

PROTECTING THE RIGHT TO HARM: WHY STATE RIGHT TO FARM LAWS SHOULD NOT SHIELD FACTORY FARMS FROM NUISANCE LIABILITY

I. INTRODUCTION

Just days after Missouri’s legislature passed a “right to farm” law limiting the right of neighbors to agricultural operations to bring nuisance lawsuits, Bohr Farms in Callaway County, Missouri, opened a concentrated animal feeding operation (CAFO) accommodating over 4,000 hogs, an on-site sewage disposal system, and a system for composting deceased hogs.¹ Neighbors complained of loss of use and enjoyment of property due to offensive odors constantly emanating from the agricultural operation.² In court, Bohr Farms was able to use Missouri’s right to farm law as an affirmative defense to shield it from the neighbors’ nuisance lawsuit.³ The neighbors were denied damages and forced to endure the burden of living next to a factory farm with no relief, all while their property values and health faced almost certain decline.⁴ Though right to farm laws were initially adopted to protect farmers from nuisance-type lawsuits, state right to farm laws should not be construed to make this affirmative defense available to CAFOs because of the unique and dangerous hazards CAFOs present to public health and the environment.

CAFOs should not have access to the affirmative defense to nuisance lawsuits typically available to “traditional” farming operations because CAFOs do not resemble the “traditional” agricultural operations that right to farm laws aimed to protect at the time of their promulgation. In the 1960s, just before states began adopting right to farm laws, there were approximately four million farms and, on average, each farm was about 250 acres in size.⁵ In 2012, there were only two million farms with an average size of nearly 500 acres each.⁶ The amount of land in the United States used for farming has remained relatively unchanged throughout this roughly 50-year time period.⁷ These trends suggest that farms are being consolidated and purchased by

¹ Labrayere v. Bohr Farms, LLC, 458 S.W.3d 319, 325 (Mo. 2015).

² *Id.* at 335.

³ *Id.* at 326.

⁴ *Id.*

⁵ USDA/NASS Census of Agriculture, *Change in Number of Farms*, (2012).

⁶ *Id.*

⁷ *Id.*

industrial agriculture companies.⁸ In 2015, the United State Department of Agriculture (USDA) Census of Agriculture revealed that most of the rented farmland in the United States is owned by non-farmers in partnerships, corporations, trusts, and non-traditional arrangements.⁹ The modern farms of today resemble the farms of the 1960s less and less each year as the United States moves further and further away from traditional farming towards factory farming and industrial agriculture.¹⁰ This paper will show that CAFOs are detrimental to human and environmental health, property values, community cohesion, and how right to farm laws can give CAFOs such broad nuisance immunity as to constitute unconstitutional takings. The most efficient way to ensure CAFOs are not given absolute nuisance immunity is to interpret state right to farms laws to bar them from employing the affirmative defense or amend those statutes to make this ban explicit, thereby allowing aggrieved neighbors to take advantage of unique remedies, and encourage community-building tactics to avoid initial nuisance complaints. First, Section I will address the history and current state of right to farm laws in the United States. Next, Section II will explain why it is dangerous and contrary to public policy to allow CAFOs to access state right to farm laws. Lastly, Section III will describe several potential solutions that, if adopted, could ensure that CAFOs are fairly barred from accessing the right to farm affirmative defense and preserve community cohesion.

II. RIGHT TO FARM LAWS IN THE UNITED STATES

At the time right to farm laws were adopted, farming in the United States looked very different than it does today. The right to farm laws were put in place to protect small farmers by preventing their neighbors from bringing nuisance lawsuits.¹¹ While each state's right to farm law is slightly unique, right to farm laws generally fall into one or more of three broad categories: nuisance-related, agricultural districting, or zoning.¹² To examine the structure and function of these laws it is helpful to look at a model, in this case,

⁸ Farmers as individuals only own 20% of all farmland acres rented in the United States. Alex Minchenkov, *Most of the U.S. Rented Farmland is Owned by Non-Farmers*, USDA (Aug 31, 2015),

https://www.agcensus.usda.gov/Newsroom/2015/08_31_2015.php.

⁹ Alex Minchenkov, *Most of the U.S. Rented Farmland is Owned by Non-Farmers*, USDA (Aug 31, 2015),

https://www.agcensus.usda.gov/Newsroom/2015/08_31_2015.php.

¹⁰ USDA/NASS Census of Agriculture, *Change in Number of Farms*, (2012).

¹¹ See 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 (1998).

¹² 13-124 Agricultural Law § 124.02 (2016).

Maryland's right to farm statute.¹³ Though many state courts and legislatures have not yet heard the issue, several states have and a trend in favor of protecting CAFOs has been emerging.¹⁴

A. *The History of Right to Farm Laws Indicate That the
Affirmative Defense Was Put in Place to Protect Small
Farmers and not CAFOs*

Right to farm laws have been passed in all fifty states for the purpose of protecting farmers and ranchers from nuisance lawsuits so long as their operations are not negligent and farm owners are in compliance with all applicable laws.¹⁵ Many of these laws were passed in the 1980s when large numbers of people were moving to rural areas where farming was common and bringing nuisance lawsuits against their neighbors in an attempt to curtail their agricultural operations.¹⁶ States recognized the unfairness of existing farming operations being shut down as nuisances solely because of the development of surrounding non-agricultural areas.¹⁷ North Carolina's policy statement justifies and explains the state's right to farm law at the time of its enactment:

It is the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this [law] to reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.¹⁸

Other right to farm statutes passed around the same time indicate similar purposes.¹⁹ To remain true to the purpose of state right to farm laws, it is

¹³ Md. Code Ann. § 5-403.

¹⁴ See e.g. *Labrayere v. Bohr Farms*, 458 S.W.3d 319, 325 (Mo. 2015); *Parker v. Obert's Legacy Dairy*, 988 N.E.2d 319 (Ind. Ct. App. 2013); *Pure Air & Water, Inc. v. Davidsen*, 246 A.D.2d 786 (N.Y. App. Div. 3d Dep't 1998).

¹⁵ See Hamilton, *supra* note 11 at 103.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ N.C. Gen. Stat. § 16-700 (Cum. Supp. 1981).

¹⁹ See e.g. Ill. Rev. Stat. ch. 5, § 1101 (1981); Wash. Rev. Code Ann. § 7.48.300 (Supp. 1982).

critical that they only apply to “traditional agricultural operations” and explicitly deny CAFOs the right to use them.²⁰

i. Types of Right to Farm Laws

All fifty states have some version of a right to farm law and while they all share similarities in language and purpose they tend to take one of three forms: nuisance-related, agricultural districting, or zoning.²¹ Though a given right to farm law will take on one of these designations most strongly, it is not uncommon to find a blend of these themes contained within one statute.²² First, the nuisance-related model historically favors agriculture by creating a climate where farms are given nuisance immunity so long as they meet the statutorily provided criteria.²³ This model can confer a presumption of immunity and is the most common model appearing in the right to farm statutes in 42 states.²⁴

The second right to farm law model, agricultural districting, includes provisions that prohibit local governments and municipalities from creating regulations that restrict commonly accepted agricultural practices.²⁵ Some states have created agricultural districting regulations that provide protection to certain agricultural practices while others are more general in what types of activities are protected by using words like “accepted,” “traditional,” or “normal” agricultural practices.²⁶ Oregon’s statute defines “accepted farm practice” as “a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use.”²⁷

The final model of right to farm law is zoning related.²⁸ This model is the least common of the three and is only explicitly present in three states.²⁹ This model creates zoned areas in a municipality that are designated agricultural zones and are exempt from certain regulations.³⁰ For example, in certain designated regions an agricultural operation does not need to acquire certain

²⁰ See Hamilton, *supra* note 11 at 103.

