

Cardozo Law Review  
December, 1994

**Note**

**\*595 INSURING DOMESTIC TRANQUILITY THROUGH QUIETER PRODUCTS: A PROPOSED  
PRODUCT-NUISANCE TORT**

Jason A. Lief

Copyright © 1994 Yeshiva University; Jason A. Lief

Long ago it was adjudged that one . . . who with the aid of a speaking trumpet made great noises in the night time to the disturbance of the neighborhood, must answer to the King. [FN1]

Chief Judge Cardozo (1930).

Introduction

Is there a place upon this globe where one may escape the drone of our industrial beehive and bask in calm tranquility? Thoreau observed that the "mass of men lead lives of quiet desperation." [FN2] Paradoxically, the source of that quiet desperation often is uncontrollable environmental noise. Even within the home, the one supposed sanctuary from the world's evils, unwanted noise invades lives and disrupts serenity. Although noise is not a new problem for mankind, [FN3] its magnitude has changed over time. Today's "speaking trumpets" do indeed "have a power unknown to a simpler age." [FN4] Amplified sound can be a weapon, as well as a means of communication. [FN5] Noise is used to wage "psychological \*596 warfare." [FN6] It is even reported that the "French have invented an infrasonic generator that can turn people's flesh to the consistency of toothpaste and kill at a distance of five miles." [FN7]

In an attempt to address the problem of nonoccupational noise pollution, the United States Congress passed the Noise Control Act of 1972. [FN8] This legislation, along with the Quiet Communities Act of 1978, [FN9] authorized the U.S. Environmental Protection Agency's ("EPA") Office of Noise Abatement and Control [FN10] to investigate the sources of noise, promulgate noise control regulations, impose product noise labeling, and aid local governments in the fight against noise. In the early 1980s the Office of Noise Abatement and Control was closed, ostensibly for budgetary reasons. The Noise Control Act, itself, was not repealed. Subsequent federal and local efforts to control noise pollution have been of a limited nature. [FN11] In response to this vacuum, this Note contemplates a new "product- nuisance" tort. [FN12] This tort would compensate the residential victims of noisy products, and give manufacturers an incentive to produce quieter products by holding them liable for the disturbances their products cause. Alternative legislative approaches to noise pollution are also briefly examined. [FN13]

Part I argues that noise pollution is a growing problem [FN14] that poses a serious threat to the health of individual Americans, and to \*597 the economic, social, and political well-being of our nation. Although the Note justifies its legal proposal by pointing to the costs of noise pollution, Part I also posits a legal right to "domestic tranquility," and argues that the denial of this right is a harm, in and of itself. This right, hinted at by several opinions from the U.S. Supreme Court, [FN15] is also found in the long espoused view that a person's home is his castle. Part II reviews current tort, federal, and local laws that deal with noise, and concludes that these laws fail to prevent noise pollution, or to compensate the victims of domestic noise.

The reader is then asked to imagine a new legal machinery that is designed to insure a quieter and more serene home environment. Using tort and risk-utility concepts, Part III identifies a classification scheme for noise- emitting products. This classification scheme provides the foundation for Part IV's discussion of the proposed product- nuisance tort. Specifically, Part IV compares various elements of products liability and nuisance law, and explains how the hybrid product- nuisance tort incorporates these elements in an attempt to hold manufacturers responsible for the external noise pollution costs of their products. Part V examines how damage might be measured under a product- nuisance theory, and what potential defenses manufacturers might invoke in response to a claim of product- nuisance.

## I. The Harmful Effects of Noise

The unacceptable "costs" of noise become clear as one examines the health effects, communication breakdowns, hostile attitudes, losses in property value, decreases in worker productivity, and disruptions of thought that result from noise. In addition, this Part argues that there exists a right to domestic tranquility, the denial of which has serious consequences for the individual and for civilized society.

### A. Noise: The Silent Health Hazard

Hardened by the presence of violent crime, dramatic environmental catastrophes, and international upheaval, we tend to assume \*598 that assault upon the ear drums and the nerves, while annoying, poses no grave threat. [FN16] Mere vibrations in the air seem an unlikely source of danger. Unlike radiation or exotic chemicals, noise is viewed as commonplace, and therefore as relatively harmless. But scientific research indicates otherwise. A 1960 Columbia Medical School study indicated that an average eighty-year-old inhabitant of a quiet Sudanese jungle had the hearing ability of an average thirty-year-old American. [FN17] It is currently believed that noise pollution is at least partially responsible for hearing loss among ten million Americans. [FN18] This hearing impairment may result from sudden exposure to very loud sounds or from chronic exposure to lower levels of noise. [FN19]

Although past legislative inquiries into the health effects of noise have focused mainly on hearing impairment, subsequent scientific studies have suggested that noise produces psychological stress, aggressive behavior, hypertension, adverse cardiovascular changes, digestive and respiratory ills, and hormonal changes. [FN20] Some studies have suggested that noise contributes to increases in mortality rates. [FN21]

Scientists believe that noise produces stress by provoking the "fight or flight" response, which is characterized by an adrenaline \*599 surge, increased heart rate, and general physiological stimulation. [FN22] "The relation between stress and illness is now well recognised, and stress is known to be exacerbated by feelings of lack of control, such as those caused by noise inflicted by others." [FN23] Simply stated, noise triggers an instinctive alarm in the human mind, and prompts the body to prepare to react to an unknown danger. When this instinctive alarm is repeatedly invoked, it may produce serious physiological damage, and mental distraction. All types of uncontrollable noise can produce stress in exposed individuals. [FN24]

Psychological stress and the fight or flight response "may increase an individual's risk of developing certain cancers." [FN25] One scientific commentator has noted that an "external factor with carcinogenic potential is noise at certain frequencies and intensities." [FN26]

Noise can also cause adverse health effects by interfering with sleep. "The consequences [of which] may be serious . . . because adequate periods of rest and sleep are physiologically necessary. Chronic loss of sleep may impair performance and cause psychological distress." [FN27] Sleep loss also causes a decrease in creative \*600 thinking ability and may affect the functioning of the immune system. [FN28]

Studies of the effects of noise on birth weight and birth defects have yielded mixed results. Some studies have shown a link between residence in a noisy area during pregnancy and birth defects or low birth weight, while other studies have not revealed a significant association. [FN29]

Noise is, obviously, capable of producing mental distraction and annoyance. Indeed, studies have shown that student test scores dramatically improve when noise distractions are removed from the learning environment. [FN30]

Although scientific knowledge regarding the health effects of noise exposure still leaves much to be desired, the extra-auditory effects of noise are no longer mere speculation. Furthermore, science is beginning to recognize that the effects of noise are not purely the result of individual psychological sensitivities, but of explainable physiological responses to waves of audible energy. [FN31] In addition to affecting humans, new research shows that noise, produced by human activity, poses a potential health threat to marine mammals... [FN32] Thus, noise pollution is a genuine health and environmental hazard, which needs to be properly addressed by the law. As former U.S. Surgeon General William H. Stewart said, "Noise must be considered a hazard to the health of people everywhere." [FN33]

### \*601 B. The Economic, Social, Educational, and Political Impact of Noise

The capacity of noise to cause illness and annoyance, interrupt speech, and divert one's train of thought, has import beyond the basic health concerns that it raises.

Noise, encountered in the work place or in the employee's daily life, can lower worker productivity, and increase worker absenteeism and work place accidents. [FN34] Decreases in productivity may be especially significant where the work requires high levels of mental concentration. [FN35] In 1972, the annual costs of noise pollution "from increased absenteeism, accidents, and decreased efficiency . . . [were] estimated at four billion dollars." [FN36]

The negative effects of noise on work place performance and safety are paralleled by its effects on the home. The victim of domestic noise, in many ways, may experience a form of homelessness. [FN37] When people's homes are disrupted by noise, they sense that their last safe refuge has been taken from them. [FN38] In response, they may strike out in violence. It is reported that in England at least five murders a year, as well as some suicides, result from persistent noise. [FN39] While enmity, anguish, and violence might seem unusual consequences of noise, [FN40] they are not uncommon. Aroused by the "fight or flight" response, indignant at the inconsiderate behavior of noise polluters, [FN41] and sensing the absence of a legal remedy, victims often seek retaliation. [FN42]

\*602 The story of Mark Leach from Oxford, England [FN43] serves to illustrate some of the negative consequences of residential noise. For four years Mr. Leach and his wife listened to the screeches of their neighbor's two parrots. [FN44] The birds had learned to call out Mr. Leach's name whenever he went into his garden. Stripped of his patience, deprived of his capacity for civility, and no longer willing to bear the nuisance, Mr. Leach broke into his neighbor's aviary, and strangled one of the birds with his bare hands. In the midst of the excitement, Mr. Leach and his wife inflicted bites upon the head and thigh of their next door neighbor. Speaking in Churchillian tones after the incident, Mr. Leach said, "This is not the end, it is the beginning. I am determined to get rid of these parrots and get back to peace and quiet." [FN45]

In another story from England, a man was reported to have "stormed into his neighbour's house, ordered everyone out, doused the carpets with petrol and threatened to set the place on fire," \*603 after enduring a year of raucous parties with the "music at top volume." [FN46]

In addition to the foregoing examples of reckless or intentional harassment, there are the countless cases of residential dwellers who find that a new airport landing route, or a new road, or a neighbor's noisy new air conditioner or lawn mower has taken root next to their once quiet home.

Examining the economic costs [FN47] of domestic noise provides an important, although incomplete, perspective. Someone in Mr. Leach's position will have difficulty selling their noisy house for the same price as a comparable house that has no such avian anguish attached to it. The competitive marketplace will reduce the selling price, in accord with the potential buyer's distaste for noise. [FN48] Furthermore, when residential noise causes people to move, it can create a transient atmosphere that decreases the value of an entire neighborhood.

Despite the difficulties of quantifying its effect, we know that noise interrupts the intellectual, and thus the political, well-being of a society. Within a democratic society anything that disturbs the education of future generations is a matter of concern to the body politic. Noise, no doubt, can disrupt the educational process. [FN49] Noise also disrupts the thoughtful contemplation and discourse that is a prerequisite for wise political action. As Justice Frankfurter once pointed out:

The men whose labors brought forth the Constitution of the United States had the street outside Independence Hall covered with earth so that their deliberations might not be disturbed by passing traffic. Our democracy presupposes the deliberative \*604 process as a condition of thought and of responsible choice by the electorate. [FN50]

### C. The Costs of Solutions Versus the Lockean Rights of Noise Victims

Weighed against the harmful effects of noise are the "benefits" of free noise disposal and the costs of solutions. We face the challenge of reducing undesirable environmental noise pollution without creating economic costs as great, or greater than, the costs of the noise itself. If the costs of noise regulation and abatement are high, should they be undertaken? Should the noise victim or the noise polluter pay the cost? Should manufacturers of noisy products be considered noise polluters? What are the "transaction costs" of implementing, or even beginning to think about, noise abatement? The answers to some of these questions are to be found in hard economic facts. In addition, this Note appeals to the right of domestic tranquility to justify its proposal.

It can be argued that there are "benefits" to be derived from not regulating noise. One "benefit is the increased production of goods and services made possible by the tolerance of noise, in effect, by allowing 'free' disposal of noise pollution throughout the community." [FN51] In addition, for some real estate purchasers, the ability to produce uninhibited noise while using a particular property might make that property more "valuable." Also, the aggregate effect of noise on property values may be ambiguous, because the presence of noise in one area may make property in a quieter area more desirable and more valuable. [FN52] Conversely, if all the world's residences were similarly plagued by noise, there would be no competition between quiet and noisy properties, and noise would be irrelevant to real estate prices. Despite this economic fact, all these noise-ridden homes, undoubtedly, would be depreciated in absolute value when considered in light of the worth of tranquility to human well-being. [FN53] While the aggregate effect of \*605 noise on property values may be unclear, it must be remembered that individual property rights are not aggregate rights.

Similar "aggregate benefits" arguments can be made with regard to most forms of pollution. Whenever the "external costs" of tolerating or cleaning up pollution are borne by non-polluters, the polluter reaps the benefit, because he avoids these costs. If the polluter is engaged in a business of great economic or social utility, it can be argued that the entire society reaps benefits. However, adhering to a pure cost-benefit perspective, pollution, by definition, also exacts costs upon society. The complete cost of noise pollution, to individuals and society generally, may be significantly underestimated by market evaluations and cost-benefit analyses. [FN54]

While expenditures will be required to cure noise pollution problems, [FN55] it has been observed that as "noise abatement technology evolves it will be easier and cheaper to prevent noise pollution. . . . Requiring noise makers to recognize the costs of noise emissions encourages the search for cost-effective noise-reducing technology." [FN56] The discovery and increased use of such technologies, as a result of stricter anti-noise law, will result in mass production, further cost savings, and generalized economic benefits.

The recognition that economic benefits will flow from anti-noise law is consistent with the growing view that solutions to environmental problems need not prove a hindrance to overall economic goals, [FN57] and that we should use "economic means in order to obtain environmental ends." [FN58] This Note's proposals -- the product-nuisance tort, as well as the market-based approaches that are \*606 briefly discussed in Part II.E [FN59] -- are aimed at the manufacturers of noise-emitting products. The goal of such proposals is, in part, to assure that the "environmental perspective is integrated into economic policy." [FN60] However, the underlying justifications go beyond questions of economics.

While efforts to reduce noise pollution will undoubtedly yield economic benefits, the right to a tranquil home environment, as well as other legal rights, should not be analyzed solely from an economic perspective. The question of who has a "right" to do as they please on their own land, unhindered by their neighbors, is fundamentally a legal question. [FN61] The problem of noise pollution speaks to our very conceptions of civilized society and to the rights, freedoms, and insulations from harm that we expect to derive from that society. As the Supreme Court has noted, the state has "a substantial interest in protecting its citizens from unwelcome noise." [FN62] This "interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." [FN63] It derives from "the unique nature of the home" [FN64] as a place of "retreat to which men and women can repair to escape from the tribulations of their daily pursuits." [FN65] The worth \*607 of a life, or of the quality of life, is often immeasurable, yet no less deserving of protection. Furthermore, the denial of a right may be seen to constitute a harm, in and of itself, in a society that lives by the rule of law. This difference between a market perspective and a perspective based upon political and legal rights has been noted by commentators from many varying political and philosophical traditions. [FN66]

It is the purpose of the law in a civilized society to safeguard the rights of citizens. Lockean theory reveals that government is formed when individuals, living in a state of nature, grant their individual right to defend their property to a government, and "joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties." [FN67] "War was the condition of man prior to the existence of civil society, and the return to it is always possible." [FN68] Where the government does not recognize individual's rights, or "the Supream Executive Power, neglects and abandons [its duty to protect those rights]. . . . This is demonstratively to reduce all to Anarchy, and so effectually to dissolve the Government." [FN69] Thus, the failure of the law, or of law enforcement, to properly shield noise victims from invasions of their property by an unwanted noise nuisance can culminate in a breakdown of civilized behavior and a return to the rule of force. [FN70] As Locke stated, "Men would not quit the freedom of the state of Nature . . . were it not to preserve their Lives, Liberties and Fortunes; and by stated Rules of Right and Property to secure their Peace and Quiet." [FN71] This "Lockean perspective" suggests the high "cost" to society, in terms of violence and localized anarchy, when the law does not address such conflicts.

\*608 Thus, it is not simply that the medical costs of stress and hearing loss from noise are too high, and should be borne by the producers of the noise, but that people have a right to not have such injury inflicted upon them. It is that no one has the absolute economic freedom to engage in any activity or produce any and all products, when those activities or products are

profoundly disruptive to the tranquil existence of others. Sole reliance upon cost-benefit analyses might overlook these rights and responsibilities by viewing all environmental phenomena as economic quantities and looking singularly to the efficiency of outcomes to justify intervention by the law. There simply are no independent "environmental ends" or inherent legal rights under a pure cost-benefit analysis, only economic ones. [FN72] For those who, after years of anguish, are longing to strangle the parrot next door, or sledgehammer their neighbor's stereo, the problem is not merely one of lost productivity. It is the invasion of an apparently self-evident right; the right to be free of disturbance in one's most private thoughts and existence that conjures up the strongest feelings of indignation, and represents, perhaps, the greatest harm that noise produces.

## II. The Current State of the Law Regarding Noise Pollution

This Part reviews how current nuisance tort law, products liability law, local anti-noise ordinances and zoning regulations, and the Federal Noise Control Act of 1972 address, or fail to address, environmental noise pollution. It also briefly discusses market-based approaches that Congress might implement to strengthen the Noise Control Act. This Part concludes that the current state of the law is inadequate to the task of preventing or remedying the harm caused by noise pollution.

