

Course Learning Objectives

The learning objectives for Torts II include both mastery of skills and doctrinal knowledge. Below you will find a list of key skills that will be practiced and developed, and an outline of the areas of doctrinal coverage. Basic mastery of these skills and a complete understanding of these doctrinal areas is necessary to earn a grade consistent with good standing.

Skills:

- **Issue Spotting:** You should be able to identify the appropriate legal question arising out of a fact pattern.
- **Rule Statement:** You should be able to state an accurate paraphrase of applicable rules, including appropriate legal *terms of art*.
- **Holdings:** You should be able to develop broad and narrow holdings for all cases.
- **Rule Interpretation and Application:** You should be able to interpret and apply a rule to a hypothetical set of facts. There will be a particular emphasis on the application of factor-based rules to facts.
- **Case Synthesis and Application:** You should be able to apply and distinguish cases in relation to a hypothetical set of facts, with appropriate explanation of significance—i.e., the relevance of the similarities and differences to the outcome of the dispute.
- **Making Policy-Based Arguments.** You should be able to identify the public policies of a precedent case or rule and their implications, and to assert policy implications of a legal controversy to support an argument for a particular application or distinction of a precedent case to the legal controversy, or a particular resolution of the application of a rule to the legal controversy.

Doctrinal Coverage:

- A. Trespass and Nuisance
 - 1. Elements of common law Trespass.
 - 2. Private Nuisance doctrine
- B. Strict Liability
 - 1. Animals
 - 2. Abnormally Dangerous Conditions

C. Products Liability

1. Historical Approaches
 - a. Negligence
 - b. Warranty
 - c. The early development of Strict Liability
2. Modern Products Liability
 - a. Plaintiffs/Defendants
 - b. Manufacturing Defects
 - c. Warning Defects
 - d. Design Defects. Tests:
 - i. Consumer Expectation Test
 - ii. Risk/Utility Test
 - iii. Reasonable Alternative Design (Restatement 3rd)
 - e. Causation
 - f. Comparative Negligence

D. Defamation

1. Common Law rules
 - a. Libel vs. Slander
 - b. Damages
 - c. Privileges
2. Adjustment of Standard for First Amendment considerations
 - a. Public vs. Private Figure
 - b. Public vs. Private Matter

E. Invasion of Privacy

1. Intrusion
2. Public disclosure of private facts
3. False Light
4. Appropriation

Reading Assignments

The required text for the course is **Henderson, et al., The Torts Process (9th ed. 2017)**. All page references are to this text. Assignments labeled “Handout” will be distributed ahead of time in class and on the course website. Handouts 1 and 2 are attached to this syllabus. Principle cases with starting page numbers (or “h1,” “h2,” etc. to indicate the Handout) are noted for your reference. However, you are responsible for all material within the listed pages of the week’s assignment.

Please note that for the first seven weeks of the semester, each class session is three hours. For weeks 8-14, each class session is one hour (the remaining two hours of the evening will be, for most of you, your Principles of Agency and Partnership class). The amount of material assigned for each week reflects the amount of class time. *Between the reading assignments and other homework, you should expect on average to spend two hours or more preparing for each hour of class.*

WEEK	TOPICS	ASSIGNMENT	CASES
1 1/16	Trespass and Nuisance Strict Liability (wild animals)	439-448, Handout #1, Handout #2, 481-485	<i>Friendship Farms v. Parson (h1)</i> <i>Prah v. Maretti (h2)</i>
2 1/23	Strict Liability Abnormally Dangerous Conditions	468-499 (top) 502-512	<i>Rylands v. Fletcher (488)</i> <i>Turner v. Big Lake Oil (489)</i> <i>Siegler v. Kuhlman (492)</i> <i>Toms v. Calvary Assembly of God (507)</i> <i>Foster v. Preston Mill (510)</i>
3 1/30	Products Liability Negligence theory Warranty theory Strict Liability theory	515-528, 249-252, 528-545	<i>MacPherson v. Buick Motor Co. (517)</i> <i>Henningsen v. Bloomfield Motors (522)</i> <i>Escola v. Coca Cola Bottling (249, focus on Traynor concurrence)</i> <i>Vandemark v. Ford Motor Co. (529)</i>
4 2/6	Products Liability Design Defects	582 (bottom)-594, 569-578 (top)	<i>Heaton v. Ford Motor Co. (582)</i> <i>Soule v. General Motors (587)</i> <i>Troja v. Black & Decker (569)</i>
5 2/13	Products Liability Warning Defects Midterm Review	568-569, 578-579 599-616	<i>Parish v. JumpKing (578) (warning)</i> <i>Sheckells v. AGV Corp. (599)</i> <i>Moore v. Ford (608)</i>

