"A PIG IN THE PARLOR INSTEAD OF THE BARNYARD"?[1] AN EXAMINATION OF IOWA AGRICULTURAL NUISANCE LAW

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I. INTRODUCTION

In a state like Iowa, with an economy heavily reliant on agriculture and related industries, it is expected that agricultural issues will be at the forefront of news and policy debates. This expectation has proven to be true. Iowa, in the past several years, has wrestled with various agricultural issues resulting from the confluence of increased population in rural areas, public awareness and increased protection of the environment, and the progression toward the use of large-scale production facilities as a means of competing with other states in agricultural industries, most notably in livestock production.[2] One area in which the debate has been extremely intense is agricultural nuisance law. Increased movement of "nonfarm" people from urban to rural areas, combined with the expansion of agriculture production, has resulted in an increased number of disputes among neighbors over alleged nuisances involving odor from livestock production facilities.[3]

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1. The phrase in the title refers to Justice Sutherland's often-quoted standard regarding what constitutes a nuisance in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

2. *See generally* NEIL D. HAMILTON, A LIVESTOCK PRODUCER'S LEGAL GUIDE TO: NUISANCE, LAND USE CONTROL, AND ENVIRONMENTAL LAW (1992) (discussing the impact of changes in agriculture production and other social factors on nuisance law).

3. *Id.* at 5.

William Aldred's Case,[4] dating back to seventeenth-century England, is one of the first recorded instances of agricultural nuisance as a cause of action. Aldred brought a nuisance action against his neighbor, who operated a pig sty near Aldred's home.[5] The trial court ruled for Aldred and the neighbor appealed, arguing that such facilities were necessary for the production of food and that "one ought not to have so delicate a nose, that he cannot bear the smell of hogs."[6]

The appeals court rejected the neighbor's arguments and affirmed the holding that the pig sty was a nuisance.[7] In support of its decision the court discussed four core principles associated with a home that the courts should protect: habitation by man, the pleasure of the inhabitant, necessary light, and wholesome air.[8] These same principles continue to represent "[s]ociety's standards for the comforts of the home."[9]

For most of this nation's history, agricultural nuisance cases have been governed by principles of common law.[10] In the past two decades, however, individuals who made their living in agriculture and related industries, as well as legislators in states with high agriculture production, realized that changes in agricultural nuisance law were necessary.[11] Proponents of such changes argue they are necessary to protect members of the agriculture industry from financial ruin as a result of defending nuisance suits, while continuing to protect neighboring property owners and the environment.[12]

Many states have addressed this problem by passing "right-to-farm" legislation intended to shield farmers from the effects of nuisance suits, provided their facilities meet certain requirements.[13] Two right-to-farm laws existed in Iowa prior to the 1995 state legislative session. The first of these statutes protects feedlot operators if they operate their feedlots in conformity with applicable zoning and environmental statutes and regulations.[14] The second allows counties to establish protective "agricultural areas."[15] Farming operations located in agricultural areas are exempt from nuisance actions, provided the owners comply with applicable laws and do not operate the

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4. William Aldred's Case, 77 Eng. Rep. 816 (K.B. 1610).
5. *Id.* at 816.
6. *Id.* at 817.
7. *Id.* at 821-22.
8. *Id.* at 817.
9. HAMILTON, *supra* note 2, at 8.
10. *Id.*
11. *Id.* at 21.
12. *See* Marcus C. McCarty & Stephen F. Matthews, *Foreclosing Common Law Nuisance for Livestock Feedlots: The Iowa Statute*, 2 AGRIC. L.J. 186, 186-87 (1980) (discussing the impetus and legislative reasoning behind Iowa Code Chapter 172D, which provides protection for feedlot owners from nuisance suits).
13. *See* Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & L. 99, 101 (1988).
14. IOWA CODE §§ 172D.1-.4 (1997). The Iowa Code defines feedlot as "a lot, yard, corral, or other area in which livestock are confined, primarily for the purposes of feeding and growth prior to slaughter." *Id.* § 172D.1(6).
15. *Id.* §§ 352.1-.12.

facility negligently.[16] Although these two laws were enacted in the late 1970s and early 1980s, the Iowa Supreme Court did not directly interpret the feedlot statute until 1995[17] and did not consider the agricultural area statute until 1996.[18]

In 1995, the Iowa legislature responded to increasing pressure from large livestock producers regarding the liability exposure faced under the common law of nuisance, and the Iowa legislature passed House File 519, which contained amendments to several agriculture-related statutes.[19] The most significant and controversial amendments involved Iowa Code Chapter 657, which codifies Iowa nuisance law.[20] The legislature added section 657.11 to the chapter, which provides that a person who has received all permits required to operate an animal feeding operation functions under a rebuttable presumption that the facility is not a public or private nuisance.[21] To overcome the presumption, the plaintiff must show by clear and convincing evidence that the facility constitutes a nuisance and that the facility is being operated negligently.[22] This provision has the potential to make successful litigation of an agricultural nuisance suit much more difficult for the plaintiff.

This Note is intended to provide an overview of Iowa agricultural nuisance law and examine attempts by the Iowa legislature to reduce the possible effects of nuisance suits on livestock producers. Part II of this Note will address general nuisance law principles in Iowa and specific application of those principles to agricultural nuisance cases. Part III will discuss Iowa's right-to-farm statutes in existence before the 1995 legislative session and analyze the validity of those laws. Part IV will discuss the addition of section 657.11 to Iowa nuisance law and its possible ramifications.

II. GENERAL NUISANCE LAW PRINCIPLES IN IOWA

A. *Defining Nuisance*

Nuisance is a vague and uncertain concept.[23] This vagueness exists partly because the term does not identify the cause of the problem, but simply means the hurt, annoyance, or inconvenience that results from it.[24] One of the

16. *Id.* § 352.11.

17. *See* Thompson v. Hancock County, 539 N.W.2d 181 (Iowa 1995). The *Thompson* decision interpreted the definition of "feedlot" set forth in Chapter 172D, which potentially could have an important impact on Iowa agricultural nuisance law. *See id.* at 183-84. This decision is discussed at length in Part III.A of this Note.

18. *See* Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996); HAMILTON, *supra* note 2, at 135. The *Weinhold* decision interpreting section 352 is discussed in Part III.B of this Note.

19. 1995 Iowa Acts ch. 195.

20. *See* IOWA CODE § 657.

21. *Id.* § 657.11(2).

22. *Id.* § 657.11(3).

23. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 617 (5th ed. 1984).

24. *Id.*

most apt expressions of this vagueness and uncertainty is from *Prosser and Keeton on the Law of Torts*:

> There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance." It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition.[25]

As a result of this uncertainty, Iowa, along with many other states, enacted statutory provisions that attempt to define nuisance and list conduct or conditions which constitute a nuisance.[26] Despite the codification of some elements of nuisance law, however, statutory law has not abrogated the common law of nuisance.[27] Courts consult the common law of nuisance to "fill in the gaps" that statutes have not covered.[28]

The Iowa statute defines nuisance and provides for a civil remedy in section 657.1:

> Whatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof.[29]

Section 657.2 lists types of conduct or conditions that are deemed to be nuisances,[30] several of which appear to have relevance to agricultural nuisance law:

> 1. The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort, or property of individuals or the public.
> 2. The causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others.

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25. *Id.* at 616. This excerpt is also quoted as part of a general discussion of nuisance law in *Guzman v. Des Moines Hotel Partners*, 489 N.W.2d 7, 10 (Iowa 1992).

26. IOWA CODE §§ 657.1-.2.

27. *See, e.g.*, Guzman v. Des Moines Hotel Partners, 489 N.W.2d at 10; *see also* Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126, 129 (Iowa 1974) (stating that the Iowa statute does not abrogate the common law of nuisance); Bates v. Quality Ready-Mix Co., 154 N.W.2d 852, 857 (Iowa 1967) (noting that "statutory enumerations do not modify the common-law application to nuisances"); Schlotfelt v. Vinton Farmers' Supply Co., 109 N.W.2d 695, 698 (Iowa 1961) (holding that "statutory definitions and enumerations do not modify the common-law rule applicable to nuisances").

28. Weinhold v. Wolff, 555 N.W.2d 454, 459 (Iowa 1996).

29. IOWA CODE § 657.1.

30. *Id.* § 657.2.

