

ANNOYANCETECH VIGILANTE  
TORTS AND POLICY

*Robert F. Blomquist\**

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*Abstract*

The twenty-first century has ushered in demand by some Americans for annoyancetech devices—novel electronic gadgets that secretly fend off, punish, or comment upon perceived antisocial and annoying behaviors of others. Manufacturers, marketers, and users of certain annoyancetech devices, however, face potential tort liability for personal and property damages suffered by the targets of this “revenge by gadget.” Federal, state, and local policymakers should start the process of coming to pragmatic terms with the troubling rise in the popularity of annoyancetech devices. This is an

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\* Professor of Law, Valparaiso University School of Law. My thanks go to my research assistants Bill Frederick and Ian Koven for excellent and helpful work.

area of social policy that cries out for thoughtful and creative legislative solutions.

## I. INTRODUCTION: FASCINATING NEW AND TROUBLING VIGILANTE TECHNOLOGIES

Technology is a two-edged sword: new machines, devices, processes, contrivances, appliances, tools, and gizmos can bring benefits; but there are negative consequences to boot.<sup>1</sup> Indeed, at one time the federal government funded an Office of Technology Assessment (“OTA”) (now defunct) that studied new and emerging technologies and issued reports on how to manage and regulate these cutting edge tools.<sup>2</sup>

It is fundamental, of course, that at least since the early years of the twentieth century, tort law has imposed liability on manufacturers, sellers, and users of products (whether new or old). Under theories of warranty, intentional torts, negligence, and strict liability (of one sort or the other), tort law has awarded damages to victims of technology gone awry or misused.<sup>3</sup>

A beguiling recent development, however, raises interesting legal

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<sup>1</sup> See generally EDWARD TENNER, *WHY THINGS BITE BACK: TECHNOLOGY AND THE REVENGE OF UNINTENDED CONSEQUENCES* (1996) (discussing several types of mechanical, chemical, biological, and medical technological innovations with negative unintended consequences); see also JOHN MCPHEE, *THE CONTROL OF NATURE* 265–71 (1989) (discussing the paradoxes and unanticipated impacts of human attempts to control the environment); Robert F. Blomquist, *Legal Perspectives on Cloning: Cloning Endangered Animal Species?*, 32 VAL. U. L. REV. 383, 410–16 (1998) (discussing the pros and cons of an aggressive policy of government cloning of endangered animal species).

<sup>2</sup> The Office of Technology Assessment was created in 1972 as an analytical arm of Congress. Wikipedia.org, Office of Technology Assessment, [http://en.wikipedia.org/wiki/Office\\_of\\_Technology\\_Assessment](http://en.wikipedia.org/wiki/Office_of_Technology_Assessment) (last visited Nov. 13, 2009). The basic purpose of the OTA was to help members of Congress better anticipate and plan for the consequences of technological change and to examine the intended and unintended ways that the new technologies affect people’s lives. *Id.* The OTA was eliminated by Congress in 1995. *Id.* At its most active period during the 1980s, OTA had “studies under way in nine program areas: energy and materials; industry, technology, and employment; international security and commerce; biological applications; food and renewable resources; health; communication, and information technologies; oceans and environment; and science, education, and transportation.” U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, *SERIOUS REDUCTION OF HAZARDOUS WASTE: FOR POLLUTION PREVENTION AND INDUSTRIAL EFFICIENCY* PUB. NO. OTA-INTE-317 (back inside cover) (1986) (on file with author).

<sup>3</sup> See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 899 (Cal. 1963) (recognizing an injured man’s claim for strict product liability predicated on a manufacturing defect that caused him personal injuries when he was using a power tool that his wife had purchased for him; the court concluded that the plaintiff should not be forced to seek recovery against the manufacturer under the less attractive law of warranties); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051–53 (N.Y. 1916) (holding, in an opinion authored by Judge Cardozo, that the plaintiff automobile driver could sue the manufacturer for negligence even though there was no privity of contract between the parties).

questions. In an August 2007 *Wall Street Journal* article, innocuously placed in the “Weekend Journal” section, readers learned of “the growing ranks of electronic vigilantes” who have started to deploy novel gadgetry to secretly fend off, punish, or comment upon annoying behavior of their fellow Americans.<sup>4</sup> “Thanks to the falling cost of microcontroller chips and the lure of easy online sales, inventors are turning out record numbers of gadgets. One growing subset of these inventions: products that help people neutralize antisocial behavior at the push of a button.”<sup>5</sup>

Who are the purveyors of these new anti-antisocial behavior contraptions? “The brains behind these devices range from entrepreneurs in suburban Los Angeles to graduate students at the Massachusetts Institute of Technology.”<sup>6</sup> Some examples are illuminating: (1) “A Tennessee company has created a \$50 device that shuts up other people’s dogs by answering their barks with an ultrasonic squeal that humans can’t hear,” and is deceptively inserted in a backyard birdhouse;<sup>7</sup> (2) “British inventors are exporting a new product for people who hate lousy drivers—it’s a luminescent screen that fits in a car’s rear window and, at the driver’s command, flashes one of five messages to other motorists” including “Back Off,” “Idiot,” “a sad face,” a happy face and—not yet widely disseminated, but demanded by some purchasers of the screen—“offensive hand gestures”;<sup>8</sup> (3) MIT’s Media Lab, which has coined the new word “annoyancetech” has developed a “No-Contact Jacket’ that, when activated with a controller, delivers a blast of electricity to anyone who touches the person wearing it”;<sup>9</sup> (4) the “Annoy-a-tron,” designed for simple revenge by allowing a user to hide the device under the desks of one’s enemies with the device

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<sup>4</sup> Jennifer Saranow, *Revenge by Gadget*, WALL ST. J., Aug. 17, 2007, at W1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* The product, known as the “Outdoor Bark Control Birdhouse” was developed “by accident.” Indeed:

Though the technology has been around for five years, the manufacturer, Radio Systems of Knoxville, Tenn., initially sold it as an indoor training tool for pet owners. But the company says it began getting requests from customers for an outdoor version that could be used on annoying neighborhood dogs. When a market analysis showed 60% of consumers would welcome a covert way to shut up somebody else’s canine, the company decided to proceed. . . . After flirting with fake rocks and footballs [to camouflage the device], the company settled on a somewhat unlikely design—a brightly painted Bavarian-style birdhouse.

*Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* “During a demonstration in Japan . . . [the device] drew interest from women who were eager to retaliate against gropers on the subway.” *Id.*

emitting “a loud, piercing little beep”;<sup>10</sup> (5) a specially revamped iPod which silences annoying FM radio stations in taxicabs;<sup>11</sup> (6) “TV-B-Gone,” “a \$20 handset that allows people to shut off loud televisions in public places like doctor’s offices and bars”;<sup>12</sup> (7) “cellphone [sic] jammers”;<sup>13</sup> (8) “the Mosquito,”—marketed by a firm called “Kids Be Gone”—which “emits high-frequency sounds particularly irritating to congregations of teenagers”;<sup>14</sup> and (9) an invention called the “I-Bomb’ that emits an electromagnetic pulse that disables all electronics in its range (a similar device was depicted in the movie ‘Ocean’s Eleven’)”<sup>15</sup> and that, for instance, could be used to shut down a neighbor playing loud music on her stereo.

