Wisconsin Supreme Court Sees the Light: Nuisance Remedy Granted For Obstruction of Solar Access

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INTRODUCTION

Until relatively recently, legislators and legal commentators gave little thought to providing legal protections for a solar energy user's interest in unobstructed access to sunlight. In the years following the 1974 Arab oil embargo, however, Congress enacted several programs to provide incentives for solar use in order to reduce the nation's dependence on foreign oil,¹ and legal commentators began critically to evaluate various statutory and common law methods available to protect solar access.² In addition, several states enacted legislation requiring consideration of solar energy options in local zoning and land use planning,³ or establishing procedures to describe and record express ease-
ments to sunlight.

Although the English common law doctrine of "ancient lights" recognized a prescriptive easement to light where the landowner had enjoyed unobstructed illumination flowing across the land of another from "time immemorial," American courts traditionally have refused to recognize a common law right to sunlight. In July of 1982, however, the Wisconsin Supreme Court, in Prah v. Maretti, approved the use of a private nuisance cause of action to protect a solar energy user's access to sunlight. This Note analyzes this decision and concludes that private nuisance law may be useful as a supplement to statutory protections by providing a flexible and workable approach to settling disputes between adjacent landowners over sunlight access.

I

THE CASE

A. Factual Background

In 1970 plaintiff Glen Prah built the first house in a new subdivision at a cost of $120,000, including $18,000 for the purchase and installation of a solar energy system. Although Prah did not construct his house in the center of the lot, he did build within the limitations established by the restrictive covenants governing development of the subdivision. Prah's solar energy system included a battery of solar......
collectors built into the southern roof exposure of the home, and provided fifty-five to sixty percent of his energy requirements for the next two years at an annual cost savings of $600 per year.

In 1980 Richard Maretti purchased a lot adjacent to Prah's and presented plans, which called for construction of a two-story home ten feet south of Prah's lot line, to the subdivision's Architectural Control Committee. Prah advised Maretti that the proposed location of the home would shade his solar collectors and reduce the energy system's efficiency. He also expressed concern that the shading might cause the collectors to freeze and crack, causing water damage to his home. At the conclusion of this meeting Maretti agreed to move his construction site an additional fifteen feet to the south, a total of twenty-five feet from Prah's lot line, following which the Committee approved Maretti's building plans.

When he applied for a building permit, however, Maretti used his original plans. In addition, without giving prior notice to the Archi-

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11. Appellant's Brief, supra note 9, at 3.

Most residential solar collectors convert sunlight and other radiations into heat. Flat plate collectors usually consist of a transparent glass cover plate over a dark metal absorber plate which is housed in an insulated box. Since glass is a one-way conductor of solar radiation, the radiations enter through the cover plate and are trapped behind the glass, heating the absorber plate. Absorber plate surfaces are often corrugated to increase absorbing surface area.

Solar heating systems may be "active" or "passive". Active systems use fans or pumps to move heated air or water from the collector to the storage mass, such as rocks or a water tank. The stored heat then can be distributed by radiant hot water baseboard or through a forced air system. Active systems may use air or water as the heat transfer mechanism. A majority use water because it is a cheap and very efficient heat transfer mechanism. Pipes to carry the heated water are easily incorporated into building structures. One disadvantage with this system is that the water is often treated with toxic chemicals to prevent pipe corrosion, so that leaks in plumbing may cause damage to the home.

In solar hot water systems, the heated water is pumped from the storage tank into a water-to-water or water-to-air heat exchanger for distribution through the house. In forced air systems, warm air is drawn off the collector and forced through a bed of rocks. The rocks store the heat, and fans blow air through the rocks to warm the house at night.

Passive systems store heat in the building's structural mass, a principle as old as the adobe pueblos of the Southwest American Indians. In passive systems, solar radiation is absorbed by a dark masonry wall or water container, stored in the collector structure itself and reradiated at night. Passive systems do not achieve the high temperatures of active systems but the lower temperatures are more comfortable if the house itself, rather than the air inside it, is heated. Examples of passive solar collectors are greenhouses and Trombe walls, which use a south-facing glass wall in front of absorbing dark masonry or concrete wall. See generally KRAEMER, supra note 2, at 7-22.

12. Appellant's Brief, supra note 9, at 3-4.

13. Id. at 4-5; Court of Appeals Certification, supra note 9, at 3; 108 Wis. 2d at 225, 321 N.W.2d at 185.

14. 108 Wis. 2d at 226, 321 N.W.2d at 185.

15. Appellant's Brief, supra note 9, at 4.

16. Id. at 5.

17. Id. See also 108 Wis. 2d at 226, 321 N.W.2d at 185.

18. Appellant's Brief, supra note 9, at 5.
tectural Control Committee, he elevated the planned grade of the property another two feet, thus compounding the potential shading problems. In response, the Committee at first rescinded its approval of Maretti's plans, though it later decided solely on aesthetically grounds to approve construction of the home at a point twenty feet south of the lot line. This shaded Prah's solar collectors.

When Maretti commenced construction, Prah filed suit in a Wisconsin state court, claiming that he was entitled to unrestricted use of the sun and its solar power. He sought damages and a temporary injunction restraining continued construction. The circuit court asserted that Prah should have foreseen that a house might be built next to his lot and that he could have avoided any prospective harm by proper planning. The court held that Prah had failed to state a claim upon which relief could be granted and entered summary judgment in the defendant's favor.

Prah appealed the circuit court's decision. The court of appeals found that the claim involved a question of first impression calling for application of existing law to an emerging technology and that the ultimate resolution of the issue would have a wide-ranging impact on public policy, and therefore certified the case for review by the state supreme court.

In a five-to-one decision, the Wisconsin Supreme Court held that Prah's complaint had stated a claim upon which relief could be granted, reversing the judgment of the circuit court and remanding for further proceedings.

B. Majority Holding

The Wisconsin Supreme Court began its analysis of the case by invoking the traditional common law maxim that a landowner does not have an absolute right to use his land in a manner detrimental to the rights of others. It pointed out that under nuisance law any owner's property rights are relative to the rights of neighboring landowners and, therefore, any use of property must not interfere unreasonably with others' enjoyment of their property.

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19. Id. at 6. See also 108 Wis. 2d at 226, 321 N.W.2d at 185.
20. 108 Wis. 2d at 224-25, 321 N.W.2d at 184-85.
21. Id. at 225, 321 N.W.2d at 184.
22. Id. at 224-25, 321 N.W.2d at 184-85.
23. Id. at 242, 321 N.W.2d at 192.
24. Id. at 225, 321 N.W.2d at 185.
25. Id. at 224, 321 N.W.2d at 184.
26. Id. at 225, 321 N.W.2d at 184.
27. Id. at 233, 321 N.W.2d at 187.
28. Id.
recently\(^\text{29}\) had adopted the Restatement of Torts definition of a private
nuisance—as "a nontrespassory invasion of another's interest in the
private use and enjoyment of land."\(^\text{30}\) The majority argued that since
the Restatement's drafters had construed broadly the phrase "interest
in the use and enjoyment of land,"\(^\text{31}\) the obstruction of access to sun-
light could fall within this definition of private nuisance.\(^\text{32}\)

The court next traced the development of American law applicable
to interests in sunlight. At English common law, a landowner could
acquire a right to sunlight flowing across adjoining land under the doc-
trine of "ancient lights."\(^\text{33}\) This doctrine provided that once a land-
owner had received the sunlight for some required period—usually
twenty years\(^\text{34}\)—he acquired a negative prescriptive easement and
thereafter could bar adjoining landowners from obstructing his access
to sunlight.\(^\text{35}\) American courts initially adopted the English doctrine,\(^\text{36}\)
but later repudiated it as inconsistent with the needs of a developing
country.\(^\text{37}\)

The Wisconsin court argued that courts had based this repudiation
on three social policies that were important in the nineteenth-century
but now are obsolete.\(^\text{38}\) The court observed, first, that nineteenth-cen-
tury courts vigorously defended landowners' rights to use their prop-
erty in any manner they wished.\(^\text{39}\) Second, the court noted, society
traditionally valued sunlight only for aesthetic enjoyment or for illumi-
nation, and thus courts attached little importance to its deprivation.\(^\text{40}\)
Third, the judiciary traditionally favored unhindered—and therefore

\(^{29}\) Id. (citing CEW Mgmt. Corp. v. First Federal Sav. & Loan Ass'n, 88 Wis. 2d 631, 633, 277 N.W.2d 766 (1979)).