> . . . .
> 4. The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, . . . to the injury or prejudice of others.[31]

The general category of nuisance can be divided into two sub-categories: public and private. A public or common nuisance is an interference with the rights of the community at large.[32] A person or entity convicted of operating or causing a public nuisance is guilty of an aggravated misdemeanor under Iowa law.[33] In addition, the court may order the nuisance to be abated.[34] A suit alleging a public nuisance may be instituted by a private individual, but only when that individual can allege "special damages," which are defined as damages of a different type than those suffered by the community as a whole.[35]

A private nuisance is a civil wrong based on an interference with the use and enjoyment of land.[36] This standard places a burden on all property owners to use their property in such a way that neighboring property owners' comfortable and reasonable use and enjoyment of their land "will not be unreasonably interfered with or disturbed."[37] In a private nuisance action two determinations must be made: (1) whether a nuisance exists; and (2) if a nuisance does exist, what type of remedy is appropriate.[38]

B. *Existence of a Nuisance*

Iowa courts have emphasized several factors to be weighed in determining whether a nuisance exists. In *Bates v. Quality Ready-Mix Co.*[39] the court stated, "A fair test of whether the operation of a lawful trade or industry constitutes a nuisance has been said to be the reasonableness of conducting it in the manner, at the place and under the circumstances in question."[40] For instance, a court may determine that a farming operation or livestock facility is a reasonable use for a rural area and refuse to recognize a plaintiff's nuisance claim.[41] These considerations necessarily make the determination of whether a nuisance exists a question of fact and not one of law.[42]

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31. *Id.*
32. Guzman v. Des Moines Hotel Partners, 489 N.W.2d at 10 (citing KEETON ET AL., *supra* note 23, at 618).
33. IOWA CODE § 657.3.
34. *Id.*
35. McCarty & Matthews, *supra* note 12, at 195.
36. Guzman v. Des Moines Hotel Partners, 489 N.W.2d at 10 (citing KEETON ET AL., *supra* note 23, at 619).
37. Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 560 (Iowa 1972) (citations omitted in original).
38. Valasek v. Baer, 401 N.W.2d 33, 34-35 (Iowa 1987) (citing Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126, 129 (Iowa 1974)).
39. Bates v. Quality Ready-Mix Co., 154 N.W.2d 852 (Iowa 1967).
40. *Id.* at 857 (citing Riter v. Keokuk Electro-Metals Co., 82 N.W.2d 151, 158 (Iowa 1957); Schlotfelt v. Vinton Farmers' Supply Co., 109 N.W.2d 695, 698 (Iowa 1961)).
41. HAMILTON, *supra* note 2, at 18.
42. Bates v. Quality Ready-Mix Co., 154 N.W.2d at 857.

A major factor considered by courts in determining the reasonableness of the condition in a certain place and under particular circumstances is the "character and gravity of the resulting injury."[43] Speculative, potential, or threatened injury, however, may not be considered by a court when making its determination of reasonableness.[44] A second consideration in the determination of nuisance status is the priority of occupation of the owners,[45] also known as the "coming to the nuisance doctrine."[46] Priority of occupation essentially means "who was there first," the operator of the alleged nuisance or the plaintiff.[47] It is based on the theory that if the plaintiff is "second in time" in the use of the property the plaintiff assumed the risk of the nuisance.[48] The result of this doctrine is that the plaintiff will find it more difficult to prove a nuisance if he is found to be second in time in ownership of the property in comparison to the defendant's use. Iowa courts have accorded this factor considerable weight in nuisance litigation.[49]

An additional factor is the nature of the neighborhood where the alleged nuisance is located.[50] The Iowa Supreme Court has noted that even largely rural areas also have residential aspects.[51] In its most recent

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43. Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 697 (Iowa 1980) (citing Ryan v. City of Emmetsburg, 4 N.W.2d 435, 439 (Iowa 1942)).

44. *Id.*

45. Bates v. Quality Ready-Mix Co., 154 N.W.2d at 858 (citing Mahlstadt v. City of Indianola, 100 N.W.2d 189, 194 (Iowa 1959); Schlotfelt v. Vinton Farmers' Supply Co., 109 N.W.2d 695, 699 (Iowa 1961)).

46. Patrick J. Wheeler, *Livestock Odor & Nuisance Actions v. "Right-to-Farm" Laws: Report by Defendant Farmer's Attorney*, 68 N.D. L. REV. 459, 462 (1992).

47. Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126, 129 (Iowa 1974) (citing Schlotfelt v. Vinton Farmers' Supply Co., 109 N.W.2d at 699); *see also* Kriener v. Turkey Valley Community Sch. Dist., 212 N.W.2d 526, 530 (Iowa 1973) (stating that the prior occupation by the plaintiffs weighed heavily in their favor in finding the existence of an actionable nuisance).

48. Wheeler, *supra* note 46, at 462.

49. Bates v. Quality Ready-Mix Co., 154 N.W.2d at 858.

Indeed, priority of occupation is of such importance in Iowa that it is incorporated into one of Iowa's right-to-farm statutes as one of the requirements a defendant must meet to obtain protection from nuisance suits. *See* IOWA CODE § 172D.2 (1997). One Iowa-based commentator has suggested that the coming to the nuisance doctrine forms the theoretical basis for right-to-farm laws. *See* HAMILTON, *supra* note 2, at 18.

In other jurisdictions, however, the coming to the nuisance doctrine is considered controversial and perhaps not as important as once thought. *See generally* Wheeler, *supra* note 46, at 462 (stating that the coming to the nuisance doctrine is sharply disputed and has been much debated) (citing CHARLES O. GREGORY ET AL., CASES AND MATERIALS ON TORTS 616 (1977)); Osborne M. Reynolds, Jr., *Of Time and Feedlots: The Effect of* Spur Industries *on Nuisance Law*, 41 WASH. U. J. URB. & CONTEMP. L. 75, 85-86 (1992) (stating that commentators have criticized the coming to the nuisance doctrine because "it allows an accidental priority in time to determine the future development of an area") (citing DANIEL R. MANDELKER, LAND USE LAW § 4.04, at 97 (2d ed. 1988)).

50. Weinhold v. Wolff, 555 N.W.2d 454, 459 (Iowa 1996) (citing Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 561 (Iowa 1972)).

51. *Id.* at 460.

consideration of agricultural nuisance, the Iowa Supreme Court quoted the following passage with approval:

> The fact that a residence is in a rural area requires an expectation that the residence will be subjected to normal rural conditions, but not to such excessive abuse as to destroy the ability to live and enjoy the home, or such as to reduce the value of the residential property.[52]

In addition to these three factors, Iowa courts follow the common-law principle that the determination of a nuisance is not affected by the proven lawfulness of the conduct[53] or by an absence on the part of the actor of an intent to injure.[54]

Utilizing the factors discussed above, the plaintiff must prove the presence of a nuisance, created or operated by the defendant, by a preponderance of the evidence.[55] In addition, the plaintiff must demonstrate that the nuisance was the proximate cause of the alleged damage or injury.[56] If the plaintiff proves the existence of a nuisance under the requirements discussed above, the case progresses to the remedy stage, in which the court must fashion appropriate relief.[57]

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52. *Id.* (citing Flansburgh v. Coffey, 370 N.W.2d 127, 131 (Neb. 1985)).

53. Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 561 (Iowa 1972); *see also* Valasek v. Baer, 401 N.W.2d 33, 35 (Iowa 1987) ("The fact that defendant's hog operation was a lawful business and was being carried on in accordance with accepted standards does not impact on the finding of a nuisance."); Higgins v. Decorah Produce Co., 242 N.W. 109, 111 (Iowa 1932) ("[A] perfectly lawful business operated under some circumstances and in some locations might so interfere with the comfortable use and enjoyment of property as to constitute a private nuisance.").

In discussing this element, it is important to note the distinction between nuisance per se and nuisance per accidens (nuisance in fact). A nuisance per se is treated as a nuisance by its mere existence in a certain location. This type of nuisance is usually made illegal by statute. *See* HAMILTON, *supra* note 2, at 15. A nuisance per accidens is conduct that becomes a nuisance by the way it is operated. *Id.* Thus, the factor regarding the lawfulness of the activity discussed in *Patz* would apply only in cases dealing with a nuisance per accidens; unlawful conduct would be a nuisance per se, making consideration of the above-listed factors unnecessary. Most agricultural nuisance suits involve nuisances per accidens, because the farming activity itself is not illegal, but it can become a nuisance by the way it is conducted. *Id.* Thus, this Note progresses with an analysis based on that assumption.

It is also important to note that while the above-stated principle is true under the common law, in some instances, a presumption is created that a lawful animal feeding operation is not a nuisance. *See, e.g.*, IOWA CODE § 657.11 (1997). This statute will be discussed more thoroughly *infra* in Part IV.

54. Patz v. Farmegg Prods., Inc., 196 N.W.2d at 561 (citing Claude v. Weaver Constr. Co., 158 N.W.2d 139, 143 (Iowa 1968); Iverson v. Vint, 54 N.W.2d 494, 496 (Iowa 1952); Bonnell v. Smith, 5 N.W. 128, 128-29 (Iowa 1880); 66 C.J.S. *Nuisances* § 10 (1950)).

55. Kriener v. Turkey Valley Community Sch. Dist., 212 N.W.2d 526, 532 (Iowa 1973).

56. *Id.*

57. Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126, 129-30 (Iowa 1974).