Yet—apparently unexamined at this writing—the manufacturers, marketers, and users of certain annoyancetech devices face possible liability for various tort causes of action by those who are the

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<sup>10</sup> Revenge in the Form of the Annoy-a-tron, <http://www.coollest-gadgets.com/20070130/revenge-in-the-form-of-the-annoy-a-tron/> (last visited Nov. 13, 2009). According to this Web site:

Some people are just annoying and deserve to be messed with for whatever reason. . . . The Annoy-a-tron serves a simple purpose: to annoy someone or even a whole group of people. It’s extremely small [a little larger than a quarter] . . . and even has a built in magnet to help you hide it. Once in place, you can set your Annoy-a-tron to emit a 2 kHz, 12 kHz (this is the more cruel setting), or an alternating sound every few minutes. . . . Intervals range from 2 to 8 minutes; your target will never know when the next beep will come! Slowly but surely, you’ll defeat your enemy, or maybe the battery will just run out, but that’ll be a good 3–4 weeks.

*Id.*

<sup>11</sup> Saranow, *supra* note 4, at W1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; see also Mary Hanna, *Fighting Fire with Fire*, DAILY REV. (Hayward, Cal.), Aug. 22, 2007, available at 2007 WLNR 16385507 (“Gone are the days when we simply ask someone to turn down the volume [of music or a TV or dog] and he complies with an apology. We seem to find fighting excessive noise with gadgets to be safer than [sic] confronting people, what with the prevalence of Intermittent Explosive Disorder, which used to be called having a short fuse. What if you ask your neighbor to quiet his dog and he goes all postal on you? Next thing you know he’ll be training the pooch to jump the fence and attack you.”); *Robot Vigilante Homemade ‘Bum Bot’ Patrols Area near Atlanta Bar at Night*, AUGUSTA CHRON. (Ga.), Apr. 23, 2008, at B7 (describing an invention of a bar owner that patrols an Atlanta neighborhood and is controlled by the bar owner with a wireless remote control, the “Bum Bot” is equipped with bright red lights, a blazing spotlight, an infrared video camera, and a water cannon on the spinning turret on top, warning vagrants through a loudspeaker that they are trespassing); Arthur H. Rotstein, *Groups Use Camera to Keep Watchful Eye on Border*, ALAMEDA TIMES-STAR (Cal.), Apr. 19, 2008, available at 2008 WLNR 7366001 (describing border vigilante groups that watch the U.S. southern border with Mexico and make video recordings of suspects); Paige Wiser, *Annoyance Is Mother of Today’s Inventions*, CHI. SUN-TIMES, Mar. 2, 2008, at 17 (“The hottest area for inventors is known as ‘annoyancetech’—stealth gadgets for cranky people. Now, they like to be called ‘electronic vigilantes.’”).

intended or foreseeable targets of these evolving electronic vigilante technologies. My overarching purpose in the remainder of this very brief overview article is to sketch possible tort causes of action by plaintiffs harmed by annoyancetech devices and potential defenses to these annoyancetech torts. First, in Part II, various annoyancetech tort causes of action are discussed.<sup>16</sup> Then, in Part III, potential assorted annoyancetech tort defenses are analyzed.<sup>17</sup> Finally, in Part IV, public policy implications of annoyancetech manufacturing, marketing, and use are considered.<sup>18</sup>

## II. ANNOYANCETECH TORT CAUSES OF ACTION

We live in a world full of annoying behaviors. No doubt, from

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<sup>16</sup> See *infra* notes 19–39 and accompanying text.

<sup>17</sup> See *infra* notes 40–74 and accompanying text.

<sup>18</sup> See *infra* notes 75–102 and accompanying text. This article will bypass a discrete and growing area of electronic vigilantism—cyber-vigilantism involving computers. There are swelling reports of this emerging social trend. See, e.g., Jim Carlton, *Campaign '08: Gay-Marriage Backers Allege Web Mischief in California*, WALL ST. J., Oct. 31, 2008, at A8 (“Opponents of California’s proposed ban on gay marriage claim their Web site was shut down by a coordinated computer attack, amid rising tensions over one of the nation’s most controversial ballot measures” involving an electronic vigilante “denial of service” attack); *China’s Online Vigilantes: Virtual Carnivores*, ECONOMIST, Oct. 4, 2008, at 47 (describing “[h]uman-flesh searching” in China, also known as “crowdsourcing” in English-speaking countries, that involves posting personal information of those perceived to have done or said something wrong by “internet vigilantes”); B.J. Lee, *Death by Web Posts*, NEWSWEEK, Oct. 27, 2008, at 51 (reporting that an unsubstantiated rumor about a South Korean actress and singer, spread “among hundreds of thousands of chat-room users,” led the woman to hang herself from the stress); Sue Shellenbarger, *Cyberbully Alert: Web Sites Make It Easier to Flag Trouble*, WALL ST. J., Dec. 17, 2008, at D1 (describing how social networking sites have made it easier to report cyber-vigilantism involving computers). Legal scholars have addressed cyber-vigilantism in recent articles. See, e.g., Michael A. Fisher, *The Right to Spam? Regulating Electronic Junk Mail*, 23 COLUM.-VLA J.L. & ARTS 363, 399–400 (2000) (discussing anti-spamming vigilante revenge on the internet in reaction to cyber spamming); Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1377 (2008) (describing, among other phenomena, web-surfing vigilantes who seek embarrassing information about neighbors they want to chase out of town); Monica R. Shah, *The Case for a Statutory Suppression Remedy to Regulate Illegal Private Party Searches in Cyberspace*, 105 COLUM. L. REV. 250, 250–51 (2005) (describing vigilante computer hackers who gain access to an individual’s private information and use or disseminate this information); Richard Warner, *Spam and Beyond: Freedom, Efficiency, and the Regulation of E-mail Advertising*, 22 J. MARSHALL J. COMPUTER & INFO. L. 141, 142 (2003) (discussing “lewd and annoying electronic messages that can flood [computer] user mailboxes and cripple networks” and cause “a wicked backlash” including “vigilante action”). Moreover, this article will also bypass a newly-emerging technological vigilante trend—and accompanying potential tort liability—involving the manufacturing, marketing, and use of products by motorists to block government cameras that capture the license plate numbers of traffic offenders like photo-blocking clear-plastic print and Web sites, like Trapster.com, that allow the motorist to see and update a computerized map of government roadway cameras. See, e.g., William M. Bulkeley, *Get the Feeling You’re Being Watched? If You’re Driving, You Just Might Be*, WALL ST. J., Mar. 27, 2009, at A1 (discussing traffic cameras and motorist vigilante technology).

time to time, every human being annoys others. For the most part, tort law seeks to bypass trifles, bad manners, bothersome and pesky human behavior—at least if the behavior is unintentional, sporadic, and minor. But discerning what is a mere trifle, on the one hand, and what is tortious harm, on the other hand, can sometimes be difficult.

