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RECENT DEVELOPMENT

CASTING A SHADOW ON A SOLAR COLLECTOR—A CAUSE OF ACTION RECOGNIZED; AN ALTERNATIVE RESOLUTION FRAMEWORK SUGGESTED:

Prah v. Maretti

Despite federal and state efforts to encourage the development of alternative energy sources,¹ courts and legislatures in the United States have not fully protected² solar energy systems.³ Until recently, most commentators assumed that one could block the light to a neighbor's solar collector without legal consequence.⁴ In this nation's first solar ac-

¹ Among the federal legislation designed to encourage the use of alternative energy sources, particularly solar energy, are: Solar Energy and Energy Conservation Bank Act of 1980, 12 U.S.C. § 3601 (1982) (loans to encourage use of solar energy and lessen dependence on imported oil); National Energy Conservation Policy Act, 42 U.S.C. §§ 1451, 1703-45 (Supp. V 1981) (loan insurance); Federal Energy Tax Act of 1978, I.R.C. § 44C (1976) (tax credits for solar modifications); Small Business Energy Loan Act, 15 U.S.C. §§ 631, 633, 636, 639 (1982) (loans to small businesses in solar technology); Energy Conservation and Production Act, 42 U.S.C. § 6881 (Supp. V 1981) (pilot solar energy project).

In addition, many state legislatures have enacted laws to encourage alternative energy sources. *See, e.g.*, TEX. CONST. art. VIII, § 2 (“[L]egislature may, by general laws, exempt from taxation . . . solar or wind-powered energy devices.”); CAL. GOV'T CODE § 66475.3 (West Supp. 1982) (allows subdivisions to dedicate solar easements for solar energy systems); CAL. HEALTH & SAFETY CODE § 17959 (West Supp. 1982) (gives power to localities to require roof pitches and roof alignments for future installation of solar collectors); WIS. STAT. ANN. § 66.031-.033 (West. Supp. 1983) (gives counties power to issue solar permits, and requires that solar easements be written and recorded, *see infra* notes 69, 171-74 and accompanying text). For an extensive listing of state solar legislation, see Note, *Solar Access Rights*, 23 URBAN L. ANN. 437, 438 n.10, 456, table 1 (1982). Table 1 in *Solar Access Rights* was prepared before Wisconsin passed the legislation discussed *infra* at notes 2, 72, 102, and 104.

² Some state laws have attempted to give protection to solar access. *See, e.g.*, WIS. STAT. ANN. § 66.031 (West Supp. 1983) (“The legislature intends to: (a) Remove legal impediments which discourage use of solar energy while providing for the protection of individual property rights”); *cf.* Note, *supra* note 1, at 440 (“Since twenty-three of the states enacted solar easement statutes, one might conclude that local lawmakers consider that easements fully protect solar rights. Nevertheless, easements alone cannot assure solar access.”) Yet, only in New Mexico has the legislature clearly defined a system for solar access protection. N.M. STAT. ANN. § 47-3-1 to -3-5 (1978). *See infra* note 62 and accompanying text.

³ Solar energy systems are usually classified as passive or active. This Note focuses primarily on active solar energy systems.

Active solar systems employ mechanical collecting devices, usually glass panels placed on southern rooftop surfaces, to collect and hold solar heat. The captured heat is both channeled to interior heating units and stored for periods of inadequate light exposure.

Note, *supra* note 1, at 437 n.3 (citing S. KRAEMER, SOLAR LAW 12-17 (1978)).

⁴ *See, e.g.*, Note, *Obtaining Access to Solar Energy: Nuisance, Water Rights and Zoning Administration*, 45 BROOKLYN L. REV. 357, 364 (1979) (“In spite of the seeming applicability of

cess nuisance case, *Prah v. Maretti*,⁵ the Wisconsin Supreme Court broadened the protection for solar energy users. The court rejected the per se non-nuisance conclusion traditionally used in blockage-of-light nuisance claims.⁶ The court recognized the importance of solar access and concluded that a complaint against the blockage of solar access stated a claim of private nuisance⁷ upon which relief could be granted.⁸

The decision rejected nineteenth century policies and embraced values befitting the last quarter of the twentieth century.⁹ The court favored the modified tort framework of the Restatement (Second) of Torts¹⁰ to resolve this solar access dispute. This Note suggests an alter-

nuisance principles to obstructions of light and air, American courts have refused to recognize a nuisance action on the policy ground that the need for construction takes precedence over the right to light.""); Note, *supra* note 1, at 443; Comment, *Obstruction of Sunlight as a Private Nuisance*, 65 CALIF. L. REV. 94, 101 (1977) ("Logically, the courts should employ a similar balancing test even if the obstruction serves a useful purpose. . . . Yet the ironclad rule has been that the obstruction of a neighbor's light and air is not a nuisance if it serves any useful purpose.") (emphasis in original).

⁵ 108 Wis. 2d 223, 321 N.W.2d 182 (1982); see also Brief for Natural Resources Defense Council as Amicus Curiae at 4, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982) (first appellate solar access case).

⁶ See *infra* notes 13-36, 65-67, 85-87, 112 and accompanying text. *E.g.*, *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. App. 1959) ("There being, then, no legal right to the free flow of light and air from the adjoining land, . . . [blockage of] it does not give rise to a cause of action . . .").

⁷ Private nuisances must be distinguished from public nuisances.

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance. . . ."

. . . .

These two lines of development [private and public nuisances], the one narrowly restricted to the invasion of interests in the use or enjoyment of land, and the other extending to virtually any form of annoyance or inconvenience interfering with common public rights, have led to the prevailing uncertainty as to what a nuisance is. A private nuisance is a civil wrong, based on a disturbance of rights in land. . . . A public or common nuisance, on the other hand, is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large

W. PROSSER, LAW OF TORTS § 86, at 571-73 (4th ed. 1971) (footnotes omitted). The nuisance most often thought about in the solar context is a private nuisance. *But see* Note, *supra* note 1, at 454 (arguing that recognition of private nuisance claims will gradually lead to making obstruction of solar collector public nuisance).

Some critics argue that "the public-private nuisance dichotomy has little significance." Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440; cf. *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 183, 494 P.2d 700, 705 (1972) ("The difference between a private nuisance and a public nuisance is generally one of degree.").

⁸ The case reached the Wisconsin Supreme Court on what appeared to be an appeal from a summary judgment. See *infra* notes 58-59 and accompanying text. After deciding to consider the case as an appeal from summary judgment, rather than from a judgment after full trial, the court held "the plaintiff has stated a claim . . . upon which relief can be granted" 108 Wis. 2d at 242, 321 N.W.2d at 192.

⁹ 108 Wis. 2d at 239-240, 321 N.W.2d at 191; see *infra* notes 90-112 and accompanying text.

¹⁰ 108 Wis. 2d at 240, 321 N.W.2d at 191; see *infra* notes 126-39 and accompanying text.

native land use framework¹¹ for adjudicating solar access disputes. The land use framework focuses on blameworthiness and efficiency in independent inquiries, with the more blameworthy party paying for the most efficient result.¹² This approach will better ensure a fair yet efficient result than does the *Restatement Second* analysis favored by the *Prah* court.

I

HISTORICAL BACKGROUND

Blockage-of-light nuisance claims have traditionally failed in common law courts. As early as 1586 the court in *Bury v. Pope*¹³ applied the property maxim that one who owns the land owns up to the sky and down to the center of the earth (*cujus est solum, ejus est summitas usque ad coelum et ad infernos*) to reject a blockage-of-light nuisance claim.¹⁴ Courts used this maxim to foreclose similar claims well into this century.¹⁵ Conversely, courts decided other nuisance claims, such as creat-

¹¹ The framework suggested in this Note is an extrapolation of Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299 (1977). See *infra* notes 149-53 and accompanying text.

¹² See *infra* notes 176-210 and accompanying text. With fairness and efficiency assured, the court can protect solar access without unduly sacrificing competing property interests. On the other hand, a per se non-nuisance conclusion or the *Restatement Second* framework will produce inefficient land uses. See also Rabin, *supra* note 11, at 1309:

Because utility correlates well with both fairness and efficiency, a decision that is both fair and efficient is almost certain to be utilitarian. If decisionmaking could promote both fairness and efficiency, society, through the legislature and the courts, would not need to choose between fairness and utility as the ultimate goal. This would be true, as a practical matter, because decisions that were both fair and efficient would also be utilitarian.

¹³ 1 Cro. Eliz. 118, 78 Eng. Rep. 375 (Ex. 1586).

¹⁴ It was agreed by all the justices, that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and this house and the lights have continued by the space of thirty or forty years, yet the other may upon his own land and soil lawfully erect an [sic] house or other thing against the said lights and windows, and the other can have no action; for it was his folly to build his house so near to the other's land: and it was adjudged accordingly.

Id.

One commentator explained the use of maxims in the common law: "In many cases a maxim merely restated a simple rule of law in a form which made it more easily remembered or which endowed it with a solemn Latinity. . . . But even where the maxim was merely making the law more orderly, it was, by that very fact making the law seem more natural." D. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 117 (1941) (illustrating this effect with *cujus est solum* maxim). For an extensive treatment of the *cujus est solum* maxim, see C. DONAHUE, T. KAUPER & P. MARTIN, *CASES AND MATERIALS ON PROPERTY* 291-322, 375-79 (2d ed. 1983).

¹⁵ *E.g.*, *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. App. 1959) (no legal right to free flow of light and air from adjoining land); *Granberry v. Jones*, 188 Tenn. 51, 52, 216 S.W.2d 721, 722 (1949) ("In so far as the bill alleges a deprivation of air and light by reason of the height of this shrubbery . . . the bill is without equity.").

ing a "truly wretched" smell, under the tort maxim of use your own property in such a manner as not to injure that of another (*sic utere tuo ut alienum no laedas*).¹⁶ The modern law of nuisance grew out of these two views of landownership. The common law courts used each maxim to "decide" different types of cases, rather than combining them into a single nuisance doctrine.¹⁷

By the end of the middle ages in England the less costly and less time-consuming trespass-on-the-case, a tort action, had almost entirely subsumed the property action of nuisance.¹⁸ Nuisance law formalized into a tort framework, but never entirely escaped its property origins.¹⁹ This framework included both a few per se non-nuisances based on the *cujus est solum* property maxim²⁰ and many per se nuisances based on the

¹⁶ *E.g.*, *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 92 Eng. Rep. 222 (K.B. 1705) (broken privy left unrepaired).

¹⁷ "The law of private nuisance is very largely a series of adjustments to limit the reciprocal right and privileges of both [landowners]." W. PROSSER, *supra* note 7, § 89, at 596; *see also* *Antonik v. Chamberlain*, 81 Ohio App. 465, 78 N.E.2d 752, 759 (1947) ("[N]uisance law plys [sic] between two antithetical extremes."); *cf.* J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 355 (2d ed. 1979):

When does a bad neighbor become a legal nuisance? One way of solving such problems of policy was to treat the enjoyment of light and air and other 'commodities' as property rights, so that their infringement was ipso facto a tort. But this approach was not comprehensive, because some rights were recognised [sic] as attaching . . . independently of any grant or long usage. It was therefore convenient to divide the interests protected by actions for nuisance into those which had to exist as property rights created by grant or prescription, and those which were the natural incidents of land ownership in general.

. . . Illumination for a house may once have been regarded as a natural right, acquired by whomsoever built his house first

But cf. Comment, *supra* note 4, at 99 ("Ownership is qualified by nuisance law; it cannot preclude the application of nuisance law.").

¹⁸ "The assizes of novel disseisin and nuisance . . . separated under Henry II." T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 372 (5th ed. 1956); *see also* J. BAKER, *supra* note 17, at 351 (assize of nuisance only for and against freeholders in twelfth century); *cf.* A. HARDING, *A SOCIAL HISTORY OF ENGLISH LAW* 96 (1973) (easements incapable of exact definition recoverable by assize of nuisance); W. PROSSER, *supra* note 7, § 86, at 572 (nuisance "became fixed in the law as early as the thirteenth century with the development of the assize of nuisance, which was a criminal writ affording incidental civil relief . . .").

"Case" for nontrespasory damage to realty "seems to be derived from the twelfth-century assize of nuisance, whose history is very obscure." J. BAKER, *supra* note 17, at 351-55 (replacement by end of fifteenth century, after some judicial struggles); T. PLUCKNETT, *supra*, at 469 n.2. *See generally* Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974).

¹⁹ Before the nineteenth century, strict liability governed both property law and tort law. Nuisance suits were either absolutely privileged or absolutely forbidden. Courts required a showing of "damage" and "injury" to win at nuisance, and there was no injury when the defendant's activity was absolutely privileged. *See* 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 534 (1959) ("If I erect a mill upon my land and so subtract customers from your mill, I do you damage, but no injury. We see here [in Bracton] an incipient attempt to analyze the actionable wrong . . ."); *cf.* J. BAKER, *supra* note 17, at 355.

²⁰ In addition to blockage of light, blockage of percolating water was also a per se non-

sic utere tort maxim.²¹ Courts accepted, however, some affirmative defenses, such as "coming to the nuisance"²² and "extrasensitivity."²³

Common law evolution modified the formal tort framework during the nineteenth and twentieth centuries.²⁴ Initially, the courts only used

nuisance. *Acton v. Blundell*, 12 Mees. & W. 324, 354, 152 Eng. Rep. 1223, 1235 (Ex. 1843); *Hanson v. McCue*, 42 Cal. 303 (1871); accord Comment, *supra* note 4, at 102.

On the evolution of percolating water doctrine, see Note, *Henderson v. Wade Sand & Gravel Co.: A Prototype for Economic Analysis in Strict Liability Cases*, 33 ALA. L. REV. 199, 204 (1981) (common law or English rule of percolating water law is based on the maxim *cujus est solum*).

²¹ *E.g.*, *Aldred's Case*, 9 Co. Rep. 57, 77 Eng. Rep. 816 (K.B. 1611) (odor from pig sty: even though plaintiff argued pigs are necessary, *sic utere* maxim applied); *Jones & Powell*, Palm. 536, 81 Eng. Rep. 1208 (K.B. 1628) (no defense of reasonableness or usefulness of brewery); *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 22 Eng. Rep. 222 (K.B. 1705 (*sic utere* maxim applied)); see also *J. BAKER*, *supra* note 17, at 358 (from 1629 on it was clear that "if an activity amounted to a nuisance, it was actionable regardless of its utility; and this is the present law"). *But cf.* *Brenner*, *supra* note 17, at 406-07 (noting small number of suits against industries; because of cost of getting injunction and small likelihood of winning damage award on "case").

²² *E.g.*, *Rex v. Cross*, 2 Car. & P. 484, 172 Eng. Rep. 219 (K.B. 1826) (dictum) ("If a certain noxious trade is already established in a place remote from habitations . . . and persons afterwards come and build houses within the reach of its noxious effects; . . . [then] in those cases the party would be entitled to continue his trade . . .").

²³ *E.g.*, *Webb v. Bird*, 10 C.B.(N.S.) 268, 142 Eng. Rep. 455 (Ex. 1861). *But see* *Aldred's Case*, 9 Co. Rep. 57, 77 Eng. Rep. 816 (K.B. 1611) (argued that plaintiff should not be so sensitive, plea rejected). The common law courts may have disfavored the extrasensitivity defense because it clashes with the general tort theory that you take the victim as you find him.

²⁴ It is a general rule that every person may exercise exclusive dominion over his own property, and subject it to such uses as will best subserve his private interests. Generally, no other person can say how he shall use or what he shall do with his property. But this general right of property has its exceptions and qualifications. *Sic utere tuo ut alienum non laedas* is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. Such a rule could not be enforced in civilized society. . . .

