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Turn Down the Volume: The Constitutionality of Ohio's Municipal Ordinances Regulating Sound from Car Stereo Systems

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TURN DOWN THE VOLUME: THE CONSTITUTIONALITY OF
OHIO’S MUNICIPAL ORDINANCES REGULATING SOUND
FROM CAR STEREO SYSTEMS

STUART A. LAVEN¹

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I. INTRODUCTION

The decade of the 90's will be remembered by investors as the longest bull stock market in history;² by computer geeks as the period of geometric growth in personal computer processing speed and memory as a function of cost;³ and by car stereo manufacturers and aficionados as not only a time of tremendous technological advancement in the power, clarity and popularity of car stereo systems, but also as a time of explosive growth in municipal ordinances criminalizing the emission of sound from such systems in excess of proscribed limits.

This article will examine such ordinances, including the methods adopted to measure offending sound and the penalties imposed for violations, the Ohio (and certain non-Ohio) cases which have challenged the constitutionality of such ordinances, and certain constitutional aspects of such ordinances and their enforcement which have yet to be addressed.

II. SOUND, NOISE AND THEIR REGULATION

"Sound" is "a vibratory disturbance in pressure . . . with frequency in the approximate range of 20 to 20,000 cycles per second, and capable of being detected by the organs of hearing."⁴ Sound is generally measured in decibels (db),⁵ which is the basic unit of sound pressure that impinges on the human ear.⁶

²From December 31, 1990 to December 31, 1999, the Dow Jones Industrials average rose from 2829 to 11497. Standard & Poor's Daily Stock Record (October – November – December 2001).

³See generally, Jason Patterson, *The History of Computers During My Lifetime – The 1990's* (visited Nov. 8, 2003) <http://www.pattosoft.com.au/Jason/Articles/HistoryOfComputers/1990s.html>; e-mail from Jason Patterson to the author (Nov. 9, 2003) (on file with the author).

⁴THE AMERICAN HERITAGE DICTIONARY, NEW COLLEGE EDITION.

⁵A decibel measurement is more thoroughly described as follows:

While the decibel scale measures pressure, it does not take into account the frequency of the sound waves causing such pressure. Depending on the particular frequencies, two sounds of the same decibels (*i.e.*, causing the same pressure on the human ear) can trigger dramatically different human responses—from pleasant to annoying. Since it is generally believed that “high-pitched tones are more annoying . . . than low tones,”⁷ a modified decibel scale, known as the “A” Scale (dB_A) and which “gives less weight to low tones,” has gained widespread acceptance.⁸

Noise, on the other hand, has been defined as “unwanted sound which produces unwanted effects” or “unwanted sound” or, more narrowly, “unpitched sound that is composed of many frequencies.”⁹ Noise has been the subject of regulation for more than 170 years,¹⁰ and noise generated by motor vehicles has been regulated for more than half of a century.¹¹ Most noise regulation has been at the state and local, or

. . . sound pressure is measured in decibels, or tenths of a bel (a logarithmic unit used to express ratios). Zero on the decibel scale indicates the barely audible sound produced by a pressure of .0002 microbar (one microbar equals one dyne per square centimeter, or about a millionth of a standard atmosphere) alternating at the rate of 1,000 cycles per second. Sound intensity increases exponentially: a 10-decibel sound is only twice as loud as a 1-decibel sound, but a 20-decibel sound is 4 times louder and a 100-decibel sound is 1,000 times louder.

Leo L. Beranek, *Noise*, SCIENTIFIC AMERICA, Dec., 1966, at 66, 69; *see also*, John M. Mecklin, *It's Time To Turn Down All That Noise*, FORTUNE MAG., Oct., 1969, at 130, 139.

⁶26 AM. JUR. PROOF OF FACTS 181, 181, 189 (2002) [hereinafter *Community Noise*]; Mecklin, *supra* note 5, at 133.

⁷Mecklin, *supra* note 5, at 133. *But see* Sedgwick, *supra* note 330 and accompanying text.

⁸*Id.* There are also many other modified decibel scales, such as the dB_C (“C” scale), PN_{db} (“perceived noise”), EPN_{db} (“effective perceived noise”), SIL (“speech interference level”) and the “sone” and “phon” scales. A few dB_A readings to which people are commonly exposed are as follows:

Conversational speech 60
 Heavy city traffic 90
 Home lawnmower 98
 Loud motorcycle 110
 Jet airliner (500 feet overhead) 115
 Human pain threshold 120
 Rock and roll band (when playing at its loudest) 120
 Winner of the 2001 IASCA AutoSound Competition World Finals 175
 Saturn V Moonrocket (measured at launching pad) 180

Id.; *Community Noise*, *supra* note 6, at 190; *Manufacturer Marketing Report* from Autoblast 2001 IASCA World Finals.

⁹*Community Noise*, *supra* note 6, at 185-86 and the footnotes referenced therein.

¹⁰John P. Ludington, Annotation, *Validity, Under Federal Constitution of Federal, State, or Local Antinoise Laws and Regulations*, 36 L. Ed. 2d 1042, 1045 and the footnotes referenced therein.

¹¹Dep't of Pub. Safety v. Buck, 256 S.W.2d 642 (Tex. Civ. App. 1953); *see generally* L.I. Reiser, Annotation, *Public Regulation Requiring Mufflers or Similar Noise-preventing Devices on Motor Vehicles, Aircraft or Boats*, 49 A.L.R.2d 1202 (1956); *see also* Ludington, *supra* note 10, at 1042; *see generally* 61 AM. JUR. 2D *Pollution Control*, §§ 1532, 1533 [hereinafter *Pollution Control*].

municipal level, where ordinances have been enacted regulating noise emanating from barking dogs, commercial operations, playing of musical instruments, car mufflers, sound amplification and even loud talking.¹² As a result of increasing noise, especially in urban areas, and the concerns over adverse affects of noise on human health and well being, in 1972 noise also became the subject of federal regulation with the enactment of the Noise Control Act of 1972.¹³ But it was not until the late 1980's¹⁴ that municipalities began enacting ordinances specifically aimed at regulating "sound" or "noise"¹⁵ emitted from motor vehicle stereo systems.¹⁶

III. THE EVOLUTION OF CAR STEREOS

Radios have been installed in cars for more than three-quarters of a century,¹⁷ and today virtually all vehicles leave the factory with a radio, usually in combination

¹²6 A MCQUILEIN MUN. CORP. § 24.101 (3d ed. 1997).

¹³42 U.S.C.A. §§ 4901; *see generally* *Pollution Control*, *supra* note 11, at §§ 1534-1568.

The Act established an "Office of Noise Abatement and Control under the Environmental Protection Administration, with a network of ten regional offices scattered across the country to assist local communities in the implementation and enforcement of noise regulations. But Congress has not provided funding for the program for more than fifteen years, and in those years, the infrastructure of noise control nationwide has more or less collapsed." Sue Schultz, *Battle of the Boombox*, GOVERNING MAG., Oct. 1999, at 37, 38; *see also* Jason A. Lief, Note, *Insuring Domestic Tranquility Through Quieter Products: A Proposed Product- Nuisance Tort*, 16 CARDOZO L. REV. 595, 621-24 (1994).

¹⁴Since a relatively small number of municipalities make their ordinances available online or in any other easily accessible source, it is difficult, at best, to determine which municipality first enacted an ordinance regulating noise from car stereos. However, from a survey of the ordinances of 16 Ohio municipalities, some of which are available through online data bases, it appears that an Ohio municipal ordinance specifically regulating sound from car stereos was enacted as early as 1976, but that the large majority (12 of 16) of such municipal ordinances reviewed were enacted from 1992 through 2000. *See* LAKEWOOD, OHIO, ORDINANCES § 515.04(j)(2) (1976). *See generally* the website for Noise Pollution Clearing House, a non-profit organization headquartered in Vermont, at <http://www.nonoise.org>; the website for General Code at www.generalcode.com; the website for The Noise Consultancy, LLC at <http://www.noiseconsultancy.com>; and the website for American Legal Publishing at <http://www.amlegal.com>.

¹⁵"Sound" and "noise" are not synonymous. For example, an orchestra playing Beethoven and a construction worker operating a jackhammer may both emit sound, but most would agree that only the jackhammer emits noise. Many municipalities do not seem to appreciate this distinction, and their ordinances often use the terms more or less interchangeably. Some even proscribe "loud music." As seen in the discussion, *infra*, regulating sound – and music – is more problematic than regulating noise.

¹⁶In this article the phrases "stereo systems" and "sound systems" are used interchangeably to describe the system installed in a motor vehicle, either by the factory or as an aftermarket add-on, to produce sound inside the vehicle from radio signals, compact discs, audio tapes or other media.

¹⁷*Digital America 2001, Electronics on The Road*, Consumer Electronics Association (visited December 2001), available at http://www.ce.org/publications/books_references.

with an in-dash cassette tape and/or compact disc player.¹⁸ But the factory installed sound systems do not appear to be the source of the sound that has triggered the enactment of noise ordinances specifically aimed at car stereos. Rather, it appears that it is the sound generated by the more powerful and more advanced amplifiers, equalizers, cross overs, and other components¹⁹ purchased and installed in the aftermarket that “disturbed the peace”²⁰ and generated a public outcry²¹ for a legislative solution.

From 1989 to 2000 the annual sales of aftermarket car sound equipment more than doubled from \$1.023 to 2.169 billion.²² And the power, as well as the clarity, of such aftermarket systems increased as well.²³ If one assumes that the average cost of

¹⁸In 2000 the value of factory installed radios, tape and CD players was 2.7 billion. While the growth of such auto sound equipment is expected to slow, new in-car technologies, such as satellite radio, products that will put “home theater” in the car and MP3 systems, are expected to “explode.” *Digital America 2001, Mobile, In-car Technology Overview*, CONSUMER ELECTRONICS ASSOCIATION (visited December 2001) available at http://www.ce.org/publications/books_references; U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES (2000); Consumer Electronics and Electronic Components—Factory Sales by Product Category, 1990-1999, at 750.

¹⁹While the number of company’s supplying audio equipment to automobile manufacturers for factory installation is limited (e.g., GM makes available systems supplied by Delco and Bose; DaimlerChrysler systems supplied by Infinity), the number of companies manufacturing systems and components for the aftermarket is not. Virtually all of the recognized leaders in home audio systems, such as JVC, Panasonic, Pioneer, Sony, McIntosh and Yamaha, as well as numerous others, supply systems and components to the car stereo aftermarket. See *Manufacturers’ Marketing Report from Autoblast 2001 IASCA World Finals* (October 20, 21, 2001 Charlotte, North Carolina).

²⁰In what might not be the best choice for a product name, Sony markets its aftermarket car controller/amplifier under the trademark “Disturb The Peace.” See *Car Stereo Review*, September 1989, at 97.

²¹In the 1990’s newspapers throughout the country reported stories of citizens’ complaints of excessive noise from car stereos. For example, The Plain Dealer, quoting Councilwoman Helen Smith, reported, “In the past 24 hours I took four complaints about this kind of thing . . . You just put your kid to bed on a hot summer night . . . Two of these things come down the street—the boom—boom . . . boooooom.” E.J. Kissel & Christopher Quinn, *Boom, Boom, Boom, Bust as Car Drivers Blast Stereos, City Police Pump Out Tickets*, THE PLAIN DEALER (Cleveland, Ohio), June 15, 1996, at B1 available at 1996 WL 3556259. The Providence Journal reported that the Providence Police Chief had told a group: “I have told the men time and time and again that noise is a pet peeve of mine and I want them to give it a priority. In my book, cracking down on noise is up there with catching a murderer.” Richard C. Dujardin, *2 Bills Sound Alarm on Noise*, PROVIDENCE JOURNAL, May 18, 2000, available at 2000 WL 5107263; see also, Keven A. McKenna, *Past Time to Stop The Noise Marauders*, PROVIDENCE JOURNAL, May 12, 2000, available at 2000 WL 5106361; *Because You Asked*, ROCKY MOUNTAIN NEWS, September 17, 1998, available at 1998 WL 7961217; Barbara Kois, *State Statute on Noise from Vehicles is Reinstated*, CHICAGO TRIB., August 1, 2000, available at 2000 WL 3691801.

²²U.S. CENSUS BUREAU, *supra* note 18; E-mail from Matt Swanston, Consumer Electronics Association, Mswanston@ce.org to the author (Feb. 19, 2002) (on file with the author).

²³In 1990, the power of a typical aftermarket car stereo system was approximately 50 watts and cost approximately \$200; in 2002, the power was approximately 800 to 1000 watts

an aftermarket car sound system is \$500.00, then there may be as many as 23 million cars on the highways with such systems.²⁴

In 1987, a group of industry manufactures organized the International Auto Sound Challenge Association, Inc. (“IASCA”) to guide the growing interest of owners of aftermarket car stereos to compete with one another to see whose system can, among other things, emit the loudest and best quality sound.²⁵

While the manufacturers have been active in developing and marketing their auto sound systems and sponsoring competitions, they have done little to try to address the public’s negative reaction to the use of their products and the legislation aimed at making the use of such products illegal.²⁶

IV. ORDINANCES

The ordinances that Ohio municipalities²⁷ have adopted to make sound or noise from motor vehicle sound systems illegal are not uniform, and vary not only in the

and cost approximately \$2,000. Telephone interview with Rick Davis, owner, Ohio Auto Sound (Toledo, Ohio 2002).

²⁴It is estimated that 98% of new cars sold in the U.S. since 1995, or 39.7 million, were, as of July 1, 2000, still in operation, and that the total sales of aftermarket car sound systems from 1995 through 2000 was 11.781 billion. Dividing 11.781 billion by \$500 equals 23.6 million times 98% equals 23 million. See *Ward’s Motor Vehicle Facts & Figures 2001*, Passenger Cars in Operation by Model Year and Average Age of Cars in Use, at 45.

²⁵The IASCA sanctions over 300 competitions annually in the U.S. culminating in “World Finals” event (held in 2001 and 2002 in Charlotte, North Carolina), which event is attended by 15,000 auto sound enthusiasts from all over the world. The 2001 winner in the loudness category exceeded 175 decibels. Manufactures Marketing Report from Autoblast 2001 IASCA World Finals, *supra* note 19.

²⁶While The Consumer Electronics Association (“CEA”) continues to track legislation concerning sound/noise issues, it has not been directly involved in state or local legislation since 1999. The CEA’s general objection to such ordinances has centered on (1) subjective enforcement and (2) unreasonably harsh penalties for first offenders. Matt Swanston, Consumer Electronic Association, *supra* note 22.