6 2/27	MIDTERM Products Liability Proximate Cause Comparative Negligence	545-561 (OK to read after class)	<i>Union Pump v. Allbritton (547)</i> <i>Murray v. Fairbanks Morse (554)</i>
7 3/6	Defamation	801-834, 840-848 Handout #3	<i>Gertz v. Robert Welch, Inc. (841)</i> <i>Dun & Bradstreet v. Greenmoss (h3)</i>
8 3/20	Post-Midterm Review		
9 3/27	Defamation	Handout #4 849-856	<i>Wells v. Liddy (h4)</i> <i>Milkovich v. Lorain Journal Co. (849)</i>
10 4/3	Defamation	Catch-up and writing exercises	
11 4/10	Invasion of Privacy: 1. Intrusion	859-874	<i>Hamberger v. Eastman (863)</i> <i>Shulman v. Group W (867)</i>
12 4/17	Invasion of Privacy: 2. Disclosure	874-884 (top)	<i>Diaz v. Oakland Tribune (874)</i>
13 4/24	Invasion of Privacy: 3. False Light 4. Appropriation/ Publicity	892-907	<i>Godbehere v. Phoenix Newspapers (892)</i> <i>In Re NCAA Student-Athlete Name & Likeness Licensing Litigation (900)</i>
14 5/1	Final Exam Review		

Course Requirements and Other Details

1. Attendance is mandatory. If you exceed more than four hours' worth of absences, you will be dropped from the course. *You are responsible for keeping track of the number of absences you accumulate, including the use of the immunity form. Please keep records.* Promptness is also mandatory.
2. Class participation and preparation are required. If you are unprepared in class, your final grade will be adjusted down by one tenth for each occasion.
3. During the course of the semester, there will be a number of exercises and homework assignments that are both individual and group assignments. You will be assigned to a standing small group. All exercises and components of group work must be completed in good faith and on time. Failure to do so on more than one occasion will result in the same penalty as set out in #2 above. The "free bite" (the one missed or late exercise for which no penalty is assessed) is designed to cover emergencies. This penalty applies equally to required components of group exercises and to individual assignments. Because of the ease of electronic submission, absence from class does not affect due dates.
4. Occasional short on-line quizzes will be announced. Successful completion of these quizzes will count for 5% of your grade.
5. Small groups will earn points through successful completion of exercises, in-class quizzes, and other means to be discussed later. The group's accumulated points will be awarded to each group member and will count 5% of the final grade.
6. Your grade will consist of the 10% noted in #4 and #5 above, 15% midterm, to be administered in the sixth week (F), and 75% final examination.
7. Students must enroll in the Torts II course website (the access code is "t2Keller"), and ensure that an accurate email address is recorded there. You will be held responsible for the content of any email messages sent through the website.
8. My office is in the Executive Suite, Room 205. I will maintain Office Hours by appointment (**days/times tba**). You may sign up for these appointments using the sign-up sheet posted outside the Executive Suite. If you wish to make an appointment at a different time, or if you wish to cancel an appointment, please contact Ms. Christy Alvarez at 714-459-1168 or calvarez@wsulaw.edu. You may also feel free to contact me by email at skeller@wsulaw.edu.

