# COMMENT

## "ONE OUGHT NOT HAVE SO DELICATE A NOSE": CAFOS, AGRICULTURAL NUISANCE, AND THE RISE OF THE RIGHT TO FARM

BY

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*The origins of agricultural nuisance can be traced back more than four hundred years to William Aldred's Case in 1610. There, William Aldred brought an action against Thomas Benton for housing livestock in a manner that resulted in unpleasant odors reaching his property. In deciding in favor of Aldred, the Court of Common Pleas ultimately set in motion more than four hundred years of agricultural nuisance suits. This Article, which begins by exploring the roots of agricultural nuisance in early English and American law, ultimately focuses on the trend toward the statutory and constitutional protection of agriculture. The Article's discussion of those protections begins with the passage of right-to-farm laws. These laws, which now exist in some form in every state, have had inconsistent effects upon the success of agricultural nuisance suits. Finally, this Article discusses the potential trend toward the amendment of state constitutions to include a right to farm. Currently, only North Dakota and Missouri have amended their constitutions to include this right. A similar measure was proposed in Oklahoma in 2016 but was easily defeated.*

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## I. INTRODUCTION

This Article explores the contours of the nuisance doctrine from early English common law to its modern application in the United States, including a number of laws enacted to expand, supplement, or narrow its application.

Part II discusses the origins of nuisance in the common law of England and its later application in early American common law. Nuisance doctrine has been applied to a variety of agricultural activities for centuries. The earliest case seems to have been *William Aldred's Case*,[1] which is often cited as the foundation for modern environmental law. Typically, private entities filed suit to enjoin the activities constituting a nuisance on a neighboring property or acquire damages for past harms resulting from the nuisance. In the late 19th century, the Parliament of the United Kingdom enacted two Acts to mitigate the harm caused by a lack of sanitation. Both pieces of legislation had a significant impact on the procedures that were followed in the bringing and settling of nuisance claims in English courts. In the United

[1] (1610) 77 Eng. Rep. 817, 9 Co. Rep. 57b.

States, as is illustrated below by a selection of early American cases, the nuisance doctrine operated in much the same fashion.

Part III focuses on the rise of modern methods of raising livestock. The first major shift in the operation of the nuisance doctrine was caused by a trend toward industrialization of animal agriculture practices in the first half of the 20th century. This trend culminated in the ubiquity of concentrated animal feeding operations (CAFOs), which solidified as the standard method of farming in the second half of the 20th century. This transition was marked by a decrease in the number of livestock farms in the United States during a major population spike. The result is seen in the type of suits that are brought by plaintiffs today—they are often against livestock operations housing large numbers of animals.

Part IV focuses on the modern application of nuisance doctrine and the shift toward protection of agricultural interests. This shift took place in the 1970s when states began enacting right-to-farm statutes, which essentially limited the effectiveness of nuisance claims brought by private individuals. All fifty states now have some form of these laws. Although they are often criticized, many commentators explain that right-to-farm laws are nothing more than a codification of the common law coming to the nuisance affirmative defense.

Although common law nuisance and statutory supplementation of the doctrine vary from state to state, the doctrine of nuisance remains a viable option for those who are harmed by the agricultural activities taking place on neighboring properties. However, the recent introduction of right-to-farm amendments to state constitutions presents uncertainty in the future of state regulation of agriculture. It seems apparent that the trend toward protecting agricultural interests is on the rise, particularly in states with large agricultural industries.

## II. NUISANCE AND EARLY ENGLISH COMMON LAW

The application of nuisance doctrine to sources of deleterious odors is nothing new. *Aldred's Case* is often cited as one of, if not the, earliest environmental law cases.[2] In 1610, William Aldred brought action against Thomas Benton for building a pigsty that emitted fetid and unwholesome odors near Aldred's house.[3] The defendant pleaded not guilty, and in his defense, he argued that "one ought not have so delicate a nose, that he cannot bear the smell of hogs."[4] The Court of Common Pleas determined that the plaintiff should be able to recover damages.[5] In making that determination, the court relied on a decision in 1587 by the King's Bench in

[2] *E.g.*, Jonathan L. Mayes, *The Right to Trial by Jury in Environmental Cost-Recovery and Contribution Actions: United States v. England*, 10 ALB. L. ENVTL. OUTLOOK J. 71, 97 (2005).

[3] Aldred's Case, 77 Eng. Rep. at 817, 9 Co. Rep. at 57b–58a.

[4] *Id.*, 9 Co. Rep. at 58a.

[5] *Id.* at 822, 9 Co. Rep. at 59a.

*Bland v. Moseley*.[6] As the *Aldred's Case* court characterized it, the *Bland* case involved the plaintiff's dwelling which contained seven windows that allowed air and light to enter the structure.[7] The defendant built a structure so close to the plaintiff's house "that the said seven windows were stopped."[8] The King's Bench determined "that for stopping as well of the wholesome air . . . as of light, an action lies, and damages shall be recovered for them, for both are necessary."[9] However, as the *Aldred's Case* court noted, the court in *Bland* went further and held that a cause of action only lies in what is necessary and not what is considered only to be "a matter of delight."[10] As mentioned above, the court determined that "wholesome" air and light were necessary.[11] However, the court noted "that for . . . prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect . . . . But the law does not give an action for things of delight."[12] Although it is unclear where the line was to be drawn between a "necessity" and a "delight," it seems apparent that the court in *Aldred's Case*, and subsequent courts making nuisance determinations, considered air free of noxious odors to be a necessity.

The underlying framework of *Aldred's Case* was perpetuated in numerous cases for centuries. For example, a similar determination can be found in *Rex v. White*.[13] There, the defendants erected buildings used to manufacture several substances which created smoke and odors.[14] According to the plaintiff, "the air was impregnated with noisome and offensive stinks and smells."[15] In determining that the defendants' operations constituted a nuisance, the court explained, "it is not necessary that the smell should be unwholesome: it is enough, if it renders the enjoyment of life and property uncomfortable."[16] Again, it is unclear from the court's opinion whether it thought air that is free of "offensive stinks and smells" is considered a necessity, or if the court was attempting to expand the general application of nuisance to what the court in *Aldred's Case* would have considered a mere delight. After determining that the defendants had discontinued operation of the manufacturing facility, the court issued a stipulated order requiring the defendants not to resume operations that

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6 *Id.* at 817, 9 Co. Rep. at 58a.

7 *Id.* at 817–20, 9 Co. Rep. at 58a–58b.

8 *Id.* at 820, 9 Co. Rep. at 58b.

9 *Id.* at 821, 9 Co. Rep. at 59a.

10 *Id.*

11 *Id.*

12 *Id.* In late Middle English, "prospect" was a noun denoting the action of looking toward a distant object. OXFORD ENGLISH DICTIONARY (Compact ed. 1971) (1933). Thus, it is assumed that the court was referring to a property with an expansive view of the surrounding land.

13 (1757) 97 Eng. Rep. 338, 1 Burr. 333.

14 *Id.* at 338–39, 1 Burr. 333.