C. *Remedies*

Remedies available in nuisance litigation include: damages, an injunction completely enjoining the activity, a partial injunction mandating a change in conduct, or some combination of an injunction and damages.[58] Implicit in the consideration of remedies is the determination of whether the nuisance is permanent or subject to abatement, also known as a temporary nuisance. A permanent nuisance is "one of such character and existing under such circumstances that it will be reasonably certain to continue in the future."[59] It is important to note, however, that a nuisance need not be permanent in the sense of forever to qualify as a permanent nuisance; an "indefinite but significant period of time" is enough.[60] Conversely, a nuisance subject to abatement is not permanent; it is possible for the person or entity responsible for the nuisance to take constructive steps to abate the nuisance.[61] Thus, in the case of a permanent nuisance, damages are the only proper remedy because the nuisance cannot be enjoined or abated; whereas, when a nuisance is subject to abatement, the court has discretion regarding whether to issue some type of injunction or award damages.[62]

For a permanent nuisance, "the proper measure of damages is the diminution in the market value of the property."[63] This remedy is intended to compensate the plaintiff for an interference with his or her property "that is tantamount to a permanent taking."[64] In addition to recovering the diminution in property value, the plaintiff can also recover special damages.[65] Special damages include the inconvenience and discomfort suffered by the plaintiff and his or her family as a result of the nuisance.[66]

When determining the proper remedy for a temporary nuisance the main consideration is the appropriateness of injunctive relief, which is determined by weighing the "reasonableness of carrying on a lawful business

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58. *Id.* at 130. The relevance of the distinction between nuisance per se and nuisance per accidens reappears in this inquiry as well. A nuisance per se (or, in other words, an activity prohibited by statute) can only be remedied by an injunction; damages are not considered sufficient. *See* HAMILTON, *supra* note 2, at 15. When a suit involves a nuisance per accidens, an injunction can only be issued requiring the defendant to correct the conduct causing the nuisance; the injunction cannot completely prohibit the activity. *Id.* Courts will often grant a partial injunction to regulate prospective conduct and award damages as a remedy for past conduct. *Id.*

59. Patz v. Farmegg Prods., Inc., 196 N.W.2d at 562 (citing Ryan v. City of Emmetsburg, 4 N.W.2d 435, 440 (Iowa 1942)).

60. Mel Foster Co. Properties v. American Oil Co., 427 N.W.2d 171, 175 (Iowa 1988).

61. Patz v. Farmegg Prods., Inc., 196 N.W.2d at 562 (citing Vogt v. City of Grinnell, 98 N.W. 782, 783 (Iowa 1904)).

62. *Id.* at 563 (citing Riter v. Keokuk Electro-Metals Co., 82 N.W.2d 151, 161 (Iowa 1957); Friedman v. City of Forest City, 30 N.W.2d 752, 756-57 (Iowa 1948)).

63. Weinhold v. Wolff, 555 N.W.2d 454, 465 (Iowa 1996) (citing 58 AM. JUR. 2D *Nuisances* § 289 (1989); Mel Foster Co. Properties v. American Oil Co., 427 N.W.2d at 175).

64. *Id.* (citing Sundell v. Town of New London, 409 A.2d 1315, 1321 (N.H. 1979)).

65. *Id.* (citing 58 AM. JUR. 2D *Nuisances* § 293 (1989)).

66. *Id.* (citing 58 AM. JUR. 2D *Nuisances* § 296 (1989)).

in the manner, at the place and under the circumstances involved."[67] To justify an injunction, "the annoyance must be such as would cause physical discomfort or injury to a person of ordinary sensibilities."[68] Injunctions are commonly used[69] but are also considered an extraordinary remedy by many courts, which advise that injunctions should be used with caution and only when clearly required.[70] Iowa courts have held that an injunction is not mandated when adequate redress can be obtained by a monetary award, even though a nuisance clearly exists.[71]

Another significant consequence of the permanent versus temporary nuisance distinction is the effect on subsequent litigation. If the nuisance is determined to be permanent in nature, only one action is possible, through which all damages—past, present, and future—are recoverable.[72] Once a plaintiff recovers damages for a permanent nuisance, however, no second recovery is possible, even if the defendant resumes the nuisance-producing activity.[73] A second recovery is not allowed because damages for a permanent nuisance "are complete when the nuisance comes into existence" and are not dependent on the subsequent use of the property.[74] With regard to a temporary nuisance, however, one recovery against the defendant is not a bar to subsequent actions for damages that accrue from the same wrong.[75] "[E]ach repetition of the nuisance creates further liability, and gives rise to a new cause of action" unless and until the nuisance is abated.[76]

1. *Injunction as a Remedy*

When determining the reasonableness of an injunction, the court must make a comparative appraisal of certain factors and conduct a balancing test.[77] The court must weigh the relative hardship to the defendant if the injunction is granted against the hardship to the plaintiff if the injunction is denied.[78] Courts in Iowa are committed through case precedent to this

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67. Valasek v. Baer, 401 N.W.2d 33, 35 (Iowa 1987) (citing Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 560-61 (Iowa 1972)).

68. Schlotfelt v. Vinton Farmers' Supply Co., 109 N.W.2d 695, 698 (Iowa 1961) (citing Kellerhals v. Kallenberger, 103 N.W.2d 691, 694 (Iowa 1960)).

69. HAMILTON, *supra* note 2, at 14.

70. Valasek v. Baer, 401 N.W.2d at 35 (citing Kriener v. Turkey Valley Community Sch. Dist., 212 N.W.2d 526, 536 (Iowa 1973)).

71. *See* City of Harrisonville v. Dickey Clay Mfg. Co., 289 U.S. 334, 337-39 (1933); Riter v. Keokuk Electro-Metals Co., 82 N.W.2d 151, 160 (Iowa 1957); Friedman v. City of Forest City, 30 N.W.2d 752, 756-57 (Iowa 1948).

72. 58 AM. JUR. 2D *Nuisances* § 274 (1989). This distinction proved to be of great import in *Weinhold v. Wolff*, 555 N.W.2d 454 (Iowa 1996). For a complete discussion of that case, see *infra* Part II.D.4.

73. 58 AM. JUR. 2D *Nuisances* § 274 (1989).

74. *Id.*

75. *Id.* § 275.

76. *Id.*

77. Valasek v. Baer, 401 N.W.2d 33, 35 (Iowa 1987).

78. *Id.* (citing Kriener v. Turkey Valley Community Sch. Dist., 212 N.W.2d 526, 536 (Iowa 1973); RESTATEMENT (SECOND) OF TORTS §§ 936(1), 941 (1979)).

"relative hardship" or "balance of convenience" standard.[79] The following factors are considered under this standard:

(a) the nature of the interest to be protected,
(b) the relative adequacy to the plaintiff of injunction and of other remedies,
(c) any unreasonable delay by the plaintiff in bringing suit,
(d) any related misconduct on the part of the plaintiff,
(e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
(f) the interests of third persons and of the public, and
(g) the practicability of framing and enforcing the order or judgment.[80]

Courts have great discretion in tailoring an injunction to fit a particular situation, based on what is necessary to handle the nuisance problem effectively.[81]

2. *Money Damages as a Remedy*

American courts, including those in Iowa, have become more willing to award money damages as a remedy rather than imposing an injunction in nuisance cases.[82] In some instances, however, an award of damages may be so high as to effectively enjoin a defendant's operation or conduct.[83] A damage award could force the defendant into bankruptcy or leave the farm operation with insufficient funds to operate after payment of the award. When damages are awarded along with an injunction, the purpose of the damage award is generally to compensate for harm that occurred prior to the commencement of the lawsuit.[84] In such an instance, the amount of damages "is the diminution in the rental value of the property caused by the nuisance, plus any special damages."[85]

If damages are the only relief awarded, they usually are intended to compensate for past and potential future injury.[86] This type of relief is referred to as permanent damages.[87] Once paid, such relief precludes further nuisance actions by the plaintiff regarding the same conduct.[88]

It is difficult to discern from Iowa case law which type of remedy is favored by Iowa courts. The next section, however, will present several Iowa

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79. *See* Kriener v. Turkey Valley Community Sch. Dist., 212 N.W.2d at 536 (citing Riter v. Keokuk Electro-Metals Co., 82 N.W.2d 151, 159-61 (Iowa 1957)).

80. RESTATEMENT (SECOND) OF TORTS § 936(1) (1979); *see also* Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126, 130 (Iowa 1974) (relying on the *Restatement* factors to determine the appropriateness of an injunction).

81. HAMILTON, *supra* note 2, at 14.

82. *Id.* (citing Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 563 (Iowa 1972)).

83. *Id.* at 14-15.

84. *Id.* at 15.

85. Schlotfelt v. Vinton Farmers' Supply Co., 109 N.W.2d 695, 702 (Iowa 1961).

86. HAMILTON, *supra* note 2, at 15.

87. *Id.*

88. *Id.*

cases dealing with agricultural nuisance law to illustrate how Iowa courts determine which remedy is appropriate and how the fundamental concepts of common law nuisance are applied.

