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KEEPING THE FARM AND FARMER IN FOOD POLICY AND LAW

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Neil D. Hamilton*

INTRODUCTION

Thank you for the opportunity to be with you, it is always a pleasure to return to the University of Arkansas Law School where I began my teaching career in the fall of 1981. We are pleased Drake University Law School and the University of Arkansas College of Law have built and maintained a partnership on teaching and research that stretches back over three decades. I am especially pleased to be with you as we celebrate the 10th Anniversary of the *Journal of Food Law and Policy*, another part of the University's pioneering work in the area of food policy and agricultural law.

As I consider the changes over the last ten years, not just in our food system and the law, but also in the people involved, the achievements your programs have made possible are impressive; new interests were fostered, new careers launched, and new opportunities to think, write and publish were made possible. I will always be thankful to the *Journal* for publishing my article on the theme of Food Democracy, a journey still underway in our nation.¹ We see an increase in the number of law schools with programs focusing on food and the law. In addition to what you here at Arkansas and we at Drake have helped lead, we now have efforts such as Michael Robert's program at the Resnick Center at UCLA, the work of Emily Broad Lieb and Allie Condra at Harvard, and a new student group focused on food law being formed at Yale. Other schools have embryonic programs or grand plans to begin them—all in recognition of the growing student interest in food law and policy. But you here in Arkansas have special reasons to be proud of your program and how it has helped lead the way. The hundreds of students who have received their LL.M. degrees here, the dozens who have written and staffed your journal, and the many more who have taken classes—are finding rewarding careers working with food, farming and agriculture. Their success is of real value and their contributions are no less significant than the scholarship you have published.

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1. See Neil D. Hamilton, *Food Democracy II: Revolution or Restoration?*, 1 J. FOOD L. POL'Y 13 (2005).

I appreciate the opportunity to be here today to share a few thoughts on the future of food law and policy, a subject I have been writing about for many years. Consider how prevalent the subject “the future of food law and policy” is all around us—whether in the debates over food labeling, from added sugars to GMO ingredients, to the increasingly common debates over the safety or ethics of various food production practices (a topic I will examine)—the topic is everywhere.

One measure of the importance and interest in food law and policy can be seen in the proliferation of state legislative ideas and initiatives encompassing the topic. Consider these examples:

Food Freedom laws, such as the one passed in Wyoming and others introduced in Missouri and Virginia, designed to give farmers the right to sell food they produce and consumers the right to purchase these foods, unimpeded by food safety regulations or other legal requirements, if notice of this status is shared;²

Urban agriculture protections such as the recent Michigan proposal with the impressive name “Homestead Subsistence Farming Act,” designed to allow homeowners to garden and raise livestock such as goats, poultry and bees on their lots free of the burden of local zoning and land use laws;³

The New Jersey law to ban the use of gestation crates for swine production, a law quickly vetoed the Governor perhaps with his eyes more on the concerns of Iowa pork producers than on the voters in his own state;⁴

2. See, e.g., Dan Flynn, *WY Editorials Warn Against Dangers of ‘Food Freedom’ Bill*, FOOD SAFETY NEWS, Feb. 4, 2015, available at: <http://www.foodsafetynews.com/2015/02/wyoming-editorial-writers-warn-against-dangers-in-food-freedom/#.VNjmkVZ8yGk> (regarding H.B. No. HB0056 in Wyoming); Bernadette Barber, *Ya. HB 1290: Groundbreaking Bill Supports Local Food Choice*, Jan. 23, 2015, available at: http://www.farmtoconsumer.org/news_wp/?p=17632; H.B. 1290, 2015 Sess. (Va. 2015); Dan Flynn, *Missouri Bill Seeks end to State and Local Regulation of Direct Farm Sales*, FOOD SAFETY NEWS, Feb. 25, 2015, available at: <http://www.foodsafetynews.com/2015/02/missouri-bill-seeks-end-to-state-and-local-regulation-of-direct-farm-sales/#.VPOUoFZ8yGI>; H.B. 866, 98th Gen. Assem., Reg. Sess. (Mo. 2015).