### A. The Nature of Nuisance

Nuisance law stands, in theory, as a limitation upon the absolute freedom of one property owner in relation to another. [FN73] It recognizes that the

\*609 old and familiar maxim that one must so use his property as not to injure that of another (*sic utere tuo ut alienum non laedas*) is deeply imbedded in our law. An owner will not be permitted to make an unreasonable use of his premises to the material annoyance of his neighbor if the latter's enjoyment of life or property is materially lessened thereby. [FN74]

Nuisance, as a cause of action, was first recognized in twelfth century, pre- industrial England. [FN75] Since the thirteenth century, noise has been recognized as a potential nuisance for which courts have granted damages or injunctive relief. [FN76] Two types of nuisance, private and public, are recognized by tort law. [FN77] Private nuisance is currently understood to be a "nontrespassory invasion of another's interest in the private use and enjoyment of land." [FN78] The Restatement (Second) of Torts claims that the following elements must be present for liability to exist under a private nuisance action:

1.) The defendant's "conduct" must be a legal cause of an invasion of another's interest in the use or enjoyment of their land. [FN79]

2.) The defendant's conduct must be either intentional and unreasonable; or negligent or reckless; or must involve "abnormally dangerous conditions or activities." [FN80]

\*610 3.) There must be "significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." [FN81]

These requirements serve to limit the scope of nuisance liability. The causal requirement negates suits where a defendant, like a manufacturer, does not have "control over the instrumentality alleged to constitute the nuisance." [FN82] The requirement that the nuisance result from an intentional, negligent, or abnormally dangerous activity or condition is a relatively new limitation on nuisance, [FN83] and is not universally accepted. [FN84] The "significant harm" requirement is designed to deny recovery in "frivolous" suits, and to impose a reasonable person standard for determining the severity of the nuisance. The law, it is said, "does not concern itself with trifles." [FN85] For "[n]oise, to be enjoined, [it] must produce substantial injury and annoy the normal person." [FN86]

In addition to requiring significant harm, courts often examine the importance or utility of the noise-emitting activity, [FN87] and the \*611 "nature" of the affected area, [FN88] before recognizing or granting relief for a private nuisance. In *McQuade v. Tucson Tiller Apartments*, [FN89] the plaintiffs sued to obtain an injunction barring loud music concerts from being held in the shopping center adjoining their apartment. The court stated that in

determining whether the acts constitute a nuisance, the court should consider all the circumstances including the locality and character of the surroundings, the nature of the defendant's business and the manner in which it is conducted, the value to the community of the defendant's activities, the defendant's ability to reduce the harm, and the extent to which the defendant would be damaged by an injunction and the plaintiff damaged by the failure to enjoin. The court can also consider priority of

use. [FN90]

The need to protect industrial development has justified new limits on nuisance law just as the industrial age is spawning the most powerful instruments of nuisance. For instance, some courts have refused to afford traditional injunctive relief in nuisance cases where it would result in the closing of an economically desirable factory. [FN91] However, as the proposed tort suggests, risk-utility theories may serve to expand nuisance liability where noise is produced by low utility activities. [FN92]

Categorizing a private nuisance as "permanent" or "continuing" in nature provides courts with another means of expanding or \*612 limiting the protections afforded by nuisance law. [FN93] Permanent nuisances occur when a single act is responsible for a permanent injury. Where injunctive relief is not possible, these nuisances may be remedied through a single payment for all damages. [FN94] Continuing nuisances are those "that may be discontinued at any time." [FN95] Unlike permanent nuisances, damages for continuing nuisances are only given for the harm already suffered, and not for anticipated harm. [FN96] Noise that can be easily abated probably constitutes a continuing nuisance.

Even when nuisance law provides a remedy against a particular user of a noisy product, [FN97] it creates no incentive for manufacturers to make a quieter product.

## B. Products Liability Theories

Where nuisance law reminds us of the responsibilities of land users, products liability reminds us of the duties of manufacturers. Products liability is imposed upon manufacturers who negligently produce or design a product which then causes a foreseeable physical harm. [FN98] Manufacturers can also be held liable, in the absence of negligence, under strict products liability theories. [FN99] The Restatement (Second) of Torts requires, inter alia, the following elements for the imposition of strict products liability:

- 1.) The product must be in a "defective condition unreasonably dangerous to the user or consumer." [FN100]
- \*613 2.) The product must have caused a "physical harm . . . to the ultimate user or consumer, or to his property." [FN101]
- 3.) The product must have "reached the user or consumer without substantial change in the condition in which it was sold." [FN102]

Some products liability theories also impose liability upon manufacturers who fail to warn, or inadequately warn, consumers of non-obvious potential dangers involved in the use of a product. [FN103]

These general elements of strict products liability encompass many subtle variations in meaning, which can either expand or contract the reach of liability. The defect requirement might be satisfied by a theory holding that low utility products that produce harm when used as intended are defective. [FN104] Another related approach to proving defect might hinge on the ready availability of an alternative design, like a lower maximum volume setting on a stereo, that removes the risk of harm. [FN105] The differing definitions of "defect" and "unreasonable danger" are discussed further in Part IV.

The physical harm requirement, in the context of noise pollution, stands as a bar to suits involving mere annoyance. However, \*614 hearing loss is apparently considered a sufficient "physical harm" to sustain a products liability suit against a manufacturer. [FN106]

Products liability law has not traditionally been used as a tool of environmental enforcement against the manufacturers of polluting products. In *Chicago v. General Motors Corp.*, [FN107] the city of Chicago attempted, unsuccessfully, to bring a class action products liability suit against automobile manufacturers whose cars were collectively responsible for local air pollution. The Seventh Circuit stated:

The city has not alleged that any particular motor vehicle is unreasonably dangerous because of defective design or manufacture nor that any vehicle has caused any particular injury to any particular person. To allege that an indeterminate number of persons are generally harmed by an atmosphere polluted and contaminated by an indeterminate number of sources does not state a cause of action . . . . [FN108] Arguably, a products liability suit brought by an individual noise victim would be distinguishable from *Chicago v. General Motors Corp.*, because it would allege particular damage sustained by an identifiable plaintiff from an identifiable product. Nonetheless, the "physical harm" requirement and the novelty of applying pure products liability law to "environmental harms" make this an implausible theory to support suits by noise victims against the manufacturers of noise-emitting products under current law.

### C. Noisy Products and the "Open Space" Between Nuisance and Products Liability Law

It becomes clear that although one may sue the owner and user of a noise-emitting device under a private nuisance theory, the manufacturers, who are undeniably "but for" causes of the problem, are not liable under nuisance or products liability theories.

The nuisance theory of manufacturer liability is rarely used, and has been rejected even where extremely hazardous products, like asbestos, have been incorporated into a plaintiff's school property, \*615 making the property unfit for use. [FN109] Although a condition may be a "nuisance," as the term is commonly used, the courts will not always impose liability. [FN110] The rationale in the asbestos cases, apparently, was that liability for a nuisance exists only when the defendant has "control over the instrumentality alleged to constitute the nuisance." [FN111] In addition, or perhaps in harmony with that first rationale, nuisances were viewed as arising only "from the use of property, either actively or passively, in an unreasonable manner." [FN112] This second criterion might be satisfied by arguing that the manufacturer is using his property to produce a product which then inflicts a nuisance upon someone else's land. However, nuisance law has been viewed as dealing with problems directly emanating from adjoining, or at least neighboring, parcels of land. [FN113] The requirement of control over the instrumentality presents an equally difficult hurdle under pure nuisance law. In essence, it creates a per se finding that the product user is a superseding cause of the nuisance, and thus exonerates the manufacturer from liability.

Significantly, in the asbestos cases discussed above, the courts did recognize a cause of action under products liability theories. However, the manufacturer of a noisy product will not be liable under current products liability theories for the disturbance that the product creates. As discussed in Part II.B, products liability requires that the product be "defective," [FN114] and that it cause physical \*616 harm to a person or property. [FN115] Unless a noisy product causes hearing loss, [FN116] or some other physical harm, or damages the physical structure of the plaintiff's property, there is no cause of action.

Thus, although current tort law recognizes that an injury or a "nuisance" can be created by a loud product, it does not impose liability against the manufacturer on that theory because the manufacturer does not control the product once it leaves the factory. Conversely, products liability theory does not shy from imposing liability upon a manufacturer simply because the product left the factory, given that it was not misused by the consumer. However, products liability theory does avoid imposing liability for the kind of injury created by a nuisance, which is considered either emotional or economic, but rarely "physical." Thus, the victim of a noisy product faces a Catch-22 situation, as the manufacturer escapes liability through an open space in the law of torts.

### D. Local Anti-Noise Ordinances and Zoning Regulations

Local anti-noise statutes have been described as "a sorry collection of restrictions or bans against 'unreasonable,' 'unusual,' 'loud and boisterous' and 'raucous' noises." [FN117] Often, local governmental regulation of noise is hampered by the fear of disrupting regional economic competitiveness. [FN118] Furthermore, despite recent renewed interest in noise, the withdrawal of funding for federal anti-noise efforts may have reduced the incentives to regulate noise at the local level. [FN119]

The New York City Noise Control Code [FN120] states, as a general prohibition, that "[n]o person shall make, continue or cause or permit\*617 to be made or continued any unnecessary noise." [FN121] The Code goes on to specify sound limits for various types of noise-emitting activities and products, including motor vehicles, motorcycles, aircraft, railroads, air compressors, circulation devices, [FN122] refuse-compacting vehicles, motor vehicle claxons, emergency signal devices, paving breakers, and commercial music. [FN123] The Code also sets ambient noise quality standards for daytime and nighttime noise in residential and commercial zones. [FN124] The City Commissioner of Environmental Protection is authorized to institute a permit program for various noisy activities, including tunneling. [FN125] The Code's prohibitions are enforceable by administrative "cease and desist" orders, [FN126] as well as fines. [FN127] Provisions for citizen complaints are also provided. [FN128]

The New York Code aims primarily at public noise nuisances. The measurement of noise emissions under the Code are, almost exclusively, to be made within a short distance of an outdoor activity. Furthermore, the domestic use of stereos is not specifically addressed, [FN129] although the general prohibition might apply. Despite these limitations, the Code might

prove beneficial if strictly enforced. However, the ubiquitous nature of noise, and the presence of more serious crimes make enforcement a low priority. [FN130] The \*618 result, as residents and visitors know, is that the Code, despite its rather grandiose goal of "prevent[ing] [noise] injury to human, plant, and animal life, and property," [FN131] simply fails to protect city dwellers from noise.

Other localities have used varying approaches to attack noise. Applying an approach similar to New York's prohibition on the sale of noisy refuse compacting vehicles, [FN132] Chicago's anti-noise ordinance prohibits the sale of "a wide variety of equipment not meeting noise emission standards that are gradually tightened over time." [FN133] Recently, the Los Angeles City Council passed an ordinance banning car alarms that warn off potential burglars by continuously emitting "beeps or chirps every 10 to 15 seconds." [FN134] In 1985 the village of Larchmont, New York, [FN135] amended its anti-noise laws to ban the use of gardening equipment, including lawn mowers and leaf blowers, that exceeded "70 decibels from 8 a.m. to 10 p.m. and 62 decibels from 10 p.m. to 8 a.m." [FN136] Subsequently, in 1990, the village found it necessary to expand the restrictions, banning the use of "garden ing equipment powered by internal combustion engines . . . from 8 A.M. to 5:30 P.M. on weekdays and 10 A.M. to 4 P.M. on weekends." [FN137] Despite the tougher stance, the Deputy Mayor of Larchmont conceded that the law was "unenforceable" because "offending parties . . . just turn off the equipment" when a police car arrives. [FN138] Ignoring the potential limitations of such laws, "[m]ore than 220 cities and towns across the country have discussed restricting or banning leaf blowers. In Westchester, several towns, including Scarsdale, Pelham, White Plains and New Rochelle, have . . . begun regulating or banning leaf blowers." [FN139]

\*619 Governments outside of the United States have also been dealing with noise pollution. The British government is currently drawing up legislation to criminalize the behavior, and streamline the prosecution, of noisy neighbors. [FN140] In Ealing, United Kingdom, the local government has enacted laws allowing police officers to break into homes, [FN141] and cars [FN142] to turn off disruptive burglar alarms. In Vancouver, Canada, the local government, refusing to authorize police break-ins, has required owners of burglar alarms to provide a list of three people to contact if the alarm is activated while the owners are away, and has provided for fines of up to \$2,000 when an alarm rings for more than five minutes or more than four times in a twenty-four-hour period. [FN143] In Hong Kong, a proposed law would impose a severe fine against the owners of car alarms that go off for more than five minutes. [FN144]

In the United States, local efforts to criminalize noise pollution, or pass anti-noise zoning laws, can face constitutional challenges. [FN145] These challenges, grounded in the Constitution's Due \*620 Process and First Amendment guarantees, often attack the vagueness [FN146] or overbreadth with which a law defines "noise."

In two remarkable minority opinions, [FN147] Justice Frankfurter expressed the view that "aural aggression" [FN148] is simply not protected by the Constitution. Frankfurter's opinions reveal that there is a distinction between protecting the volume with which a statement is expressed, and protecting the message itself. [FN149] Although the Court has not adopted Frankfurter's view, it has shown a willingness to find anti-noise ordinances constitutional. [FN150]

Laws that criminalize the behavior of noisy neighbors, and other anti-noise laws are, undoubtedly, worthy of support. However, their enforcement is difficult. Furthermore, these laws fail to compensate the noise victim, or to provide strong incentives for manufacturers to produce quieter products. [FN151]

#### \*621 E. The Federal Noise Control Act of 1972

By 1970, some commentators felt that the

traditional legal remedies for noise [like tort law and anti-noise ordinances] have a common shortcoming: they are all retrospective. They are pursued, if at all, only after technology has been employed and weighty economic and practical interests have vested. A more useful approach to problems of noise would be to create incentives for the use of quiet technology. [FN152] The federal government's response to such concerns was to pass the Noise Control Act of 1972. [FN153] This Act was designed to reduce noise by requiring the EPA to identify and regulate noisy products, [FN154] and to create market forces for quieter products through a consumer labeling scheme. [FN155] The Act also authorizes citizen suits [FN156] and criminal sanctions [FN157] against those in violation of noise control requirements. The Act preempts states from adopting "any law or regulation which sets a limit on noise emissions from" new products that have come under EPA regulation. [FN158] When Congress, \*622 at the White House's urging, withdrew funding for the EPA's Office of Noise Abatement and Control in 1981, [FN159] it did not repeal the Noise Control Act. This has created a situation where the federal government is essentially incapable of regulating noise, while the states are preempted from setting their own standards for those products already regulated by the EPA. [FN160] There have also been concerns that "some private rights to bring tort or other actions may be affected by these EPA emission and labeling standards." [FN161] Thus, at this point in time, the federal law may hinder the very cause it was designed to help.

Recently, there have been attempts in Congress to pass legislation to re-open the Office of Noise Abatement and Control. [FN162] However, not all commentators approved of the Office of Noise Abatement and Control's performance when it was funded. Some have noted that the Office never promulgated product-labeling requirements, [FN163] and others have criticized the noise control regulations that were put forth. [FN164] Commentators have also criticized the original legislation for giving administrative agencies too much regulatory leeway, while simultaneously providing those agencies with ambiguous guidelines. [FN165]

In any event, the labeling approach employed by the original legislation was doomed to ineffectiveness. Labeling and disclosure laws are designed to encourage manufacturers to produce safer, less polluting products by creating consumer awareness and demand for such products. [FN166] However, this approach is only viable \*623 where consumers perceive a threat, and then, having been informed of its presence, act to avoid it. In contrast to the public's strong aversion to chemical pollutants, "noise is not widely recognized as a cause of psychological and physiological damage." [FN167] Indeed, even apparent proponents of noise labeling have admitted that it has been hard to rouse the public's concern about noise pollution. [FN168] Furthermore, market approaches like labeling, "will not function properly if the purchasing decisions of individual consumers affect the health of third persons." [FN169]

The labeling of products is not the only way to create market incentives for less polluting products. Before Congress re-institutes a program which achieved limited results, it should investigate alternative regulatory approaches. [FN170] However, as with local \*624 anti-noise ordinances, even the best regulations can be difficult to enforce.

As the foregoing discussions reveal, the laws relating to noise give manufacturers of noisy products little incentive to make quieter products, and noise victims limited avenues for seeking redress. Thus, an enlightened tort law is necessary to address these concerns.

### III. Characterizing the Sources of Noise Using Risk-Utility Concepts

A radical vision of the right to domestic tranquility would lead one to ban all noise-emitting products, or to impose strict liability for all such products. In contrast, this Note recognizes that certain noise-emitting products serve important purposes, and must be shielded from liability. This Part seeks to provide guidelines for categorizing noise-emitting products, using risk-utility concepts, so that manufacturer liability can be appropriately assigned.

There is an undeniable logical tension between this Note's appeal to the right of domestic tranquility, and its reliance on risk-utility concepts. If a right to seek legal redress exists only where the harm one experiences is greater than the benefit someone else gains, then the right is defined, and necessarily limited, by a mathematical formula; the right does not stand as an independent force in the law. There are two, somewhat unsatisfactory, answers to this theoretical conflict. Ronald Dworkin argues that

the assumption that an economic calculation of any sort must be an argument of policy [and not of principle] overlooks the distinction between abstract and concrete rights. Abstract rights, like the right to speak on political matters, take no account of \*625 competing rights; concrete rights, on the other hand, reflect the impact of such competition. [FN171] An alternative answer might be that the "life of the law has not been logic: it has been experience." [FN172] Thus, experience reveals that it is wise to protect domestic tranquility, but that there are competing interests that must also be protected. Recognizing the right to domestic tranquility adjusts our baseline judgement of what constitutes an acceptable risk-utility ratio. That is to say, in the absence of the right, products liability theories require a risk of physical harm before imposing liability. Once the right is recognized, the "lesser" harm of nuisance triggers liability.

Turning from philosophical underpinnings to the construction of practical standards for assessing product-nuisance liability, it is observed that noise-emitting products exist along a risk-utility spectrum, and that the inverse of this spectrum approximates a liability spectrum. Manufacturers of products on the low end of the risk-utility spectrum are deserving of product-nuisance liability; they are at the high end of the liability spectrum. Manufacturers of products that fall into a middle area along the risk-utility spectrum, because of their potential utility or low risk of nuisance, may, under some circumstances, be held liable. Finally, manufacturers of products that serve high utility purposes in relation to the noise they produce are at the low end of the liability spectrum, and must be protected from liability.

Risk-utility should be measured, to the extent possible, by objective standards. The risk in a product-nuisance case is measured by the volume and duration of sound that a product can emit. Considerations of the sound's quality, in terms of pitch or rhythm or other factors, may also become relevant in certain circumstances. However, such factors may be subjective in nature, and, thus, are not as reliable as decibel measurements. Utility should be measured along a scale that examines the product's importance to basic life functions. It may be argued that the utility of a product cannot be measured

objectively, or that the marketability of a \*626 product reveals its utility. However, the law of torts has a long tradition of basing judgements on the objective "reasonably prudent" person standard. A reasonably prudent person would recognize that products designed for entertainment purposes are, generally, of lower utility than products designed to preserve food, or ferry the sick to the hospital. [FN173] Safety and survival take precedence over entertainment.