D. *Iowa Agricultural Nuisance Case Law*

1. Patz v. Farmegg Products, Inc.[89]

Reported cases in the area of agricultural nuisance law in Iowa are sparse; however, there are several cases which demonstrate how Iowa courts have dealt with such suits. In *Patz,* the plaintiffs were farmers who brought a nuisance action against Farmegg, a commercial chicken-raising facility situated adjacent to their farm, alleging its operation generated intolerable odors that penetrated their land and buildings.[90] The Iowa Supreme Court affirmed the trial court's ruling that the defendant's facility created a nuisance.[91] As factors in determining the existence of a nuisance, the court noted that the plaintiffs enjoyed priority of possession and that the defendants were unable to collect and dispose of the manure generated by the chickens in an efficient manner.[92]

In assessing whether the odors constituted a substantial invasion of the plaintiffs' use and enjoyment of their land, the court noted the proper standard for comparison is that "of normal persons in a particular locality."[93] The court noted its approval of the following comment from the *Restatement of Torts*: "If normal persons living in the locality would regard the particular situation as definitely offensive or annoying, then the invasion is substantial."[94] The locality component allows the court to consider whether the area is rural or urban and then gauge the offensiveness of the alleged nuisance based on that factor. Presumably, persons in a rural area would not find livestock smells as offensive as those living in an urban area.

The Iowa Supreme Court adopted the trial court's finding that the odors were a substantial invasion of the plaintiffs' use and enjoyment of their property, and concluded that the operation clearly created a nuisance.[95] The court

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89. Patz v. Farmegg Prods., Inc., 196 N.W.2d 557 (Iowa 1972).

90. *Id.* at 559-60. The defendants built the facility, which handled over 80,000 chickens at one time, less than 1000 feet southeast of the plaintiffs' farm. *Id.* at 557. The court noted that the prevailing winds during the spring, summer, and fall caused odors to waft across the plaintiffs' farm. *Id.* at 560.

91. *Id.* at 562.

92. *Id.* at 561. The defendants used a manure disposal process known as an aerobic system, alleged to be the most scientific and sophisticated available. *Id.* The premise of the aerobic system was to keep the manure dry at all times and, therefore, the manure would be less likely to produce offensive odors. *Id.* The defendants, however, were unable to keep the manure dry, a factor which contributed significantly to the odor problem. *Id.*

93. *Id.* at 561.

94. *Id.* at 562 (citing RESTATEMENT OF TORTS § 822 cmt. g (1939)).

95. *Id.* The trial court noted that "the plaintiffs' children became irritable, lost their appetites and had headaches"; the wife was nauseated, nervous, and unable to sleep; and the husband suffered a loss of appetite as well as other physical symptoms. *Id.*

also affirmed the trial court's remedy of $20,000 as permanent and total damages.[96] As noted previously, permanent damages are intended to compensate for past and potential future injury.[97] Thus, this remedy, although favorable, barred the Patz family from relitigating for additional damages in the future. Significantly, the court did not enjoin the defendant from any of its practices or mandate a change in the operation of the facility—presumably the nuisance was allowed to continue unabated under the court's holding.[98]

2. Valasek v. Baer[99]

This case, reported fifteen years after *Patz*, involved a dispute among neighbors regarding a noncommercial livestock operation owned by the defendant.[100] The plaintiffs, two neighboring property owners, sought to enjoin the defendant, a third neighbor, from spreading waste produced at his hog confinement operation on land near their homes.[101] The plaintiffs did not object to the defendant's hog operation as a whole, only to the defendant's practice of spreading manure from pits beneath the hog confinement structure on land near their homes.[102] The defendant spread the confinement manure several times per year as the pits became full.[103]

The court first determined that a nuisance existed; finding, as the trial court had, that the offensive odor produced by the manure spread near their homes interfered with the plaintiffs' enjoyment of their property.[104] The court also addressed the legality of the defendant's operation stating, "[t]he fact that defendant's hog operation was a lawful business and was being carried on in accordance with accepted standards does not impact on the finding of a nuisance. A lawful business, properly conducted may still constitute a nuisance if it interferes with another's use of his own property."[105]

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96. *Id.* at 563.

97. HAMILTON, *supra* note 2, at 15. See *supra* Part II.C.2 for a discussion of money damages as a remedy.

98. Patz v. Farmegg Prods., Inc., 196 N.W.2d at 563.

99. Valasek v. Baer, 401 N.W.2d 33 (Iowa 1987).

100. *Id.* at 33-34.

101. *Id.* The plaintiffs' original petition also sought damages; however, the action was bifurcated and only the equity portion concerning the injunction was tried and appealed. *Id.* at 34. The court noted that the odor from a confinement facility is considered to be much worse than the odor from manure originating in an ordinary barn or feedlot. *Id.* at 35-36. At trial, "expert testimony showed that, because the pit beneath the confinement houses contain[ed] no straw (as would manure taken from an ordinary barn), and thus no cellulose to stabilize the chemical breakdown of the manure, an organic compound with an odor like that of a skunk was produced." *Id.* at 36.

102. *Id.* at 34.

103. *Id.*

104. *Id.* at 35 (citing Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 561 (Iowa 1972)).

105. *Id.* (citing Kriener v. Turkey Valley Community Sch. Dist., 212 N.W.2d 526, 530 (Iowa 1973)). This rule of law is important in light of the 1995 amendments to Iowa Code section 657 regarding nuisance law. These changes will be discussed *infra* at Part IV of this Note.

Once the Iowa Supreme Court determined that the odor emanating from the defendant's practice of spreading manure constituted a nuisance, a large portion of the court's opinion dealt with structuring an appropriate remedy.[106] The district court and court of appeals both held that injunctive relief was inappropriate.[107] The Iowa Supreme Court, however, after considering the relative hardship to the defendant if the court granted an injunction and to the plaintiff if an injunction was denied, determined that a partial injunction was appropriate in this instance.[108]

The court noted that the only factors weighing in favor of the defendant and against imposition of an injunction prohibiting the defendant from spreading manure near the plaintiffs' homes were the rural and agricultural nature of the neighborhood, the defendant's usual practice of plowing the manure under the soil to keep the level of odor down, and the hardship of driving a short distance farther if enjoined from spreading the manure at the usual sites.[109]

In contrast, the court found several factors weighing in favor of an injunction. Notably, the plaintiffs were first in time in ownership and use of the land; however, the court did not view this as the strongest factor in their favor.[110] According to the court, the character of the nuisance and the injury caused by it were the most significant of the factors mandating a decision in the plaintiffs' favor.[111] The court noted that the smell from the confinement manure spread near the plaintiffs' home "permeated their houses, clothing, carpeting, draperies, and cars" and that they "were forced to take extraordinary measures to avoid the odor."[112] The court emphasized that the plaintiffs did not seek to completely enjoin the defendant from operating his hog confinement facility, nor to stop him from spreading the confinement manure at locations farther away from their land.[113] The plaintiffs only wished to enjoin the defendant from spreading manure in areas close to their homes.[114]

The court structured a partial injunction which prohibited the defendant from spreading the confinement manure within one-quarter of a mile from the plaintiffs' homes and required that the waste be turned under the soil the same day as it was spread.[115] The court believed the location near the plaintiffs' homes, where the defendant had previously disposed of the confinement

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106. Valasek v. Baer, 401 N.W.2d at 35-37.

107. *Id.* at 34. The trial court held that the defendant carried out his operation reasonably under the circumstances and thus an injunction was improper. *Id.* at 35.

108. *Id.* at 35-37 (citing Patz v. Farmegg Prods., Inc., 196 N.W.2d at 560-61; RESTATEMENT (SECOND) OF TORTS §§ 936(1), 941 (1979)).

109. *Id.* at 35.

110. *Id.* at 36.

111. *Id.* With regard to the character of the nuisance, the court distinguished between "ordinary manure" and manure from a confinement operation. *Id.* It found on the basis of expert and lay testimony that odor from confinement manure was "much more obnoxious" than the smell from ordinary manure. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 37.

waste, was unreasonable, given the large number of additional acres he had available elsewhere to spread the manure and the relatively minor inconvenience of hauling the manure a short distance farther.[116] The court emphasized that the holding should be confined to the specific facts presented, noting that a determination of the appropriateness of an injunction must be decided on a case-by-case basis.[117] In the closing paragraphs of the opinion, the court suggested that as a practical matter, the parties should use common sense and act in a neighborly manner to avoid the necessity of further legal intervention.[118] Perhaps the court was intimating that such a dispute could and should have been settled amicably outside the courtroom.

