

# A LEASE-BASED APPROACH TO SUSTAINABLE FARMING, PART I: FARM TENANCY TRENDS AND THE OUTLOOK FOR SUSTAINABILITY ON RENTED LAND

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## I. INTRODUCTION

There is a growing list of concerns regarding the sustainability of the current agricultural system in the United States. A few of these issues include environmental concerns, such as: soil erosion, nutrient depletion, hypoxia, increased

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flooding, the destruction of wildlife habitat, the emission of greenhouse gases, the reciprocal effect of global warming on agriculture, and the effects of genetically modified organism (GMO) traits on natural species. Other concerns include lack of access to land for beginning farmers, consumer concern over “factory farming,” and a dwindling quality of life and human resources in rural communities. However, the need for stable food production, as well as the recognition of the environmental benefits that can be derived from agriculture continues to grow. We must, therefore, view the agricultural industry in a broad context, taking full account of how working within the current agricultural system can aid in limiting and even mitigating environmentally harmful practices. In order to understand the risks and solutions that agriculture, as practiced in the United States, poses to the environment, we must understand how land use decisions on agricultural land are made.<sup>1</sup> The critical aspects of such an examination (perhaps *the* critical aspect, at least in finding intra-institutional solutions) are the trends regarding farmland tenancy.

The current state of agricultural land tenure in the United States, particularly in areas rich with row crop production such as Iowa, is creating a tenuous situation regarding sustainable practices on farmland. Cause for concern over the adoption of sustainable practices lies not only in the amount of farmland leased, but also in the changing nature of lease arrangements and landlord-tenant relationships. Sociological and economic studies indicate that land tenure security, while not the only factor, is directly related to the adoption of conservation practices on agricultural land.<sup>2</sup> The theory is that tenants do not have as much of a

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1. See generally Neil D. Hamilton, Essay, *Feeding Our Green Future: Legal Responsibilities and Sustainable Agricultural Land Tenure*, 13 DRAKE J. AGRIC. L. 377 (2008) [hereinafter Hamilton, *Green Future*] (providing a more complete analysis of the need for examination of land tenure).

2. FRANK CLEARFIELD & BARBARA T. OSGOOD, SOIL CONSERVATION SERV., SOCIOLOGICAL ASPECTS OF THE ADOPTION OF CONSERVATION PRACTICES 9 (1986), [http://www.ssi.nrcs.usda.gov/publications/2\\_Tech\\_Reports/T014\\_Adoption01Main.pdf](http://www.ssi.nrcs.usda.gov/publications/2_Tech_Reports/T014_Adoption01Main.pdf); J. Gordon Arbuckle Jr. et al., *Non-Operator Landowner Interest in Agroforestry Practices in Two Missouri Watersheds*, 75 AGROFOREST SYS. 73, 74 (2009); Meredith J. Soule et al., *Land Tenure and the Adoption of Conservation Practices*, 82 AM. J. AGRIC. ECON. 993, 993-94, 1003 (2000) [hereinafter Soule et al., *Land Tenure*]; see also J. GORDON ARBUCKLE, JR., IOWA STATE UNIV. EXTENSION, RENTED LAND IN IOWA: SOCIAL AND ENVIRONMENTAL DIMENSIONS 1 (2010), available at <http://www.soc.iastate.edu/extension/farmpoll/PMR1006.pdf> [hereinafter ARBUCKLE, RENTED LAND] (noting ownership plays a role in the environmental effects of farming); MICHAEL DUFFY ET AL., IOWA STATE UNIV. EXTENSION, FARMLAND OWNERSHIP AND TENURE IN IOWA 2007, at 18 (rev. 2008), available at <http://www.extension.iastate.edu/Publications/PM1983.pdf> [hereinafter DUFFY ET AL., FARMLAND OWNERSHIP] (discussing length of tenure and the effect on soil conservation); Michael S. Carolan, *Barriers to the Adoption of Sustainable Agriculture on Rented Land: An Examination of Contesting Social Fields*, 70 RURAL SOC. 387, 398 (2005) (noting there is more incentive for conservation if leases are for multiple growing seasons); cf. Linda K. Lee & William H.

long-term interest in the land, so their motivation for conservation investments is limited.<sup>3</sup> This notion is stated frankly by a tenant:

“From the tenant’s standpoint, I’m not going to want to put in hundreds of hours of sweat-equity into soil that I may not have next year. Why should I as a tenant build up soil fertility in land that is not even mine? Just so he can rent it to someone else for more than I’m paying—so that person can benefit from the dirt I built up?”<sup>4</sup>

The large amount of leased farmland and the corresponding concern for conservation is not a new phenomenon.<sup>5</sup> However, recent land ownership trends combined with increased environmental concerns provide reason to refocus on this issue.

Current trends point toward lease arrangements with less stable tenure and decreased landlord involvement.<sup>6</sup> This does not bode well for the adoption of long-term sustainable practices. While landowners, if so inclined, can simply include specific contract provisions requiring a tenant to adopt various sustainable farming practices, this solution may not always be practical due to limited resources or reticent tenant inclinations.<sup>7</sup> Rather, a solution, within the context of a private lease contract, which addresses these broader trends is possible by including provisions that take into account the various motivations of both landowners and tenants.<sup>8</sup>

This Article will examine the trends regarding agricultural tenancy in the United States, with a focus on Iowa, to help illustrate the dilemmas facing agriculturally abundant states. It will include an examination of the overall amount of leased farmland, impacts of the term and type of lease chosen, and the overall stability of lease relationships. The discussion will show the effects of the chang-

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Stewart, *Landownership and the Adoption of Minimum Tillage*, 65 AM. J. AGRIC. ECON. 256, 257 (1983) (noting tenure arrangements that separate ownership from operation can hinder conservation).

3. Carolan, *supra* note 2.

4. *Id.* (quoting a male tenant, age 56, with 475 acres of rented farmland).

5. See SPECIAL COMM. ON FARM TENANCY, FARM TENANCY, H.R. Doc. No. 75-149, at 2-7 (1937) (discussing the negative effects of tenancy on soil conservation during the Great Depression); see also GEORGE WINGROVE COOKE, TREATISE ON THE LAW AND PRACTICE OF AGRICULTURAL TENANCIES 190-92 (1850) (discussing concerns in mid-19th Century England regarding the tenant’s temptation “to withdraw from the land the elements of production by over-cropping,” and the need for provisions “to prevent the deterioration of the farm”).

6. ARBUCKLE, RENTED LAND, *supra* note 2, at 17-18 (discussing the prevalence of intergenerational farm transfers and the effect of increasing distance on landlord/tenant relationships).

7. See Neil D. Hamilton, *Adjusting Farm Tenancy Practices to Support Sustainable Agriculture*, 12 J. AGRIC. TAX’N & L. 226, 247-248 (1990) [hereinafter Hamilton, *Farm Tenancy*].

8. See *id.* at 248-51.

ing characteristics of the parties, particularly the landowners, on the stability of the lease relationship. It will also show the types of leases chosen and the innate compounding effect the choice of lease type has on the stability of the tenancy. The Article will conclude with an examination of working within the institution of the landlord-tenant relationship, as it exists—as opposed to, or in some cases in conjunction with, external legal sources. This Article will suggest by including mechanisms within the lease agreement that provide incentives for the tenant's long-term investments in the farmland's sustainability, while maintaining alignment with the changing landowner characteristics and motivations, effective sustainability can be achieved on leased farmland. However, the specifics of relevant provisions will be the subject of a succeeding Article.

