

## Food Systems Law from Farm to Fork and Beyond

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## ABSTRACT

In urging “responsible eating,” food writer Wendell Berry once wrote, “I begin with the proposition that eating is an agricultural act.”<sup>1</sup> Yet the legal world has long treated food and agriculture as separate spheres. Food law in the United States has traditionally been viewed as the area of law related to the development and marketing of final food products, while agricultural law has been viewed as the area of law relevant to farmers and rangers, agri-businesses, and food processing and marketing firms. But more recently, both policymakers and scholars have been taking a more systems-oriented approach to food regulation through the reframing of food and agricultural law into a broader food systems<sup>2</sup> law. In particular, a number of legal scholars working in these areas have begun merging the fields of food law and agricultural law—as well as components of other fields of law—into something perhaps greater than the sum of its parts: a field of law that examines food systems as an interactive whole, rather than as individual components of the farm-to-fork process.<sup>3</sup>

This Article is the first of a two-part project. This part explores trends in agricultural and food law scholarship to argue that a nascent integrated approach, one that is more systems-oriented, is developing within current legal scholarship. The Article begins by providing some

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<sup>1</sup> Wendell Berry, *The Pleasures of Eating*, in *COOKING, EATING, THINKING, TRANSFORMATIVE PHILOSOPHIES OF FOOD* 374 (Deane W. Curtin & Lisa M. Heldke eds., 1992).

<sup>2</sup> A broad definition of food systems is “the interactions between and within biogeophysical and human environments, which determine a set of activities; the activities themselves (from production through to consumption); [and] outcomes of the activities (contributions to food security, environmental security, and social welfare).” Polly J. Ericksen, *Conceptualizing Food Systems for Global Environmental Change Research*, 18 *GLOBAL ENVTL. CHANGE* 234, 234 (2008). A food systems approach, in turn, has been defined as “the integrative study of the ecology of the entire food system, encompassing ecological, economic and social dimensions,” or more simply, the ecology of food systems. C. Francis & et al., *Agroecology: The Ecology of Food Systems*, 22 (3) *J. SUSTAIN. AGR.* 99 (2003). This Article uses the term “food systems law” in describing the emerging, more integrated approach to food and agriculture. Others, however, including some colleagues with an article regarding this emerging area of law, use the term “food law and policy.” See Baylen J. Linnekin & Emily M. Broad Leib, *Food Law & Policy: The Fertile Field’s Origins and First Decade*, 2014 *WIS. L. REV.* 557 (2014). In many ways, we are using different, albeit similar, language to describe the same phenomenon. Thus, I want to emphasize that the focus of this Article is more on the development of this integrated approach, rather than the choice of a particular term, *cf. id.* at 559 (referring to agricultural law and food law as not “adequately cover[ing] many of the legal issues that currently impact our food system”), although I will argue *infra* Part IV for some of the normative benefits of using a systems approach.

<sup>3</sup> See, e.g., Dan Farber, *The Emergence of Food Law*, *LEGAL PLANET* (May 26, 2013), <http://legal-planet.org/2013/05/26/the-emergence-of-food-law/>.

broader context on systems-oriented approaches to understanding food, drawing from food policy and environmental policy literature. It next briefly describes the different origins and coverage of early agricultural law and food law,<sup>4</sup> situating the distinct historical and theoretical foundations of agricultural law and food law into the broader literature of legal taxonomy. It then illustrates developing trends in scholarly articles, legal casebooks, and other law school institutional coverage to suggest the convergence of these two areas into a broader, more systems-oriented approach. Finally, the Article highlights distinctive features that might arise out of a more deliberate development of systems-oriented approach in this legal field. It argues that such an approach may provide insights into other cross-cutting areas of legal scholarship that the separated areas of food law and agricultural law cannot provide. In doing so, this Article lays the groundwork for the next part of this project, which presents case studies to provide a more complete analysis of the benefits that would arise from such an approach and uses systems theory to develop important considerations for the deliberate cultivation of food systems law as a field of law.

### I. THE TERRAIN OF FOOD SYSTEMS

To many modern eaters, the worlds of agriculture and food appear detached from each other.<sup>5</sup> In an essay that inspired Michael Pollan,<sup>6</sup> Wendell Berry described this separation as one where people “think of food as an agricultural product, perhaps, but . . . do not think of themselves as participants in agriculture. They think of themselves

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<sup>4</sup> In doing so, this Article references an article by another set of authors that provides a much more thorough analysis of the history of these two separate fields. See Linnekin & Broad Leib, *supra* note 2. Both articles were written in loose coordination with each other, and my hope is that further coordination in terms of cross-references can occur during any publication process.

<sup>5</sup> See Mihály Vörös & Masahiko Gemma, *Intelligent Agrifood Chains and Networks: Current Status, Future Trends, and Real-Life Cases from Japan*, in INTELLIGENT AGRIFOOD CHAINS AND NETWORKS 227, 227 (Michael Bourlakis et al. eds., 2011) (“[U]rbanisation has . . . separated city people from knowing where, how and by whom the materials for their food are produced, grown and processed.”); A. Bryan Endres & Nicholas R. Johnson, *Integrating Stakeholder Roles In Food Production, Marketing, and Safety Systems: An Evolving Multi-Jurisdictional Approach*, 26 J. ENVTL. L. & LITIG. 29, 31 (2011) (“On the demand side of this agricultural supply chain, a disconnect emerged in the latter half of the twentieth century between the consumer and farmer.”).

<sup>6</sup> See also Joe Fassler, *The Wendell Berry Sentence That Inspired Michael Pollan’s Food Obsession*, THE ATLANTIC (Apr. 23, 2013, 10:40 AM), <http://www.theatlantic.com/entertainment/archive/2013/04/the-wendell-berry-sentence-that-inspired-michael-pollans-food-obsession/275209/>.

as ‘consumers.’”<sup>7</sup>

Yet food and agricultural policy scholars who attempt to tackle problems related to one aspect of either agriculture or food consumption often find that these areas are inextricably intertwined.<sup>8</sup> For example, one group of scholars has observed that piecemeal approaches to understanding food-related problems led to numerous missteps in assessing and addressing the Niger food security crisis.<sup>9</sup> According to this account, “international early warning systems are more focused on production shortfalls from weather anomalies than on tracking market signals,” and policymakers failed to adequately consider “the role that grain markets in Nigeria play in both affordability and availability of staple grains in Niger.”<sup>10</sup> Based on this, and other examples, the group’s suggestion is that a more comprehensive approach would “contribute to understanding the multiple ways in which food systems interact with global environmental change, and the consequences of these interactions for food

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<sup>7</sup> Berry, *supra* note 1, at 374.

<sup>8</sup> See, e.g., Polly Ericksen et al., *The Value of a Food System Approach*, in FOOD SECURITY AND GLOBAL ENVIRONMENTAL CHANGE 25 (John Ingram et al. eds., 2010) (arguing that a systems-oriented approach would aid in addressing food security problems without compromising environmental and social welfare problems), available at [http://www.gecafs.org/publications/Publications/Food\\_Security\\_and\\_Global\\_Environmental\\_Change.pdf](http://www.gecafs.org/publications/Publications/Food_Security_and_Global_Environmental_Change.pdf); A. Wezel & C. David, *Agroecology and the Food System*, in AGROECOLOGY AND STRATEGIES FOR CLIMATE CHANGE 17 (Eric Lichtfouse ed., 2012) (describing research questions regarding water quality as necessitating inquiries into fish production, agricultural use of surrounding land, and local fish products and marketing strategies); John Ingram, *A Food Systems Approach to Researching Food Security and Its Interactions with Global Environmental Change*, 3 FOOD SEC. J. 417 (2011) (arguing that a systems-oriented approach is necessary for understanding food security issues); cf. Polly J. Ericksen, *Conceptualizing Food Systems for Global Environmental Change Research*, 18 GLOBAL ENVTL CHANGE 234 (2008) (providing a framework for understanding the multiple interactions of food systems, as broadly defined); Jean D. Kinsey, *The New Food Economy: Consumers, Farms, Pharms, and Science*, 83 AM. J. AGR. ECON. 1113, 1113 (2001) (arguing that in light of the complexity of modern day food production, an expansion of “the size of the envelope that contains ‘agriculture’” would open up “vast reservoirs of research challenges and educational opportunities, as well as new partners with whom to work”). Cf. Linnekin & Broad Leib, *supra* note 2, at 557, 560 (“Much of the conversation about food outside of law schools—embedded in fields as wide-ranging as public health, behavioral economics, and urban planning—focuses on diverse issues that range from obesity to food trucks and on policies like sustainability and localization.”).

<sup>9</sup> See Ericksen et al., *supra* note 8, at 26 (citing E. Clay, *The Niger Food Crisis: How Has This Happened? What Should Be Done to Prevent a Recurrence?* (ODI Opinions 2005), available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/730.pdf>).

<sup>10</sup> See Ericksen et al., *supra* note 8, at 26 (citing J.C. Aker, *How Can We Avoid Another Food Crisis in Niger?* (Center for Global Development 2008)).

security.”<sup>11</sup>

Similarly, another set of scholars recognized that even addressing a more limited problem, such as the agricultural impacts on a particular shallow lake ecosystem, requires a broader look at the entire agro-food system.<sup>12</sup> In a case study, these scholars showed how, although initially it was ecologists who initiated the research on the lake ecosystem, the scholars soon realized that a number of other elements of the food system needed to be examined (often, using other disciplines) in order to develop tools for addressing the ecosystem problems at issue.<sup>13</sup> Such inquiries included addressing the use of fertilizers and pesticides in the neighboring area,<sup>14</sup> the management practices of farmers and fishers, the relevant regional, national, and supranational regulations, as well as the marketing landscape for the fish raised in that ecosystem.<sup>15</sup>

The importance of understanding interconnectivities arises in the climate change context as well. Climate change arises not from one single aspect of the food system, but from many stages, ranging from fertilizer manufacture to agriculture, to processing, to refrigeration and transport.<sup>16</sup> Likewise, climate change can impact not only agricultural production,<sup>17</sup> but also reliability of delivery and food quality and safety.<sup>18</sup> All of these elements, in turn, are affected not only by demand-side drivers such as population growth and consumption patterns, but also by changing institutional and social processes such as trade liberalization, food company transnationalization, and food industry marketing.<sup>19</sup> Accordingly, scholars have found it necessary “to draw attention to wider issues of food systems beyond food production, to highlight the distribution of climate-related impacts on food

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<sup>11</sup> See Ericksen et al., *supra* note 8, at 27.

<sup>12</sup> See Wezel & David, *supra* note 8, at 22.

<sup>13</sup> See Wezel & David, *supra* note 8, at 22.

<sup>14</sup> See Wezel & David, *supra* note 8, at 22. (citing D. Vallod et al., *Etude des facteurs de transfert des produits phytosanitaires vers des étangs piscicoles en Dombes, zone humide continentale associant prairies et cultures*, 193 FOURRAGES 51 (2008)).

<sup>15</sup> See Wezel & David, *supra* note 8, at 23.

<sup>16</sup> Compare Sonja J. Vermeulen et al., *Climate Change and Food Systems*, 37 ANN. REV. ENVTL. & RES. 195, 198 (2012) (reviewing studies of impacts from all parts of the food system), with Annise Maguire, *Shifting the Paradigm: Broadening Our Understanding of Agriculture and Its Impact on Climate Change*, 33 ENVIRONS: ENVTL. L. & POL’Y J. 275, 289–97 (2010) (focusing on agricultural impacts on climate change).

<sup>17</sup> See Pete Smith & Peter J. Gregory, *Climate Change and Sustainable Food Production*, 72 PROC. NUTRITION SOC’Y 21, 24 (2012).

<sup>18</sup> See Vermeulen, *supra* note 16, at 202.

<sup>19</sup> See Vermeulen, *supra* note 16, at 197.

security across sectors of global society,”<sup>20</sup> and to address “[c]oordinated actions . . . required for climate change adaptation and mitigation in food systems.”<sup>21</sup>

Why, then, have earlier analytical accounts of these areas—agriculture and food consumption—treated them as so distinct? Although some of these changes can be attributed to intellectual developments in understanding the various interactions within the food system as well as greater awareness of attenuated chains of causation,<sup>22</sup> much of it may also arise from both the potential for richer analysis of a systems-oriented approach as well as the changed nature of “modern” food systems themselves. “[H]olistic frameworks are useful because they help to identify the full range of interactions, as well as provide an organizing framework to understand change.”<sup>23</sup> These need not be unmanageable; observed patterns of interactions—albeit complex—can be simplified using different typologies to embody those interactions.<sup>24</sup> Instead, scholars have suggested that use of more holistic frameworks may allow observers to “move beyond assumptions that may mask what is actually going on, especially cause and effect,”<sup>25</sup> assumptions that might arise from looking at only one aspect of the food system.

“Modern” food systems also present greater interconnectivities than “traditional” food systems, providing additional reasons to take a systems-oriented approach towards analysis.<sup>26</sup> Modern food systems have been described as “a kaleidoscope of foods, firms, consumers, countries, contracts, and agreements that provide us with a dizzying vision of moving targets.”<sup>27</sup> For example, as compared to traditional food systems— which tend to have shorter, more localized supply chains—modern food systems tend to have longer supply chains with many food miles and nodes.<sup>28</sup> Moreover, modern food systems exhibit an increase in resources expended in post-production activities;

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<sup>20</sup> See Vermeulen, *supra* note 16, at 196.

<sup>21</sup> See Vermeulen, *supra* note 16, at 208.

<sup>22</sup> See Wezel & David, *supra* note 8, at 18–19 (providing a discussion of changing approaches towards agrofood systems within the discipline of agroecology).

<sup>23</sup> Ericksen et al., *supra* note 8, at 37 (citation omitted).

<sup>24</sup> Ericksen et al., *supra* note 8, at 37.

<sup>25</sup> Ericksen et al., *supra* note 8, at 38.

<sup>26</sup> Ericksen et al., *supra* note 8, at 26 (describing how agriculture is no longer the primary income generating activity in the food supply chain in developed countries, but instead such primary activities include processing, packaging, distribution, and retailing activities).

<sup>27</sup> See Kinsey, *supra* note 8, at 1113.

<sup>28</sup> See Ericksen, *supra* note 2, at 235, tbl. 1.

“[f]arming is no longer the dominant economic activity in the overall food system. As [post-production] activities have increased, corporate concentration up and down the food supply chain . . . has as well.”<sup>29</sup> Finally, modern agriculture has moved towards larger farm sizes with globally hired labor,<sup>30</sup> bringing into play more complex labor issues than traditional agriculture. Indeed, “[a] predominant feature of 21<sup>st</sup>-century food systems is that they are inherently cross-level and cross-scale.”<sup>31</sup>

This is not to say that similar interconnectivities were absent in more “traditional” food systems.<sup>32</sup> For example, global trade in traditional food components such as sugar,<sup>33</sup> salt,<sup>34</sup> and spices<sup>35</sup> has long existed, and comprised complex international relationships between producers, processors, and transporters. Instead, any differences between more modern food systems and traditional food systems may arise more from differences in degree and pervasiveness of interconnectivity between the two systems. Moreover, increasing attention to these differences may arise more from increasing awareness of these connections on the part of academic and policy communities.

Indeed, the fact that the changes described above are not uniform for all food sectors or in all regions further complicates the analysis of food-related issues in the context of modern food systems.<sup>36</sup> That is, even in modern food systems, different geographies and subsectors vary with respect to degrees of interconnectedness.<sup>37</sup> Thus, scientific, economic, and policy analysts have increasingly found it necessary to take not only a systems-oriented approach, but also one that is both

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<sup>29</sup> See Ericksen, *supra* note 2, at 236 (citation omitted).

<sup>30</sup> See Ericksen, *supra* note 2, at 235–36.

<sup>31</sup> Ericksen et al., *supra* note 8, at 31.

<sup>32</sup> See, e.g., SIDNEY W. MINTZ, SWEETNESS AND POWER: THE PLACE OF SUGAR IN MODERN HISTORY (1986) (describing a long history of globalized markets in sugar).

<sup>33</sup> *Id.*

<sup>34</sup> See MARK KURLANSKY, SALT: A WORLD HISTORY (2003).

<sup>35</sup> See JOHN KEAY & MAREI PITTNER, THE SPICE ROUTE: A HISTORY (2007).

<sup>36</sup> See Vermeulen et al., *supra* note 16, at 197 (“Broadly speaking, there is no global food system but rather a set of partially linked supply chains for specific products, sometimes global in extent (e.g., soy protein) and sometimes more local (e.g., cassava and other staple food crops in much of the world.”).

<sup>37</sup> *Cf.* Vermeulen et al., *supra* note 16, at 198 (“In high-income countries, the postproduction stages tend to have a greater role [in greenhouse gas emissions], while in other countries, specific economic subsectors are important, such as the United Kingdom, or to do with country-specific economic subsectors, such as the high contribution from fertilizer manufacture in China.”).

context and geography-specific.<sup>38</sup>

This Article does not present these institutional changes to agricultural and food production in order to criticize such changes. As one scholar has observed with respect to Latin America, “the nature of food insecurity shifted fundamentally over the 20<sup>th</sup> century . . . . Growth in incomes and agricultural productivity, improvements in market functions, along with the political will to intervene to prevent famines, have improved food security for many . . . .”<sup>39</sup> Instead, these changes are presented to provide context for the developing holistic focus by scholars outside the legal arena on food, rather than on individualized aspects of food or agriculture. These concerns, as this Article shall describe, also underlie the growing recognition of legal scholars regarding the interconnectivities between these two areas and their development of approaches towards synthesis.

## II. THE SEPARATED ROOTS OF LEGAL FIELDS

Legal fields arise and fade away, expand and contract according to the problems and possibilities of contemporary society and commerce . . . . Compare the curriculum of almost any law school in 1950 with today’s curriculum. Only a small proportion of subjects remain the same in name and content. Family law, for example, has absorbed the older law of marriage, with its reliance on distinctions between public and private spheres of responsibility, yet also feathers into principles of contract, tort, wills and trusts. Property law has borrowed from real and personal property. Subjects that today seem commonplace, like securities law and insurance law, would have surprised our ancestors, while to others they paid studious attention, like admiralty, restitution, or maritime law, have a narrower audience. New fields arise and gain acceptance despite their initial strangeness. In 1868, Bishop encouraged his readers to study the U.S. Constitution because, “Here is a new field.”<sup>40</sup>

The focus of this Article is to highlight and characterize the emergence of an integrated legal academic approach to food—what this Article calls “food systems law”<sup>41</sup>—in order to reference the food

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<sup>38</sup> Cf. Vermeulen et al., *supra* note 16, at 198.

<sup>39</sup> Ericksen, *supra* note 2, at 236; *but see* Ericksen, *supra* note 2 (recognizing that “local and regional distributional inequities,” as well as insecurity, still currently exist in sub-Saharan Africa).

<sup>40</sup> Wendy K. Mariner, *Toward an Architecture of Health Law*, 35 AM. J.L. & MED. 67, 80 (2009).

<sup>41</sup> As already mentioned in *supra* note 2, some scholars have used another term,



systems approach found in other areas of science, economic, and policy analysis. But the emergence of new fields of law is not itself a novel phenomenon. Instead, this phenomenon has occurred throughout the history of legal scholarship.<sup>42</sup> For example, the field of products liability arguably presents a morphing of some parts of torts and contracts law.<sup>43</sup> Indeed, a rich academic literature lies behind discussions of the nature and definition of “legal fields,” as well as the utility of relying on discrete legal fields to organize legal thought.