The term “tort”—derived from Latin roots meaning “twisted”—suggests that “tortious conduct is twisted conduct, conduct that departs from [social] norm[s].”<sup>19</sup> So, broadly speaking, “torts are traditionally associated with wrongdoing in some moral sense.”<sup>20</sup> Indeed, tort theorists have engaged in a dynamic, ongoing debate over the past half-century between those who espouse economic efficiency grounds of tort liability, on the one hand,<sup>21</sup> and others who have argued “that the foundations of tort law rest[] more firmly on moral ground.”<sup>22</sup> As Professor Dan Dobbs cogently notes, “[i]n the great majority of cases today, tort liability is grounded in the conclusion that the wrongdoer was *at fault* in a legally recognizable way.”<sup>23</sup>

Legal fault, in the law of torts, is traditionally grouped into two categories: (1) intentional wrongs and (2) negligent wrongs.<sup>24</sup> “Most commonly, the intentional tort defendant is consciously aware of his wrongdoing [and] he is always aware of his act.”<sup>25</sup> Negligent wrongs entail unreasonably risky behaviors that actually result in harm.

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<sup>19</sup> 1 DAN B. DOBBS, *THE LAW OF TORTS* 2 (2001).

<sup>20</sup> *Id.*

<sup>21</sup> *See, e.g.*, GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 3–4 (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 167–68 (7th ed. 2007); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 1–4 (1987); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499, 500–01 (1961); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089, 1093–94 (1972); R. H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 18–19 (1960); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 *GA. L. REV.* 851, 851–52 (1981); C. Robert Morris, Jr., *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 *YALE L.J.* 554, 555 (1961); Richard A. Posner, *A Theory of Negligence*, 1 *J. LEGAL STUD.* 29, 33 (1972).

<sup>22</sup> David G. Owen, *Foreword to PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 2 (David G. Owen ed., 1995); *see also*, RONALD DWORKIN, *LAW’S EMPIRE* 276–312 (1986); CHARLES FRIED, *AN ANATOMY OF VALUES* 2 (1970); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 2–3 (1995); Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 *WM. & MARY L. REV.* 259, 259–60 (1976); Jules L. Coleman, *On the Moral Argument for the Fault System*, 71 *J. PHIL.* 473, 474 (1974); Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 *L. & PHIL.* 37, 37 (1983); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 *YALE L.J.* 247, 268–74 (1980).

<sup>23</sup> 1 DOBBS, *supra* note 19, at 2 (emphasis added).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

“The defendant in the negligence case is sometimes aware that he is taking unreasonable risks; he is always in violation of reasonableness standards whether he is consciously aware of that fact or not.”<sup>26</sup>

Strict liability torts, however, provide liability without *fault* (typically involving foreseeability of harm and blameworthy conduct) for abnormally dangerous activities and defective products among other categories. Theorists ascribe various policy reasons for imposing strict liability—from better deterrence to more generous compensation; from wide risk spreading to basic fairness.<sup>27</sup>

Given the aforementioned background principles, what would be the nature of the potential fault-based and strict liability-based wrongs suffered by a victim of annoyancetech electronic vigilantism? First, on a very general level, the impalpable *autonomy* of an individual to live as he or she deems fit—however eccentric or bothersome—is challenged, and possibly violated, by someone who seeks to punish or control another for a barking dog, poor driving, unwanted television or radio noise, or irritating teens. Second, the *dignity* of a target of annoyancetech vigilantism may be sullied. This dignitary interest is intangible and addresses the emotional distress and insult that a victim of electronic vigilantism might experience at the loss of freedom and the underhanded subjugation to the will of another person. Third, a victim of annoyancetech measures could very possibly experience diminished enjoyment or *hedonic impairment* in using his or her property (pets, cell phones, stereos, televisions, and electrical appliances) by devices that shut down, silence, or interfere with the property. Fourth, after being the victim of electronic vigilantism—and discovering the particular facts regarding the nature of the annoyancetech device and how it was used by the perpetrator—a person might experience *anxiety* that a similar stealth interference with his or her life enjoyment might happen in the future. Fifth, the victim of annoyancetech vigilantism may experience unpleasant stress at having his or her *privacy* breached by another who electronically tampers with one’s seclusion. Sixth, casualties of electronic annoyancetech, when discovering that another has taken self-help measures because of perceived antisocial behavior (loud music, public cell phone usage, barking dogs) may experience *reputational distress* if the incident is reported or publicized.

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<sup>26</sup> *Id.* at 2–3.

<sup>27</sup> *Id.* at 964–68.

Seventh, targets of annoyancetech vigilantism may, of course, incur tangible *economic loss*: of the health or death of a pet who has been silenced by electronic pulses; of the health or death of a teenager who has been accosted by electronic sounds; of the proper functioning of cell phones, televisions, stereos and other electronic appliances that have been electronically tampered with; of lost business opportunities that come about because a PowerPoint sales pitch at a convention was shut down or an important commercial call was dropped.

Users of annoyancetech devices would, in most cases, be at fault for intent-based conduct. They would have the purpose of silencing a dog, dispersing teenagers, shutting down electronic devices, and the like; doubtful cases would still seem easy marks for the substantial certainty prong of intent.<sup>28</sup> In instances where non-target annoyances are impacted by annoyancetech devices (collateral damage so to speak), transferred-intent would likely lead to liability of intentional torts (with the exception of the tort of outrage which does not transfer).<sup>29</sup> Potential tort causes of action would include assault,<sup>30</sup> battery,<sup>31</sup> trespass to chattels,<sup>32</sup> conversion,<sup>33</sup> and even intentional infliction of emotional distress (outrage).<sup>34</sup> An action for invasion of privacy based on intrusion upon seclusion or private affairs is possible if annoyancetech tactics by a tort defendant involve making video or sound recordings of a person from a private space.<sup>35</sup> Since the scope and sweep of an electronic annoyancetech device could foreseeably harm non-targets

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<sup>28</sup> 1 RESTATEMENT (SECOND) OF TORTS § 8A (1965) (“The defendant has an intent to achieve a specified result when the defendant either (1) has a purpose to accomplish that result or (2) lacks such a purpose but knows to a substantial certainty that the defendant’s action will bring about the result.”). 1 DOBBS, *supra* note 19, at 48 (footnote omitted).

<sup>29</sup> The doctrine of transferred intent “holds that if the defendant intended to cause any one of five trespassory torts,” descended from the old English writ of trespass (assault, battery, false imprisonment, trespass to chattels, and trespass to land), “then the defendant ‘intended’ to cause any invasion within that range of actions that befalls either the intended victim or a third party.” VINCENT R. JOHNSON, *MASTERING TORTS* 19 (3d ed. 2005) [hereinafter JOHNSON, *MASTERING*]. *But see* Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903, 908–10 (2004) (arguing that courts should be cautious about applying the doctrine of transferred intent to third-parties not known by the defendant to be present).

<sup>30</sup> 1 RESTATEMENT (SECOND) OF TORTS §§ 21, 32 (1965).

<sup>31</sup> § 13.

<sup>32</sup> §§ 217–18.

<sup>33</sup> § 222A.

<sup>34</sup> § 46.

