

# A RECONSIDERATION OF AGRICULTURAL LAW: A CALL FOR THE LAW OF FOOD, FARMING, AND SUSTAINABILITY

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*Agricultural law can be defined 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.*<sup>1</sup>

American agricultural policy has evolved from its early focus on agricultural development and expansion to its current focus on economic and political support for the agricultural sector.<sup>2</sup> Agricultural law as a discipline has tracked this policy, with agricultural law scholars debating the origins and the validity of the special treatment of agriculture under the law. This article reviews these debates and calls for a reconsideration of agricultural law and policy to address the unique aspects of agricultural production, the fragility of the environment, and the fundamental need for healthy food. Transforming the special law of agriculture to a new more inclusive system that focuses on the sustainable production of healthy food is a critical challenge for the future. Moreover, it provides the only way to assure a politically sustainable agricultural policy.

## INTRODUCTION

The study of the laws that apply to farmers and the products that they grow can be complex. “Agricultural exceptionalism,” i.e., the use of legal exceptions to protect the agricultural industry, is pervasive.<sup>3</sup> This

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<sup>1</sup> University of Arkansas School of Law, About Agricultural Law, <http://law.uark.edu/prospective/llm/about-agricultural-law.html> (last visited Mar. 23, 2010). This is the definition used by the LL.M. Program in Agricultural & Food Law at the University of Arkansas School of Law, the only advanced legal degree program in either agricultural or food law in the United States. University of Arkansas School of Law, LL.M. Program, <http://law.uark.edu/prospective/llm-program.html> (last visited Mar. 23, 2010).

<sup>2</sup> BRUCE L. GARDNER, *AMERICAN AGRICULTURE IN THE TWENTIETH CENTURY: HOW IT FLOURISHED AND WHAT IT COST* 176–88 (2002).

<sup>3</sup> See Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 489 (1998).

term is often used to reference its American origins in labor law, where agricultural laborers are excluded from many of the protections afforded to other workers.<sup>4</sup> However, the concept is evident throughout the law, with farmers protected from involuntary bankruptcy,<sup>5</sup> exempted from many environmental regulations,<sup>6</sup> and excepted from anti-trust restrictions.<sup>7</sup> The first use of the term is often credited to international trade scholarship, where special exceptions are also evident in other countries.<sup>8</sup>

Other laws, most notably the federal farm programs, provide unique benefits for farmers, paying billions of dollars to farmers who produce certain favored crops.<sup>9</sup> Additional specialized laws include the federally subsidized system of crop insurance,<sup>10</sup> the special use valuation afforded to farmers for estate planning purposes,<sup>11</sup> the farm loan programs provided to farmers who cannot obtain credit elsewhere,<sup>12</sup> and Chapter 12 of the Bankruptcy Code, a powerful tool available only to “family farmers.”<sup>13</sup> Furthermore, agriculture has its own cabinet department, the U.S. Department of Agriculture (“USDA”).<sup>14</sup>

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<sup>4</sup> See *id.* The most notable current exceptions are that “agricultural laborers” are excluded from the definition of “employee” for purposes of protection under the federal National Labor Relations Act, 29 U.S.C. § 152(3) (2006); and “any employee employed in agriculture” is exempt from the overtime pay requirements of the Fair Labor Standards Act, 29 U.S.C. § 213(b)(12) (2006). A limited exclusion for minimum wage protection still exists under the Fair Labor Standards Act, 29 U.S.C. § 213(a)(6) (2006). Previously agricultural workers were completely excepted. See Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1335 (1987).

<sup>5</sup> 11 U.S.C. § 303(a) (2006).

<sup>6</sup> See J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 293–327 (2000) (describing the “active and passive safe harbors farms enjoy” under environmental law); *id.* at 263.

<sup>7</sup> See 7 U.S.C. § 291 (2006).

<sup>8</sup> See Grace Skogstad, *Ideas, Paradigms and Institutions: Agricultural Exceptionalism in the European Union and the United States*, 11 GOVERNANCE 463, 463, 468 (1998) (explaining that agricultural exceptionalism is based both on the specific interests and needs of farmers and upon the broader national interest in a secure food supply).

<sup>9</sup> See, e.g., 7 U.S.C. § 1441 (2006); see also EWG Farm Subsidy Database Update, ENVTL. WORKING GROUP, Apr. 14, 2008, <http://farm.ewg.org/farm/summary.php>. See generally Allen H. Olson, *Federal Farm Programs—Past, Present And Future—Will We Learn From Our Mistakes?*, 6 GREAT PLAINS NAT. RES. J. 1 (2001) (reviewing the history of federal farm programs).

<sup>10</sup> Federal Crop Insurance Act, 7 U.S.C. §§ 1501–1524 (2006).

<sup>11</sup> 26 U.S.C. § 2032A (2006).

<sup>12</sup> 7 U.S.C. §§ 1921–1949 (2006).

<sup>13</sup> 11 U.S.C. § 109(f) (2006).

<sup>14</sup> The White House, The Executive Branch, <http://www.whitehouse.gov/our-government/executive-branch> (last visited Mar. 23, 2010).

Over the years, agricultural law scholars have theorized as to how and why this special legal system came about, articulating some of the most persuasive reasons for the existence of a parallel regulatory framework for agriculture.<sup>15</sup> Some defend the special status by tying it to noble societal concerns.<sup>16</sup> Others bemoan the special treatment, linking it to political and economic power.<sup>17</sup> Are unique agricultural laws a relic from the past? How much of the structure of agricultural law is based upon support for a special interest group, and how much is based on the more overarching needs of a society to feed itself? While some explain support for agriculture as necessary in order to feed the world, how much has agricultural policy shaped food policy rather than the other way around?

This article argues for the special treatment of agriculture, but not for a status that necessarily exempts it from regulation. Rather, it calls for a reconsideration of the framework of agricultural law and the development of an agricultural policy that supports and encourages a sustainable food policy. It calls for a policy that supports the economic welfare of the agricultural industry but only in the context of the universal societal goal that justifies its special treatment—the production of food.

Moreover, it calls for a recognition that ‘not all food is created equal.’ Some serves as healthy fare; other food can actually contribute to health problems. Because food production is a limited resource, choices should be made wisely. Although, as a mature industry, much of agriculture can and should flourish without government intervention, to the extent that government policies influence the production of food this influence should be focused on the production of healthy food. “Agricultural law” should be recast as the law of food, farming, and sustainability, with the sustainable production and delivery of healthy food to consumers as its central goal.

## I. HISTORICAL JUSTIFICATIONS FOR A DISTINCT BODY OF AGRICULTURAL LAW

A variety of rationales have supported governmental policies that treat agricultural producers differently than other businesses. Looking

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<sup>15</sup> See *infra* Part I; see also, e.g., Donald B. Pedersen, *Introduction* to 23 MEM. L. REV. 401, 405-10 (1990) (describing four attributes of agriculture that have led to its special treatment—its extensive use of land, its reliance on biological cycles, atomistic structure, and the agrarian tradition).

<sup>16</sup> See *infra* Part I and notes 18, 30–33.

<sup>17</sup> See *infra* Part I and notes 21–24.

to agricultural exceptionalism in both the United States and the European Union, Professor Grace Skogstad described a two-pronged rationale based on the “special interests and needs of farmers” and the “broader national interests and goals” associated with the production of food.<sup>18</sup> Implicit is the potential balancing of these factors. The interests of farmers are to be supported because of the critical service that they provide to society by producing the food that is needed for survival.<sup>19</sup>

Such a balanced rationale, however, may not always be the political reality. Although it is the least appealing explanation for the special rules for agriculture, the significant political power of the agricultural industry cannot be denied as an important factor in the development of agricultural law, and it has sometimes tipped the balance in favor of the special interest of the industry, giving less emphasis to the broader national interest.<sup>20</sup>

Legal scholar Dean Jim Chen “tell[s] the story . . . of American agricultural law’s constitutional origins” in his provocative article, *Of Agriculture’s First Disobedience and its Fruit*.<sup>21</sup> Chen argues that the drafting of the Constitution by the founding fathers is the oldest example of favoritism toward American agriculture, through its promise of two Senators for each state regardless of population and its protection of slavery.<sup>22</sup> With this foundation, agricultural interests, particularly those in the South, have had significant political power that continued long after the abolition of slavery.<sup>23</sup> Indeed, the agricultural exceptionalism found in federal labor laws has its direct roots in the power of Southern Democrats to block New Deal labor legislation unless farm laborers were excepted from its protection.<sup>24</sup>

Indeed, while Dean Chen’s analysis is harsh, few could argue that the political clout of the agricultural industry is not a major factor in the continued support for federal farm programs and the existence of so many laws and policies that favor the industry. Although rural populations have

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<sup>18</sup> Skogstad, *supra* note 8, at 467–68.

<sup>19</sup> *See id.* at 468.

<sup>20</sup> *See id.* at 464, 468–69; *see also* Terry D. Van Doren et al., *Political and Economic Factors Affecting Agricultural PAC Contribution Strategies*, 81 AM. J. AGRIC. ECON. 397, 397–98 (1999) (analyzing the role of political contributions and special interests in framing agricultural policy).

<sup>21</sup> Jim Chen, *Of Agriculture’s First Disobedience and its Fruit*, 48 VAND. L. REV. 1262, 1274 (1995).

<sup>22</sup> *Id.* at 1275–78.

<sup>23</sup> *See id.* at 1281 (citing Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1371–75 (1987)).

