

# THOUGHTS ON AGRICULTURAL LAW AND THE ROLE OF THE AMERICAN AGRICULTURAL LAW ASSOCIATION\*

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When I first discovered “agricultural law” as a discipline, I was mid-way through law school. I signed up for an agricultural law survey course taught by Professor Gerald Torres, an enthusiastic new teacher at the University of Minnesota School of Law.<sup>1</sup> For our course materials, we used a photocopied draft of what would later become the MEYER, PEDERSON, THORSON AND DAVIDSON, AGRICULTURAL LAW casebook.<sup>2</sup> The Preface of that book defined “agricultural law”.

It is our view that agricultural law is not just a bit of contracts, a bit of torts, a bit of land use, a bit of commercial law, a bit of regulated industries, a bit of this and a bit of that. Rather, it is a complex and highly integrated field of law held together by certain broad themes. First, agricultural law reflects the critical role of land in the agricultural industry. Agriculture is the only industry where land is a predominant production input. Unlike other resources, land is neither mobile nor fungible. That unique legal rules and institutions have developed in response to the importance of land as an agricultural input should come as no surprise. Second, and perhaps more importantly, agricultural law reflects the fact that agriculture is the nation’s most highly regulated industry. Economic regulation of agriculture is, however, atypical. Normally, industries are regulated to thwart the exercise of monopoly power; in contrast, agriculture is regulated to mitigate against the harsh effects of competition. In part, this peculiar form of

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1. Professor Gerald Torres is now a professor at the University of Texas and the President of the American Association of Law Schools.

2. KEITH G. MEYER, DONALD B. PEDERSEN, NORMAN W. THORSON, & JOHN H. DAVIDSON, JR., AGRICULTURAL LAW: CASES AND MATERIALS (1985).

economic regulation is justified as necessary to maintain an adequate food supply. Political stability depends in large measure on stability in the agricultural sector, or so the argument goes. Finally, agricultural law reflects numerous and diverse efforts to directly regulate the structure of agriculture in ways that are foreign to any other industries. Efforts to protect and promote family size farms have deep historical roots, and constitute a separate and distinct policy theme that permeates agricultural law. Thus, agricultural law is the study of laws and institutions that have developed to reflect unique characteristics of agriculture, including the importance of land as a productive input, recognition that the agricultural output is of such social and political importance that normal roles of government in fostering competition are reversed in favor of policies that facilitate collusion and collective action, and historic social preference in favor of relatively small scale family farms.<sup>3</sup>

At that time, an extensive farm financial crisis was causing heartache on family farms throughout Minnesota, and I soon learned that this crisis spawned many hard fought legal battles.<sup>4</sup> In my Agricultural Law course, practicing attorneys came to the class as special visitors and told stories of these battles.

Jim Massey was one visitor, and at the time he was working for Mid-Minnesota Legal Assistance. He spoke of farmers who were losing their land and could not afford legal representation. He told us about his efforts to fund a non-profit law firm that would represent the interests of financially distressed family farmers. Within a short time, Jim's dream was realized when he founded the Farmers Legal Action Group, Inc.<sup>5</sup> with fellow legal services attorney, Lynn Hayes.<sup>6</sup>

Sarah Vogel visited the class. Sarah was the former Commissioner of Agriculture in North Dakota and the lead plaintiffs' counsel in *Coleman v. Block*, a national class action case which challenged USDA-FmHA foreclosure actions against farmer-borrowers.<sup>7</sup> She told the class about her clients in *Coleman* and

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3. *Id.* at xix-xx.

4. See generally NEIL E. HARL, *The Farm Debt Crisis of the 1980s*, in THE HENRY A. WALLACE SERIES ON AGRICULTURAL HISTORY AND RURAL STUDIES (Richard S. Kirkendall ed., 1990) (providing an analysis of the farm debt crisis of the 1980s, focusing on the events that led up to the crisis, the legal battles that evolved in the private and public sectors, and the lessons to be learned from this period in American agriculture).

5. Farmers Legal Action Group, Inc. (FLAG) is still functioning as a successful non-profit law firm in St. Paul, Minnesota, under new leadership and with a broadened mission of serving a variety of legal issues affecting family farmers. See FARMER'S LEGAL ACTION GROUP, INC., HISTORY & MISSION (2004), at <http://www.flaginc.org/flag/history.htm> (last visited Jan. 11, 2005).

6. Lynn Hayes continues to serve FLAG, Inc., as "of counsel", regularly consulting with FLAG staff. See FARMER'S LEGAL ACTION GROUP, INC., STAFF & BOARD (2004), at <http://www.flaginc.org/flag/staff.htm#Hayes> (last visited Jan. 11, 2005).

