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What is Agricultural Law?

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The Association of American Law Schools (AALS) Agricultural Law Section chair, Professor Anthony Schutz identified two related goals for the 2009 AALS Agricultural Law section session: (1) To consider the pedagogical and scholarly value of agricultural law, and (2) To identify what belongs in the canon of agricultural law. As Professor Schutz indicated in his message to the panelists, “given the various changes that the agricultural sector has undergone over the last twenty-five years, it is time to reconsider the roots of the subject matter to which our section is devoted.”

It was my privilege to serve with Professor Schutz, Professor Drew Kershen and Dean Jim Chen on the panel discussing these important issues. I now offer my thoughts to the AALA membership.

I begin with a general definition of what I mean by “agricultural law.” I define agricultural law as the study of the network of laws and policies that apply to the production, marketing, and sale of agricultural products, i.e., the food we eat, the natural fibers we wear, and increasingly, the bio-fuels that run our vehicles.

The Pedagogical And Scholarly Value Of Agricultural Law

In general terms, studying agricultural law takes a different approach than the traditional area-of-law focus that exemplifies most law school courses. Rather than being defined by the area of law, as in Contracts, Torts, or Property, an agricultural law survey course is defined by the industry, and thus, there are numerous areas of law covered.

The study of the application of a variety of different laws to an industry provides the kind of practical “real world” analysis that gives life to the study of law. It is client based as opposed to subject based. Industry is not affected by just one area of law, it is affected by many applicable laws, and lawyers must be mindful of the integrated whole. Studying agricultural law, like studying the law applied to any particular industry or type of client, gives students an opportunity to learn how a variety of different laws apply and interact, thus providing an integrated, practical study of applied law.

Several reasons support the specific choice of the agricultural sector for this applied-law study. As noted, changes in U.S. agriculture have altered the landscape over the years, reinforcing some reasons, diminishing others, and adding new justifications.

One enduring reason to study agricultural law is that agriculture provides one of the most basic of human needs: food. In 1990, Professor Neil Hamilton identified “the fundamental nature of the production of food to human existence” as one of the primary reasons supporting the study of agricultural law.¹ The importance of food to society has certainly not diminished, and in fact, recent concerns about food security,² food safety,³ the use of food stocks for fuel,⁴ and the global interplay of food production and consumption⁵ have heightened contemporary interest in food and agriculture. An adequate supply of safe, wholesome food is a fundamental need for any society, and what food is produced, how it is produced, and who has access to it all raise fundamental issues for legal study.

A second constant concerns the basic nature of agricultural production. Agriculture is an unusual if not unique industry in that it relies on the production of living things. It is therefore vulnerable to natural processes and natural forces; it is not truly under human control as it is inextricably intertwined with nature. This gives the industry a special status, and it has been a justification for protective treatment. In addition, however, as we are now beginning to

¹ Neil D. Hamilton, *The Study of Agricultural Law in the United States: Education, Organization and Practice*, 43 ARK. L. REV. 503 (1990).

² See, e.g., Andrew Martin, *U.N. Food Meeting Ends With a Call for ‘Urgent’ Action*, NEW YORK TIMES, June 6, 2008 (discussing the crisis level of food insecurity in poor nations as exacerbated by higher food prices and reporting on the UN’s call for “urgent and coordinated action” to address the problem). With respect to U.S. food insecurity, see, e.g., *Long Lines, Empty Shelves Are Signs Of Times At Food Banks*, CNN Online available at <http://www.cnn.com/2008/US/11/25/thanksgiving.food/>

³ See, e.g., Bina Venkataraman, *Amid Salmonella Case, Food Industry Seems Set to Back Greater Regulation*, NEW YORK TIMES, July 31, 2008.

⁴ See, e.g., C. Ford Runge and Benjamin Senauer, *How Biofuels Could Starve the Poor*, FOREIGN AFFAIRS, May/June 2007. For a spirited debate on this issues, see Tom Daschle, C. Ford Runge, and Benjamin Senauer, *Food for Fuel?* FOREIGN AFFAIRS, Sept./Oct. 2007. From Foreign Affairs, September/October 2007. Both articles are available at <http://www.foreignaffairs.org/20070901faresponse86512/tom-daschle-c-ford-runge-benjamin-senauer/food-for-fuel.html>.

