WHAT IS AGRICULTURAL LAW? PROPOSING PRODUCTION AGRICULTURE AS THE CORE

by Drew Kershaw

Teaching Agricultural Law – Personal History

I taught my first course in Agricultural Law in 1975 as a seminar that covered a very broad range of subjects related to agriculture – commercial, environmental, international trade, farm programs, cooperatives, taxation, estate planning, and others since forgotten. I adopted this approach because I considered agricultural law to be the study of how laws and legal institutions affected agriculture as a sector. I did not think of agricultural law as dealing with a “subject matter” – contrasting, for example, to torts, or civil procedure, or contracts. This first seminar and the several seminars that followed showed the breadth of the subject matter that could fit within the ken of agricultural law.

While this breadth of subject matter is an accurate vision of agricultural law, I ultimately found this breadth to be unsatisfactory because the breadth did not seem to provide a sufficient focus that would allow the development of a discipline called agricultural law. I found that (cont. on page 2)

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focus in the early 1980s when I began to teach a 3-hour "Agricultural Law" course using Keith Meyer, Donald Pedersen, Norman Thorsen, and John Davidson, AGRICULTURAL LAW: CASES and MATERIALS (West Publishing Co., 1985).²

What greatly appealed to me about the AGRICULTURAL LAW casebook is that the authors had identified three unique themes for agricultural law. Theme One involved the critical roles that land and the biological cycles of crops and livestock play in agriculture and how law and legal institutions influence and shape the use of these resources in agriculture. Theme Two involved the fact that agriculture is a highly regulated industry. I called this the bifurcated nature of the economics of agriculture—a regulated industry within a fairly pristine free-market oriented sector. Theme Two emphasized the unique nature of the regulation of agriculture—often to protect against competition and to provide exemptions for agriculture from labor, antitrust, environmental, and other laws applicable to other sectors of the American economy. Theme Three involved the structural issues of agriculture—implicitly raising the question: what is agriculture? These structural issues provided the underlying policy issues and debates about who will or should control U.S. agriculture. These structural issues were implicitly and explicitly pervasive in all the courses that I presented within the discipline of agricultural law.

I used the AGRICULTURAL LAW casebook for eighteen years (through academic year 2001–2002) to teach a course built around the first theme of the book—how law and legal institutions influence and shape the use of resources (land, crops, and livestock) in agriculture. My "Agricultural Law" course explicitly built upon the first year curriculum of contracts, property, and torts to educate students about how these foundational private law courses applied in practical terms in the agricultural sector.³ The course focused on farmers and their use of these resources to produce food and fiber, which I considered the raison d'être for American agriculture. If I were to begin an agricultural law course today, I would begin with this "Agricultural Law" course that I taught for eighteen years.

While I considered my "Agricultural Law" course as the core (the course taught every year once a year), I also considered Theme Two—agriculture as a regulated industry—to be essential to agricultural law as a discipline. Hence, I ultimately developed two additional courses taught alternating every other year—Agricultural Environmental Law and Agricultural Biotechnology Law and Policy.⁴

In "Agricultural Environmental Law," my materials focus on the environmental and conservation provisions from the various farm bills—e.g., Swampbuster, Soilbuster, Conservation Reserve Program—and the application of environmental laws most particularly the Clean Water Act—to wetlands, point source, and nonpoint source pollution arising from agricultural practices. In "Agricultural Biotechnology Law and Policy," my materials focus on the meaning and impact of science and technology upon American farmers and their production methods while emphasizing the passionate public policy debates that have erupted about modern agriculture's embrace of science and technology.

While the subject matter emphasis of these two courses obviously differs, in my mind I have been asking myself and the students very similar questions. How can farmers use their land, crop and livestock resources to produce food, fiber, and (more recently) energy under the laws, cases, regulatory regimes, and public policy debates connected to the environment and biotechnology? What constraints upon production do these laws, regulatory regimes, and public policy debates impose? What incentives for production do these create? How can these environmental and biotechnology legal regimes coexist with the agronomic, economic, social, and technological demands that farmers face? Do these regimes intensify or ameliorate these demands? Do these regimes respond realistically or unrealistically to these demands? How do environmental and biotechnology laws and legal institutions influence and shape—for better or worse—a sustainable intensive agriculture?

By the questions I ask, one can see that the common theme in all three of my agricultural law courses is the theme of production agriculture. What is the justification for that theme?