But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor.

Campbell v. Seaman, 63 N.Y. 568, 576-77 (1876). The evolution can be seen in the changes wrought upon the three aspects of the formal tort approach. See *supra* notes 20-23 and accompanying text. For example, the per se non-nuisance of percolating water blockage gave way to a "reasonable use" rule prohibiting "spite wells." This rule prohibited purely malicious interference with percolating water. *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 117 (1839) (action allowed for purely malicious spite well); *Frazier v. Brown*, 12 Ohio St. 294 (1861) (reserved for future question of recovery for purely malicious interference with percolating water). The "spite well" reasonable use rule has now given way, in some states, to a rule that requires full balancing of interests.

Similarly, the per se nuisance conclusion in pollution cases gave way to a balancing of equities. Compare *Sullivan v. Jones & Laughlin Steel Co.*, 208 Pa. 540, 555, 57 A. 1065, 1071 (1904) (no balancing; must grant injunction to home owner injured by pollution from steel mill) with *Elliot Nursery Co. v. Duquesne Light Co.*, 281 Pa. 166, 173, 177, 126 A. 345, 346, 348 (1924) (did not overrule *Sullivan*, but limited *Sullivan's* holding to solid industrial wastes and refused to shut down power plant even though it injured plaintiff's nursery business).

The affirmative defenses, never really absolute, are now often not even persuasive; *e.g.*, *Pendoley v. Ferreira*, 345 Mass. 309, 312, 187 N.E.2d 142, 145 (1963) (rural community became primarily residential; pig farm that was without fault in rural area, "has, with the

this modified approach in cases when the formal tort approach yielded an egregious result, such as allowing the construction of a "spite well,"²⁵ mandating the closing of an important factory,²⁶ or permitting the continued operation of a hog farm to thwart suburban development.²⁷ Today courts judge almost every case under the modified approach that accommodates dominion over property with the duty not to injure another.²⁸

In contrast, the harsh per se conclusion of no nuisance in blockage-of-light cases has continued virtually unmodified in the United States.²⁹ Although English courts softened the per se conclusion under the ancient lights doctrine, which allowed a prescriptive easement for light,³⁰ this doctrine never flourished in the United States.³¹ Unless the plaintiff

change in the environs of the farm to a residential district, become unreasonable"); *Gronn v. Rogers Const., Inc.*, 221 Ore. 226, 232, 350 P.2d 1086, 1089 (1960) (Plaintiff's use as mink farm is extra-sensitive. "But a sensitive use is entitled to protection if the conduct of the defendant is unreasonable with respect to that sensitive use."). *But see Spur Indus. Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972) (coming to nuisance important, not for entitlement, but for deciding who will pay costs of resolving conflict); *see also infra* notes 152, 197-99 and accompanying text.

²⁵ The initial modification of the per se non-nuisance conclusion was in the "spite well" situation. *See supra* note 24. In addition, the major modification in the per se non-nuisance conclusion in blockage-of-light cases has been the prohibition of "spite fences." *Burke v. Smith*, 69 Mich. 380, 37 N.W. 838 (1888) (relying on principle of prohibition against spite wells). *See infra* notes 33-36 and accompanying text.

²⁶ *E.g.*, *Elliot Nursery Co. v. Duquesne Light Co.*, 281 Pa. 166, 126 A. 345 (1924).

²⁷ *E.g.*, *Pendoley v. Ferreira*, 345 Mass. 309, 187 N.E.2d 142 (1963).

²⁸ *E.g.*, *Prah v. Maretti*, 108 Wis. 2d 223, 238, 321 N.W.2d 182, 190 (1982) (refusing to apply approach "favoring the unrestricted development of land and of applying a rigid and inflexible rule protecting . . . right to build . . . [that disregards] any interest of the plaintiff in the use and enjoyment of his land"); *cf. Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107, 1120-21 (7th Cir. 1976) (footnotes omitted):

Judicial involvement in solving environmental problems does, however, bring its own hazards. Balancing the interests of a modern urban community . . . may be very difficult. . . .

. . . If necessary, the courts are qualified to perform the task. The courts are skilled at "balancing the equities," a technique that traditionally has been one of the judicial functions. . . .

²⁹ *E.g.*, *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. App. 1959) ("There being . . . no legal right to the free flow of light . . . , it is universally held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action . . . even though it causes injury to another . . . regardless of the fact that the structure may have been erected partly for spite."); *Musmeci v. Leonardo*, 77 R.I. 255, 260, 75 A.2d 175, 177 (1950) ("Under the common law as it is generally applied in America an adjacent proprietor has no right to light and air coming to him across the land of his neighbor.").

³⁰ The doctrine of ancient lights was alluded to in *Bury v. Pope*, 1 Cro. Eliz. 118, 78 Eng. Rep. 375 (Ex. 1586), although apparently in that case, the prescriptive period was longer than 40 years. *See also* J. BAKER, *supra* note 17, at 355. *See generally* Note, *supra* note 4, at 357-60.

³¹ *See Lynch v. Hill*, 24 Del. Ch. 86, 6 A.2d 614 (1939) (overruled doctrine of ancient lights as established in *Clawson v. Primrose*, 4 Del. Ch. 643 (1873)); *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d at 359 ("[A]ncient lights' has been unanimously repudiated in this country."); *Prah v. Maretti*, 108 Wis. 2d at 233 n.8, 321 N.W.2d at

in the United States acquired an express easement, he had no judicially protected right to receive light, even if the blockage of light served no useful purpose.³²

At the end of the nineteenth century, some courts and legislatures in the United States began prohibiting purely malicious blockages of light,³³ labelling them "spite fences."³⁴ The prohibition did not extend to cases of mixed malicious and nonmalicious motives.³⁵ Any blockage caused by the construction of a building was exempt from nuisance liability, even when a malicious motive predominated.³⁶ Because plaintiffs must still prove that the defendant's motives were purely malicious, twentieth century plaintiffs, when threatened with a blockage of their light, are as unprotected as their nineteenth century counterparts.

Many commentators have applauded the shift away from the formal tort approach to nuisances and have advocated a land use framework for resolving nuisance disputes.³⁷ Similarly, many commentators on solar access protection have suggested a modified tort,³⁸ or land use,³⁹ framework to recognize a claim of solar access blockage. Most solar access commentators have urged protection of solar access through legislation, easements, zoning, or restrictive covenants. Although nui-

188 n.8 ("No American common law state recognizes a landowner's right to acquire an easement of light by prescription.") (citing Pfeiffer, *Ancient Lights: Legal Protection of Access to Solar Energy*, 68 A.B.A. J. 288 (1982)).

³² See, e.g., *Mahan v. Brown*, 13 Wend. 260 (N.Y. 1835) (lawful act is not made unlawful by defendant's motive); *accord* *Cohen v. Perrino*, 355 Pa. 455, 50 A.2d 348 (1947); *Metzger v. Hochrein*, 107 Wis. 267, 272, 83 N.W. 308, 310 (1900) ("[H]is sovereign right in his own property . . . may be so exercised as to violate the moral obligations which every member of society owes to his neighbors, without any penalty being visited upon him . . .").

³³ *E.g.*, *Burke v. Smith*, 69 Mich. 380, 37 N.W. 838 (1888); 1903 Wis. Laws ch. 81 (giving nuisance remedy in direct response to outcome in *Metzger*; see *supra* note 32).

³⁴ *E.g.*, *Musumeci v. Leonardo*, 77 R.I. 255, 256, 75 A.2d 175 (1950) ("[A] fence erected on one's own land with the intent to deprive an adjacent landowner of light and air is . . . popularly called a 'spite fence.'").

³⁵ Cf. *Schorck v. Epperson*, 74 Wyo. 286, 295, 287 P.2d 467, 470 (1955):

It cannot be surprising that the cases above mentioned [requiring pure spite for any recovery] were cautiously feeling their way. It was hard enough at first to break away from the former rule [spite immaterial] as announced by many without going further than absolutely necessary. There is no reason, however, for saying that these cases spoke the last word on the subject. The time was bound to come when that rule would come under scrutiny and the acid test of reason. It could not permanently, in this changing world, be or remain one to the effect that a fence is lawful if it subserved some useful purpose, however slight such useful purpose would be.

³⁶ *E.g.*, *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 358 (Fla. App. 1959).

³⁷ *Calabresi & Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); *Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); *Rabin, supra* note 11. *But see* *Epstein, Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

³⁸ *E.g.*, Note, *supra* note 1; Comment, *supra* note 4.

³⁹ *E.g.*, Note, *supra* note 4.

sance law should not be the sole protection for solar access, *Prah v. Maretti* demonstrates that solar access disputes may slip through the interstices of these protective devices.⁴⁰ Courts facing the inevitable solar access nuisance claim must either dispose of the claim with the nineteenth century per se non-nuisance conclusion or recognize a cause of action and resolve the conflict.

II

PRAH V. MARETTI

In 1978 Prah built his partially solar-powered home,⁴¹ the first home in the Lake Brittany Estates subdivision of Muskego, Wisconsin.⁴² The home was off-center to the south, but it complied with zoning ordinances and restrictive covenants.⁴³ Maretti purchased the southern adjoining lot in 1979⁴⁴ and submitted proposed house plans to the Lake Brittany Estates Architectural Control Board (Board) in September 1980.⁴⁵ Maretti contemplated a two-story house located ten feet from Prah's lot line at a grade of 785.5 feet above sea level.⁴⁶ Prah objected on the ground that the house would cast a shadow on Prah's solar collec-

⁴⁰ For alternative methods of protecting solar access, see the authorities cited *supra* at note 4. These other methods—zoning, easements, and restrictive covenants—should bear the primary burden of protecting solar energy users. Nevertheless, in all human endeavors, disputes occur despite private and legislative solutions to prevent them. For example, in *Prah v. Maretti*, although the Architectural Review Board and the city building inspector approved Maretti's plans, the particular lay of his lot and position of Prah's solar collector created a dispute. Even though the Wisconsin legislation has subsequently created a system of solar access rights, *see supra* note 2, the system may not be implemented in some municipalities. 108 Wis. 2d at 255, 321 N.W.2d at 199 (Callow, J., dissenting). In addition, the system is ineffective in dealing with preexisting obstructions.

⁴¹ In the principal case, the solar energy system consisted of:

[S]olar collectors located on the roof of Prah's home . . . used by Prah to supply heat and hot water in his home. . . . The heat generated by the solar collectors is used to heat water which is pumped through the roof and then recirculated to a storage tank in the basement. The heated water is used to heat the home and provide the power for certain utilities. The annual cost savings realized by Mr. Prah in each prior year approximated \$600 per year . . . [for] approximately 55-60% of his energy requirements. [Prah spent] approximately \$18,000 for the installation of [his] solar energy system, . . . [which] required the placement of solar collectors on the entire southern roof exposure of the home.

Brief for Appellant at 1-4, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982).

⁴² *Prah v. Maretti*, 108 Wis. 2d 223, 225-46, 321 N.W.2d 182, 184-85 (1982); *see also* Brief for Appellant at 2-3.

⁴³ 108 Wis. 2d at 226, 321 N.W.2d at 185; *see also* Brief for Respondent at 9, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982) ("North wall of his home was located 23 feet from his North lot-line, and the South wall of his home was located 11 feet from his South lot-line . . .").

⁴⁴ Brief for Appellant at 4.

⁴⁵ *Id.*

⁴⁶ *Id.* at 4-5.

tor.⁴⁷ Eventually,⁴⁸ Maretti obtained the Board's approval for a twenty-foot setback from Prah's line.⁴⁹ He also received the City of Muskego's approval, although at the natural grade level of 787.5 feet, rather than his originally proposed 785.5 feet.⁵⁰ Prah notified Maretti that a house with the twenty-foot setback at the natural grade level would still interfere with the solar energy system.⁵¹ Nevertheless, Maretti began construction.⁵²

Prah filed suit and moved for a temporary injunction.⁵³ The circuit court, after taking testimony, receiving affidavits, and viewing the construction site, denied Prah's motion.⁵⁴ The court found that the "plaintiff has failed to state a claim upon which equitable relief can be granted" and asked for "a motion by defendant for summary judgment."⁵⁵ Maretti failed to bring the motion, so Prah submitted an order

⁴⁷ *Id.* at 5; *see Prah*, 108 Wis. 2d at 226, 321 N.W.2d at 185 ("Plaintiff advised defendant that if the defendant's home were built at the proposed site it would cause a shadowing effect on the solar collectors which would reduce the efficiency of the system and possibly damage the system."). This reduction in efficiency would "defeat in large part the annual fuel savings heretofore realized by Mr. Prah. The freezing condition . . . would result in a cracking of the solar collectors thereby causing serious damage not only to the collectors themselves but also causing significant water damage to the home as well." Brief for Appellant at 4; *see also id.* at A-27 to -28 (noting that according to expert, collectors were built into roof such that if collector plates froze, cracked, and leaked, home's interior would be damaged; shadowing of plates could cause such cracking; expert asserted that if collectors are in shadow they probably will freeze during their lifetime).

⁴⁸ The court noted: "There appears to be some dispute over the facts that immediately preceded the initiation of construction concerning the granting of building permits, approval of the Architectural Control Committee and subsequent initiation of construction at a grade level not approved by the Committee." 108 Wis. 2d at 226 n.2, 321 N.W.2d at 185 n.2. Prah contended that the parties agreed initially that Maretti would build 25 feet south of his north property line, but that Maretti later submitted to the Architectural Control Board a plan to build only 10 feet south of the north line. Prah claimed that the Board then temporarily rescinded approval. Brief for Appellant at 5-6. Maretti rebutted that he only agreed to discuss with his builder the proposal that the house be moved to 25 feet south of the line and that he later told Prah he would only move it to 17 feet south of the line. Brief for Respondent at 11-12.

⁴⁹ Brief for Appellant at 6, A-8 to -12; *see also* Brief for Respondent at 12.

⁵⁰ *See* 108 Wis. 2d at 226, 321 N.W.2d at 185 ("After such approval, the defendant apparently changed the grade of the property without prior notice to the Architectural Control Committee."). Maretti claimed that Muskego "directed" that the grade be at 787.5 feet. Brief for Respondent at 12. Prah contended that the city would have approved a grade variance to 785.5 feet. Brief for Appellant at 6.

⁵¹ [T]he primary problem with the proposed construction was a combination of grade and distance between the homes. The entire problem could have been rectified by increasing the distance between the two homes or reducing the grade of the Maretti home. Although the movement of the Maretti home an additional 10 feet to the south had reduced the shadow, the increase in the grade had compounded the problem since the degree of shadow is a function of the distance between the two homes and the height of the Maretti home.

Brief for Appellant at 6-7 (citations omitted).

⁵² 108 Wis. 2d at 225, 321 N.W.2d at 184.

⁵³ *Id.* at 226, 321 N.W.2d at 184.

⁵⁴ *Id.* at 226-27, 321 N.W.2d at 184-85.