\(^{30}\) RESTATEMENT (SECOND) OF TORTS § 821(d) (1977).

\(^{31}\) 108 Wis. 2d at 232, 321 N.W.2d at 187; RESTATEMENT (SECOND) OF TORTS
§ 821(d) comment b (1977).

\(^{32}\) 108 Wis. 2d at 232, 321 N.W.2d at 187.

\(^{33}\) 108 Wis. 2d at 233, 321 N.W.2d at 188. See also, e.g., William Alfred's Case, 77

\(^{34}\) See Clawson v. Primrose, 4 Del. Ch. 643, 658 (1873).

\(^{35}\) 108 Wis. 2d at 233, 321 N.W.2d at 188. See generally Gergacz, Solar Energy Law,
supra note 2; Comment, Solar Rights, supra note 2, at 109-113.

\(^{36}\) 108 Wis. 2d at 233, 321 N.W.2d at 188. See also, e.g., Clawson v. Primrose, 4 Del.
Ch. 643 (1873); Gerber v. Grabel, 26 Del.
Ch. 233, 321 N.W.2d at 188. See also generally Lynch v. Hill, 24 Del.
Ch. 643, 658 (1873); Hachlens v. Wilson, 11 Cal.
App. 2d 643, 654 (1854); Berkeley v. Smith, 68 Va.
2d 892 (1876).

\(^{37}\) 108 Wis. 2d at 233-34, 321 N.W.2d at 188. See also generally Lynch v. Hill, 24 Del.
Ch. 86, 6 A. 2d 614 (1939); Hachlens v. Wilson, 11 Cal.
App. 62, 643, 654 (1836); Stein v.
Hauck, 56 Ind. 65 (1877); Lapere v. Luckey, 23 Kan.
534 (1880); Ray v. Sweeney, 77 Ky.
1878); Pierre v. Fernand, 26 Maine 436 (1847); Parker v. Foote, 19 Wend.
309 (N.Y. 1838); 1
AM. JUR. 2D Adjoining Landowners § 89 (1962). See also infra notes76-78 and accompany-
ing text.

\(^{38}\) 108 Wis. 2d at 236, 321 N.W.2d at 189.

\(^{39}\) 108 Wis. 2d at 235, 321 N.W.2d at 189 (citing Metzger v. Hochrein, 107 Wis. 647, 658 (1873)).

\(^{40}\) 108 Wis. 2d at 235, 321 N.W.2d at 189.
rapid and easy—private land development. In arguing for the obsolescence of these policies, the Supreme Court asserted that the private use of land has become increasingly regulated over the last century, that sunlight has taken on new significance as a source of energy, and that the need for easy and rapid land development is no longer as great as it once was.

The majority then observed that the adaptability of the common law permitted the court, in resolving solar access disputes, to abandon the rigid rule that the right to develop land is superior per se to an interest in sunlight access in favor of the more flexible “reasonable use doctrine” of private nuisance law. The court limited its holding, however, by stating that although an obstruction might be found to constitute a nuisance in some circumstances, it need not be so considered in every instance. The majority called on future courts to make an individual determination in each case as to whether the plaintiff’s use of his land is reasonable, by making “a comparative evaluation of the conflicting interests and . . . weigh[ing] the gravity of the harm to the plaintiff against the utility of the defendant’s conduct.” The court argued that use of this balancing approach would protect a solar energy user’s right of access while minimizing burdens to adjoining land development.

The court also commented that the defendant’s compliance with local ordinances and deed restrictions and the foreseeability of harm to the plaintiff would be relevant, but not controlling, factors in determining whether any obstruction constitutes a nuisance. Rather, the court noted, the result in each case will depend primarily on whether the conduct complained of is unreasonable.

C. Dissenting Opinion

Justice William Callow, the lone dissenter, remained unconvinced...

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41. Id. at 235-36, 321 N.W.2d at 189 (citing Dillman v. Hoffman, 38 Wis. 559, 574 (1875); Miller v. Hoeschler, 126 Wis. 263, 268, 105 N.W. 790 (1905); Depner v. United States National Bank, 202 Wis. 405, 409, 232 N.W. 851 (1930)).
42. 108 Wis. 2d at 235, 321 N.W.2d at 189-90.
43. See 108 Wis. 2d at 238 n.12, 321 N.W.2d at 190 n.12. See also Maricopa Co. v. Southwest Cotton Co., 39 Ariz. 65, 81, 4 P. 2d 369, 375 (1931) (observing that: “[T]he common law is not in its nature . . . an absolute, fixed, and inflexible system; it is rather a system of general juridical truths . . . truth adapt themselves to the gradual changes of . . . society . . .”).
44. 108 Wis. 2d at 239-40, 321 N.W.2d at 191.
45. Id.
47. 108 Wis. 2d at 240, 321 N.W.2d at 191.
48. Id. at 242, 321 N.W.2d at 192.
49. Id. at 240, 321 N.W.2d at 191.
of the obsolescence of the policies cited by the majority. He argued that the first policy attacked by the court, the landowner's unfettered right to use his property, "is a fundamental precept of a free society." Second, he asserted that solar energy is at this time "sparingly used and of questionable economic value." Finally, he argued in favor of the continued vitality of society's significant interest in unrestricted land development. He conceded that the law has begun to value aesthetics over increased development, and agreed that an individual may not use his land in a manner that might harm the public. Justice Callow distinguished Prah v. Maretti, however, because the restriction on the defendant's property would benefit only the plaintiff and not the public. He argued also that unrestricted property development ameliorates housing shortages.

The majority noted that courts in many jurisdictions afford limited protection to solar access rights in "spite fence" cases, and argued that Wisconsin courts had been reluctant to follow only because of the three outmoded policy considerations. The dissent criticized this analogy to "spite fence" cases. He first observed that since Prah had failed to allege malice, the spite fence doctrine was inapplicable. Justice Callow argued also that the policy considerations cited by the majority are not obsolete, and therefore there was no reason to extend the protection of access to sunlight beyond the spite fence cases.

The dissenting justice submitted that it would be more appropriate...