So to provide a theoretically developed account of the emergence of food systems law, this Part gives a general overview of the literature on legal taxonomy, and examines the historical roots of food systems law using the legal taxonomical lens. The account of the legal taxonomy literature is provided to contextualize what this Article means when it discusses the emergence of food systems law as a field of law. Although the resolution of these debates is beyond the scope of this Article, the Article nevertheless highlights them to avoid giving an impression of unanimity on certain issues. Instead, this Part presents insights from the legal taxonomical literature that may lend some normative support for the use of food systems as a new, underlying organizational principle.

This Part then examines the more established fields from which food systems law primarily derives—agricultural law and food law—using the legal taxonomical lens. The intent is to draw from the insights of legal taxonomy to better understand why the roots of food systems law are organized in the way that they have been organized.

#### A. *Legal Fields as Taxonomical Entities*

Legal fields are not essentialist categories; instead, law can be potentially organized into “innumerable theoretically available classifications . . . .”<sup>44</sup> To some extent, the very definition of a “legal

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“food law and policy,” to describe this emerging phenomenon. This Article is agnostic regarding the actual term chosen to describe this area of law; however, Part IV of this Article will suggest that particular beneficial features, with respect to addressing food-related problems, arise out of an approach that is deliberately structured to be systems-oriented, and the second part of this project will examine what sorts of features such a systems-oriented approach would contain. Thus, this Article uses the term “food systems law” to lay the groundwork for this argument.

<sup>42</sup> See Mariner, *supra* note 40, at 80.

<sup>43</sup> See DAVID G. OWEN, PRODUCTS LIABILITY LAW 5 (2005) (discussing how the development of products liability law presents a major shift away from viewing problems now conceived of as products liability under earlier separate rubrics of “tort” or “contract”).

<sup>44</sup> Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry into Legal Taxonomy*, 95 CORNELL L. REV. 221, 227 (2010). See also *id.* at 237 (“There are numerous

field” is a contested area. As Professor Wendy Mariner puts it, “[t]he literature is notable for the absence of an epistemology or *meta* theory for positively defining the essential characteristics of a ‘field of law.’”<sup>45</sup> Instead, the term has a number of potential meanings, including the law centering around the “history and tradition of rules and customs associated with a particular subject” (such as maritime law), the law centering around “a statute or set of related documents” (such as administrative law), or the law as centered around a particular purpose (such as contracts law).<sup>46</sup>

One of the potential meanings for “legal field” is entirely descriptive/observational: a field of law happens to be whatever is accepted as a field of law within the legal community—that is, that “separate fields have become accepted as a matter of historical accident or practical need.”<sup>47</sup> Indeed, at times, fields of law have been defined by simply applying to the same subject matter, such as the “law of highways, the law of railways, the law of telegraphs, and the law of building associations . . . .”<sup>48</sup> As Professor Emily Sherwin puts it:

In a project of this kind, the taxonomer does not attribute meaning to legal categories: categories such as tort law are simply historical facts, taken at face value and displayed in an orderly way. The resulting classification has no direct normative implications for legal decisionmaking; its purpose is simply to make law accessible.<sup>49</sup>

Those focusing on legal taxonomy, however, attempt to develop principles for defining fields of law that go beyond historical accident or subject matter. This Article classifies these principles as more normative principles for defining fields of law. These, according to Professor Sherwin, can be broken down into two subcategories: the functional approach and the formalist approach.<sup>50</sup> The functional approach focuses on social purposes surrounding the definition of a field of law. For example, whether that definition would “promote efficient use and allocation of resources, promote safety by deterring dangerous acts, provide insurance against unexpected loss, spread losses in a manner that is distributively fair, or promote social peace by

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ways to define a legal field. A legal field can be defined on the basis of, among other things, a substantive topic . . . ; an aspect of the legal process . . . ; an institutional actor . . . ; or a transsubstantive methodological approach . . . .”).

<sup>45</sup> Mariner, *supra* note 40, at 79.

<sup>46</sup> Mariner, *supra* note 40, at 81.

<sup>47</sup> Mariner, *supra* note 40, at 79.

<sup>48</sup> Mariner, *supra* note 40, at 79 (internal footnotes omitted).

<sup>49</sup> Emily Sherwin, *Interpreting Tort Law*, 39 FLA. ST. U. L. REV. 227, 237 (2011).

<sup>50</sup> *See id.*

channeling appetites for revenge.”<sup>51</sup> The formalist approach, in turn, developed by Ernest Weinrib,<sup>52</sup> focuses on characteristic features that should normatively configure fields of law,<sup>53</sup> often centering primarily around the internal coherence of that area of law, rather than external factors such as social benefit.<sup>54</sup>

An article by Professor Todd Aagaard, presents an excellent overview of some of the definitional debates around normative principles for defining legal fields.<sup>55</sup> In a way, these debates are created by tensions between both descriptive and normative instincts regarding taxonomy.<sup>56</sup> That is, descriptive approaches revolve around finding features fundamental to those areas that end up accepted as fields of law, while normative/prescriptive approaches revolve around finding features that are argued to enhance that area of law in some manner. Both perspectives exist in the legal taxonomical literature.

With respect to description, Professor Aagaard writes, “The goal of legal taxonomy is to identify significant patterns in the law. . . . The usefulness of the field varies depending on how well that pattern explains the various situations that the field encompasses.”<sup>57</sup> The explanatory power of a particular characterization of an area of law as a legal field, in turn, comes from a number of factors, such as the extent to which situations that arise within the field actually fall under a recognizable pattern, the simplicity of the pattern, the extent to which the pattern predominates the field, and the scope of situations that arise under the field to which explanatory patterns can be applied.<sup>58</sup>

Of particular relevance to food law and agricultural law is that descriptive taxonomical approach described as the “primary interests” approach, a taxonomical approach expounded by Professor John Norton Pomeroy in the 1800s.<sup>59</sup> “Such fields often take as their center

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<sup>51</sup> *Id.*

<sup>52</sup> ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

<sup>53</sup> See Sherwin, *supra* note 49, at 237–38.

<sup>54</sup> See Sherwin, *supra* note 49, at 238.

<sup>55</sup> See Aagaard, *supra* note 44 (applying an analysis of legal taxonomy to the field of environmental law).

<sup>56</sup> See Aagaard, *supra* note 44, at 240–41 (“In reality, most legal taxonomies to some extent combine descriptive and prescriptive elements.”); *id.* at 241 (“In reality, most legal taxonomies to some extent combine descriptive and prescriptive elements . . . . In the law, the taxonomist is also inherently part of the project to shape the law as well as to observe and characterize it.”).

<sup>57</sup> See Aagaard, *supra* note 44, at 228–29.

<sup>58</sup> See Aagaard, *supra* note 44, at 229.

<sup>59</sup> See Theodore Ruger, *Health Law’s Coherence Anxiety*, 96 *GEO. L.J.* 625, 630, 631–33 (2008) (describing Pomeroy’s classification of fields of law into areas of primary

a set of primary interests and status relationships, but then struggle to describe and classify the legal responses that define and encircle such relationships.”<sup>60</sup> In applying this approach to health law, Professor Theodore Ruger provides examples of agreed-upon primary interests of health law, from the bodily autonomy of patients, to relationships between physicians and patients, to the types of dependencies that therapeutic transactions engender.<sup>61</sup> He suggests that this type of classification presents a more effective classification for areas such as health law, which suffers from weaknesses under other classification approaches because of its wide variety of legal forms (including statutory and common law, as well as state and federal law).

But, another aspect of legal taxonomy is more normative or prescriptive; that is, legal taxonomy may advocate for particular norms to draw aspects of the field together, as well as create paradigms under which a particular field is understood. This “quest for coherence,”<sup>62</sup> as Professor Aagaard describes it, derives from a desire to “add[] some amount of logical order, consistency, and clarity.”<sup>63</sup> Coherence, in turn, comes with a number of benefits. Such benefits include academic benefits such as ease of learning, practicing, and theorizing within that defined field.<sup>64</sup> They also include more pragmatic concerns, such as more legitimacy within the legal academy, where coherence is regarded as important for academic legitimacy.<sup>65</sup>

Whether coherence is (or should be) considered an essential feature of fields of law, however, is of debate within legal taxonomy. That is, consistency may be difficult to attain even if, descriptively, an area is generally accepted as a field of law.<sup>66</sup> These barriers to attaining coherence, in turn, can arise not only from the diversity of factual contexts, but also from lack of consensus among relevant legislative bodies.<sup>67</sup> Thus, both rapidly evolving factual contexts and lack of consensus may create barriers for coherence even within areas of law accepted as fields, calling into question coherence as a necessary feature of fields of law.

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rights and interests).

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* at 635.

<sup>62</sup> Aagaard, *supra* note 44, at 229.

<sup>63</sup> Aagaard, *supra* note 44, at 229.

<sup>64</sup> Aagaard, *supra* note 44, at 230.

<sup>65</sup> *See* Ruger, *supra* note 59, at 630.

<sup>66</sup> *See* Aagaard, *supra* note 44, at 231–32 (describing how the diversity of contexts has led to decreased coherence of water law, despite its acceptance as a field of law).

<sup>67</sup> *See* Aagaard, *supra* note 44, at 231–32.

Moreover, the taxonomical emphasis on coherence may itself present some disadvantages, at least in terms of the descriptive explanatory power of the chosen organizational principles. Prioritizing coherence may lead to the imposition of principles that do not exist descriptively<sup>68</sup> by discouraging experimentation, by demanding a coherent approach,<sup>69</sup> or by forcing the incoherence in other areas less established as fields of law.<sup>70</sup> Thus, while some commentators accept coherence as an important, and perhaps even necessary, feature of a field of law,<sup>71</sup> others question its criticality.<sup>72</sup> As such, at least descriptively, “[f]ields of law appear to have grown up according to quite different principles of organization, principles that are neither mutually exclusive nor internally consistent.”<sup>73</sup>

Professor Aagaard presents his own approach towards key features, an approach that is appealing due to its express attempt at balance between descriptive and prescriptive considerations. He suggests two somewhat descriptive features—commonality and distinctiveness—that nevertheless lend themselves towards the prescriptive goals of coherence.<sup>74</sup> When significant commonalities exist within the body of law addressed by a field, they establish the potential for establishing patterns that cohere that field.<sup>75</sup> These can include fact patterns, policy tradeoffs, values and interests, or even doctrinal considerations. He suggests that these commonalities be

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<sup>68</sup> Aagaard, *supra* note 44, at 233–34 (“An organizational framework that prioritizes coherence may do so at the cost of imprecisely and inaccurately characterizing the field by ignoring complexity and variation.”).

<sup>69</sup> Aagaard, *supra* note 44, at 235.

<sup>70</sup> Aagaard, *supra* note 44, at 235.

<sup>71</sup> See, e.g., Brian Langille & Patrick Macklem, *The Political Economy of Fairness: Frank Iacobucci’s Labour Law Jurisprudence*, 57 U. TORONTO L.J. 343, 343 (2007) (describing coherence as “a necessary precondition to principled decision-making”); Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 17 (1987) (attributing, in a sense, this instinct towards Christopher Langdell’s approach to common law as a body that forms a coherent picture).

<sup>72</sup> See, e.g., Chaim Saiman, *Restating Restitution: A Case of Contemporary Common Law Conceptualism*, 52 VILL. L. REV. 487, 518 (2007) (providing the example of sports law as a body accepted as a field of law that nevertheless lacks a focal conceptual principle that creates coherence); Aagaard, *supra* note 44, at 231 (describing water law as lacking coherence but nevertheless accepted as a field of law); Ruger, *supra* note 59, at 630 (questioning the drive for coherence in legal taxonomy); Mariner, *supra* note 40, at 79 (recognizing that some define fields of law based on “historical accident or practical need,” rather than coherence).

<sup>73</sup> Mariner, *supra* note 40, at 81.

<sup>74</sup> See Aagaard, *supra* note 44, at 242–45.

<sup>75</sup> Aagaard, *supra* note 44, at 242.

legally relevant, however, or else a proposed area of law may merely be “an amorphous amalgamation of portions of other, existing fields.”<sup>76</sup> He also suggests, in turn, that distinctiveness as a relevant feature of a field of law helps avoid the pitfall of looking too narrowly at legal questions without considering commonalities that may be available in related areas of law.<sup>77</sup> That is, requiring some element of distinctiveness in determining that a field of law exists, or in defining a field of law, provides some reason for looking towards that field of law for coherence rather than looking towards broader classifications.<sup>78</sup> Distinctiveness may arise from either the field of law containing distinct legal rules, or by more generally applicable legal rules reaching distinct, factual outcomes unique to the field. He argues not for the strict presence of features as performing an absolute gatekeeping role, but rather that “[a] legal field may exist where the field’s set of defining features is unified by sufficient similarity and distinctiveness—even if not perfect uniqueness—to merit unified consideration.”<sup>79</sup>

Professor Aagaard also urges the consideration of another feature as not necessary but useful: transcendence.<sup>80</sup> He defines transcendence as the degree to which a constituted field of law lends trans-substantive insights to other legal fields. He presents the differing but related fields of occupational health and safety law and environmental law, and argues that insights from the presence of contractual relationships in one and the absence from the other may allow for additional lessons in their comparison.<sup>81</sup> Thus, although not necessarily a required feature for potential fields of law, the potential for transcendence may create additional benefits for using a particular organizational principle.<sup>82</sup>

As mentioned earlier, it is beyond the scope of this Article to resolve some of these underlying debates.<sup>83</sup> Nevertheless, discussion of these debates highlights some of the relevant theoretical considerations involved not only regarding legal taxonomy, but also in determining whether a body of law can be constituted as an actual field

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<sup>76</sup> Aagaard, *supra* note 44, at 242.

<sup>77</sup> Aagaard, *supra* note 44, at 244–45.

<sup>78</sup> Aagaard, *supra* note 44, at 244–45.

<sup>79</sup> Aagaard, *supra* note 44, at 245.

<sup>80</sup> Aagaard, *supra* note 44, at 245–47.

<sup>81</sup> Aagaard, *supra* note 44, at 246.

<sup>82</sup> Aagaard, *supra* note 44, at 246–47.

<sup>83</sup> This Article takes a more pragmatic stance to these controversies. As Professor Aagaard puts it, “we should maintain ambivalence about prioritizing coherence in legal taxonomy and should stay cognizant of what a classification conceals as well as what it reveals.” Aagaard, *supra* note 44, at 326.

of law. These considerations include coherence, potential pattern recognition, and potential external beneficial features arising from a chosen classification scheme, such as insights into other fields. To an extent, the disputes regarding necessary features for fields of law arise from differing degrees of desire for each of these considerations.

Moreover, despite these differences, one similarity remains: to some extent, lawyers and legal scholars find these classifications useful.<sup>84</sup> This usefulness can derive from the ability of a classification scheme to:

provide a vocabulary and grammar that can make law more accessible and understandable to those who must use and apply it [and] make[] it easier for lawyers to argue effectively about the normative aspects of law, for judges to explain their decisions, and for actors to coordinate their activities in response to law.<sup>85</sup>

Indeed, as Professors J.B. Ruhl and James Salzman observe, the recognition of an area of law as a legitimate field of law serves multiple purposes.<sup>86</sup> It can provide a “powerful political statement” that such issues matter.<sup>87</sup> It can also allow the use of highly technical knowledge to be spread within a defined area.<sup>88</sup> Finally, it can “ensure effectiveness by reorienting laws and policies in a more productive structure.”<sup>89</sup>

This Article initially takes a descriptive approach, but later draws from some of the features described as arising out of more principled taxonomic considerations. In particular, this Article initially uses “legal field” to refer to common classification by the legal community, rather than attempting to resolve any of these epistemological debates. This approach allows the Article to first focus on tracking developments in legal organization related to food systems, and to better understand changes in the approach of the legal community towards what it considered useful within the broad area of food

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<sup>84</sup> As Lawrence Lessig said in his argument for cyberlaw as a legal field, “We see something when we think about the regulation of cyberspace that other areas would not show us.” Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999).

<sup>85</sup> Emily Sherwin, *Legal Positivism and the Taxonomy of Private Law*, in STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS 103, 119 (Charles Rickett & Ross Grantham eds., 2008).

<sup>86</sup> See J.B. Ruhl & James Salzman, *Climate Change Meets the Law of the Horse*, 62 DUKE L.J. 975, 987–89 (2013).

<sup>87</sup> *Id.* at 987.

<sup>88</sup> *Id.* at 989.

<sup>89</sup> *Id.*

systems. Only later does the Article explore what the changes in the conceptualization of these particular fields mean for the place of food under different classification approaches, drawing from the theoretical literature to describe potential benefits that arise from the field that this article argues is developing.<sup>90</sup>

*B. The Fields of Agricultural and Food Law as Roots of Food Systems Law*

This Part explores agricultural law and food law as the primary roots of a new field of law—food systems law. In doing so, however, I lay out some caveats. First, this Part does not suggest that other traditional fields of law are not shaping the development of food systems law. Indeed, as explained in Parts III & IV, *infra*, food systems law is also informed by perspectives from environmental law, health law, and labor law. Instead, this article focuses on agricultural law and food law as the roots of food systems law because the more doctrinal aspects of what this Article describes as the developing food systems law come primarily from these two areas. Moreover, this Part approaches this phenomenon from the perspective of domestic law of the United States. Fields as conceived in other jurisdictions, such as the European Union, have their own complex histories that lead to different conceptualizations of their relevant precepts.<sup>91</sup>

Agricultural law and food law began as quite distinct fields in the United States. Even their origin stories are different. For example, agricultural law, first formally recognized as legal field in the 1940s,<sup>92</sup> revolved around law related to the activities of “agriculturalists.”<sup>93</sup> In

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<sup>90</sup> See *infra* Part IV.

<sup>91</sup> Cf. Alberto Alemanno, *Introduction to FOUNDATIONS OF EU LAW AND POLICY* 1, 1–4 (Alberto Alemanno & Simone Gabbi eds.) (2014) (describing scope of European Union food law, referencing “other disciplines such as administrative and agricultural law”).

<sup>92</sup> See Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 935, 941 (2010) (citing Harold W. Hannah, *Law and Agriculture*, 32 VA. L. REV. 781, 781–84 (1946) and Neil D. Hamilton, *The Study of Agricultural Law in the United States: Education, Organization, and Practice*, 42 ARK. L. REV. 503, 509 n.6 (1990)).