## II. TRENDS IN AGRICULTURAL LAND TENURE

### A. *Amount of Leased Farmland*

Approximately 40% of agricultural land in the U.S. is farmed by someone other than the owner.<sup>9</sup> Higher rates are frequent in the agriculturally abundant Midwestern states.<sup>10</sup> For instance, more than half the farmland in Iowa is rented, and the areas of the state containing the most fertile agricultural land have tenancy rates ranging between 61% and 70%.<sup>11</sup> The large proportion of agricultural land farmed under a lease raises issues regarding land stewardship. Additionally, the amount of rented farmland is likely to continue increasing. Fifty-five percent of Iowa's farmland is owned by people over the age of 65, and 28% of the land is owned by individuals over 75.<sup>12</sup> Many of these owners are retired from farming, but for a variety of reasons do not wish to sell their land.<sup>13</sup> This has contributed to the increase in rented land, which will likely continue as aging landowners continue to retire.

Further, the landowners that do transfer ownership are also likely to add to the amount of leased farmland. In a recent Iowa survey, 43% of current land-

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9. See NAT'L. AGRIC. STAT. SERV., USDA, 2007 CENSUS OF AGRICULTURE 262, 262, 268 (2009), available at [http://www.agcensus.usda.gov/Publications/2007/Full\\_Report/usv1.pdf](http://www.agcensus.usda.gov/Publications/2007/Full_Report/usv1.pdf). (percentage reached by dividing total rented or leased land in farms (350,792,353 acres) by total land in farms (922,095,840 acres) equaling 38.04%).

10. NAT'L. AGRIC. STAT. SERV., USDA, PERCENT OF LAND IN FARMS RENTED OR LEASED: 2007 (2007), [http://www.agcensus.usda.gov/Publications/2007/Online\\_Highlights/Ag\\_Atlas\\_Maps/Operators/Tenure/07-M117-RGBChor-largetext.pdf](http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Ag_Atlas_Maps/Operators/Tenure/07-M117-RGBChor-largetext.pdf) (map highlighting the tenancy rates of farmland across the U.S.).

11. ARBUCKLE, RENTED LAND, *supra* note 2, at 2.

12. DUFFY ET AL., FARMLAND OWNERSHIP, *supra* note 2, at 11.

13. See, e.g., FarmPolicy.com, USDA Reports; Climate Issues; Land Values; Budget Issue; and Trade, <http://www.farmpolicy.com/?p=2099> (Apr. 1, 2010, 03:51 CST).

owners anticipate transferring their property to family by will and another 10% anticipate transferring their property to family by gift.<sup>14</sup> Thus, over half of the transfers will result in continued family ownership of the farmland. However, children and spouses of farmers are less likely to continue operating the farm.<sup>15</sup> Again, the likely result is a further increase in rented farmland.

Thus, the rising age of landowners will play a significant role in the continued increase in the amount of rented farmland, due both to the retirement of landowners and the transfer of farmland to non-farming family members. However, purchases by investors will also play a significant role.<sup>16</sup> Investors are drawn to the steady increase in agricultural land values and generally lease the property while they own it for cash flow.<sup>17</sup> This creates an additional class of non-operator owners, dependant on tenant farming to create yearly returns on their investment. Due to the correlation between tenure security and the adoption of conservation practices, the continued increase in tenancy will likely have a negative impact on the sustainability of agricultural land. However, the number of leased farmland acres is not the only concern. Rather, additional trends in farm ownership and tenancy are contributing to a decrease in tenure security, and thus, a likely corresponding decrease in the adoption of sustainable practices.

## B. Length of Tenure

### 1. Term of Lease

The parties entering a lease arrangement have few restrictions in determining the length of the lease term. Considering the powerful incentive that tenure stability provides the tenant for investing in the property and the resulting long-term benefits for the landlord, the parties' discretion should allow for the creation of lease arrangements that last for several years. However, U.S. farms,

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14. DUFFY ET AL., FARMLAND OWNERSHIP, *supra* note 2, at 20.

15. J. GORDON ARBUCKLE, JR., IOWA STATE UNIV. EXTENSION, 2009 SUMMARY REPORT 2 (2009), <http://www.extension.iastate.edu/Publications/PM2093.pdf> (stating that of farmers with adult children, only 33% had at least one child engaged in farming); DUFFY ET AL., FARMLAND OWNERSHIP, *supra* note 2, at 17 (explaining that while women owned 47% of the farmland in Iowa in 2007, they owned 54% of the leased farmland).

16. *Rural Communities Weakened by Absentee Farmland Ownership*, CTR. NEWSLETTER (Center for Rural Affairs, Lyons, Neb.), Sept. 2009, <http://www.cfra.org/newsletter/2009/09/rural-communities-weakened-absentee-farmland-ownership>.

17. Beth Anderson, *Farmland Investment: Leasing Farmland for Profit*, NUWIRE INVESTOR, Dec. 20, 2007, <http://www.nuwireinvestor.com/articles/farmland-investment51384.aspx>; Steve Jordon, *Food Demand Drives Farmland Prices*, OMAHA WORLD-HERALD, June 9, 2010, <http://www.omaha.com/article/20100609/MONEY/706099947>.

particularly those in the Midwest, rely heavily on year-to-year leases.<sup>18</sup> Only about 25% of the leases in Iowa have a fixed length, and the majority of these are for two years or less.<sup>19</sup> The remaining 75% are indefinite year-to-year tenancies.<sup>20</sup> State laws and automatic renewal provisions within a written lease often create year-to-year tenancies at the expiration of the initial lease period.<sup>21</sup> Further, particularly concerning cash rent leases, the landlord often wishes to renegotiate the terms of the lease each year; therefore, the leases are terminated at will under the contract and the same tenant is then renewed for an additional year at a new contract price. Landlords may also be reticent to enter into long-term obligations that affect the market value of the property.

The lack of long-term lease arrangements is considered by many to be the most significant barrier to the adoption of sustainable practices.<sup>22</sup> These year-to-year tenancies provide a very short horizon for a tenant to receive a return on any investments made in conservation practices. Although there are sustainable practices that may show short-term gains due to fewer input expenses, such as

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18. Margaret Rosso Grossman, *Leasehold Interests and the Separation of Ownership and Control in U.S. Farmland*, in PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 119, 127-28 (Charles Geisler & Gail Daneker eds., 2000).

19. Michael Duffy, Iowa State Univ. Extension, *Survey of Iowa Leasing Practices*, 2007, AG DECISION MAKER, Sept. 2008, at 2, <http://www.extension.iastate.edu/Publications/FM1811.pdf> [hereinafter Duffy, *Iowa Leasing Practices*].

20. *Id.*; see IOWA CODE § 562.6 (2009) (stating a tenancy continues unless written notice of termination is given).

21. See, e.g., ARK. CODE ANN. § 18-16-105 (2009) (continuing an oral lease agreement for farmland for the following year unless written notice of termination is provided on or before June 30); IOWA CODE §§ 562.6-562.7 (2009) (establishing the continuation of a lease agreement beyond the agreed term if notice of termination is not provided on or before September 1 of the last year of the agreement); KAN. STAT. ANN. §§ 58-2502, 2506(d) (2009) (establishing a year-to-year tenancy when a tenant holds over from the original lease term with the consent of the landlord). See JAMES D. LIBBIN, N.M. STATE UNIV. EXTENSION SERV., FARM RENTAL AGREEMENTS 9 (2004), [http://aces.nmsu.edu/pubs/\\_circulars/CR-598.pdf](http://aces.nmsu.edu/pubs/_circulars/CR-598.pdf); Farm Serv. Agency, USDA, Cash Farm Lease, FSA-1940-53 § E.1 (June 11, 2002), available at <http://forms.sc.egov.usda.gov/efcommon/eFileServices/eFormsAdmin/FSA1940-0053.pdf>; Iowa State Univ. Extension, Iowa Farm Lease § 2 (rev. Feb. 1999), <http://www.extension.iastate.edu/agdm/wholefarm/pdf/c2-12.pdf>; Univ. of Md., Cash Lease of Farm Land, Buildings, and Equipment § 10, <http://garrett.umd.edu/Agnr/Farmland%20Cash%20Lease.pdf>, for form lease provisions establishing year-to-year tenancies if notice of termination is not given before a specified time prior to the end of the original lease term.