15 *Id.*

16 *Id.* at 340, 1 Burr. 337.

would result in a nuisance.[17] Additionally, the court fined the defendants in the amount of six shillings and eight pence.[18]

The existence of the potential negative health effects of the types of nuisances in both *Aldred's Case* and *Rex v. White* was clear to at least one notable commentator. William Chadwick authored the *Report on the Sanitary Condition of the Labouring Population of Great Britain*.[19] Chadwick's Report—published in 1842—thoroughly discussed, among other concerns, health problems that occurred in Great Britain from odors and airborne diseases due to a lack of sanitation.[20] The Report explained how gases and particles present in the air affected the general public's health. He explained that, "[w]hen diffused in the air, these noxious particles are conveyed into the system through the thin and delicate walls . . . of the lungs in the act of respiration."[21] The Report also discussed at length Chadwick's thorough understanding of the potential effects of such airborne pollutants in densely populated areas:

> It is equally well known that, when the air is infected by particles of decomposing vegetable and animal matter, fevers are produced of various types . . . ; that the exhalations arising from marshes, bogs, and other uncultivated and undrained places, constitute a poison . . . ; and that exhalations accumulated in . . . densely-populated cities, where little attention is paid to the removal of putrefying and excrementitious matters, constitute a poison chiefly of an animal nature, which produces continued fever of the typhoid character.[22]

In fact, Chadwick's Report was so influential that the United Kingdom's Parliament responded with two significant pieces of legislation: the Public Health Act 1848,[23] and the Nuisance Removal and Disease Prevention Act 1848.[24]

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17 *Id.* at 341, 1 Burr. 338.

18 *Id.* In 2005, that fine would amount to approximately £28. *Currency Converter*, NAT'L ARCHIVES, https://perma.cc/T3VV-N7WY (input 6 shillings (s) 8 pence (d) in form; change year to 1750; follow "Convert" hyperlink) (last visited Feb. 25, 2017).

19 EDWIN CHADWICK, REPORT ON THE SANITARY CONDITION OF THE LABOURING POPULATION OF GREAT BRITAIN: A SUPPLEMENTARY REPORT ON THE RESULTS OF A SPECIAL INQUIRY INTO THE PRACTICE OF INTERMENT IN TOWNS (W. Clowes & Sons 1843) (1842). Interestingly, it appears that Chadwick published the Report at his own expense. Ian Morley, *City Chaos, Contagion, Chadwick, and Social Justice*, 80 YALE J. BIOLOGY & MED. 61, 61 (2007).

20 CHADWICK, *supra* note 19, § 10.2, at 18–19.

21 *Id.* at 18.

22 *Id.* at 19.

23 11 & 12 Vict. c. 63.

24 11 & 12 Vict. c. 123.

### *A. The Public Health Act 1848*

The Public Health Act did several notable things. First, it created a central Board of Health.[25] Chadwick was one of the original board members.[26] The Board was given the authority to send an inspector into towns to "authorize the town council to carry out the duties imposed on it by the Act."[27] If no town council was in existence, the Board also had the power to set up a local board of health to then implement the Act.[28] The local authorities were required by the Act to appoint several officials, including an "inspector of nuisances."[29] Other officials, such as an "officer of health, were optional."[30] Statements by these officials were often presented in the nuisance suits that sometimes resulted under the Act. For example, in *Digby v. West Ham*,[31] the statements of West Ham's local inspector of nuisances were submitted in support of the plaintiff's nuisance claim.[32] The inspector's statements included his observations regarding the number of animals on the property, the presence of an unpleasant odor, and the proximity of the plaintiff's dwelling to the alleged nuisance.[33] The local board of health's medical officer's statements were also presented.[34] That officer's statements concluded that the defendant's property was kept in such a manner as to cause injury to the health of the residents of the adjoining property, and thus constituted a nuisance.[35] However, the Public Health Act only provided for a five-year trial period of the new General Board of Health.[36] At the conclusion of the trial period, Parliament decided against maintaining the Board.[37] Instead, it was replaced with other arrangements.[38] The Act's provisions were apparently unpopular from the beginning for meddling with property rights and freedom.[39] This was likely a result of political pressure on Parliament to remove the rigid framework of the Act. Legislation that is likely the result of political pressure was seen again in the flood of right-to-

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25 11 & 12 Vict. c. 63, § 4.

26 DOROTHY MARSHALL, INDUSTRIAL ENGLAND: 1776–1851, at 219 (1973).

27 *Id.*; *accord* 11 & 12 Vict. c. 63, § 13.

28 11 & 12 Vict. c. 63, § 13.

29 *Id.* § 40.

30 *Id.* §§ 37, 40.

31 Digby v. W. Ham Local Bd. of Health (1858) 22 JPR 304 (QB).

32 *Id.* at 304.

33 *Id.*

34 *Id.*

35 *Id.*

36 Public Health Act 1848, 11 & 12 Vict. c. 63, § 4.

37 Elizabeth Fee & Theodore M. Brown, Public Health Classic, *The Public Health Act of 1848*, 83 BULL. WORLD HEALTH ORG. 866, 867 (2005).

38 *Id.*

39 *Id.*

farm statutes, first seen in the late 1970s and now enacted, in one form or another, by all fifty states.[40]

### *B. The Nuisance Removal and Disease Prevention Act 1848*

As may be inferred from its name, the essential purpose of the Nuisance Removal and Disease Prevention Act was to allow "for the more speedy removal of certain nuisances and to enable the privy council to make regulations for the prevention of contagious and epidemic diseases."[41] The Act set forth a procedure to allow public officials to begin actions against those who maintained nuisances on their property. Under the Act:

> [U]pon receipt (or as soon afterwards as can be) by the Town Council [or other specified officials] of a notice in writing [in the form specified by the Act] signed by two or more inhabitant householders . . . stating that, to the best of the knowledge and belief, of [those persons], any dwelling-house or building . . . over which the jurisdiction or authority of the town council [or other specified officials] extends, is in such a filthy and unwholesome condition as to be a nuisance to or injurious to the health of any person . . . , such town council [or other specified officials] shall, after twenty-four hours' notice in writing, by delivering the same to some person on the premises referred to in such first-mentioned notice, or (if there be no person upon the premises who can be so served) by fixing the same upon some conspicuous part of such premises, or (in case of emergency without notice) . . . enter such premises, and examine the same with respect to the matters alleged in the first-mentioned notice, and do all such works, matters, and things necessary for that purpose.[42]

If, during the examination, the property was found to be in a filthy and unwholesome condition, the town council or other official submitted a complaint to a justice.[43] The Act then required that the justice issue a summons requiring the owner of the property in question to appear to answer the complaint.[44] The summons was to be served in a similar manner to that of the notice of entry.[45] This meant that the summons had to either be served "to some person on the premises," or, where no one was present, by placing the summons on a conspicuous part of the property.[46]

If the property was shown to be filthy and unwholesome to the satisfaction of the justices at the time of the summons, the "justices shall make an order in writing . . . for cleansing, whitewashing, or purifying such

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40 *See generally* Rusty Rumley, *A Comparison of the General Provisions Found in Right-to-Farm Statutes*, 12 VT. J. ENVTL. L. 327, 350 (2011) (discussing the enactment of right-to-farm laws by all fifty states).

41 Nuisance Removal and Disease Prevention Act 1848, 11 & 12 Vict. c. 123, § 1.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

dwelling house or building, or for the removal of the abatement of any such cause or causes of complaint."[47] Further, the Act set forth strict time requirements in which the cleansing had to take place.[48] The order required the property owner to either comply with the order or face penalties under the Act.[49] If the owner did not comply with the justices' order, they were subject to a penalty, which was not to exceed ten shillings for every day that the owner was noncompliant.[50] In addition to the penalty, the town council or their representatives had the authority to enter the premises and "cleanse, whitewash, or purify" the property, or "remove or abate the cause or causes of the complaint" in compliance with the justices' order.[51]

### *C. English Nuisance Cases*

While the Public Health Act and the Nuisance Removal and Disease Prevention Act focused almost exclusively on matters of public health and sanitation, early English courts did not limit nuisance claims to those resulting in deleterious health effects. An early example of this is *Walter v. Selfe*.[52] In that case, the plaintiff filed a motion for an injunction from the manufacture of bricks in a manner that would result in an annoyance to the plaintiff or damage his property.[53] In response to that claim, the defendant argued that the vapors and fumes caused by the manufacturing of bricks were not hurtful or unhealthy to the plaintiff, and thus was not a nuisance.[54] The court ultimately held that the vapors and fumes did not need to cause harm to human, animal, or plant life to be considered a nuisance.[55] The court explained that "a smell may be sickening, though not in a medical sense . . . . A man's body may be in a state of chronic discomfort, still retaining its health, and perhaps suffer even more annoyance from nauseous or fetid air for being in a hale condition."[56] The court held that defendant's actions "abridge[d] and diminish[ed] seriously and materially the ordinary comfort of existence to the occupier and inmates of the Plaintiffs' house."[57] Thus, the court granted the plaintiff's requested injunctive relief, which required "[t]hat the Defendant, his servants, workmen and agents be restrained . . .