²¹ 13-124 Agricultural Law § 124.01 (2016).

²² 13-124 Agricultural Law § 124.02(1) (2016).

²³ 13-124 Agricultural Law § 124.02(2) (2016).

²⁴ *Id.*

²⁵ See 505 Ill. Comp. Stat. 5/1 *et seq.*; Md. Agric. Code Ann. § 2-513; Minn. Stat. Ann. § 473H.12; Or. Rev. Stat. § 215.253; Va. Code Ann. § 15.1-1512B.

²⁶ 13-124 Agricultural Law § 124.02(2) (2016).

²⁷ Or. Rev. Stat. § 215.203(2)(c).

²⁸ 13-124 Agricultural Law § 124.02(4) (2016).

²⁹ See Ariz. Rev. Stat. § 3-112; Okla. Stat. Ann. tit. 50, § 1.1; Wash. Rev. Code Ann. § 17.48.305.

³⁰ 13-124 Agricultural Law § 124.02(4) (2016).

permits or comply with certain regulations.³¹ These three models of right to farm confer varying degrees and types of protections to agricultural operations. While all three models can be found in the statutes of various states, the nuisance-based model will be the subject of this analysis because it is the most common and the most challenging to examine due to its many designations of exemptions and complicated balance of relevant interests.

ii. Case Study: Maryland's Right to Farm Law

Though all states have adopted their own right to farm laws, many of them are drafted similarly and reflect the same interest in protecting farmers from frivolous lawsuits. For example, the State of Maryland's right to farm law, codified as "Actions against farms for nuisance" does just this.³² The law defines "agricultural operation" as an operation for the processing of agricultural crops or on-farm production, harvesting, or marketing of any agricultural, horticultural, silvicultural, aquacultural, or apicultural product that has been grown, raised, or cultivated by the farmer.³³ The right to farm law does not relieve any agricultural operation from complying with federal, State, or local health, environmental or zoning requirements or permit agricultural operations to operate in a negligent manner.³⁴ The right to farm law does not protect any operation without a fully and demonstrably implemented nutrient management plan for nitrogen and phosphorus if otherwise required by law.³⁵ So long as the operation has been operating for one year, is in compliance with federal, State, and local health, environmental, zoning, and permit requirements and is not conducted in a negligent manner, the operation may use to right to farm laws as an affirmative defense to public and private nuisance claims.³⁶ If the agricultural operation has not been operating for one full year at the time the nuisance claim is brought, the agricultural operation may not use right to farm as an affirmative defense against that claim.³⁷

When properly used in court, the right to farm affirmative defense prohibits agricultural operations from being found as a private or public nuisance based on sight, noise, odors, dust, or insects resulting from the operation.³⁸ The right to farm defense will also help defeat claims that the operation has interfered or is presently interfering with the right to use and enjoyment of property of

³¹ *Id.*

³² Md. Code Ann. § 5-403.

³³ Md. Code Ann. § 5-403(a).

³⁴ Md. Code Ann. § 5-403(b)(1)(ii)-(iii).

³⁵ Md. Code Ann. § 5-403(b)(2).

³⁶ Md. Code Ann. § 5-403(c)(1)-(2).

³⁷ Md. Code Ann. § 5-403.

³⁸ Md. Code Ann. § 5-403(c)(1).

others.³⁹ The right to farm law will not provide a defense when the claim involves negligence of an operation.⁴⁰

The University of Maryland's Center for Agricultural and Natural Resource Policy published a fact sheet in 2013 regarding Maryland's right to farm law.⁴¹ Though the fact sheet provides no explicit guidance regarding CAFOs, it does note that all traditional forms of agricultural operations are likely to be protected under the right to farm law.⁴² Additionally, the fact sheet includes an example of an agricultural operation not complying with State laws and the agricultural operation used in the hypothetical is a CAFO.⁴³ This use of a CAFO as a hypothetical agricultural operation that would not be covered by the right to farm law if it was not complying with State laws implies that if a CAFO *was* complying with State laws then it would be covered by the right to farm law. This detail in the fact sheet, though minor, may serve to support the proposition that CAFO operators may use the right to farm law to shield themselves from nuisance suits as a reasonable interpretation of Maryland's right to farm laws.

The State of Maryland has not put out any official statements or regulations that explicitly state whether the right to farm law does or does not protect CAFOs. It seems that whether or not CAFOs are covered by the right to farm law hinges on whether or not CAFOs are considered "traditional" agricultural operations or fall under the definition of agricultural operations provided in Maryland's right to farm law. However, the State of Maryland has not provided any guidance outside of the literature discussed above as to whether or not CAFOs can be considered agricultural operations for the purpose of the right to farm law. There is no case law or legal precedent and no regulations providing guidance on the matter at this time. The statutory ambiguity found in Maryland's statute is not uncommon among right to farm statutes throughout the United States.

³⁹ Md. Code Ann. § 5-403(c)(2).

⁴⁰ Md. Code Ann. § 5-403(b)(1)(iv).

⁴¹ See Understanding Agricultural Liability: Maryland's Right to farm Law, Center for Agricultural & Natural Resource Policy, University of Maryland (2013) [http://drum.lib.umd.edu/bitstream/handle/1903/15012/MD%20RIGHT TO FARM%20Fact%20sheet.pdf;jsessionid=972BAC34AA97B18606AA6F9CFAD5BDD9?sequence=1](http://drum.lib.umd.edu/bitstream/handle/1903/15012/MD%20RIGHT%20TO%20FARM%20Fact%20sheet.pdf;jsessionid=972BAC34AA97B18606AA6F9CFAD5BDD9?sequence=1) (last viewed Jan. 13, 2017).

⁴² *Id.* at 2-3.