<sup>93</sup> See Hamilton, *supra* note 92, at 509 (citing Hannah, *supra* note 92, at 781.) (quotations in original); see also KEITH G. MEYER, DONALD B. PEDERSEN, NORMAN W. THORSON, JOHN H. DAVIDSON, JR., *AGRICULTURAL LAW, CASES AND MATERIALS* xvii (1985) (“What is agricultural law? From earliest times laws and legal institutions focused on agricultural practices and problems.”); JULLIAN CONRAD JUERGENSMEYER & JAMES BRYCE WADLEY, *AGRICULTURAL LAW (VOLS I & II)* 3 (1982) (“‘Agricultural law,’ as the term is used in this treatise, refers to the vast body of statutes, regulations, rules, administrative decisions, judicial decisions, and common law principles that apply to agricultural operations and activities.”).



his comprehensive account of agricultural law education in the United States, Professor Neil Hamilton describes the field of agricultural law as initially focused on legal matters arising out of the financial difficulties experienced by the agricultural sector during that time.<sup>94</sup> Such matters included farm-business organization and land leases. The field of food law in the United States also arose out of a response to a crisis: the various food safety and production scandals around the turn of the century publicized by Upton Sinclair. But American food law's origins revolved around regulatory responses, rather than the more property- and contracts-based approaches of agricultural law. As Professor Neil Fortin explains, “[t]he modern U.S. system of national food law began with enactments in Theodore Roosevelt’s administration when public outrage vented on the meat industry after publication of Upton Sinclair’s *The Jungle*.”<sup>95</sup> The initial response was the Pure Food and Drug Act of 1906, but the later, more comprehensive Federal Food, Drug, and Cosmetic Act (FDCA) of 1938 still “remains the basic food and drug act in the United States.”<sup>96</sup>

Yet these origin stories, as well as the observed developments in these areas of law that will be described in more detail later in Parts II.B. & III of this Article, share some similarities: both have historically focused on use and compliance of legal regimes mainly from the perspective of the grower/producer. Professor Susan Schneider, director of the L.L.M. program in Agricultural & Food Law at the University of Arkansas Law School, writes: “studying agricultural law takes a different approach than the traditional area-of law focus that exemplifies most law school courses. Rather than being defined by the area of law, as in Contracts, Torts, or Property, an agricultural law survey course is defined by the industry, and thus, there are numerous areas of law covered . . . . It is client based as opposed to subject based.”<sup>97</sup> Similarly, in the introduction to the major food (and drug) law casebook, Professor Peter Barton describes food law as the “area of law related to the development and marketing of food.”<sup>98</sup> Thus

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<sup>94</sup> See Hamilton, *supra* note 92.

<sup>95</sup> Neil D. Fortin, *The Hang-Up with HACCP: The Resistance to Translating Science into Food Safety Law*, 58 FOOD & DRUG L.J. 565, 584 (2003); see also George M. Burditt, Esq., *The History of Food Law*, 50 FOOD & DRUG L.J. 197, 198 (1995) (“Upton Sinclair wrote *The Jungle*, and muckrakers precipitated the passage of the first major American food and drug statute, the Pure Food and Drugs Act of 1906.”).

<sup>96</sup> Burditt, *supra* note 95, at 200.

<sup>97</sup> See Susan A. Schneider, Remarks Prepared for the Association of American Law Schools 2009 Annual Meeting, *What is Agricultural Law?* (Jan 6–10, 2009).

<sup>98</sup> PETER B. HUTT, RICHARD A. MERRILL & LEWIS A. GROSSMAN, *Introduction*, FOOD AND DRUG LAW (3d. ed. 2007) [hereinafter HUTT, MERRILL, & GROSSMAN, FOOD AND

because of their client-centered nature, these areas of law cover diverse legal subjects, drawn together due to the relationships between those legal subjects and the relevant industry.

As explained earlier in Part II.A., however, the fact that these fields of law—agricultural law and food law—initially shared a client-centered focus does not mean that these areas necessarily had to be structured in that way. One can imagine more issue-oriented themes—hunger, for example, or rural development—that would engender an alternative field that encompassed much of the subject matter covered by agricultural law and food law. Such different approaches, however, might mean that the alternative field focus on different primary interests under the Pomeroy taxonomy approach (with focal interests such as consumers or rural communities), or different points of coherence under the more coherence-based taxonomical approaches (with unifying themes such as food security or economic development). Moreover, certain topics would receive less emphasis under alternative classification schemes, while additional topics would become more central.

The point of this section, however, is not to suggest alternative ways that a legal field addressing food issues could or should have been conceived. Instead, it is to explore the origins of agricultural and food law as they have been structured to better appreciate the changes that this Article argues have occurred over time. And an examination of the historical contents of both of these fields of law, although they have changed over time, shows their continuing client-oriented focus. This focus is evident in a law review article that presents a superb historical account of agricultural law and food law, both with respect to institutional dynamics as well as changing substantive content.<sup>99</sup> In it, authors Baylen Linnekin, executive director of non-profit Keep Food Legal, and Emily Broad Leib, director of the Harvard Food Law and Policy Clinic, examine the very different ways that agricultural law and food law developed, through a very thorough historical overview of these areas.

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DRUG LAW (3d ed. 2007)]. See also PETER BARTON HUTT & RICHARD A. MERRILL, FOOD AND DRUG LAW xxi (2d ed. 1991) (“Food and drug law deals with government’s attempt to protect public health and individual welfare in the development and marketing of essential commodities.”).

<sup>99</sup> See Linnekin & Broad Leib, *supra* note 2.

With respect to agricultural law, Linnekin and Broad Leib cite to Professor Neil Hamilton's account of the field as "the study of the law's effects upon the ability of the agricultural sector of the economy to produce and market food and fiber."<sup>100</sup> As such, the field in its earliest days was "narrowly focused on farm law."<sup>101</sup> But as rural and agricultural land values rose in the 1970s, agricultural law expanded to additional issues relevant to farmers, such as tax and estate planning, and export sales of agricultural commodities.<sup>102</sup> The nationwide farm credit crisis further led agricultural law to coalesce in the late 1970s and early 1980s around financial matters relating to farm operations, in addition to the earlier issues addressed.<sup>103</sup> Ultimately, in the 1980s and 1990s, agricultural law encompassed other legal matters relevant to farmers such as access to credit and financing, farm tenancy, commodities marketing, and purchase and sale of farm inputs.<sup>104</sup> As such, the current field of agricultural law comprises a number of different legal areas—ranging from land use, to farm sales and purchasing contracts, to tax and estate planning, to credit and finance matters, to marketing and tenancy law.<sup>105</sup>

Linnekin and Broad Leib, however, note that even historically, those in the field were suggesting broader changes to its development. They cite to scholars from the 1980s who noted that the "purpose of U.S. agricultural policy had become less clear than in years past."<sup>106</sup> Instead, these scholars called upon those in the field to more explicitly address policy considerations within the context of their agricultural law practice and scholarship,<sup>107</sup> presaging some of the changes described later in this Article.

The changing content of the field of food law described by Linnekin and Broad Leib present a similar focus on clients. They trace the beginnings of food law scholarship to debates surrounding the Food and Drug Act of 1906.<sup>108</sup> The field of U.S. food law evolved to also encompass subsequent food-related statutes, including the Meat Inspection Act, the Poultry Products Inspection Act, and the Eggs

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<sup>100</sup> Linnekin & Broad Leib, *supra* note 2, at 579 (citing Hamilton, *supra* note 92, at 503).

<sup>101</sup> Linnekin & Broad Leib, *supra* note 2, at 580 (internal quotation marks omitted).

<sup>102</sup> See Hamilton, *supra* note 92, at 510.

<sup>103</sup> See Linnekin & Broad Leib, *supra* note 2, at 581.

<sup>104</sup> See Hamilton, *supra* note 92, at 506–08.

<sup>105</sup> See *infra* Part III.B.

<sup>106</sup> See, e.g., Linnekin & Broad Leib, *supra* note 2, at 583 (citing James W. Looney, *Agricultural Law and Policy: A Time for Advocates*, 30 S.D. L. REV. 193, 193 (1984)).

<sup>107</sup> See Linnekin & Broad Leib, *supra* note 2, at 583.

<sup>108</sup> See Linnekin & Broad Leib, *supra* note 2, at 564.

Product Inspection Act. In the years following the advent of this field, practitioners and scholars in this area actively worked on “chang[ing] the topography of food law” to “prepare students to become food lawyers.”<sup>109</sup> Food lawyers, in turn, were likely perceived as those representing clients within the food industry, given the background of one of the leaders of food law educational reform, Charles Wesley Dunn, a prominent practitioner who presented large national clients such as the Grocery Manufacturers Association,<sup>110</sup> as well as the significant participation of active industry lawyers in the effort.<sup>111</sup> As such, the initial educational focus of food law seemed centered on the ways in which practitioners in the area—mainly representing industry clients, although sometimes representing government interests—interacted with the major food law statute, the FDCA, as well as interactions with the major food law federal agency, the Food and Drug Administration (FDA).<sup>112</sup> Such statutory areas included regulatory requirements for labeling, identity and quality, nutritional content, and safety, as well as interactions between state law and federal law.<sup>113</sup>

As with agricultural law, signs of a shifting focus appeared even within the context of those working in food law as traditionally conceptualized. For instance, by the late 1970s and early 1980s, under the leadership of Professors Peter Barton Hutt and Thomas Merrill, it had shifted to “starting with ‘substantive issues—namely the regulation of food.’”<sup>114</sup> Indeed, Professor Hutt’s description of his classroom focus “appears to mark an important departure from traditional [food and drug law] teaching. . . . Classroom discussions, though grounded in FDA regulations, would sometimes veer into interesting and non-traditional areas that ventured well outside the scope of the FDCA.”<sup>115</sup>

These traditional conceptualizations of agricultural law and food law fit (or fail to fit) the criteria formulated by legal taxonomists in different ways. Under the perspective of coherence, both fields lack some of the logical order and clarity desired by those scholars who

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<sup>109</sup> Linnekin & Broad Leib, *supra* note 2, at 564–65.

<sup>110</sup> See Linnekin & Broad Leib, *supra* note 2, at 564.

<sup>111</sup> See Linnekin & Broad Leib, *supra* note 2, at 565.

<sup>112</sup> See Linnekin & Broad Leib, *supra* note 2, at 576 (“The prevailing approach for teaching [food and drug law] always started with FDCA statutory definitions, moved on to FDA jurisdiction under the Commerce Clause and then looked at FDA enforcement authority.”).

<sup>113</sup> See *infra* Part III.B.

<sup>114</sup> Linnekin & Broad Leib, *supra* note 2, at 576 (citing Peter Barton Hutt, *Food and Drug Law: Journal of an Academic Adventure*, 46 J. LEGAL EDUC. 1, 1–2 (1996)).

<sup>115</sup> Linnekin & Broad Leib, *supra* note 2, at 578 (citing Hutt, *supra* note 114, at 12).

prioritize internal coherence as a feature of legal taxonomy.<sup>116</sup> That is, agricultural law is extremely decentered in terms of its legal forms—which range from contracts to financing instruments to federal and state statutory requirements to estate planning. Moreover, as described earlier, the addition of different sets of legal forms to the field of agricultural law occurred piecemeal, usually in response to particular external developments rather than any comprehensive attempt to achieve coherence. Food law is a bit more centered on particular legal forms than agricultural law, having a focal statutory regime in the FDCA.<sup>117</sup> But the variety of state and common law regimes that also fall under this field of law, as well as the well-recognized jurisdictional fragmentation of these regimes,<sup>118</sup> limit the extent to which food law could be fully considered ordered.<sup>119</sup>

Instead, both of these fields may be viewed as what Professor Ruger, referring to health law and drawing from Professor Pomeroy, described as fields of law classified by their primary interests.<sup>120</sup> The structures of traditional agricultural law and food law share these approaches. Traditional agricultural law, while like health law decentered in its variety of legal forms, expressly focuses on the law related to the activities of agriculturalists.<sup>121</sup> It addresses farmers' primary interests in organizing their businesses, engaging in land transactions, financing and operating their sales, and planning for taxes and estates. It also covers a number of legal areas related to status relationships: between producers and purchasers, producers and state and federal governments, and producers and export markets.

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<sup>116</sup> See Sherwin, *supra* note 49, at 238.

<sup>117</sup> Ruger, *supra* note 59, at 629–39.

<sup>118</sup> See, e.g., U.S. Gov't Accountability Office (GAO), *Report to Congressional Committees, Federal Food Safety Oversight: Food Safety Working Group Is a Positive First Step but Governmentwide Planning Is Needed to Address Fragmentation* GAO-11-289 (2011), available at <http://www.gao.gov/new.items/d11289.pdf>; Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 77 (2000) (describing the “fragmented nature of food safety regulation”); *Id.* at 85–87 (describing some of the origins of this fragmentation).

<sup>119</sup> See Aagaard, *supra* note 44, at 229.

<sup>120</sup> See Ruger, *supra* note 59, at 635, 640–48 (2008).

<sup>121</sup> See, e.g., JUERGENSMEYER & WADLEY, *supra* note 93, at 3 (focusing on the interests of the agricultural industry); MEYER ET AL., *supra* note 93, at xix–xx (describing three key features of agricultural law—the critical role of land in the agricultural industry, the nature of the agricultural industry as highly regulated in a manner unique to other industries, and structural modes of agricultural regulation as distinct from other industries—that all revolve around agricultural interests).

Likewise, traditional food law is a field of law that could be characterized as revolving around specific sets of primary interests and relationships. But these primary interests and relationships within traditional food law are broader than those within traditional agricultural law. Food law covers both the interests of food producers from the perspective of legal compliance with various food safety and labeling regulatory requirements and common law liability requirements, as well as status relationships between producers and state and federal governments and consumers. In that sense, they satisfy some of the features called for by current legal education reformers—a focus on client-centered perspectives rather than doctrine.<sup>122</sup> Yet to the extent that some in the academic community regard coherence as important for the legitimacy of a field, the weaknesses in coherence exhibited by agricultural law and food law may lie behind some of the temporary periods of scholarly stagnation described by Linnekin and Broad Leib in their histories of these fields of law.<sup>123</sup>

### III. THE CONVERGING STEMS OF AGRICULTURAL AND FOOD LAW SCHOLARSHIP

This Article provides three approaches for examining the ways in which agricultural and food law, as different legal fields, have begun to morph into a more systems-oriented framework. The first approach is an examination of law review articles in the comprehensive bibliography of agricultural law scholarship housed at the National Agricultural Law Center (NALC),<sup>124</sup> which has been developed over the years by Professor Drew Kershen.<sup>125</sup> This Article uses the tags developed by Professor Kershen for different subtopics in agricultural law scholarship to create a chronological illustration of the changes in

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<sup>122</sup> See, e.g., Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437, 448–49 (2013) (advocating for more client-centered problem solving approaches in law school); Paul Horwitz, *What Ails the Law Schools?*, 111 MICH. L. REV. 955, 973–75 (2013) (advocating that law school reformers consider more directly the perspectives of clients in suggesting changes to legal education); see also W. Burette Carter, *Introduction: What Makes a “Field” a Field?*, 1 VA. J. SPORTS & LAW 235, 243–44 (1999) (describing sports law as a way to bridge the gap between more conceptual fields of law by pulling together those areas into a single practice setting).

<sup>123</sup> See Linnekin & Broad Leib, *supra* note 2, at 577 (describing an idling period for food law); *Id.* at 580–81 (describing a period of scholarly stagnation for agricultural law).

<sup>124</sup> NAT’L AGRIC. L. CTR., <http://nationalaglawcenter.org/> (last visited Oct. 27, 2014).

<sup>125</sup> *Bibliography*, NAT’L AGRIC. L. CTR., <http://nationalaglawcenter.org/ag-law-bibliography/> (last visited Oct. 27, 2014).

agricultural law scholarship coverage from 1980–2012.

The second approach used to examine developments in the law related to food systems is an examination of the changes in agricultural and food law casebooks and other comprehensive treatises on this topic. The final approach is a contrast between the coverage of traditional agricultural law and food law courses (as taught through the casebooks), and emerging courses taught at law schools providing a more systems-oriented approach.

All of these approaches have their weaknesses. No food law center provides a comprehensive bibliography similar to that of the NALC which exists for scholarship considered to be within the realm of food law<sup>126</sup> (although the NALC bibliography includes food law within its bibliographic scope); thus, to the extent that this study provides an illustration of any merging of the two fields of law, it is somewhat asymmetrical. Casebook coverage is subject to the discretion of authors,<sup>127</sup> and thus may reflect personal preference or even individual biases.<sup>128</sup> To the extent that there are relatively few competing agricultural law or food law casebooks, these areas may be more subject to author idiosyncrasies than other areas, and thus may be unrepresentative of true consensus regarding the content of the fields. Nevertheless, because casebooks are often the primary way in which legal education is conveyed,<sup>129</sup> a review of their coverage may

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<sup>126</sup> The closest analogue is the Food and Drug Law Institute's *One Decade of Food and Drug Law Scholarship: A Selected Bibliography*, <http://www.fdli.org/~resources/resources-order-box-detail-view/one-decade-of-food-and-drug-law-scholarship-a-selected-bibliography>. Due to its more limited chronological scope (1990–2000), however, this Article does not use the FDLI bibliography for comparison.

<sup>127</sup> In *Integrating Tax and Elder Law Into Elder Law and Tax Courses*, 30 STETSON L. REV. 1375, 1410 (2001), Edward D. Spurgeon and Elizabeth J. Mustard write:

Casebook authors and professors already struggle with what they should include in the casebook or course. Even when a casebook includes certain materials, the instructor may choose to eliminate or supplement the coverage. This process naturally requires balancing and weighing the importance of various materials on one hand and the time available on the other. The end result is a value judgment on the part of the instructor.

See also *id.* at 1395 (“The prefaces in most basic income tax casebooks emphasize the expanse of material that could be covered and the balancing process that the authors use in determining actual coverage”).

<sup>128</sup> Cf. Ann Shalleck, *The Feminist Academic's Challenge to Legal Education: Creating Sites for Change*, 20 J. L. & POL'Y 361, 379 (2012) (critiquing a number of legal casebooks for absence of female authors, thus “shaping the story of the law that first-year students encountered”).

<sup>129</sup> See Angela Fernandez, *Fuzzy Rules and Clear Enough Standards: The Uses and Abuses of Pierson v. Post*, 63 U. TORONTO L.J. 97, 115 (2013) (“What the casebook editor includes or omits, what questions are asked after the text, just like the questions asked

nevertheless illustrate how the legal community eventually approaches a given field of law. This Article's exploration of course coverage is also asymmetric, but with respect to time, rather than to fields of law. Because of the lack of available syllabi from law school courses over the years, this study focuses on illustrating the contrast between the organization of existing traditional survey courses in agricultural law and food law (usually taught as food and drug law), and the organization of emerging seminar-style courses touching upon aspects of the food system.

The hope is that examining legal developments from multiple lenses may mitigate some of these weaknesses by overlaying different snapshots into a broader picture. Indeed, none of these individual examinations are intended to be comprehensive, and should be reviewed in conjunction with related studies conducted in other articles, such as that of Linnekin and Broad Leib,<sup>130</sup> which reviews (from a historical development perspective) additional topics of degree programs,<sup>131</sup> dedicated legal journals,<sup>132</sup> student societies,<sup>133</sup> professional associations,<sup>134</sup> and academic conferences,<sup>135</sup> along with overlapping studies to those here. Instead, the studies in this Article are presented to provide some more concrete observations about the changing nature of the overall landscape of legal studies of different

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in the classroom itself, will shape what the case comes to mean collectively for the profession, as more and more students are exposed to it over time.”); In *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 298 (2000), Judge Alex Kozinski stated:

Casebooks provide a common language that transcends particular law schools or generations of lawyers—I can usually get a knowing nod from my law clerks when I speak about the ships *Peerless*—and casebooks also provide young lawyers with a fundamental outlook on the legal landscape, which in turn shapes their approach to cases.

<sup>130</sup> See Linnekin & Broad Leib, *supra* note 2 (examining additional changes in agricultural law and food law from the perspective of professional organizations and conferences, as well as conducting related analyses of textbook publications and courses). As mentioned earlier in this Article, these pieces have been deliberately drafted in rough coordination with each other, after they were both presented at the 2013 Yale Food Systems Symposium. As part of this coordination, a number of particular topics were chosen to be more emphasized in each piece, based on the topics that fit best with each article's internal organization. Any omissions in this piece on examining topics such as developments related to degree programs, legal journals, student societies, professional organizations, and academic conferences were intended to avoid unnecessary duplication between the two pieces.

