

THE RIGHT TO FARM: HOG-TIED AND NUISANCE-BOUND

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INTRODUCTION

When Howard Flaherty found out in 1980 that his neighbors, the Bowens, were building a cotton gin, he complained, fearing that the gin would aggravate his asthma.¹ The Bowens continued to build the gin and put it into operation that year. From 1980 to 1986, Howard experienced considerable health problems because of the gin's effects on his asthmatic condition. On October 24, 1986, Howard and his wife Carrie brought suit in Pontotoc County Chancery Court, asserting that the Bowens were creating a private nuisance by operating their cotton gin.² In their defense, the Bowens claimed that the Mississippi Right to Farm Act (RTF)³ established a one-year statute of limitations for any nuisance action brought against an agricultural operation. The trial court found that the RTF did not bar the Flahertys's action and ordered an abatement of the nuisance. The Mississippi Supreme Court reversed the lower court's judgment, finding that the RTF established a one-year statute of limitations, and that none of the exceptions enumerated in the statute applied.⁴ The Flahertys had likely never heard of Mississippi's RTF before their lawsuit. They probably were surprised to find that it prevented a suit like theirs from proceeding.⁵

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¹ The facts described in this paragraph are set out in detail in *Bowen v. Flaherty*, 601 So. 2d 860, 861 (Miss. 1992).

² See *id.* at 861-62.

³ Miss. Code Ann. § 95-3-29 (1994).

⁴ Specifically, the court found that the Bowens had not "expanded" their agricultural operation since they began ginning cotton. See *Bowen*, 601 So. 2d at 863. As discussed in Part II.B *infra*, some RTFs provide that substantial changes in or expansion of protected agricultural activities operate to make the farm "new" for the purposes of the statute of limitations.

⁵ In a later case, the Mississippi Supreme Court found that one of the purposes of the right-to-farm law was to protect against nuisance claims in which the defendant's operation began before the plaintiff was in the vicinity of the operation. See *Leaf River Forest Prod., Inc. v. Ferguson*, 662 So. 2d 648, 661 (Miss. 1995). A literal reading of the law, however,

RTFs exist in some form in all fifty states.⁶ Along with property tax breaks, they are by far the most ubiquitous farmland protection program in this country.⁷ States have enacted RTFs with the stated purpose of preventing the slow destruction of farmland as a result of expansion of urban areas into traditionally rural land.⁸ All RTFs protect farmers from liability for common law nuisance to some extent, and many also prevent municipalities from passing ordinances that would make an agricultural operation a nuisance.⁹

Several problems are inherent to most current RTFs. First, by privileging agricultural land uses over neighboring land uses within a municipality, they may reduce the efficient allocation of land use entitlements. Second, such privileging may be an unnecessary and unjust intrusion into the rights of those whose land use conflicts with protected agricultural uses. Third, such privileging may work against the stated intent of RTF supporters by protecting operations that contribute to the degradation of rural landscapes.

While RTFs are widespread and radically restructure common law property rights, RTF proponents have glossed over any potential issues of unfairness and have suggested changes in order to strengthen perceived weaknesses in protection afforded by the laws.¹⁰ Commen-

supports the findings of the *Bowen* court. See Miss. Code Ann. § 95-3-29(1) (1994) (allowing agricultural operation absolute defense to nuisance action if it has existed "substantially unchanged" for one year or more).

⁶ See *infra* note 76. The Iowa Supreme Court recently eviscerated Iowa's RTF of any substantive effect by declaring unconstitutional the section of the law that immunizes farms from nuisance suits. See *Borman v. Board of Supervisors*, No. 96-2276, 1998 WL 650904, at *14 (Iowa Sept. 23, 1998) (holding that provision providing immunity from nuisance constitutes taking of private property without just compensation, in violation of state and federal constitutions). Thus, functionally, RTFs are currently in effect in only 49 states.

⁷ See Tom Daniels & Deborah Bowers, *Holding Our Ground: Protecting America's Farms and Farmland 11* (1997) (comparing prevalence of state farmland protection programs).

⁸ 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, 97-98 (reviewing justifications for RTF legislation). RTF proponents justify the laws with a simplified three-part narrative. First, as suburban and urban developments encroach upon rural areas, conflict between rural agricultural land use and nonagricultural land use is inevitable. Accordingly, new residents attempt to resolve such conflict by bringing common law nuisance actions and/or enacting new zoning ordinances, which leads some farmers to abandon their traditional activity. RTF supporters insist, finally, that insulating growers from common law nuisance liability and changes in local zoning ordinances will help to preserve farmland. See *infra* notes 15-17 and accompanying text.

⁹ See *infra* Part II.B.

¹⁰ For example, one article offered the following suggestion to state legislatures considering revising RTFs:

A legislature should be wary of including so many exceptions that the statute offers farmers little or no protection from nuisance liability. The requirement that a farm must comply with environmental laws and regulations can be justi-

tators have paid little attention to the effects RTFs have had on conflicts between landowners in traditionally agrarian communities. In an attempt to begin the type of critical examination demanded by RTFs, this Note discusses RTFs as they currently exist and offers empirical and theoretical critiques of their structure. Part I summarizes the doctrinal and regulatory framework in which RTFs emerged, including the current condition of farms in the United States. Part II describes the current RTFs and discusses some of the explanations offered to justify RTFs. Part III offers a critique of RTFs from several perspectives, integrates this critique with the conflicts between urban and rural land use, and suggests changes to RTFs in an attempt to tailor the statutes more closely to the perceived problems of urban encroachment.

I

PRIVILEGING THE "RIGHT TO FARM": THE EMPIRICAL AND DOCTRINAL ORIGINS OF RIGHT-TO- FARM LAWS

We must observe that pork production generates odors which cannot be prevented, and so long as the human race consumes pork, someone must tolerate the smell.¹¹

Most RTFs were passed at the state level between 1978 and 1983.¹² It is no coincidence that so many RTFs appeared on the political landscape over this period of five years, at the same time an influential study, the National Agricultural Lands Study (NALS), warned

fixed in terms of protecting both the environment and public health and safety; nonetheless, it will restrict the statute's protection. Environmental laws cause particular problems when they define odor and other kinds of pollution in nuisance terms. Additional exceptions—for example, that the statute does not apply when the nuisance threatens public health and safety or when the farm operation has been substantially changed—might be interpreted broadly by courts, historically accustomed to balancing interests in nuisance cases and eager to grant relief to plaintiffs. Such broad judicial interpretation may limit the law's protection to those farmers who would have prevailed in a traditional nuisance action. In this situation, no right to farm law would be better than a statute that gives farmers false hopes but contains no substance.

Grossman & Fischer, *supra* note 8, at 162-63; see also Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. Pitt. L. Rev. 289, 347-48 (1984) (considering fairness of RTFs). Both articles summarize the RTFs, describe the common law of nuisance, and discuss the constitutional validity of the statutes. Neither, however, critically discusses the justifications offered by RTF supporters. One notable exception to the lack of critical academic attention paid to RTFs is discussed below. See *infra* notes 214-22 and accompanying text.

¹¹ *Shatto v. McNulty*, 509 N.E.2d 897, 900 (Ind. Ct. App. 1987) (holding that Indiana RTF protects hog operation).

¹² See *infra* note 79 and accompanying text.

of a national crisis in farmland preservation.¹³ The NALS study recommended, among other measures, state-enacted RTFs, given the lack of similar national legislation.¹⁴

RTF supporters invoke a specific image of conflict between urban and rural land uses. One of the key explanations for the decline in active farms throughout the United States is, according to this narrative, the extension of development into previously rural areas, with accompanying complaints from residents not accustomed to the sounds and smells of farm life.¹⁵ Complaints from residents “bombard” farmers. When new residents successfully sue farmers on a nuisance theory, the farmers often are forced to abandon their livelihood and sell their land to developers.¹⁶ In addition, as nonfarmers begin to outweigh farmers in the local political process, municipalities use their zoning power to “zone out” offensive agricultural uses.¹⁷

In response to these perceived problems, legislatures passed RTF legislation to protect farming operations from both common law nuisance suits and municipal ordinances that make certain practices a nuisance. As explored below, RTFs offer varying degrees of protection, but almost all seek to prevent new residents from restricting es-

¹³ See National Agricultural Lands Study, Final Report 8-10 (1981); National Agricultural Lands Study, *Where Have the Farm Lands Gone?* 2, 12 (1980).

¹⁴ See William Fischel, *Urban Development and Agricultural Land Markets*, in *The Vanishing Farmland Crisis* 79, 92 (John Baden ed., 1984) [hereinafter *Vanishing Farmland*] (reviewing NALS recommendations).

¹⁵ See Timothy Aepfel, *Farming: A Nuisance for Suburban Aesthete?*, *Christian Sci. Monitor*, May 7, 1981, at 1 (stating that 1980 census shows population growth in rural and small-town communities is greater than in metropolitan areas for first time in more than 160 years, which has led to increasing nuisance suits).

¹⁶ See Richard Warchol, *Law Would Block Farm Nuisance Suits*, *L.A. Times* (Ventura County Ed.), July 12, 1997, at B4 (“As a result [of complaints], the [right to farm] ordinance says, farmers are forced to shut down or curtail their work, discouraging investment and threatening the economic viability of the county’s agricultural industry.”). Even unsuccessful nuisance suits are said to create a hostile environment for farmers, encouraging the abandonment of farms. Part III.A.1, *infra*, evaluates the legitimacy of the claims raised by supporters of RTFs. The empirical data suggest that there has not been a significant problem with nuisance suits directed against farmers on the edges of developing suburbia and that farmland in metropolitan areas was functioning successfully and efficiently prior to the adoption of right-to-farm laws. See *infra* notes 122-35 and accompanying text.

¹⁷ See Grossman & Fischer, *supra* note 8, at 97 (claiming that new rural residents pressure municipalities “to adopt ordinances that restrict agricultural activity”); Teri E. Popp, *A Survey of Agricultural Zoning: State Responses to the Farmland Crisis*, 24 *Real Prop., Prob. & Tr. J.* 371, 379 (1989) (“On the exurban fringe . . . municipalities often adopt ordinances that restrict farming practices, based upon classification of farm operations as a public nuisance.”). The legislative history of New York State’s RTF is a good example of the multiple reasons offered to justify extending this protection to farms, including the concern that local governments passed restrictive ordinances in response to complaints by nonfarmers. See Sam Howe Verhovek, *‘Right to Farm’ Laws Are Tested in Exurbs*, *N.Y. Times*, Sept. 29, 1991, § 4, at 6 (reporting justifications for New York RTF).

tablished agricultural practices. This Part describes three factors that influenced the adoption of RTFs: the current state of farming in historical perspective, the common law of nuisance and perceived problems with its applications, and municipal zoning regulation.

A. *Farming Today: A Move Toward Large-Scale Enterprises*

One cannot ignore the recent changes in the practice and experience of farmers. In 1880s, the United States farm population was twenty-two million; now fewer than five million people live on farms.¹⁸ A decrease in land devoted to farmland, with a seventeen percent drop between 1945 and 1990, has accompanied this decrease in farming population.¹⁹ During the same period, however, crop yields and livestock production have nearly doubled due to technological advances.²⁰ While current estimates of farmland loss vary from about one million to 1.5 million acres annually,²¹ there is no concomitant crisis concerning a decrease in overall farm production.

Today, there are more large farms than there have been in the past, and they are more productive. Measured by either annual sales or total acreage, between 1982 and 1992 only large farms (greater than \$250,000 in annual sales, or larger than 1,000 acres) have increased in number.²² Medium-sized farms (between 50 and 499 acres) have seen the largest decrease in number.²³ The top twenty percent of productive farms produce ninety percent of all farm outputs now, reflecting a trend toward imbalanced production.²⁴ Arguably, government funding policies have encouraged this shift away from small "family farms" toward large-scale operations.²⁵

At the same time that large farms are growing larger, farming occupies less space now than ever before, with urban and suburban

¹⁸ See American Farm Bureau Federation, *Farm Facts—Declining U.S. Farm Population* (last modified Feb. 23, 1998) <<http://www.fb.com/today/farmfacts.ffacts8.html>>.

¹⁹ See Daniels & Bowers, *supra* note 7, at 10.

²⁰ See *id.*

²¹ See *id.*

²² See *id.* at 63-64 (reporting that number of farms with annual sales of \$250,000 or more increased from 86,468 in 1982 to 125,460 in 1992, and number of farms larger than 1,000 acres increased from 161,972 to 172,912 over same period).

²³ See *id.* at 64 (reporting decrease from 1,238,162 in 1982 to 1,011,794 in 1992).

²⁴ See *id.* at 11. Just four percent of all farms accounted for half of all gross sales in 1993. See Robert A. Hoppe et al., U.S. Dep't of Agric., *Structural and Financial Characteristics of U.S. Farms, 1993: 18th Annual Family Farm Report to Congress iii* (Agric. Info. Bull. No. 728, 1996).

²⁵ See John Opie, *The Law of the Land: Two Hundred Years of American Farmland Policy 186-88* (1987) (arguing that government policies have favored large-scale farming operations).

dwellers taking up more space.²⁶ There is potential for real conflict between developing suburbs and established agricultural areas. While less than one-third of America's farmland is rated "prime" for production,²⁷ this farmland is also the most amenable to residential development.²⁸ Thus, pressure on farmers to sell land can be intense where residential development occurs. RTFs have emerged in this context of declining farm population, increased centralization of farming activities, and increased demand for land at the edges of suburbia.

B. The Common Law of Nuisance

Supporters of RTFs, bolstered by evidence of suburban growth described above, have insisted on greater protection for farmers from nuisance suits.²⁹ Modern nuisance law has moved away from fault-based evaluations of conduct and toward flexible remediation by courts. As discussed below, the passage of RTFs has reversed this modern trend of nuisance law as it applies to agriculture.

Nuisance law is one of the earliest examples of environmental regulation. As early as the fifteenth century, hog farmers and their neighbors relied on nuisance law to resolve land use conflicts.³⁰ The common law of nuisance mediates conflicts in land or property uses that private actors cannot resolve through the market.³¹

Nuisance law can be summarized by the proposition that one may not unreasonably interfere with the use and enjoyment of another's property.³² In the nineteenth century, American nuisance law was

²⁶ See Daniels & Bowers, *supra* note 7, at 10 (reporting that urban and suburban settlements consumed about one-third more land per person in 1990 than 1970).

²⁷ See *id.* at 8.

²⁸ See *id.* ("Because prime farmland is level to gently sloping and is well drained, it is also the cheapest land to develop for houses, offices, and factories.")

²⁹ This connection between suburban growth and protection from nuisance suits is best exemplified by statements of purpose found in RTF statutes themselves. See, e.g., Idaho Code § 22-4501 (1995):

The legislature finds that agricultural activities conducted on farmland in urbanizing areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature removal of the lands from agricultural uses, and in some cases prohibit investments in agricultural improvements. It is the intent of the legislature 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.

³⁰ See E. F. Roberts, *The Law and the Preservation of Agricultural Land* 8 (1982) (reporting use of nuisance law in fifteenth century).

³¹ Bilateral monopoly and organizational inequity are free market failures of particular importance in nuisance cases. Where only two parties are bargaining together, bilateral monopoly is a likely result. Because each party has a monopoly on the good desired by the other party, both parties demand more than a competitive market would provide. Organizational inequity is caused by differential abilities of each party to organize to bargain.

³² See Jesse Dukeminier & James E. Krier, *Property* 956 (3d ed. 1993).

framed by a conception of property as a “natural right,” existing independently of legal and social institutions.³³ The need to accommodate economic development put pressure on this absolutist conception of property rights, so that nuisance doctrine became focused on the “reasonableness” or “wrongfulness” of the defendant’s land use.³⁴ The “wrongfulness” standard required a “normative evaluation of reasonableness within a natural rights framework.”³⁵ This normative judgment meant, for example, that plaintiffs thought to be at fault for their predicament—those who had moved near an ongoing industrial operation, for instance—were less likely to receive relief.³⁶

Modern nuisance law, beginning with the Restatement of Torts,³⁷ emphasized a utilitarian analysis, replacing value-laden judgments with considerations of economic efficiency.³⁸ This shift has continued with the advent of law and economics. Rather than focusing on judgments of fault implicit in an “unreasonable interference” standard, law and economics theorists, informed by the observations of Ronald Coase,³⁹ suggested that courts concentrate on resolving conflict so that resources are allocated most efficiently.⁴⁰ Modern law has taken account of this criticism by adopting a multifaceted analysis of land use conflict that attempts to balance the harm caused by the activity

³³ See Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 Alb. L. Rev. 189, 199 (1990) (describing doctrinal evolution of American nuisance law).

³⁴ See *id.* at 199, 202-03 (describing doctrinal impact of industrialization and shift in nuisance law to rule of reasonable use).