⁴³ *Id.* at 5.

iii. Right to Farm Laws in Other States

Right to farm laws in Missouri and North Dakota have been strengthened to include protection for CAFOs.⁴⁴ Oklahoma's right to farm law explicitly includes CAFOs as a protected agricultural operation under the State's right to farm law.⁴⁵ Plaintiffs in Indiana challenged the state's right to farm laws' protection of CAFOs unsuccessfully.⁴⁶ Plaintiffs alleged that a farming operation caused an unreasonable nuisance and the defendants asserted right to farm as a defense and were successful because the court reasoned that the farm was being operated in compliance with all applicable laws and may employ right to farm as a result.⁴⁷ The court in its order for summary judgment stated that "even if the operation grows from a few hogs to several thousand, and even if the operation changes from growing corn to raising thousands of hogs" the operation may still use right to farm as an affirmative defense.⁴⁸ This broad reading of the applicability of right to farm laws is indicative of Indiana's interest in shielding CAFOs from nuisance liability. The national trend in states that have heard this issue has been to allow CAFOs to use state right to farm laws.⁴⁹ This trend, however, is in direct opposition with the spirit of the original right to farm laws. Right to farm laws were adopted to prevent people moving to rural areas and suing local farmers for nuisance.⁵⁰ It is manifestly unfair to allow people who have knowingly moved next door to a CAFO to sue the CAFO. Individuals could have selected another home, property, or community to live in to avoid the dangers posed by factory farming. These people arguably "came to the nuisance" and can be fairly barred from bringing a nuisance suit. However, today's trend in preventing individuals who owned property before the CAFO existed or who owned property next to an agricultural operation that later became a CAFO is patently less just. To deny neighbors who owned land before the offending CAFO

⁴⁴ Missouri Right-to-Farm, Amendment 1 (August 2014); North Dakota Farming and Ranching Amendment, Measure 3 (2012).

⁴⁵ Okla. Stat. Title 2 § 20.

⁴⁶ The Supreme Court of Indiana held that massive changes in the size and scope of the farming operation did not constitute a new and different which would have barred the application of the Right to Farm defense. *Armstrong v. Maxwell Farms of Ind., Inc.*, No. 68C01-0912-CT-0539, (Ill. Cir. Ct. July 10, 2014).

⁴⁷ *Id.* at 6.

⁴⁸ *Id.* at 5.

⁴⁹ See e.g. *Labrayere v. Bohr Farms*, 458 S.W.3d 319, 325 (Mo. 2015); *Parker v. Obert's Legacy Dairy*, 988 N.E.2d 319 (Ind. Ct. App. 2013); *Pure Air & Water, Inc. v. Davidsen*, 246 A.D.2d 786 (N.Y. App. Div. 3d Dep't 1998).

⁵⁰ Agricultural Mediation Improvement Act of 1994, Hearing on H.R. 4153 before the H. Comm. on Agric., 103rd Cong. 1994 WL 226464 (statement of Edward Thompson, Jr., Director, Public Policy, American Farmland Trust).

sprung up the right to recover for the nuisance caused is contrary to the spirit of right to farm laws.

Some states are further frustrating the original purpose of the right to farm laws by attempting to pass amendments to their states' constitutions guaranteeing citizens the right to farm without being sued by neighbors. Indiana legislators considered a formal amendment to the state's constitution that would add the right to "engage in the agricultural or commercial production of meat, fish, poultry, or dairy products."⁵¹ Making industrial farming a "fundamental right" makes it nearly impossible to limit or challenge. When a right is considered fundamental, regulations limiting that right face a higher degree of scrutiny than laws that abridge rights that are not fundamental.⁵² State courts, by upholding right to farm amendments, are essentially holding the right to farm, an economic liberty, above the "safety, health, morals, and general welfare of the public" in a manner that has not been favored since the *Lochner* era.⁵³ It is settled that economic liberties may be limited for "the common good and the wellbeing of society" and that legislative enactments that are "plainly and palpably" in excess of legislative power must be declared void by the judiciary.⁵⁴ Amendments to state constitutions that add the right to farm are "plainly and palpably" passed in excess of legislative power because such an amendment offends public health and safety and infringes upon the fundamental liberty interests of neighboring landowners.

Right to farm laws were passed to ensure the viability of agricultural operations when people were moving from urban to rural areas, not to protect industrial agriculture from nuisance suits brought by people who were adversely affected by their actions.⁵⁵ Unlike Indiana, North Dakota actually passed an amendment that enshrined the right to engage in "modern farming practices" in the state's constitution.⁵⁶ Opponents of the amendment argued that the amendment would preempt local zoning and water drainage laws and afford overly broad protections to industrial agriculture.⁵⁷

⁵¹ S.J. Res. 7, 118th Gen. Assemb. Reg. Sess. (Ind. 2013).

⁵² *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

⁵³ *Lochner v. New York*, 198 U.S. 45, 53 (1905); The *Lochner* Era was characterized by the judicial use of substantive due process to invalidate legislation that limited economic liberties between 1897 and 1937. Because of its radical departure from American Constitutionalism, *Lochner* was overturned in 1937 and is remembered for its wrongness by the majority of legal scholars. Sujit Choudhry, *The Lochner era and comparative constitutionalism*, 2, 5 Int'l J. Const. L. 1 (2004), available at: <http://scholarship.law.berkeley.edu/facpubs/2282>.

⁵⁴ *Lochner v. New York*, 198 U.S. 45, 68 (1905) (Harlan J., dissenting).

⁵⁵ See Hamilton, *supra* note 11, at 103.

⁵⁶ North Dakota Farming and Ranching Amendment, Measure 3 (2012).

⁵⁷ See Carolyn Orr, *First-of-its-kind 'right to farm' law now part of North Dakota Constitution; new animal cruelty law now being considered in wake of defeat of*

III. LEGAL ANALYSIS

CAFOs present uniquely dangerous hazards to human and environmental health by creating large amounts of waste and emitting harmful pollutants in greater quantities than smaller farms.⁵⁸ Additionally, CAFO present a higher risk of infectious disease outbreaks in surrounding communities.⁵⁹ Unlike smaller, traditional farms, CAFOs have a measurably negative effect on the market value of surrounding properties.⁶⁰ Permitting CAFOs to claim nuisance immunity, in some cases, amount to an unconstitutional taking because it denies neighbors a remedy under the law.⁶¹ Lastly, CAFOs with unqualified nuisance immunity can be a barrier to community cohesion by creating tension between CAFO operator and neighbors.⁶²

Although CAFOs, under current regulations, have proven harmful in many ways CAFOs, if managed properly, present an efficient and cost-effective means of mass-producing meat, eggs, milk, and other agricultural products.⁶³ Additionally, the economic effect of CAFOs on communities can be beneficial because of both job creation and increased tax expenditures.⁶⁴

A. The Detrimental Effect CAFOs Have on Environmental and Human Health Should Bar These Operations from Asserting Right to Farm as a Defense to Nuisance Lawsuits

CAFOs cannot be considered traditional farming operations because threats they pose far exceed the threats posed by “traditional” farming operations. CAFOs are responsible for emitting hundreds of thousands of tons of ammonia

November ballot measure, The Council of State Governments (2013)
<http://www.csgmidwest.org/policyresearch/0113righttofarm.aspx> (last visited Jan. 15 2017).

⁵⁸ Industrial vs. Family Farms Comparison, *Beyond Factory Farming* (2002)
<http://www.beyondfactoryfarming.org/get-informed/industrial-vs-family-farms-comparison> (last visited Feb. 24, 2017).

⁵⁹ See P. Ebner, *CAFOs and Public Health: Pathogens and Manure*, PUBLIC HEALTH (2007).