⁵⁵ *Id.* at 228, 321 N.W.2d at 185.

for judgment in conformity with the court's memorandum decision.⁵⁶ Prah then appealed from this order to the Wisconsin Court of Appeals.⁵⁷

The court of appeals certified the appeal to the Wisconsin Supreme Court as a question of first impression, "namely, whether an owner of a solar-heated residence states a claim upon which relief can be granted when he asserts that his neighbor's proposed construction of a residence . . . interferes with his access to an unobstructed path of sunlight across his neighbor's property."⁵⁸ The Wisconsin Supreme Court heard argument on three substantive issues:⁵⁹ common law nuisance,⁶⁰ statutory nuisance,⁶¹ and prior appropriation (as applied to water allocation in western states and solar access in New Mexico).⁶² The court held that

⁵⁶ Compare *id.* at 227, 321 N.W.2d at 185 ("The circuit court . . . declared it would entertain a motion for summary judgment and thereafter entered judgment in favor of the defendant.") with Brief for Appellant at 7-8 ("The Defendant, however, refused to submit an order in conformity with the Court's Memorandum Decision. Plaintiff-appellant thereafter submitted a proposed Revised Order for Judgment in conformity with the Court's Memorandum Decision. That order was signed by the Court . . .") (citations omitted) and Brief for Respondent at 13 ("The Order for Judgment, which was prepared by Plaintiff-Appellant's counsel, was signed by the court . . . Defendant-Respondent refrained from bringing on the aforesaid motion due to the failure of Plaintiff-Appellant to appear for a deposition pursuant to an agreement . . .").

⁵⁷ Brief for Appellant at 8; Brief for Respondent at 13.

⁵⁸ 108 Wis. 2d at 224, 321 N.W.2d at 184.

⁵⁹ The Respondent argued that "the Trial Court's Decision must not be viewed as a decision granting the defendant summary judgment pursuant to Sec. 802.06, Wis. Stats., but rather as an order for judgment." Brief for Respondent at 14. Neither party brought a motion for summary judgment under WIS. STAT. § 802.08 (1977). In addition, the Revised Order for Judgment, submitted by the plaintiff and signed by the circuit court, states: "Plaintiff's complaint is dismissed upon its merits."

Nevertheless, the court treated "this as an appeal from a judgment entered on a motion for summary judgment." 108 Wis. 2d at 228, 321 N.W.2d at 185.

⁶⁰ The common law nuisance action was based on a theory of private nuisance. See *supra* note 7.

⁶¹ The statutory nuisance claim was based on WIS. STAT. § 844.01 (1977):

(1) Any person owning or claiming an interest in real property may bring an action claiming physical injury to, or interference with, the property or his interest therein; the action may be to redress past injury, to restrain further injury, to abate the source of injury, or for other appropriate relief.

(2) Physical injury includes unprivileged intrusions and encroachments; the injury may be surface, subsurface or suprasurface; the injury may arise from activities on the plaintiff's property, or from activities outside the plaintiff's property which affect plaintiff's property.

(3) Interference with an interest is any activity other than physical injury which lessens the possibility of use or enjoyment of the interest.

The court noted "We can find no reported cases in which sec. 844.01 has been interpreted and applied, and the parties do not cite any." 108 Wis. 2d at 229 n.3, 321 N.W.2d at 186 n.3.

⁶² The prior appropriation doctrine has been used in the western United States to allocate water. "It provides that the first appropriator of water for a beneficial use is uniformly recognized as having a right to the continued use of that water to the exclusion of subsequent users of the same water." Supplemental Brief for Appellant at 11-12. The application of water rights law to the solar access context is discussed at some length in Note, *supra* note 4, at 368-78.

New Mexico framed its solar protection legislation on the prior appropriation doctrine.

the plaintiff stated a cause of action in common law nuisance and therefore did not address the other two issues.⁶³

Justice Abrahamson, writing for the court, first noted that plaintiff's complaint "appeared" to state a claim under the Restatement (Second) of Torts definition of private nuisance: "a nontrespassory invasion of another's interest in the private use and enjoyment of land."⁶⁴ The court explained that the common law courts had given some minimal protection to the right to receive light and then examined the reluctance of those courts to extend that protection.⁶⁵ The court concluded that the policy considerations of the nineteenth century "are no longer fully accepted or applicable [because they] reflect factual circumstances and social priorities that are now obsolete."⁶⁶ On this basis, the court re-

New Mexico's statute is discussed in Note, *The Allocation of Sunlight; Solar Rights and the Prior Appropriation Doctrine*, 45 U. COLO. L. REV. 421 (1976).

As applied to water rights, this doctrine deals with the allocation of a single resource. On its face, *Prah v. Maretti* is not an allocation case, but rather a case of competing resources: light and land. See *supra* text accompanying note 58. Nevertheless, in another sense *Prah v. Maretti* is an allocation case: "As the facts elicited at the trial indicate, the Defendant-Respondent is installing a solar system of his own." Brief for Respondent at 35. A major portion of the blockage could be avoided if the respondent would place his chimney on a wall other than his north wall. Brief for Appellant at A-26 (citing the transcript of Oct. 21, 1980 proceedings, testimony of Glenn Prah, Record No. 24, at 24). The defendant may well have placed his chimney on the north wall to avoid casting a shadow on his own solar collector. If this explanation is correct, then *Prah v. Maretti* is actually a dispute over the allocation of sunlight.

⁶³ 108 Wis. 2d at 242-43, 321 N.W.2d at 192.

⁶⁴ *Id.* at 231-32, 321 N.W.2d at 187 (citing RESTATEMENT (SECOND) OF TORTS § 821D (1977)). The Restatement Second definition is overinclusive, sweeping in many activities that are excused. Cf. Comment, *Nuisance as a Modern Mode of Land Use Control*, 46 WASH. L. REV. 47, 49 (1970) (nuisance law cannot be successfully distilled into 14 words).

⁶⁵ 108 Wis. 2d at 233-38, 321 N.W.2d at 188-98 ("The defendant is not completely correct in asserting that the common law did not protect a landowner's access to sunlight across adjoining property."). *Id.* at 233, 321 N.W.2d at 188. The court first discussed the doctrine of ancient lights. See *supra* notes 30-31 and accompanying text. "At English common law a landowner could acquire a right to receive sunlight across adjoining land by both express agreement and under the judge-made doctrine of 'ancient lights.'" 108 Wis. 2d at 233, 321 N.W.2d at 188. The court then acknowledged that the doctrine had not been adopted in the United States. Yet, "American courts have afforded some protection to a landowner's interest in access to sunlight." *Id.* The court detailed the development of spite fences, see *supra* notes 32-36 and accompanying text, and concluded that "a landowner's interest in sunlight has been protected in this country by common law private nuisance law at least in the narrow context of the modern American rule invalidating spite fences." 108 Wis. 2d at 234-35, 321 N.W.2d at 189.

⁶⁶ 108 Wis. 2d at 236, 321 N.W.2d at 189. The court recognized "that common law rules adapt to changing social values and conditions." *Id.* at 238, 321 N.W.2d at 190. Citing Justice Douglas in a footnote, the court added: "If this were not so, we must succumb to a rule that a judge should let others 'long dead and unaware of the problems of the age in which he lives, do his thinking for him.'" 108 Wis. 2d at 238 n.12, 321 N.W.2d at 190 n.12 (quoting Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949), quoted in *Bielski v. Schulze*, 16 Wis. 2d 1, 11, 114 N.W.2d 105, 110 (1962)). The court concluded that "[t]he genius of the common law is its ability to adapt itself to the changing needs of society." 108 Wis. 2d at 238 n.12, 321 N.W.2d at 190 n.12 (quoting *Moran v. Quality Aluminum Canning Co.*, 34 Wis. 2d 542, 551, 150 N.W.2d 137, 141 (1967)).

jected a per se non-nuisance conclusion and remanded the case to the circuit court, holding that "the reasonable use doctrine as set forth in the Restatement" be applied in further proceedings.⁶⁷

Justice Callow, in dissent, rejected the court's conclusion that the nineteenth century policy considerations are no longer valid⁶⁸ and argued that these policies should control in *Prah v. Maretti*. He also suggested that the enactment of solar access legislation made a decision in *Prah v. Maretti* unnecessary.⁶⁹ Finally, Justice Callow argued that there was no invasion of Prah's right to use and enjoy his property,⁷⁰ and that Prah should not prevail because his use of the land was extra-sensitive.⁷¹ Justice Callow reasoned that allowing a cause of action in this case would shake "the very foundation of property law [which] encompasses a system of filing and notice" ⁷² For these reasons, Justice Callow would not have recognized a cause of action for common law nuisance

⁶⁷ 108 Wis. 2d at 240, 321 N.W.2d at 191.

Yet the defendant would have us ignore the flexible private nuisance law as a means of resolving the dispute between the landowners in this case and would have us adopt an approach, already abandoned in [a prior Wisconsin case], of favoring the unrestricted development of land and of applying a rigid and inflexible rule protecting his right to build on his land and disregarding any interest of the plaintiff in the use and enjoyment of his land. This we refuse to do.

. . . .

We therefore hold that private nuisance law . . . is applicable to the instant case.

Id. at 238-40, 321 N.W.2d at 190-91 (footnotes omitted).

⁶⁸ *Id.* at 244, 321 N.W.2d at 193 (Callow, J., dissenting) ("The majority has failed to convince me that these policies are obsolete.")

⁶⁹ "The legislature has recently acted in this area. Chapter 354 . . . (effective May 7, 1982), was enacted to provide the underlying legislation enabling local governments to enact ordinances establishing procedures for guaranteeing access to sunlight. This court's intrusion into an area where legislative action is being taken is unwarranted . . ." 108 Wis. 2d at 249, 321 N.W.2d at 195 (Callow, J., dissenting).

Legislative action in 1982, of course, should not preclude Prah from obtaining relief for a cause of action that arose in 1979. Also, the legislation enables municipalities to elect not to enact the permit scheme. Nuisance law is well suited to handle the cases that slip between the permit scheme and restrictive covenants. See *supra* note 40 and accompanying text; accord *Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107, 1121 (7th Cir. 1976) ("All other forums for obtaining relief were cut-off from the claimants and they understandably turned to the courts for relief."); Comment, *supra* note 64, at 53.

⁷⁰ 108 Wis. 2d at 250-51, 321 N.W.2d at 196-97; see *infra* notes 84-85 and accompanying text.

⁷¹ "I conclude that plaintiff's solar heating system is an unusually sensitive use. . . . 'The plaintiff cannot, by devoting his own land to an unusually sensitive use . . . make a nuisance out of conduct of the adjoining defendant which would otherwise be harmless.'" 108 Wis. 2d at 252-53, 321 N.W.2d at 197 (Callow, J., dissenting) (quoting W. PROSSER, *supra* note 7, § 87, at 578-79). But see *Gronn v. Rogers Constr., Inc.*, 221 Ore. 226, 232, 350 P.2d 1086, 1089 (1960) ("[A] sensitive use is entitled to protection if the conduct of the defendant is unreasonable with respect to that sensitive use.")

⁷² 108 Wis. 2d at 254, 321 N.W.2d at 198. Callow argued that there was no notice of Prah's use of a solar collector. Prah's solar collectors, however, were visible and should have put Maretti on notice that Prah was interested in the sunlight flowing across Maretti's lot.

given the facts in *Prah v. Maretti*.⁷³

III ANALYSIS

In *Prah v. Maretti*, the Wisconsin Supreme Court correctly concluded that blocking light from striking a solar collector may be a private nuisance, recognizing that solar access is one of many important land use interests.⁷⁴ The policies supporting earlier reluctance to protect the receipt of light are no longer appropriate. Instead, a balancing of interests under nuisance law "will promote the reasonable use and enjoyment of land in a manner suitable to the 1980's"⁷⁵ and beyond.

The court favored "the reasonable use doctrine as set forth in the Restatement [(Second) of Torts]" for adjudicating the Prah-Maretti dispute.⁷⁶ The *Restatement Second* nuisance framework, however, retains vestiges of formal tort law and thus is not flexible enough to achieve the balancing of interests advocated by the court.⁷⁷ A land use framework, on the other hand, is unfettered by the formalism of tort law and can provide a fair and efficient resolution to solar access disputes.⁷⁸ This

Further, Prah objected to Maretti's design and location at the Board meeting and notified Maretti of the lawsuit before construction began.

Callow bolstered the notice argument with an excerpt from the recently enacted Wisconsin solar access legislation. 108 Wis. 2d at 254-55, 321 N.W.2d at 198; *see also supra* note 69. The legislation enables localities to grant recordable solar access permits. WIS. STAT. ANN. § 66.032(5) and (6) (West Supp. 1983). The legislature also recognized that the right to establish a renewable energy resource easement was unclear prior to that legislation. *Id.* at § 66.031. The legislature had not clearly expressed requirements for recording solar easements prior to the 1982 legislation.

In addition, Prah should have been able to secure such a permit, had the permit system been in existence in 1978 when he built his home. The system requires notification of the application for a solar permit to any neighboring landowners. *Id.* § 66.032(3)(b). Prah alleged that he inquired as to the intentions of Maretti's predecessor to determine whether the owner's proposed use of that property would interfere with the proposed solar heating system contemplated by the Prah's. Brief for Appellant at A-26 (quoting complaint, Record No. 2, at 1). Prah indicated at the trial court hearings "that he had procured a verbal agreement from the Respondent's predecessor in title to the effect that said predecessor in title would not build a home which would interfere with the Appellant's solar system." Supplemental Brief for Respondent at 7.

A permit should be granted unless, (1) it would unreasonably interfere with orderly land development, (2) the permit would disrupt someone's current residence or present plans to build a residence, or (3) the burden of the permit outweighs the benefit to the public and the applicant. WIS. STAT. ANN. § 66.032(5)(a) (West Supp. 1983). If Prah's plans received approval of the Board and the city building inspector, and if Maretti's predecessor would not have complained, there would have been no reason to deny Prah's application.

⁷³ 108 Wis. 2d at 257, 321 N.W.2d at 199.

⁷⁴ *Id.* at 236, 321 N.W.2d at 189; *cf. supra* note 1.

⁷⁵ 108 Wis. 2d at 240, 321 N.W.2d at 191.

⁷⁶ *Id.*

⁷⁷ *See supra* notes 24-27 and accompanying text; *infra* notes 126-39 and accompanying text.

⁷⁸ *See infra* notes 149-211 and accompanying text.

Note explains the court's recognition of a nuisance claim and suggests a land use framework for resolving solar access disputes.

A. A Cause of Action Recognized

The primary issue in *Prah v. Maretti* was whether the per se non-nuisance conclusion was justified in blockage-of-light cases, or whether such cases warranted a full trial on the merits.⁷⁹ The majority concluded that policies from the nineteenth century no longer justified a per se non-nuisance conclusion, especially in obstructed solar access cases,⁸⁰ and held that a nuisance claim must be recognized.⁸¹

The dissent attacked the court's recognition of a nuisance claim⁸² and argued that this case presented no cause of action,⁸³ primarily because of the absence of a physical invasion.⁸⁴ The physical invasion test, however, is merely a rule of thumb for separating actionable and nonac-

⁷⁹ 108 Wis. 2d at 224, 242, 321 N.W.2d at 184, 192 ("Summary judgment is not an appropriate procedural vehicle in this case when the circuit court must weigh evidence which has not been presented at trial.")

⁸⁰ See *supra* note 66 and accompanying text; *infra* notes 90-113 and accompanying text.

⁸¹ 108 Wis. 2d at 240, 321 N.W.2d at 191 ("Recognition of a nuisance claim for unreasonable obstruction of access to sunlight will not prevent land development or unduly hinder the use of adjoining land.")

⁸² The dissent's implicit attack on the recognition of a nuisance had two major prongs. First, prior cases had not recognized a right to light, see *id.* at 244-45, 321 N.W.2d at 193-94 (Callow, J., dissenting), and second, no nuisance exists without a physical invasion, see *infra* notes 84-87 and accompanying text.