³⁵ *Id.* at 211.

³⁶ See *Feldstein v. Kammauf*, 121 A.2d 716, 721 (Md. 1956) (denying relief to plaintiffs who “knew or should have known” of existence of nuisance prior to moving); *East St. Johns Shingle Co. v. City of Portland*, 246 P.2d 554, 563 (Or. 1952) (rejecting suit against municipality by plaintiff who came to nuisance); cf. *Kramer v. Sweet*, 169 P.2d 892, 896 (Or. 1946) (favoring suit by established residents against defendant who had not been present for lengthy time period).

³⁷ See Restatement of Torts §§ 822(d), 826-828 (1939) (defining elements of nuisance liability).

³⁸ See Lewin, *supra* note 33, at 212 (“In short, the Restatement represented a shift from the balancing of ‘interests’ to the balancing of ‘utility.’”).

³⁹ See generally R. H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960). Coase counsels that, instead of thinking about a nuisance as A interfering with B’s use of property, courts should think of A and B having incompatible uses of their respective property. See *id.* at 2 (“The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?”).

⁴⁰ Allocation of blame is suspect because it is not directed towards maximizing social wealth, but may reflect moral judgments about the value of certain activities. The ideal of maximizing social wealth is, of course, laden with its own value judgments, and even Coase acknowledges that there are concerns other than economic efficiency. See *id.* at 43 (“[P]roblems of welfare economics must ultimately dissolve into a study of aesthetics and morals.”).

complained of against the value of that activity.⁴¹ Part of this move away from a fault-based evaluation of nuisance has consisted of rejecting the doctrine barring relief for plaintiffs who “come to the nuisance.”⁴² As discussed below, RTFs represent a dogmatic return to the fault-based origins of nuisance law.

The traditional fault-based nuisance analysis has led courts to adopt primarily one-sided solutions. In most cases under the common law, the court either granted the plaintiff an injunction⁴³ or allowed the defendant to continue operating without interference. In the framework proposed by Guido Calabresi and Douglas Melamed, the courts granted “property rule” protection to either the plaintiff’s or defendant’s entitlement to a particular land use.⁴⁴ These two possible solutions are those most commonly considered by the common law: courts either enjoin the activity complained of or deny all relief to the complainant.⁴⁵ Calabresi and Melamed proposed two remaining pos-

⁴¹ In looking at the gravity of harm, courts are to factor in the extent and character of the harm, the social value of the plaintiff’s use, and the burden on the plaintiff of avoiding the harm. The utility of the actor’s conduct is evaluated by considering its social value, its suitability to the locality in question, and the impracticability of the actor preventing the harm. See Restatement (Second) of Torts § 826 (1979). The Restatement both provides a summary of current law and influences judges in evolving common law concepts. Courts have long used multiple factors in evaluating the existence of a nuisance, although not all are motivated by balancing economic values of competing land uses. See, e.g., *Eller v. Koehler*, 67 N.E. 89, 90-91 (Ohio 1903) (factors include nature and importance of defendant’s business, nature and frequency of disturbance, injuries disturbance causes, character of neighborhood, past actions by either party taken to reduce injury, and cost and feasibility of preventive measures).

⁴² See, e.g., *Forbes v. City of Durant*, 46 So. 2d 551, 552 (Miss. 1950) (en banc) (vitiating “old” rule). In some jurisdictions and treatises, the doctrine continued to receive breathing room. See *East St. Johns Shingle Co. v. City of Portland*, 246 P.2d 554, 563 (Or. 1952) (citing 39 Am. Jur. Nuisances § 196 for proposition that plaintiff who knowingly places himself in injurious situation will be barred from relief).

⁴³ In later cases, damages were more often granted than injunctions. See, e.g., Leah C. Hill, Note, “A Pig in the Parlor Instead of the Barnyard?” An Examination of Iowa Agricultural Nuisance Law, 45 Drake L. Rev. 935, 944 (1997) (“American courts . . . have become more willing to award money damages as a remedy rather than imposing an injunction in nuisance cases.” (citing Neil D. Hamilton, *A Livestock Producer’s Legal Guide to: Nuisance, Land Use Control, and Environmental Law* 14 (1992))).

⁴⁴ Calabresi and Melamed speak of three different types of protections offered when entitlements are placed with a party. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1092 (1972). Parties must bargain around *property rule* protection without court interference. See *id.* A party may “bargain” around *liability rule* protection for a price set by the court. See *id.* Entitlements protected by *inalienability rules* cannot be transferred. See *id.* Because the changes wrought by RTFs are limited to the play between property and liability rule protection, this Note will not address inalienable entitlements.

⁴⁵ By enjoining the operation, the court places an entitlement in the plaintiff protected by a property rule. By denying all relief, the court places an entitlement in the defendant, protected by a property rule. In either case, if the losing party wants either to continue

sible remedies, and the courts have taken only one up with consistency—allowing the activity to continue so long as the defendant pays damages.⁴⁶ Courts have not widely adopted the final possible resolution of nuisance cases, in which the court enjoins the defendant's activity on the condition that the plaintiff pays damages. This approach places an entitlement with the defendant, protected by a liability rule.

The Arizona Supreme Court fashioned this latter solution in its famous "coming to the nuisance" case, *Spur Industries v. Del E. Webb Development Co.*⁴⁷ In *Spur*, the defendant operated a cattle feedlot, and the plaintiff was a developer in the surrounding area.⁴⁸ Over time, the developer built housing tracts progressively closer to the feedlot operation.⁴⁹ Eventually, residents of the development complained about the odors and flies emanating from the feedlot's operations, and the developer brought a nuisance action.⁵⁰ The feedlot operator argued that the developer had "come to the nuisance" and was therefore barred from relief.⁵¹ The court resolved the controversy by granting an injunction conditioned upon the developer paying the costs of closing up or moving the operation.⁵² In theory, the developer had to weigh the cost of paying the feedlot operator to cease operations against the benefit of building developments free of nuisance. If the developer can make a rational choice, in theory the result will represent the most efficient land use allocation.

The *Spur* case exemplifies a shift in nuisance law in response to the criticisms outlined above. On one hand, the court refused to lay all the blame on the plaintiff even though it had "created" the nuisance by extending its housing development in the direction of the feedlot. At the same time, the court granted relief in a way that, at least theoretically, would result in a more efficient allocation of resources than simply enjoining the defendant's operation. While most courts have not been as creative as the *Spur* court in fashioning relief, they also have not viewed the "coming to the nuisance" defense as a

operating or to live free of the nuisance, he or she must buy the other party out at an agreed-upon price.

⁴⁶ This result places an entitlement in the plaintiff protected by a liability rule. Theoretically, this solution forces the defendant to calculate whether her activity is more valuable than the damages incurred by the plaintiff.

⁴⁷ 494 P.2d 700 (Ariz. 1972) (en banc).

⁴⁸ See *id.* at 704.

⁴⁹ See *id.* at 705.

⁵⁰ See *id.*

⁵¹ See *id.* at 707.

⁵² See *id.* at 708.

complete bar to relief.⁵³ Rather, they apply a multifaceted analysis to determine when to grant relief and what type of relief to grant.⁵⁴ The timing of the plaintiffs' arrival is only one factor in this analysis.⁵⁵

RTFs are an attempt to shift the trend in modern nuisance jurisprudence away from fault-based valuations, at least as it relates to farming. Most RTFs, at the very least, reflect the legislative judgment that plaintiffs who "come to the nuisance" are to blame for their own troubles and hence should not be protected by nuisance law. In this sense, RTFs call for a return to the fault-based world of the common law. RTFs allocate blame according to the type of land use (agricultural versus nonagricultural) and priority of use.⁵⁶ At the same time, RTFs offer farms property rule protection in their entitlement to operate, preventing courts from flexibly resolving land use conflicts.⁵⁷

C. Municipal Zoning Power

Zoning is the flip side of nuisance law. Where nuisance law relies on judges to resolve conflicts in land use, zoning vests municipalities with the prescriptive right to resolve land use conflicts in advance.⁵⁸ Until the late nineteenth century, most municipalities enacted few formal land use controls.⁵⁹ By the 1920s, however, many cities had adopted zoning ordinances in order to regulate local land uses.⁶⁰ The

⁵³ See, e.g., *Abdella v. Smith*, 149 N.W.2d 537, 541 (Wis. 1967) ("A plaintiff, of course, is not *ipso facto* barred from relief in the courts merely because of 'coming to the nuisance,'" (citations omitted)).

⁵⁴ See, e.g., *Eller v. Koehler*, 67 N.E. 89, 90-91 (Ohio 1903) (factors include nature and importance of defendant's business, nature and frequency of disturbance, injuries disturbance causes, character of neighborhood, past actions by either party taken to reduce injury, and cost and feasibility of preventive measures).

⁵⁵ See, e.g., *Abdella*, 149 N.W.2d at 541 (finding that coming to nuisance was factor that "bears upon the question of whether the plaintiff used his land reasonably under the circumstances" (citation omitted)).

⁵⁶ See *infra* Part II.

⁵⁷ See *infra* Part III.B.

⁵⁸ See Robert H. Nelson, *Zoning Myth and Practice—From Euclid into the Future*, in *Zoning and the American Dream* 299, 302 (Charles M. Haar & Jerold S. Kayden eds., 1989) [hereinafter *Zoning and the American Dream*] (describing link between zoning and nuisance law).

⁵⁹ See David Listokin, *Introduction*, in *Land Use Controls: Present Problems and Future Reform* 3, 3 (David Listokin ed., 1974) (stating that except for building regulations enacted to prevent fire in cities, local governments were not active in regulating land use (citing William Goodman & Eric Freund, *Principles and Practice of Urban Planning* 15 (1968))).

⁶⁰ See Joe R. Feagin, *Arenas of Conflict: Zoning and Land Use Reform in Critical Political-Economic Perspective*, in *Zoning and the American Dream*, *supra* note 58, at 73, 80 (describing history of adoption of zoning ordinances); see also Daniels & Bowers, *supra* note 7, at 42 (same). In 1916, New York City became the first city in the United States to adopt a comprehensive zoning ordinance (i.e., with restrictions based on use, area, and

Supreme Court upheld the power of municipalities to zone based on the “health, morals, safety and general welfare of the community” in the landmark case *Village of Euclid v. Ambler Realty Co.*⁶¹ With that decision, zoning became firmly entrenched in the land use policies of urban areas. Suburbs did not widely adopt zoning as a means of regulating land use until the 1960s, and zoning did not appear in force in rural areas until the 1970s.⁶²

Euclidean zoning, named after the *Euclid* case, is the dominant form of zoning in the United States.⁶³ Euclidean zoning “anticipates conflicts or choices, identifies them in the abstract, reduces them to a limited number of generic cases, and then proceeds to resolve them in the body of the ordinance.”⁶⁴ Zoning achieves this prescriptive remedy by limiting landowners’ options according to three variables: the use to which land can be put (industrial, residential, commercial); the height above which structures cannot be built; and the area of a plot of land, as well as the area occupied by various structures built on the plot.⁶⁵

The critical issues raised by zoning have shifted with the demographic landscape. At its inception, zoning in urban areas was a response to unrelenting industrial expansion associated with early-twentieth century capitalism.⁶⁶ Thus, zoning displaced individual rights and substituted collective neighborhood rights over land use control.⁶⁷ For suburban localities, however, zoning served as a means of enforcing exclusionary social policy by restricting growth to reflect race and class prejudice.⁶⁸ Rural locales put zoning to divergent uses:

height). See Michael Kwartler, *Legislating Aesthetics: The Role of Zoning in Designing Cities*, in *Zoning and the American Dream*, supra note 58, at 187, 190.

⁶¹ 272 U.S. 365, 392 (1926).

⁶² See Daniels & Bowers, supra note 7, at 42.

⁶³ See James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 Harv. Envtl. L. Rev. 489, 492-93 (1994) (describing evolution of local zoning laws).

⁶⁴ Kwartler, supra note 60, at 195.

⁶⁵ See id. (describing Euclidean zoning).

⁶⁶ See Feagin, supra note 60, at 80 (arguing that zoning was direct result of negative effects of capitalist expansion). Feagin characterizes zoning as a conflict between exchange value and use value. See id. at 73. While exchange value is the dominant framework for land use decisions under unrestrained capitalism, use value, emphasizing utility rather than profitability, moderates zoning decisions. See id.

⁶⁷ See Nelson, supra note 58, at 301 (describing shift away from individual control over land use regulation).

⁶⁸ See Peter L. Abeles, *Planning and Zoning*, in *Zoning and the American Dream*, supra note 58, at 122, 124 (describing historical landmarks of planning and zoning). Exclusionary zoning has been well-described elsewhere. See, e.g., Bernard K. Ham, Comment, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 Seton Hall Const. L.J. 577 (1997) (reviewing effectiveness of New Jersey Supreme Court’s prohibition of exclusionary zoning).

On one hand, they may use zoning to “zone out” farming activities in order to facilitate residential development;⁶⁹ on the other hand, municipalities may use zoning to restrict further development by preserving open space.⁷⁰

RTFs proceed from the assumption that localities use zoning laws to “zone out” agricultural operations. Thus, many RTFs limit the power of local government to pass ordinances that restrict agricultural activity. The statutes also prevent local governments from passing ordinances that will cause a court of law to consider a farming activity a nuisance.

RTFs emerged in response to changes both in the day-to-day experience of farmers and in the legal framework for resolving conflicts between farmers and their neighbors. Suburbanization has increased pressures on farmers by creating incentives to sell land at residential prices and by increasing the number of neighbors potentially discomforted by farming practices. Potentially compounding the problem for agriculture, modern nuisance law has rejected the fault-based premise that might have offered solace to first-in-time farmers faced with suits from new neighbors. RTFs work an explicit shift in agricultural nuisance law to reverse this trend. The next Part of this Note will explore more precisely how RTFs accomplish this transformation.

II

OVERVIEW OF RTFs

Many states passed RTFs at a time when the conversion of agricultural land to urban uses drew attention.⁷¹ The laws operate in two related spheres to protect farmland. Most statutes limit the applicability of the common law of nuisance to farms.⁷² Some statutes, in addition, restrict the ability of local governments to use zoning to define agricultural operations as nuisances. In both scenarios, RTFs prevent established agricultural operations from becoming nuisances because of the actions of neighboring landowners.

Laws limiting the application of nuisance laws vary in their level of protection. Some RTFs codify an absolute “coming to the nui-

⁶⁹ See Opie, *supra* note 25, at 169-70.

⁷⁰ See Abeles, *supra* note 68, at 150 (describing recent “open space” zoning philosophy). Abeles suggests that the sudden rural (and suburban) interest in promoting open space is linked to the demise of exclusionary zoning as a viable tool for race- and class-based restrictions. See *id.* (observing rise of open space zoning at height of civil rights movement and suggesting zoning for open space is used as “final defense against the consequences of providing socially balanced residential land use plans” where communities are pessimistic about winning exclusionary zoning battle).

⁷¹ See *supra* notes 13-17 and accompanying text.

⁷² See *infra* Part II.B.

sance” defense.⁷³ Other RTFs act as a complete bar to nuisance actions brought against any agricultural operation that meets certain minimum conditions.⁷⁴ Laws that limit the power of local governments are similar in their declaration that no ordinance shall operate to make an agricultural operation a nuisance.⁷⁵

A. Overview and Purpose of Right-to-Farm Laws

Every state has passed an RTF.⁷⁶ The model RTFs were passed in the 1960s as feedlot nuisance statutes.⁷⁷ This Note addresses the modern laws, which extend protection to other agricultural operations. Almost every law acts as an absolute bar against public and

⁷³ See *infra* note 99.

⁷⁴ See *infra* notes 101-04 and accompanying text.

⁷⁵ See *infra* note 111.