²⁷In Ohio, there are 88 counties and 1,491 townships, within which are 704 villages and 232 cities. REBECCA C. PRINCEHORN, OHIO TOWNSHIP LAW § 1.11 (4th ed.) at 38. Under Article VIII, Section 3, of the Ohio Constitution (commonly known as the “Home Rule Amendment”), municipalities (i.e., cities and villages) may adopt ordinances, including ordinances regulating noise from car stereos, so long as they are not in conflict with the general laws of Ohio and are “reasonable” and do “not interfere with private rights beyond the necessities of the situation.” *Teegardin v. Foley*, 143 N.E.2d 824, 825 (Ohio 1957). On the other hand, townships serve as an “instrumentality of the State . . . for the purpose of local administration, . . . possess only such powers . . . as . . . conferred on them by statute . . . [and have] . . . no inherent or constitutionally granted police power.” 20 OHIO JUR.3D COUNTIES, TOWNSHIPS, AND MUNICIPAL CORPORATIONS § 302 (2002); *Henn v. Univ. Atlas Cement Co.*, 144 N.E.2d 917 (C.P. 1957). Under Ohio Revised Code § 4513.221, Townships have been granted the power to regulate passenger car and motorcycle noise on streets and highways under their jurisdiction, but only if such regulation is in compliance with the requirements of such Section, which requires, among other things, that the noise must be measured in decibels at a distance of not less than 50 feet from the center of the line of travel, must exceed specified decibel limits (82 decibels for motorcycles and 70 decibels for all other vehicles when operated at a speed of 35 miles per hour or less, and 86 decibels for motorcycles and 79 decibels for all other vehicles when operated at a speed of more than 35 miles per hour), and

way the unlawful sound or noise is defined, but also in the way it is measured. While there are many variations, most of the ordinances can be divided into the following general categories:

A. *Ordinances Making Unlawful Any Sound or Noise Which is Audible Outside the Vehicle* (“Audible Outside the Vehicle Ordinances”).

Typical of this type of ordinance is Hamilton, Ohio, City Codified Ordinance Section 337.271(b),²⁸ which provides, in pertinent part:

No . . . operator of a motor vehicle . . . shall recklessly play, . . . [a] sound amplifying device located within or upon such motor vehicle at such a level, volume, frequency, or intensity that the sound emitted exceeds the capacity of such motor vehicle to fully absorb, . . . the sound being

may not become effective until signs giving notice of the regulation are posted upon or at the entrance to the highway or street affected. OHIO REV. CODE ANN. § 4513.221(B), (D) (Anderson 1999); *see also* OHIO REV. CODE ANN. § 505.17 (Anderson 1998) (appearing to limit a township’s power under Ohio Revised Code § 4513.221 to regulating *engine noise* from passenger cars and motorcycles); OHIO REV. CODE ANN. § 505.172 (Anderson 1998) (authorizing townships to regulate noise at any premises to which a D Permit has been issued by the Division of Liquor Control); OHIO REV. CODE ANN. § 2917.11 (Anderson 1999), Ohio’s Disorderly Conduct Statute (providing *inter alia*, that no “person shall recklessly cause inconvenience, annoyance, or alarm to another by . . . [m]aking unreasonable noise . . .”). While a Township could conceivably regulate noise from car stereos if it established that such noise violated Ohio Revised Code § 2917.11 or regulations adopted under Ohio Revised Code § 4513.221, there is no authority for townships to adopt and enforce regulations specifically aimed at noise or sound from car stereo systems.

The same holds true for Ohio counties, except for Summit County, which is the only charter county in Ohio with home rule powers similar to municipalities. In 1993, Summit County enacted a car stereo noise ordinance making unlawful any noise from sound equipment in a motor vehicle which is “likely to cause inconvenience or annoyance to persons of ordinary sensibilities” and *prima facie* unlawful if the offending sound is “plainly audible” at a distance “of 100 feet or more.” *See* SUMMIT COUNTY, OHIO, ORDINANCE §§ 343.01, 343.02 and 343.99 (1993).

In other states, most of the ordinances regulating sound or noise from car stereos have also been adopted at the local, or municipal level, but there are exceptions. *See, e.g.*, CALIFORNIA VEHICLE CODE § 27007 (2000) (Audible at a Distance Ordinance); DELAWARE REGULATIONS GOVERNING THE CONTROL OF NOISE §§ 71-1-4.0.2.(1) (2001) (Annoyance Ordinance); FLORIDA TRAFFIC NOISE CODE § 316.3048 (2001) (Combination Ordinance); N.Y. VEH. & TRAF. LAW § 375(47)(a) (McKinney Supp. 1995) (Decibel Ordinance); OREGON REVISED STATUTE § 815.232 (2001) (Combination Ordinance); RHODE ISLAND STATUTES §§ 31-45-5 and 31-45-1 (2001) (Decibel Ordinance); and GENERAL LAWS OF RHODE ISLAND ANNOTATED § 31-45-5 (2000) (Decibel Ordinance); *see also* 33 LAWS OF PUERTO RICO ANNOTATED § 1443 (1996) (Annoyance Ordinance).

²⁸Section 337.271, which is part of the Traffic Code, was enacted on November 20, 2000 to replace § 509.14, which was part of the General Offense Code of the Codified Ordinances of the City of Hamilton, Ohio, which was adopted on November 22, 1995. The reason this Section was renumbered and moved from the General Offense Code to the Traffic Code was because the Traffic Code “would result in fining the first-time juvenile offenders and eliminating the need to process them through Juvenile Court.” *See* HAMILTON, OHIO EMERGENCY ORDINANCE No. EOR2000-11-130 (2000).

emitted so that such sound is inaudible to persons located outside the motor vehicle. . . .²⁹

B. Ordinances Making Unlawful Any Sound or Noise Which is Audible at a Specific Distance from the Vehicle (“Audible at a Distance Ordinances”).

These ordinances make unlawful sounds which are audible³⁰ at a specified distance from the motor vehicle, which distance generally ranges from 25 to 150 feet. Typical of this type of ordinance is Tiffin, Ohio, Codified Ordinance Section 509.11(a), which provides:

It is unlawful for any person operating or occupying a motor vehicle within the City to operate or amplify the sound produced by a radio, tape player or other soundmaking device or instrument from within the motor vehicle so that the sound is: Plainly audible at a distance of 100 feet or more from the motor vehicle.³¹

²⁹The Hamilton City Ordinance defines “sound” as “any kind of humanly audible stimulus . . .,” and sets forth certain exceptions, such as sound created by emergency vehicles, sound generated by automobile alarm devices for and during such a reasonable period as is necessary to permit the owner to silence the device without danger of attack or injury, and sound emanating directly from a motor vehicle engine. HAMILTON CITY, OHIO CODIFIED ORDINANCES §§ 337.271(a)(3) & 337.271(c)(1)-(8) (2003). Another example of an “Audible Outside the Vehicle Ordinance” is EAST CLEVELAND, OHIO, ORDINANCE § 337.31(a) (2002), which provides, in pertinent part:

No person shall play any radio, music player or an audio system in a motor vehicle . . . at a volume which is plainly audible to persons other than the occupants of said vehicle.

The East Cleveland Ordinance also makes unlawful the playing of “any radio, music player or an audio system in a motor vehicle at such volume as to disturb the quiet, comfort or repose of other person(s) . . .” This portion of the statute, however, seems unnecessary, because a sound which disturbs the quiet, comfort or repose of other persons, would be “plainly audible” outside the vehicle, and a sound which is “plainly audible” outside the vehicle constitutes a *per se* violation of the ordinance. *See also* CLEVELAND, OHIO, MUNICIPAL CODE § 683.02 (2002).

³⁰Some municipal sound ordinances simply use the word “audible” (*see e.g.*, ALLIANCE, OHIO, MUNICIPAL CODE § 509.14(a) (2003) (“ . . . where the sound is audible 100 feet from the device generating the sound.”)); others use the term “plainly audible” (*see, e.g.*, note 29, *infra*); while others use such terms as “discernable” (*see e.g.*, REVISED GENERAL ORDINANCES OF THE CITY OF DAYTON, OHIO § 94.12 (2002) (“If the sound . . . is discernable at a distance of 25 feet or more from the vehicle.”)).

³¹The Tiffin Ordinance defines “Plainly audible” as “any sound . . ., that can be clearly heard . . . by a person using his normal hearing facilities, . . .” TIFFIN, OHIO, CODIFIED ORDINANCE § 509.11(d) (2002). The Tiffin Ordinance, like many of the Audible at a Distance Ordinances, also includes exceptions for law enforcement and emergency vehicles and noises made by horns or other warning devices; and provides that: “the primary means of detection shall be by means of the officer’s ordinary auditory senses . . .”; that “The officer need not determine the particular words or phrases being produced or the name of any song or artist producing the sound;” and that the “detection of a rhythmic base reverberating type sound is sufficient to constitute a plainly audible sound.” TIFFIN, OHIO, ORDINANCE §§ 509.11(b), (c) & (e) (2002). *But see* AURORA, COLO., MUNICIPAL CODE § 94-109(c) (2003) (“For the purposes of this Section, the term “plainly audible” means that the information content of the sound is

C. Ordinances Making Unlawful Any Sound From a Vehicle Which Disturbs or Annoys a Person of Ordinary Sensibilities (“Annoyance Ordinances”).

Many municipalities have adopted ordinances regulating sound from car stereo systems which are based on a purely subjective standard; *i.e.*, the violation occurs when an officer determines that the sound is annoying or disturbs the quiet, comfort or repose of other persons, or causes “inconvenience.”

Typical of an “Annoyance Ordinance” is Cincinnati, Ohio Municipal Code Section 910-10(A), which provides, in pertinent part:

No person . . . in possession of a motor vehicle with any radio, phonograph, television, tape player . . . or device shall cause or permit any noise to emanate from the motor vehicle . . . which causes inconvenience and annoyance to persons of ordinary sensibilities.³²

D. Ordinances Which Make Unlawful Any Sound Which is Both Audible at a Specific Distance From the Vehicle and Annoys or Disturbs a Person of Ordinary Sensibilities (“Combination Ordinances”)³³

Typical of this type of “Combination Ordinance” is Section 132.13(A), as amended, of the Codified Ordinances of the Village of Kelleys Island, Ohio, which

unambiguously transferred to the auditor, such as but not limited to understanding of spoken speech, comprehension of raised or normal voices or comprehension of musical rhythms”), and FT. LUPTON, COLO. MUNICIPAL CODE § 10-185(b) (2002) (“For the purpose of this Section, the phrase *plainly audible* means that sound is transferred to the auditor, such as but not limited to being able to understand spoken or sung words, or comprehension of musical rhythms.”) *See also* HUBER HEIGHTS, OHIO, MUNICIPAL CODE § 509.11(b) (2002), as amended (plainly audible at 25 feet); SHAKER HEIGHTS, OHIO, ORDINANCE § 1131.45 (2003) (plainly audible at 50 feet); ALLIANCE, OHIO, MUNICIPAL ORDINANCE § 509.14 (2003) (audible at 100 feet); VILL. OF KELLEYS ISLAND, OHIO, ORDINANCE § 132.13 (2002) (plainly audible at 150 feet); MONTGOMERY, ALA., MUNICIPAL CODE § 27-6(a) (1993) (plainly audible, at a distance of 5 feet from a motor vehicle or 10 feet in the case of a pedestrian). Prior to being amended in 1999, the Shaker Heights Code also required, among other things, that the audible sound or noise “annoys or disturbs a reasonable person of normal sensitivities.” SHAKER HEIGHTS, OHIO, ORDINANCE § 755.01(o)(2) (1998).

³²*See also* AKRON, OHIO, CITY CODE § 132.16 (2002) (“generate or permit to be generated unreasonable noise or loud sound which is likely to cause inconvenience or annoyance to persons of ordinary sensibilities . . .”).

³³A variation on this theme are ordinances which require that the sound be annoying or disturbing, but also provide that such sound is “*prima facie*” annoying or disturbing if it is plainly audible at a specified distance. *See, e.g.*, CINCINNATI, OHIO, MUNICIPAL CODE §§ 910-10(A) & (B) (providing that it shall be unlawful to “cause or permit any noise to emanate from the motor vehicle in such manner and to be of such intensity and duration to create unreasonable noise or loud sound which causes inconvenience and annoyance to persons of ordinary sensibilities”). The statute goes on to provide that any noise which is plainly audible at a distance of 50 feet from the motor vehicle is “*prima facie*” unlawful. *Id.* Of course, establishing a “*prima facie*” case does not mean that the defendant is automatically guilty. Rather, as the Ohio Supreme Court has stated, a *prima facie* case is “one in which the evidence is sufficient to support *but not to compel* a certain conclusion and does no more than furnish evidence to be considered and weighed but not necessarily accepted by the trier of facts.” *City of Cleveland v. Keah*, 105 N.E.2d 402, 403 (Ohio 1952) (emphasis added).

provides, in pertinent part: “No persons shall generate . . . noise or loud sound which is likely to cause inconvenience or annoyance to persons of ordinary sensibilities . . . which is plainly audible at a distance of 150 feet or more from the source of the noise or loud sound. . . .”³⁴

E. Ordinances Making Unlawful Any Sound Which Exceeds a Certain Decibel Level at a Specified Distance From the Vehicle (“Decibel Ordinances”)

The few Ohio municipalities that had enacted ordinances which made sound from motor vehicle stereos unlawful, if such sound exceeded specific decibel levels, appear to have replaced such ordinances with Audible at a Distance or other types of anti-noise ordinances. For example, the City of Huber Heights, Ohio amended its Decibel Ordinance in 1997 to one that makes sound unlawful if audible at a distance of 25 feet because “Officials said enforcement had been difficult and ineffective in the past because the ordinance prohibited only car speakers from causing a noise level in excess of 80 decibels, . . .”³⁵

A few non-Ohio jurisdictions have adopted and maintained Decibel Ordinances to regulate sound or noise from car stereos, even though enforcement of such ordinances requires more effort and expense than enforcement of non-decibel alternatives. For example, under New York City’s ordinance,³⁶ a vehicle stereo system may not be operated in excess of 70 decibels (dbA) measured at (or adjusted to) 25 feet from the vehicle. Initially, the law was seldom enforced because the police were not equipped or experienced in measuring sound levels.³⁷ But since approximately 1995, when the New York City Police joined forces with representatives of the New York City Department of Environmental Protection, the ordinance has been successfully enforced.³⁸

³⁴This ordinance also provides for a *prima facie* violation if the noise or loud sound is plainly audible at 150 feet or more and occurs on property between the hours of 11 p.m. and 8 a.m. of the following day or on a street, highway or public right-of-way. VILL. OF KELLEYS ISLAND, OHIO, ORDINANCE §§ 132.13(A)(1) & (2) (2002); *see also* ALLIANCE, OHIO, CITY CODE § 509.14(a) (2003).

