

CHANGING THE TAX SYSTEM TO EFFECT HUMANE TREATMENT OF FARM ANIMALS

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I. INTRODUCTION

Meat consumption in the United States equaled 221.4 pounds per capita in 2004.¹ To satiate American appetites, the food industry slaughters over ten billion land animals for food each year.² Large farming operations use factory farms to raise the majority of these slaughtered animals.³ Unlike labor intensive traditional farms, factory farms are capital intensive.⁴ The capital intensive nature of factory farming allows for cheaper production of a greater number of animals.⁵

Cheaper production via factory farm results in lower consumer prices; however, this cheaper production method also causes billions of animals to suffer immense injury, stress, and disease each year.⁶ Factory farms force animals to live in tight confinement.⁷ For example, egg-laying hens live in battery cages which provide each hen less floor space than the area of a regular sheet of notebook paper.⁸ Crowded tightly with other hens, the birds cannot engage in many natural habits, such as nesting, perching, spreading their wings, dustbathing, and even walking.⁹ The cruelty of the battery cage system has led many countries to ban their use.¹⁰ Other animals, including pigs, dairy cows, turkeys, and calves, also endure harsh and brutal treatment and suffer tight confinement on factory farms.¹¹ In fact, approximately 10% of farm animals raised for food die on the farm and therefore never reach the slaughterhouse.¹² Exemptions for common farm practices within the animal cruelty laws of most states prevent the conditions endured by farm animals from being defined as animal cruelty under the law.¹³ Furthermore, the federal Animal Welfare Act does not protect farm animals¹⁴ and the federal

¹ Nat'l Agric. Statistical Serv., U.S. Dep't of Agriculture, *Statistical Highlights 2004 and 2005 Tables – Livestock*, <http://www.usda.gov/nass/pubs/stathigh/2005/tables/livestock.htm#meat> [hereinafter NASS, *Statistical Highlights*] (last visited Apr. 17, 2007).

² The Humane Soc'y of the U.S., *The Dirty Six: The Worst Practices in Agribusiness*, http://www.hsus.org/farm/resources/pubs/the_dirty_six.html [hereinafter HSUS, *The Dirty Six*] (last visited April 17, 2007) (equating the total number of farm animals killed each year to over one million per hour).

³ See The Humane Farming Ass'n, *Factory Farming*, <http://www.hfa.org/factory/index.html> (last visited April 17, 2007).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ HSUS, *The Dirty Six*, *supra* note 2.

⁹ *Id.*

¹⁰ Compassion in World Farming Trust, *Laid Bare . . . The Case Against Enriched Cages in Europe* 3 (2002), http://www.ciwf.org/publications/reports/laid_bare_2002.pdf (citing the 1999 Laying Hens Directive which bans barren battery cages in the European Union from 2012).

¹¹ HSUS, *The Dirty Six*, *supra* note 2.

¹² The Humane Farming Ass'n, *supra* note 3.

¹³ *Id.*

¹⁴ Animal Welfare Act, 7 U.S.C. § 2132(g) (2000).

Humane Methods of Slaughter Act does not apply to poultry,¹⁵ even though chickens, turkeys, and other birds represent 95% of the animals slaughtered each year.¹⁶ As large agricultural organizations regularly make significant campaign contributions and strongly lobby Congress, extensive federal regulation is unlikely in the near future.¹⁷ Thus, the factory farmers themselves principally determine the level of humane treatment given to farm animals.

Factory farming, in addition to causing the immense suffering of numerous animals, results in serious costs to society.¹⁸ First, large farming operations with low production costs squeeze out small farms relying on labor intensive practices.¹⁹ Remaining small farms, forced to reduce prices to remain competitive, lose profits quickly.²⁰ Rural communities depending upon the sustainability of small farms suffer economically as small farm businesses fail.²¹ Second, American consumers lose as the number of animals produced on factory farms grows. To keep costs low, factory farms tightly confine animals.²² To ward off the ill effects of this tight confinement and to accelerate growth, animals receive doses of growth hormones and antibiotics, such as penicillin and tetracycline.²³ Widespread use of antibiotics in farm animals creates new strains of bacteria resistant to typical antibiotics used in humans and thereby poses a great threat to human health.²⁴ Third, factory farms generate significant animal waste which harms land, air, and water quality.²⁵ Further, toxic gases produced by animal waste wreak havoc on agricultural workers and nearby residential areas.²⁶ Raising animals more humanely will reduce these societal costs.

Changes to the tax system can be used to effect humane treatment of farm animals. The federal government often utilizes the tax system to influence social policy.²⁷ In fact, the federal government currently uses tax policies as financial incentives for farms to engage in technological change and economics of size.²⁸ Tax policies also stimulate farms to substitute capital investment for labor.²⁹ Various tax incentives and penalties, such as providing additional credits and disallowing certain deductions, can be used to encourage farm owners to treat farm animals humanely.

Changing the tax system will mitigate the harm caused to farm animals by the current void in state and federal protection. Part II of this paper describes the inhumane treatment suffered by billions of farm animals each year, the inadequacy of current federal and state laws,

¹⁵ Humane Methods of Slaughter Act, 7 U.S.C. §§ 1902-07 (2000).

¹⁶ The Humane Soc'y of the U.S., *Farm Animal Legislation*, <http://www.hsus.org/farm/camp/lit-leg/legislation.html> [hereinafter HSUS, *Farm Animal Legislation*] (last visited Apr. 17, 2007).