<sup>131</sup> Linnekin & Broad Leib, *supra* note 2, at 48–49.

<sup>132</sup> Linnekin & Broad Leib, *supra* note 2, at 50–51.

<sup>133</sup> Linnekin & Broad Leib, *supra* note 2, at 53–54.

<sup>134</sup> Linnekin & Broad Leib, *supra* note 2, at 54–55.

<sup>135</sup> Linnekin & Broad Leib, *supra* note 2, at 55–56.



aspects of the food system.

A. *Law Review Articles: 1980–2012*

A chronological survey of law review articles, such as that presented in this Article, can provide a rough picture of the changing interests and determinations of salience within the legal academy, if not the overall community of lawyers within a given legal field.<sup>136</sup> Even though the term “changing interests,” is a coarse one, subsuming the variety of factors that shape the sorts of articles that get published.<sup>137</sup> Such factors include the particular individual interests of the authors, the actual available legal landscape, current events, the individual interests of law review editors (given that legal scholarship primarily occurs in student-edited journals), various publication pressures on the part of the authors, and even changing norms within the legal academy itself. Nevertheless, by examining the changes in publication topics in the articles recognized to be within the field of agricultural law, this study attempts to highlight some general patterns with respect to topical trends over time.

1. Methodology

This study uses the comprehensive agricultural law bibliography (and its subject area classifications) compiled by Professor Drew Kershen and housed at the National Agricultural Law Center (NALC), a federally funded, nonpartisan research and information center on agricultural law.<sup>138</sup> The choice to use the bibliography and

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<sup>136</sup> See, e.g., Michael J. Saks, Howard Larsen & Carol J. Hodne, *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 30 SUFFOLK U. L. REV. 353, 372–73 (1996) (finding, based on an empirical study of a chronological set of law review articles tagged by certain features, that contrary to critics who suggest that law review articles have become less and less useful to practitioners over time, the gap in perception of law review articles was better explained by the increasing usefulness of law review articles to judges, legislators, and legal scholars rather than legal practitioners); Jason A. Cantone & Michelle M. Harner, *Is Legal Scholarship Out Of Touch? An Empirical Analysis Of The Use Of Scholarship In Business Law Cases*, 19 U. MIAMI BUS. L. REV. 1, 50 (2011) (finding no general trend in the use of legal scholarship by courts in business law cases, but finding that “judges appear to be relying on academic scholarship more frequently as the issues they face become increasingly more novel and complex”).

<sup>137</sup> Cf. Erwin Chemerinsky & Catherine Fisk, *In Defense Of The Big Tent: The Importance Of Recognizing The Many Audiences For Legal Scholarship*, 34 TULSA L.J. 667 (1999) (arguing that legal scholarship does and should include multiple audiences).

<sup>138</sup> NAT’L AGRIC. L. CTR., *supra* note 124. The website for the National Agricultural Law Center states:

[T]he only agricultural law research and information facility that is independent, national in scope, and directly connected to the national

classifications created by Professor Kershen and housed at NALC was deliberate. Professor Kershen has been compiling a comprehensive agricultural law bibliography since the 1980s.<sup>139</sup> In the 1990s, he began to publish his bibliography in the American Agricultural Law Association (AALA) monthly newsletter, the *Agricultural Law Update*,<sup>140</sup> and, based on interest and demand, ultimately reached an agreement in 2004 with NALC to house the bibliography on its website.<sup>141</sup> He also worked with an assistant in order to extend the bibliography back to 1950, creating subcategories and classifications in order to make the bibliography useful.<sup>142</sup> This bibliography is updated on a quarterly basis. By using the categories created by Professor Kershen, I hope to highlight the legal categories used by recognized agricultural law experts, rather than interject potential personal biases in classification.

The Kershen/NALC bibliography uses forty-eight legal subject categories to subdivide its bibliography, and states that: “The entries in the bibliography derive primarily from law journals, law reviews, and legal periodicals that publish articles, comments, notes, and developments that comprise the body of published research in agricultural and food law.”<sup>143</sup> Each article is generally tagged by only one subcategory, although when the overlap is more significant, they are tagged under multiple subcategories.<sup>144</sup>

This study takes the articles classified into the Kershen/NALC subcategories<sup>145</sup> and creates a chronological breakdown of the number of articles published each year in those categories. Some publications listed as articles, however, were omitted for uniformity. For example, this study omits listed book chapters under the assumption that books, which are less searchable under traditional electronic methods, may be more likely than law review articles to present unrepresentative outliers that happen to come to the bibliographers’ attentions, rather

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agricultural information network. The Center has expanded the scope of its coverage to include food law as it recognizes the expanding scope of agricultural law and its convergence with food law topics.

The website also describes Congress calling for the creation of such a center in 1987, and the funding of the National Agricultural Law Center has been funded with federal appropriations through the National Agricultural Library, an entity within the Agricultural Research Service of the U.S. Department of Agriculture.

<sup>139</sup> Email correspondence with Prof. Drew Kershen, January 1, 2014.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* See also NAT’L AGRIC. L. CTR., *supra* note 125.

<sup>142</sup> See Kershen, *supra* note 139.

<sup>143</sup> See Kershen, *supra* note 139.

<sup>144</sup> NAT’L AGRIC. L. CTR., *supra* note 125.

<sup>145</sup> Some of these subcategories, such as “Treatises,” were omitted because they did not pertain to this section of the study.

than the result of more comprehensive systematic surveys of periodic legal publications. Moreover, when an article is published in several separate parts in the same law journal, this study treats the result as a single article dated by the publication of the first part even though the bibliography provides individual entries for all of the parts; this approach was chosen so that an article too long to appear in a single law review issue did not create the appearance of a publishing frenzy on a given topic, given that only one editorial choice was made. If, however, the separate parts appeared in different law reviews, each separate part was counted to better reflect the publication choices of the different law reviews. Finally, although the bibliography covers law review articles prior to 1980, a cutoff start date of 1980 was chosen because it appeared to be the date at which the bibliographic coverage began to be more comprehensive.

This study is not intended to be mathematically rigorous. Indeed, for a number of categories, such as administrative law and commodities futures and organizational forms, too few law review articles were published each year to provide the basis for any trend analysis, however rough. The Article takes a conservative approach and treats these areas as areas where trends are not observed. Moreover, unlike some trend analyses where the only potential trends are lack of change and linear increase and decrease, a number of possible trends could exist for each subfield of law: a curve peaking at a given year, for example, or dual curves with multiple peaks; thus, more mathematical approaches towards evaluating trends are difficult to apply here.

Finally, various factors potentially lead to significant noise in the data set. First, the general use of only one subfield to classify each article may potentially mask trends in publications that fall under one or more fields. Next, the inclusion of articles from symposia, which can generate a relatively large number of articles in one given year (especially for areas of law in which there are relatively few publications in general), may lead to the appearance of general community interest when that interest may only be exhibited by a single law review editorial board. Also, the bibliography consolidates articles published by practitioners, law professors, and student authors, potentially masking differing trends in the practice community, legal academia, and law students. Because of these factors, this Article does not purport to be comprehensive, and instead presents the raw data in tabulated form, and graphs only where the most cursory visual inspection suggests a trend.

## 2. Results

For many of the categories, such as administrative law, agribusiness law, alien land ownership, attorney roles and education, commodities futures law, farmer-processor bargaining, federal loan programs, organizational forms, securities, transportation, and veterinary law, too few publications existed to isolate any particular trend.<sup>146</sup> For other categories, although sufficient numbers of publications existed each year upon which a trend might be found, few patterns in publication were apparent. These areas were corporate farming/family farm preservation; equine law; farm labor; farm policy and regulation; hunger and food security; hunting, recreation, and wildlife; and marketing boards/orders.

A number of areas, however, exhibit visually apparent trends towards decreased publication: bankruptcy, cooperatives, estate planning, finance and credit, land reform, land sales and real estate, land use regulation, leases, taxation, and uniform commercial code. Other areas, in contrast, exhibit increased numbers of publications per year over time, at least from 1980: animals and animal rights, aquaculture, energy issues, food and drug law, international trade, patents and intellectual property rights, rural development, sustainable and organic farming, torts and insurance, and trade regulation and antitrust.<sup>147</sup> Finally, a number of areas appear to increase from 1980 and then taper off after certain peak years: biotechnology (2001), environment (2000), forestry (1996), fruits, vegetables, and perishables (1998), livestock packers and stockyards (2000, 2006), pesticides (1992), public lands (1994), and water rights (1991). These areas are listed on the chart as “peaked curves.”

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<sup>146</sup> For this category, I chose a somewhat arbitrary threshold of under five articles per year. I chose this threshold because it roughly matches the number of articles that might be published as a result of a single law review symposium on a given topic.

<sup>147</sup> Note: some of the increases appear to taper off around the year 2011. After consultation with Professor Kershen, we identified a gap in coverage which he is in the process of correcting. I will incorporate this corrected data in any editing process that follows. Kershen, *supra* note 139.

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A table presenting these categorizations is presented below:

<b>Trend</b>	<b>Areas of law</b>
<b>Too little data</b>	Administrative law; agribusiness law; alien land ownership; attorney roles and education; commodities futures law; farmer-processor bargaining; federal loan programs; organizational forms; securities; transportation; and veterinary law
<b>No apparent trend</b>	Corporate farming/family farm preservation; equine law; farm labor; farm policy and legislation; hunger and food security; hunting, recreation, and wildlife; and marketing boards/orders
<b>Decreased publication</b>	Bankruptcy; cooperatives; estate planning; finance and credit; land reform; land reform; land sales and real estate; land use regulation; leases; taxation; and uniform commercial code
<b>Increased publication</b>	Animals and animal rights; aquaculture; energy issues; food and drug law; international trade; patents and intellectual property rights; rural development; sustainable and organic farming; torts and insurance; and trade regulation and antitrust
<b>Peaked curve (with peaks in parentheses)</b>	Biotechnology (2001); environment (2000); forestry (1996); fruits, vegetables, and perishables (1998); livestock packers and stockyards (2000, 2006); pesticides (1992); public lands (1994); and water rights (1991)

**Table A. Observed trends in agricultural law scholarship**

A graph illustrating the areas of decreased and increased publications is presented in the appendix, with areas of decreasing publication shaded using red spectrum colors and areas of increasing publication shaded using green spectrum colors for easier visual comparison and inspection.

With respect to the areas referred to as “peaked curves,” many of these peaks occurred around years in which some major legal development arose in that area. After increasing commentary on the expected development was published, interest in those areas appeared to wane, leading to a curve peaking around the time at which the legal development arose. For example, many pesticide articles surrounding the “peak year” of 1992 revolved around the issue of federal preemption of state pesticide regulations,<sup>148</sup> an issue addressed by the Supreme Court in the 1991 case of *Wisconsin Public Intervenor v. Mortier*.<sup>149</sup> Two of the peaked curves were surprising, however. One was that of environmental law-related agricultural law articles, given the general increase in attention to environmental issues and farming over the years. The other was that of biotechnology—a number of issues revolving around the labeling of genetically modified foods have arisen in recent years, and thus the decreasing publication counts do not appear to reflect the presence of available live legal controversies. Instead, this apparent decrease likely arises due to the way in which many of the biotechnology-related articles also fell under other categories.<sup>150</sup> Based on his expert judgment regarding the

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<sup>148</sup> See, e.g., Jeffrey W. Coverdell, Note, *Environmental Law—The Federal Insecticide, Fungicide, and Rodenticide Act Does Not Preempt Local Government Regulation of Pesticide Use* (Wisc. Pub. Intervenor v. Mortier, 111 S. Ct. 2476 (1991)), 42 DRAKE L. REV. 287, 287–98 (1993); Timothy A. Quarberg, Note, *Getting the Bugs Out: The Role of Legislative History in Determining the Pre-Emptive Effect of FIFRA upon Local Regulation of Pesticides in Wisconsin Public Intervenor v. Mortier* (111 S. Ct. 2476 (1991)), 15 HAMLINE L. REV. 223, 223–45 (1991); Joseph T. Carter, Note, *The Possibility that FIFRA Might Preempt State Common-Law Tort Claims Should be Exterminated*, 45 ARK. L. REV. 729, 729–45 (1992); R. David Allnutt, Comment, *FIFRA Preemption of State Common Law Claims After Cipollone v. Liggett Group, Inc.*, 68 WASH. L. REV. 859, 859–80 (1993); Elena S. Rutrick, Comment, *Local Pesticide Regulation Since Wisconsin Public Intervenor v. Mortier*, 20 B. C. ENVTL. AFF. L. REV. 65, 65–97 (1993); Martha L. Noble, Note, *Local Regulation of Pesticide Use*, 14 J. AGRIC. TAX’N & L. 365, 365–70 (1992); James Ford Lang, Note, *Federal Preemption of Local Pesticide Use Regulation: The Past, Present, and Future of Wisconsin Public Intervenor v. Mortier*, 11 VA. ENVTL. L.J. 241, 241–83 (1992); William T. Smith & Kathryn M. Conrad, *Cipollone’s Effect on FIFRA Preemption*, 61 U. MO. KAN. CITY L. REV. 489, 489–502 (1993).

<sup>149</sup> Wisc. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991).

<sup>150</sup> Discussion with Professor Kershner suggests that the appearance of decreasing

categorization scheme that would be most useful for those consulting the bibliography, Professor Kershen used the other, more specific topics for those articles' primary categorization.<sup>151</sup> Thus it is possible that an increased number of articles in environmental law or biotechnology were captured by apparent increases in other topics, such as sustainable and organic farming or international trade.

The most salient observations with respect to this Article arise out of the comparison between those subfields of law that are decreasing in terms of number of publications, and those subfields that are increasing. Many of the areas of decreased publication revolve around the practice of lawyers who represent farmers and agribusinesses, and are consistent with those subject areas covered within traditional law casebooks (as discussed later). From the primary interest taxonomic perspective,<sup>152</sup> they could be seen to reflect the financial interests of a narrow set of core actors: those within the farming industry. For example, issues of bankruptcy, cooperatives, agricultural leases, taxation, and uniform commercial code are all topics that are of interest primarily to traditional agribusinesses, rather than food or consumer perspectives. This may suggest that the interest of scholars writing about legal aspects of food has shifted away from a focus on legal questions relevant to farm and agribusiness interests, although some interest certainly remains.

This is in contrast to areas which have increased in publications over time. The increasing focus on these areas appear either to reflect a broader range of interests from the primary interests perspective<sup>153</sup> or to show a shifting taxonomic conceptualization of the field,<sup>154</sup> using other organizing principles such as food systems. Some increased-publication topics such as aquaculture and food law involve topics that are more consistent with those traditionally categorized under food law rather than agricultural law. Other areas of increased publication such as animals, energy, sustainable and organic farming, and rural development draw in considerations from external fields such as environmental law, labor law, and health law. Even other areas of increased publication such international trade, patents and

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publications in articles categorized as "biotechnology" arises from their categorization under other categories found to be more specific to them—e.g., intellectual property, food law, or international trade. This organization, in turn, was chosen in order to make the bibliography useful for those consulting the bibliography to identify the types of articles which would interest them. See Kershen, *supra* note 139.

<sup>151</sup> See Kershen, *supra* note 139.

<sup>152</sup> See Ruger, *supra* note 59, at 631–33.

<sup>153</sup> See Ruger, *supra* note 59, at 631–33.

<sup>154</sup> See Sherwin, *supra* note 49, at 238.

intellectual property rights, torts and insurance, and trade regulation and antitrust draw from a broader range of topics, external to the above listed fields of law. This could mean that additional interests, such as environment and health and labor relations, have become more salient. Or it could mean that newer academic scholarship relating to food could be more effectively organized around non-interest-based principles, such as the interrelationship of different elements of the food system.

This semi-quantitative examination, however, does not fully uncover some of the complex dynamics involved with respect to the morphing of agricultural and food law scholarship. That is, this observation of shifting areas of interest suggested by a chronological examination of the NALC subtopics does not distinguish whether the cause of these shifts is due to changing interests within a core set of scholars, due to newer scholars entering the field who bring in interests outside of traditional agricultural law, or even due to the changing landscape of agricultural practice itself. A cursory investigation suggests that all of these explanations may be at play.

Take, for example, the publication history of long-term agricultural law scholar, Professor Susan Schneider. While her earlier works focused on agricultural entity bankruptcy<sup>155</sup> (a topic well within the core of traditional agricultural law), her later works examine topics that crossover more into traditional food law, such as connections between consumer and producer interests,<sup>156</sup> and food, farming, and sustainability.<sup>157</sup> Similarly, another long-term agricultural law scholar Neil Hamilton primarily focused his earlier works on federal farm programs,<sup>158</sup> soil conservation programs,<sup>159</sup> agricultural production contracts,<sup>160</sup> and right-to-farm laws;<sup>161</sup> his later works expanded into

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<sup>155</sup> See, e.g., Susan Schneider, *Bankruptcy Reform and Family Farmers: Correcting the Disposable Income Problem*, 38 TEX. TECH L. REV. 309 (2006); Susan Schneider, *Who Gets the Check: Determining When Federal Farm Program Payments Are Property of the Bankruptcy Estate?*, 84 NEB. L. REV. 469 (2005).

<sup>156</sup> Susan Schneider, *Reconnecting Consumers and Producers: On the Path Toward a Sustainable Food and Agriculture Policy*, 14 DRAKE J. AGRIC. L. 75 (2009).

<sup>157</sup> See generally Susan Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM & MARY J. ENVTL L. & POL'Y REV. 935 (2010).

<sup>158</sup> See, e.g., Neil Hamilton, *Legal Issues Arising in Federal Court Appeals of ASCS Decisions Administering Federal Farm Programs*, 12 HAMLINE L. REV. 633 (1989).

<sup>159</sup> See, e.g., Neil Hamilton, *Legal Issues in Enforcing Federal Soil Conservation Programs: An Introduction and Preliminary Overview*, 23 U.C. DAVIS L. REV. 637 (1990).

<sup>160</sup> See, e.g., Neil Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. L. REV. 1051 (1995).

<sup>161</sup> See, e.g., Neil Hamilton, *Right-To-Farm Laws Reconsidered: Ten Reasons Why*



issues such as climate change,<sup>162</sup> rural communities,<sup>163</sup> and even broadly systemic approaches.<sup>164</sup> Professor Drew Kershen also focused his earlier works on topics such as the legal regime for agricultural products under warehouse receipts,<sup>165</sup> but has recently published on topics such as the conflicted relationship between agroecology and sustainable intensive agriculture.<sup>166</sup>

Legal scholars who have more recently begun to write about food also appear to take a more integrated approach to these two areas, at least consistent with some form of food systems analysis. Some of these newer articles address issues that fall solely under either agricultural law or food law as traditionally conceived, but approach their analyses using additional perspectives, such as environmental or consumer perspectives.<sup>167</sup> Others draw together different areas of law traditionally viewed as separated between food law and agricultural law, and discuss the relationships between those areas.<sup>168</sup> Yet others use

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*Legislative Efforts To Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103 (1998).

<sup>162</sup> Neil D. Hamilton, *Farming An Uncertain Climate Future: What COP 15 Means For Agriculture*, 2011 U. ILL. L. REV. 341 (2011).

<sup>163</sup> See generally Neil D. Hamilton, *Rural Lands And Rural Livelihoods: Using Land And Natural Resources To Revitalize Rural America*, 13 DRAKE J. AGRIC. L. 179 (2008).