⁶⁰ See Richard C. Ready & Charles W. Abdalla, *The Amenity and Disamenity Impacts of Agriculture: Estimates from a Hedonic Pricing Model*, AM. J. OF AGRIC. ECON., 314-26 (2005).

⁶¹ *Trickett v. Ochs*, 176 Vt. 89 (Vt. 2003).

⁶² See Joshua M. Duke & Scott A. Malcolm, *Legal Risk in Agriculture: Right to farm Laws and Institutional Change*, 75 AGRIC. SYSTEMS 295, 299 (2003).

⁶³ See Carrie Hribar & Mark Schultz, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities 2*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2013).

⁶⁴ *Id.*

per year.⁶⁵ Most of the ammonia emitted from CAFOs results from manure being stored in large quantities.⁶⁶ Small farms do not emit nearly as much ammonia because many of them compost the manure to use as fertilizer thus reducing the amount of manure that is decomposing in storage and giving off ammonia.⁶⁷ Ammonia exposure can cause irritation to the eyes, skin, mucous membranes, and upper respiratory system.⁶⁸ Ammonia is water-soluble, therefore absorption into the upper respiratory system can occur with ease in some circumstances.⁶⁹ However, if high humidity and aerosols are present in the surrounding ambient air, the ammonia can absorb into the aerosols and be taken deeper into the lungs as particulate matter (PM2.5).⁷⁰ Ammonia is a precursor to PM2.5, meaning that gaseous ammonia has the potential to turn into particulate matter under certain conditions and pose an even greater risk to public health.⁷¹ If PM2.5 is inhaled into the human body it can cause a variety of more serious respiratory diseases including bronchitis, asthma, and farmers' lung, an allergic respiratory illness.⁷² The most common adverse health outcomes resulting from inhalation of excessive ammonia range from coughing and wheezing, to temporary blindness and shock to severe stomach pain and vomiting.⁷³ Farms with fewer animals emit less ammonia and do not pose the same threat.

Children exposed to ammonia are more likely to experience more severe effects than adults because they have a greater lung surface area-to-body

⁶⁵ See R. Burns, et al. *Tyson broiler ammonia emission monitoring project: Final report*. (2007).

⁶⁶ See Industrial vs. Family Farms Comparison, *Beyond Factory Farming* (2002) <http://www.beyondfactoryfarming.org/get-informed/industrial-vs-family-farms-comparison> (last visited Feb. 24, 2017).

⁶⁷ *Id.*

⁶⁸ See B. Crook et al. Airborne Dust, Ammonia, Microorganisms, and Antigens in Pig Confinement Houses and the Respiratory Health of Exposed Farm Workers, 52 AM. INDUSTRIAL HYGIENE ASS'N J. no. 7, 1991, at 271.

⁶⁹ *Id.*

⁷⁰ Dana Cole, *Concentrated Swine Feeding Operations and Public Health: A Review of Occupational and Community Health Effects*, ENVIRONMENTAL HEALTH PERSPECTIVES, 685, 686, (2000).

⁷¹ See William M. Hodan et al. Evaluating the Contribution of PM2.5 Precursor Gases and Re-entrained Road Emissions to Mobile Source PM2.5 Particulate Matter Emissions, <https://www3.epa.gov/ttnchie1/conference/ei13/mobile/hodan.pdf> (last visited Jan. 13, 2017).

⁷² See *Ammonia Best Practices*, Colorado State University, (2008), <http://ammoniabmp.colostate.edu/link%20pages/impacts%20of%20ammonia.html#humanhealth> (last visited Jan. 13, 2017),

⁷³ See Jacob Heller, *Ammonia Poisoning*, Medical Encyclopedia, National Library of Medicine, <https://www.nlm.nih.gov/medlineplus/ency/article/002759.htm> (last visited Jan. 17, 2017).

weight ratio.⁷⁴ Children's shorter height may also increase their exposure because concentrations of ammonia vapor are usually significantly higher closer to the ground.⁷⁵ The health of persons living nearby CAFOs can also be affected. Odors emanating from the farms caused by ammonia and other emissions are offensive to neighbors and a variety of medical complaints including headaches and sore throats are reported to be more common in those people who live near CAFOs than in those who do not.⁷⁶

The potential serious harm CAFOs can cause further supports the contention that neighboring property owners should have adequate legal remedies to protect themselves. Many large CAFOs collect, store and apply to fields as fertilizer the manure generated on site.⁷⁷ This creates the potential for infectious disease outbreaks in neighboring areas.⁷⁸ Livestock waste was implicated as the cause of a *Cryptosporidium* outbreak in Milwaukee, Wisconsin that affected an estimated 403,000 people.⁷⁹ CAFO supporters may argue that neighbors are overreacting in alleging nuisance because of farm odors or noise but the threat of infectious disease outbreaks is undeniably serious. As a matter of environmental justice, it is inherently unfair to subject communities to the threat of an infectious disease outbreak with no means of affording a legal remedy. Every right withheld or injury caused must have a legal remedy.⁸⁰ Furthermore, CAFOs pretreat animals with antibiotics because disease can spread rapidly through animal populations raised in close quarters.⁸¹ Studies show that current practices employed on CAFOs do not adequately guard water resources from contamination by excessive nutrients and pharmaceutical materials.⁸² Traditional farms, because of their smaller scale, do not threaten public health in the same way that CAFOs do.

⁷⁴ See *Medical Management Guidelines for Ammonia*, Agency for Toxic Substances and Disease Registry, (2015)

<https://www.atsdr.cdc.gov/toxprofiles/TP.asp?id=7&tid=1> (last visited Jan. 22, 2017).

⁷⁵ New York State Department of Health, *Facts About Ammonia*,

https://www.health.ny.gov/environmental/emergency/chemical_terrorism/ammonia_tech.htm (last visited Jan. 13, 2017).

⁷⁶ See S.G. Von Essen, *Health effects from breathing air near CAFOs for feeder cattle or hogs*, J. OF AGROMEDICINE, 55 (2008).

⁷⁷ See P. Ebner, *CAFOs and Public Health: Pathogens and Manure*, PUBLIC HEALTH (2007).

⁷⁸ *Id.*

⁷⁹ See I.N. Eisenberg, *The role of disease transmission and conferred immunity in outbreaks: analysis of the 1993 Cryptosporidium outbreak in Milwaukee, Wisconsin*. 161 AM. J. OF EPIDEMIOLOGY 1, 62-72 (2005).

⁸⁰ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁸¹ JoAnn Burkholder et. al., *Impacts of Waste from Animal Feeding Operations on Water Quality*, 115(2) ENVIRONMENTAL HEALTH PERSPECTIVES 308 (2007).

