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## **Divergent Views on Agriculture in American Law and Society**

by

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## AGRICULTURAL LAND: A FORGOTTEN NATURAL RESOURCE

### INTRODUCTION: DIVERGENT VIEWS ON AGRICULTURE IN AMERICAN LAW AND SOCIETY

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This introductory talk is somewhat the equivalent of an overture to an opera. There are several purposes for an overture. First it sets a general mood for the rest of performance. Second, it may state important themes that will reoccur throughout the performance. We all know, however, that the real reason for an overture or an introduction is to ensure that people who come in late will not miss anything important.

One may look at agriculture from a number of different views.<sup>1</sup> I imagine with this audience the appropriate way of looking at agriculture is as a business. Much of agricultural law does indeed

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I would like to express extreme personal pleasure in seeing Gonzaga Law Review co-sponsor this symposium. My interest in Agricultural Law arose from my own work on the South Dakota Law Review, where I contributed articles to the agricultural symposium issues of Volumes 21 and 23, and edited the symposium issue for Volume 22. It is most gratifying that agricultural law continues to receive the nation-wide scholarly attention that it merits.

1. See generally, J. DAVIDSON, AGRICULTURAL LAW (1981 & Supp. 1982); N. HARL, AGRICULTURAL LAW (1980 & Supp. 1984); J. JUERGENSMEYER & J. WADLEY, AGRICULTURAL LAW (1982).

concentrate on income related issues. So, for instance, there is much to be said legally about the formation of agricultural cooperatives, farm and equipment leases, futures trading and commodities exchanges. Bankruptcy and other credit issues are particularly important in agriculture these days,<sup>2</sup> not only concerning farmers and ranchers, but of course, respecting grain elevators as well. We have in our program today two speakers who predominately focus on what I call the "business related aspects" of agriculture. Dr. Neil Harl will be talking about "debtor distress", and Professor Keith Meyers will address issues involving agricultural financing under the Uniform Commercial Code.

As one looks at the commercial potential of agriculture, however, much of the focus is on more than the individuals engaged in commercial enterprises. Recently there has been quite a floodlight trained on agriculture as a subject of international trade.<sup>3</sup> For example, when there are Soviet grain sales, there is always wide press coverage. This afternoon agricultural trade issues will be addressed. Another current issue with international implications for agriculture is the controversy in Congress regarding immigration legislation. Migrant farm workers, of course, would be significantly and directly affected, but there are also clearly foreign policy implications, particularly with our neighbor, Mexico.<sup>4</sup>

Even though the international aspects of agricultural trade have recently come into the spotlight, over the years it generally has been domestic agricultural policies that have been of greater national concern.<sup>5</sup> In the area of agricultural policy one can simply

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2. See e.g., *Agricultural Law-Debtor/Creditor Relations Symposium*, 60 N.D. L. REV. 387-583 (1984).

A debate raged throughout the winter of 1985 over the wisdom of enacting federal farm credit relief. Several credit measures were attached to H.R. 1096, 99th Cong., 1st Sess. (1985), which was passed by both the House and Senate, but vetoed by President Reagan on March 6, 1985. The debate appeared guaranteed to continue throughout the year.

3. See, e.g., McGivern, *International Letters of Credit and Their Use in Agricultural Export Situations*, 37 ARK. L. REV. 217 (1984); Rom, *Export Controls in GATT*, 18 J. WORLD TRADE L. 125 (1984); Comment, *United States/Common Market Agricultural Trade and the GATT Framework*, 5 NW. J. INT'L L. & BUS. 326 (1983).

4. The most controversial of the immigration bills was H.R. 1510, 98th Cong., 2d Sess. (1984), the "Simpson Mazzoli" bill. The bill was passed by the House. A similar bill, S. 529, 98th Cong. 1st Sess. (1983), had been passed by the Senate, but major differences could not be ironed out, and the bills died in the conference committee.

5. The first major piece of domestic agricultural legislation, the Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31, was held unconstitutional in *United States v. Butler*,

drop various words into a conversation and provoke sharply divergent reactions. For example, "What do you think of parity?" or "Is there an appropriate role for agricultural subsidies?" In the right crowd, these can start quite a lively discussion. Even some federal programs that are ordinarily thought of as predominately "welfare" programs had their genesis in agriculture production policies. For instance, the food stamp program and the hot lunch program for schools really were initiated as agricultural policies.<sup>6</sup> I could probably spend the rest of my time enumerating all the federal agricultural programs and multiple federal agencies that are involved in agriculture—giving you an alphabet soup: Farmers Home Administration, United States Department of Agriculture, the Agricultural Stabilization and Conservation Service, and on and on. But I do not need to expand upon federal programs, because former Secretary of Agriculture Earl Butz's remarks will focus on the question of governmental involvement in agriculture.