3. H.B. 4012 (Mich. 2015); see *House Bill 4012: Could Michigan Residents Regain Their ‘Basic Human Right’ to Farm their Yards?*, Jan. 21, 2015, available at: <http://www.inquisitr.com/1767732/house-bill-4012-could-michigan-residents-regain-their-basic-human-right-to-farm-their-yards/>.

4. See Hunter Schwarz, *Christie Vetoed N.J. Pigs bill to Charm Iowa ahead of 2016, critics say*, WASHINGTON POST Dec. 3, 2011, available at: <http://www.washingtonpost.com/blogs/govbeat/wp/2014/12/03/christie-vetoed-n-j-pigs-bill-to-charm-iowa-ahead-of-2016-critics-say/>; Christopher Doering, *Tyson Calls for Hog Producers to Forgo Sow Crates*, GANNETT WASHINGTON BUREAU, Jan. 10, 2014, available at:

The litigation over California’s ban on the importation of eggs from other states not in compliance with the state’s standards for cage spacing and humane treatment of laying hens; litigation led by among others the Attorney General of Missouri and the Governor of Iowa, who claim the law is an affront to the Commerce Clause and threatens the free flow of food in our nation;⁵

The continuing debates over the enactment of “ag-gag laws” designed to restrain the ability of individuals concerned about livestock production practices to obtain employment or otherwise discover and reveal their findings without risk of prosecution;⁶ and

Seed exchange libraries, a growing phenomena where libraries offer seeds for use by patrons, which have come under scrutiny by state seed regulators in states like Minnesota and Pennsylvania, who apparently believe such local exchanges threaten either the commerce of the seed trade or the safety of the seeds.⁷

These examples, as varied as they are, all involve the law through state legislative or regulatory action, and involve food in some form. They also involve the desire by some people for better food, in whatever form that may be for them. These proposals also help illustrate some of the conflicts or fault lines in our national debate about food—its safety, how it is raised and what can be said or known about it—a theme I will return to later. These proposals may also represent conflicts between agriculture and farmers (or at least some part of agriculture) and those seeking alternatives or more choice in our food system. This brings me to my theme—the need to keep the farm and farmer in mind when we talk about food policy and law. I believe it is of critical importance we marry an understanding and appreciation for farming and agricultural law with our development of food law and policy. This marriage is something the University of Arkansas and Drake both do well, in large part because our respective projects on food law and policy grew out of historic work on agricultural law.

So what does it mean to keep the farm and the farmer in food policy? First it means remembering all of the food issues also involve the land, which

<http://archive.citizen-times.com/article/D2/20140110/BUSINESS01/301100102/Tyson-Foods-calls-hog-producers-forgo-sow-gestation-crates>.

5. See Christopher Doering, *Branstad joins challenge of California egg law*, GANNETT WASHINGTON BUREAU, Mar. 2, 2014, at 13A, 14A.

6. Rita-Marie Cain Reid & Amber L. Kingery, *Putting a Gag on Farm Whistleblowers: The Right to Lie and the Right to Remain Silent Confront State Agricultural Protectionism*, 11 J. FOOD L. POL’Y 33 (2015).

7. Scott McFetridge, *Seed Libraries Struggle with Limiting Exchanges*, THE DES MOINES REGISTER, Dec. 29, 2014, at 6A.

is why land tenure issues—who owns the land, how it is farmed and by who, and who has access to land are critical to the future of not just agriculture, but also of a healthy sustainable food system. Second, it means remembering all these issues involve people making decisions—how to farm, what crops to grow, what production practices to use, how to market a crop—and how to respond to political issues and market forces. Third, it means trying to understand how the real world works, whether it is politics, lawmaking and regulations, or market forces and decisions made by consumers as individuals or as food companies and how these forces affect the acceptance of food. The key is food starts with a farm and with a farmer—all else flows from there.