⁵ See, e.g., Roger Thurow and Andrew Batson, *Two Families’ Shifting Fortunes*, WALL STREET JOURNAL, Dec. 30, 2008, at A-7 (contrasting a poor Ethiopian family struggling to feed their child with a middle class Chinese family’s food wealth and linking increased meat consumption in China to higher prices for grain elsewhere); see Posting of Susan Schneider to Agricultural Law Blog, <http://aglaw.blogspot.com/2009/01/ws-j-on-food-and-agriculture-contrast-in.html>.

understand, being the business of creating living things gives the industry of agriculture a special responsibility to confront ecological and ethical issues that may arise regarding the appropriate use and treatment of living products.⁶

Related to agriculture's production of living things, agriculture's extensive use of land is a third important rationale. As noted in the preface to the Agricultural Law casebook published in 1984, "[a]griculture is the only industry where land is a predominant production input. Unlike other resources, land is neither mobile nor fungible."⁷ The USDA Economic Research Service (ERS) reports that agriculture uses approximately 46% of the U.S. land base.⁸ Who has control of this land, how this land is used, and what role government should play in regulation are clearly important topics of legal analysis.

History and culture provide a fourth rationale. Agriculture has long held a special place in the fabric of our society, with support for the "family farm" deeply engrained in our beliefs. As noted in the preface to the Agricultural Law casebook, "[e]fforts to protect and promote family size farms have deep historical roots and constitute a separate and distinct policy theme that permeates agricultural law."⁹ Whether these efforts are based on romantic notions of the agrarian ideal or upon political and economic concerns about land tenure and the control of our food supply, structural issues and debate over the appropriate role of government in regulating farm structure continue to support the study of agricultural law.

These four factors, in combination with the significant political clout of the agricultural industry, have led to the creation of a network of laws that are distinct to agriculture. Historically, our legal system has treated agriculture differently than other industries, providing it with its own specific laws and with exceptions to many general laws. Thus, many of the special rules governing food and agriculture are not covered in the typical law school curriculum.¹⁰ This in itself represents a an important reason to study agricultural law – both to learn the laws that apply and to debate the validity of the separate treatment of the agricultural industry.

⁶ These concerns may related to modification of natural processes and products such as those expressed regarding genetic modification or they may relate to animal welfare concerns.

⁷ KEITH G. MEYER, DONALD B. PEDERSEN, NORMAN W. THORSON, *AGRICULTURAL LAW CASES AND MATERIALS*, xix (1984).

⁸ USDA/ERS Briefing Room, *Land Use, Value, and Management*, available at <http://www.ers.usda.gov/Briefing/LandUse/>.

⁹ *AGRICULTURAL LAW CASES AND MATERIALS*, *supra* note 7.

¹⁰ For example, the major law school casebooks for employment and labor law courses note only that "special rules apply to agriculture." The laws that apply to the farmers who hire millions of migrant farmworkers are simply excluded from study.

A final justification, one with increasing relevance, exists. Agricultural production is a highly consumptive activity.¹¹ The agricultural sector uses more natural resources, including land¹² and water,¹³ than any other single industry. It is recognized as a major polluter of water,¹⁴ and a significant source of global warming.¹⁵ Developing an agricultural system that balances production needs with environmental sustainability, particularly in the face of climate change is a serious challenge for the future.

In summary, agriculture is an industry that is essential to human survival, interconnected with the natural environment, supported by a rich cultural heritage, highly consumptive of our essential natural resources, and a major source of environmental problems. Clearly, it is an industry that has an impact on *everyone*, not just those involved in farming. Understanding the special network of laws that apply and developing sufficient expertise to debate the attendant policies is a very important and highly relevant academic endeavor.

What Belongs In The Canon Of Agricultural Law

One of the most fascinating aspects of agricultural law is its diversity. For example, the LL.M. Program in Agricultural Law at the University of Arkansas attracts candidates from all over the United States and from many other countries. From the very beginning of the course of study each year, it is apparent that there are widely divergent views of agriculture. What it means to be a cotton farmer in the delta of Mississippi or Arkansas is very different than what it means to be a corn farmer in Iowa or a dairy farmer in Vermont. Similarly, consider the fruit and

¹¹ See generally, David E. Adleman and John H. Barton, *Environmental Regulation for Agriculture: Towards a Framework to Promote Sustainable Intensive Agriculture*, 21 STAN. ENVTL. L.J. 3 (2002).

