

Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law

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INTRODUCTION

Instagram pictures of elegantly plated dinners, long farm-style tables, and well-to-do people laughing in what looks like a loft apartment are followed by commenters asking, “Where is this?” This is the world of underground dining. Aspiring and established chefs invite strangers into their homes (or their friends’ stores after hours, or the empty warehouse at the edge of town, or the nearest farm) for a night of food and revelry in exchange for cash. Although decidedly antiestablishment, these secret suppers and pop-up restaurants are popular—there are websites to help people locate them, and many respected publications have penned stories about their rise.¹ While some municipalities have been proactive in regulating these events, in other locales these dinners remain completely illegal, violating health, zoning, employment, and business-licensing regulations.

At the most basic level, this Essay considers what society should make of these dinners. In Part I, it defines underground dining. In Part II, it considers the benefits of regulating food establishments and the extent to which secret suppers and pop-up restaurants comply with existing regulatory schemes. In Part III, the Essay explores underground dining as part of the sharing economy and addresses the concerns associated with regulation in that emerging sphere. Finally, in Part IV, it asks how we should balance our societal commitments to entrepreneurial innovation, community-building, and eating good food against the rule of law.

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¹ See, for example, Gregory Dicum, *At Pop-Ups, Chefs Take Chances with Little Risk* (NY Times Feb 11, 2010), online at <http://www.nytimes.com/2010/02/12/dining/12sfdine.html> (visited Feb 26, 2015).

The answers to these questions are not straightforward. Just because these dinners are often illegal does not mean that they are necessarily bad. In some ways, underground dining is a form of transgression that society should celebrate: by undermining an arguably archaic system of food regulations, secret suppers could lead to meaningful reform, activate underused spaces, contribute to economic exchange as part of the growing “sharing economy,” and build community. In other ways, however, underground dining seems quite similar to old-fashioned, antiregulatory libertarianism, with chefs playing the role of factory owners who would prefer to produce goods without having to worry about expensive and burdensome health and safety regulations. Underlying both views is an even more troubling vision: skyboxification,² represented in this instance by zones of limited law enforcement for the rich and well-connected, where diners can experience the thrill of illegal action without the real possibility of punishment. In Part IV, I explore all these models in considering whether and how society should regulate these forms of meal sharing.

I. WHAT IS UNDERGROUND DINING? SECRET SUPPERS AND POP-UP RESTAURANTS

Underground dining takes many different forms. Here I will focus on two of the most common: secret suppers and pop-up restaurants. While there are no firm lines or formal regulations distinguishing these events, secret suppers are typically held in an individual’s home or some other nonrestaurant space.³ The food is generally prepared in a noncommercial kitchen, and the facility presumably has not received any formal inspections from city health or code-enforcement officials. Pop-up restaurants, by contrast, often operate in underused existing restaurant space, which has been inspected and contains a licensed kitchen.⁴ However, they may also operate in nonrestaurant commercial

² See Michael Sandel, *What Money Can’t Buy: The Skyboxification of American Life* (Huffington Post Apr 20, 2012), online at http://www.huffingtonpost.com/michael-sandel/what-money-cant-buy_b_1442128.html (visited Feb 26, 2015) (“[T]he marketization of everything means that people of affluence and people of modest means lead increasingly separate lives. We live and work and shop and play in different places.”).

³ See, for example, Dana Goodyear, *Toques from Underground: The Rise of the Secret Supper Club* (New Yorker Dec 3, 2012), online at <http://www.newyorker.com/magazine/2012/12/03/toques-from-underground> (visited Feb 26, 2015).

⁴ See Frank Bruni, *The Now-You-See-It Restaurant* (NY Times Jan 4, 2011), online at <http://www.nytimes.com/2011/01/05/dining/05temp.html> (visited Feb 26, 2015).

or industrial spaces, such as warehouses, functioning breweries, shuttered retail spaces, or outside in parks or on farms.⁵ These dining experiences differ with respect to how public or private they are. Some events are at the invitation of the chef; others require diners to be members of a group, from which only a limited number are selected for each dinner; notices for some are posted in the physical establishment where the event will occur; and invitations for others are posted on social media sites such as Facebook, Twitter, or Instagram.⁶

Chefs have different reasons for choosing to operate in these nontraditional conditions. For some, it is about the food—by hosting small, infrequent dinners, they are able to use small amounts of expensive, strange, or seasonal foods that would not make sense in a traditional restaurant setting with large crowds and a set menu.⁷ Underground chefs also can “cook without any borders or limitations, [and] without having a boss” to oversee the operation.⁸ Some chefs relish the chance to connect with their patrons on a personal level, and the secret supper format gives them both the time and physical space to do so.⁹

For others, the choice is more practical. Some chefs start by operating pop-up dinners with hopes of gaining fans while saving money in order to open a more traditional restaurant in the future.¹⁰ The pop-up approach is a way to avoid the worries that accompany a brick-and-mortar restaurant, including a mortgage, taxes, regular employees, and the costs of a commercial

⁵ See Dan Eaton, *Dinner Lab Bringing Pop-Up Restaurant Parties to Columbus* (Columbus Business First Dec 26, 2014), online at <http://www.bizjournals.com/columbus/blog/2014/12/dinner-lab-brings-its-pop-up-restaurant-parties-to.html> (visited Feb 26, 2015).

⁶ Sarah Schindler, *Unpermitted Urban Agriculture: Transgressive Actions, Changing Norms, and the Local Food Movement*, 2014 Wis L Rev 369, 382. I also derived this information from a November 20, 2014, interview with Ian Ray, the owner of The Old Pal in Athens, Georgia.

⁷ See Goodyear, *Toques from Underground* (cited in note 3).