22. MICHAEL M. BELL ET AL., IOWA STATE UNIV., PROFESSIONAL DEVELOPMENT FOR THE ADOPTION OF SUSTAINABLE AGRICULTURE ON RENTED LAND 11 (2001), [http://www.pfi.iastate.edu/ofr/Landlord\\_Tenant\\_Sustainability.pdf](http://www.pfi.iastate.edu/ofr/Landlord_Tenant_Sustainability.pdf); ANNETTE M. HIGBY ET AL., UNIV. OF VT. EXTENSION, A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT 75 (2006), available at <http://www.uvm.edu/~farmtran/LegalGuide.pdf>.

conservation tillage,<sup>23</sup> most sustainable practices require years to fully appreciate.<sup>24</sup> Therefore, the year-to-year tenancy, or even a two-year term on a written lease, does not provide adequate economic incentives for the adoption of sustainable practices. Further, the length of tenant tenure is likely to continue decreasing. This is in large part due to the changing characteristics of landowners, as well as the increased reliance on cash rent leases.

## 2. *Actual Length of Tenure*

It is worth noting the average tenure length for an Iowa farm tenant is 11.3 years.<sup>25</sup> This extended period of tenure, in conjunction with predominantly year-to-year tenancies, creates what has been referred to as “a *de facto* multi-year lease” resulting from “the longstanding relationships (sometimes encompassing generations) that landlords and tenants have traditionally shared.”<sup>26</sup> However, while this might provide a sufficient length of time to reap the benefits of many sustainable practices, a tenant that receives notice of termination each year for renewal negotiations still does not have much assurance they will have the same land to farm the following year. In addition, “such implicit long-term contracts are becoming scarce as competition among farmers increases, as land becomes more commodified, and as the logic of capital accumulation within agriculture grows.”<sup>27</sup> Thus, the *de facto* multi-year lease is not likely to offer the type of assurance needed to encourage long-term investments by tenant farmers. Perhaps, more important than the actual length of tenancy is the tenant’s confidence in the landlord’s commitment to the continued tenancy. The effects of current trends in this confidence factor will be discussed in greater detail below.

### C. *Type of Lease*

The two principal types of leases used for renting cropland are the crop share lease and the cash rent lease. These leases are primarily distinguished by

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23. Meredith Soule et al., *Conservation on Rented Farmland: A Focus on U.S. Corn Production*, AGRIC. OUTLOOK, Jan.-Feb. 1999, at 15, 16 [hereinafter Soule et al., *Conservation*].

24. *Id.*; see also Carolan, *supra* note 2 (“Sustainable agriculture . . . remains wedded to such long-term farm management strategies as building up soil fertility without the use of chemicals, developing an integrated pest management strategy, and expanding crop rotations to include multi-year phases. These strategies are resistant to short-term economic rationalities precisely because they take time to implement.”).

25. Duffy, *Iowa Leasing Practices*, *supra* note 19.

26. Carolan, *supra* note 2, at 397 (citing MICHAEL DUFFY ET AL., IOWA STATE UNIV. EXTENSION, SURVEY OF IOWA FARM LEASING PRACTICES 2003 (2003)).

27. *Id.*

the type of payment, though there are other distinct aspects with significant consequences. Under the crop share lease, in return for providing the land and a share of input expenses, the landlord receives a specified share of the crop proceeds. The tenant provides the labor, management, and the remaining share of input expenses. Alternatively, in the cash rent arrangement, the landlord receives a cash payment in exchange for the use of the land. The landlord also typically pays the taxes and for major repairs. However, unlike the crop share lease, the landlord does not provide a share for inputs. The tenant pays for all of the inputs, retains the entire harvested crop, and provides the labor and management.

The type of lease used also has a significant impact on a tenant's tenure security and implementation of conservation practices.<sup>28</sup> In 2007, 42% of Iowa's agricultural land was farmed under a cash rent lease.<sup>29</sup> Further, cash rent leases accounted for 77% of all leased farmland in Iowa in 2007, whereas in 1982, the amount of leased farmland was evenly split between cash rent and crop share leases.<sup>30</sup> The changing nature of the farm lease is a reflection of the changing characteristics of landowners and tenants.<sup>31</sup>

There are a number of reasons both landlords and tenants prefer cash rent leases, though landlord preference seems to be the predominant factor contributing to their increased use.<sup>32</sup> Many landlords no longer desire to participate in the management decisions of farm operations.<sup>33</sup> Other reasons cited for why cash rent leases are preferred include a desire to avoid sharing risks, high land prices, and a lack of understanding of crop share lease terms.<sup>34</sup> It should be noted there are significant estate and tax planning issues involved in deciding on the type of lease, but it appears estate and tax benefits are subsumed by more general landowner motivations.

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28. See Soule et al., *Conservation*, *supra* note 23.

29. DUFFY ET AL., *FARMLAND OWNERSHIP*, *supra* note 2, at 7.

30. Duffy, *Iowa Leasing Practices*, *supra* note 19.

31. Grossman, *supra* note 18, at 133-34 ("The main change in characteristics of landowners is a shift from knowledgeable owners . . . to people who are less knowledgeable about farming and own land as one of the investments in their portfolio. This change in knowledge and emotional ties to farms and farmland is a primary reason why leases, particularly the traditional share lease, are changing.") (quoting J. T. Scott, *Leasing Practices*, in *ILLINOIS AGRICULTURE, AGRIBUSINESS AND THE RURAL ECONOMY: STRATEGIC ISSUES FOR THE NEXT CENTURY* 92, 96 (1994)).

32. Peter J. Barry et al., *Professional Farm Managers' Views on Leasing Contracts and Land Control: An Illinois Perspective*, 62 J. AM. SOC'Y FARM MANAGERS & RURAL APPRAISERS, 1998-1999, at 15, 17, available at [http://portal.asfmra.org/userfiles/file/journal/barry15\\_19.pdf](http://portal.asfmra.org/userfiles/file/journal/barry15_19.pdf); Carolan, *supra* note 2, at 399.

33. *Id.*

34. *Id.*

Tenant preference for a cash rent arrangement results from “ease of bidding for more acreage, avoidance of management sharing and ease of adjustment of lease terms,” and “competition for acreage.”<sup>35</sup> This preference is not surprising as the average tenant in Iowa has three landlords,<sup>36</sup> and tenants continue to acquire more farmland.<sup>37</sup> The reasons for a cash rent preference become more important when attempting to create a lease agreement that satisfies the concerns of both parties and ensures sustainable agricultural practices. These will be discussed further in the succeeding article on the inclusion of solutions within the lease provisions.