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47 *Id.*

48 *Id.* The Act required that the justices' order be fulfilled within "two clear days, exclusive of Sunday, after service of such order." *Id.*

49 *Id.*

50 *Id.* Ten shillings in 1850 would be worth approximately £29 in 2005. *National Archives Currency Converter*, *supra* note 18 (input 10 shillings (s) in form; change year to 1850; follow "Convert" hyperlink).

51 Nuisance Removal and Disease Prevention Act 1848, 11 & 12 Vict. c. 123, § 1.

52 (1851) 64 Eng. Rep. 849, 4 De G. & Sm. 315.

53 *Id.* at 851, 4 De G. & Sm. at 320.

54 *Id.* at 852, 4 De G. & Sm. at 322–23.

55 *Id.*, 4 De G. & Sm. at 322.

56 *Id.*

57 *Id.*

from burning, or causing to be burnt, any bricks . . . so as to occasion damage or annoyance to the Plaintiffs."[58]

In *Digby*, the court made a similar determination regarding manure attributable to the defendant's pigsty.[59] In accordance with the process set forth in the Nuisance Removal and Disease Prevention Act, the West Ham Local Board of Health filed an information against James Digby for keeping swine and pigsties on his property in such a manner as to be a nuisance to nearby property—a direct violation of the Public Health Act of 1848.[60] The inspector of nuisances, who was appointed by the local board of health, testified:

> I have seen the pigs feeding on barley; that the appellant kept about thirty-four pigs on his premises; that there was an unpleasant effluvia to a certain extent; that the pigstyes were within about twelve yards of Mr. Martin's house; and that there was a number of dwellings within about sixty or seventy yards of the pigstyes.[61]

It quickly becomes apparent that one of the main sources of odor-related nuisance at early English common law was the result of accumulated manure. For example, in *Smith v. Waghorn*,[62] William Waghorn occupied a stable-yard where he kept seven or eight horses.[63] He allowed the dung to accumulate such that Thomas Smith, a nearby neighbor, had to close his windows to avoid the stench.[64] There, the court held that Waghorn had violated a local act that prohibited nuisances.[65] The court's reasoning was that, while dung piles are not always a nuisance, they invariably are when it results in a stench that is an annoyance to neighbors.[66]

As the courts continued to decide nuisance cases, they seemed to refine their approach to the issue. The court's discussion in *Crump v. Lambert*[67] is notable for two reasons. First, it discussed the concept of a material addition.[68] Second, it advanced the discussion on injunctive remedies, noting the inherent vagueness that accompanies such remedies.[69] In *Crump*, the defendants, who were iron bedstead manufacturers, built a factory on property adjacent to the plaintiff's property.[70] The complaint alleged that the smoke, effluvia, and noise that constantly emanated from the facility

58 *Id.* at 853, 4 De G. & Sm. at 325–26.
59 Digby v. W. Ham Local Bd. of Health (1858) 22 JPR 304 (QB) at 304.
60 *Id.*; *see also* discussion *supra* Part II.A (discussing the Public Health Act 1848).
61 *Digby*, 22 JPR at 304.
62 (1863) 27 JPR 744 (QB).
63 *Id.* at 744.
64 *Id.*
65 *Id.* at 745.
66 *Id.*
67 (1867) L.R., 3 Eq. 409.
68 *Id.* at 413.
69 *Id.* at 414 ("I cannot make the order more precise; it is always a question of degree . . . .").
70 *Id.* at 409–11.

constituted a nuisance.[71] On this point, the court thought it necessary to determine whether the addition of the defendant's smoke and effluvia to an area in which much smoke and effluvia were already present—as a result of factories that had been in place for more than twenty years—was sufficient to constitute a material addition.[72] After considering the possibility that the complained of nuisances were already present as a result of plaintiff's proximity to other factories, the court determined that defendant's new factory "produced a completely new state of things as regards the Plaintiff's house and grounds."[73] After resolving the material addition question, the court explained that "[t]he real question in all the cases is the question of fact, viz. whether the annoyance is such as materially to interfere with the ordinary comfort of human existence."[74] With regard to this issue, the court determined that the "smoke and noise materially interfere[d] with the comfort of human existence in the Plaintiff's house and grounds."[75] The court subsequently issued an injunction "to restrain the Defendants . . . from allowing smoke and effluvia to issue from their said factory so as to occasion nuisance, disturbance, and annoyance to the Plaintiffs."[76] The court issued a similar injunction with regard to the noise emanating from the factory.[77] Further, the court noted that the injunction was "a question of degree," which meant that the defendants would be able to continue operating the facility so long "as to avoid any substantial issue of smoke or noise."[78]

### *D. American Nuisance Cases*

Early American courts took much the same approach to nuisance actions arising from noxious vapors and offensive odors. In *Commonwealth v. Van Sickle*,[79] it was alleged that the defendant maintained a facility to house up to 1,000 hogs, which he fed with refuse from an adjoining distillery also owned by him.[80] The facility, located within the city limits of Philadelphia, omitted odors that affected those living nearby.[81] The prosecution introduced evidence that "in warm weather the stench was so intolerable as to make it almost impossible to pass through the street, on which the establishment opened, without nausea."[82] The prosecution also introduced evidence that the odor resulted in a significant decrease in the

71 *Id.*
72 *Id.* at 413.
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.* at 414.
77 *Id.*
78 *Id.*
79 7 Pa. L.J. 82 (Pa. 1845).
80 *Id.* at 83.
81 *Id.* at 86–87.
82 *Id.* at 84.

value of nearby property.[83] Ultimately, the jury found that the defendant's operation constituted a nuisance.[84]

Manure is not the exclusive source of nuisance odors. In *State v. Payson*,[85] the defendant kept twelve hogs on property adjoining a public street.[86] Yet the cause of the nuisance there was not manure; instead, the defendant's nuisance resulted from his unlawful collection of offal, which was fed to the pigs.[87]

Although admittedly similar in terms of legal arguments, an early American nuisance case that presents an interesting factual situation is *City of Baltimore v. Sackett*.[88] There, the City of Baltimore, Maryland proposed to arrange for the establishment of a "piggery" for purposes of disposing of the city's excess waste.[89] As part of the plan, the garbage would be fed to 15,000 pigs on a 125-acre parcel that the city had recently acquired.[90] Perhaps unsurprisingly, the plaintiffs sought an injunction to prevent the city's proposed plan.[91] The court ultimately denied the plaintiff's request for an injunction.[92] In doing so, the court focused on the lack of certainty with regard to the potential harm to plaintiffs.[93] The court determined that "[t]he mere allegation . . . that irreparable damages will ensue is not sufficient, unless facts be stated which will satisfy the court that the apprehension is well founded, and they do not sufficiently appear in this case to justify a court of equity to interfere."[94]

Another case with facts similar to that of *Von Sickle* is *Smiths v. McConathy*.[95] There, the defendant operated a distillery and a hog farm.[96] The refuse from the distillery was used to feed the hogs which created unpleasant odors.[97] The plaintiff claimed that as a result of the "noxious and offensive smells and stenches," the plaintiff's home was "rendered uncomfortable and unhealthy and unfit for habitation."[98] Additionally, the plaintiff claimed that the odors made his property "unfit for the use of the horses and cattle and other stock."[99] At trial, the jury found for the defendants, but the plaintiff appealed the decision, arguing that the trial judge's instructions on what must be proved to recover damages for a