¹⁷ The Humane Farming Ass'n, *supra* note 3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See USDA Advisory Comm. on Small Farms, U.S. Dep't of Agriculture, *Building on A Time to Act 2* (Feb. 2003), available at <http://www.usda.gov/oce/smallfarm/reports/advrpt2-building.pdf> [hereinafter USDA, *Building*].

²² The Humane Farming Ass'n, *supra* note 3.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ The Humane Soc'y of the U.S., *Human Health and Food Safety Concerns*, http://www.hsus.org/farm_animals/factory_farms/the_pig_factory_farm/human_health_and_food_safety_concerns.html [hereinafter HSUS, *Human Health*] (last visited Apr. 8, 2006).

²⁷ Jay P. Kesan & Rajiv C. Shah, *Shaping Code*, 18 HARV. J.L. & TECH. 319, 382 (2005).

²⁸ Ron Durst & James Monke, U.S. Dep't of Agric., *Effects of Federal Tax Policy on Agriculture IV* (Apr. 2001), <http://www.ers.usda.gov/publications/aer800/aer800.pdf>.

²⁹ *Id.* at 48.

the societal costs of factory farms, and the availability of humane alternatives. Part III discusses the relationship between the inhumane treatment of farm animals and the tax system. Part IV discusses the use of the tax code to promote social policy goals and suggests tax incentives and disincentives to encourage farms to treat farm animals humanely. Part V concludes this paper by summarizing recommended changes to the tax code to effect humane treatment of farm animals.

II. FACTORY FARMS

A. INHUMANE TREATMENT OF FARM ANIMALS AND THE INADEQUACY OF CURRENT LAWS

The meat, egg, and dairy industries raise and slaughter over ten billion land animals each year in the United States.³⁰ Per capita, Americans consumed 85.4 pounds of chicken, 66.1 pounds of beef, 51.3 pounds of pork, 17.0 pounds of turkey, 0.5 pounds of veal, and 1.1 pounds of lamb and mutton in 2004.³¹ To produce this meat cheaply, large farming operations have taken over and industrialized the animal agriculture business by running factory farms.³² In fact, a mere 3% of total farms reaped 62% of total sales and government payments in 2002.³³ Only 15% of farms generated 89% of total sales and government payments.³⁴

Factory farms profit by warehousing hundreds or thousands of animals in tightly confined spaces.³⁵ Animals in factory farms cannot engage in many of their natural habits, including walking in most cases.³⁶ For example, in the United States, more than 90% of pregnant female pigs are confined in gestation crates throughout their pregnancy.³⁷ These small, narrow metal stalls confine the sow so much that she can only move a step or two backward or forward.³⁸ The pregnant pig cannot even turn around.³⁹ To raise calves for veal, factory farms use similar restrictive crates along with neck chains to prevent movement.⁴⁰ Furthermore, factory farms keep cattle raised for beef in pens.⁴¹ Factory farms cram around 100,000 animals into cattle feedlots filled with the pens.⁴² Less movement fattens the animals quicker.⁴³ While fattening up, cattle stand in their own waste and breathe noxious fumes arising from the waste.⁴⁴ Moreover, to maximize egg production, factory farms confine egg-laying hens in battery cages,

³⁰ HSUS, *Farm Animal Legislation*, *supra* note 16.

³¹ NASS, *Statistical Highlights*, *supra* note 1.

³² Farm Sanctuary, *The Facts About Farm Animal Welfare Standards 1*, http://www.farmsanctuary.org/campaign/standards_booklet_FINAL.pdf [hereinafter Farm Sanctuary, *The Facts*] (last visited Apr. 17, 2007).

³³ Nat'l Agric. Statistical Serv., U.S. Dep't of Agriculture, *Quick Facts from the 2002 Census of Agriculture*, <http://www.nass.usda.gov/census/census02/quickfacts/distribution.htm> [hereinafter NASS, *Quick Facts*] (last visited Apr. 17, 2007).

³⁴ *Id.*

³⁵ See Farm Sanctuary, *The Facts*, *supra* note 32, at 1.

³⁶ See HSUS, *The Dirty Six*, *supra* note 2.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Farm Sanctuary, *The Facts*, *supra* note 32, at 1.

⁴² *Id.*

⁴³ See *id.*

⁴⁴ *Id.*

which are small wire enclosures lined up in rows and stacked several tiers high.⁴⁵ Hens cannot move or even spread their wings due to the lack of space.⁴⁶

The tight confinement endured by these farm animals denies them the ability to engage in natural behaviors and causes them tremendous psychological and physical suffering.⁴⁷ Animals on factory farms typically develop unnatural behaviors, such as unnatural aggression, due to the boredom, frustration, and stress of living in factory farm conditions.⁴⁸ For example, pregnant sows in gestation crates display abnormal behaviors such as feet stamping, compulsive and intense biting of the crate bars, and mourning.⁴⁹ Turkeys often develop the unnatural behaviors of feather pecking and cannibalism due to the dim and crowded conditions on factory farms.⁵⁰ Other typical factory farm practices used to facilitate tight confinement and high volume production, such as beak trimming, forced molting, and selective breeding, force further suffering upon farm animals.⁵¹ Factory farms perform many procedures, such as tail docking, castration, and beak trimming without anesthesia.⁵² Selective breeding for fast-growing animals in conjunction with the use of growth-producing antibiotics causes many farm animals to outgrow their bodies' support systems and thereby forces their bodies to struggle just to function.⁵³ Conditions on the factory farm result in the on-farm death of approximately 900 million of the animals raised for food.⁵⁴ These farm animals never reach slaughter.⁵⁵ However, losing inventory due to these tight confinement and other high volume production measures is more cost effective to factory farms than treating the animals humanely.⁵⁶