<sup>24</sup> *Id.*

declined dramatically over the years, with only twenty-one percent now living in broadly defined rural areas<sup>25</sup> and less than two percent of workers employed in agriculture,<sup>26</sup> farm states each have their two U.S. Senators, agricultural interests are a strong presence in Washington, D.C.,<sup>27</sup> and the “farm vote” remains a strong political force.<sup>28</sup> Who the “farm vote” actually represents may often be a complex issue.<sup>29</sup>

Support for the family farm as an admirable lifestyle provides a far more endearing basis for special rules for agriculture. Authors of the first agricultural law casebook noted that “[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.”<sup>30</sup>

These historical roots are often traced back to the Jeffersonian concept of agrarianism. Jefferson wrote in *Notes on the State of Virginia* that, “[t]hose who labour in the earth are the chosen people of God, if ever he had a chosen people,”<sup>31</sup> and in his letters to John Jay, “[c]ultivators of the

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<sup>25</sup> U.S. Census Bureau, United States—Urban/Rural and Inside/Outside Metropolitan Area, [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=01000US&-\\_box\\_head\\_nbr=GCT-P1&-ds\\_name=DEC\\_2000\\_SF1\\_U&-redoLog=false&-mt\\_name=ACS\\_2007\\_1YR\\_G00\\_GCT2303\\_US37&-format=US-1&-CONTEXT=gct](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-P1&-ds_name=DEC_2000_SF1_U&-redoLog=false&-mt_name=ACS_2007_1YR_G00_GCT2303_US37&-format=US-1&-CONTEXT=gct) (last visited Mar. 3, 2010).

<sup>26</sup> ROBERT A. HOPPE ET AL., USDA, STRUCTURE AND FINANCES OF U.S. FARMS: FAMILY FARM REPORT, 2007 EDITION 4 (2007), available at <http://www.ers.usda.gov/publications/eib24/eib24.pdf>.

<sup>27</sup> See, e.g., Center for Responsive Politics, Agribusiness: Background, <http://www.opensecrets.org/industries/background.php?cycle=2010&ind=A> (last visited Feb. 20, 2010). The Center for Responsive Politics estimated lobbying from the agribusiness sector at more than \$91 million in 2006. *Id.*

<sup>28</sup> See, e.g., *Democrats Divided Over Farm Bill Changes*, ENVTL. WORKING GROUP, July 13, 2007, <http://www.ewg.org/node/22055> (noting that “the farm vote is still a factor” in relation to political support for proposed Farm Bill changes).

<sup>29</sup> The competing interests in agricultural policy make for a complex dynamic. Many issues pit one segment of agriculture against another. For example, row crop producers seek higher prices for a greater return on their production; livestock producers who use feed grains, along with food manufacturers and industrial users of crops seek lower prices. See Timothy A. Wise, *Identifying the Real Winners from U.S. Agricultural Policies 4* (Global Dev. and Env’t Inst., Working Paper No. 05-07, 2005). Recent trends include conflicts between proponents of sustainable agriculture and proponents of industrial agriculture. See, e.g., Jodi Soyars Windham, *Putting Your Money Where Your Mouth Is: Perverse Food Subsidies, Social Responsibility & America’s 2007 Farm Bill*, 31 ENVIRONS ENVTL. L. & POL’Y J. 1, 4, 13–19, 22 (2007) (identifying industrial agriculture as the true beneficiary of U.S. farm commodity subsidies and criticizing the exclusion of organic farming from farm programs).

<sup>30</sup> KEITH G. MEYER ET AL., AGRICULTURAL LAW: CASES AND MATERIALS xx (1985).

<sup>31</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 170 (Frank Shuffelton ed., Penguin Books 1999) (1785). A discussion of Jefferson’s statements on agrarianism

earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, & they are tied to their country & wedded to it's [sic] liberty & interests by the most lasting bonds."<sup>32</sup> Agrarianism and Jefferson's lofty statements have been used to support a "political duty to preserve and protect farms."<sup>33</sup>

Often lost, however, has been the interpretation of Jefferson and of agrarianism as the reconciliation of "self-interest with the public good."<sup>34</sup> Perhaps farmers are not simply noble because they are farmers but because they appreciate farming's dependence on land and nature. Farming, or at least "good farming," is "the proper use and care of an immeasurable gift."<sup>35</sup> In this sense, the dual rationales for the support for agriculture—the interests of farmers and the national interest—are reconciled by an agrarian philosophy.

It appears, however, that the "duty to preserve and protect farms"<sup>36</sup> was easier to translate into political and economic goals than the reconciliation of "self-interest with the public good."<sup>37</sup> Historically, the notion that the family farm was worthy of support was often coupled with a paternalistic presumption that farmers were different from, and less sophisticated than, other business owners.<sup>38</sup> As noted agricultural economist Don Paarlberg<sup>39</sup> wrote, farming has been considered to be

basically different from other occupations; it was more a way of life than a business. Farmers were self-sufficient.

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contrasted with his use of slaves for the actual "labour in the earth" is beyond the scope of this article. *Id.*

<sup>32</sup> Letter from Thomas Jefferson to John Jay (Aug. 23, 1785), *available at* [http://avalon.law.yale.edu/18th\\_century/let32.asp](http://avalon.law.yale.edu/18th_century/let32.asp).

<sup>33</sup> WILLIAM B. BROWNE ET AL., SACRED COWS AND HOT POTATOES: AGRARIAN MYTHS IN AGRICULTURAL POLICY 7 (1992).

<sup>34</sup> *Id.*

<sup>35</sup> Wendell Berry, *The Agrarian Standard*, in THE ESSENTIAL AGRARIAN READER, THE FUTURE OF CULTURE, COMMUNITY, AND THE LAND 24 (Norman Wirzbza, ed., 2003).

<sup>36</sup> See BROWNE ET AL., *supra* note 33, at 7.

<sup>37</sup> *Id.*

<sup>38</sup> See DON PAARLBERG, FARM AND FOOD POLICY: ISSUES OF THE 1980S 5–6 (1980).

<sup>39</sup> Dr. Don Paarlberg, a farmer, writer, and professor of agricultural economics at Purdue University, served as a White House assistant to President Dwight D. Eisenhower where he helped to prepare and run the Food for Peace initiative. Wolfgang Saxon, *Don Paarlberg, 94, Agricultural Economics Adviser to 3 Presidents, Is Dead*, N.Y. TIMES, Feb. 20, 2006, <http://www.nytimes.com/2006/02/20/national/20paarlberg.html>. Of this initiative, Eisenhower promised, "[f]ood can be a powerful instrument for all the free world in building durable peace." *Id.*

They bought and sold little; they took to market only what was in excess of their family needs. Despite regional differences, there was a generally recognizable rural culture, tradition, and life-style. Farmers were readily distinguishable from other people by speech, dress, and manner.

Farmers had much lower cash incomes than non-farmers, and they had fewer conveniences. But these disadvantages were not so much the subject of invidious comparisons as accepted attributes of a special way of life.

Farmers were considered uniquely worthy. The Jeffersonian ideal was a nation of family farm operators producing food, the most needed product of all.<sup>40</sup>

American law schools and legal scholars assisted in the creation of “agricultural law” as a specific discipline to be studied.<sup>41</sup> It was first recognized as such in the 1940s.<sup>42</sup> Law schools at Harvard, Yale, Texas, and Iowa all are reported to have initiated agricultural law studies during this period, although the efforts were mostly short lived.<sup>43</sup> The real beginnings of agricultural law as a recognized legal discipline came about in the late 1970s and early 1980s.<sup>44</sup> In 1979, a quarterly scholarly journal, *The Agricultural Law Journal*, was initiated.<sup>45</sup> In 1980, the American Agricultural Law Association was formed<sup>46</sup> and an LL.M. Program in Agricultural Law was founded at the University of Arkansas.<sup>47</sup> In 1981, the fifteen-volume AGRICULTURAL LAW treatise was published.<sup>48</sup> In 1985,

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<sup>40</sup> PAARLBERG, *supra* note 38 at 5.

<sup>41</sup> See MEYER ET AL., *supra* note 30, at xix.

<sup>42</sup> See Harold W. Hannah, *Law and Agriculture*, 32 VA. L. REV. 781, 781–84 (1946) (addressing the unique aspects of agricultural law and challenging lawyers to become more familiar with the agricultural industry and the effect of the law on it). Professor Hannah is considered by some to be the “father of modern agricultural law studies.” Neil D. Hamilton, *The Study of Agricultural Law in the United States: Education, Organization and Practice*, 43 ARK. L. REV. 503, 509 n.6 (1990).

<sup>43</sup> MEYER ET AL., *supra* note 30, at xix. Only the University of Iowa continued its efforts into the 1960s. *Id.*

<sup>44</sup> See Hamilton, *supra* note 42, at 503, 511.

<sup>45</sup> *Id.* at 514.

<sup>46</sup> Susan A. Schneider, *Thoughts on Agricultural Law and the Role of the American Agricultural Law Association*, 10 DRAKE J. AGRIC. L. 2, 4 (2005) (citing Leo P. Martin, *Agricultural Law Association Forms at Law School; Discusses Taxes, Zoning, Conservation*, QUARE: UNIV. OF MINN. LAW SCHOOL NEWSPAPER, Jan. 1981, at 1).

<sup>47</sup> Hamilton, *supra* note 42, at 516.

<sup>48</sup> *Id.* at 513.

West Publishing casebook AGRICULTURAL LAW: CASES AND MATERIALS was published.<sup>49</sup>

Finance and credit issues were at the forefront of the legal debate in the 1980s, and the financial crisis that loomed over the agricultural industry encouraged the sense that agricultural law was much more than an academic discipline.<sup>50</sup> It was about protecting the interests of farmers and saving the family farm.<sup>51</sup> Disputes involved how much protection to provide and how the American agricultural industry should be structured.<sup>52</sup> Legal scholars provided critical assistance to the practicing bar in defending the family farm in crisis.<sup>53</sup> Popular culture, as evidenced by movies like *Country*, viewed financially distressed farmers with great sympathy.<sup>54</sup> Americans saw in family farmers “[g]ood work, long hours, love of nature, and caring for a simple, loving life.”<sup>55</sup> As Neil Harl wrote of this time period, “agriculture enjoys an enormous reservoir of good will among nonfarm individuals in this country. Polls and surveys repeatedly showed that a strong majority were highly supportive of efforts to provide economic assistance to heavily indebted farmers.”<sup>56</sup>

Congress captured the nation’s sentiment toward family farmers in its statement of policy:

Congress reaffirms the historical policy of the United States to foster and encourage the family farm system of agriculture in this country. Congress believes that the maintenance of the family farm system of agriculture is essential to the social well being of the Nation and the competitive production of adequate supplies of food and fiber. Congress further believes that any significant expansion of nonfamily

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<sup>49</sup> *Id.* at 517.