⁸² *Id.*

The severity of this threat demands adequate legal remedies for affected parties. In order to seek coverage under the right to farm laws, farms must be operating in compliance with all applicable laws and non-negligently.⁸³ Most state right to farm laws also stipulate that an agricultural operation must be in operation for at least one year in order to access the affirmative defense.⁸⁴ Therefore, to argue that CAFOs would be shielded from liability for infectious disease outbreaks by attempting to employ the right to farm defense is arguably incorrect because causing an infectious disease outbreak seems like it would demonstrate *per se* negligence and bar application of the right to farm laws. However, highly organized and intensive industrial farming operations can have hundreds of thousands of animals and it only takes one sick animal to cause an outbreak. Overlooking the health of a single animal could reasonably be considered non-negligent.⁸⁵ And so long as a farm can be considered non-negligent in its operation, the right to farm laws may be employed to protect their actions.⁸⁶

i. The Negative Effect of CAFOs on Property Values Is So Severe that Traditional Nuisance Remedies Will not Adequately Compensate Aggrieved Neighbors

In addition to threatening human health and environmental quality, CAFOs have a strong negative effect on the property values of neighboring properties. Living near a CAFO evokes fear of loss of amenities, perceived higher risk of water and air pollution, and the increased possibility of nuisances related to odors or insects.⁸⁷ In cases unrelated to CAFOs, it is common for courts to award damages and injunctions for the aforementioned nuisance activities.⁸⁸ As a result, proximity to CAFOs has a negative effect on property values.⁸⁹ For example, proximity to hog CAFOs creates decreased neighboring property values, on average, in the following order: forty percent within one half mile;

⁸³ See Hamilton, *supra* note 11 at 103.

⁸⁴ See e.g. Tex. Agric. Code Ann. § 251.004(a).

⁸⁵ See F.M. Tomley, *Livestock infectious diseases and zoonoses*, 364 *Philosophical Transactions of the Royal Society B: Biological Sciences* 2637 (2009).

⁸⁶ See Hamilton, *supra* note 11 at 103.

⁸⁷ See Carrie Hribar & Mark Schultz, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2013).

⁸⁸ The Supreme Court awarded damages to a church following a nuisance claim against a railroad company for “steam, the ringing of bells, the sounding of whistles, and the smoke from the chimneys, with its cinders, dust, and offensive odors.” *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U.S. 317, 329 (1883).

⁸⁹ Richard C. Ready & Charles W. Abdalla, *The Amenity and Disamenity Impacts of Agriculture: Estimates from a Hedonic Pricing Model*, *AM. J. OF AGRIC. ECON.*, 314-26 (2005).

thirty percent within one mile; twenty percent within one and one half miles, and ten percent within two miles.⁹⁰ Similarly, another study determined that the largest negative effect on property value was found in properties downwind from CAFOs, citing odor and emission of pollutants as the causes of the decline.⁹¹ These factors have been found to negatively affect property values up to three miles from poultry operations.⁹² Beyond the neighboring property owners themselves, the regional residential tax base may also suffer as a result of localized reductions in property values.⁹³

Courts have followed the lead of the scientific community in acknowledging the negative impact on property values suffered by homeowners with property near CAFOs. In 2013, a property owner in Idaho was awarded a twenty percent reduction in his residential property assessment due to the proximity of this property to a CAFO.⁹⁴ Similar decisions have come from state courts in Indiana, Nebraska, South Dakota and other states with a strong industrial agriculture presence.⁹⁵ Because of this strong and individualized effect CAFOs have on the property values of their neighbors, those neighbors should have access to effective and fair remedies to minimize the harm they suffer and CAFOs should not be able to hinder this by utilizing their state's right to farm laws as an affirmative defense to nuisance lawsuits.

⁹⁰ William J. Weida, *The CAFO: Implications for Rural Economies in the U.S.* GRACE FACTORY FARM PROJECT 1 (2004).

⁹¹ Secchi S. Herriges & B.A. Babcock, *Living with hogs in Iowa: The impact of livestock facilities on rural residential property values.* LAND ECONOMICS, 81, 530–545 (2005).

⁹² Seanicaa Edwards, *Animal Feeding Operations and Residential Value*, UNIVERSITY OF MISSOURI EXTENSION, (2011).

⁹³ Doug Gurian-Sherman, *CAFOs Uncovered: The Untold Costs of Confined Animal Feeding Operations*, Union of Concerned Scientists at 61 (2008).

⁹⁴ *In the Matter of the Appeals of Joe Morton*, Nos. 12-A-1377 & 12-A-1379 (Idaho Bd. of Tax Appeals, April 22, 2013).

⁹⁵ *Corey v. State Bd. of Tax Comm'rs*, 674 N.E.2d 1062, 1063, 1065-66 (Ind. Tax. Ct. 1997); *Sexton v. Jackson County Bd. of Zoning Appeals*, 884 N.E.2d 889, 893-94 (Ind. App. 2008); *Livingston v. Jefferson County Bd. of Equalization*, 640 N.W.2d 426, 431, 437 (Neb. Ct. App. 2002).

ii. Overbroad Right to Farm Laws Lead to Absolute Nuisance Immunity and Unconstitutional Takings

If, through a state constitutional amendment or court decision, right to farm law coverage expands to become an irrebuttable presumption barring nuisance suits then it is possible that denying the neighbors any legal remedy for the nuisance would amount to a taking without just compensation.⁹⁶ If a regulation goes too far, it will be recognized as a taking.⁹⁷ The argument that broad right to farm laws amount to unconstitutional takings has been successful in two legal challenges in Iowa.⁹⁸ In Iowa, neighbors to a hog confinement facility challenged a statute that gave animal feeding operations “nuisance immunity” and that statute was struck down as a taking without just compensation because the plaintiff had no legal remedy to recover for the “diminished value of their real property and for their intangible, personal damages caused by the defendant's hog confinement operation.”⁹⁹ In another action, the Iowa Supreme Court found a provision providing nuisance immunity in an agricultural land preservation statute to be unconstitutional after the Kossuth Board of Supervisors designated a parcel of land belonging to the plaintiffs as an “agricultural area” with nuisance immunity and offered no compensation to the affected landowners.¹⁰⁰

New York’s right to farm law states that in order to enjoy nuisance immunity, the agricultural operation must only engage in “sound agricultural practices.”¹⁰¹ The “soundness” of a given practice is determined on a case-by-case basis by the state Commissioner of Agriculture and Markets.¹⁰² New York’s law does not amount to an unconstitutional taking because it does not give farms unqualified immunity like the Iowa statute because it gives citizens the opportunity to overcome the presumption of nuisance immunity.¹⁰³ The expansively broad approach being taken by many states in interpreting right to farm laws is arguably more like the unconstitutional Iowa statute than the constitutional New York statute and therefore constitutes an unconstitutional taking. Extensive nuisance immunity, if left unchallenged, may lead to the

⁹⁶ *Trickett v. Ochs*, 176 Vt. 89 (Vt. 2003).

⁹⁷ *Pennsylvania Coal Co. v. Mahon*, 260 US 393 (1922).

⁹⁸ *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998); Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right to Farms Laws Go Too Far?* 33 B.C. ENVTL. AFF. L. REV. 87 (2006).

⁹⁹ *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004).

¹⁰⁰ *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998).

¹⁰¹ N.Y. Agric. & Mkts. Law § 308(1)(b).