Inadequate government regulation and oversight permit factory farms to perpetuate this inhumane treatment. The federal Animal Welfare Act excludes animals used in food production from its coverage.⁵⁷ Furthermore, approximately one-half of state laws on animal cruelty

⁴⁵ HSUS, *The Dirty Six*, *supra* note 2 (noting that more than 95% of egg-laying hens in the United States are confined in battery cages)

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ The Humane Soc'y of the U.S., *Frequently Asked Questions About Factory Hog Farms*, http://www.hsus.org/farm_animals/factory_farms/the_pig_factory_farm/frequently_asked_questions_about_factory_hog_farms.html (last visited Apr. 8, 2006).

⁴⁹ *Id.* (characterizing mourning behavior as "sitting motionless for hours with heads hung low or pressed against the crate, ears drooping, eyes clamped shut").

⁵⁰ The Humane Soc'y of the U.S., *The Turkey Factory Farm*, http://www.hsus.org/farm_animals/factory_farms/the_turkey_factory_farm/ [hereinafter HSUS, *The Turkey Factory Farm*] (last visited Apr. 8, 2006).

⁵¹ *See* The Humane Soc'y of the U.S., *An HSUS Report: Animal Suffering in the Egg Industry* 1, http://www.hsus.org/web-files/PDF/HSUS_laying_Hen_Report.pdf [hereinafter HSUS, *An HSUS Report*] (last visited Apr. 8, 2006) (noting that forced molting is the purposeful starvation of hens for ten to fourteen days to induce an additional laying cycle).

⁵² *See id.*; Farm Sanctuary, *The Facts*, *supra* note 32, at 5.

⁵³ HSUS, *The Dirty Six*, *supra* note 2; HSUS, *The Turkey Factory Farm*, *supra* note 50 (noting that factory farm turkeys have a high rate of leg and hip disorders); *see also* HSUS, *An HSUS Report*, *supra* note 51, at 1 (noting that osteoporosis affects almost all battery hens).

⁵⁴ The Humane Farming Ass'n, *supra* note 3 (noting that the 900 million death figure roughly equates to 10% of total farm animals raised for food)

⁵⁵ *Id.*

⁵⁶ *See* Farm Sanctuary, *The Facts*, *supra* note 32, at 1.

⁵⁷ Animal Welfare Act, 7 U.S.C. 2132(g) (2000) (excluding farm animals from the definition of animal under the Act).

exempt customary farming practices,⁵⁸ even though many of these practices are considered cruel and are therefore restricted industrialized nations.⁵⁹ Besides suffering inhumane treatment on the farm, more than 95% of all farm animals often endure several parts of the slaughter process fully conscious, as the United States Department of Agriculture does not consider chickens, turkeys, and other birds “livestock” under the Humane Methods of Slaughter Act (HMSA).⁶⁰ Further, despite the HMSA’s requirement that all animals be “rendered insensible to pain . . . before being shackled, hoisted, thrown, cast, or cut” or “suffer[] loss of consciousness,”⁶¹ investigations have shown that animals of all species have endured parts of the slaughter process while conscious due to incorrect stunning.⁶²

Like the government, trade associations provide no incentive for factory farms to provide animals with more humane treatment.⁶³ Guidelines for quality assurance published by the National Chicken Council, Milk and Dairy Beef Quality Assurance Center, National Pork Board, National Turkey Federation, and the National Cattlemen’s Beef Association simply maintain the status quo.⁶⁴ These quality assurance programs, created in response to pressures from grocery stores and chain restaurants, fail to ensure that the basic needs of farm animals are met.⁶⁵ Under these guidelines, farm animals still endure hunger, discomfort, pain, fear, and distress.⁶⁶ Animals can also be denied the ability to engage in normal behaviors.⁶⁷ Although these programs encompass cruel practices, trade associations often cite these guidelines to argue against government regulation.⁶⁸ As the food industry contributes significantly to political campaigns,⁶⁹ strenuous regulation in the near future is unlikely.

B. THE SOCIETAL COSTS OF FACTORY FARMS

Aside from the suffering endured by farm animals, factory farming also results in serious costs to society, including a reduction in the number and profitability of family farms, an increase in the health risks related to meat consumption, a proliferation of damage to the environment, and a rise in threats to farm workers’ health.⁷⁰ Small farms, ranches, and woodlot owners comprise approximately 93% of the total farms, ranches, and woodlots;⁷¹ however, only

⁵⁸ Farm Sanctuary, *The Facts*, *supra* note 32, at 2; *see e.g.*, Alaska Stat. §11.61.140(c)(3) (2005); Colo. Rev. Stat. Ann. § 18-9-201.5(1) (West 2004); Kan. Stat. Ann. §21-4310(b)(6) (1995).

⁵⁹ *See* Farm Sanctuary, *The Facts*, *supra* note 32, at 2.

⁶⁰ The Humane Soc’y of the U.S., *Still a Jungle Out There: The HSUS Takes USDA to Court to Ensure a Humane End for Birds* (Nov. 21, 2005), http://www.hsus.org/farm/news/ournews/still_a_jungle_out_there.html (noting these birds are often “shackled by their legs, hung upside-down, cut with mechanical blades, and immersed in scalding water – all while they’re fully conscious”).