<sup>50</sup> *See id.* at 518–21. *See generally* NEIL E. HARL, *THE FARM DEBT CRISIS OF THE 1980S* (1990) (describing and analyzing the farm debt crisis of the 1980s).

<sup>51</sup> *See* Hamilton, *supra* note 42, at 518–21.

<sup>52</sup> *See, e.g.*, HARL, *supra* note 50, at 148–49.

<sup>53</sup> *See, e.g.*, Christopher R. Kelley & Barbara J. Hoekstra, *A Guide to Borrower Litigation Against the Farm Credit System and the Rights of Farm Credit System Borrowers*, 66 N.D. L. REV. 127 *passim* (1990) (providing extensive guidance to attorneys representing farmers with loans held by the Farm Credit System).

<sup>54</sup> *See* COUNTRY (Touchstone Pictures 1984).

<sup>55</sup> Carol Bly, *Foreword* to DIANNA HUNTER, *BREAKING HARD GROUND: STORIES OF THE MINNESOTA FARM ADVOCATES* xi, xi (1990).

<sup>56</sup> HARL, *supra* note 50, at 282.



owned large-scale corporate farming enterprises will be detrimental to the national welfare.<sup>57</sup>

Political, societal, and legal support for agriculture, and in particular, support for a family-farm based agricultural system, has been a hallmark of American history. However, as agriculture has changed in recent years, defining what is meant by the term “family farm” has become increasingly difficult.<sup>58</sup>

## II. AGRICULTURE AND AGRICULTURAL LAW TODAY

Popular culture still seems to view family farms as the relatively small and diversified farming operations that historically dotted the Midwest landscape. That is not how most of our agricultural products are produced today.<sup>59</sup> Although farm families still own most American farms, these farms are larger, less diversified, and more capital intensive than ever before.<sup>60</sup> In fact, even before the financial crisis of the 1980s, American agriculture embarked on a path designed to bring about the elimination of much of its uniqueness, a path that would model itself after other industries.<sup>61</sup>

Congressional policy encouraged agriculture down this path, encouraging the consolidation of farms and the industrialization of agricultural operations.<sup>62</sup> Significant incentives to specific commodity crops such as feed grains and the structuring of the incentives so that those who produce the most receive the most, reward large monocultures.<sup>63</sup> Agricultural economists at land grant universities and as part of the vast

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<sup>57</sup> 7 U.S.C. § 2266(a) (2006).

<sup>58</sup> See, e.g., PAARLBERG, *supra* note 38, at 7–9.

<sup>59</sup> See Susan A. Schneider, *Reconnecting Consumers and Producers: On the Path Toward a Sustainable Food and Agriculture Policy*, 14 DRAKE J. AGRIC. L. 75, 76–80 (2009).

<sup>60</sup> See CAROLYN DIMITRI ET AL., USDA, THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY 2–5 (2005), available at <http://www.ers.usda.gov/publications/EIB3/eib3.pdf>; see also OFFICE OF COMMUNICATIONS, USDA, AGRICULTURE FACTBOOK 2001–2002 23–34 (2003), available at <http://www.usda.gov/factbook/2002factbook.pdf> [hereinafter AGRICULTURE FACT BOOK].

<sup>61</sup> See PAARLBERG, *supra* note 38, at 5–9.

<sup>62</sup> See Schneider, *supra* note 59, at 77–78.

<sup>63</sup> See PAARLBERG, *supra* note 38, at 41 (discussing the farm commodity programs and the criticism that they are “hastening . . . the trend toward fewer and larger farms”); see also Michael Pollan, *Farmer in Chief*, N.Y. TIMES MAGAZINE, Oct. 9, 2008, at 65, available at <http://www.nytimes.com/2008/10/12/magazine/12policy-t.html?ref=magazine> (criticizing government support for feed grains as creating cheap food for large industrialized livestock operations).

USDA extension service have consistently promoted economies of scale as key to financial success.<sup>64</sup> These economies of scale have made a dramatic impact on farming and rural life.<sup>65</sup>

Where there were seven million small farms in 1935, by 1997, this number was reduced to 1.9 million larger farms.<sup>66</sup> Today, although the number of smaller farms run by part-time farmers is on a recent rise,<sup>67</sup> 75.4% of agricultural production occurs on large-scale family and non-family farms.<sup>68</sup>

Most of these farms are located far from consumers.<sup>69</sup> Large-scale farms are not the attractive neighbors that smaller diversified farms are, and urban sprawl continues to push agricultural uses farther out. It is estimated that over six million acres of agricultural land was lost to development between 1992 and 1997.<sup>70</sup> Farms have gotten further and further away from the consumers that they serve.

Consistent with the move toward larger farm size, most of these large farms have adopted an industrialized model of production.<sup>71</sup> This model focuses not only on economies of scale, but on a radically different concept of production.<sup>72</sup> Farming is modeled on manufacturing, with a focus on "capturing increased profitability through the standard incidents of the industrial model: large scale production of a specialized product, reliance upon technology; and vertical integration."<sup>73</sup> The goal of an indus-

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<sup>64</sup> See generally Willis Peterson, *Relation Between Crop Yields and Estimated Returns to Scale and Returns to Research* (Univ. Of Minn., Dep't of Agric. & Applied Econ., Staff Paper Series, Paper No. P91-45, 1991); Vernon W. Ruttan, *Scale, Size, Technology and Structure: A Personal Perspective* (Univ. Of Minn., Dep't of Agric. & Applied Econ., Staff Paper Series, Paper No. P88-1, 1988).

<sup>65</sup> See DIMITRI ET AL., *supra* note 60, at 1–7.

<sup>66</sup> AGRICULTURE FACT BOOK, *supra* note 60, at 24.

<sup>67</sup> HOPPE ET AL., *supra* note 26, at 4 (estimating that there were 2.1 million farms in 2005).

<sup>68</sup> *Id.* at 8. "Large-scale family farms" are defined as those with gross sales of \$250,000 or more. *Id.* at 2.

<sup>69</sup> See ROBERT A. HOPPE ET AL., USDA, STRUCTURAL AND FINANCIAL CHARACTERISTICS OF U.S. FARMS: 2001 FAMILY FARM REPORT 15–19 (2001), available at <http://www.ers.usda.gov/publications/aib768/aib768.pdf> (discussing geographic location of farms).

<sup>70</sup> Farmland Information Center, Statistics, [http://www.farmlandinfo.org/agricultural\\_statistics/](http://www.farmlandinfo.org/agricultural_statistics/) (last visited Mar. 23, 2010) (based on USDA, Natural Resources Conservation Service, Natural Resources Inventory).

<sup>71</sup> See Schneider, *supra* note 59, at 78; see also Neil Hamilton, *Feeding our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 213 (1993).

<sup>72</sup> Schneider, *supra* note 59, at 78.

<sup>73</sup> *Id.* (citing Neil Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 213 (1993); MARTY STRANGE, FAMILY FARMING: A NEW ECONOMIC VISION 32–42 (1988)).

trialized farming operation is to produce mass uniform output with the lowest cost of production possible; specialization in the production of one product replaces diversification.<sup>74</sup>

In a marked change from the historical image of farmers described by Paarlberg, modern farmers “have entered the mainstream of American economic, social, and political life.”<sup>75</sup> Both the average and median household income for a farm household is significantly higher than that of U.S. households generally.<sup>76</sup> The news media is likely to mention farm finance in the context of political battles waged over whether the \$2.5 million income cap on the receipt of government payments to farmers should be reduced,<sup>77</sup> or whether the federal estate tax exemption should be eliminated or raised to \$10 million to better protect farm financial interests.<sup>78</sup> And, farmers, who once were thought to be good stewards of the land, are increasingly recognized as significant contributors to environmental degradation.<sup>79</sup> Some warn that “[t]oday the public seems less willing to see the farming community as the principal source of moral inspiration and virtue. Some city dwellers now see farmers as glorified welfare recipients or as willful polluters, rather than as paragons of virtue.”<sup>80</sup>

What is agricultural law in this context? Is there still a rationale for treating agriculture as an exceptional sector because of the special

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<sup>74</sup> *Id.*; see also MARTY STRANGE, FAMILY FARMING: A NEW ECONOMIC VISION 32–39 (1988) (contrasting industrialized and non-industrialized agricultural production models).

<sup>75</sup> PAARLBERG, *supra* note 38, at 8.

<sup>76</sup> HOPPE ET AL., *supra* note 26, at 22–24. Average farm household income was estimated to be thirty-five percent higher than the average for all U.S. households in 2004. *Id.* at 24. Average farm household income was \$81,600 in 2004. *Id.* at 22. Median farm household income that year was \$53,700, an amount that is twenty-one percent higher than that for all U.S. households. *Id.* at 24.

<sup>77</sup> See generally RON L. DURST, USDA, EFFECTS OF REDUCING THE INCOME CAP ON ELIGIBILITY FOR FARM PROGRAM PAYMENTS (2007), available at <http://www.ers.usda.gov/publications/eib27/eib27.pdf> (evaluating the effects of the proposed lower income cap on farm sole proprietors and crop-share landlords).

<sup>78</sup> The National Farmers Union tax policy supports a \$4 million exemption per estate. National Farmers Union, Tax Policy, <http://nfu.org/issues/economic-policy/tax-policy> (last visited Mar. 3, 2010). The Farm Bureau advocates the complete elimination of estate taxes and until then, the exemption should be “large [enough] to exclude farms and ranches from estate taxes, [and] the exemption should be indexed for inflation and be transferable to a spouse.” American Farm Bureau Federation, Estate Tax Reform (Feb. 2010), <http://www.fb.org/issues/docs/estatetax10.pdf>.