Although risk-utility factors provide the fundamental basis for defining a product's position on the liability spectrum, a court might also consider whether imposing liability is likely to reduce noise from the product and whether imposing liability is just. Manufacturer liability will only tend to reduce noise if the manufacturer can exert some control over the noise that his product emits. [FN174] Thus, where the consumer's influence over the product's noise output is substantial, the manufacturer's position on the liability spectrum might be lowered. Nonetheless, it must be recognized that manufacturers must anticipate foreseeable nuisances that their products will cause. The justness of imposing liability may depend on the "state of mind" of the manufacturer. Thus, manufacturers who deliberately design a low utility product to make excess noise [FN175] may justifiably be moved up a notch on the liability spectrum. The determination of a product's position on the liability spectrum is relevant for purposes of both liability and damages. [FN176]

The scheme of classification described above does not apply to types of products, but to particular products. Although stereos and other sources of entertainment noise are likely to fall into the low risk-utility, high liability category, the classification system allows courts to weigh the individual merits of any particular product. Thus, stereo manufacturers are given an incentive to limit the maximum volume of their products, and thereby lower their position on the liability spectrum. Of course, if a low utility product has \*627 produced enough noise to cause a nuisance, it is unlikely that the manufacturer has minimized his position on the liability spectrum.

A comparison of several types of products should give some sense of the proposed liability classification system. However, this exercise will, by definition, provide only an example of how actual common law determinations might proceed.

An icebox makes noise only when it is moved along the floor, or when it is dropped, or when its door is opened. A refrigerator makes a continuous hum, which occasionally gets louder or quieter. Both products serve the same purpose of preserving food. The risk-utility determination of these products will depend upon the actual level and duration of noise that each produces. Refrigerators are not likely to fall into the high liability category because of their usefulness. However, a refrigerator that produces extreme levels of noise might fall into the high liability category. The probability of reducing noise by imposing liability on the manufacturer of a refrigerator is greater than that from imposing liability on an icebox manufacturer, because the refrigerator manufacturer is in a better position to redesign a quieter product. However, this observation might change if it were shown that a particular icebox's noise resulted from a defect in the door hinges, or another part.

In contrast to the products above, consider a powerful home stereo or "a baby's squeeze toy . . . [or] a battery-powered siren on a toy police car . . . measured at 110 dB [decibels], which can cause instant hearing loss if occurring near the ear." [FN177] The consumer using either a refrigerator or a stereo as it was meant to be used will produce noise. However, unlike the refrigerator, or the icebox of the previous example, the stereo and the children's toys are of lower utility. The volume of sound that a powerful stereo can supply certainly goes beyond that needed for mere communication. Furthermore, stereo manufacturers have deliberately designed, and placed into the hands of the consumer, an inexhaustible capacity to produce torrents of inexpensive noise. [FN178] Thus, the limited \*628 utility of the product, coupled with its tendency to produce noise, makes it a prime target for the imposition of manufacturer liability.

Like a stereo, an ambulance siren serves the purpose of producing loud noise. However, the siren allows emergency vehicles to ferry the seriously ill to the hospital for medical attention. The utility of this product is so high that it is unlikely that liability would ever be imposed upon the manufacturer. This approach to "noisy, but essential" products is analogous to the exemption that strict products liability law grants to "unavoidably unsafe products" that serve highly useful purposes. [FN179] However, even here, certain levels or types of sound might move an ambulance siren from the low liability category to the medium liability category.

As with most attempts at drawing bright line distinctions, there will be products that fall into ambiguous categories along the spectrum. For instance, consider a bullhorn or, as Judge Cardozo would say, a speaking trumpet. In one sense, like a stereo, it is a product whose purpose is to amplify sound. However, it may serve many useful purposes. Furthermore, like the icebox, it cannot produce noise without constant human input, and thus imposing liability is unlikely to result in a quieter design. Other products that might defy easy categorization include car theft alarms, wooden rocking chairs, air conditioners, leaf blowers, and lawn mowers. Do car theft alarms efficiently serve a high utility purpose? Should rocking chairs be treated in the same manner as an ice box? Is the utility of an air conditioner equivalent to that of a refrigerator? Despite posing some difficulties, these questions are not beyond the capabilities of the common law.

#### IV. Proposal: The Product-Nuisance Tort

Liability against a manufacturer, [FN180] under a product-nuisance theory, shall be found when the following elements exist:

\*629 1.) The manufacturer's product emits noise [FN181] that has caused a significant disturbance to a person dwelling within or upon his residential property. A significant disturbance is defined in the context of a person of reasonable sensitivities.

2.) The product is "unreasonable," in the context of product-nuisance law, because (a) it falls into the high range of the liability spectrum described in Part III; or (b) it falls into the middle range of the liability spectrum, and produces noise as a result of its negligent manufacture or design. [FN182]

3.) The product has not been altered, or misused in an unforeseeable manner by the consumer; and no other acceptable defense exists. [FN183]

##### A. Why Discover a New Tort to Deal with Noisy Products?

Tort law is meant to right certain wrongs by placing the burden for the injury at the feet of those responsible. [FN184] Thus, tort may be \*630 seen as serving the dual goals of compensating victims and deterring undesirable activities. [FN185] Over many centuries jurists and legal scholars have identified numerous categories and modes of behavior deserving of a tort remedy. However, we must not be complacent in assuming that all such categories have been identified. Where a wrong has been clearly done, and no known tort offers an appropriate remedy, the law ought to recognize a new tort. The dilemma created by pounding stereos, and similar products, whose primary purpose is to produce loud sounds which can easily invade private residences, is not fully addressed by current tort law. There exists an "open space" that leaves manufacturers of noise-creating products free from liability under either nuisance or products liability theories. [FN186] This state of affairs does not adequately serve the needs of the individual victim, or of society. Cardozo noted that courts must "fill[ ] the open spaces in the law." [FN187] He believed that this meant creating new law. [FN188] This Note concurs, but suggests that the process of recognizing and remedying a previously ignored wrong is one of discovery, not creation. [FN189]

Although a product-nuisance tort will "right the wrongs" suffered by individual noise victims, will it effectively serve the broader policy goal of preventing environmental noise pollution? In other environmental contexts, it has been recognized that "[w]hen numerous and diverse pollutants emanating from widely dispersed sources affect large populations the common law is simply inadequate for providing redress . . . . Even when the aggregate damage caused by pollution is quite large, the damage to any individual victim may be insufficient to make a lawsuit worthwhile." [FN190]

Residential noise pollution, however, differs from other types of pollution in several important respects. Noise is a localized, transitory pollutant. When a manufacturer distributes many noisy products to "widely dispersed" areas, the nuisance produced by each product does significantly affect individuals. From the point \*631 of view of finding willing plaintiffs, this fact makes noise pollution fundamentally different from pollutants that have only aggregate effects on "large populations." Given the likelihood of a successful lawsuit yielding significant damages, [FN191] individual victims of domestic noise pollution would pursue tort remedies against those who have facilitated the production of excessive noise. Furthermore, where toxic chemicals and radiation can linger silently in the environment, unbeknownst to those who are being exposed, noise is best documented and appreciated by the individual victim.

Thus, a carefully elucidated tort would provide incentives for "private enforcement" of environmental noise pollution goals, while providing noise victims with compensation. The recognition of the proposed tort would encourage the incorporation of noise-reducing technologies in various products. [FN192] In addition, the recognition of a partial defense to the tort based on the presence of a warning label [FN193] might prod manufacturers to improve product labeling regarding noise. This would accomplish one of the limited, but unachieved goals of the original Noise Control Act. [FN194]

The dual purposes of the proposed tort, compensation and deterrence, are clearly evidenced by this Note's approach to the issue of causation. Part IV.B.4 argues that the manufacturers of low utility products should be viewed as partial causes of the foreseeable nuisances produced by their products. If compensation were the only goal of the product-nuisance tort, causation would not be a necessary element of the tort. [FN195] A system could be devised in which noncausal defendants would compensate noise victims. [FN196] The refusal to abandon causation serves to advance the goal of deterring\*632 the manufacture of noise-emitting products. [FN197] Furthermore, the retention of a causal theory serves the equally important goal of imposing a just compensation and not merely a form of purely redistributive cost spreading. Such a redistributive

effort, in the absence of any requirement of causation, is the hallmark of legal creation, as opposed to legal discovery.

## B. Intersections of Nuisance and Products Liability Law

The following passages compare theoretical aspects of current nuisance and products liability law, with an eye toward explaining how relevant elements of each are integrated into the new hybrid tort through the use of risk-utility concepts.

### 1. Shared Visions Regarding Strict Liability

Traditional nuisance law, like strict products liability law, does not require negligence for the imposition of liability. Cardozo wrote that the "primary meaning [of nuisance] does not involve the element of negligence as one of its essential factors. One acts sometimes at one's peril. In such circumstances, the duty to desist is absolute whenever conduct, if persisted in, brings damage to another." [FN198] The shared use of strict liability by nuisance and products liability law, coupled with concepts from risk-utility theory, lends support to the idea of using strict liability against manufacturers of low utility products that create nuisances.

The proposed tort's use of strict liability can also be justified by traditional explanations for strict liability. These explanations often point out that the consumer has less knowledge and control over the product than the manufacturer, and is relying upon the manufacturer to produce a safe product. [FN199] This rationale carries \*633 greater weight when a bystander, who has even less knowledge and control over the product than the consumer or the manufacturer, is harmed by the product. [FN200]

Although inconsistent with this Note's refusal to abandon concepts of causation, strict liability has also been justified because the manufacturer is more capable of bearing the external costs of his product. [FN201]

### 2. The Trigger for Strict Liability

Although strict liability provides a theory of tort recovery in the absence of intentional or negligent tortious behavior, it does not provide for liability under all circumstances. Strict liability often is triggered only where there exists an abnormally or unreasonably dangerous activity or product. This Note adopts an "unreasonableness" standard, as defined below, for the imposition of strict product-nuisance liability.

Traditional nuisance law imposes strict liability without requiring that an "unreasonable" or "abnormally dangerous condition" be the cause of the nuisance. [FN202] In contrast, strict products liability often requires, in addition to physical harm and a product defect, \*634 that the product be deemed unreasonably dangerous. [FN203] Some jurisdictions have, however, jettisoned this "danger requirement," and impose strict products liability simply, "where a defective product causes personal injury." [FN204] Other courts have explicitly discussed the need to consider risk-utility factors before imposing strict products liability. [FN205]

Risk-utility theory moves strict liability away from the rigid, universal concept of "abnormal" danger [FN206] to the shifting definition embodied in the phrase "unreasonable" danger. [FN207] Arguably, \*635 within a risk-utility framework, danger is not inherent in a product, but is defined by the place where the product is expected to be used, the utility of the product, and, perhaps, by the harm sought to be remedied. Given this view of risk-utility analysis, what is reasonable under a products liability analysis may be unreasonable in nuisance, because these two torts address different risks. Nuisance, seeking to protect residential property rights, should be more willing than products liability to view the residential use of a "pavement shaking" stereo speaker as unreasonable.

In the modern nuisance context, some courts have defined "unreasonableness" very broadly. In *Krueger v. Mitchell*, [FN208] the Wisconsin Court of Appeals, defying the moderate restraints that risk-utility theory might impose, stated that an activity may be unreasonable even when it is of great utility and produces little harm. The *Krueger* court then suggested that the reasonableness of a nuisance may hinge upon whether the victim is compensated. [FN209]

The tort proposed in this Note, existing as an independent entity, need not accept all the tenets of nuisance or products liability law, especially where there is ambiguity or conflict on an issue, such as what triggers strict liability. The proposed tort does not go so far as to jettison all "danger requirements." However, instead of requiring an "abnormal" danger, the proposed tort applies strict liability where a low utility product produces "significant disturbances" to residential dwellers.

This approach creates a risk-utility "unreasonableness" standard.

### 3. Rylands v. Fletcher and the Historical Roots of Danger Requirements

The dilution of strict liability's abnormal danger requirement, using risk-utility arguments, may be objected to as being historically unfounded. However, as shown above, many courts are unwilling to apply the abnormal or ultrahazardous danger standard in either products liability or nuisance contexts. Furthermore, it is \*636 the application of a rigid or universal definition of "abnormal danger" in nuisancelike situations that is historically unfounded.

The case of *Rylands v. Fletcher* [FN210] is often cited as standing for the proposition that an abnormal danger is a prerequisite to strict liability. [FN211] However, the *Rylands* doctrine does not require that activities or objects be inherently abnormally dangerous, only that they be extremely dangerous in relation to their expected place of use. [FN212]

The injury in *Rylands* arose not from a product, but from the flooding of an underground mine shaft when a reservoir above the shaft was partially filled with water. In the Exchequer Division, it was decided that there was no nuisance because the reservoir was being lawfully and nonnegligently used. [FN213] On appeal, the Exchequer Chamber, speaking through Lord Blackburn, reversed, stating that a person who places on his land, "anything likely to do mischief if it escapes, must keep it in at his own peril, and if he does not do so, is prima facie answerable for all the damages" [FN214] resulting from its escape. It is hard to imagine that the phrase "anything likely to do mischief" refers only to objects that are defective or abnormally dangerous or capable of producing extraordinary damage. It is easy to imagine that the concept of "escape" might encompass noises that invade neighboring lands. [FN215] The case was appealed to the House of Lords. The Lords affirmed and did not explicitly take issue with Lord Blackburn's approach. However, their opinion, by Lord Cairns, spoke of a "non-natural use" of the land. [FN216] This approach does not impose a universal definition of \*637 what is non-natural. The standard is relative to the "place and manner" of the land. [FN217] Similarly, it could be said that the proposed tort imposes strict liability where the product used is non-natural in relation to the domestic place it adversely affects.

Paradoxically, this relativistic approach, which assesses "danger requirements" in light of the locale of the nuisance and the risk-utility properties of the product, allows the law to protect certain absolute property rights in ways that an absolute definition of "abnormal danger" might not.

### 4. Causation, Facilitation, and Bystanders

Obviously, the proposed tort goes further than *Rylands*, because it extends liability to manufacturers who "place" the nuisance-creating instrument into the hands of the direct actor. Although these manufacturers no longer control the "instrumentality," they have, nonetheless, "facilitated" the nuisance. *Rylands* did not address whether the seller of the water, or the builder of the reservoir, should be liable in addition to those who filled the reservoir. Strict products liability law has generally allowed manufacturers to be sued by injured bystanders. [FN218] This approach would seem equally appropriate in product- nuisance law, because the nuisance caused by the product is, by definition, experienced by a bystander. The manufacturers are undoubtedly "but for" causes of the nuisance, yet are they the proximate cause? Furthermore, is the product user a superseding cause? The application of risk-utility theory to these questions suggests that manufacturers of low utility products should be held proximately responsible for the foreseeable nuisances that result from the foreseeable uses of their products.

Proximate cause is often defined, as a policy matter, in relation to the mens rea of the tortious behavior. For intentional torts, the reach of proximate cause is extended, by doctrines such as transferred intent, beyond the "foreseeable consequences" of the act. As one moves away from intentional actions, the range of proximate cause contracts. Thus, for actions based in negligence, liability is generally imposed only where the harm caused was \*638 "foreseeable." [FN219] One would expect, moving even further away from intentional acts, into the realm of strict liability, that proximate cause concepts would require at least "foreseeability," if not something more.

However, this Note argues that the application of risk-utility theory should change our view of proximate cause in the realm of strict liability. Risk-utility seeks to expand the reach of liability for those activities that produce little benefit relative to the harm they produce. Thus, for low utility products, strict liability should use nothing more restrictive than the "foreseeability" standard of negligence when determining proximate cause. [FN220] It is not surprising that the application of risk-utility theory, in the strict liability context, yields results approximating those of negligence. Risk-utility theory has been recognized to bear a resemblance to some definitions of negligence. [FN221] Under the proposed foreseeability standard, \*639 manufacturers of low utility noisy products, having placed those products into the market knowing the nuisance they might cause, would be held proximate causes of any resulting nuisance.

This leaves the question of whether the product user is a superseding cause of the nuisance. Certain noise-emitting products, like car alarms, involve limited user control over the noise, and therefore, the causal link between the injury and the manufacturer seems less likely to be broken by the user's actions. Other products, like stereos or bullhorns, pose more serious questions about superseding cause, because the user is more directly involved in the production of the noise. The user of a product that causes injury may be a superseding cause of that injury if the product is used for an improper purpose, or in an improper manner. [FN222] A stereo manufacturer will not be liable for injuries that occur when the stereo is dropped from the window of a skyscraper, because stereos are not made for this purpose. However, we are left to consider whether a stereo user who plays the stereo at top volume has acted in a sufficiently improper manner to constitute a superseding cause of the resulting nuisance.

In the context of negligence, not all intervening causes are superseding ones. [FN223] Liability is imposed when "the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence." [FN224] In the strict liability context, a product user may, or may not, be a superseding cause of the injury, depending upon the facts of the case. [FN225] In *Jurado v. Western Gear \*640 Works*, [FN226] a strict products liability case, the New Jersey Supreme Court stated that "[u]nder a risk-utility analysis, a defendant may still be liable . . . if the misuse was objectively foreseeable. The concept of foreseeable misuse extends to cases in which a product has been substantially altered from its original design." [FN227] In accord with these principles, this Note would not find the user of a noise-emitting product to be a superseding cause simply by virtue of his use, or foreseeable misuse, of the product. Only where a consumer altered a product in an unforeseeable manner, making it "extra" loud, would a court in a product-nuisance case find a superseding cause. [FN228]

It cannot be denied that this Note's approach to proximate and superseding cause seems a departure from the common law's instinctual understanding of causation. In *Schemel v. General Motors Corp.*, [FN229] the court rejected a negligence theory of products liability against the manufacturer of a car that struck the plaintiff-motorist at 115 miles per hour. The plaintiff claimed that the manufacturer had a duty to produce a car that could go no faster than 100 miles per hour, and that a simple alteration in design could have achieved that goal. Dismissing the case, the court held that no duty existed, and intimated that, in any event, the driver of the General Motors car was a superseding cause, because his specific actions were illegal and unforeseeable. [FN230] The court also suggested that even if a product user's actions are foreseeable, the user may still be a superseding cause. In support of this latter suggestion, the Schemel court pointed to the factually distinct case of *Evans v. General Motors Corp.*, [FN231] which dealt with automobile crashworthiness. </SPAN>The Schemel court observed that the Evans court had held that an automobile manufacturer had no duty to safeguard occupants of their cars from the effects of a side impact crash, even \*641 where "the injury occurred in precisely the manner which the manufacturer could have foreseen." [FN232] The view that foreseeable misuse constitutes a superseding cause is no longer singularly adhered to. In *Jurado*, the New Jersey Supreme Court clearly stated that a "manufacturer . . . has a duty to prevent an injury caused by the foreseeable misuse of its product." [FN233] Similarly, newer case law, advancing design defect theory, tends to refute the holding of the Evans court. [FN234]

The Schemel case might be distinguished from a product-nuisance case, with regard to superseding causation, by noting that the intervening actor in Schemel committed an extremely serious violation of the law, whereas the user of a loud stereo is not necessarily committing an illegal act. [FN235] A further distinction may exist if one views automobiles as high utility products. [FN236] Concededly, the proposed tort's examination of noise-limiting alternative designs does seem analogous to the Schemel plaintiff's rejected claim that automobile manufacturers should impose speed limits on their cars. To the extent that these theories are irreconcilable, this Note prefers, for product-nuisance law, the approach to causation advocated in *Jurado*. Where there is limited utility in relation to the foreseeable harm produced by a product, the manufacturer should be viewed as the proximate cause of that harm, even when the product was foreseeably misused. "[A] manufacturer must anticipate the environment in which its products will be used, and it must design \*642 against the reasonably foreseeable risks attending the product's use in that setting." [FN237] This approach is particularly justified when the harmed plaintiff is a foreseeable bystander.