83 *Id.*
84 *Id.* at 88–89.
85 37 Me. 361 (1853).
86 *Id.* at 361–62.
87 *Id.* at 362–63.
88 107 A. 557 (Md. 1919).
89 *Id.* at 558.
90 *Id.*
91 *Id.*
92 *Id.* at 560.
93 *Id.*
94 *Id.* at 560.
95 11 Mo. 517 (1848).
96 *Id.* at 519.
97 *Id.* at 519–20.
98 *Id.*
99 *Id.* at 520.

nuisance were incorrect.[100] The Missouri Supreme Court ultimately held that "there cannot be a private nuisance unless it be attended with some damage or inconvenience to the party injured, and this idea enters into the very definition of a nuisance."[101] The court went on to distinguish the requirements for public and private nuisances. The court explained that to sue for a public nuisance, an individual must show that they suffered a special damage beyond the damage that the public at large suffered, yet there is no such requirement for a private nuisance.[102]

## III. THE RISE OF INDUSTRIALIZED AGRICULTURE AND THE ANIMAL FEEDING OPERATION

During the first half of the 20th century in the United States, a major shift in agricultural practices took place.[103] While the United States was undergoing a major population increase, the number of family farms decreased significantly and were steadily replaced by large industrial operations.[104] This trend continued into the second half of the 20th century and eventually resulted in the CAFO.[105] These massive facilities may house more than 100,000 animals and have one or more on-site manure storage facilities (called lagoons), the contents of which may later be sprayed onto adjoining fields and crops.[106]

### *A. What is an Animal Feeding Operation (AFO)?*

Perhaps the most comprehensive definitions for "animal feeding operation" (AFO) and CAFO are set forth by the United States Environmental Protection Agency (EPA) through the implementing regulations of the Clean Water Act[107] (CWA). EPA defines an AFO as:

> a lot or facility (other than an aquatic animal production facility) where . . . [a]nimals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and . . . [c]rops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.[108]

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100 *Id.* at 522.

101 *Id.*

102 *Id.*

103 J. Nicholas Hoover, *Can't You Smell That Smell? Clean Air Act Fixes for Factory Farm Air Pollution*, 6 STAN. J. ANIMAL L. & POL'Y 1, 4 (2013).

104 *Id.*

105 *Id.* at 4–5.

106 *Id.* at 6.

107 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

108 40 C.F.R. § 122.23 (b)(1) (2015).

For purposes of the CWA, to be considered a CAFO, a facility must meet EPA's definition of an AFO and the additional criteria set forth by EPA.[109] EPA defines a CAFO as an AFO that meets or exceeds the requisite number of a given species provided in the regulations.[110] CAFOs are then subdivided into "large CAFOs" and "medium CAFOs," with each type requiring a different number of animals to trigger the designation.[111] For example, to be considered a medium CAFO, a dairy facility would need to have between 200 and 699 mature dairy cows.[112] If the same facility contained at least 700 mature dairy cows it would be designated as a large CAFO.[113] If the facility contained fewer than 200 dairy cows, it would be designated as an AFO, but not a CAFO.[114] However, the numbers vary greatly depending on the type of livestock in the facility. For a facility containing chickens that are not egg-laying hens, a large CAFO would contain at least 125,000 chickens, a medium CAFO would contain between 37,500 and 124,999 chickens, and anything fewer than 37,500 would be designated an AFO, if all the other relevant requirements were met.[115]

Although EPA's regulatory definitions of AFOs and CAFOs only apply to the CWA, they are useful as an indication of the types of conditions and quantities that are sufficient to trigger such categorization within the sphere of environmental regulations. Further, it is apparent that many scientific studies and reports that refer to AFOs and CAFOs are not necessarily applying any particular, formal definition and may instead be using the term in a colloquial sense.[116]

### *B. Health Effects Attributable to Animal Feeding Operations*

Many environmental organizations have criticized AFOs for their effects on the environment and human health as a result of water and air pollution.[117] Critics of those types of claims have argued that the issues of AFO-related community health effects are "open and controversial."[118]

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109 *Id.* § 122.23(b)(2).

110 *Id.*

111 *Id.* § 122.23(b)(4) (defining Large CAFO); *id.* § 122.23(b)(6) (defining Medium CAFO").

112 *Id.* § 122.23(b)(6)(i)(A).

113 *Id.* § 122.23(b)(4)(i).

114 *Id.* § 122.23(b)(1).

115 *Id.* § 122.23(b)(4)(x) (large CAFO); *id.* § 122.23 (b)(6)(i)(J) (medium CAFO).

116 *See, e.g.*, Kendall Thu, *CAFOs are in Everyone's Backyard: Industrial Agriculture, Democracy, and the Future*, *in* CAFO (CONCENTRATED ANIMAL FEEDING OPERATIONS): THE TRAGEDY OF INDUSTRIAL ANIMAL FACTORIES 123, 127 (Daniel Imhoff ed., 2010) (addressing moral and ethical concerns that arise from the world of animal factory farming and offering a vision for a healthier food system).

117 *See, e.g.*, *Pollution from Giant Livestock Farms Threatens Public Health*, INST. FOR AGRIC. & TRADE POL'Y (July 25, 2001), https://perma.cc/55PV-BLY5 (criticizing CAFOs for causing health problems in humans and threatening water quality).

118 Dick Heederik et al., *Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations*, 115 ENVTL. HEALTH PERSP. 298, 298 (2007).

Further, it has been suggested that there "is limited evidence that symptom patterns may be the result of CAFO exposures in individuals living in their vicinity."[119] This may be the case, but it is likely a result of the limited amount of data available on AFOs. In a United States Government Accountability Office (GAO) report, the authors noted difficulty in determining trends relating to AFOs and CAFOs because, "[n]o federal agency collects accurate and consistent data on the number, size, and location of CAFOs."[120] Instead, the authors were forced to rely on the United States Department of Agriculture's data on large livestock farms.[121]

Some of the most frequently cited health effects resulting from CAFOs relate to airborne exposure.[122] The types of CAFO emissions concerning human health are typically divided into two categories. The first category includes gases and vapors from the handling of animal waste.[123] Although this category comprises the main causes of CAFO air pollution, other sources can include barns, feedlots, and even the animals.[124] It is these other sources that lead to the second category: particulate matter, which can be caused by the movement of animals or feed products.[125]

### *C. CAFO Animal Waste and Neighboring Properties*

The amount of manure produced by an animal agriculture operation can vary widely depending on the type of livestock being raised and the size of the facility.[126] A recent GAO Report indicated that a CAFO raising 140,000 beef cattle could result in the production of more than 1.6 million tons of manure annually, an amount that would exceed the sanitary waste created by the entire human population of the city of Houston, Texas.[127]

When the manure at a facility breaks down, it gives off a number of gases and aerosols, which include hydrogen sulfide, ammonia, and volatile organic compounds (VOCs).[128] In fact, studies using gas chromatography and mass spectroscopy have found over 330 VOCs at swine facilities.[129] The

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119 *Id.*

120 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS: EPA NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR QUALITY FROM POLLUTANTS OF CONCERN 4 (2008).

121 *Id.*

122 *See, e.g.*, CARRIE HRIBAR, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 5–7 & tbl.1 (Mark Schultz ed., 2010) (discussing the deterioration of air quality resulting from CAFOs).

123 *Id.* at 5.

124 Hoover, *supra* note 103, at 5–6.

125 HRIBAR, *supra* note 122, at 5.

126 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 120, at 18.