In the first prong of the attack, the dissent states: "It is a fundamental principle of law that a 'landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land.'" 108 Wis. 2d at 244-45, 321 N.W.2d at 193-94 (Callow, J., dissenting) (quoting *United States v. Causby*, 328 U.S. 256, 264 (1946)). Yet, *Causby* was a case that modified the *cujus est solum* maxim to accommodate the modern phenomenon of the airplane. It is quite possible that the *cujus est solum* maxim must be modified again to accommodate the modern advent of solar energy. See *infra* note 88 and the discussion of solar envelopes. After *Causby*, the dissent quoted from "the frequently cited and followed case of" *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. App. 1959), for an affirmation of the *cujus est solum* maxim and a rejection of the *sic utere* maxim in right to light cases. That opinion defined lawful rights as rights that have been in the past protected by law. 114 So. 2d at 359. The definition begs the question of whether the law will in the future protect additional rights to light. The *Fontainebleau* court was unable to find any jurisdictions in the United States that granted protection for the right to light and so concluded that plaintiff's right to light enjoyed no protection. The plaintiff, therefore, had not stated a claim upon which relief could be granted. *Id.* The *Prah* majority pointed out that the "statement that a landowner has no right to light should be the conclusion, not [the court's] initial premise." 108 Wis. 2d at 239 n.13, 321 N.W.2d at 191 n.13. *Fontainebleau*, because of its tautological reasoning, is not persuasive authority for the per se non-nuisance conclusion.

⁸³ In addition to the implicit attack on the majority's recognition of a nuisance, see *supra* note 82, the dissent also argued that the facts of the case presented no cause of action. 108 Wis. 2d at 251-54, 256-57, 321 N.W.2d at 197-99. This Note will not address the dissent's factual argument, except as it arises in connection with the suggested framework for adjudication. See *infra* notes 152-208 and accompanying text.

⁸⁴ 108 Wis. 2d at 250, 321 N.W.2d at 196 (Callow, J., dissenting).

tionable invasions.⁸⁵ Under this test, courts dismiss nonphysically invasive conduct with a per se non-nuisance conclusion.⁸⁶ When a court considers applying an established rule of thumb to a new situation, it should not apply the rule unless the court first finds that the policies underlying the rule apply to that new situation.⁸⁷ Similarly, when a court confronts changes in an old context, it must relax an old rule of thumb.⁸⁸

The majority in *Prah v. Maretti* identified three policies underlying

⁸⁵ The *Restatement Second* defines private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." RESTATEMENT (SECOND) OF TORTS § 821D (1979); cf. W. PROSSER, *supra* note 7, § 89, at 244 ("Nuisance: the unwarranted doing of an act that interferes with another's enjoyment of property.") Justice Callow equates the "invasion" in the *Restatement Second* formulation with physical invasion. *Accord* Epstein, *supra* note 37, at 61 ("With the blocking of light, however, there can be no actionability under the invasion test.") (emphasis in original).

Assuming *arguendo*, that an "invasion" of some type is needed, as per the *Restatement Second* formulation, a physical invasion requirement cannot be read into the language of the *Restatement Second* nuisance sections. Section 821E defines the scope of liability: "For a private nuisance there is liability only to those who have property rights and privileges in respect to the use and enjoyment of the land . . ." Comment a to § 821E amplifies this limitation: "the liability . . . exists only for . . . persons having . . . legally protected property interests, in respect to the particular use or enjoyment that has been affected." Finally, illustration 1 of § 829 demonstrates patently unreasonable conduct that gives rise to liability: "A's sole purpose in building this fence is to annoy B by shutting out the light and view from his windows. A's conduct is malicious and he is subject to liability to B." A's conduct only affects B's right to light and view; there was no physical invasion. Because A is liable to B only for affecting B's legally protected property interests, and A was indeed liable to B, then the property interests that were affected must have been legally protected. Thus, the *Restatement Second* provides nuisance protection against noninvasive conduct.

⁸⁶ Cf. Epstein, *supra* note 37, at 60 ("[There are] a number of recurrent situations . . . [with] an evident tension between the asserted nuisance and the physical-invasion test."). Although Epstein defended non-nuisance treatment of nonphysically invasive nuisances, *id.* at 65, he admitted "the power of the theory [based on a physical invasion test] seems in all cases to outstrip the capacity of the theory to command wholehearted allegiance." *Id.* at 60.

⁸⁷ The court in *Prah v. Maretti* quoted an earlier Wisconsin case:

Inherent in the common law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of *stare decisis*, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arose.

108 Wis. 2d at 238 n.12, 321 N.W.2d at 190 n.12 (quoting *Bielski v. Schulze*, 16 Wis. 2d 1, 11, 114 N.W.2d 105, 110 (1962)).

⁸⁸ See Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949):

This search for a static security—in law or elsewhere—is misguided. The fact is that security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts. There is only an illusion of safety in a Maginot Line. Social forces like armies can sweep around a fixed position and make it untenable.

Cf. Epstein, *supra* note 37, at 74 (willing to modify physical invasion test under certain circumstances where "utilitarian constraints" dictate). *But see* Rabin, *supra* note 11, at 1329-30 (physical invasion test should be abandoned completely because not helpful).

Both Justice Callow, in his dissent, and Epstein, in his article, argued that the modification of the physical invasion test in blockage-of-light as well as blockage-of-view cases would

the per se non-nuisance conclusion in nineteenth century blockage-of-light cases: absolute dominion over property, low value placed on light, and high value placed on unimpeded land development.⁸⁹ All these policies must be fully applicable to the solar access context⁹⁰ before the dissent's physical invasion rule of thumb and per se analysis can be properly extended to the new area of blocked solar access. Even if the dissent is correct that these policies are not totally obsolete,⁹¹ they are not fully applicable in the solar access context. The court, therefore, was correct in rejecting the physical invasion test.

First, courts considered the dominion of each landowner over his property a fundamental freedom to be "jealously" guarded.⁹² This freedom is still important, as the dissent points out,⁹³ but it is not as dominant as it once was. The landowner's autonomy has been seriously restricted during the twentieth century. Among the most important of these restrictions are zoning laws⁹⁴ and related legislation,⁹⁵ and the extensive powers exercised by quasi-governmental homeowner associa-

have a restrictive impact on all construction. *See* 108 Wis. 2d at 251, 321 N.W.2d at 196 (Callow, J., dissenting); Epstein, *supra* note 37, at 62.

This argument treats different land use interests, as though they were identical. Legislation, restrictive covenants, or judicial decisions, can create a definition for 'solar envelopes' in each community, taking into consideration reasonable local expectations. Then, the invasion necessary to state a nuisance claim would be an invasion of a neighbor's solar envelope, rather than a mere blockage of light. This would be a redefinition of the *cujus est solum* maxim similar to the redefinition that accompanied the advent of the airplane. *See* United States v. Causby, 328 U.S. 256, 264 (1946). In most communities, the solar envelope can dovetail with zoning ordinances and local restrictive covenants. "Recent studies have shown that access to sunlight is quite compatible with densities of development equal to at least 8 units per acre, equivalent to the minimum area of most single family developments." Brief for the Natural Resources Defense Council as Amicus Curiae at 15. With but a few exceptions, a lawfully constructed building in a residential area will not obstruct a neighboring solar collector. Nor is *Prah v. Maretti* one of the exceptions. If Maretti had built at the grade approved by the Architectural Control Board, there would have been no substantial interference with Prah's solar collector. Brief for Appellant at 6-7.

⁸⁹ 108 Wis. 2d at 235, 321 N.W.2d at 189.

⁹⁰ The *Prah* court did not explicitly limit its recognition of a cause of action to the solar access context, though they focused on the new context. *Id.* at 236, 321 N.W.2d at 189. This Note focuses solely on the solar access context.

⁹¹ *Id.* at 244, 321 N.W.2d at 193 (Callow, J., dissenting).

⁹² *Id.* at 235, 321 N.W.2d at 189 ("First, the right of landowners to use their property as they wished, as long as they did not cause physical damage to a neighbor, was jealously guarded.")

⁹³ *Id.* at 245, 321 N.W.2d at 194 (Callow, J., dissenting) ("I firmly believe that a landowner's right to use his property within the limits of ordinances, statutes, and restrictions of record where such use is necessary to serve his legitimate needs is a fundamental precept of a free society which this court should strive to uphold.")

⁹⁴ *E.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926). The extent of zoning restrictions has become quite pervasive. *E.g.*, State *ex rel* Stoyanoff v. Berkeley, 458 S.W.2d 305, 308 (Mo. 1970) (per curiam) (zoning ordinance regulating architectural styles is valid).

⁹⁵ *E.g.*, People v. Goodman, 31 N.Y.2d 262, 290 N.E.2d 139, 338 N.Y.S.2d 97 (1972) (conviction for violation of village sign ordinance affirmed).

tions.⁹⁶ Judicial enforcement of most restrictive covenants reinforces the quasi-governmental power of homeowner associations.⁹⁷ The restrictions a typical homeowner association imposes far exceed in scope and number the restrictive covenants that a court in the nineteenth century would enforce when dominion over land was a fundamental freedom.⁹⁸ Autonomy over one's own land has been sacrificed to further collective goals. Individual freedom over land, in its currently diminished form, does not warrant a per se non-nuisance conclusion.⁹⁹

Second, courts and society in general did not consider the right to receive sunlight to be terribly important after the advent of artificial illumination, when compared with individual freedom over land and unimpeded land development.¹⁰⁰ Solar energy technology, however, has changed the traditionally low value society assigned to the right to receive sunlight.¹⁰¹ The majority in *Prah v. Maretti* acknowledged the

⁹⁶ In the instant case, Lake Brittany Estates Architectural Control Board required each homeowner to submit plans for their proposed residence, and had the power to require changes in the design, such as requiring Maretti to move his home an additional 10 feet. See *supra* note 48.

For a general view of the pervasiveness of homeowner associations see Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 227 (1976). See also Hyatt, *Community Associations: How to Draft Documents that Work*, 7 REAL EST. L.J. 26 (1978); Scavo, *Dispute Resolution in a Community Association*, 17 URBAN L. ANN. 309 (1979).

⁹⁷ See Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139 (1978).

⁹⁸ Cf. Reichman, *supra* note 96, at 269-70:

The modern attitude is to vest an almost unlimited discretion in an architectural control committee to pass upon building plans. The committee is usually empowered not only to decide whether the proposed house is "harmonious" with the neighborhood, but also to review minor details [such as, paint, materials, awning design, etc.].

See also Stoebeck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 885-86 (1977) (footnotes omitted):

The traditional view has been that courts should not favor the existence of real covenants, especially [on] the burden side. At bottom was the general policy against encumbrances on land titles. . . . Requirements of horizontal privity are the leading example. In England, the burden is permitted to run only when the covenant was made between landlord and tenant. New York's old rule against the running of affirmative duties was another example of the antagonistic policy. So was the older concept that covenants had to touch and concern the land in a physical sense.

⁹⁹ 108 Wis. 2d at 237, 321 N.W.2d at 190.

¹⁰⁰ 108 Wis. 2d at 235, 321 N.W.2d at 189 ("[S]unlight was valued only for aesthetic enjoyment or as illumination. Since artificial light could be used for illumination, loss of sunlight was at most a personal annoyance which was given little, if any, weight by society."); accord Note, *supra* note 4, at 364 ("American courts have refused to recognize a nuisance action on the policy ground that the need for construction takes precedence over the right to light.")

¹⁰¹ E.g., Note, *supra* note 4, at 390 ("The law, in response to the contemporary economic order, must recognize a right to solar access for use as an alternative energy resource."); accord Brief for Natural Resources Defense Council as Amicus Curiae at 8-9 (citations omitted):

The use of solar energy for heating, particularly water heating, is already competitive with alternative fuels in many parts of the country when judged by traditional measures of return on investment. . . .

Where solar energy can help reduce the need for new power plants, the

"new significance in recent years [of] access to sunlight."¹⁰²

The dissent attacked this assertion by questioning the value of solar energy, but this attack is flawed. The dissent attributed the sparing use of solar energy systems to high costs. These high costs are allegedly due to the lack of mass production, which, in turn, results from the systems' limited efficiency.¹⁰³ Another factor in the high cost of solar energy systems, which the dissent apparently neglected, is the risk that a neighbor will obstruct a collector.¹⁰⁴ This hidden cost may also appear in the form of a purchased easement of light, or through the implicit cost of agreeing to a set of restrictive covenants.¹⁰⁵ The courts and legislatures

potential economic benefits to society are much greater, although traditional electricity rate structures do not pass on these savings to those who install the systems. . . .

While solar energy systems are thus at least competitive now in many places (without reference to environmental benefits and other social advantages that are not easily quantified), solar systems will become economically preferable over the next ten years.

see also *supra* note 1 and accompanying text; see also authorities cited *supra* note 4.

¹⁰² 108 Wis. 2d at 236, 321 N.W.2d at 189. The Wisconsin legislature has also recognized the importance of sunlight for solar energy:

(a) Diminishing supplies of nonrenewable energy resources threaten the physical and economic well-being of the citizens of this state who presently rely on such resources to maintain their homes, industries, businesses and institutions.

(b) Solar energy systems hold great promise for the future energy needs of this state because they use a renewable energy resource; because they require less capital, land, water and other resources needed for central-station generation of electricity; and because they do not pollute the state's water and air.

WIS. STAT. ANN. § 66.031 (West Supp. 1983).

¹⁰³ 108 Wis. 2d at 247, 321 N.W.2d at 194 (Callow, J., dissenting) ("limited efficiency may explain lack of production").

¹⁰⁴ Brief for Natural Resources Defense Council as Amicus Curiae at 4 ("Legal and institutional issues rank with economic considerations as major barriers to the utilization of solar energy technologies. . . . Even a few instances of investments in solar energy lost due to shading could very adversely affect the industry because of the uncertainty likely to be created in consumers' minds.") (citations omitted).

This hidden cost was explicitly recognized by the legislature in Wisconsin. WIS. STAT. ANN. § 66.031 (West Supp. 1983) ("The unsettled state of the law regarding the right to use of sunlight discourages capital investment in solar energy systems and impedes production of economically accessible solar energy hardware. . . . Unless the law on solar access rights is clarified, the use of solar energy systems will remain limited.").

¹⁰⁵ Neither a purchased easement nor a restrictive covenant will avoid problems. The purchased easement may not be enforceable by the solar energy user if a court treats the easement as a novel negative easement rather than an extension of the permissible express negative easement for light. *Cf.* D. DONAHUE, T. KAUPER & P. MARTIN, *supra* note 14, at 1039. In addition, a solar easement may not be enforceable by the current solar energy user against his current neighbor. It is possible that a court would find a solar easement to be in gross, rather than appurtenant. *E.g.*, *Shia v. Pendergrass*, 222 S.C. 342, 72 S.E.2d 699 (1952) (right of way in gross, as it did not reach the easement owner's property). Recent legislation specifically recognizing solar easements indicates prior doubt concerning the extent and the enforceability of such easements. *E.g.*, WIS. STAT. ANN. § 66.031 (West Supp. 1983) ("Re-

have been slow to afford full protection against these hidden costs.¹⁰⁶ Thus, the sparing use of solar collectors may be attributed partly to the lack of judicial or legislative protection, rather than only to a lack of efficiency.

Third, nineteenth century society considered unimpeded land development important for the full utilization of resources in order to produce the prosperity expected from the industrial revolution.¹⁰⁷ Both the majority¹⁰⁸ and the dissent¹⁰⁹ recognized that the value of unimpeded land development had diminished in response to an increased societal interest in aesthetics. Justice Callow argued, however, that unimpeded land development had only yielded to aesthetics for the public welfare, not for purely private benefit.¹¹⁰ Even granting this, Justice Callow's conclusion that unimpeded land development should not yield for private benefit¹¹¹ does not inexorably follow. Rather, the concession that this policy has yielded at all demonstrates its currently waning value.

newable energy resource easements shall run with the land benefitted and burdened unless otherwise expressly stated therein.”).