The significance of the trend toward cash rent arrangements, as it relates to conservation practices, lies in a shorter average tenure, the allocation of the production risk on the tenant, and less cost sharing between landlord and tenant.<sup>38</sup> The average tenure for an Iowa tenant with a cash rent lease is 9.5 years, while the tenure for crop share leases averages 18.1 years.<sup>39</sup> Crop share leases are more likely to be multi-year tenancies since the nature of the crop share lease creates integrated adjustments in rent through a share of product subject to yearly market and yield fluctuations.<sup>40</sup> Cash rent leases’ shorter actual tenure, along with the prevalence of less predictable year-to-year tenancies, gives less opportunity for the cash rent tenant to recoup on sustainable agricultural investments. Further, cash rent leases often place priority on maximizing yields through increased inputs and the use of monoculture cash crops.<sup>41</sup> Under such conditions, placing all of the risk on the tenant is not conducive to the adoption of sustainable practices.<sup>42</sup> In addition, cost sharing between a landlord and tenant is typically minimal under a cash rent lease.<sup>43</sup> This furthers the farmer’s lack of incentive, and per-

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35. *Id.* (noting also that the reasons may not apply to all tenants since beginning farmers relying on leased land to start farming are likely to have fewer landlords, less capital, and a higher need for shared risk).

36. ARBUCKLE, RENTED LAND, *supra* note 2, at 8.

37. Dan Piller, *More Tenants Take Operation of Farms as Landowners Age*, DES MOINES REGISTER, Feb. 1, 2009, at 1D.

38. *See* Carolan, *supra* note 2, at 398-99 (discussing risk allocated more evenly between landlord and tenant under a crop share arrangement, but the guarantee of a check in the mail for landlords regardless of production under a cash rent agreement).

39. Duffy, *Iowa Leasing Practices*, *supra* note 19, at 2-3.

40. Grossman, *supra* note 18, at 129.

41. Hamilton, *Farm Tenancy*, *supra* note 7, at 242.

42. *See* Douglas Allen & Dean Lueck, *Contract Choice in Modern Agriculture: Cash Rent Versus Cropshare*, 35 J.L. & ECON. 397, 401 (1992) (explaining in a cash rent arrangement the farmer “supplies the optimal amount of his own inputs but overutilizes any inputs supplied by the landowner,” including soil moisture and nutrients).

43. *See* HIGBY ET AL., *supra* note 22, at 71; *see also* Farm Serv. Agency, USDA, *supra* note 21 (providing optional cost-sharing provisions for specific farm operation inputs to be supplied by the landlord; otherwise, the tenant is responsible for those expenses by default); Ind. State

haps capacity, to implement certain sustainable practices.<sup>44</sup> While a landowner may not desire all of the ill effects the typical cash rent arrangement produces, particularly in terms of the long-term productivity of the property, the simple cash rent arrangement does offer a convenient method to meet some landowner motives. Thus, the nature of the cash rent lease itself, in addition to the motivations for adopting such an arrangement, further deteriorates a tenant's incentive and ability to adopt sustainable practices. It is important to note that there are modifications that can be made and are sometimes used, such as flexible cash rent options, which alter the effects of the lease type on the adoption of sustainable practices. A more in-depth examination of such modifications and their effects will also be addressed in the succeeding article.

#### D. *Tenant Tenure Stability*

It is necessary not only to observe the characteristics of the lease arrangement, but also the underlying landowner and tenant characteristics and motivations that impact the landlord-tenant relationship in regard to tenure stability. Such variables appear to influence both the actual average length of a tenant's tenure as well as a tenant's perception of their tenure, which do not necessarily coincide. Because the landlord-tenant relationship affects the stability, or at least the tenant's perception of the tenure's stability and the prospects of implementing sustainable practices, the relationship variables become critical to the examination of land tenure trends. Further, by recognizing the changing landowner and tenant characteristics and motivations, mechanisms addressing these characteristics may be incorporated within a lease to alter some of the critical aspects of the landlord-tenant relationship. These mechanisms can boost confidence and encourage the adoption of sustainable agricultural practices without resorting to

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Bar Ass'n, Cash Farm Lease Agreement (on file with author) (providing no cost sharing provisions for farm operation inputs); Univ. of Ill. Extension, Illinois Cash Farm Lease, *available at* [http://www.farmdoc.uiuc.edu/legal/Farmdoc\\_Form\\_CL01\\_0912.pdf](http://www.farmdoc.uiuc.edu/legal/Farmdoc_Form_CL01_0912.pdf) (last visited Dec. 25, 2010) (providing no cost sharing other than for ground limestone); David L. Hunter et al., Univ. of Tenn. Agric. Extension Serv., Farm Lease Agreement § C, Option 1 & Option 2, *available at* <http://economics.ag.utk.edu/publications/landuse/lease.pdf> (last visited Dec. 25, 2010) (providing input cost sharing only for the crop share lease option). Compare Iowa State Univ. Extension, Iowa Farm Lease § 4 (rev. Feb. 1999), <http://www.extension.iastate.edu/agdm/wholefarm/pdf/c2-12.pdf> (providing the form lease's cash rent option, which has no cost sharing provisions), with Iowa State Univ. Extension, Iowa Farm Lease § 5 (1999), <http://www.extension.iastate.edu/agdm/wholefarm/pdf/c2-12.pdf> (providing the crop share option with a table for establishing the owner's share of the expenses). But see Iowa State Bar Ass'n, Farm Lease—Cash or Crop Shares § 4 (rev. June 2005) (on file with author) (allowing for specified cost sharing with either the cash rent or crop share option).

44. See Allen & Lueck, *supra* note 42, at 401-02.

regulatory tools to ensure sustainability. It is important to clarify that while a landowner may simply mandate specific practices in a lease, this solution may not be practical. This Article is focused on examining and addressing the broader issue of instability in the land tenure system and the lack of incentives for tenants to adopt sustainable practices.

### 1. *Tenant Confidence in Tenure*

A key element in the landlord-tenant relationship is the tenant's confidence in the landlord's commitment to continue the lease.<sup>45</sup> This confidence is determined by several variables, including: 1) the distance the landowner resides from the property; 2) the type of owner and their connection to agriculture, whether as a former farmer, a spouse of a former farmer, an heir, or an investor; and 3) the social ties between the landlord and tenant.<sup>46</sup> Examination of a recent Iowa Farm Poll reveals some determining factors.

Overall, in the 2008 Iowa Farm Poll, 78% of tenants agree that their "landlord is committed to [their] continuation as a tenant."<sup>47</sup> The number of tenants with confidence their landlord is committed to their continuation is greater when the landlord resides in the same or an adjacent county, with 83% and 86% respectively, than when the landlord lives elsewhere in Iowa or out of state, which are 70% and 67% respectively.<sup>48</sup> The number of tenants with such confidence is lower in Iowa corporations at 53%, and out-of-state corporations have the lowest number of confident tenants with 44%.<sup>49</sup> However, the number of confident tenants does not accurately reflect the actual length of tenure based on the same landowner characteristics. Out-of-state landlords actually have the longest tenures with 20.3 years, while in-county landlords average 16.6 years.<sup>50</sup> However, in-state and out-of-state corporations do have the shortest tenures with 16.2 and 11.3 years respectively.<sup>51</sup>

In regard to the type of owner, tenants have the highest confidence in the spouses of former farmers with 84% of tenants indicating that these landlords are committed to their continuation as tenants.<sup>52</sup> Tenancy confidence in former farmers is at 83%, heirs of a farm estate have 72%, and investors with no ties to

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45. ARBUCKLE, RENTED LAND, *supra* note 2, at 12.

46. *See id.* at 12-13.

47. *Id.* at 12.

48. *Id.* at 12 fig.18.

49. *Id.*

50. *Id.* at 11 fig.14.

