Note that the first class meeting will be **Monday, August 19, 2019**.

**Classes #1 and 2: Monday, August 19 and Wednesday, August 21, 2019.** Read the handout on Private Nuisance (the handout is posted on the class website, and also appears below). Be prepared to discuss the two principal cases in the handout (*Sundowner, Inc. v. King* and *Carpenter v. The Double R Cattle Co., Inc.*) and the notes and questions following those cases. In particular, focus with particular care on the questions in notes 1 through 5 following the *Carpenter* case, which will be the primary focus of Wednesday’s class session.

**Class #3: Friday, August 23, 2019.** Read Casebook pages 1-11. Focus particularly on the hypothetical discussed on page 1, and the questions in notes 1 through 4 on pages 1-2.

**Class #4: Monday, August 26, 2019.** Casebook pages 11-21 (*Village of Euclid v. Ambler Realty Co.*). Focus particularly on the questions in Notes 1-9 on pages 19-21.

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**What Is a Nuisance?**

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word “nuisance.” . . . There is general agreement that it is incapable of any exact or comprehensible definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for analysis of a problem; the defendant's interference with the plaintiff’s interests is characterized as a “nuisance,” and there is nothing more to be said. [William L. Prosser, Handbook of the Law of Torts 549 (1st ed. 1941).]

Neighbors often rely upon servitudes to reconcile in advance potentially incompatible land uses in neighborhoods. But what happens when conflict about appropriate and permissible land uses arises between neighbors in the absence of any servitude regime or other consensual private arrangements? Long before the law of servitudes evolved, courts developed the law of *nuisance* to regulate such conflicts, and to define when one landowner could face liability for—or could be enjoined from engaging in—conduct that interfered with another's use and enjoyment of her land.

Courts frequently cite, as a principle deeply imbedded in our law, the Latin maxim *sic utere tuo ut alienum non laedas*—roughly translated “one must so use her property as not to injure that of another.” The law of nuisance provides that although each landowner has the general right to make use of her land as she wishes, no landowner has the right to use her land in a way that unreasonably interferes with her neighbors’ enjoyment of their possessory rights in their land. As a practical matter, *A*’s use of the 10 feet of land on her side of a common boundary line with *B*
almost inevitably affects B’s enjoyment of the adjoining land on his side of the boundary. But while we all must accept reasonable interferences with our use and enjoyment of land, we should not have to accept unreasonable interferences. The difficulty arises in trying to distinguish between reasonable and unreasonable interferences.

The Restatement (Second) of Torts employs an explicit balancing test to determine whether one landowner’s conduct should be considered a nuisance.

§ 821. Significant Harm. There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose.

§ 822. General Rule. One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another’s interest in the private use and enjoyment of land, and the invasion is either
(a) intentional and unreasonable, or
(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

§ 825. Intentional Invasion—What Constitutes. An invasion of another’s interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor
(a) acts for the purpose of causing it, or
(b) knows that it is resulting or is substantially certain to result from his conduct.

§ 826. Unreasonableness of Intentional Invasion. An intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if
(a) the gravity of the harm outweighs the utility of the actor’s conduct, or
(b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

§ 827. Gravity of Harm—Factors Involved. In determining the gravity of the harm from an intentional invasion of another’s interest in the use and enjoyment of land, the following factors are important:
(a) the extent of the harm involved;
(b) the character of the harm involved;
(c) the social value that the law attaches to the type of use or enjoyment invaded;
(d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
(e) the burden on the person harmed of avoiding the harm.

§ 828. Utility of Conduct—Factors Involved. In determining the utility of conduct that causes an intentional invasion of another’s interest in the use and enjoyment of land, the following factors are important:
(a) the social value that the law attaches to the primary purpose of the conduct;
(b) the suitability of the conduct to the character of the locality; and
(c) the impracticability of preventing or avoiding the invasion.

§ 829. Gravity vs. Utility—Conduct Indecent or Malicious. An intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if the harm is significant and the
actor’s conduct is

(a) for the sole purpose of causing harm to the other; or
(b) contrary to common standards of decency.

§ 829A. Gravity vs. Utility—Severe Harm. An intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation.

Stating the maxim is far easier than understanding exactly when A’s use of her land legally constitutes a nuisance. Determining whether something is a nuisance requires the balancing of a multitude of factors—something that might be a nuisance in one situation might not be a nuisance in another situation. Hence, Professor Prosser’s description of nuisance as an “impenetrable jungle.”