<sup>79</sup> See Ruhl, *supra* note 6, at 274–92 (describing environmental harms attributed to agricultural production, including: habitat loss, soil erosion, water resources depletion, agrochemical releases, animal waste, and water and air pollution).

<sup>80</sup> BROWNE ET AL., *supra* note 33, at 15.

needs of farmers? Is there a way to effectively balance special interest politics with the public good? It is feared that “[c]ynical uses of agrarian myths to promote private interests, whether by agribusinesses or farm interest groups, will further erode the cultural foundations of agrarian ideals and mask the fact that farmers still face unique challenges.”<sup>81</sup> Yet, the reconciliation of self-interest and the public good through a real sense of agrarianism remains a laudable goal. The question is how to get there.

### III. AGRICULTURAL LAW FOR THE FUTURE

*We, the Heads of State and Government, or our representatives, gathered at the World Food Summit at the invitation of the Food and Agriculture Organization of the United Nations, reaffirm the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger.*<sup>82</sup>

What justifies any special treatment for an industry that is increasingly an industrialized and financially powerful sector of the business economy? One word sets the stage for the future of agricultural law as a mature legal discipline—food.

The need for food is the most rational basis for agricultural law as a unique discipline. Food, as the most basic of human needs, provides a compelling justification for a legal system that nurtures and guides its agricultural sector. A primary role of government is the assurance that its people have sufficient food. Agricultural law scholar Neil Hamilton referred to this as, “the fundamental nature of the production of food to human existence” and identified it as one of the primary reasons for the origins of agricultural law as a special discipline.<sup>83</sup>

This food-based agricultural law, however, cannot be driven solely by protectionism or exceptionalism, and it cannot be focused solely on assuring the economic vitality of the agricultural industry. A return to the agrarianism that reconciles the self-interest of farmers with the public

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<sup>81</sup> *Id.*

<sup>82</sup> World Food Summit, Nov. 13–17, 1996, *Report of the World Food Summit*, app., WFS 96/REP, available at <http://www.fao.org/docrep/003/w3548e/w3548e00.htm#clo10> (follow the Rome Declaration on World Food Security link). The declaration provides that “[w]hen ‘Government’ is used, it means as well the European Community within its areas of competence.” *Id.*

<sup>83</sup> Hamilton, *supra* note 42, at 504.

good of society should be the hallmark of the new food-based agriculture. Three unique attributes involved in agricultural production are themselves areas of significant public interest. These unique attributes, reflecting the public's interest in agricultural production, should frame the outline of the new food-focused agricultural law.

First, agricultural production is the primary way that we obtain food—a product that is essential to human health and survival.<sup>84</sup> Both farmers and the public at large have a fundamental interest in the production of healthy foods, in policies that assure the safety of those foods, and in the ready availability of healthy foods to all segments of society.

Second, agricultural production involves the production of living things, evoking ecological and moral issues that are completely different than the production of inanimate products.<sup>85</sup> That these products are the food we eat accentuates this imperative.

Third, agricultural production is heavily dependent upon the natural world and its resources—in particular, land and water—and it has been both a significant consumer of natural resources<sup>86</sup> and a significant source of environmental degradation.<sup>87</sup> Moreover, it remains heavily dependent on human resources, resources that in the past have often not been adequately respected. Each of these attributes makes agriculture a unique industry, and each reflects an important societal concern.

These fundamental attributes provide policymakers with a new framework for analysis. The new agricultural law should be a system of agricultural laws and policies that promote an agricultural sector that produces healthy food in a sustainable manner. This requires a balancing of the needs of farmers with the needs of consumers, all within the context of protecting both the social fabric of society and the environment.

A balanced system would be a sustainable system reflecting the triad of considerations: economic sustainability, environmental sustainability, and social sustainability.<sup>88</sup> Farmers should have the opportunity to make a profit farming; environmental damage should be minimized so

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<sup>84</sup> *Id.*

<sup>85</sup> Schneider, *supra* note 59, at 78–79.

<sup>86</sup> See, e.g., J.B. Ruhl, *Farmland Stewardship: Can Ecosystems Stand Any More of It?*, 9 WASH. U. J.L. & POL'Y 1, 9–10 (2002).

<sup>87</sup> See Ruhl, *supra* note 6, at 274–92.

<sup>88</sup> Cf. David E. Adleman & John H. Barton, *Environmental Regulation for Agriculture: Towards a Framework to Promote Sustainable Intensive Agriculture*, 21 STAN. ENVTL. L.J. 3, 31–34 (2002) (characterizing intensive farming operations as sustainable by focusing on economic and short-term environmental sustainability without addressing social sustainability).

as to allow regeneration and renewal; and society's ethical and moral standards should be respected. This system would be based on the societal need for healthy food, not on efforts to protect any given segment of society or the preservation of vested interests. Under this system, farmers would be supported, but not because they are farmers, but because of societal interests in the production of healthy food in a sustainable manner.

A. *The Production and Delivery of Healthy Food*

The link between food and health has long been recognized. The complexity of this link and the failings of the American food system to deliver healthy food has been a topic of much recent interest.<sup>89</sup> The new food-focused agricultural law must incorporate support for the production of healthy foods, a food policy that assures the safety of those foods, and the ready availability of healthy foods to all segments of society.

1. The Production of Healthy Foods

To date, the production of healthy food has not been the basis for our current agricultural law policies. According to USDA data analyzed by the Environmental Working Group, “[t]axpayers sent \$13.4 billion in farm subsidies to more than 1.4 million recipients in 2006.”<sup>90</sup> Yet, none of these subsidies were provided in direct support of production of those crops recognized to be the most healthy—fresh fruits and vegetables.<sup>91</sup> Cotton production is extensively subsidized by the federal government.<sup>92</sup>

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<sup>89</sup> See MICHAEL POLLAN, *IN DEFENSE OF FOOD: AN EATER'S MANIFESTO* (2008); MICHAEL POLLAN, *OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* (2006) [hereinafter POLLAN, *OMNIVORE'S DILEMMA*]; ERIC SCHLOSSER, *FAST FOOD NATION* (2005).

<sup>90</sup> *EWG Farm Subsidy Database Update*, *supra* note 9.

<sup>91</sup> See JEAN M. RAWSON, CONG. RESEARCH SERV., *FRUITS, VEGETABLES, AND OTHER SPECIALTY CROPS: A PRIMER ON GOVERNMENT PROGRAMS* summary (2007), available at <http://www.nationalaglawcenter.org/assets/crs/RL32746.pdf> (noting that “specialty crops are ineligible for the federal commodity price and income support programs” but explaining other types of USDA assistance may be available including, “crop insurance, disaster assistance, and, under certain conditions, *ad hoc* market loss assistance payments”). *Id.*

<sup>92</sup> JASPER WOMACH, CONG. RESEARCH SERV., *COTTON PRODUCTION AND SUPPORT IN THE UNITED STATES* Summary (2004), available at <http://www.nationalaglawcenter.org/assets/crs/RL32442.pdf> (explaining the cotton subsidy and support programs and computing federal support for U.S. cotton producers from 1991–2003 at an average of \$1.76 billion per year). The Environmental Working Group, 2007 Farm Subsidy Database provides that in 2007, \$586,187,836 in direct subsidies alone were paid to upland cotton producers. *Farm Subsidy Database, 2007 Direct Payments*, ENVTL. WORKING GROUP, <http://farm.ewg.org/>

Import restrictions and indirect subsidies support the cane and sugar beet industry, encouraging the production of sugar.<sup>93</sup> The largest beneficiary of federal farm program support is corn production;<sup>94</sup> it is reported that “[o]ver the past twelve years, taxpayers have spent \$56 billion on corn subsidies.”<sup>95</sup> Yet, the subsidized corn is used primarily for animal feed, high fructose corn syrup and other processed additives, industrial uses, and ethanol.<sup>96</sup> Finally, producers of subsidized commodity crops are restricted from converting their acreage to production of the more healthy crops.<sup>97</sup>

This is not to say that cotton, sugar, and corn should not be produced. Rather, the question is whether federal policy should encourage their production through financial incentives? Emerging energy policies may answer that question in the affirmative for certain non-food crops, but these policies should not be masked as food policy.

While a profitable agricultural industry is essential to assure adequate food production, the interests of the industry should not drive food policy. When aspects of the food and agriculture industry can be profitable without government support and exceptional laws, special treatment can and should be eliminated. When support is provided, society’s interest in the production of healthy food should be the first objective of that support. The financial security of the overall agricultural production sector can be addressed through risk management strategies as it is now, but health should drive what incentives are provided and where they are directed. The 2008 Farm Bill<sup>98</sup> took a step toward a healthier food policy, although it was a small step with a long road ahead.<sup>99</sup>

In addition to concerns about what crops are produced, serious consideration must be given to the quality of the crops produced. How crops

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farm/dp\_analysis.php (last visited Feb. 21, 2010).

<sup>93</sup> U.S. GEN. ACCOUNTING OFFICE, SUGAR PROGRAM: SUPPORTING SUGAR PRICES HAS INCREASED USERS’ COSTS WHILE BENEFITTING PRODUCERS 3, 6, 12 (2000), *available at* <http://www.gao.gov/archive/2000/rc00126.pdf>.

<sup>94</sup> *EWG Farm Subsidy Database Update*, *supra* note 9. The analysis performed by the Environmental Working Group is based on data released by the USDA regarding federal farm subsidies.

<sup>95</sup> *Id.*

<sup>96</sup> USDA Economic Research Service: Briefing Rooms, Corn, <http://www.ers.usda.gov/Briefing/Corn/> (last visited Mar. 3, 2010).

<sup>97</sup> 7 U.S.C. § 8717(b) (2006).

<sup>98</sup> Food, Conservation, and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1664 (2008).