51. *Id.*

52. *Id.* at 13 fig.19.

the land have 70%.<sup>53</sup> However, this also does not wholly comport with the actual lengths of tenure based on the same landowner characteristics. The spouses of former farmers have the longest tenures with their tenants at 21.2 years, then heirs of a farm estate with 20.7 years, former farmers with 15.2 years, and investors with an average of 12.2 years.<sup>54</sup> Thus, while former farmers have the second highest number of tenants confident in their landlord's commitment, the average tenancy is six years shorter than a tenancy under a former farmer's spouse and nearly five years less than the average under an heir of a farm estate. While it should be noted that the actual lengths may be affected by the changing characteristics of demographic groups or when the landowner began leasing farmland, these results do demonstrate the possibility for longer-term relations with landlords that have typically been thought of as less committed to a long-term landlord-tenant relationship. The issue then becomes determining which factors cause increased tenant confidence in certain landlords, despite shorter actual tenure lengths amongst these same landlords, and incorporating mechanisms within the lease that address these factors.

## 2. *Landlord-Tenant Communication*

One of the critical aspects of the landlord-tenant relationship that impacts land tenure stability is the amount of communication between landlord and tenant. Typically, the frequency of communication decreases as the landlord's distance from the property grows. According to the Iowa Farm Poll, in-county landlords average 9.9 communications per year regarding farm practices, and the number decreases steadily ending with only 3 communications per year for in-state and out-of-state corporations.<sup>55</sup> The frequency of communication also appears dependent on the type of owner and their connection to agriculture. Former farmers and the spouses of former farmers have the highest number of communications in a year with 10.9 and 7.9 respectively, while heirs and investors have significantly less communication with their tenants averaging 5.4 and 5.0 times per year.<sup>56</sup>

The Iowa State Extension Report states that tenant confidence looks good overall, but “[r]esults consistently point to a correlation between distance—both geographic and cultural—and deterioration of tenant-landlord relationships.”<sup>57</sup> It is interesting that this correlation does not coincide with the actual

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53. *Id.*

54. *Id.* at 11 fig.15.

55. *Id.* at 12 fig.16.

56. *Id.* at 12 fig.17.

57. *Id.* at 13.

length of tenure, but rather correlates with the amount of communication between landlord and tenant. For instance, despite out-of-state landlord tenures averaging nearly four years more than in-county landlords and heirs of farm estates averaging six years greater tenure than landlords that are former farmers, tenants consistently expressed less confidence in out-of-state landlords and heirs of farm estates.<sup>58</sup> This underscores the importance of communication as a key element in establishing land tenure confidence. It should be noted, however, that there are other aspects of the relationship that could account for the increased confidence. For example, social ties between the landlord and tenant might also account for the increased confidence, although such social ties are partly formed by interactions in the context of the landlord-tenant relationship itself.<sup>59</sup>

It is also significant that communication specifically regarding conservation is much lower than communications regarding other farm operations in all types of landlord-tenant relationships.<sup>60</sup> However, some categories did have a higher frequency of conservation-related communications. Spouses of former farmers average 5.4 times per year, former farmers 3.9 times, and heirs and investors are lowest with only 2.2 times.<sup>61</sup> Communications regarding conservation also decrease with distance.<sup>62</sup> While sustainability issues are often a difficult area for landlords and tenants to engage one another,<sup>63</sup> there appears to be less reluctance to discuss conservation practices the closer the landlord is, culturally and geographically, to the operation.<sup>64</sup> The numbers regarding both general communication and conservation-oriented communication demonstrate the importance of establishing correspondence between the parties. Based on the current trends in farmland ownership and tenancy, including more landowners that are more distant from the land and removed from the agricultural community, communication and overall tenure confidence are likely to decline. This lack of communication and confidence will further undermine the incentives and capacity for adopting sustainable practices already diminished by the prevalence of year-to-year tenancies and increasing reliance on cash rent leases.

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58. *Id.* at 11-13.

59. Douglas H. Constance et al., *Landlord Involvement in Environmental Decision-Making on Rented Missouri Cropland: Pesticide Use and Water Quality Issues*, 61 RURAL SOC. 577, 591 (1996).

60. ARBUCKLE, RENTED LAND, *supra* note 2, at 13.

61. *Id.* at 14 fig.21.

62. *Id.* at 14 fig.20.

63. *See* BELL ET AL., *supra* note 22, at 10-11.

64. ARBUCKLE, RENTED LAND, *supra* note 2, at 14 fig.20.

*E. Landlord Involvement and Decision-Making*

The current trends in land tenure will increase the amount of leased farmland while decreasing the stability of tenant tenure, but they will also likely decrease the amount of landlord involvement in land-use decisions. In light of the prevailing notion that tenants are not as likely to adopt sustainable farm practices as landowner-operators, landlord involvement in land use decisions is critical to the adoption of sustainable farming practices, particularly where tenants lack confidence in stable tenure. Based on trends over the last few decades, landowner involvement will decrease and leave control of many land use decisions to tenants.<sup>65</sup> Rural Sociologist Douglas H. Constance describes an extreme “dominant-tenant subordinate-landlord” model of the landlord-tenant relationship:

a combination of trends bodes ill for the cooperative tenure system that has characterized Midwestern agriculture. These trends include the increasing numbers of absentee landlords who are generations removed from the farm and are mostly interested in economic gains from the rental farmland, coupled with the rise of powerful part-owners who increasingly dominate local rental markets. The trend in landlord-renter relationships may be towards a less cooperative land tenure system where renters dominate weaker landlords . . . . In the future, renter domination could lead to their control of land markets through local monopolies and oligopolies in which both absentee and local landlords have little choice but to accept the conditions and terms of area farmers.<sup>66</sup>

It does not appear that such a confrontational takeover by large part-owner farmers has occurred, and the market for leased farmland remains extremely competitive; yet there is evidence that landowners are becoming less involved in operational decision-making.

This is largely a voluntary surrender of control stemming from landlords living a greater distance from the land with a lack of experience in agriculture and the community.<sup>67</sup> The increase in absentee landlords removed from the farm both geographically and culturally results in landlords who are less likely to involve themselves in the operations of the farm due to practical constraints and a

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65. Grossman, *supra* note 18, at 122 (“[M]any landlords have a more tenuous connection with their land than did rural landlords in earlier times. Landlords who have never lived on their farm or who have never operated a farm often leave substantial freedom to their tenants.”).

66. Constance et al., *supra* note 59, at 602 (citing Jess Gilbert & Thomas M. Beckley, *Ownership and Control of Farmland: Landlord-Tenant Relations in Wisconsin*, 58 RURAL SOC. 569 (1993)).

67. Grossman, *supra* note 18, at 122; Constance et al., *supra* note 59, at 600; *see also* ARBUCKLE, RENTED LAND, *supra* note 2, at 12 figs.16 & 17, 14 fig.20 (indicating the lack of communication from absentee landowners is most prevalent between heirs and out-of-state landlords and their tenants, who demonstrate not only the lowest frequency of communication but the lowest number of discussions regarding conservation practices).

lack of ability to communicate effectively with the tenant. “[D]istance suggests ownership by newer generations with few social ties to renters, lower frequencies of agricultural experience and background, and confrontation with pragmatic and communications limitations on landlord-renter interactions.”<sup>68</sup> In 2007, approximately 79% of Iowa landowners were identified as full-time residents, down from 94% in 1982.<sup>69</sup>

The growth of absentee landowners, however, is not the only concern regarding landlord involvement. While local landowners may have established social ties and more frequent communication with tenants, as well as a greater understanding of farm practices, they are also more likely to be retired or to be the spouse of a former farmer.<sup>70</sup> Landlords who are retired from farming often prefer turning operational control over to the tenant in exchange for a steady cash rent income.<sup>71</sup> Further, there is also a sense of alienation reported by women landowners from access to knowledge and networking in the agricultural community.<sup>72</sup> The view of women landowners as less willing or capable to make land use decisions further increases tenant control of decision-making.