¹⁰² N.Y. Agric. & Mkts. Law § 308(4).

¹⁰³ *Pure Air & Water, Inc. v. Davidsen*, 246 A.D.2d 786 (N.Y. App. Div. 3d Dep’t 1998).

unconstitutional taking of property affected by CAFOs, which supports the contention that this immunity should not extend to protect them.

iii. The Barriers to Community Cohesion Presented by CAFOs Call for Unique Remedies for Nuisance Claims

When CAFO operators believe they are protected from nuisance lawsuits brought by neighbors, they are less likely to be sensitive to the needs of the community and of their neighbors.¹⁰⁴ It logically follows that if CAFO operators are cognizant of the threat of a nuisance lawsuit and the associated costs, CAFOs may conform their management practices to be less offensive to neighbors.¹⁰⁵ On the most basic level, community members that are mindful of the needs of other community members create localities that are pleasant to live in but the benefits of equal expectations among residents goes deeper. Both citizen and agricultural operations benefit when right to farm laws are both clear and fair. When rights and obligations are properly codified, owners of agricultural operations and residents hold the same informed expectations regarding their own property interest and can successfully avoid nuisance lawsuits.¹⁰⁶

Under federal law, CAFOs fall into three size threshold categories: small, medium, and large. Operations housing 1000 or more cattle, 2500 or more large swine, 500 or more horses and 125,000 chickens fall into the “Large CAFO” designation.¹⁰⁷ While amending right to farm laws to apply to only certain types of agricultural operations, namely not Large CAFOs, may explicitly revoke CAFOs of their nuisance immunity, it would make the rights and obligations of the CAFO operators more clear; therefore leading to fewer nuisance lawsuits and conflicts so long as the CAFO is complying with applicable law. Though it is the neighbors to the CAFOs who are truly suffering, CAFO operators are arguably disadvantaged by unequal application of unclear right to farm laws that do not explicitly include or exclude.¹⁰⁸ Lack of clarity in right to farm laws has produced unpredictable results following litigation.¹⁰⁹ In one Iowa case, a farmer lost a nuisance suit after switching his operation from growing crops to a concentrated hog operation.¹¹⁰ In another Iowa case, the court produced an opposite result finding for the farmer even though he had made a dramatic change in management practices to the detriment of his neighbors’ wellbeing.¹¹¹ These conflicting outcomes make

¹⁰⁴ Duke & Malcolm, *supra* note 61 at 299.

¹⁰⁵ *Id.* at 298.

¹⁰⁶ *Id.* at 296.

¹⁰⁷ 40 C.F.R. § 122.23(b)(4).

¹⁰⁸ Duke & Malcolm, *supra* note 61 at 298.

¹⁰⁹ *Id.*

¹¹⁰ *Weinhold v. Wolf*, 555 N.W.2d 454 (Iowa 1996).

¹¹¹ *Armstrong v. Maxwell Farms of Ind., Inc.*, No. 68C01-0912-CT-0539, (Ill. Cir. Ct. July 10, 2014).

selecting farm management practices challenging for CAFO owners if they are unsure of their rights and obligations under right to farm laws.

IV. POTENTIAL SOLUTIONS

In the face of ambiguity, states should interpret their right to farm laws to not extend to protect CAFOs from nuisance lawsuits. In examining the language of the states' statutes, legislative histories, recent case law, and public policy concerns, it becomes clear that not only are right to farm laws not intended to apply to CAFOs, it also makes sense from a public policy standpoint to prohibit their inclusion. States essentially fall into three categories: states that have allowed right to farm laws to apply to CAFOs, states that have prohibited right to farm laws from applying to CAFOs, and states that have not yet ruled on the matter.

States that have refused to allow CAFOs to employ right to farm laws as a defense should be considered the standard model. Other states should follow suit by either amending their right to farm laws to unambiguously bar CAFOs from right to farm protection if their courts are unwilling to interpret their right to farm statutes in that manner. States that have not yet heard the matter should preemptively update their right to farm laws to ensure that CAFOs are barred from accessing the right to farm defense before their current, and potentially unclear, laws are challenged in court. Texas attempted to amend its law to deny those affected by CAFOs from bringing nuisance lawsuits.¹¹² A non-profit formed to protect the rights of local property owners successfully challenged the rule and the court struck down the new rule as invalid because the Texas Natural Resource Conservation Commission was unable to provide satisfactory justification for promulgating a rule that denied legal remedies to those adversely affected by CAFOs.¹¹³ This proactive model should be adopted on a larger scale in other jurisdictions considering similar legislation.

A. Right to Farm Laws Should be Amended by State Legislatures to Explicitly Deny Protection to CAFOs

State legislatures should amend their right to farm laws to bar CAFOs from accessing right to farm as an affirmative defense especially if courts have held that CAFOs may access the right to farm affirmative defense. Some states, like Indiana, have interpreted their right to farm laws to unambiguously protect CAFOs from nuisance liability.¹¹⁴ This interpretation is contrary to public

¹¹² Texas Natural Resource Conservation Comm'n v. Accord Agric., Inc., 1999 Tex. App. LEXIS 6898 (Tex. App. Austin Sept. 10, 1999).

¹¹³ Texas Natural Resource Conservation Comm'n v. Accord Agric., Inc., 1999 Tex. App. LEXIS 6898, *13 (Tex. App. Austin Sept. 10, 1999).

¹¹⁴ Armstrong v. Maxwell Farms of Ind., Inc., No. 68C01-0912-CT-0539, (Ill. Cir. Ct. July 10, 2014).

health and safety as well as environmental health. States that have extended right to farm protection to CAFOs should amend their right to farm laws to be protective of human and environmental health. Many states' right to farm laws are ambiguous and an amendment would work to clarify how they should apply.

Operations that are federally defined as Large CAFOs have the largest number of animals and therefore produce the most waste and have the greatest impact on human and environmental health. Large CAFOs make up only five percent of all animal feeding operations but they house half of all farm animals in the United States and produce sixty-five percent of livestock manure annually.¹¹⁵ For these reasons, only Large CAFOs should be barred from employing right to farm laws as an affirmative defense to nuisance lawsuits. The purpose of the right to farm laws was to allow traditional farmers to operate their farms so long as they are complying with all applicable regulations even if it posed a nuisance to their neighbors because the societal interest in farming is so great and smaller farmers are unlikely to be able to afford a nuisance lawsuit.¹¹⁶ Therefore, withholding the right to farm affirmative defense from smaller operations frustrates the original purpose of laws. Smaller agricultural operations are less likely to create the high levels of pollution necessary to create adverse health effects in their communities and should therefore be able to access the right to farm laws as an affirmative defense so long as they are not negligently operating.