<sup>35</sup> 3 RESTATEMENT (SECOND) OF TORTS § 652B (1977). According to § 652B, an action for intrusion upon seclusion will lie if the defendant commits an intentional intrusion (physical or otherwise) upon solitude, seclusion or private affairs that would be highly offensive to a reasonable person.

in closely packed urban and suburban neighborhoods, the tort of negligence would also exist as a theory of liability for non-target plaintiffs and target plaintiffs to deploy against annoyancetech electronic vigilantes. Moreover, electronic vigilante users of annoyancetech devices could conceivably be held liable for abnormally-dangerous strict liability. In this regard, judges, who undertake question of law calculations of whether or not particular uses of annoyancetech devices are “abnormally dangerous” under section 520 of the Restatement (Second) of Torts,<sup>36</sup> might readily conclude that activities like electronically silencing a neighbor’s dog, dispersing a group of teenagers, shutting down a television, cutting off a cell phone conversation, or scolding a motorist triggers a preponderance of the six factors. Strict liability for using annoyancetech could plausibly be based on the following section 520 factors:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.<sup>37</sup>

Manufacturers, sellers, and marketers of annoyancetech devices would face potential liability for purveying defective products based on strict liability for failure to warn the user of untoward consequences of the devices to third parties and their property. Moreover, annoyancetech devices might be prime candidates for product-category strict liability because the dangers of having the product on the market outweigh its utility.<sup>38</sup> On the other hand, to the extent that electronic vigilantism is viewed by a court as being justified in a particular case, annoyancetech purveyors could assert that the devices, like guns, do what they were designed to do and

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<sup>36</sup> § 520.

<sup>37</sup> § 520(a)–(f).

<sup>38</sup> *See, e.g.*, *O'Brien v. Muskin Corp.*, 463 A.2d 298, 301 (N.J. 1983) (holding, in a strict product liability tort suit for injuries suffered when plaintiff dove into an above-ground swimming pool, that the jury could conclude that the product was so dangerous and of so little utility that it should not have been marketed at all).

should not subject purveyors of the devices to strict tort product liability.<sup>39</sup>

### III. ANNOYANCETECH TORT DEFENSES

#### A. *Intentional Torts and Negligence Defenses*

The justificatory success of tort defendants who intentionally or negligently cause personal, property, or emotional harm to others by using electronic annoyancetech devices will depend on a hodgepodge of what can usefully be called self-help legal doctrines and principles. These self-help legal constructs, in turn, can be divided into three parts: (1) traditional intentional tort defenses, (2) traditional negligence tort defenses and barriers, and (3) analogical self-help defenses.

#### 1. Traditional Intentional Tort Defenses

Tort suits based on purposeful use of annoyancetech electronic devices have eight traditional tort defenses that are theoretically applicable: (1) self-defense, (2) defense of others, (3) private necessity, (4) public necessity, (5) defense of property, (6) unlawful conduct, (7) consent, and (8) general justification.

First, considering the privilege of self-defense, annoyancetech vigilantes would probably flounder in their attempt to use this defense because the typical use of annoyancetech devices is retaliatory in nature, stemming from frustration at the relatively trifling conduct of others.<sup>40</sup> Furthermore, the privilege of self-defense requires reasonable force under the circumstances; conduct by others like verbal threats, however, is legally insufficient to trigger the self-defense privilege.<sup>41</sup> Accordingly, if verbal threats are not an appropriate predicate for lawful exercise of the privilege, unthreatening and merely annoying behavior that has no tendency to suggest imminent bodily harm would likely be insufficient to justify electronic reaction.

Second, defense of others, for reasons similar to our consideration of the privilege of self-defense, is a weak defense for annoyancetech users who cause harm to others. In most cases, the vigilante annoyancetech user would be using the technology not because she

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<sup>39</sup> See *infra* note 72 and accompanying text.

<sup>40</sup> Retaliation destroys the self-defense privilege. 1 DOBBS, *supra* note 19, at 160.

<sup>41</sup> *Id.*

reasonably believed that force was necessary to protect another from physical harm, but because the annoyancetech user wants to punish another for what the user perceives as antisocial conduct.<sup>42</sup>

Third, a privilege of private necessity may exist if it is apparently necessary for one to invade the interests of the plaintiff in order to prevent greater harm.<sup>43</sup> In all but the most extreme situations (a neighbor's continuously barking dog that prevents sleep and is not stopped by police intervention, or a blaring television set in a physician's waiting room that is out of reach and will not be tuned down by office staff), engaging in self-help annoyancetech measures would not be protected by the privilege of private necessity.<sup>44</sup>

Fourth, the privilege of public necessity, for reasons similar to my private necessity analysis, would be of no avail to an annoyancetech vigilante in all but the most extreme of situations.<sup>45</sup>

Fifth, while a possessor of property may use reasonable force to defend property,<sup>46</sup> it would be difficult to fathom legitimate annoyancetech defenses based on this privilege.

Sixth, some states provide for a privilege of unlawful conduct to bar recovery for an intentional tort.<sup>47</sup> At first blush, this defense might be attractive to a user of annoyancetech devices who is sued in tort by plaintiffs who own barking dogs, who are bad drivers of automobiles, and who are other technical law breakers. On closer examination, however, the defense would likely not prove effective for the annoyancetech user because it requires that (a) the conduct constitutes a *serious* violation of the law and (b) the injuries for which recovery is sought were a direct result of that violation.<sup>48</sup> Irksome driving (including tailgating, changing lanes without signals, driving below the speed limit), for example, would not be considered a serious violation of the law (whereas speeding at a high rate of speed or drunken driving might); harboring one barking dog, by way of further example, would likely be viewed as a minor violation of a disturbing the peace ordinance (but keeping multiple continuously barking dogs might be deemed a serious legal

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<sup>42</sup> *Id.* (noting that retaliation is not permitted in defense of others).

<sup>43</sup> The privilege of private necessity, however, "can only be invoked when the defendant is threatened, or reasonably appears to be threatened with serious harm and the response is reasonable in the light of the threat." *Id.* at 249 (footnote omitted).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 170.

<sup>47</sup> JOHNSON, MASTERING, *supra* note 29, at 61.

<sup>48</sup> *Id.*

violation).<sup>49</sup>

Seventh, a privilege of consent<sup>50</sup> could conceivably apply to certain annoyancetech tort actions if notice of the device was provided. Thus, by way of analogy to a property owner who posts a warning sign, such as “Beware of Dog” (or lines his perimeter fence with barbed wire), we might imagine a property owner posting a warning sign that a “Kids Be Gone” device for irritating neighborhood congregations of teenagers or an ultrasonic squeal device for barking dogs was on the premises. Under the principle of *volenti non fit injuria*, whereby one who deliberately confronts a known danger thereby manifests consent, neighborhood dog owners and neighborhood teenagers (and their parents) might be precluded from recovering for intentional torts against the annoyancetech vigilante.

Finally, under a general justification defense, whereby the law of torts recognizes privileges under new and changing circumstances, we might see a lawyer in a future annoyancetech intentional tort suit make the following illustrative creative argument—“my client alerted the police on numerous occasions about the loud barking dogs of the plaintiff who sues for trespass to chattels. No fines were assessed. The local government did not take the matter seriously.” The lawyer might close by contending: “My client used the ultrasonic squeal device as a last resort to obtain some peace and quiet at an affordable price.”<sup>51</sup>

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<sup>49</sup> See, e.g., Mary Owen & Sheila Burt, *Barking to be Ticketed*, CHI. TRIB., Nov. 7, 2008, at 35 (describing the frequent “loud barking” of an Illinois homeowner’s neighbor’s three German Shepherds, leading the village of Homer Glen to pass an ordinance whereby “owners of animals that make loud noises for longer than 15 minutes” are fined after a second complaint up to \$100, and after a third complaint up to \$750). Query: would a fourth violation of the Homer Glen ordinance be considered a “serious” violation of law sufficient to provide a tort defense for a neighbor using an electronic dog device?