50. Id. at 245, 321 N.W.2d at 194 (Callow, J. dissenting).
51. Id. at 247, 321 N.W.2d at 194.
52. Id. at 247, 321 N.W.2d at 195.
53. Id. at 247, 321 N.W.2d at 194-95.
54. Id. at 248, 321 N.W.2d at 195.
55. Id. at 247, 321 N.W.2d at 195.
56. Id. at 234, 321 N.W.2d at 188. In such cases courts have reasoned that an obstruction motivated solely by malice lacks any utility to weigh against the harm it causes. See generally Hornsby v. Smith, 191 Ga. 491, 13 S.E. 2d 20 (1941); Sundowner, Inc. v. King, 95 Idaho 367, 509 P. 2d 785 (1973); Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888); Burris v. Creech, 220 N.C. 302, 17 S.E 2d 123 (1941). If the obstruction served any useful purpose at all, however, courts did not utilize the balancing test and generally found the obstruction to be a nuisance. See, e.g., Daniel v. Birmingham Dental Mfg. Co., 207 Ala. 659, 93 So. 652 (1922); Green v. Schick, 194 Okla. 491, 153 P. 2d 821 (1944). In the single exception, Schork v. Epperson, 74 Wyo. 286, 287 P. 2d 467 (1955), the Wyoming Supreme Court noted the incongruity of limiting the spite fence cause of action to situations where malice exists and there is no benefit to the party erecting the obstruction, and applied the RESTATEMENT'S nuisance balancing test. 74 Wyo. at 295, 287 P. 2d at 470. The Schork court found that the utility the owner derived from the fence was less than the harm caused by its excessive height, id. at 296, 287 P. 2d at 470, and thus reversed the trial court, which had made the same finding but followed the prevailing rule that no remedy exists unless the fence is of no benefit whatsoever to the owner. Id. at 290, 287 P. 2d at 468.
57. 108 Wis. 2d at 235, 321 N.W.2d at 189.
58. Id. at 244, 321 N.W.2d at 193.
59. Id.
to leave any policy decisions affecting solar access to the legislature.\(^6^0\) He observed that the Wisconsin legislature recently had enacted a statute enabling local governments to establish procedures for issuance of solar access permits, which would prohibit subsequent interference with the user's solar access.\(^6^1\) Justice Callow argued that judicial intrusion where the legislature already has acted would be unwarranted and might undermine the contemplated legislative scheme.\(^6^2\)

The dissenting opinion asserted further that granting a private nuisance cause of action for obstruction of solar access "thwarts the very foundation of property law" by failing to provide prospective purchasers with notice of any limitations on the use of their property.\(^6^3\) Justice Callow observed that, in contrast, the legislative provisions for granting solar access permits provide for notice to the owners of restricted property and to subsequent purchasers by recording the permit with the county registrar of deeds.\(^6^4\)

The dissenter also took issue with the majority's conclusion that an "obstruction" of sunlight could fall within the Restatement's definition of a private nuisance. He argued that an obstruction of sunlight is not a nontrespassory "invasion" of another's interest in land and therefore is outside the scope of the Restatement definition.\(^6^5\)

Justice Callow concluded by observing that nuisance law normally protects only those suffering harm of a kind that would be suffered by a normal person in the community, and that a "solar heating system is an unusually sensitive use."\(^6^6\) Since the defendant's obstruction did not cause the type of significant harm suffered by normal persons in the community, the dissent contended that liability for nuisance could not attach.\(^6^7\)

II
LEGAL BACKGROUND

A landowner's control and use of his property has never been completely unrestricted. Historically, courts have employed the maxim

\(^{60}\) *Id.* at 248, 321 N.W.2d at 195.

\(^{61}\) *Wis. Stat. Ann.* § 66.032 (Supp. 1982). This statute was of no benefit to the plaintiff in *Prah* because the legislature enacted the measure after the plaintiff brought his nuisance action.

\(^{62}\) 108 Wis. 2d at 249, 321 N.W.2d at 195.

\(^{63}\) 108 Wis. 2d at 254, 321 N.W.2d at 198.

\(^{64}\) *Id.* at 254-55, 321 N.W.2d at 198; 1981 Wis. Laws, Ch. 354, §§ 66.032(5), (6).

\(^{65}\) 108 Wis. 2d at 240, 321 N.W.2d at 196. See also *supra* note 30 and accompanying text.

\(^{66}\) See *infra* note 180 and accompanying text.

\(^{67}\) See 108 Wis. 2d at 252, 321 N.W.2d at 197. See also *Restatement (Second) of Torts* § 821(f) (1979); W. Prosser, *Law of Torts* § 87 (4th ed. 1971).
“use your own so that you do not injure that of another”\(^{68}\) to prevent uses of land that unreasonably caused injury to others.\(^{69}\) Furthermore, local zoning ordinances designed to effect control of private land use have been upheld by United States courts since the early twentieth century.\(^{70}\) Even the extent of private control over land has been curtailed. For example, the United States Supreme Court restricted the early common law doctrine of \textit{ad coelum}—“he who owns the soil also owns to the heavens and the depths”\(^{71}\)—in \textit{United States v. Causby}.\(^{72}\) In that case the Court denied trespass suits against airplane overflights on the theory that the airspace is a public highway.\(^{73}\) American courts thus have not been adverse to reworking traditional notions of property law regarding an owner’s control over his land, though they have been unreceptive generally to judicial doctrines protecting access to sunlight.

\textbf{A. Ancient Lights and Other Common Law Protections}

The English common law doctrine of ancient lights provides that if a landowner’s access to sunlight from adjoining property continues for an uninterrupted period of time, he acquires an easement to sunlight which may not be obstructed by adjacent landowners.\(^{74}\) United States courts originally accepted the doctrine,\(^{75}\) though courts in every jurisdiction later disavowed it. Courts often cited the seminal case of \textit{Parker v. Foote}\(^{76}\) as authority for rejecting the doctrine. In \textit{Parker}, a New York court ruled that prescriptive easements\(^{77}\) for light and air were “hostile to the spirit of our institutions.”\(^{78}\) The court theorized that there could be no exclusive, open, and adverse use of light flowing across neighboring land because there was no physical encroachment to put the neighbor on notice of the adverse use. The court held that without this notice there could be no presumption of acquiescence by

\begin{itemize}
\item \textsuperscript{68} Translated from the Latin: “Sic utere tuo ut alienum non laedas”. \textit{See} Kraemer, \textit{supra} note 2, at 133.
\item \textsuperscript{69} \textit{See generally} Riblet v. Spokane-Portland Cement Co., 41 Wash. 2d 249, 248 P. 2d 380 (1952).
\item \textsuperscript{70} \textit{See infra} note 133 and accompanying text. For a discussion of the evolution of zoning in the United States, see R. Ellickson & A. Tarlock, \textit{Land Use Control} 39-43 (1981).
\item \textsuperscript{71} Translated from the Latin: “Cujus est solum ejus est usque ad coelum et ad infernos.” \textit{See} Kraemer, \textit{supra} note 2, at 132.
\item \textsuperscript{72} 328 U.S. 256 (1946).
\item \textsuperscript{73} \textit{Id.} at 261.
\item \textsuperscript{74} \textit{See, e.g.}, Clawson v. Primrose, 4 Del. Ch. 643 (1873). The Delaware court overruled Clawson in Lynch v. Hill, 24 Del. Ch. 86, 6 A. 2d 614 (1939).
\item \textsuperscript{75} \textit{See supra} note 36.
\item \textsuperscript{76} 19 Wend. 309 (N.Y. Sup.Ct. 1838).
\item \textsuperscript{77} Prescriptive easements are analogous to adverse possession, which requires open and hostile possession of another’s land. \textit{See, e.g.}, R. Powell, \textit{Powell on Real Property} \S 413 (1981); R. Boyer, \textit{Survey of the Law of Property} 569 (3d ed. 1981).
\item \textsuperscript{78} 19 Wend. at 318.
\end{itemize}
the rightful owner, and thus no prescriptive easement could arise.\textsuperscript{79}

In another often-cited case, \textit{Fontainebleau Hotel Corp. v. Forty-Five, Inc.},\textsuperscript{80} a Florida district court of appeals permitted construction of a building that shaded the pool of a neighboring resort hotel. The Florida court argued that nuisance protection covers only those interests recognized by law, and thus concluded:

There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure serves some useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction \ldots even though it causes injury to another by cutting off the light and air \ldots .\textsuperscript{81}

The Florida court therefore held, in effect, that a landowner's interest in solar access is excluded \textit{per se} from the nuisance law balancing approach. Nearly all American courts have reached the same result.\textsuperscript{82}

Wisconsin courts decided that jurisdiction's only case involving easements of light and air in 1930. In \textit{Depner v. United States National Bank},\textsuperscript{83} a hotel keeper sought damages for a blocked view caused by his landlord's construction of a building on adjoining land. The Wisconsin Supreme Court held that easements of light and air are not acquired by prescription,\textsuperscript{84} noting that strict limitations on easements acquired by necessity were essential to the easy and rapid development of municipalities.\textsuperscript{85} The court implied that the tenant should have anticipated the construction and guarded his interest by negotiating lease provisions against such obstructions.\textsuperscript{86}

Although American courts have been hostile to assertions of prescriptive easements to sunlight, they have recognized limited rights to preserve access to sunlight. First, the courts generally have honored express easements protecting a landowner's solar access.\textsuperscript{87} Second, most courts recognize a cause of action for spite fences,\textsuperscript{88} although, as previously noted, the spite fence doctrine requires that the obstruction

\textsuperscript{79} \textit{Id.} at 316-19.