SUNDOWNER, INC. v. KING
Supreme Court of Idaho
95 Idaho 367, 509 P.2d 785 (1973)

SHEPARD, Justice. This is an appeal from a judgment ordering partial abatement of a spite fence erected between two adjoining motels in Caldwell, Idaho. This action is evidently an outgrowth of a continuing dispute between the parties resulting from the 1966 sale of a motel.

In 1966 Robert Bushnell sold a motel to defendants appellants King. Bushnell then built another motel, the Desert Inn, on property immediately adjoining that sold to the Kings.

The Kings thereafter brought an action against Bushnell (H. J. McNeel, Inc.) based on alleged misrepresentations by Bushnell in the 1966 sale of the motel property. In 1968 the Kings built a large structure, variously described as a fence or sign, some 16 inches from the boundary line between the King and Bushnell properties. The structure is 85 ft. in length and 18 ft. in height. It is raised 2 ft. off the ground and is 2 ft. from the Desert Inn building. It parallels the entire northwest side of the Desert Inn building, obscures approximately 80% of the Desert Inn building and restricts the passage of light and air to its rooms.

Bushnell brought the instant action seeking damages and injunctive relief compelling the removal of the structure. Following trial to the court, the district court found that the structure was erected out of spite and that it was erected in violation of a municipal ordinance. The trial court ordered the structure reduced to a maximum height of 6 ft.

The Kings appeal from the judgment entered against them and claim that the trial court erred in many of its findings of fact and its applications of law. The Kings assert the trial court erred in finding that the “sign” was in fact a fence; that the structure had little or no value for advertising purposes; that the structure cuts out light and air from the rooms of the Desert Inn Motel; that the structure has caused damage by way of diminution of the value of the Desert Inn Motel property; that the erection of the structure was motivated by ill feeling and spite; that the structure was erected to establish a dividing line; and that the trial court erred in failing to find the structure was necessary to distinguish between the two adjoining motels.

We have examined the record at length and conclude that the findings of the trial court are supported by substantial although conflicting evidence. The trial court had before it both still and moving pictures of the various buildings. The record contains testimony that the structure is the largest “sign” then existing in Oregon, Northern Nevada and Idaho. An advertising expert
testified that the structure, because of its location and type, had no value for advertising and that its cost, i.e., $6,300, would not be justified for advertising purposes.

The pivotal and dispositive issue in this matter is whether the trial court erred in requiring partial abatement of the structure on the ground that it was a spite fence. Under the so called English rule, followed by most 19th century American courts, the erection and maintenance of a spite fence was not an actionable wrong. These older cases were founded on the premise that a property owner has an absolute right to use his property in any manner he desires. See: 5 Powell on Real Property, 696, p. 276 (1949 ed. rev’d 1968); Letts v. Kessler, 42 N.E. 765 (Ohio 1896).

Under the modern American rule, however, one may not erect a structure for the sole purpose of annoying his neighbor. Many courts hold that a spite fence which serves no useful purpose may give rise to an action for both injunctive relief and damages. See: 5 Powell, supra, 696, p. 277; IA Thompson on Real Property, § 239 (1964 ed.). Many courts following the above rule further characterize a spite fence as a nuisance. See: Hornsby v. Smith, 13 S.E.2d 20 (Ga. 1941); Barger v. Barringer, 66 S.E. 439 (N.C. 1909).

One of the first cases rejecting the older English view and announcing the new American rule on spite fences is Burke v. Smith, 37 N.W. 838 (Mi. 1888). Subsequently, many American jurisdictions have adopted and followed Burke so that it is clearly the prevailing modern view. See: Powell, supra, 696 at p. 279.

In Burke a property owner built two 11 ft. fences blocking the light and air to his neighbors’ windows. The fences served no useful purpose to their owner and were erected solely because of his malice toward his neighbor. Justice Morse applied the maxim sic utere tuo ut alienum non laeditas, and concluded:

But it must be remembered that no man has a legal right to make a malicious use of his property, not for any benefit or advantage to himself, but for the avowed purpose of damaging his neighbor. To hold otherwise would make the law a convenient engine, in cases like the present, to injure and destroy the peace and comfort, and to damage the property, of one’s neighbor for no other than a wicked purpose, which in itself is, or ought to be, unlawful. The right to do this cannot, in an enlightened country, exist, either in the use of property, or in any way or manner. There is no doubt in my mind that these uncouth screens or “obscurers” as they are named in the record, are a nuisance, and were erected without right, and for a malicious purpose. . . . The wanton infliction of damage can never be a right. It is a wrong, and a violation of right, and is not without remedy. The right to breath [sic] the air, and to enjoy the sunshine, is a natural one, and no man can pollute the atmosphere, or shut out the light of heaven, for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice towards his neighbor. [37 N.W. at 842.]