⁶¹ Humane Methods of Slaughter Act, 7 U.S.C. § 1902 (2000).

⁶² The Humane Soc’y of the U.S., *Slaughter and Animal Welfare*, http://www.hsus.org/farm_animals/factory_farms/slaughter_and_animal_welfare/ (last visited Apr. 8, 2006) (noting electric stunning by electricity or captive bolt are often used to render unconsciousness in the animals).

⁶³ Farm Sanctuary, *The Facts*, *supra* note 32, at 3.

⁶⁴ *Id.*

⁶⁵ *Id.* at 4.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 3.

⁶⁹ The Humane Farming Ass’n, *supra* note 3.

⁷⁰ *Id.*

⁷¹ USDA, *Building*, *supra* note 21, at 4.

15% of farms reaped 89% of total sales and government payments in 2002.⁷² The sustainability of small farms is critical to the maintenance of healthy rural communities, as the foundation of their economy is farming.⁷³ The United States Department of Agriculture finds the viability of family farms so important that it has commissioned advisory committees to research the needs of small family farms, as most of the Department's current programs and policies slant favorably toward larger farms and agricultural operations.⁷⁴ In addition to contributing to the reduction of small family farms, factory farms create considerable risks to public health and the environment.

Factory farms provide abundant doses of antibiotics to farm animals, resulting in a significant threat to human health.⁷⁵ In fact, according to one estimate, healthy livestock receive 70% of the antibiotics used in the United States.⁷⁶ Factory farm animals receive antibiotics to promote fast growth and to ward off diseases likely to arise from the crowded and unsanitary conditions present on factory farms.⁷⁷ The overuse of antibiotics in farm animals produces bacteria resistant to antibiotics.⁷⁸ For example, directly following the approval, licensing, and use of the powerful antibiotic Fluoroquinolone in poultry, strains of salmonella and campylobacter resistant to Fluoroquinolone were found in animals and humans.⁷⁹ Since the initial use of the antibiotic in poultry, several countries have reported outbreaks of salmonellosis and campylobacteriosis resistant to treatment with Fluoroquinolone.⁸⁰ In fact, the U.S. Food and Drug Administration estimates that the use of this antibiotic in poultry affects at least 5000 Americans annually.⁸¹

As many of the antibiotics given to farm animals are also prescribed to humans and the number of current and new antibiotic drugs is limited, resistant bacteria dangerously threaten humans.⁸² Workers caring for the farm animals face a heightened risk of becoming infected with the resistant bacteria and then spreading the bacteria to others.⁸³ Another threat of widespread infection arises from the potential contamination of waterways and groundwater with bacteria seeping from manure lagoons or manure-spread fields.⁸⁴ Persons consuming undercooked meat or food contaminated with raw meat juices face a significant threat as well, as most meat sold in grocery stores comes from animals raised on factory farms.⁸⁵ Threats arising from the abundant

⁷² NASS, *Quick Facts*, *supra* note 33 (indicating further than only 3% of farms generated 62% of total sales and government payments).

⁷³ See USDA, *Building*, *supra* note 21, at 1.

⁷⁴ *Id.* at 1-2.

⁷⁵ The Humane Farming Ass'n, *supra* note 3.

⁷⁶ Suzanne Millman, The Humane Soc'y of the U.S., *The Emerging Threat of Anti-biotic Resistance: A Hidden Cost of Factory Farming*,

http://www.hsus.org/press_and_publications/humane_society_magazines_and_newsletters/all_animals/volume_4_is_sue_1_spring_2002/the_emerging_threat_of_antibiotic_resistance_a_hidden_cost_of_factory_farming.html (last visited Apr. 19, 2007).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ World Health Org., *Use of Antimicrobials Outside Human Medicine and Resultant Antimicrobial Resistance in Humans* (Jan. 2002), <http://www.who.int/mediacentre/factsheets/fs268/en/>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Millman, *supra* note 76 (naming penicillin, tetracycline, and erythromycin as examples of antibiotics prescribed for both human and farm animal use).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

dosing of farm animals with antibiotics prompted the European Union to ban the use of certain antibiotics in animal feed.⁸⁶

Environmental contaminants produced by factory farms also increase the risk of health problems for factory farm workers and residential neighbors.⁸⁷ Factory farming operations produce significant amounts of animal waste: in 1996, the cattle, pork, and poultry industries in the United States generated 130 times more waste than generated by the U.S. human population.⁸⁸ Although animal manure is a valuable fertilizer, the quantity of manure produced drastically exceeds needs.⁸⁹ Over application of manure drives pollutants into rivers, streams, groundwater, and air.⁹⁰ The clustering of factory farm operations in close proximity to each other and to the slaughterhouse increases the potential for environmental contamination.⁹¹ Another pollution risk arises from the potential for manure lagoons to burst or overflow.⁹² Twenty-five million gallons of animal waste spilled into the New River after the bursting of an eight acre hog waste lagoon in North Carolina in 1995.⁹³ The burst killed ten million fish and forced the closure of 364,000 acres of coastal wetlands used for shellfishing.⁹⁴ Individuals living near factory farms and factory farm workers also face health risks due to the emission of pollutants, such as hydrogen sulfide, ammonia, and methane, into the air.⁹⁵ For example, residents near a swine factory farm in Minnesota suffered dizziness, nausea, vomiting, and blackouts as a result of high levels of hydrogen sulfide.⁹⁶ Testing of ten local operations showed five exceeded public health limits for hydrogen sulfide, some by up to fifty times the standard.⁹⁷

Overall, factory farms raise significant social costs, including threats to public health, damage to the environment, and the loss of family farms.⁹⁸ However, humane alternatives to factory farming have the potential to reduce these societal costs.