A lack of landlord involvement will likely continue due to landowner characteristics, which focus less on farm management and more on creating new dynamics with tenant farmers based on cash returns.<sup>73</sup> However, these effects will be further compounded by the choices made regarding the length and type of tenure, which will likely further isolate the landlord and tenant and create decreased communication, less tenure confidence, and less likelihood for the adoption of sustainable practices.

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68. Constance et al., *supra* note 59, at 600.

69. DUFFY ET AL., FARMLAND OWNERSHIP, *supra* note 2, at 12.

70. ARBUCKLE, RENTED LAND, *supra* note 2, at 12 figs.16 & 17.

71. See Carolan, *supra* note 2, at 399.

72. Women, Land & Legacy, History of WLL,

<http://www.womenlandandlegacy.org/history.htm> (last visited Dec. 25, 2010) (describing women feeling uninvited or unwelcome at landowner informational meetings); *cf.* Constance et al., *supra* note 59, at 598 (indicating that, at least with local landowners, male gender and higher farmland rental income are the greatest predictors of increased environmental decision making).

73. See Grossman, *supra* note 18, at 136 (“Though owners have the opportunity to exercise significant control over their land, they do not always use those opportunities. Indeed, landlord participation in management of rented land has declined, in part because of the large percentage of landlords who lack experience or interest in farming or who live far from their rented land. The gradual increase in cash leases also leads to less owner involvement in land management.” (citation omitted)).

### III. A DANGEROUS COMBINATION: DECREASED LANDLORD INVOLVEMENT WITH INCREASED TENURE INSTABILITY

The combination of diminished tenure security and a lack of landlord involvement creates a particularly precarious situation for sustainable farming on rented land. Landowner isolation from the farm, a lack of landowner desire to participate in farm management, and usurpation of decision-making power from female landowners, combined with the resulting predominance of cash rent leases, year-to-year tenancies, and fewer communications between landlord and tenant, creates a cycle which takes landowners out of the decision-making process, increases the tenant's need for short-term productivity, and destroys the incentives for long-term planning.

However, the significance of landlords surrendering decision-making control to tenants lies not only in the lack of motivation for tenants to adopt sustainable practices, but also in the underlying view of many tenants that stewardship issues are a landowner responsibility. Over one-third of the Iowa farmers polled said the landlord is responsible for addressing conservation needs on the rented property.<sup>74</sup> Though it was a minority of the tenants, the combination of landowner disengagement and tenant tenure instability amplifies this problem: "If landlords who are more removed from the land are less involved in its stewardship, while at the same time their tenants are relying on them to take the initiative on conservation issues, environmental outcomes could be less than optimal."<sup>75</sup>

However, there is reason for hope. Because the dominant-tenant model, described above by Constance, has not come to complete fruition, there is room to make adjustments in order to compensate for the negative results of current trends. While tenants are gaining greater control over farm operations, it is not the result of hostile control of land markets; rather, it is a voluntary relinquishment of control (with the exception of the alienation of female landowners) by retired or absentee landowners who still retain a great deal of bargaining power due to the stiff competition for land to farm.<sup>76</sup> This power is evidenced by the ability of landlords to raise rents and determine tenure length. Further, many tenants are not opposed to the notion of sustainability but simply lack the incen-

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74. ARBUCKLE, RENTED LAND, *supra* note 2, at 15.

75. *Id.* at 15, 17.

76. See Grossman, *supra* note 18, at 122, 139 ("In the current climate of farm leases, with significant competition among potential tenants for land to farm, landlords have substantial bargaining power during negotiation of farm leases; they can often demand higher rents and specific lease terms. Nonetheless, many landlords have a more tenuous connection with their land than did rural landlords in earlier times. Landlords who have never lived on their farm or who have never operated a farm often leave substantial freedom to their tenants.").

tive and capacity to adopt such practices.<sup>77</sup> Therefore, provided the landowners are motivated to ensure the sustainability of their land, progress can be made in establishing lease terms conducive to sustainable agriculture. Bridging the gap to make landowners prioritize conservation on their land is a topic more suitable for in-depth exploration elsewhere. The development of a landowner stewardship ethic has been broached previously, though perhaps not strictly in the lease context. Here, we restrain our examination to the solutions available for landowners seeking sustainability on their land but potentially lacking the motivation or ability to oversee its implementation first hand. The possible solutions provided in the succeeding Article are not strictly tailored to this one type of landowner, but it is an apropos focus.

#### IV. TRIED EFFORTS AND THE BENEFITS OF CREATIVE LEASE-BASED SOLUTIONS

The lack of tenure stability in conjunction with decreased landlord involvement creates the potential for grave consequences regarding the adoption of sustainable farming practices. However, closer examination of the trends in agricultural land ownership and tenancy not only reveals the increasing instability of land tenure and the resulting decrease in sustainable practice implementation, but also provides insight into how to partly remedy this instability and increase the adoption of sustainable practices. Acknowledging landowner characteristics, motivations, and tenant needs allows for the development of appropriate tools to cope with these detrimental factors. The task of mitigation might be accomplished through a variety of legal mechanisms, including government incentives, land use regulations, alterations of farm tenancy laws, and existing contract law. While all of these approaches have been utilized in one capacity or another to directly promote sustainability or affect tenure stability in favor of sustainable practices, the contract law mechanism—the farm lease agreement—has perhaps been the least examined. It may provide the most intuitive remedy, however, with the least cost for all parties—including landowners, tenants, policymakers, and the public.

There is existing policy involving both incentives and regulations that directly address the issue of sustainability on agricultural land, both owner-operated and leased. In order to fully appreciate the benefits of using farm-lease contracts to promote sustainability in the land tenure system as it presently exists, the strengths and weaknesses of tried policy tools should first be examined. These programs have had some success, particularly reducing the amount of soil

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77. See BELL ET AL., *supra* note 22, at 10-11.

erosion on cropland.<sup>78</sup> There are significant drawbacks though, to which a lease-based approach can add further support and fill in gaps.

#### A. *Incentive-Based Programs*

There are a variety of government farm programs that provide financial incentives for the construction of conservation improvements and the adoption of environmentally beneficial practices. However, few incentive-based programs focus exclusively on the promotion of sustainable practices on leased farmland. These programs likely have varying effects on a tenant's inclination to adopt conservation practices due to the enrollment requirements and the combination of the contribution required from the tenant, the time needed to realize the benefits of that contribution, and the length of the tenant's tenure.<sup>79</sup> In addition, the public support on which these programs rely may not be sustainable.<sup>80</sup>

While tenants are eligible to enroll in most programs, with permanent easements such as the Wetlands Reserve Program posing the only exception, there are obstacles to enrollment on leased land. Programs with long-term commitments, such as the Conservation Reserve Program (CRP), obviously require the operator submitting the application to be in control of the property for the entire term of the program contract or to gain the landowner's participation in the program. Based on the predominance of year-to-year tenancies, this precludes tenants from enrolling in many programs without the participation of the landlord. This is not an insurmountable problem as the landlord may be very willing to participate. However, it may hinder the application of some conservation programs to leased property, particularly where tenants are reticent to discuss the use of certain sustainable practices with their landlords.<sup>81</sup> The 2008 Farm Bill Conservation Stewardship Program (CStP) provides payments to the farm operator for the environmental benefits achieved through conservation practices.<sup>82</sup> The usefulness of such programs, at least from a tenant's financial perspective, depends on the amount of time required for the practices to incur the financial reward. Therefore, their usefulness still depends on the stability of the tenant's

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78. See NATURAL RES. CONSERVATION SERV., USDA, 2007 NATIONAL RESOURCES INVENTORY: SOIL EROSION ON CROPLAND 1 (2010), available at [http://www.nrcs.usda.gov/technical/NRI/2007/2007\\_NRI\\_Soil\\_Erosion.pdf](http://www.nrcs.usda.gov/technical/NRI/2007/2007_NRI_Soil_Erosion.pdf) (showing a 43% decrease in soil erosion on U.S. cropland between 1982 and 2007).