⁷⁶ See Ala. Code § 6-5-127 (1993); Alaska Stat. § 09.45.235 (Michie 1996); Ariz. Rev. Stat. Ann. § 3-112 (West 1995); Ark. Code Ann. §§ 2-4-101 to -107 (Michie 1996); Cal. Civ. Code §§ 3482.5-6 (West 1997); Colo. Rev. Stat. §§ 35-3.5-101 to -103 (1997); Conn. Gen. Stat. Ann. § 19a-341 (West 1997); Del. Code Ann. tit. 3, § 1401 (1993); Fla. Stat. Ann. § 823.14 (West 1994 & Supp. 1998); Ga. Code Ann. § 41-1-7 (1997); Haw. Rev. Stat. §§ 165-1 to -6 (1993); Idaho Code §§ 22-4501 to -4504 (1995 & Supp. 1998); 740 Ill. Comp. Stat. 70/1-5 (West 1993 & Supp. 1998); Ind. Code Ann. § 34-19-1-4 (LEXIS Law 1998); Iowa Code Ann. § 352.11 (West Supp. 1998); Kan. Stat. Ann. §§ 2-3201 to -3203 (1991); Ky. Rev. Stat. Ann. § 413.072 (Michie Supp. 1996); La. Rev. Stat. Ann. §§ 3:3601-3612 (West 1987 & Supp. 1998); Me. Rev. Stat. Ann. tit. 17, § 2805 (West 1983 & Supp. 1997); Md. Code Ann., Cts. & Jud. Proc. § 5-403 (Supp. 1997); Mass. Gen. Laws Ann. ch. 243, § 6 (West Supp. 1998); Mich. Comp. Laws Ann. §§ 286.471-474 (West 1996); Minn. Stat. § 561.19 (1996); Miss. Code Ann. § 95-3-29 (1994); Mo. Rev. Stat. § 537.295 (1986); Mont. Code Ann. § 27-30-101(3) (1997); Neb. Rev. Stat. §§ 2-4401 to -4404 (1991); Nev. Rev. Stat. § 40.140(2) (1997); N.H. Rev. Stat. Ann. §§ 432:32-35 (1991 & Supp. 1997); N.J. Stat. Ann. §§ 4:1C-1 to 1C-10 (West 1998); N.M. Stat. Ann. §§ 47-9-1 to -7 (Michie 1995); N.Y. Agric. & Mkts. Law §§ 308, 308-a (McKinney Supp. 1998); N.C. Gen. Stat. §§ 106-700 to -701 (1995); N.D. Cent. Code §§ 42-04-01 to -05 (1983 & Supp. 1997); Ohio Rev. Code Ann. § 929.04 (West 1994); Okla. Stat. tit. 50, § 1.1 (1991); Or. Rev. Stat. §§ 30.930-.947 (1997); 3 Pa. Cons. Stat. Ann. §§ 951-957 (West 1995 & Supp. 1998); R.I. Gen. Laws §§ 2-23-1 to -7 (1987); S.C. Code Ann. §§ 46-45-10 to -60 (Law. Co-op. Supp. 1997); S.D. Codified Laws §§ 21-10-25.1-6 (Michie Supp. 1998); Tenn. Code Ann. §§ 43-26-101 to -104 (1993); Tex. Agric. Code Ann. §§ 251.001-.005 (West 1982 & Supp. 1998); Utah Code Ann. §§ 78-38-7 to -8 (1996); Vt. Stat. Ann. tit. 12, §§ 5751-53 (Supp. 1997); Va. Code Ann. §§ 3.1-22.28-.29 (Michie 1994); Wash. Rev. Code §§ 7.48.300-.310 (West 1996); W. Va. Code §§ 19-19-1 to -5 (1997); Wis. Stat. § 823.08 (1993-1994); Wyo. Stat. Ann. §§ 11-44-101 to -103 (Michie 1997). The Iowa Supreme Court has declared the substantive provision of Iowa’s RTF unconstitutional, while leaving the remainder of the statute intact. See *Borman v. Board of Supervisors*, No. 96-2276, 1998 WL 650904, at *14 (Iowa Sept. 23, 1998) (holding that Iowa Code Ann. § 352.11(a) (West Supp. 1998), providing farms immunity from nuisance suits, constitutes taking of private property without just compensation, in violation of state and federal constitutions). In all other states, RTFs remain in full effect.

⁷⁷ See Grossman & Fischer, *supra* note 8, at 111-12 (comparing feedlot statutes and RTFs).

private nuisance actions.⁷⁸ Of the fifty states that have passed modern versions of the legislation, all but eight passed their laws between 1979 and 1983.⁷⁹

North Carolina's Right-to-Farm Statute is considered a model statute.⁸⁰ Passed in 1979, the law's stated purpose is to protect against the extension of nonagricultural uses into agricultural areas.⁸¹ It provides that a farm operation may not become a nuisance because of changed conditions in the vicinity of the operation, so long as the farm has operated for one year, was not a nuisance when it began operating, and is not operated negligently or improperly.⁸² This protection legislates an absolute "coming to the nuisance" defense for agricultural operations that have existed for more than one year. North Carolina's law also declares null and void any local ordinance that would make a farm operation a nuisance.⁸³ In essence, any ordinance that makes a particular agricultural practice illegal (for example, running a tractor after 9 p.m.) will also make it a nuisance and thus would be void under the North Carolina statute. Thus, this statute severely limits the application of zoning ordinances to agricultural operations.

While states like North Carolina broke new ground with the passage of RTFs twenty years ago, the most recent agricultural protections are being enacted on the local level, rather than statewide. In New Jersey, for instance, seventy-nine municipalities had passed RTF ordinances by 1995.⁸⁴ These ordinances are more difficult to monitor, but some trends emerge from the reports of these ordinances. First, some municipalities are creating mediation panels to deal with nui-

⁷⁸ See, e.g., Miss. Code Ann. § 95-3-29(1) (1994) (providing absolute bar to nuisance actions provided certain conditions are met).

⁷⁹ For the exceptions, see Alaska Stat. § 09.45.235 (Michie 1996) (passed in 1986); Mass. Gen. Laws Ann. ch. 243, § 6 (West Supp. 1998) (passed in 1989); Nev. Rev. Stat. § 40.140(2) (1997) (passed in 1985); N.H. Rev. Stat. Ann. §§ 432:32-35 (1991) (passed in 1985); N.Y. Agric. & Mkts. Law § 308 (McKinney Supp. 1998) (passed in 1992); Or. Rev. Stat. §§ 30.930-.947 (1997) (passed in 1993); S.D. Codified Laws §§ 21-10-25.1 to .6 (Michie Supp. 1998) (passed in 1991); Wyo. Stat. Ann. §§ 11-44-101 to -103 (Michie 1997) (passed in 1991).

⁸⁰ See, e.g., Grossman & Fischer, *supra* note 8, at 119 ("North Carolina enacted one of the earliest and most influential right to farm laws in 1979.").

⁸¹ See N.C. Gen. Stat. § 106-700 (1995) ("When other 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.").

⁸² See *id.* § 106-701(a).

⁸³ See *id.* § 106-701(d).

⁸⁴ See Andy Newman, *Towns Putting It in Writing: Farms Are Loud and Smelly*, N.Y. Times, Sept. 17, 1995, § 13, at 6 (noting advent of municipal RTFs in New Jersey).

sance disputes.⁸⁵ Potential litigants must bring their disputes before these panels before filing suit. Second, many municipalities are passing ordinances requiring notification to prospective homebuyers of the existence of RTFs.⁸⁶ Third, some municipalities are requiring, along with notification, that new homebuyers waive their right to sue any farmer on a nuisance liability theory.⁸⁷

While these changes at the local level are important, this Note is primarily concerned with prevailing state law. The next subsection summarizes the existing RTFs with respect to certain critical characteristics.

B. Scope of Protection Offered by RTFs

RTFs vary in several important respects: the types of facilities covered by the statutes, the eligibility requirements for RTF protection, and the nature of the RTF protection.

In general, operations involved in producing agricultural products, such as crop raising and livestock production, can take advantage of RTFs.⁸⁸ However, there are two considerations for eligibility for RTF protection: whether processors of agricultural products and industrial operators in general are protected under the law and whether the law distinguishes among farm operations based on size or value of crops.

Processors of agricultural products are likely to receive RTF protection.⁸⁹ Only Alaska ties the protection of such processors to their

⁸⁵ See Maryland Right to Farm Plan Discussed, *York Daily Rec. (Md.)*, Apr. 30, 1996, at 6, available in 1996 WL 7873259 (discussing county ordinance establishing mediation panel based on another county).

⁸⁶ The ordinances vary with regard to the required notification. Some require simply notifying that farms are nearby and that they may generate noise, odor, etc. Others require that landowners be notified of the RTF and its ramifications. See Gene Fadness, *Getting Nosy: Idaho Bill Would Give Transplanted Urbanites a Whiff of Rural Life*, *Chi. Trib.*, Feb. 2, 1997, § 16, at 4 (describing proposed bill to require deed disclosure to prospective homeowners moving into rural areas, informing them of agricultural activities that cause odor, noise, and other problems).

⁸⁷ See *Farm Operations Protection Gets Nod*, *Spokesman Rev. (Spokane, Wash.)*, Feb. 15, 1997, at B4, available in 1997 WL 7704097 (reporting that Senate passed proposed amendments to Idaho's RTF that would take away homebuyers' right to sue about nearby farm practices on nuisance theory); *Vanishing Farmland: Experts Say Indiana Lags Behind in Checking Loss*, *Evansville Courier (Ill.)*, Mar. 10, 1997, at A10, available in 1997 WL 6521925 (discussing county ordinance that requires property owners to waive objections to agricultural use of land within two miles of their subdivision).

⁸⁸ I will use the term "primary agriculture" to refer to activities directed toward using the land directly to produce something useful to human beings such as crop growing and livestock raising. "Secondary agriculture" encompasses those activities that alter the product of primary agriculture in some way (meatpacking, processing, canning, cottonginning).

⁸⁹ See Ala. Code § 6-5-127(a) (1993) (protecting agricultural, industrial, or manufacturing "plant"); Ark. Code Ann. § 2-4-102 (Michie 1996) (protecting processors of crops, live-

connection with a primary agricultural producer.⁹⁰ Industrial operators, unsurprisingly, do not fall within the ambit of most RTFs. Two statutes, however, do explicitly extend RTF protection to industrial operators.⁹¹ In one reported case, an RTF protected a bleach manufacturer operating in Indianapolis from a nuisance suit.⁹²

The second variation in protected activities is size- or value-dependent. Some commentators have suggested that RTFs should protect only operations of a certain size or profitability.⁹³ Almost all of the laws currently in existence impose no such restrictions; they protect all agricultural operations, regardless of size.⁹⁴

Minnesota takes a singular, contrary approach to right-to-farm legislation. The Minnesota RTF has singled out large hog and cattle

stock, poultry, swine, or fish); Cal. Civ. Code § 3482.6(e) (West 1997) (protecting nonexclusive list of processors, such as beer and wine producers and bottlers, freezers and canners of agricultural products, and fruit and grain dryers); Ga. Code Ann. § 41-1-7(b)(1) (1997) (protecting processors of crops, livestock, animals, poultry, honeybees, and products used in commercial aquaculture); Idaho Code § 22-4502 (Supp. 1998) (protecting processors of livestock or agricultural commodities); Ky. Rev. Stat. Ann. § 413.072(3) (Michie Supp. 1996) (protecting facilities for production of livestock, poultry, and horticultural products); La. Rev. Stat. Ann. § 3:3602 (West 1987 & Supp. 1998) (protecting processors of crop, livestock, poultry, and other products); Miss. Code Ann. § 95-3-29(2)(a) (1994) (protecting processors of crops, livestock, fish, wood, and poultry); Mo. Rev. Stat. § 537.295(2) (1986) (protecting processors of crops, livestock, swine, and poultry); N.M. Stat. Ann. § 47-9-5 (Michie 1995) (substantially same as Georgia); N.C. Gen. Stat. § 106-701(b) (1995) (including livestock and poultry products); S.C. Code Ann. § 46-45-20(A) (Law. Co-op. Supp. 1997) (same as Georgia); S.D. Codified Laws § 21-10-25.3 (Michie Supp. 1998) (protecting processors of crops, timber, livestock, swine, and poultry); Wis. Stat. § 823.08(2) (1993-1994) (protecting any activity "associated with an agricultural use").

⁹⁰ Alaska's statute protects primary agricultural operations and "any practice conducted on the agricultural operation as an incident to or in conjunction with [primary agricultural] activities. . . ." Alaska Stat. § 09.45.235(d)(2) (Michie 1996). Thus, only agricultural processing conducted on the same site as primary agricultural activities are protected by Alaska's RTF.

⁹¹ See Ala. Code § 6-5-127 (1993); Ind. Code Ann. § 34-19-1-4 (LEXIS Law 1998). Ironically, Indiana's statement of purpose does not mention industrial users, just concern with the extension of nonagricultural uses into agricultural areas. See Ind. Code Ann. § 34-19-1-4(a) (LEXIS Law 1998) ("It is the purpose of this section 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.").

⁹² See *Erbrich Prod. Co. v. Wills*, 509 N.E.2d 850, 852 (Ind. Ct. App. 1987). *Erbrich* is discussed in more detail *infra* notes 156-57 and accompanying text.

⁹³ See Grossman & Fischer, *supra* note 8, at 126 (arguing that laws should protect large operations, not family farms).

⁹⁴ Pennsylvania, Nebraska, West Virginia, and Minnesota are the four exceptions. Pennsylvania, West Virginia, and Nebraska extend the right to farm protection only to farms of a certain size or profitability. Pennsylvania requires farms to be greater than 10 acres in size, or to generate more than \$10,000 in annual income, in order to qualify for protection. See 3 Pa. Cons. Stat. Ann. § 952 (West Supp. 1998). Nebraska has a 10 acre minimum size requirement. See Neb. Rev. Stat. § 2-4402(1) (1991). West Virginia requires a farm to be at least five acres and to sell at least \$1000 in agricultural products. See W. Va. Code § 19-19-2(b) (1997).

operations as not meriting protection against nuisance laws.⁹⁵ Hog operations larger than 1,000 hogs and cattle operations larger than 2,500 cattle do not receive RTF protection.⁹⁶ This statute is unique in denying protection to larger operations and in singling out livestock operations.⁹⁷

Once a particular facility is considered eligible for protection, most RTFs impose additional requirements before extending such protection. In general, the requirements focus on three variables: changed conditions in the vicinity of the agricultural operation, time elapsed since the operation was established, and the manner in which the operation has functioned since its establishment.

By focusing on changed conditions in the vicinity, RTFs are more likely to narrow their impact to those cases in which a "coming to the nuisance" defense would apply. The majority of these statutes, in addition to limiting their application to nuisances created by changed conditions in the vicinity of the operation, also require that the operation was not a nuisance when it began and that the operation has been in existence for a certain time period (time since established date of operation, or EDO), usually one year.⁹⁸

Some statutes require that a farm have been on the land before the plaintiff acquired an interest in the land or before any changes in the vicinity occurred.⁹⁹ While RTFs enumerate minimal requirements

⁹⁵ See Minn. Stat. § 561.19(2)(c)(4) (1996).

⁹⁶ See *id.*

⁹⁷ The rationale for Minnesota's exclusion is not clear, although the state is generally unwelcoming to corporate farmers. See Katherine R. Smith & Peter J. Kuch, *What We Know About Opportunities for Intergovernmental Institutional Innovation: Policy Issues for an Industrializing Animal Agriculture Sector*, 77 *Am. J. Agric. Econ.* 1244, 1246 (1995) (comparing Iowa and Minnesota's treatment of corporate farms). The state's focus on hog and cattle operations is particularly important given that most agricultural nuisance cases involve livestock operations (particularly hograising) and that much of the conflict surrounding RTFs involves hograising. See *infra* notes 178-79 and accompanying text.

⁹⁸ See Ala. Code § 6-5-127 (1993) (requiring one year of operation); Alaska Stat. § 09.45.235 (Michie 1996) (requiring three years of operation); Ark. Code Ann. § 2-4-107 (Michie 1996) (one year); Cal. Civ. Code § 3482.6(a) (West 1997) (three years); Colo. Rev. Stat. § 35-3.5-102 (1997) (one year); Fla. Stat. Ann. § 823.14(4)(b) (West 1994) (same); Idaho Code § 22-4503 (1995) (same); 740 Ill. Comp. Stat. 70/3 (West 1993) (same); Ind. Code Ann. § 34-19-1-4(c) (LEXIS Law 1998) (same); Ky. Rev. Stat. Ann. § 413.072(2) (Michie Supp. 1996) (same); Mo. Rev. Stat. § 537.295 (1986) (same); N.H. Rev. Stat. Ann. § 432:33 (1991) (same); N.M. Stat. Ann. § 47-9-3 (Michie 1995) (same); N.C. Gen. Stat. § 106-701(a) (1995) (same); N.D. Cent. Code § 42-04-02 (1983) (same).

⁹⁹ See Ariz. Rev. Stat. Ann. § 3-112 (West 1995) (protecting operations established "prior to surrounding nonagricultural uses"); Kan. Stat. Ann. § 2-3202 (1991) (same); La. Rev. Stat. Ann. § 3:3603(B)(2) (West Supp. 1998) (protecting operations established prior to plaintiff acquiring interest in land); Me. Rev. Stat. Ann. tit. 17, § 2805(3) (West 1983) (protecting operations established prior to change in land use or occupancy); Mich. Comp. Laws Ann. § 286.473(2) (West 1996) (same as Maine); Mont. Code Ann. § 27-30-101(3) (1997) (protecting operations established prior to plaintiff acquiring possession); Neb. Rev.

other than prior use,¹⁰⁰ for the most part the laws protect farms simply for being there first.