C. AVAILABILITY OF HUMANE ALTERNATIVES

Economically feasible humane alternatives to the cruel methods typically used by factory farms are available.⁹⁹ These alternatives treat animals more humanely and decrease the health and environmental threats associated with factory farming.¹⁰⁰ For example, instead of cramming animals into pens and utilizing confined feeding systems, farmers can let the animals graze

⁸⁶ *EU Bans Farm Antibiotics*, BBC NEWS, Dec. 14, 1998, <http://news.bbc.co.uk/2/hi/europe/234566.stm>.

⁸⁷ HSUS, *Human Health*, *supra* note 26.

⁸⁸ The Humane Farming Ass'n, *supra* note 3 (indicating that those industries generated 1.4 billion tons of animal waste which equals approximately 5 tons of waste for every person in the United States).

⁸⁹ Natural Res. Def. Council, *America's Animal Factories: How States Fail to Prevent Pollution from Livestock Waste*, <http://www.nrdc.org/water/pollution/factor/cons.asp> (last visited Apr. 19, 2007).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* (noting that lagoons lined with clay can still leak several thousand gallons per acre per day).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* (noting that "[h]ydrogen sulfide is a toxic gas associated with the decomposition of swine manure").

⁹⁷ *Id.*

⁹⁸ The Humane Farming Ass'n, *supra* note 3.

⁹⁹ The Humane Soc'y of the U.S., *Sustainable Agriculture and Organic Farming*, http://www.hsus.org/farm_animals/inside_farming/sustainable_agriculture_and_organic_farming/ (last visited Apr. 8, 2006).

¹⁰⁰ *Id.*

openly in pastures.¹⁰¹ Manure from the animals fertilizes the pastures.¹⁰² Matching the number of animals to the land's carrying capacity and utilizing rotational grazing techniques ensures the sustainability of the land and diminishes environmental and health threats by inhibiting the over application of manure.¹⁰³ Further, by grass-feeding their farm animals, farmers will reduce outlays for farm equipment and fuel.¹⁰⁴ Moreover, freeing the animals from cramped quarters will decrease incidence of disease and thereby allow farmers to cut the number of antibiotics given to the farm animals.¹⁰⁵ Restricting the use of antibiotics to situations where an animal is actually ill has the potential to lower the risk of creating and passing antibiotic resistant bacteria from animals to humans.¹⁰⁶

In addition to diminishing the societal costs associated with factory farming methods, the implementation of humane alternatives responds to growing consumer demand.¹⁰⁷ Customers increasingly demand and pay premiums for organically grown and raised products, such as crops and livestock.¹⁰⁸ In fact, several farming industry associations have developed animal welfare certification programs in response to heightened consumer demand for improved animal welfare and pressure from the restaurant and grocery store industries.¹⁰⁹ Unfortunately, rather than improving the treatment provided to farm animals, standards established by the farming industry basically maintain the status quo.¹¹⁰ To achieve true improvement in farm animal welfare, several common factory farming practices need to be halted. For this reason and to decrease health risks, many European nations will be banning the use of battery cages from 2012¹¹¹ and the use of certain antibiotics.¹¹² If similar bans cannot be enacted in the United States due to political pressure by the farming industry on agricultural committees within Congress, then other measures, such as amending the tax system, should be taken to encourage the implementation of humane alternatives.

III. INHUMANE TREATMENT AND TAXES

The federal tax system currently impacts several aspects of the farming industry in America,¹¹³ including encouraging the use of livestock production methods which detrimentally impact the treatment of farm animals. Federal tax policies, especially policies enacted through the income tax, the self-employment tax, and the estate and gift taxes, impact "farm profitability, the number and size of farms, the organizational structure of the farm sector, and the mix of land,

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ World Health Org., *supra* note 79 (indicating that a rising threat of vancomycin resistant enterococci prompted European countries to ban the use of vancomycin, an animal growth promoter. After the ban, the prevalence of antibiotic resistant Enterococcus in animals and food dropped sharply.).

¹⁰⁷ Catherine Greene & Amy Kremen, U.S. Dep't of Agric., *U.S. Organic Farming in 2000-2001: Adoption of Certified Systems 2*, 22-24 (Feb. 2003), <http://www.ers.usda.gov/publications/aib780/aib780.pdf>.

¹⁰⁸ *Id.*

¹⁰⁹ See Farm Sanctuary, *The Facts*, *supra* note 32, at 2-3.

¹¹⁰ *Id.*

¹¹¹ Compassion in World Farming Trust, *supra* note 10, at 3.

¹¹² *EU Bans Farm Antibiotics*, *supra* note 86.