⁸ Allen Weiner, *Inside the Secret Supper Clubs of America* (Kernel Nov 16, 2014), online at <http://kernelmag.dailydot.com/issue-sections/headline-story/10877/inside-the-secret-supper-clubs-of-america> (visited Feb 26, 2015).

⁹ See Corey Karnes Huyler, *You Gotta Know Someone: Underground Dining Clubs* (Crain's Chicago Business Mar 14, 2014), online at <http://www.chicagobusiness.com/article/20140314/BLOGS09/140319835/you-gotta-know-someone-underground-dining-clubs> (visited Feb 26, 2015).

¹⁰ See Weiner, *Inside the Secret Supper Clubs of America* (cited in note 8). I also derived this information from an October 5, 2013, interview with Jessica Sheahan and Vien Dobui, chefs at Công tử Bớt Vietnamese Pop-Up Noodle Restaurant in Portland, Maine.

kitchen.¹¹ Sometimes, these dinners even function as political statements. One chef stated that his “invite-only events are explicitly about functioning ‘outside the everyday milieus of economic exchange. . . . [They are] alternatives to the restaurant industry and its ultra-capitalist, ultra-exploitative, ultra-wasteful trappings.”¹²

From the diner’s perspective, secret suppers and pop-up restaurants offer an exciting, hip, and unusual dining experience.¹³ The focus is often the food itself, providing diners with an opportunity to consume items that they cannot easily get elsewhere. And the communal-consumption aspect provides a form of social connectivity to others with a passion for food.¹⁴

II. UNDERGROUND DINING, REGULATION, AND ILLEGALITY

Pop-ups may sound rather appealing, particularly if you are on the invite list: good food, a sense of community, and a certain hint of edgy exclusiveness reminiscent of an old speakeasy where patrons needed a password to get in. But there are real, important reasons that these dinners perhaps should be regulated.

Regulations and inspections serve both public health and information-forcing purposes. Regulations limit the types of food that can be served or sold, and the locations in which that food can be prepared, in order to prevent food-borne illness.¹⁵ Further, in choosing a restaurant, some consider its health-inspection scores.¹⁶ Unregulated underground restaurants are not subject to inspection, which may put public health at risk.

¹¹ See Goodyear, *Toques from Underground* (cited in note 3); Weiner, *Inside the Secret Supper Clubs of America* (cited in note 8).

¹² Elizabeth Kennedy, *Dining off the Grid: A Movement of Movable Feasts, Secret Supper Clubs and Artistic Speakeasies Sates the Desires of the Culinary Crowd* (The Monthly Mar 2008), online at <http://www.themonthly.com/feature-03-08-1.html> (visited Feb 26, 2015).

¹³ See Scott James, *Underground Dining: Illegal but Tasty* (Bay Citizen Jan 6, 2011), online at <https://www.baycitizen.org/columns/scott-james/underground-dining-illegal-tasty> (visited Feb 26, 2015) (“Being illicit is part of the excitement, with diners learning the secret locations only hours before service.”).

¹⁴ See Goodyear, *Toques from Underground* (cited in note 3); Juho Hamari, Mimmi Sjöklint, and Antti Ukkonen, *The Sharing Economy: Why People Participate in Collaborative Consumption* *2 (working paper, May 31, 2013), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271971 (visited Feb 26, 2015).

¹⁵ See, for example, Matthew V. Bradshaw, *The Rise of Urban Agriculture: A Cautionary Tale—No Rules, Big Problems*, 4 Wm & Mary Bus L Rev 241, 261–63 (2013); Ryan Almy, *State v. Brown: A Test for Local Food Ordinances*, 65 Me L Rev 789, 793–94 (2013).

¹⁶ See, for example, James, *Underground Dining* (cited in note 13).

The lack of inspections and oversight also means that pop-ups are not required to report information regarding wages paid to any workers.¹⁷ Pop-ups also avoid requirements under the Americans with Disabilities Act¹⁸ (ADA) and environmental regulations.¹⁹ For example, it is difficult to determine what pop-ups do with their waste, such as cooking oils; brick-and-mortar restaurants typically must install expensive grease traps to prevent large amounts of oil and fat from entering the wastewater-treatment system.²⁰ While these regulations serve important functions, their applicability to underground dinners is not straightforward.

This Part discusses two potential scenarios that could arise under the existing regulatory environment depending on the actions of the proprietors: (1) the underground restaurant operates in a municipality with permitting schemes in place to accommodate secret suppers or pop-up dinners, and the proprietors have obtained all proper permits and are thus operating legally; or (2) the municipality has a permitting scheme in place that would accommodate at least some aspects of underground dining, but the proprietors have chosen not to comply with that scheme or obtain the appropriate permits.

A. Legally Compliant Underground Dinners

As suggested by the first scenario, there are pop-up restaurants that comply with most, if not all, regulatory requirements. While some municipalities have modified their ordinances to expressly allow temporary dining, others have existing regulations in place that allow for some aspects of pop-ups.²¹ For example, a catering license will typically allow a chef to prepare food in her

¹⁷ See *id.*

¹⁸ Americans with Disabilities Act of 1990, Pub L No 101-336, 104 Stat 327, codified at 42 USC § 12101 et seq.

¹⁹ See, for example, *Knight v Union/Pine*, 2013 WL 4828751, *1 (D Or) (detailing the plaintiff's allegation that he was excluded from attending a pop-up restaurant in violation of the ADA).

²⁰ See, for example, Atlanta Department of Watershed Management, *Grease Management*, online at <http://www.atlantawatershed.org/inside-dwm/offices/watershed-protection/grease-management> (visited Feb 26, 2015).