### C. Summary of the Product-Nuisance Tort

From a historical perspective, the rise of industrialism has brought with it an emphasis on chattel over real property. The coming ages of information, and genetic engineering may further erode the law's emphasis on real property, while producing new mechanisms for invading the private and domestic realm. The product-nuisance tort seeks to reassert the importance of residential property in the face of such intrusions.

The proposed tort departs from current tort law in several major respects. First, and perhaps foremost, it imposes liability, technically not "products liability," upon a manufacturer for harm other than "physical harm." [FN238] Second, in the

absence of an "alternative design" or "risk-utility" definition of defect, the proposed tort does not require that the product be "defective." [FN239] In this sense, the proposed tort imposes absolute, not merely strict, liability upon the manufacturer. [FN240] Third, it places liability for a nuisance-like harm upon the shoulders of the manufacturer, who does not control the instrumentality.

The proposed tort might be criticized for improperly lowering the threshold of harm required to impose products liability, or for improperly extending nuisance liability to those not immediately in control of the instrumentality. It does neither. Instead, it identifies and applies itself to a class of products that escape these traditional tort theories, but nevertheless produce a unique harm. It is an independent tort; drawing elements from, but not affecting, products liability or nuisance law.

The proposed tort may also be criticized on the ground that the "transaction" costs involved in identifying the manufacturer of a noise-emitting product, or providing evidence of the nuisance, \*643 may be prohibitive. [FN241] However, the evidence required to prove a disturbance in a product-nuisance case would be no different from that required in a standard nuisance case. Indeed, the presence of a powerful noise-emitting product would lend strong circumstantial support to the claim. Noise that is capable of motivating retaliation against noise polluters will also be capable of motivating potential plaintiffs to document noise nuisances and pursue legal remedies. This is particularly true where a substantial recovery may be allowed. [FN242] Having initiated a nuisance suit against the product user, discovery techniques would reveal the identity of the product manufacturer. Although the manufacturers of some mobile products might escape detection, the chronic noise originating from a neighbor's products would not. Furthermore, all manufacturers, facing new tort liability concerns, [FN243] would be motivated to take preventive measures to avoid lawsuits. Thus, mere judicial recognition of the tort would prove beneficial.

Although fundamentally different from formalized "invasion of privacy" theories, [FN244] the proposed tort nonetheless seeks to preserve the right of a person, recognized by such theories, "to be let alone." [FN245] Viewed in light of our nation's high regard for this right, and for the right of residential tranquility, [FN246] the manufacturers of absurdly disruptive products [FN247] are rightly held liable.

#### \*644 V. Avoiding Frivolous "Nuisance" Suits: Remedies and Defenses

"[T]he law does not . . . seek to indemnify a man from all harms." [FN248] An unlimited tort, like an unlimited freedom to create a nuisance, can produce harm. This Part outlines how the proposed tort could be limited so that it does not produce improper restraints upon industry, or result in frivolous lawsuits. The proposed limitations arise in the context of the remedies awarded to the successful plaintiff, and the defenses allowed to the defendant-manufacturer.

##### A. Remedies

###### 1. Modified Property-Based Damages

Once a court decides to impose product-nuisance liability upon a manufacturer, it must then decide the question of remedy. The proposed tort is not meant to provide compensation for physical harm. Cases involving actual physical harm, like hearing loss, should be remedied through traditional products liability. The harm involved in product-nuisance is the significant deprivation of the right to peacefully enjoy one's property. It is the same harm that private nuisance law addresses. However, injunctive relief is not an option. The defendant's product, in a product-nuisance suit, may have contributed to one private nuisance, but may be serving many other consumers without producing harm. Banning the manufacture or sale of a product is a legislative task, [FN249] because its effects deliberately extend well beyond the parties involved in the lawsuit. Thus, we are left to ponder the value of the damages. There may be emotional distress associated with a noise nuisance. However, this harm is obviously difficult to value. [FN250] Furthermore, the "significant disturbance" required for product-nuisance liability \*645 need not result in neurosis or psychosis to be actionable or compensable. [FN251] Thus, avoiding issues of emotional distress, this Note would use a modified property market-value standard for assessing damages.

Under the envisioned property market-value standard, the court would award the plaintiff a multiple [FN252] of the worth of the property (as assessed in the absence of the chronic nuisance) for the period of time that the nuisance was present, [FN253] and the costs of litigation. The court need not attempt to calculate the "difference" between the worth of the plaintiff's property with and without the nuisance. The "significant disturbance" experienced by the plaintiff has deprived him entirely of the nuisance-free enjoyment of his land.

The multiple damage approach serves to overcome some of the barriers that may hinder the pursuit of environmental goals through private tort litigation. [FN254] It also serves to emphasize the importance of the right to domestic tranquility. The multiple should be high enough so as to encourage worthy suits, but not so high as to open the floodgates of frivolity. Nonetheless, fairly high multiples are not inconceivable. The multiple should be determined on a sliding scale that is inversely proportional to the risk-utility properties of the particular product at issue. Thus, products that are found to be of extremely low utility in relation to the intensity of the nuisance that they produce would have the highest multiples. [FN255] However, all manufacturers incurring product-nuisance liability have produced a relatively low utility product, and would face a minimum multiple. This sliding scale provides manufacturers with an additional incentive, beyond that of avoiding liability, for making design changes that limit the noise emissions of \*646 their products, because these changes may place the product in a more favorable risk-utility category.

## 2. Limiting Infinite Suits for Continuing Nuisances

The question of whether the product has created a permanent or continuing nuisance is also important to the determination of damages. Products which can be turned off, or easily moved away from the noise victim's property, probably are continuing nuisances. As such, the manufacturer would be liable for each new occurrence. This, theoretically, could result in an infinite number of suits by a single plaintiff. It would seem more efficient, if not more just, to require that each product-nuisance claim for chronic noise be aggregated over a defined time period, perhaps several months or a year. However, where a product causes a singular and exceptional noise nuisance event, as determined by objective measures of noise intensity, suit should be allowed immediately. [FN256]

## 3. No Consequential Damages

This Note does not contemplate using product-nuisance law as a means of holding manufacturers liable for secondary damages flowing from the nuisance. A plaintiff who lost sleep before an important business meeting as a result of a noisy product could not recover for resulting economic losses. Nor would there be product-nuisance recovery for lost real estate sales profits resulting from a neighbor's use of a noisy product, or for a landlord's loss of a tenant's rent due to the use of a noisy product by another tenant. The product-nuisance tort is designed, specifically, to compensate for an individual's lost tranquility while they are using their residential property.

## 4. Apportioning Damages Among Joint Product-Nuisance-Feasors

The idea of apportioning damages between several responsible tortfeasors is not unknown to current nuisance law. [FN257] Under the proposed tort, the manufacturers of several different products might all be implicated in the creation of a single nuisance. Where only one of two simultaneously used products produced an independent noise nuisance, its manufacturer would bear the entire \*647 liability. In contrast, the manufacturers of two simultaneously used products would be jointly and severally liable where each product independently produced a level of noise that would constitute a nuisance if used in isolation.

While manufacturers of noisy products are responsible for the harm created, the product users are also responsible. Although the proposed product-nuisance tort is directed solely at manufacturers of noisy products, [FN258] in certain circumstances the consumer's "fault" might be estimated, and the manufacturer's total liability, as calculated with the multiplier, proportionately reduced.

When the consumer "misuses" the product in an unforeseeable manner, the manufacturer has a complete defense. However, product users may engage in improper practices that a reasonably prudent manufacturer would foresee and advise against. [FN259] Where the manufacturer has adequately advised against the very activity complained of, the court might consider reducing the manufacturer's product-nuisance liability in proportion to the user's culpability. [FN260] However, the manufacturer who fails to warn the user against foreseeable misuse should be liable for the full product-nuisance damages.

## B. Defenses

The following list represents a partial compilation of potential manufacturer defenses to the product-nuisance tort:

- 1.) The plaintiff's belief that a "significant disturbance" occurred is inconsistent with the views of a person of reasonable sensitivities.
- 2.) A source of noise other than the defendant's product was the true and independent cause of the nuisance. In the absence of this other source, no nuisance would have occurred.
- 3.) Where two separate noise-producing products, used simultaneously, caused a nuisance that neither one could have independently caused, neither manufacturer will be liable.
- \*648 4.) The consumer of the noisy product altered or misused the product in an unforeseeable manner, causing a nuisance that would not have occurred otherwise. [\[FN261\]](#)

### Conclusion

At the beginning of the twentieth century it was observed that, "the day will come when men will have to fight noise as inexorably as cholera and plague." [\[FN262\]](#) Our expanding population and industrial prowess have brought that day ever closer. Our choices are undeniably difficult. The industrialized world provides many great advantages. Furthermore, noise pollution law addresses questions at the boundaries and limitations of our freedoms. It confronts us with the dilemma over how to balance our need for activity with the destructive, noisy consequences of activity. As Oliver Wendell Holmes said, "A man need not . . . do this or that act . . . but he must act somehow." [\[FN263\]](#) A world devoid of all sound would prove a haunting desolate place. A world of never-ending "aural aggression" [\[FN264\]](#) is no better. We seek a moderate alternative that lies between Robert Frost's visions of "fire or ice." To these ends, this Note has urged the adoption of a new common law tort, the product-nuisance tort, and the consideration of new federal legislation designed to create market incentives for quieter products. Such measures would help to insure domestic tranquility and foster civilized existence.

[FN\[FN1\]. \*People v. Rubinfeld\*, 172 N.E. 485, 486 \(N.Y. 1930\)](#) (Cardozo, C.J.) (referring to a 1726 English case). This Note asks whether, in certain circumstances, the manufacturer of the "speaking trumpet" should also answer to the law.

[FN\[FN2\]. \*Walden and Other Writings of Henry David Thoreau\* 8](#) (Brooks Atkinson ed., Random House 1992) (1854).

[FN\[FN3\].](#) See George A. Spater, Noise and the Law, in *Noise Pollution and the Law* 21, 22 (James L. Hildebrand ed., 1970) ("Long before the beginning of modern science, men were making sounds that were disagreeable to their neighbors."). In supposedly peaceful colonial Philadelphia, Benjamin Franklin was forced to change residences because of the "din of the Market." *Id.* Julius Caesar is known to have "banned chariots from the streets at night because the sound annoyed him." N.R. Kleinfeld, Turn Down The Volume, *N.Y. Times*, Nov. 14, 1993, s 13, at 1, 12. Winston Churchill's train of thought was disrupted by, among other things, the "jangling of cowbells." William Manchester, *Winston Spencer Churchill: The Last Lion Alone* 5 (1988).

[FN\[FN4\]. \*Rubinfeld\*, 172 N.E. at 486.](#)

[FN\[FN5\].](#) See, e.g., Marlene McCampbell, Noises in the Culture of Victimization, *New York*, Nov. 2, 1992, at 34, 35. McCampbell observes that:

[T]hough popular music ... has always been enjoyed fortissimo, a sea change -- a tsunami -- has lately occurred. Technology ... has changed the very way we listen to today's music. The ... higher and higher levels exploit[ ] the way the music feels as it hits the skin and palpates inner organs. "The beats are no longer dull thumps ... they're patches of heavy turbulence; the blocks of sound aren't noise; they're projectiles." *Id.*

[FN\[FN6\].](#) See, e.g., Benjamin J. Stein, Killing Us (Not) Softly with a Song, *L.A. Times*, Jan. 5, 1990, at B7 (reporting that the U.S. Army supposedly "drove the Panamanian dictator [Manuel Noriega] to desperation and

surrender ... by using a boom box"); Mary Jordan & Sue Anne Pressley, Standoff with Cult Takes a Noisy Turn; Koresh Spurns Deal, Blasts Tunes at Agents, Wash. Post , March 8, 1993, at A1 (reporting that cult members blasted law enforcement officials with loud music in an attempt at "psychological warfare").

FN[FN7]. John Vidal, A Pain in the Ears, Guardian (U.K.), Sept. 8, 1993, at 2.

FN[FN8]. [42 U.S.C. ss 4901- 4918 \(1988 & Supp. V 1993\)](#).

FN[FN9]. Id. s 4913.

FN[FN10]. The Office of Noise Abatement and Control was first established by the 1970 Clean Air Act. [42 U.S.C. s 7641 \(1988\)](#).

FN[FN11]. See Sidney A. Shapiro, Rejoining the Battle Against Noise Pollution, Issues in Sci. & Tech. , Spring 1993, at 73 -74 (discussing the original 1972 legislation, the closing of the EPA's Office of Noise Abatement and Control under the Reagan administration, and recent attempts to pass new legislation reinstating the office); see also [Implementation of the Noise Control Act, 57 Fed. Reg. 30,110 \(1992\)](#) (discussing the closing of the Office of Noise Abatement and Control, and various problems arising from the federal legislation's preemption of state anti-noise efforts).

FN[FN12]. The concept of a product-nuisance tort was first advocated by the author in a law school newspaper article in December 1993.

FN[FN13]. See infra note 170.

FN[FN14]. See, e.g., Susan Walton, Noise Pollution: Environmental Battle of the 1980s, Bioscience , Mar. 1980, at 205 (noting the EPA's estimation that "the amount of noise in America will double by the year 2000").

FN[FN15]. See, e.g., [Frisby v. Schultz, 487 U.S. 474, 484 \(1988\)](#) (citing to [Carey v. Brown, 447 U.S. 455, 471 \(1980\)](#) and [Gregory v. Chicago, 394 U.S. 111, 125 \(1969\)](#) (Black, J., concurring) for the proposition that the tranquility of the home is of great importance to a civilized society); cf. [City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806 \(1984\)](#) (pointing to [Kovacs v. Cooper, 336 U.S. 77 \(1949\)](#) for the proposition that a state may protect its citizens from "unwelcome noise").

FN[FN16]. David Medine, Comment, The Noise Control Act: Legislation and Administrative Problems of Implementation, 9 Env'tl. L. 311, 312 (1979) ("[N]oise is not widely recognized as a cause of psychological and physiological damage.").

FN[FN17]. See Rebecca Young, The Damaging Din; Environmental Noise May Be Causing Hearing Loss that Americans Take for Granted, Wash. Post , Feb. 13, 1985, Health Section, at 16; see also Janet Raloff, Noise Can Be Hazardous to Your Health, Sci. News , June 5, 1982, at 377, 380 (noting that the Sudanese inhabitants of a quiet jungle had "near-perfect" hearing -- defying theories regarding the effects of aging on the ears).

FN[FN18]. Consensus Conference, Noise and Hearing Loss, 263 JAMA 3185 (1990).

FN[FN19]. Id.

FN[FN20]. Young, *supra* note 17; see also Raloff, *supra* note 17:

The EPA sums it up, saying: "The body shifts gears. Blood pressure rises, heart rate and breathing speed up, muscles tense, hormones are released into the bloodstream, and perspiration appears." If the sounds are sudden, unexpected, or difficult to recognize, they don't even have to be especially loud to call out these responses. *Id.* at 380; Leon Resnekov, Noise, Radio Frequency Radiation and the Cardiovascular System, 63 *Circulation* 264A, 265A (1981) (discussing the effects of noise on blood pressure, hormonal changes, plasma cholesterol, and platelet aggregation); Anders Jonsson & Lennart Hansson, Prolonged Exposure to a Stressful Stimulus (Noise) as a Cause of Raised Blood-Pressure in Man, *Lancet*, Jan. 8, 1977, at 86 (finding significantly more cases of hypertension among men with noise-induced hearing loss than among men with normal hearing, and concluding that chronic noise exposure may be a cause of hypertension).

FN[FN21]. See, e.g., W.C. Meecham & Neil Shaw, Effects of Jet Noise on Mortality Rates, 13 *Brit. J. Audiology* 77, 79 (1979) (pointing to higher mortality rates in residential areas subject to airport traffic noise).

FN[FN22]. Fiona Godlee, Noise: Breaking the Silence, 304 *Brit. Med. J.* 110, 113 (1992); Aage R. Møller, Noise as a Health Hazard, 4 *Ambio* 6, 11 (1975) ("Because sound has acted as an important alarm signal since the very beginning of evolution of terrestrial animals, it is not surprising that it arouses a number of autonomous mechanisms in the body to prepare the animal for flight or fight."); J.C. Westman & J.R. Walter, Noise and Stress: A Comprehensive Approach, 41 *Envtl. Health Persp.* 291 (1981); cf. Karl D. Kryter, *The Effects of Noise on Man* 390 (2d ed. 1985) ("It is generally believed that continued exposure to noise in real life can be a source of physiological stress possibly capable of causing health disorders beyond that of direct damage to the auditory receptor system.").

FN[FN23]. Godlee, *supra* note 22, at 113.

FN[FN24]. Vidal, *supra* note 7 ("[A]s noise psychologists know, there is little difference between pop and classical [music] when it comes to sound disturbance: both can drive people to the edge.").

FN[FN25]. K.A. Fackelmann & J. Raloff, Psychological Stress Linked to Cancer, *Sci. News*, Sept. 25, 1993, at 196. Scientists know that stress can trigger the body's "fight or flight" response, in which the adrenal glands churn out powerful hormones that divert blood flow from internal organs .... Once the danger subsides, blood rushes back into the oxygen-starved internal organs .... That burst of oxygen-rich blood may lead to increased production of free radicals -- and DNA lesions. In addition stress weakens the immune response ... [to] malignant cells .... *Id.*

FN[FN26]. Pierre Tran Ba Loc, The Environment and Cancer, *J. Env'tl. Pathology Toxicology Oncology*, Nov.-Dec. 1990, at 273; see also Møller, *supra* note 22, at 11 (noting that noise increases cortisol levels, and that cortisol suppresses the liver's capacity to detoxify potential cancer-causing agents).