³⁵*Heights Amendment to Noise Law Targets Car Stereos*, DAYTON DAILY NEWS, July 2, 1997, available at 1997 WL 11425017; *see* HUBER HEIGHTS, OHIO, MUNICIPAL CODE § 509.11(b) (as amended by Ordinance 97-0-730 passed June 23, 1997). Prior to Amendment, the Huber Heights Ordinance provided:

(1) No person shall operate any sound amplification device in a motor vehicle, or in a public place within the City so as to cause a noise level in excess of eighty (80) dB(A). Such noise level limits shall be based on a distance of not less than fifteen (15) feet from the noise source. Huber Heights Municipal Code § 509.1(b)(1), Ordinance No. 94-01730, passed October 31, 1994.

³⁶N.Y. VEH. & TRAF. LAW § 375(47)(a) (McKinney 1995).

³⁷William J. Bratton, *The New York City Police Department’s Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL’Y 447, 460 (1995).

³⁸*Id.* While representatives of the New York City Department of Environmental Protection (“DEP”) were experienced in measuring sound levels, they were not trained to conduct motor vehicle stops. On the other hand, the police, who knew how to conduct traffic stops, were not trained to measure sound levels. As part of an enforcement strategy known as “Operation Sound Trap,” the DEP officers measured the sound levels, while the police officers stopped the vehicles and issued citations. Once the police learned the sound measuring procedures,

On the other hand, many Ohio municipalities, which avoid decibel measurements when regulating sound from motor vehicle stereo systems, commonly employ them when regulating sound or noise from other sources, including other parts of the vehicle.³⁹ It appears that municipalities have avoided decibel ordinances when it comes to sound from motor vehicle car stereos because of the added expense of equipping their police officers with decibel measuring meters and training them in their proper use.⁴⁰ But avoiding a decibel standard when measuring sound from car stereos, while applying a decibel standard when measuring sound or noise from virtually every other source, including sound or noise from motor vehicle engines, mufflers and other parts of the motor vehicle, raises issues that have yet to be adequately addressed by the courts.⁴¹

V. PENALTIES

The penalties for violating Ohio's municipal car stereo sound ordinances are as varied as the ordinances themselves. Generally, violation of a municipal car stereo sound ordinance is a minor misdemeanor, with subsequent violations within a defined period of the first offense being categorized as either third or fourth degree misdemeanors, depending on the number of times the ordinance is violated within that period.⁴²

they were able to enforce the ordinance without help from the DEP personnel. While the only limitation on enforcement was simply a lack of an adequate number of sound meters, the police have found that the mere presence of "fake sound meters" has been effective in reducing violations because the "mere site of the imitation meter . . . [causes] . . . them to turn down their sound systems." *Id.* at 460-61.

³⁹*See, e.g.*, SHAKER HEIGHTS, OHIO, ORDINANCE § 755.05 (2003) (establishing that a motor vehicle, motorcycle or motorized bicycle cannot be operated if it exceeds a sound level of 86 decibels (for vehicles over 10,000 pounds or more) or 80 decibels for other vehicles, motorcycles or motorized bicycles); *see also*, LAKEWOOD, OHIO, GENERAL OFFENSE CODE, Chapter 515 – Noise Control (2002).

⁴⁰In Bristol, Rhode Island, after the American Civil Liberties Union questioned the constitutionality of the town's existing noise ordinance, council enacted a decibel ordinance which was "designed to eliminate subjectivity by tying offenses to readings from newly purchased noise meter, [which] meter can read decibel levels and generate a computer printout." The ordinance provided that a warning be given to first-time offenders, but some council members felt the ordinance was too lenient ". . . particularly given the difficulty in catching offenders with the noise meter." Sam Nitze, *First-time Offenders Won't Escape Crackdown On Noise*, PROVIDENCE J., June 1, 2000, available at 2000 WL 21732708; *see also* Code Drafting Tip for 2002 *Boom Cars – Boom Boxes* available at www.noiseconsultancy.com (describing the problems of enforcing a decibel ordinance because ". . . the sound is transient and the source is mobile. While some jurisdictions enforce a curblin sound level limit, the enforcement agency must set up in advance in the location at which they suspect a violation may occur. While enforcement and deterrence is extremely effective during the operation of such an enforcement action, it is only effective at the time and in the place this action occurs. Outside of these parameters, deterrence is minimal.")

⁴¹*See* note 236, *infra* and accompanying text.

⁴²*See, e.g.*, VILL. OF KELLEYS ISLAND, OHIO, ORDINANCES § 132.13(G) (2002); *see also* LAKEWOOD, OHIO, ORDINANCES § 515.99 (2002) (minor misdemeanor for the first offense; misdemeanor of the fourth degree for each subsequent offense committed within six months of a prior offense); CLEVELAND, OHIO, MUNICIPAL CODE § 683.99(c) (1998) (second offense

Fines typically range from \$75.00⁴³ to \$200.00⁴⁴ for the first offense. But there are exceptions, the most notable of which are those municipal ordinances which make the stereo sound equipment and/or the car itself subject to forfeiture or impounding.⁴⁵ For example, Section 132.16(E) of the Akron, Ohio City Code provides that:

In any violation of this Section involving sound equipment in a motor vehicle, both the sound equipment and the motor vehicle are hereby deemed contraband and subject to seizure and forfeiture under Ohio Revised Code §§ 2933.41 through 2933.43.⁴⁶

within thirty-six hours of being charged with a first offense is a misdemeanor of the third degree and shall be fined not less than \$100.00 and not more than \$500.00); DAYTON, OHIO, MUNICIPAL CODE § 94.99 (2002) (“[F]or a second offence committed within one year after the commission of the first offense, the person shall be guilty of a fourth degree misdemeanor; for a third and/or subsequent offense committed within one year of the commission of the first offense, the person shall be guilty of third degree misdemeanor.”).

⁴³CLEVELAND, OHIO, MUNICIPAL CODE § 683.99(a) (1998) (“[U]pon a first offense, shall be fined seventyfive dollars (\$75.00), which fine shall not be suspended, waived, or otherwise reduced below that amount.”).

⁴⁴EAST CLEVELAND, OHIO, MUNICIPAL CODE § 337.31(b) (2002). This mandatory fine of \$200.00 is in addition to the penalty set forth in § 303.99 which provides for a fine of not more than \$1,000 or imprisonment of not more than 6 months, or both.

⁴⁵There are also a variety of other, somewhat unconventional, penalties imposed for violation of car stereo sound ordinances. For example, Hamilton, Ohio Municipal Code § 337.271(E) provides, among other things, that for a second conviction a “court may order the offender to render up to 180 hours of community service”; and, in a case that has received some publicity, a judge in Greeley, Colorado (Weld County Court System) required a violator of the Lupton, Colorado Municipal Code § 10-185 to sit in a small room and listen to an hour’s worth of Barry Manilow or the “Barney” theme song. See Joanna Karkissis, *Thwarting Thunderous Car Stereos*, THE RALEIGH, NORTH CAROLINA NEWS OBSERVER, April 3, 1999, available at 1999 WL 2745203.

⁴⁶See also ALLIANCE, OHIO, MUNICIPAL CODE § 509.14(e) (2003). This Code provides: Upon a conviction of a second violation of this section, both the sound equipment and the motor vehicle are hereby deemed contraband and subject to seizure and forfeiture under Ohio R.C. 2933.41 through 2933.43 unless and until the offender has removed the sound equipment from the motor vehicle within 15 days of the conviction and upon conviction of any subsequent violation of this section, both the sound equipment and the motor vehicle are hereby deemed contraband and subject to seizure and forfeiture under Ohio R.C. 2933.41 through 2933.43 unless and until the offender has removed the sound equipment from the motor vehicle within 15 days of the conviction upon which event the motor vehicle shall be returned to the offender and the sound equipment shall remain subject to the provisions of §§ 2933.41 through 2933.43 of the Ohio Revised Code.

Id.; see also, SUMMIT COUNTY, OHIO, ORDINANCE § 343.99 (Nov. 8, 1993). This ordinance provides, upon a third conviction, for a “\$500.00 fine with confiscation of the sound equipment involved” and that the confiscated “equipment shall be picked up between 91 and 120 days after confiscation” and that if not picked up, “shall be sold by local law enforcement sale.” *Id.*

Other examples include East Cleveland, Ohio Municipal Code Section 337.31(c), which simply provides that “upon conviction for a violation of this Section, the sound device used during the commission of the offense, shall be subject to seizure and payment of a judgment”; and Hamilton, Ohio Municipal Code Section 337.271(e), which provides that upon a second or subsequent conviction, “the Court shall order the impoundment of a motor vehicle in which the violation occurred . . . for a period of not less than 10 days nor more than 180 days, and shall assess the costs of towing, impoundment, storage and redemption against the offender.”⁴⁷

VI. ENFORCEMENT

Although there are no federal or state agencies which track the number of citations issued by Ohio municipalities for violation of their respective car stereo noise ordinances, it is clear that in recent years the number of citations, as well as the number of arrests and convictions, have risen dramatically.

In 1996, The Plain Dealer reported that in the first five months of the year, Cleveland police issued 367 citations, citing 75 drivers in one week alone.⁴⁸ For the period January 1, 2000 through March 21, 2002, the City of Cleveland issued 11,034 citations for loud sound from car stereos (§ 683.02) and arrested 470 individuals.⁴⁹ This is an average of more than 409 citations and 17 arrests per month. By contrast, during the same period, the City of Cleveland issued only 111 citations and arrested only 4 individuals for violation of its general loud noise ordinance (Section 605.10),

⁴⁷Some Ohio Municipal Courts have not hesitated to impose severe and somewhat unusual penalties, especially when the defendant is a repeat offender. For example, in *State v. Williams*, the Youngstown Municipal Court sentenced the appellant, who was found guilty for the third time of violating Youngstown’s Combination Ordinance, to “sixty days in jail with thirty days suspended . . . thirty days of house arrest: . . . \$1100 in fines or perform sufficient community service, . . . write a twenty-five page paper on the damaging effects of loud music to hearing; and . . . five years of probation, . . .” Case No. 01CA221, Ohio App. 7th Dist. (Sept. 18, 2002) (unreported) (emphasis added); see also *State v. Ivy*, Case, No. 01CA191, Ohio App. 7th Dist. (Sept. 18, 2002) (unreported) (where the Youngstown Municipal Court refused to accept the recommendation of the prosecutor to accept a plea agreement where the appellant would pay a \$600 fine, costs, forfeit his stereo and accept one year of non-reporting probation because “jail time was required because loud music is disturbing and offensive, appellant did not learn the first time, and he got a break with no jail the second time”).

⁴⁸E.J. Kissel & Christopher Quinn, *Boom, Boom, Boom, Bust as Car Drivers Blast Stereos, City Police Pump Out Tickets*, THE PLAIN DEALER (Cleveland, Ohio), June 15, 1996, at B1.

⁴⁹Letter and attachments from Laura T. Palinkas, Assistant Director of Administration, Department of Public Safety, City of Cleveland to Mark Kessler, Librarian Assistant, Ulmer & Berne LLP (March 25, 2002) (on file with the author). From January 4, 2000 to April 4, 2002, the City of Parma, Ohio issued 579 citations for violation of its Audible at a Distance Noise Ordinance (Parma Municipal Code § 669.02), and during the year 2001, the City of Shaker Heights issued 61 citations for violation of its Audible at a Distance Noise Ordinance (Shaker Heights Codified Ordinance § 1131.45). Statistics furnished by the Parma Police Department to Mark Kessler, Librarian Assistant, Ulmer & Berne LLP (April 4, 2002) (on file with the author). Facsimile from Walter A. Ugrinic, Shaker Heights Police Chief to Mark Kessler, Librarian Assistant, Ulmer & Berne LLP (April 3, 2002) (on file with the author).

and issued 4,829 citations and arrested 9 individuals for violation of the City's loud muffler ordinance (Section 437.20).⁵⁰

In 1999, the City of Springdale, Ohio began posting signs on the main thoroughfares entering the City which read: "Loud stereos prohibited – \$50 fine," but this warning does not appear to have significantly reduced the number of citations for violating the City's car stereo noise ordinance.⁵¹

VII. THE CONSTITUTIONAL CHALLENGES

In recent years, a number of Ohio municipal car stereo ordinances have faced constitutional challenges, without much success. Constitutional challenges have also been made to similar ordinances in other states, and such challenges have fared somewhat better. The lack of success, however, seems to be based on reasons other than the lack of a sound legal basis.

The challenges have been made directly (*i.e.*, where the defendant was actually charged with violating the car sound ordinance) and indirectly (*i.e.*, where the defendant is charged with violating another law, like possession of illegal drugs, and challenges the alleged violation of the car sound ordinance as an insufficient basis for the probable cause that led to the drug arrest.)⁵²

The constitutional challenges are generally based on either the First Amendment (*i.e.* the statute, because of its over breadth, regulates or proscribes expression), and/or the due process clause of the Fourteenth Amendment (*i.e.* the statutes are vague, or arbitrary, or selectively enforced or, in at least one case, racially discriminatory).⁵³

⁵⁰*Id.* During 2001, Cleveland's Dog Warden received 1,277 calls about barking dogs but issued only 56 citations. Mark Vosburgh & Christopher Quinn, *Calls Show Bark is Worse Than Bite*, THE PLAIN DEALER (Cleveland, Ohio), April 14, 2002, at B1.

⁵¹SPRINGDALE, OHIO, ORDINANCES § 91.10 (2003). This ordinance prohibits the "unreasonable noise or loud sound . . . which causes inconvenience and annoyance to persons of ordinary sensibilities," and specifically provides for a *prima facie* violation if "any noise emanating from the motor vehicle . . . is plainly audible at a distance of fifty (50) feet from the motor vehicle." *Id.* at §§ 91.10(A) & (A)(3). Notwithstanding the posting of the warning signs, the number of citations issued for unlawful noise emanating from motor vehicles increased from 40 in 2000 to 88 in 2001 to 82 in 2002 (through July 3, 2002). Interview with City of Springdale Police Department.