¹¹³ Ron Durst, U.S. Dep't of Agric., *Federal Taxes* (Nov. 3, 2005), [http://www.ers.usda.gov/Briefing/Federal Taxes/](http://www.ers.usda.gov/Briefing/Federal%20Taxes/).

labor, and capital inputs used in farming.”¹¹⁴ In general, federal income taxes comprise the major portion of farmers’ total federal tax burden.¹¹⁵

Although three basic size categories of farming operations exist, most of the federal income tax burden falls on intermediate and commercial farms.¹¹⁶ While approximately three-fourths of all rural residence farms report a tax loss, over half of all intermediate and commercial farms report taxable profits.¹¹⁷ In fact, in 2000, intermediate and commercial farms reported over 90% of all farm profits.¹¹⁸ Small farm sole proprietorships, on the other hand, reported an aggregate net farm operating loss equaling \$9 billion for tax purposes.¹¹⁹ Although these sole proprietorships reported a net operating loss, their taxable gross farm business income equaled over \$91 billion.¹²⁰ The great disparity between gross farm income and net farm operating losses indicates the farmers claimed significant deductions. While intermediate and commercial farms pay taxes on farming profits, smaller farms use net farm operating losses to offset their non-farm income.¹²¹ Tax policy changes which impact farm income and farm investment will therefore affect both small and large farms.¹²²

Tax relief measures enacted by Congress in the last few years benefit all farmers considerably, especially commercial farmers.¹²³ Farm animals, however, stand to lose. Overall, the average tax rate on farm income and investment declined from 18% in 2000 to 14% in 2005.¹²⁴ Although the legislation impacted several areas of the tax code, changes relating to capital investment¹²⁵ primarily threaten to affect farm animals negatively by encouraging further development of factory farms and the industrialization of livestock agriculture. The major changes encouraging capital investment include a preferential capital gains tax rate of 15% and an increased immediate expensing provision for capital purchases.¹²⁶ The preferential capital gains tax rate allows capital gain income to be taxed at a preferential rate, regardless of the rate applied to the taxpayer’s ordinary income.¹²⁷ The immediate expensing provision allows for

¹¹⁴ *Id.*

¹¹⁵ Ron Durst, U.S. Dep’t of Agric., *Federal Taxes: Federal Tax Policy & Farmers* (Apr. 4, 2005), <http://www.ers.usda.gov/Briefing/FederalTaxes/FederalTaxPolicy.htm> [hereinafter Durst, *Federal Tax Policy*] (indicating income taxes on farm and non-farm income accounts for almost two-thirds of farmers’ federal tax burden, social security and self-employment taxes account for almost one-third, and estate taxes account for a little more than 1%).

¹¹⁶ *Id.*; see also Ron Durst, U.S. Dep’t of Agric., *Changing Federal Tax Policies Affect Farm Households Differently* (Nov. 2005), <http://www.ers.usda.gov/AmberWaves/November05/Features/ChangingFederalTax.htm> [hereinafter Durst, *Changing Federal Tax Policies*] (defining intermediate farms as farms where farming is the primary occupation and sales are less than \$250,000, defining commercial farms as farms with sales greater than \$250,000, and defining rural residence farms as lifestyle, retirement, and limited resource farms).

¹¹⁷ Durst, *Federal Tax Policy*, *supra* note 115.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (noting that “[t]he net loss consisted of \$8.3 billion in profits reported by about one third of all farm sole proprietors and \$17.3 billion in losses reported by the remaining two thirds” and “[n]early \$10 billion of this loss can be attributed to rural residence farms”).

¹²⁰ *Id.*

¹²¹ Durst, *Changing Federal Tax Policies*, *supra* note 116.

¹²² See *id.* (noting, however, that smaller farms will be “primarily affected by the changes in individual marginal income tax rates, standard deduction and other exemption amounts, and those policies affecting the tax treatment of income from nonfarm sources”).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* (noting the preferential capital gains tax rate is 5% for taxpayers in a tax bracket of 15% or lower).

¹²⁷ See *id.*

faster write-off of capital purchases by permitting a significantly greater deduction in the year of purchase than depreciation deductions alone would allow.¹²⁸ Because of the time value of money, a greater deduction in the current year is worth more than deductions in future years. Commercial farms, who already invest heavily in capital assets, stand to benefit exceedingly from these legislative changes.¹²⁹ As capital investments increase, farms will become more capital intensive. Without restrictions on which capital investments receive preferential treatment under this legislation, farms will likely choose investments which allow for higher volume and faster production at a lower cost. Therefore, more and more farm animals will be forced to endure the suffering ubiquitous on factory farms.

Like the federal tax system, state tax systems may also encourage capital investments that detrimentally impact farm animals. For example, in 2001, California enacted legislation which provides a tax exemption for agricultural equipment purchases.¹³⁰ California's Board of Equalization administers the exemption and has some discretion over which purchases are exempted under the legislation.¹³¹ Since 2001, the Board of Equalization has allowed an exemption for the purchase of battery cages used to confine egg-laying hens.¹³² The Humane Society of the United States recently filed suit to enjoin this subsidization of inhumane treatment as a violation of California's animal cruelty laws.¹³³

In 2005, the Wisconsin legislature considered a similar tax bill which also stood to further inhumane treatment of farm animals.¹³⁴ This bill created an income and franchise tax credit for livestock farm modernization or expansion equal to 10% of the amount paid.¹³⁵ The legislation did not limit this preferential treatment to capital investments furthering humane treatment of livestock.¹³⁶ Therefore, like the legislative changes made to the federal and the California tax systems, the Wisconsin tax bill would promote the growth of factory farms by encouraging farmers to make additional capital investments to further high volume production methods.

IV. PROPOSED TAX SYSTEM CHANGES TO EFFECT HUMANE TREATMENT OF FARM ANIMALS

A. SOCIAL POLICY & TAXES

Governments often use the tax system to further social policy, in spite of criticisms that the tax system should be used only to raise revenue.¹³⁷ In particular, the U.S. Congress pursues

¹²⁸ *Id.* (indicating that 2001 legislation increased the amount which could be immediately expensed from \$25,000 to \$100,000 with the \$100,000 value to be adjusted for inflation in the following years).