<sup>50</sup> Apparent consent or actual consent might conceivably apply. JOHNSON, MASTERING, *supra* note 29, at 48.

<sup>51</sup> The problem with this general justification ploy—which conceptually requires a showing that the defendant’s conduct was acceptable under the circumstances—is that an annoyancetech defendant would not be seeking to apprehend a so-called antisocial wrongdoer. Instead, the defendant’s conduct would likely be viewed as retribution not reasonably calculated to protect the defendant’s person or property when other feasible alternative courses of action—such as calling the police, asking the plaintiff to moderate antisocial behavior, or suing in nuisance—would be available. Cf. *Sindle v. N.Y. City Transit Auth.*, 307 N.E.2d 245, 247–48 (N.Y. 1973) (holding that the trial court abused its discretion by not permitting the defendants to amend their answers to present evidence of justification where one of the defendants, a school bus driver, drove unruly children to the police station when some of the children continued to engage in acts of vandalism to the bus despite requests by the defendant for the children to stop the serious misbehavior).

## 2. Traditional Negligence Tort Defenses

In riposting against tort of negligence suits by tort plaintiffs who claim personal or property damages caused by annoyancetech devices, several potential considerations may come into play to limit or abrogate liability.

First, issues of factual causation may call into question whether or not the particular annoyancetech device was a substantial cause of claimed damages.<sup>52</sup> Second, while intervening criminal or intentionally tortious conduct sometimes cuts off negligence liability of a tortfeasor, manufacturers of annoyancetech devices would likely be unprotected under such a theory because the very nature of the devices are designed to be used by vigilantes who want to punish annoying behavior of others.<sup>53</sup> Third, since damages are an essential element of the tort of negligence,<sup>54</sup> plaintiffs may have difficulty proving recoverable damages for relatively minor interferences with their property occasioned by an annoyancetech device. It is possible, however, that juries may award non-economic damages for pain and suffering if they determine that a particular annoyancetech device caused plaintiff to incur distress.<sup>55</sup> Yet “most courts hold that negligent harm to property, by itself, is an insufficient predicate for an award of emotional-distress damages at least if the harm occurs outside of the plaintiff’s presence and is the result of mere negligence.”<sup>56</sup> If, however, the gravamen of a plaintiff’s negligence case is really negligent infliction of emotional distress caused by an annoyancetech device, the plaintiff will usually have to prove severe emotional distress, which is ordinarily judged by an objective standard.<sup>57</sup>

Fourth—regarding defenses based on an annoyancetech plaintiff’s conduct in negligence cases—in jurisdictions that have adopted comparative negligence or comparative fault, the nature of a plaintiff’s antisocial act that triggered the defendant’s use or marketing of an annoyancetech device would be relevant to reduce

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<sup>52</sup> 1 DOBBS, *supra* note 19, at 405.

<sup>53</sup> *Id.* at 462.

<sup>54</sup> *Id.* at 269.

<sup>55</sup> 2 DAN B. DOBBS, *THE LAW OF TORTS* 1050–51 (2001).

<sup>56</sup> JOHNSON, *MASTERING*, *supra* note 29, at 180.

<sup>57</sup> *See, e.g.*, *Lewis v. Westinghouse Elec. Corp.*, 487 N.E.2d 1071, 1071–73 (Ill. 1985) (holding that an ordinary person would not have suffered severe distress from being trapped in an elevator for forty minutes; therefore, plaintiff’s claim for negligent infliction of emotional distress was dismissed). *But see* *Johnson v. Supersave Mkts., Inc.*, 686 P.2d 209, 213 (Mont. 1984) (finding that substantial indicia of emotional distress genuineness exists if there has been a “substantial invasion of a legally protected interest”).

(or bar) damages.<sup>58</sup> Assumption of risk defenses would likely be unavailable by a defendant sued by an annoyancetech victim—express assumption of risk would not exist;<sup>59</sup> primary implied assumption of risk would falter in most case scenarios because of the lack of a sport or game;<sup>60</sup> secondary implied assumption of risk would be inapplicable because of the lack of voluntariness in annoyancetech victims in confronting a risk of harm from vigilante use of electronic devices and the absence of manifested willingness to relieve the user or marketer of these devices from obligations to exercise reasonable care.<sup>61</sup>

### 3. Analogical Self-Help Defenses

Some kinds of self-help are permitted by the law whereby a party is allowed to remedy a wrong by another without calling upon the police or initiating legal proceedings.<sup>62</sup> Examples in the realm of commercial law include the right to repossess an automobile<sup>63</sup> and the right of a bank to setoff an account balance of a customer who owes money to the bank.<sup>64</sup> An important limitation of these commercial self-help measures, however, is a prohibition against

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<sup>58</sup> JOHNSON, MASTERING *supra* note 29, at 230–31.

<sup>59</sup> Express assumption of risk requires an agreement in advance between potential tort parties whereby the plaintiff agrees with the defendant, prior to the harm, not to hold the defendant liable for failure to exercise reasonable care. *See, e.g.*, Winterstein v. Wilcom, 293 A.2d 821, 828 (Md. Ct. Spec. App. 1972) (upholding an express release for negligence); Gross v. Sweet, 400 N.E.2d 306, 309 (N.Y. 1979) (discussing the requirements of a valid pre-accident release).

<sup>60</sup> The primary assumption of risk doctrine holds that a defendant is under no tort duty to protect a plaintiff from inherent risks in a particular sport or recreational activity. *See, e.g.*, Coleman v. Ramada Hotel Operating Co., 933 F.2d 470, 472–73 (7th Cir. 1991) (applying the doctrine of primary implied assumption of risk to preclude a plaintiff's claim for negligence against a hotel for injuries received in a game of climbing a sliding board backwards); Turcotte v. Fell, 502 N.E.2d 964, 967–69 (N.Y. 1986) (applying the doctrine of primary implied assumption of risk to bar a horse-racing jockey's claims for negligence against the racetrack and another jockey).

<sup>61</sup> *See, e.g.*, Marshall v. Ranne, 511 S.W.2d 255, 266 (Tex. 1974) (holding no secondary implied assumption of risk by a plaintiff who was injured by defendant's boar hog, since the defendant was not entitled to force the plaintiff to surrender his rights to use his real property by staying indoors to avoid the dangerous animal and because plaintiff's confrontation of the danger of being attacked by defendant's hog was involuntary).

<sup>62</sup> 1 DOBBS, *supra* note 19, at 166–67.

<sup>63</sup> *Id.* at 139, 189–90.

<sup>64</sup> The United States Supreme Court has recognized a bank's right of setoff multiple times. *See, e.g.*, Citizens Bank of Md. v. Strumpf, 516 U.S. 16, 18 (1995) (“The right of setoff . . . allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding ‘the absurdity of making A pay B when B owes A.’” (quoting Studley v. Boylston Nat'l Bank, 229 U.S. 523, 528 (1913))). Also, for a brief discussion and example of a bank's right to setoff against a depositor see *Bank's Right of Set-Off*, 60 BANKING L.J. 4, 4–8 (1943).

breaching the peace by causing a confrontation that could conceivably lead to violence.<sup>65</sup> A tort defendant who has used or marketed annoyancetech devices would likely be viewed by courts as breaching the peace by engaging in or enabling retributive behavior against another likely to spur violence, if discovered by the victim.