3. Michael v. Michael[119]

This case illustrates yet another facet of agricultural nuisance law—it can be so controversial and bitter as to pit not only neighbor against neighbor, but cousin against cousin.[120] In *Michael*, the plaintiff alleged that the defendant's practice of spreading manure from his hog confinement operation on land only one-quarter of a mile from the plaintiff's home created a nuisance.[121] The trial court enjoined the defendant from spreading manure on land near the plaintiff's home from April 1 to December 1 of each year unless the manure could be incorporated into the soil within forty-eight hours.[122]

The Iowa Supreme Court upheld the district court's finding of a nuisance and the general terms of the injunction.[123] The court felt, however, that allowing the defendant forty-eight hours to incorporate the manure into the soil was unreasonable when the problem could be cured more promptly.[124] Thus, the court modified the injunction to require incorporation of the manure on the same day as it was spread, making this injunction very similar to the one imposed in *Valasek*.[125] The *Valasek* and *Michael* cases are significant in terms of showing the creativity and flexibility a court may exercise in structuring an injunction that serves the plaintiff by reducing or eliminating the nuisance, while not unduly hampering the farming operation and livelihood of the defendant.

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116. *Id.* at 36.
117. *Id.* at 36-37 (citing Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 561 (Iowa 1972)).
118. *Id.* at 37.
119. Michael v. Michael, 461 N.W.2d 334 (Iowa 1990).
120. *See* HAMILTON, *supra* note 2, at 14 (noting that the plaintiff and defendant in *Michael* were cousins).
121. Michael v. Michael, 461 N.W.2d at 334.
122. *Id.*
123. *Id.* at 335.
124. *Id.*
125. *See id.*

4. Weinhold v. Wolff[126]

The most recent Iowa case involving agricultural nuisance law was decided by the Iowa Supreme Court in 1996. In *Weinhold v. Wolff*, much like the preceding cases, the plaintiffs sued their neighbors, alleging that their hog confinement facility created a nuisance.[127] The Weinholds, who raised several breeds of alternative livestock, including deer, antelope, and elk, lived just north of the Wolffs in rural Buena Vista County, Iowa.[128] The defendants owned their land prior to the plaintiffs; however, they had used the land solely for grain farming until 1990, thirteen years after the plaintiffs purchased and moved onto their property.[129] In 1990, the defendants began operating a hog confinement facility, which included a 500,000 gallon uncovered earthen waste collection lagoon.[130] Two times per year, the defendants would empty the lagoon and apply its contents to the surrounding fields as fertilizer, often on fields located near the plaintiffs' property.[131] Approximately one year later, the defendants and several of their neighbors, not including the plaintiffs, sought and received an agricultural area designation for their property pursuant to Iowa Code section 352.6.[132]

In July 1992, the plaintiffs filed suit, alleging that the defendants' operation created a nuisance by the odors that permeated the plaintiffs' property.[133] They sought damages and injunctive relief.[134] The Wolffs raised the agricultural area exemption found in section 352.11 of the Iowa Code as an affirmative defense.[135] The district court refused to apply the agricultural area defense to this case, however, holding that the statute "would work an unconstitutional taking of the landowners' preexisting nuisance claim" as applied to the unique facts presented in the case.[136] With no effective affirmative defense, the district court found that the plaintiffs had proven a temporary nuisance existed and awarded $45,000 in damages for pain and suffering, but refused to grant injunctive relief.[137] The plaintiffs appealed the damage award, arguing that the nuisance was permanent, not temporary as the court had found.[138] The defendants appealed the finding of a nuisance and also the decision that the agricultural area defense was unconstitutional.[139]

The Iowa Supreme Court reviewed the lower court's finding that a nuisance existed and also concluded that the defendants' facility created a

126. Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996).
127. *Id.* at 457.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 457-58.
132. *Id.* at 458.
133. *Id.*
134. *Id.*
135. *Id.* (citing IOWA CODE § 352.11 (1995)).
136. *Id.* at 457.
137. *Id.*
138. *Id.* at 458.
139. *Id.*

nuisance.[140] In reaching its holding, the court considered three factors: "priority of location, the nature of the neighborhood, and the wrong complained of."[141] The court discussed at length the injuries that the plaintiffs allegedly sustained.[142] The plaintiffs kept meticulous track of the conditions resulting from the defendants' hog confinement operation and the court relied on this information and the testimony of several witnesses in finding that the operation would offend a person of ordinary sensibilities.[143] The court emphasized the fact that while the odor was strongest from March through October, the predicted crusting of the surface during the winter months, which would allegedly reduce the odor, did not occur as the defendants had predicted.[144] Thus, the smell from the defendants' operation was nearly constant. The court also noted the distinction between the odor from a traditional hog operation and that from a confinement operation, stressing that the latter was much more offensive to the plaintiffs and the other witnesses who testified, many of whom were born and raised on farms and several of whom were hog farmers.[145]

In addition to finding that the odors emanating from the defendants' farm would offend persons of ordinary sensibilities, the court emphasized that the plaintiffs had acquired their property prior to the time the defendants built and began to operate their hog confinement facility.[146] Finally, the court noted that while the nature of the neighborhood was largely agricultural, it was also residential.[147] The court was unwilling to completely discount the rights of rural residents, even in light of legislative policies in Iowa, which largely favor the development of agriculture.[148] After considering the foregoing three factors, the court concluded that a nuisance existed and that it was permanent in nature.[149]

It is difficult to find a distinction between the *Valasek* and *Michael* cases, which held that the livestock production facilities created temporary nuisances, and *Patz* and *Weinhold*, which found that similar activities created permanent nuisances. The only obvious distinction is that in the temporary nuisance cases, the plaintiffs did not object to the defendants' entire operation, but only to specific practices, such as the spreading of manure near the plaintiffs' homes.[150] Thus, it would seem that it is possible for plaintiffs to

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140. *Id.* at 461. For a complete discussion of the analysis and holding in *Weinhold*, see *infra* notes 212-237 and accompanying text.

141. *Id.* at 459 (citing Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 561 (Iowa 1972)).

142. *Id.* at 459-61.

143. *Id.* The plaintiffs wrote on their wall calendar the times and characteristics of the odors emanating from the defendants' facility. *Id.* at 459.

144. *Id.* at 460.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 461, 463. For a complete discussion of the court's analysis in determining that the nuisance was permanent, see *infra* notes 212-237 and accompanying text.

150. *See* Michael v. Michael, 461 N.W.2d 334, 334 (Iowa 1990); Valasek v. Baer, 401 N.W.2d 33, 34 (Iowa 1987).

craft their pleadings in such a way as to have a better chance of obtaining the specific relief they seek.

The foregoing cases illustrate the common law of nuisance as applied to discrete nuisance problems. In the past twenty years, however, the Iowa legislature has attempted to supplant the common law of nuisance with laws specifically tailored to the area of agricultural nuisance. The following Part will discuss these laws and interpretations of the laws from case law and commentary.

III. RIGHT-TO-FARM STATUTES

A. *Iowa Code Chapter 172D*[151]

In 1976, the Iowa legislature enacted the state's first right-to-farm statute, Chapter 172D, designed to protect feedlot operators from nuisance suits.[152] For nearly twenty years, however, Iowa courts did not directly interpret this law in a decision that had precedential effect.[153] This portion of the Note will trace the history of Chapter 172D, including the speculation of commentators regarding the potential interpretation by Iowa courts, as well as an in-depth discussion of the first case to directly interpret a portion of the law.[154]

With the enactment of Chapter 172D, the Iowa legislature provided substantial protection from nuisance suits to the operators of feedlots. The statute defines feedlot as "a lot, yard, corral, or other area in which livestock are confined, primarily for the purposes of feeding and growth prior to slaughter."[155] The statute provides that in any nuisance action brought by a person whose date of property ownership is subsequent to the established date of operation for the feedlot, proof of compliance with the applicable rules of the Department of Natural Resources and county zoning requirements is an absolute defense.[156] Presumably, if a feedlot is in compliance with environmental rules and zoning regulations, there should be no legitimate need for a nuisance suit, because the rules would not permit nuisance-causing activity.[157] Therefore, any nuisance action would be instituted solely for purposes of harassment by residents who acquired their land subsequent to the feedlot's initial date of operation.[158]

The validity of a law which purported to take away a cause of action from those affected by a possible nuisance concerned some legislators and

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151. IOWA CODE § 172D (1997).

152. *Id.*; *see also* HAMILTON, *supra* note 2, at 135 (noting the purpose of Chapter 172D).

153. HAMILTON, *supra* note 2, at 135. Several lower courts considered Chapter 172D in unreported decisions. See *infra* notes 171-189 and accompanying text for a discussion of two of these unreported decisions.

154. *See* Thompson v. Hancock County, 539 N.W.2d 181 (Iowa 1995).

155. IOWA CODE § 172D.1(6).

156. *Id.* §§ 172D.2-.4. If no rule exists to govern a particular action, the operation is deemed to comply with the section as a matter of law. *Id.* § 172D.3(1).