We agree both with the philosophy expressed in the Burke opinion and with that of other jurisdictions following what we feel is the better reasoned approach. We hold that no property owner has the right to erect and maintain an otherwise useless structure for the sole purpose of injuring his neighbor. The trial court found on the basis of substantial evidence that the structure served no useful purpose to its owners and was erected because of the Kings’ ill will and enmity [sic] toward their neighboring competitor. We therefore hold that the trial court did not err in partially abating and enjoining the “sign” structure as a spite fence.
Notes

Although the Sundowner court does not mention Restatement § 829, is that section relevant to the dispute? What other types of conduct might the drafters of § 829 have had in mind?

Suppose A and B are next door neighbors whose relationship has deteriorated over the years because of A’s overtly racist opinions. B, knowing that A has seasonal allergies, spends $2,000 planting a variety of highly-attractive (but significantly pollen-producing) blooming plants along the boundary between their homes, where the prevailing winds were likely to blow the pollen in A’s direction (which would force A to remain inside and install costly air conditioning filters). Can A successfully use Sundowner as a basis to require B to remove the plants?

Note that Missouri courts have not adopted Restatement § 829 and have held that Missouri law does not take account of motive in determining whether conduct constitutes a nuisance. 44 Plaza, Inc. v. Gray-Pac Land Co., 845 S.W.2d 576 (Mo. Ct. App. 1992). Under this approach, how would Sundowner be decided? Under this approach, would B’s plants be a nuisance?

How might effective preventive lawyering have better served the parties in Sundowner? For example, if you had been representing the Kings in the 1966 motel sale, how would you have advised them?

CARPENTER v. THE DOUBLE R CATTLE CO., INC.

Supreme Court of Idaho
108 Idaho 602, 701 P.2d 222 (1985)

BAKES, JUSTICE.... Plaintiff appellants are homeowners who live near a cattle feedlot owned and operated by respondents. Appellants filed a complaint in March, 1978, alleging that the feedlot had been expanded in 1977 to accommodate the feeding of approximately 9,000 cattle. Appellants further alleged that “the spread and accumulation of manure, pollution of river and ground water, odor, insect infestation, increased concentration of birds, ... dust and noise” allegedly caused by the feedlot constituted a nuisance. After a trial on the merits a jury found that the feedlot did not constitute a nuisance. The trial court then also made findings and conclusions that the feedlot did not constitute a nuisance....

The case was assigned to the Court of Appeals which reversed and remanded for a new trial. The basis for this reversal was that the trial court did not give a jury instruction based upon subsection (b) of Section 826 of the Restatement (Second) of Torts. That subsection allows for a finding of a nuisance even though the gravity of harm is outweighed by the utility of the conduct if the harm is “serious” and the payment of damages is “feasible” without forcing the business to discontinue.

This Court granted defendant's petition for review. We hold that the instructions which the trial court gave were not erroneous, being consistent with our prior case law and other persuasive authority. We further hold that the trial court did not err in not giving an instruction based on subsection (b) of Section 826 of the Second Restatement, which does not represent the law in the State of Idaho.... Accordingly, the decision of the Court of Appeals is vacated, and the judgment of the district court is affirmed....

The Court of Appeals, without being requested by appellant, adopted the new subsection (b) of Section 826 of the Second Restatement partially because of language in Koseris v. J.R. Simplot Co., 352 P.2d 235 (Idaho 1960), which reads: “We are constrained to hold that the trial court erred in sustaining objections to those offers of proof [evidence of utility of conduct], since
they were relevant as bearing upon the issue whether respondents, in seeking injunctive relief, were pursuing the proper remedy; nevertheless, on the theory of damages which respondents had waived, the ruling was correct.” 352 P.2d at 239. The last phrase of the quote, relied on by the Court of Appeals, is clearly dictum, since the question of utility of conduct in a nuisance action for damages was not at issue in Koseris. It is very doubtful that this Court's dictum in Koseris was intended to make such a substantial change in the nuisance law. When the isolated statement of dictum was made in 1960, there was no persuasive authority for such a proposition. Indeed, no citation of authority was given. The [two] cases from other jurisdictions which the Court of Appeals relied on for authority did not exist until 1970. See Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970); Jost v. Dairyland Power Co-op., 172 N.W.2d 647 (1970).... The Second Restatement, which proposed the change in the law by adding subsection (b) to Section 826, was also not in existence until 1970. Therefore, we greatly discount this Court’s dictum in the 1960 Koseris opinion as authority for such a substantial change in the nuisance law. The case of McNichols v. J.R. Simplot Co., 262 P.2d 1012 (Idaho 1953) should be viewed as the law in Idaho that in a nuisance action seeking damages the interests of the community, which would include the utility of the conduct, should be considered in the determination of the existence of a nuisance. The trial court's instructions in the present case were entirely consistent with McNichols. A plethora of other modern cases are in accord.