⁵²*See infra* text accompanying note 101.

⁵³*State v. Boggs*, No. C-980640, 1999 WL 42010 (Ohio Ct. App. June 25, 1999). The appellants argued that Cincinnati, Ohio Municipal Code § 910.10 (prohibiting unreasonable noise or loud sound which causes inconvenience and annoyance to persons of ordinary sensibilities and making a plainly audible sound at 50 feet from the motor vehicle *prima facie* unlawful) was unconstitutional as applied because a disproportionate number of African Americans are cited for violating it. The Court of Appeals, in affirming the appellants' convictions, found the statistics were not enough to prove a constitutional violation "because the appellants offered no other evidence to show an intent to discriminate . . ." *Id.* at *3, *4.

A. *General Noise Ordinances*

As previously noted,⁵⁴ the large majority of Ohio Municipalities did not enact ordinances specifically aimed at sound or noise from car stereos until the mid to late 1990's, and consequently the first known constitutional challenge to an Ohio car stereo ordinance was not made until 1994 in a case involving an arrest for violating East Cleveland, Ohio's car stereo ordinance.⁵⁵ But earlier decisions of the Ohio Supreme Court, and certain decisions of Ohio's lower courts, dealing with challenges to general anti-noise ordinances established the reference point against which many subsequent challenges to car stereo ordinances would be analyzed.

The Ohio Supreme Court's 1983 decision in *State v. Dorso*⁵⁶ is the authority most often cited by Ohio's lower courts in addressing constitutional challenges of municipal ordinances specifically directed at sound or noise from car stereo systems. In *Dorso*, the appellant, the manager of a roller rink, was convicted in Municipal Court for violating Cincinnati's Noise Ordinance⁵⁷ which prohibited sound or noise, including music of any kind, which "disturb[s] the peace and quiet of the neighborhood, having due regard for the proximity of places of residence, hospitals or other residential institutions and to any other conditions affected by such noises."⁵⁸

The Municipal Court's decision was reversed by the Court of Appeals for the First District,⁵⁹ which found the term "neighborhood" to be unconstitutionally vague.⁶⁰ On appeal to the Ohio Supreme Court, the State asserted that the ordinance was not unconstitutionally vague because it provided the public with "the requisite 'fair notice' of what behavior should be deemed criminal."⁶¹

In adopting the approach taken by the New Hampshire Supreme Court in *New Hampshire vs. Chaplinsky*,⁶² the Ohio Supreme Court reversed the Court of Appeals, finding that "as used in the subject ordinance, 'Neighborhood' possesses the clarity and certainty which the Constitution demands."

The Court also found the phrase "to disturb the peace and quiet" not impermissibly vague by construing the ordinance as prohibiting only (1) "the playing

⁵⁴See *supra* note 14.

⁵⁵*State v. Harris*, No. 65520, 1994 WL 110938 (Ohio Ct. App., March 31, 1994).

⁵⁶446 N.E.2d 449 (Ohio 1983)

⁵⁷CINCINNATI, OHIO, MUNICIPAL CODE § 910-9 (2003). This section also provides: "It shall be prima facie unlawful . . . to engage in the playing or rendition of music of any kind, . . . or other noises on or about the premises during the night season after 11:00 p.m."

⁵⁸*Id.* According to witnesses, and testimony of the appellant himself, "all-night noisy music" could be heard by families residing from 20, 40 or 50 feet from the roller rink." See *State v. Dorso*, No. C-810115, 1982 WL 8428 (Ohio Ct. App. Jan. 20, 1982) (Keefe, J., dissenting).

⁵⁹*State v. Dorso*, 1982 WL 8428 (Ohio Ct. App. Jan. 20, 1982).

⁶⁰*Id.* at *4.

⁶¹*State v. Dorso*, 446 N.E.2d 449, 450 (Ohio 1983).

⁶²91 N.H. 310, 18 A.2d 754 (1941), *aff'd*, *Chaplinsky vs. New Hampshire*, 315 U.S. 568 (1942).

of music, amplification of sound, etc. in a manner which could be anticipated to offend the reasonable person, i.e., the individual of common sensibilities,” and (2) “the transmission of sound which disrupts the reasonable conduct of basic human activities, e.g., conversation or sleep.”⁶³

The analysis used by the Supreme Court in *State v. Dorso* was applied, in some fashion, by lower courts in upholding the constitutionality of a number of Ohio municipal noise ordinances⁶⁴ which, although not specifically directed at car stereos, were broad enough to encompass music or other sounds emitted by car stereos.

In the *City of Marietta v. Grams*⁶⁵ the appellant had been found guilty of violating Marietta Municipal Code Section 509.08(a)⁶⁶ as a result of “loud music” emanating from her son’s 16th birthday party.

The appellant argued that the ordinance was “unconstitutionally vague” because “it does not sufficiently describe conduct so as to enable one to determine objectively what action violates its provisions “in violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States of America, and the Constitution of the State of Ohio due process provisions.”⁶⁷

The Court acknowledged that “. . . the ordinance does not delineate the type or duration of the clamor or noise which it was intended to prohibit,”⁶⁸ but followed the

⁶³*State v. Dorso*, 446 N.E.2d 449, 452 (Ohio 1983). The Court noted:

Our construction of the ordinance does not permit the imposition of criminal liability upon a party whose conduct disturbs only the hypersensitive. Thus, the standard hereby adopted vitiates the claimed vagueness of the ordinance.

* * *

Ordinances aimed at regulating noise are inherently imperfect. The City of Cincinnati’s “loud musical noises” ordinance, however, as construed, provides parties with constitutionally sufficient “fair warning” of the conduct which is criminally punishable. *Id.* at 453.

The Court also addressed, and dismissed, appellee’s argument that the phrase “due regard for the proximity of places of residence . . . and to any other conditions affected by such noises’ places a constitutionality proscribed burden on the party.” Specifically, the appellee argued that he could be punished for “failing to control conditions, e.g. the wind direction or the behavior of others, outside his dominion and which may affect the neighborhood’s sensitivity to the propagated sound.” The Court noted that the ordinance “simply dictates that in playing music or amplifying sound, a party consider how particular features in his surroundings would be affected by the sounds.” *Id.*

⁶⁴*State v. Dorso* has also been relied upon in upholding the constitutionality of that portion of Ohio’s “disorderly conduct statute” (Ohio Revised Code § 2917.11(A)(2)) which makes unlawful recklessly causing “inconvenience, annoyance, or alarm to another by . . . making unreasonable noise” See, e.g., *State v. Livingston*, 1986 WL 11112 at *2 (Ohio Ct. App. Oct. 2, 1986). See generally, *State v. Reeder*, 479 N.E.2d 280 (Ohio 1985); *Kettering v. Sonstegard*, 374 N.E.2d 163 (Ohio Ct. App. 1977); *Cuyahoga Falls v. Ganocy*, 439 N.E.2d 968 (Cuy. Falls Mun. Ct. 1981).

⁶⁵531 N.E.2d 1331 (Ohio Ct. App. 1987).

⁶⁶Section 509.08(a) which provides, in pertinent part: “No person shall disturb the good order and quiet of the Municipality by clamors or noises in the night season . . . to the annoyance of the citizens, . . .”

⁶⁷*City of Marietta v. Grams*, 531 N.E.2d 1331 (Ohio Ct. App. 1987).

⁶⁸*Id.* at 1335.

State v. Dorso approach and applied a construction which, in the Court's view, passed constitutional muster:

In summary, we construe Marietta Municipal Court Code Section 509.08 to be violated when, with the culpable mental state of recklessness, one by his conduct, produces loud and continued noise which offends a reasonable person of common sensibilities and disrupts the reasonable conduct of basic nighttime activities such as sleep. So construed, it gives sufficient notice of what conduct is proscribed for one to be lawabiding.⁶⁹

In *City of Cleveland v. Powell*,⁷⁰ one of the first reported Ohio cases challenging a noise ordinance with a provision specifically aimed at car stereos,⁷¹ the Cleveland Municipal Court upheld the constitutionality of Cleveland Municipal Ordinance Section 605.10(a), which prohibited "any unreasonably loud, disturbing and unnecessary noise . . . as to be detrimental to the life and health of any individual."

Although it is not clear what specific conduct led to the defendant being charged with violating Section 605.10(a), the defendant challenged its constitutionality on the grounds that "the noise ordinance fails to provide fair notice that the contemplated conduct is forbidden and that it fails to set reasonably clear guidelines for those charged with its administration, resulting in arbitrary and unequal enforcement."⁷²

In denying Defendant's motion to declare Section 605.10(a) unconstitutional, the Court, while citing *State v. Dorso* for the proposition that "[a]n enactment will not be held unconstitutionally vague if the court can make it constitutionally definite by applying a reasonable construction,"⁷³ simply upheld the ordinance as written because "the ordinance sets forth in greater detail than most what is prohibited . . .

⁶⁹*Id.* at 1336. The Court's construction that there must be a showing that the defendant acted "with a culpable mental state of recklessness" is interesting inasmuch as there is no specific reference to "recklessness" in the Marietta ordinance. Compare with Ohio Revised Code § 2917.11(A)(2), which specifically provides that that Section is violated only when there is a showing that the defendant acted "recklessly" in making "unreasonable noise," and Ohio Revised Code § 2901.22(c), which provides that a person acts "recklessly" when, with heedless indifference to the consequences, he perversely disregards a known and a significant possibility that his conduct is likely to cause a certain result . . ." OHIO REV. CODE ANN. §§ 2917.11(A)(2) and 2901.22 (c) (Anderson 1999).

⁷⁰584 N.E.2d 1386 (Cleve. Mun. Ct. 1991).

⁷¹Subsection 9 of § 605.10(a) prohibits "the making of any loud, unseemly, or unnecessary noise by operating a sound amplifying device in violation of the provisions of Chapter 683 of the codified Ordinances," and § 683.02 of Chapter 683, which was added in 1990, specifically describes sound emitted from a car stereo system: "No person shall play any radio, music player or audio system in a motor vehicle at such volume as to disturb the quiet, comfort or repose of other persons or at a volume which is plainly audible to persons other than the occupants of said vehicle." (Ord. No. 2487-A089, passed 6-18-90 and effective 6-27-90). In *City of Cleveland v. Beasley*, 789 N.E.2d 1193 (Cleveland Mun. Ct. 2003), the Cleveland Municipal Court upheld § 683.02 against a challenge that the ordinance was unconstitutional because "it violated the principle of substantive due process under the Fourteenth Amendment to the United States Constitution." *Id.* at 65. See note 161 *infra* and accompanying text.

⁷²*City of Cleveland v. Powell*, 584 N.E.2d 1386, 1389 (Cleveland Mun. Ct. 1991).

⁷³*Id.* at 1386.

[and] is more than sufficiently modified by the nine sections of examples which describe the types of noise which the law seeks to forbid.”⁷⁴

In *Village of Edison v. Jenkins*,⁷⁵ the Court of Appeals for the Fifth District upheld the Village of Edison’s noise ordinance against the challenge that it was unconstitutionally “vague, overbroad and underinclusive.”⁷⁶ In *Jenkins*, the appellant had been found guilty in the Mayor’s Court for violating Village of Edison Ordinance 98.04⁷⁷ by failing to keep a live band playing in his garage from making unnecessary noise, which noise could be heard by a neighbor whose residence was more than one hundred feet from the garage.

Citing *State v. Tanner*,⁷⁸ and construing a violation of ordinance 98.04 to require that the noise be heard at more than one hundred feet,⁷⁹ the Court found that the ordinance was not unconstitutionally vague because, *inter alia*:

A person of ordinary intelligence should have no difficulty thinking of ways to ensure compliance with the ordinance *i.e.*, turning down [the] volume, practicing indoors.⁸⁰

⁷⁴*Id.* at 1389.

⁷⁵No. CA893, 2000 WL 873692 (Ohio Ct. App., June 7, 2000).

⁷⁶*Id.* The “underinclusive” challenge was not addressed by the Court.

⁷⁷Ordinance 98.04 provides, in pertinent part:

SECTION I. UNNECESSARY NOISE PROHIBITED

No person shall make . . . within any residentially zoned district, the making of noise which by reason of volume, pitch, frequency, intensity, duration or nature annoys or disturbs the comfort peace or health of a person of ordinary sensibilities . . . Noise levels in excess of that normally perceptible in the area or in excess of ordinary street traffic noise levels are proscribed by this Ordinance except as hereinafter provided.

VILL. OF EDISON, OHIO ORDINANCE 98.04 (2003).

Ordinance 98.04 also provides:

SECTION 2. EXAMPLES OF UNNECESSARY NOISES

The following acts, which constitutes a non-exclusive list, are declared to be in violation of this Ordinance:

* * *

c. *Yelling; Shouting.* Yelling, shouting, hooting, whistling, or singing.

d. *Musical Instruments.* The use of any drum or other musical instrument or device with or without electric amplification.

SECTION 3. It shall be prima facie violation of this Ordinance when the noise can be heard more than one hundred feet from the property where it is created.

VILL. OF EDISON, OHIO ORDINANCE 98.04 §§ 2, 3 (2003).

⁷⁸472 N.E.2d 689, 692-93 (Ohio 1984) (upholding Ohio’s driving while intoxicated statute (OHIO REV. CODE § 4511.19(A)(2)) against a challenge that it was unconstitutionally vague and overbroad and created an unconstitutional presumption of guilt).

⁷⁹The Court seemed to ignore the fact that section 3 of the Ordinance provides only for a **prima facie** violation of the Ordinance when the noise can be heard at more than one hundred feet, and consequently that offenders can also be convicted when the noise cannot be heard at one hundred feet but nevertheless “annoys or disturbs the comfort, peace or health of a person of ordinary sensibilities.” VILL. OF EDISON, OHIO ORDINANCE 98.04, §§ 1, 3 (2003).

The Court also dispensed with the appellant's "overbreadth" challenge, noting simply that the "ordinance is not aimed at abridging the expression of ideas, but merely places limitations on certain behaviors in order to protect the privacy rights of others."⁸¹

More recently, in two separate cases involving the same defendant and being titled *Village of Kelleys Island v. Joyce*, the anti-noise ordinance of the Village of Kelleys Island was challenged and declared unconstitutional, amended, again challenged and upheld.