WHY FOOD LAW PROFESSORS NEED TO KNOW SOMETHING ABOUT FARMING

Underlying my talk is the idea there are certain “givens.” One is we all have to eat—we may be able to choose what to eat but not whether to eat. This means we all need agriculture and farmers. A second given is if you produce something on your farm to sell, it has to have a market, someone must want to (or need to) buy it. To the extent you don’t understand or trust agriculture you will always be frustrated, worried and looking for more (or other alternatives). To the extent farmers don’t appreciate or recognize the validity of consumer concerns they will always be at risk of consumers moving on to something else or continuing to look for “the” issue of the day to attack farming (i.e., the string to unravel the sweater).

As a result it should come as no surprise I believe there is a difference in coming to food law and policy issues from a perspective or understanding of agriculture and farming as compared to coming to food policy issues only as an eater or consumer. The difference may not change your views on an issue, but it will deepen your understanding for why the issue is significant, why some in agriculture might be opposed or concerned, and what might be the impacts or effects of any proposed change in production practices.

One’s angle of approach can impact the nature of the examination, e.g. what is the goal, who is the audience, and why or for whom the law is being used. Consider for example the difference in looking at direct farm marketing as a new farmer economic development strategy with a focus on marketing, farm income and profitability—as opposed to coming to local foods (which relies on small farmers, direct marketing and farmers markets) as a form of food access and a way to address food deserts, promote healthy eating, and other social justice goals.

The reality is both perspectives are valuable but the emphasis and point of departure can determine how the subject is considered and the legal and policy ideas (and issues) that emerge. One issue is who the law is serving

and how? One key point to recognize is the traditional focus on agricultural law was on the people—the farmers who the law served and their needs—and land security, income, and a safer environment. The increased corporatism of the U.S. economy and the increasingly industrialized nature of agriculture, in structure and scale, has helped shift the focus of the law or perhaps our perception of it. Unfortunately what we most often hear now from agriculture are the voices of the large companies who sell the inputs and market the products—rather than from the farm people themselves. This makes it too easy for us to forget the human dimension in farming, and conclude that most farms are factories and many farmers are evil.

I come to these issues from a somewhat unique perspective because my feet and history are firmly planted on both sides of this possible divide. I grew up on a quintessential small Iowa family farm raising hogs and cattle, corn and soybeans—a farm that has been in my family since the 1870’s. From that perspective we experienced all the major transitions of U.S. agriculture of the last 50 years—export expansion, industrialization in scale, and the 1980’s farm crisis. My neighbor and friend was recently president of the American Soybean Association—one of the most powerful and traditional farm organizations in U.S. politics. And I am a friend and informal advisor to Secretary Vilsack at USDA. Many of my former students work for agricultural companies like DuPont Pioneer and for farm organizations like the Iowa Corn Growers. I know and understand Big Ag or “production agriculture,” a term they may favor, though this doesn’t mean I always agree with what agriculture does and how it thinks.

I am a direct marketing small farmer, with my wife Khanh on our 10-acre Sunstead Farm near Waukege, with a reputation for raising high quality produce for local restaurants and a small CSA. I founded and ran the local Slow Food Des Moines chapter for over 10 years, and wrote the *Legal Guide on Direct Farm Marketing*, recently available in electronic format. For six years I chaired the Iowa Food Policy Council under then Gov. Vilsack and with USDA funding the Drake Agricultural Law Center helped form real food policy councils in 15 states and regions. My Center also ran the Buy Fresh Buy Local program for the greater Des Moines region for a decade. I know from experience the legal issues relating to small farming, local food policy and direct marketing.