FN[FN27]. P.L. Pelmear, Noise and Health, in *The Noise Handbook* 31, 32 (W. Tempest ed., 1985).

FN[FN28]. William K. Stevens, For Those Who Have Lost Sleep, the First Casualty is Creativity, *N.Y. Times*, Jan. 5, 1989, at B12; Sandra Blakeslee, Mystery of Sleep Yields as Studies Reveal Immune Tie, *N.Y. Times*, Aug. 3, 1993, at C1.

FN[FN29]. Compare Paul Knipschild et al., Aircraft Noise and Birth Weight, 48 *Int'l Archives Occupational Env'tl. Health* 131 (1981) (suggesting a link between low birth weight and aircraft noise in Amsterdam) and F. Nowell Jones & Judy Tauscher, Residence Under an Airport Landing Pattern as a Factor in Teratogenesis, 33 *Archives Env'tl. Health* 10, 10 (1978) (finding a "higher incidence of reportable birth defects ... under the landing pattern at Los Angeles International Airport than in the rest of the County") and Y. Ando & H. Hattori, Statistical Studies on the Effects of Intense Noise During Human Fetal Life, 27 *J. Sound & Vibration* 101, 101 (1973) ("rate of low-birth-weight babies [in Japan] increased as the noise level increased") with Larry D. Edmonds et al., Airport Noise and Teratogenesis, 34 *Archives Env'tl. Health* 243 (1979) (finding no relation between birthdefects and noise pollution).

FN[FN30]. Ari L. Goldman, Student Scores Rise After Nearby Subway Is Quieted, N.Y. Times , April 26, 1982, at B4.

FN[FN31]. Cf. Raloff, *supra* note 17, at 380 ("though we can intellectually tune out noise, physiologically, our bodies never adapt").

FN[FN32]. Malcolm B. Browne, Human Noises in Ocean Held to Threaten Marine Mammals, N.Y. Times , Oct. 19, 1993, at C1.

FN[FN33]. Raloff, *supra* note 17, at 377.

FN[FN34]. See, e.g., K.R. Wiens & J.R. Kinley , Economic Aspects of Noise in Alberta 39 - 40 (1980).

FN[FN35]. *Id.* at 39.

FN[FN36]. Medine, *supra* note 16, at 312.

FN[FN37]. See, e.g., Alison Gordon, Driven to Death by the Tyranny of Noise; On the Growing Menace of a Heartless Intruder You Cannot Escape, Mail on Sunday (U.K.), Sept. 11, 1994, at 16 -17 (reporting on the suicides of several victims of domestic noise, and the death of one woman from "pneumonia and despair" after "sitting out in the cold and rain for several nights" in an attempt to escape her neighbor's stereo).

FN[FN38]. McCampbell, *supra* note 5, at 35 (discussing the importance of the home as a refuge from noise, and the anguish and anger that results from noise that invades the home).

FN[FN39]. Vidal, *supra* note 7, at 2; see also Gordon, *supra* note 37.

FN[FN40]. See McCampbell, *supra* note 5, at 36 ("Among the more minor irritations faced by those who have high-decibel neighbors is the attitude of almost everyone who doesn't .... 'People who have never been in this predicament tend to be skeptical.' ").

FN[FN41]. Gale M. McElhiney, Letter, Sounding Off About L.A.'s "Noise Plague," L.A. Times , Sept. 5, 1993, at E3 (the writer relates that her "nerves are increasingly being shattered by people's insensitivity to their neighbors").

FN[FN42]. See, e.g., McCampbell, *supra* note 5, at 34 -37 (discussing noise harassment and retaliation among New York City apartment, co-op, and condominium dwellers). McCampbell relates the story of a Mr. Lund, whose New York apartment has come under bombardment by his neighbor's noisy stereo. The landlord's lawyer informed Lund that the landlord "was not a policeman." *Id.* at 36. (However, see [Cohen v. Werner, 368 N.Y.S.2d 1005, 1006 \(1975\)](#), denying a landlord recovery of rent; the court pointed to the implied warranty of habitability and stated that "[w]hile plaintiff [landlord] did not cause this noise, he did nothing at all to try to stop it although he had ample time to do so before defendant finally moved out after having complained to him about it.") McCampbell's article chronicles how Lund and his neighbor have engaged in a series of "noise" retaliations against each other. McCampbell, *supra* note 5, at 36. The article also notes that:

[a]ural assault brings not only misery but a desperate ingenuity. One loft- dweller fought an upstairs flamenco dancer by bolting a giant speaker to his ceiling and playing Viennese waltzes at the first heel-stomp. Baffling even Con Ed [electric company] repairmen, an electronics whiz wired his building so that the sound from a neighbor's chord organ always came out distorted. An art dealer, seeking to escape the city's overall hubbub, installed a concrete bomb shelter in his living room. *Id.* at 35; see also Sarah Lyall, A Love Song That Some Love to Hate,

N.Y. Times , Mar. 6, 1994, s 4, at 2 (relating the story of a woman who stormed into her neighbor's apartment and flung the stereo out the window after listening to repeated playings of Whitney Houston's song, I Will Always Love You). But see Alison Gordon, A Decent Man, Tortured by Noise and Then Murdered; Police Must Be Given Powers to Curb Menace of Loud Neighbours, Mail on Sunday (U.K.), Sept. 18, 1994, at 8 - 9 (reporting on the murder of a man by his noisy neighbor, after his protests about the noise).

FN[FN43]. Michael Fleet, Man Strangled Parrot After Four-Year Row with Neighbours; Judge Hears of the Warm Spring Evening in a Suburban Garden When Tempers Finally Exploded and the Screeching Had to Stop, Daily Telegraph (U.K.), Oct. 10, 1992, at 3.

FN[FN44]. While this problem may seem particularly unique, other similar cases have been reported in the press. See, e.g., McCampbell, *supra* note 5, at 35 (discussing how the "squawks and screeches" of a neighbor's exotic birds "shrilled through the wall" of a New York City dweller's apartment).

FN[FN45]. Fleet, *supra* note 43, at 3.

FN[FN46]. Vidal, *supra* note 7, at 2 (the judge dismissed the charges against the noise-tortured man, who was an engineer, saying that he had endured a "year of hell" and had "suffered enough").

FN[FN47]. See *infra* part I.C for a discussion of some of the economic "benefits" derived from free noise disposal.

FN[FN48]. See Wiens & Kinley , *supra* note 34, at 42 ("A noisy property will not be able to command as high a price. The measure of the monetary value placed by residents on the disagreeable effects of noise is expressed by the discount they demand when purchasing noisy property."); see also A.A. Walters , Noises and Prices 9 (1975) (discussing the depreciation of real estate that results from noise pollution); Note, The Noise Control Act of 1972 -- Congress Acts to Fill the Gap in Environmental Legislation, 58 Minn. L. Rev. 273, 278 -79 (1973) [hereinafter Congress Acts] (pointing out that noise can reduce property values).

FN[FN49]. Goldman, *supra* note 30, at B4.

FN[FN50]. [Saia v. New York, 334 U.S. 558, 565 \(1948\)](#) (Frankfurter, J., dissenting) (the Court had held that a New York town's law, requiring public speakers to get the approval of the local police before using sound amplification equipment, was an unconstitutional "prior restraint" of free speech).

FN[FN51]. Wiens & Kinley , *supra* note 34, at 9.

FN[FN52]. *Id.* at 42 ("a premium is placed on property that is more or less free from noise").

FN[FN53]. Cf. *id.* at 44 ("In a technical sense, preferences as revealed through market prices are not necessarily the same as individual preferences and neither are they the same as compensation that would make individuals as fortunate as they would be without the noise.").

FN[FN54]. See Al Gore, Earth in the Balance: Ecology and the Human Spirit 183 (1992) ("[J]ust as our eyes fail to see all but a narrow portion of the light spectrum, our economics fails to see -- let alone measure -- the full value of major parts of our world."). "[E]stablished methods of calculating costs and benefits ... accepted as holy writ ... are virtually impossible to change without a major determined effort." *Id.* at 337; see also [Steve Bennett, Note, Cost-Benefit Analysis and the Feasibility Requirement of the Occupational Noise Regulation, 55 Geo. Wash. L. Rev. 123, 151 \(1986\)](#) (concluding that "[c]ost-benefit analysis [of occupational noise] is an imprecise and awkward tool that overstates the costs and understates the benefits of implementing adequate noise control devices").

FN[FN55]. See, e.g., Elaine Louie, For Shutting Out the Noisy World, N.Y. Times , Dec. 24, 1992, at C2 ("[T]he cost of building a soundproof room is at least \$30 a square foot and can range as high as \$150 a square foot ....").

FN[FN56]. Wiens & Kinley , supra note 34, at 10.

FN[FN57]. See, e.g., Gore , supra note 54, at 337 (discussing how a new environmental program could "reinvigorate our ability to excel at applied as well as basic research, spur gains in productivity ... and reestablish the United States as the world's leader in applied technology").

FN[FN58]. Economics and the Environment: A Reconciliation , at vii (Walter Block ed., 1989).

FN[FN59]. See infra note 170.

FN[FN60]. Michael Jacobs, The Green Economy , at xiv (1991).

FN[FN61]. It might be argued by some that there is no such thing as a "right." Coase argued, in essence, that the "victim" of a noise nuisance is a partial "cause" of the nuisance by virtue of his presence. R.H. Coase, The Problem Of Social Cost, 3 J.L. & Econ. 1, 13 (1960). Coase's analysis is confined to the "actions of business firms." Id. at 1. Arguably, because it contemplates a world of high utility actors, Coase's analysis may be inapplicable to domestic residences under bombardment by low utility activities. Nevertheless, for Coase, economic analysis apparently provides the means of avoiding, or denying the presence of, the thornier legal issue of who has a right to be free from a noise nuisance. See [Mark Kelman, The Necessary Myth of Objective Causation Judgments in Liberal Political Theory, 63 Chi.-Kent L. Rev. 579, 584 \(1987\)](#) ("Coase's claim, that each party harms the other when they interact, makes it impossible to assign rights in the common cases where desires clash because each party would seemingly harm the other if he acted on his desire.").

Applying Coasean analysis to the problem of noise pollution, one is led to discuss how the noise victim can efficiently pay the noise polluter to stop making noise. See [Steven N. Brautigam, Note, Rethinking the Regulation of Car Horn and Car Alarm Noise: An Incentive-Based Proposal to Help Restore Civility to Cities, 19 Colum. J. Envtl. L. 391, 414 \(1994\)](#) (concluding, curiously, that Coase's theorem does not provide a solution to noise only because the transaction costs of the deal are too high). A perspective based upon the legal right to domestic tranquility is properly offended by this type of blackmail by noise.

FN[FN62]. [City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806 \(1984\)](#) (citing to [Kovacs v. Cooper, 336 U.S. 77 \(1949\)](#)).

FN[FN63]. [Frisby v. Schultz, 487 U.S. 474, 484 \(1988\)](#) (quoting from [Carey v. Brown, 447 U.S. 455, 471 \(1980\)](#)). Frisby found a local ordinance that banned the picketing of residences to be constitutional in the face of a First Amendment challenge from antiabortion protesters.

FN[FN64]. [Frisby, 487 U.S. at 484.](#)

FN[FN65]. [Carey, 447 U.S. at 471.](#)

FN[FN66]. See, e.g., Allan Bloom , The Closing of the American Mind 364 - 65 (1987) (arguing from a "conservative" perspective, Bloom observed: "The market cannot be the sole concern of the polity, for the market depends on the polity, and the establishment and preservation of the polity continuously requires deeds which are 'uneconomic' or 'inefficient.' Political action must have primacy over economic action, no matter what the effect on the market."); Mark Sagoff , The Economy of the Earth 49 (1988) (arguing from an undoubtedly more "liberal"

perspective regarding environmental issues than Bloom, Sagoff states that, "we must be able to act, at least at times, on a public philosophy, conviction, or faith. We cannot permit welfare economics to replace the moral function of public law. The antinomianism of cost-benefit analysis is not enough.").

FN[FN67]. John Locke , *Two Treatises of Government* 331 (Peter Laslett ed., Cambridge University Press student ed. 1988) (1698).

FN[FN68]. Bloom , *supra* note 66, at 364.

FN[FN69]. Locke , *supra* note 67, at 410 -11.

FN[FN70]. See *supra* notes 42- 46 and accompanying text.

FN[FN71]. Locke , *supra* note 67, at 359.

FN[FN72]. Undeniably, few rights or freedoms are absolute. To the extent that risk-utility or cost-benefit concepts serve to define the practical boundaries of the right to domestic tranquility they are incorporated into this Note's proposal. However, a proper appreciation of the sanctity of the domestic realm provides the only true foundation for its protection. The apparent conflict between rights theory and risk-utility theory is discussed further, *infra*, at the beginning of part III.

FN[FN73]. See, e.g., [Booth v. Rome, W. & O. Terminal R.R.](#), 35 N.E. 592, 594 (N.Y. 1893) ("The general rule that no one has absolute freedom in the use of his property, but is restrained by the coexistence of equal rights in his neighbor to the use of his property, so that each, in exercising his right, must do no act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impregnably in the necessities of the social state, that its vindication by argument would be superfluous."), overruled on other grounds by [Spano v. Perini Corp.](#), 250 N.E.2d 31 (N.Y. 1969).

FN[FN74]. [Bove v. Donner-Hanna Coke Corp.](#), 258 N.Y.S. 229, 231 (App. Div. 1932). Despite the fine rhetoric, the court in *Bove* refused to find that a coke plant that emitted smoke and steam was a nuisance to neighboring residents, noting that the plant had not been negligently designed, was reasonably operated, and that the newly emerging industrial nature of the area was sanctioned by legislative acts. *Id.*

FN[FN75]. [Restatement \(Second\) of Torts s 821D](#) cmt. a (1965). During this period of history, obviously, there were no mass-produced products capable of emitting loud or persistent noise. Such products were probably not even imagined.

FN[FN76]. See P.S. Edelman & A.J. Grenna, *Noise and the Law in the United States*, in *The Noise Handbook* , *supra* note 27, at 337, 338 ("The English common law first took cognizance of the noise problem in the thirteenth century in cases in which noise was termed a 'nuisance,' and remedies similar to those available to modern plaintiffs (injunction, damages, etc.) originated then.").

FN[FN77]. See [Restatement \(Second\) of Torts ss 821B, 821D \(1965\)](#) (discussing public and private nuisance, respectively). While the proposals made by this Note deal with private nuisances only, it is conceivable that they might be modified to address public nuisances as well. Furthermore, if adopted, this Note's proposals might have beneficial ancillary effects upon public nuisances, through the creation of a generalized incentive for quieter products.

FN[FN78]. *Id.* s 821D.

FN[FN79]. *Id.* s 822.

FN[FN80]. *Id.* s 822 (a), (b).

FN[FN81]. *Id.* s 821F.

FN[FN82]. [City of Manchester v. National Gypsum Co., 637 F. Supp. 646, 656 \(D.R.I. 1986\)](#) (denying nuisance liability against the manufacturers of asbestos, for property losses resulting from its use in school buildings, because the manufacturers did not control the "instrumentality" after they sold it).

FN[FN83]. See [Restatement \(Second\) of Torts s 822](#) cmt. b (1965) (discussing how a private nuisance was traditionally actionable "irrespective of the type of conduct involved").

FN[FN84]. Compare [Frank v. Environmental Sanitation Management, Inc., 687 S.W.2d 876, 880 n.3 \(Mo. 1985\)](#) (stating that although some court opinions suggest that "modern law requires intentional, negligent, reckless or abnormally dangerous conduct by defendant[,] ... defendant's negligence, intention, design, or motive are immaterial to his liability for nuisance") with [Copart Indus. v. Consolidated Edison Co., 362 N.E.2d 968 \(N.Y. 1977\)](#) (denying liability for nuisance because of a lack of negligence or an abnormally dangerous condition). The Frank court required "unreasonable activity," but, unlike the Restatement, did not require "intentional and unreasonable activity." This Note argues for an "unreasonableness" standard for the product-nuisance tort, as opposed to the less flexible "abnormally dangerous conditions or activities" standard. Significant harm is all that nuisance law requires. Adding the requirement that the significant harm be caused by a situation viewed as inherently abnormally dangerous, because it could produce greater than significant harm, ignores the property aspect of nuisance law.

FN[FN85]. [Restatement \(Second\) of Torts s 821F](#) cmt. c (1965); see also R. Grime, Noise and the Law in the United Kingdom, in *The Noise Handbook*, supra note 27, at 303, 325 ("The law cannot be used to remedy every interference with our way of life, to support every complaint about our neighbour's behaviour.").

FN[FN86]. [McQuade v. Tucson Tiller Apartments, Ltd., 543 P.2d 150, 152 \(Ariz. Ct. App. 1975\)](#) (citing to [Kubby v. Hammond, 198 P.2d 134 \(Ariz. 1948\)](#) and [Hooks v. International Speedways, Inc., 140 S.E.2d 387 \(N.C. 1965\)](#)).

FN[FN87]. Congress Acts, supra note 48, at 280 ("many courts [in nuisance cases] utilize a cost-benefit approach in which the gravity of the harm to the plaintiff is weighed against the social utility of the defendant's conduct"); see also James M. Kramon, Noise Control: Traditional Remedies and a Proposal for Federal Action, in *Noise Pollution and the Law* 77, 83 - 86 (James L. Hildebrand ed., 1970) (discussing the limited ability of nuisance law to address many noise problems, and the use of "utility" considerations by the courts to limit nuisance actions).

FN[FN88]. [Bove v. Donner-Hanna Coke Corp., 258 N.Y.S. 229, 232 \(App. Div. 1932\)](#) ("One who chooses to live in the large centers of population cannot expect the quiet of the country.").

FN[FN89]. [543 P.2d 150 \(Ariz. Ct. App. 1975\)](#).