²¹ See generally, for example, Rajiv Bhatia, "Pop-Ups" and Other Non-traditional Temporary Food Facilities (San Francisco Department of Public Health Environmental Health Memo, Nov 18, 2011), online at <http://www.sfdph.org/dph/files/EHSdocs/ehsFood/PopUpGuidelines.pdf> (visited Feb 26, 2015). See also, for example, Or Rev Stat § 624.490 (allowing for temporary restaurants with payment of a reduced licensing fee).

certified facility and then serve it somewhere else.²² The pop-up dinner may thus take place in an industrial facility or a private home without violating food-preparation–health-and-safety regulations.²³ In another example, if a chef takes over the day shift at a licensed restaurant facility that typically serves only dinner in order to host a pop-up lunch, there would likely be few legal concerns.²⁴ However, the legality of the operation will still depend on the details of the city’s or state’s permitting process. For example, in Georgia this scenario might be problematic because two different food-service establishments cannot share the same commercial kitchen.²⁵

Sometimes, chefs will exploit loopholes in the regulatory scheme in order to avoid obtaining permits while operating an event that is at least arguably legal. For example, some chefs attempt to get around permitting issues by making events invitation only and charging for attendance at the event or for accompanying music instead of for the food itself.²⁶ Of course, even if a pop-up is legally permitted, its operations could still be illegal; indeed, even some fully permitted brick-and-mortar restaurants violate health-and-safety requirements in their operation. Anecdotally, I was told of a well-respected and well-reviewed restaurant that recently failed a health inspection when the inspectors discovered that the restaurant was hanging meat to cure in a back office, where they thought it would go undetected.²⁷ Thus, just because a facility has the proper permits does not necessarily mean it always complies with all regulations. However, these

²² See, for example, Md Ann Code § 10.15.03.28(G)(2).

²³ However, the use may not be permitted under the zoning code. See, for example, Berkeley Municipal Code § 23C.16.010. Pop-up events often still require temporary use permits. See, for example, San Francisco Department of Public Health, *Food Safety Program: Temporary Food Facilities (TFFs) at Special Events*, online at <https://www.sfdph.org/dph/EH/Food/Permits/permitSpecEvents.asp> (visited Feb 26, 2015).

²⁴ See, for example, Ifanyi Bell, *Roaming Ramen Parties Courtesy of Boke Bowl* (OPB Apr 5, 2011), online at <http://www.opb.org/artsandlife/article/boke-bowl-roaming-ramen-parties> (visited Feb 26, 2015).

²⁵ See Georgia Department of Public Health, *Interpretation Manual for the Rules and Regulations for Food Service *B17* (June 19, 2014), online at http://dph.georgia.gov/sites/dph.georgia.gov/files/related_files/site_page/EnvHealthFoodSECTION%20B%20Admin%20Guidelines.pdf (visited Feb 26, 2015).

²⁶ See Schindler, 2014 Wis L Rev at 382–83 (cited in note 6). Some cities have regulations that allow people to obtain permits for temporary food events; these are generally required only for events open to the public. See, for example, Salt Lake County Health Department, *Obtaining a Temporary Event Food Permit*, online at <http://slcohealth.org/programs/foodProtection/tempFoodBooths.html> (visited Feb 26, 2015).

²⁷ In this instance, the regulatory system of inspections worked and led to the discovery of the violation.

examples suggest that it is possible for localities to craft rules that would regulate underground dinners; the question is whether the number of such dinners would be reduced because the proprietors would be unable or unwilling to comply with the requirements, and whether enforcement of the regulations would be practical.

B. Noncompliant Underground Dinners

With respect to the second scenario, the extent to which a secret supper or pop-up dinner is illegal depends on a variety of factors, including the jurisdiction in which it operates and features of the physical space in which it is hosted. On the most illegal end of the spectrum, imagine a secret supper in a private home for which the chef charges patrons. Such a setup could violate several laws. The meal is cooked in a home kitchen, which has presumably never been inspected or certified—this could be a violation of health codes that prohibit the sale of food that is not cooked in a commercial kitchen.²⁸ The host's dog lives in the home where the food is prepared and served—this could violate best practices.²⁹ The host serves a pig that was raised and then killed in his backyard with a bullet to the head, and subsequently butchered in his home kitchen—this process would violate the requirements that meat that is sold must be slaughtered in a USDA-inspected slaughter facility.³⁰ The host serves home-cured meat and fresh raw milk and cheese—laws often prohibit the sale of such products.³¹ The home in which the meal is served is located in a neighborhood zoned for residential use only—the secret supper would likely constitute a business and, thus, would be permitted only in zones that allow home businesses (and specifically food-service businesses), either expressly or through conditional-use permitting.³² The pop-up would also likely require

²⁸ See, for example, Christina Hamlett, *California Requirements for a Commercial Kitchen* (Houston Chronicle), online at <http://smallbusiness.chron.com/california-requirements-commercial-kitchen-13208.html> (visited Feb 26, 2015) (stating that commercial kitchens “must meet California’s environmental, safety, electrical, ventilation, plumbing and waste management codes”).

²⁹ See 21 CFR § 110 et seq.

³⁰ See, for example, 9 CFR § 302.1.

³¹ See Marsha A. Echols, *Food Safety Regulation in the European Union and the United States: Different Cultures, Different Laws*, 4 Colum J Eur L 525, 529–33 (1998).