79. See Hamilton, *Green Future*, *supra* note 1, at 385-86.

80. Soule et al., *Conservation*, *supra* note 23, at 17.

81. See, e.g., BELL ET AL., *supra* note 22, at 10-11.

82. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 2301, 122 Stat. 1651, 1768-76 (2008) (codified as amended at 16 U.S.C. §§ 3838d-3838g (Supp. II 2008)); Conservation Stewardship Program, 7 C.F.R. §§ 1470.1, 1470.20-1470.24 (2010).

tenure. Programs to offset the costs of installing conservation improvements can also be entered by a tenant.<sup>83</sup> While this type of program does lessen the cost of conservation improvements for the tenant, the tenant will still bear a certain amount of risk without secure tenure or some provision for reimbursement included in the lease agreement.

The Transition Incentives Program (TIP) is an example of a program promoting sustainability specifically geared toward leasing arrangements, albeit applicable to only a small group of landowners and tenants.<sup>84</sup> TIP encourages sustainable land management by rewarding retired farmer-landowners with additional CRP payments for two years provided they enter a non-revocable lease of five years or more with a beginning or socially disadvantaged farmer.<sup>85</sup> This encourages the adoption of conservation practices and improvements by securing tenure of five years or more for the tenant, requiring the use of sustainable grazing or crop production methods, and requiring the landowner to allow the tenant to begin organic certification on the property, develop a conservation plan, and make conservation improvements.<sup>86</sup>

However, the stability and financial soundness of the incentive programs also raises concerns. While the federal government has increased overall spending on conservation incentive programs over the last two decades, the level of funding does not match the demand from farm operators.<sup>87</sup> In addition, these programs are often the subject of political maneuvering and are potential targets for cuts to fund other programs or to meet budget constraints.<sup>88</sup> The lack of sufficient funding to meet the conservation needs of farm operators and the unstable nature of the programs create a precarious situation for sustainable agriculture.

However, it is clear that incentive-based programs do play a role in the adoption of sustainable practices on leased farmland. Rewarding the use of conservation improvements, whether through cost-sharing or payments for environmental benefits, provides some incentive but is still limited. This is due to the

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83. 16 U.S.C. § 3839aa (2006 & Supp. II 2008) (stating that one of the purposes of the Environmental Quality Incentives Program (EQIP) is to “provid[e] flexible assistance to producers to install and maintain conservation practices”).

84. Conservation Reserve Program, 7 C.F.R. § 1410.64 (2010) (discussing the Transition Incentives Program which encourages retiring landowners to lease to beginning and socially disadvantaged farmers).

85. *Id.* § 1410.64(e).

86. *Id.* § 1410.64(a).

87. MEGAN STUBBS, CONG. RESEARCH SERV., ENVIRONMENTAL QUALITY INCENTIVES PROGRAM (EQIP): STATUS AND ISSUES 6 (2009), available at <http://ncseonline.org/nle/CRSreports/10Apr/R40197.pdf>.

88. *See id.*; see also NAT’L COMM’N ON FISCAL RESPONSIBILITY AND REFORM, THE MOMENT OF TRUTH 40 (2010), available at <http://c-span.org/pdf/debtCmsn120110.pdf> (arguing for a reduction in mandatory spending for agricultural programs).

inherent nature of the programs, reliant on control over the land for the term of the program contract, in conjunction with the limitations of the current tenancy situation. The advantages from incentive-based programs regarding sustainability on leased farmland are still largely dependent on lease agreements that establish stable tenant tenure and include provisions protecting a tenant's investment in conservation practices.

### B. *Land Use Regulations*

There have been a variety of regulatory mechanisms developed with the potential to limit the negative impacts of agriculture on the environment. These tools have been aimed at preserving the long-term productivity of the nation's soil resources as well as addressing off-farm environmental degradation. While these tools have shown some results in accomplishing these aims, they remain inconsistent in application and outcome and have been unable, in their present state, to adequately address the need for a sustainable agricultural system. An overview of both state and federal attempts to regulate the environmental impact of agriculture demonstrates the potential, and in some cases availability of such tools, but also the reticence at the local, state, and federal level for their adoption and application.

One of the most widespread, yet under-utilized, methods for regulating soil loss and controlling runoff is the Soil and Water Conservation District.<sup>89</sup> The districts were originally established with encouragement and funding from the federal government and in large part for the purpose of gaining control over the environmental disaster: the "dustbowl."<sup>90</sup> Regulatory authority over agricultural practices relating to soil erosion was given to local districts in many states.<sup>91</sup> The districts were successful in addressing many of the concerns raised by the depression-era "dustbowl" catastrophe, but this was in large part due to the large-scale and highly visible nature of the environmental disaster. Therefore, the application of mandatory regulations was less necessary. Conservation Districts relied heavily on and made significant progress using educational programs and financial and technical assistance to promote voluntary activities.<sup>92</sup> As the country

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89. See Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 Neb. L. Rev. 210, 232 (1993) [hereinafter Hamilton, *Feeding Our Future*].

90. *Id.*; see generally CLEARFIELD & OSGOOD, *supra* note 2, at 1-5 (discussing the adoption of conservation practices).

91. Hamilton, *Feeding Our Future*, *supra* note 90, at 232; see, e.g., IOWA CODE § 161A.44 (2009).

92. Hamilton, *Feeding Our Future*, *supra* note 90, at 232.

recovered, the regulatory authority of the districts was either legislatively eliminated or rendered ineffective through non-use and a lack of enforcement.<sup>93</sup>

The 1970s saw a dramatic increase in federal environmental regulation and the 1980s witnessed a movement toward stricter federal regulations on agriculture through the compliance provisions of the 1985 Farm Bill.<sup>94</sup> The Clean Water Act, adopted to address the decline in the quality of the nation's waters, established the National Pollutant Discharge Elimination System for issuing permits to limit the discharge of pollutants into the country's waters.<sup>95</sup> The mandatory permit system, however, only applies to point sources of pollution, from which agricultural runoff from stormwater and return flows from irrigated agriculture are expressly excluded.<sup>96</sup>

One critical area of agriculture that does come under the permitting system is discharges from Concentrated Animal Feeding Operations (CAFOs).<sup>97</sup> However, CAFOs can avoid the permit requirements through land application of manure and other byproducts, regardless of the propensity for those applications to discharge into waters from precipitation.<sup>98</sup> These laws effectively take the major sources of agricultural pollution, namely sediments and nutrients, out from under federal regulatory mandates.<sup>99</sup>

More of a financial disincentive than a regulation, the soil loss limit compliance laws of the 1985 Farm Bill have witnessed a great deal of success in reducing soil erosion and runoff. However, there are limits to the effectiveness of the compliance laws. The law only applies to highly erodible land (HEL), not cultivated land.<sup>100</sup> There has been demonstrated success in reducing soil loss on

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93. *See id.* *But cf.* 70 ILL. COMP. STAT. ANN. 405/38 (West 2005) (creating Soil and Water Conservation Districts with authority to develop regulations for soil erosion and sediment control for varying land uses). However, no soil loss limits or other erosion control regulations have been imposed on Illinois agriculture. Telephone Interview with Tom Ryterske, District Conservationist for Kane-Du Page Counties, Ill. (May 19, 2010); *see also* IND. CODE ANN. § 14-32-5-1(17) (LexisNexis 2003 & Supp. 2010) (granting authority to Soil and Water Conservation Districts to adopt rules and regulations to carry out the purposes and powers of the article). However, Soil and Water Conservation Districts in Indiana do not provide soil loss regulations in practice. Email from Jennifer Boyle Warner, Executive Director, Ind. Ass'n of Soil & Water Conservation Dists., to Edward Cox, Agricultural Law Center Fellow, Drake University Law School (June 1, 2010, 10:17 CST) (on file with author).