Some privileges to intentional tort actions are other candidates, by analogy, for annoyancetech tort users or marketers. One is the privilege to discipline. The argument by an annoyancetech tort defendant would be that he used the electronic device to “discipline” the plaintiff for antisocial activity (like harboring continuously barking dogs, noisy parties late at night, or playing an obnoxious television show or radio program in a public place). This argument, however, would likely fail because the privilege of discipline has been strictly limited by courts and legislators to apply only to military discipline of military members<sup>66</sup> and reasonable parental discipline of minor children by those who are properly in charge of a child’s care.<sup>67</sup>

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<sup>65</sup> See, e.g., U.C.C. § 9-609 (2008) (formerly U.C.C. § 9-503 (1977)); Eugene Mikolajczyk, Comment, *Breach of Peace and Section 9-503 of the Uniform Commercial Code—A Modern Definition for an Ancient Restriction*, 82 DICK. L. REV. 351, 355 (1977).

In implementing the self-help policies of protecting the debtor’s personal interests and society’s prohibition against the use of force, courts have held that it is a breach of the peace to effect repossession by the use of force directed against the debtor. Many courts in cases of self-help repossession derived precedent from the criminal law definitions of breach of peace.

The criminal law definitions of breach of peace is essentially oriented to the use or threatened use of violence. Courts in self-help cases derive precedent from this definition when violence occurs during the repossession. Unfortunately, however, at least one court that applied the criminal law definition has determined that violence is a “necessary” element to a finding of breach of peace. . . .

When the secured party’s method of repossession entails less than blatant violence, the criminal law definition of breach of peace as a violence-oriented concept may no longer be effective in protecting the debtor’s personal interest. Increasingly, the breach of peace definition is analyzed from the tort perspective of harmful or offensive touching. *Id.* at 355–56.

<sup>66</sup> The Uniform Code of Military Justice governs the disciplinary rules of the Armed Forces of the United States and provides for courts martial procedures and other military punishments for various misbehaviors by military personnel. Uniform Code of Military Justice, 10 U.S.C. §§ 801–1800 (2006); see also DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 3–7 (7th ed. 2008).

<sup>67</sup> Parents may apply the force or impose the confinement that they reasonably believe is necessary for controlling or training their children. 1 RESTATEMENT (SECOND) OF TORTS § 147 (1965). Factors bearing on the reasonableness of parental discipline of children include: the age of the child, the nature of the child’s misbehavior, the example to be set for other children in the family, whether the parental punishment is necessary and appropriate to induce obedience, and whether the behavior is disproportionate, unnecessarily degrading, or likely to cause serious or permanent harm. § 150. The parental privilege to discipline children may be extended to persons who are properly in charge of the children but who are not the actual

Another potential analogical intentional tort privilege that might be of interest to annoyancetech tort defendants is the privilege of citizen arrest. The argument by an annoyancetech defendant would be that she used the electronic device on the plaintiff or the plaintiff's property to affect the functional equivalent of a citizen's arrest for the plaintiff's antisocial conduct. This argument, however, would likely fail because of the severe limitations most jurisdictions place on a citizen's arrest, the likelihood that most antisocial behavior would not be felonious, and the likely failure of a defendant to show that use of an annoyancetech device was an "arrest" as opposed to a vengeful act.<sup>68</sup>

### *B. Strict Liability Tort Defenses*

Annoyancetech users and marketers defending against a strict liability tort for harm caused by abnormally dangerous activities would be hard-pressed to present evidence of any of the equitable factors under Restatement principles. Those users and marketers could argue that the likelihood of harm that results from most annoyancetech devices would be low, and—although a stretch—that the value to the community of punishing or abating antisocial behavior, like barking dogs, loud teenagers, or obnoxious televisions, outweighs the dangerous attributes of the vigilante electronic devices.<sup>69</sup> Under the reformulated abnormally-dangerous provisions of the Third Restatement, however, annoyancetech defendants could focus their argument on the lack of "physical harm" provided as a more restrictive ambit of strict liability; most annoyancetech scenarios would likely not involve physical harm to

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parents of the children. § 147(2). Examples might include schools and teachers, child-care providers, surrogate parents, and school bus drivers.

<sup>68</sup> An arrest takes a person into custody for the purpose of bringing a person before a court or police entity administering the law. 1 RESTATEMENT (SECOND) OF TORTS § 127 (1965). The privilege of a citizen's arrest permits a private defendant to arrest a plaintiff in three potential situations. First, the plaintiff has in fact committed the felony (serious crime) for which he is arrested; second, someone has committed a felony and the defendant reasonably suspects that the plaintiff is the person responsible; or third, the plaintiff has committed a breach of the peace in the presence of the defendant. § 119.

Another analogical defense by a user of annoyancetech devices to a tort suit might be self-help to remedy a nuisance. See Jon K. Wactor, Note, *Self-Help: A Viable Remedy for Nuisance? A Guide for the Common Man's Lawyer*, 24 ARIZ. L. REV. 83, 98 (1982) ("[While self-help abatement of nuisance is an established principle of common law,] problems would likely exist for an annoyancetech tort defendant because "breach of peace or unnecessary damage cannot occur during the abatement attempt." The annoyance uses examined in this article would likely run afoul of these key limitations).

<sup>69</sup> See 3 RESTATEMENT (SECOND) OF TORTS § 520 (1977).

the plaintiff but, rather, harm to the plaintiff's property accompanied by purely non-physical emotional distress.<sup>70</sup>

Annoyancetech manufacturers and marketers defending against a strict liability tort for product defects by a victim, who has suffered damages because of someone's use of an electronic device, would likely face design defect claims based on an argument by plaintiffs that the annoyancetech device flunks a risk/utility calculus or failure-to-warn defect claims.<sup>71</sup> The only feasible defense for annoyancetech defendants is to argue that their products are "unavoidably unsafe," along the lines that knives, guns, alcohol, and tobacco are dangerous by nature.<sup>72</sup> Annoyancetech manufacturers and marketers, however, are likely to be met with arguments by plaintiffs that annoyancetech devices are manifestly too risky in the light of the low—if not nonexistent—utility of the products.<sup>73</sup> A defense based on a defect warning for annoyancetech devices would be logically flawed. Although "[w]hen a product is unavoidably dangerous," as virtually all annoyancetech devices would be, "a warning permits the consumer to make informed choices whether to accept the product,"<sup>74</sup> it is the plaintiff victim in an annoyancetech product strict liability action who would, by definition, be unable to read warnings or make a choice.

#### IV. PUBLIC POLICY CONSIDERATIONS

##### A. *The Historical Problematics and Uses of Vigilante Justice*

While Americans have become accustomed to public policing of antisocial conduct since the mid-nineteenth century,<sup>75</sup> "[t]he

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<sup>70</sup> The reformation of strict liability in the context of abnormally dangerous activities is as follows:

- (a) A defendant who carries on an abnormally dangerous activity is subject to strict liability for *physical harm* resulting from the activity.
- (b) An activity is abnormally dangerous if:
  - (1) The activity creates a foreseeable and highly significant risk of *physical harm* even when reasonable care is exercised by all actors; and
  - (2) The activity is not a matter of common usage.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 (Tentative Draft No. 1, 2001) (emphasis added).

<sup>71</sup> 2 RESTATEMENT (SECOND) OF TORTS § 402A (1965).