\textsuperscript{80} \textit{Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.}, 114 So. 2d 357 (Fla. Dist. Ct. App. 1956), \textit{cert. denied}, 117 So. 2d 842 (Fla. 1960).

\textsuperscript{81} Id. at 359.

\textsuperscript{82} \textit{See}, \textit{e.g.}, cases cited \textit{supra} note 37.

\textsuperscript{83} 202 Wis. 405, 232 N.W. 851 (1930).

\textsuperscript{84} Id. at 408, 232 N.W. at 852.

\textsuperscript{85} Id.\textsuperscript{86}

\textsuperscript{86} Id.\textsuperscript{87}

\textsuperscript{87} \textit{See}, \textit{e.g.}, Taliaferro v. Sayler, 162 Cal. App. 2d 685, 328 P. 2d 799 (1958); Annot., 142 A.L.R. 467 (1943). \textit{See also} \textit{Cal. Civ. Code} § 801 (West 1954) (permissible subjects of easements include, \textit{inter alia}, “\textit{the right of receiving air, light, or heat \ldots over land}”).

not serve any useful purpose.\footnote{See \textit{supra} note 56.}

\section*{B. Modern Statutory Protections}

To date, over half of the states have enacted some type of statutory protection of solar access.\footnote{See \textit{supra} notes 3 & 4.} Some of these statutes are enabling legislation, granting municipal governments authority to include solar energy considerations in land use planning decisions. These acts make inclusion and evaluation of solar options either permissive or mandatory on the part of local authorities.\footnote{Compare \textit{OR. REV. STAT.} § 215.110(1) (1979) (creating a planning commission with authority to \textit{recommend} to local bodies ordinances to provide protections for access to sunlight) \textit{with MINN. STAT. ANN.} § 473.859(2) (Supp. 1979) (\textit{requiring} local commissions to include allowances for future solar energy development when adopting a comprehensive zoning plan).} The procedures typically require filing of an application for a solar access permit, notice to the owners of restricted property, a hearing on the permit application, and recording of the permit when it is granted.\footnote{See, \textit{e.g.}, \textit{WIS. STAT. ANN.} §§ 66.032(3)(b), (6)(b) (Supp. 1982). One author has proposed that solar zoning schemes place each of a city’s areas into one of three categories. “Mandatory” solar zones would be located in residential districts where height and setback restrictions already are in effect, and future obstructions of solar access would be prohibited. Those who construct new buildings in these areas would be required to install solar energy systems. In “permissive” solar zones, where development is less uniform, solar access rights would be contingent on a local authority’s issuance of a use permit. Finally, those areas where the surrounding airspace is very valuable, such as downtown business districts, would be denominated “unenforceable” areas and solar rights could not be enforced. \textit{See Note, Obtaining Access to Solar Energy, supra} note 2, at 385-89. \textit{See generally KRAEMER, supra} note 2, at 73-94.}

Other states’ solar acts specify the conditions under which express easements for sunlight will be recognized. Some statutes require that express solar easements be created in writing and subjected to conveyancing and recording requirements.\footnote{\textit{Id.} This statute requires the document creating the easement to include “the vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the solar easement.” \textit{Id.}} Such easements can be described technically in terms of horizontal and vertical degrees,\footnote{\textit{See, \textit{e.g.}}, \textit{ILL. REV. STAT.} ch. 96 1/2 § 7303 (Smith-Hurd 1979). (defining the “solar skyspace” when the energy system is used for heating purposes as “the maximum three dimensional space extending from a solar energy collector to all positions of the sun between 9 am and 3 pm . . . from September 22 through March 22 . . . “)).} or more pragmatically by the incidence of shadows during certain seasons of the year and times of the day.\footnote{\textit{See N. MEX. STAT. ANN.} §§ 47-3-1 to -5 (1978). \textit{See generally Note, The Allocation of Sunlight, supra} note 2.}

The New Mexico legislature has adopted the doctrine of prior appropriation, a concept having its origins in water law.\footnote{See \textit{N. MEX. STAT. ANN.} §§ 47-3-1 to -5 (1978).} Under this
doctrine, the first person who puts the sunlight to a beneficial use is granted the right of unobstructed solar access.97

In California, several statutory provisions promote solar energy use.98 Notable innovations include section 714 of the California Civil Code, which voids restrictive covenants against solar collectors as contrary to public policy.99 Section 17959 of the Health and Safety Code empowers local governments to mandate that new buildings be constructed to permit the installation of solar collectors.100

III
ANALYSIS

Prah v. Maretti is the first reported state supreme court decision granting a cause of action in nuisance for obstruction of a solar energy user's sunlight. The case could provide valuable precedent for courts in other states to invoke the law of private nuisance to protect solar access.101 Because present uncertainty over the solar collector owner's legal right to sunlight may well be a major obstacle to increased utilization of solar energy,102 this decision could have a profound impact on state and national programs to encourage the use of solar power.

97. Under water law, the beneficial uses of the parties involved are compared to determine which is more productive when the water supply is insufficient to accommodate all uses. This comparison is more difficult in solar access cases because courts must compare different categories of uses, such as energy and housing development, without the benefit of prior case law. See generally A. Miller & G. Thompson, Solar Access and Land Use: State of the Law 19 (1977).


A. The Appropriateness of Nuisance Law in Resolving Solar Access Disputes

Courts often have turned to nuisance law to balance the competing interests of adjacent landowners. Dean Prosser has defined a private nuisance as a substantial and unreasonable invasion of another’s use and enjoyment of his land. In determining whether the activity complained of constitutes a nuisance, courts typically balance the gravity of the harm to the plaintiff against the utility of the defendant’s conduct. A central factor in this determination is the reasonableness of the defendant’s use of his property. Other factors include the extent of the harm, the suitability of the location to the competing uses, their relative social utility, the relative ability of the parties to avoid the harm, the existence of malice, and the order of use.

A major advantage of the nuisance approach in settling solar access disputes is flexibility. This flexibility allows the courts to test both old and new values in the judicial decisionmaking process and adjust the reasonableness test as technology and social priorities change. As Professor Ellickson notes, when horses were the prevailing mode of transportation, the first automobiles were considered nuisances. Later, as automobiles became commonplace, horses became the nuisance.