94. *See* Food Security Act of 1985, Pub. L. No. 99-198, §§ 1211, 1221, 99 Stat. 1354, 1506-07 (1985) (codified as amended at 7 U.S.C. §§ 1281-1393 (2006)) (making farmers ineligible to receive payments if they farm on highly erodible soil or wetlands).

95. 33 U.S.C. § 1342(a) (2006).

96. 33 U.S.C. § 1342(f), (l)(1)-(2); 33 U.S.C. § 1362(14).

97. 33 U.S.C. § 1362(14).

98. Concentrated Animal Feeding Operations, 40 C.F.R. § 122.23(e) (2010).

99. 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23(e) (2010).

100. 16 U.S.C. § 3811(a).

HEL, but it overlooks the continued erosion on non-highly erodible land (NHEL).<sup>101</sup> In addition, enforcement of the provisions relating to HEL is incomplete.<sup>102</sup> Michelle Perez of the Environmental Working Group provides a more in-depth look at both the potential to reduce soil erosion and the lack of the compliance provisions in reaching that potential.<sup>103</sup>

There are efforts to increase the use of environmental regulations for agriculture. A concerted effort to implement regulations in the Chesapeake Bay Watershed has resulted in significant changes in how agriculture operates in that region. However, despite the increased pressure and the established precedent for such laws, public sentiment regarding the welfare of farmers and protecting private property rights has made existing regulatory mechanisms difficult to enforce and has stymied the adoption of more comprehensive regulations. While these laws can be effective and have passed constitutional muster, they may be relegated to use in conjunction with or to merely plug the holes left by voluntary approaches. Those approaches may be the result of either the incentive programs discussed above or from an enlightened landowner demographic with a desire to improve the sustainability of their property through private agreements. Therefore, rather than wait for the effects of the next environmental disaster to be felt in order to gain the required momentum to adopt effective regulations or enforce existing regulatory mechanisms, efforts should be made to continue educating both farm operators and landowners on the advantages of sustainable practices. Efforts should be made to enable concerned, yet hesitant, landowners to develop private lease arrangements which ensure the advantages of sustainable practices are reaped.

### C. *Land Tenure Laws*

Tenure insecurity, exacerbated in the U.S. by the predominance of short-term leases, plays a significant role in destabilizing the stewardship of farmland. The land-tenure system is molded by the law. It is a man-made system subject to change and renovation. Why, therefore, should the law not provide an answer to a lack of sustainable agricultural production by altering the tenure system? This was attempted during the Great Depression and has been held to meet constitu-

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101. MICHELLE PEREZ, ENVTL. WORKING GROUP, TROUBLE DOWNSTREAM: UPGRADING CONSERVATION COMPLIANCE 19-20 (2007), available at <http://www.ewg.org/book/export/html/22513>.

102. *Id.* at 39 (explaining that the NRCS staff had difficulty implementing existing conservation programs).

103. *See generally id.* (explaining the need for application of compliance provisions on non-HEL cropland and better enforcement of existing compliance provisions).

tional restrictions.<sup>104</sup> Federal efforts have focused on increasing farmland ownership.<sup>105</sup> However, despite attempts throughout the last century to increase ownership, tenancy remains a vital aspect of our agricultural system, and the amount of land under tenant operation is likely to continue increasing.

There are existing laws that offer protection regarding a tenant's labor and investment on the property, which provides some measure of increased stability. These have primarily been relegated to the states.<sup>106</sup> Much of the effort to protect a tenant's tenure has focused on the termination of agricultural leases. While such laws have provided benefits to tenants regarding their labor and short-term investments, they have not provided the needed assurance for the adoption of long-term sustainable practices. A few require the landlord to provide notice of six months, a period which still provides the tenant little time for planning. Suggestions for providing a year's notice have been made, at least in cases involving tenants who have had long tenures on the land; but even a year's notice before termination does not provide adequate time for long-term conservation planning and sustainable nutrient management.<sup>107</sup>

#### D. *Lease-Based Solutions*

It is not a premise of this Article that there is no place for incentive-based approaches, regulations, or modifications to the tenure system. Instead, additional consideration should be given to private institutional arrangements that avoid some of the pitfalls and costs experienced with external approaches. Thus, rather than relying wholly on direct government incentives or regulations, financially and politically expensive options, or statutorily changing the structure or direction of the farm tenure system—a monumental task in scope and effort and perhaps antithetical to American ideals of land ownership—it may be more efficient and effective to promote the use of private contracts to enable the parties to address the issue of sustainability on their own terms. This approach takes into account landowner and tenant motivations to develop creative lease agreements that coincide with those motivations, while also resolving the broader concerns regarding the adoption of sustainable practices—principally a lack of stable tenure and loss of landowner involvement in land use decision-making. Again, this is not to say there is no place for government compensation for private parties

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104. Albert H. Cotton, *Regulations of Farm Landlord-Tenant Relationships*, 4 *LAW & CONTEMP. PROBS.* 508, 509 (1937) (citing *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 600 (1935)).

105. *Id.* at 508 (citing the Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862)).

106. *See id.* at 509.

107. H.W. Hannah & Joseph Ackerman, U. Ill. Agric. Experiment Station, *Legal Aspects of Farm Tenancy in Illinois*, *BULLETIN* 465, at 239, 265 (1940).

providing public benefits, that laws regulating the use of farmland for the general welfare are not possible or necessary, or that agricultural landlord-tenant laws should not be examined for possible modifications. However, efforts to further the sustainability of farmland through the use of existing instruments that address the priorities and motivations of landowners and tenants provides an economically and politically appealing solution.

It is important to note, though, that this approach requires at least one of the parties to desire, or at least value, the implementation of sustainable practices. The development of creative lease provisions is not useful if people do not adopt them. Thus, there is a place for public policy to help create, if not a duty of stewardship, at least an understanding of the need for responsible land management through education and accessible resources on how this responsibility can be manifested in a farm lease agreement. In addition to recognizing the need for sustainability through education, the promotion of sustainability through private farm lease agreements also requires the personal initiative to address sustainability issues with the other party. This may entail not only educating landowners but also empowering landlords who suffer from a sense of alienation, such as that expressed by many female landowners.<sup>108</sup> Public policy will also be left to fill in the gaps created by those left unpersuaded, unconcerned, or simply unable to act on their own. Such policy will most likely continue to rely on a combination of the mechanisms discussed above.

#### V. CONCLUSION

While specific lease provisions regarding sustainable practices may be included in a lease and are of value, it is critical to address the larger issues resulting in instability. The ownership trends discussed previously present a variety of landowner and tenant characteristics and motivations. Therefore, it is necessary to create a variety of lease-based solutions. The implementation of such solutions within the lease agreement will be the subject of a succeeding Article.

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108. See Women, Land & Legacy, Building Your Farms' Future Today: An Iowa Outreach Project to Women, <http://www.womenlandandlegacy.org> (last visited Dec. 25, 2010).