<sup>99</sup> See ZACHARIAH BAKER ET AL., SUSTAINABLE AGRIC. COALITION, THE SUSTAINABLE AGRICULTURE COALITION’S GRASSROOTS GUIDE TO THE 2008 FARM BILL 3, 6 (2008), *available at* <http://sustainableagriculturecoalition.org/wp-content/uploads/2008/11/sac-farm-bill-guide.pdf>.

are grown, which varieties are grown, when they are harvested, and how long before they are consumed, can dramatically affect the quality of the food produced. Many argue that while industrialized agriculture's focus on quantity, uniformity, and transportability has reduced food prices, it has also resulted in diminished food quality.<sup>100</sup> Anyone with a vegetable garden or who has shopped at a local farmers market knows the taste difference between homegrown produce and that which is mass-produced, transported long distances, and sold in packages in the supermarket. This anecdotal taste test has received support from scientific testing on fruits and vegetables that shows a reduction in nutrient content over the last fifty years.<sup>101</sup> Another study showed that the focus on high-yield as a goal has resulted in diminished nutritional values.<sup>102</sup> Studies that confirm the loss of nutrient value with time post-harvest raise questions about our practice of picking produce before it reaches full maturity in preparation for long transit periods and a longer shelf life.<sup>103</sup> These studies all question the generic value that we have placed on our food and the focus of much of our agricultural law policy—produce more for less.<sup>104</sup> They show that there are consequences for this emphasis; as they say, there is no free lunch.<sup>105</sup> Particularly in light of limited natural resources, food quality as well as food quantity must test the efficiency of our production.

## 2. Food Safety with Safe and Sound Production Practices

The goal of the production of healthy foods must include food safety protections. Consumer confidence as well as personal safety has been threatened by a series of national food safety incidents, including a recent

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<sup>100</sup> BRIAN HALWEIL, THE ORGANIC CENTER, STILL NO FREE LUNCH: NUTRIENT LEVELS IN U.S. FOOD SUPPLY ERODED BY PURSUIT OF HIGH YIELDS 1–15 (2007), available at [http://www.organic-center.org/reportfiles/Yield\\_Nutrient\\_Density\\_Final.pdf](http://www.organic-center.org/reportfiles/Yield_Nutrient_Density_Final.pdf).

<sup>101</sup> See POLLAN, OMNIVORE'S DILEMMA, *supra* note 89, at 118–19; see also Donald R. Davis, *Declining Fruit and Vegetable Nutrient Composition: What Is the Evidence?*, 44 HORTSCIENCE 15, 15 (2009) (demonstrating a decline in the concentration of certain nutrients in vegetables over the last 50–100 years); see also Donald R. Davis et al., *Changes in USDA Food Composition Data for 43 Garden Crops, 1950 to 1999*, 23 J. AMER. C. OF NUTRITION 669, 669 (2004), available at <http://www.jacn.org/cgi/reprint/23/6/669>.

<sup>102</sup> HALWEIL, *supra* note 100, at 4.

<sup>103</sup> Joy C. Rickman et al., *Review: Nutritional Comparison of Fresh, Frozen, and Canned Fruits and Vegetables. Part 1. Vitamins C and B and Phenolic Compounds*, 87 J. OF THE SCI. OF FOOD & AGRIC. 930, 934, 942 (2007), available at <http://postharvest.ucdavis.edu/datastorefiles/234-779.pdf>.

<sup>104</sup> HALWEIL, *supra* note 100, at 1–15.

<sup>105</sup> See *id.*



incident involving an antibiotic resistant strain of Salmonella Newport in ground beef processed by Fresno-based Beef Packers Inc., associated with Cargill.<sup>106</sup> Previous incidents have prompted Congress to consider ways to better coordinate efforts to assure food safety.<sup>107</sup> These efforts should be aimed at strengthening government authority and providing for better coordination and consolidation of our food safety regulatory system.<sup>108</sup> This system has been identified as “high risk” by the Government Accountability Office for years, with the most recent 2009 report confirming that our “fragmented federal oversight of food safety” continues to be marked by “inconsistent oversight, ineffective coordination, and inefficient use of resources.”<sup>109</sup>

Reform should not, however, discourage small farming operations and regional food processing centers through regulatory structures that are impossible for smaller operations to meet.<sup>110</sup> Smaller, regional food systems may be key to achieving better food transparency, higher quality products, and better connections between consumers and their food.<sup>111</sup>

Regulatory food safety reform efforts, although critical to achieving a safer food supply, must be supplemented with a food and agriculture

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<sup>106</sup> See Posting of Salmonella Lawyer to Marler Blog, <http://www.marlerblog.com/2009/08/articles/case-news/obama-administration-fails-salmonella-test-at-least-27-people-in-colorado-california-and-wyoming-sickened-with-salmonella-newport-linked-to-cargill-hamburger/> (Aug. 7, 2009). The Marler Blog, published by noted food safety litigator, William Marler, is a source for some of the most up to date and relevant information about food safety incidents in the United States. See Marler Blog: Providing Commentary on Food Poisoning Outbreaks & Litigation, About Bill, <http://www.marlerblog.com/promo/about/> (last visited Mar. 3, 2010).

<sup>107</sup> See, e.g., Food Safety Enhancement Act of 2009, H.R. 2749, 111th Cong. § 1 (2009) (granting the Food and Drug Administration wide authority to regulate growing and production of food).

<sup>108</sup> See *id.* § 121(c)(1)(C)–(D) (proposing to “[s]trengthen the capacity of State and local agencies to carry out inspections and enforce safety standards” and to “[i]mprove the effectiveness of Federal, State, and local partnerships to coordinate food safety and defense resources and reduce the incidence of food-borne illness.”).

<sup>109</sup> U.S. GEN. ACCOUNTING OFFICE, HIGH RISK SERIES: AN UPDATE 71 (2009), available at <http://www.gao.gov/new.items/d09271.pdf>.

<sup>110</sup> See Food Safety Enhancement Act of 2009, *supra* note 107, at 36 (providing that under § 418A(b)(3)(D) of the introduced Bill, labeled the “Food Safety Plan,” the Secretary of Agriculture “shall consider the impact of any guidance or regulations under this section on small businesses; and . . . shall issue guidance to assist small businesses in complying with the requirements of this section and the amendments made by this section.”).

<sup>111</sup> See generally Marne Coit, *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POLY 45 *passim* (2008) (discussing the growth of the local food movement).

policy that analyzes how food is produced and that considers ways to improve production practices to promote safer food.<sup>112</sup> Much can be done prior to testing and recall.<sup>113</sup>

This calls for a review of current food production practices. The goal of “cheap” food cannot result in food that is unsafe or unhealthy.<sup>114</sup> The nonpartisan Pew Commission on Industrialized Farm Animal Production provided this type of analysis with respect to concentrated livestock operations, and the result is disturbing.<sup>115</sup> The Pew Commission report concluded that:

The present system of producing food animals in the United States is not sustainable and presents an unacceptable level of risk to public health and damage to the environment, as well as unnecessary harm to the animals we raise for food.<sup>116</sup>

Specifically with respect to the public health risks, the report described numerous overlapping areas of concern, including: the high rate of pathogens, the potential for transmission of pathogens from animal to animal and from animal to human, the development of particularly virulent pathogens, and the development of pathogens that are antibiotic resistant.<sup>117</sup> Of particular concern is the industry’s dependence on subtherapeutic antibiotics for disease prevention and growth stimulation.<sup>118</sup>

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<sup>112</sup> See Center for Science in the Public Interest: Process Controls & Performance Standards to Prevent Outbreaks and Recalls, <http://www.cspinet.org/foodsafety/captions.html> (last visited Mar. 3, 2010) (discussing process controls and performance standards necessary to prevent outbreaks and recalls).

<sup>113</sup> See *id.*

<sup>114</sup> See PBS.org, Now on PBS, Q & A: Eric Schlosser, <http://www.pbs.org/now/shows/523/schlosser-food-finances.html> (last visited Mar. 3, 2010) [hereinafter Schlosser Q & A].

<sup>115</sup> See PEW COMM’N ON INDUSTRIALIZED FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA *passim* (2008), available at <http://www.ncifap.org/bin/ej/PCIFAPFin.pdf> (a project of the Pew Charitable Trusts and John Hopkins Bloomberg School of Public Health); see also E.K. Silbergeld et al., *Industrial Food Animal Production: Food Safety, Socioeconomic, and Environmental Health Concerns*, 19 EPIDEMIOLOGY S13, S15 (2008) (raising many of the same concerns as the Pew Commission but on a global level); see also DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, CAFOS UNCOVERED: THE UNTOLD COSTS OF CONFINED ANIMAL FEEDING OPERATIONS 2, 9 (2008), available at [http://www.ucsus.org/assets/documents/food\\_and\\_agriculture/cafos-uncovered.pdf](http://www.ucsus.org/assets/documents/food_and_agriculture/cafos-uncovered.pdf).

<sup>116</sup> PEW COMM’N, *supra* note 115, at viii.

<sup>117</sup> See *id.* at 13–16.

<sup>118</sup> See Sudeshna Ghosh & Timothy M. LaPara, *The Effects of Subtherapeutic Antibiotic*

Such use can contribute to antibiotic resistance.<sup>119</sup> Particularly, when the antibiotics used are those needed for combating human disease and infection, serious public health issues are raised.<sup>120</sup>

A new focus on healthy food must give serious consideration to any production method that gives rise to a serious public health concern. Short-term economic efficiency and the production of low-cost food must be weighed honestly against the long-term externalities, including both direct and indirect health effects.<sup>121</sup> The government and industry should partner in research that is directed toward the production of healthy food that is produced in a sustainable manner, not simply the cheapest and the fastest production possible.<sup>122</sup>

### 3. Connecting Healthy Food to Consumers

Finally, connecting healthy food with consumers must be part of the new food-focused agricultural policy. Three issues are of most current concern. First, the significant distance between food production and food

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*Use in Farm Animals on the Proliferation and Persistence of Antibiotic Resistance Among Soil Bacteria*, 1 INT'L SOC'Y FOR MICROBIAL ECOLOGY J. 191, 191 (2007) (discussing how "[t]he use of antibiotics at subtherapeutic concentrations for agricultural applications is believed to be an important factor in the proliferation of antibiotic-resistant bacteria.").