Between June and July, 1999, the owner of the Caddy Shack, a restaurant and bar located in the downtown area of the Village of Kelleys Island, a popular summer vacation and recreation spot located at the western end of Lake Erie, was cited ten times for sound emanating from "karaoke" and live band performances on an outdoor patio in violation of Section 132.13 of the Codified Ordinances of the Village of Kelleys Island.⁸² Section 132.13 then provided, in pertinent part:⁸³

No person shall generate . . . unreasonable noise or loud sound which is likely to cause inconvenience or annoyance to persons of ordinary sensibilities by means of a live performance . . . or any . . . sound amplifying device.⁸⁴

The defendant challenged Section 132.13 as being unconstitutional because it was both overbroad and vague in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution and Article I, §§ 11 and 16 of the Ohio Constitution.⁸⁵

⁸⁰*Vill. of Edison v. Jenkins*, No. CA 893, 2000 WL 873692 at *2 (Ohio Ct. App. June 7, 2000). The Court also noted:

Discriminatory and arbitrary enforcement are . . . discouraged by the delineation of a specific distance. While it is arguable the playing of loud music in one's own garage is a form of free speech, the ordinance does not prohibit the playing of loud music unless it "annoys or disturbs . . . a person of ordinary sensibilities" and "can be heard more than one hundred feet from the property where it is created." *Id.* at *2, *3.

⁸¹*Id.* at *3.

⁸²*Vill. of Kelleys Island v. Joyce*, No. 99CRB 00360 (County Court for Erie County, Ohio, Dec. 17, 1999); Defendant's Motion to Dismiss; Affidavit of Thomas P. Joyce.

⁸³VILL. OF KELLEYS ISLAND, OHIO, ORDINANCE 1998-0-46 (1998). Section 132.13 of the Codified Ordinances of Village of Kelleys Island was enacted on July 10, 1997, as Ordinance No. 1997-0-26, but was first amended on September 10, 1998 to eliminate a slightly different treatment of sound or noise generated on commercially zoned property as opposed to sound or noise generated on residentially zoned property.

⁸⁴Section 132.13 also provided:

- (1) It is prima facie unlawful for a person to generate or permit to be generated sound by the above described devices or instruments in the following circumstances:
- (2) On private property between the hours of 11:00 p.m. and 8:00 a.m. of the following day . . . where the sound is audible more than 100 feet from the property line of the property on which the source of the sound is located;
- (3) On a street, highway or in the public right-of-way where the sound is audible 100 feet from the device generating the sound.

⁸⁵Specifically, the defendant argued that the Ordinance was unconstitutional because it placed "proscriptions on all 'sound' and 'noise' generated by 'sound amplifying devices'

In granting the defendant's Motion to Dismiss, the Erie County Court found that Section 132.13 was unconstitutionally vague because there was no "specific definition for what constituted 'plainly audible'" sounds and no "objective standard for what constitutes an 'audible' sound at 100 feet."⁸⁶

The Village of Kelleys Island did not appeal Erie County Court's decision; rather, it amended Section 132.13 of its Codified Ordinances to require that the sound be "plainly audible at a distance of 150 feet or more from the source of the noise or loud sound" and to define "plainly audible" as "any sound . . . , that can be clearly heard by a person using his normal hearing faculties. . . ."⁸⁷

without limiting, or even allowing for consideration of, the duration of the sound or noise, or the place or context in which it is being generated; that the Ordinance was 'underinclusive', because, in some context, . . . a sound may not be 'audible' at a distance of 100 feet but may nevertheless 'cause inconvenience or annoyance to persons of ordinary sensibilities' . . . [and] also overbroad and overinclusive because, in many situations and contexts, a sound can be 'audible' at a distance of 100 feet and nevertheless not 'cause inconvenience or annoyance to persons or ordinary sensibilities.'; and that the term 'audible', unlike a decibel meter, was 'entirely subjective, but . . . also subject to numerous variables and changing conditions.'" The Defendant also argued that the Ordinance was unconstitutional pursuant to Article XVIII, Section 3 of the Ohio Constitution (a/k/a the "Home Rule Amendment") because, *inter alia*, it is "simply 'unreasonable' and 'interferes with the private rights beyond the necessities of the situation.'" Brief of Defendant, *Vill. of Kelleys Island v. Joyce*, No. 99CRB00360 (County Court for Erie County, Ohio, Dec. 17, 1999).

⁸⁶Judgment Entry, *Vill. of Kelleys Island v. Joyce*, No. 99CRB00360 (County Court for Erie County, Ohio, Dec. 17, 1999).

⁸⁷*Vill. of Kelleys Island, Ohio, Ordinance 2000-34* (June 8, 2000):

§ 132.13 SOUND AMPLIFYING DEVICES

(A) No person shall generate or permit to be generated noise or loud sound which is likely to cause inconvenience or annoyance to persons of ordinary sensibilities by means of a live performance, radio, phonograph, television, tape player, compact disc player, loudspeaker or any other sound amplifying device which is plainly audible at a distance of 150 feet or more from the source of the noise or loud sound.

(1) It is prima facie unlawful for a person to generate or permit to be generated sound by the above described devices or instruments in the following circumstances:

(2) On all property between the hours of 11:00 p.m. and 8:00 a.m. of the following day . . . where the sound is plainly audible 150 feet or more from the source of the sound;

(3) On a street, highway or in the public right-of-way where the sound is plainly audible 150 feet from the device generating the sound. Persons in possession of a current parade permit are exempt from the provisions of this subsection.

* * *

(B) As used in this section, "Plainly audible" means any sound produced by a live performance, radio, phonograph, television, tape player, compact disc player, loudspeaker or any other mechanical or electronic sound making or sound amplifying device, or instrument, that can be clearly heard by a person using his normal hearing faculties, at a distance of 150 feet or more from the source of the noise or loud sound.

(C) Any law enforcement officer or person who hears a sound that is plainly audible as defined herein shall be entitled to measure the sound according to the following standards:

(1) the primary means of detection shall be by means of the officer's or person's ordinary auditory senses, so long as the officer's or person's hearing is not enhanced by any mechanical device, such as a microphone or hearing aid;

Between June 23 and July 8, 2000, the owner of the Caddy Shack was again cited on three different occasions for sound emitted from “karaoke” and other live entertainment conducted on the patio in violation of newly amended Section 132.13 because the music and/or voices were allegedly “heard” or were “audible” more than 150 feet “away from the person and/or mechanism generating or producing the sound.”⁸⁸

The defendant again filed a Motion to Dismiss arguing that the amendments made to Section 132.13 did not cure its constitutional defects.⁸⁹

This time around, however, the Erie County Court denied the defendant’s Motion to Dismiss, finding that “upon review the new statute does in fact cure the previously constitutional problem, and sufficiently defines a “plainly audible” sound.” In response to the defendant’s argument that “a sound audible from 150 feet could still be on defendant’s own property,” the Court concluded, relying on *City of Tiffin v. McEwen*,⁹⁰ that while the argument was “interesting in the abstract, from a commonsense perspective it simply has no application.”⁹¹

(2) the officer or person must have a direct line of sight and hearing to the source that is producing the sound so that the officer or person can readily identify the offending person and the distance involved; and

(3) the officer or person need not determine the particular words or phases being produced or the name of any song or artist producing the sound.

The detection of a rhythmic bass reverberating type sound is sufficient to constitute plainly audible sound.

⁸⁸*Vill. of Kelleys Island v. Joyce*, No. 00CRB00280 (County Court for Erie County, Ohio, Oct. 25, 2000).

⁸⁹Memorandum in Support of Defendant’s Motion to Dismiss, *Vill. of Kelleys Island v. Joyce*, No. 00CRB00280 (County Court for Erie County, Ohio, Oct. 25, 2000). The defendant argued that the amendments failed to provide “any meaningful definition of what is meant by the term “plainly audible” and that the term “clearly heard” does “nothing to remove the vague and subjective qualities . . . because it is simply replacing one vague and subjective term with another equally vague and subjective term.” And because the amended ordinance, unlike the prior ordinance, made unlawful a sound audible at 150 feet from the source of the sound, as opposed to 150 feet from the property line on which the source of the sound is located, the new ordinance was unconstitutionally overbroad because the “ordinance includes within its prescriptions prohibitions against engaging in a constitutionally protected conduct that takes place (and can be heard) only on private property.” The defendant also argued that amended section 132.13 was unconstitutionally vague and overbroad in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution and Article I, §§ 11 and 16 of the Ohio Constitution and also unconstitutional pursuant to Article XVIII, Section 3 of the Ohio Constitution because it was “unreasonable and interferes with the private rights of citizens well beyond the necessities of most situations.” Memorandum in Support of Defendant’s Motion to Dismiss; *Vill. of Kelleys Island v. Joyce*, No. 00CRB00280 (County Court for Erie County, Ohio, Oct. 25, 2000).

⁹⁰720 N.E.2d 587 Ohio App. 3d 527 (Ohio Ct. App. 1998) See note 120 *infra* and accompanying text.

⁹¹The Court observed:

Is such an anomaly sufficient to support a constitutional challenge? This Court does not think so.

Upon a close reading of *McEwen*, it is apparent that the *McEwen* Statute deals with motor vehicles only. Obviously, the sound emanating from a motor vehicle, depending on location, could be wholly within an individual’s own property.

Following the denial of his Motion to Dismiss, the defendant entered a plea of no contest and was convicted.⁹² On appeal, the Court of Appeals for the Sixth District affirmed⁹³ relying on, among others, the Ohio Supreme Court's decision in *State v. Dorso*⁹⁴ and the decisions of the Court of Appeals in *Village of Edison v. Jenkins*⁹⁵ and *State v. Boggs*.⁹⁶

In applying the principles set forth in these cases, we are compelled to conclude that a person of ordinary intelligence would not have difficulty understanding what is prohibited from the text of Section 132.13. The "noise or loud sound" is made definite by adding that it must be "plainly audible" or "clearly heard" by a person using his or her "normal hearing faculties." Also, the noise or sound must be inconvenient or annoying to persons of "ordinary sensibilities." Thus, only unreasonable noises or loud sounds are prohibited. Time and distance limitations also aid in providing fair warning of the nature of the unlawful conduct.⁹⁷

Therefore, how could the *McEwen* Court find that the Tiffin ordinance passed constitutional muster? The answer is quite simple. If the "plainly audible" sound is wholly within one's own property, who is to complain? The answer obviously is no one.

Judgment Entry, *Vill. of Kelleys Island v. Joyce* No. 000CRB00280 (County Court for Erie County, Ohio, Oct. 25, 2000).

⁹²Brief for Appellant, *Vill. of Kelleys Island v. Joyce* No. 000CRB00280 (County Court for Erie County, Ohio, Oct. 25, 2000).

⁹³*Vill. of Kelleys Island v. Joyce*, 765 N.E.2d 387 (Ohio Ct. App. 2001).

⁹⁴446 N.E.2d 449 (1983).

⁹⁵No. CA 893, 2000 WL 873692 (Ohio Ct. App. June 7, 2000).

⁹⁶No. C-980640, 1999 WL 42010 (Ohio Ct. App. June 25, 1999).

⁹⁷*Vill. of Kelleys Island v. Joyce*, 765 N.E.2d 387, 393 (Ohio Ct. App. 2001) (citing *State v. Boggs*, No. C-980640, 1999 WL 42010 (Ohio Ct. App. June 25, 1999)). The Court also rejected appellant's argument that the ordinance "must contain an exact measurement of the magnitude of a noise, such as decibels, in order to overcome a vagueness challenge: "measurement by decibels is not necessarily one of common understanding"; and also rejected appellant's argument that the Ordinance, because of its overbreadth, prohibited conduct protected by the First Amendment to the United States Constitution:

Assuming solely for the purpose of our analysis that "noise or loud sound" made by means of "live performance" or any of the sound producing/sound amplifying devices enumerated in Section 132.13(A) falls within the ambit of the First Amendment, a reading of the ordinance in this case reveals that it does not target the content of speech or expressive conduct. Instead, it is purely a restriction on conduct, that is, a time, place, and manner restriction. Appellant failed to offer any evidence suggesting that the potential application Section 132.13 would reach a significant amount of activity protected by the First and Fourteenth Amendments. Consequently, we reject his overbreadth challenge as it relates to the First Amendment.

Id. at 100-101. Finally, the Court rejected appellant's argument that the ordinance was unconstitutionally overbroad as to the distance limitation of "150 feet from the source of the sound" as opposed, for example to "150 feet from the property line." Also, the Court rejected the appellant's argument that the ordinance violated Section 3, Article XVIII of the Ohio Constitution, the so-called "Home Rule Amendment," because the ordinance interfered with

B. Car Stereo Noise Ordinances

In light of the fact that in Ohio live bands and other land-based generators of sound and music did not have much success in challenging the constitutionality of the ordinances which they were charged with violating, it is not surprising the vehicle based generators of offending sound have not done much better.

In *State v. Harris*,⁹⁸ the appellant was stopped and arrested for violating East Cleveland, Ohio's Audible Outside the Vehicle Ordinance⁹⁹ because of "excessively loud music playing . . . [and because] . . . when appellant's car drove by, the bass in the music made the patrol car shake . . . [and the officers] could feel the music."¹⁰⁰ Pursuant to a "lawful" arrest for violating the car stereo ordinance, the appellant was searched, and bags of cocaine were discovered in the appellant's underwear.

The appellant was charged with, and found guilty of, drug trafficking,¹⁰¹ and appealed, arguing, *inter alia*, that the East Cleveland car stereo ordinance was "unconstitutional on its face and as applied" because it is 'patently vague, overbroad and lacking appropriate standards and guidelines for constitutional purposes,'"¹⁰² and thus could not be the basis for the necessary probable cause for the arrest and search that led to the appellant's conviction for drug violations.

In affirming appellant's conviction, the court concluded that even if the East Cleveland Ordinance was subsequently determined to be unconstitutional, it would not affect the validity of the arrest made for violation of such Ordinance, and thus declined to directly address the ordinance's constitutionality.¹⁰³ However, the Court

the "private rights of most citizens beyond the necessities of most situations due to the 'low level' of sound that constitutes a violation." *Id.* See also *City of Columbus v. Kendall*, 154 Ohio App. 3d 639 (Ohio Ct. App. 2003), where the Court of Appeals for the Tenth District, citing *State v. Dorso*, reversed the Franklin County Municipal Court and found that the City of Columbus Community Noise Ordinance (Columbus City Code § 2329.1 (c)) was not unconstitutionally vague.

⁹⁸No. 65520, 1994 WL 110938 (Ohio Ct. App. 1994).

⁹⁹EAST CLEVELAND, OHIO, MUNICIPAL CODE § 337.29(A) (2002).