<sup>72</sup> 2 DOBBS, *supra* note 55, at 988–89; *see also* 2 RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

<sup>73</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2, cmt. e (1998).

<sup>74</sup> 2 DOBBS, *supra* note 55, at 1005.

<sup>75</sup> THE OXFORD COMPANION TO UNITED STATES HISTORY 603 (Paul S. Boyer ed., 2001). "In colonial America, policing relied on community consensus and citizens' service as constables and in sheriffs' posses. Public punishments were the most important means of encouraging

American police tradition also includes private policing” and vigilante justice movements.<sup>76</sup> Lawrence Friedman discusses the vigilante movement in the American West in conjunction with ad hoc, privately-instituted “miners’ codes,” in the latter part of the nineteenth century, as “[t]wo famous western institutions” of privately-ordered frontier justice.<sup>77</sup>

The miners’ codes were little bodies of law adopted as binding customs in western mining camps. The miners’ courts and codes resembled . . . the claim clubs of the Midwest. These were [private] organizations of squatters who banded together to control the outcomes of public land auctions. The claim clubs also drew up rules and procedures, to govern, record, and document the land claims of their members. Such clubs flourished in Wisconsin in the late 1830s, in Iowa through the 1840s. There is some slight evidence of connection between the claim clubs, miners’ groups in the Midwest (near Galena, Illinois, and in southwestern Wisconsin), and the miners’ codes of the Far West.<sup>78</sup>

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conformity and order. Modern American police forces, patrols to prevent and detect crime and maintain order, arose in the nineteenth century” as adaptations of English institutions. *Id.* New York City’s police force, formed in 1845, is viewed as the first modern police force in America, “modeled on London’s Metropolitan Police,” which was organized in 1829. *Id.* Notably, New York City’s

policemen walked beats, and they had power to arrest without a warrant. They also performed services such as rescuing lost children or animals or lodging the homeless temporarily in station houses. Other [American] cities, and later small towns, followed this model. . . .

. . . .

By the early twentieth century, reformers emphasized professionalization, a more military-style organization, higher educational standards, better training, concentration on crime-fighting over general service, and freedom from politics. However, professionalization sometimes widened the distance between the police and local communities.

*Id.* Advanced technology innovation was important to American police forces. “Mobility evolved from walking the beat to horse-drawn patrol wagons . . . to motorcycles, automobiles, and helicopters. Communications progressed from rapping a club on the street to radios and computers.” *Id.* Moreover, “[i]nvestigative methods progressed from mug shots to up-to-date crime labs . . . computerization, and DNA analysis.” *Id.*

<sup>76</sup> *Id.* “Vigilante movements of the nineteenth and early twentieth centuries, such as the vigilantes of early San Francisco or the Ku Klux Klan, expressed fear of outsiders or minority groups.” *Id.* Moreover, “[f]ormal private police forces, like the Pennsylvania Coal and Iron Police and the strikebreaking Pinkerton Detective Agency, founded in 1852 by Allan Pinkerton, served industrialists’ interests in labor disputes.” *Id.*; see also EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH 151–62 (1984) (discussing vigilante justice).

<sup>77</sup> LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 275 (3d ed. 2005).

<sup>78</sup> *Id.* at 275. According to Friedman:

Friedman's account of the details of the American "vigilante movement" of the late-nineteenth century notes that it "was more flamboyant, and at times more sinister"<sup>79</sup> than the private miners' codes of the same period. As Friedman notes:

This was not exclusively a western phenomenon; but the West was the vigilante heartland. The two San Francisco Vigilance Committees, of 1851 and 1856, were early and famous examples. These committees were "businessmen's revolutions" directed against corrupt, inept local government. Those who supported the vigilantes considered themselves decent citizens, using self-help, taking the law into their own hands, striking out against violence, corruption, and misrule in San Francisco. The city was turbulent, anarchic; gold-hungry hordes had swollen its population. The first committee began its work by arresting a "desperate character" named Jenkins. He was given a kind of trial, convicted and hanged from a heavy wooden beam . . . . *Other bad characters were simply told to get out of town.*<sup>80</sup>

Vigilante justice also existed in other western communities in the late-nineteenth century including: Carson City, Nevada; Denver, Colorado; Cheyenne and Laramie, Wyoming; Montana; and Idaho.<sup>81</sup> While the "vigilante story" in the American West was at times harsh, Friedman properly points out that there were logical reasons for vigilante groups.<sup>82</sup> "The vigilantes were often not really reacting to a legal vacuum; they were fighting against a legal order that was simply not to their liking. Not just weak justice, but justice that (in the eyes of elites) was reaching the wrong results."<sup>83</sup> Indeed,

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These miners' codes were at least as old as the California gold rush, and were also found in other parts of the West. . . . Many codes were reduced to written form. They set up rough but workable rules and processes for recording claims, for deciding whose claim was first, for settling disputes among claimants, and for enforcing decisions of miners' "courts." The Gregory Diggings ruled itself through its little legal system two years before Colorado Territory was formally organized. The mining code served the function, well known in American legal history, of a *makeshift judicial and political order*, in places that were settled before ordinary government institutions arrived. Other mining districts copied the Gregory code. . . . The Colorado territorial legislature in 1861 and 1862 ratified, with a broad sweep, the local claims and judgments these informal courts had rendered.

*Id.* (emphasis added).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 275–76 (emphasis added) (citations omitted).

<sup>81</sup> *Id.* at 276–77.

<sup>82</sup> *Id.* at 277.

<sup>83</sup> *Id.*

another legal scholar confirmed this view, noting that American late-nineteenth-century “vigilantism was not really a ‘pre-law phenomenon,’ a ‘groping towards the creation of legal institutions,’ but more accurately a ‘reaction against the corruption, weakness, or delays’ of the established legal order.”<sup>84</sup>

“In any event, social control, like nature, abhors a vacuum. The ‘respectable’ citizens—the majority, perhaps?—in western towns were not really lawless.”<sup>85</sup> To the contrary, “[t]hey were Americans; they were unwilling to tolerate too sharp a break in social continuity; they reacted against formal law that was too slow, or too corrupt, for their purposes . . . [They] were products of a culture clash, in small communities” of an emerging nature.<sup>86</sup>

### *B. Twenty-First-Century Extreme American Neighborhood Trends*

In a recent article, I uncover a troublesome trend of inept, slow, and potentially corrupt police, and formal legal control of neighborhood disputes.<sup>87</sup> My research uncovered instances where land use or boundary disputes dragged on for years,<sup>88</sup> cases of police response to neighborhood arguments that culminated in police violence and abuse,<sup>89</sup> and instances of recurring retaliation and taunting by out-of-control neighbors angered at a neighbor’s behavior.<sup>90</sup>

Are we seeing a level of frustration by twenty-first-century Americans that matches the historical pattern of American frustration with the formal governments and laws of the late-nineteenth century that culminated in vigilante justice?<sup>91</sup> Could the demand for, and development and recent popularity of, revenge-motivated annoyancetech electronic devices be a logical manifestation of American frustration with the ability or willingness of public police forces and formal legal processes to adequately manage antisocial neighborhood misbehavior involving loud animals, unruly children, wild parties, and the like?