Addendum to Course Requirements – Use of Electronic Devices

1. The purpose of the following policies is to enable all students to focus on the learning activities of the classroom without distraction.
2. Violation of the following policies will result in the student being excluded from the class session. An absence will be recorded.
3. Cell phones: All cell phones must be turned **off** at the start of class. Leaving the phone on and merely turning off the ringer is a violation of this policy. Sending and receiving text messages, photographs or other uses of a cell phone are violations. Rare situations in which the student must leave a phone on in order to receive emergency information should be cleared with the professor prior to the start of class.
4. Lap tops: Lap top computers are permitted in the classroom for the purposes of taking notes and consulting briefs, outlines, or other documents the student has previously created. Use of the lap top for internet access is governed by #5 below. Use of the lap top for playing games, completing puzzles, viewing photographs, engaging in email or written correspondence, consulting documents unrelated to the class in session, or other uses unrelated to the class is prohibited.
5. Internet use: Only the following internet access is permitted during the class session: Accessing the professor's website for the class in session; brief consultation of online reference sources, such as dictionaries or encyclopedias, for the purpose of understanding class discussion; or limited research on Westlaw or Lexis directly related to material under discussion in the classroom. In addition, a professor may direct you to a specific website directly relevant to the class, such as that for a government agency. All other uses of the internet are prohibited. Sending and receiving email of any kind, including email from classmates about the class in session, is prohibited.
6. Any questions about the scope of these rules or about ambiguous situations should be directed to the professor.

DISABILITY SERVICES STATEMENT:

Western State College of Law provides accommodations to qualified students with disabilities. The **Disabilities** Services Office assists qualified students with disabilities in acquiring reasonable and appropriate accommodations and in supporting equal access to services, programs, and activities at Western State College of Law.

To seek reasonable accommodations, a student must contact Senior Assistant Dean Donna Espinoza, Student Services Director and Disabilities Services Coordinator, whose office is in the Second Floor Students Services Suite. Dean Espinoza's phone number and email address are: (714) 459-1117; despinoza@wsulaw.edu. When seeking accommodations, a student should notify Dean Espinoza of her or his specific limitations and, if known, her or his specific requested accommodations. Students who seek accommodations will be asked to supply medical documentation of the need for accommodation. Classroom accommodations are not retroactive, but are effective only upon the student sharing approved accommodations with the instructor or professor. Therefore, students are encouraged to request accommodations as early as feasible with Dean Espinoza to allow for time to gather necessary documentation. If you have a concern or complaint in this regard, please notify Dean Espinoza; or please notify Associate Dean of Students Charles Sheppard at csheppard@wsulaw.edu or (714) 459-1152. Complaints will be handled in accordance with the College of Law's "Policy against Discrimination and Harassment."

Western State College of Law – Programmatic Learning Outcomes

Western State College of Law’s curriculum is designed so that every student achieves a level of competency prior to graduation in each of the eight Programmatic Learning Outcomes listed below:

(1) Doctrinal Knowledge

Students will demonstrate knowledge of substantive and procedural law in the core curriculum subjects, including Contracts, Criminal Law, Criminal Procedure, Torts, Real Property, Business Association, Evidence, Civil Procedures, Constitutional Law, Estates, Community Property, Remedies, and Professional Responsibility.

(2) Practice Skills

Students will demonstrate the development of other law practice skills. Each student’s chosen outcomes within this category will be varied based on the student’s particular interests, coursework and work experiences. They may include, but are not limited to, the following topics: oral presentation and advocacy; interviewing; counseling; client service and business development; negotiations, mediation, arbitration, or other alternate dispute resolution methods; advanced legal research and writing (excluding purely academic papers and the first four units earned in introductory first-year legal research and writing class); applied legal writing such as drafting contracts, pleadings, other legal instruments; law practice management or the use of technology in law practice; cultural competency; collaboration or project management; financial analysis, such as accounting, budgeting project management, and valuation; cost benefit analysis in administrative agencies; use of technology, data analyses, or predictive coding; business strategy and behavior; pre-trial preparation, fact investigation, such as discovery, e-discovery, motion practice, assessing evidence, or utilizing experts; trial practice; professional civility and applied ethics; a law clinic that includes a classroom component; or a legal externship that includes a classroom component.