127 *Id.* at 20. At the time of the report Houston had over two million residents. *Id.*

128 Susan S. Schiffman et al., *Symptomatic Effects of Exposure to Diluted Air Sampled from a Swine Confinement Atmosphere on Healthy Human Subjects*, 113 ENVTL. HEALTH PERSP. 567, 567 (2005).

129 Susanna G. Von Essen & Brent W. Auvermann, *Health Effects from Breathing Air Near CAFOs for Feeder Cattle or Hogs*, 10 J. AGROMEDICINE, no. 4, 2005, at 55, 56.

health effects related to ammonia exposure include "[r]epiratory irrita[tion], chemical burns to the respiratory tract, skin, and eyes, severe cough, [and] chronic lung disease."[130] Hydrogen sulfide, on the other hand, can cause "[i]nflammation of the moist membranes of eye and respiratory tract, olfactory neuron loss, [and] death."[131] Even short periods of exposure to high concentrations of hydrogen sulfide can be fatal, and have resulted in the deaths of swine AFO workers.[132]

One study examined the health effects of a swine operation on individuals residing within a two-mile radius of the facility.[133] All of the study's participants reported "higher frequencies of 14 out of the 18 symptoms than the control population."[134] Among the more frequently complained of symptoms were "respiratory problems, nausea and weakness, headaches and plugged ears, and irritation of the eyes, nose, and throat."[135] Another study explored the health effects of separate cattle and hog facilities on neighboring residents, all of whom lived within two miles of one of the facilities.[136] When compared with a control population, these residents reported elevated occurrences of "headache, runny nose, sore throat, excessive coughing, diarrhea, and burning eyes."[137] However, studies focused on the effects of AFO emissions on neighboring residents are relatively uncommon.[138]

Some states have taken the potentially deleterious health effects resulting from CAFOs seriously. For example, in 1997, the North Carolina legislature enacted a temporary moratorium on the construction of new hog CAFOs and the expansion of existing hog CAFOs.[139] Later, the State made the moratorium permanent with the passage of the Swine Farm Environmental Performance Act.[140] Although a step in the right direction, the overall effect of the legislation is questionable for two reasons. First, after the enactment of the moratorium, the number of new poultry CAFOs in the state expanded rapidly—likely a response to the inability of producers to construct or

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130 HRIBAR, *supra* note 122, at 6 tbl.1.

131 *Id.*

132 Von Essen & Auvermann, *supra* note 129, at 56.

133 K. Thu et al., *A Control Study of the Physical and Mental Health of Residents Living Near a Large-scale Swine Operation*, 3 J. AGRIC. SAFETY & HEALTH 13, 15 (1997).

134 *Id.* at 16.

135 *Id.*

136 Steve Wing & Suzanne Wolf, *Intensive Livestock Operations, Health, and Quality of Life Among Eastern North Carolina Residents*, 108 ENVTL. HEALTH PERSP. 233, 235 (2000).

137 *Id.* at 237.

138 Annette M. O'Conner et al., *The Association Between Proximity to Animal Feeding Operations and Community Health: A Systematic Review*, 5 PLOS ONE, Mar. 10, 2010, e9530, at 4.

139 Act of Aug. 27, 1997, 1997 N.C. Sess. Laws 1938.

140 Act of Aug. 31, 2007, 2007 N.C. Sess. Laws 1678 (codified as amended at N.C. Gen. Stat. § 143-215.10I (2016)); *see also* Vanessa Zboreak, *"Yes, In Your Backyard!" Model Legislative Efforts to Prevent Communities from Excluding CAFOs*, 5 WAKE FOREST J.L. & POL'Y 147, 160 (2015).

expand hog CAFOs.[141] Second, and perhaps in response to North Carolina's moratorium, other states—including South Carolina and Georgia—have attempted or considered attempting to attract hog CAFO operators by way of enacting relaxed standards for those facilities.[142] This essentially means that instead of reducing the overall potential health risks to communities, the problem has simply moved—either from one type of facility to another, or one location to another.

## IV. NUISANCE AND MODERN AMERICAN COMMON LAW

After the appearance of large modern farms, most notably CAFOs, the number of animals increased dramatically.[143] Even with the recent developments in agricultural techniques that are significantly different than the farming techniques employed during the time of early nuisance cases, the application of the doctrine in its most basic form has remained largely untouched. In 1979, the American Law Institute issued the *Restatement (Second) of Torts*, which recognized two types of nuisance: public nuisance[144] and private nuisance.[145] The *Restatement* defines a public nuisance as "an unreasonable interference with a right common to the general public."[146] A private nuisance is defined as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[147]

### *A. Right-to-Farm Statutes*

Although many aspects of the application of the traditional nuisance doctrine to agricultural operations have remained untouched, one relatively recent development has significantly curtailed the ability of private landowners to file suit claiming that a nearby facility is a nuisance. That development is many states' decisions to abrogate significant portions of the common law of nuisance with their respective legislatures' enactment of a variety of "right-to farm" laws.[148]

The first right-to-farm laws started appearing in the late 1970s, with North Carolina's being one of the most influential.[149] All fifty states have now

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141 Zboreak, *supra* note 140, at 160.

142 *Id.*

143 PEW COMM'N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 5–6 (2008), https://perma.cc/PX9F-T2D7.

144 RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

145 *Id.* § 821D.

146 *Id.* § 821B(1).

147 *Id.* § 821D.

148 *See generally* Rumley, *supra* note 40 (discussing the enactment of right-to-farm laws by various states).

149 *See* Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 119–20 (1983) (noting that by 1983, at least nineteen states have modeled their right-to-farm laws on North Carolina's, which was one of the first).

enacted some variation of a right-to-farm statute.[150] These types of statutes provide agricultural operations protection from liability resulting from nuisance claims.[151] These laws are generally enacted to further the protection of agricultural investments and the preservation of land being used for agricultural operations.[152] One of the reasons cited for a recent increase in the number of nuisance suits against animal agriculture operations is the increase in the size of urban areas that results in the close proximity of residential areas to areas that have historically been used for agriculture.[153] This newly realized proximity results in conflicts between residential property owners and agricultural operations.[154] The argument for right-to-farm laws essentially boils down to "protect[ing] qualifying farmers and ranchers from nuisance lawsuits filed by individuals who move into a rural area where normal farming operations exist, and who later use nuisance actions to attempt to stop those ongoing operations[.]"[155] It has also been deemed a codification of the common law defense of "coming to the nuisance."[156] Defendants in a nuisance suit can raise a coming to the nuisance defense when the defendant's livestock or agricultural operation was already in existence and the plaintiffs moved within the vicinity of that operation.[157] However, according to the *Restatement (Second) of Torts*, "[t]he fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action, but it is a factor to be considered in determining whether the nuisance is actionable."[158] At first, the rule may seem to be counterintuitive. Yet, the *Restatement* offers a valuable justification for this position. It explains that:

> [T]he defendant by setting up an activity or a condition that results in the nuisance could condemn all the land in his vicinity to a servitude without paying any compensation, and so could arrogate to himself a good deal of the value of the adjoining land. The defendant is required to contemplate and

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150 Rumley, *supra* note 40, at 350.

151 *Id.*

152 *See* Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 88 (2006) (explaining that these laws enabled farmers to focus on farming rather than on avoiding nuisance or being enjoined by the presence of a nuisance).

153 Rumley, *supra* note 40, at 327–28.

154 *Id.*

155 Kyle Welden & Elizabeth R. Rumley, *States' Right-To-Farm Statutes*, NAT'L AGRIC. L. CTR., https://perma.cc/SMV9-NNVM (last visited Feb. 25, 2017). The National Agricultural Law Center is a national and independent "agricultural law research and information facility" that receives federal funding. *About the Center*, NAT'L AGRIC. L. CTR., https://perma.cc/33NC-YSVN (last visited Feb. 25, 2017).