The State of Idaho is sparsely populated and its economy depends largely upon the benefits of agriculture, lumber, mining and industrial development. To eliminate the utility of conduct and other factors listed by the trial court from the criteria to be considered in determining whether a nuisance exists, as the appellant has argued throughout this appeal, would place an unreasonable burden upon these industries. We see no policy reasons which should compel this Court to accept appellant's argument and depart from our present law. Accordingly, the judgment of the district court is affirmed and the Court of Appeals decision is set aside.

BISTLINE, JUSTICE, dissenting.... The majority today continues to adhere to ideas on the law of nuisance that should have gone out with the use of buffalo chips as fuel. We have before us today homeowners complaining of a nearby feedlot—not a small operation, but rather a feedlot which accommodates 9,000 cattle. The homeowners advanced the theory that after the expansion of the feedlot in 1977, the odor, manure, dust, insect infestation and increased concentration of birds which accompanied all of the foregoing, constituted a nuisance. If the odoriferous quagmire created by 9,000 head of cattle is not a nuisance, it is difficult for me to imagine what is. However, the real question for us today is the legal basis on which a finding of nuisance can be made.

... [I] agree wholeheartedly that the interests of the community should be considered in determining the existence of a nuisance. However, where this primitive rule of law fails is in recognizing that in our society, while it may be desirable to have a serious nuisance continue because the utility of the operation causing the nuisance is great, at the same time, those directly impacted by the serious nuisance deserve some compensation for the invasion they suffer as a result of the continuation of the nuisance. This is exactly what the more progressive provisions of § 826(b) of the Restatement (Second) of Torts addresses. Clearly, § 826(b) recognizes that the continuation of the serious harm must remain feasible. What § 826(b) adds is a method of compensating those who must suffer the invasion without putting out of business the source or cause of the invasion. This does not strike me as a particularly adventurous or far-reaching rule of law. In fact, the fairness of it is overwhelming.
The majority’s rule today overlooks the option of compensating those who suffer a nuisance because the interests of the community outweigh the interests of those afflicted by the nuisance. This unsophisticated balancing overlooks the possibility that it is not necessary that one interest be ignored when the community interest is strong. We should not be adopting a rule of preference which suggests that if the community interest is preferred any other interest must be disregarded. Instead, § 826(b) accommodates adverse interests by contemplating continuation of the facility which creates the nuisance while compensating those who suffer the direct impact of the nuisance—in the instant case the homeowners who live in the vicinity of the feedlot.

The majority’s rule today suggests that part of the cost of industry, agriculture or development must be borne by those unfortunate few who have the fortuitous luck to live in the immediate vicinity of a nuisance producing facility. Frankly, I think this naive economic view is ridiculous in both its simplicity and its outdated view of modern economic society. The “cost” of a product includes not only the amount it takes to produce such a product but also includes the external costs: the damage done to the environment through pollution of air or water is an example of an external cost. In the instant case, the nuisance suffered by the homeowners should be considered an external cost of operating a feedlot and producing beef for public consumption. I do not believe that a few should be required to pay this extra cost of doing business by going uncompensated for a nuisance of this sort. If a feedlot wants to continue, I say fine, providing compensation is paid for the serious invasion (the odors, flies, dust, etc.) of the homeowner’s interest. My only qualification is that the financial burden of compensating for this harm should not be such as to force the feedlot (or any other industry) out of business. The true cost can then be shifted to the consumer who rightfully should pay for the entire cost of producing the product he desires to obtain....

Notes

1. Property Rules, Entitlements and the Restatement’s Balancing Test—When Is a Nuisance Not a Nuisance? Decisions in nuisance cases basically involve the allocation of an entitlement. What are the consequences for the plaintiffs after the court’s conclusion that operation of the cattle feedlot was not a nuisance? If the plaintiffs want to stay on their land, but be free from the “interferences” attributable to the feedlot, what will they need to do?