(3) Legal Analysis

Students will demonstrate the ability to identify the factual and legal issues implicated by a fact pattern and to appropriately use cases (including identifying the salient features of an appropriate precedent case, identifying legally significant similarities or differences between the precedent case and a fact pattern and explaining why those are legally significant) and rules (including the ability to connect legally significant facts in a fact pattern to the rule) to predict how a court would decide the issue. Students will also demonstrate the ability to identify and evaluate the public policies of a precedent case or rule, and be able to evaluate how public policy can impact the application of a rule to the legal issue.

(4) Legal Research

Students will demonstrate the ability to locate relevant legal authority using a variety of book and electronic resources, and to properly cite to such legal authority.

(5) Communication

Students will demonstrate the ability to communicate both orally and in writing in a manner appropriate to a particular task to effectively convey the author or speaker’s ideas. This includes audience sensitivity in written and oral communication (the ability to adopt a tone, style and level of detail appropriate to the needs, knowledge and expertise of the audience); and written communication basic proficiency (the ability to use the conventions of grammar, spelling, punctuation, diction and usage appropriate to the task and sufficient to convey effectively the author’s ideas).

(6) Advocacy of Legal Argument

Students will demonstrate the ability, in both oral and written formats, to evaluate the legal, economic and social strengths and weaknesses of a case and use case and statutory authority as well as public policy to persuade others. Making policy-based arguments includes the ability to identify and evaluate the public policies of a precedent case or rule and their implications, and be able to assert such appropriate arguments to support a particular application or distinction of a precedent case to a legal controversy or a particular resolution of the application of a rule to the legal controversy.

(7) Client Sensitivity and Cultural Competency

Students will demonstrate an awareness of clients' needs and goals, including a sensitivity to clients' background and circumstances (including, but not limited to, socio-economic, gender, race, ethnicity, educational, disability and/or religious background(s)), the ability to make decisions that reflect an appropriate focus on those needs and goals, and awareness that cultural issues may affect the relevance of facts and application of the law.

(8) Legal Ethics

Students will demonstrate the ability to identify ethical issues in law practice contexts and make appropriate decisions to resolve such issues.

Argosy University

Institutional Learning Outcomes:

1. Analytical Reasoning

Analyze issues objectively, interpret and synthesize data and ideas, and develop feasible, flexible, and creative solutions to real world problems

2. Effective Communication

Identify audiences, assess information provided, interpret needs, and present relevant information using appropriate written, oral, and listening skills and media to meet the needs of the situation

3. Information Competency

Gather, evaluate, and ethically use information from a variety of relevant technological and library resources to make decisions and take action

4. Interpersonal Effectiveness

Develop individual and group interpersonal skills to improve and foster participation and interaction critical for achieving individual and group goals

5. Personal and Professional Integrity and Ethical Behavior

Demonstrate a multi dimensional awareness of individual and social responsibility to act ethically and with integrity in a diverse, global society.

6. Professional Competence

Apply skills appropriate to program objectives and employ critical reasoning to contribute to one's field and profession.

Handout 1

Friendship Farms Camps, Inc. and Ronald Gabbard v. Leo Parson, Dorothy Parson, Max Combs and Lena Combs

Court of Appeals of Indiana, First District

**172 Ind. App. 73; 359 N.E.2d 280; 1977 Ind. App. LEXIS 738
February 3, 1977, Filed**

OPINION:

Defendants-appellants Friendship Farms Camps, Inc. (Friendship) is appealing the awarding of damages to each of the plaintiffs-appellees, Parsons and Combs, as well as the trial court's granting of an injunction designed to abate a nuisance.

• * *

We affirm the trial court's judgment.

The record shows that Ronald Gabbard, his wife, and parents orally leased their 80 acres of rural property to Friendship Farms Camps, Inc. for use as a campground. Friendship Farms Camps, Inc. was organized and incorporated by Ronald Gabbard, his wife, and another primarily for the purpose of providing camping facilities on the Gabbard property.