¹² *Supra*, note 8 and the accompanying text.

¹³ See, e.g., Piet Klop and Jeff Rodgers, *Watering Scarcity: Private Investment Opportunities in Agricultural Water Use Efficiency*, World Resources Institute, Nov. 2008 (reporting that “[a]griculture is by far the biggest water user, accounting for more than 70% of global withdrawals”).

¹⁴ USDA, ERS, *Agricultural Resources and Environmental Indicators*, 2006 ed., Chapter 2.2: *Water Quality—Impacts of Agriculture*, (recognizing agriculture as “the leading source of impairment in the Nation's rivers and lakes, and a major source of impairment in estuaries.”)

¹⁵ Keith Paustian, John M. Antle, John Sheehan, and Eldor A. Paul, *Agriculture's Role in Greenhouse Gas Mitigation*, Pew Center for Global Climate Change (2006) (reporting that “[g]lobally about one-third of the total human-induced warming effect due to GHGs comes from agriculture and land-use change. U.S. agricultural emissions account for approximately 8 percent of total U.S. GHG emissions when weighted by their relative contribution to global warming.”) These figures do not include food transportation costs. See also, U.S. Department of Energy, Energy Information Administration date available at <http://www.eia.doe.gov/oiaf/1605/ggrpt/>

vegetable farms in Florida and California as contrasted with ranchers in Montana. Adding in the important international dimensions, contrast a U.S. cotton farmer with cotton farmer in Sub-Saharan Africa.

All differences, however, are not regional. Consider the farmer who earns his or her livelihood by direct-marketing fruits and vegetables at one of the many farmers' markets. Contrast this face of agriculture with a large industrialized operation that sells to wholesale markets or canneries. Production methods, scale of operation, size of operation, and method of marketing all make for a fascinating diversity of structure, form, and culture.

Consider as well the different perspectives based on race, sex, class, and social status. The agricultural law of the migrant farm worker or the farmer who has been discriminated against because of his race or her gender may have a very different perspective than the typical white male farmer¹⁶ whose land has been in the family for generations.

And, consider the different perspectives of agriculture from the standpoint of consumers. To reject or discourage consumer input into agricultural laws would be nonsensical. In our free market system, agriculture is in the business of raising products for sale. What seller can be successful with out a close connection to its buyers? And what purchase is more important than the food one eats? Increasingly, consumers are recognizing this importance and seeking a greater connection with the food they eat while questioning its origins and composition. This heightened interest on the part of those previously detached from farming offers a tremendous opportunity for learning, for constructive debate, and for coordinated efforts to examine the positive and the negative aspects of our food system.

With these varying perspectives in mind, it is virtually impossible for an agricultural law survey course to cover all of the issues raised in any satisfying manner. Even in the LL.M. Program in Agricultural Law it is a struggle to cover all of the issues within a twenty-four credit curriculum.

Each of the following topics or curricular subject matter, in no particular order, could be considered to be a topic area that directly supports the reasons given for the study of agricultural law:

- The government's regulation of agricultural production and the sale of agricultural commodities, including the study of the federal farm programs; marketing orders, the Packers & Stockyards Act, the Perishable Agricultural Commodities Act, and the Warehouse Act and state grain dealer statutes.

¹⁶ USDA ERS reports that “[a]bout three-quarters of the general U.S. population is classified as being solely White (i.e., White alone and of all ethnic origins). Farm operators are much more likely than the general population to report being White. In 2007, 96.6 percent of principal operators reported being White . . .” ERS data also finds that only “about 10 percent of principal farm operators are women.” USDA ERS Briefing Room, *Farm Household Economics and Well-Being: Beginning Farmers, Demographics, and Labor Allocations*, available at <http://www.ers.usda.gov/briefing/wellbeing/demographics.htm>