In some cases factually similar to Carpenter, courts have enjoined the operation of animal feedlots or cement plants as a nuisance. See, e.g., Valasek v. Baer, 401 N.W.2d 33 (Iowa 1987) (granting injunction against spreading of wastes from hog confinement facility within a few hundred feet of plaintiffs’ homes); Morgan County Concrete Co. v. Tanner, 374 So.2d 1344 (Ala. 1979) (granting injunction against operator of ready-mix concrete plant due to dust and noise). What is the consequence of the issuance of an injunction in such a circumstance? If the defendant wants to continue to engage in the desired conduct, what will the defendant have to do?

Sections 826(a), 827, and 828 explicitly integrate the relative social utility of each landowner’s conduct in determining whether a nuisance exists. As a result, an otherwise significant interference with one landowner’s use and enjoyment of her land may not be a nuisance if the offending landowner’s conduct is of significant social utility. Carpenter highlights one consequence of applying this balancing test in certain circumstances: a landowner located adjacent to an activity of great social utility arguably must accept greater interference with the use and enjoyment of her land than a landowner located adjacent to an activity of lesser social utility. At least one scholar has noted that courts concerned about the consequences of injunctive relief if a nuisance is found tended to conclude that conduct that caused significant harm did not constitute a nuisance, even though the landowner engaged in the conduct could have absorbed the costs associated with diminishing the harm to neighboring owners. See Robert

2. The Restatement’s Balancing Test Revisited—Sections 826(b) and 829A. Read Justice Bistline’s dissent carefully. Do you think Justice Bistline is correct that the balancing test (as reflected in sections 826(a), 827, and 828) makes little sense from the standpoint of economic efficiency because it fails to encourage defendants to internalize external costs? Why or why not? How do sections 826(b) and 829A adjust the framework of the Restatement’s balancing test?

3. Entitlements and Economic Efficiency Revisited. Some economics scholars (most notably Ronald Coase) question the appropriateness of requiring the defendant to internalize external costs. Coase argues that nuisance problems present a “joint cost” or “reciprocal cost” conundrum. While many view a factory (or feedlot) as imposing external costs on neighboring homeowners, one could just as easily say that homeowners are imposing external costs on neighboring landowners who want to use their land for a feedlot. Giving the feedlot the right to pollute imposes external costs on the neighboring homeowners, but giving the homeowners the right to be free from pollution imposes external costs on the feedlot. Coase suggests that no clear justification exists to impose on the feedlot (rather than the homeowners) the obligation to internalize external costs. Coase further suggests that in the absence of transaction costs, it does not matter to whom the law awards the entitlement. Regardless of who possesses the initial entitlement (i.e., the right to engage in certain conduct, or the right to prevent it), market forces will produce negotiations that will reallocate the entitlement if reallocation would lead to a more efficient result (assuming the parties have perfect information and can bargain freely). Under this view, it should not matter whether a facility has the “right” to pollute or the neighboring landowners have the “right” to be free from pollution. Either way, the party who places the greater value on its use has the ability to bargain to accomplish what it believes is in its best interest. In other words, if the facility has the “right” to pollute, but the neighbors place a greater value on being free from pollution than the facility places on its right to pollute, the neighbors can pay the facility for the “right” to be free from pollution. Conversely, if the neighbors have the “right” to be free from pollution, but the facility places a greater value on having the “right” to pollute, the facility can buy this right from the neighbors. See, e.g., Ronald Coase, The Problem of Social Cost, 3 J. L. & Econ. 1 (1960).

From a practical standpoint, are there any holes in this theory? What problems can hinder the parties in their efforts to reach an efficient result? Even if the parties can reallocate the entitlement to reach an efficient result, does that necessarily mean that how the law initially allocates that entitlement does not matter? See Frank Michelman, Pollution as a Tort: A Non–Accidental Perspective on Calabresi’s Costs, 80 Yale L. J. 647 (1971); Ellickson, supra note 1; Ward Farnsworth, Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral, 66 U. Chi. L. Rev. 373 (1999) (in set of nuisance cases involving a small number of parties, none of the parties engaged in further negotiation after the judgment assigning the entitlement).