Whether one considers agriculture in a predominately business or commercial sense or as a subject of national policy, the debates are complicated by the need to account for the "human" factor, or the view of agriculture in the United States as a "way of life." This was brought most forcibly to my attention in my first appearance before an appellate court. The case was a UCC controversy between a farmer and a grain elevator, which I represented. I lived with the UCC for weeks before the appeal, and as I rose before the bench I thought, "You are prepared for any possible question they can throw at you." After I was able to answer a few technical questions, I was finally relaxing and becoming confident, arguing strenuously for the grain elevator when one of the judges cleared his throat, and said: "Excuse me Counselor, but you're not much of a farmer, are you?" At which point I thought, "Don't bother opening the door, I'll just crawl right underneath it." I did ultimately pre-

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297 U.S. 1 (1936). In the landmark decision of *Wickard v. Filburn*, 317 U.S. 111 (1942), however, the Supreme Court relinquished its hostility to agricultural controls, and agriculture has since been regulated heavily.

Significant recent general articles on national agricultural policy include Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333 (1983); Rasmussen, *New Deal Agricultural Policies After Fifty Years*, 68 MINN. L. REV. 353 (1983); Wadley, *The Future of Government Regulation of Agriculture: Biting the Hand That Feeds Us?* 3 N. ILL. U. L. REV. 299 (1983).

6. Rasmussen, *supra* note 5 at 372-74.

vail on the appeal, but it brought forcibly to my attention that one does not merely deal with law, one deals with people. Rather persistently, in the United States there is a view of agriculture as a people business, with specific emphasis on the family farm.<sup>7</sup>

One can see the "human factor" of farming reflected in a number of federal laws. One of the most commented upon federal laws which exemplifies this is the revision of the estate tax.<sup>8</sup> Under Section 2032(a) of the Internal Revenue Code, there is a provision for special use valuation of certain farm property which allows it to be evaluated at less than it ordinarily would be. Furthermore, I.R.C. § 6166 allows for installment payments of taxes, if there is tax liability, over some 15 years. Quite consciously, these laws were designed to prevent the breakup of farm holdings upon the death of the holder. They were not specifically limited to use in the context of farms, but are most widely used in that area.

Other federal laws were clearly designed with the family farm in mind. The federal reclamation law recently was revised<sup>9</sup> to change the old 160 acre limitation<sup>10</sup> on the delivery of water from federal reclamation projects in the western states. The change was based on the realization that 160 acres may be an unrealistically low number of acres to give an individual operator. The acreage limitation on water delivery was not abolished however. It was

7. Perhaps the most powerful depiction of the dignity and stamina of the family farmer was Ole Rolvaag's portrayal of Per Hansa in *GIANTS IN THE EARTH* (1924-1925); while Nobel Prizewinner John Steinbeck captured the tragedy of the displaced farm family in *THE GRAPES OF WRATH* (1939). Several generations of American children have warmly embraced the Ingalls' family from the *LITTLE HOUSE* series by Laura Ingalls Wilder. And the popular mystique of the gallant small farmer still survives, evidenced by the trio of successful 1984 movies, *COUNTRY*, *THE RIVER*, and *PLACES IN THE HEART*.

A useful recent study of the family farm was made by the ECONOMIC RESEARCH SERVICE, USDA, SENATE COMM. ON AGRICULTURE, NUTRITION & FORESTRY, 97TH CONG. 1ST SESS., *STATUS OF THE FAMILY FARM: FARM ORGANIZATION AND PERFORMANCE IN THE 1970's* (Comm. Print 1982).

8. See, e.g., Becker, *Decedent's Rental of Real Estate: Application of Internal Revenue Code Sections 2032A and 6166*, 33 *DRAKE L. REV.* 371 (1983); Harl, *The Future of Government Regulation of Agriculture: Implications of Tax Policy for Agriculture*, 3 *N. ILL. U. L. REV.* 279 (1983); Note, *Taxation: Valuation of Farmland for Estate Tax Purposes, Qualifying for I.R.C. § 2032A Special Use Valuation*, 23 *WASHBURN L.J.* 638 (1984).

9. Reclamation Reform Act of 1982, 43 U.S.C. §§ 3390aa-zz1 (1982). The new law generally limits water deliveries to 960 acres of Class I land. *Id.* § 390dd.

10. Section 5 of The Reclamation Act of 1902, ch. 1093, 32 Stat. 388, codified *id.* at § 431. The premier authority on the acreage limitation, or "excess lands" laws is Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 *YALE L.J.* 477 (1955).

raised to meet the presumption of what a farm unit might be in the 1980's.