157. McCarty & Matthews, *supra* note 12, at 187.

158. *Id.*

commentators. Prior to the law's passage, a state senator requested an advisory opinion from the Iowa Attorney General regarding the constitutionality of the proposed legislation.[159] According to the attorney general, the proposed legislation showed vulnerability to a constitutional challenge.[160] The constitutionality of a law restricting the right of individuals to resort to a tribunal of some form to adjudicate their complaints particularly concerned the attorney general.[161]

The opinion suggests that the constitutional rights involved are those embodied in the Fifth and Fourteenth Amendments to the United States Constitution—the right of an individual to the free use and enjoyment of his or her property and the right to protect that property.[162] The final paragraphs of the opinion summarize the attorney general's conclusion regarding the proposed law: "[W]e feel the provisions of [proposed Chapter 172D] could be construed as an attempt to abrogate the common law on nuisance and deprive certain portions of society of their constitutional rights of due process of law."[163] Iowa legislators did not heed this advice, however, and in the same year Chapter 172D was enacted into law.

The recorded legislative history of Chapter 172D does not provide a clear explanation of the legislature's decision to enact the law despite the attorney general's negative opinion.[164] According to certain commentators, weaknesses in the opinion likely prompted the decision to pass the bill.[165] To those commentators, the due process problems posed by the attorney general seemed unfounded because a court would review a challenge to the law under a rational basis standard.[166] Laws enacted to promote the health, safety, and welfare of society almost always have a legitimate governmental end and thus would pass rational basis scrutiny.[167] Even though Chapter 172D benefits feedlot operators more than neighboring landowners, there are benefits which would accrue to society as a whole, including economic growth and lower production costs resulting in lower prices for agricultural commodities.[168] Thus, the attorney general's warning of possible due process violations resulting from enforcement of the statute may have been unwarranted. Commentators have also suggested that Chapter 172D may be vulnerable to a

159. 41 Iowa Op. Att'y Gen. 451 (1976) (answering a letter from Senator James V. Gallagher requesting an opinion on the pending legislation).

160. *Id.* at 455.

161. *Id.* at 454.

162. *Id.* at 452.

163. *Id.* at 455.

164. McCarty & Matthews, *supra* note 12, at 198. There is virtually no formal record of legislative proceedings regarding Chapter 172D. Other than the opinion of the Iowa Attorney General, no other written commentary on the validity of the law is available. It does appear, however, that agriculture lobbying groups attempted to counter the attorney general's opinion. *Id.* at 218 n.84.

165. *Id.* at 198.

166. *Id.* at 200-01 (citing Williamson v. Lee Optical Co., 348 U.S. 483, 486 (1955); Central States Theatre Corp. v. Sar, 66 N.W.2d 450, 452-53 (Iowa 1954)).

167. *Id.* at 201.

168. *Id.*

Fifth Amendment "taking" challenge as well;[169] however, such warnings have thus far been unrealized.[170]

In 1990, the Iowa Court of Appeals considered Chapter 172D under rather unusual circumstances. In *Newman v. Weber*,[171] the plaintiff sued under a nuisance theory, alleging that the defendant spilled hog manure on a road near his fields of sweet corn.[172] Dust from the road, allegedly smelling of manure, collected on the plaintiff's corn, rendering a portion of the crop unmarketable, according to the plaintiff.[173] The district court awarded the plaintiff $46,000 in damages.[174] On appeal, the defendant raised Chapter 172D as a defense.[175] Because the statute provides an affirmative defense, however, the defendant's failure to raise it at the district court level led the court of appeals to reject the argument.[176] The court opined, nevertheless, that even if the defendant had raised the defense at the trial level, Chapter 172D did not offer the defendant any protection.[177]

The court's analysis of Chapter 172D is merely dicta and the entire opinion is unpublished; thus, it has no precedential value. The court's interpretation, however, is considered incorrect by an Iowa-based commentator.[178] According to the court, the law would not protect the defendant because the complaint concerned the "spilling of manure on a public roadway and not the hog feedlot itself" and "the protection of the statute does not extend to ancillary operations outside the feedlot."[179] There are several reasons why this interpretation may not be accurate. The most salient is that if the Iowa legislature intended to protect feedlot operators, the protection should extend to manure disposal—a necessary aspect of operating any feedlot and the aspect most likely to prompt nuisance litigation.[180]

In 1992, the Iowa Court of Appeals again considered Chapter 172D in the unreported decision of *Masuen v. Loutsch*.[181] The plaintiffs sued under a nuisance theory, alleging that the defendants' feedlot "caused excess odor, flies, and dust" as well as damage to their property due to run-off from a settlement basin.[182] The defendants argued that Chapter 172D barred the nui-

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169. For an in-depth discussion of the Fifth Amendment taking challenge theory, see McCarty & Matthews, *supra* note 12, at 201-07.

170. HAMILTON, *supra* note 2, at 135 (noting that Chapter 172D has not been directly interpreted or challenged).

171. Newman v. Weber, No. 0-119/89-65 (Iowa Ct. App. Sept. 26, 1990).

172. *Id.*, slip op. at 2.

173. *Id.*

174. *Id.*

175. *Id.*, slip op. at 7.

176. *Id.*, slip op. at 8.

177. *Id.*, slip op. at 8-9.

178. HAMILTON, *supra* note 2, at 49 ("The court's ruling is not legally binding but is significant because it misinterpreted the law.").

179. Newman v. Weber, No. 0-119/89-65, slip op. at 8.

180. HAMILTON, *supra* note 2, at 50.

181. Masuen v. Loutsch, No. 2-208/90-1851 (Iowa Ct. App. Oct. 27, 1992).

182. *Id.*, slip op. at 5.

sance claim.[183] The court of appeals noted that the plaintiffs' date of ownership was "subsequent to the established date of operation" for the defendants' feedlot, which triggered the defense provided by section 172D.2.[184] The court held that the defendants were protected from any nuisance claims for odor, flies, and dust because the plaintiffs failed to cite any applicable regulations that the defendants had violated.[185] Under section 172D.3(1), "[a] person complies with this section as a matter of law where no rule of the department exists."[186] Therefore, Chapter 172D provided complete protection for that portion of the claim.

With regard to the run-off from the settlement basin, the court concluded that the defendants were not protected by Chapter 172D.[187] The defendants did not comply with two administrative regulations that required the removal of settleable solids from waste prior to its discharge into waterways and disposal of waste in a manner that would not cause water pollution.[188] Thus, the nuisance protection provided in Chapter 172D did not apply to that portion of the plaintiffs' claim.[189]

The first direct and legally significant interpretation of Chapter 172D did not occur until October 1995, when the Iowa Supreme Court decided *Thompson v. Hancock County*.[190] Even this decision did not advance the debate regarding the constitutionality of Chapter 172D, but instead narrowed the category of livestock producers to whom the nuisance protection applies.[191]

In *Thompson*, the plaintiffs sought a declaratory judgment interpreting Iowa Code section 335.2,[192] which provides an exemption from county zoning ordinances for buildings constructed for an agricultural purpose.[193] The trial court found the plaintiffs' proposed hog confinement operation fell within the exemption, making it unnecessary for the plaintiffs to comply with the county zoning ordinances when constructing the facility.[194] On appeal, the defendants argued that section 172D.4(1), which requires operators of feedlots to comply with applicable zoning requirements,[195] superseded section 335.2 because it was enacted after the agricultural purpose exemption found in section 335.2.[196]

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183. *Id.*, slip op. at 6.
184. *Id.*, slip op. at 7-8 (citing IOWA CODE § 172D.2 (1992)).
185. *Id.*, slip op. at 9.
186. IOWA CODE § 172D.3(1) (1997).
187. Masuen v. Loutsch, No. 2-208/90-1851, slip op. at 8.
188. *Id.*, slip op. at 7-8 (citing IOWA ADMIN. CODE r. 567-652.2(1), (7)).
189. *Id.*, slip op. at 8.
190. Thompson v. Hancock County, 539 N.W.2d 181 (Iowa 1995).
191. *See id.* at 183-84.
192. IOWA CODE § 335.2 (1997).
193. *See id.*; Thompson v. Hancock County, 539 N.W.2d at 182.
194. Thompson v. Hancock County, 539 N.W.2d at 182.
195. IOWA CODE § 172D.4(1) ("A person who operates a feedlot shall comply with applicable zoning requirements.").
196. Thompson v. Hancock County, 539 N.W.2d at 183.