- The government's regulation of food through the statutes implemented by both the FDA and the USDA, including efforts to regulate food safety, food labeling, and production claims such as the organic standards.
- The application of commercial laws to agriculture, including the study of UCC Articles 2, 7, and 9 as well as the Bankruptcy Code.
- Governmental entities and programs established to promote agriculture, including USDA lending programs and the Farm Credit System as well as other USDA efforts.
- The adaptation of business structures, such as agricultural cooperatives to agricultural operations.
- The regulation of natural resource use and efforts to protect the environment from degradation from agriculture; efforts to develop a sustainable model for production.
- Legal and policy issues regarding land tenure, farm structure, and the ownership of the incidents of production.
- The regulation of animal husbandry and the ethical and cultural issues raised.
- International trade in agricultural products and the global impact of domestic production and consumption patterns.
- Agricultural labor law, both domestic and international.
- Food security, insecurity, poverty, and the right to food as a human right.
- The use and regulation of technology, including biotechnology; and intellectual property rights associated with agricultural production.
- Agricultural taxation and planning for generational transfer of agricultural assets.
- The encouragement, regulation and consequences of agricultural production of biofuels.
- Agriculture and rural residency, including such topics as rural poverty, population decline, and rural development initiatives.

Developing a reasonable survey course from this list far ranging topics need not be as daunting a task as the length of the list implies. I offer five guidelines for selecting subject matter from this list and designing a fluid course model.

1) Emphasize the importance of agricultural law, relying upon the rationales set forth above, and using the subject matter selected to reinforce this theme.

An Agricultural Law course should awaken in the students the realization that this is something that matters to them personally and that will spark a life long interest and appreciation in where their food comes from and how it is produced.

2) Expose the diversity of agriculture while addressing the interests of the students.

Teaching the Grazing Act in Vermont or the Migrant and Seasonal Agricultural Worker Protection Act in Montana may not be of great interest to the students. There is clearly a need to focus on the elements of agricultural law that are of interest and relevance to the students. Showing them the incredible diversity of issues and perspectives, however, should serve to heighten their interest and demonstrate the complexity of the discipline.

3) Reflect the current issues of concern and pressures on the industry.

Agriculture is a dynamic industry; what issues are of greatest concern will vary with the times. During the financial crisis of the 1980's, most Agricultural Law courses were focused on commercial law, in particular, issues of finance and credit. Today, issues of environmental law, sustainability, and food safety are arguably of greater interest. Using the events of the time can serve to promote student interest, increase the relevancy of the course, and best prepare students to address those issues in practice.

4) Promote open discussion of policy issues.

Many of the policy issues involved in agricultural law are complex and controversial. They may deal with one's family heritage, one's personal beliefs, and one's personal choices. I personally do not teach agricultural law as an advocacy exercise. My approach is generally not "pro-farmer" or "anti-farmer." My goal is to raise questions, provide resources, and suggest ways for the students to develop answers.

5) Balance the interests of those who consume agricultural products with those who produce them.

In my view, agricultural law, and indeed agriculture, has suffered in the past from being too isolated from the consumers that it serves. Food is the most basic item that is produced and sold, and the interests of consumers of agricultural products must have a seat at the agricultural law table. Greater understanding will promote greater appreciation and in the long run, a more secure food system.

6) Provide access to the unique aspects of the law as applied to agriculture.

Because other law school courses do not often address the unique application of their subject matter to agriculture, it is helpful to focus the agricultural law curriculum on those areas of law that are unique to agriculture. However, many such areas may well be beyond the typical survey course.

Refer students to the abundant resources available for future study. Tell them about: The American Agricultural Law Association;

The LL.M. Program in Agricultural Law (<http://law.uark.edu/llm>; blog at <http://aglawllm.blogspot.com>);

The website of the National Center for Agricultural Law (<http://nationalaglawcenter.org>); Information available through the government websites such as <http://USDA.gov>; and The ongoing current discussions on the many related blogs such as the Agricultural Law blog at <http://aglaw.blogspot.com>; the Legal Ruralism blog at <http://legalruralism.blogspot.com/>; and, the FoodLawClass at <http://foodlawclass.blogspot.com>

7. Seek help with regard to teaching materials and suggestions.

There are few organizations with members who are as anxious to help and as supportive as the AALA. And, there are is so much expertise to tap into.

As a result of discussions at the AALS conference, the panelists are working on the creation of an online data bank of agricultural course materials and resources, possibly through the new CALI feature, E-Langdell (<http://w.cali.org/elangdell>).

And, Carolina Press will be publishing an issues-based agricultural law / food law casebook designed for a survey course in the future.¹⁷

¹⁷ I signed a contract with them for the production of this book last summer and hope to have it ready for submission at the end of next summer. Suggestions are welcome!