A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability

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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.¹

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.² 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.³ This

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² 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).
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. However, the concept is evident throughout the law, with farmers protected from involuntary bankruptcy, exempted from many environmental regulations, and excepted from anti-trust restrictions. The first use of the term is often credited to international trade scholarship, where special exceptions are also evident in other countries.

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


6 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.


8 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).


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. Some defend the special status by tying it to noble societal concerns. Others bemoan the special treatment, linking it to political and economic power. 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
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. 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.

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.

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. 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. With this foundation, agricultural interests, particularly those in the South, have had significant political power that continued long after the abolition of slavery. 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.

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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18 Skogstad, supra note 8, at 467–68.
19 See id. at 468.
20 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).
22 Id. at 1275–78.
24 Id.
declined dramatically over the years, with only twenty-one percent now living in broadly defined rural areas\(^{25}\) and less than two percent of workers employed in agriculture,\(^{26}\) farm states each have their two U.S. Senators, agricultural interests are a strong presence in Washington, D.C.,\(^ {27}\) and the “farm vote” remains a strong political force.\(^ {28}\) Who the “farm vote” actually represents may often be a complex issue.\(^ {29}\)

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.”\(^ {30}\)

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,”\(^ {31}\) and in his letters to John Jay, “[c]ultivators of the

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\(^{28}\) 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).

\(^{29}\) 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. & POLY 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).


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.”

Agrarianism and Jefferson’s lofty statements have been used to support a “political duty to preserve and protect farms.”

Often lost, however, has been the interpretation of Jefferson and of agrarianism as the reconciliation of “self-interest with the public good.” 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.” 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” was easier to translate into political and economic goals than the reconciliation of “self-interest with the public good.” 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. As noted agricultural economist Don Paarlberg 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.

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


See Browne et al., supra note 33, at 7.


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.

American law schools and legal scholars assisted in the creation of “agricultural law” as a specific discipline to be studied. It was first recognized as such in the 1940s. 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. The real beginnings of agricultural law as a recognized legal discipline came about in the late 1970s and early 1980s. In 1979, a quarterly scholarly journal, The Agricultural Law Journal, was initiated. In 1980, the American Agricultural Law Association was formed and an LL.M. Program in Agricultural Law was founded at the University of Arkansas. In 1981, the fifteen-volume AGRICULTURAL LAW treatise was published.
West Publishing casebook AGRICULTURAL LAW: CASES AND MATERIALS was published.\textsuperscript{49}

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.\textsuperscript{50} It was about protecting the interests of farmers and saving the family farm.\textsuperscript{51} Disputes involved how much protection to provide and how the American agricultural industry should be structured.\textsuperscript{52} Legal scholars provided critical assistance to the practicing bar in defending the family farm in crisis.\textsuperscript{53} Popular culture, as evidenced by movies like Country, viewed financially distressed farmers with great sympathy.\textsuperscript{54} Americans saw in family farmers “[g]ood work, long hours, love of nature, and caring for a simple, loving life.”\textsuperscript{55} 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.”\textsuperscript{56}

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

\begin{quote}
   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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\textsuperscript{49} Id. at 517.
\textsuperscript{50} 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).
\textsuperscript{51} See Hamilton, supra note 42, at 518–21.
\textsuperscript{52} See, e.g., Harl, supra note 50, at 148–49.
\textsuperscript{53} 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).
\textsuperscript{54} See Country (Touchstone Pictures 1984).
\textsuperscript{55} Carol Bly, Foreword to Dianna Hunter, Breaking Hard Ground: Stories of the Minnesota Farm Advocates xi, xi (1990).
\textsuperscript{56} Harl, supra note 50, at 282.
owned large-scale corporate farming enterprises will be detrimental to the national welfare.57

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.58

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.59 Although farm families still own most American farms, these farms are larger, less diversified, and more capital intensive than ever before.60 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.61

Congressional policy encouraged agriculture down this path, encouraging the consolidation of farms and the industrialization of agricultural operations.62 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.63 Agricultural economists at land grant universities and as part of the vast

58 See, e.g., PAARLBERG, supra note 38, at 7–9.
61 See PAARLBERG, supra note 38, at 5–9.
62 See Schneider, supra note 59, at 77–78.
63 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. These economies of scale have made a dramatic impact on farming and rural life.