¹²⁹ *Id.*

¹³⁰ The Humane Soc'y of the U.S., *The HSUS Files Suit to End California's Battery Cage Tax Break* (Feb. 1, 2006), http://www.hsus.org/farm/news/ournews/hsus_sues_ca_battery_cage_tax_break.html.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* Especially pertinent to the lawsuit is the fact that California's cruelty laws, unlike most states' cruelty laws, do not exempt common farming practices.

¹³⁴ Assemb. 145, 2005-2006 Leg., Reg. Sess. (Wis. 2005), available at <http://www.legis.state.wi.us/2005/data/AB-145.pdf>.

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ Maureen B. Cavanaugh, *On the Road to Incoherence: Congress, Economics, and Taxes*, 49 UCLA L. REV. 685, 687 (2002).

social goals through the federal tax system.¹³⁸ For example, charitable organizations do not pay federal income tax.¹³⁹ By exempting these charities from paying income taxes, the government recognizes that the charities' missions are important and that funds raised by the charity should be used to achieve those missions rather than to build the public treasury.¹⁴⁰ Aside from blanket tax exemptions, Congress also promotes social goals through the use of tax credits and deductions.¹⁴¹ For example, the Hope Scholarship Credit and Lifetime Learning Credit directly reduce tax liability for qualifying taxpayers.¹⁴² These credits, which encourage the attainment of post-secondary education,¹⁴³ indicate the government's goal of creating a more educated citizenry. Congress also encourages home ownership¹⁴⁴ and donations to charity¹⁴⁵ through itemized deductions in the federal tax code.¹⁴⁶ Furthermore, Congress may disallow deductions for socially undesirable behavior, such as criminal activities.¹⁴⁷ For example, the code explicitly denies a trade or business expense deduction for illegal bribes, illegal kickbacks, and other illegal payments.¹⁴⁸ The code also denies any deductions or credits for trade or business expenses when the trade or business consists of trafficking in illegal substances.¹⁴⁹

As the above examples illustrate, Congress utilizes various mechanisms within the federal income tax to promote social policies. These mechanisms can be broadly separated into two categories: tax incentives and tax disincentives.¹⁵⁰ Both categories provide mechanisms for the government to control externalities.¹⁵¹ The government promotes activities with positive external benefits by reducing the tax cost of those activities.¹⁵² The government discourages activities with negative external benefits by increasing the tax cost.¹⁵³

Tax incentives, also known as tax expenditures, encourage activities by reducing tax liability.¹⁵⁴ The term tax expenditure arises from the fact that the reduction in tax liability is effectively a substitute for spending by the government to subsidize the activity directly.¹⁵⁵ The government often prefers to regulate and promote desired activities through tax expenditures instead of government spending for several reasons.¹⁵⁶ First, administrative control of tax expenditures lies within the Treasury Department and the Internal Revenue Service, whereas administrative control of government spending lies within agencies that may be strongly

¹³⁸ *Id.*

¹³⁹ I.R.C. § 501 (2000); *see also* Joanne M. Pyc, *Changing the Animal Legal Paradigm Using the United States Tax Code*, 30 CAP. U. L. REV. 947, 951 (2002).

¹⁴⁰ Pyc, *supra* note 139, at 951.

¹⁴¹ *Id.* at 951-52.

¹⁴² I.R.C. § 25A (2000).

¹⁴³ *See id.*

¹⁴⁴ *See* I.R.C. § 163(h)(3) (2000) (allowing a deduction for acquisition and home equity indebtedness on qualified residences owned by the taxpayer); *see also* I.R.C. § 121 (2000) (allowing exclusion of gain from sale of a taxpayer's principal residence).

¹⁴⁵ *See* I.R.C. § 170 (2000).

¹⁴⁶ Pyc, *supra* note 139, at 952.

¹⁴⁷ *Id.*

¹⁴⁸ I.R.C. § 162(c)(2000).

¹⁴⁹ I.R.C. § 280E (2000).

¹⁵⁰ *See* Cavanaugh, *supra* note 137, at 687.

¹⁵¹ *Id.* at 688.

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ Kesan & Shah, *supra* note 27, at 380.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 380-81.

influenced by industry groups.¹⁵⁷ Furthermore, eligibility for the tax savings will likely be limited to taxpayers who truly meet the eligibility requirements, as the Treasury Department and the Internal Revenue Service tend to interpret the tax code strictly to maximize tax revenues.¹⁵⁸ Second, regulation through the tax code is less visible than direct government spending.¹⁵⁹ A responsible agency actively manages direct government spending programs; the tax expenditure, on the other hand, is situated amongst other code provisions in the voluminous Internal Revenue Code.¹⁶⁰ Moreover, politicians who regard themselves as fiscally conservative often prefer tax expenditures to major government spending programs.¹⁶¹ Finally, as opposed to direct spending programs which are perceived as providing benefits to a select few, tax expenditures are perceived as encouraging private decision-making.¹⁶² Types of tax expenditures or incentives include exclusions, deductions, deferrals, and credits.¹⁶³

In contrast to tax incentives, tax disincentives discourage socially undesirable behavior by increasing the tax liability associated with the behavior.¹⁶⁴ Common tax disincentives include denial of deductions and credits.¹⁶⁵ The government may also impose excise taxes, or additional fees, to discourage socially undesirable activity.¹⁶⁶ For example, a “sin tax” is imposed on purchases of alcohol¹⁶⁷ and pollution taxes are imposed on certain pollutant discharges.¹⁶⁸