Many RTFs require a farm to be in place for a certain period of time before granting protection, but these statutes also require that the plaintiffs have "come to the nuisance." Some statutes, however, provide immunity from common law nuisance suits regardless of when the farm operation was established. In some cases, the farm must have been established for one year, with no significant changes in the type of operation.¹⁰¹ Only one of these statutes defines a significant change in operation.¹⁰² In these statutes, the RTF essentially establishes a statute of limitations for nuisance actions brought against agri-

Stat. § 2-4403 (1991) (same as Maine); Nev. Rev. Stat. § 40.140(2) (1997) (same as Arizona); Ohio Rev. Code Ann. § 929.04 (West 1994) (protecting operations established prior to plaintiff's activities or interest in land); Okla. Stat. tit. 50, § 1.1 (1991) (similar to Arizona); S.C. Code Ann. § 46-45-30 (Law. Co-op. Supp. 1997) (protecting operations established prior to changed conditions in vicinity); Tenn. Code Ann. § 43-26-103 (1993) (same as Maine); Vt. Stat. Ann. tit. 12, § 5753 (Supp. 1997) (same as Arizona); Wash. Rev. Code § 7.48.305 (West 1996) (same); W. Va. Code § 19-19-4 (1997) (protecting operations established prior to plaintiff's use and occupancy of land); Wis. Stat. § 823.08 (1993-1994) (protecting operations established prior to plaintiff's use of land); Wyo. Stat. Ann. § 11-44-103 (Michie 1997) (protecting operations established prior to change in land use adjacent to farm).

¹⁰⁰ Some states require that the farm not have been a nuisance when it began operating and limit the vicinity of changed conditions to within one mile of the farm. See Me. Rev. Stat. Ann. tit. 17, § 2805(3) (West 1983); Mich. Comp. Laws Ann. § 286.473(2) (West 1996); Tenn. Code Ann. § 43-26-103 (1993). Others simply require that it was not a nuisance when it began operating. See Neb. Rev. Stat. § 2-4403 (1991); Wyo. Stat. Ann. § 11-44-103 (Michie 1997) (requiring farm to also operate according to generally accepted practices). Still others require only that the farm be operating according to generally accepted management practices. See Ariz. Rev. Stat. Ann. § 3-112 (West 1995); Nev. Rev. Stat. § 40.140(2) (1997); Ohio Rev. Code Ann. § 929.04 (West 1994); Okla. Stat. tit. 50, § 1.1 (1991); Vt. Stat. Ann. tit. 12, § 5753 (Supp. 1997); Wash. Rev. Code § 7.48.305 (West 1996).

¹⁰¹ See Conn. Gen. Stat. Ann. § 19a-341 (West 1997) (requiring farm to follow generally accepted practice and stating that substantial change in operation creates new EDO); Haw. Rev. Stat. § 165-4 (1993) (providing that physical expansion or new technology creates new EDO); Md. Code Ann., Cts. & Jud. Proc. § 5-403 (Supp. 1997) (requiring one year since EDO and providing for new EDO with change in operation); Minn. Stat. § 561.19 (1996) (requiring two years since EDO, and providing new EDO with expansion in operation); Miss. Code Ann. § 95-3-29(1) (1994) (expanding physical facilities creates new EDO); S.D. Codified Laws § 21-10-25.2 (Michie Supp. 1998) (requiring one year since EDO, and allowing reasonable expansion); Tex. Agric. Code Ann. § 251.004 (West 1982) (providing for separate EDO with each expansion).

¹⁰² See Minn. Stat. § 561.19(b)(1) (1996):

[A]n expansion by at least 25 percent in the amount of a particular crop grown or the number of a particular kind of animal or livestock located on an agricultural operation [or] a distinct change in the kind of agricultural operation, as in changing from one kind of crop, livestock, animal, or product to another, but not merely a change from one generally accepted agricultural practice to another in producing the same crop or product.

cultural operations.¹⁰³ Other statutes protect agricultural operations from all nuisance actions, with no "first in time" or EDO requirements.¹⁰⁴

Rather than focusing on priority of use or time in operation, some RTFs offer protection based on how the defendant operates its farm. Many RTFs protect any farm that conforms to generally accepted practices regardless of other circumstances.¹⁰⁵ In at least one case, this protection is qualified by a requirement that the farm be in operation for one year.¹⁰⁶

In addition, some statutes set guidelines for dealing with changes in the nature of the agricultural operation, as opposed to the vicinity of the operation. These RTFs state the point at which a farm operation is deemed to have changed so substantially that the one-year time requirement begins again.¹⁰⁷ On the other hand, some statutes explicitly state that even if the farm has made a change in operation, the RTF still protects the new operation as long as the original operation

¹⁰³ See *Bowen v. Flaherty*, 601 So. 2d 860, 863 (Miss. 1992) (treating Mississippi statute as one-year statute of limitation for agricultural nuisance actions).

¹⁰⁴ See Or. Rev. Stat. § 30.936 (1997) (limiting protection to farms outside urban growth boundary); R.I. Gen. Laws § 2-23-5 (1987) (restricting application to actions complaining of odor, noise, dust, and chemicals). Interestingly, Oregon's RTF does not apply to actions brought for damages to commercial agricultural products. See Or. Rev. Stat. § 30.036(2)(a) (1997). This would apparently be motivated by a desire to protect other agricultural operations. It is echoed by Ohio's RTF. See Ohio Rev. Code Ann. § 929.04 (West 1994) (withholding application in actions where plaintiff is involved in agriculture). In West Virginia, a farm has blanket protection when its uses interfere with nonagricultural uses, but if an adjoining property owner can complain of harm to an agricultural operation, the complainant was present prior to the agricultural operation complained of, and the conduct complained of "has caused or will cause actual physical damage," then a nuisance suit may be brought. See W. Va. Code § 19-19-4 (1997).

¹⁰⁵ See Me. Rev. Stat. Ann. tit. 17, § 2805 (West 1983 & Supp. 1997) (requiring conformity with generally accepted agricultural practices); Mich. Comp. Laws Ann. § 286.473(1) (West 1996) (requiring conformity with "agricultural and management practices"); N.J. Stat. Ann. § 4:1C-10 (West 1998) (requiring conformity with agricultural management practices recommended by state committee); N.Y. Agric. & Mkts. Law § 308 (McKinney Supp. 1998) (requiring written commissioner's ruling declaring "sound agricultural practice"); Tenn. Code Ann. § 43-26-103 (1993) (requiring conformity with agricultural and management practices promulgated by department of agriculture); Utah Code Ann. § 78-38-7 (1996) (requiring conformity with sound agricultural practices); Va. Code Ann. § 3.1-22.29 (Michie 1994) (requiring conformity with best management practices).

¹⁰⁶ See Mass. Gen. Laws Ann. ch. 243, § 6 (West Supp. 1998).

¹⁰⁷ See Ark. Code Ann. § 2-4-104 (Michie 1996) (providing for new EDO with material increase in size or change in character); Colo. Rev. Stat. § 35-3.5-102 (1997) (providing for new EDO with change in operation or substantial increase in size); Fla. Stat. Ann. § 823.14 (West 1994 & Supp. 1998) (providing for new EDO with any expanded land boundary); Ind. Code Ann. § 34-19-1-4 (LEXIS Law 1998) (providing for new EDO with any significant change in hours or type of operation); 3 Pa. Cons. Stat. Ann. § 954 (West 1995) (providing for new EDO if physical facility is substantially altered or expanded).

has existed for more than one year.¹⁰⁸ Most of the statutes are silent on this question.

The final variable is the nature of protection offered by the statute. For the most part, RTFs act as a complete defense against public and private nuisance actions.¹⁰⁹ In addition, most RTFs offer additional protection by limiting local government's ability to regulate agriculture and by awarding costs and fees to agricultural operations that are successful in defending a nuisance suit.¹¹⁰

Many RTFs provide that zoning ordinances and municipal ordinances cannot render a farming operation a nuisance.¹¹¹ This provision prevents the application of new concepts of nuisance to agricultural operations. State legislatures are likely to enact provi-

¹⁰⁸ See Mo. Rev. Stat. § 537.295 (1986) (allowing reasonable expansion); N.M. Stat. Ann. § 47-9-3(c) (Michie 1995) (refusing to consider expanded facility or new technology to be change in EDO).

¹⁰⁹ For exceptions, see Alaska Stat. § 09.45.235 (Michie 1996) (barring only private nuisance); Ariz. Rev. Stat. Ann. § 3-112 (West 1995) (creating presumption that is essentially nuisance bar); Kan. Stat. Ann. § 2-3202 (1991) (same); Minn. Stat. § 561.19 (1996) (barring private or public nuisance); N.Y. Agric. & Mkts. Law § 308 (McKinney Supp. 1998); (barring only private nuisance); Tenn. Code Ann. § 43-26-103 (1993) (creating rebuttable presumption that farm is not nuisance); Vt. Stat. Ann. tit. 12, § 5753 (Supp. 1997) (same); Wash. Rev. Code § 7.48.305 (West 1996) (creating presumption that farm is not nuisance).

¹¹⁰ See Haw. Rev. Stat. § 165-5 (1993) (applying only if suit found to be frivolous); 740 Ill. Comp. Stat. 70/4.5 (West Supp. 1998) (awarding reasonable costs and attorneys' fees if defendant prevails); La. Rev. Stat. Ann. § 3:3605 (West 1987) (same as Hawaii); N.M. Stat. Ann. § 47-9-7 (Michie 1995) (same as Hawaii); N.Y. Agric. & Mkts. Law § 303-a (McKinney Supp. 1998) (same as Illinois); S.D. Codified Laws § 21-10-25.6 (Michie Supp. 1998) (same as Hawaii); Tex. Agric. Code Ann. § 251.004(b) (West 1982) (same as Illinois); Wis. Stat. § 823.08(4) (1993-1994) (same as Illinois).

¹¹¹ See Ala. Code § 6-5-127(c) (Michie Supp. 1997):

Any and all ordinances now or hereafter adopted by any municipal corporation in which such plant is located, operating to make the operation of any such plant, establishment, or any farming operation facility, or its appurtenances a nuisance or providing for an abatement thereof as a nuisance in the circumstances set forth in this section are, and shall be, null and void.

See also Alaska Stat. § 09.45.235 (Michie 1996) (providing that RTF supersedes municipal ordinances, resolutions, or regulations to contrary); Ark. Code Ann. § 2-4-105 (Michie 1996) (rendering void local ordinances which make operation of agricultural facility nuisance); Colo. Rev. Stat. § 35-3.5-102(3) (1997) (substantially similar to Alabama, but excepting farms located in city at time of enactment); Conn. Gen. Stat. Ann. § 19a-341 (West 1997) (substantially similar to Alabama); Idaho Code § 22-4504 (Supp. 1998) (same); Ky. Rev. Stat. Ann. § 413.072(7) (Michie Supp. 1996) (same); La. Rev. Stat. Ann. § 3:3607 (West 1987 & Supp. 1998) (same); N.M. Stat. Ann. § 47-9-3(B) (Michie 1995) (substantially similar to Alabama, but excepting farms located in city at time of enactment); N.C. Gen. Stat. § 106-701 (1995) (same); N.D. Cent. Code § 42-04-04 (1983) (same); Or. Rev. Stat. § 30.935 (1997) (substantially similar to Alabama); 3 Pa. Cons. Stat. Ann. § 953 (West 1995) (same); S.C. Code Ann. § 46-45-60 (Law. Co-op. Supp. 1997) (substantially similar to Alabama, but excepting farms located in city at time of enactment); Va. Code Ann. § 3.1-22.28 (Michie 1994) (substantially similar to Alabama, but excepting ordinances related to health, safety, and general welfare).

sions such as these to prevent a nonfarming majority in a municipality from "zoning out" agricultural land uses. As such, the justification for this aspect of RTFs may rest on a vision of politically vulnerable farmers that is empirically questionable.¹¹²

RTFs, then, serve many functions. They eviscerate the common law of nuisance as applied to farming operations. They severely limit the ability of local government to regulate agricultural land uses. RTFs, in essence, privilege the rights of agricultural land uses over all others. The next Part closely examines the justifications offered in support of this privilege and offers a theoretical and empirical critique of the enthusiasm for RTFs.

III

CRITIQUING AND RESOLVING THE RIGHT TO FARM

Legislatures passed RTFs in the face of little organized opposition.¹¹³ Could countless legislatures have gotten it wrong? This Part will first scrutinize the empirical justifications offered by supporters of RTFs, consider problems in RTFs' structure, and review resulting difficulties in application of the statutes. Second, this Part will discuss the theoretical problems of RTFs from the perspectives of various property theories.

A. A Critical Examination of RTFs

1. *Hollow Justifications*

As discussed above, the standard justification for RTFs revolves around protecting farmers from a barrage of nuisance complaints created either through common law or municipal zoning ordinances.¹¹⁴ Yet this claim may not accurately describe the empirical facts for two reasons. First, the focus on nuisance suits is overstated, if not actually

¹¹² Such a rationale does not seem satisfactory, given the historical clout that farmers have wielded in order to avoid regulations related to labor and health and safety laws. For instance, in 1996, California strawberry growers successfully convinced Governor Pete Wilson and a special session of the California legislature to postpone a pending ban of methyl bromide, an ozone-depleting fungicide. See Robert P. Gunnison, *Wilson Signs Extension to Methyl Bromide Use*, S.F. Chron., Mar. 13, 1996, at A18. In addition, the Labor-Management Relations Act, successor to the National Labor Relations Act, does not protect farmworkers, despite the importance of unionization in the industry. See 29 U.S.C. § 152(3) (1994) (excluding agricultural workers from those protected by Act); cf. Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 Hamline L. Rev. 649, 655-56 (1989) (describing influence of farm lobby in gaining exemption of agricultural labor from initial federal minimum wage law).

¹¹³ Interviews with state farm bureaus support this contention. See, e.g., Telephone Interview with Glen Jones, Director of Research, Education, and Policy Development, Texas Farm Bureau (Mar. 18, 1998) (stating that there was no opposition to state RTF).

¹¹⁴ See *supra* notes 15-17 and accompanying text.

misleading. Second, the claim that farming is endangered by the encroachment of residential developments is questionable.

There are three ways in which the standard emphasis on deleterious effects of nuisance suits is inconsistent with available evidence: the typical defendants are a limited class of operators who do not contribute to many of the goals of RTFs; the typical plaintiffs are not new residents; and the frequency of nuisance suits is exaggerated. Reported cases indicate that livestock operators, not small crop growers, are defendants in most nuisance suits, and rural residents, not suburban newcomers, bring most suits.¹¹⁵ Where states have passed RTFs, supporters are often unable to point to specific problems with an inordinate number of nuisance suits.¹¹⁶ This is true even of state farm bureaus, the most ardent supporters of RTFs.¹¹⁷ In addition, there was no reported explosion of nuisance suits prior to the adoption of most RTFs between 1979 and 1983.¹¹⁸ In New Jersey, relatively few conflicts were reported between 1960 and 1980.¹¹⁹ Only thirty percent of 280 New Jersey farmers contacted had ever received a complaint from a neighbor, according to a Kean College study.¹²⁰ Finally, several states have strengthened RTFs over the past several years, in the absence of any reported evidence that the existing laws were insufficiently protective.¹²¹ The rhetorical appeal to the onslaught of nuisance suits thus appears to have little basis.

¹¹⁵ See Grossman & Fischer, *supra* note 8, at 101, 112 (noting trends in reported cases).

¹¹⁶ See Gwen Ifill, *Farm Bill Approved in P.G.*, Wash. Post Md. Wkly., Oct. 18, 1984, at Md.1 (stating that although backers claim that complaints put farms out of business, planner with Maryland's Capital Park and Planning Commission was unaware of any lawsuits that had arisen out of complaints); Grant Moos, *Louisiana: New 'Takings' Law Requires Compensation for Agricultural, Forest Land*, West's Legal News 1188, Aug. 16, 1995, available in 1995 WL 908901 (stating that there had been few problems in Louisiana, but Farm Bureau wanted to be "out in front"); Lani Wiegand, *Committee Approves Right-to-Farm Bill*, U.P.I., May 7, 1981, available in LEXIS, News Library, UPI File (noting that supporters "could not estimate the number of nuisance lawsuits filed each year or the number of farmers put out of business by complaining neighbors, [but said] the problem was severe").

¹¹⁷ See Telephone Interview with Richard S. Hannah, Executive Secretary, West Virginia Farm Bureau (Mar. 18, 1998) (stating that Farm Bureau wanted law on books in advance of any particular problem); Telephone Interview with Rodney Baker, Director of Governmental Affairs, Arkansas Farm Bureau (Mar. 19, 1998) (same).

¹¹⁸ This observation refers only to reported cases, but a large increase in nuisance suits in general would likely be reflected in the reported cases as well.