Prior to 1972, youth day camps were held on the property, but beginning in 1972, a number of weekly high school marching band camps were held. The bands would arrive on Sunday afternoon and stay until Friday evening during which time they would practice both marching and playing music. During 1973 and 1974, the band camps use increased, and Friendship proposed to extend the 1975 program to include weekend band camps during football season.

The Parsons and the Combs, whose residences were located across the road from Friendship, brought an action against Friendship to abate an alleged nuisance and for damages. The essence of their testimony at trial was that during the summer months loud band music and electronically amplified voices could be heard from 7:00 or 8:00 A.M. until 9:00 or 10:00 P.M. which interfered with their sleep and use of their property during the evening hours. They had complained to Gabbard and asked that the band music be confined to an earlier hour. Gabbard made an effort to enforce quiet hours. However, the evening noise continued for the reason that the cooler period of the day was better for practice time.

The trial court awarded Parsons and Combs \$600 each in damages and permanently enjoined Friendship from permitting music or the use of bull horns on its property between 500 P.M. and 8:00 A.M. on weekdays and any time during weekends.

Friendship first contends that the judgment is not supported by sufficient evidence in that the evidence fails to show that the Parsons and the Combs were reasonable people of ordinary sensibilities, tastes, and habits and that no actual injury or sickness resulted from the alleged nuisance.

In determining the sufficiency of the evidence, this Court will look only to that evidence most favorable to the appellee and the reasonable inferences to be drawn therefrom. * * *

Friendship's contention that actual physical sickness or illness must result before a nuisance may be found is without merit. This court has repeatedly stated that the essence of a private nuisance is the fact that one party is using his property to the detriment of the use and enjoyment of others. While injury to health is a factor to be considered in

determining if one's property is being detrimentally used, it is not the only factor to be considered for our legislature has defined a nuisance as:

“Whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action.” IC 1971, 34-1-52-1 (Burns Code Ed.).

It is settled that noise, in and of itself, may constitute a nuisance if such noise is unreasonable in its degree. Reasonableness is a question for the trier of fact.

The evidence at trial shows that the proximity of the band music and amplified voices aggravated existing illnesses of Dr. Parsons and Mrs. Combs. Additionally, the noise interfered with sleep, required windows and doors to be kept closed on summer evenings, prohibited hearing television or conversing with another person in the same room, and made sitting outside unpleasant and visiting with others virtually impossible.

We are of the opinion that there is an adequate evidentiary foundation for the trial court's judgment.

* * *

Friendship argues that the trial court's decision is contrary to law because . . . the net effect of the injunction was to destroy the operation of a lawful and useful business.

* * *

As to whether the operation of a lawful and useful business is being destroyed, we agree that curtailment exists, but not its destruction.

It is the law in Indiana that a lawful and useful business is not to be destroyed unless the necessity for doing so be strong, clear, and urgent. In the present case, the injunction granted by the trial court will not destroy Friendship's business operation. The evidence shows Friendship Farms may continue to conduct band camps during the week-days within the specified time periods. Furthermore, the camping facilities operated by Friendship were shown to be amenable for uses other than band camps.

Friendship next contends that the trial court committed reversible error in refusing to permit defendant's witness, Stanley Barkley, to testify as to the general economic conditions of the community surrounding Friendship Farms.

At trial, Mr. Barkley was asked to describe the general economic conditions of the area. An objection was made on the grounds of relevancy, and it was sustained. He was then asked if the camping facility operated by Friendship had any effect upon the community. The same objection was made, and the court sustained the objection over defendants' offer to prove.

Friendship argues that the trial court's action prevented it from showing that the operation of its business promoted the interests of the surrounding area to an extent outweighing the private inconvenience resulting therefrom. Friendship relies upon *Northern Indiana Public Service Co. v. W.J. & M.S. Vesey* (1936), 210 Ind. 338, 200 N.E. 620, for the proposition that it is a defense to an action to enjoin a nuisance that the act promotes the public convenience and interest to such an extent as to outweigh the private inconvenience. In *Northern Indiana Public Service Co.*, our Supreme Court refused to abate the operation of a gas plant because of the overriding public interest to be served by the continued production of gas for the community's use. While refusing to enjoin the gas plant, the court did award permanent damages.