As the Wisconsin Supreme Court recognized in Prah, “private nuisance law . . . has the flexibility to protect both a landowner’s right of access to sunlight and another’s right to develop land.” The nuisance doctrine allows courts to resolve the competing needs of land developers and alternative energy users based on the specific equities and facts of the case before it. One commentator has suggested that the impossibility of specifying all the situations in which solar access

104. See supra note 46 and accompanying text.
105. 108 Wis. 2d at 240, 321 N.W.2d at 191. See also Abdella v. Smith, 34 Wis. 2d 393, 399, 149 N.W.2d 537, 540 (1967).
106. RESTATEMENT OF TORTS § 827(a) (1939).
107. Id. §§ 827(d), 828(b).
108. Id. §§ 827(c), 828(a).
109. Id. §§ 827(e), 828(c).
110. Id. § 829(a).
112. Ellickson, Alternatives to Zonings: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. CHI. L. REV. 681, 731 (1973) [hereinafter cited as Ellickson]. Indeed, even a solar collector could be considered a nuisance if, for example, solar panel glare temporarily were to blind auto drivers and cause an accident. The dissent recognized this possibility. 108 Wis. 2d at 248 n.3, 321 N.W.2d at 195 n.3. In 1981 a couple living within Teton National Park in Wyoming filed suit claiming the glare from neighboring solar panels denied them the use and enjoyment of their home and deterred wildlife from coming onto their property. See Couple Sues Neighbor Over Reflector Glare, 3 SOLAR L. REP. 212 (1981).
113. 108 Wis. 2d at 239, 321 N.W.2d at 191.
should be protected is a primary reason why a flexible, case-by-case approach is needed. In a solar nuisance action, the court can examine the totality of the circumstances and weigh the many factors involved.

The nuisance doctrine is flexible also in terms of the available remedies. The court may issue an injunction against the disputed use, or permit it to continue and require payment of compensation to the plaintiff. Thus, even where the utility of an obstruction to sunlight outweighs the harm it causes, the user of solar energy may be able to recover damages. By paying damages to the owner of the solar system the individual causing the nuisance in effect internalizes the costs of the obstruction.

The nuisance doctrine is as broad in application as it is flexible. Nuisance law protects all substantial interests in land from unreasonable interferences and allows no per se exceptions from its coverage of property interests. As Dean Prosser stated, "so long as the interference is substantial and unreasonable . . . virtually any disturbance of the enjoyment of the property may amount to a nuisance." Prah can thus be viewed as a correction of previous judicial reasoning which failed to recognize the broad scope of the nuisance doctrine.

114. Comment, Obstruction of Sunlight as a Private Nuisance, supra note 2, at 118.
115. See Restatement (Second) of Torts § 822 comment d (1977). A suit to enjoin a nuisance action sounds in equity and courts have used their equitable discretion to tailor relief appropriate to the particular circumstances of the case. For example, in Spur Indus., Inc. v. Del E. Webb Devel. Co., 108 Ariz. 178, 494 P. 2d 700 (1972), the Arizona Supreme Court held that a residential developer could enjoin operation of a cattle feedlot as a public nuisance but would be required to indemnify the owner of the business for the cost of moving or shutting down. Del E. Webb had constructed a retirement community outside the limits of any city, and in so doing had increased the population in a location that previously had been devoted to agricultural uses. The Arizona court noted that the "coming to the nuisance" defense would have barred relief if the developer had been the only party injured, because its actions made the injunction necessary. Id. at 185, 494 P. 2d at 707. The court expressed its concern "with protecting the operator of a lawful, albeit noxious, business from the result of a knowing and willful encroachment by others." Id. at 184, 494 P. 2d at 706.

The Del E. Webb result corresponds to "rule four" of the nuisance law principles developed by Professors Guido Calabresi and A. Douglas Melamed. See Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1116 (1972). The concept of a "purchased injunction" may appear foreign to the courts because the plaintiff, rather than the defendant, would be burdened with damages. This approach nevertheless provides courts of equity with an alternative form of relief in solar nuisance actions. See Note, Obtaining Access to Solar Energy, supra note 2, at 367. Professor Ellickson suggests that the use of this remedy may expedite private settlement of nuisance actions. See Ellickson, supra note 112, at 744, 745 n.225.

117. See Comment, Obstruction of Sunlight as a Private Nuisance, supra note 2, at 113.

See also infra text accompanying note 126.
118. See Restatement (Second) of Torts § 821D comment b (1979).
In *State v. Deetz*, the Wisconsin Supreme Court itself rejected *per se* exceptions to the application of nuisance law. In *Deetz*, it adopted the reasonable use doctrine from the Restatement of Torts, abandoning the rigid "common enemy" rule which allowed a surface water user an unrestricted legal privilege to exploit water for his own purposes regardless of the harm it inflicted on others. In *Prah*, the court thus extended the reasonable use rule adopted in *Deetz* to include obstructions of sunlight as nuisances. In states that have adopted the Restatement rule of reasonableness, *Prah* should provide precedental authority for a solar nuisance cause of action.

**B. Nuisance Law Compared With Other Means of Protecting Solar Access**

Some courts have argued that if public policy requires recognition of a right to sunlight, the legislature is the proper body to determine such questions, and that zoning laws are the appropriate means to enforce these rights. Zoning has a number of drawbacks as a means to protect solar access, however. While comprehensive zoning laws do have the advantage of integrating solar energy considerations into local planning and decisionmaking, they are of general application and may not be effective to resolve the equities involved in specific disputes between adjoining landowners. Under a zoning scheme, certain uses either are allowed or prohibited. Nuisance law, on the other hand, provides a more flexible means to remedy obstructive uses by permitting use of the property while allowing compensation to the injured solar user. In addition, zoning laws are legislative acts and therefore are subject to revision or repeal. Such ephemeral legal protection may not offer sufficient long-term protection for the consumer who must invest—and therefore risk—substantial financial resources in order to purchase solar energy systems.

Another means of protecting solar access might be the use of easements. Easements typically would provide absolute protection of solar access, and thus could restrain development to a degree disproportionate to the value of the solar energy produced. Furthermore, a solar energy user would have to acquire the easement either by prescription or by express purchase. Both modes of acquisition pose risks and costs that might discourage a potential user from investing in a solar energy system. The major drawback of acquiring solar easements by prescrip-

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120. 66 Wis. 2d 1, 224 N.W.2d 407 (1974).
121. *Id.* at 14-15, 224 N.W.2d at 414-15.
122. *See, e.g.*, *Fontainebleu*, 104 So. 2d at 360.
123. *Id.*
tion is that it may take a considerable period of time for the property right to vest and and the solar system owner will have no security during the interim. Express easements, though effective from the date of purchase, may be acquired only through voluntary agreement, and the neighboring landowner may demand an excessively high price for the solar access right. These acquisition costs increase the total costs to the user of the solar energy system and thus may reduce the competitiveness of solar alternatives in the energy market. Such an easement may be assessed for property tax purposes, adding further to the purchaser’s total costs. It may be more equitable to place the cost of obtaining the easement on the builder causing the sunlight obstruction since he is in a better position to avoid the interference and thus minimize any potential harm than is the owner of an existing solar energy system. If the sunlight blocker must bear the cost of the obstruction, he will have an incentive to minimize the interference.

The nuisance approach, similarly, may also present costs and risks for the solar energy user. To prove the existence of a nuisance and protect his interest, the solar user must initiate a lawsuit and prosecute it to conclusion, a process that involves litigation costs for both the solar user and the builder in addition to possible delays in construction and acrimony between neighboring landowners. The user will not be certain of his right to continued access to sunlight until after, and if, he prevails in the lawsuit. Furthermore, the builder often receives no notice of the solar right until the plaintiff files his lawsuit, and even then the builder cannot be sure that there is a valid claim affecting his property. Finally, an increase in solar access nuisance suits will lead inevitably to increased costs for the judicial system.

C. Policy Considerations

In Prah, the majority cited three policy considerations as the basis for the prior courts’ reluctance to provide legal protection for a landowner’s access to sunlight. These were (1) the right of landowners to develop their land; (2) the limited weight given to the loss of sunlight for illumination; and (3) the interest in promoting rapid growth and development.