While the court found the defendants' argument persuasive, it ultimately was to no avail because the court held that the plaintiffs' proposed hog confinement did not fall within the statutory definition of feedlot found in Chapter 172D.[197] The court was unwilling to expand the general term "other area" in the statutory definition to include all types of livestock production facilities.[198] Rather, the court limited the definition to include open areas (such as a lot, yard, or corral) and not enclosed structures.[199] Based on this analysis, Chapter 172D could not supersede the agricultural purpose zoning exemption in section 335.2 in the plaintiffs' situation.[200] Chapter 172D did not apply to the plaintiffs because they were not building a feedlot, but an enclosed hog confinement facility.[201] Thus, the plaintiffs' proposed building remained exempt from county zoning regulations under the agricultural purpose exemption.[202]

The significance of the *Thompson* decision in agricultural nuisance law remains unclear. By its definition of feedlot, however, the court's ruling appears to remove the nuisance protection provided by section 172D.2 for operators of enclosed livestock production facilities or confinements, which are quickly becoming the most popular method of producing many types of livestock.[203]

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197. *Id.* at 183-84. The conclusion in the court's statement that it found the defendants' argument persuasive is that a county *can* apply its zoning regulations to feedlots; in other words, feedlots do not qualify for the agricultural purpose exemption because the later enactment of Chapter 172D superseded the exemption provision. *See* Neil D. Hamilton, *Hog Confinements: What Effect Will Iowa Court Ruling Have?*, DES MOINES REG., Jan. 7, 1996, at 2C. Thus, even though the plaintiffs' operation was not a feedlot, this implicit conclusion may provide counties with the authority to regulate the thousands of livestock production facilities that are feedlots through zoning regulations. *Id.*

198. Thompson v. Hancock County, 539 N.W.2d at 184. The court used rules of statutory construction to reach this conclusion. The opinion states, "when specific words of the same nature are used in the statute followed by the use of general ones, the general terms take their meaning from the specific ones and are restricted to the same genus." *Id.* (citing DeMore v. Dieters, 334 N.W.2d 734, 738 (Iowa 1983); Fleur de Lis Motor Inns, Inc. v. Bair, 301 N.W.2d 685, 690 (Iowa 1981)). The words lot, yard, and corral all refer to open air facilities; thus, following the rule of statutory construction discussed above, the court was unwilling to extend the statutory definition to include the plaintiffs' proposed hog confinement facility, which was an enclosed structure. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *See* Hamilton, *supra* note 197, at 2C (noting that Iowa livestock producers and their attorneys have operated under the assumption that Chapter 172D provided a defense in nuisance suits if environmental and zoning regulations were met regardless of the type of growing facility used; after this ruling, such an assumption is likely inaccurate for livestock producers that have enclosed confinement buildings rather than open-air feedlots).

B. *Iowa Code Chapter 352*[204]

In 1982, the Iowa legislature enacted another right-to-farm law, Chapter 352, which allows landowners to petition their county board of supervisors to establish "agricultural areas" of 300 or more acres.[205] After a county establishes an agricultural area, farm or livestock operations within that area are immune from public or private nuisance actions.[206] One important characteristic of this nuisance protection is that time of possession does not matter; an operation located in a designated agricultural area is immune from nuisance suits regardless of the established date of operation or any subsequent expansion of the agricultural activities in relation to a plaintiff's date of occupation.[207] However, the defense does not apply to actions brought for injuries or damages sustained prior to the establishment of the agricultural area.[208] As with Chapter 172D, the nuisance protection does not apply if the farm operation violates a federal or state statute, regulation, or rule.[209] In addition, if the plaintiff can prove that the defendant operated the facility negligently—or if the nuisance is the result of pollution, overflowing of land, or excessive soil erosion onto the plaintiff's land that is not caused by an act of God—no protection is available for the defendant.[210]

Iowa courts did not interpret the agricultural area statute until 1996, in part because the statute remained a little-used protection for the first ten years of its existence.[211] In 1996, however, the Iowa Supreme Court issued a ruling directly interpreting Chapter 352 in *Weinhold v. Wolff*.[212] The defendants' land was included in an agricultural area, for which the defendants sought and obtained approval approximately one year after starting their hog confinement operation.[213] Several years later, the plaintiffs filed a nuisance suit, alleging that the odors from the hog confinement, especially those from an uncovered manure storage lagoon, were an unreasonable interference with the use and enjoyment of their land.[214] The defendants raised the agricultural area exemption found in section 352.11 as an affirmative defense.[215] The district court found for the plaintiffs, holding that a temporary nuisance existed, and awarded the plaintiffs $45,000 in damages.[216] The district court did not consider the affirmative defense of section 352.11, holding that the

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204. IOWA CODE § 352 (1997).
205. *Id.* § 352.6.
206. *Id.* § 352.11.
207. *Id.* § 352.11(1)(a).
208. *Id.* § 352.11(1)(b).
209. *Id.*
210. *Id.*
211. As of 1992, less than 10 of Iowa's 99 counties had agricultural areas within their borders. *See* HAMILTON, *supra* note 2, at 135.
212. Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996). A complete discussion of the facts in *Weinhold* can be found *supra* at Part II.D.4.
213. Weinhold v. Wolff, 555 N.W.2d at 458.
214. *Id.*
215. *Id.*
216. *Id.* at 457.

statute constituted an unconstitutional taking as applied to the facts of the case.[217]

On appeal, the Iowa Supreme Court undertook an interpretation of the statute. The defendants argued that, contrary to the lower court decision, section 352.11 provides a complete defense to nuisance actions after the property has been included in an agricultural area.[218] The defendants did not disagree with the lower court's award of $9,000 for damages that accrued between the time they started their hog confinement operation and when they received the agricultural area designation approximately one year later.[219] The defendants contested, however, the remaining $36,000 of the award because those damages occurred after the agricultural area designation had been granted.[220] The plaintiffs argued that their cause of action arose out of an "injury created and damage sustained" before the agricultural area had been approved.[221] According to the plaintiffs, all the damage that they sustained occurred prior to the establishment of the agricultural area and therefore, the protection provided by the statute did not apply.[222]

The court concluded that the issue of whether section 352.11 provided immunity to the defendants revolved around whether the nuisance was permanent or temporary.[223] After considering various factors, the court concluded that the nuisance was permanent.[224] First, the court noted that there was no foreseeable way for the defendants to abate the nuisance nor were the defendants likely to cease operating the facility in the future.[225] Second, while the court found that it could order closure of the offending open-air manure lagoon, such action would effectively enjoin the entire operation, because no other effective disposal process existed.[226] The court felt that such a result would be inequitable and impractical.[227] Finally, the

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217. *Id.*

218. *Id.* at 461.

219. *Id.*

220. *Id.*

221. *Id.* This theory was based on the wording of section 352.11(1) which provides: "This subsection does not apply to actions or proceedings arising from injury or damage to person or property caused by the farm or farm operation before the creation of the agricultural area." IOWA CODE § 352.11 (1997).

222. Weinhold v. Wolff, 555 N.W.2d at 461-62.

223. *Id.* at 462. See *supra* Part II.C for a discussion of the distinction between permanent and temporary nuisance and the remedies available for each type.

224. Weinhold v. Wolff, 555 N.W.2d at 463.

225. *Id.* The district court considered testimony of an expert in the area of odor control who "speculated" that the odor problems commonly associated with livestock production facilities would eventually be resolved. *Id.* The supreme court, however, concluded that no evidence existed that a breakthrough was near. *Id.* The court noted that permanent does not mean forever in this context—"indefinitely long is sufficient." *Id.* (citing Mel Foster Co. Properties v. American Oil Co., 427 N.W.2d 171, 175 (Iowa 1988)).

226. *Id.*

227. *Id.* The court noted that such action "would be contrary to the spirit and purpose of chapter 352." *Id.* at 464. In addition, the court stated that finding a nuisance to be permanent is an accepted way of classifying a nuisance if finding the nuisance to be subject to abatement

court found that because of the agricultural area defense, the plaintiffs would never be able to recover for the continuing nuisance unless the nuisance was classified as permanent.[228] Thus, equity militated a finding of a permanent nuisance so that the plaintiffs could recover their past, present, and future damages in this action.[229]

The court considered the purpose of Chapter 352 and found that the legislature did not "intend to cut off the Weinholds' cause of action to recover damages because of a permanent nuisance."[230] Furthermore, the court noted that under Iowa law, "causes of actions accrue when the wrongful act produces loss or damage to the claimant."[231] In this situation, the defendants' operation caused the plaintiffs' injuries and damages before the defendants received the agricultural area designation and the concomitant nuisance protection.[232] The court noted that "a permanent nuisance 'contemplates that [the nuisance] is at once necessarily productive of all the damages that can ever result from it.'"[233] Therefore, the court concluded that the plaintiffs' damages were complete when the defendants began their operation.[234] The court granted the plaintiffs $45,000 for past, present, and future damages under the special damages component of the permanent nuisance finding.[235] The court remanded the case for a determination of the amount of diminution in market value of the plaintiffs' land.[236] Based on the traditional balancing test for evaluating the propriety of an injunction, the court determined that injunctive relief was inappropriate in this case.[237]

This interpretation of one of Iowa's right-to-farm laws may be seen as somewhat of a blow to the industry and to the legislature, which desired to protect lawful operations from nuisance suits. The interpretation of Chapter 352 may be more restrictive than Iowa livestock producers would have wished; yet, under the holding in *Weinhold* full nuisance protection can still be retained by obtaining an agricultural area designation prior to beginning operation of a facility. Nevertheless, the classification of the hog confinement facility as a permanent nuisance may have important implications for those facilities currently operating without an agricultural area designation.

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would mean ordering some action which is not just and equitable in order to abate the nuisance. *Id.* at 463-64 (citing 58 AM. JUR. 2D *Nuisances* § 275 (1989)).