Restrictive covenants, although far more enforceable today than they were in the nineteenth century, *see supra* note 98, often do not accomplish the intentions of the drafters. *E.g.*, *Sleepy Creek Club, Inc. v. Lawrence*, 29 N.C. App. 547, 222 S.E.2d 167, *cert. denied*, 290 N.C. 659, 222 S.E.2d 167 (1976). The court held the restrictive covenants unenforceable by the homeowner's association because the homeowner's association was a stranger to the chain of title at the time of the insertion of the restriction, and the deed did not include a grant of the right to sue to the plaintiffs. The principle of *Sleepy Creek Club* would apply when an established subdivision votes to impose restrictive covenants against obstructing solar collectors of neighbors, but stumbles over one of the property law hurdles.

¹⁰⁶ *See supra* notes 1-2 and accompanying text.

¹⁰⁷ 108 Wis. 2d at 235, 321 N.W.2d at 189 (“Third, society had a significant interest in not restricting or impeding land development . . . [and] recognition of a right to sunlight would hinder [such] development.”).

¹⁰⁸ *Id.* at 237, 321 N.W.2d at 190 (“The need for easy and rapid development is not as great today as it once was . . .”).

¹⁰⁹ *Id.* at 247, 321 N.W.2d at 194 (Callow, J., dissenting) (“I concede the law may be tending to recognize the value of aesthetics over increased volume development . . .”). *But see id.*, 321 N.W.2d at 195 (“I note that this court in [*State v. Dectz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974)] stated: ‘The reasonable use rule retains . . . a policy of favoring land improvement and development.’ [66 Wis. 2d] at 20.”).

¹¹⁰ 108 Wis. 2d at 247, 321 N.W.2d at 194-95 (Callow, J., dissenting) (“[A]n individual may not use his land in such a way as to harm the *public*. The instant case, however, deals with a *private* benefit.”) (emphasis in original).

¹¹¹ *Id.*, 321 N.W.2d at 195 (“While the majority's policy arguments may be directed to a cause of action for public nuisance, we are presented with a private nuisance case which I believe is distinguishable in this regard.”) (footnote omitted); *see also id.* at 246, 321 N.W.2d at 194 (“The cases involving the use of police power and eminent domain are clearly distinguishable from the present situation as they relate to interference with a private right solely for the *public* health, safety, morals or welfare.”) (emphasis in original). *But see supra* note 7 (discussion of unclear division between public and private nuisance); *see also* Note, *supra* note 1, at 454 (recognition of private nuisance will lead to recognition of public nuisance). *See generally* WIS. STAT. ANN. § 66.031 (West Supp. 1983) (quoted *supra* note 102). The Wisconsin legislature apparently believes that the protection of solar access is a public benefit, as well as a private benefit. *Cf. Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926) (nuisance law provides helpful analogies for determining reasonableness of zoning laws); *infra*

The policies that justified the use of a physical-invasion rule of thumb in blockage-of-light cases are "no longer 'in harmony with the realities of our society,'"¹¹² especially in solar access nuisance cases. The majority in *Prah v. Maretti* refused to extend the per se non-nuisance conclusion to the solar access nuisance dispute.¹¹³ They correctly recognized a cause of action and remanded for a full trial.

B. An Alternative Framework for Resolution Suggested

With a cause of action recognized, courts should resolve solar access disputes through a framework that has "the flexibility to protect both a landowner's right of access to sunlight and another landowner's right to develop land,"¹¹⁴ one that is both efficient and fair.¹¹⁵ "[T]he most efficient [result] achieve[s] the greatest gain in value [of the properties involved] at the least expense. By definition, any other [result] would waste resources."¹¹⁶ The fair result imposes the costs of the conflict on the blameworthy party.¹¹⁷

notes 194-96 and accompanying text (discussion of public and private benefits in eminent domain context).

¹¹² 108 Wis. 2d at 238, 321 N.W.2d at 190 (quoting *State v. Deetz*, 66 Wis. 2d 1, 15, 224 N.W.2d 407, 414 (1974)).

¹¹³ The juxtaposition of the values society places on unimpeded land development and sunlight indicates a need for a reevaluation of the per se conclusion. A per se conclusion of non-nuisance is appropriate in a situation where the "interest" injured will never be found more important than the conduct that causes the injury. According to many courts, including those in Wisconsin, the right to light used to be subservient to any beneficial land use, *see supra* notes 35-36 and accompanying text. The per se conclusion, however, is no longer warranted because now the interest interfered with may be more important than the interfering conduct. 108 Wis. 2d at 237, 321 N.W.2d at 190. "What is regarded in law as constituting a nuisance in modern times would no doubt have been tolerated without question in former times." 108 Wis. 2d at 237, 321 N.W.2d at 190 (quoting *Ballstadt v. Pagel*, 202 Wis. 484, 489, 232 N.W. 862, 864 (1930)).

¹¹⁴ 108 Wis. 2d at 239, 321 N.W.2d at 191.

¹¹⁵ Rabin, *supra* note 11, at 1309 ("If decisionmaking could promote both fairness and efficiency, society, through the legislature and the courts, would not need to choose between fairness and utility as the ultimate goal."); *see infra* notes 138-50 and accompanying text.

¹¹⁶ Rabin, *supra* note 11, at 1304; *accord* Calabresi & Melamed, *supra* note 37, at 1093; Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1081 (1980).

¹¹⁷ Rabin, *supra* note 11, at 1304; *cf.* Polinsky, *supra* note 116, at 1083-84 ("The second potentially important concern in any nuisance dispute is distributional equity."). *But cf.* Calabresi & Melamed, *supra* note 37, at 1118 (prescribing rule based on ability of parties to reduce or avoid cost of conflict). Calabresi and Melamed look to societal preference for bearing the cost, in the sense of a redistribution of wealth, rather than fairness based on fault. *See also* R. POSNER, *ECONOMIC ANALYSIS OF LAW* 16-31 (1977) (liability assigned only on economic grounds); *accord* Note, *supra* note 4, at 365-68 (applying Calabresi and Melamed "set of principles governing nuisance actions," generally placing cost of solution on wealthier party). Rabin, *supra* note 11, at 1314-15, after recognizing that transaction costs always exist, *see infra* notes 140-45 and accompanying text, argued that the Calabresi and Melamed analysis "confuses questions of efficiency with those of fairness."

In the framework presented below, the Calabresi and Melamed notions of distributional preference by society are encompassed by the efficiency criteria, *see infra* notes 171-74 and accompanying text.

The court in *Prah v. Maretti* rejected the formal tort approach, a *per se* non-nuisance conclusion, and chose the Restatement (Second) of Torts nuisance framework.¹¹⁸ This section of the Note will recommend adoption of a land use framework¹¹⁹ that focuses on blame and efficiency in two separate stages¹²⁰ before resolving solar access disputes.¹²¹

1. *The Problem with the Restatement (Second) of Torts Approach*

Solar access disputes differ from typical tort cases because of the effect the court's decision may have on the parties. In a typical tort case, the physical damage has occurred before the case comes to trial. The judge and jury will assign blame and award monetary damages, but will not alter the physical damage. In solar access disputes, however, the physical damage usually will not have occurred when a party brings suit. Although a claim for past injuries may be included,¹²² the plaintiff's primary demand will be for an injunction,¹²³ giving the court complete control of the physical result. The court's disposition of the case will require action by the parties that is damaging to one of the parties.

¹¹⁸ 108 Wis. 2d at 239-40, 321 N.W.2d at 190-91.

¹¹⁹ See *infra* notes 149-50 and accompanying text (format and definitions).

¹²⁰ See *infra* notes 152-65 (blame), 166-76 (efficiency) and accompanying text.

¹²¹ See *infra* notes 176-208 and accompanying text. Solar access nuisance disputes may also be framed inversely to the one in *Prah v. Maretti*. The proposed framework would apply if Maretti had sued Prah because Prah's solar collector restricted Maretti's use and enjoyment of his land beyond the applicable covenants and zoning restrictions. In his dissent, Justice Callow noted this possible reversal:

[I] wonder if we are examining the proper nuisance in the case before us. In other words, could it be said that the solar energy user is creating the nuisance when others must conform their homes to accommodate his use? I note that solar panel glare may . . . reflect into adjacent buildings causing excessive heat, and otherwise irritate neighbors. Certainly in these instances the solar heating system constitutes the nuisance.

108 Wis. 2d at 248 n.3, 321 N.W.2d at 195 n.3. Justice Callow's footnote points up the importance of a framework for nuisance dispute resolution that does not presuppose only one possible "nuisancee" and "nuisancer." See *infra* notes 138-39, 152 and accompanying text.

In a recent Wyoming suit, a landowner charged that his neighbor's solar collectors reflected light and heat against the rear of his house to the south, thus causing a public and private nuisance and constituting a trespass as well as a breach of a restrictive covenant. *Hinkley v. Black*, No. 4823 (Teton County Ct., Wyo. 1981) (reported in *Couple Sues Neighbor over Collector Glare*, 3 SOLAR L. REP. 212 (1981)).

¹²² *E.g.*, *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982). In *Prah v. Maretti*, the plaintiff sued for damages as well as an injunction. According to the evidence and court papers, the parties had not incurred any costs due to damage, but they had incurred legal fees. Because Prah filed the case before Maretti obstructed the solar collector, Maretti's acts only posed the threat of a "nuisance."

¹²³ The capacity to sue for both damages and an injunction is relatively new in nuisance law. Abatement acted as the sole civil remedy for the assize of nuisance. J. BAKER, *supra* note 17, at 351. When the assize of nuisance gave way to nuisance as a branch of "case," see *supra* note 18, damages became the sole remedy; a plaintiff could also sue in equity to secure an injunction, but it was a separate and risky procedure. *E.g.*, *Bury v. Pope*, 1 Cro. Eliz. 118, 78 Eng. Rep. 375 (Ex. 1586). With the merger of law and equity in the late nineteenth century, plaintiffs finally could sue for both damages and injunctive relief in a single proceeding.

If, for example, in *Prah v. Maretti*, the judge finds Maretti blameworthy and issues the injunction, then Maretti must redesign his house.¹²⁴ Or, if the judge finds Prah at fault and dismisses the suit, then Prah must abandon or rebuild his solar collector.¹²⁵ Unlike a typical tort case, the physical result in a solar access dispute will wait to be determined until the judge disposes of the case.

The *Restatement Second* nuisance framework begins with an analysis of the defendant's reasonableness.¹²⁶ For example, in *Prah v. Maretti*, if the utility of Maretti's obstruction outweighs the gravity of the harm it causes Prah's solar energy system, then Maretti acted reasonably.¹²⁷

¹²⁴ *Accord* Note, *An Economic Analysis of Land Use Conflicts*, 21 STAN. L. REV. 293, 297 (1969) ("Regardless of the approach it takes, the legal system will always answer these questions in one fashion or another.").

An injunction will enable Prah to bring to bear the power of the state if Maretti continues his construction. To avoid being subject to the discipline of the state, Maretti will "choose" to modify his proposed chimney. See also Calabresi & Melamed, *supra* note 37, at 1091.

¹²⁵ A dismissal of the case enables Maretti to proceed with his construction with no fear that Prah will bring the power of the state to bear against him. If Prah's fears of a freeze-up in his solar panels are genuine, see *supra* note 47, then he will "choose" to modify his solar collector system, rather than risk damaging his home. See also Calabresi & Melamed, *supra* note 37, at 1091.

¹²⁶ RESTATEMENT (SECOND) OF TORTS § 822 (1979) provides the general rules governing liability. The defendant's conduct must be intentional and unreasonable; unintentional but actionable as negligence; or strictly liable as a dangerous activity. Almost all nuisance claims fall within the first category. Whether the "invasion" involved intent is rarely in question. Maretti, for example, began construction knowing that his proposed house would "invade" Prah's alleged rights. Because the issue of intent usually is resolved quickly, the bulk of the *Restatement Second* analysis falls on the issue of unreasonableness.

RESTATEMENT (SECOND) OF TORTS § 826(a) (1979) entitled "Unreasonableness of Intentional Invasion" provides: "An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if . . . the gravity of the harm outweighs the utility of the actor's conduct . . ."

Section 827 of the *Restatement Second* details the factors involved in determining the gravity of the harm:

- (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.

Section 828 of the *Restatement Second* details the factors involved in determining the utility of the defendant's conduct:

- (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.

The two sections differ in one respect. The gravity of the harm checklist includes factors (a) and (b) as a threshold test to determine if the harm is *de minimis*.

¹²⁷ *Prah v. Maretti* is a good case to illustrate the inadequacies of the *Restatement Second* framework and the advantages of the land use framework. First, *Prah v. Maretti* was the first solar access nuisance dispute to reach an appellate court. It has a well developed set of facts, which are useful to illustrate the workings of the suggested framework. Second, *Prah v. Maretti*

Absent patent unreasonableness, such as pure malice,¹²⁸ unlawfulness,¹²⁹ or unsuitability to the location,¹³⁰ this determination will often hinge upon whom the court deems more blameworthy for creating the conflict.¹³¹ If the court finds Prah more blameworthy, it will dismiss the case.¹³² On the other hand, if the court finds Maretti more blameworthy, Maretti will be subject at least to damages and possibly to an injunction.¹³³

If the court finds that Maretti is more blameworthy and that a damage award would not adequately compensate Prah, it will grant an injunction.¹³⁴ In some instances, "adequate" will be synonymous with

may well be a typical solar access nuisance case. It involved neither egregious activities nor patently unreasonable parties—factors that make nuisance cases easy to decide. Rather *Prah v. Maretti* involved generally reasonable suburbanites. Because the situation in *Prah v. Maretti* appears to be typical, the suggested approach in this Note differs from a similar discussion in Note, *supra* note 4, at 364-67. In that Note, the author discussed a set of principles governing nuisance actions in cases involving egregious conduct or dissimilarly situated parties. For the residual category of similarly situated parties, the author offered one solution: splitting the costs of adjustment. This Note focuses on similarly situated parties—the hardest category—and the most likely category for solar access nuisance disputes.

¹²⁸ RESTATEMENT (SECOND) OF TORTS § 829(a) (1979) provides that "[a]n 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 . . . for the sole purpose of causing harm to the other" Section 829 illustrates its subsection (a) with a spite fence example. *Id.* illustration 1.

¹²⁹ *Id.* § 829(b) (invasion "unreasonable if the harm is significant and the actor's conduct is . . . contrary to common standards of decency"). Section 829, comment d, notes that "[c]ertain types of indecent conduct are illegal"

¹³⁰ *See id.* § 829(b). Section 829, comment d, explains that "many types of conduct . . . have a definite social value when carried on with circumspection, but . . . contravene the commonly accepted standards of decency when not so carried on."

¹³¹ With a significant harm, *Restatement Second* §§ 827 and 828 weigh three elements: the value of each activity, the suitability of each activity to the location, and the ability to have prevented or ameliorated the harm. Society encourages home ownership and solar energy use. Similarly, in a subdivision such as Lake Brittany Estates, neither owning a home nor using a solar energy system is unsuitable. Thus, in this typical case, the *Restatement Second* formulation would normally determine whether the defendant had acted unreasonably based on which party could have prevented the conflict most easily.