1. Limits on the Landowner’s Traditional Property Rights

The majority noted that the right of a landowner to use his property in any manner not causing physical damage to neighbors has been

125. See generally Moskowitz, supra note 2, at 198.
126. See generally Ellickson, supra note 112. See also Note, An Economic Analysis of Land Use Conflicts, 21 STAN. L. REV. 293 (1969).
127. See infra text accompanying notes 197-200.
128. 108 Wis. 2d at 235, 321 N.W.2d at 189.
jealously guarded by the courts. In the turn-of-the-century case of *Metzger v. Hochrein*,\(^{129}\) the Wisconsin Supreme Court stated that "the doctrine of personal liberty and personal domain over his own property enables [the landowner] to do things to the annoyance of others, not causing actual, material discomfort to them."\(^{130}\)

The *Prah* majority concluded that this policy has become less important as society increasingly regulates the private use of land for the public welfare. The court cited two cases as examples of such regulation.\(^{131}\) In the first, *Village of Euclid v. Ambler Realty Co.*,\(^{132}\) the U.S. Supreme Court found zoning laws a valid means to achieve adequate spacing between buildings and to ensure compatible uses.\(^{133}\) In *Just v. Marinette County*,\(^{134}\) the Wisconsin Supreme Court upheld stringent restrictions on the development of privately owned wetlands.\(^{135}\)

In his dissent, Justice Callow distinguished these cases as involving use of the state's police power for the public welfare rather than a restriction of the defendant's use of his property for the plaintiff's private benefit.\(^{136}\) This distinction between public and private benefit is impossible to maintain, however. Every successful private nuisance action results in the use of the state's police power to benefit a private party. In addition, society benefits from the abatement of private nuisances through the peaceful resolution of disputes between neighboring landowners.

By granting and protecting a legal right to solar access, the courts will not restrict property rights unreasonably. A landowner's right to use his property must necessarily become more limited as urban density and interdependence between neighboring landowners increases. When hearing a nuisance case the court should consider this right, but this interest should not automatically be accorded paramount importance where the landowner's right conflicts with his neighbor's interest in the free flow of sunlight as an energy source. Only unreasonable interferences with solar access will be prohibited where courts enforce a right to sunlight. Therefore a judicially-imposed right to sunlight will not greatly limit landowners' property rights. Where buildings are adequately spaced and sited, allowing a private nuisance action for solar access would not result in an unreasonable restraint on neighboring uses. Recognition of a common law right to solar access will not signifi-

\(^{129}\) 107 Wis. 267, 83 N.W. 308 (1900).
\(^{130}\) Id. at 272, 83 N.W. at 310.
\(^{131}\) 108 Wis. 2d at 236, 321 N.W.2d at 189.
\(^{132}\) 272 U.S. 365 (1926).
\(^{133}\) Id. at 397.
\(^{134}\) 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
\(^{135}\) Id.
\(^{136}\) 108 Wis. 2d at 245-46, 321 N.W.2d at 194.
icantly impede residential development. An example is suggested by the plaintiff in *Prah*, who alleged that the defendant could have alleviated the shading problem by moving his construction site an additional five feet or lowering the grade to the height originally planned. These were reasonable alternatives to the complained-of obstruction. By his refusal, the defendant unreasonably interfered with the plaintiff's interest in receiving sunlight and thereby subjected the plaintiff to substantial economic injury.

2. Increased Societal Importance of Sunlight Access

The second policy consideration dealt with by the supreme court, the importance that society attaches to sunlight access, also has undergone significant change in recent years. Historically, society valued sunlight only for its aesthetic appeal or for its use as a source of illumination. Since sunlight easily could be replaced by artificial illumination, society gave little weight to the deprivation of sunlight as a light source. In recent years access to sunlight has become more important, however, both as a valuable incident of private property ownership and as an alternative source of energy for society as a whole.

Several federal programs aimed at reducing domestic consumption of foreign oil promote the use of solar energy in the interests of national security. The federal government has established programs for research and development of solar technologies, authorized loans and loan guarantees for investment in solar equipment, and offered

139. 108 Wis.2d at 235, 321 N.W.2d at 189.
138. *See, e.g.*, *R. Knowles, Energy and Form* 191 (1974) (suggesting that higher property values along Los Angeles' Wilshire Blvd. coincide with the side of the street facing the sun).
subsidies to homeowners who purchase such equipment by granting them tax credits of up to forty percent of the first $10,000 invested.\textsuperscript{144} These programs encourage investment in solar energy systems as a contribution to national security and as a means to help protect the environment.\textsuperscript{145}

Solar energy systems provide substantial economic benefits to their owners and hold the promise of still greater benefits in the future. In many parts of the country, solar energy as a source of heat is cost competitive with alternative fuels when judged by traditional measures of return on investment.\textsuperscript{146} These costs are expected to decline as technological development continues and the industry moves into mass production.\textsuperscript{147} By comparison, the costs of oil, gas, and electricity are expected to increase at a rate higher than the rate of inflation.\textsuperscript{148}

A solar energy user whose access to sunlight is obstructed is deprived of a significant property interest. Solar energy systems require substantial financial investments, and are often integrated into the structure of the building as in \textit{Prah}.\textsuperscript{149} The harm resulting from the obstruction of access to sunlight may be measured by the replacement cost of the energy produced by the system,\textsuperscript{150} as well as the potential physical damage to the collectors themselves and the owner’s home.

\begin{footnotes}
\item[145.] \textit{See, e.g.}, Solar Heating and Cooling Demonstration Act of 1974, Pub. L. 93-409, § 2(a)(6), 42 U.S.C. §§ 2473, 5501-17 (observing that “the widespread use of solar energy in place of conventional methods for the heating and cooling of buildings would have a significantly beneficial effect upon the environment”).
\item[146.] The use of solar energy systems has a minimal impact on the environment. The benefits of the solar option become most apparent when measured against the environmental dangers presented by the alternatives. Unlike coal or oil combustion, the generation of solar power creates little direct air pollution. A significant increase in coal consumption could cause global climatic changes—the so-called “greenhouse effect.” Solar energy poses no risk of radioactive contamination, unlike nuclear energy. \textit{See generally} CEQ, \textit{Solar Energy, supra} note 141, at 2, and sources cited therein.
\item[147.] \textit{Id.}
\item[149.] \textit{See Appellant’s Brief, supra} note 9, at 2.
\item[150.] For plaintiff Prah, this cost was $600 per year. \textit{See supra} text accompanying note 12. It would be expected that the value of the energy produced by the system will increase as the cost of replacing the solar energy with conventional sources increases.
\end{footnotes}
The increasing importance to society of solar energy may provide the most persuasive rationale for the court's decision. Allowing a cause of action for obstruction of solar access recognizes the potentially important role for solar energy as the search continues for environmentally benign substitutes for U.S. dependence on foreign oil consumption.

3. Modern Limits on Unhindered Land Development

The Prah majority found that the third policy courts have relied on to deny relief for obstruction of light, that of favoring unhindered private land development, is also less imperative than it once was. The court cited its previous holding that strict limitations on easements for light and air were "essential to easy and rapid development" during the period of extensive economic growth in the nineteenth and early twentieth centuries. In the 1905 case of Miller v. Hoeschler, the Wisconsin high court argued that the rationale for the English rule recognizing implied easements of light was the "presumption of intended permanence of real estate arrangement" between the grantor and grantee. The court asserted, however, that with respect to municipalities, "instead of permanence, change is to be expected—is, indeed, essential to prosperity."

Even the dissent in Prah recognized that landowners are subject to some restrictions in developing their land. Justice Callow conceded that "an individual may not use his land in such a way as to harm the public," but argued that the instant case involved private benefit rather than public harm. This analysis ignored, however, the benefit to society resulting from the use of solar energy to reduce fossil fuel consumption. The dissenting justice also quoted dictum from State v. Deetz indicating that "the reasonable use rule retains a policy of favoring land improvement and development." He further noted the need for continued development as a means to alleviate housing shortages.