<sup>119</sup> See *id.*

<sup>120</sup> See *Preservation of Antibiotics For Medical Treatment Act of 2009: Hearing on H.R. 1549 Before the H. Comm. on Rules*, 110th Cong. 1, 8–9 (2009) (statement of Dr. Joshua M. Sharfstein, Principal Deputy Commissioner of Food and Drugs, Food and Drug Administration, Department of Health and Human Services), available at [http://www.rules.house.gov/111/oj/hr5419/statements/sharfstein\\_hr1549\\_111.pdf](http://www.rules.house.gov/111/oj/hr5419/statements/sharfstein_hr1549_111.pdf); see also Gardiner Harris, *Administration Seeks to Restrict Antibiotics in Livestock*, N.Y. TIMES, July 14, 2009, at A18, available at <http://www.nytimes.com/2009/07/14/health/policy/14fda.html> (reporting on Dr. Sharfstein's testimony and the Preservation of Antibiotics For Medical Treatment Act of 2009).

<sup>121</sup> See Schlosser Q & A, *supra* note 114 (suggesting that low-cost food production leads to various health problems); see also GURIAN-SHERMAN, *supra* note 115, at 65 (summarizing externalities of Concentrated Animal Feeding Operations); see also PEW COMM'N, *supra* note 115, at 47 (discussing the externalities and costs of meat production).

<sup>122</sup> GURIAN-SHERMAN, *supra* note 115, at 10 (assessing alternatives to Concentrated Animal Feeding Operations that would produce livestock in a sustainable way); see RICH PIROG ET AL., LEOPOLD CTR. FOR SUSTAINABLE AGRIC. (IOWA STATE UNIV.), FUEL, AND FREEWAYS: AN IOWA PERSPECTIVE ON HOW FAR FOOD TRAVELS, FUEL USAGE, AND GREENHOUSE GAS EMISSIONS 8–9 (2001), available at [http://www.leopold.iastate.edu/pubs/staff/ppp/food\\_mil.pdf](http://www.leopold.iastate.edu/pubs/staff/ppp/food_mil.pdf) (discussing the University of Michigan's sustainability indicators of the U.S. food system); see also PEW COMM'N, *supra* note 115, at 51 (discussing sustainability and agriculture); see also APPLIED SUSTAINABILITY CTR., *infra* note 131 (addressing the Center's goal of promoting sustainable agricultural production).

consumption that marks our current food system contributes to problems for the environment, the loss of nutrients to consumers, and a disconnect between consumers and producers.<sup>123</sup> Second, food insecurity is a serious problem in America, and it is one that is related not only to poverty but to access to healthy food.<sup>124</sup> Third, the loss of Americans' connection to their food is one of the factors in the food-related health problems that now plague our society.<sup>125</sup>

Our current food system is dependent upon the transportation of food products over long distances: the transport of feed for livestock, the transport of livestock themselves to feedlots, the transport of crops to processing facilities, and the ultimate "food miles" of products delivered to grocery stores.<sup>126</sup> Nutrition is lost in transit, and crops are selected for transportability rather than nutrition or taste.<sup>127</sup> Moreover, this system relies heavily on fossil-fuel driven transportation, which contributes to climate change.<sup>128</sup>

The new food-focused agriculture should encourage a diverse and regionally based agriculture that is able to provide local food to customers and retail clients.<sup>129</sup> This can be done through a range of mechanisms, including: the direct marketing of products to consumers, the use of local suppliers by retail markets, and the development of regional hubs for distribution.<sup>130</sup> The new food-focused agriculture should encourage these mechanisms.<sup>131</sup>

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<sup>123</sup> PIROG ET AL., *supra* note 122, at 1 (analyzing the impact food transportation has on the environment and communities); Coit, *supra* note 111, at 48–50 (discussing popular dissatisfaction with the distance between food production and consumption and the rise of the local food movement).

<sup>124</sup> See MARK NORD ET AL., USDA, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES, 2007 2 (2008), available at <http://www.ers.usda.gov/Publications/ERR66/ERR66.pdf>.

<sup>125</sup> See generally Coit, *supra* note 111 (addressing the deteriorating link between producers and consumers).

<sup>126</sup> See PIROG ET AL., *supra* note 122, at 9–14.

<sup>127</sup> HOLLY HILL, NAT'L SUSTAINABLE AGRIC. INFO. SERV., FOOD MILES: BACKGROUND AND MARKETING 2 (2008), available at <http://attra.ncat.org/attra-pub/PDF/foodmiles.pdf>; Rickman et al., *supra* note 103, at 1.

<sup>128</sup> See PIROG ET AL., *supra* note 122, *passim* (discussing the complexities of global food transportation); see also Coit, *supra* note 111, at 51–55; see also HILL, *supra* note 127, at 2–3.

<sup>129</sup> Coit, *supra* note 111, at 70; PIROG ET AL., *supra* note 122, at 3.

<sup>130</sup> See Coit, *supra* note 111, at 45, 70; HILL, *supra* note 127, at 6–8, 10.

<sup>131</sup> See, e.g., APPLIED SUSTAINABILITY CTR., UNIV. OF ARK., AGILE AGRICULTURE: LINKING SMALL PRODUCERS WITH LARGE MARKETS (2009), available at [http://asc.uark.edu/Agile\\_Agriculture\\_Summit\\_2009.pdf](http://asc.uark.edu/Agile_Agriculture_Summit_2009.pdf). The "Agile Agriculture" project of the Applied Sustainability Center at the University of Arkansas promotes sustainable food systems and reduced

Urban farming opportunities should be developed as a new and positive trend in agriculture.<sup>132</sup> These opportunities provide urban consumers with access to fresh foods and a greater appreciation of the process of agricultural production.<sup>133</sup> They can also, however, address the startling problem of food insecurity that exists in America today.<sup>134</sup> The USDA reports that “[i]n 2007, 36.2 million people lived in food-insecure households,” including “12.4 million children.”<sup>135</sup> Many of these people live in urban areas, where the existence of “food deserts”<sup>136</sup> means that they have easy access to food only through fast food restaurants, gas stations, liquor stores, and convenience stores.<sup>137</sup> Access to healthy, fresh foods is minimal, if available at all.<sup>138</sup> Urban farming efforts serve as models for what can be done to address this problem and should guide policies for the future.<sup>139</sup>

Finally, a new food-focused agricultural law should help to restore the natural connection between people and the food that they eat. In his essay, *Food Democracy*, Neil Hamilton expressed concern regarding the

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transportation costs. *Id.* As an indication of the economic viability of this project, the Agile Agriculture Summits have been largely funded by Walmart, whose website states that they are “purchasing more produce from local farmers and purchasing products that are grown and produced by people who use sustainable practices in their business.” Walmartstores.com, Agriculture and Seafood, <http://walmartstores.com/Sustainability/9173.aspx> (last visited Mar. 3, 2010).

<sup>132</sup> See Dave M. Matthews, *Urban Farming Movement 'Like a Revolution,'* CNN.COM, July 20, 2009, <http://www.cnn.com/2009/LIVING/06/29/bia.urban.farming/index.html#cnnSTCText>.

<sup>133</sup> See *id.*; see, e.g., Growing Power, Inc., About Us, [http://www.growingpower.org/about\\_us.htm](http://www.growingpower.org/about_us.htm) (last visited Mar. 3, 2010) (discussing the benefits of urban farming).

<sup>134</sup> NORD ET AL., *supra* note 124, at iii–iv; Matthews, *supra* note 132.

<sup>135</sup> NORD ET AL., *supra* note 124, at 14.

<sup>136</sup> The Mari Gallagher Research and Consulting Group defines “food deserts” as “areas with no or distant grocery stores.” GEORGE A. KAPLAN, MARI GALLAGHER RESEARCH AND CONSULTING GROUP, GOOD FOOD: EXAMINING THE IMPACT OF FOOD DESERTS ON PUBLIC HEALTH IN CHICAGO 5 (2006), available at [http://www.marigallagher.com/site\\_media/dynamic/project\\_files/Chicago\\_Food\\_Desert\\_Report.pdf](http://www.marigallagher.com/site_media/dynamic/project_files/Chicago_Food_Desert_Report.pdf) [hereinafter MARI GALLAGHER]. The 2008 Farm Bill called for research on the problem of food deserts and ways that this problem can be addressed. It defined the term “food desert” as “an area in the United States with limited access to affordable and nutritious food, particularly such an area composed of predominantly lower-income neighborhoods and communities.” Food, Conservation, and Energy Act of 2008, H. R. 2419, 110th Cong. § 2, § 7527 (2008).

<sup>137</sup> See Matthews, *supra* note 132; see also MARI GALLAGHER, *supra* note 136, at 13.

<sup>138</sup> See MARI GALLAGHER, *supra* note 136, at 5 (discussing food deserts and difficulties some communities face in accessing healthy food); see also Matthews, *supra* note 132.

<sup>139</sup> See Growing Power, *supra* note 133 (demonstrating the possibilities of urban farming and its impact on poor neighborhoods); see also Matthews, *supra* note 132.

separation of “people from their food and from the land on which it is produced.”<sup>140</sup> Hamilton notes that:

Progress has reduced our food knowledge and eroded our appreciation for its tastes and differences and for its value in our lives and society. We have substituted the fast foods and cheap foods manufactured by a food industry that deems efficiency and low prices as more important than quality or consumer satisfaction. Worse yet, most people still involved in agriculture do not see themselves as farmers growing food but instead as growers producing commodities, the raw materials food manufacturers process into the convenience foods we consume.

