Issues Shaping the Future of Agricultural Law

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ESSAY

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ISSUES SHAPING THE FUTURE OF AGRICULTURAL LAW

Agricultural lawyers play a fundamental role in helping our nation craft the legal and institutional arrangements responsible for promoting a productive, profitable, and sustainable agriculture. The history of agricultural law reflects periods of development as new legal challenges have required us to respond to the changing needs of agriculture. A hallmark of American agricultural law has been the focus on the practical issues facing the farm sector. The legal system in the United States does not take a theoretical view toward the development and study of agricultural law, as is the case in Europe. The study is therefore primarily concerned with the economic relations, for example the study of contracts and property ownership. This is understandable because we deal with the real life needs of our clients.

My goal today is for us to stop and think about some emerging issues, perhaps more philosophical or theoretical, which we need to address. There are six philosophical questions I believe will shape the future of agriculture, and thus agricultural law. They are

1. What is agriculture?
2. Is there a right to farm?
3. Is there a duty of stewardship with owning or using farmland?
4. What are the limits of private property?
5. Do farm animals have rights?

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6. Should plant genetic resources be subject to legal ownership?

1. What Is Agriculture?

The question—"What is agriculture?"—may seem odd to this audience because we all have well developed views of what agriculture is—and even perhaps what it isn't. But legal definitions of agriculture vary. An important future legal issue may be whether some food producing activities lose their status as agricultural when they reach a certain size or are organized in certain ways. Consider the industrialization of agriculture. American agriculture is becoming more concentrated, more technically advanced, and more integrated with the input and marketing sectors. Thomas Urban, president of Pioneer Hi-Bred International, Inc., in an article in *Choices* said: "Production agriculture in the Western World is now entering the last phase of industrialization—the integration of each step in the food production system. The production is rapidly becoming part of an industrialized food system."¹ He describes industrialization as the restructuring of production to integrate "each step in the economic process to achieve increasing efficiencies in the use of capital, labor, and technology."² While not advocating the change, Urban views it optimistically, noting it will attract capital to agriculture and lead to more rapid adoption of new technologies. He is optimistic that industrialization will create new opportunities—possibly giving rise to a new super farm—one "dependent as much on financial management skills and contract marketing as on production and agronomy know-how."³ Still, the industrialization of agriculture is not without critics who identify concerns about the economic and social health of family farms and rural communities, land stewardship, and the effect on the cost and quality of our food. Despite conflicting opinions, the signs of the industrialization are all around:

- the movement toward contract production of swine in the Midwest, led by the integrators who dominate the poultry sector;

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² Id.
³ Id. at 5.
the continued trend toward larger, confined animal feeding facilities; and
the commercialization of biotechnology, on the horizon for years but now coming true as products come to the market.

Each trend raises fundamental legal issues that will challenge both the farming community and agricultural lawyers. Increased use of contract production for hogs raises questions both about the fairness of the contracts offered to producers and the economic effect of integration on the swine industry. Some states, such as Minnesota, have responded by regulating agricultural contracting to protect producers who enter such agreements.4 This development has triggered controversies over the location of new swine facilities, and even the appropriate relation between cooperatives and their members. Producer access to contracting opportunities and specialty production spurring concentration are also real issues. One result of industrialization may be the need for farmers to consider collective action to negotiate fair contracts. In recent years broiler producers throughout the South have begun to organize to combat the unequal bargaining strength of integrators. The experiences of these farmers who live under industrialized integrated production contract systems suggest that collective bargaining may join the body of agricultural law.

2. Is There a Right To Farm?

Every state has passed some form of “right to farm” law, primarily to protect livestock producers from nuisance suits by neighbors. But the question for society is, “should farmers be given special protections to carry on activities that have adverse social consequences?” Passage of right to farm and right to spray laws show society has answered the question affirmatively, at least for now. However, the change from the traditional family farm to an industrialized agriculture system may reopen the issue for legitimate inquiry. The recent controversy over the Supreme Court’s decision that local governments may restrict use of pesticides reflects the conflict in rural-urban attitudes toward farming.5 Legislation has been introduced in Congress to pre-empt such local actions, but

Congress has not acted on the amendment.⁶

Restrictions on the use of farm property are a second area of tension between agriculture and society. Consider the following examples:

- distance separation restrictions on the location of new livestock facilities, such as those found in Arkansas and Illinois;
- agricultural water right disputes, which have become more of an issue due to the recent drought in California;
- increasing grazing fees for public land; and
- protection of endangered species, although not a major issue for the agricultural community, has given rise to recent controversies that have caused some farm groups to reexamine the possible effects.