7. *Coleman v. Block*, 580 F. Supp. 194, 196-97 (D. N.D. 1984).

her work on their behalf. She obtained an injunction in *Coleman*, halting FmHA foreclosures and requiring FmHA to comply with their own procedures throughout the country.<sup>8</sup>

Phil Kunkel also visited the class. Phil was a partner in a small firm in Hastings, Minnesota; he had developed a regional agricultural law practice based on farm financial advisement.<sup>9</sup> Phil fascinated farm advocates and frustrated creditors and their attorneys with his creativity, and he helped farmers work out of their financial distress. As Chapter 12 had not yet been enacted, farmer options were limited, although Phil continually challenged those limits.<sup>10</sup> He talked

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8. *Id.* at 208. Two of Sarah's agricultural law colleagues, Martha Miller an attorney in Georgia, and Dale Reesman, an attorney in Missouri, cleared the way for *Coleman* in the cases of *Curry v. Block*, 541 F. Supp. 506 (S.D. Ga.1982) and *Allison v. Block*, 556 F. Supp. 400 (W.D. Mo. 1982). All three cases challenged the USDA's failure to effectively implement the loan deferral program found within the Consolidated Farm & Rural Development Act, Pub. L. No. 87-128, 75 Stat. 307 (codified as amended in scattered sections of 7 U.S.C.) ("the Act"). *Curry* was the first case in the series brought on behalf of farmers who were borrowing money from FmHA. The Court explained that while the FmHA loan program was created as a unique mixture of social welfare legislation as well as the government serving as a supplementary lender for high-credit risk farmers, in light of FmHA's major obligation to provide management assistance to farmer-borrowers and move them to a more positive financial position no longer requiring government agricultural credit, the predominate goal of the program was to serve as a form of social legislation. 541 F. Supp. at 512-14. Based on this analysis, the Court, in *Curry* and *Allison*, enjoined FmHA from foreclosing on loans until FmHA complied with the statutory framework of the Act. As a result, FmHA was charged with the following procedural steps in administering the loan program: providing farmer-borrowers notice of loan repayment deferral options, an opportunity for the farmer-borrowers to show they were eligible to take advantage of the loan payment deferral program, and FmHA was charged with then exercising the "discretion" in the Act, and reaching a determination of whether the borrower should be granted that loan repayment deferral. *Id.* at 509-21; *Allison*, 556 F. Supp. at 403-06. By the time of *Coleman*, FmHA had enacted a review procedure pursuant to the Act. The Court, continuing with the same manner of analysis in *Curry* and *Allison*, again held that a farmer-lender was entitled to receive notice of the loan deferral options, an opportunity to show they were eligible to defer their loan repayment, as well as a decision by FmHA on the loan deferral possibility. 580 F. Supp. at 208. Vogel was able to gain further ground for farmer-borrowers in *Coleman*, as the Court further ruled that the FmHA was now required to complete their decision-making process *before* any action could be taken to liquidate or accelerate loan repayment. *Id.* (emphasis added).

9. Phil practiced with the firm of Moratzka, Dillon & Kunkel. He now is a principal in the law firm Gray Plant Mooty, and he concentrates his practice in commercial financing and bankruptcy, and agricultural and agri-business financing. Phil continues to stay with the leading edge of agricultural law, as he is the current chair of the Agricultural and Agri-Business Financing Subcommittee of the ABA. See GRAY, PLANT, MOODY, PEOPLE, PHILLIP L. KUNKEL, at [http://www.gpmlaw.com/law/page\\_79\\_446.htm](http://www.gpmlaw.com/law/page_79_446.htm) (last visited Jan. 11, 2005).

10. See e.g., Phillip L. Kunkel, *Farmers' Relief Under the Bankruptcy Code: Preserving the Farmers' Property*, 29 S.D. L. REV. 303 (1984) (highlighting certain sections of the Bankruptcy Code, "as they relate to the ability of a debtor...attempting to rearrange his business affairs...to preserve his farming operation, to avoid certain transfers...[as well as] ways in which the

about the farm clients he had that would drive all day to get to his office for an appointment and then drive all the way home in order to get back to the farm work waiting them.

These three individual attorneys put a face on the practice of agricultural law for me. While the face shown was that of an attorney representing a financially distressed farmer, the full picture was much broader. It was that of an attorney doing work that was important, work that was both intellectually challenging and rewarding. The issues were complex, and they touched the lives of those in the farming community.

Professor Torres told our class about a new organization called the American Agricultural Law Association that was devoted to the study of these complex issues. This organization brought together diverse individuals based upon their interest in agricultural law. It provided a forum for discussing cutting edge issues. Because many of these issues were emotionally charged and potentially very divisive, the association was careful not to advocate; rather, it sought to provide an opportunity for respectful discussion and open education.