The true costs to society of these changes, not just in food, but in health and obesity, satisfaction and confidence, and understanding and appreciation, are just now beginning to be weighed. Separating us from our food has had many affects—not the least of which are how it is cheapening both our food and ourselves.<sup>141</sup>

A food-focused agricultural law would support the restoration of the connection between people and their food.

### B. *The Production of Living Things*

Agricultural production is unusual, if not unique, “in that it relies on the production of living things.”<sup>142</sup> These living things, whether crops or livestock, can grow well or grow poorly.<sup>143</sup> They can die prematurely; they are vulnerable to natural processes and natural forces with seemingly little concern for the effort put forth in their production.<sup>144</sup> Farmers are similarly vulnerable in that they are inextricably entwined with the complexities of nature and the fragility of life and death. This “gives the industry a special status, and it has been a justification for protective treatment.”<sup>145</sup>

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<sup>140</sup> Neil D. Hamilton, *Essay—Food Democracy and the Future of American Values*, 9 DRAKE J. AGRIC. L. 9, 10 (2004).

<sup>141</sup> *Id.* at 10.

<sup>142</sup> Schneider, *supra* note 59, at 78.

<sup>143</sup> See, e.g., Pascal Fletcher, *Freeze Mauls Florida Citrus, Significant Damage Seen*, REUTERS, Jan. 11, 2010, <http://www.reuters.com/article/idUSTRE60913020100111>.

<sup>144</sup> *Id.*; see also Susan A. Schneider, *What is Agricultural Law?*, AGRIC. L. UPDATE 1, 2 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1331422](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331422).

<sup>145</sup> See Schneider, *supra* note 144, at 2.

In addition, however, the production of living things evokes ecological and moral issues that are completely different than the production of inanimate products.<sup>146</sup> As a result, “being [in] 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.”<sup>147</sup> Moreover, there is a responsibility with respect to the impact that agricultural activities and its products may have on other forms of life.<sup>148</sup> These are issues that confront not only farmers, but society as a whole.

Applying these considerations to the production of a living product that will feed us requires an even greater standard of care. With respect to crop production, while technological advances should not be discouraged, their implementation must be accomplished in a way that will not adversely impact the health, safety, or integrity of food today or in the future.<sup>149</sup> Prior to the implementation of new technologies in production, the long-term impact must be analyzed.<sup>150</sup>

Current regulatory structures leave significant gaps in research, analysis, and enforcement, and they lack coordination.<sup>151</sup> For example, recent Government Accountability Office findings indicate that:

Over 70 percent of processed foods contain ingredients from genetically engineered crops. However, USDA, FDA, and the Environmental Protection Agency do not have a coordinated strategy for monitoring and evaluating the use of marketed genetically engineered crops to determine whether they are causing food safety concerns, such as unintentional intro-

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<sup>146</sup> See, e.g., Elisabeth Rosenthal, *A Genetically Engineered Potato, Not for Eating, is Stirring Some Opposition in Europe*, N.Y. TIMES, July 24, 2007, <http://www.nytimes.com/2007/07/24/business/worldbusiness/24spuds.html> (discussing public concerns with genetically modified plants); see also Janice C. Swanson, *Special Issue: Farm Animals in Research and Teaching*, U.S. DEP'T OF AGRIC., ANIMAL WELFARE INFO. CTR. (Dep't of Animal Sci. and Indus., Kan. State Univ., Manhattan, Kan.), Spring 1994, at 1, available at <http://www.nal.usda.gov/awic/newsletters/v5n1.htm> (discussing moral issues surrounding the use of farm animals in research).

<sup>147</sup> Schneider, *supra* note 144, at 3.

<sup>148</sup> See discussion *infra* Part III.A.2.

<sup>149</sup> See Paul Voosen, *Can We Feed the World Without Damaging It?*, N.Y. TIMES, Jan. 4, 2010, <http://www.nytimes.com/gwire/2010/01/04/04greenwire-can-we-feed-the-world-without-damaging-it-99381.html>; see also Michael Pollan, *Playing God in the Garden*, N.Y. TIMES MAG., Oct. 25, 1998, at 644, available at <http://www.nytimes.com/1998/10/25/magazine/playing-god-in-the-garden.html>.

<sup>150</sup> See Voosen, *supra* note 149.

<sup>151</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 109, at 71.

duction of pharmaceutical or industrial compounds into the food supply.<sup>152</sup>

The issues are complex. For example, the contamination of non-genetically engineered crops through cross pollination represents a significant problem that remains unresolved.<sup>153</sup> In terms of research into the efficacy of new technologies, intellectual property rights have been used to thwart researchers who seek to study patented crops.<sup>154</sup>

For consumers, transparency is lacking.<sup>155</sup> The Food and Drug Administration ("FDA") has repeatedly declined to require product labeling that would educate consumers about how the food that they consume is produced.<sup>156</sup> For example, GM labeling is not required.<sup>157</sup> Labeling terms such as "natural" are not regulated by the FDA.<sup>158</sup> Additionally, the

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<sup>152</sup> *Id.*

<sup>153</sup> Legal Scholars are attempting to analyze this difficult issue. *See, e.g.*, Stephanie Cox, Note, *Genetically Modified Organisms: Who Should Pay the Price for Pollen Drift Contamination?*, 13 DRAKE J. AGRIC. L. 401 (2008) (discussing liabilities for pollen drift); *see also* Alison Peck, *The New Imperialism: Toward an Advocacy for GMO Accountability*, 21 GEO. INT'L ENVTL. L. REV. 37 (2008) (addressing territorial integrity as a strategy for nations); *see also* Margaret Rosso Grossman, *Anticipatory Nuisance and the Prevention of Environmental Harm and Economic Loss from GMOs in the United States*, 18 J. ENVTL. L. & PRAC. 107 (2008) (discussing anticipatory nuisance as a legal remedy); *see also* David E. Sella-Villa, Note, *Gently Modified Operations: How Environmental Concerns Addressed through Customs Procedures Can Successfully Resolve the US-EU GMO Dispute*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 971 (2009) (exploring the hurdles and possible legal solutions to importation of GMOs into the EU).

<sup>154</sup> Andrew Pollack, *Crop Scientists Say Biotechnology Seed Companies are Thwarting Research*, N.Y. TIMES, Feb. 19, 2009, at B3, available at <http://www.nytimes.com/2009/02/20/business/20crop.html>; *see also* Posting of Andrew W. Torrance to Agriculture Law Blog, <http://aglaw.blogspot.com/2006/11/growing-dominance.html> (Nov. 16, 2006, 22:14).

<sup>155</sup> *See* PBS *Newshour: Book Investigates Public Transparency Policies* (PBS television broadcast May 1, 2007), available at [http://www.pbs.org/newshour/bb/entertainment/jan-june07/disclosure\\_05-01.html](http://www.pbs.org/newshour/bb/entertainment/jan-june07/disclosure_05-01.html) (discussing the need for transparency in many areas including food labeling).

<sup>156</sup> *See, e.g.*, FDA Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22,984 (May 29, 1992).

<sup>157</sup> *Id.* (stating the FDA's position that it "is not aware of any information that foods derived by these new methods differ from other foods in any meaningful or uniform way, or that, as a class, foods developed by the new techniques present any different or greater safety concern than foods developed by traditional plant breeding"). *Id.*

<sup>158</sup> *See* Schneider, *supra* note 59, at 88–89 (citing Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definitions of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993) and discussing the FDA's decision to not regulate the term "natural").



voluntary labeling of food to provide new information to consumers is sometimes discouraged<sup>159</sup> and sometimes specifically restricted.<sup>160</sup>

Finally, and surprisingly, there currently exists no forum for a consideration of ethical issues regarding food. This was recently evidenced with regard to the approval of the use of cloned animal meat.<sup>161</sup> The FDA acknowledged that it had no authority to consider ethical issues, but was limited to its authority to consider only the safety of the immediate product sold to consumers.<sup>162</sup> It also is evidenced by the failure of federal animal welfare statutes to apply to farm animals raised for slaughter.<sup>163</sup>

As we produce living things for food, new technology should be encouraged. This encouragement, however, should come with coordinated regulation, an appreciation of and a role for ethical considerations, and a more holistic approach to the long-term implications of our decisions.

### C. *The Use of Natural and Human Resources*

As land and other natural resources are finite, societal interests in preservation are paramount.<sup>164</sup> In addition to preservation concerns, there is continual competition between potential uses, both within and outside of agriculture.<sup>165</sup> Not only must agricultural law policies assure that a sufficient amount of these resources are devoted to the production of food, this production must be environmentally sustainable, i.e., the “cultivation

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<sup>159</sup> Draft Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering, 66 Fed. Reg. 4839–40 (Jan. 18, 2001).

<sup>160</sup> Interim Guidance, Voluntary Labeling of Milk and Milk Products From Cows That Have Not Been Treated With Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279–80 (Feb. 10, 1994) (restricting the labeling of milk as rGBH free).

<sup>161</sup> See Animal Cloning Risk Assessment; Risk Management Plan; Guidance for Industry; Availability, 73 Fed. Reg. 2923 (Jan. 8, 2008).

<sup>162</sup> *Id.*

<sup>163</sup> 7 U.S.C. § 2132(g) (2006). The Animal Welfare Act specifically excludes “farm animals . . . used or intended for use as food” in defining the term “animal.” *Id.*

<sup>164</sup> See USDA, National Institute of Food and Agriculture, National, State, and Local Land Preservation Programs, [http://www.csrees.usda.gov/nea/nre/in\\_focus/ere\\_if\\_preserve\\_programs.html](http://www.csrees.usda.gov/nea/nre/in_focus/ere_if_preserve_programs.html) (last visited Mar. 3, 2010).