156 Neil D. Hamilton, *Right-To-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 104 (1998).

157 Grossman & Fischer, *supra* note 149, at 107–08.

158 RESTATEMENT (SECOND) OF TORTS § 840D (AM. LAW INST. 1979).

> expect the possibility that the adjoining land may be settled, sold or otherwise transferred and that a condition originally harmless may result in an actionable nuisance when there is later development.[159]

Although there are often unimportant differences in right-to-farm laws from state to state, there are several features that are commonplace. For example, these types of statutes typically include livestock within their definitions of agricultural activities that are covered by the laws. California's right-to-farm statute defines "agricultural operation" broadly to include animal agricultural operations, such as "the raising of livestock, fur bearing animals, fish, or poultry, and any practices performed by a farmer or on a farm as incident to or in conjunction with those farming operations, including preparation for market, delivery to storage or to market, or delivery to carriers for transportation to market."[160] Similarly, under Oregon's right-to-farm law,[161] a farm is defined as "any facility, including the land, buildings, watercourses and appurtenances thereto, used in the commercial production of crops, nursery stock, livestock, poultry, livestock products, poultry products, vermiculture products or the propagation and raising of nursery stock."[162] Washington State defines agricultural activity as "a condition or activity which occurs on a farm in connection with the commercial production of farm products."[163] In Washington, the term "farm products" is itself defined as including:

> animals useful to humans and includes, but is not limited to, . . . dairy and dairy products, poultry and poultry products, livestock, including breeding, grazing, and recreational equine use, . . . freshwater fish and fish products, apiaries and apiary products, equine and other similar products, or any other product which incorporates the use of food, feed, fiber, or fur.[164]

Instead of defining animal agriculture as part of the general definition of agricultural activities, some states have entire sections of their right-to-farm statutes set aside specifically to address the issue of animal feeding operations. One of those states is Iowa.[165] The reason for dedicating an entire section of the Iowa law to separately address livestock may be partially attributable to the fact that Iowa's annual livestock sales are second only to

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159 *Id.* § 840D cmt. b.

160 CAL. CIV. CODE § 3482.5(e) (West 2016). Although nuisance suits against animal agriculture facilities are the focus of this article, it should be noted that nuisance suits can be brought against other types of agricultural operations that are unrelated to livestock production, and thus right-to-farm statutes are broad enough to include these actions as well. *See, e.g.*, Rancho Viejo, LLC v. Tres Amigos Viejos, LLC, 123 Cal. Rptr. 2d 479, 491 (Cal. Ct. App. 2002) (applying California's right-to-farm law to an avocado farm).

161 OR. REV. STAT. §§ 30.930–30.947 (2016).

162 *Id.* § 30.930(1).

163 WASH. REV. CODE. § 7.48.310(1) (2016).

164 *Id.* § 7.48.310(4).

165 *See* IOWA CODE § 657.11 (2017) (distinguishing "animal agricultural production operations" from other agricultural areas for purposes of Iowa's right-to-farm laws).

those of Texas,[166] a state with nearly five times the land area of Iowa.[167] It is a natural inference that legislators in states with significant livestock industry may afford farmers additional protection, or at least additional consideration.

Other right-to-farm statutes are tied to standards such as "good agricultural practices" or to other statutes that apply to agricultural operations or livestock facilities.[168] For example, Vermont's right-to-farm law states that "agricultural activities shall be entitled to a rebuttable presumption that the activity does not constitute a nuisance if . . . it is conducted in conformity with federal, state, and local laws and regulations (including required agricultural practices) . . . [and] is consistent with good agricultural practices."[169]

Case law after the codification of states' right-to-farm laws shows that these laws often result in limited applicability.[170] This is likely the result of the variety and complexity of the laws.

### *B. Modern American Nuisance Cases*

#### *1. When Right-to-Farm Statutes Apply: Coming to the Nuisance*

Most right-to-farm statutes are only applicable to situations where the harm has not resulted from "coming to the nuisance." For example, Nebraska's right-to-farm law explicitly enacted what is essentially a coming to the nuisance defense. The Nebraska statute states that:

> A farm or farm operation . . . shall not be found to be a public or private nuisance if the farm or farm operation . . . existed before a change in the land use or occupancy of land in and about the locality of such farm or farm operation . . . ."[171]

This means that if the facility was already in existence before the plaintiff moved within the vicinity of the facility's effects, the plaintiff's claim is barred under the statute. An argument that is frequently employed against the idea of exemptions for facilities that already exist is that there is a major loophole in this approach. One example is if a small farm expands into a CAFO—which may represent a significant increase in the number of livestock and the amount of manure produced—it would be protected by

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166 NAT'L AGRIC. STATISTICS SERV., U.S DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE HIGHLIGHTS: FARM ECONOMICS 4 (2014), https://perma.cc/SS45-BESN.

167 Iowa's total land area is 56,273 square miles, and Texas's total land area is 268,596 square miles. *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU, https://perma.cc/83FG-V7KZ (last visited Feb. 25, 2017).

168 Rumley, *supra* note 40, at 334, 345–46.

169 VT. STAT. ANN. tit. 12, § 5753(a)(1) (2016). The statute incorporates elements of the coming to the nuisance defense. *Id.* § 5753(a)(1)(C)–(D).

170 Hamilton, *supra* note 156, at 107–08.

171 NEB. REV. STAT. § 2-4403 (2016).

many right-to-farm statutes because it was already in existence.[172] Under certain circumstances, some courts have found that the fact that an existing facility has done nothing more than expand is not sufficient to afford them complete protection under a state's right-to-farm statute. For example, in *Payne v. Skaar*,[173] the court held that Idaho's right-to-farm act "does not wholly prevent a finding of nuisance in circumstances of an expanding agricultural operation surrounded by an area that has remained substantially unchanged."[174]

Plaintiffs who are affected by right-to-farm statutes may attempt to circumvent the prohibition on nuisance suits by challenging the applicability of the laws to the specific claim or arguing that the statute is unconstitutional.[175] However, the success of these strategies has been mixed.

In 1998, the Iowa Supreme Court was asked to determine "whether a statutory immunity from nuisance suits results in a taking of private property for public use without just compensation in violation of federal and Iowa constitutional provisions."[176] The court held that the relevant portion of the state's right-to-farm law was unconstitutional and explained that "[w]hen all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers."[177]

More recently, the plaintiffs in *Labrayere v. Bohr Farms, LLC*[178] challenged the constitutionality of the Missouri right-to-farm law[179] under the state's Constitution.[180] Here, the plaintiffs' concern was over a CAFO's sewage disposal system and composting of deceased animals.[181] Specifically, the plaintiffs claimed that the CAFO, which was capable of accommodating more than 4,000 hogs, constituted a nuisance as a result of the "offensive odors, particulates, pathogens, hazardous substances, flies, and manure" that affected their nearby property.[182] Plaintiffs argued that the statute was unconstitutional under the Missouri Constitution for a number of reasons, including the argument that the statute allowed a private taking without just compensation.[183] The court found the statute to be constitutional and found

172 MIDWEST ENVTL. ADVOCATES, PROTECTING YOUR COMMUNITY FROM EXISTING AND PROPOSED CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOS): A GUIDE TO LEGAL ACTIONS 8 (2013).

173 900 P.2d 1352 (Idaho 1995).

174 *Id.* at 1355.

175 Rumley, *supra* note 40, at 328.

176 Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 311 (Iowa 1998).

177 *Id.* at 322.

178 458 S.W.3d 319 (Mo. 2015).

179 MO. REV. STAT. § 537.296 (2016).

180 *Labrayere,* 458 S.W.3d at 326.