<sup>164</sup> See, e.g., Neil D. Hamilton, *Moving Toward Food Democracy: Better Food, New Farmers, And The Myth Of Feeding The World*, 16 DRAKE J. AGRIC. L. 117 (2011); Neil D. Hamilton, *Farms, Food, And The Future: Legal Issues And Fifteen Years Of The "New Agriculture"*, 26 J. ENVTL. L. & LITIG. 1 (2011).

<sup>165</sup> See generally Drew L. Kershen, *Comparing The United States Warehouse Act And U.C.C. Article 7*, 27 CREIGHTON L. REV. 735 (1993–94).

<sup>166</sup> See, e.g., Drew L. Kershen, *The Contested Vision For Agriculture's Future: Sustainable Intensive Agriculture And Agroecology*, 46 CREIGHTON L. REV. 591 (2013).

<sup>167</sup> See, e.g., Donna M. Byrne, *Cloned Meat, Voluntary Food Labeling, And Organic Oreos*, 8 PIERCE L. REV. 31 (2009) (examining food labeling from the perspective of consumer reactions); Alexia Brunet Marks, *Check Please: Using Legal Liability To Inform Food Safety Regulation*, 50 HOUS. L. REV. 723 (2013) (examining tort based food safety claims from the perspective of plaintiffs attorneys); Diana R. H. Winters, *From Industrial to Artisanal: A New Regulatory Framework for a Changing Food Landscape* (Indiana University Robert H. McKinney School of Law Research Paper No. 2013-23, 2013) (forthcoming) (examining food safety regulation from the perspective of public health); Michael T. Roberts, *A Perspective On Emerging Law, Consumer Trust And Social Responsibility In China's Food Sector: The "Bleaching" Case Study*, 66 FOOD & DRUG L.J. 405 (2011) (examining Chinese food safety from the perspective of consumers, using tools of corporate social responsibility).

<sup>168</sup> See, e.g., Laurie J. Beyranevand, *Balancing Food Safety and Burdens On Small Farms*, 28-FALL NAT. RESOURCES & ENV'T 17 (2013) (discussing food safety and the livelihood of small farmers); Nicole E. Negowetti, *A National "Natural" Standard for Food Labeling*, 65 ME. L. REV. 581 (2013) (discussing food labeling and "natural" food production); Sarah B. Schindler, *Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments And Locavores*, 87 TUL. L. REV. 231 (2012) (discussing local planning, local food production, and local food consumption); Emily Broad Leib, *The Forgotten Half*

umbrella phenomena such as food-involved social movements or cultures to examine aspects of food law and agricultural law together.<sup>169</sup> In doing so, these authors take advantage of being able to observe additional patterns that arise when elements of or interests from both fields are examined in conjunction.<sup>170</sup> All of these articles are notable in that in addition to addressing topics that fall under traditional agricultural or food law, they also address various related issues not traditionally grouped under these fields.<sup>171</sup>

A few of these articles do, however, more directly incorporate food systems-oriented analysis through their express focus on interconnections and relationships between multiple physical, economic, social, and legal aspects of food, either as abstract concepts or as applied to particular problems or food systems.<sup>172</sup> For example, Professors Margaret Sova McCabe and Joanne Burke take a systems-oriented approach in their analysis of developing state food systems

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*Of Food System Reform: Using Food And Agricultural Law To Foster Healthy Food Production*, 9 J. FOOD L. & POL'Y 17 (2013) (discussing the use of food and agricultural legal reforms to promote public health).

<sup>169</sup> See, e.g., Laurie Ristino, *Back To The New: Millennials And The Sustainable Food Movement*, 15 VT. J. ENVTL. L. 1 (2013) (focusing on the dynamics of the millennial generation with respect to sustainable food movements); Jaime Bouvier, *The Symbolic Garden: An Intersection Of the Food Movement And The First Amendment*, 65 ME. L. REV. 425 (2013) (examining the ways in which food system actions relate to speech); Stephanie Tai, *The Rise of U.S. Food Sustainability Litigation*, 85 S. CAL. L. REV. 1069 (2012) (examining the relationship between the values of those in the sustainable movement with the actual litigation dynamics presented by the movement); Alison Peck, *Revisiting The Original "Tea Party": The Historical Roots Of Regulating Food Consumption In America*, 80 UMKC L. REV. 1 (2011) (examining misconceptions about the role of food regulation in U.S. history and their relationship with current Tea Party dynamics); Allison Condra, *Food Sovereignty In The United States: Supporting Local And Regional Food Systems*, 8 J. FOOD L. & POL'Y 281 (2012) (discussing the dynamics of food sovereignty and proponents of food sovereignty as they apply to regional and local food systems); cf. TIMOTHY D. LYTTON, PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD (2013) (addressing kosher food systems regulation).

<sup>170</sup> Cf. Aagaard, *supra* note 44, at 229 (discussing enhanced pattern recognition as one of the benefits of a taxonomical grouping).

<sup>171</sup> See, e.g., Negowetti, *supra* note 168 (discussing natural food production); Schindler, *supra* note 168 (discussing the local food movement); Ristino, *supra* note 169 (discussing new generations of farmers); Condra, *supra* note 169 (discussing food sovereignty).

<sup>172</sup> See generally Margaret Sova McCabe & Joanne Burke, *The New England Food System In 2060: Envisioning Tomorrow's Policy Through Today's Assessments*, 65 ME. L. REV. 549 (2013); Amy Cohen, *The Law and Political Economy of Contemporary Food: Some Reflections on the Local and the Small*, LAW & CONTEMP. LEGAL PROBS. (forthcoming 2014); Bret C. Birdsong, *From "Food Miles" to "Moneyball": How We Should Be Thinking About Food and Climate*, 65 ME. L. REV. 409 (2013); Jason J. Czarnezki, *Food, Law & The Environment: Informational And Structural Changes For A Sustainable Food System*, 31 UTAH ENVTL. L. REV. 263 (2011).

missions in the New England region.<sup>173</sup> This comprehensive approach has led them to identify four important considerations for moving forward, considerations which arguably might not have been identified had they not focused on interconnected aspects of food policy.<sup>174</sup> These considerations include the role of state government in food system planning,<sup>175</sup> the role of food policy councils in food system planning,<sup>176</sup> the relationship between state-based plans and regional initiatives,<sup>177</sup> and the role of funding in reaching the goals of a policy.<sup>178</sup>

Professor Amy Cohen also explores scale with respect to food system governance, but using a more theoretical perspective.<sup>179</sup> In her forthcoming article, she examines the ways in which local food systems operate not merely physically, but also conceptually as alternative economic spaces whose perceived natures are tied to their particular size and scale.<sup>180</sup> In doing so, she characterizes different historical food regimes through the lens of political economy,<sup>181</sup> using an approach that integrates labor and economic theory that is systems-oriented, at least along these two axes. Taking a more systems-oriented approach allows Cohen to juxtapose small-scale alternative food economies against other contemporary food regimes to highlight the multiple ways in which the former poses a challenge to the latter.<sup>182</sup>

A systems approach is used by Professor Bret Birdsong in highlighting analytical approaches towards understanding relationships between food and climate that would overcome some of the limitations of the “food miles” concept.<sup>183</sup> In a way, his piece begins with a food systems approach most like that used by many food and environmental policy scholars by providing an account of the varied elements of the food sector’s contribution to climate change.<sup>184</sup> Such an approach is similar to the food systems and climate analyses presented in Part I of this Article. But he also uses this systems-based approach towards food sector contributions to climate change to

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<sup>173</sup> McCabe & Burke, *supra* note 172, at 556.

<sup>174</sup> McCabe & Burke, *supra* note 172, at 567–68.

<sup>175</sup> McCabe & Burke, *supra* note 172, at 567–68.

<sup>176</sup> McCabe & Burke, *supra* note 172, at 568.

<sup>177</sup> McCabe & Burke, *supra* note 172, at 568.

<sup>178</sup> McCabe & Burke, *supra* note 172, at 568.

<sup>179</sup> Cohen, *supra* note 172.

<sup>180</sup> Cohen, *supra* note 172, at 41.

<sup>181</sup> Cohen, *supra* note 172, at 24–37.

<sup>182</sup> Cohen, *supra* note 172, at 56.

<sup>183</sup> Birdsong, *supra* note 172.

<sup>184</sup> Birdsong, *supra* note 172, at 411–15.

derive legal strategies based on this approach.<sup>185</sup> These include engaging in strategic intensification,<sup>186</sup> engaging in limited and strategic extensification (to avoid overreliance on converting additional areas for food production),<sup>187</sup> influencing diets towards less carbon-intensive food products,<sup>188</sup> rationalizing biofuels policy,<sup>189</sup> and reducing food waste.<sup>190</sup> His systems-informed problem identification allowed him to draw together diverse sectoral strategies to attempt to address food sector contributions to climate change.

Professor Jason Czarnezki takes a different sort of food systems-informed approach, using the insights of system relationships to suggest legal and structural changes to the food economy that he argues are necessary to increase access to sustainable foods.<sup>191</sup> For example, drawing from the relationships between diet and environmental impacts, he concludes that one important change is increasing consumer access to information about the environmental impacts of food choices.<sup>192</sup> He also draws attention to the need to address both production and distribution channels when examining structural changes.<sup>193</sup> Indeed, his article expressly calls for something much like food systems analysis (if directly labeled that way) in stating, “[W]e need a more holistic food model that takes account of all phases of production and distribution, and various ideals of sustainable food.”<sup>194</sup> In sum, a number of newer works in this emerging area of law either adopt approaches that are more consistent with formal systems-oriented approaches, use systems-informed analyses to enhance their legal analyses, or even advocate for the use of models that are themselves systems-oriented.

Finally, the changing focus of agricultural law scholarship may, to some extent, reflect the changing landscape of agricultural practice itself. “Driven by larger, more demanding, and more savvy customers, industries in the new economy have become ‘consumer-centric.’”<sup>195</sup> As Professor Neil Hamilton observed recently, agricultural legislation may

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<sup>185</sup> Birdsong, *supra* note 172, at 417–23.

<sup>186</sup> Birdsong, *supra* note 172, at 419–20.

<sup>187</sup> Birdsong, *supra* note 172, at 420–21.

<sup>188</sup> Birdsong, *supra* note 172, at 421.

<sup>189</sup> Bret C. Birdsong, *From “Food Miles” to “Moneyball”: How We Should Be Thinking About Food and Climate*, 65 ME. L. REV. 409 (2013).

<sup>190</sup> *Id.* at 422–23.

<sup>191</sup> Czarnezki, *supra* note 172.

<sup>192</sup> Czarnezki, *supra* note 172, at 280.

<sup>193</sup> Czarnezki, *supra* note 172, at 284.

<sup>194</sup> Czarnezki, *supra* note 172, at 285.

<sup>195</sup> Kinsey, *supra* note 8, at 1115.

be in its newest period, the post-industrial food democracy period.<sup>196</sup> As he puts it:

This period involves new methods of producing food, for example the growth of organics, and more reliance on relational marketing, often on a local basis in activities such as direct farm marketing, farmers markets, and community supported agriculture (“CSA”). But the new period is also defined by new legal and political controversies over animal welfare, food safety, and mandatory disclosures on food labels—consumer trends that make agriculture respond and that open opportunities for farmers willing to do so.<sup>197</sup>

Thus, the incorporation of more integrated concerns within the umbrella of legal scholarship about food could also be consistent with on-the-ground changes in the issues faced by those in the food economy.

Regardless of the underlying cause or causes for this shift in focus with respect to academic publications, the trend appears to be towards more articles that address interfacial issues between agricultural law and food law, with topics from agricultural law and food law sometimes drawn together even in the same article. This is not to say that the “core” agricultural law and agricultural law pieces have fallen entirely by the wayside; instead, they are situated alongside an increasing number of articles that focus on examining interconnectivities.

#### B. Books

This section provides another lens with which to examine changes in scholarship related to different aspects of the food system. It contrasts traditional agricultural law and food law casebooks with some newer survey books related to different aspects of the food system.<sup>198</sup>

Two casebooks/treatises have been widely used for agricultural law: Julian Conrad Juergensmeyer and James Bryce Wadley’s *Agricultural Law*, published in 1982,<sup>199</sup> and Keith G. Meyer, Donald B.

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<sup>196</sup> Neil Hamilton, *Harvesting The Law: Personal Reflections On Thirty Years Of Change In Agricultural Legislation*, 46 CREIGHTON L. REV. 563, 569–70 (2013).

<sup>197</sup> *Id.* at 569.

<sup>198</sup> As such, this approach is similar to that taken in Professor Janet Halley’s study of the development of family law as a field of law. See Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1 (2011).

<sup>199</sup> JUERGENSMEYER & WADLEY, *supra* note 93. *But see* Neil Hamilton, Book Review, *Agricultural Law. By Juergensmeyer & Wadley*, 48 LA. L. REV. 1585, 1586–87 (1983) (criticizing the treatise as failing to beyond general reporting of the material and ambiguous with respect to its intended audience while praising the treatise as a welcome addition to the body of agricultural law).

Pedersen, Norman W. Thorson, and John H. Davidson's *Agricultural Law: Cases and Materials*, published in 1985.<sup>200</sup> Although their organizational schemes, depth, and perspectives are quite different from each other, both of these casebooks provide similar core coverage, addressing land related issues,<sup>201</sup> business organization related issues,<sup>202</sup> financing related issues,<sup>203</sup> contracts related issues,<sup>204</sup> soil and water related issues,<sup>205</sup> and labor related issues.<sup>206</sup> They also each have areas of unique coverage. For example, the Juergensmeyer & Wadley treatise covers food stamps (now known as the Supplemental Nutrition Assistance Program, or SNAP), civil liabilities, international trade, and estate planning,<sup>207</sup> topics which are not addressed in the Meyer casebook. In contrast, the Meyer casebook covers livestock regulation,<sup>208</sup> which is not addressed as such in Juergensmeyer & Wadley.

As suggested earlier, each of these texts has different, broader organizational themes. All of these themes, however, revolve around the perspectives of agricultural organizations. The Juergensmeyer & Wadley treatise focuses on three themes: the ways in which judicial, statutory, and regulatory treatment is often unique in the agricultural context, the ways in which certain legal concepts and frameworks have been developed to focus exclusively on agriculture, and the ways in

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<sup>200</sup> MEYER ET AL., *supra* note 93. Prior to the publication of AGRICULTURAL LAW: CASES AND MATERIALS, Professor Davidson also published a compendium of edited agricultural law materials. See AGRICULTURAL LAW (John H. Davidson ed., 1981). This Article does not treat the edited volume as a casebook because of its own design—less for students, and more as a supplementary guide for lawyers and judges. See *id.* at iii (“This work is intended for lawyers, judges, and all others who must deal with the intricacies of federal statutes regulating American agriculture.”). As such, it takes a more summary approach towards the law than books in the casebook format, which tend to provide broader themes for students, as the Juergensmeyer & Wadley treatise attempts to do.

<sup>201</sup> JUERGENSMEYER & WADLEY, *supra* note 93, at 63–196 (vol. 1); MEYER ET AL., *supra* note 93, at 52–107, 839–912.

<sup>202</sup> JUERGENSMEYER & WADLEY, *supra* note 93, at 125–447 (vol. 2); MEYER ET AL., *supra* note 93, at 569–679.

<sup>203</sup> JUERGENSMEYER & WADLEY, *supra* note 93, at 245–80 (vol. 1), 367–84 (vol. 1), 317–88 (vol. 2); MEYER ET AL., *supra* note 93, at 52–107, 268–356.

<sup>204</sup> JUERGENSMEYER & WADLEY, *supra* note 93, at 265–316 (vol. 2); MEYER ET AL., *supra* note 93, at 357–96, 491–568.

<sup>205</sup> JUERGENSMEYER & WADLEY, *supra* note 93, at 357–66 (vol. 1); MEYER ET AL., *supra* note 93, at 759–838.

<sup>206</sup> JUERGENSMEYER & WADLEY, *supra* note 93, at 367–84 (vol. 1), 317–88 (vol. 2); MEYER ET AL., *supra* note 93, at 680–758.

<sup>207</sup> JUERGENSMEYER & WADLEY, *supra* note 93, at 585–600 (vol. 1), 1–124 (vol. 2), 557–574 (vol. 2), 413–46 (vol. 2), 447–514 (vol. 2).

<sup>208</sup> MEYER ET AL., *supra* note 93, at 397–490.

which certain legal exemptions were created to specifically for agricultural operations.<sup>209</sup> The Meyer casebook has similar, though differing, themes: the unique importance of land in the agricultural industry, the highly regulated nature of the agricultural industry in ways that run counter to the regulation of similarly situated industries (for example, the mitigation rather than encouragement of some of the harsher effects of competition in order to protect food supplies), and the unique ways in which laws attempt to structure the agricultural industry that extend beyond market-preference ways (for example, the promotion of family-sized farms).<sup>210</sup> This suggests that agricultural law, at least as seen through the lens of its chief casebooks, is conceived of as structured around the primary interests<sup>211</sup> of agricultural organizations, and how they are shaped by the relevant laws. Such a focus is understandable, given the likely future client base of law students interested in practicing in this area, but it also shapes the way that agricultural law as a field has ended up being structured. Moreover, this focus may overlook patterns and solutions that only emerge when examined in conjunction with food-related topics,<sup>212</sup> such as public health solutions related to production and consumption.<sup>213</sup>

Only one primary casebook exists for food law, and it covers food and drug law, not only food law alone: Peter Barton Hutt and Richard A. Merrill's *Food and Drug Law*, published initially in 1980, and subsequently in 1991<sup>214</sup> and 2007. The authors describe food and drug law as "deal[ing] with government protection of public health and safety with regard to the marketing of food, drugs, cosmetics, medical devices, and biological products,"<sup>215</sup> and the organization of the casebook reflects that perspective. That is, with respect to food, the casebook is organized around different types of federal regulation of food: labeling,<sup>216</sup> identity and quality,<sup>217</sup> nutrient content,<sup>218</sup> and

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<sup>209</sup> JUERGENSMEYER & WADLEY, *supra* note 93, at 6–7 (vol. 1).

<sup>210</sup> MEYER ET AL., *supra* note 93, at xix–xx.

<sup>211</sup> See Ruger, *supra* note 59, at 631–33.

<sup>212</sup> See Aagaard, *supra* note 44, at 244–45.

<sup>213</sup> See Broad Leib, *supra* note 168; Lindsay F. Wiley, *The U.S. Department Of Agriculture As A Public Health Agency? A "Health In All Policies" Case Study*, 9 J. FOOD L. & POL'Y 61 (2013); cf. Endres & Johnson, *supra* note 5, at 39–46.

<sup>214</sup> HUTT, MERRILL, & GROSSMAN, *FOOD AND DRUG LAW* (3d ed. 2007), *supra* note 98.

<sup>215</sup> *Id.* at v.

<sup>216</sup> *Id.* at 92–151.

<sup>217</sup> *Id.* at 152–97.

<sup>218</sup> *Id.* at 198–245.

safety.<sup>219</sup> It also addresses interactions between state law and federal law.<sup>220</sup>

The text's primary focus on federal regulation, with some discussion of state and local regulation and common law, exhibits an emphasis on the status relationships between the government and food producers. Although consumer concerns are brought in through the government's statutory charge of protecting public health and individual welfare, these concerns are not the direct focus of the casebook discussions. This is not to say that the casebook's discussion of these concerns is marginal, or that its coverage is incomplete, simply that the shape and scope of consumer interests in food are only indirectly addressed, with instead the focus of food law, at least in the framework of this casebook, being the shape and scope of the government's ability and legal authority to exercise its discretion to protect its perception of those interests.<sup>221</sup> Again, this perspective makes sense in light of students' likely future practice experience, but also channels the field of food law into a particular structure and may overlook patterns and solutions that emerge only when topics in both fields are examined together.