¹¹⁹ See Anthony De Palma, *Right-to-Farm Gains Backing*, N.Y. Times, Nov. 16, 1980, § 11, at 1 (stating that "a few incidents suggested that there might be more trouble ahead"). One case reported to indicate a possibility of trouble in New Jersey involved a judge limiting days on which a hog farmer could spread out manure in a field adjacent to private homes. See *id.*

¹²⁰ See *id.*

¹²¹ The effectiveness of existing right-to-farm laws was discussed in Part II.B, *supra*. There is anecdotal evidence that some of the legislation has had the effect of decreasing lawsuits. See, e.g., *Farm Law Said to Work*, U.P.I., July 30, 1982, available in LEXIS, News

In addition, farmland on the edge of suburbia is arguably a long way from being threatened with extinction, even when neighbors pursue complaints of nuisance.¹²² The NALS study, which provided much of the support for early RTFs, has been criticized on empirical grounds since its release.¹²³ While the amount of farmland in metropolitan areas increased by nearly fifty percent between 1974 and 1982, the evidence suggests that prime farmland is better utilized in metropolitan areas than outside metropolitan areas.¹²⁴ The benefits of urbanization include access to specialized markets and off-farm employment, higher farm equity because of higher property values,¹²⁵ and political support for farmland measures.¹²⁶

A study of agriculture in western Washington supports the position that urbanization is not necessarily detrimental to the farming economy. Relying on county-level data, the U.S. Census, and the U.S. Bureau of Economic Analysis, Linda Klein and John Reganold studied changes in agriculture in western Washington from 1974 to 1992.¹²⁷ Interestingly, the number of farms increased between 1974 and 1992, with ninety-six percent of the increase occurring in metropolitan counties.¹²⁸ Most of this increase, however, took place from 1974 until 1982.¹²⁹ Farm numbers began to decline after reaching

Library, UPI File (reporting study released by Michigan Agriculture Department stating more than 20 attorneys had requested copies of law, and law had been used in eight counties). Given the lack of data available for these types of cases before the law was passed, the significance of this data is unclear. There is also no assurance that the law has been used correctly to resolve complaints.

¹²² See Clifton B. Luttrell, Reexamining the "Shrinking" Farmland Crisis, in *Vanishing Farmland*, supra note 14, at 31, 40 ("Considering that cropland acreage is not shrinking, that crop yields have increased, and that food costs as a percentage of personal income have declined, allegations of a shrinking farmland appear to be unfounded.").

¹²³ See Fischel, supra note 14, at 80-92 (criticizing data and conclusions of NALS study); see generally Julian L. Simon, *Some False Notions About Farmland Preservation*, in *Vanishing Farmland*, supra note 14, at 59 (same).

¹²⁴ See Ralph Heimlich, *Agriculture Adapts to Urbanization*, 14 *Food Rev.* 21, 21 (1991) ("The best farmland is actually more fully utilized in metro areas. That is, the percentage of prime farmland used for crop production is higher in metro areas than in nonmetro areas."). In addition, metro farmers farm more intensively, doubling the gross sales per acre compared with nonmetro farmers. See *id.* at 23 (citing sales of \$241 versus \$115 per acre).

¹²⁵ See U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., *Agricultural Land Values and Agricultural Cash Rents* (Oct. 1, 1997) <http://usda2.mannlib.cornell.edu/reports/nassr/other/plrbb/agricultural_land_values_10.01.97> (reporting that since 1987, average value of farm real estate has increased 57%).

¹²⁶ See Heimlich, supra note 124, at 22 (reporting 1982 Iowa survey showing metropolitan area residents were more concerned than farmers about land use problems).

¹²⁷ See Linda R. Klein & John P. Reganold, *Agricultural Changes and Farmland Protection in Western Washington*, 52 *J. Soil & Water Conservation*, Jan.-Feb. 1997, at 6.

¹²⁸ See *id.* at 8 (reporting overall increase of 10%).

¹²⁹ See *id.* (noting that number of farms declined after reaching peak in 1982).

their highest levels in 1982.¹³⁰ While the number of farms increased, the average size decreased.¹³¹ The amount of land devoted to farmland experienced its greatest decrease from 1982 to 1992, although agricultural sector earnings increased during this time period.¹³² In part, the increased urbanization of farms influenced this shift by bringing a larger consumer base, more efficient transportation, shorter distances to local markets, and direct marketing opportunities.¹³³

Available national and regional studies support the data from Washington.¹³⁴ Thus, the empirical data suggest first, that there has not been a significant problem with nuisance suits directed against farmers on the edges of developing suburbia and second, that farmland in metropolitan areas was functioning successfully prior to the adoption of RTFs.¹³⁵ Given the available evidence, RTF proponents cannot support the offered justifications.

2. *Overbroad Structure of RTFs*

RTFs suffer from numerous structural defects. Some weaknesses, such as lack of a clearly stated legislative purpose and poor definition of key terms, invite misunderstanding by courts and municipalities.

¹³⁰ See *id.* (noting decline of about 20% in nonmetropolitan and metropolitan counties alike).

¹³¹ See *id.* (reporting average decrease from 77 to 59 acres in metropolitan areas, with decrease from 141 to 99 acres in nonmetro areas).

¹³² See *id.* at 9 (reporting that between 1982 and 1992, western Washington's agricultural sector earnings grew by approximately 50%, while farmland area decreased by 16%).

¹³³ See *id.* (observing "locational advantages" of farms located in metropolitan areas). The Washington study provides some evidence that population growth is linked to a decrease in acreage devoted to farmland. In western Washington, population growth did not necessarily correlate with farmland loss. The greatest period of farmland loss (between 1982 and 1987) occurred *before* the greatest period of population growth (between 1987 and 1992). See *id.* (reporting 15% population growth between 1987 and 1992 and 10% farmland decline between 1982 and 1987). While residential development was primarily responsible for the conversion of farmland to urban uses, environmental regulations also had an impact. The timing of the pattern of population growth and farmland loss is consistent with residential development, necessarily preceded by farmland loss, leading to the increase in population.

¹³⁴ See William Lockeretz, *Secondary Effects on Midwestern Agriculture of Metropolitan Development and Decreases in Farmland*, 65 *Land Econ.* 205, 215 (1989) (finding that results of studies fail to support proposition that metropolitan expansion has had adverse effect on remaining farmland).

¹³⁵ On the other hand, some farmers may have received informal complaints, and the number of reported nuisance suits likely underestimates the number of cases litigated. If so, RTFs might play a role in the informal resolution of conflicting land uses (e.g., by convincing a potential plaintiff that a lawsuit will be unsuccessful). There is little way of confirming or denying this possibility, although conversations with state farm bureaus support it. See, e.g., Telephone Interview with Andy Ellen, Associate General Counsel, North Carolina Farm Bureau (Mar. 18, 1998) (reporting experience that state RTF is used more often in informal resolution of conflict).

Other defects reflect a faulty legislative judgment to overprotect agricultural operations.

RTFs usually lack, or only vaguely provide, a statement of legislative purpose to guide their interpretation.¹³⁶ Statements of legislative purpose are important for at least two reasons. First, a clear statement of purpose will aid courts in interpreting the laws, so that judges do not apply the laws inappropriately.¹³⁷ If there is no statement of purpose, a court may apply the law more broadly than the legislature intended. Second, the statement of purpose provides a framework to analyze the effectiveness of the law in meeting its goals.

Twenty-six of the current laws contain no statement of purpose.¹³⁸ In thirteen of these states, the absence of a legislative purpose does not present interpretive problems because the protection afforded by the statute is triggered only when there have been changed conditions in the vicinity of the agricultural operation.¹³⁹ This requirement, while not restricted to situations where urbanization is threatening farmland, provides an absolute defense in cases where the plaintiff has "come to the nuisance." In the states that have neither a statement of purpose nor "changed conditions" language, courts may interpret the protection broadly.

Laws containing a statement of purpose may be divided into three groups. First are laws in which the legislature specifically states an intent to protect agriculture against the encroachment of urbaniza-

¹³⁶ See *supra* Part II.A.

¹³⁷ See, e.g., *Laux v. Chopin Land Assoc.*, 550 N.E.2d 100, 103 (Ind. Ct. App. 1992) (interpreting "changed conditions" criteria as requiring change in vicinity of agricultural operation before nuisance suit could be initiated).

¹³⁸ See Ala. Code § 6-5-127 (Michie Supp. 1997); Alaska Stat. § 09.45.235 (Michie 1996); Ariz. Rev. Stat. Ann. § 3-112 (West 1995); Cal. Civ. Code §§ 3482.5-6 (West 1997); Colo. Rev. Stat. § 35-3.5-102 (1997); Conn. Gen. Stat. Ann. § 19a-341 (West 1997); Del. Code Ann. tit. 3, § 1401 (1993); Iowa Code Ann. § 352.11 (West Supp. 1998); Me. Rev. Stat. Ann. tit. 17, § 2805 (West 1983 & Supp. 1997); Md. Code Ann., Cts. & Jud. Proc. § 5-403 (Supp. 1997); Mass. Gen. Laws ch. 243, § 6 (Law. Co-op. Supp. 1998); Mich. Comp. Laws Ann. §§ 286.471-473 (West 1996); Minn. Stat. § 561.19 (1996); Miss. Code Ann. § 95-3-29 (1994); Mo. Rev. Stat. § 537.295 (1986); Mont. Code Ann. § 27-30-101(3) (1997); Neb. Rev. Stat. §§ 2-4401 to -4404 (1991); Nev. Rev. Stat. § 40.140(2) (1997); N.H. Rev. Stat. Ann. §§ 432:32-35 (1991 & Supp. 1997); N.Y. Agric. & Mkts. Law §§ 308, 308-a (McKinney Supp. 1998); N.D. Cent. Code §§ 42-04-01 to -05 (1983 & Supp. 1997); Ohio Rev. Code Ann. § 929.04 (West 1994); Okla. Stat. tit. 50, § 1.1 (1991); Tenn. Code Ann. §§ 43-26-101 to -104 (1993); Utah Code Ann. §§ 78-38-7 to -8 (1996); Wyo. Stat. Ann. §§ 11-44-101 to -103 (Michie 1997).

¹³⁹ See Ala. Code § 6-5-127 (1993); Alaska Stat. § 09.45.235 (Michie 1996); Cal. Civ. Code § 3482.5 (West 1997); Colo. Rev. Stat. § 35-3.5-102 (1997); Del. Code Ann. tit. 3, § 1401 (1993); Mo. Rev. Stat. § 537.295 (1986); Neb. Rev. Stat. § 2-4403 (1991); Nev. Rev. Stat. § 40.140(2) (1997); N.H. Rev. Stat. Ann. § 432:33 (1991); N.D. Cent. Code § 42-04-02 (1983); Okla. Stat. tit. 50, § 1.1 (1991); Tenn. Code Ann. § 43-26-103 (1993); Wyo. Stat. Ann. § 11-44-103 (Michie 1997).

tion.¹⁴⁰ Second are laws that reflect a more generalized concern with extension of nonagricultural uses into agricultural areas.¹⁴¹ The third type of law is designed to promote, protect, conserve, or preserve agriculture in general.¹⁴² The difference between these stated purposes lies in the breadth of protection the legislature apparently intended. Without clearly stated legislative goals, a court may not know how to interpret a broadly protective law.¹⁴³

¹⁴⁰ See Idaho Code § 22-4501 (1995):

The legislature finds that agricultural activities conducted on farmland in urbanizing areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature removal of the lands from agricultural uses, and in some cases prohibit investments in agricultural improvements. It is the intent of the legislature 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.

See also Or. Rev. Stat. § 30.933 (1997) (substantially similar language); R.I. Gen. Laws § 2-23-3 (1987) (same); Vt. Stat. Ann. tit. 12, § 5751 (Supp. 1997) (same); Wash. Rev. Code § 7.48.300 (West 1996) (same); Wis. Stat. § 823.08 (1993-1994) (same).

¹⁴¹ See Ark. Code Ann. § 2-4-101 (Michie 1996):

It is the declared policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land and other facilities 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 or other agricultural improvements. It is the purpose of this chapter 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.

See also Colo. Rev. Stat. § 35-3.5-101 (1997) (substantially similar language); Ga. Code Ann. § 41-1-7(a) (1997) (same); Haw. Rev. Stat. § 165-1 (1993) (same); 740 Ill. Comp. Stat. 70/1 (West 1993) (same); Ind. Code Ann. § 34-19-1-4(a) (LEXIS Law 1998) (same); Kan. Stat. Ann. § 2-3201 (1991) (same); Ky. Rev. Stat. Ann. § 413.072(1) (Michie Supp. 1996) (same); N.C. Gen. Stat. § 106-700 (1995) (same); 3 Pa. Cons. Stat. Ann. § 951 (West 1995) (same); S.C. Code Ann. § 46-45-10 (Law. Co-op. Supp. 1997) (same); S.D. Codified Laws § 21-10-25.1 (Michie Supp. 1998) (same); Va. Code Ann. § 3.1-22.28 (Michie 1994) (same); W. Va. Code § 19-19-1 (1997) (same).

¹⁴² See Fla. Stat. Ann. § 823.14(2) (West 1994) ("It is the purpose of this act to protect reasonable agricultural activities conducted on farm land from nuisance suits."); La. Rev. Stat. Ann. § 3:3601(B)(1) (West Supp. 1998) ("The legislature hereby finds and declares that agriculture is essential not only to the economy of the state but to the sustenance of life, yet acreage devoted to agriculture has steadily declined in this century."); N.J. Stat. Ann. § 4:1C-2 (West 1998) (substantially similar language); N.M. Stat. Ann. § 47-9-2 (Michie 1995) (same); Tex. Agric. Code Ann. § 251.001 (West 1982) (same).

¹⁴³ This possibility is less likely in those states where the protection operates specifically against nuisance caused by changed circumstances in the vicinity of the farm. See Ark. Code Ann. § 2-4-107 (Michie 1996); Colo. Rev. Stat. § 35-3.5-102(1) (1997); Fla. Stat. Ann. § 823.14(4) (West 1994); Ga. Code Ann. § 41-1-7(c) (1997); Idaho Code § 22-4503 (1995); 740 Ill. Comp. Stat. 70/3 (West 1993); Ind. Code Ann. § 34-19-1-4(c) (LEXIS Law 1998); Ky. Rev. Stat. Ann. § 413.072(2) (Michie Supp. 1996); La. Rev. Stat. Ann. § 3:3603(B)(2)(b) (West Supp. 1998); Mont. Code Ann. § 27-30-101(3) (1997); N.M. Stat.

The lack of clear legislative intent causes difficulties for courts attempting to interpret the statutes. *Steffens v. Keeler*¹⁴⁴ illustrates this point. In *Steffens*, a Michigan appellate court found it irrelevant that the owners of a hog farm moved onto their property after nearby residents, because the court found that there had been no change in land use in the vicinity of the hog farm.¹⁴⁵ By the court's logic, if the area had become residential since the pig farm began operating, then the RTF would not apply. Conversely, established rural residents had no legal recourse against the pig farm so long as the area remained predominantly agricultural. If Michigan's RTF had included a statement of purpose, explaining that the intent of the law was to protect farms against growing residential developments, the court might have come to a different conclusion.

Payne v. Skaar,¹⁴⁶ on the other hand, provides an excellent example of how a clearly stated legislative purpose may prevent a statute from being applied overbroadly. In a suit to enjoin the operation of a cattle feedlot, the Idaho Supreme Court refused to read the statute literally in order to bar relief.¹⁴⁷ The feedlot operator argued that his operation met the requirements of the statute, as it had been operating for more than one year, was not a nuisance when he began operation, and had not been negligently operated.¹⁴⁸ The legislative purpose of the Idaho statute was the linchpin in the court's decision. Because the purpose of the statute was to prevent urban encroachment into rural areas,¹⁴⁹ the court did not apply the broad protections of the law in *Payne*, where there had been no evidence of urbanization in the area surrounding the defendant's feedlot.¹⁵⁰

RTFs usually fail to define clearly which farms are eligible for protection and under what circumstances. In statutes that rely on generally accepted practices, it is often unclear who determines these

Ann. § 47-9-3(A) (Michie 1995); N.C. Gen. Stat. § 106-701(a) (1995); S.C. Code Ann. § 46-45-30 (Law. Co-op. Supp. 1997); Wis. Stat. § 823.08(3)(a)(1) (1993-1994).

¹⁴⁴ 503 N.W.2d 675 (Mich. Ct. App. 1993).

¹⁴⁵ See *id.* at 677-78.

¹⁴⁶ 900 P.2d 1352 (Idaho 1995).

¹⁴⁷ See *id.* at 1355.

¹⁴⁸ See *id.*

¹⁴⁹ See Idaho Code § 22-4501 (1995) (stating that intent of legislature is to reduce loss of agricultural resources).