These examples illustrate how a changing agriculture is coming into conflict with modern society's desires for a range of values. While the economic interests of the agriculture sector will not be unheard or disregarded in these debates, the changing nature of agriculture, its declining political base, and its public perception will greatly influence the outcome.

The underlying issue may be whether the public will continue to view farmers as stewards of the land who perform a unique social function as producers of our food, thus deserving of special legal status, or as individuals concerned solely with profits, caring little for either the health of the land or the public good. That question may be determined by how society answers the next question.

3. Is There a Duty of Stewardship in Owning and Using Farmland?

The issue of stewardship is at the heart of the Jeffersonian agrarian model upon which American agriculture and democracy was founded. Secretary of Agriculture, Henry A. Wallace, in the forward to the 1938 Yearbook of Agriculture—Soil and Man, said, "The social lesson of soil waste is that no man has the right to destroy soil even if he does own it in fee simple. The soil requires a duty of man which we have been slow to recognize."⁷ We are still slow in responding.

The debate over existence of a duty of stewardship has ethical implications best articulated by Aldo Leopold as the "land ethic." Leopold noted that human history reveals an ethical sequence, first in relations between individuals and then between individuals and society. What concerned Leopold was society's failure to develop a necessary third ethical dimension, that between humans and the land. It was this land ethic that Leopold described as "an evolutionary possibility and an ecological necessity." The issue today is whether American society is moving toward recognizing a duty of stewardship.

I believe the nation has clearly entered a new period of policy development concerning environmental problems associated with agriculture. The first stage is reflected in soil conservation laws enacted from the 1930's to the early 1980's. These laws focused on providing education and sufficient financial assistance to farmers, who, acting out of a sense of stewardship and economic self-interest, would protect the soil and water. The first stage, while retaining viability, is being challenged by a new second stage, in which greater reliance is being placed on using laws to impose on the agricultural sector a duty to protect the environment. The second stage is best illustrated by the "revolutionary" soil conservation provisions of the 1985 federal farm bill. For the first time a farmer's eligibility for federal farm benefits is being tied not just to what is raised but to how the land is farmed. This simple but fundamental shift is the most significant change in U.S. farm policy in fifty years.

The new generation of federal soil conservation laws illustrates the impact of the second stage of policy development. The agricultural sector is being made to confront evidence of its adverse impact on the environment and reconcile it with traditional claims of farmers' commitment to stewardship. While many farmers are dedicated stewards, some are not. The agricultural sector is being forced to accept both the responsibility for and burden of its impact on the environment. Furthermore, legal institutions are being used both as a primary force to deal with the impact of agriculture on the environment and also as the delivery mechanism for implementing a new relationship between farmers and the environment. The

United States will have trouble developing a true Leopoldian land ethic because of our traditional commodity and market-oriented view of land. Yet, that does not mean society is without methods to address the impact of agriculture on the environment. In an increasingly legalized society we have come to rely on laws and legal duties as a substitute for a land ethic.

If this is the approach chosen, an important legal challenge for our profession will be identifying the legal mechanisms for promoting a duty of stewardship. Existing legal mechanisms include:

- using the regulatory authority of local soil and water conservation districts;
- developing the common law covenant of good husbandry in farm leases;
- relying on economic incentives, as in federal conservation programs;
- creating voluntary systems of producer education and certification such as those of the National Pork Producers Council and the Minnesota Turkey Growers; and
- harnessing the economic power of research on sustainable agriculture.

We may not need to use regulatory approaches if we make the right choices now. Consider one of my favorite topics, harnessing the economic power of research on sustainable agriculture.

Sustainable agriculture will have a direct effect on the legal approach chosen to address environmental concerns. Sustainable agriculture is defined in various ways but in its simplest form means developing agricultural practices that protect the environment while preserving the profitability of farmers. By combining a concern for the environment with attention to the economics of farming, sustainable agriculture offers a way to harness the producer's natural concern for the economics of farming. In Iowa, sustainable agriculture research has reduced fertilizer use rates from 145 pounds in 1985 to 127 pounds in 1990 without affecting yields. As a result, Iowa farmers are saving $80 million a year in reduced fertilizer costs while decreasing the potential for excess nitrates to enter water supplies. Application rates in Illinois increased during the same

period.

If farmers adopt new practices to protect the environment, negative environmental effects that create public pressure to regulate agriculture should subside. If this happens, reliance on laws and legal institutions to limit the effects of modern farming will diminish. Thus, American agriculture may enter a third stage of environmental awareness—development of a "sustainable agriculture" that respects the environment and in which laws no longer substitute for a land ethic.