Some of the newer comprehensive books that have been published pertaining to various aspects of the food system differ quite widely from the traditional casebooks, however. To illustrate these differences, two such books are examined: Susan Schneider's *Food, Farming, and Sustainability: Readings in Agricultural Law*, published in 2011,<sup>222</sup> and Mary Jane Angelo, Jason Czarnezki, and William Eubanks's *Food, Agriculture, and the Environment*, published in 2013.<sup>223</sup>

*Food, Farming, and Sustainability* presents the more direct hybrid of agricultural law and food law. Its coverage overlaps strongly with the agricultural law casebook in addressing financing, economic support, and land-based issues,<sup>224</sup> but it also addresses the Barton Hutt & Merrill

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<sup>219</sup> *Id.* at 360–464.

<sup>220</sup> PETER B. HUTT, RICHARD A. MERRILL & LEWIS A. GROSSMAN, *Introduction*, FOOD AND DRUG LAW 1410–1457 (3d ed. 2007).

<sup>221</sup> Compare HUTT & MERRILL (3d ed. 2007), *supra* note 98, with RICHARD REVESZ, ENVIRONMENTAL LAW AND POLICY (2d ed. 2012); J.B. RUHL ET AL., THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW (3d ed. 2013); ROBERT V. PERCIVAL, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY (7th ed. 2013).

<sup>222</sup> SUSAN A. SCHNEIDER, FOOD, FARMING, AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW (2011).

<sup>223</sup> MARY JANE ANGELO, JASON CZARNEZKI, & WILLIAM EUBANKS, FOOD, AGRICULTURE AND THE ENVIRONMENT (2013).

<sup>224</sup> SCHNEIDER, *supra* note 222, at 53–302.



casebook in addressing food safety and production issues.<sup>225</sup> It also addresses a number of additional issues pertaining to the food system but not addressed in traditional agricultural law or food law casebooks: labor discrimination and “fair food” concerns,<sup>226</sup> policy concerns with biotechnology and patenting,<sup>227</sup> and animal welfare.<sup>228</sup> And it ties together these different issues as interrelated parts of the overall system.

*Food, Agriculture, and the Environment* addresses food systems primarily from an environmental angle,<sup>229</sup> a perspective whose relevant laws are addressed in agricultural law casebooks, but more from the perspective of agriculturalists rather than those concerned with environmental protection. Indeed, to the extent that it exhibits statutory overlap with any casebook, it is more with environmental law casebooks than either agricultural law or food law casebooks.<sup>230</sup> This reflects the background of the three authors, who began their careers working more in the environmental law arena,<sup>231</sup> and suggests that the morphing of the fields of agricultural and food law may be at least partially driven by the influx of scholars who bring additional interests once considered more peripheral to the fields. Nevertheless, it also shares some statutory overlap with agricultural law casebooks with its focus on farm bill structures<sup>232</sup> and with food law case books in its

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<sup>225</sup> SCHNEIDER, *supra* note 222, at 617–95.

<sup>226</sup> SCHNEIDER, *supra* note 222, at 357–432.

<sup>227</sup> SCHNEIDER, *supra* note 222, at 535–616.

<sup>228</sup> SCHNEIDER, *supra* note 222, at 489–534.

<sup>229</sup> ANGELO ET AL., *supra* note 223, at 35–222.

<sup>230</sup> Compare ANGELO ET AL., *supra* note 223, at 147–84, with J.B. RUHL, JOHN COPELAND NAGLE, JAMES SALZMAN & ALEXANDRA B. KLASS, *THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW* 131–296 (3d ed. 2011) (addressing the Clean Air Act and the Clean Water Act). Compare ANGELO ET AL., *supra* note 223, at 185–206, with RUHL ET AL. at 39–105 (Endangered Species Act); ANGELO ET AL., *supra* note 223, at 207–22, with RUHL ET AL. at 406–66 (National Environmental Policy Act).

<sup>231</sup> See, e.g., Mary Jane Angelo et al., *Exalting The Corporate Form Over Environmental Protection The Corporate Shell Game And The Enforcement Of Water Management Law In Florida*, 17 J. LAND USE & ENVTL. L. 89 (2001); Mary Jane Angelo, *Embracing Uncertainty, Complexity, And Change: An Eco-Pragmatic Reinvention Of A First-Generation Environmental Law*, 33 *ECOLOGY L.Q.* 105 (2006); Jason J. Czarnezki, *Shifting Science, Considered Costs, And Static Statutes: The Interpretation Of Expansive Environmental Legislation*, 24 VA. ENVTL. L.J. 395 (2006); Jason J. Czarnezki, *Revisiting The Tense Relationship Between The U.S. Supreme Court, Administrative Procedure, And The National Environmental Policy Act*, 25 STAN. ENVTL. L.J. 3 (2006); William S. Eubanks II, *Environmental Justice For All? The Navy's Recent Failure To Protect North Carolina's Citizens*, 30 N.C. CENT. L. REV. 206 (2008); William S. Eubanks II, *The Life-Altering Impacts Of Climate Change: The Precipitous Decline Of The Northeastern Sugar Maple And The Regional Greenhouse Gas Initiative's Potential Solution*, 17 PENN ST. ENVTL. L. REV. 81 (2008).

<sup>232</sup> ANGELO ET AL., *supra* note 223, at 13–34.

limited presentation of federal food statutes such as the FDCA and the newer Food Safety Modernization Act.<sup>233</sup> (Indeed, its most food-related chapter shows how a shift in organizational emphasis can also lead to a shift in substantive emphasis; *Food, Agriculture, and the Environment's* chapter on federal food statutes devotes similar discussion space to the FDCA, the Organic Foods Production Act, and the National School Lunch Program.<sup>234</sup>) Overall, however, the book focuses primarily on the relationship between differing aspects of the food system with the environment, addressing unique issues not covered by agricultural law and food law casebooks such as the environmental effects of biotechnology,<sup>235</sup> eco-labeling,<sup>236</sup> and agriculture and climate change.<sup>237</sup>

The contrast between the traditional casebooks and the two newer books supports the emergence of a conceptual shift within the legal academy. But it is not only the subject matter coverage that differs between the newer books and the traditional casebooks. The perspectives presented in both *Food, Farming, and Sustainability* and *Food, Agriculture, and the Environment* present a broader set of primary interests under consideration than the traditional casebooks, suggesting an increasing concern between the relationships between a wider range of elements of the food system. For example, *Food, Farming, and Sustainability*, in presenting relevant labor statutes, focuses not only on agricultural organizations as employers, but also on the actual farm laborers themselves as separate actors with individual interests.<sup>238</sup> It presents animal welfare statutes from the perspective of not only livestock operators, but also the animals themselves, as well as citizens interested in the welfare of farm animals.<sup>239</sup> Similarly, it discusses systematic relationships between food and agriculture itself, as well as changing perceived interests in food and agriculture from the perspectives of consumers and the general public.<sup>240</sup> *Food, Agriculture, and the Environment* takes a similar multiple-interests-and-relationships-based approach by examining how legal structures related to agriculture and food either have or could have positive or

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<sup>233</sup> ANGELO ET AL., *supra* note 223, at 223–27.

<sup>234</sup> ANGELO ET AL., *supra* note 223, at 223–40.

<sup>235</sup> ANGELO ET AL., *supra* note 223, at 93–111.

<sup>236</sup> ANGELO ET AL., *supra* note 223, at 301–24.

<sup>237</sup> ANGELO ET AL., *supra* note 223, at 325–33.

<sup>238</sup> SCHNEIDER, *supra* note 222, at 357–432; *see also* Guadalupe T. Luna, United States v. Duro: *Farmworker Housing and Agricultural Law Constructions*, 9 HASTINGS RACE & POVERTY L.J. 397 (2012).

<sup>239</sup> SCHNEIDER, *supra* note 222, at 492–534.

<sup>240</sup> SCHNEIDER, *supra* note 222, at 617–710.

negative effects on various aspects of the environment.<sup>241</sup>

*C. Courses, Clinical Offerings, and Centers*

The final examination of this Article highlighting the changes in the conceptualization of law related to aspects of food systems involves a brief, non-comprehensive survey of the content of newer law school courses and legal clinics.<sup>242</sup> A more comprehensive study is presented in the Linnekin and Broad Leib article discussed earlier.<sup>243</sup> However, a related review is presented in this Article in order to apply taxonomical theories to the changing scope of law school offerings.

Traditionally, most survey courses in agricultural law or food law were taught using one of the casebooks described in Part II.B. In the past decade, however, law professors and clinicians have been experimenting with new ways to present some of the same subject matter (although often more integrated between traditional agricultural law and food law), while also exposing students to a broader variety of perspectives beyond the client-based focus of traditional curricula.

For example, a number of law schools have begun to offer some form of seminar in sustainable agriculture and food law. As Linnekin and Broad Leib note, “twenty [top 100 U.S. law schools] offered at least one (and sometimes more than one)” course under the newly developing field that morphs aspects of food and agricultural law into a different, reconceptualized field they call Food Law and Policy.<sup>244</sup> This is compared to sixteen of the top 100 U.S. law schools that offer traditional agricultural law, and 41 of the top 100 U.S. law schools that offer traditional food (and drug) law.<sup>245</sup> A few of these seminars are labeled more as special topics seminars in agricultural law, but containing content that extends substantially into either food-related

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<sup>241</sup> ANGELO ET AL., *supra* note 223, at 35–50 (examining environmental effects of fertilizers and pesticides), 51–64 (examining environmental effects of agricultural irrigation), 65–92 (examining environmental effects of industrialized animal agriculture), 113–28 (examining climate change effects of food production, processing, packaging, and distribution), 241–62 (examining ecosystem services provided by agricultural systems).

<sup>242</sup> This is not to say that a more comprehensive survey would not provide an even deeper look at the developing dynamic. See, e.g., Jeff Sovern, *The Content of Consumer Law Classes II*, 14 J. CONSUMER & COM. L. 16 (2010) (assessing, based on nationwide survey responses, the changes in content of consumer law courses around the United States).

<sup>243</sup> Linnekin & Broad Leib, *supra* note 2, at 601–03, 605–07.

<sup>244</sup> Linnekin & Broad Leib, *supra* note 2, at 599.

<sup>245</sup> Linnekin & Broad Leib, *supra* note 2, at 599.

areas<sup>246</sup> or environment-related areas.<sup>247</sup> More of these newer courses, however, use food as their descriptive base, but extend their content substantially into agriculture.<sup>248</sup>

These courses tend to draw from elements of both agricultural law and food law. For example, on the agricultural law side, they address legal topics such as pesticide regulation,<sup>249</sup> labor,<sup>250</sup> federal farm programs,<sup>251</sup> and land use.<sup>252</sup> On the food law side, they tend to address federal food safety regulations<sup>253</sup> and labeling requirements.<sup>254</sup> But a stronger focus of all of these classes is the relational aspects between all of these legal requirements on the different aspects of the food system: not only the growing and processing of food, but also the relationships between different aspects of the production and provision of food with the greater society.<sup>255</sup>

As with the changing scope of legal scholarship and casebooks, the scope of these newer “food law and policy” courses suggest a possible reconceptualization of the relevant interests involved in the study of law related to food, while still keeping the primary interests

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<sup>246</sup> See, e.g., *Sustainability: Food & Agriculture Seminar*, LEWIS & CLARK LAW SCHOOL, <http://law.lclark.edu/live/profiles/1786-sustainability—food-amp-agriculture-seminar-504> (last visited Nov. 9, 2014); *Agricultural Law Seminar 6–7*, NORTHERN ILLINOIS UNIVERSITY, [http://latcrit.org/media/medialibrary/2013/09/1\\_guadalupe\\_fall2008\\_aglaw.pdf](http://latcrit.org/media/medialibrary/2013/09/1_guadalupe_fall2008_aglaw.pdf).

<sup>247</sup> See, e.g., *Agriculture and Environment Seminar*, UNIVERSITY OF MINNESOTA LAW SCHOOL, <http://www.law.umn.edu/current/alphabetical-course-list/details.html?courseNumber=6709> (last visited Nov. 9, 2014); *Agricultural Law and the Environment Seminar*, UNIVERSITY OF WISCONSIN LAW SCHOOL, <http://law.wisc.edu/courseInfo/courseDescription.php?iTerm=1124&iSc=A1&iCatNBR=988&iSection=001> (last visited Nov. 9, 2014).

<sup>248</sup> See, e.g., *Food: A Health Law and Policy Seminar*, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/academics/curriculum/catalog/index.html?o=64460> (last visited Nov. 9, 2014); *Food Law and Policy*, UCLA SCHOOL OF LAW, <https://curriculum.law.ucla.edu/Guide/Course/204> (last visited Nov. 9, 2014); *Food Law and Policy Seminar*, WILLIAM MITCHELL COLLEGE OF LAW, <http://web.wmitchell.edu/students/course-description/?course=1957> (last visited Nov. 9, 2014); *Food Law and Policy Seminar*, UNC SCHOOL OF LAW, <http://www.law.unc.edu/academics/courses/foodlaw/> (last visited Nov. 9, 2014); *Food Law & Policy Seminar*, UC DAVIS SCHOOL OF LAW, <http://www.law.ucdavis.edu/current/registrar/course-descriptions.html> (last visited Nov. 9, 2014).

<sup>249</sup> LEWIS & CLARK LAW SCHOOL, *supra* note 246.

<sup>250</sup> NORTHERN ILLINOIS UNIVERSITY, *supra* note 246.

<sup>251</sup> UNIVERSITY OF MINNESOTA LAW SCHOOL, *supra* note 247.

<sup>252</sup> UNIVERSITY OF WISCONSIN LAW SCHOOL, *supra* note 247.

<sup>253</sup> UCLA SCHOOL OF LAW, *supra* note 248.

<sup>254</sup> WILLIAM MITCHELL COLLEGE OF LAW, *supra* note 248.

<sup>255</sup> See, e.g., UC DAVIS SCHOOL OF LAW, *supra* note 248 (“This course addresses the unique intersection between this new, consumer food-movement and food law and policy.”).

taxonomical approach. That is, the expanded primary interests covered under the newer courses could be seen as incorporating the interests of other actors—beyond the government and business entities—that come into contact with food as consumers, laborers, residents in areas where food is grown, and concerned citizens. It could also be seen as an expansion of the concept of business interests to encompass the wider range of interests shared by what Professor Hamilton describes as the “new agrarians,” newer members of the agribusiness community who “generally bring an enlightened attitude to resource conservation and sustainability and are interested in embracing environmental stewardship.”<sup>256</sup> Finally, the scope of these newer courses could also signal a shift away from the primary interests approach towards an approach unified by themes of interconnections and relationships, given the wide range of topics encompassed by these courses, and their often interactive elements, such as farm policy and food safety.

In addition, some law schools have begun to either broaden their pre-existing law clinics into projects related to different aspects of the food system, or to establish new clinical education programs that deal focus entirely on different aspects of the food system. Indeed, Linnekin and Broad Leib’s study finds “30 different clinics at 23 of the top 100 law schools were in the midst of or had completed at least one project engaged in” broader food law and policy work.<sup>257</sup> Again, some of these clinics are discussed here—despite the more comprehensive survey presented by Linnekin and Broad Leib—in order to contextualize them with respect to what these developments mean for the taxonomical standing of this emerging area of law.

For example, the Stanford Law School’s Organizations and Transactions Clinic, which focuses generally on providing students with experiential learning opportunities in corporate and transactional work,<sup>258</sup> has been expanding their representation to “clients . . . active in sustainable agriculture, food security, small-scale

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<sup>256</sup> Neil D. Hamilton, *America’s New Agrarians: Policy Opportunities And Legal Innovations To Support New Farmers*, 22 FORDHAM ENVTL. L. REV. 523, 527 (2011). Hamilton contrasts this newer generation of farmers with stands in contrast to many in the traditional farm sector who continue to view environmental issues, such as addressing water quality protection or confronting the challenges of climate change, as an economic burden rather than a social and legal responsibility.

<sup>257</sup> Linnekin & Broad Leib, *supra* note 2, at 605–07.

<sup>258</sup> *Organizations and Transactions Clinic*, STANFORD LAW SCHOOL, <http://www.law.stanford.edu/organizations/clinics/organizations-and-transactions-clinic> (last visited Oct. 28, 2014).

farming and agricultural education.”<sup>259</sup> The Institute for Justice Entrepreneurship Clinic at the University of Chicago Law School has begun working to provide transactional and regulatory advice and advocacy for small-scale food entrepreneurs in Chicago.<sup>260</sup> Similarly, the Michigan State University College of Law initiated an Urban Food, Farm, and Agricultural Law Clinic in 2012 dedicated to providing legal services to those working in the urban food and agricultural areas.<sup>261</sup> These present a shift in primary interests from traditional agricultural business and food operations to those businesses described by Neil Hamilton as “the post-industrial food democracy period.”<sup>262</sup>

Harvard Law School has even created a new legal clinic dedicated to addressing the legal needs of clients working with different aspects of the food system. It began its Food Law and Policy Clinic<sup>263</sup> in 2010, “as a division of the Harvard Center for Health Law and Policy Innovation.”<sup>264</sup> The scope of its work extends broadly over different aspects of the food system, from “[i]ncreasing access to healthy produce for low-income individuals, recipients of food benefit programs, and those living in ‘food deserts’”<sup>265</sup> to “[f]ostering small-scale producer’ sales to grocery stores, restaurants, schools, state agencies, and institutions by identifying and eliminating legal and non-legal barriers,” to “[a]ssessing food safety laws and policies at all levels of government and recommending reform that would increase economic opportunities for small-scale local producers, including working with state governments to allow for the in-home production of certain low-risk food products.” Again, these goals suggest a shift in primary interests to those beyond that of traditional agricultural and food businesses. Moreover, by shifting its interest away from the traditional primary interests of agricultural law and food law, the clinic opens itself up to finding innovative ways to address problems that span both fields of law.

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<sup>259</sup> *Id.*

<sup>260</sup> See *Ij Clinic*, UNIVERSITY OF CHICAGO LAW SCHOOL, <http://ij.org/clinic-on-entrepreneurship>. (last visited Oct. 28, 2014).

<sup>261</sup> *Urban Food, Farm & Agriculture Law Practicum*, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW, <http://www.law.msu.edu/clinics/food/index.html> (last visited Sept. 27, 2014).

<sup>262</sup> Hamilton, *supra* note 196, at 569–70.

<sup>263</sup> *Food Law and Policy*, HARVARD LAW SCHOOL, <http://www.chlpi.org/food-law-and-policy/about/> (last visited Nov. 9, 2014).

<sup>264</sup> *About Us*, HARVARD FOOD LAW AND POLICY CLINIC, <http://blogs.law.harvard.edu/foodpolicyinitiative/about/about-us/> (last visited Sept. 27, 2014).