Right to farm laws were originally put in place to protect existing farm investments by reducing the prevalence of nuisance suits.¹¹⁷ Original right to farm laws also sought to protect farmland.¹¹⁸ Denying smaller agricultural access to the right to farm laws guts the law of its purpose entirely and adversely impacts the farmers it originally sought to protect. Right to farm laws obviously have the potential to affect the property rights of those who own land adjacent to an agricultural operation by denying them the right to recover damages following common law claims. Oppositely, losing the right to farm defense to common law claims would affect farmers' ability to conduct the societally necessary job of farming. To balance these competing interests, it is both reasonable and necessary to narrow the class of agricultural

¹¹⁵ Ribaudo, M., N. Gollehon, M. Aillery, J. Kaplan, R. Johansson, J. Agapoff, L. Christensen, V. Breneman, and M. Peters. 2003. Manure management for water quality: Costs to animal feeding operations of applying manure nutrients to land. Agricultural economic report no. 824. Economic Research Service, Resource Economics Division, U.S. Department of Agriculture.

¹¹⁶ See Hamilton, *supra* note 11 at 103.

¹¹⁷ Jacqueline P. Hand, *Right to Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 305-06 (1984).

¹¹⁸ Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 95 WIS. L. REV. 152 (1983).

operations that can access the right to farm affirmative defense to those operations that are smaller and therefore less likely to cause serious harm to neighbors and are the least likely to be able to afford a lawsuit. Large CAFOs are exponentially more likely to cause harm to neighbors due to their higher emission and waste production levels and are also more likely to be able to afford a lawsuit in the event that a neighbor brought a case.¹¹⁹ Perdue Farms, one of America's largest private companies and commercial CAFO operator generated over six billion dollars in revenue in 2015,¹²⁰ while the average American farming household had a net annual income of \$81,480.¹²¹ This dramatic disparity supports the proposition that Large CAFO owners are in a better financial place to defend against nuisance lawsuits than farmers operating smaller farms that the right to farms laws originally sought to protect. Ensuring Large CAFOs do not have access to the right to farm defense fairly balances the interests of both farmers and their neighbors.

*B. The Severe Adverse Public Health and Environmental Outcomes
Caused by CAFOs Demand Unique Nuisance Remedies*

To ensure fairness to both the farmers and their aggrieved neighbors, exploring nontraditional remedies for nuisance lawsuits is also advisable. Traditional remedies for nuisance include damages and/or injunctive relief.¹²² Nuisance lawsuits stemming from farming pose a unique challenge because farming is undeniably valuable to society and the competing interest (neighbors' property rights, health, etc.) are equally important. Because adverse health outcomes, decreased environmental quality, and property values are affected, traditional damages may not be sufficient to compensate the aggrieved neighbors. Furthermore, to demand that a CAFO cease operation is unreasonable because of the importance of food production. For these reasons, it is necessary to examine alternative remedies.

At common law, nuisance remedies are traditionally somewhat flexible.¹²³ However in the context of right to farm laws and nuisance lawsuits, courts

¹¹⁹ R.C. Ilea, *Intensive Livestock Farming: Global Trends, Increased Environmental Concerns, and Ethical Solutions*, 22 J. OF AGRIC. & ENVT'L ETHICS 2, 153 (2009).

¹²⁰ Perdue Farms at a Glance, Perdue Farms by the Numbers (2015).
<http://www.perdufarm.com/uploadedFiles/Perdue%20At%20a%20Glance2013!.pdf>
(last visited Jan. 18, 2017).

¹²¹ Farm Family Income, U.S. Dept. of Agric. (2005).
https://www.usda.gov/documents/FARM_FAMILY_INCOME.pdf (last visited Jan 18, 2017).

¹²² Nuisance, Wex Legal Dictionary, <https://www.law.cornell.edu/wex/nuisance>.

¹²³ Robert H. Cutting, "One Man's Ceilin' is Another Man's Floor": *Property Rights as the Double-Edged Sword*, 31 ENVTL. L. 819, 891 (2001).

have been hesitant to consider remedies outside of injunction.¹²⁴ Modern nuisance law has moved toward cooperative court mediation while right to farm litigation has failed to evolve in the same way, preferring rigid application of outdated nuisance-immunity provisions.¹²⁵ It is critical that right to farm laws examine more flexible and equitable remedies in deciding the outcome of disputes because right to farm laws are rooted in nuisance common law.

People who own properties near CAFOs complain of constant odors, threat of pollution, and declining property values.¹²⁶ Studies show that persistent exposure to CAFO odors can have significant and adverse health effects.¹²⁷ A study compared residents living within 2 miles of a CAFO to residents not living near a CAFO and those living nearer to a CAFO reported higher frequencies of both headaches and burning eyes that can be attributed to CAFO emissions.¹²⁸ A Michigan study found that property values decreased 1.71 percent for every 1000 hogs nearby.¹²⁹ Damages are not enough to cure the nuisance in most cases and an injunction is not reasonable due to the strong need for agricultural operations. These unique circumstances call for unique remedies.

The dramatic way in which CAFOs affect the lives of their neighbors call for an uncommon remedy. In order to compensate CAFO-adjacent homeowners for the decline in property value, CAFOs should be forced to purchase the property from its owner at fair market value as if the nuisance was not present. At first blush this remedy may appear unsound but the Supreme Court recently held that the government may take property from a private property owner unwilling to sell the property and give it to another if doing so furthers a permissible public use.¹³⁰ By this logic, it would be

¹²⁴ See e.g. *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 326 (Mo. 2015); *Weinhold v. Wolf*, 555 N.W.2d 454 (Iowa 1996).

¹²⁵ See Terence J. Centner, *Creating an 'Undeveloped Lands Protection Act' for Farmlands, Forests and Natural Areas*, 17 DUKE ENVTL. L. & POL'Y 1, 2 (2006).

¹²⁶ See generally John A. Kilpatrick, *Concentrated Animal Feeding Operations and Proximate Property Values*, 69 THE APPRAISAL J. 3 (2001).

¹²⁷ See Elenor Stamer, *Environmental and Health Problems in Livestock Production: Pollution in the Food System*, The Agribusiness Accountability Initiative http://www.ase.tufts.edu/gdae/Pubs/rp/AAI_Issue_Brief_2_1.pdf (last visited Jan. 18, 2017).

¹²⁸ Wallinga, D., MD (2004). *Concentrated Animal Feeding Operations: Health Risks from Air Pollution*.

¹²⁹ M. Abeles-Allison & L. J. Connor, *An analysis of local benefits and costs of Michigan hog operations experiencing environmental conflicts*, Agricultural Economics Report 536. Department of Agricultural Economics, Michigan State University (1997).

¹³⁰ *Kelo v. City of New London*, 545 U.S. 469 (2005).

permissible for the government to compel a sale of property even if the buyer is unwilling if it furthers a permissible public use, in this case that use would be nuisance abatement. These affected homeowners are unable to sell their properties and move away from the nuisance.¹³¹ During a public hearing on a CAFO moratorium in Indiana, one resident testified that a local man was “driven to suicidal thoughts because he was unable to sell his home after six years because of the odor from a nearby CAFO.”¹³² Another resident during the same hearing testified that the decrease in property values led to decreased revenue from property taxes, which would mean less money for public schools.¹³³ One such remedy would be to force CAFOs to purchase the properties belonging to the affected homeowners. The CAFO would be forced to purchase the property at what fair market value would be in the absence of the CAFO. Naturally, this remedy would safeguard CAFOs from being unfairly forced to purchase properties by stipulating that the affected homeowner must use reasonable or best efforts to find a buyer offering a reasonable price and/or have the property on the market for a reasonable amount of time. The threat of being forced to purchase the aggrieved property could prompt CAFO operators to be more cognizant of how their operation impacts their neighbors. A remedy like this could operate as a deterrent, similar to how punitive damages function. This remedy allows the affected homeowner to get away from the nuisance and avoids the challenge of calculating ongoing damages to be paid to the homeowner by the CAFO.