4. What Are the Limits to Private Property?

One of the most fundamental issues in society is the balance between private property rights and the power of the state to restrict the use of property to protect public health and project social values. The issue has both ethical and political dimensions about the form of society we create, and a constitutional dimension because of the Fifth Amendment prohibition against taking private property for public use without just compensation. Use and enjoyment of private property is a fundamental component of American life and a major factor in our economic freedom. But the quality of life and success of the economy is greatly shaped by state action—such as environmental protection.

As society has developed, our understanding has evolved both as to what is recognized as private property and what activities are seen as potentially injurious to the public. Perhaps no better example is the dramatic shift in policies toward the use of wetlands. In the last twenty years the important value of wetlands has been recognized. As a result, federal and state policies on draining wetlands have shifted dramatically. Regulations protecting remaining wetlands have unleashed a storm of controversy by owners who claim their private lands are being taken.

The agricultural community has a fundamental stake in the takings issue. Whether the issue is protecting wetlands, controlling soil erosion, or preventing water pollution, important public goals cannot be achieved without affecting the actions of agricultural landowners. But in recent years a growing and vocal "property rights" movement has emerged in the United States, targeting laws such as the Endangered Species Act and wetland protections. Their goal is a realignment of American
property law to place private desires to develop land superior to public welfare concerns, and require compensation to landowners whenever a regulation reduces the value of the property. The takings issue was the subject of public attention in *Lucas v. South Carolina Coastal Council,*¹¹ but that case has not resolved the underlying issue.

Constitutional protections for private property are of fundamental importance. Yet it appears to me that there are risks if farmers respond to public desires for environmental protection with the attitude that “if the public wants me to protect the environment, pay me.” One risk is that the position may be judicially incorrect and will be rejected by the courts. Court rulings such as the Iowa Supreme Court’s rejection of a takings claim in upholding the state soil conservation law show considerable precedent exists, at common law and in statutes, for regulating farming practices.¹² Another risk is that the clamor about “property rights” and “takings” fails to recognize the important public benefits received by the agricultural community in the form of conservation costs shared by the public, and various farm program subsidies and local property tax breaks such as special use valuations. By focusing on claims that the public cannot limit use of private property, farmers and other landowners may risk a political and social backlash, such as on the first two questions of what is agriculture and is there a right to farm?

A final risk is that by diverting the current policy debate on environmental protection to a referendum on “property rights,” the agricultural community may miss an important opportunity to help society develop creative alternatives to accommodate both the public interest and landowners’ desires. One of the best examples of this type of private-public compromise is the use of conservation easements. Conservation easements leave the property in private ownership and available for other compatible economic uses while placing responsibility for funding on the public that reaps most of the benefits. They can be an effective compromise between regulatory approaches that force the landowner to do the same thing without any compensation and public acquisition of the property.

¹² Woodbury County Soil Conservation District v. Ortner, 279 N.W.2d 276 (Iowa 1979).
property. The potential use of conservation easements is illustrated by the Wetlands Reserve Program where over 2,700 farmers expressed interest in bidding 466,000 acres into the program. The irony is that one month after the sign-up, Congress eliminated funding for the second year. Regardless of the fate of the wetland reserve, the nation needs to continue searching for ways to accommodate economic activity on private land while protecting important resource values. Agricultural lawyers will play a central, perhaps starring, role in this drama.

5. Do Farm Animals Have Rights?

Animal rights is one of the most controversial and emotional topics facing agriculture both in Europe and the United States. The topic promises to become more contentious as animal rights activists organize more aggressive efforts to focus attention on consumption of meat and how they believe meat animals are raised. All farmers agree they owe an obligation to care for the welfare of animals under their control. The economic success of any farm raising animals is determined by the animals' health and productivity. Thus, providing care, shelter, feed, and water are fundamental aspects of animal agriculture. Legislation that protects the welfare of animals by requiring standards of care for their treatment have a long history in western culture. However, the idea of "animal rights" is premised on animals having certain intrinsic rights that must be respected, including, most adherents would argue, the right not be eaten or used for the benefit of humans. This is a view many farmers have trouble accepting.

The controversy over animal rights has an ethical and moral dimension making its resolution particularly difficult. In recent years bills have been introduced in Congress both to regulate the practices used in producing veal calves and to grant standing to sue to animals or their representatives. Animal rights activists have conducted campaigns of terrorism and vandalism against research facilities, leading Congress and several states to pass laws making it a crime to interfere with animal research or production. Taken to its extreme, the idea of animal rights threatens the very existence of much of world agriculture. No one likes to be on the receiving end of epithets, but agricultural lawyers may have to risk being labeled
“specieists” in working to help the farm community protect the freedom of consumers to eat and use livestock products.