³² See, for example, Berkeley Mun Code § 23C.16.010 (prohibiting home occupations that require customer visits in certain residential districts).

a business license from the city.³³ Fire codes generally require sufficient fire-suppression equipment and adequate egress,³⁴ and zoning codes often limit the number of cars that can park on a given property.³⁵ An unregulated, unlicensed secret supper is also likely in violation of income, sales, and business-personal-property tax requirements.³⁶

For some chefs, the underground-dining experience is intimately tied to the avoidance of permits and licensing. This is driven by a theoretical desire for independence, as well as a practical desire to avoid “the massive overhead expense of a fully licensed establishment with all the necessary permits, benefits and infrastructure.”³⁷ This approach is risky; it sometimes backfires when the municipality discovers the illegal activity and decides to shut it down. For example, the Jersey City Health Department shut down a sold-out alfresco pop-up dinner that was to benefit a local historic cemetery and a preservation group. The inspectors destroyed the food after discovering that the pop-up’s chef failed to prepare the food in a commercial kitchen and failed to obtain licenses to serve food to guests in exchange for payment.³⁸ Similarly, a Southern Nevada Health Department inspector arrived at a farm-to-table pop-up dinner event at a farm. Upon discovering that the meat that was to be served was from the farm and was not USDA certified—in addition to other problems—the inspector required the hosts to pour bleach on it so that it could not be eaten.³⁹ While such events can be dramatic, they need not always be negative. One chef stated that health-department intervention was “a blessing” because it spurred him and his partner to pursue a legitimate restaurant space and “burnished their creation myth.”⁴⁰

³³ See, for example, Berkeley Mun Code § 9.04.035.

³⁴ See, for example, Ohio Admin Code 1301:7-7-10(B)(1).

³⁵ See, for example, City of Cupertino, *Code & Ordinances—Frequently Asked Questions*, online at <http://www.cupertino.org/index.aspx?page=494> (visited Feb 26, 2015).

³⁶ See *The Sharing Economy: Remove the Roadblocks*, *The Economist* 18, 18 (Apr 26, 2014).

³⁷ Kennedy, *Dining off the Grid* (cited in note 12).

³⁸ Laryssa Wirstiuk, *Underground Supper Club Event at Historic Cemetery Shut Down by City Health Inspectors* (Jersey City Independent Aug 21, 2012), online at <http://www.jerseycityindependent.com/2012/08/underground-supper-club-event-at-cemetery-shut-down-by-city-health-inspectors> (visited Feb 26, 2015).

³⁹ See J. Patrick Coolican, *Farm-to-Table Event Turns Sour when Health Inspector Crashes Party* (Las Vegas Sun Nov 12, 2011), online at <http://www.lasvegassun.com/news/2011/nov/12/farm--table-event-turns-sour-when-inspector-crashe> (visited Feb 26, 2015).

⁴⁰ See Goodyear, *Toques from Underground* (cited in note 3) (“We were seedy, and being caught validated that we really *were* underground.”).

III. UNDERGROUND DINING AS PART OF THE SHARING ECONOMY

A. Defining the Sharing Economy

Although much has been written in recent years about the growing sharing economy and the “peer-production economy,” these terms still lack crisp and coherent meanings.⁴¹ Generally, these ideas encompass peer-to-peer services that facilitate a “direct exchange of money between individuals in return for goods and services.”⁴² Consumers are connected to producers in a decentralized manner, typically through technology like websites and applications.⁴³ For example, Airbnb provides a platform through which people can allow strangers to stay in their homes, apartments, or spare bedrooms on a short-term basis for money.⁴⁴ Similarly, ridesharing applications like Uber and Lyft allow people to hail car rides from strangers who are close to them using the GPS technology in smartphones.⁴⁵

Underground dining is part of the sharing economy as well, although the extent to which the dinners are technology reliant depends in large part on the chef or host. While some prefer to publicize by word of mouth or physical notifications posted at the site of the dinner (such as information on a chalkboard), many rely on the Internet (including social media or e-mail lists) to let people know about and book their meals. A small number of websites compile this information and facilitate bookings and payment, functioning like Airbnb for secret suppers. One of these websites even provides insurance to chefs who use their web platform to list dinners.⁴⁶ While communal dinners are an old tradition, the use of the Internet and sharing websites has transformed the concept by expanding the potential audience and reducing transaction costs such as marketing expenses.⁴⁷

⁴¹ In practice, these terms are often used interchangeably. See, for example, Eli Lehrer and Andrew Moylan, *Embracing the Peer-Production Economy*, *Natl Affairs* 51, 51 (Fall 2014).

⁴² Alexandra Chang, *Regulation Won't Kill the Sharing Economy. We Just Need New Rules*, *Popular Sci* 28, 28 (Aug 2014). See also *The Sharing Economy: Remove the Roadblocks*, *Economist* at 18 (cited in note 36).

⁴³ See Lehrer and Moylan, *Natl Affairs* at 51 (cited in note 41).

⁴⁴ See Airbnb, *About Us*, online at <https://www.airbnb.com/about/about-us> (visited Feb 26, 2015).

⁴⁵ See *The Sharing Economy*, *Economist* at 18 (cited in note 36).

⁴⁶ See *Feastly \$1,000,000 Cook Protection*, online at <https://eatfeastly.com/info/cook-protection> (visited Feb 26, 2015) (covering personal injury to guests and damage to guests' property when diners purchase their meals through the service).

⁴⁷ See Lehrer and Moylan, *Natl Affairs* at 52 (cited in note 41).

B. Regulating the Sharing Economy

There is a concern that “regulatory mechanisms have not kept pace” with advances in the sharing economy.⁴⁸ This is the situation in which many peer-to-peer operations find themselves: they do not “fit established regulations, [so] they typically operate outside them, which can hurt consumers.”⁴⁹ In the context of underground dining, many jurisdictions do not offer inexpensive or easy to obtain permits for temporary food establishments; rather, the permitting structures in these jurisdictions are designed for more traditional brick-and-mortar restaurants. Thus, as was presented in the second scenario above, many secret suppers are unregulated.