¹⁵⁰ See *Payne*, 900 P.2d at 1355 (noting that neighborhood surrounding feedlot had remained substantially unchanged during feedlot's existence). The court used this analysis even though the terms of the statute were not linked solely to protecting agricultural activities from changed conditions in their vicinity.

practices and who bears the burden of proving that a certain practice is generally accepted.¹⁵¹

Finally, most RTFs do not adequately address the significance of changes in the agricultural operation being protected. In these laws, there are rarely useful definitions of when an operation has become "new" for the purposes of the statute.¹⁵² Determining what constitutes changed conditions could be one of the most contentiously litigated points of the statutes. Most agricultural operations change over the years, and it is conceivable that certain changes will create a nuisance where before there was none. Consider, for example, the dilemma of residents of a development built near a farm that primarily harvests crops with a small livestock production. Imagine that the farm gradually becomes more livestock-intensive, until it becomes an annoyance for the residents. An RTF that does not provide that certain changes cause an agricultural operation to be considered "new," and hence unprotected, may prevent residents from suing on a nuisance theory. Since the original operation will not have been a nuisance at the time it began, and there have been changes in the vicinity of the farm (before the new nuisance producing land use), a court may find that the nuisance common law does not protect new residents.

While the defects enumerated above may lead to problematic application of RTFs, other problems are likely to lead to irrational allo-

¹⁵¹ See *supra* note 105 for a list of statutes that include a requirement that agricultural operations conform to generally accepted practices in order to receive RTF protection. Of these, two states, Utah and Virginia, do not specify who defines generally accepted practices. See Utah Code Ann. § 78-38-7 (1996); Va. Code Ann. § 3.1-22.29 (Michie 1994). The remaining statutes allocate decisionmaking power to state government. See Me. Rev. Stat. Ann. tit. 17, § 2805(2) (West Supp. 1997) (defining "best management practices" as determined by Commissioner of Agriculture, Food and Rural Resources); Mich. Comp. Laws Ann. § 286.473(1) (West 1996) (providing that generally accepted practices be determined by Michigan commission of agriculture); N.J. Stat. Ann. § 4:1C-10 (West 1998) (requiring conformity with practices recommended by State committee); N.Y. Agric. & Mkts. Law § 308(1)(a) (McKinney Supp. 1998) (providing that commissioner of agriculture shall issue opinions upon request as to whether particular practices are sound); Tenn. Code Ann. § 43-26-103(a) (1993) (providing that generally accepted practices be promulgated by department of agriculture). The lack of clarity in definition of appropriate agricultural practices may generate additional litigation. See Telephone Interview with Lee Gardner, Executive Director, Rhode Island Farm Bureau (Mar. 18, 1998) (stating that weakness of RTF is lack of definition of acceptable farm practice).

¹⁵² In many RTFs, when an operation becomes "new," it no longer receives statutory protection. Most statutes state that if change is "reasonable," not material, or not substantial, the agricultural operation will not lose its protected status. See, e.g., Ark. Code Ann. § 2-4-104 (Michie 1996) (stating that statute will not protect agricultural facilities which change materially). Only one state actually defines with precision when a change makes an existing agricultural operation "new." See Minn. Stat. § 561.19(1)(b) (1996) (defining change in operation as expansion of production by 25% or "a distinct change in the kind of agricultural operation").

cation of statutory protection. The misallocation of RTF protection occurs by protecting large operations that may not require immunity from nuisance suits and by protecting operations that actually contribute to the degradation of rural areas. Existing RTFs generally fail to differentiate among operations according to size. Three RTFs incorporate minimum size requirements, and some commentators have encouraged this approach.¹⁵³ Minimum size requirements may actually run counter to the purpose of the RTF legislation and may be economically irrational. A large farming operation appears to have advantages over smaller operations in dealing with nuisance. First, a large firm may innovate better to internalize the costs of nuisance creating activity, simply because of available equity, capital, and reserves. Second, larger operations may be better able to shift land uses to create buffers between offensive uses and neighboring landowners.¹⁵⁴ As they stand, RTFs may act as a regressive subsidy from neighboring landowners to large corporate farms by preventing the farm from internalizing the economic costs of its activity.

In addition, by extending protection to industrial operations, RTFs may sweep within their protection industries that contribute to the degradation of rural land and rural life, including other agricultural operations. Two statutes explicitly extend the protection of their RTFs to industrial operators.¹⁵⁵ One court has extended the RTF refuge, based on this language, to a bleach manufacturer operating on the northeast side of Indianapolis that had released chlorine gas and injured surrounding residents.¹⁵⁶ The court in that case found that Indiana's RTF protected the industrial operation because the injured residents could prove neither that the manufacturer had been negligent, nor that the plant was a nuisance in 1932, when it began operating.¹⁵⁷ In Mississippi, where the RTF did not explicitly extend protection to industrial operators, the state's supreme court found

¹⁵³ See *supra* notes 93-94.

¹⁵⁴ For instance, if a large farm has several operations, and one is causing odors and dust, it may be possible to shift the location of this use within the farm such that neighboring landowners are no longer negatively impacted by the noxious operation.

¹⁵⁵ See Ala. Code § 6-5-127 (1993) (listing industrial plants or establishments as qualifying for protection); Ind. Code Ann. § 34-19-1-4(c) (LEXIS Law 1998) (including industrial operations in protection). Indiana's RTF contains a statement of purpose solely addressing the extension of nonagricultural uses into agricultural areas. See Ind. Code Ann. § 34-19-1-4(a) (LEXIS Law 1998) ("[W]hen nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits.").

¹⁵⁶ See *Erbrich Prod. Co. v. Wills*, 509 N.E.2d 850 (Ind. Ct. App. 1987).

¹⁵⁷ See *id.* at 858-59.

that the RTF theoretically could protect a paper mill.¹⁵⁸ This extension runs counter to the general rationale offered in support of RTFs: Protection of industrial operations, regardless of their location, will not safeguard rural ways of life, preserve open space, or protect agriculture. Before states passed RTFs, long-time rural residents, including farmers, brought most reported nuisance actions against agricultural operations. If RTFs protect industrial operations, they will stymie efforts to prevent the degradation of the environment that industrial facilities cause.

Many statutes also extend coverage to processors of agricultural products.¹⁵⁹ Depending on the goals of the RTF, the rationale for offering such protection is questionable. On one hand, if the law is intended simply to favor agriculture, there is logic in protecting agricultural processors in order to ensure that primary agricultural producers will have a market for their product. On the other hand, processing operations do not preserve open space, protect rural ways of life, or prevent the encroachment of developers.¹⁶⁰

Finally, some RTFs are overbroad in offering protection beyond even that sanctioned by the common law centuries ago. Many statutes do not require that a farm be in existence prior to adjacent complaining landowners.¹⁶¹ Some of these statutes essentially provide a one-year statute of limitations for any nuisance suit brought against an agricultural operation.¹⁶² Thus, even if the plaintiff used his or her land before the defendant began farming, the RTF will protect the farming operation. Statutes that provide that even a radical change in the nature of the agricultural operation does not diminish the protection afforded by the statute also provide overbroad protection.¹⁶³ These statutes do not require that the plaintiff have "come to the nui-

¹⁵⁸ See *Leaf River Forest Prod., Inc. v. Ferguson*, 662 So. 2d 648 (Miss. 1995) (finding that paper mill qualified as agricultural operation for purposes of right-to-farm laws, but that act did not apply to facts).

¹⁵⁹ See *supra* note 89.

¹⁶⁰ Alaska appears to have come up with a sensible alternative: protecting processors based on their intimate association with a primary agricultural producer. See *supra* note 90 and accompanying text.

¹⁶¹ See, e.g., R.I. Gen. Laws § 2-23-5 (1987) ("No agricultural operation . . . shall be found to be a public or private nuisance, due to alleged objectionable . . . odor . . . noise . . . dust . . . use of pesticides, rodenticides, insecticides, herbicides, or fungicides.").

¹⁶² See, e.g., Tex. Agric. Code Ann. § 251.004 (a) (West 1982):

No nuisance action may be brought against an agricultural operation that has lawfully been in operation for one year or more prior to the date on which the action is brought, if the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation.

¹⁶³ See, e.g., N.M. Stat. Ann. § 47-9-3(c) (Michie 1995) (not considering expanded facility or use of new technology change in EDO).

sance” to bar suit—rather, the nuisance can “come to the plaintiff,” and the first-in-time resident will have no legal recourse.

3. *Unclear Application of RTFs*

The consequences of RTFs in the courts and in local political decisions are unclear. Some early observers indicated their opinion that such laws would be ineffective.¹⁶⁴ Commentators have raised concerns that RTFs will be used to protect commercial farms, not family farms.¹⁶⁵ Reported case law, anecdotal newspaper reports, and interviews with individuals familiar with agriculture provide evidence of how RTFs have been applied.

Four generalizations arise from the available evidence about RTFs' effect on rural life. First, some courts have misinterpreted various provisions of the RTFs, usually the “changed circumstances in the vicinity” criterion. Second, when RTFs have been used successfully to defend against a nuisance action, they have generally protected operations that may degrade rural life. Third, some municipalities feel that RTFs limit their regulation of farm-related operations. Fourth, RTFs have had their greatest effect on informal resolution of land use conflict.

The reported cases interpreting RTFs demonstrate that these statutes hold great potential for improper application. In *Laux v. Chopin Land Associates*,¹⁶⁶ the defendant sold 113 acres to Chopin, knowing that Chopin would use the land for residential development.¹⁶⁷ The parties closed the sale in December 1986, and in March 1987, Laux began constructing a hog raising facility.¹⁶⁸ By the summer of 1987, Laux ran a 300 to 350 hog operation.¹⁶⁹ Chopin protested to no avail and brought suit in January 1988.¹⁷⁰ Indiana's law provides that “[a]n agricultural or industrial operation . . . is not and does not become a nuisance . . . by any changed conditions in the vicinity of the locality” provided other conditions are met.¹⁷¹ The

¹⁶⁴ See, e.g., Aepfel, *supra* note 15, at 9 (“‘The [right to farm] laws will either be ineffective or unconstitutionally restrict the rights of neighbors,’ says Edward Thompson, Jr., director of an agricultural lands project for the National Association of Counties.”).

¹⁶⁵ See Jamie C. Ruff, Proposed Hog Farm Irks Neighbors, Richmond (Va.) Times-Dispatch, July 27, 1997, at C3 (stating that RTF “has opened the floodgate for the agribusiness industry instead of protecting the family farm,” according to Pittsylvania County Administrator George E. Supensky).

¹⁶⁶ 550 N.E.2d 100 (Ind. Ct. App. 1990).

¹⁶⁷ See *id.* at 101.

¹⁶⁸ See *id.* At the time of the sale closing, the Lauxes were feeding between 85 and 90 hogs. See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See Ind. Code Ann. § 34-19-1-4 (LEXIS Law 1998).

court incorrectly interpreted the RTF to require a change in the surrounding area in order to allow Chopin to bring a nuisance suit.¹⁷² Because no development had been built, the court found insufficient proof that there had been a change in the surrounding area and concluded that the RTF barred Chopin's suit.¹⁷³

The cases that have applied RTFs to bar relief have done so to protect hog farms,¹⁷⁴ a cotton ginning operation,¹⁷⁵ a bleach factory,¹⁷⁶ and a peafowl farm.¹⁷⁷ These operations arguably contribute in no meaningful way to the values supposedly promoted by RTFs. In addition, anecdotal evidence from newspaper reports and reported cases indicates that RTFs are not being tested in court very often, but that livestock operators (particularly hog farmers) are most likely to attempt to use the laws as an affirmative defense.¹⁷⁸ In fact, most of the criticism of RTFs since their passage has focused on their potential application in protection of hog farms. There is also anecdotal evidence that hog farms have sought legal protection in order to expand current facilities or site new farms in rural communities.¹⁷⁹ On one

¹⁷² See *Laux*, 550 N.E.2d at 103.

¹⁷³ See *id.* *Steffens v. Keeler*, 503 N.W.2d 675, 675-76 (Mich. Ct. App. 1993), discussed above, demonstrates similar interpretation of language from Michigan's RTF. See *supra* notes 144-45 and accompanying text.

¹⁷⁴ See *Laux*, 550 N.E.2d at 101; *Shatto v. McNulty*, 509 N.E.2d 897, 897 (Ind. Ct. App. 1987); see also *Steffens*, 503 N.W.2d at 675-76.

¹⁷⁵ See *Bowen v. Flaherty*, 601 So. 2d 860, 861 (Miss. 1992).

¹⁷⁶ See *Erbrich Prod. Co. v. Wills*, 509 N.E.2d 850, 852 (Ind. Ct. App. 1987).

¹⁷⁷ See *Mary Gail Hare*, Panel Rules in Favor of Fowl Farmer, *Balt. Sun*, July 23, 1996, at 3B, available in 1996 WL 6628983.

¹⁷⁸ Of the reported cases interpreting RTFs, most address hog or cattle operations. See *Herrin v. Opatut*, 281 S.E.2d 575, 576 (Ga. 1981) (egg farm); *Payne v. Skaar*, 900 P.2d 1352, 1353 (Idaho 1995) (cattle); *Wendt v. Kerkhof*, 594 N.E.2d 795, 796 (Ind. Ct. App. 1992) (hog farm); *Laux v. Chopin Land Assoc.*, 550 N.E.2d 100, 101 (Ind. Ct. App. 1990) (same); *Shatto v. McNulty*, 509 N.E.2d 897, 898 (Ind. Ct. App. 1987) (same); *Weinhold v. Wolff*, 555 N.W.2d 454, 457 (Iowa 1996) (same); *Finlay v. Finlay*, 856 P.2d 183, 186 (Kan. Ct. App. 1993) (cattle); *Cline v. Franklin Pork, Inc.*, 361 N.W.2d 566, 569 (Neb. 1985) (same); *Flansburgh v. Coffey*, 370 N.W.2d 127, 129 (Neb. 1985) (same); *Villari v. Zoning Bd. of Adjustment*, 649 A.2d 98, 99 (N.J. Super. Ct. App. Div. 1994) (same); *Durham v. Britt*, 451 S.E.2d 1, 2 (N.C. Ct. App. 1994) (hog farm). For a newspaper account, see *Scott Gold*, *Hog Farms May Face Increased Lawsuits*, *Wilmington (N.C.) Morning Star*, Dec. 10, 1994, at 1A (reporting at least four court battles being fought by neighbors of factory-like hog farms in southeastern N.C.). Mark Tollison, a staff attorney for the South Carolina Association of Counties, has argued that North Carolina's law has enabled factory farms to push out small hog farms while increasing their own production. See Mark W. Tollison, *Commentary*, *State's 'Right to Farm' Bill Would Exempt Factory Farms from Local Laws*, *Post and Courier* (Charleston, S.C.), Aug. 20, 1995, at 23-A ("In the 10 years since the rules were changed to open North Carolina up to corporate farming, hog production in that state has grown; however, the number of hog farmers dropped from 23,400 to 7,000 farmers, roughly a two-thirds reduction.").

¹⁷⁹ The Attorney General's office in Kentucky was asked by several counties to state whether their RTF applied to large scale hog farming, and the answer was, "no." See

hand, then, RTFs have provided a successful defense in only a handful of cases. On the other hand, operations with questionable social benefit have been most aggressive (though often unsuccessful) in attempting to seek protection from RTFs.¹⁸⁰

The effect of an RTF's restrictive provisions on local government is likely to be profound. Anecdotal evidence suggests that municipalities interpret the limitations of RTFs as handcuffing local regulation of farm-related operations. In Rhode Island, the Department of Environmental Management interpreted the RTF as preventing it from responding to complaints by neighbors of a composting operation.¹⁸¹ Farmers' advocates described the same law in another case involving a hog farm as granting "farmers almost unlimited freedom to farm on their property as they please."¹⁸²

In a case in New Jersey, neighbors protesting a change in size and location of a farm stand were unsuccessful because of the RTF.¹⁸³ Neighbors who had lived there before the farm stand opened were concerned about increased traffic, but the state's Department of Agriculture supported the Planning Board's approval of the expansion.¹⁸⁴

Large Hog Farms Considered 'Industry,' *Evansville (Ill.) Courier*, Aug. 22, 1997, at A11, available in 1997 WL 6528189 (reporting that opinion was requested by officials of eight counties where hog farms were considering locating). In Virginia, the Pittsylvania County Board of Supervisors worried that it would not be able to prevent the construction of a 10,000 capacity hog farm because of the limitations imposed by the RTF. See Ruff, *supra* note 165, at C3 (stating that RTF prohibits localities from restricting livestock, dairy, and poultry operations in areas zoned for agriculture). In South Carolina, hog farmers were alleged to be backing a change in the RTF bill that would ease restrictions on factory farms. See Tollison, *supra* note 178, at 23-A. In these situations, the farms are often characterized as "industries," not farms. See Ruff, *supra* note 165, at C3 ("It's not a hog farm, it's a hog industry," [Pittsylvania Supervisor William H.] Pritchett said. 'A family-owned farm, that can be controlled. . . . Big industry, that's tons and tons of waste.'").