The AALA's official formation had been at the University of Minnesota School of Law several years earlier. In December 1980 at a seminar on agriculture and the law, "[f]orty-five lawyers, law professors, law students, extension farm management specialists, agricultural economics professors, government officials, bankers and accountants from eighteen states and Washington, D.C., ratified the articles of incorporation and the bylaws of the organization."<sup>11</sup>

One unusual but critical characteristic of the new association was its appeal to both academics and practitioners. It is reported that some questioned whether the association would be successful in this regard.<sup>12</sup> In fact, one early report notes that "[s]ome members expressed their reservations that a single organization could not serve the needs of both the practicing attorney and the academic professor. Members of each group indicated that they anticipated differences in emphasis but thought that the organization would help eliminate the

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Bankruptcy Code may be enforced by the farm debtor so as to provide himself with the greatest opportunity for the "fresh start" contemplated by the Code." *Id.* at 332); *see also* Phillip L. Kunkel, *The Fox Takes Over the Chicken House: Creditor Interference with Farm Management*, 60 N.D. L. REV. 445 (1984) (proposing the idea that an agricultural loan agreement may be sufficient to characterize the lender as an insider within then-Section 547 of the Bankruptcy Code, and thus, if the lender used its powers pursuant to the loan agreement to adversely affect the farm-debtor, the lender could face liability for taking advantage of the farmer-debtor. *Id.* at 471-77, 487).

11. Leo P. Martin, *Agricultural Law Association Forms at Law School; Discusses Taxes, Financing, Zoning, Conservation*, QUAERE: UNIV. OF MINN. LAW SCHOOL NEWSPAPER, Jan. 1981, at 1.

12. *See Id.*

disparity between academic ideas and practice.”<sup>13</sup> As a law student, I was hungry for this merger of my law school studies with the realities of practice, and I enthusiastically joined the AALA. I have been a member ever since, and it was my honor to serve as President of the AALA during this past year.

Over time, there have been significant changes in the legal landscape of agricultural law. While financial issues are still extremely important, the landscape is obviously different in the respect that the farm financial crisis of the 1980s is long gone, and debtor-creditor issues no longer predominate agricultural law discussions. While we have lost the focus of one over-arching concern, in its place is an expanding web of new issues. For example, the 2004 AALA Annual Educational Symposium and Annual Meeting offered twenty different sessions, with over forty different speakers.<sup>14</sup> Topics included the traditional subjects such as an Update on Farm Bankruptcy, Farmland Preservation, Estate and Business Planning, and Uniform Commercial Code Issues.<sup>15</sup> Also included, however, were a wide range of topics that were not anticipated when the AALA was formed: Farmers and the False Claims Act, Alternative Dispute Resolution in Agriculture, Strategies in Defending Agricultural Product Liability Claims, European Rules regarding Genetically Modified Organisms, Food Traceability, and Environmental Management Systems.<sup>16</sup>

The broad themes that define agricultural law—the critical role of the land, agriculture as the most heavily-regulated industry, and the structural efforts to support family-sized farms<sup>17</sup>—still remain. But, affecting these themes are new questions. Should large industrialized farms reap the benefits developed for family-sized farms? How should the environmental consequences of intensive farming be regulated? What are our expectations regarding the food we eat? What role should new biological technologies play in American agriculture? How does American agriculture fit into a global economy?

Nevertheless, some things have remained the same. Agricultural law continues to involve complex and intriguing legal issues. And, it continues to involve emotional controversies, hard fought legal battles, and creative lawyering. Reflecting this, the members of the AALA continue to be diverse in their perspectives. The AALA continues to be an organization that, primarily through its annual conference, brings together people who might otherwise never have an opportunity to interact. Over two hundred attended the 2004 Annual Symposium

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13. *Id.*

14. AM. AGRIC. LAW ASS'N, 2004 ANNUAL AGRICULTURAL LAW SYMPOSIUM AND ANNUAL MEETING HANDBOOK, SCHEDULE OF EVENTS (2004).

15. *Id.*

16. *Id.*

17. *See* MEYER ET AL., *supra* note 3.

and Annual Meeting.<sup>18</sup> Those in attendance were academics and practicing attorneys; seasoned professionals and students; attorneys from big law firms in large metropolitan areas and solo practitioners from small rural communities; government lawyers and the attorneys who battle with them; general counsel with agribusiness and individual farmers whose law license is a way to keep the farm going.<sup>19</sup>

Over the years, I have come to appreciate the unique opportunity provided by membership in the AALA. It is an opportunity for learning, an opportunity for exploring and debating tough issues, and it is an opportunity for better understanding to celebrate the complexities that make up agricultural law today.

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18. AM. AGRIC. LAW ASSOCIATION, 2004 ANNUAL AGRICULTURAL LAW SYMPOSIUM AND ANNUAL MEETING HANDBOOK, LIST OF ATTENDEES (2004).

19. *Id.*