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

Most of these farms are located far from consumers. 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. 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. This model focuses not only on economies of scale, but on a radically different concept of production. 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.” The goal of an indus-

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65 See Dimitri et al., supra note 60, at 1–7.
66 Agriculture Fact Book, supra note 60, at 24.
67 Hoppe et al., supra note 26, at 4 (estimating that there were 2.1 million farms in 2005).
68 Id. at 8. “Large-scale family farms” are defined as those with gross sales of $250,000 or more. Id. at 2.
72 Schneider, supra note 59, at 78.
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.74 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.”75 Both the average and median household income for a farm household is significantly higher than that of U.S. households generally.76 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,77 or whether the federal estate tax exemption should be eliminated or raised to $10 million to better protect farm financial interests.78 And, farmers, who once were thought to be good stewards of the land, are increasingly recognized as significant contributors to environmental degradation.79 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.”80

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

75 Paarlberg, supra note 38, at 8.  
76 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.  
79 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).  
80 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.”81 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.82

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.83

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

81 Id.
82 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.
83 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. 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. 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 and a significant source of environmental degradation. 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. Farmers should have the opportunity to make a profit farming; environmental damage should be minimized so

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84 Id.
85 Schneider, supra note 59, at 78–79.
87 See Ruhl, supra note 6, at 274–92.
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. 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.” 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. Cotton production is extensively subsidized by the federal government.

89 See EWG Farm Subsidy Database Update, supra note 9.
90 See Jean M. Rawson, Cong. Res. 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.
Import restrictions and indirect subsidies support the cane and sugar beet industry, encouraging the production of sugar.\textsuperscript{93} The largest beneficiary of federal farm program support is corn production;\textsuperscript{94} it is reported that “[o]ver the past twelve years, taxpayers have spent $56 billion on corn subsidies.”\textsuperscript{95} Yet, the subsidized corn is used primarily for animal feed, high fructose corn syrup and other processed additives, industrial uses, and ethanol.\textsuperscript{96} Finally, producers of subsidized commodity crops are restricted from converting their acreage to production of the more healthy crops.\textsuperscript{97}

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\textsuperscript{98} took a step toward a healthier food policy, although it was a small step with a long road ahead.\textsuperscript{99}

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

\textsuperscript{94} 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.
\textsuperscript{95} Id.
\textsuperscript{97} 7 U.S.C. § 8717(b) (2006).
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.100 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.101 Another study showed that the focus on high-yield as a goal has resulted in diminished nutritional values.102 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.103 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.104 They show that there are consequences for this emphasis; as they say, there is no free lunch.105 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

102 HALWEIL, supra note 100, at 4.
104 HALWEIL, supra note 100, at 1–15.
105 See id.
incident involving an antibiotic resistant strain of Salmonella Newport in ground beef processed by Fresno-based Beef Packers Inc., associated with Cargill.\footnote{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).} Previous incidents have prompted Congress to consider ways to better coordinate efforts to assure food safety.\footnote{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).} These efforts should be aimed at strengthening government authority and providing for better coordination and consolidation of our food safety regulatory system.\footnote{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.”).} 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.”\footnote{U.S. GEN. ACCOUNTING OFFICE, HIGH RISK SERIES: AN UPDATE 71 (2009), available at http://www.gao.gov/new.items/d09271.pdf.}

Reform should not, however, discourage small farming operations and regional food processing centers through regulatory structures that are impossible for smaller operations to meet.\footnote{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.”).} Smaller, regional food systems may be key to achieving better food transparency, higher quality products, and better connections between consumers and their food.\footnote{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. & POL’Y 45 passim (2008) (discussing the growth of the local food movement).}

Regulatory food safety reform efforts, although critical to achieving a safer food supply, must be supplemented with a food and agriculture
policy that analyzes how food is produced and that considers ways to improve production practices to promote safer food. Much can be done prior to testing and recall.

This calls for a review of current food production practices. The goal of “cheap” food cannot result in food that is unsafe or unhealthy. 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. 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.

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. Of particular concern is the industry’s dependence on subtherapeutic antibiotics for disease prevention and growth stimulation.

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113 See id.
116 PEW COMM’N, supra note 115, at viii.
117 See id. at 13–16.
118 See Sudeshna Ghosh & Timothy M. LaPara, The Effects of Subtherapeutic Antibiotic
Such use can contribute to antibiotic resistance. Particularly, when the antibiotics used are those needed for combating human disease and infection, serious public health issues are raised.

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. 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.

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.”).

119 See id.


121 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).

122 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/ppf/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. 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. 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.

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. Nutrition is lost in transit, and crops are selected for transportability rather than nutrition or taste. Moreover, this system relies heavily on fossil-fuel driven transportation, which contributes to climate change.

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. 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. The new food-focused agriculture should encourage these mechanisms.