¹³² *See id.* § 827 comment (e); *see also id.* § 941 comment c: "A satisfactory technique for dealing with an action to restrain an alleged nuisance must embrace at least three possible solutions: (1) holding that there is no tort, and that the plaintiff must bear the harm in question as an incident of group life, without redress of any kind"

¹³³ *Id.* § 821F comment b (1979) ("[A] private nuisance may be enjoined because harm is threatened that would be significant if it occurred, and that would make the nuisance actionable under the rule here stated, although no harm has yet resulted."). Sections 933-51 deal with injunctions. Sections 933-43 test for the appropriateness of an injunction and §§ 944-51 compare the relative adequacy of other remedies to injunctions. The nuisance chapter, §§ 821A-840E, contains no independent tests for injunctions and deals primarily with damage remedies.

¹³⁴ *See id.* § 933(1) ("The availability of an injunction against a committed or threatened tort depends upon the appropriateness of this remedy as determined by a comparative appraisal of factors listed in § 936.").

Restatement Second § 936 lists the following factors to determine the appropriateness of granting an injunction:

- (a) the nature of the interest to be protected,

"efficient."¹³⁵ Yet, in other instances, the court may deny an "efficient" injunction because the damage award is "adequate," or grant an "inefficient" injunction because the damage award is "inadequate."¹³⁶ An injunction imposes a specific result; Maretti must modify his house. A damage award allows Prah to bargain with Maretti over which result to adopt.

The *Restatement Second* framework does not focus the court's attention on the "efficient" result when the court dismisses a case because the plaintiff is at fault,¹³⁷ or when the court finds that damages provide the plaintiff an "adequate" remedy.¹³⁸ When the constraints of the *Restatement Second* framework would produce a grossly inefficient result, a court may sacrifice fairness and grant the efficient result, blame notwithstanding.¹³⁹ Because the result reached using the *Restatement Second* framework may be inefficient or unfair, that framework is inappropriate for resolving solar access disputes.

- (b) the relative adequacy to the plaintiff of injunction and of other remedies,
- (c) [laches]
- (d) [unclean hands]
- (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
- (f) the interests of third persons and of the public, and
- (g) the practicability of framing and enforcing the order or judgment.

In the typical solar access dispute, establishment of a nuisance with the *Restatement Second* formulation is likely to leave unresolved only factor (b), the relative adequacy of damages.

¹³⁵ See *id.* § 941(c) (having balanced conflicting interests to determine if there is nuisance, court must balance interests again to prevent extortionate behavior by plaintiff if court enters injunction). See also *id.* § 938 comment b ("In determining the appropriateness of injunction as a remedy, it may sometimes be found that an injunction provides relief that is more than adequate, and that affords too much protection.").

¹³⁶ See *id.* § 941 ("The relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, is one of the factors to be considered in determining the appropriateness of injunction against tort."). But see *id.* comment c (the warning of extortionate behavior evidences concern for efficiency).

¹³⁷ See *id.* (one solution is "holding that there is no tort, and that the plaintiff must bear the harm in question as an incident of group life, without redress of any kind"). Under this solution, no opportunity exists to review efficiency in a typical solar access case because the court would find no tort based on the initial inquiry into reasonableness. See *supra* note 131 and accompanying text.

¹³⁸ See *supra* notes 133-36 and accompanying text.

¹³⁹ See, e.g., *Pendolay v. Ferreria*, 345 Mass. 309, 187 N.E.2d 142 (1963). In that case, the court, while not explicitly applying the *Restatement Second* framework, found the defendant was reasonable in running a pig farm, but enjoined the farm's operation because it was a "nuisance" to suburbanites who had arrived in the vicinity several years after the defendant established his farm. The court did not require or permit the defendant to pay damages to his neighbors for the inconvenience.

The court could have found that the plaintiffs acted unreasonably for having moved to the vicinity of an existing "nuisance," which, incidentally, probably enabled them to purchase their land at a lower cost. Under the *Restatement Second* approach, the court should have dismissed the case. Under the land use framework suggested *infra* at notes 150-211 and accompanying text, the court would grant the plaintiffs a "purchased" injunction. See *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972); *infra* notes 197-207 and accompanying text.

The *Restatement Second* framework might produce efficient results if the free market view of the "Coase theorem"¹⁴⁰ applies. "Coase theorem" analysis holds that regardless of initial legal entitlements, the parties will negotiate an efficient allocation of resources. If, for example, it would be more efficient to scrap Prah's solar collector, but the court enjoined Maretti from building his house as planned, Maretti would pay Prah to abandon the collector.

The "Coase theorem," however, "does not imply that the policy maker need not be concerned about how rights are assigned."¹⁴¹ Three primary reasons ultimately prevent the "Coase theorem" free market view from providing fair and efficient results in most solar access disputes. First, Coase posited "a world, admittedly unrealistic, in which parties to a nuisance dispute bargain cooperatively . . . , income redistribution is costless, and courts have perfect information."¹⁴² Yet, as many commentators have pointed out, transaction costs always exist.¹⁴³ Second, Coase intentionally ignored fairness in his formulation to demonstrate that absent transaction costs, the free market will create efficient results.¹⁴⁴ Third, even accepting the "Coase theorem" conclusion that bargaining will reach an efficient result, it "would not mean . . . that the *same* allocation of resources would exist regardless of the initial set of entitlements."¹⁴⁵ For these reasons, the free market's capacity to eliminate the unfairness or inefficiencies created by the *Restatement Second* framework in solar access disputes is doubtful.

2. *The Land Use Solution*

Nuisance law, originally a branch of property law, can be administered under a land use, rather than tort, framework. Building on the work of Calabresi and Melamed,¹⁴⁶ Ellickson,¹⁴⁷ and Michelman,¹⁴⁸

¹⁴⁰ See Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); Ellickson, *supra* note 37, at 722-23; cf. Rabin, *supra* note 11, at 1313-16 ("Coase proved a rather technical and narrow economic point: that whatever the initial assignment of entitlements, efficiency would not be adversely affected in a world without transaction costs.")

¹⁴¹ Ellickson, *supra* note 37, at 723; see also Coase, *supra* note 140, at 15.

¹⁴² Polinsky, *supra* note 116, at 1088 (footnote omitted); see Calabresi & Melamed, *supra* note 37, at 1094-95 ("[N]o transaction costs' must be understood extremely broadly as involving both perfect knowledge and the absence of *any* impediments or costs of negotiating.") (emphasis added); Ellickson, *supra* note 37, at 722-24; Rabin, *supra* note 11, at 1316; Regan, *The Problem of Social Cost Revisited*, 15 J. LAW & ECON. 427, 428-32 (1972).

¹⁴³ See, e.g., Rabin, *supra* note 11, at 1313.

¹⁴⁴ See Coase, *supra* note 140, at 15; Rabin, *supra* note 11, at 1315-16.

¹⁴⁵ Calabresi & Melamed, *supra* note 37, at 1095.

"[W]hat is a Pareto optimal, or economically efficient solution [from bargaining] varies with the starting distribution [As] transaction costs become important, the goal of economic efficiency starts to prefer one allocation of entitlements over another." *Id.* at 1096.

¹⁴⁶ See Calabresi & Melamed, *supra* note 37.

¹⁴⁷ See Ellickson, *supra* note 37.

¹⁴⁸ See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

Professor Rabin¹⁴⁹ suggested a land use framework for resolving nuisance disputes. Rabin's framework evaluates fairness and efficiency separately and then combines them to produce the optimal disposition of each case.¹⁵⁰ Although Rabin argued for the abandonment of the physical invasion test,¹⁵¹ he illustrated his land use framework with a physically invasive nuisance, a polluting factory.¹⁵² Nevertheless, a court can adopt a land use framework to produce fair and efficient results in nonphysically invasive nuisance cases, such as those involving obstructed solar collectors.¹⁵³

A land use framework,¹⁵⁴ evaluating blameworthiness and fairness

¹⁴⁹ See Rabin, *supra* note 11. "[T]his article expands upon a suggestion first made by Professors Calabresi and Melamed . . ." *Id.* at 1347. "Professor Ellickson[s] outstanding article . . . has strongly influenced this one . . ." *Id.* at 1339. "Although Michelman used the [utility, fairness, and efficiency] criteria in the police power context, they can shed light on nuisance law as well. In applying them to nuisance law, I believe that existing law can and should be modified to satisfy these criteria more fully." *Id.* at 1303 (footnote omitted).

¹⁵⁰ See Rabin, *supra* note 11, at 1309-12.

The procedure here proposed for resolving private nuisance cases involves two steps. The first step would be to determine who is morally more blameworthy for the existence of the conflict. That person should bear the cost of resolving the conflict. This should satisfy the fairness criterion. ["Generally the current methods of assigning fault are satisfactory." *Id.* at 1309 n.30.] The second step in the proposed procedure would be to determine how the conflict can be resolved with least expense. This resolution of the conflict would satisfy the efficiency criterion. As a result, the person at fault would pay the cost of resolving the conflict caused by the nuisance in the most efficient manner. This result would be both fair and efficient.

Id. at 1309 (footnotes omitted).

¹⁵¹ Rabin argues that the physical invasion test is both over and under inclusive. See *id.* at 1329-30.

¹⁵² Rabin explains "fault" as illustrated by a polluting factory:

In a conflict between two landowners, each legitimately can be seen as causing the conflict. The homeowner's insistence on being free from the smoke of a factory is as much a cause of the conflict as the factory owner's insistence on running a factory that produces smoke. While both thus can be said to have caused the conflict, this does not mean that both are equally at fault, or that neither is at fault.

Id. at 1316. In rejecting the physical invasion argument, Rabin again used the polluting factory:

As between the polluter and his neighbor we often are tempted to assume that the polluter must be at fault. That the polluter is annoying his neighbor, not vice versa, is the initial reaction of many. Yet if the injunction is granted, the neighbor will be "annoying" the polluter. A priori, there is no reason to prefer one landowner to the other.

Id. at 1329 (footnote omitted).

¹⁵³ See *supra* note 85 and accompanying text (discussion of physical invasion test).

¹⁵⁴ The land use framework is illustrated below. The term "land use" has been popular in academic literature for many years. *E.g.*, Comment, *supra* note 64:

But this does not imply that the interests of individuals should be ignored in the total system of land use controls. Those interests are as important as the public's interests, even though public law systems may be inappropriate for protecting them. It is at this juncture that *private nuisance* can be introduced as an important mode of land use control. Individual landowners who suffer unreasonable interference from a land use which is acceptable to the public

in separate stages before fashioning an appropriate remedy, will not sacrifice fairness or efficiency. This framework will meet the criteria set by the *Prah* court for resolving solar access disputes: "the flexibility to protect both a landowner's right of access to sunlight and another landowner's right to develop land"¹⁵⁵ and "promote the reasonable use and enjoyment of land in a manner suitable to the 1980's."¹⁵⁶ The facts developed in *Prah v. Maretti* will illustrate the framework's mechanics in the solar access context.

a. *Blameworthiness.* Under the first stage of the land use framework, the court assesses the reasonableness of both parties' behavior. Absent any patent unreasonableness, the party that should have avoided the conflict is to blame.¹⁵⁷

Several factors point to *Prah* as the "cause" of the conflict. First, he built to the south of center on his lot.¹⁵⁸ Second, he did not have an express easement of light over Maretti's lot.¹⁵⁹ Third, *Prah* installed a

may bring actions for private nuisance to secure remedies appropriate to them as individuals.

. . . .

In many land use disputes, damages are appropriate but preventive remedies are not.

Id. at 53 (emphasis in original); accord Ellickson, *supra* note 37; Note, *supra* note 124.

¹⁵⁵ *Prah v. Maretti*, 108 Wis. 2d at 239, 321 N.W.2d at 191.

¹⁵⁶ *Id.* at 240, 321 N.W.2d at 191.

¹⁵⁷ This evaluation of blameworthiness is the same as the evaluation of unreasonableness under the *Restatement Second* formulation. See Rabin, *supra* note 11, at 1309 n.30. Rabin explains: "The question of who should pay can be answered only with reference to the criterion of fairness, involving an assessment of relative moral fault." *Id.* at 1309.

Rabin concludes:

Fault in this context is the result of many factors that cannot easily be summarized. The person who produces the interference is not necessarily, or even usually, at fault. And for purposes of assigning fault it should be immaterial who first owned property in the area. Rather, the relevant, but not necessarily determinative, question should be "On which property was the use first begun that subsequently proved incompatible with the use of neighboring property?"

Id. at 1346-47; see also Note, *supra* note 124, at 314 (use that emits externality is equivalent to use that is sensitive to that externality).

¹⁵⁸ See *supra* note 43 and accompanying text.

Prah claimed that Maretti's house would not block his solar collector if it was five feet further to the south. In assigning fault, one might also ask whether the conflict would have been foreclosed had *Prah* initially built five feet further north. "The circuit court also concluded that the plaintiff could have avoided any harm by locating his own house in a better place. . . . [P]laintiff's ability to avoid the harm is a relevant but not a conclusive factor." 108 Wis. 2d at 242, 321 N.W.2d 192. But see *id.* at 256 n.8, 321 N.W.2d at 199 n.8 (Callow, J., dissenting) ("Mr. *Prah* could have avoided this litigation by building his home in the center of his lot instead of only ten feet from the Maretti lot line . . ."). *Prah's* location may have been off-center to comply with elevation or zoning requirements.

¹⁵⁹ The dissent in *Prah* mentions this argument: "Property law encompasses a system of filing and notice in a place of public records to provide prospective purchasers with any limitations on their use of the property. Such a notice is not alleged by the plaintiff." 108 Wis. 2d at 254, 321 N.W.2d at 198; see also Brief for Respondent at 35 ("[Plaintiff] could have

solar collector that was too prone to freeze-ups.¹⁶⁰

On the other hand, several factors indicate that Maretti might be the "cause" of the conflict. First, he insisted upon building as close to Prah's lot as the Board would approve.¹⁶¹ Second, he allowed the elevation to be approved at 787.5 feet, rather than 785.5 feet, although he could have sought a variance.¹⁶² Third, Maretti insisted on placing his chimney on the north side of his house.¹⁶³

The court could assign blame on these facts to Prah, to Maretti, to both,¹⁶⁴ or to a third party.¹⁶⁵ No matter what the court determines in this first stage, the court must proceed to the next stage: evaluation of the efficiency of possible resolutions.

b. *Efficiency.* In contrast to the analysis in the *Restatement Second*, the second stage of the land use framework is reached in every case and focuses on the physical results of the conflict, for example, moving the location of Maretti's chimney, rather than on remedies, such as a temporary injunction. The court will focus on the remedy only after separately evaluating blameworthiness and efficiency.

The pleadings and testimony will often narrow the spectrum of pos-

further protected himself by procuring a solar easement from Defendant-Respondent's predecessor [sic] in title . . ."). *But see supra* note 72 (discussion of verbal agreement between Maretti's predecessor and Prah.)

¹⁶⁰ Brief for Respondent at 35 ("Plaintiff-Appellant had no right to assume that his system would be operable indefinitely. . . . [He] came into court without previously investigating whether or not there were any technological innovations or remedial measures available in the solar energy field to help him eliminate the problems . . ."). *But see* Brief for Natural Resources Defense Council as Amicus Curiae at 3 ("Plaintiff-appellant Glenn Prah built his home and solar heating system with expert assistance . . .").

¹⁶¹ *See supra* notes 48-49 and accompanying text; *cf.* Brief for Appellant at A-10 (letter from Glenn Prah to Architectural Control Committee, Record at 7-8) ("Mr. Maretti has indicated that the off center position is necessary to meet all set backs."). Maretti also mentioned maximizing his view of Lake Brittany.

¹⁶² *See supra* note 50 and accompanying text.