But there is an important difference between underground dining and other peer-to-peer services when it comes to regulation. Some have suggested that “most of the rules that the sharing economy is breaking have little to do with protecting the public.”⁵⁰ For example, it is primarily taxi companies—not potential riders—that oppose Lyft and Uber due to a fear of being undercut by these services’ lower prices.⁵¹ Similarly, it is the hotels that are losing business and cities that are losing tax revenue that have most actively opposed services like Airbnb. This argument might understate the public benefit that attaches to the regulation of entry into the hotel or taxi business.⁵² But to the extent that it is valid, regulating underground dining is different.

The regulation of food preparation is *fundamentally* about protecting the public; with underground dining, there is a true public health concern. Upton Sinclair’s *The Jungle* provides a time capsule of our history of unregulated meat production.⁵³ That text was directly responsible for the passage of our first

⁴⁸ Molly Cohen and Corey Zehngbot, *What’s Old Becomes New: Regulating the Sharing Economy*, 58 Boston Bar J 6, 6 (2014).

⁴⁹ Chang, Popular Sci at 28 (cited in note 42).

⁵⁰ *The Sharing Economy*, Economist at 18 (cited in note 36).

⁵¹ Id. See also Chang, Popular Sci at 28 (cited in note 42) (“[C]ritics argue that operating without regulation gives start-ups an unfair advantage over highly regulated incumbents. It also opens the door to misconduct.”).

⁵² Many neighbors and condominium associations believe that short-term vacation rentals are detrimental to their communities. And regulated businesses such as hotels and taxi companies must comply with the Occupational Safety and Health Act, the Fair Labor Standards Act, and other laws. Even if most individuals are not complaining, there may still be legitimate underlying public safety, health, and welfare reasons for regulating these fields.

⁵³ See generally Upton Sinclair, *The Jungle* (Sinclair 1920).

federal food-safety laws: the Food and Drugs Act of 1906⁵⁴ and the Federal Meat Inspection Act.⁵⁵ People care about the enforcement of food-safety laws because there is a real interest in preventing and avoiding food-borne illness;⁵⁶ these regulations have much less to do with issues like competition and taxes than with public health.⁵⁷ This distinction suggests that regulating underground dining might be more important, more squarely within the standard police powers, and more in line with the popular view of the proper role of government than regulating other manifestations of the sharing economy.

IV. EVALUATING UNDERGROUND DINING: THE ROLE OF PRIVILEGE AND THE ROLE OF LAW

As I explained in the Introduction, one can view underground dining through a variety of lenses. Each lens leads to a distinct set of conclusions about the desirability of underground dining, which then leads to conclusions about whether and how underground dining should be regulated. This Part examines each lens, and its implications, in turn.

A. Underground Dining as Community Building

In deciding whether to regulate secret suppers and pop-up dinners, local governments should consider their value. There is social value in underground dining in that it enhances communities; secret suppers and pop-up restaurants contribute to the social, cultural, and even political lives of the municipalities in

⁵⁴ Act of June 30, 1906, 34 Stat 768.

⁵⁵ Act of Mar 4, 1907, 34 Stat 1256, 1260, codified at 21 USC § 601 et seq. See Adam Cohen, *100 Years Later, the Food Industry Is Still 'The Jungle'* (NY Times Jan 2, 2007), online at <http://www.nytimes.com/2007/01/02/opinion/02tue4.html> (visited Feb 26, 2015).

⁵⁶ US Public Health Service, *Food Code 2013 *1*, online at <http://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM374510.pdf> (visited Feb 26, 2015).

⁵⁷ Of course, restaurant permitting requirements are also a source of tax revenue. And there is certainly a competition issue. For example, many brick-and-mortar restaurants are opposed to the operation of food trucks too close to their establishments. See Sarah E. Needleman, *Street Fight: Food Trucks vs. Restaurants* (Wall St J Aug 9, 2012), online at <http://www.wsj.com/articles/SB10000872396390443404004577576992254177540> (visited Feb 26, 2015). However, I have not uncovered similar concerns with respect to secret suppers and, in fact, a number of well-known chefs who operate brick-and-mortar restaurants also participate in pop-ups. Perhaps the difference is that pop-ups are by their nature more transitory and consequently present less of a concern as a form of long-term competition.

which they occur. Pop-ups often enliven vacant and underused space, efficiently contributing to the vibrancy, diversity, and culture of the food industry and the community.⁵⁸ Secret suppers that take place in private homes foster social interaction and connectivity among neighbors and visitors who dine together at communal tables. These activities build social capital, thus providing a public benefit; the question is whether and to what extent that benefit outweighs the accompanying risk to public health.⁵⁹

Recognizing their benefits, and in order to encourage their proliferation, some cities have already begun decreasing the regulatory burden on pop-up facilities. For example, Oregon provides low-cost licenses for intermittent, seasonal, and single-event restaurants, which reduce the overhead that might otherwise be required for a traditional restaurant.⁶⁰ Thus, there are ways to create a regulatory system with a minimal cost burden and flexible rules so that chefs who are beginning their careers do not face the standard financial barriers to entry that accompany brick-and-mortar restaurants. That said, these temporary restaurants must still comply with certain health-code provisions and inspections;⁶¹ they are not free to serve whatever they want, however they want. So while the barrier to entry carries a reduced burden, the activities that can be undertaken within the restaurant are still limited. This suggests that further deregulation might be necessary to allow underground dining to achieve its goals. In choosing to deregulate, the locality allows individuals to choose whether to assume the risk of food-borne illness

⁵⁸ In crafting its fairly permissive regulations to allow pop-ups, San Francisco's health department stated, "Pop-ups are becoming an important part of the diversity in San Francisco's vibrant food industry. The Department supports this diversity yet also needs to ensure that all food facilities comply with health and safety rules." Bhatia, *"Pop-Ups" and Other Non-traditional Temporary Food Facilities* (cited in note 21).