¹⁰⁰No. 65520, 1994 WL 110938 at *1 (Ohio Ct. App. 1994).

¹⁰¹*Id.* In addition to being found guilty of two charges of drug trafficking in violation of Ohio Revised Code § 2925.03, the appellant was also found guilty of possession of criminal tools in violation of Ohio Revised Code § 2923.24 and permitting drug abuse in violation of Ohio Revised Code § 2925.13. The trial court overruled the appellant's motion to suppress, and, after entering a plea of no contest, was found guilty. *Id.*

¹⁰²*Id.* at *2. The appellant also argued that the arrest was unlawful because the violation of the Ordinance was only a "minor misdemeanor" and that the arrest and search for violating the car stereo ordinance was simply a "pretext."

¹⁰³In *Illinois v. Krull*, 480 U.S. 340 (1987), the United States Supreme Court held that the "Fourth Amendment exclusionary rule does not apply to evidence obtained by police who acted in objectively reasonable reliance upon a statute . . . which is subsequently found to violate the Fourth Amendment . . . If a statute is not clearly unconstitutional, officers cannot be expected to question the judgment of the legislature that passed the law." *Id.*, Syllabus 1 and 1 (a).

The decision has been widely criticized, and a number of state courts have refused to follow it, often because the state constitution offers broader protection against non-consensual searches without probable cause. See, e.g. *Illinois v. McGee*, 644 N.E.2d 439 (Ill. App. Ct.

did suggest, in dictum, that the ordinance would, in light of *State v. Dorso*¹⁰⁴ and *City of Marietta v. Grams*,¹⁰⁵ pass constitutional muster:

Thus, in the present case, while we entertain no serious doubt about the constitutionality of the above ordinance, . . . we need not reach its constitutionality in order to overrule appellant's first assignment of error.

* * *

Therefore, assuming, without deciding, that the ordinance is subsequently determined to be invalid on vagueness or overbreadth grounds, the validity of appellant's arrest for violation of such ordinance is not undermined, and evidence obtained in the subsequent search need not be suppressed where the arrest is based on probable cause.¹⁰⁶

In *Kent v. Boyer*,¹⁰⁷ the appellant had been charged with violating the City of Kent's Annoyance Ordinance¹⁰⁸ by playing the stereo in his truck too loudly.¹⁰⁹

1995); Michael F. Kiely, Note, *Illinois v. Krull: When Has a Legislature Wholly Abandoned its Responsibility to Enact Constitutional Laws?* 1993 U. Ill. L. Rev. 411. *But see* *City of Cleveland v. Beasley*, 123 Ohio Misc. 2d 63, 65 (Cleveland Mun. Ct., 2003), where the Court, citing *Illinois v. Krull*, denied a motion to suppress based on the alleged unconstitutionality of Cleveland's car stereo noise ordinance (Cleveland Cod. Ord. § 683.02):

In the present case, the officer stopped the defendant for a violation of . . . noise in a motor vehicle. This act of the police officer was a lawful, dutiful act done with reasonable reliance on the validity of the statute. No deterrent effect on unlawful police conduct can be accomplished through application of the exclusionary rule in this circumstance. The United States Supreme Court has established that a police officer does not have a duty to determine the constitutionality of a legislative act. [citing *Illinois v. Krull*]

Given the police officer's reasonable reliance on the constitutionality of Cleveland Codified Ordinance 683.02, noise in a motor vehicle, the defendant's motion to suppress is denied.

Ohio's constitution, like the Fourth Amendment to the U. S. Constitution, specifically provides that "The right of the people to be secure in their persons . . . , against unreasonable searches seizures shall not be violated; . . ." (OH CONST. Amend. I, §14). However, whether the Ohio Constitution would allow an exception to the exclusionary rule for searches and seizures based on a violation of a statute subsequently found to be unconstitutional was not raised by the defendant or addressed by the Court.

¹⁰⁴446 N.E.2d 449 (1983).

¹⁰⁵531 N.E.2d 1331 (Ohio Ct. App. 1987).

¹⁰⁶No. 65520, 1994 WL 110938, at *3 (Ohio Ct. App. 1994).

¹⁰⁷Nos. 97-P-0107, 97-P-0108, 1998 Ohio App. LEXIS 4833 (Ohio Ct. App. Oct. 13, 1998).

¹⁰⁸Kent City Ordinance § 509.12 (2003), which provides, in pertinent part:

* * *

(b)(2) Radio, Stereo, Musical Instruments. The playing of any radio, stereo, television set, amplified or unamplified musical instruments, loud speaker, tape recorder or other electronic sound producing devices, in such a manner or with such volume at any time or place so as to annoy or disturb the quiet, comfort or repose of persons . . . in the vicinity.

* * *

At trial the arresting officer testified that he first heard the offending music at a distance of 251 feet (using his laser speed measuring device to determine the distance) and that it “was very loud. It was loud enough to shake my cruiser” and again heard the music at 157 feet and at that distance the “music was still shaking my cruiser.”¹¹⁰ The appellant was convicted, and on appeal argued that Section 509.12(b)(2) was both unconstitutionally vague because it failed to “quantify what is too loud, how noise is to be measured, or who is empowered to determine exactly what is annoying” and unconstitutionally over broad because “the enforcement of the statute places too much authority on the law enforcement system such that it is an arbitrary process that the ordinary person could not possibly hope to avoid prosecution for what is otherwise constitutionally protected action.”¹¹¹

In affirming the appellant’s conviction, the Court of Appeals, without citing any authority, found that since the offending music could be heard at more than thirty feet and thus constituted a *prima facie* violation under Section 509(c)(2), it was “unnecessary to address at this time whether Section[s] (b)(2) . . . [is] too vague or overbroad. . . .”¹¹²

The Court of Appeal’s reasoning, however, seems flawed, in that Section 509.12(b)(c)(2) does not make unlawful sound which is audible at thirty feet, but rather establishes a *prima facie* violation when the sound is audible at such distance. *Prima facie* simply means that there is evidence “to support but not to compel a certain conclusion and does no more than furnish evidence to be considered and weighed . . . ;”¹¹³ and while the fact that the sound was audible at thirty feet may be some evidence that the sound is annoying, it is not conclusive and the question still remains as to whether the phrase “so as to annoy or disturb the quiet, comfort or repose of persons” is unconstitutionally vague or over broad.

In another unreported decision issued seven weeks after the *Kent v. Boyer* decision, the Shaker Heights Municipal Court in *City of Shaker Heights v. David L. Laven*,¹¹⁴ overruled the defendant’s Motion to Dismiss and upheld the constitutionality of Shaker Heights Codified Ordinance Section 1131.45, which provided in pertinent part:

(c) Sound Generated By Devices or Instruments. It is prima facie unlawful for a person to generate or permit to be generated sound by the above described devices or instruments in the following circumstances:

* * *

(2) On a street, highway or in the public right-of-way where the sound is audible thirty feet from the device generating the sound ...

¹⁰⁹Nos. 97-P-0107, 97-P-0108, 1998 Ohio App. LEXIS 4833 (Ohio Ct. App. Oct. 13, 1998). A month earlier the defendant had also been charged for failing to stop at a red light, and both charges were consolidated for trial. The defendant’s conviction for failing to stop at a red light was reversed on appeal because he had not been brought to trial within the statutorily mandated time.

¹¹⁰*Id.* at *3.

¹¹¹*Id.*

¹¹²*Id.* at *4.

¹¹³*City of Cleveland v. Keah*, 105 N.E.2d 402, 403 (Ohio 1952).

¹¹⁴No. 98 TRD 09900 (Shaker Heights, Ohio Mun. Ct., Dec. 4, 1998). David L. Laven is the son of the author.

* * *

No person shall operate . . . any radio, tape player, CD player, or similar device in such a manner as to create a continuing noise disturbance at fifty (50) feet from such device, when operating in or on a motor vehicle on a public right-of-way or public space.

A noise disturbance is defined as any sound which:

* * *

Annoys or disturbs a reasonable person of normal sensitivities; . . .

* * *

In relying upon *State v. Dorso*,¹¹⁵ *City of Cleveland v. Powell*¹¹⁶ and *City of Marietta v. Grams*,¹¹⁷ and relying on the unsubstantiated allegation that the arresting officer could “hear the Defendant’s radio for more than one hundred fifty (150) feet away,” the Court found that Section 1131.45 was constitutional in that it “clearly outlines the conduct which is prohibited:

1. The person must operate or play a radio, tape player, or CD player;
2. create a continuing disturbance by playing such device,
3. noise from the device must be at least fifty feet away;
4. and the noise must be such that it would annoy or disturb a reasonable person of normal sensitivities.”¹¹⁸

A few months before the Court of Appeals for the Eleventh District in *Kent v. Boyer*¹¹⁹ issued its opinion upholding the constitutionality of the City of Kent’s Annoyance Ordinance, the Tiffin, Ohio Municipal Court in *City of Tiffin v. McEwen*¹²⁰ found unconstitutional the City of Tiffin’s Audible at a Distance Ordinance prohibiting sound from a car stereo which is plainly audible at 100 feet.

In *McEwen*, the police officer heard “music that was loud and starting to get louder” coming from defendant’s car at a distance of over 200 feet, and issued a citation to the defendant for violating Tiffin Codified Ordinance Section 509.11,

¹¹⁵446 N.E.2d 449 (Ohio 1983).

¹¹⁶584 N.E.2d 1386 (Ohio Mun. Ct. 1991).

¹¹⁷531 N.E.2d 1331 (Ohio Ct. App. 1987).

¹¹⁸98 TRD 09900 (Shaker Heights, Ohio Mun. Ct. December 4, 1998). The City of Shaker Heights voluntarily dismissed the case without explanation the day before it was set for trial. Approximately four months prior to being cited in case 98TRD09900 and before his 18th birthday, the defendant was also cited by a Shaker Heights police officer for violating section 1131.45 for “loud noise” from his car stereo. The case was assigned to a magistrate in the Juvenile Division (Traffic) of the Cuyahoga Court of Common Pleas (Case No. 9849382). The defendant filed a similar Motion to Dismiss on the grounds the ordinance was unconstitutional, which was granted without opinion. In 1999 the City of Shaker Heights amended its ordinance to simply provide that a violation occurs when the sound is plainly audible at fifty feet. *See supra* note 31.

¹¹⁹Nos. 97-P-0107, 97-P-0108 1998 Ohio App. LEXIS 4833 (Ohio Ct. App. Oct. 13, 1998).

¹²⁰720 N.E.2d 587 (Ohio Ct. App. 1998).

entitled “Operation of Radios or Other Soundmaking Devices or Instruments in Vehicles.”¹²¹

After the prosecutor presented his evidence, the Court dismissed the case *sui sponte* finding that “the ordinance unconstitutionally infringed on the defendant’s rights under the First Amendment to the United States Constitution.”¹²² Although the Tiffin Municipal Court did not file an opinion, the Municipal Court “stated on the record that it believed that the ordinance proscribed First Amendment expression and that a restriction on such expression is only ‘a proper exercise of police power when that First Amendment expression annoys someone else’.”¹²³

The Court of Appeals reversed, finding that the City of Tiffin had the power to regulate sound from motor vehicles under the Home Rule Amendment,¹²⁴ that the ordinance met the test enunciated by the Ohio Supreme Court in order to be a valid exercise of the city’s police powers,¹²⁵ and that the trial court’s additional requirement of an annoyed victim would drastically alter the effectiveness of the ordinance for no good reason.¹²⁶

In *State v. Boggs*¹²⁷ the appellants challenged Cincinnati’s car stereo Annoyance Ordinance¹²⁸ on the grounds of vagueness and overbreadth, and also on the grounds

¹²¹Tiffin, Ohio Codified Ordinance § 509.11 (2002) which provides, in pertinent part:

(a) It is unlawful for any person operating or occupying a motor vehicle within the City to operate or amplify the sound produced by a radio, tape player or other sound making device or instrument from within the motor vehicle so that the sound is: Plainly audible at a distance of 100 feet or more from the motor vehicle.

* * *

(d) ‘Plainly audible’ means any sound produced . . . from within the interior . . . of a motor vehicle, . . . that can be clearly heard outside the vehicle by a person using his normal hearing facilities, at a distance of 100 feet or more from the motor vehicle.

* * *

(e)(1) The primary means of detection shall be by means of the officer’s ordinary auditory senses, so long as the officer’s hearing is not enhanced by any mechanical device, such as a microphone or hearing aid.

* * *

(e)(3) The officer need not determine the particular words or phrases being produced or the name of any song or artist producing the sound.

The detection of a rhythmic base reverberating type sound is sufficient to constitute a plainly audible sound.

¹²²720 N.E.2d at 589.

¹²³*Id.* Apparently, the officer had videotaped his encounter with the defendant’s vehicle as well as the music emanating from that vehicle, which the defendant had intended to introduce as evidence had the case not been dismissed at the end of the prosecution’s case. *Id.*, n.1.

¹²⁴Ohio Const. art. XVIII, § 3.

¹²⁵720 N.E.2d at 589-90 *citing* Teegardin v. Foley, 143 N.E.2d 824 (Ohio 1957); Hausman v. Dayton, 653 N.E.2d 1190 (Ohio 1995).

¹²⁶*Id.* at 590. On the same day, on the authority of its decision in *City of Tiffin v. McEwen*, the Court of Appeals also reversed the Municipal Court’s decision finding Tiffin Codified Ordinance § 509.11(a) unconstitutional in a case where the defendant had been cited for “playing loud music” which was audible at “a distance of 162 feet.” *See City of Tiffin v. Hufford*, No. 13-98-27, 1998 WL 801952 (Ohio Ct. App. Nov. 20, 1998).

¹²⁷No. C-980640, 1999 WL 420108 (Ohio Ct. App. June 25 1999).

that it was unconstitutional as applied because a disproportionate number of African Americans were cited for violations.