<sup>265</sup> *Id.*

As with the newer systems-related seminars, these clinical opportunities present students with a chance to engage with a broader client base beyond those contemplated from traditional agricultural and food law perspectives. Students represent urban<sup>266</sup> and small-scale<sup>267</sup> farmers, local food entrepreneurs,<sup>268</sup> and low-income consumers,<sup>269</sup> exposing them to a greater range of primary interests. Indeed, some of these clinics represent multiple types of actors involved with different aspects of the food system,<sup>270</sup> perhaps providing students with a greater degree of appreciation regarding how different primary interests, as well as different aspects of the food system itself—production, processing, sales, and consumption—interact. Additionally, the clinical focus on this expanded set of interests has also led these clinics to engage students in areas of legal practice not traditionally covered in agricultural law or food law. These areas include local business zoning, employment contracts, and food policy councils;<sup>271</sup> as such, they exemplify some of the “expand[ing] and contract[ing]” that legal taxonomers have long observed occurring with legal fields.<sup>272</sup>

Finally, different law schools have begun to establish centers that revolve not around solely agricultural or food law as traditionally conceived, but around broader aspects of the food system.<sup>273</sup> To some extent, though, this is not an entirely new development. Drake University Law School has had its Agricultural Law Center since 1983;<sup>274</sup> the Center’s description as “providing opportunities to study how the legal system shapes our food system”<sup>275</sup> has been in place since

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<sup>266</sup> MICHIGAN STATE UNIVERSITY COLLEGE OF LAW, *supra* note 261.

<sup>267</sup> STANFORD LAW SCHOOL, *supra* note 258.

<sup>268</sup> UNIVERSITY OF CHICAGO LAW SCHOOL, *supra* note 260.

<sup>269</sup> HARVARD LAW SCHOOL, *supra* note 263.

<sup>270</sup> STANFORD LAW SCHOOL, *supra* note 258; HARVARD LAW SCHOOL, *supra* note 263.

<sup>271</sup> Cf. Emily M. Broad Leib & Amanda L. Kool, *Using Cross-Practice Collaboration To Meet The Evolving Legal Needs Of Local Food Entrepreneurs*, 28-FALL NAT. RESOURCES & ENV'T 21 (2013).

<sup>272</sup> See Mariner, *supra* note 40, at 80.

<sup>273</sup> See Linnekin & Broad Leib, *supra* note 2, at 603. There has been relatively little theoretical literature, however, on the role and function of research centers within the legal academy. See, e.g., Larry Catá Backer, *Toward General Principles of Academic Specialization by Means of Certificate or Concentration Programs: Creating a Certificate Program in International, Comparative and Foreign Law at Penn State*, 20 PENN ST. INT'L L. R. 67, 74 n.9 (2001).

<sup>274</sup> Ann Van Hemert, *Agricultural Law Center*, DRAKE LAW SCHOOL, <http://www.law.drake.edu/academics/agLaw/> (last updated July 24, 2014).

<sup>275</sup> *Id.*

at least May 4, 2001.<sup>276</sup> And the Center's scholarly output reflects broader systemic considerations, with its director, Professor Neil Hamilton, publishing in areas such as sustainable food development, food democracy, and the relationships and differences between animal rights and animal welfare.<sup>277</sup> To the extent that the Center reflects the more traditional elements of agricultural law, it appears mostly in its description of "Careers and Internships" to which students have access due to their engagement with the center: these tend to revolve around either government or agribusiness careers (versus consumer or labor organization related careers).<sup>278</sup> This, however, could result less from the Center's focus in terms of its scholarly and policy agenda, and more because of practical circumstances involving available career opportunities for their graduates, or even perceptions of how to best attract potential law students to the clinic or law school.

Some of the newer centers in development, however, even more expressly focus not only approaching research regarding food systems more comprehensively, but also on examining a broader range of primary interests with respect to food itself. For example, the Vermont Law School Center for Agriculture and Food Systems,<sup>279</sup> established in 2012,<sup>280</sup> describes its "dual mission" as developing leaders in sustainable food and agricultural law and policy, and providing legal and policy resources to decisionmakers in this area.<sup>281</sup> Its self-description expressly presents a food systems-oriented approach, stating "[w]e believe that in order to truly foster sustainable agriculture and food, we need to understand the connections these systems have to the environment, energy, human and animal health, labor, and climate change."<sup>282</sup>

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<sup>276</sup> WAYBACK MACHINE INTERNET ARCHIVE, <http://web.archive.org/web/20010504221853/http://www.law.drake.edu/lawCenters/agLawCenter/aboutCenter.html#AboutAgCenter> (last visited Nov. 9, 2014).

<sup>277</sup> *Ag Law Publications*, DRAKE LAW SCHOOL, <http://www.law.drake.edu/academics/agLaw/?pageID=agPublications> (last updated July 24, 2014).

<sup>278</sup> Ann Van Hemert, *Academics*, DRAKE LAW SCHOOL, <http://www.law.drake.edu/academics/agLaw/?pageID=agCourses> (last updated July 24, 2014).

<sup>279</sup> *Center for Agriculture and Food Systems*, VERMONT LAW SCHOOL, [http://www.vermontlaw.edu/Academics/Environmental\\_Law\\_Center/Institutes\\_and\\_Initiatives/About.htm](http://www.vermontlaw.edu/Academics/Environmental_Law_Center/Institutes_and_Initiatives/About.htm) (last visited Sept. 27, 2014).

<sup>280</sup> *Fall 2012: Conference on Agriculture and Food Systems*, VERMONT LAW REVIEW, <http://lawreview.vermontlaw.edu/symposia/previous-symposia/conference-on-agriculture-and-food-systems> (last visited Nov. 9, 2014) ("This conference will serve as a launch platform for the law school's new Center for Agriculture and Food Systems.").

<sup>281</sup> *Center for Agriculture and Food Systems*, VERMONT LAW SCHOOL, [http://www.vermontlaw.edu/Academics/Environmental\\_Law\\_Center/Institutes\\_and\\_Initiatives/About.htm](http://www.vermontlaw.edu/Academics/Environmental_Law_Center/Institutes_and_Initiatives/About.htm) (last visited Sept. 27, 2014).

<sup>282</sup> HARVARD FOOD LAW SOCIETY, *FOOD LAW AND POLICY CAREER GUIDE 7* (3d ed.



Also recently in 2013, the UCLA School of Law established the Resnick Program for Food Law and Policy.<sup>283</sup> As with the Vermont Center, the Resnick Program describes itself as systems oriented, by being “dedicated to studying and advancing law and policy solutions to improve the modern food system.”<sup>284</sup> It also takes a primary interest approach, but using that of the consumer rather than agricultural or food businesses.<sup>285</sup> And its scope is quite wide-ranging, covering issues that were traditionally grouped under agricultural law (urban agriculture), issues that were traditionally grouped under food law (nutrition, labeling, food fraud, food safety), and also issues that end up playing a larger role under this more integrated and consumer-based approach (obesity, hunger, social justice, food entrepreneurialism, school gardens, local food, food access, intellectual property, and animal welfare).<sup>286</sup>

The development of these new centers suggest that various academic institutions are committing resources towards the development of more integrated legal approaches towards food and its systems of production and consumption. These legal approaches do not appear to be merely combinations of individual elements of agricultural law and food law, but instead attempts to transform different elements of these fields of law into a holistic approach with multiple perspectives. Given the role that legal centers may have in educating students, shaping research agendas, and developing recommendations for legal reform,<sup>287</sup> these new food-related legal centers may play similar roles in the development and taxonomical classification of the emerging field of law explored in this article.

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2014), *available at* [http://www.chlpi.org/wp-content/uploads/2013/12/2014Food-Law-and-Policy-Career-Guide\\_FINAL2.pdf](http://www.chlpi.org/wp-content/uploads/2013/12/2014Food-Law-and-Policy-Career-Guide_FINAL2.pdf).

<sup>283</sup> Lauri Gavel, *News*, UCLA LAW (Aug. 30, 2013), <https://www.law.ucla.edu/news-and-events/in-the-news/2013/08/ucla-school-of-law-names-executive-director-of-the-resnick-program-for-food-law-and-policy/>.

<sup>284</sup> Lauri Gavel, *News*, UCLA LAW (Dec. 9, 2013), <http://www.law.ucla.edu/news-and-events/in-the-news/2013/12/ucla-school-of-law-appoints-policy-and-special-programs-director-of-the-resnick-program-for-food-law-and-policy/>.

<sup>285</sup> *Resnick Program for Food Law & Policy*, UCLA LAW <http://www.law.ucla.edu/centers-programs/resnick-program-for-food-law-and-policy/Pages/default.aspx> (last visited Sept. 27, 2014).

<sup>286</sup> *Id.*

<sup>287</sup> See, e.g., Patricia E. Salkin, *Anniversary Celebration: Teaching Government Law And Policy In Law School: Reflections On Twenty-Five Years Of Experience*, 66 ALB. L. REV. 993, 996–1012 (2003).

## IV. THE GROWING FRUIT OF FOOD SYSTEMS LAW

What this Article has done—through a look at developing trends in law review topics, casebook coverage, and law school courses and centers—is show a convergence in the way that legal scholars and educators have begun to approach both agricultural law and food law. As shown, while the doctrinal content appears to derive primarily from elements of both traditional agricultural law and food law, this emerging approach incorporates perspectives seen more often in fields such as environmental law, health law, and labor law, drawing them together into a single, more unified, field. These glimpses can and should be combined with other studies, such as that provided by Linnekin and Broad Leib,<sup>288</sup> to provide an even more comprehensive picture of all the changes. But the snapshots shown here at least illustrate, through the lens of legal taxonomy, how overlapping issues between agricultural law and food law are increasingly salient for legal scholarship, legal education, and general legal understanding and how this might entail a different taxonomical treatment of this emerging field as compared to agricultural law and food law. What’s more, these snapshots highlight how legal issues beyond those traditionally conceptualized as part of agricultural law or food law are becoming more salient under this emerging approach to food.

In describing this emerging approach, I have used the term “food systems law,” although other terms, such as “food law and policy” have also been proposed.<sup>289</sup> Indeed, the term “food law and policy” appears to be the phrase more commonly used to refer to this emerging field, although the phrase “food systems” is often also used in the descriptions of its scope and coverage. However, I choose to use “food systems law” as a descriptor in order to reference the food systems approach found in other areas of science, economic, and policy analysis described in Part I. This seems especially appropriate because, as suggested in this article’s examination of emerging scholarship,<sup>290</sup> emerging legal scholarship seems to be drawing from the food systems approach established in these other disciplines. The term “food system,” as described in Part I, has been described as “the interactions between and within biogeophysical and human environments, which determine a set of activities; the activities themselves (from production through to consumption); [and] outcomes of the activities (contributions to food security, environmental security, and social

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<sup>288</sup> See, e.g., Linnekin & Broad Leib, *supra* note 2, at 597–612.

<sup>289</sup> Linnekin & Broad Leib, *supra* note 2, at 557.

<sup>290</sup> See *supra* Part III.A.2.

welfare).<sup>291</sup> Thus, the term “food systems law” seems appropriate to reflect the emerging approach shown in this article, which appears more focused on interactions, interrelationships, structures, and overall outcomes than either traditional agricultural law or food law.

The use of the descriptor “food systems law” has an additional benefit—that is, it also emphasizes the general systems-related approach (and potential systems-related insights) that are available to this emerging conceptualization of a distinct field. “A system is an interconnected set of elements that is coherently organized in a way that achieves something”<sup>292</sup>—in this case, elements organized potentially for the production, provision, and consumption of food. A systems approach, in turn, is described as one that proceeds “by identifying systems, discovering their goals or attributing goals to them, mapping their subsystems and the functions each performs, determining their internal structures, depicting them with attention paid to efficiency of presentation, and searching for internal inconsistencies.”<sup>293</sup>

By deliberately adopting a systems approach, legal scholars can draw from the insights developed more fully in the engineering and computer-based field of systems theory.<sup>294</sup> Indeed, scholars in other disciplines, as suggested in Part I, have already been applying this approach to food. Moreover, as Donella Meadows observed in her influential work on systems thinking and sustainable public policy, “[o]nce we see the relationship between structure and behavior, we can begin to understand how systems work, what makes them produce poor results, and how to shift them into better behavior patterns.”<sup>295</sup> As such, a systems approach can greatly enhance the problem-solving capacity of this new field, especially if it also takes the more policy-driven perspective argued for by Linnekin and Broad Leib.<sup>296</sup>

From the systems perspective, a system comprises three parts: its elements, its interconnectivities, and its function.<sup>297</sup> All of these parts are important, but systems analysis emphasizes interconnectivities and function as more relevant towards deriving avenues for potential

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<sup>291</sup> Ericksen, *supra* note 2, at 234.

<sup>292</sup> DONELLA MEADOWS, THINKING IN SYSTEMS 11 (Diana Wright ed., 2008).

<sup>293</sup> Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 481 (1997).

<sup>294</sup> See MEADOWS, *supra* note 292, at 3 (“Modern systems theory, bound up with computers and equations, hides the fact that it traffics in truths known at some level by everyone.”).

<sup>295</sup> *Id.* at 1.

<sup>296</sup> Linnekin & Broad Leib, *supra* note 2, at 584–588.

<sup>297</sup> MEADOWS, *supra* note 292, at 11.

change.<sup>298</sup> In turn, systems analysis introduces concepts rarely used in legal analysis, concepts such as stocks (which constitute elements of the system that can be measured or seen at any given time),<sup>299</sup> flows (the actions which change the stocks over time),<sup>300</sup> dynamics (the behavior of stocks and flows over time),<sup>301</sup> and dynamic equilibria (equilibrium states that are reached through the dynamics of a system).<sup>302</sup> It also introduces concepts such as feedback loops (mechanisms that—through the interaction of stocks and flows—lead to consistent behavior patterns over a long period of time),<sup>303</sup> shifting dominance (changes in the impact of one feedback loop over others, when multiple feedback loops are present),<sup>304</sup> resilience (a system's ability to persist within a changing environment),<sup>305</sup> and limiting factors (necessary inputs to systems that limit the activities of the system at particular moments).<sup>306</sup> In short, the systems approach emphasizes concepts that allow analysts to evaluate more fully the ways in which particular interrelated structures both operate, and respond to change—these sorts of evaluations that seem to be arising frequently in the newer legal scholarship related to food, given the complex interrelationships and dynamics involved in this area.

Systems analysis also provides new paradigms to examine structural changes, through the systems-analysis understanding of leverage points.<sup>307</sup> Leverage points are understood as places within complex systems “where a small shift in one thing can produce big changes in everything.”<sup>308</sup> While there are no easy ways of identifying leverage points beyond immersion into a particular system,<sup>309</sup> systems scholars have at least suggested ways of thinking about the types of leverage points that are more effective at achieving change.<sup>310</sup> Such insights, in turn, are also especially useful for legal scholars seeking to

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<sup>298</sup> MEADOWS, *supra* note 292, at 14–17.

<sup>299</sup> MEADOWS, *supra* note 292, at 17–18.

<sup>300</sup> MEADOWS, *supra* note 292, at 18–19.

<sup>301</sup> MEADOWS, *supra* note 292, at 19–20.

<sup>302</sup> MEADOWS, *supra* note 292, at 21–22.

<sup>303</sup> DONELLA MEADOWS, THINKING IN SYSTEMS 25–27 (Diana Wright ed., 2008).

<sup>304</sup> *Id.* at 44–45.

<sup>305</sup> *Id.* at 76–78.

<sup>306</sup> *Id.* at 100–03.

<sup>307</sup> See DONELLA MEADOWS, *LEVERAGE POINTS: PLACES TO INTERVENE IN A SYSTEM* (The Sustainability Institute 1999), available at [http://www.donellameadows.org/wp-content/userfiles/Leverage\\_Points.pdf](http://www.donellameadows.org/wp-content/userfiles/Leverage_Points.pdf).

<sup>308</sup> *Id.* at 1.

<sup>309</sup> *Id.* at 2.

<sup>310</sup> *Id.* at 3.

integrate legal analysis and policy reform, an approach that Linnekin and Broad Leib ascribe to this developing area of law,<sup>311</sup> and will be developed more fully in the second part of this project.

A systems approach as applied to law would focus on the complex interrelationships between the relevant laws, the legal institutions, parties, and circumstances,<sup>312</sup> as well as the overall function of the system. These functions may or may not be intended by particular actors within the system.<sup>313</sup> Indeed, some of the internal questions involved in this emerging area of law revolves around whether more emphasis should be placed on functions or goals such as food sustenance,<sup>314</sup> sustainable production,<sup>315</sup> agrodiversity,<sup>316</sup> or even economic fairness within the production system.<sup>317</sup> A systems approach at least provides a constructive avenue for resolving, or at least continuing, these debates. Indeed, one of the advantages of a systems approach is that it allows for a more structured examination of increasingly important policy debates within this emerging legal field regarding the effectiveness (or ineffectiveness) of different types of private and government interventions and governance<sup>318</sup> by focusing researchers' attention on the ways in which these different types of interventions interact with each other.

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<sup>311</sup> Linnekin and Broad Leib, *supra* note 2, at 585 (describing this emerging area as “encompass[ing] the study of relevant food laws and regulations at all levels of government—federal, state, and local—and adopt[ing] a policy focus that is uncommon in other legal fields”).

<sup>312</sup> LoPucki, *supra* note 293, at 522.

<sup>313</sup> See MEADOWS, *supra* note 292, at 15.

<sup>314</sup> See, e.g., Broad Leib, *The Forgotten Half of Food System Reform*, *supra* note 168.

<sup>315</sup> See, e.g., Czarnezki, *supra* note 172.

<sup>316</sup> See, e.g., Marsha A. Echols, *Expressing the Value of Agrodiversity and Its Know-How in International Sales*, 48 HOW. L.J. 431 (2004).

<sup>317</sup> Guadalupe T. Luna, *supra* note 238; Guadalupe T. Luna, *Chicanas, Chicanos And “Food Glorious Food”*, 28 CHICANA/O-LATINA/O L. REV. 43 (2009).

<sup>318</sup> Compare Diana R. H. Winters, *How Reliance on the Private Enforcement of Public Regulatory Programs Undermines Food Safety in the United States: The Case of Needled Meat*, 65 ME. L. REV. 719 (2013) (arguing for more public governance of food safety), and Varun Shekhar, *Produce Exceptionalism: Examining the Leafy Greens Marketing Agreement and Its Ability to Improve Food Safety*, 6 J. FOOD L. & POL’Y 267 (2010) (critiquing private food safety governance of leafy greens as inadequate), with Tacy Katherine Hass, *New Governance: Can User-Promulgated Certification Schemes Provide Safer, Higher Quality Food?*, 68 FOOD & DRUG L.J. 77 (2013) (suggesting ways in which public/private partnerships could work together to achieve food safety), and Fabrizio Cafaggi, *Transnational Private Regulation and the Production of Global Public Goods and Private ‘Bads’*, 23 EUR. J. INT’L L. 695 (2012) (suggesting that private governance can be successful in reaching many food safety goals); Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 DUKE ENVTL. L. & POL’Y F. 253, 267 (2013).

These systems analysis concepts can be directly applied to this emerging field of law. Much discussed aspects such as federal funding; energy, fertilizer, antibiotic, and carbon inputs; and even caloric and nutritional outputs can be envisioned as stocks within this system. Certain features such as supply chain organization and food distribution policies, in turn, can be viewed through the lens of systems flow. And dynamics and dynamic equilibria can be explored through more deliberate analysis of the ways in which legal and policy structures lead to certain states, such as current emphasis on producing commodity crops, or stable markets for processed foods, or inadequate nutritional supplies to low income communities.