6. Should Plant and Animal Genes Be Subject to Patent Claims?

President Thomas Jefferson, in many ways the architect of the American system of family farms, once said, “The greatest service which can be rendered any country is to add a useful plant to its culture.” The ownership and control of plant and animal genetic resources (PGR) promises to shape irreversibly the development of agriculture production in the United States and abroad. The debate and struggle over control of PGR is being waged in international forums such as the United Nation’s Environmental Conference in Rio and the debate on the Biodiversity Treaty, in the FAO, which has adopted the idea of farmer’s rights and national sovereignty over PGR, and in the GATT negotiations. The issue is being debated at international agricultural research centers, universities, and in companies involved in plant breeding, seed production, and genetic engineering.

The ultimate issue for many is money and profit. To others it is feeding humanity and seeking equity between the world’s rich and poor. The question is, who will benefit from unleashing the power of the world’s plant genes? Will it be the scientists and companies who develop improved seeds and the products they yield, as well as the farmers who raise them? Will the nations and traditional farmers who argue they have preserved the genetic resources over the centuries receive a portion of the profits? Who will decide who controls the wealth of nature and results of the laboratory—patent lawyers, courts, diplomats, scientists, lawmakers, or the marketplace? Should farmers have a say in the debate? Surprisingly few farmers know a controversy exists that may shape what they raise and how they farm. More surprisingly, farmers are not directly involved in the debate and will have little influence on the outcome.

While the involvement of farmers in the debate has been limited, the most direct impact of the resolution of these issues will be felt on the nation’s farms. The outcome will be seen in what is raised, in the price of the seeds, plants, and animals.

used to grow food, and in how commodities are produced and marketed. There are two components to the legal issues concerning plant genetic resources. The first concerns the various forms of plant intellectual property rights. The second, which for farmers and their lawyers is probably more important, concerns the practical questions that will accompany the implementation of legal controls over use of agricultural genetic resources. The issues include:

A. Will farmers have to pay a royalty on some seeds to fund an international mechanism compensating “farmer’s rights” in developing countries where the parent material was discovered?

B. Will farmers have opportunities to “pharm” transgenic animals to produce drugs and industrial products and if so, will they have to pay a royalty on each generation of transgenic animals they produce, rather than owning the parent animals?

C. Will farmers retain the right to “plant back” seeds raised on their land from protected varieties, or sell such “saved seeds” to other farmers as they now can under the PVPA?

D. If most grain is produced using “end use tailored varieties” under contract with seed breeders or the ultimate user, what effect will this have on traditional marketing and production relations?

E. Will consumers purchase foods produced with genetic engineering, or will social, environmental, and economic concerns limit how quickly the products of genetic engineering are commercialized?

F. Will genetically engineered seeds available to farmers be resistant to increased pesticide use or to the pests themselves? How will the direction of the nation’s research agenda on genetic engineering in agriculture be determined?

The legal dimensions of these issues are clear, as is the need for well-informed lawyers. Granting patents to reflect property ownership in genetic resources raises significant issues about society’s ideas of intellectual property. Jefferson, who also wrote the nation’s first patent law, was no doubt correct about the importance of adding new plants to our agricultural heritage. But the question remains whether he also would have expected the person who “discovered” the plant (or the scientist who “engineered” the gene) to be granted a legal
right to own it. A sobering thought on the subject comes from Otto Frankel, a respected authority on the world’s plant genetic resources, who warns, “[A] litigious world community insisting on sovereign rights to what evolved long before the beginnings of civilization is likely to lose in the long run what it tries to exploit in the short run.”

7. Conclusion

America has long recognized the fundamental role agriculture plays in building society. Daniel Webster said in 1840 that, “let us never forget that the cultivation of the earth is the most important labor of man. . . . When tillage begins, other arts follow. The farmers, therefore, are the founders of human civilization.”

The function of agricultural law is to protect and preserve the role of agriculture in society by creating relations that encourage both its economic prosperity and its physical sustainability, while satisfying the social obligations placed on it. The role of law in meeting this challenge is undeniable. As the study of agricultural law matures, and as the full range of legal issues shaping agriculture are recognized, we, as scholars and professionals, must devote our time and resources to addressing the fundamental questions facing society when considering the future of agriculture.