facilitate advertising and payment processing for sales of homemade foods. However, if a home cook uses a website operated
specifically for facilitating sales of food, then the following proposed law would apply to the web platform enterprise.

**Restrict the ownership and governance of the web platforms.** Each web platform would be organized as one of the following: worker cooperative, consumer cooperative, nonprofit mutual benefit corporation, or nonprofit public benefit corporation, as discussed in more detail below. Regular shareholder-owned corporations would not be permitted to operate web platforms dedicated to selling homemade food (unless it is a wholly-owned subsidiary of a government agency or nonprofit).

**Worker cooperative** (as defined in California Corporations Code Section 12253.5 and as governed by the Cooperative Corporation law beginning in Section 12200 of the Corporations Code). If operating a worker cooperative corporation, the corporation must be controlled primarily by the cooks, not investors (if any). Any investors in a cooperative corporation must be debt investors, or community investors as defined by Corporations Code Section 12238(f) and subject to the voting power provisions in Section 12253(c), meaning that the investors only have the opportunity to vote on rare and major decisions such as mergers or unusual sales of major assets. All owners of any proprietary interest in the cooperative must be worker-members, community investors, or another type of member whose voting rights are restricted in the same ways as the community investors.

Any home cook who sells food through a web platform regulated under this proposed law would have a reasonable opportunity to become an owning member of the web platform cooperative. The cooperative may set reasonable membership requirements, such as a requirement that a cook sell a certain number of meals on the platform with reasonably positive results prior to becoming a member, but there may not be unreasonably high costs to becoming a member or unreasonably long candidacy periods for membership. The cooperative may require that cooks sell a certain minimum volume of food or that cooks sell food of a certain quality to maintain their membership.

**Consumer cooperative** (as governed by the Cooperative Corporation law beginning in Section 12200 of the Corporations Code). If the consumer cooperative has any shareholders with proprietary interests that are different from the typical consumer member, their voting rights must be similarly restricted as community investors in worker cooperatives described in the previous section.

**Nonprofit mutual benefit corporation** (as described in California Corporations Code Section 7110 et seq.). If a nonprofit mutual benefit corporation, any investors must be debt investors or investors with voting powers that are substantially the same as community investors in a worker cooperative corporation described above.

**Nonprofit public benefit corporation** (as described in California Corporations Code Section 5110 et seq). Nonprofit public benefit corporations may not have shareholders and may not exist to provide profits for any individuals or entities. Therefore, many homemade meal sales platforms may not find it feasible to operate as a nonprofit public benefit corporation unless their food preparation activities are entail vocational training or a charitable program, such as nutrition education, job training, or meal preparation for the very needy. This may be a suitable structure for platforms that are highly committed to job training or food systems education for the general public as a primary goal, and not benefits for its members.

**A government agency, or a corporation controlled wholly by a government agency or nonprofit public benefit corporation.** While most government agencies are unlikely to pursue managing a web platform for any type of commerce, California farmers' market law contemplates government agencies managing farmers markets, and in fact the city of Santa Monica does so quite successfully. Therefore, we propose that government agencies also be among the limited array of entities that can manage a homemade food web platform.
Why prohibit web platforms from operating as regular for-profit enterprises?

As the homemade meals sector evolves, there are many risks of harm to workers (i.e. cooks and delivery people), consumers, and our communities. It is critical to adopt business models that mitigate the potential for harm. In the tech economy, third party web intermediaries tend to hold a large amount of power over both workers and consumers, particularly because the dominant business model of tech companies is to grow rapidly to control the lion’s share of their market. This keeps competition at bay and provides lucrative return to shareholders.

Typical for-profit intermediaries have both an incentive and the leverage to raise fees and set uniform standards, taking from both consumers and workers, who often have very little power to negotiate better terms for themselves. Workers can be terminated without recourse, particularly in the absence of an employment relationship, which is often the case where tech intermediaries are concerned. This control wielded by powerful intermediaries can also often hinders creativity and autonomy over the work performed by service providers. By contrast, in a nonprofit or cooperative, there is little or no incentive to squeeze more value from workers and consumers.

For-profit intermediaries that merely share equity with their users do not solve the underlying problems of the for-profit business structure. The problem with simply sharing some of the equity is that someone is still profiting off the labor of others, and the business can still easily be sold to the highest bidder, as recently occurred when the New York based ride hailing app Juno was sold for $200 million. Although Juno had been touted as a new and improved model for the "gig economy" because a small portion of the stock of the company was owned by drivers, in the end these drivers (as minority shareholders) were forced to sell their shares for very little profit compared to the early investors who received most of that $200 million. Cooperatives change the equation entirely because dividends go to each worker on the basis of how much each worker earned for the cooperative during a fiscal year and under California law the role of outside investors is quite limited. In a worker cooperative, there's little to no reason to extract more earnings from workers, because much of it will go back to those same workers in the end.

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