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<sup>84</sup> *Id.* at 276–77 (quoting Willard Hurst, *The Uses of Law in Four ‘Colonial’ States of the American Union*, 1945 WIS. L. REV. 577, 585 (1945)).

<sup>85</sup> *Id.* at 277.

<sup>86</sup> *Id.*

<sup>87</sup> Robert F. Blomquist, *Extreme American Neighborhood Law*, 45 GONZ. L. REV. (forthcoming 2009).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See *supra* notes 75–86 and accompanying text.

### C. *Some Sociological Perspectives*

Pending more robust case histories regarding the demand for production and use of annoyancetech electronic devices to respond to perceived antisocial behaviors in neighborhoods and public places (which case studies would enable comparative and longitudinal analyses), a few sociological musings are in order.

Under the so-called frustration-aggression theory, human “aggressive behavior results when purposeful activity is interrupted.”<sup>92</sup> A related theory of aggression focuses on social learning to behave in accordance with norms of violence because individuals come to view aggression as giving rise to positive utility or gain through approval by others, prestige, or economic reward.<sup>93</sup> Demand for annoyancetech electronic vigilante devices might fit both types of aggression theory: first, Americans might be frustrated in having their peace and quiet significantly interrupted, and, second, electronic-savvy devotees (accustomed to computers, portable communication devices, and other modern contraptions) might have learned that electronic technologies can quickly and efficiently meet their needs.<sup>94</sup>

Demand for and use of annoyancetech electronic devices also implicates social norm theory, particularly dynamic models of social interaction (with a focus on negotiation of roles and social meanings), ethnomethodology, and post-modern philosophy.<sup>95</sup> The writing of Erving Goffman may be helpful in understanding why people might be attracted to a non-dramaturgical, non-interactive approach to resolving social conflict by anonymously deploying technology to “solve” perceived antisocial behavior of others instead of publicly complaining and frontally negotiating a resolution to a social problem.<sup>96</sup> Perhaps the desire for anonymously deployed

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<sup>92</sup> A DICTIONARY OF SOCIOLOGY 12 (Gordon Marshall ed., 2009) [hereinafter SOCIOLOGY].

<sup>93</sup> *Id.* at 11–12.

<sup>94</sup> A related sociological topic of interest is “new technology” defined as “[a]ny set of productive techniques which offers a significant improvement (whether measured in terms of increased output or savings in costs) over the established technology for a given process in a specific historical context.” *Id.* at 513.

<sup>95</sup> See FRANCESCA CANCIAN, WHAT ARE NORMS? A STUDY OF BELIEFS AND ACTION IN A MAYA COMMUNITY 106–09 (1975) (discussing both Parsonsian static conformist norm conceptions and dynamic social identity theories of norms that emphasize personal identity so that persons conform to norms to demonstrate to themselves and to others that they are a particular kind of person).

<sup>96</sup> Goffman was an influential micro-sociologist during the 1960s and 1970s that pioneered the so-called dramaturgical perspective of sociology. Deploying a metaphor of the theater, he was interested in the way that people “play” roles and manage the social impressions that they present to others in different social settings, and how people interact when they are in

annoyancetech devices can be understood as aberrant social behavior—deviating from what is considered normal—that is performed in secret and for reasons of self-interest, in contrast with non-conforming behavior which refers to public violation of social norms frequently done to promote social change (such as a political or religious dissenter who relishes a proclamation of deviance to an audience).<sup>97</sup>

Concepts of alienation—“the estrangement of individuals from one another, or from a specific situation or process”<sup>98</sup>—are also germane to our better understanding of the growing popularity of annoyancetech devices. Psychological alienation—by those who feel powerless and isolated from public sources of power and social control like the police and the courts—might account for the demand for these electronic vigilante devices.<sup>99</sup>

Related to concepts of alienation are sociological constructs of anomie and anarchism. Anomie involves norm turbulence through conflict, breakdown, or insufficient social norms.<sup>100</sup> Anarchism—believes that society functions better in the absence of government or social authority, leading not to chaos but to spontaneous order—has been influential in modern debate on topics that include communes, decentralization, and federalism, trade union labor movements, and Gandhi-inspired techniques of non-violent protest.<sup>101</sup> Anomie theory could explain how annoyancetech trends might be part of a twenty-first-century breakdown in social norms of negotiated conflict resolution through personal interaction, mediated by the police and the courts. Moreover, annoyancetech users and marketers could be conceived of as participants in a web-inspired electronic anarchy.

Annoyancetech can also be viewed as part of the “broken windows” thesis of neighborhood social control that posits a

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the presence of others. *See* ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 1–5 (1971) (offering a plethora of new sociological concepts that help the understanding of the minute details of face-to-face social interactions); ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 10–13 (1958) (outlining of his dramaturgical framework).

<sup>97</sup> *See* CONTEMPORARY SOCIAL PROBLEMS 28–31 (Robert K. Merton & Robert Nisbet eds., 4th ed., 1971) (discussing different forms of social deviance).

<sup>98</sup> SOCIOLOGY, *supra* note 92, at 14.

<sup>99</sup> *See* JOHN TORRANCE, ESTRANGEMENT, ALIENATION AND EXPLOITATION: A SOCIOLOGICAL APPROACH TO HISTORICAL MATERIALISM (1977) (discussing the philosophical, sociological, and psychological facets of alienation).

<sup>100</sup> *See* ANOMIE AND DEVIANT BEHAVIOR: A DISCUSSION AND CRITIQUE 1–20 (Marshall B. Clinard ed., 1964); MARCO ORRU, ANOMIE: HISTORY AND MEANINGS 118–20 (1987).

<sup>101</sup> SOCIOLOGY, *supra* note 92, at 20–21.

connection between public order and crime prevention.<sup>102</sup> Under this thesis, the most promising way to fight crime is to stop the disorder that precedes it. Thus, a broken window in a building might suggest to a pedestrian that no one cares about neighborhood order which can theoretically mushroom from petty offenses like rock-throwing to the breaking of more windows to serious crimes like drug-dealing, robbery, and murder. “Zero tolerance,” neighborhood watch programs and community policing are the usual iterations of the broken windows thesis of social control. But it is potentially edifying to think of annoyancetech electronic vigilantism against antisocial behavior as a more recent iteration.

## V. CONCLUSION

The twenty-first century has ushered in demand by some Americans for novel electronic gadgetry—called annoyancetech devices—that secretly fend off, punish, or comment upon perceived antisocial and annoying behaviors of their fellow citizens. The manufacturers, marketers, and users of certain annoyancetech devices, however, face possible tort liability under theories of intentional, negligence, and strict liability torts for personal and property damages suffered by the targets of this “revenge by gadget.” While assorted potential defenses to tort liability for harm from annoyancetech devices theoretically exist (traditional international tort defenses, traditional negligence tort defenses, and strict liability tort defenses), these tort defenses are weak and problematic.

Federal, state, and local policymakers should start the process of coming to pragmatic terms with the troubling rise in the popularity of annoyancetech electronic devices. This is an area of social policy that cries out for thoughtful and creative legislative solutions. In grappling with this matter, American policymakers should consider (1) the historical and problematic uses of vigilante justice; (2) twenty-first-century extreme American neighborhood trends; and (3) various sociological perspectives regarding human aggression, norm theory, alienation, anomie, anarchism, and the “broken windows thesis” of neighborhood control.

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<sup>102</sup> See GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 19 (1996).