FN[FN90]. *Id.* at 152. Based on these criteria, and the fact that the local area was both residential and commercial in nature, the Arizona appeals court ordered that the lower court's injunction be limited in scope, noting that music is not a "per se" nuisance, although it can become a nuisance. The court did not rule out further injunctive relief if, in the future, a nuisance arose. *Id.*

FN[FN91]. See, e.g., [Boomer v. Atlantic Cement Co., 257 N.E.2d 870 \(N.Y. 1970\)](#) (imposing permanent payment of damages in lieu of an injunction against a cement factory); [Haber v. Paramount Ice Corp., 267 N.Y.S. 349 \(App. Div. 1933\)](#) (denying injunctive relief to a family complaining of noise from the defendant's factory in an industrial area, the court remanded the case for an examination of damages), *aff'd*, [190 N.E. 163 \(N.Y. 1934\)](#).

FN[FN92]. Furthermore, although the proposed product-nuisance tort seeks to safeguard purely residential uses of domestic dwellings, an argument can be made that new computer technology allows people to engage in high utility activities at home. See Debra Sourby, Letter, Leaf Blowers Torment Those Working at Home, *N.Y. Times*, Oct. 5, 1994, at A22 (noting that although "landscape contractors complain that they will be out of business because of bans on leaf blowers, ... noise is already causing loss of productive income for those working at home").

FN[FN93]. See [Baker v. Burbank-Glendale-Pasadena Airport Auth., 705 P.2d 866, 870 \(Cal. 1985\)](#) (finding that plaintiff's suit was not barred by the statute of limitations because the airport was a continuing nuisance, and thus each new occurrence renewed the cause of action), *cert. denied*, [475 U.S. 1017 \(1986\)](#). Judge Mosk's dissent argued that an airport was a permanent nuisance because it remained in place indefinitely. *Id.* at 873 -75; see also [Spar v. Pacific Bell, 1 Cal. Rptr. 2d 480 \(Ct. App. 1991\)](#) (noting the difficulties of distinguishing permanent from continuing nuisances).

FN[FN94]. [Burbank-Glendale-Pasadena Airport Auth., 705 P.2d at 870](#) (damages for permanent nuisances include all past, present, and future harm).

FN[FN95]. *Id.*

FN[FN96]. *Id.*

FN[FN97]. Nuisance law has not been viewed as an effective overall response to the growing problem of noise pollution. See *supra* note 87; cf. Vidal, *supra* note 7 ("Noise sufferers, despite being one of the most polluted groups in Britain, are left to pick a tortuous route to the courts ...").

FN[FN98]. See generally [Restatement \(Second\) of Torts s 395 \(1965\)](#); see also [MacPherson v. Buick Motor Co., 111 N.E. 1050 \(N.Y. 1916\)](#) (holding that, even in the absence of privity of contract, manufacturers may be liable for the foreseeable harms that are caused by their negligently made or designed products).

FN[FN99]. See, e.g., [Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 \(Cal. 1963\)](#).

FN[FN100]. [Restatement \(Second\) of Torts s 402A\(1\) \(1965\)](#).

FN[FN101]. *Id.* This same physical harm requirement exists for products liability suits grounded in negligence. *Id.* [s 395](#).

FN[FN102]. *Id.* [s 402A\(1\)\(b\)](#).

FN[FN103]. *Id.* [s 402A](#) cmt. j.

FN[FN104]. See, e.g., [Johansen v. Makita U.S.A., Inc., 607 A.2d 637, 645 \(N.J. 1992\)](#) (observing that "Dean Keeton's analysis [holds that] ... '[a] product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger ... outweighed the benefits of the way the product was so designed and marketed.' "); [Phipps v. General](#)

[Moters Corp.](#), 363 A.2d 955, 961 (Md. 1976) (stating that "in some circumstances the question of whether a particular design is defective may depend upon a balancing of the utility of the design and other factors against the magnitude of that risk").

FN[FN105]. See, e.g., [Wood v. General Motors Corp.](#), 865 F.2d 395, 397 n.1 (1st Cir. 1988) (discussing whether, under Massachusetts law, a car is considered defective if it lacks airbags that could have easily been included; citing to [Back v. Wickes Corp.](#), 378 N.E.2d 964, 970 (Mass. 1978) ("In evaluating the adequacy of a product's design, the jury should consider ... the mechanical feasibility of a safer alternative design ....")), cert. denied, 494 U.S. 1065 (1990); [Johansen](#), 607 A.2d at 642 (noting that one of the factors to be considered when applying "risk-utility" analysis in a products liability case is the "availability of a substitute product [that] would meet the need and not be as unsafe"); cf. [Payne v. Johnson](#), 145 P.2d 552 (Wash. 1944) (limiting, but not prohibiting, the use of a drive-in movie speaker system in a noise nuisance suit, where an alternative in-car speaker system was unavailable due to the war effort); [Booth v. Rome, W. & O. Terminal R.R.](#), 35 N.E. 592, 594 (N.Y. 1893) (in a case involving physical injury to property from blasting done on adjacent property, the court observed that "if less powerful blasts might have been used, which, if used, would not have occasioned injury, or would have lessened it, the omission to use them might well be considered as negligence"), overruled on other grounds by [Spano v. Perini Corp.](#), 250 N.E.2d 31 (N.Y. 1969) (holding blasting to be subject to strict liability).

FN[FN106]. See, e.g., [Gearhart v. Uniden Corp. of Am.](#), 781 F.2d 147 (8th Cir. 1986) (recognizing a cause of action for hearing loss resulting from the use of a cordless phone); [O'Brien v. Remington Arms Co.](#), 601 So.2d 330 (La. Ct. App. 1992) (hunter sued the manufacturer of a shell that exploded in his rifle, causing him to suffer hearing loss); [Simpson v. Chesapeake & Potomac Tel. Co.](#), 522 A.2d 880 (D.C. 1987) (switchboard operator, having suffered hearing impairment when an electrical spark and a loud noise were released from the telephone equipment, sued the manufacturer under a products liability theory).

FN[FN107]. [467 F.2d 1262 \(7th Cir. 1972\)](#).

FN[FN108]. [Id. at 1268](#) (footnote omitted).

FN[FN109]. See [City of Manchester v. National Gypsum Co.](#), 637 F. Supp. 646, 656 (D.R.I. 1986) (dismissing plaintiff school property owner's nuisance claim against the manufacturers of asbestos); [Town of Hooksett Sch. Dist. v. W.R. Grace Co.](#), 617 F. Supp. 126, 133 (D.N.H. 1984) (dismissing a nuisance claim, because the asbestos manufacturer's "ability to abate or relieve the complaint of nuisance ... are absent in the case at bar"); [Board of Educ. v. United States Gypsum Co.](#), 580 F. Supp. 284, 294 (E.D. Tenn. 1984) (denying a nuisance claim against an asbestos manufacturer, the court observed that to allow "the plaintiff to bring this action under a nuisance theory would convert almost every products liability action into a nuisance claim"), vacated, [664 F.Supp. 1127](#) (allowing plaintiff to proceed on breach of warranty claim).

FN[FN110]. [Restatement \(Second\) of Torts s 821A](#) cmts. b, c (1965).

FN[FN111]. [National Gypsum Co.](#), 637 F. Supp. at 656; cf. [Poe v. Atlas Powder Co.](#), 444 S.W.2d 170 (Tenn. Ct. App. 1968) (denying strict liability against explosives manufacturer for damage to neighboring property caused by blasting operations; even though manufacturer's employees assisted with the operations, they were not in control).

FN[FN112]. [National Gypsum Co.](#), 637 F. Supp. at 656 (quoting [Shea v. City of Portsmouth](#), 94 A.2d 902, 906 (N.H. 1953)).

FN[FN113]. See, e.g., [Frank v. Environmental Sanitation Management, Inc.](#), 687 S.W.2d 876, 880 (Mo. 1985) ("The unreasonable use element of nuisance balances the rights of adjoining property owners.") (second emphasis added).

FN[FN114]. See, e.g., [Morningstar v. Black & Decker Mfg. Co.](#), 253 S.E.2d 666, 676 (W. Va. 1979) (stating that

strict liability is imposed when "the product is actually defective"); see also [Restatement \(Second\) of Torts s 402A \(1\) \(1965\)](#) (requiring that the product be in a "defective condition" in order to impose strict liability).

FN[FN115]. See generally [Restatement \(Second\) of Torts ss 388 - 402A \(1965\)](#) (reciting, inter alia, the requirement for physical harm in negligence and strict products liability cases). The Restatement defines physical harm as the physical impairment of the human body, or of land or chattel. Id... s 7(3).

FN[FN116]. See supra note 106.

FN[FN117]. William H. Rodgers, Jr. , Environmental Law 563 - 64 (1977). For a comprehensive, although dated, compilation of local anti-noise ordinances, see 115 Cong. Rec. 32,188 -258 (1969).

FN[FN118]. Sidney A. Shapiro, [Lessons from a Public Policy Failure: EPA and Noise Abatement](#), 19 Ecology L.Q. 1, 37-38 (1992); see also Jim Roberts, White Plains Coat & Apron Raises Din over Peekskill Noise Ordinance, Westchester County Bus. J. , Jan. 17, 1994, s 1, at 9 (reporting on a lawsuit filed by a laundry plant, which employs 230 people, against a local anti-noise ordinance prohibiting commercial activity between 9 p.m. and 6:30 a.m.).

FN[FN119]. Shapiro, supra note 118, at 42 ("If Congress does not fund a federal infrastructure to support state and local abatement efforts, such efforts are unlikely to be made.").

FN[FN120]. New York City, N.Y., Admin. Code ss 24 -201 to 24 - 269 (1992) [hereinafter N.Y.C. Admin. Code ].

FN[FN121]. Id. s 24 -218. The language is rather unclear. Do citizens have an affirmative duty to stop others from engaging in noisy acts?

FN[FN122]. Circulation devices include air conditioners, pumps, cooling towers, fans, and blowers. Id. s 24 -203 (q). Unlike other instruments of noise, the prohibited noise from circulation devices is to be measured from within an affected dwelling. However, the measurement is to be made with the window of the dwelling open. Id. s 24 - 237.

FN[FN123]. The prohibited sound levels for these various products are described in ss 24 -232 to 24 -241.1 of the Code.

FN[FN124]. Id. ss 24 -243 to 244.

FN[FN125]. Id. ss 24 -245 to 256.

FN[FN126]. Id. s 24 -257.

FN[FN127]. Id. s 24 -257(b)(5) (arguably applying a risk-utility view to fines, the Code lists the highest fine, \$8,000, for violations of the prohibition on commercial music). Persistent violators of any section of the Code are to have their fines doubled. Id. s 24 -257(b)(10).

FN[FN128]. Id. s 24 -261. This provision might have the detrimental effect of keeping issues involving noise out of the courts.

FN[FN129]. There is, however, an absolute prohibition on the public use of radios, and other devices, on "any rapid transit railroad, omnibus or ferry in such a manner that the sound emanating from such sound reproduction device is audible to another person." *Id.* s 24 -220(c).

FN[FN130]. See *Rodgers*, *supra* note 117, at 564 (observing that a "common denominator of ... [anti-noise] legislation is its unenforceability, its common fate is to be ignored"); cf. *The 'Law' on Carpets and Noise*, *N.Y. Times*, March 6, 1994, s 10 (Real Estate), at 10 (" '[J]udges on the whole are not too sympathetic to noise complaints in New York City, given the more serious things they have to deal with.' ") (quoting Michael Finder, a Manhattan lawyer).

FN[FN131]. *N.Y.C. Admin. Code* s 24 -202.

FN[FN132]. *Id.* s 24 -238 (prohibiting the sale and operation of refuse-compacting vehicles that violate the stated sound levels).

FN[FN133]. *Rodgers*, *supra* note 117, at 573 -74 (discussing *Chicago, Ill.*, *Municipal Code* s 17- 4.8).

FN[FN134]. *Westside Watch: Car Chirping Is Cause for Alarm to Galanter, Council*, *L.A. Times*, May 1, 1994, at J2; see also *New Law Allows Action Against Car Alarm Noise*, *Herald (Glasgow)*, Sept. 12, 1994, at 7 (also addressing continuous bleeping car alarms).

FN[FN135]. "[I]t was a noise dispute more than 200 years ago that gave the village its name: when Peter J. Munro ordered larch trees from Scotland to block the noise from the Post Road." Tessa Melvin, *Airborne Summer Pest: More La Guardia Traffic*, *N.Y. Times*, June 2, 1991, s 12WC (Westchester), at 4.

FN[FN136]. *Larchmont Regulates Noise from Gardening Equipment*, *UPI*, June 4, 1985, available in *LEXIS*, *News Library*, *Wires File*.

FN[FN137]. *Elsa Brenner, Gardening Equipment Provokes a New Look at Noise Ordinances*, *N.Y. Times*, June 24, 1990, s 12WC (Westchester), at 1.

FN[FN138]. *Id.*

FN[FN139]. *Straws in the Wind*, *N.Y. Times*, Aug. 14, 1994, s 1, at 44.

FN[FN140]. *Adrian Lithgow et al., Ministers Back the Fight Against Noise*, *Mail on Sunday (U.K.)*, Oct. 2, 1994, at 20 (reporting that British Environment Minister Robert Atkins has set up an "emergency working party" to draft new legislation, because of the inadequacies of current laws, and rising complaints and violence relating to noise).

FN[FN141]. *Lynn Eaton, Council Acts to Silence Alarms*, *Independent (U.K.)*, Aug. 4, 1994, at 4.

FN[FN142]. *Council Acts to Stop Car Alarm Racket*, *Independent (U.K.)*, July 19, 1994, at 6.

FN[FN143]. *Kevin Griffin, Ringing Burglar Alarms Leave Vancouver Officials in Sticky Situation*, *Vancouver Sun*, Aug. 9, 1994, at B1 (discussing the *Vancouver, Canada, False Alarm Reduction Bylaw*). Despite the bylaw, the article reports that police were forced to break into a home to turn off an alarm that had been blaring for forty-eight hours. *Id.*

FN[FN144]. Victoria Finlay, Car Alarm Penalties Proposed, South China Morning Post (Hong Kong), June 21, 1994, at 4 ("Owners of noisy car alarms could be fined up to \$10,000 if a proposal by the Environmental Protection Department becomes law.").

FN[FN145]. See generally John P. Ludington, Annotation, Validity, Under Federal Constitution, of Federal, State, or Local Antinoise Laws and Regulations, 36 L. Ed. 2d 1042 (1992) (compiling examples of anti-noise laws that have survived and failed constitutional challenge); see also [Village of Belle Terre v. Boraas, 416 U.S. 1, 9 \(1974\)](#) (sustaining a New York village's zoning restriction that limited unrelated people from living together). The Belle Terre court stated that the "police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where ... the blessings of quiet seclusion ... make the area a sanctuary for people." *Id.* Justice Marshall, in his dissent, argued that this zoning law restricted the First Amendment right of association. [Id. at 14 - 15](#). One wonders whether the Court would sustain zoning laws banning stereos from residential areas, and how questions about property rights and interstate commerce might play into the constitutional analysis of such laws? To the extent that the First Amendment restricts state tort law, see, e.g., [New York Times Co. v. Sullivan, 376 U.S. 254 \(1964\)](#) (finding that the First Amendment limits state defamation law), these constitutional issues may also be relevant to anti-noise tort theories.

FN[FN146]. [Grayned v. City of Rockford, 408 U.S. 104, 108 \(1972\)](#) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").

FN[FN147]. [Kovacs v. Cooper, 336 U.S. 77, 89 \(1949\)](#) (Frankfurter, J., concurring); [Saia v. New York, 334 U.S. 558, 562 \(1948\)](#) (Frankfurter, J., dissenting).

FN[FN148]. [Saia, 334 U.S. at 563](#).

FN[FN149]. See also [Grayned, 408 U.S. at 115 -16](#) (Marshall, J.) (observing that "government has no power to restrict such activity because of its message..... [However, if] overamplified loudspeakers assault the citizenry, government may turn them down.").

FN[FN150]. In [Grayned](#), the Court sustained the appellant's conviction for noisily demonstrating outside of a school during a protest over racial grievances. The Court found that the City's anti-noise ordinance, which prohibited willful noisemaking outside of a school while classes were in session, was neither vague nor broad, but constitutionally permissible as a "time, place, or manner" regulation of protected expression. The decision appears to leave unresolved the question of whether all "sound" is protected expression.

In [Ward v. Rock Against Racism, 491 U.S. 781 \(1989\)](#), the Court upheld New York City's requirement that Central Park performers use sound equipment and technicians supplied by the city, so as to avoid excess noise. As in [Grayned](#), the Court relied upon the "time, place, and manner" doctrine, and the presence of valid governmental ends to justify their holding. Over a sharply worded dissent, the Court held that such restrictions are constitutional when applied without regard to the content of the regulated expression, despite their failure to use the least restrictive means of achieving their goals. The Ward majority relied, in part, upon [Renton v. Playtime Theatres, 475 U.S. 41 \(1986\)](#), a case involving "time, place, and manner" restrictions on sexually explicit materials. The dissenters argued that [Renton](#) was not applicable to the facts of [Ward](#), and that the Court's approach could jeopardize free speech. [491 U.S. at 804](#).

The Ward Court's analogy to restrictions on sexually explicit materials does not signal an acceptance of Justice Frankfurter's view that "aural aggression" is, like obscenity, constitutionally unprotected. Sexually explicit materials are not necessarily obscene in the eyes of the law. See, e.g., [Fort Wayne Books v. Indiana, 489 U.S. 46, 81 \(1989\)](#) (discussing "nonobscene yet sexually explicit" materials). Furthermore, the "time, place, and manner" doctrine applies to protected speech. Thus, activities which Justice Frankfurter would have accorded no First Amendment protection are now apparently considered protected, but not beyond all regulation.

FN[FN151]. Indeed, despite enacting a tougher anti-noise ordinance, the mayor of Larchmont felt that it was necessary to write "to seven manufacturers urging them to devote research efforts to developing garden equipment

combining efficiency with noise abatement." Brenner, *supra* note 137.

FN[FN152]. Kramon, *supra* note 87, at 95.