181 *Id.*

182 *Id.*

183 *Id.* at 327–28.

that the statute did not authorize an unconstitutional private taking.[184] Further, the concurrence noted that the state's action via the right-to-farm statute only eliminated a specific type of damages for certain nuisance claims, and plaintiffs were not prohibited from seeking injunctive relief against those facilities.[185]

*2. When Right-to-Farm Statutes Are Inapplicable: Anticipatory Injunctions*

Although the laws vary from state to state, right-to-farm laws frequently offer protection only to agricultural operations that were in existence before a change in the surrounding land. This means that those laws do not protect agricultural operations in the planning or construction stages. In those situations, a plaintiff's request is for an injunction to prevent the construction or completion of the facility in question. The basic approach by modern courts to cases where the requested remedy is an anticipatory injunction is essentially the same as that of the *Sackett* court in 1919, which is discussed above.[186]

For example, in *Superior Farm Management, L.L.C. v. Montgomery*,[187] the Supreme Court of Georgia affirmed the lower court's issuance of an injunction, which would prevent the construction of a proposed hog-breeding facility near plaintiffs' property.[188] The facility would have covered 1,345 acres, and would have been approximately half a mile from the plaintiffs' property.[189] The plaintiffs argued that the facility would cause both groundwater contamination and a decrease in air quality on their property.[190] The lower court found that the plaintiffs proved to a "reasonable degree of certainty that there was a substantial threat that they would be irreparably damaged, hurt, inconvenienced, or injured by defendants' construction of the proposed swine facility."[191] The application of the "reasonable degree of certainty" standard was precedent from the prior Georgia Supreme Court case *Camp v. Warrington*.[192] In that case, the court held that the resulting odors and noise from a proposed private airport was a nuisance sufficient to constitute a nuisance claim, and thus the lower court's decision to deny the defendant's motion to dismiss was affirmed.[193] Similarly, in *Superior Farm Management*, the plaintiffs proved—in part with testimony from defendant-company's general manager—with a "reasonable [degree of] certainty" that harm would result from the facility's construction.[194] The proposed facility in

184 *Id.*
185 *Id.* at 336 (Fischer, J. concurring).
186 *See* discussion *supra* notes 88–94 and accompanying text.
187 513 S.E.2d 215 (Ga. 1999).
188 *Id.* at 219.
189 *Id.* at 217.
190 *Id.*
191 *Id.*
192 182 S.E.2d 419 (Ga. 1971).
193 *Id.* at 420.
194 *Superior Farm Mgmt.*, 513 S.E.2d at 217–18 (quoting *Camp*, 182 S.E.2d at 419).

*Superior Farm Management* was to hold more than 22,000 hogs, which would produce considerable amounts of feces and urine.[195] The animal waste would then be pumped into lagoons, where it would attract insects.[196] The waste would later be sprayed onto fields.[197] Further, the waste's unpleasant odor would be noticeable to people within half a mile of the facility on a daily basis; at certain times, the odor would be noticeable to people up to three miles away.[198] After considering these facts, the Supreme Court of Georgia found that the evidence was sufficient to support the lower court's injunction.[199]

It should be noted that the Georgia legislature had enacted a right-to-farm law at the time of the *Superior Farm Management* case,[200] but the court did not discuss it because, for the law to apply, the agricultural operation had to already be in existence.[201] The Georgia law states that "[n]o agricultural facility . . . shall be or shall become a nuisance, either public or private, as a result of changed conditions in or around the locality of such facility or operation if the facility or operation has been in operation for one year or more."[202] However, the statute does allow nuisance suits to be brought against applicable agricultural operations when the nuisance results from "negligent, improper, or illegal operation of any such facility or operation."[203] Therefore, Georgia's right-to-farm law never entered into the court's consideration, because the agricultural operation in question was not in existence. That is because in this particular case, the plaintiffs intended to prevent the construction of a facility. In making its determination, the court applied the "reasonable degree of certainty" standard to determine the construction and operation of the proposed facility would constitute a nuisance.[204] However, not all courts apply such a lenient standard.

In *Simpson v. Kollasch*,[205] another case involving a proposed livestock operation, the plaintiffs appealed the trial court's rejection of their requested anticipatory injunction.[206] On appeal, the court explained that "[a]n injunction based on an anticipatory nuisance is an extraordinary remedy and requires proof a nuisance will necessarily result from the developers'

195 *Id.* at 217.

196 *Id.*

197 *Id.*

198 *Id.* Although right-to-farm laws did not appear until the late 1970s, some states that were heavily involved in animal agriculture had similar statutes that were called "feedlot statutes." Grossman & Fischer, *supra* note 149, at 111, 117–18. These laws were designed to protect the industry from nuisance suits. *Id.* at 111.

199 *Superior Farm Mgmt.,* 513 S.E.2d at 218–19.

200 GA. CODE ANN. § 41-1-7 (1998).

201 *Id.* § 41-1-7(c).

202 *Id.*

203 *Id.*

204 *Superior Farm Mgmt.*, 513 S.E. 2d at 217.

205 749 N.W.2d 671 (Iowa 2008).

206 *Id.* at 674.

proposal."[207] In relying on prior Iowa case law regarding anticipatory nuisance, the court noted that "[a]n anticipated nuisance will not be enjoined unless it clearly appears a nuisance will necessarily result from the act."[208] Under that standard, the court explained that an anticipatory injunction generally will not be granted in a situation where determinations of nuisance depends on the use or other circumstances.[209]

In *Simpson*, the plaintiffs requested an anticipatory injunction to prevent the construction of two CAFOs.[210] At trial, defendant indicated that he currently only had plans to construct one of the two proposed facilities.[211] The proposed facility would house more than 10,000 pigs, and the operation of the facility would result in the composting of 2,500 dead pigs, and the storage and spreading of five million gallons of manure annually.[212] Two of the plaintiffs lived approximately one mile from the site of the proposed facility, and all the other plaintiffs lived more than two miles away.[213] Among the bases for the requested relief were concerns about health, water quality, odors, and property values.[214] Ultimately, the court determined that while the plaintiffs' expert witnesses' concerns were legitimate, they "conceded they could not be certain a nuisance will necessarily result[,]" and thus the plaintiffs could not prove an anticipatory nuisance.[215]

### *C. The Right to Farm as an Amendment to State Constitutions*

Many states have moved well beyond right-to-farm statutes. In recent years, several states with right-to-farm statutes have begun to push for constitutional amendments to further insulate agricultural activities from state regulations. For example, in 2012, more than two-thirds of voters in North Dakota supported a broad amendment to the state's constitution.[216] The amendment, which passed with little fanfare, reads:

> The right of farmers and ranchers to engage in modern farming and ranching practices shall be forever guaranteed in this state. No law shall be enacted which abridges the right of farmers and ranchers to employ agricultural technology, modern livestock production, and ranching practices.[217]

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207 *Id.* at 672.
208 *Id.* at 675 (quoting Livingston v. Davis, 50 N.W.2d 592, 599 (Iowa 1951)).
209 *Id.* (quoting *Livingston*, 50 N.W.2d at 599).
210 *Id.* at 672–73.
211 *Id.* at 673.
212 *Id.*
213 *Id.* at 675.
214 *Id.*
215 *Id.* at 677–78.
216 Blake Nicholson, *Voters Make North Dakota First State in the Nation to Protect Right to Farm in Constitution*, STAR TRIB. (Minneapolis) (Nov. 8, 2012), https://perma.cc/3JRC-QWVX.
217 N.D. CONST. art. XI, § 29.