228. *Id.* at 464.

229. *Id.*

230. *Id.*

231. *Id.* (citing McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc., 507 N.W.2d 405, 408 (Iowa 1993)).

232. *Id.*

233. *Id.* (quoting Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 562 (Iowa 1972)) (alterations in original).

234. *Id.* The court found other evidence in Chapter 352 that this was the intended result. *Id.* Section 352.6 states that "[n]onconforming preexisting residences may be continued in residential use" in agricultural areas approved under the statute. IOWA CODE § 352.6(1)(a) (1997). The court found that this section evinced a legislative intent to protect not only farmland, but private residential property. Weinhold v. Wolff, 555 N.W.2d at 464.

235. Weinhold v. Wolff, 555 N.W.2d at 466.

236. *Id.*

237. *Id.* at 467.

IV. THE REFORMATION OF IOWA AGRICULTURAL NUISANCE LAW?

The general law governing nuisance litigation in the state of Iowa, Chapter 657, remained relatively unchanged until 1995. In the 1995 legislative session, however, Iowa legislators added a new section to the Iowa Code chapter on nuisance, which has the potential to greatly affect agricultural nuisance law.[238] The new section of Chapter 657 has the following stated purpose:

> [T]o protect animal agricultural producers who manage their operations according to state and federal requirements from the costs of defending nuisance suits, which negatively impact upon Iowa's competitive economic position and discourage persons from entering into animal agricultural production. This section is intended to promote the expansion of animal agriculture in this state by protecting persons engaged in the care and feeding of animals. The general assembly has balanced all competing interests and declares its intent to protect and preserve animal agricultural production operations.[239]

The general effect of the statute is much like that of Chapter 172D, affording immunity from nuisance lawsuits provided the defendant meets certain criteria.[240] Under Iowa Code section 657.11, if all the permits required for an animal feeding operation are obtained by the producer, a rebuttable presumption arises that the operation is not a public or private nuisance.[241] The rebuttable presumption may be overcome by clear and convincing evidence that the animal feeding operation unreasonably and continuously interferes with another person's comfortable use and enjoyment of his or her life or property and that the injury or damage is proximately caused by the negligent operation of the animal feeding facility.[242] This places a higher standard of proof on a plaintiff than what is required in most civil litigation and other types of nuisance suits and also requires proof of the

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238. *See* IOWA CODE § 657.11 (1997).

239. *Id.* § 657.11(1).

240. *Id.*

241. *Id.* § 657.11(2). One interesting wrinkle of Chapter 657 has not been discussed by commentators since the enactment of section 657.11. Section 657.8 provides: "This chapter shall apply to the operation of a livestock feedlot, only as provided in Chapter 172D." *Id.* § 657.8. If this section of the statute is applied to determine which types of operations receive nuisance protection, then the limited definition of feedlot, as interpreted by the Iowa Supreme Court in *Thompson v. Hancock County*, 539 N.W.2d 181 (Iowa 1995), could be used to deny nuisance protection to those who operated enclosed livestock containments. *See* Thompson v. Hancock County, 539 N.W.2d at 184. Section 657.11 uses the term "animal feeding operation" for the types of facilities that receive the nuisance protection. IOWA CODE § 657.11(2). It references Chapter 455B to provide the definition for animal feeding operation. *Id.* Section 455B.161(3) uses the same definition as provided for feedlot in section 172D.1(6). *See id.* § 455B.161(3).

242. IOWA CODE § 657.11(3).

defendant's negligence, which is unnecessary in common-law nuisance claims.[243]

Interestingly, the statute also provides that the rebuttable presumption arises regardless of the facility's established date of operation.[244] This provision eviscerates the common-law standard regarding priority of occupation, which was previously a strong factor weighing in favor of a plaintiff who occupied the property prior to the defendant's use of his or her property as an animal feeding operation.[245] Another common-law standard was also abandoned for the purposes of this statute. Previously, Iowa courts held that the lawfulness of the conduct in question did not affect the finding of a nuisance.[246] Under section 657.11, however, if the defendant obtains all necessary permits, and therefore is conducting a lawful operation, the rebuttable presumption arises, making it much more difficult for a plaintiff to prove the presence of a nuisance.[247] The law also contains a fee-shifting provision which can be implemented in favor of the defendant if a court finds that the plaintiff's claim is frivolous.[248] The combination of these changes could have a large impact on the feasibility of agricultural nuisance lawsuits.

Although the Iowa legislature passed the bill in April 1995[249] and Governor Terry Branstad signed the bill into law a short time later,[250] Iowa legislators continued to debate the issue intensely, with some questioning whether the new law was appropriate and environmentally sound.[251] During the 1996 legislative session, the Iowa legislature passed an amendment to the 1995 legislation, referred to as the chronic violator amendment.[252] Under the amendment, which Governor Terry Branstad signed into law, any animal feeding operator classified as a chronic violator would not receive the benefit of the nuisance protection provided under section 657.11.[253] A chronic violator is defined as a person who "has committed three or more violations" of state laws or regulations resulting in either an assessment of a civil penalty of

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243. *See* Kriener v. Turkey Valley Community Sch. Dist., 212 N.W.2d 526, 532 (Iowa 1973) (holding that the plaintiff must show the presence of a nuisance by a *preponderance of the evidence* and must demonstrate the nuisance was the proximate cause of the alleged damage or injury).

244. IOWA CODE § 657.11(4).

245. *See* Bates v. Quality Ready-Mix Co., 154 N.W.2d 852, 858 (Iowa 1967) (stating that Iowa courts have accorded priority of occupation considerable weight in nuisance litigation). For a more complete discussion of the "first in time" issue see *supra* notes 45-49 and accompanying text.

246. Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 561 (Iowa 1972). For a full discussion of this concept, see *supra* note 53.

247. *See* IOWA CODE § 657.11(2).

248. *Id.* § 657.11(6).

249. Thomas A. Fogarty, *Budget Issues Hang over Lawmakers*, DES MOINES REG., Apr. 30, 1995, at 4B.

250. Thomas A. Fogarty, *Proposed Hog-Lot Rules Now Are Law*, DES MOINES REG., June 1, 1995, at 4M.

251. *Hog Lot Debate Sparks Tempers*, DES MOINES REG., Dec. 14, 1995 at 8S.

252. *See Tightened Hog Lot Bill Becomes Law*, DES MOINES REG., Apr. 18, 1996, at 4M; Jonathon Roos, *Hog-Lot Neighbors Get Boost*, DES MOINES REG., Mar. 29, 1996, at 8M.

253. IOWA CODE § 657.11(4) (1997).

$3,000 or more or a court order or judgment from "a legal action brought by the attorney general after referral by the department" within a five-year period.[254] An offender can be removed from the chronic violator classification once he or she has "committed less than three violations for the prior five years."[255]

Opponents of this restriction on the nuisance protection provided in section 657.11 argued that such laws will cripple Iowa's pork industry.[256] Others felt that the chronic violator provision did not go far enough in revising the 1995 legislation.[257] One legislator called the amendment a "minuscule step . . . . Tens of thousands of people in rural Iowa have no protection from mega pork producers that move . . . next door."[258] The chronic violator provision was first utilized less than one year after it became law, when a hog confinement operator received his "third strike" for violating Iowa's environmental laws.[259]

During the 1996 session, the Iowa legislature considered several other amendments to the much-maligned 1995 law; however, the chronic violator provision was the only amendment that passed.[260] In 1997, several other amendments were considered, including one that would have repealed the nuisance protection entirely.[261] None of the amendments were passed; however, the contentious issue promises to rear its head during future legislative sessions.[262]

V. CONCLUSION

Iowa agricultural nuisance law appears to be at a turning point. Prior to 1995, there was no general law aggressively protecting the rights of all livestock producers to operate free from the fear of nuisance litigation, provided they obtained all necessary operating permits. The nuisance protection provided in section 657.11 is poised to change that status quo. What remains to be seen is whether the law will function as its proponents intended and indeed, whether it will be substantially changed or even revoked during a future legislative session.

Leah C. Hill

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254. *Id.* § 657.11(4)(a).

255. *Id.*

256. Thomas A. Fogarty, *Senate Takes On Hog Issue*, DES MOINES REG., Mar. 3, 1996, at 1B, 4B.

257. Roos, *supra* note 252, at 8M.

258. *Id.* (quoting Rep. Deo Koenigs).

259. Jerry Perkins, *DeCoster Must Pay $59,000 State Fine*, DES MOINES REG., Mar. 6, 1997, at 8S.

260. *Tightened Hog Lot Bill Becomes Law*, *supra* note 252, at 4M.

261. Jonathon Roos, *House Holds Off Attempts to Limit Hog Confinements*, DES MOINES REG., Apr. 9, 1997, at 5M.

262. Jonathon Roos, *Branstad: No Special Session*, DES MOINES REG., May 1, 1997, at 5A.