Production Agriculture as the Core of Agricultural Law

Food, fiber, and energy are basic needs of human beings. Human beings have met these basic needs for thousands of years through plant (primarily domesticated crops) and animal (primarily domesticated livestock) agriculture. From the beginning of agriculture, production of food, fiber, and energy has been and is the raison d'être for agriculture. To my mind, it is simply obvious that without production the justification for agriculture ceases. Human beings using land, plants, and animals without a productive intent are engaging in human activity, but they are not engaged in the human activity of agriculture. From my perspective, agriculture as production is a tautological statement.

And production still matters. First and foremost, production matters because of human population. Agriculture provides the basic needs for food, fiber, and (to a much lesser extent) energy that human populations place upon it. Human populations continue to grow, particularly in developing countries, and hence the demands upon agriculture to meet these basic needs also grow. It has been the shame and moral indictment of generations for generations that fellow human beings are hungry and malnourished. Second, production matters because as human beings improve their well-being, as they move from subsistence agriculture to modern agriculture, as they move from rural to urban living, human beings change their dietary preferences. Human beings seek to feed, clothe, and power themselves with quantities and qualities of agricultural produce that increase the productivity demands placed upon agriculture. These basic facts about human beings and agriculture are not likely to change in meeting basic human needs, agriculture is productivity.

And production still matters for additional reasons. While Australia-New Zealand, Europe, North America, and some countries of South America have very productive agricultural sectors, the agricultural sectors of many nations, especially in sub-Saharan Africa and Southeast Asia, are unproductive. Many nations of the world desperately need to have agricultural sectors that are vastly

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more productive. While many ways exist to improve agricultural productivity, modern agriculture with its adoption of science and technology for seeds, nutrients, tillage, labor, transport, storage, and processing is a model well worthy of consideration and emulation. In a recent newspaper article about food security and food shortages, Thomas Lumpkin, Director of the International Wheat and Maize Improvement Center in El Batán, Mexico (better known by its Spanish initials, CIMMYT) was quoted as saying, “We need science to come back to farming.”

Unless productivity improves in many nations of the world, food trade (backstopped by food aid) will be a primary source of food and fibre for the urban poor, especially, of developing nations. Unless productivity improves, rural subsistence farmers, who are outside the markets for food (and often) outside the reach (physically or politically) of food aid, will remain in subsistence poverty with its attendant chronic malnutrition and frequent seasons of hunger. Far better to reduce food shortages, enhance food security, improve food nutrition, and promote domestic tranquility in developing nations by assisting them to intensify agricultural productivity both for rural farmers and their families directly and for urban consumers through domestic markets.

And production matters to the Red Queen. The Red Queen Principle can be stated thus: “For an evolutionary system, continuing development is needed just in order to maintain its fitness relative to the systems it is co-evolving with.” To my mind, the Red Queen Principle means that farmers must keep adapting to the biotic and abiotic conditions affecting their agricultural production. If farmers do not select improved seeds, control pests and weeds more effectively, conserve soils more healthfully, and manage weather (i.e. droughts, floods, frosts) more wisely, farmers’ productivity over time will not only not increase but will likely decline. Hence, for agriculture to be productive, agriculture must change in order just to maintain its fitness and must improve to gain productivity advances. For agriculture whose first unique trait is its use of land, plant, and animal resources (evolutionary systems all), standing still is not a viable option.

What do these claims for why productivity matters mean for agricultural law? I posit that the singular importance of productivity for agriculture means that production agriculture should be (must be) the core of agricultural law. I have previously described my preferred first course as focusing on how private and legal institutions influence and shape the use of resources in agriculture. I have also described briefly two other courses that, while focusing on environmental or biotechnological issues, also ask very similar questions about how farmers use their agricultural resources to produce food, fiber, and energy.

As the years have passed, I have come to name the agricultural production that I place at the core of my agricultural law courses as sustainable intensive agriculture. I have described the challenges of sustainable intensive agriculture as follows:

In the coming decades, agriculture faces three significant challenges. While these challenges will manifest themselves in ways unique to the cultural, socio-economic, and political conditions of different countries, developed and developing nations alike will face these challenges.

Agriculture faces an agronomic challenge... an environmental challenge... an economic challenge....

Agriculture must face these challenges in the coming decades in a manner that creates complementary, not conflicting, synergies between and among [these challenges]. As quickly as possible, agriculture must become agronomically sophisticated, environmentally protective, and economically sound.

To my mind, the core of agricultural law should be how laws (e.g. cases, statutes, regulations, decrees, and international agreements) and legal institutions (e.g. administrative agencies, financial systems, marketing structures, and educational and extension services) influence and shape - for better or for worse - a sustainable intensive agriculture. This is what I mean by proposing production agriculture as the core of agricultural law.