In 2014, just over fifty percent of Missouri voters supported an initiative to amend their state constitution to include a right-to-farm provision.[218] The amendment, which is now part of the Missouri Constitution's Bill of Rights, reads:

> That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.[219]

Voters who opposed the amendment criticized it for its broad language, which they argued may lead to uncertainty in the courts.[220] Similar concerns led to the failure of a proposed constitutional amendment in Indiana in 2015.[221] In 2016, Oklahoma asked voters to decide whether to adopt a similar amendment.[222] Ultimately, it was rejected when almost two-thirds of voters decided against the measure.[223] The new section would have "create[d] the following guaranteed rights to engage in farming and ranching: [t]he right to make use of agricultural technology, [t]he right to make use of livestock procedures, and [t]he right to make use of ranching practices."[224] The constitutional protection would have severely curtailed the legislature's ability to regulate agriculture.[225] An amendment of this order would likely have acted to prevent state lawmakers from regulating agriculture in any meaningful way. Randy Ross, the mayor of Choctaw, Oklahoma clearly envisioned the type of situation that would typically result in a nuisance

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218 Julie Bosman, *Missourians Approve Amendment on Farming*, N.Y. TIMES, Aug. 7, 2014, at A16. Given the amendment's narrow success, it is unsurprising that the election was challenged shortly thereafter. Shoemyer v. Kander, 464 S.W.3d 171, 172–73 (Mo. 2015) (per curiam). Ultimately, the Missouri Supreme Court's decided to uphold the election's result. *Id.* at 175.

219 MO. CONST. art. I, § 35.

220 Bosman, *supra* note 218. Interestingly, perhaps the most notable result of the amendment this far is a criminal defendant who attempted to use it as a defense to charges related to the growing of marijuana plants. United States v. White, No. 12-cr-03045-BCW, 2016 WL 4473803, at *2 (W.D. Mo. Aug. 23, 2016). Specifically, the defendant argued that "that the plain language of Missouri Constitution, Article I, Section 35 ('Right to Farm Amendment'), has decriminalized the manufacture of marijuana in the State of Missouri." *Id.*

221 Ryan Sabalow, *Indiana Senate Kills 'Right to Farm' Amendment*, INDIANAPOLIS STAR (Feb. 24, 2015), https://perma.cc/CN6T-Q3Y8.

222 H.R.J. Res. 1012, 55th Leg., 1st Sess. (Okla. 2015).

223 Joe Wertz & Logan Layden, O*klahoma Divided: How Geography Influence the Vote on 'Right to Farm'*, NAT'L PUB. RADIO: STATEIMPACT (Nov. 10, 2016), https://perma.cc/Y77L-RZ44.

224 *Agriculture State Question 777*, 2015 OKLA. VOTER GUIDE, https://perma.cc/RXL5-BTY7 (last visited Feb. 25, 2017).

225 Okla. H.R.J. Res. 1012 ("The Legislature shall pass no law which abridges the right of citizens and lawful residents of Oklahoma to employ agricultural technology and livestock production and ranching practices without a compelling state interest.").

suit.[226] He voiced his opposition to the amendment in an Oklahoma newspaper and said, "[i]magine a pig sty within 100 feet of your bedroom; you would have no help from your city, county or state governments. These are some of the potential consequences of SQ 777. It needs to be rejected."[227]

It should also be noted that the amendments in Oklahoma and other states have been opposed on grounds unrelated to nuisance.[228] Opponents of these amendments have received support from animal welfare organizations; the Humane Society of the United States ("HSUS") spent more than $375,000 to oppose the amendment in Missouri and another $40,000 in Oklahoma.[229] In addition to HSUS, the list of animal welfare organizations opposing the Oklahoma amendment includes the Humane Society Legislative Fund, American Society for the Prevention of Cruelty to Animals, the Humane Society of Tulsa, and Mercy for Animals.[230] This is the obvious result of the amendment's language relating to "agricultural technology," "livestock procedures," and "ranching practices," which would also be likely to affect the ability of the state's legislature to enact laws to ensure humane practices related to the livestock and ranching industries.

Aside from election-related procedural challenges, constitutional amendments, once passed, are particularly difficult to contest when compared to the enactment of statutes by the legislature. Perhaps unsurprising given the opposition to the amendment, the Oklahoma ballot measure spurred litigation. In 2015, the nonprofit Save the Illinois River initiated a challenge to the constitutionality of the joint resolution that directed the Oklahoma Secretary of State to put the right to farm amendment to a vote.[231] Specifically, the plaintiffs argued that the amendment was facially unconstitutional.[232] In response to the pre-election challenge, the trial court ruled that the proposed amendment was not unconstitutional, and the Oklahoma Supreme Court affirmed on other grounds.[233]

The number of states that have recently either proposed or passed constitutional amendments regarding the right-to-farm indicates that more

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226 Randy Ross, Opinion, *Why Tie Officials' Hands with SQ 777?*, J. REC. (Okla. City) (Apr. 5, 2016), https://perma.cc/SC7A-WSZL.

227 *Id.*

228 *See, e.g.*, *Vote No On 777: People & Organizations Opposed to SQ 777*, OKLA. STEWARDSHIP COUNCIL, https://perma.cc/7KV5-7BQP (last visited Feb. 25, 2017) (quoting one opponent describing the Oklahoma initiative as promoting "a corporate power grab," impacting animal welfare, and increasing danger to human health).

229 Sarah Ferris, *Animal Rights Group Warns Missouri Ballot Measure Would Protect Puppy Farming*, WASH. POST: GOVBEAT (July 26, 2014), https://perma.cc/J6B4-58FA; Joe Wertz, *Heavy Fundraising on State Question 777 Suggests Right-to-Farm is High-Stakes Political Issue*, NAT'L PUB. RADIO: STATEIMPACT (Sept. 22, 2016), https://perma.cc/8WMH-K8H8.

230 OKLA. STEWARDSHIP COUNCIL, *supra* note 228.

231 Save the Ill. River, Inc. v. Oklahoma, 378 P.3d 1220, 1221 (Okla. 2016).

232 *Id.*

233 *Id.* at 1223 (the Oklahoma Supreme Court held that the trial court should have abstained from reaching the merits prior to the referendum being voted on).

states will likely follow suit. These amendments, which bar the subsequent passage of legislation aimed at regulating the industry, mean that in those states agricultural technology will continue to advance unchecked by state laws. Further, because the amendments are generally drafted broadly and lack crucial definitions, the effects will largely be determined by judicial interpretation.

## V. CONCLUSION

More than four hundred years have passed since the court in *Aldred's Case* determined that the corrupted air resulting from his neighbor's pigsty was a nuisance. Yet, looking at the state of the common law, its statutory counterparts, and their application to modern nuisance cases in the United States, one would be hard pressed to find many significant departures from the nuisance doctrine of 17th century English common law. Both public and private nuisance exist and remain distinct from one another. Private plaintiffs continue to use the doctrine of nuisance in an attempt to acquire an injunction, damages, or both as a result of odor and noise emanating from nearby agricultural operations. Even the enactment of right-to-farm laws in all fifty states seems to have had a minimal impact on the modern application of the nuisance doctrine. Many commentators see those laws as nothing more than a codification of what was already available as an affirmative defense at common law. It remains to be seen how right-to-farm laws that anchor the exemption to operations' compliance with federal and state laws will be affected if policymakers determine that it is time to enact stricter laws to regulate the operation of agricultural facilities. Ultimately, in the context of agricultural operations, modern nuisance doctrine is just as, or perhaps even more, relevant today as it was four hundred years ago. However, the recent amendment of several state constitutions to include the right to farm is likely to significantly infringe upon those states' legislative efforts to regulate agriculture. Even with the recent defeat of Oklahoma's amendment, the trend toward the constitutional right-to-farm will likely continue, at least in states with large agricultural industries. The long-term effects of these amendments are unclear, and the breadth and relevance of these amendments will ultimately be decided by each state's judicial interpretation, leading to an uncertain future for the regulation of agriculture.

If an agricultural facility is compliant with state and federal laws and is effectively insulated from nuisance liability, what reason does it have to consider the harm suffered by neighbors as a result of its operations?