Why does it matter (or why is it important) to have an understanding of agriculture and farming? One reason is because so many of the key and important issues and controversies in the field of food law and the environment are based on commonly accepted agricultural production practices. So an understanding of how and why farmers might respond as they do when criticized can be critical to understanding complex current policy debates. Consider these issues:

1. The Renewable Fuel Standard ("RFS") and EPA's controversial proposal to possibly restrain it – the significance of this debate cannot be appreciated without understanding the relation of ethanol policy to corn production, increasing land values, expansion of farm leasing, changes in land tenure and the whole economic structure of mid-western agriculture.
2. The FDA and proposals on feeding antibiotics as a growth promoter – the issue is integrally tied to the structure of animal feeding and concentrated livestock production, and is being used by agriculture as a proxy for other issues, such as animal welfare, which are portrayed as "attacks" on livestock production.
3. The 2014 Farm Bill – and all of the internal debates over issues like the expansion of crop insurance, conservation cross compliance, SNAP cuts, the shifting corn belt, and proposals like the King Amendment on the dormant commerce clause aimed at the California egg rules.⁸
4. The Food Safety Modernization Act – especially its impact on small-scale direct market farmers—and the concern the law is being used not just to improve food safety but also to reduce competition.
5. The GMO labeling debate – the current dominance of GMO seeds in commodity crop production and issues about the availability of alternative crops and seed supplies for producers, as well as the growing significance of pesticide resistant weeds and bugs now changing the dynamics of cropping practices and products.

All of these issues and debates involve important food policy questions. Basic economics shows the RFS must have some relation to food costs and supplies (in part through higher feed costs and the impact on livestock production). Perhaps the most significant impacts of ethanol are the environmental costs on soil conservation and land conversion. There are real human health concerns about the over use of antibiotics to promote growth and agriculture can clearly exist and thrive without them, as the experience in Denmark shows. There are serious political equity concerns about cutting SNAP benefits while at the same time creating new forms of subsidized crop insurance and farm income supports of untold cost. FMSA has the potential to increase consumer confidence in the food supply, but there are also threats

8. Neil D. Hamilton, *The 2014 Farm Bill: Lessons in Patience, Politics, and Persuasion*, 19 DRAKE J. AGRIC. L. 1 (2014).

through increasing food imports from China—including poultry—and potential unnecessary impacts on small U.S. producers. The GMO labeling debate is interesting, but in many ways is a diversion from what may be more significant food labeling issues, ignoring the legitimate scientific concerns about the overuse and expansion of GM technology.

Our ability to address or resolve whatever the food policy issue may be, won't be possible without addressing and understanding the resistance and opposition of the agriculture and farming sectors and Big Food, and appreciating their perspectives is part of that challenge. I am not saying you had to grow up on a farm to be an effective teacher and scholar in food law and related topics—but to the extent you do not understand agriculture or make any attempt to recognize the significant variations found in America's farming and agricultural system, the risk is your teaching and scholarship will be open to criticism as being one-sided, biased, unrealistic, and uniform. You don't have to agree with farmers about what they do—but if you are going to criticize what they do then you probably need to understand what it is they do and why. In that context let me next turn briefly to an issue that is fundamental to understanding agriculture and that is the role of land and land tenure.

THE IMPORTANCE OF LAND OWNERSHIP IN UNDERSTANDING FOOD AND AGRICULTURAL LAW AND POLICY

In the debates on the future of food and agriculture in the U.S., such as: (1) conflicts between industrial agriculture and the new agrarianism; (2) debates over environmental stewardship, soil conservation and water quality protection; (3) creating opportunities for new and beginning farmers; and (4) discussions about addressing climate change—the land is at the heart of the issue.

Who owns it, who farms it, how it is used, and who makes the decisions? All these issues are involved in land tenure. This is why the issue of farmland ownership is a critical topic for anyone interested in studying food policy and law to consider and understand. You really can't talk about food policy issues without considering land tenure and you certainly can't begin to understand agricultural law without considering farmland ownership. Land ownership provides the stability, the autonomy, the opportunity for long-term planning and investment, and the wealth creation potential central to our agricultural history. Owning land in many ways offers status and legitimacy to the owner. While owning farmland by itself doesn't make the owner a farmer and it is possible to farm without being an owner, the act of owning land is still central to the idea and identity of farming in the U.S. This ideal is at the heart of many of the laws developed over the centuries to deal with farming.