4. Proof Problems—Causation and Extent of Harm. A landowner complaining that a neighbor’s conduct unreasonably interferes with her use and enjoyment of her land must show that such conduct is the proximate cause of that interference. Causation may be clear in some cases, e.g., where distinct loud noises interfere with someone’s use and enjoyment of her land. See, e.g., Maykut v. Plasko, 170 Conn. 310, 365 A.2d 1114 (1976) (use of corn cannon to scare birds held a nuisance); Sakler v. Huls, 183 N.E.2d 152 (Ohio Ct. Com. Pl. 1961) (drag strip constituted nuisance). In some cases, however, background sources of noise or pollution may make it difficult to prove that the targeted defendant is “causing” the unreasonable interference. See, e.g., Karpiak v. Russo, 450 Pa.Super. 471, 676 A.2d 270 (1996) (noise from landscaping business not nuisance given limited impact and other sources); Bove v. Donner–Hanna Coke Corp., 236 A.D. 37, 258 N.Y.S. 229 (1932) (dust, soot and noise from industrial facility in industrial region of city not nuisance). The plaintiff also may find it difficult to prove that the conduct resulted in a significant interference with use and enjoyment. See, e.g., Leaf River Forest Prods., Inc. v. Ferguson, 662 So.2d 648 (Miss. 1995) (paper mill’s discharge of dioxin-containing wastewater did
not constitute nuisance to residents miles downstream); State of New York v. Fermenta ASC Corp., 166 Misc.2d 524, 630 N.Y.S.2d 884 (Sup. Ct. 1995) (release of chemical contaminant into groundwater did not constitute nuisance at concentrations found in groundwater); Langan v. Bellinger, 203 A.D.2d 857, 611 N.Y.S.2d 59 (1994) (church bells not a nuisance).

5. First-in-Time and “Coming to the Nuisance.” Should it matter whether the landowner had been engaged in the allegedly offensive conduct long before a neighbor began his competing use? As you recall from Property, property law often allocates entitlements based upon the “first-in-time, first-in-right” principle. Sometimes, the law re-allocates those entitlements despite the first-in-time principle. When should the law of nuisance allow a prior use to continue, even though it may result in an unreasonable interference with a neighbor’s subsequent use? Should someone who “comes to a nuisance” be foreclosed from bringing suit? Section 840D of the Restatement (Second) of Torts suggests that “coming to the nuisance” is not determinative, but is simply a factor in deciding whether an alleged nuisance is actionable.

For example, suppose that Organ Scrap Metal, Inc. has owned and operated an automobile shredding facility for 30 years. At the time Organ began operating, there were two persons residing within one mile of the facility. Ten years later, this number had grown to six; after 10 more years, it had grown to 15. Now there are 35 neighbors living within one mile of Organ’s facility, all of whom bring a nuisance action against Organ complaining of the explosions, noise, and emissions coming from the facility. Assuming that Organ’s operation significantly interferes with the neighbors’ use and enjoyment of their land, should the neighbors necessarily prevail? Are the arguments of all the neighbors equally compelling? See Hoffman v. United Iron & Metal Co., 108 Md.App. 117, 671 A.2d 55 (1996).

6. “Coming to the Nuisance” and Right-to-Farm Statutes. Suburban growth has produced increasing tension between farmers (who wish to continue their agricultural life) and nonfarmers (who wish to pursue metropolitan life but seek to reside in "the country" while they do so). Acting to preserve the agricultural communities near growing metropolitan centers, many state legislatures have passed “right-to-farm” statutes legislatively that certain agricultural activities cannot constitute a nuisance under certain circumstances—generally if they have been in operation for a year or more. See, e.g., Jacqueline P. Hand, Right-to-Farm Laws: Breaking New Ground In The Preservation of Farmland, 45 U. Pitt. L. Rev. 289 (1984); Margaret R. Grossman & Thomas G. Fischer, Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer, 1983 Wis. L. Rev. 95.

Livestock feedlot disputes like those reflected in Carpenter have reemerged in recent years with the development of confined animal feeding operations (“CAFOs”) in the hog and poultry industries. For example, pork producers have constructed large automated facilities that house tens of thousands of hogs in elevated pens. The floors are rinsed on a regularly scheduled basis, with wastewater pumped to on-site “lagoons.” After temporary retention in the lagoons, the wastewater is applied to surrounding agricultural land as fertilizer. Many of these facilities have encountered frequent problems with releases of wastewater that have resulted in fish kills. More significant for many neighboring landowners, however, is the odor that results from such a large concentration of animals generating so much waste. These situations continue to prompt nuisance actions, as well as other types of enforcement actions under environmental statutes. See, e.g., Sierra Club v. Wayne Weber LLC, 689 N.W.2d 696 (Iowa 2004).