¹⁶³ *See supra* note 62 and accompanying text. Maretti claimed that Prah did not ask him to move his chimney until after he began construction. Brief for Respondent at 26-27. Maretti admitted, however, that it was "obvious that both of the parties were aware of the fact that the chimney of Defendant Respondent's [sic] home would be a factor in contributing to the alleged shadowing . . . particularly since the chimney was shown on the plans and specifications originally submitted by Defendant-Respondent. . . ." *Id.* Maretti's placement may have been dictated by his need for an unobstructed southern roof for his own solar collector. *Id.* at 35.

¹⁶⁴ In Note, *supra* note 124, at 314, the author suggests that when the parties are equally to blame, the court should make them split the costs.

¹⁶⁵ If the blame falls on a third party, and that party is brought into the suit, the claim against the third party would probably not be a nuisance suit. In *Prah v. Maretti*, the court might have determined that the "blame" was assignable to Maretti's predecessor in title, who may have failed to inform Maretti of his verbal agreement with Prah. Or, the Lake Brittany Estates Architectural Control Board may have been blameworthy for failing to require Maretti to bring his City of Muskego approved plans back to the Board. Further, the Board may have been blameworthy for having allowed Prah to build so close to his southern lot line, if they were not prepared to ensure him proper free space to the south.

sible physical results to a few alternatives. In *Prah v. Maretti*, Prah's solar expert testified that the problems anticipated by the construction of Maretti's house would have been solved if Maretti had placed his chimney on any other wall of his house.¹⁶⁶ Maretti suggested that Prah alleviate his solar collector problems with "technological innovations or remedial measures . . . such as the use of reflectors."¹⁶⁷ The parties narrowed the court's choice to only two results.¹⁶⁸ Using the *Restatement Second* framework, the court would grant one of these results by focusing on remedies,¹⁶⁹ without specifically addressing the issue of efficiency. Using the land use framework, the court will evaluate the relative efficiency of these two results, or any result the court develops *sua sponte*, before proceeding to the remedy stage.

Evaluating the efficiency of potential results to a land use conflict requires the court to pose this hypothetical question: "If I now owned both properties and had society's preferences, which resolution would I adopt?"¹⁷⁰ The court will need to address three major factors to answer this question: aggregate land value, gain or loss according to societal preferences, and out-of-pocket costs.

To determine the first factor, aggregate land value, the court must evaluate the gain or loss in fair market value for each property under each result, absent other societal preferences. If Maretti's chimney is redesigned, then Maretti's property may lose a small portion of its fair market value, while Prah's property may gain in fair market value after the removal of an obstruction to his solar collector system. On the other hand, if Prah must modify his solar collector system, his property's fair market value will probably remain the same. The fair market value might increase slightly if the potential problems of freezing in the solar collector pipes and reduced energy output could be solved by a "techno-

¹⁶⁶ Brief for Appellant at A-29 (testimony of Herbert Zien, Record at 24) (agrees with Prah testimony that Maretti home without chimney would not be problem). Prah testified that a chimney on any other side of Maretti's house would eliminate the blockage. *Id.* at A-26 (testimony of Glenn Prah, Record at 24).

¹⁶⁷ Brief for Respondent at 35.

¹⁶⁸ This narrowing helps alleviate the problem identified in Note, *supra* note 124, at 296 where the author rejected application of economics to a two party case because judicial machinery and expenses would be too high to identify the most efficient result.

¹⁶⁹ See *supra* note 132 and accompanying text; see also Note, *supra* note 124, at 297 ("Regardless of the approach it takes, the legal system will always answer these questions in one fashion or another.>").

¹⁷⁰ Cf. Rabin, *supra* note 11, at 1303 (citation omitted):
R owns two adjoining parcels of land. . . .

The question facing R is purely one of efficiency, uncomplicated by questions of fairness. Both the costs and benefits of the course of action taken will accrue to R. Because R owns both [properties] he need not worry about the relative legal and moral rights of [his neighbor]. R's only concern, therefore, is to maximize the value of both properties. He will balance the total costs, including loss of value of either parcel

logical innovation."¹⁷¹ Maretti's fair market value should remain unchanged.

The gain or loss according to societal preference, the second factor in the efficiency analysis, is a nebulous issue that should be strongly influenced by legislation, even when the legislature acts after the filing of the nuisance suit.¹⁷² In *Prah v. Maretti*, for example, although the court recognized that society still places some value on freedom to develop one's own land,¹⁷³ while the case was on appeal, the Wisconsin legislature passed a solar zoning law intended to promote the use of solar energy.¹⁷⁴ Thus, society may favor a result that includes the retention of Prah's solar energy system.

The final factor that the court must evaluate in the efficiency analysis is the anticipated out-of-pocket costs required to eliminate the land use conflict under each result. The court would weigh the cost of modifying Prah's solar collector against the cost of redesigning Maretti's chimney. This factor assures that the greatest gain according to fair market value tempered by societal preferences is achieved at the lowest cost.¹⁷⁵

c. *Fashioning a Remedy.* Armed with its analyses of fairness and efficiency, the court will proceed to fashion an appropriate remedy. The court must structure the remedy to yield the disposition in which the blameworthy party pays for the efficient solution.¹⁷⁶ The court must

¹⁷¹ To a casual observer, it appears that the elimination of a chance of freeze-ups or significant losses of efficiency would increase the house's fair market value. On the other hand, the "technological innovation" may be so unwieldy, or unsightly, or delicate, that the fair market value of Prah's property would be reduced.

¹⁷² Although blameworthiness must be examined in light of factors existing at the time the dispute arose, efficiency must be determined from the perspective of the court at the time of trial.

Sometimes societal preference overwhelms the remaining elements of a land use framework. See Polinsky, *supra* note 116, at 1086 ("It will often be convenient to subsume the goals of efficiency and distributional equity within a more general concept of 'social welfare.' One can think of social welfare as a weighted average of the two underlying goals . . ."). Ultimately, the three measures of efficiency and some societal preferences for redistribution of wealth will fall within a weighted average. Nevertheless, until land use frameworks become as popular with the courts as they are with the commentators, courts would be well advised to handle each issue separately, lest some possible solution be left by the wayside.

¹⁷³ See *supra* notes 102-03, 108-09 and accompanying text.

¹⁷⁴ See *supra* notes 102-04, 106 (discussing WIS. STAT. ANN. § 66.031 (West Supp. 1983)).

¹⁷⁵ Accord Rabin, *supra* note 11, at 1303-04 (weigh total costs of alternatives, including actual disbursements, against total gains to be derived from each alternative); see *supra* text accompanying note 116. In *Prah v. Maretti* the dispute involved an existing use and a contemplated use. When the change in fair market value and the societal preferences do not strongly indicate one solution or the other, it will usually be less expensive, and therefore more efficient, to modify a contemplated use rather than an existing use.

¹⁷⁶ The fashioning of an appropriate remedy is at the heart of the land use framework. See Rabin, *supra* note 11, at 1309-12 (proposing that in nuisance cases courts use "conditional injunctions" to promote economic efficiency without sacrificing fairness, instead of merely issuing injunctions or awarding damages); cf. Calabresi & Melamed, *supra* note 37, at 1115

engage in some judicial zoning, but will be armed with its previous determinations of blame and efficiency.¹⁷⁷

Prah v. Maretta is helpful in illustrating the proper approach to framing remedies when using the land use framework. For this illustration, assume that the cause of the dispute is either Prah's failure to build on the center of his lot¹⁷⁸ or Maretta's failure to seek a grade variance.¹⁷⁹ Similarly, assume that only two possible resolutions to the problem, either redesign of Maretta's chimney¹⁸⁰ or modification of Prah's solar collector,¹⁸¹ are before the court. Four dispositions (one of two possible blameworthy parties paying for one of two potential resolutions) will be examined.¹⁸²

First, if the court determines that the off-center location of Prah's

("Nuisance . . . is one of the most interesting areas where the question of who will be given an entitlement, and how it will be protected, is in frequent issue.") (footnote omitted); Polinsky, *supra* note 116, at 1075 (examining how damages and injunctive remedies can be used to efficiently and economically resolve land use dispute); Note, *supra* note 124 (suggesting that courts apply well-defined economic analysis to resolve land use disputes in order to guide parties in future disputes).

Some critics may attack this suggested approach for being judicial zoning. The charge of judicial zoning was implied by the dissent in *Prah v. Maretta*:

I would submit that any policy decisions in this area are best left for the legislature. "What is 'desirable' or 'advisable' or 'ought to be' is a question of policy, not a question of fact. What is 'necessary' or what is 'in the best interest' is not a fact and its determination by the judiciary is an exercise of legislative power when each involves political considerations." . . . (litigation is a slow, costly and uncertain method of reform). I would concur with these observations of the trial judge: "While temptation lingers for the court to declare by judicial fiat what is right and what should be done, under the facts in this case, such action under our form of constitutional government where the three branches each have their defined jurisdiction and power, would be an intrusion of judicial egoism over legislative passivity."

108 Wis. 2d at 248, 321 N.W.2d at 195 (Callow, J., dissenting) (quoting *In re City of Beloit*, 37 Wis. 2d 637, 644, 155 N.W.2d 633, 636 (1968)) (citations omitted). *But cf.* Beuscher & Morrison, *supra* note 7, at 452 (power of sovereign exercised by judiciary in nuisance cases, same as power exercised through legislative zoning); Ellickson, *supra* note 37 (suggesting that legislative zoning may not be best mechanism to regulate land use and that alternative means such as covenants, nuisance law, and fines should also be considered); Comment, *supra* note 64, at 53 (courts can apply nuisance law in individual cases to compensate for inequities created by legislative zoning).

Critics also criticized courts for judicial zoning when they deviated from the pure tort approach. *E.g.*, *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (Jasen, J., dissenting); *see also infra* notes 194-96, 200-07 and accompanying text.

¹⁷⁷ Even if a court does not attempt to engage in judicial zoning, it cannot help but do so. *See* Note, *supra* note 124, at 297. It is better that courts realize the inevitable and make decisions accordingly, with a view to both efficiency and fairness.

¹⁷⁸ *See supra* note 158 and accompanying text.

¹⁷⁹ *See supra* note 50; text accompanying note 162.

¹⁸⁰ *See supra* note 166 and accompanying text.

¹⁸¹ *See supra* text accompanying note 167.

¹⁸² *See supra* notes 164-65, 168; *infra* notes 208-11 and accompanying text.

Although these four dispositions were chosen for purposes of illustration, the land use framework is flexible enough to handle disputes that do not fit into one of these categories.

house is the cause of the dispute and that the efficient result is the modification of Prah's solar collector, the court can dismiss the suit.¹⁸³ A dismissal leaves Prah to remedy the effects of Maretti's obstruction, which he is likely to do in the most efficient fashion.¹⁸⁴ The expense of this modification will be borne by Prah because the court has absolved Maretti of any liability. The court can reach this same disposition under the *Restatement Second* approach, but, under that approach, the court would never expressly address efficiency. The court would merely conclude that the defendant had not acted unreasonably and would dismiss the suit.¹⁸⁵ Under the land use framework, the judge can be satisfied that a dismissal will produce a fair and efficient result.

Second, if the court decides that Maretti is to blame for not seeking a variance and that redesign of Maretti's chimney would be the efficient result, then the court should permanently enjoin Maretti from blocking Prah's solar collector.¹⁸⁶ When such an injunction flows from the application of the land use framework, it will achieve results that the court has determined to be fair and efficient. Maretti will need to modify his plans to avoid another suit that might result in a contempt of court sanction.¹⁸⁷ The least expensive method for complying with the injunc-

¹⁸³ Cf. Calabresi & Melamed, *supra* note 37, at 1115-16 (rule 3); Rabin, *supra* note 11, at 1310 (chart summarizing solutions resulting from proposed procedure). Rabin's chart does not explicitly include the remedy of dismissal of the action. On Rabin's chart, if the plaintiff is at fault, the court should grant an injunction against the defendant if the plaintiff pays the cost of the defendant's compliance. When the modification of the plaintiff's use is the "efficient" solution, Rabin suggests that the plaintiff "will not attempt to enforce her right to an injunction conditional upon her payment of the [defendant's] cost of compliance." *Id.*

If it would be efficient for the plaintiff to modify her own use at her own expense, Rabin's solution requires a conditional injunction that Rabin does not expect the plaintiff to purchase. If the plaintiff is perfectly rational and agrees with the court's assessment of efficiency, this disposition amounts to the issuance of a useless piece of paper. On the other hand, if the plaintiff has a different perception of efficiency from the court, the plaintiff will purchase the "inefficient" injunction and force the defendant to modify his use. It is much simpler for the court to dismiss the case and force the plaintiff to follow the efficient solution. See *infra* notes 184-85 and accompanying text.

¹⁸⁴ Unlike Rabin's "conditional injunction that will not be purchased," see *supra* note 183, Prah's options do not include forcing an unwilling Maretti to modify his chimney. Of course, Prah can try to bargain for a modification of Maretti's chimney, but Maretti will have the leverage that comes from judicial support of his right to leave his chimney unmodified.

¹⁸⁵ See *supra* notes 132, 137 and accompanying text.

¹⁸⁶ Cf. Calabresi & Melamed, *supra* note 37, at 1115-16 (rule 1); Rabin, *supra* note 11, at 1310, suggests that when the defendant is blameworthy, the court should enjoin him from interfering with the plaintiff's use unless he pays damages equal to the most efficient solution. He then suggests that if the most efficient solution is a modification of the defendant's use, the defendant will pay for such modifications in "complying with the injunction." This circuitous path to a "permanent injunction" results from Rabin's chart, rather than his analysis. Cf. *supra* note 183.

¹⁸⁷ The effort to modify future land use relations by remedies beyond mere damages which would then be enforceable through the power of the state is not new to nuisance law.

The notion of probability was also important if one was to understand the law of nuisance: [Blackstone stated in 1768 that] "[i]ndeed every continuance of a nuisance is held to be a fresh one; and therefore a fresh action will lie, and

tion will be to redesign the chimney,¹⁸⁸ an expense Maretti will bear because the remedy requires no action by Prah.¹⁸⁹ This disposition is also possible under the *Restatement Second* approach,¹⁹⁰ but under that approach the court may concentrate only on the "inadequacy" of a damage remedy, rather than on the "efficiency" of the result produced by an injunction.

Third, if Maretti caused the dispute, and the efficient result is to modify Prah's solar collector, the court should issue a "dissolvable" injunction to resolve the problem.¹⁹¹ Under the terms of a dissolvable injunction, the court will enjoin Maretti from blocking Prah's solar col-

very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it. Yet the founders of the law of England did not rely upon probabilities merely, in order to give relief to the injured. They have therefore provided two other actions . . . which . . . strike at the root and remove the cause itself." Physical and legal probability were thus made indistinguishable.

D. BOORSTIN, *supra* note 14, at 132-33 (quoting W. BLACKSTONE, COMMENTARIES bk. III *220).

¹⁸⁸ If the injunction forbids Maretti's chimney from casting a shadow upon Prah's solar collector, Maretti has several options. First, he can bargain with Prah to "buy off" the injunction. In many nuisance cases, especially those involving a polluting factory and residential plaintiffs, injunctions are disfavored for fear of extortion. *See* *Smith v. Staso Milling Co.*, 18 F.2d 736, 738 (2d Cir. 1927); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 225, 257 N.E.2d 870, 873, 309 N.Y.S.2d 312, 317 (1970); *see also* Rabin, *supra* note 11, at 1344. In this case the threat of extortion is low; Maretti can easily choose the second or third option if Prah tries to extort an unreasonable amount for not enforcing the injunction. Prah is unlikely to be receptive to an offer from Maretti once the court has found Maretti to blame and has concluded that Maretti's chimney should be modified.