The appellants, whose cases were consolidated, were convicted in a bench trial in the Hamilton Municipal Court. The police officers testified that they could hear “music” coming from the vehicles at distances ranging from 75 to 300 feet, and in one instance, with the base pounding, and in another, with the officer’s vehicle’s window vibrating.¹²⁹

On appeal, the appellants argued that the Ordinance did not “express a clear and concise meaning that would allow a person of ordinary sensibilities to determine whether the nature of his or her acts is subject to punishment” and, more specifically, that the words “intensity and duration” permitted a number of subjective interpretations and that the language “inconvenience and annoyance to persons of ordinary sensibilities” was too indefinite and resulted in “arbitrary actions by police officers.”¹³⁰ Finally, the appellants argued that the ordinance was unconstitutional as applied because “a disproportionate number of African Americans are cited for violating it.”¹³¹

In affirming the appellants’ convictions, the Court of Appeals found that the vagueness and overbreadth challenges were overcome by the fact that the ordinance included a provision making it *prima facie* unlawful if the noise was plainly audible at a distance of 50 feet or more:

By placing a concrete and quantifiable measurement into the language of the ordinance, subsection (B) serves to objectively narrow its breadth. It is reasonable to conclude that if the sound can be heard at such distance, then the sound is excessively loud.¹³²

¹²⁸Cincinnati Municipal Code § 910-10 (2003) which provides, in pertinent part:

(A) No person, firm or corporation being the owner or person in possession of a motor vehicle with any radio, phonograph, televisions, tape player, loudspeaker or any other instrument, machine or device shall cause or permit any noise to emanate from the motor vehicle in such a manner and to be of such intensity and duration to create unreasonable noise or loud sound which causes inconvenience and annoyance to persons of ordinary sensibilities.

(B) It shall be *prima facie* unlawful . . . to cause or permit any noise emanating from a motor vehicle which is plainly audible at a distance of 50 feet from the motor vehicle

The ordinance also contains a number of exceptions, including lawful use of the motor vehicle horn, noises made by public-safety vehicles, and noises made during a parade or other activity for which a permit has been obtained. *See* CINCINNATI MUNICIPAL CODE § 910.10 (C)(2) and (C)(4) (2003).

¹²⁹State v. Boggs, 1999 WL 420108, at *1.

¹³⁰*Id.* at *2, 3.

¹³¹*Id.* at *3.

¹³²*Id.* at *2, 3. The Court of Appeals also found that “intensity” and “duration” were words of common usage and that “an exact length of time or measurement of magnitude, such as decibels . . . , need be specified in the ordinance for it to withstand the constitutional challenge” and that the terms “inconvenience” and “annoyance” were not indefinite and were not “beyond the grasp of the average person”:

Finally, the Court of Appeals found the Ordinance was not unconstitutional as applied because, although the evidence showed that 79% of the persons who were issued citations were African Americans, and although such statistics were relevant, “they alone were not sufficient to prove a constitutional violation, which would involve the Equal Protection Clause.”¹³³ The Court of Appeals also rejected the appellants’ argument that the conviction was against the manifest weight of the evidence because, although a *prima facie* case was established, the “police were reasonable in concluding that the noise emanating from appellants’ cars was inconvenient and annoying . . . due in part to complaints about the noise from residents around the area.”¹³⁴

In two decisions issued a week apart in June of 2001, the Court of Appeals for the Twelfth District, in *City of Hamilton v. Hendrix*,¹³⁵ addressed a constitutional challenge to an Audible Outside the Vehicle ordinance, and affirmed the lower court’s overruling of the appellant’s Motion to Dismiss on grounds the Ordinance was vague and overbroad; and the Court of Appeals for the Fifth District, in *State v. McCroskey*,¹³⁶ suggested that the City of Alliance, Ohio’s Audible at a Distance ordinance was not unconstitutionally vague.

In *Hendrix*, the appellant had been charged with six violations of Hamilton, Ohio Audible Outside the Vehicle Ordinance¹³⁷ because he was apparently “operating his

In other words, the ordinance prohibits noise that would cause inconvenience and annoyance to reasonable persons. We hold that this standard is sufficiently definite so as to prohibit arbitrary enforcement by the police—only unreasonable noises can be punished. *Id.* at *3.

The Court also noted that the formulation “‘inconvenience,’ annoyance, or alarm to persons of ordinary sensibilities’ is the exact language used in Ohio’s disorderly conduct statute. . . .” OHIO REV. CODE ANN. § 2917.11(B)(1) (Anderson 1999) (footnotes omitted).

¹³³*Id.* at *4 (footnotes omitted).

¹³⁴*Id.* at *4. Unlike the Eleventh District Court of Appeals’ decision in *Kent v. Boyer*, the First District Court of Appeals understood the distinction between a statute which simply makes “plainly audible” at 50 feet *prima facie* and one which makes “plainly audible” at 50 feet *per se* unlawful. *See supra* note 113 and accompanying text.

¹³⁵760 N.E.2d 43 (Ohio Ct. App. 2001).

¹³⁶No. 2000 CA 00341, 2001 WL 715861 (Ohio Ct. App. June 11, 2001).

¹³⁷Hamilton, Ohio Ordinance § 509.14 (b) (1995) which provided, in pertinent part: No owner of a motor vehicle, operator of a motor vehicle or person in physical control of a motor vehicle shall recklessly play, cause to be played, or permit to be played any sound generating or sound-amplifying device located within or upon such motor vehicle at such a level, volume, frequency, or intensity that the sound emitted exceeds the capacity of such motor vehicle to fully absorb, insulate, deaden, shield or muffle the sound being omitted so that such sound is inaudible to persons located outside the motor vehicle in which the sound-generating or sound-amplifying device is located.

The Ordinance defined “sound” as “any kind of humanly audible stimulus . . .” and listed specific exceptions for alarm systems, collision noise, sounds created by emergency vehicles, and sound emanating from the motor vehicle engine. *See* HAMILTON, OHIO, ORDINANCE § 509.14(a)(3) (1995). On November 20, 2000, § 509.14 was moved to the Traffic Code and renumbered as § 337.271. *See supra* note 28.

car stereo at a volume that could be heard outside the automobile, sometimes as much as two blocks away.”¹³⁸

On appeal, the Court of Appeals limited its review to whether or not the ordinance was unconstitutionally vague as applied to the appellant.¹³⁹ In affirming the appellant’s conviction, the Court of Appeals found that the conduct was clearly proscribed by the ordinance and, as “applied to appellant and the specific facts of this case is not unconstitutionally vague.”¹⁴⁰

The Court of Appeals went on to note, however, that it was troubled that a “fair number of absurd applications of the Ordinance can be contrived” (e.g., playing of a radio or CD system in a convertible with its top down or with a window open would be unlawful) and by the fact that since there is “no objective distance or decibel standard to guide police officers,” and since the Ordinance is “inevitably violated scores of times each day,” it granted officers “unfettered discretion” for enforcement.

Nevertheless, the Court felt bound to affirm the lower court’s decision because such issues were not properly before it:

Although appellant points out, and the Court agrees, that a fair number of absurd applications of the ordinance can be contrived, those facts are not properly before us in the present matter.

* * *

More troublesome is the unfettered discretion granted to law enforcement officials in the application of the ordinance. The blanket prohibition on sound of any sort emanating from a motor vehicle grants police officers a high level of discretion in the application of Section 509.14. Containing no objective distance or decibel standard to guide police officers in its enforcement, the ordinance is highly susceptible to selective enforcement and prosecution . . . The ordinance’s plain language is inevitably violated scores of times each day, yet only those individuals chosen by the police, in their unguided discretion, are charged and prosecuted for violation.¹⁴¹

In *McCroskey*, the appellant had been stopped for violating the City of Alliance, Ohio’s Audible at a Distance Ordinance.¹⁴² The officer testified that he could hear

¹³⁸760 N.E.2d at 45.

¹³⁹While the appellant had apparently raised in the trial court the issue of the ordinance’s overbreadth and argued it was therefor facially unconstitutional, such argument was not raised in the Court of Appeals and as a result the Court of Appeals found that the appellant lacked “standing” to challenge § 509.14 as unconstitutionally overbroad and unconstitutionally vague on its face. *Id.* at 45.

¹⁴⁰*Id.* at 48. The Court observed: “As appellant’s conduct falls squarely within the prohibitions of section 509.14, and Section 509.14 provides standards that are constitutionally sufficient to apprise persons of ordinary intelligence of its prohibitions, we do not find that Section 509.14 is unconstitutionally vague as applied to appellant.” *Id.* at 47.

¹⁴¹*Id.* at 47-48.

¹⁴²Alliance City Ordinance § 509.14(a) (2003) which provides, in pertinent part:
No person shall generate or permit to be generated unreasonable noise or loud sound by means of a radio, tape player, compact disc player . . . or any other sound

the appellant's vehicle "at 300 feet," and after stopping the appellant ordered him to open his trunk "to obtain information as to any sound equipment which may be subject to forfeiture pursuant to subdivision (e) of [the] ordinance. . . ." ¹⁴³

While the search of the trunk, and subsequently the entire vehicle, proved fruitless,¹⁴⁴ a search of appellant's person (to which he consented) found illegal drugs in his shoes, for which he was charged and convicted.¹⁴⁵

On appeal, the appellant argued that Alliance's Ordinance was invalid because it failed to follow the requirements of Ohio Revised Code Section 4513.221(C), and the Court correctly rejected this argument because Ohio Revised Code Section 4513.221 is only applicable to townships, and not municipalities.¹⁴⁶ However, Court recognized that a "reasonable degree of clarity" is required for the ordinance to meet constitutional standards, but found that the Alliance ordinance met such standards and affirmed appellant's conviction:

The court agrees with appellant that a reasonable degree of clarity in enacted ordinances is required. However, this court finds that the 100 foot audibility level required by Alliance Ordinance 509.14(a) meets such standard that was known by the Appellant and is a valid exercise to the police power of the City of Alliance.¹⁴⁷

Most recently, in *State v. Cornwell*,¹⁴⁸ the Court of Appeals for the Seventh District considered the constitutionality of the City of Youngstown, Ohio's Combination Ordinance, and in *City of Cleveland v. Beasley*,¹⁴⁹ the Cleveland Municipal Court addressed a constitutional challenge to the City of Cleveland, Ohio's identical ordinance.

Youngstown's Ordinance provides:

No person shall play any radio, music player or audio system in a motor vehicle at such volume as to disturb the quiet, comfort or repose of other

amplifying device . . . in the public right-of-way where the sound is audible 100 feet from the device.

¹⁴³McCroskey, No. 2000 CA 00341, 2001 WL 715861 (Ohio App. June 11, 2001). Section 509.14(e) of the Alliance City Ordinance provides that upon conviction of a second and subsequent violations, "both the sound equipment and the motor vehicle are deemed contraband and subject to seizure and forfeiture under Ohio R.C. §§ 2933.41 through 2933.43."

¹⁴⁴*Id.* Fruitless, that is, in terms of finding illegal drugs, but it is unclear if the search was "fruitless" in terms of finding "any sound equipment." Interestingly, the officer testified that "his actual intention was to search for illegal drugs, as he suspected through other information that the defendant was involved in drug sales." *Id.*

¹⁴⁵It is unclear whether the appellant was ever cited, or convicted, of violating Alliance's Car Stereo Noise Ordinance.

¹⁴⁶*See supra* note 27.

¹⁴⁷McCroskey, No. 2000 CA 00341, 2001 WL715861 (Ohio App. June 11, 2001) at *2 (citation omitted).

¹⁴⁸149 Ohio App.3d 212 (Ohio Ct. App. 2002).

¹⁴⁹789 N.E.2d 1193 (Cleveland Mun. Ct., 2003).

persons or at a volume which is plainly audible to persons other than the occupants of said vehicle.¹⁵⁰

The appellant was charged in Youngstown Municipal Court, and after his oral motion to dismiss on constitutional grounds was overruled, entered a plea of no contest. The Municipal Court found appellant guilty and, since he had been cited for violating the Ordinance on three previous occasions, was sentenced to 60 days in jail and fined \$600.¹⁵¹

Appellant appealed, arguing that the Ordinance was “unconstitutional pursuant to the First, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution.”¹⁵² The Court observed that the first part of the Ordinance provided for “two distinct limitations on the sound level of audio equipment in an automobile”; that is, the first part of the Ordinance prohibited sound which “disturbed the quiet, comfort or repose of other persons,” and the second part of the Ordinance prohibited sound which “is plainly audible to persons other than the occupants of said vehicle.”¹⁵³ Since the Court concluded that, based on the record, the municipal court was justified in convicting appellant under the first part of the Ordinance, the Court addressed only the constitutionality of this part of the Ordinance, and did not consider the constitutionality of the second part of the Ordinance which prohibited sound which “is plainly audible to persons other than the occupants of said vehicle.”

In affirming the appellant’s conviction, the Court found that the first part of the Ordinance was not so vague as to violate the Fourteenth Amendment of the United States Constitution,¹⁵⁴ was not overbroad on its face in violation of the First

¹⁵⁰CODIFIED ORDINANCES OF THE CITY OF YOUNGSTOWN § 539.07(b)(1) (2002). This Ordinance was subsequently amended. *See infra* note 159 and accompanying text.

¹⁵¹*State v. Cornwell*, 149 Ohio App.3d 212, 214 (Ohio Ct. App. 2002). A person who violates the ordinance is subject to the penalties imposed by both §§ 539.99/501.99 and § 539.07(b)(5) and (6) of the Youngstown Municipal Ordinance. Under §§ 539.99/501.99, a violator is guilty of a minor misdemeanor (maximum fine of \$100, no imprisonment) for a first offense and a misdemeanor of the third degree (maximum fine of \$500 and maximum imprisonment of 60 days) for any subsequent offense. In addition, under § 539.07(b)(5), for a first offense, a violator is subject to a fine between \$50 and \$250; for a second offense, a mandatory fine of \$500; and for a third and subsequent offense, a mandatory fine of \$600. Finally, under § 539.07(b)(6), upon conviction, the “sound device used during the commission of the offense is . . . deemed contraband and subject to seizure and forfeiture.” However, on February 7, 2001, § 539.07(b)(6) was amended, and now provides that for a first or second violation, the “sound device used during the commission of the offense is . . . deemed contraband and subject to seizure and forfeiture,” and upon conviction for a third or greater offense, the “sound device used during the commission of the offense is . . . deemed contraband and *shall* be forfeited.” (Emphasis added).