We feel that in certain circumstances the continued operation of a nuisance creating business is necessary for the benefit and convenience of the community. In these limited situations less injury would be occasioned by the continued operation of the nuisance than by enjoining it. However, the private injury suffered must be compensated by an award of permanent damages if appropriate.

We believe the trial court was correct in finding that this case does not present a situation where the social utility of the Friendship business greatly outweighed the private harm to the adjoining land owners. Therefore, no error existed in the trial court's ruling. * * *

Handout 2

Glenn Prah, Plaintiff-Appellant, v. Richard D. Maretti, Defendant-Respondent

No. 81-193

Supreme Court of Wisconsin

108 Wis. 2d 223; 321 N.W.2d 182; 1982 Wisc. LEXIS 2741; 29 A.L.R.4th 324; 12 ELR 21125

**March 29, 1982, Argued
July 2, 1982, Decided**

JUDGES:

Shirley S. Abrahamson, J. Ceci, J., took no part. William G. Callow, J. (*dissenting*).

OPINIONBY:

ABRAHAMSON

OPINION:

[*224] [**184] This appeal from a judgment of the circuit court for Waukesha county, Max Raskin, circuit judge, was certified to this court by the court of appeals, sec. (Rule) 809.61, Stats. 1979-80, as presenting an issue 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 (which conforms to existing deed restrictions and local ordinances) interferes with his access to an unobstructed path for sunlight across the neighbor's property. This case thus involves a conflict between one landowner (Glenn Prah, the plaintiff) interested in unobstructed access to sunlight across adjoining property as a natural source of energy and an adjoining landowner (Richard D. Maretti, [*225] the defendant) interested in the development of his land.

I.

According to the complaint, the plaintiff is the owner of a residence which was constructed during the years 1978-1979. The complaint alleges that the residence has a solar system which includes collectors on the roof to supply energy for heat and hot water and that after the plaintiff built his solar-heated house, the defendant purchased the lot adjacent to and immediately to the south of the plaintiff's lot and commenced planning construction of a home. The complaint further states that when the plaintiff learned of defendant's plans to build the house he advised the defendant that if the house were built at the proposed location, defendant's house would substantially and adversely affect the integrity of plaintiff's solar system and could cause plaintiff other damage. Nevertheless, the defendant began construction. The complaint further alleges that the plaintiff is entitled to

"unrestricted use of the sun and its solar power" and demands judgment for injunctive relief and damages.

Plaintiff's home was the first residence built in the subdivision, and although plaintiff did not build his house in the center of the lot it was built in accordance with applicable restrictions. 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. To avoid these adverse effects, plaintiff requested defendant to locate his home an additional several feet away from the plaintiff's lot line, the exact number being disputed. Plaintiff and defendant failed to reach an agreement on the location of defendant's home before defendant started construction.

[**187] We consider first whether the complaint states a claim for relief based on common law private nuisance. This state has long recognized that an owner of land does not have an absolute or unlimited right to use the land in a way which injures the rights of others. The rights of neighboring landowners are relative; the uses by one must not unreasonably impair the uses or enjoyment of the other. When one landowner's use of his or her property unreasonably interferes with another's enjoyment of his or her property, that use is said to be a private nuisance.

The private nuisance doctrine has traditionally been employed in this state to balance the conflicting rights of landowners, and this court has recently adopted the analysis of private nuisance set forth in the Restatement (Second) of Torts. *CEW Mgmt. Corp. v. First Federal Savings & Loan Association*, 88 Wis. 2d 631, 633, 277 N.W.2d 766 (1979). The Restatement defines private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement [*232] (Second) of Torts Sec. 821D (1977). The phrase "interest in the private use and enjoyment of land" as used in sec. 821D is broadly defined to include any disturbance of the enjoyment of property.