B. PROPOSED CHANGES TO EFFECT HUMANE TREATMENT OF FARM ANIMALS

The government has several tax mechanisms at its disposal to encourage farm owners to treat farm animals humanely. First, the government can create a tax credit for purchases of equipment and erection of buildings which further humane treatment. This tax credit would be structured similarly to the previously mentioned tax credit legislation considered in Wisconsin;¹⁶⁹ however, the credit would be explicitly denied for purchases of equipment furthering inhumane treatment, such as battery cages and gestation crates. Second, the government can grant an increased level of immediate expensing for capital investments which further humane treatment of farm animals. Similar to the tax credit option, the expensing provision should list specifically the items not eligible for the preferential treatment. Third, similar to the “sin tax” on alcohol,¹⁷⁰ an excise tax can be levied on purchases of inhumane equipment, such as battery cages, veal crates, and gestation crates. Fourth, trade and business expense deductions can be denied or limited for the maintenance costs of inhumane equipment

¹⁵⁷ *Id.* at 380.

¹⁵⁸ *Id.* at 381.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Cavanaugh, *supra* note 137, at 711.

¹⁶⁴ Kesan & Shah, *supra* note 27, at 343.

¹⁶⁵ See Pyc, *supra* note 139, at 952.

¹⁶⁶ See Kesan & Shah, *supra* note 27, at 343-44.

¹⁶⁷ See David J. DePippo, Comment, *I'll Take My Sin Taxes Unwrapped and Maximized, with a Side of Inelasticity, Please*, 36 U. RICH. L. REV. 543, 545-47 (2002).

¹⁶⁸ Stephen M. Johnson, *Economics v. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Injustice?*, 56 WASH. & LEE L. REV. 111, 114 (1999).

¹⁶⁹ See *supra* Part III.

¹⁷⁰ See *supra* Part IV.A.

and for the purchase of growth producing hormones and non-therapeutic antibiotics.¹⁷¹ This disincentive is comparable to the code sections denying trade and business expense deductions for certain illegal payments.¹⁷² For humane treatment of farm animals to be achieved with these proposed measures, the change in tax liability must be great enough to make switching to humane methods more cost efficient than maintaining the status quo.

Farm industry trade associations will likely oppose these proposed tax measures. In doing so, the associations will point to current trade association humane treatment certification standards. Unfortunately, as mentioned previously, these certification standards basically maintain the status quo of inhumane treatment.¹⁷³ Notwithstanding the likelihood for opposition from the trade association, the first two options have a greater chance of being enacted by the Legislature. As tax incentives, the tax credit and immediate expensing options encourage farming operations to switch to more humane methods to receive the tax benefit. These options would be more palatable to the industry trade associations because, unlike the second two options which are tax disincentives, they do not directly penalize current inhumane farming methods. Further, the legislators themselves could more easily defend a decision to provide a benefit to those who treat farm animals humanely than a decision to impose additional costs on currently utilized livestock production methods.¹⁷⁴ Thus, implementation of tax incentives, such as a tax credit and an increased level of immediate expensing, should be the initial step in changing the tax code to effect humane treatment of farm animals.

V. CONCLUSION

Billions of farm animals face slaughter each year to satisfy American appetites. For most of these animals, life on the farm means tight confinement, restricted movement, and abundant doses of antibiotics and growth promoting hormones. In addition to forcing immense suffering on the farm animals, factory farms inflict significant costs on society, including the decline of family farms, an increase in health risks, and a rise in environmental damage. Viable humane alternatives are available and demanded by consumers. However, federal laws, state laws, and the current tax system turn a blind eye to much of the inhumane treatment endured by farm animals. In fact, many governmental policies, as recognized by the United States Department of Agriculture, favor large farming operations.¹⁷⁵ The tax system offers several mechanisms for effecting the humane treatment of farm animals. Two tax incentives, a tax credit for purchases furthering humane treatment and an increased level of immediate expensing for capital investments furthering humane treatment, should be the first changes made to the tax code to effect humane treatment of farm animals. If these measures are successful, tax disincentives,

¹⁷¹ The tax treatment of expenses for feeding, handling, and caring for animals, including the cost of antibiotics, depends upon the animals' use. Amounts expended for work, breeding, dairy, or sporting animals are capitalized and depreciated, unless the animals are included in an inventory under section 1.61-4 of the Treasury Regulations. Treas. Reg § 1.162-12(a) (as amended in 2000). Amounts expended for animals in fattening operations (i.e. fattening for the purpose of slaughter for human consumption) are currently deductible. *See id.*; I.R.S. Mkt. Segment Specialization Program Guideline: Gen. Livestock (Apr. 2000), available at 2000 WL 753768 (I.R.S.).

¹⁷² *See supra* Part IV.A.

¹⁷³ *See supra* Part II.A.

¹⁷⁴ The general public's desire for humane treatment of farm animals, illustrated through such acts as buying cage-free eggs and pressuring retail chains for more organic options, particularly enhances the defensibility of a decision to provide a special tax benefit to farmers who treat animals humanely. *See supra* Part I.

¹⁷⁵ *See supra* note 74 and accompanying text.

such as an excise tax on inhumane equipment purchases and a denial of deductions for upkeep of inhumane equipment, should be put forth for consideration. All in all, these tax code changes have the potential to improve life on the farm for the billions of animals abused and slaughtered by the food industry each year.