Applying these concepts entails not merely a change in vocabulary, but also the enhanced ability to apply systems-related insights towards understanding and reforming the legal structure governing food. That is, by examining the food system through these concepts, we can also explore potential feedback loops within the food system (such as negative feedback loops within the Conservation Reserve Program between enrollment, supply production, and crop prices, that actually lead to increased acreage of land brought into production),<sup>319</sup> shifting dominance between different feedback loops (such as the changes in approach potentially raised by the Food Safety Modernization Act), resilience or resilient adaptations in particular food systems (through responses to assessed vulnerabilities in a particular food system),<sup>320</sup> and limiting factors (such as, in the case of aquaculture, access to land and water, as well as adequate market prices to ensure viable returns on investment and operating costs).<sup>321</sup> Moreover, we can use these systems' understandings to identify leverage points for intervention, as, for example, the Rhode Island Food Policy Council has accomplished in its Rhode Island Food Assessment,<sup>322</sup> which, through its thorough analysis of the components

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<sup>319</sup> See, e.g., ROBERT KAUFMANN & CUTLER J. CLEVELAND, ENVIRONMENTAL SCIENCE 330 (2007).

<sup>320</sup> See, e.g., Angela M. Tagtow, MS, RD, LD & Susan L. Roberts JD, MS, RD, *Cultivating Resilience a Food System Blueprint that Advances the Health of Iowans, Farms and Communities* (2011), available at <http://static.squarespace.com/static/50117bc684aed1d3066e4dee/5022f889e4b0b04213ea98f1/5022f889e4b0b04213ea98f5/1298915569947/>; cf. Craig Anthony (Tony) Arnold & Lance H. Gunderson, *Adaptive Law And Resilience*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10426 (2013).

<sup>321</sup> See H. Charles J. Godfray et al., *The Future Of The Global Food System*, 365 no.1554 PHIL. TRANS. R. SOC. B 2769-77 (2010), available at <http://rstb.royalsocietypublishing.org/content/365/1554/2769.full>; cf. Jonathan A. Foley, *Can We Feed the World and Sustain the Planet?*, SCIENTIFIC AMERICAN 60, 65 (Nov. 2011), <http://www.nature.com/scientificamerican/journal/v305/n5/full/scientificamerican1111-60.html>.

<sup>322</sup> See Karp Resources for the Rhode Island Food Policy Council, *Rhode Island Food*

of the Rhode Island food system,<sup>323</sup> identifies key leverage points for consumers and access,<sup>324</sup> producers,<sup>325</sup> processors and distributors,<sup>326</sup> retailers,<sup>327</sup> policy and planners,<sup>328</sup> and natural resources and resource recovery.<sup>329</sup> Such understandings can enhance the sorts of legal analysis conducted in this emerging area of law, even if comprehensive systems-based studies such as the ones in these examples are not directly conducted.

But this Article has not established, in a mathematical proof sort of way, that the type of legal approach that is emerging is indeed an actual systems-oriented approach. The emerging conceptualization is *consistent* with such an approach, but it is also consistent with an approach that takes into account additional perspectives, interests, and policy considerations that extend beyond those in traditional agricultural law and food law.<sup>330</sup> Thus this Article puts forth a somewhat normative argument that will be presented more fully in the second part of this overall project: that the considered development of a food systems (and policy) oriented approach will be useful for both solidifying and enhancing this emerging field of law and for allowing practitioners to better address arising problems within this field.<sup>331</sup>

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Assessment (Nov. 2011), available at <http://www.rifoodcouncil.org/sites/default/files/Rhode%20Island%20Food%20Assessment.pdf>.

<sup>323</sup> *Id.* at 3–28.

<sup>324</sup> *Id.* at 58.

<sup>325</sup> *Id.* at 59–60.

<sup>326</sup> *Id.* at 60–61.

<sup>327</sup> *Id.* at 62.

<sup>328</sup> See Karp Resources for the Rhode Island Food Policy Council, *Rhode Island Food Assessment* (Nov. 2011), available at <http://www.rifoodcouncil.org/sites/default/files/Rhode%20Island%20Food%20Assessment.pdf>.

<sup>329</sup> *Id.* at 63.

<sup>330</sup> See *supra* Part III.

<sup>331</sup> Such developments could occur in forums similar to those used in other efforts to reenvision legal fields. See, e.g., David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT'L L. J. 417 (1994) (describing a collaborative effort to rethink the foundations of international law). During these conversations, participants discussed ways in which their approaches fit (or did not fit) with traditional academic approaches, *id.* at 418, the ways in which their scholarship challenged dominant intellectual styles within traditional international law as well as its foundations, *id.* at 418, and self-consciously addressed issues of methodological development, *id.* at 419. In part, such discussions are already occurring among scholars writing in this emerging field, and I have been honored to be involved in these discussions. For example, we at the University of Wisconsin Law School held a conference in the fall of 2013 entitled *Safety and Sustainability in the Era of Food Systems: Reaching a More Integrated Approach*, drawing together scholars from food safety, environmental, labor, antitrust, property, and health areas in order to brainstorm more intentionally integrated legal approaches. See <https://law.wisc.edu/lrs/>. Similarly, students from the Yale School of Forestry and Environmental Studies have

The argument for a deliberate emphasis on food systems as a unifying theme (rather than solely enhanced interest or policy considerations), which appears consistent with the emerging scholarship and teaching in this area,<sup>332</sup> is primarily based on how such an emphasis may shape the way in which this area of law is classified as a legal field. As described earlier, agricultural law and food law appear to consist of legal fields as defined by their primary interests.<sup>333</sup> Such an approach may better reflect suggestions by legal education reformers to provide more client-centered pedagogy for law students,<sup>334</sup> and these considerations should not be forgotten. Scholars in the emerging field—while incorporating enhanced perspectives and understandings—should also be reminded of their educational mission of training incoming lawyers who can represent potential clients in practice. As such, I am not arguing that areas critical for legal practice should somehow fall by the wayside in favor of a systems-oriented approach. Nevertheless, the changes in the actual demands of clients, as well as changes in the practice environment,<sup>335</sup> may still warrant this shift in perspectives while still retaining client-centered considerations. Indeed, as observed in Part III.C, the clinics emerging in this field have found that taking a more holistic approach has been necessary to allow students to better represent the types of “new food economy” clients that need representation. Thus I retain the hope that with enough consideration in its development, the systems-oriented focus can result in enhanced practice opportunities for incoming lawyers, rather than signal a move away from preparing students for legal practice.

From the taxonomical perspective, however, the primary interest approach to the classification of legal fields is still more of a minority approach; instead, Professor Ruger describes modern legal taxonomy as operating under a “classical coherence paradigm”<sup>336</sup> which in turn entails preferences for “reductionist explanation,”<sup>337</sup> “typological

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begun a yearly Yale Food Systems Symposium that a sizable number of legal scholars have been attending. YALE FOOD SYSTEMS SYMPOSIUM, <http://yalefoodsymposium.org/about/overview/> (last visited Nov. 9, 2014). Such forums, and others, could become incubation areas for refining and restructuring this developing field.

<sup>332</sup> See *supra* Part III.

<sup>333</sup> See *supra* Part I.

<sup>334</sup> See Rhode, *supra* note 122, at 448–49; Horwitz, *supra* note 122, at 973–75.

<sup>335</sup> See Hamilton, *supra* note 256, at 527.

<sup>336</sup> Ruger, *supra* note 59, at 628–29.

<sup>337</sup> Ruger, *supra* note 59, at 629–31.



distinctions based on pure legal forms,”<sup>338</sup> “institutional centrality,”<sup>339</sup> and “historical determinism.”<sup>340</sup> Areas of law (such as health law, or agricultural law, or food law) that fail to fit neatly into the coherence paradigm, Professor Ruger suggests, may be viewed by the legal academy as less normatively preferable to more coherent fields of law.<sup>341</sup> Thus the availability of coherent themes presented by this emerging field of law may also serve to solidify its place within the legal academy, at least among those who desire more classical coherence within fields of law.

This is not to suggest that coherence alone presents a determinative reason for further developing the emerging field of food systems law in a particular manner. As others such as Professor Todd Aagaard have observed, the use of coherence as the primary criterion for defining a legal field, while alluring, may lead to a number of problems: the creation of the illusion of coherence where none actually exists, the discouragement of legal experimentation; and the waste of resources spent forcing coherence where even consensus is unavailable.<sup>342</sup> In a way, these “problems” have not arisen with respect to agricultural law or food law because both fields already fail to fit easily into the criteria of coherence; instead, as explained earlier, scholars have taken a more primary interests approach towards these fields.

With respect to the emerging legal approach to food, however, the legal academy’s emphasis on coherence may present both a benefit and a challenge. That is, food systems law, or food law and policy, may benefit from this emphasis on coherence because it has at least the potential to satisfy this demand for coherence.<sup>343</sup> An emphasis on systems, and their internal interconnections and functions, provides unifying themes seen to cohere the multiple parties, institutional actors, jurisdictions, and relationships in a way that separate examinations of agricultural law and food law do not. At the same time, statutory and agency fragmentation<sup>344</sup> may prevent doctrinal coherence from emerging unless further legal reforms are sought.

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<sup>338</sup> Ruger, *supra* note 59, at 631–35.

<sup>339</sup> Ruger, *supra* note 59, at 635–36.

<sup>340</sup> Ruger, *supra* note 59, at 636–39.

<sup>341</sup> Ruger, *supra* note 59, at 625–27.

<sup>342</sup> Aagaard, *supra* note 44, at 234–36.

<sup>343</sup> Ruger, *supra* note 59, at 630.

<sup>344</sup> See, e.g., GAO, *supra* note 118; Merrill & Francer, *supra* note 118.

Alternative ways of classifying fields of law have been proposed, however, that may even better reflect the nature of the emerging food systems law. As described earlier, Professor Aagaard has suggested two (and a half) alternative minimal features, based on a balance of descriptive and prescriptive considerations, to classify an area of law as a legal field that are useful in understanding the emergence of food systems law. The first feature is commonality:

[A] characteristic or set of characteristics shared in common by the situations that arise within the area of law that the field encompasses. Commonalities establish patterns that cohere the field. These commonalities may arise within any of the different constitutive dimensions of the field: the factual context, the policy trade-offs, the values and interests, or the legal doctrine.<sup>345</sup>

The second feature is distinctiveness: “the idea that some features of a field are distinct to that field and not present in other fields;”<sup>346</sup> these can arise either from unique features in the law in that area, or the unique contexts arising in that area, or even unique interplay that arises between the non-unique aspects of that area.<sup>347</sup> Finally, Professor Aagaard suggests a third but “not necessary” feature (a half feature, as it were): transcendence.<sup>348</sup> This feature is more prescriptive than the first two features and revolves around the ability of a field to illuminate other areas of law.<sup>349</sup>

The reason this particular alternate classification system is especially useful for examining the emerging food systems law is that it may provide some insight into why food systems law is emerging from two other fields of law once treated as fairly separate, in addition to providing an appropriate taxonomical lens with which to view this emerging area of law. A number of changes have occurred in our agricultural and food landscapes to render what was once more distinct (the second feature of the alternative classification scheme), and thus understandably treated as two separate fields of law, no longer nearly so distinct: the emergence of more complex and interwoven regional, national and global supply chains (sometimes with vertical integration) meaning that producers and processors are no longer necessarily separate entities,<sup>350</sup> the rise of regulatory schemes

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<sup>345</sup> Aagaard, *supra* note 44, at 242.

<sup>346</sup> Aagaard, *supra* note 44, at 244.

<sup>347</sup> Aagaard, *supra* note 44, at 344.

<sup>348</sup> Aagaard, *supra* note 44, at 245.

<sup>349</sup> Aagaard, *supra* note 44, at 245.

<sup>350</sup> See, e.g., Rutger Schilpand et al., *Governance Beyond the State: Non-state Actors and*

such as organic food labeling that address both agricultural and food production practices;<sup>351</sup> the increase in sectoral concentration that enhances the potential for market distortions with respect to both food and agriculture;<sup>352</sup> the increased intensiveness of agricultural land use and long distance transport leading to environmental considerations playing a more salient role in both agricultural and food discussions;<sup>353</sup> the greater expenditure of resources on commodifiable intellectual capital in both agricultural and food areas,<sup>354</sup> and the increased presence of similar third party certification processes that extend to both agricultural and food areas.<sup>355</sup> These developments in the actual context of modern food production may lead to agricultural law and food law becoming less distinct from each other, and more distinct from other fields of law when examined together.

But to treat the emergence of food systems law as solely a systematic response to the ways in which agricultural and food production have become less distinct from each other would be to ignore some of the other, less taxonomy-related, drivers behind the development of this new area. First is the increased recognition within the legal academy that the traditional areas of law have been too isolated from consumers.<sup>356</sup> In some sense, the emerging food systems law, with its emphasis on a wide range of actors, has developed to respond to this criticism. Next is general student interest in food

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*Food Systems*, in INGRAM ET AL., *supra* note 8, at 279.

<sup>351</sup> See, e.g., Margot J. Pollans, *Bundling Public and Private Goods: The Market for Sustainable Organics*, 85 N.Y.U. L. REV. 621, 639 n.101 (2010) (describing the different tiers of organic label for processed foods).

<sup>352</sup> See, e.g., Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 WIS. L. REV. 531, 537–38 (2000).

<sup>353</sup> See, e.g., Carmen G. González, *Cluster 1: Theoretical Perspectives Introduction: The Global Politics of Food*, 43 U. MIAMI INTER-AM. L. REV. 77, 81 (2011); Jason J. Czarnecki, *The Future of Food Eco-Labeling: Organic, Carbon Footprint, and Environmental Life-Cycle Analysis*, 30 STAN. ENVTL. L.J. 3, 12–13 (2011); David E. Adelman & John H. Barton, *Environmental Regulation for Agriculture: Towards a Framework to Promote Sustainable Intensive Agriculture*, 21 STAN. ENVTL. L.J. 3, 37–38 (2002).

<sup>354</sup> See, e.g., Elizabeth I. Winston, *What if Seeds Were Not Patentable?*, 2008 MICH. ST. L. REV. 321 (2008); Teshager W. Dagne, *Place-Based Intellectual Property Strategies for Traditional and Local Agricultural Products: Acting Locally to Participate Globally in a Rights-Based Approach*, 17 DRAKE J. AGRIC. L. 565 (2012).

<sup>355</sup> See, e.g., Schilpzand et al., *Governance Beyond the State*, *supra* note 350, at 272–300; PRIVATE FOOD LAW: GOVERNING FOOD CHAINS THROUGH CONTRACT LAW, SELF-REGULATION, PRIVATE STANDARDS, AUDITS AND CERTIFICATION SCHEMES (Bernd Van Der Meulen ed., 2011), available at [http://www.wageningenacademic.com/\\_clientFiles/download/EIFL-06-e.pdf](http://www.wageningenacademic.com/_clientFiles/download/EIFL-06-e.pdf).

<sup>356</sup> Susan Schneider, *What is Agricultural Law?*, *supra* note 97, at 7.

systems, which appears to be increasing.<sup>357</sup> Last is the growing understanding that policy problems arising within one aspect of the food system cannot be addressed without understanding the system as a whole.<sup>358</sup>

Whether because of these additional drivers or because of the nature of examining food under a systems-based approach, the emerging food systems law may also have the potential for the transcendence suggested by Professor Aagaard as an alternative feature for classifying a field of law. That is, the theme seen throughout many of the more integrated writings—the recognition of interactions and interdependence between all of the different aspects of the food system—allows for the further development of structural insights that could be applied to other areas of law as well.

For example, scholars and policy analysts have long recognized the food safety management barriers created by the fragmentation of agency governance<sup>359</sup> over different types of food, from imported food to minimally processed food.<sup>360</sup> Indeed, the Food Safety Modernization Act (FSMA) was drafted to attempt to address some of this fragmentation.<sup>361</sup> As such, scholars adopting this integrated approach are beginning to apply systems-based thinking to evaluate whether the implementation of the FSMA enhances coordination.<sup>362</sup> Although the newness of the implementation efforts means that such analysis is still ongoing, insights regarding coordination efforts derived from a systems perspective could also provide insights for problems involving multiple agency coordination problems, such as certain issues found in energy law.<sup>363</sup> Similarly, the greater attention to global supply chains found in this emerging field of food systems law<sup>364</sup> may lead to insights for other fields of law, such as labor, that are also tackling global supply chain issues.<sup>365</sup>

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<sup>357</sup> See Jay A. Mitchell, *Getting into the Field*, 7 J. FOOD L. & POL'Y 69, 79–82 (2011).

<sup>358</sup> See discussion *supra* Part I.

<sup>359</sup> See, e.g., GAO, *supra* note 118; Merrill & Francer, *supra* note 118; Endres & Johnson, *supra* note 5, at 39; Michael R. Taylor, *Lead or React? A Game Plan for Modernizing the Food Safety System in the United States*, 59 FOOD & DRUG L. J. 399, 402 (2004).

<sup>360</sup> See, e.g., GAO, *supra* note 118, at 4.

<sup>361</sup> 21 U.S.C. §399c(b)–(d) (Supp. IV 2011).

<sup>362</sup> See Endres & Johnson, *supra* note 5, at 107–08.

<sup>363</sup> See, e.g., Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 830 (2013).

<sup>364</sup> See, e.g., Ching-Fu Lin, *Global Food Safety: Exploring Key Elements for an International Regulatory Strategy*, 51 VA. J. INT'L L. 637 (2011).

<sup>365</sup> Mark Anner et al., *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. &

To conclude, the emerging field of law based on agricultural law and food law is consistent with the food systems approach found in other disciplines, and many recent scholarly works in this field appear to be incorporating such a food systems approach into their analyses. A number of factors contribute to the emergence of this approach, including changes to the food system itself, the reduction of distinctions between agricultural and food economies, as well as an increase in students interested in such an approach. By deliberately structuring this emerging approach around food systems, scholars can take advantage of features recognized by legal taxonomists—features such as coherence, distinctiveness, and transcendence—to solidify further this field of law in a manner effective for educating new lawyers, valued by the legal academy, and useful for solving relevant legal problems.

#### V. THE FUTURE SEEDS OF A SYSTEMS APPROACH TO FOOD

What I have argued in this Article is that a new field of law appears to be emerging—one that draws from some of the content of both agricultural law and food law, but also containing its own aspects of concern. I have supported this argument with illustrations of the changing nature of legal scholarship, casebooks, and law school institutions in this area and suggested that this emerging field—what I call food systems law—appears to show features that may make it more theoretically accepted within the legal academy. Moreover, I have argued that further developing this emerging field using a food systems approach may provide benefits both for more effective analysis and problem solving within this field, as well as provide potential insights for other fields of law.

But this new field, if indeed it is emerging, is just that—it is new. It will take the time, attention, and intellectual energy of legal practitioners, scholars, and students to ensure that these seeds take root and grow. Although I have attempted to provide an objective depiction of the changes in this area, I hope to further nourish these seeds in the next stage of this project, which focuses on drawing from the insights of systems analysis to provide more concrete suggestions for how to deliberately formulate this new area of law and provide case studies of the application of these insights. In doing so, I echo Professor Schneider's call: that there should be a field of law

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POL'Y J 1 (2013); Naomi Jiyoung Bang, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 HOUS. J. INT'L L. 255 (2013).

conceptualized around “the unique aspects of agricultural production, the fragility of the environment, and the fundamental need for healthy food.”<sup>366</sup> My hope is to see it flourish.

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<sup>366</sup> Schneider, *supra* note 92, at 935.