⁵⁹ See, for example, Jim Saksa, *How the Pop-Ups Can Actually Prop Up Their Neighbors* (PlanPhilly July 28, 2014), online at <http://planphilly.com/articles/2014/07/28/how-the-pop-ups-can-actually-prop-up-their-neighbors> (visited Feb 26, 2015).

⁶⁰ Or Rev Stat § 624.490. See also Or Rev Stat § 624.010(4) (defining "intermittent temporary restaurant"). Underground dinners may also sometimes fit within existing provisions for temporary or special food-service permits. See, for example, Md Ann Code § 10.15.03.02(78)(a)(iii) (defining "special food service facility" as one "for which the [Health] Department provides exceptions to certain regulations because of the . . . [l]imited length of time that the facility operates in association with special events").

⁶¹ See, for example, Or Rev Stat § 624.091.

that may accompany the community-centered benefits that they find.⁶²

B. Underground Dining as Rebellion

Although many secret suppers and pop-up dinners are currently illegal—at least in part—there are benefits to rebellious, unauthorized actions.⁶³ Specifically, they may act as catalysts for bringing attention to, and ultimately changing, outdated laws;⁶⁴ participation in these transgressive activities furthers political goals.

Our existing food-safety regulations serve to “check abuses” by large-scale food producers.⁶⁵ For example, four companies kill and process over 80 percent of the 35 million cows that are slaughtered for consumption each year in the United States.⁶⁶ Industrialized factory farming, which takes place within Concentrated Animal Feeding Operations (CAFOs), produces the majority of the meat that people consume in the United States.⁶⁷ However, many patrons of underground restaurants expressly want to avoid food produced through those systems—which they view as cruel and environmentally harmful⁶⁸—and thus seek out alternatives to traditional restaurant options. Our current regulatory system makes that very difficult to do; in many communities, one must forage for vegetables, raise and slaughter one’s own meat, and then cook those items for oneself in order to avoid industrialized agricultural products and the restaurants

⁶² See, for example, Dana Goodyear, *Is Raw Milk Worth It? The Case of the Single-Udder Butter* (New Yorker Apr 22, 2012), online at <http://www.newyorker.com/culture/culture-desk/is-raw-milk-worth-it-the-case-of-the-single-udder-butter> (visited Feb 26, 2015).

⁶³ See Schindler, 2014 Wis L Rev at 387–91 (cited in note 6).

⁶⁴ See *id.* See also generally Eduardo Moisés Peñalver and Sonia K. Katyal, *Property Outlaws*, 155 U Pa L Rev 1095 (2007); Michael Pollan, *Farmer in Chief* (NY Times Magazine, Oct 12, 2008), online at <http://www.nytimes.com/2008/10/12/magazine/12policy-t.html> (visited Feb 26, 2015) (discussing outdated food-safety laws)

⁶⁵ Pollan, *Farmer in Chief* (cited in note 64).

⁶⁶ Emilene Ostlind, *Big Beef: Cattlemen Struggle against Giant Meatpackers and Economic Squeezes*, High Country News 10, 12 (Mar 21, 2011).

⁶⁷ See Doug Gurian-Sherman, *CAFOs Uncovered: The Untold Costs of Confined Animal Feeding Operations* *2 (Union of Concerned Scientists Apr 2008), online at http://www.ucsusa.org/sites/default/files/legacy/assets/documents/food_and_agriculture/cafos-uncovered.pdf (visited Feb 26, 2015).

⁶⁸ See Catherine Groves, *To Promote Compliance with the Clean Water Act, the EPA Should Pursue a National Enforcement Initiative to Regulate Concentrated Animal Feeding Operations*, 39 Ecol L Q 321, 323 (2012) (“[CAFOs] create vast amounts of manure that harms the environment and human health by entering our waterways.”).

that serve them. Viewing underground dining as an act of rebellion against outdated food-safety laws, one could posit that, if the demand for underground dinners that serve alternative, local foods grows large enough, the laws might change. Thus, their current status as lawbreaking events is helpful.

C. Antiregulatory Libertarian Values and Food Sovereignty

There is a sense, both from chefs who choose to avoid the permitting process and enter the realm of the unlicensed underground, and from the clientele who patronize these events, that these actors would rather the government stay out of the way. The idea ties into a larger debate anchored in civil-libertarian views and a narrower one about the “nanny state” and public health paternalism.⁶⁹ While the government’s police powers allow it to regulate in furtherance of public health and safety, some commentators believe that the government should focus its regulatory authority on other-regarding, rather than self-regarding, harm.⁷⁰ If people consume uninspected food from unlicensed kitchens with the knowledge that they are doing so, their risk of food-borne illness would be considered self-regarding.⁷¹ Further, the market is especially active here given that secret suppers and pop-up dinners are often coordinated through websites on which people can leave reviews.⁷² If enough people were to get sick at a given underground dinner and write reviews to that effect, then the chef’s reputation would be harmed and others might stop attending.⁷³ Similarly, the

⁶⁹ See, for example, Lindsay F. Wiley, Micah L. Berman, and Doug Blanke, *Who’s Your Nanny? Choice, Paternalism and Public Health in the Age of Personal Responsibility*, 41 J L, Med & Ethics 88, 88 (2013) (“Arguments about public health paternalism . . . are playing a role in political opposition to the adoption of new policy interventions and in legal challenges aimed at striking down existing public health laws.”).

⁷⁰ See, for example, John Stuart Mill, *On Liberty* 23 (Ticknor & Fields 1863) (“That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”); Wiley, Berman, and Blanke, 41 J L, Med & Ethics at 89 (cited in note 69).

⁷¹ Of course, no action is completely isolated; if more people are getting sick from food, insurance premiums may increase whether the people getting sick have insurance or not.

⁷² See note 46.