Though unique, compelling a party to make a purchase it otherwise would not necessarily want to make is not legally uncommon. In circumstances where it is impossible to make the aggrieved party whole courts will often grant specific performance.¹³⁴ For this reason, it is reasonable to compel CAFO owners to purchase neighboring properties in certain limited situations as they have violated the rights of their neighbors and purely compensatory damages may not be adequate. However, it is important to note that courts only order specific performance in the presence and violation of a valid contract.¹³⁵ If courts are willing to recognize a social contract between neighbors to maintain the mutual quiet enjoyment of property, it is possible to award specific performance in this way to landowners aggrieved by CAFOs.¹³⁶ Though potentially useful, compelling offending CAFOs to purchase neighboring land may raise constitutional takings issues. However, one of the primary rights of

¹³¹ Jondi Schmitt, *Hoosiers Voice CAFO Concerns: Proposed Bill Would Put Three-Year Moratorium on Start of Construction*, South Bend Tribune, Jan. 30, 2007.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Restatement (Second) of Contracts § 359 (Am. Law Inst. 1981).

¹³⁵ *Id.*

¹³⁶ I. MacNeil, *The New Social Contract* 4-13, 66-70, 78-84, 90-92 (1980).

property owners is the right to exclude.¹³⁷ A reasonable property owner would most likely wish to exclude CAFOs from affecting his or her property and overbroad right to farm laws arguably prevent such exclusion. When a CAFO is dangerous to its neighbors, the state should be able to regulate its use without compensating the CAFO.¹³⁸

*C. To Promote Community Cohesion and Avoid Nuisance Lawsuits
Preventative Legislative Measures Should be Taken in Addition to
Denying CAFOs the Right to Farm Defense*

As urban citizens continue to spread out and begin to share space with rural farmers, it is imperative to prevent conflict as much as possible. One method of doing so is creating a paradigm in which nuisance lawsuits may be entirely avoided without unfairly limiting the rights of the farm operators and their neighbors.¹³⁹ Nuisance law is based on equities and therefore it should be based on more than just economics.¹⁴⁰ Right to farm laws originally sought to benefit farmers by shielding them from nuisance lawsuits because society recognizes farming as an important and economically beneficial activity so much so that it weighs the needs of the agricultural operation over the comfort of the neighboring property owners.¹⁴¹ Terence Centner, Professor of Agricultural and Applied Economics at the University of Georgia, has proposed a piece of legislation called the Undeveloped Lands Protection Act (ULPA) which would more appropriately balance the needs and interests of both farmers and neighboring property owners.¹⁴² This Act would allow farmers nuisance immunity from some activities including “fertilizer application, weed and pest control, and planting” but not others including the erection of any “building, pen, or feedlot used for the production of confined animals meeting the definition under state law for concentrated animal feeding operations.”¹⁴³ The ULPA, in this instance, protects farmers performing activities associated with traditional farming but does not give them nuisance immunity for activities that have broader and more serious consequences for human and environmental health. The ULPA model represents a blend of the

¹³⁷ David L. Callies and J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J. L. & POL’Y 39 (2000), http://openscholarship.wustl.edu/law_journal_law_policy/vol13/iss1/3.

¹³⁸ “But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (Brandeis, J., dissenting).

¹³⁹ Centner, *supra* note 125, at 1.

¹⁴⁰ *Id.* at 11.

¹⁴¹ C. Ford Runge, *Environmental Protection from Farm to Market*, 14 *Thinking Ecologically: The Next Generation of Environmental Policy* 200-16 (1997).

¹⁴² Centner, *supra* note 125, at 56-61.

¹⁴³ *Id.* at 60.

nuisance-based right to farm law model and the agricultural districting right to farm law model.¹⁴⁴ The ULPA is a prime example of an alternative right to farm that embodies the spirit of the original laws while explicitly considering the treatment of CAFOs.

V. CONCLUSION

Right to farm laws should not be available to CAFOs as an affirmative defense to nuisance lawsuits brought by neighboring property owners. Allowing CAFOs to employ right to farm laws frustrates the original purpose of protecting small farmers from new neighbors and preserving farmland while subjecting surrounding communities to unique and dangerous public health and safety threats.¹⁴⁵ Giving CAFOs nuisance immunity could permit industrial agriculture to pollute water and air resources while creating the potential to spread infectious disease without facing legal consequences.¹⁴⁶ Furthermore, a broad interpretation of the right to farm laws to create irrebuttable nuisance immunity may constitute an unconstitutional taking without just compensation.¹⁴⁷ Granting CAFOs explicit permission to use right to farm laws to fight off nuisance lawsuits not only goes against public interest, it also presents the potential for constitutional violations.¹⁴⁸ Therefore, to interpret current right to farm laws to grant nuisance immunity or for states to amend their right to farm laws to explicitly extend to CAFOs is both incorrect and unjust.

To combat the negative consequences and externalities of extending right to farm protection to CAFOs, states should amend their statutes or state constitutions to be clear in excluding industrial farming operations from employing the defense. Ideally, states could create a paradigm that balances the interests of all parties and allows nuisance lawsuits to be avoided as often as possible perhaps by passing an “Undeveloped Lands Protection Act.”¹⁴⁹ Because right to farm laws, when properly construed, serve an important societal purpose, it is imperative to ensure the smaller farming operations that the laws originally sought to protect are, in fact, protected. To safeguard this protection, states should deny right to farm protection to farms above a certain size. Furthermore, states should reevaluate their right to farm laws to ensure that individuals who own property adjacent to CAFOs have adequate legal remedies and opportunities to recover damages to guarantee the state’s right

¹⁴⁴ 13-124 Agricultural Law § 124.02(2) (2016).

¹⁴⁵ See Hamilton, *supra* note 11 at 103.

¹⁴⁶ See P. Ebner, *CAFOs and Public Health: Pathogens and Manure*, PUBLIC HEALTH (2007).

¹⁴⁷ *Trickett v. Ochs*, 176 Vt. 89 (Vt. 2003).

¹⁴⁸ See Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right to farms Laws Go Too Far?* 33 B.C. ENV'T L. AFF. L. REV. 87 (2006).

¹⁴⁹ Centner, *supra* note 125 at 56-61.

to farm laws do not amount to an unconstitutional taking without just compensation. Because of the unique issues CAFOs present to communities across the United States, it is helpful to consider creative and unconventional remedies to balance the interests at play and promote fairness.

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