Maretti's second option is to change the design of his entire house in order to eliminate the shadowing. This second option, however, is probably much more expensive, once Maretti has laid his foundation, than either the first or third options.

Maretti's third option, and the one the court would prefer he elect, is to modify the design of his chimney or the chimney's location. This option can be achieved at a lower cost than the second option and without any need for negotiations with Prah, required by the first option.

¹⁸⁹ No matter which of the options Maretti chooses, *see supra* note 188, Maretti will bear the cost. If he negotiates, Prah, who has the entitlement, will demand payment. If he modifies the design of his whole house, or his chimney, Maretti will not be able to seek compensation from Prah. If Maretti ignores the injunction and Prah files a suit to enforce the injunction, Maretti will "pay" through a potential contempt of court sanction.

¹⁹⁰ *See supra* notes 134-36 and accompanying text.

¹⁹¹ *Cf.* Calabresi & Melamed, *supra* note 38, at 1115-16 (rule 2). *See generally* Rabin, *supra* note 11, at 1311 ("Only rarely does a plaintiff receive an injunction that is dissolvable if the defendant pays damages. . . . This article contends that these rarely used conditional injunctions should become the usual remedies . . . [as they] will promote economic efficiency more effectively without sacrificing fairness."). Rabin further states that "[a]s a general rule, the appropriate remedy in a nuisance action should be an injunction cancellable upon the payment by the defendant of damages to the plaintiff for past injuries and for future injuries that would flow from the continuation of the defendant's activities." *Id.* at 1347.

The dissolvable injunction is slightly more complex than a standard damage remedy. The damage remedy does not specifically address the possibility that the defendant cannot or will not comply with the damage award. When a defendant fails to pay a damage award, the plaintiff will have to have the defendant's property attached. Such disposition may not be efficient. On the other hand, a dissolvable injunction specifically addresses the possibility of a

lector until he pays the costs of Prah's modifications. Because either party might opt for a less-than-efficient result,¹⁹² the court must carefully structure the dissolvable injunction. For example, the dissolvable injunction might consist of a temporary injunction against any further construction on Maretti's lot, with the proviso that the injunction will become permanent, unless Maretti posts a bond for twice the expected costs of modifying Prah's solar collector. This proviso will force Maretti to pay for the efficient result, or to forgo any construction. After the bond has been posted, the court can dissolve the temporary injunction. For Prah to obtain any of the money from Maretti's bond, the court can require him to submit estimates for the modifications and an estimate for the reduction, if any, in the market value of his property. If Prah does not comply, he will get no money and will still suffer from the obstruction by Maretti's chimney that he filed suit to prevent. Prah, then, logically will opt for the choice that generates a damage award to be paid out of Maretti's bond. After the court approves Prah's estimates, the court should withhold payment until after Prah has tendered the bills for the modifications. By withholding both the modification costs and the compensation for diminished market value, the court forces Prah to choose the efficient result.

This third disposition is also possible under the *Restatement Second* approach.¹⁹³ Under that approach, a damage remedy without an injunction blames Maretti and forces Prah to implement the result. Prah probably will choose to modify the solar collector with the compensation from the lawsuit. Under that approach, however, Prah will modify his collector not because the court found that result efficient, rather because the court found that damages adequately compensated Prah for his injuries.

This disposition has been vilified as an unwarranted foray into judicial zoning. The dissent in *Boomer v. Atlantic Cement Co.*,¹⁹⁴ for example, contended that "[i]n permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, li-

recalcitrant defendant. See, e.g., *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970); see *infra* note 192 and accompanying text.

¹⁹² The less-than-efficient result includes the possibility that Maretti will choose not to build his house according to the plans that the court has found most efficient and that Prah will use the money Maretti pays for a purpose other than the modification of his solar collector. Because the court has already determined that the efficient solution is to have Maretti finish his house as planned and to pay Prah for the modification of his solar collector, the remedy should be tailored to meet this particular outcome.

¹⁹³ In fact, under the *Restatement Second* approach this result is the preferred one because a court only will issue an injunction if the damage remedy would be inadequate. RESTATEMENT (SECOND) OF TORTS § 951 (1979); see also *supra* notes 139-42 and accompanying text.

¹⁹⁴ 26 N.Y.2d 219, 230, 257 N.E.2d 870, 876, 309 N.Y.S.2d 312, 321 (1970) (Jasen, J., dissenting); accord *Hulbert v. Portland Cement Co.*, 161 Cal. 239, 245, 118 P. 928, 930 (1911); *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 101 N.E. 805 (1913).

censing a continuing wrong. . . . This kind of inverse condemnation may not be invoked by a private person . . . for private gain or advantage."¹⁹⁵ The majority in *Boomer* countered: "All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed. . . . Thus it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this litigation."¹⁹⁶ The result in *Boomer* was a sacrifice of the plaintiffs' property compensated by permanent damages. In the solar access case, a total sacrifice of the plaintiff's property will not be required because the plaintiff's use and the defendant's use generally can coexist with a mere modification.

Fourth, if the court finds that Prah is at fault for building his house off-center, and that efficiency dictates that Maretti should redesign his chimney, the court should impose a purchased injunction.¹⁹⁷ In this disposition, if Prah pays for the redesign of Maretti's chimney and the de-

¹⁹⁵ 26 N.Y.2d at 230, 257 N.E.2d at 876, 309 N.Y.S.2d at 321 (Jasen, J., dissenting) (citation omitted).

¹⁹⁶ *Id.* at 226, 228, 257 N.E.2d at 873, 875, 309 N.Y.S.2d at 317, 319; *see also* Rabin, *supra* note 11, at 1331-32 (ameliorating charge that land use framework is "soft on polluters" by pointing out that land use framework gives plaintiff right to injunction even when plaintiff is blameworthy, and will make courts more willing to give plaintiff some relief "because damages rather than injunctions would be the customary remedy against polluters").

[T]he law recognizes that private parties can and should be able to exercise a kind of eminent domain where the gains outweigh the loss to society that flows from limiting a landowner's right to refuse to sell his property rights. This principle should apply in the nuisance context as well. Thus, nothing should be sacrosanct about protecting a landowner from a nuisance by an injunction rather than by an award of damages.

Id. at 1334 (citations omitted); *cf.* Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135, 149-50 (1963) ("Property rights cannot be used as a shibboleth to cloak conduct which adversely affects . . . others.").

¹⁹⁷ *Cf.* Calabresi & Melamed, *supra* note 37, at 1116 (rule 4) (focus of their model building was to point out possibility that one remedy to nuisance dispute could be that plaintiff pay to enjoin the nuisance); Ellickson, *supra* note 37, at 738 & n.202 (compensated injunction); Polinsky, *supra* note 116, at 1086 n.31 (emphasis in original):

While a remedy allowing the resident to halt the factory's activity, even at the cost of paying court-determined damages, may seem like an injunction, such a remedy is in fact the logical counterpart to the conventional damage remedy with the entitlement to the resident. Under the conventional damage remedy, the factory is allowed to continue its polluting activity, but must pay the resident court-determined damages. Under the present version of the damage remedy, the resident is entitled to continue *his* activity—pollution-free enjoyment of his property, which implies a right to halt or reduce the factory's activity—but must pay court-determined damages to the factory.

Rabin explains one reason for granting this purchased injunction to a blameworthy plaintiff:

[W]here the plaintiff does not deserve an entitlement, the proposed rule suggests that he nevertheless receive an injunction conditional on his paying the defendant's costs of compliance. This procedure would tend to protect the plaintiff from extortionate behavior by the defendant. A court desiring to grant the initial entitlement to the defendant therefore, will not be deterred by the fear of encouraging extortion. For this reason, the defendant justly deserving the initial entitlement will be more likely to receive it than he would under the traditional rule, which simply denies plaintiff an injunction when defendant is given the initial entitlement.

cline in the fair market value of Maretti's property, then the court will enjoin Maretti from blocking Prah's solar access. The efficient result may be harder to ensure with the fourth disposition than with the first three dispositions; nonetheless, the court should attempt to fashion a remedy to bring about the efficient result.

For example, the court can first enter a temporary restraining order against Maretti prohibiting him from obstructing Prah's solar access. The restraining order will expire unless Prah posts a bond. If Prah allows the restraining order to expire, Maretti can build his chimney as planned. This result would be inefficient, because Prah will modify his solar collector, even though the court found that redesign of Maretti's chimney was the most efficient solution.¹⁹⁸ If Prah does post the bond, then the court should turn the temporary restraining order into a permanent injunction. Maretti would then use the bond to redesign his chimney at Prah's expense.¹⁹⁹

The court can increase the likelihood that Prah will post the bond by limiting the amount of the bond to the expected cost of Maretti's redesigned chimney and loss in fair market value.²⁰⁰ Prah will post the bond if he would rather pay to redesign Maretti's chimney than to redesign his own solar collectors. Posting the bond will probably be less expensive than bargaining with Maretti. Whatever Prah decides to do, he ultimately "pays" for the result.²⁰¹

Maretti is likely to acquiesce in the result for three reasons. First, he will want to finish his house.²⁰² Second, he will want to be reimbursed for the changes in the design of his chimney and the diminished fair market value caused by the redesign.²⁰³ Finally, he will not want to

Rabin, *supra* note 11, at 1346. The court ordered this remedy in *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972).

¹⁹⁸ At first glance, Prah would be irrational not to post the bond required by the purchased injunction. Actually, Prah might rationally fail to act if he later concludes that the dangers from a shadow are no longer substantial. For this reason, if a court has found Prah to blame but is unsure of the efficient solution, it should elect this fourth solution and let Prah determine which solution is most efficient. This disposition is preferable to dismissal of the case, because with a dismissal, Maretti may require an inefficiently prohibitive amount from Prah before agreeing to modify his chimney.

¹⁹⁹ *Cf.* Polinsky, *supra* note 116, at 1086 n.31 (quoted *supra* note 197); Rabin, *supra* note 11, at 1310 (chart summarizing proposed solutions; assumes plaintiff will comply with purchased injunction).

²⁰⁰ As mentioned, *supra* note 198, Prah may be indifferent, or even adverse to paying for the redesign of Maretti's chimney. By limiting the amount of bond, the court at least avoids encouraging these "inefficient" tendencies. Even if Prah desires the efficient solution, requiring a bond of twice the expected costs might "force" him into an inefficient solution.

²⁰¹ *Cf. supra* notes 183-85 and accompanying text. Thus, under a criterion of fairness, absent an argument about absolute land ownership, the proposed fourth remedy and the first remedy, which is well-accepted, are equally just.

²⁰² Once the bond is posted, the injunction against obstruction becomes permanent. Maretti faces several options. *See supra* notes 199-203 and accompanying text.

²⁰³ Because the court is willing to have Prah compensate Maretti for his entire loss,

risk a contempt of court sanction.

The outcome under the fourth disposition cannot be achieved under the *Restatement Second* approach. Under that approach the court will dismiss the suit if Prah is to blame. Prah then would take the inefficient step of modifying his solar collector.²⁰⁴ This fourth disposition under the land use framework, however, requires the deepest foray into judicial zoning,²⁰⁵ because the judge will "force" a solution on a non-blameworthy defendant. Unlike the third disposition, the party must accept a result, even though he neither brought the conflict before the court nor is blameworthy for creating the dispute. Nevertheless, the result can be more efficient than dismissing the suit.²⁰⁶ The court must ultimately choose between engaging in judicial zoning, which will produce a fair and efficient result using a land use framework, and following the *Restatement Second* framework, which will produce a fair, but inefficient result.²⁰⁷

The court's determinations of fault and efficiency may require other dispositions. For example, the court may find both parties or a third party blameworthy.²⁰⁸ The court may determine that a combination of the proposed results is more efficient than any of the proposed

Maretti should take advantage of the offer, when the alternative is facing contempt of court sanctions. *Cf. supra* note 187 and accompanying text.

²⁰⁴ See *supra* notes 132, 137 and accompanying text. Under the *Restatement Second* approach, a finding of Prah as the blameworthy party would result in the dismissal of the case. Prah will modify his solar collector because the dismissal will allow Maretti to proceed with the construction of his proposed house with impunity. Under the proposed framework, if the court fails to "force" upon the parties the efficient solution of redesigning Maretti's chimney, then Prah will elect to modify his solar collector rather than purchase the injunction—the result reached under the *Restatement Second* approach.

²⁰⁵ The only case employing this fourth remedy to date is *Spur Indus. Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972). In *Spur*, the plaintiff, a building developer alleged that the defendant's nearby feed lot interfered with his purchasers' use and enjoyment and adversely affected the sales of his houses. The court held that the defendant had not been at fault, but due to the large number of residents inconvenienced by the feedlot, the efficient solution would be for the feedlot to be relocated, at the developer's expense. This disposition was clearly judicial zoning.

Calabresi and Melamed, *supra* note 37, at 1116, observe that this potential remedy, "[u]nlike the first three . . . does not often lend itself to judicial imposition for a number of good legal process reasons." Among these reasons are first, the difficulty of apportioning the costs among the plaintiffs and second, the "freeloader" problem, when more people than the plaintiffs will benefit from the injunction. Calabresi and Melamed recognize, however, that the purchased injunction "is available, and may sometimes make more sense than any of the three competing approaches." *Id.* at 1117. The solar access nuisance suit will often be such an appropriate setting because there will rarely be an apportionment or freeloader problem.

²⁰⁶ See *supra* note 137 and accompanying text. The court, having more experience under the *Restatement Second* in determining blame than efficiency, is more likely to dismiss the suit (fair, but possibly inefficient) than it is to issue a permanent injunction (possibly efficient, but probably unfair).

²⁰⁷ Perhaps the attraction of a tort approach is that the court will not have to break new ground, but that approach offers the court principles that answer only half of the questions needed to flexibly resolve a nuisance dispute. See *supra* note 156 and accompanying text.

²⁰⁸ See *supra* notes 164-65 and accompanying text.

results standing alone.²⁰⁹ The court must use its full range of remedial powers to fashion a fair and efficient disposition of the case.²¹⁰ This flexibility is needed "to protect both a landowner's right of access to sunlight and another landowner's right to develop land."²¹¹ The flexibility of the land use framework makes it superior to the *Restatement Second* approach suggested by the *Prah* court.

CONCLUSION

In *Prah v. Maretti*, the Wisconsin Supreme Court refused to extend the traditional *per se* non-nuisance conclusion to the blockage of light in a solar access nuisance dispute. Instead, the court chose the *Restatement (Second)* of Torts nuisance doctrine to resolve this solar access conflict. A better approach is the more flexible land use framework, which evaluates fairness and efficiency in two separate stages before addressing the remedy. Using this framework, a court can resolve a solar access dispute without sacrificing efficiency or fairness.

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²⁰⁹ For example, the court might determine that a backup heating system will be needed to prevent freeze-ups on Prah's solar collectors and that Maretti's chimney must be moved, even though Maretti's roof will still cast some shadow on Prah's roof.

²¹⁰ Determinations of blame and efficiency that fall outside of the four dispositions that this analysis presents should not dissuade a court from following the land use framework through to the finish. Not only is it beyond the scope of this Note to delineate precisely the remedy for each of these potential determinations, but it is also contrary to the underlying goals of the land use framework here proposed. The framework should allow a court to make independent inquiries into fault and efficiency before fashioning an appropriate remedy. If pat answers are provided, these other dispositions may become "boxes into which one then feels compelled to force situations which do not truly fit." Calabresi & Melamed, *supra* note 37, at 1128.

²¹¹ 108 Wis. 2d at 239, 321 N.W.2d at 191.