⁷³ See David Adam Friedman, *Micropaternalism*, 88 Tulane L Rev 75, 93 (2013) (“A purely libertarian approach . . . would assume two things: (1) consumers should be able to preserve their autonomy to make choices to consume certain things even if they are self-harming and/or (2) that even if the harm is of concern, regulatory intervention is unnecessary because as information spreads, behavior will change.”).

direct-to-consumer and infrequent nature of underground restaurants suggests that an instance of food-borne illness will be easily traceable; the same occurrence at a chain restaurant with a broad distribution network could result in a public health emergency.⁷⁴

From the individual's perspective, perhaps it is her liberty interest that primarily motivates the desire for a lack of regulation: I want to be able to pay money to eat good food prepared by someone whom I trust. But from the chef's perspective, it is hard to separate a true interest in personal liberty from the desire to operate cheaply, without expensive permits or time-consuming inspections: I want to serve raw milk and home-slaughtered pig, but I also cannot afford to spend the money to open a permitted restaurant and install an expensive commercial kitchen and grease trap.⁷⁵ Soda manufacturers and cigarette makers use these sorts of libertarian and antipaternalism arguments to counter governmental health regulations.⁷⁶ But those claims are made in conjunction with a desire to further a successful business. Similarly, factory owners historically fought against the

⁷⁴ See, for example, *Company News; Jack in the Box's Worst Nightmare* (NY Times Feb 6, 1993), online at <http://www.nytimes.com/1993/02/06/business/company-news-jack-in-the-box-s-worst-nightmare.html> (visited Feb 26, 2015).

⁷⁵ A chef who operates secret suppers out of his home could also argue that he is exercising a fundamental aspect of his property rights: the right to include. See Daniel B. Kelly, *The Right to Include*, 63 Emory L J 857, 859 (2014) (“[T]he ability of owners to ‘include’ others in their property is a central attribute of ownership and fundamental to any system of private property.”). See also generally Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 Cal W L Rev 187 (1992). Further, activities taking place within the home have historically received heightened levels of protection. See *Payton v New York*, 445 US 573, 601 (1980) (“[An] overriding respect for the sanctity of the home [] has been embedded in our traditions since the origins of the Republic.”). Although pop-ups in nonresidential or public spaces might lack these property rights justifications, to the extent that a secret supper is taking place in a home that is owned or leased by the host, some might argue in favor of less regulation. That said, the law may limit the way that we use our property. See *State v Shack*, 277 A2d 369, 371–72, 374 (NJ 1971). The right to include would not extend so far as to protect the inclusion of clearly illegal activities in one's home.

⁷⁶ For discussions of this phenomenon, see Richard A. Epstein, *What (Not) to Do about Obesity: A Moderate Aristotelian Answer*, 93 Georgetown L J 1361, 1362 (2005) (“Opponents of government intervention see the obesity controversy as a giant government land grab . . . they invoke the language of liberty and freedom on their own behalf.”); Tom Ginsburg, Jonathan S. Masur, and Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U Chi L Rev 291, 304 (2014) (discussing smoking bans).

adoption of environmental regulations because dumping waste into nearby rivers was cheap and easy.⁷⁷

Protecting liberty values is important, but few would want to return to the era of meat production completely free from regulation, as described in *The Jungle*. Further, despite the efforts of food-sovereignty advocates, there is no fundamental right to purchase, or even consume, the foods that one wants.⁷⁸ Thus, while liberty interests are certainly important, it is unclear whether they outweigh the legitimate public health justifications that support the regulation of underground food.

D. A Privileged Clientele

An interesting element of underground dining that is not often written about or even discussed is the privileged clientele that frequent many of these shared meals. It is not uncommon for a place at the table to cost nearly \$100.⁷⁹ Thus, a patron must be able to afford to attend the pop-up dinner and must also be in the know about the event.⁸⁰

If a city were to exempt pop-ups from regulations, one could at least question whether it was in part because these meals were attended by residents with money and political clout—people whom the city wants to attract and appease. There may be an assumption that wealthy, young urbanites are both underground chef and

⁷⁷ See Neil Stoloff, *Regulating the Environment: An Overview of Federal Environmental Law* 1 (Oceana 1991).

⁷⁸ See *Ravin v State*, 537 P2d 494, 501–04 (Alaska 1975) (determining that “the ingestion of food, beverages or other substances” is not a fundamental right); Samuel R. Wiseman, *Liberty of Palate*, 65 Me L Rev 737, 742 (2013) (exploring “whether food choice activists can persuasively claim a fundamental right to liberty of palate [and] finding a low likelihood of success”); Brief in Support of United States’ Motion to Dismiss Plaintiff’s Amended Complaint, *Farm-to-Consumer Legal Defense Fund v. Sebelius*, No C 10-4018-MWB, *26 (ND Iowa filed Apr 26, 2010) (“[T]here is no ‘deeply rooted’ historical tradition of unfettered access to foods of all kinds. . . . [P]laintiffs do not have a fundamental right to obtain any food they wish.”). Although some have argued otherwise, their arguments have not yet proven successful. See, for example, *Farm-to-Consumer Legal Defense Fund v Sebelius*, 734 F Supp 2d 668, 679–80 (ND Iowa 2010) (noting that the plaintiffs “allege that they have a fundamental right to raise their family in their own way, and to their own bodily and physical health, which rights include the right to determine what foods they do and do not choose to consume for themselves and their families”). See also David E. Gumpert, *Life, Liberty, and the Pursuit of Food Rights: The Escalating Battle over Who Decides What We Eat* 5 (Chelsea Green 2013); David J. Berg, *Food Choice Is a Fundamental Liberty Right*, 9 J Food L & Pol 173, 177 (2013).

⁷⁹ See Goodyear, *Toques from Underground* (cited in note 3).