The centrality of land and its importance to the future of agriculture—and the identify of being a farmer—is also why land ownership is a significant issue which should not be overlooked when considering food policy issues. This centrality is why we should be aware of and concerned about developments such as the:

- Concentration of ownership into fewer and older owners;
- Increases in farm tenancy and the separation of ownership from operation;
- Increasing numbers of non-operator landowners who may have very little contact with the land;
- Increased use of trusts which remove management and use of the land from living people and extend the dead hand control of the deceased; and
- Economic forces that concentrate wealth and land into fewer hands and obstacles to creating new landowners and opportunities for land to change hands.

It is also why we have to be creative in looking at new types of landowner relations, such as non-traditional farm land owners like land trusts, and to creating opportunities for farming on smaller acreages.

THE “GIVENS” ABOUT LAND

In thinking about land one question to consider is if there are certain “givens” that accompany any piece of land—things that are unavoidable or which shape the environment in which landownership functions? Here are several to consider:

1. Land is always owned by someone – no land goes unclaimed, though the owners may be private, public or quasi-public entities. Even at the death of an owner the legal title passes either instantly or through a process such that who owns the land is never impossible to determine.
2. There will always be a “market” for the land and someone interested in owning it, although the price or value may fluctuate and differ from the owner’s expectations.
3. People own, acquire, and continue to own land for a variety of reasons and economics may be only one

consideration. Others can include: sentiment, tradition, freedom, security, and lack of alternatives.

4. All property is owned subject to interests of other people, such as the neighbors, and is subject to prohibitions or restrictions on use which might arise from statutes, regulations or the common law developed by the courts. This means that while you may own the land and have broad autonomy in how it is used your actions are not without limits.
5. Regardless of where land is located it is subject to the jurisdiction of several levels of government, including the state and county where it is located; and it may be subject to the jurisdiction of private organizations such as a drainage district or a homeowners association.
6. Land by its very nature is shaped by its physical features—the soils, the slope, the drainage, the climate, its geology and the other land features around it—streams, lakes, slopes—and by its location.

There are many decisions made by any owner of farmland, such as: which crops to plant; whether to renew a lease with a tenant; whether to plow up a pasture or a grass waterway; whether to install a buffer strip; and whether to rent a farm, or sell it, to a new and beginning farmer. If we are interested in changing certain behaviors or actions taken by farmland owners—such as not farming right up to the bank of a stream or encouraging them to do something differently like renting a farm to a new farmer—then we have to think about why it is landowners are acting as they are. What are their motivations and where do they get the information that shapes their actions?

CONFRONTING THE DANGERS OF ABSOLUTISM AS WE MOVE FORWARD

The American food and agriculture sectors are facing a period of conflict and change: an aging farm population, increasing scale of farms, more concern about environmental impacts, challenges to new technologies, and food safety concerns are just some of the issues. Communicating with new audiences of consumers who are more willing to scrutinize the status quo and crafting new arguments and legal strategies to defend and support agriculture will all be part of the mix.

The context presents conflicts and controversies—such as labeling food products and agriculture’s undeniable role in increasing water pollution—but there are also opportunities for new families finding a future in farming and new rural economic activity with wineries and food artisans.

Some of these controversies will be resolved through court cases and through the application of new legislative responses, but many of the issues will rest on the historic foundation of landownership and laws that have shaped not just the development of agriculture, but of our nation.