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123 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).
125 See generally Coit, supra note 111 (addressing the deteriorating link between producers and consumers).
126 See Pirog et al., supra note 122, at 9–14.
128 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.
129 Coit, supra note 111, at 70; Pirog et al., supra note 122, at 3.
130 See Coit, supra note 111, at 45, 70; Hill, supra note 127, at 6–8, 10.
131 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. 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. These opportunities provide urban consumers with access to fresh foods and a greater appreciation of the process of agricultural production. They can also, however, address the startling problem of food insecurity that exists in America today. The USDA reports that “[i]n 2007, 36.2 million people lived in food-insecure households,” including “12.4 million children.” Many of these people live in urban areas, where the existence of “food deserts” means that they have easy access to food only through fast food restaurants, gas stations, liquor stores, and convenience stores. Access to healthy, fresh foods is minimal, if available at all. Urban farming efforts serve as models for what can be done to address this problem and should guide policies for the future.

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 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).


See Matthews, supra note 132; see also MARI GALLAGHER, supra note 136, at 13.

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.” 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.

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.” These living things, whether crops or livestock, can grow well or grow poorly. 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. 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.”

141 Id. at 10.
142 Schneider, supra note 59, at 78.
145 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. 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.” Moreover, there is a responsibility with respect to the impact that agricultural activities and its products may have on other forms of life. 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. Prior to the implementation of new technologies in production, the long-term impact must be analyzed.

Current regulatory structures leave significant gaps in research, analysis, and enforcement, and they lack coordination. 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-

147 Schneider, supra note 144, at 3.
148 See discussion infra Part III.A.2.
150 See Voosen, supra note 149.
151 U.S. GEN. ACCOUNTING OFFICE, supra note 109, at 71.
duction of pharmaceutical or industrial compounds into the food supply.\textsuperscript{152}

The issues are complex. For example, the contamination of non-genetically engineered crops through cross pollination represents a significant problem that remains unresolved.\textsuperscript{153} 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.\textsuperscript{154}

For consumers, transparency is lacking.\textsuperscript{155} 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.\textsuperscript{156} For example, GM labeling is not required.\textsuperscript{157} Labeling terms such as “natural” are not regulated by the FDA.\textsuperscript{158} Additionally, the

\textsuperscript{152} Id.
\textsuperscript{157} 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.
\textsuperscript{158} 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\(^\text{159}\) and sometimes specifically restricted.\(^\text{160}\)

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.\(^\text{161}\) 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.\(^\text{162}\) It also is evidenced by the failure of federal animal welfare statutes to apply to farm animals raised for slaughter.\(^\text{163}\)

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.\(^\text{164}\) In addition to preservation concerns, there is continual competition between potential uses, both within and outside of agriculture.\(^\text{165}\) 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


\(^{162}\) Id.

\(^{163}\) 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.


and harvesting of crops must leave the land able to support comparable or greater, future yields.”

Agricultural production is a highly consumptive activity. The agricultural sector uses more natural resources, including land and water, than any other single industry. It is recognized as a major polluter of water and a significant source of global warming. 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.

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

166 Adelman & Barton, supra note 88, at 31.
169 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 (reporting that “[a]griculture is by far the biggest water user, accounting for more than 70% of global withdrawals”).
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.\textsuperscript{174}

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

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,\textsuperscript{178} 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.\textsuperscript{179} 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.\textsuperscript{180} This im-

\textsuperscript{174} Berry, supra note 35, at 29–30.

\textsuperscript{175} Ruhl, supra note 86, at 3 ( challanging the notion that society can rely on the farmers’ inherent stewardship for environmental protection).

\textsuperscript{176} 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.

\textsuperscript{177} Id. Professor Ruhl explains that:

\begin{quote}
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.
\end{quote}

\textsuperscript{178} Ruhl, supra note 6, at 267.

\textsuperscript{179} Id. at 274.

poses tremendous costs on society, costs that are not accurately reflected in the marketplace.\footnote{See id. at 10498–504.}

Environmental externalities must be recognized so that the cost of production can be accurately determined.\footnote{See DEPT FOR INT’L DEV., OVERSEAS DEV. INST., SUSTAINABLE AGRICULTURE 1 (2003), available at http://www.odi.org.uk/resources/download/2301.pdf.} Only when long-term environmental costs to society are recognized will there be adequate incentive for the problems to be efficiently addressed.\footnote{Id.} 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.\footnote{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).} The use of human resources in agriculture, the darkest side of agricultural exceptionalism, must be addressed.\footnote{Id.} 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.”\footnote{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).}

CONCLUSION

\textit{[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.}\footnote{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.}
America’s history includes a rich tradition of agricultural productivity, and we have all benefitted from it.\(^{188}\) 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.\(^{189}\) Appreciation is also expressed to those who promoted sustainable agriculture and a new agrarianism long before it was popular.\(^{190}\)

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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\(^{189}\) See, e.g., Pollan, Omnivore’s Dilemma, supra note 89.

\(^{190}\) See, e.g., Wendell Berry, The Unsettling of America: Culture & Agriculture (1977).