¹⁸⁰ In several cases involving mostly hog farms, the RTF was found to be inapplicable because there had been no change in the vicinity of the farming operation; the plaintiff had not "come to the nuisance." See *Herrin v. Opatut*, 281 S.E.2d 575, 578 (Ga. 1981) (limiting explicitly application of RTF to instances where there have been changed conditions surrounding farm); *Wendt v. Kerkhof*, 594 N.E.2d 795, 798 (Ind. Ct. App. 1992) (refusing to apply RTF where defendant had not started hog operation until after plaintiff had moved nearby); *Finlay v. Finlay*, 856 P.2d 183, 188 (Kan. Ct. App. 1993) (holding that purpose of RTF of protecting agricultural land from encroachment of nonagricultural activities does not apply); *Cline v. Franklin Pork, Inc.*, 361 N.W.2d 566, 572 (Neb. 1985) (holding act inapplicable because there was no change in surrounding land use); *Flansburgh v. Coffey*, 370 N.W.2d 127, 131 (Neb. 1985) (holding there was no evidence of any change in use or occupancy of land in and about locality of farm).

¹⁸¹ See Stacy Jones, *Neighbors Raise a Stink Over Compost*, *Hous. Chron.*, June 1, 1996, at 5D.

¹⁸² Diane Michele Yap, *Clam-Waste Stench at Hog Farm Prompts Town to Take Action*, *Providence J. Bull.* (East Bay Ed.), Aug. 28, 1996, at C1.

¹⁸³ See Paul Rogers, *Right to Farm vs. Right to Quiet Life: Neighbor Finds Law Is Not on His Side*, *Rec.*, N. N.J., Oct. 29, 1996, at A1, available in 1996 WL 6115243.

¹⁸⁴ See *id.*

When municipalities do act to regulate agricultural land uses, judges seem reluctant to use RTFs to deprive them of this power. In most reported cases involving municipal regulation of agricultural operations, courts have not applied RTFs to prevent local governments from acting.¹⁸⁵

The most pervasive effects of RTFs are likely occurring at an informal level. One would expect RTFs to stop complaints from evolving into full-blown nuisance suits. This is exactly what makes their impact difficult to monitor because legitimate complaints may never be filed. Even proponents of RTFs admit that while the laws have been most influential on an informal, unreported level, there is little evidence to evaluate their overall impact.¹⁸⁶ Given that reported data indicate that hog farmers have been the most aggressive RTF opportunists,¹⁸⁷ hog operations may be more likely to make informal use of the laws. If so, RTFs' impact may be immeasurable, but they are unlikely to be beneficial.

The discussion above reveals a tenuous connection between the stated goals of RTFs and their effects. The main goal of the RTF legislation is to reduce the conversion of farmland into development. RTF supporters argue that the laws achieve this by protecting farmers from nuisance suits caused by population expansion into primarily rural areas. There is reason to question the bald assertion that there is a

¹⁸⁵ See *Pasco County v. Tampa Farm Serv., Inc.*, 573 So. 2d 909, 912 (Fla. Dist. Ct. App. 1990) (holding that court or local government can regulate changes that involve significant or substantial degradation in locale without violating RTF); *City of Troy v. Papadelis*, 572 N.W.2d 246, 250 (Mich. Ct. App. 1997) (finding RTF does not bar application of zoning ordinance to residential parcel that had not established prior nonconforming use); *Jerome Township v. Melchi*, 457 N.W.2d 52, 55 (Mich. Ct. App. 1990) (finding that apiary was not protected from 1965 zoning ordinance where it was established after 1965); *Village of Peck v. Hoist*, 396 N.W.2d 536, 538 (Mich. Ct. App. 1986) (rejecting argument that right to farm is defense against ordinance requiring use of public sewer system); *Villari v. Zoning Bd. of Adjustment*, 649 A.2d 98, 102 (N.J. Super. Ct. App. Div. 1994) (holding that right-to-farm act does not express legislative intent to deprive municipalities of authority to zone); *L & Z Realty Co. v. Borough of Ringwood*, 6 N.J. Tax 450, 453-54 (N.J. Tax Ct. 1984) (holding that RTF cannot be used to overcome local zoning prohibition on commercial logging in order to get farmland assessment); *Wellington Farms, Inc. v. Township of Silver Spring*, 679 A.2d 267, 267-68 (Pa. Commw. Ct. 1996) (holding that poultry slaughterhouse not protected by RTF). But see *Northville Township v. Coyne*, 429 N.W.2d 185, 187 (Mich. Ct. App. 1988) (finding RTF valid defense to nuisance suit arising out of zoning ordinance violation); *Judge Throws Out Parents' Complaint Against Agricultural Field Burning*, *Idaho Statesman*, Sept. 5, 1997, at 5B, available in 1997 WL 12712420 (reporting judge's decision that county cannot be forced to adopt law banning field burning because of RTF).

¹⁸⁶ See Telephone Interview with Andy Ellen, *supra* note 135; Telephone Interview with Lee Gardner, *supra* note 151; Telephone Interview with Paul Gutierrez, Director of Governmental Affairs, New Mexico Farm Bureau (Mar. 18, 1998); Telephone Interview with Richard S. Hannah, *supra* note 117; Telephone Interview with Ben Parks, Lobbyist, Florida Farm Bureau (Mar. 18, 1998).

¹⁸⁷ See *supra* note 178 and accompanying text.

close link between an increase in population, an increase in nuisance suits, and a decrease in farmland.¹⁸⁸

The preservation of open space is another goal of RTF legislation. The laws' success in this regard is questionable, given their application to operations that do not preserve open space.¹⁸⁹ In fact, the laws may contribute to the decline of rural open space because RTFs limit the ability of rural residents to deal with the threat of industrial hog production with its attendant structures and stink.

Environmentalists who supported RTF legislation may find that the laws actually contribute to the degradation of the environment because their wide swath of protection may freeze existing inefficient, environmentally harmful land uses. A farmer who has the opportunity to make innovations resulting in reduced nuisance and more efficient food production nonetheless may choose to continue the existing use for fear of losing his protection by significantly changing the nature of the operation. The benefit a farmer retains from being protected from nuisance suits may outweigh benefit from the increased efficiency in production. An RTF's protection may skew incentives such that nuisance-producing activity continues unabated.¹⁹⁰

B. The Theory of the Right to Farm: Too Much Protection, Too High a Price

If RTFs are neither necessary to protect farmland nor effective in meeting their supporters' professed goals, the proper question is: What types of harm could they cause? RTFs suffer from at least three theoretical deficiencies that may prove to be seriously harmful in the long run, but which have not yet been realized.¹⁹¹ First, RTFs do not reflect the value of nonmonetizable goods and entitlements that may

¹⁸⁸ See *supra* Part III.A.

¹⁸⁹ Processing plants, industrial operations, and large scale livestock operations can hardly be said to contribute to open space in an aesthetically valuable way.

¹⁹⁰ Some empirical data confirm this distortion of incentives. Cf. Heimlich, *supra* note 124, at 24-25 (describing success of "adaptive" farming techniques in farms near metro areas, with shift towards intensive crops, and away from odor causing livestock operations); Klein & Reganold, *supra* note 127, at 9 (suggesting advantages of farming in metropolitan areas). In addition, at least one Farm Bureau supporter has suggested that farmers may be taking advantage of the protections offered by RTFs. See Telephone Interview with Lee Gardner, *supra* note 151.

¹⁹¹ Many commentators have explored the possibility that RTFs work an unconstitutional taking, but that issue will not be raised in this Note. See Grossman & Fischer, *supra* note 8, at 135-42 (reviewing takings argument and concluding that takings claim is potential obstacle to operation of RTFs); Hand, *supra* note 10, at 328-47 (surveying arguments and concluding RTFs do not constitute taking). Interestingly, the highest court in one state has struck down the section of an RTF providing farms immunity from nuisance suits, holding that the provision constitutes a taking of private property without just compensation. See *Borman v. Board of Supervisors*, No. 96-2276, 1998 WL 650904, at *14 (Iowa

deserve protection. Second, RTFs naturally lead to an inefficient allocation of resources between agricultural and nonagricultural uses. Third (and relatedly), RTFs may be overprotective of farming operations in informal ways that are difficult to monitor.

1. RTFs May Not Adequately Resolve Conflicting Property-for-Personhood Interests

A family with property for many generations looks at the land with a different view; they view themselves in a stewardship role for the land.¹⁹²

Professor Margaret Radin has suggested an approach to property theory based on distinguishing between property with personal value and property that is fungible.¹⁹³ In this analysis, the same item of property may be fungible to one person and have great personal value to another.¹⁹⁴ A property relationship attains property-for-personhood status when it is bound up with personal identity in such a way that one's identity is linked to maintaining the property relationship.¹⁹⁵

Farmers form one potential group of claimants to a property-for-personhood interest. When farmers speak in support of RTF legislation they often emphasize personal and familial links to the land, bolstering the assertion that farmers do not view their land and their livelihood as solely fungible commodities. Farmers may relate to the land in such a way that ceasing to farm would cause them pain for which money cannot compensate them.¹⁹⁶ They express strong

Sept. 23, 1998) (resting holding on conclusion that entitlement to create nuisance constitutes easement).

¹⁹² Lawrence Ragonese, *Farmland May Dwindle, But Not Without a Fight*, *Star-Ledger* (Newark, N.J.), Mar. 23, 1997, at 51 (quoting Bill Cogger, Chester Township's liaison to county agricultural board).

¹⁹³ See Margaret Jane Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849, 1907 (1987) (arguing that property with personal value should not be viewed as market commodity). For a thorough critique of Radin's property-for-personhood theories, see generally Jeanne Lorraine Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body*, 79 *Minn. L. Rev.* 55 (1994).

¹⁹⁴ Radin uses a wedding band as one example of this phenomenon. See Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957, 960 (1982). While a jeweler may view the ring as fungible, such that its theft would cause pain that can be compensated with money, the owner of the wedding ring might never be truly compensated for its loss because of its personal value. See *id.*

¹⁹⁵ See Radin, *supra* note 193, at 1905-06. Distinguishing property-for-personhood from fungible property is not easy. Radin posits the line between property-for-personhood and fungible property as a continuum; there is no bright line rule for distinguishing between the two. See *id.* at 1908 ("There is no algorithm or abstract formula to tell us which items are (justifiably) personal. A moral judgment is required in each case.").

¹⁹⁶ Long-time farmers often speak of an attachment to the land that goes beyond its mere economic value. See Ragonese, *supra* note 192, at 51 (quoting Maria Young, long-

desires to continue farming in the face of development even though it may be economically irrational.¹⁹⁷ This relationship to land may be one that society wishes to privilege.

Residents near farms may also argue for a property-for-personhood interest in living free of nuisance.¹⁹⁸ When neighbors complain about farming practices, they often emphasize their inability to use their homes in ways that are important to them.¹⁹⁹ In more extreme cases, complaints are linked to an exacerbation of personal health problems like asthma.²⁰⁰ Neighbors complain of being woken from sleep by the stench from a composting operation and of needing shots to control allergic reactions.²⁰¹ The home becomes useless for basic pleasures such as holding family gatherings.²⁰² Whether these complaints are best characterized as a property-for-personhood interest is controversial. In the case of a nuisance, claimants may argue

time farmer: "I like to come out and pick up the dirt, feel it. It's like my blood, my whole being. And I don't like to see it hurt."); see also Terri P. Guess, *Farmers in Bethlehem Township Fight for Right-to-Farm Ordinance*, *Star-Ledger* (Newark, N.J.), May 5, 1996, at 45 (reporting sixth-generation farmer backing right-to-farm ordinance so that "the land he has tilled for decades [will] always be used for agriculture").

¹⁹⁷ See Verhovek, *supra* note 17, at 6 (quoting Norman Greig, farmer for 17 years: "I'm very much aware that my farm may be worth more dead than alive . . . But this is what I do, and I'd like to be able to keep doing it.").

¹⁹⁸ Radin considers the home one of the prime examples of property-for-personhood. See Radin, *supra* note 194, at 991-92 (discussing idea of sanctity of home).

¹⁹⁹ See *Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996) (summarizing claim that odors prevented plaintiff from sleeping and forced him to sleep in his son's trailer); *Cline v. Franklin Pork, Inc.*, 361 N.W.2d 566, 570 (Neb. 1985) (summarizing plaintiffs' complaints that they cannot enjoy outdoors or entertain family and friends); *Flansburgh v. Coffey*, 370 N.W.2d 127, 130 (Neb. 1985) (restating complaints of odor so strong it causes watering eyes and breathing difficulty and prevents grandchildren from playing outside); Rebecca Sausner, *A Tale of Pigs and Unhappy Homeowners*, *Hartford Courant*, Jan. 8, 1996, at B1, available in 1996 WL 4340596 (reporting complaints of firsttime homeowners who unknowingly moved adjacent to hog farm protected by RTF); Richard Warchol, *Residents Want Farm's Pesticide Permit Revoked*, *L.A. Times* (Ventura County ed.), June 26, 1997, at B6, available in 1997 WL 2223688 ("Some of the homes sit as close as 23 feet to the farm, and residents say fumigation last August caused headaches, stomach aches, sore throats, dizziness and vomiting, and left a dry, metallic taste in their mouths.").

²⁰⁰ See *Bowen v. Flaherty*, 601 So. 2d 860, 861 (Miss. 1992) (summarizing complaint by chronic asthmatic of dust from cotton gin); *Judge Throws Out Parents' Complaint Against Agricultural Field Burning*, *supra* note 185, at 5B (reporting suit by parents on behalf of five-year-old daughter whose cystic fibrosis and asthma is exacerbated by grass burning); Sausner, *supra* note 199, at B1 (reporting exacerbation of homeowner's asthma).

²⁰¹ See *Jones*, *supra* note 181, at 5D (reporting of complaints regarding composting operation).

²⁰² See *Hog Odor Lawsuit Will Get an Airing*, *Wilmington (N.C.) Morning Star*, May 9, 1995, at 1B (reporting complaint of ruined meals, canceled barbecues, and summers spent inside because of high density swine farm); *Deborah Moore, New Right-To-Farm Bill Aims to Protect Rights of Farmers and Keep Them in Business*, *Cap. District Bus. Rev.*, July 20, 1992, § 1, at 15, available in 1992 WL 3374836 (reporting complaint from resident whose parents ceased visiting house because of smell from neighboring farm).

that being able to breathe freely, to use their homes to maintain important familial relationships, and to interact with their property in a way they choose is important to self-development.²⁰³

Finally, farms may have communal cultural value for society as a whole and particularly for rural residents such that there may be a group property-for-personhood interest in agriculture. Supporters of RTFs claim that protecting farming preserves the rural character of our small towns,²⁰⁴ retains open space,²⁰⁵ and safeguards national culture and history.²⁰⁶ In this respect, farming communities value their connection with the land, given that agriculture enhances community development in various ways. American society also places cultural value on specific images of agrarian life. For many, rural values provide stability in the midst of change.²⁰⁷ From the founding of the United States, rural imagery has been used to promote nationalism and antiurbanism and to critique capitalism.²⁰⁸ Even if farming's contribution to maintaining open spaces, preserving an image of idealized rural life, and providing an alternative vision of living is not based in

²⁰³ Radin uses property-for-personhood to describe relationships between an individual and external resources which are important to self-development. See Radin, *supra* note 194, at 957.

²⁰⁴ See Clinton Twp. Acts to Protect Farmers, *Star-Ledger* (Newark N.J.), May 30, 1997, at 41 ("The mayor has said officials [approving a right-to-farm ordinance] want to maintain the township's rural character."); De Palma, *supra* note 119 (stating that one reason for supporting RTF ordinance, according to supporter, is to keep people from "moving into the country and taking the city with them"); Editorial, Don't Plow Ventura County's Agricultural Heritage Under, *L.A. Times* (Ventura County ed.), July 6, 1997, at B17 [hereinafter Don't Plow Ventura County] ("[H]aving some 105,000 acres sprouting crops rather than new neighbors helps keep the population and some big-city problems under control."); Mary S. Yamin, Farming Remains Vital to County's Economy, *Cap. District Bus. Rev.*, July 21, 1997, at 18, available in 1997 WL 10935775 (passing right-to-farm ordinance thought to preserve town's rural element). As might be expected, a general antiurban theme pervades this rationale. While this aspect of rural-urban relations is beyond the scope of this Note, it raises the issues of the roles race and class conflict play in rural resistance to the extension of urban areas.