FN[FN153]. [42 U.S.C. ss 4901- 4918 \(1988 & Supp. V 1993\)](#). For legislative debate over the Act, see 118 Cong. Rec. 37,312-19 (1972); 118 Cong. Rec. 35,867- 93 (1972); 118 Cong. Rec. 35,409 -20 (1972); 118 Cong. Rec. 6,035 - 65 (1972).

FN[FN154]. [42 U.S.C. ss 4904 - 4905](#).

FN[FN155]. *Id.* s 4907.

FN[FN156]. *Id.* s 4911. The Act authorizes lawsuits against the Administrator of the EPA or the Federal Aviation Administration ("FAA") for violation of nondiscretionary statutory requirements, or against any other person in violation of federal noise regulations. Due to the discretionary nature of much of the Act, lawsuits brought against federal agencies pursuant to this provision may fall upon deaf ears. See, e.g., [DiPerri v. FAA, 671 F.2d 54 \(1st Cir. 1982\)](#) (affirming the dismissal of a suit where the FAA had exercised its discretionary authority in not promulgating airport noise regulations); [Alvarado v. Memphis-Shelby County Airport Auth., 765 F. Supp. 422 \(W.D. Tenn. 1991\)](#) (dismissing a claim that questioned the FAA's approval of a local airport's "noise compatibility" plan, where that approval was discretionary in nature). But see [Illinois v. Coleman, 645 F. Supp. 1 \(D.D.C. 1985\)](#) (discussing the court's prior Memorandum Order of March 11, 1981, in a case brought by several state attorneys general, directing the FAA either to adopt airport noise regulations that were proposed by EPA, or publish their reasons for refusing).

It remains unclear whether the Act's citizen suit provides a remedy to those who have suffered hearing loss as a result of violations of federal noise regulations. See [Kelley v. Union Pac. R.R., 1989 U.S. Dist. LEXIS 17694, at \\*2 \(E.D. Mo. July 14, 1989\)](#) (despite striking a suit by an employee against an employer due to a failure to provide timely notice, the court stated its hesitance to find that the Noise Control Act's citizen suit does not extend a cause of action to employees whose hearing has been damaged at work).

FN[FN157]. [42 U.S.C. s 4910 \(1988\)](#).

FN[FN158]. *Id.* [s 4905 \(e\)\(1\)](#); see also *id.* s 4916(c) (preempting state noise regulation of surface carriers). Some courts have carefully limited the scope of the federal preemption of local anti-noise laws. See, e.g., [Baltimore & O.R.R. v. Oberly, 837 F.2d 108 \(3d Cir. 1988\)](#) (holding that Delaware railroad noise control laws are not preempted by the federal statute where EPA's regulations are incomplete).

FN[FN159]. See [Implementation of the Noise Control Act, 57 Fed. Reg. 30,110 \(1992\)](#); see also Shapiro, *supra* note 118, at 1-2.

FN[FN160]. Shapiro, *supra* note 11, at 74 ("[T]his is believed to be the only instance in which Congress has eliminated the funding for a program that preempts state and local actions without also ending the statutory authorization for that program or addressing its preemptive consequences."); Shapiro, *supra* note 118, at 38 ("The decline in local noise abatement activity also may be attributed to federal preemption uncertainties, which have been exacerbated by the ONAC's [Office of Noise Abatement and Control's] demise.").

FN[FN161]. [Implementation of the Noise Control Act, 57 Fed. Reg. 30,110 \(1992\)](#).

FN[FN162]. 137 Cong. Rec. E3712-13 (daily ed. Nov. 5, 1991) (statement of Rep. Schroeder regarding the Office of Noise Abatement and Control Establishment Act of 1991); see also Shapiro, *supra* note 11, at 74.

FN[FN163]. Shapiro, supra note 118, at 13 -14.

FN[FN164]. Medine, supra note 16, at 334 ("Unfortunately, the noise control of existing trucks and railroads has been purely cosmetic with no real benefit to the public.").

FN[FN165]. Id. at 336.

FN[FN166]. See James Paul Kimmel, Jr., [Disclosing the Environmental Impact of Human Activities: How a Federal Pollution Control Program Based on Individual Decision Making and Consumer Demand Might Accomplish the Environmental Goals of the 1970s in the 1990s](#), 138 U. Pa. L. Rev. 505 (1989) (arguing for decentralized environmental regulations based upon the labeling of products with an Environmental Impact Index number); Josh Feltman, Disclosure Laws Can Regulate Gently, N.Y. Times, Oct. 3, 1993, s 3, at 9 (discussing how California's chemical disclosure laws have prompted manufacturers to remove various toxic substances from their products).

FN[FN167]. Medine, supra note 16, at 312.

FN[FN168]. Shapiro, supra note 118, at 6, 34; see also Brendan Daly, Opening Address, in Proceedings: Noise and the Environment 5 (1980) (Ir.) ("Of all the forms of pollution, I think noise pollution receives the least attention ....").

FN[FN169]. Shapiro, supra note 118, at 50 n.294.

FN[FN170]. Although a thorough examination of various market-based approaches to noise pollution is beyond the scope of this Note, several options are worth mentioning.

Imposing noise charges or taxes against the manufacturers of noisy products might be one such alternative. Shapiro, supra note 118, at 51-53. The revenues from these taxes could be used to "finance noise protection measures" and noise abatement research. Ariel Alexandre, Keynote Address, in Proceedings: Noise and the Environment, supra note 168, at 23. The granting of tax concessions to manufacturers whose products emit less noise than the law allows would provide an incentive for the production of still quieter products. See Organisation for Economic Cooperation & Development, Fighting Noise: Strengthening Noise Abatement Policies 73 (1986).

In theory, emissions-trading schemes might present yet another approach to regulating manufacturers of noisy products. These schemes result in the transfer of funds from polluters to nonpolluters, and thus act in a similar manner to a policy of noise taxes and concessions. The 1990 Clean Air Act uses a trading system to regulate sulfur dioxide emissions from coal-burning plants. [42 U.S.C. s 7651b \(Supp. V 1993\)](#).

Pollution-trading systems work by having the government set a total pollution output goal for the nation, which is then apportioned to individual polluters. Those who produce less pollution than their apportioned share may sell their balance to those who exceed their apportionment. This approach, in theory, would directly reward manufacturers of quiet products, and give them an incentive to make still quieter products. Manufacturers of noisy products would have to pay. It would also provide manufacturers with greater flexibility regarding decisions about how to comply with federal noise regulations. See The Clean Air Act Amendments: BNA's Comprehensive Analysis of the New Law 166 - 68 (1991).

The architects of a noise emissions-trading scheme would have to jump several hurdles, including how to quantify the total noise emissions from products in the United States and how to apportion noise allowances to manufacturers. There would also have to be an assurance that products whose noise outputs differ by significant scales of magnitude are placed in separate trading markets or are appropriately regulated through a ceiling on emissions trading. A small reduction in the noise produced by a railway, or by a fleet of supersonic jets, might "pay" for the increased noise of numerous household appliances. A trading ceiling might also solve the potential problem, inherent in any emissions trading scheme, of one locality bearing the pollution burden that many others have collectively avoided. However, a ceiling would limit the benefits of a free market system.

Like manufacturers, the users of noisy products might also be assessed charges. See, e.g., Brautigam, supra note 61, at 432- 42 (arguing for a municipal system of metered noise fees for car horn and alarm users). On a practical level, all noise charge schemes present difficulties and costs related to the accurate monitoring of transient noise emissions. What assurance is there that noise polluters will not simply "turn back" their noise odometers? These

difficulties seem at least as vexing as some of the evidentiary problems that might arise in a tort-based approach to noise pollution. Furthermore, even if moderately successful in the aggregate, these schemes do not provide a means of compensating individual noise victims.

FN[FN171]. Ronald Dworkin, *Taking Rights Seriously* 98 (1978). Dworkin also comments that: It is argued, first, that almost every rule developed by judges in such disparate fields as tort, contract and property can be shown to serve the collective goal of making resource allocation more efficient. It is argued, second, that in certain cases judges explicitly base their decisions on economic policy. Neither of these claims subverts the rights thesis. *Id.* at 97.

FN[FN172]. Oliver W. Holmes, Jr., *The Common Law* 1 (Dover Paperback ed., 1991) (1881).

FN[FN173]. Thus, "it is unwanted noise from radios and other devices such as tape recorders -- whether the hand-carried variety or stereo systems in homes, apartments and cars -- that seems to exasperate people the most." Amy H. Hearth, *Town Responds to Growing Noise Complaints*, *N.Y. Times*, Apr. 23, 1989, s 12WC (Westchester), at 1; see also Robert Bedlow, *Neighbours' Noise Triples in 10 Years*, *Daily Telegraph (U.K.)*, Sept. 5, 1994, at 7 (observing that, in Britain, although "excessive noise from traffic, industrial and building sites is 'largely tolerated', the increasing sound from television sets, record players and radios is becoming less acceptable").

FN[FN174]. See *infra* part IV.B.4 for a discussion of the causal relationship of the manufacturer to the nuisance.

FN[FN175]. One car stereo speaker manufacturer boasts that their "speakers are crafted from a unique blend of materials designed to give you .... plenty of pavement shaking bass." *Stereo Rev.*, Aug. 1994, at back cover (advertisement).

FN[FN176]. See *infra* notes 252-55 and accompanying text.

FN[FN177]. Shapiro, *supra* note 11, at 77.

FN[FN178]. Consumers may not initially be aware of the potential addictive quality of stereos. When a loud stereo produces hearing impairment, the user may feel compelled to increase the volume further, thereby producing more hearing loss, and more environmental noise pollution. "Numb from the constant din, increasingly desensitized to sound, your neighbor is upping his wattage and lowering the quality of your life." *McCampbell*, *supra* note 5, at 36. Furthermore, the overall proliferation of noise-emitting products may create a "need to turn the volume up to compete with the background noise." *Godlee*, *supra* note 22, at 111.

FN[FN179]. [Restatement \(Second\) Of Torts s 402A](#) cmt. k (1965) ("There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. An outstanding example is the vaccine for the Pasteur treatment of rabies .... Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified .... The seller of such products ... is not to be held to strict liability ...."). It should be noted that comment k only discusses the unsafe nature of the product with regard to its user, and not with regard to a "bystander."

FN[FN180]. For multicomponent products, the manufacturer might be defined as either the maker of the noisy part of the product, or as the company that controls decisions regarding overall design and assembly of the product. For treatment of a similar problem under the 1972 Federal Noise Control Act, see [Chrysler Corp. v. EPA, 600 F.2d 904, 914 -18 \(D.C. Cir. 1979\)](#) (discussing the impropriety of an EPA regulation that holds earlier-stage manufacturers responsible for noise-emitting attributes added to the product by later-stage manufacturers). With regard to component stereo systems, one could envision an approach that apportions responsibility between the manufacturers of speakers and the manufacturers of electronic circuitry that allows for enhanced sound volume.

FN[FN181]. Although beyond the scope of this Note, the tort might be extended to other traditional causes of nuisance, like bright light or noxious odors. Even electromagnetic fields that cause disturbance, but not physical harm, might be amenable to the tort. Cf. Roy W. Krieger, *On the Line*, A.B.A. J. , Jan. 1994, at 40 (discussing potential electromagnetic field tort litigation where actual physical harm results); Kristopher D. Brown, Note, [Electromagnetic Field Injury Claims: Judicial Reaction to an Emerging Public-Health Issue](#), 72 B.U. L. Rev. 325 (1992) (discussing nuisance and other legal remedies for physical harm and "cancerphobia" claims resulting from exposure to electromagnetic fields); [Gossett v. Southern Ry.](#), 89 S.W. 737, 738 (Tenn. 1905) (a noise nuisance case citing to [Cumberland Tel. Co. v. United Elec. Ry.](#), 29 S.W. 104 (Tenn. 1894), which dealt with an electrical discharge into a neighbor's land).

FN[FN182]. To the extent that one views negligence as a weighing of the risks and benefits of an activity, see *infra* note 221, these products may undergo a second risk-utility analysis at this point. Under this view the question would be whether the product's benefits could have been had, at reasonable cost, without the noise nuisance. Also, a negligence per se theory of product-nuisance might be advanced by showing that the product emitted noise levels that violated a local anti-noise statute, or that it was sold in violation of a law prohibiting the sale of such a product. It should be noted that this scheme differs from current law by making strict liability and negligence mutually exclusive causes of action for different categories of products. [Restatement \(Second\) of Torts s 402A](#) cmt. a (1965) (stating that the rule of strict liability "is not exclusive, and does not preclude liability based upon the alternative ground of negligence").

FN[FN183]. See *infra* part V.B for a discussion of defenses.

FN[FN184]. See, e.g., Holmes , *supra* note 172, at 144 (expressing the view that "the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms."); see also [Stanley Ingber, Rethinking Intangible Injuries: A Focus on Remedy](#), 73 Cal. L. Rev. 772, 787 (1985) (discussing, in contrast to Holmes, the element of moral blameworthiness in tort).

FN[FN185]. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. Chi. L. Rev. 69, 90 (1975) (noting that "tort law does not serve a single goal," and can simultaneously serve compensation and deterrence goals).

FN[FN186]. See *supra* part II.C for a discussion of this "open space" in current tort law.

FN[FN187]. Benjamin N. Cardozo , *The Nature of the Judicial Process* 113 (1921).

FN[FN188]. *Id.* at 115 ("The law which is the resulting product is not found, but made.").

FN[FN189]. See Winston S. Churchill , *A History of the English Speaking Peoples: The New World* 155 (Dorset Press 1990) (1956) (noting that Chief Justice Coke of 17th century England "was reluctant to admit that law could be made, or even changed. It existed already, merely awaiting revelation and exposition.").

FN[FN190]. *Environmental Regulation: Law, Science, and Policy* 87- 88 (Robert V. Percival et al. eds., 1992).

FN[FN191]. See *infra* notes 252-55 and accompanying text for a discussion of the proposed tort's approach to damages.

FN[FN192]. For instance, in an attempt to avoid liability, stereo makers might limit total volume output, or include an automatic mechanism by which a stereo reduces its own volume after a certain period of time. See *supra* note

105 and accompanying text, discussing the definition of a product defect.

FN[FN193]. See [infra](#) note 260 and accompanying text.

FN[FN194]. Shapiro, [supra](#) note 118, at 13 -14 (noting that the EPA never promulgated noise labeling regulations).

FN[FN195]. See Calabresi, [supra](#) note 185, at 73 -74 ("If spreading of injury losses were the only goal of tort law, there would be no point at all in requiring, as a prerequisite to liability, a causal link [or a but for cause]....").

FN[FN196]. Why not have the makers of all noisy products contribute to a fund for the victims of noise? Why not hold the manufacturers of noisy trucks liable to the victims of noisy stereos? Why not have the makers of drugs that cause hearing loss compensate the victims of noisy stereos? Or even more radically, why not have those who live in quiet houses pay victims of noise?

FN[FN197]. Cf. Calabresi, [supra](#) note 185, at 81 ("[T]he element of foreseeability in the requirement of proximate cause is directly relevant to collective deterrence. What ... is the use of trying to penalize or deter collectively those acts or activities whose propensity for harm cannot be known at the time the action takes place?").

FN[FN198]. [McFarlane v. City of Niagara Falls](#), 160 N.E. 391, 391 (N.Y. 1928). Of course defining the "circumstances" or "danger requirements" that trigger strict liability can be complex, and may involve the use of risk- utility concepts in ways that mimic negligence analysis. See also [Frank v. Environmental Sanitation Management, Inc.](#), 687 S.W.2d 876, 880 (Mo. 1985) ("Nuisance is a condition and does not depend on the degree of care used ...."); [Gossett v. Southern Ry.](#), 89 S.W. 737, 739 (Tenn. 1905) (noting that "the carrying on of an employment so dangerous near the [residential] land of another, thereby keeping him in continual danger and alarm, is a nuisance per se ... [for which the victim] may recover, irrespective of the question of diligence or negligence in carrying on the dangerous work").

FN[FN199]. See, e.g., [Phipps v. General Motors Corp.](#), 363 A.2d 955, 958 (Md. 1976) (quoting [Greenman v. Yuba Power Prods., Inc.](#), 377 P.2d 897, 901 (Cal. 1963), for the proposition that the costs of defective products should be "borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves"). "Another reason advanced is that a consumer relies upon the seller in expecting that a product is safe for the uses for which it has been marketed, and that this expectation is better fulfilled by the theory of strict liability than traditional negligence or warranty theories." [Phipps](#), 363 A.2d at 958 (citing to [Markle v. Mulholland's, Inc.](#), 509 P.2d 529, 532-34 (Or. 1973)); cf. Calabresi, [supra](#) note 185, at 84 (claiming that one of tort law's goals is "market deterrence," the "object [of which] is to place the incentives for choosing between accident costs and their avoidance on those actors who, as a practical matter, we believe will choose most effectively").

FN[FN200]. In [Elmore v. American Motors Corp.](#), 451 P.2d 84, 89 (Cal. 1969), the California Supreme Court observed that:

If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, where as the bystander ordinarily has no such opportunities. See also P.G. Reiter, Annotation, [Products Liability: Extension of Strict Liability in Tort to Permit Recovery by a Third Person Who Was Neither a Purchaser nor User of Product](#), 33 A.L.R.3d 415 (1970) (discussing strict products liability suits by bystanders).

FN[FN201]. See [Phipps](#), 363 A.2d at 958 (citing [Seely v. White Motor Co.](#), 403 P.2d 145, 151 (1965), for the proposition that "imposing strict liability on manufacturers for defective products is equitable because it shifts the risk of loss to those better able financially to bear the loss"); cf. Kramon, [supra](#) note 87, at 89 n.42 (noting that tort law, in general, "is frequently discussed as a means to internalize market externalities. Noise may be seen as such an externality to the extent that it burdens those who are non- beneficiaries of the noisemaking activity.").

FN[FN202]. See supra notes 83 - 84 and accompanying text.