There are also numerous state laws designed to promote the "family farm", sometimes referred to as anti-corporate farm measures. Most of these were enacted by the state legislatures, but occasionally there has been such a popular sentiment in favor of such an act that if the legislature did not act on its own, the law was passed by initiative, as was recently done in the State of Nebraska.<sup>11</sup>

Although I think it is fairly common to say that the family farm is in decline, I am of the conviction that the family farm is going to continue to be an abiding, albeit somewhat diminished, tradition in American law and politics. Agricultural population is down proportionately from about 25% of the population of the 1930's, to only about 2-½ to 3% of the population currently,<sup>12</sup> however that is still some 6 to 7 million people. The average farm size has increased in the same time from 150 acres to over 400 acres. As the various statutory rescue measures indicate, the concepts of the family farm are still with us. I don't think we will see it disappear, I simply think we will see a substantial redefinition of what it means.

After one considers the human resource of agriculture, the next step is to emphasize the natural resource aspect, which is the primary thrust of this program: "Agricultural Lands, a Forgotten Natural Resource." There are many resource issues in agricultural law. One can start with environmental regulations and problems in the use of agriculture land,<sup>13</sup> such as the use of pesticides, herbi-

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11. Initiative 300, NEB. CONST. ART. XII, § 8, cl. 1. This law provoked a great amount of controversy over the constitutionality of anti-corporate farming measures. See Brown, *Constitutionality of Nebraska's Initiative Measure Prohibiting Corporate Farming and Ranching*, 17 CREIGHTON L. REV. 233 (1983-84) and Lake, *CONSTITUTIONALITY OF "INITIATIVE 300": AN ANSWER*, 17 CREIGHTON L. REV. 261 (1983-84); Colton, *Old McDonald (Inc.) Has a Farm . . . Maybe, or Nebraska's Corporate Farm Ban: Is it Constitutional?* 6 U. ARK. LITTLE ROCK L.J. 247 (1983); Note, *An Equal Protection Analysis of the Classifications in Initiative 300: The Family Farm Amendment to the Constitution of the State of Nebraska*, 62 NEB. L. REV. 770 (1983).

12. Economic Report of the President 271 (1983); Bureau of the Census, U.S. Dep't of Commerce & Economic Research Service, USDA, Series P-27, No. 55, *Current Population Reports, Farm Population of the United States: 1981*. 1 (1982).

13. See, e.g., Keene, *Managing Agricultural Pollution*, 11 *ECOLOGY L.Q.* 135 (1983), and materials cited therein.

cides, and fertilizers, soil erosion, salinization from irrigation, and the conversion of wetlands. One can look at the farm as a toxic workplace and see how that would or should be regulated by federal law.<sup>14</sup> In Spokane itself, these types of environmental concerns arise each summer when it is time to burn off the fields. There is definitely controversy over whether it should be done or whether the pollution problems are so serious that it should be prohibited.

Another resource related issue in agriculture focuses on the way the use of the surface relates to other more traditionally defined natural resources. For instance, at the First Annual Natural Resources Institute Program at Gonzaga University, several years ago, there was a presentation on controversies between the surface farming or ranching owner and the mineral or oil and gas operator. Today we have a presentation on the program that addresses this inter-relation of the agricultural land and other resources. Mr. Stephen Shupe will be addressing water law issues that arise in the context of agriculture.

Finally, one can look at the agricultural land itself as the natural resource.<sup>15</sup> A number of our speakers today will address this issue. Professors Juergensmeyer and Wadley are going to suggest some very provocative approaches to this question of preservation of agricultural lands. Professor George Coggins will talk about issues that arise from the use of ranch land, a special type of agricultural land.

This introduction was supposed to say that there are a number of different ways of looking at agriculture and the law that deals with it. I think the conclusion that I drew while working on the presentation that is most important personally and perhaps for the purposes of this conference, is that although I entitled the presentation "Divergent Views on Agriculture in American Law and Society", it really boils down to a case of "Convergent Views." It is part of the purpose of this program to promote this conver-

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14. Comment, *The Toxic Workplace of the Child Farmworker*, 32 BUFFALO L. REV. 343 (1983).

15. See, e.g., Duncan, *Toward a Theory of Broad-based Planning for the Preservation of Agricultural Land*, 23 NAT. RESOURCES J. 61 (1983); Hand, *Right to Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289 (1983); Rose, *Farmland Preservation Policy and Programs*, 24 NAT. RESOURCES J. 591 (1984); Torres, *Helping Farmers and Saving Farmland*, 37 OKLA. L. REV. 31 (1984).

gent view; the idea of taking very diverse ways of looking at agriculture and bringing them together so that we are better able to manage all the resources, human, natural, and legal in a productive way.