Land development remains an important consideration, but courts also must consider other values when striking the balance in deciding nuisance actions. No longer is unconstrained, piecemeal growth considered a wise land use policy, as it was in the days of the expanding

151. 108 Wis. 2d at 235-36, 321 N.W.2d at 189.
152. 126 Wis. 263, 105 N.W. 790 (1905).
153. Id. at 268, 105 N.W. at 792.
154. Id.
155. 108 Wis. 2d at 247, 321 N.W.2d at 195.
156. 66 Wis. 2d 1, 224 N.W.2d 407 (1974).
157. 108 Wis. 2d at 247, 321 N.W.2d at 195 (Callow, J., dissenting) (quoting State v. Deetz, 66 Wis. 2d at 20, 224 N.W.2d at 417).
158. 108 Wis. 2d at 247, 321 N.W.2d at 195.
frontier.\textsuperscript{159} Decisionmakers recently have begun to realize that there may be natural and desirable limits to growth. As even the dissent recognized, in some cases the law is beginning to favor aesthetics over increased development.\textsuperscript{160} For example, some municipalities have enacted ordinances permitting zoning for open spaces or restricting the rate of growth.\textsuperscript{161} The nuisance suit balancing test may favor development in most cases in which the development does not create an unreasonable interference with neighboring land uses. Among the factors the court must weigh in each case is the social utility of the particular development. This factor may be given great weight, for example, where the planned development will provide housing for low income groups or the elderly. Such projects may provide greater benefits for the society as a whole than would have the energy produced from a solar collector shaded by such a development. The outcome of a specific balancing process, however, does not support the proposition that the obstruction of sunlight should never be considered in the nuisance balancing test.

The reasoning of the Wisconsin court in \textit{Prah} differed markedly from that of other states' courts in cases such as \textit{Fontainebleau}, in which the Florida court's analysis began with the premise that there is no right to sunlight. The \textit{Fontainebleau} court asserted that nuisance law protects only those interests that are "recognized and protected by law,"\textsuperscript{162} and reasoned that since there is no legally recognized right to receive light and air from adjoining land there could be no common law right to protection from an obstruction of sunlight.\textsuperscript{163} The court concluded, in effect, that rejection of the doctrine of ancient lights, which allowed a right to sunlight by prescription, precluded the assertion of \textit{any} common law right.\textsuperscript{164}

The \textit{Prah} court found the Florida court's reasoning unpersuasive. It criticized the \textit{Fontainebleau} opinion for "leap[ing] from rejecting an easement by prescription . . . to [its] conclusion that there is no right to

\begin{footnotesize}
\begin{enumerate}
\item 108 Wis. 2d at 247, 321 N.W.2d at 194. See also Note, \textit{Aesthetic Nuisance: An Emerging Cause of Action}, 45 \textit{N.Y.U. L. REV.} 1075 (1970).
\item See generally Deutsch, \textit{Land Use Growth Controls: A Case Study of San Jose and Livermore, California}, 15 \textit{SANTA CLARA LAW.} 1 (1974).
\item 114 So. 2d at 359.
\item Id.
\item Id. at 360. In Venuto v. Owens-Corning Fiberglass Corp., 22 Cal. App. 3d 116, 99 Cal. Rptr. 350 (1971), a California court adopted similar reasoning. The court dismissed a complaint alleging obstruction of the plaintiff's view. The court found that the rule that the obstruction of light, air and view does not constitute a nuisance was said to "find [its] genesis in the repudiation of the English doctrine of 'ancient lights.' . . ." \textit{Id.} at 127, 99 Cal. Rptr. at 357.
\end{enumerate}
\end{footnotesize}
protection from obstruction of access to sunlight." The majority went on to argue that the court's statement that a landowner has no right to light "should be [a] conclusion, not its initial premise." The Prah court argued that making the obstruction of sunlight a per se exception to private nuisance law may invite unreasonable behavior, and noted that the adaptability of the common law allowed it to abandon a rigid rule unsupported by changing social conditions.

D. The Dissenting Opinion

The dissent's argument is inadequate in several respects. For example, the dissent contends that "policy decisions in this area are best left for the legislature." The trial court shared this view, and declared that "while temptation lingers for the court to declare by judicial fiat what is right and what should be done such action would be an intrusion of judicial egoism over legislative passivity." The problem with this reasoning is that the courts cannot avoid becoming involved in this issue. Despite the pervasiveness of the rule that there is no legal right to sunlight, adjoining landowners continue to sue for obstructions of light and air. The judiciary cannot ignore the question so long as landowners continue to bring suit.

In addition, just as the invention of the airplane required limitations of the ad coelum doctrine, the emergence of new technologies may necessitate judicial rethinking of traditional concepts of property ownership. The judiciary should not abdicate its role in accommodating the law to technological change. Recent United States Supreme Court decisions extending due process guarantees imply that the judiciary may utilize property interests as a vehicle to allocate rights among individuals in order to attain desirable social goals. Furthermore, the basic policy choices embodied in the energy programs adopted by Congress and many state legislatures indicate a strong societal interest in solar energy development. Courts should not rely upon the outdated common law rule excluding sunlight obstruction per se from nuisance.

165. 108 Wis. 2d at 239 n.13, 321 N.W.2d at 191 n.13.
166. Id.
167. Id.
168. Id. at 238 n.12, 321 N.W.2d at 190 n.12. See also supra note 43.
169. 108 Wis. 2d at 248, 321 N.W.2d at 195.
170. 2 SOLAR L. REP. at 1017.
173. See supra notes 142-145.
174. See supra notes 3 & 4.
treatment to frustrate these legislative policy choices. As the Wisconsin Supreme Court stated previously, "when a [judge-made] rule of law thwarts social policy rather than promotes it, it is the obligation of a common law court to undo or modify a rule that it has previously made." 175

The dissenting justice also asserted that the defendant's "obstruction" of sunlight access did not fall within the Restatement's definition of a nuisance as a nontrespassory "invasion" of an interest in land, noting that an invasion is usually synonymous with "entry" or "penetration." 176 In Hunter v. McDonald, 177 however, the Wisconsin Supreme Court held that a nuisance action could be maintained in the absence of actual physical encroachment upon the property of the complaining landowner. 178 Even if actual encroachment were required, however, the shadows cast by the obstruction could be viewed as the invading substance. Where the collectors are damaged by soot, vibrations, or other effluents, the applicability of nuisance law would be unquestioned. 179 There is no logical reason to distinguish shading effects; the damage to the collectors is no less direct or tangible.

The dissent also concluded that the plaintiff's solar heating system is an unusually sensitive use. Private nuisance doctrine does not protect against every interference with an interest in land. Ordinarily, "there is liability for 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 . . . used for a normal use." 180 The leading case establishing the so called "hyper-sensitivity" defense, Amphitheaters, Inc. v. Portland Meadows, 181 held that a drive-in theater would be entitled to no relief from a neighboring race track's floodlights, which interfered with the picture on its movie screen. The Oregon Supreme Court held that because the theater was a "special and delicate use" of the property, its complaint had stated no cause of action. 182

The authority of Amphitheaters as a precedent for hypersensitivity to shadows caused by obstructions, instead of light, is doubtful. First, public policy considerations were a key factor in Amphitheaters. The Oregon court indicated that while drive-in theaters cannot claim any

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175. State v. Deetz, 66 Wis. 2d at 15-16, 224 N.W.2d at 415.
176. 108 Wis. 2d at 250-51, 321 N.W.2d at 196.
177. 78 Wis. 2d 338, 254 N.W.2d 282 (1977).
178. Id. at 344-45, 254 N.W.2d at 286. In Hunter the defendants placed rocks and fence posts along a right-of-way access road, making use of the road more difficult for the plaintiffs without actually intruding on their right-of-way. Id.
179. See generally W. PROSSER, LAW OF TORTS § 89 (4th ed. 1971).
180. RESTATEMENT (SECOND) OF TORTS § 821F (1979). See also Belmar Drive-In Theatre Co. v. The Illinois State Toll Highway Commission, 34 Ill. 2d 544, 216 N.E.2d 788 (1966); Bie v. Ingersoll, 27 Wis. 2d 490, 135 N.W.2d 250 (1965).
182. Id.
special social value, if the plaintiff's use had clear social importance the court would recognize a cause of action. Furthermore, unlike the defendant in *Prah*, the race track in *Amphitheaters* made substantial efforts to minimize the effect of its lights on the plaintiff; further protection could be provided only by shutting down the track altogether. Additionally, twelve years after *Amphitheaters*, the Oregon Supreme Court indicated that even sensitive uses are protected from unreasonable interference. "[A] sensitive use," the court reasoned, "is entitled to protection if the conduct of the defendant is unreasonable with respect to that sensitive use."