<sup>165</sup> See generally HERMANN LOTZE-CAMPEN ET AL., POTSDAM INSTITUTE FOR CLIMATE IMPACT RESEARCH, BACKGROUND NOTE TO WORLD DEVELOPMENT REPORT 2010: DEVELOPMENT AND CLIMATE CHANGE, COMPETITION FOR LAND BETWEEN FOOD, BIOENERGY AND CONSERVATION (2010), available at [http://siteresources.worldbank.org/INTWDR2010/Resources/5287678-1255547194560/WDR2010\\_BG\\_Note\\_Lotze-Campen.pdf](http://siteresources.worldbank.org/INTWDR2010/Resources/5287678-1255547194560/WDR2010_BG_Note_Lotze-Campen.pdf) (discussing the competition that exists between interests).

and harvesting of crops must leave the land able to support comparable or greater, future yields.”<sup>166</sup>

Agricultural production is a highly consumptive activity.<sup>167</sup> The agricultural sector uses more natural resources, including land<sup>168</sup> and water,<sup>169</sup> than any other single industry.<sup>170</sup> It is recognized as a major polluter of water<sup>171</sup> and a significant source of global warming.<sup>172</sup> Yet because it is a dispersed industry with environmental effects that are often only noticed over time, and with accumulated impact, it is difficult to regulate.<sup>173</sup>

The true agrarianism, as described by Wendell Berry, should be the goal of agricultural environmental policy:

Agrarian farmers see, accept, and live within their limits. They understand and agree to the proposition that there is ‘this much and no more.’ Everything that happens on an

<sup>166</sup> Adelman & Barton, *supra* note 88, at 31.

<sup>167</sup> *See id.*, at 4; *see also* FAO, WORLD AGRICULTURE: TOWARDS 2015/2030: AN FAO PERSPECTIVE 127, 138–39 (2003) (Jelle Bruinsma ed.) [hereinafter FAO, WORLD AGRICULTURE: TOWARDS 2015/2030].

<sup>168</sup> FAO, WORLD AGRICULTURE: TOWARDS 2015/2030, *supra* note 167, at 127.

<sup>169</sup> *Id.* at 138; PIET KLOP ET AL., RABOBANK, WATERING SCARCITY: PRIVATE INVESTMENT OPPORTUNITIES IN AGRICULTURAL WATER USE EFFICIENCY 4 (Oct. 2008), available at [http://pdf.wri.org/watering\\_scarcity.pdf](http://pdf.wri.org/watering_scarcity.pdf) (reporting that “[a]griculture is by far the biggest water user, accounting for more than 70% of global withdrawals”).

<sup>170</sup> *See* FAO, WORLD AGRICULTURE: TOWARDS 2015/2030, *supra* note 167, at 138; *see also* KLOP ET AL., *supra* note 169, at 4.

<sup>171</sup> Marc Ribaud & Robert Johansson, *Water Quality: Impacts of Agriculture*, in USDA, AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS, 2006 EDITION 33 (Keith Wiebe & Noel Gollehon eds., 2006), available at <http://www.ers.usda.gov/publications/arei/eib16/eib16.pdf> (recognizing agriculture as “the leading source of impairment in the Nation’s rivers and lakes, and a major source of impairment in estuaries”).

<sup>172</sup> KEITH PAUSTIAN ET AL., PEW CTR. ON GLOBAL CLIMATE CHANGE, AGRICULTURE’S ROLE IN GREENHOUSE GAS MITIGATION iii (2006), available at <http://www.pewclimate.org/docUploads/Agriculture%27s%20Role%20in%20GHG%20Mitigation.pdf> (reporting that “globally 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. emissions when weighted by their relative contribution to global warming”). *Id.* These figures do not include food transportation costs. *See* U.S. ENERGY INFORMATION ADMINISTRATION, U.S. DEPT. OF ENERGY, EMISSIONS OF GREENHOUSE GASES IN THE UNITED STATES 2008 2 (2009), available at <ftp://ftp.eia.doe.gov/pub/oi/af/1605/cdrom/pdf/ggrpt/057308.pdf>.

<sup>173</sup> *See* Tory H. Lewis, *Managing Manure: Using Good Neighbor Agreements to Regulate Pollution from Agricultural Production*, 61 VAND. L. REV. 1555, 1559 (2008) (discussing the difficulty in regulating agriculture due to its decentralization).

agrarian farm is determined or conditioned by the understanding that there is only so much land, so much water in the cistern, so much hay in the barn, so much corn in the crib, so much firewood in the shed, so much food in the cellar or freezer, so much strength in the back and arms—and no more.<sup>174</sup>

While this is the goal, it cannot be realized by trusting in the stewardship of farmers.<sup>175</sup> Self-interest, short-term goals, and financial stresses provide too much temptation.<sup>176</sup> Agriculture needs a distinct legal scheme that addresses environmental problems associated with agricultural production and that rewards sustainable production.<sup>177</sup>

In this regard, environmental policies must be based on the competing interests of agricultural production and environmental protection, and upon the reconciliation of self-interest with public good. The current system of agricultural law exceptionalism, or “anti-law” it has been called in the environmental context,<sup>178</sup> has had devastating effects. “Habitat loss and degradation; . . . soil erosion; . . . water resources depletion; . . . soil salinization; . . . chemical releases; . . . animal waste disposal; . . . water pollution; and . . . air pollution” are all significant problems attributed to agricultural production.<sup>179</sup> Many of these problems arise from agricultural policies that force farmers to compete to produce the most product without regard for sustainability or environmental degradation.<sup>180</sup> This im-

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<sup>174</sup> Berry, *supra* note 35, at 29–30.

<sup>175</sup> Ruhl, *supra* note 86, at 3 (challenging the notion that society can rely on the farmers’ inherent stewardship for environmental protection).

<sup>176</sup> *Id.* at 15 (explaining that “there is little evidence that voluntary, incentive-based programs led farming very far toward ecological stewardship in the past”). *Id.*

<sup>177</sup> *Id.* Professor Ruhl explains that:

It may not be realistic, now or ever, to subject farming to the barrage of environmental regulation other industries withstood during the past three decades. But neither will it be realistic to continue naively down the path of voluntary, incentive-based programs. Some serious, focused thought must be directed at the question of what alternatives exist to these two dead ends.

*Id.*

<sup>178</sup> Ruhl, *supra* note 6, at 267.

<sup>179</sup> *Id.* at 274.

<sup>180</sup> See William S. Eubanks II, *The Sustainable Farm Bill: A Proposal for Permanent Environmental Change*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10493, 10496 (2009).

poses tremendous costs on society, costs that are not accurately reflected in the marketplace.<sup>181</sup>

Environmental externalities must be recognized so that the cost of production can be accurately determined.<sup>182</sup> Only when long-term environmental costs to society are recognized will there be adequate incentive for the problems to be efficiently addressed.<sup>183</sup> Moreover, when these costs are accurately computed, the profitability of more sustainable farming operations will be recognized. Through a combination of direct regulation, incentives for sustainable practices, and additional research and support for sustainable agriculture, the appropriate balance can be achieved. Incorporated into these policies should be focused farmland preservation mechanisms that protect farmland, particularly prime land in and around urban areas.

Finally, a sustainable system of agricultural production requires a consideration of social sustainability.<sup>184</sup> The use of human resources in agriculture, the darkest side of agricultural exceptionalism, must be addressed.<sup>185</sup> A complete review of the agricultural labor laws should be undertaken to reconcile the treatment of farmworkers with the ideal of "our professed belief that honest labor should be justly rewarded."<sup>186</sup>

## CONCLUSION

*[H]uman health cannot be maintained apart from eating healthy nutritious food, which requires healthy soil, clean water, and healthy plants and animals. It's all connected.*<sup>187</sup>

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<sup>181</sup> See *id.* at 10498–504.

<sup>182</sup> See DEP'T FOR INT'L DEV., OVERSEAS DEV. INST., SUSTAINABLE AGRICULTURE 1 (2003), available at <http://www.odi.org.uk/resources/download/2301.pdf>.

<sup>183</sup> *Id.*

<sup>184</sup> See David Kupfer, *Striving for Social Sustainability in Agriculture*, RODALE INST., Aug. 3, 2004, <http://newfarm.rodaleinstitute.org/features/0804/worker/> (last visited Mar. 3, 2010).

<sup>185</sup> See *id.*

<sup>186</sup> DANIEL ROTHENBERG, *Preface to the Paperback Edition of WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY* xiii (paperback ed. 2000) (1998) (providing a compelling description of the underclass of migrant farmworkers and the hand labor they perform as an integral part of our food system).

<sup>187</sup> Fred Kirschenmann, *Farming, Food, and Health*, GLEANINGS, Summer 2006, at 1, 1, available at [http://www.leopold.iastate.edu/pubs/staff/files/health\\_Gleanings0806.pdf](http://www.leopold.iastate.edu/pubs/staff/files/health_Gleanings0806.pdf).

America's history includes a rich tradition of agricultural productivity, and we have all benefitted from it.<sup>188</sup> Agricultural laws and policies have supported that productivity through an agricultural exceptionalism based on a recognition of the special attributes of agricultural production and the public interest involved in food security. Along the way, however, public interest has sometimes taken a back seat to special interest. Farm policy has driven food policy, and farmers have been encouraged to farm in ways that are not sustainable, producing crops that are not good for consumers.

Appreciation is expressed to the writers outside of the agricultural law community who have eloquently and passionately questioned our agricultural and food law system and who have brought the issue of food policy to the forefront of our national debate.<sup>189</sup> Appreciation is also expressed to those who promoted sustainable agriculture and a new agrarianism long before it was popular.<sup>190</sup>

It is now time for agricultural law policy makers to reconsider the direction of agricultural policy and to develop a food-focused agricultural law that is based on the sustainable production of healthy food. It is time for a law of food, farming, and sustainability.

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<sup>188</sup> See USDA, A CONDENSED HISTORY OF AMERICAN AGRICULTURE 1776–1999 (2000), <http://www.usda.gov/documents/timeline.pdf>.

<sup>189</sup> See, e.g., POLLAN, OMNIVORE'S DILEMMA, *supra* note 89.

<sup>190</sup> See, e.g., WENDELL BERRY, THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE (1977).