⁸⁰ See Kennedy, *Dining off the Grid* (cited in note 12); Adam H. Graham, *World’s Best Pop-Up Restaurants* (Departures Aug 1 2012), online at <http://www.departures.com/articles/worlds-best-pop-up-restaurants> (visited Feb 26, 2015).

patron, and the kitchens are clean.⁸¹ But allowing underground dining to proliferate without regulation provides special treatment to—and stratifies and separates—wealthy patrons from others who are not involved in the underground-dining scene.⁸²

This example of skyboxification is problematic for a number of reasons. First, as society creates different venues for different classes of people, individuals are not forced to mingle with, speak to, or acknowledge those who are different. Moreover, although paying patrons are required for these events to succeed, if regulators intervene and shut down a dinner, the patrons themselves would not be punished.⁸³ Thus, diners can enjoy the thrill of an illegal event without fear of repercussions. Further, skyboxification might also undermine efforts at rebellious reform. Instead of working to change the outdated regulatory system that requires animals to be killed in certified slaughterhouses instead of under less stressful environs, underground diners can just avoid the system by seeking out illegal alternatives.

CONCLUSION

Secret suppers and pop-up restaurants present a series of conflicting issues. We want to allow for innovation that improves communities, and for individuals to make interesting and diverse food choices; but we also want to protect public health, ensure that workers are treated well, and control when and where businesses are appropriate in residential neighborhoods. Eli Lehrer and Andrew Moylan discuss this conflict:

Underground restaurants opened in people's homes really do leave customers without the security of regular inspections and food-sanitation certificates. A number of these supper clubs specialize in relatively risky foods like raw

⁸¹ Food-safety risks are greater than many realize. See Stacy M. Crim, et al, *Incidence and Trends of Infection with Pathogens Transmitted Commonly through Food*, 63 *Morbidity & Mortality Weekly Report* 328, 328 (Apr 18, 2014) (“In 2013, a total of 19,056 infections, 4,200 hospitalizations, and 80 deaths were reported. For most infections, incidence was well above national *Healthy People 2020* incidence targets.”).

⁸² This is not unique. “Pay to play” has long been a feature of our society, and we allow individuals to take dangerous actions at their own risk if they can afford to do so. For example, the risk of avalanche and death accompany backcountry skiing, yet it is allowed in some locations (including on many ski mountains that used to prohibit it). See Katie Zezima, *Banner Year for Skiing, and for Search Parties* (NY Times Feb 21, 2011), online at <http://www.nytimes.com/projects/2012/snow-fall> (visited Feb 26, 2015).

⁸³ But consider, for example, Ca Penal Code § 597.5(b) (making it illegal to be a spectator at a dog fight).

milk and sushi These sorts of services may genuinely raise public-health and safety concerns. What's needed is a legal framework in which peer-production services may thrive and grow, but where the legitimate public-policy interests of preserving public health and standards of safety and protecting individuals from fraud are maintained.⁸⁴

The key is in arriving at the appropriate balance. If we choose to regulate these entities, we need to determine what those regulations should look like. Should they mirror existing regulations for brick-and-mortar restaurants,⁸⁵ or should they be more permissive?⁸⁶ And if they should be more permissive, why?⁸⁷ On the other hand, we could decide to let these entities operate as they wish without regulation. Enforcement would be difficult, and even the existence of regulation may discourage these restaurants from operating.⁸⁸ If no regulation or licensing were required, this would leave patrons, who are often well-educated, to assume the risk of any harm that may befall them as a result of consuming unregulated food produced and served in uninspected facilities. We could also pursue a middle ground. To satisfy free market proponents while also ensuring some level of oversight, localities could require insurance instead of licenses and inspections.⁸⁹ Under this approach, insurers “could determine whether home-based restaurants that serve raw milk and sushi are reasonably safe.”⁹⁰

⁸⁴ Lehrer and Moylan, *Natl Affairs* at 55–56 (cited in note 41).

⁸⁵ *Id.* at 59 (“Where feasible and reasonable, lawmakers should try to model peer-production regulations on the existing rules for comparable services.”).

⁸⁶ With respect to the sharing economy, “the core of the conundrum is the fact that our laws were designed to regulate relationships in a competitive economy, not a collaborative one.” Jenny Kassan and Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 *J Environ L & Litig* 1, 13 (2012).

⁸⁷ Emily Badger, *The Street Hacker, Officially Embraced*, CityLab (The Atlantic May 7, 2012), online at <http://www.theatlanticcities.com/neighborhoods/2012/05/street-hacker-officially-embraced/1921> (visited Feb 26, 2015).

⁸⁸ But see Lehrer and Moylan, *Natl Affairs* at 59 (cited in note 41) (“[T]he fact that existing regulations would be difficult to impose on peer-production activities does not vitiate the legitimate public interests those rules are meant to serve.”).

⁸⁹ See Lehrer and Moylan, *Natl Affairs* at 59 (cited in note 41) (suggesting that policymakers “look to mandatory insurance or surety and fidelity bonds to address some of the concerns that would otherwise be handled by prescriptive regulation”).

⁹⁰ *Id.* at 60. Some of the websites that promote and facilitate secret suppers have begun to provide insurance to hosts, but it is unclear whether these websites actually inspect the facilities before doing so. Therefore, their health-protection value is not as strong as it could be with governmental oversight.

In order to arrive at an appropriate decision, a municipality should determine the existence of and demand for underground dining in its community, weigh the competing considerations addressed in this Essay, and make a regulatory determination. On balance, it seems that most municipalities should be able to craft a low-cost, low-hassle permitting system—potentially with insurance requirements—in order to ensure at least a base level of oversight. This would remove some uncertainty from the process while still allowing chefs and would-be patrons to safely enhance and challenge their local dining status quo.