Professor Ellickson contends that a "basic reason for the hypersensitivity defense, superiority of the plaintiff's knowledge of the risk, is negated when the defendant is aware of the plaintiff's condition." Both parties in solar access nuisance actions could be treated fairly if hypersensitivity were analogized to contributory negligence. Comparative fault in accident law is based on the premise that the victim is in a position to take precautions for his own safety. Under this theory, a victim who is aware of the danger of injury may still recover although his damages may be limited. By analogy, in a nuisance action a defendant who knowingly inflicts injury would be liable, even where the plaintiff's use is indeed hypersensitive.

Wisconsin nuisance law requires further that "the injury must be tangible, or the discomfort perceptible to the senses of ordinary people." In *Jost v. Dairyland Power Cooperative* the Wisconsin Supreme Court re-examined the doctrine and concluded that while "discomfort" is not actionable unless offensive to ordinary sensibilities, obvious injury to tangible property is sufficient to fix liability. In *Prah*, the plaintiff alleged that the shading would cause the solar collectors to freeze, causing physical damage to the $18,000 energy system and possible water damage to his home. This certainly constitutes tan-

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183. *Id.* at 361-63, 198 P. 2d at 857 (citing The Shelbourne, Inc. v. Crossan Corp., 95 N.J. Eq. 188, 122 A. 749 (1923)). The *Amphitheaters* court declared that "[w]e do not say that the shedding of light upon another's property may never . . . become a nuisance . . . ." but apparently based its decision on "a crystallization of legal opinion" that such invasions are reasonable as a matter of law. 184 Or. at 362-63, 198 P. 2d at 858. See also *Restatement of Torts* § 826 comment d (1939).

184. 184 Or. at 343, 198 P. 2d at 850.


187. Professor Atwood suggests that there is a bias against sensitive uses in nuisance law because such users must bear the plaintiff's burden of proof and expenses of litigation. See Atwood, *An Economic Analysis of Land Use Conflicts*, 21 STAN. L. REV. 293, 314-15 (1969).

188. Pennoyer v. Allen, 56 Wis. 502, 14 N.W. 609, 613 (1883).

189. 45 Wis. 2d 164, 172 N.W.2d 647 (1970).

190. *Id.* at 172, 172 N.W.2d at 651. The *Jost* court affirmed a jury award of $250 for one plaintiff and $145 each for two others in the context of crop damage caused by a power plant's emission of sulfur fumes.
gible injury to property, and cannot be characterized as mere discomfort. The official comments to the Restatement note that "when an invasion involves a detrimental change in the physical condition of land there is seldom any doubt as to the significant character of the invasion."191

Justice Callow also pointed out in his dissent that Maretti's plans for proposed construction conformed to applicable deed restrictions and local ordinances.192 The trial court found that the defendant's compliance with the law demonstrated that the proposed construction was reasonable.193 The supreme court majority disagreed, however, holding that "a landowner's compliance with zoning laws does not automatically bar a nuisance claim."194 Both the dissent and the trial court thought Prah should have had the foresight to realize a potential shading problem might occur in the future and should have taken steps to avoid the obstruction by negotiating for an easement or by acquiring the adjoining land.195 Although compliance with the law and foreseeability of harm are two factors to be weighed in the nuisance balance, the dissent was mistaken in suggesting that either of them standing alone should be conclusive.196 The nuisance doctrine as espoused by the majority is preferable because it allows consideration of a variety of factors rather than reaching a result through an analysis in which one fact or circumstance must be determinative.

The dissent asserted that prospective purchasers of land will not receive notice of limitations on the use of their property if a right to sunlight is recognized.197 In Prah, however, Maretti received actual notice of the potential injury to the plaintiff.198 In most instances, the sight of rooftop solar collectors on adjoining land should alert any prospective or actual purchasers to their neighbor's need for unobstructed solar access and give constructive notice that they should design building plans so as to avoid any obstructions. In a more general sense, purchasers need to be put on notice that a legal right to sunlight exists as much as they need to be advised of the physical presence of solar collectors on their neighbor's roof. Therefore, courts should prospectively grant a cause of action for sunlight blockage in situations where the defendant lacks actual notice of the possibility of causing harm.199

191. RESTATMENT (SECOND) OF TORTS § 821F comment d (1979).
192. 108 Wis. 2d at 253, 321 N.W.2d at 197.
193. 2 SOLAR L. REP. at 1015-16.
194. 108 Wis. 2d at 242, 321 N.W.2d at 192. See also HAYES, supra note 2, at 173.
195. See 108 Wis. 2d at 246, 321 N.W.2d at 194; 2 SOLAR L. REP. at 1016.
196. See Bie v. Ingersoll, 27 Wis. 2d 490, 135 N.W.2d 250 (1965); RESTATAMENT (SECOND) OF TORTS §§ 826-28 (1979).
197. 108 Wis. 2d at 254, 321 N.W.2d at 198.
198. Id. at 225, 321 N.W.2d at 184.
199. See id. at 256, 321 N.W.2d at 199.
The notice problem is inherent in nuisance actions of all types. No recorded deed states the general proposition that an owner may not unreasonably use his land in a manner that materially interferes with others' use and enjoyment of their property. This is a fact of life gleaned from the workings of the common law and the constraints imposed on individual freedom of action by the necessities of living in a civilized society. Viewed in this manner, recognition of a cause of action in nuisance for obstruction of solar access does not create a new property right by judicial fiat. It merely extends the common law principle of reasonable land use to encompass the needs of those utilizing an emerging, socially important technology: solar energy. In the words of the Wisconsin Supreme Court, protection of a right of access "will promote the reasonable use and enjoyment of land a manner suitable to the 1980's."200

CONCLUSION

Nuisance law is an appropriate legal scheme for resolving conflicts between adjoining landowners over solar access. Nuisance doctrine recognizes that the rights of neighboring landowners are relative and that rights of each party are qualified by those of the other. Nuisance law will protect the solar energy user by deterring unreasonable obstructions of sunlight, but will not burden development where the value of the construction exceeds the harm imposed on the plaintiff. In these situations, the solar energy user may be compensated for any damages caused by the obstruction.

A nuisance cause of action may be a useful supplement to existing statutory protections for solar users. The flexibility of nuisance law will permit the courts to avoid the absolute restrictions on development that might result from the use of easements. Unlike zoning laws, nuisance allows courts to balance the interest of the defendant in the unhindered use of his property against the plaintiff's interest in the free flow of sunlight based on the specific circumstances of each case. Providing adequate legal protections for a solar energy user's access to sunlight may require a combination of common law and statutory approaches. The Prah decision suggests that courts finally may be ready to abandon the rigid nineteenth century rules, which have thus far restricted development of the law, and thereby remove the barriers to common law solar rights.

200. Id. at 240, 321 N.W.2d at 191.