Although the defendant's obstruction of the plaintiff's access to sunlight appears to fall within the Restatement's broad concept of a private nuisance as a nontrespassory invasion of another's interest in the private [*188] use and enjoyment of land, [***14] the defendant asserts that he has a right to develop his property in compliance with statutes, ordinances and private covenants without regard to the effect of such development upon the plaintiff's access to sunlight. In essence, the defendant is asking this court to hold that the private nuisance doctrine is not applicable in the instant case and that his right to develop his land is a right which is *per se* superior to his neighbor's interest in access to sunlight. [*233]

Many jurisdictions in this country have protected a landowner from malicious obstruction of access to light (the spite fence cases) under the common law private nuisance doctrine. If an activity is motivated by malice it lacks utility and the harm it causes others outweighs any social values.

This court's reluctance in the nineteenth and early part of the twentieth century to provide broader protection for a landowner's access to sunlight was premised on three policy considerations. 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. *Metzger v. Hochrein*, 107 Wis. 267, 272, 83 N.W. 308 (1900).

Second, sunlight 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.

Third, society had a significant interest in not restricting or impeding land development. *Dillman v. Hoffman*, 38 Wis. 559, 574 (1875). This court repeatedly emphasized that in the growth period of the nineteenth and early twentieth centuries change is to be expected and is essential [***19] to property and that recognition of a right to sunlight would hinder property development.

Considering these three policies, this court concluded that in the absence of an express agreement granting access to sunlight, a landowner's obstruction of another's access to sunlight was not actionable. *Miller v. Hoeschler*, *supra*, 126 Wis. at 271; *Depner v. United States National Bank*, *supra*, 202 Wis. at 410. These [***20] three policies are no longer fully accepted or applicable. They reflect factual circumstances and social priorities that are now obsolete.

First, society has increasingly regulated the use of land by the landowner for the general welfare. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Just v. Marinette*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

Second, access to sunlight has taken on a new significance in recent years. In this case the plaintiff seeks to protect access to sunlight, not for aesthetic reasons or as a source of illumination but as a source of energy. Access to sunlight as an energy source is of significance both to the landowner who invests in solar collectors and to a society which has an interest in developing alternative sources of energy.

Third, the policy of favoring unhindered private development in an expanding economy is no longer in harmony with the realities of our society. *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974). The need for easy and rapid development is not as great today as it once was, while our perception of the value of sunlight as a source of energy has increased significantly.

Courts should not implement obsolete policies that have lost their vigor over the course of the years. The law of private nuisance is better suited to resolve landowners' disputes about property development in the 1980's than is a rigid rule which does not recognize a landowner's interest in access to sunlight. As we said in *Ballstadt v. Pagel*, 202 Wis. 484, 489, 232 N.W. 862 (1930), "What is regarded in law as constituting a nuisance in modern times would no doubt have been tolerated without question in former times." We read *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974), as an endorsement of the application of common law nuisance to situations involving the conflicting interests of landowners and as rejecting *per se* exclusions to the nuisance law reasonable use doctrine. [***22]

In *Deetz* the court abandoned the rigid common law common enemy rule with respect to surface water and adopted the private nuisance reasonable use rule, namely that the landowner is subject to liability if his or her interference with the flow of surface waters unreasonably invades a neighbor's

interest in the use and enjoyment of land. Restatement (Second) of Torts, sec. 822, 826, 829 (1977). This court concluded that the common enemy rule which served society "well in the days of burgeoning national expansion of the mid-nineteenth and [*238] early-twentieth centuries" should be abandoned because it was no longer "in harmony with the realities of our society." *Deetz, supra*, 66 Wis. 2d at 14-15. We recognized in *Deetz* that common law rules adapt to changing social values and conditions.

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 *Deetz*, 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.

Private nuisance law, the law traditionally used to adjudicate conflicts between private landowners, has the flexibility to protect both a landowner's right of access to sunlight and another landowner's right to develop land. Private nuisance law is better suited to regulate access to sunlight in modern society and is more in harmony with legislative policy and the prior decisions of this court than is an inflexible doctrine of non-recognition of any interest in access to sunlight across adjoining land.

[*240] We therefore hold that private nuisance law, that is, the reasonable use doctrine as set forth in the Restatement, is applicable to the instant case.