Absolutism can be a key problem in food and agriculture—from both sides of the debate—the agriculture community and food policy world. For example, consider these commonly held opposing views found in the agriculture and food camps—all industrial agriculture is bad and all Midwestern commodity production or confined livestock production is industrialized—as contrasted to the idea all groups interested in animal welfare have the goal of ending animal agriculture. First, the fact is neither of these statements is accurate although both can find healthy support among believers. Second, the fact is there may be some truth to them—yes some livestock production is “industrial” in structure if not scale and yes some groups promoting animal welfare laws would prefer to outlaw all livestock production. But at the same time many livestock farms, even very large farms, are family operations and many people who enjoy eating meat are very concerned about how the animals are raised. The key to understand these points is that the truth usually rests somewhere in the middle and understanding food and agriculture policy debates and contributing to real social progress, requires a more informed, nuanced and sensitive understanding of how things really work—in agriculture, in the real world and in legal change.

Rather than the all or nothing categorical approach so often found—what we need is a bit more effort at understanding why things are like they are, how we got here and what it will take to change. The dangers associated with the absolutist view of the world are many and the lack of understanding makes claims like these subject to disdain and rejection by those so labeled. Most of the Iowa corn growers and hog farmers I know and grew up with neither recognize nor welcome their characterization as “industrial-factory farms.” On the other hand, my friends at the Environmental Working Group see themselves as conservationists working to promote sound soil stewardship and sustainable farming not as “anti-agriculture environmental extremists” determined to starve the hungry and force people from their farms—as they were recently and approvingly portrayed by a keynote speaker at an Iowa Farm Bureau’s annual meeting.

A second danger is how this absolutist certainty can be converted into proposed laws and policies to “protect” agriculture from unfair attacks such as the Missouri “right to farm” constitutional amendment or to promote “opportunities” for farmers and consumers such as the new “food freedom” laws without considering the value of the arguments made by those on the others side, or the opportunity for compromise somewhere between. A good example of a bad idea is the “King” amendment considered but not enacted

by the conference committee trying to develop the 2014 farm bill.⁹ This proposal allowed Congress to legislatively decide by fiat a major constitutional issue involving the dormant commerce clause and the ability of California to establish standards for eggs produced or sold in the state, rather than let the issue work its way through the federal courts as issues of Constitutional interpretation should.

This “all or nothing” approach and willingness to characterize the goals of the people on the other side of the debate in a negative light, for example, the claim health food advocates real goal is replacing all existing farms with small scale organic farms, makes the arguments easier to reject as unrealistic—and in so doing may overlook or ignore what may be the real motivations of others or the legitimate concerns they have. For example, the concerns some people have about industrial agriculture may have nothing to do with animal welfare but everything to do with food safety such as the increasing public awareness that much fresh poultry may be contaminated with bacteria. The nation was reminded of this in late December 2013 when the Pew Trust and the Consumers Reports both issued reports on the incidence of contaminated poultry and related health concerns. To illustrate how much our expectation for wholesome food has changed, one evening the NBC Nightly News carried a dramatic but overly alarmist segment showing Dr. Nancy Snyderman illustrating the safe handling of poultry by putting her hand in a baggy to even touch a chicken leg—treating it as if it were dog poop or a hazardous waste product more than food.¹⁰ Is this where we have arrived? With this level of heightened and hyped food safety information, it is no surprise the public is paying attention to how food starts on a farm and is produced and marketed. Developments like this also help explain the growing student interest in food policy and law.

CONCLUSION

The future of food law and policy is bright and the issues we will have the opportunity to address are many. The role for law and lawyers will only continue to grow. As we work to help farmers, consumers, companies and policy makers address the issues our efforts will only be improved if we keep in mind that food started on a farm and was shaped by the decisions made by farmers. If we fail to do so then our efforts will be asymmetrical and will fall short of what our Nation needs and deserves.

9. Chris Petersen, *King sides against consumers, family farmers*, THE DES MOINES REGISTER, Jan. 15, 2015, at 9A; see also Hamilton, *supra* note 8, at 25-26.

10. See *How to make sure your chicken is safe*, NBC NIGHTLY NEWS, Dec. 19, 2013 available at: <http://www.nbcnews.com/video/nightly-news/53877321#53877321>.