FN[FN203]. See, e.g., [Restatement \(Second\) of Torts s 402A\(1\) \(1965\)](#) (requiring that the product be "unreasonably dangerous"). Subtle differences exist between strict liability standards that are triggered by unreasonable danger, and those triggered by abnormal danger. Unreasonable dangers may become reasonable, thereby vanquishing strict liability, where the product is of high utility, like a vaccine. *Id.* cmt... k. Thus, unreasonable danger standards incorporate a risk-utility or negligence theory. See *infra* note 221. The "abnormal danger" requirement has been avoided in products liability cases. See [Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 684 \(W. Va. 1979\)](#) (refusing to apply a "Rylands v. Fletcher" abnormal danger theory in a strict products liability case). On one hand, the formal abnormal danger standard seems to set a higher threshold requirement for imposing strict liability than the unreasonable danger standard. However, as the Morningstar court noted, if the abnormal danger standard were adopted in the products liability context, a showing that the suspect product was abnormally dangerous would obviate the need to prove defect or negligence. *Id.* In this respect the abnormal danger standard appears to be a more severe theory of liability than the unreasonable danger standard.

FN[FN204]. [Morningstar, 253 S.E.2d at 684](#) (stating the court's refusal to require that a defective product also be "unreasonably dangerous" before imposing strict products liability). The Morningstar court noted the qualified similarity of its approach to that taken in the leading case of [Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 \(Cal. 1963\)](#) and its divergence from the approach adopted by the Restatement (Second) of Torts. Cf. [Azzarello v. Black Bros. Co., 391 A.2d 1020, 1025 \(Pa. 1978\)](#) ("It must be understood that the words, 'unreasonably dangerous' have no independent significance and merely represent a label to be used where it is determined [by the court] that the risk of loss should be placed upon the supplier.").

FN[FN205]. See, e.g., [Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140, 153 \(N.J. 1979\)](#) ("The trial court must determine [in a products liability case] whether the duty of strict liability exists. In doing so, it should weigh all pertinent risk/utility factors."); cf. [Johansen v. Makita U.S.A., Inc., 607 A.2d 637, 645 \(N.J. 1992\)](#) (combining risk-utility, unreasonableness, and defect analyses, the court observed that "risk-utility analysis is based on the premise that a product is defective if it is [unreasonably] dangerous when marketed").

FN[FN206]. In fact, it is not even clear that courts regularly adhere to a rigid definition of "abnormal danger." Certain definitions of the phrase speak the language of risk-utility and unreasonableness. See [T & E Indus. v. Safety Light Corp., 587 A.2d 1249, 1259 \(N.J. 1991\)](#) (explaining that, according to the [Restatement \(Second\) of Torts ss 519 -520](#), abnormal danger is to be considered, *inter alia*, in light of the "existence of a high degree of risk of some harm," "the appropriateness of the activity for the location, and the value of the activity to the community").

FN[FN207]. See, e.g., [Suter, 406 A.2d at 153](#) (discussing strict liability, the court stated that manufacturers have an "obligation to distribute products which are reasonably fit, suitable and safe for their intended or foreseeable purposes") (emphasis added). The [Restatement \(Second\) of Torts s 822 \(a\) \(1965\)](#) discusses the "unreasonableness" of an intentional nuisance. In contrast, this Note discusses the "unreasonableness" of a strict liability product-nuisance. However, like the Restatement ss 828 - 831, this Note defines "unreasonableness" in relation to various risk-utility factors.

FN[FN208]. [317 N.W.2d 155 \(Wis. Ct. App. 1982\)](#) (dealing with a permanent nuisance from an airport). Although issues surrounding airplane and airport noise often involve questions of federal preemption of state noise laws, a subsequent opinion from the Krueger case held that state common law actions for private nuisance damages are not preempted. See [Krueger v. Mitchell, 332 N.W.2d 733, 737 \(Wis. 1983\)](#).

FN[FN209]. [Krueger, 317 N.W.2d at 158](#) ("It may be reasonable to continue an important activity if payment is made for the harm it is causing but unreasonable to continue it without pay.").

FN[FN210]. William L. Prosser et al., *Cases and Materials on Torts* 673 (8th ed. 1988) (edited version of case).

FN[FN211]. See, e.g., [Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666, 684 \(W. Va. 1979\)](#) (refusing to find a product "inherently dangerous ... under the Rylands v. Fletcher Doctrine" and observing that the "essential characteristic [of the doctrine] is that the activity or object is abnormally or exceptionally dangerous"); see also [Christine M. Beggs, Comment, As Time Goes by: The Effect of Knowledge and the Passage of Time on the Abnormally Dangerous Activity Doctrine, 21 Hofstra L. Rev. 205, 208 \(1992\)](#) (observing that "[t]he 'abnormally dangerous' activity doctrine evolved from the landmark case, Rylands v. Fletcher").

FN[FN212]. See [T & E Indus. v. Safety Light Corp., 587 A.2d 1249, 1257 \(N.J. 1991\)](#) (observing that after Rylands, "courts more readily recognized that a defendant who engages in unduly-dangerous or geographically-inappropriate activities should be held liable to others for damages flowing from that activity") (emphasis added).

FN[FN213]. Prosser et al. , supra note 210, at 674.

FN[FN214]. Id. at 675.

FN[FN215]. Cf. [T & E Indus., 587 A.2d at 1257](#) ("The [ Rylands] rule applied despite the absence of an actual invasion directly resulting from a defendant's act (trespass) and continual interference with a plaintiff 's property interest (nuisance).").

FN[FN216]. Prosser et al. , supra note 210, at 677.

FN[FN217]. Id. at 678 n.5; see also supra note 88; cf. [Foster v. Preston Mill Co., 268 P.2d 645, 647 \(Wash. 1954\)](#) (distinguishing the "ultrahazardous" nature of blasting where it directly affects neighboring land from the nonhazardous nature of the same activity when it indirectly affects mink over two miles away).

FN[FN218]. See supra note 200 and accompanying text.

FN[FN219]. See [MacPherson v... Buick Motors Co., 111 N.E. 1050 \(N.Y. 1916\)](#) (Cardozo, J.) (holding that products liability for negligence flows from foreseeable dangers); see also [Palsgraf v. Long Island R.R. Co., 162 N.E. 99 \(N.Y. 1928\)](#) (Cardozo, C.J.) (arguing, somewhat in contradiction of MacPherson, that liability for negligence exists only where there is a duty to the particular, foreseeable, injured party). Judge Cardozo noted that the bounds of proximate cause may be extended to encompass unforeseeable injuries and parties when the act is intentional. Id. at 100 - 01. In dissent, Judge Andrews questioned why the "proximate consequences" of an act that "has unreasonably threatened the safety of others" should be limited, in negligence cases, to those particular people thought to be within the "radius of danger." [Id. at 102.](#)

FN[FN220]. Arguably, strict products liability doctrine has already incorporated risk-utility analysis to arrive at a foreseeability standard for determining proximate cause. In [Jurado v. Western Gear Works, 619 A.2d 1312, 1317 \(N.J. 1993\)](#), the court stated that, "to succeed under a strict- liability design-defect theory, a plaintiff must prove that ... the defect caused the injury to a reasonably foreseeable user.... [Furthermore, the] decision whether a product is defective ... reflects a policy judgment under a risk-utility analysis." The Jurado court's approach parallels this Note's theory of proximate cause in strict liability cases. Where an injurious product is judged on risk-utility grounds to be defective and, thus, deserving of manufacturer liability, the question of proximate cause is judged under a foreseeability standard. But see [Ladner v. Mercedes Benz, 630 A.2d 308 \(N.J. Super. Ct. App. Div. 1993\)](#) (distinguishing Jurado and claiming that the question of foreseeability of the misuse comes before the question of product defect), cert. denied, [639 A.2d 301 \(N.J. 1994\)](#). In Ladner, the plaintiff was injured while attempting to stop her Mercedes from rolling down a hill after she failed to engage the parking brake and place the car in park. The lower appellate court claimed that despite the conceded foreseeability of the misuse, a defendant will have a comparative negligence defense where the plaintiff "knowingly and voluntarily encounters that risk." Id. at 315. Nonetheless, the user cannot knowingly and voluntarily encounter a risk on the behalf of a bystander. This Note

argues that manufacturers have a heightened duty to safeguard bystanders from the foreseeable misuses of the manufacturers' products.

FN[FN221]. See, e.g., [United States v. Carroll Towing Inc.](#), 159 F.2d 169, 173 (2d Cir. 1947) (Learned Hand, J.) (defining negligence in terms of an equation that balanced the risks and benefits of an activity); [Malin v. Union Carbide Corp.](#), 530 A.2d 794, 797 (N.J. 1987) ("To the extent that the 'risk-utility analysis' implicates the reasonableness of the manufacturer's conduct, strict liability law continues to manifest that part of its heritage attributable to the law of negligence."); see also [James A. Henderson, Jr. & Aaron D. Twerski, Stargazing: The Future of American Products Liability Law](#), 66 N.Y.U. L. Rev. 1332, 1334 (1991) (predicting that in certain areas of products liability law, risk-utility theory will become predominant, and thus negligence will be "supreme").

FN[FN222]. See [Jurado](#), 619 A.2d at 1318 (noting that "product misuse contemplates two kinds of conduct. One is the use of a product for an improper purpose.... The other kind of misuse concerns the manner in which the plaintiff used the product.").

FN[FN223]. See, e.g., [Derdiarian v. Felix Contracting Corp.](#), 414 N.E.2d 666, 670 (N.Y. 1980) ("Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed.").

FN[FN224]. *Id.*

FN[FN225]. See, e.g., [Amatulli v. Delhi Constr. Corp.](#), 571 N.E.2d 645, 649 (N.Y. 1991) (finding a superseding cause and denying strict products liability against a swimming pool manufacturer). The Amatulli court stated that, "[i]nstalling the pool in the ground and surrounding it with a deck transformed its configuration in such manner as to obscure its four-foot depth, which would have been readily apparent as a warning against diving had the pool been installed above ground. Thus this transformation of the pool's configuration created a new potential danger not attributable to the manufacturer or the pool's design." *Id.*; see also [Bridges v. Kentucky Stone Co.](#), 425 N.E.2d 125 (Ind. 1981) (finding that theft and subsequent intentional use of dynamite three weeks later and over one hundred miles away was a superseding cause that relieved the original possessors of the dynamite from strict liability based on a presumption of negligent storage). But cf. [Suvada v. White Motor Co.](#), 201 N.E.2d 313, 320 (Ill. App. Ct. 1964) (holding defendant brake manufacturers liable to the plaintiff for injuries resulting from brake failure, despite plaintiff's failure to have brakes inspected), *aff'd*, 210 N.E.2d 182 (1965). Suvada was apparently decided on a negligence theory, although elements of strict liability theory are also present.

FN[FN226]. [619 A.2d 1312 \(N...J. 1993\)](#).

FN[FN227]. *Id.* at 1317 (citations omitted).

FN[FN228]. See *infra* part V.B (defense #4).

FN[FN229]. [261 F. Supp. 134 \(S.D. Ind. 1966\)](#), *aff'd*, [384 F.2d 802 \(7th Cir. 1967\)](#), cert. denied, [390 U.S. 945 \(1968\)](#).

FN[FN230]. *Id.* at 135 (stating that "the possible harm to be anticipated (more accidents and more severe accidents) cannot be predicted to happen in any certain way or at any certain speed").

FN[FN231]. [359 F.2d 822 \(7th Cir.\)](#), cert. denied, [385 U.S. 836 \(1966\)](#).

FN[FN232]. [Schemel](#), 261 F. Supp. at 135.

FN[FN233]. [Jurado v. Western Gear Works, 619 A.2d 1312, 1318 \(N.J. 1993\)](#). The Jurado court went on to say that "[i]n some situations ... the issue of proximate cause is predetermined by the finding that the product is defective solely because of the manufacturer's failure to protect against a foreseeable misuse." [Id. at 1319](#); see also [Back v. Wickes Corp., 378 N.E.2d 964, 967- 69 \(Mass. 1978\)](#) (holding that manufacturers do not have a complete defense resulting from consumer misuse, but must be held accountable for injury resulting from foreseeable misuse). But see [Ladner v. Mercedes Benz, 630 A.2d 308, 317 \(N.J. Super. Ct. App. Div. 1993\)](#) (distinguishing Jurado), cert. denied, [639 A.2d 301 \(N.J. 1994\)](#). The Jurado court apparently did differ from the Massachusetts court in one regard, stating that the "absence of misuse is part of the plaintiff 's case. Misuse is not an affirmative defense." [Jurado, 619 A.2d at 1317](#).

FN[FN234]. See, e.g., [Wood v. General Motors Corp., 865 F.2d 395 \(1st Cir. 1988\)](#) (relying on federal preemption to deny state tort liability against General Motors for failing to install airbags, the court, nonetheless, explicitly acknowledged the vast expansion of design defect liability since the Evans v. General Motors Corp. case), cert. denied, [494 U.S. 1065 \(1990\)](#).

FN[FN235]. Nonetheless, some loud uses of stereos may be illegal. Furthermore, it is not clear, as a doctrinal matter, that the presence of illegal intervening acts, even serious acts, should always supersede or preclude liability against prior actors. Would a terrorist's use of a nuclear device obliterate the responsibility of those who smuggled the nuclear fuel, or negligently allowed it to be smuggled?

FN[FN236]. This distinction seems unsatisfactory, however, because the use of automobiles involves high risks, as well as high utility.

FN[FN237]. [Back, 378 N.E.2d at 969](#); cf. [Restatement \(Second\) of Torts ss 388, 389 \(1965\)](#) (discussing the liability of a supplier of a product, under a negligence standard, when he knows that the product is dangerous for the use for "which it is supplied" or for "a use which the supplier should expect it to be put").

FN[FN238]. The lower harm requirement is arguably justified by the low utility of the product and the recognition of the right to domestic tranquility.

FN[FN239]. See supra note 105 and accompanying text.

FN[FN240]. However, viewed in light of the parallels between risk-utility and negligence theories, see supra note 221, the proposed tort arguably imposes a modified negligence standard.

FN[FN241]. See, e.g., Brautigam, supra note 61, at 420 -23 (discounting the use of products liability theories as a means of attacking unwanted noise).

FN[FN242]. See infra note 252 and accompanying text.

FN[FN243]. Under the proposed scheme, a single stereo that disturbs an entire neighborhood for even a brief period of time could produce significant damage awards to each of the disturbed property dwellers.

FN[FN244]. See generally [Restatement \(Second\) of Torts s 652A \(1965\)](#) (discussing the intentional tort of intrusion upon seclusion, which can include persistently hounding someone or prying into their private affairs).

FN[FN245]. See, e.g., [Olmstead v. United States, 277 U.S. 438, 478 \(1928\)](#) (Brandeis, J., dissenting) (noting that the

right to be let alone is "the most comprehensive of rights and the right most valued by civilized men"), overruled by [Katz v. United States, 389 U.S. 347 \(1967\)](#); see also [Nader v. General Motors Corp., 298 N.Y.S.2d 137, 144 \(App. Div. 1969\)](#), aff'd [255 N.E.2d 765 \(1970\)](#).

FN[FN246]. See supra notes 62- 65 and accompanying text.

FN[FN247]. See, e.g., Peter Marks, Street Crackdown's Aim: Turn Down That Stereo, N.Y. Times , June 13, 1993, at 39 (discussing powerful car stereos that keep entire New York neighborhoods awake at night). Perhaps the installers of car stereos should also be liable under a product-nuisance theory.

FN[FN248]. Holmes , supra note 172, at 144.

FN[FN249]. Cf. Rodgers , supra note 117, at 573 -74 (discussing Chicago's ordinance "prohibiting the selling or leasing of a wide variety of equipment not meeting the noise emission standards"). Instead of an overall ban, the court in a product-nuisance case might order the manufacturer to "buy back" the particular offending product from the plaintiff 's neighbor. However, this approach would not compensate the plaintiff for harm already experienced, or provide the manufacturer with a strong incentive to engineer a quieter product.

FN[FN250]. See, e.g., Ingber, supra note 184, at 772 (1985) (stating that critics are justified in questioning, "the tort system's method of assessing and compensating intangible injuries"). With regard to "property damage situations," Ingber notes that "courts largely have denied recovery for mental distress caused by unintentional injury to either real or personal property.... However, when the injury to property is malicious -- intentionally or fraudulently caused -- mental suffering is allowed as damages." Id. at 776 n.15 (citations omitted); see also Kelman, supra note 61, at 580 (discussing how "it is simply not possible" to identify the causes of a tort victim's anxiety nor "to come up with a workable system to apportion damages on the basis of a hypothesis about risk-of-anxiety shifts").

FN[FN251]. Evidence of emotional distress, however, may be relevant to proving "significant disturbance." Conversely, it may also be relevant to proving that the plaintiff is not a residential dweller of "reasonable" sensitivities.

FN[FN252]. The use of multiple damage awards is not unprecedented in the law. For example, the antitrust laws provide for treble damages. [15 U.S.C. s 15 \(1988\)](#).

FN[FN253]. This might be assessed by examining mortgage costs, or the cost of renting a similar quiet property, over the period of time in question.

FN[FN254]. See supra note 190 and accompanying text.

FN[FN255]. Furthermore, the court might use a higher multiplier for less expensive property; thereby providing similar incentives for the protection of tranquility in the largest and smallest of castles. While people have no right to live in a large castle, they do, arguably, have as much of a right to be protected from residential noise as those who live in large castles.

FN[FN256]. Such cases might involve physical harm as well, and if so, might be coupled with a pure products liability action.

FN[FN257]. [Restatement \(Second\) of Torts s 840E](#) cmt. b (1965) ("[M]any nuisances are capable of apportionment among two or more persons who contribute to them.").

FN[FN258]. Standard nuisance law can be brought to bear against the consumer of the noisy product.

FN[FN259]. Turning a stereo up to full volume in the middle of the night, or using a product meant for outdoor rural use in the city might be examples of foreseeable misuse of products.

FN[FN260]. To allow the manufacturer's "warning label" to be a complete defense in circumstances of foreseeable consumer misuse would improperly limit the proposed tort, in such circumstances, to a mere labeling requirement.

FN[FN261]. See [Back v. Wickes Corp., 378 N.E.2d 964, 969 \(Mass. 1978\)](#) ("Clearly, a defendant is not liable for the consequences of the unforeseeable misuse of a product."); cf. supra notes 226 -37 and accompanying text.

FN[FN262]. Medine, supra note 16, at 311 (quoting Nobel Laureate Robert Koch).

FN[FN263]. Holmes , supra note 172, at 95.

FN[FN264]. [Saia v. New York, 334 U.S. 558, 565 \(1948\)](#) (Frankfurter, J., dissenting) (describing excess noise).

END OF DOCUMENT