²⁰⁵ See Judith Kohler, Urban, Rural Lifestyles Clash as Colorado Grows, *Fresno Bee*, June 29, 1997, at F7 ("As the fields and pastures disappear, so do open space, wildlife habitat and a vital part of the state's culture, say some involved in protecting ag land.").

²⁰⁶ See Don't Plow Ventura County, *supra* note 204, at B17 ("It's not too late to preserve Ventura County's agricultural past—and future. Yet."); John Lucas, Editorial, Sea Change Challenges Kentucky, *Evansville* (Ill.) *Courier*, Apr. 27, 1997, at A18, available in 1997 WL 6523650 ("How, for most of us, do we cast aside the old and take up something new, while at the same time holding on to the best of the former way of life?").

²⁰⁷ See, e.g., William Howarth, The Value of Rural Life in American Culture, 12 *Rural Dev. Persp.* 5, 9 (1996) ("Societies that develop deliberately court change, and modernization inevitably brings the crowded, swifter pace of urban life. Rural values monitor that social change, calming fears of progress with the stability of nature.").

²⁰⁸ See, e.g., Daniel B. Danborn, Why Americans Value Rural Life, 12 *Rural Dev. Persp.* 15, 16-17 (1996) (noting use of rural imagery to uphold American identity in contrast to Europe in early 19th century).

reality, it may serve an important psychological function in a community. Thus, RTF legislation may serve a symbolic purpose, showing that we value attachments to the land and strive to protect its uniqueness from stale suburban sameness.²⁰⁹ Whether all of these interests can be characterized as a group property-for-personhood interest is subject to debate. The notion that both farming and development create cultural “public goods” legitimizes a community’s claim to a group property-for-personhood interest in protecting farmland.²¹⁰

Given the existence of property-for-personhood interests, one may draw some conclusions about which property rule should protect which relationships. Radin suggests that fungible property relationships be protected with a liability rule and property-for-personhood interests be protected by a property rule.²¹¹ In the potential conflicts between agricultural users and surrounding landowners, developers and commercial farmers may be closest to having fungible property relationships with use of the land.²¹² In this case, it may make sense to accord both of these users liability rule protection when there is a conflict. Family farmers and residents may be closer to having a property-for-personhood relationship with specific land uses.²¹³ In conflicts between either family farmers or residents and either developers or commercial farmers, it may make sense to grant property rule protection to the claimant that has a greater property-for-personhood inter-

²⁰⁹ There are many theories as to why our culture values rural life, and the emphasis on symbolic meaning is not far-fetched. See, e.g., John R. Logan, *Rural America as a Symbol of American Values*, 12 *Rural Dev. Persp.* 19, 19 (1996) (“[W]hat we value in rural settings is defined by what we suspect we have lost in the city.”).

²¹⁰ See Pierre Crosson, *The Issues, in Vanishing Farmland*, supra note 14, at 1, 12 (arguing that scenic amenities are public good); B. Delworth Gardner, *The Market Allocation of Land to Agriculture, in Vanishing Farmland*, supra note 14, at 17, 25 (concluding that only market failure that “seemingly justifies social intervention in the land market is the provision of open space as a collective good”); see also James E. Holloway & Donald C. Guy, *Policy Coordination and the Takings Clause: The Coordination of Natural Resource Programs Imposing Multiple Burdens on Farmers and Landowners*, 8 *J. Land Use & Envtl. L.* 175, 226 (1992) (arguing that neighboring landowners and general public receive reciprocal benefits from farming, so that as public seeks to preserve farming and farmland, its members must often forego right to challenge unwanted farming operations).

²¹¹ See Radin, supra note 194, at 988. In addition, Radin argues that some property-for-personhood relationships should be protected by market-inalienable entitlements. See Radin, supra note 193, at 1921-36 (discussing babyselling, surrogacy, and prostitution).

²¹² It is reasonable to assume that these two groups view the land solely as a means to a profit and that any loss of a certain use of the land can be compensated monetarily.

²¹³ For residents, this may depend on how long they have lived there, whether their family is linked to the geographical area in some specific way, and whether there are specific circumstances, such as health, that particularly affect a resident. For family farmers, it may depend on factors such as how long their family has farmed there and the size of the farm.

est in the land. RTFs, however, preclude this contextual application of nuisance laws by courts.

2. *RTFs Lead to the Inefficient Allocation of Resources*

In the narrowest codification of the "coming to the nuisance" defense, an RTF gives the farmer an entitlement to cause a nuisance and protect this entitlement with a property rule.²¹⁴ If adjoining landowners want to stop the farmer from polluting, they must buy the entitlement from the farmer. In *Spur Industries v. Del E. Webb Development Co.*,²¹⁵ the court granted the farmer an entitlement to cause nuisance but protected it with a liability rule.²¹⁶ Following this approach, the court could set the price for the entitlement and force the farmer to sell to the developer. Depending on the relative positions of the court and the parties, one rule may lead to a more efficient allocation of resources.

In general, property rule protection is appropriate when the objective value of the property is unclear and transaction costs do not prevent the parties from bargaining to come to a decision about the value of the property.²¹⁷ Liability rules are useful when transaction costs would prevent one party from organizing to purchase the entitlement from the other party.²¹⁸ Liability rule protection is also a way of forcing one party to decide whether obtaining a certain entitlement is worth the price that the court sets.

In most situations, a court would find it easier to decide how much the entitlement to farm a certain way is worth to the farmer than to put a price on the adjoining landowner's entitlement to live in the absence of the nuisance. In some cases, it may be the cost of a certain technology. In extreme cases, it may be the difference between profit from one type of operation and profit from another. The most difficult cases would be where the farmer is connected to farming, or a particular way of farming, in such a personal way that its loss cannot be measured financially.²¹⁹

²¹⁴ See Keith Burgess-Jackson, *The Ethics and Economics of Right-to-Farm Statutes*, 9 *Harv. J.L. & Pub. Pol'y* 481, 510 (1986) (noting that RTFs offer property rule protection of farmer's entitlement).

²¹⁵ 494 P.2d 700 (Ariz. 1972) (en banc).

²¹⁶ See *supra* notes 47-47 and accompanying text.

²¹⁷ See Burgess-Jackson, *supra* note 214, at 510-11 (noting that property rules are inefficient when transaction costs are high and lower-valuing party receives entitlement).

²¹⁸ See Calabresi & Melamed, *supra* note 44, at 1106-07 (describing justifications for choosing liability over property rule).

²¹⁹ See *supra* Part III.B.1 for a discussion of how this personal connection relates to the theoretical defects of RTFs.

Similarly, in some situations the cost to the claimants will also be easy to measure. If the plaintiff is a developer, the difference in profit between selling a house that is exposed to nuisance-like activity and selling a house that is not may be ascertainable. Judging these costs becomes more difficult, however, when the property right is bound up in a personal relationship—for example, an ancestral home—so that its loss is not easily compensable.

In most cases it appears that RTF legislation has struck the balance between competing claimants incorrectly.²²⁰ RTFs produce inefficiencies in the allocation of land because they discourage mutually beneficial gains from trades between farmers and other landowners.²²¹ In most cases of conflict between agricultural users and surrounding users, it would be more economically efficient to grant the farmer an entitlement to pollute that a neighbor may purchase for a price set by the court.²²² This analysis is complicated by the fact that a farm may create positive externalities for society that it cannot easily capture.²²³ In that case, the balance may shift, but the surrounding landowners still may require compensation, perhaps from a general fund supported by tax dollars.

In the ideal Coasian world, the statutory system should encourage the most efficient use of resources by allocating them to the

²²⁰ See Michael I. Krauss, *The Perils of Rural Land Use Planning: The Case of Canada*, 23 *Case W. Res. J. Int'l L.* 65, 73-74 (1991) (arguing that RTF statutes freeze existing land uses that are obsolete by making efficient Coasian buy-out impossible); see also Jim Chen, *Get Green or Get Out: Decoupling Environmental From Economic Objectives in Agricultural Regulation*, 48 *Okla. L. Rev.* 333, 344 (1995) (arguing that RTFs violate traditional "polluter pays" principle).

²²¹ See Burgess-Jackson, *supra* note 214, at 493-94.

²²² See *id.* at 512 (arguing that move from traditional law of nuisance to RTFs substituted one allocatively inefficient regime for another).

²²³ This argument rests on the realization that some people decide to use resources without taking full account of how that decision affects others (producing an "externality"). Arguably, some positive externalities associated with farming, such as health and low food prices, are not easily internalized by agricultural operations, given that the externalities benefit a large, diffuse population. See, e.g., Dennis Munson, *Get Off Farmer Brown's Back: A Common Sense Approach to Farmer Liability for Groundwater Contamination Caused by the Normal Application of Pesticides*, 18 *Hamline L. Rev.* 521, 524-25 (1995) ("Because farmers are extremely efficient producers, they enable the rest of society to participate in other areas of the economy without having to worry about the production of their own food."); see also Opie, *supra* note 25, at 182 (noting that Europeans spend up to 50% of income on food while Americans spend less than 20%). Development, on the other hand, also creates positive externalities. See Luttrell, *supra* note 122, at 42 (stating that cost of land for housing, factories, and hospitals will increase if rural lands are not transformed to urban use). For instance, a farmer cannot charge the public for the sensory benefit enjoyed when driving by a strawberry field in full bloom. Thus, protection against nuisance suits may be thought necessary in order to make up for the fact that farms are not able to capture some of the social benefits that they produce. RTFs, in this light, may remedy this inequity.

most efficient user. The legal framework should not prevent farmers from bearing the costs of their activities. RTF legislation that prevents a farmer from internalizing the negative externalities associated with his or her work leads to inefficient land use, and ultimately environmental degradation.

3. *RTFs May Be Overprotective*

RTF legislation may be overprotective in several ways. While the informal application of RTFs is difficult to monitor and correct, RTFs may deter legitimate suits because of fears that a court will award attorney's fees where the suit is unsuccessful.²²⁴ This may exacerbate the organizational disadvantage of surrounding landowners. In protecting agricultural activities against municipal zoning, RTFs may prevent legislative acts that would promote the general welfare. This protection has countermajoritarian consequences,²²⁵ as well as limitations on the ability of landowners who have not "come to the nuisance" to lobby for their interests. In addition, given that some of the laws allow the protection to be given to industrial plants and processors of agricultural products, the laws may protect those whose interests are at cross-purposes with the main goals of RTFs.²²⁶

CONCLUSION

State legislators and judges should temper the effects of right-to-farm legislation. First, and most important, existing RTF statutes should be reconsidered, and if not repealed, at least reformed. Second, courts should interpret RTFs as narrowly as possible, within the confines of judicially cognizable legislative intent.

²²⁴ See *supra* note 110 and accompanying text.

²²⁵ While some have questioned the wisdom of treating municipalities as "natural" political units with sovereign power to zone, see, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *Harv. L. Rev.* 1841, 1844 (1994) (arguing that conceptions of political space exacerbate racial segregation), RTFs restrict the power of a shifting municipal electorate to regulate land uses that have traditionally been subject to local majoritarian rule.

²²⁶ See John D. Burns, *The Eight Million Little Pigs—A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming*, 31 *Wake Forest L. Rev.* 851, 880-81 (1996) (arguing that RTFs' limitation of municipalities' ability to zone out hog farming is troublesome because hog farming is "every bit as threatening to rural life as any other [industry]"). Some commentators have taken the position that the laws could be underprotective as well. See Martha L. Noble & J. W. Looney, *The Emerging Legal Framework for Animal Agricultural Waste Management in Arkansas*, 47 *Ark. L. Rev.* 159, 199 (1994) (stating that potential pitfalls of RTFs include numerous "technical requirements"); J. Walter Sinclair, *The Laws of Nuisance and Trespass as They Impact Animal Containment Operations in Idaho*, 30 *Idaho L. Rev.* 485, 502-03 (1993-1994) (predicting litigation will still occur over what constitutes improper or negligent operation).

RTF legislation should be rethought, if not retracted, to account for its misallocation of land use benefits and burdens. Legislatures should conduct a balanced inquiry into whether farm activity requires protection, how laws should protect it, and which types of activity merit protection. This course requires critically examining the arguments from the perspective of all present and future landowners, as well as understanding the social benefits and costs of choosing to protect or not protect certain agricultural activity. If the legislature legitimately decides to protect some farming, it must restructure RTFs to attain more precisely this legislative goal without unnecessarily infringing on the rights of other land users.

There are two areas in which current RTFs lack coherence. First, the legislation does not properly distinguish among claimants or among alleged offenders. The previous discussion regarding efficient allocation of resources and property-for-personhood interests demonstrates the difficulties with this approach.²²⁷ Second, the legislation does not distinguish between types of land to be protected. The sparse information on the application of RTFs is evidence of the possible ramifications of this weakness.²²⁸

RTFs should therefore explicitly distinguish among the parties and offer less protection to groups with a fungible interest in the property (developers and commercial farmers) and more protection to those with a property-for-personhood interest in the property (family farmers and residents).²²⁹ Whenever possible, the law should attempt to encourage an optimal Coasian bargaining process.²³⁰ The courts should still have the power to intervene in these cases, especially when the bargaining process deteriorates.

When there is an asymmetry of property-for-personhood interests, legislation should give the individual with the personhood interest property rule protection. When both parties have cognizable property-for-personhood interests, the courts should have the flexibil-

²²⁷ See *supra* Part III.B.

²²⁸ See *supra* Part III.A.2.

²²⁹ This suggestion is at least partly supported by a survey of Washington county agricultural departments. Most Washington planning departments felt that the significant factors contributing to an operator's decision to retain farmland were farm operation profitability, farm operator age, farm operator plans for his/her land at retirement, and farmland tenure, yet these criteria were rarely used in farmland preservation programs. See Klein & Reganold, *supra* note 127, at 12. The last three criteria relate to property-for-personhood interests, while only the first criterion would appear to be recognized by a strict economic efficiency perspective.

²³⁰ The classic parties for this type of exchange are developers and commercial farmers because both groups treat land as fungible.

ity to work out equitable solutions, keeping the interests of society in mind.²³¹

Legislatures also should amend RTFs to recognize that not all agricultural land is equal. Any legislation should attempt to determine the value of farmland eligible for protection in terms of the goals furthered by the law. First, legislation should try to distinguish between agricultural areas according to their social value. For open space with economic value, the goal is to internalize the externalities (both positive and negative) in order to arrive at the most efficient use of that land. Because the value of land with aesthetic and environmental value may be difficult to monetize, it might be better to protect it with a property rule or to make it inalienable. State boards could classify proposed areas with aesthetic value, considering such factors as accessibility and scenic qualities.

Second, RTFs should grant more protection to smaller farms, both as a proxy for privileging farmers with strong property-for-personhood interests and for economic reasons. While farm size may not be the best proxy for whether a farmer has developed a valued relationship with the land that cannot be compensated, it may be useful in distinguishing from among claimants of protection, in combination with residence on the farm and other factors. In addition, the economics of large farms supports the contention that they will be better able to internalize the negative externalities associated with their farming operation. Small farms may need more protection, both because they may be less sophisticated and because they may be less able to provide buffer zones for particularly noxious activities.

State courts should take several steps in order to avoid the overbroad application or misapplication of RTFs in agricultural nuisance suits.²³² First, in the absence of a legislative purpose section included in the statute, courts should interpret the substantive provisions of the statutes as narrowly as possible. Second, courts should not extend the protection of the statutes to industrial operations unless the law clearly supports this outcome. Third, courts should carefully interpret RTFs that are intended to offer protection only when a nuisance is created by changed circumstances in the vicinity of an agricultural operation. Finally, courts should continue to interpret RTFs narrowly when the power of local government to regulate land use is at stake.

²³¹ It is unclear how the social interest should weigh in this balance, but one possibility is to distinguish between open areas with aesthetic and environmental value, and open areas used solely for economic gain. Factors in this equation might include the quality of the agricultural land, its aesthetic value, and how it fits in with state and national resource conservation objectives.

²³² See *supra* Part III.A.2.

Right-to-farm legislation is unlikely to disappear. If anything, the evidence indicates that the protection offered to farmers may be bolstered, especially at the local level. Given the wide scope of current legislation, broader protection is not appropriate. Rather, the legislation should be tailored to the specific problems its proponents claim to address. It should distinguish among farmers in order to determine for whom protection from nuisance suits is economically rational and socially beneficial. New RTF legislation should differentiate among complainants, between those for whom a nuisance is reflected only in a budget line and those for whom a nuisance makes living at home unbearable. Currently, the legislation makes neither distinction. As envisioned, RTFs are intended to preserve open space and protect traditional rural life from urban encroachment. As applied, RTFs have served to protect land users who themselves have contributed to a decline in the quality of rural living; there is no evidence that they have contributed to a decline in the conversion of farmland to urban uses. Amended RTFs may not solve all of the problems facing farmers today, or resolve conflicts between rural landowners, but they at least will be less likely to create new ones.