Aesthetic Farming as a Competing Vision

In my personal history of teaching agricultural law, I recalled how I used the Meyers, Pedersen, Thorson, and Davidson AGRICULTURAL LAW casebook for eighteen years until 2001. Their casebook provided my core agricultural law course. By 2001, however, the casebook was too outdated for continued use. The authors never took the casebook into a second edition for many reasons related to time, effort, and potential reward. Thus, I faced the choice of updating (rewriting) the book at significant effort for a small student demand or discontinuing the course. For practical reasons relating to my own commitments, energy, and projected rewards (that I suspect reflected consideration very similar to those made by the original authors), I chose not to update the casebook with my own materials. I discontinued the course I considered core - my “Agricultural Law” course.

Underlying my decision to discontinue the course, however, may have been a deeper concern that production agriculture had faded as the paradigm for agricultural law. Although I believed in the 1970s and have posited in this presentation that production agriculture should be the core of agricultural law, the paradigm for agricultural law may well have shifted.

The new paradigm may be aesthetic farming.

Clearly I am not the best person to defend aesthetic farming because I consider the concerns of aesthetic farming to be at the margins of agricultural law. Indeed, I believe that aesthetic farming, by abandoning production for agriculture, may well have abandoned the raison d’être for agriculture itself. In my opinion, aesthetic farming has abandoned the beauty of bountiful harvests and multiplying and fattening herds - the beauty found in production agriculture - with a new definition of beauty based, charitably, in bucolic sentimentalism and agricultural illiteracy. As I sketch aesthetic farming, aesthetic farming finds its beauty in assumptions such as the following:

Nature is to be revered because nature is assumed to be good and bountiful. With this reverence, aesthetic farming introduces
raw milk as a preferred product and agrotourism as a preferred experience for consumers of the agricultural landscape.

Ecology and the environment are viewed as balanced, pristine, almost steady-state conditions. Preservation of these conditions is the goal and agriculture, as a human activity, must have as minimal impact as possible in order to protect the pure and uncontaminated state of nature.

Small is beautiful because it involves personal physical labor and personal physical management. Family farmers become romanticized icons whose daily labor is song and whose daily sweat is like drops of dew on sun-kissed faces.

Creatures great and small possess an inherent dignity that agriculture must respect. Alongside their enlightened farm owners, animals too gain standing to assert legal rights to life, liberty, and the pursuit of happiness.

Marketing is more important than production because created images are more appealing than sensory reality. Niche markets for organic products, grass-fed beef, and local foods become the drivers of agricultural policy.

Science is anti-human and alienating from nature and our true selves. Heirloom seeds and the well-manured furrow become the cutting-edge of agricultural progress and ambition.

Technology is a treadmill that grinds humans into anonymous ciphers and enslaved servants of machines. Aesthetes farmers step off the treadmill into the haute couture of hand-crafted products made from time-treasured recipes and in traditional ways.

I understand and certainly feel the emotional tug of each of these statements—these assumptions—about the world of farming. Yet, I do not assent to these assumptions because each one is either wildly inaccurate or fundamentally incorrect, particularly if—and this is a big "if"—agriculture is to produce the food, fiber, and energy that sustains and enhances human welfare—the welfare of the farm labor, the farm owner, rural communities, urban populations, and consumers among the peoples of the world in developed and developing countries. 14

Of course, if agriculture is not about production for human welfare, there are other possible solutions, including the on-line reader comment to Shreya Maheshwari, supra note 6, where the reader posted: "The solution to world hunger is simple. Forced sterilization to populations that are not able to feed themselves. There is no food shortage or water shortage only an over abundance of hungry mouths. The country of Niger for example averages 8 babies per female. That is unsustainable. Giving food = giving life = more babies = morally bankrupt." While these assumptions appear so appealing in a country like the United States where seemingly assured food abundance makes elites no longer see any personal benefits from production agriculture, these assumptions remain—and will remain in the future—wildly inaccurate or fundamentally incorrect with regard to the facts of the physical and biological reality of the world.

Conclusion

Having posited production agriculture as the core of agricultural law, I also admit that the paradigm for the discipline seems to be tilting towards aesthetic farming. The tilt towards this new paradigm may best explain why the AGRICULTURAL LAW casebook had no second edition and why "Agricultural Law" courses, like the one I taught for twenty plus years, have disappeared from law school course lists.

Yet, despite the apparent shift in paradigms, I remain convinced that sustainable intensive agriculture is the way forward for agriculture as a sector and for agricultural law as an academic discipline. I have no crystal ball to predict the future outcome of the struggles between these competing visions for agriculture. However, I do sense that I will learn the outcome when the term "sustainable" acquires an agreed upon meaning. 16 If production agriculture attains the adjective "sustainable," production agriculture—no longer an exogenous variable—will be the focus of agricultural and agricultural law. If aesthetic farming captures the adjective "sustainable," production agriculture will move to the margins of agriculture and agricultural law. If aesthetic farming becomes the "sustainable" paradigm, I would be hesitant to call that human activity "agriculture" and I would be reluctant to label the study of that aesthetic farming as agricultural law. 17

ENDNOTES

1 This essay was presented January 9, 2009 at the Association of American Law Schools (AALS) meeting in San Diego.


3 More specifically, I used the first eight chapters of the AGRICULTURAL LAW casebook as the coverage of my "Agricultural Law" course. Those eight chapters are:
   Chapter 1 – Introduction to Agricultural Law;

Chapter 2 – Financing the Ownership of Agricultural Law;
Chapter 3 – Farm Leases;
Chapter 4 – Warehouses;
Chapter 5 – Operational Financing and Related Issues;
Chapter 6 – Insolvent Warehouses and Buyers;
Chapter 7 – Animals;
Chapter 8 – Commodity Futures Contracts.

For many years, I also used North Central Regional Extension Publication 32, Who Will Control U.S. Agriculture? (Univ. of Ill., Urbana-Champaign, Special Pub. 27, Aug. 1972). I used this Illinois publication in conjunction with Chapter One of the AGRICULTURAL LAW casebook to raise the structural issues that would be pervasive throughout the course.

4 I taught "Agricultural Environmental Law," for the first time in the late 1980s, using materials developed by Neil Hamilton (Drake University) and Martha Noble (at that time, National Center for Agricultural Law, Research & Information, Fayetteville). Professors Hamilton and Noble called their materials "Environmental Agricultural Law." I revised these materials through the years so that today the materials I use for "Agricultural Environmental Law" are my own set of materials. My "Agricultural Environmental Law" course is 2-credit hours.

5 Beginning in 1995, I taught a course entitled "Agricultural Public Law," using materials of the same name developed by Jim Chen (at that time, University of Minnesota). Professor Chen's book was a broad ranging book that asked explicitly "What is agriculture?" Professor Chen explored that question by presenting cases, statutes, and administrative regulations that focused on the inclusion or exclusion of agriculture from various substantive bodies of law—e.g., antitrust, intellectual property, and food law. Of course, the inclusion or exclusion depended upon how one defined "agriculture."

By 1999, I had transformed Professor Chen's materials into the course titled "Agricultural Biotechnology Law and Policy"—3 credit-hours having a one hour component on intellectual property, another hour on comparative biotechnology regulations (the U.S. and the European Union), and a third hour on related international conventions about genetic resources and biotechnology. While I have transformed Professor Chen's materials to emphasize agricultural biotechnology, my transformed materials retain much of the public policy flavor and analysis that Professor Chen created in his materials for his 1994 "Agricultural Public Policy" course.

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For a particularly compelling account of the need for science in agriculture, read Robert Paarlberg, STARVED FOR SCIENCE: How Biotechnology is Being Kept Out of Africa (Harvard Univ. Press, 2008). Dr. Robert Paarlberg is a professor of political science at Wellesley College and a former research fellow in Science, Technology, and Globalization at the Harvard Belfer Center for Science and International Affairs.


9 For a tour-de-force about the needs for and difficulties of achieving improved crops, read Jonathan Gressel, GENETIC GLASS CEILINGS: Transgenics for Crop Biodiversity (John Hopkins Press, 2008). Professor Jonathan Gressel is a Professor Emeritus, Department of Plant Sciences, Weizmann Institute of Science.


12 It is worth mentioning in a footnote, without extended discussion, that placing production agriculture at the core of agricultural law does not presuppose economic protectionism, environmental degradation, or social-structural stagnation. While these issues are certainly part of the debate about agriculture within agricultural law, sustainable intensive agriculture — i.e. production agriculture as productive agriculture — must be agriculturally sophisticated, environmentally protective, and economically sound.

13 Aesthetic: relating to or dealing with aesthetics or the beautiful; appreciative of, responsive to, or zealous about the beautiful. Webster’s Seventh New College Dictionary (1983).

14 As those reading this essay are likely to realize, I have been greatly influenced by the scholarship of Jim Chen, Dean, Louis D. Brandeis School of Law, University of Louisville. See especially, Jim Chen, The Agroecological Opium of the Masses, 10 Choices 16 (Issue 4, 1995). While I do not know if Dean Chen would agree or approve, I think his term “agroecological” is a likely replacement term. Agricultural law would disappear to be replaced by Agroecological Law.