¹⁵²*Id.*

¹⁵³*Id.*

¹⁵⁴The Court relied on *State v. Dorso*, 446 N.E. 2d 449 (Ohio 1983), noting that: There seems to be no significant difference between part one of Ord. 539.07(b)(1) and the statute that was upheld in *Dorso*. Therefore, for the reasons set forth in *Dorso*, appellant’s “void-for-vagueness” argument is rejected. *Id.* at 216. The Court also cited *Kelleys Island v. Joyce*, 146 Ohio App. 3d 92 (2001); *Edison v. Jenkins*, No. Ca. 893, 2000 WL 873692 (Ohio Ct. of App. June 7, 2000) and *State v. Boggs*, No. C-

Amendment to the United States Constitution or Section 11 of Article I of the Ohio Constitution;¹⁵⁵ and was not applied in a selective and discriminatory manner in violation of Equal Protection Clause of Fourteenth Amendment of the United States Constitution.¹⁵⁶

Judge Donofrio dissented, finding that the second part of the Ordinance (i.e., the part which prohibited sound “which is plainly audible to persons other than the occupants of said vehicle”) was unconstitutionally vague, and as a result would have vacated the appellant’s conviction.¹⁵⁷ Applying the tripartite analysis set forth in *State v. Tanner*,¹⁵⁸ Judge Donofrio concluded that the terms “plainly” and “audible” are undefined and therefore wholly subjective, contain “no requirements for distance or any other type of standard by which noise is to be measured,” and, as a result, do not provide “fair warning to ordinary citizens as to what volume on their car stereo constitutes criminal behavior.” Consequently “whether an officer can clearly hear a motor vehicle’s audio system outside the vehicle turns on who the particular officer is . . .” and therefore gives “police unfettered discretion to choose whom to cite.”¹⁵⁹

980640, 1999 WL 420108 (Ohio Ct. of App. June 25, 1999) in support of the proposition that a “reasonable person” standard is “sufficiently clear to withstand a ‘void for vagueness’ challenge.” *Id.* at 215.

¹⁵⁵Again, relying on *State v. Dorso*, 446 N.E.2d 449 (Ohio 1983), the Court observed that “the ordinance’s prescription against loud noises is primarily an attempt to control conduct, i.e., the use of the volume control, rather than an attempt to control the type of speech being broadcast.” *Id.* at 218. The Court also noted that since the appellant only claimed that the ordinance was unconstitutional on its face, but not as applied to him, he had to “demonstrate that there are significant issues to be resolved that are separate and distinct from those raised by the facts of the case,” which appellant failed to do. *Id.* But, notwithstanding the fact that the appellant had not asserted that the first part of the Ordinance violated the First Amendment as applied to him, the Court nevertheless addressed the issue and found that the Ordinance, as applied to appellant, did not violate the First Amendment:

Ord. 539.07(b)(1), part one is not a complete ban on playing music from automobiles. It permits music to be played at any volume that does not disturb the peace of others, i.e., that does not cause or tend to incite a breach of the peace. Appellant had ample opportunity to play music from his car, albeit at a volume lower than that would cause a disturbance of the peace. Furthermore, in respect to part one of Ord. 539.07(b)(1), appellant made no attempt to show that any of the alternative avenues of communication were inadequate. *Id.* at 221. (citations omitted).

¹⁵⁶Unfortunately, the appellant simply based this argument on factual assertions that were not part of the record, and because of this deficiency, the Court would not entertain this challenge. *Id.* at 219.

¹⁵⁷*Id.* at 224.

¹⁵⁸15 Ohio St. 3d 1, 3 (1984).

¹⁵⁹*State v. Cornwell*, 149 Ohio App.3d 212, 224 (2002). Judge Donofrio also referenced the fact that the Ordinance was subsequently amended, and now reads as follows:

(1) No person operating or occupying a motor vehicle upon any public road, street, highway or private property shall operate or permit the operation of any sound amplification system from within the vehicle so as to disturb the quiet, comfort or repose of other persons, or at a volume that is plainly audible from outside the vehicle.

* * *

(3) “Plainly audible” means any sound produced by sound amplification system from within the vehicle that can clearly be heard outside the vehicle at a distance of fifty

Judge Donofrio, however, did not address the majority's position that since the appellant could be convicted under part one of the Ordinance, it was not necessary to address the constitutionality of part two of the Ordinance in order to uphold appellant's conviction.¹⁶⁰

In *City of Cleveland v. Beasley*,¹⁶¹ the defendant was charged for violation of the City of Cleveland's car stereo ordinance¹⁶² because "the volume from his stereo was so great that the sound was thumping and the mirrors in the patrol car shook."¹⁶³ The

feet or more. Measurement standards shall be the auditory senses, based upon direct line of sight. Words or phrases need not be discernable and base reverberations are included. . . .

* * *

YOUNGSTOWN MUNICIPAL ORDINANCE § 539.07 as amended by Ordinance 01-47 passed February 7, 2001, effective February 8, 2001. The penalty section of the Ordinance was also amended to provide as follows:

Upon conviction for a first or second violation of this section, the sound device used during the commission of the offense is hereby deemed contraband and subject to seizure and forfeiture. Upon conviction for a third or greater offense, the sound device used during the commission of the offense is hereby deemed contraband and shall be forfeited.

YOUNGSTOWN MUNICIPAL ORDINANCE § 539.07(b)(6), as amended.

¹⁶⁰This case could have come out differently if the appellant had not changed his plea to no contest and proceeded to trial, thereby forcing the arresting officers to testify as to whether they cited the appellant because the offending sound "disturbed the quiet, comfort or repose of other persons" or because it was "plainly audible to persons other than the occupants of said vehicle." Subsequent to the appellant's conviction on February 5, 2001 by Judge Milich of the Youngstown Municipal Court, but prior to affirmance by the Court of Appeals, Youngstown Municipal Court Judge Kobly found the "plainly audible to persons other than the occupants of said vehicle" portion of the Ordinance unconstitutionally vague in *City of Youngstown v. Brown*, Case No. 00 TRD 2980 (Youngstown Municipal Court, January 18, 2001). Judge Kobly noted:

This Court finds that it is impermissibly vague because it does not give reasonable notice to citizens of what is prohibited. It may very well include communication devices with which law enforcement and emergency vehicles are equipped. Certainly, City Council did not intend such a result. Further, it does not provide reasonable standards for police to follow when attempting to enforce the ordinance. Hence, it encourages or, at the very least, permits discriminatory enforcement. (Citations omitted). *Id.* at *2.

Judge Kobly went on to add that if the Ordinance included a distance requirement (i.e., plainly audible at a distance of 100 feet or more from the vehicle), it would have passed constitutional muster. The Ordinance was subsequently amended on February 7, 2001 to, among other things, specify that "'Plainly audible' means any sound . . . that can be clearly heard outside the vehicle at a distance of 50 feet or more." *See supra* note 159.

¹⁶¹789 N.E.2d 1193 (Cleveland Mun. Ct., 2003).

¹⁶²City of Cleveland Codified Ordinance §683.02, which provides:

No person shall play any radio, music player or audio system in a motor vehicle at such volume as to disturb the quiet, comfort or repose of other persons or at a volume which is plainly audible to persons other than the occupants of said vehicle.

¹⁶³789 N.E.2d 1193, 95 (Cleveland Mun. Ct. 2003). The arresting officer also testified that "the speaker took up the entire rear passenger section of defendant's vehicle." *Id.* When

defendant filed a Motion to Dismiss on the basis that Cleveland's ordinance is "unconstitutional as a substantive due process violation."¹⁶⁴ The Cleveland Municipal Court overruled the defendant's Motion to Dismiss, finding that his "substantive due-process argument" was "misguided."¹⁶⁵

While seven of Ohio's twelve Appellate Districts have found, or suggested, that the municipal car stereo noise ordinances that they have examined are constitutional, the Court of Appeals for the 11th Appellate District cited no authority for its conclusion;¹⁶⁶ the Court of Appeals for the 12th District acknowledged the existence of constitutional issues, but could not address them because they were not properly before the Court;¹⁶⁷ the Court of Appeals for the 5th District only suggested that the ordinance before it was constitutional without any analysis;¹⁶⁸ the Court of Appeals for the 8th District declined to directly address the ordinance's constitutionality, and its observation that the ordinance would probably pass constitutional muster is only dictum;¹⁶⁹ the Courts of Appeals for the 1st and 3d Districts relied primarily on the Ohio Supreme Court's decision in *State v. Dorso*,¹⁷⁰ which did not involve a noise ordinance specifically applicable to car stereos;¹⁷¹ and while the majority of the Court of Appeals for the 7th District found the first part of the Ordinance before it was constitutional, it did not address the second part of the ordinance which made unlawful sound which is plainly audible outside the vehicle, which second part the dissent found to be unconstitutional.¹⁷²

While the door barring a successful challenge to the constitutionality of a municipal car stereo ordinance in these seven Districts may be partially shut, it is not

the defendant was stopped for violating the noise ordinance, the officer discovered that his driver's license was suspended, and the defendant was also charged with driving under a suspended license.

¹⁶⁴The defendant also filed a Motion to Suppress the evidence relating to the driving under suspension charge on the basis the police officer was enforcing an unconstitutional noise ordinance, which Motion was overruled. *Id.* at 1194. *See supra* note 103.

¹⁶⁵*Id.* at 1195. The defendant acknowledged that he knew of no cases that have addressed certain noise ordinances as a violation of substantive due process. The Court concluded that the reason there were no such cases was because "expressions created from an audio system are arguably within a protected category of rights defined under the Constitution. Music is a form of expression protected under the First Amendment. The defendant cannot attempt to argue a substantive due-process violation where the alleged violated right is expressly defined in the Constitution." *Id.*

¹⁶⁶*Kent v. Boyer*, 1998 Ohio App. LEXIS 4833 (Ohio Ct. App. Oct. 13, 1998).

¹⁶⁷*State v. Hendrix*, 760 N.E.2d 43 (Ohio Ct. App. 2001).

¹⁶⁸*State v. McCroskey*, No. 2000CA00341, 2001 WL 715861 (Ohio Ct. App. June 11, 2001).

¹⁶⁹*State v. Harris*, No. 65520, 1994 WL 110938 (Ohio Ct. App. March 31, 1994).

¹⁷⁰*State v. Dorso*, 446 N.E.2d 449 (Ohio 1983).

¹⁷¹*See State v. Harris*, No. 65520, 1994 WL 110938 (Ohio Ct. App. March 31, 1994). *State v. Boggs*, No. C-980640, 1999 WL 420108 (Ohio Ct. App. 1999).

¹⁷²*State v. Cornwell*, 149 Ohio App.3d 212 (Ohio Ct. App. 2002).

tightly closed, and these Courts may still be receptive to certain constitutional issues involving car stereo noise ordinances which have yet to be fully addressed.

VIII. ANALYSIS

A. *Music and the First Amendment.*

The First Amendment¹⁷³ to the United States Constitution protects the freedom of expression, and music, as “one of the oldest forms of human expression,”¹⁷⁴ is protected under the First Amendment. Moreover, any regulation of the time, place or manner of protected expression must, at a minimum, “be narrowly tailored to serve the government’s legitimate . . . interests . . . ,”¹⁷⁵ and may not regulate expression in such a manner that a substantial portion of the burden . . . does not serve to advance its goals.¹⁷⁶ Additionally, when balancing First Amendment rights against community interests protected by anti-noise ordinances, courts must give First Amendment freedoms a preferred position.¹⁷⁷

Since the municipal ordinances prohibiting sound from car stereos encompass (if not specifically mention) music,¹⁷⁸ and since music emitted from car stereos is the frequent (if not exclusive) basis for citations and prosecutions under such ordinances,¹⁷⁹ it appears that many of such ordinances would be subject to challenge,

¹⁷³U.S. CONST. amend. I. The Fourteenth Amendment to the U.S. Constitution prohibits state governments from abridging the privileges and immunities of citizens. By operation of the Fourteenth Amendment, as interpreted by the United States Supreme Court, almost all provisions of the Bill of Rights are incorporated into the Fourteenth Amendment guarantees and thus apply to the states as well. The Court specifically held the free speech clause of the First Amendment to be incorporated in *Gitlow v. New York*, 268 U.S. 652 (1925). See ERWIN CHERMERINSKI, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*, 378-82 (1997). See also note 264, *infra*.

¹⁷⁴*Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). The Supreme Court observed:

From Plato’s discourse in the Republic to the totalitarian state in our own times, rulers have known its [music’s] capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment.

Id. (citations omitted).

¹⁷⁵*Id.* at 798.

¹⁷⁶*Id.* at 799.

¹⁷⁷*Saia v. New York*, 334 U.S. 558 (1948).

¹⁷⁸See *e.g.*, CINCINNATI, OHIO MUNICIPAL CODE § 910.9 (2003) (“no person . . . shall permit . . . the playing or rendition of music of any kind . . . in such a manner as to disturb the peace and quiet of the neighborhood . . .”).

¹⁷⁹See *e.g.*, *State v. Boggs*, No. C-980640, 1999 WL 420108 (Ohio Ct. App. 1999) (the police officers testified that they could hear “music” coming from the vehicle at a distance ranging from 75 to 300 feet . . .); *City of Tiffin v. McEwen*, 720 N.E.2d 587 (Ohio Ct. App. 1998) (the police officer testified that he heard “music that was loud and starting to get louder”).

both as applied and facially,¹⁸⁰ as being unconstitutional regulation of expression under the First and Fourteenth Amendments. The Audible Outside the Vehicle Ordinances (i.e., those which make any sound which is audible outside the vehicle unlawful) would appear to be most vulnerable. Such ordinances are not limited in time (e.g., after 11:00 p.m.),¹⁸¹ place (e.g., residential neighborhoods),¹⁸² or manner (e.g., reasonable volume levels)¹⁸³ to serve a legitimate government interest. Rather, these ordinances are a blanket prohibition against musical expression which can be heard outside the confines of a motor vehicle.¹⁸⁴

In *Daley v. City of Sarasota*,¹⁸⁵ the Florida District Court of Appeal considered a First Amendment challenge to a section of the Sarasota Zoning Code¹⁸⁶ which prohibited all amplified sound in non-enclosed structures during certain hours of each day:

Amplified Sound not in a completely enclosed structure is prohibited between the hours of 10:00 p.m. and 7:00 a.m. following morning on Sunday through Thursday, inclusive . . .

¹⁸⁰Under the “as applied” doctrine, a defendant can only challenge the constitutionality of an ordinance as applied to him; i.e., the application of the ordinance to his fact-specific conduct violated his constitutional rights. If the application of such ordinance to the conduct of others might be unconstitutional, but not to the specific conduct of defendant, the defendant does not have standing to challenge the ordinance because of the “personal nature of constitutional rights * * * and prudential limitations on constitutional adjudication.” *New York v. Ferber*, 458 U.S. 747, 767 (1982); *see also* *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982); *United States v. Mazurie*, 419 U.S. 544, 550 (1975). However, so-called “facial” constitutional challenges to an ordinance (i.e., challenges where the defendant need not demonstrate that the ordinance as applied to his own specific conduct is unconstitutional) are permitted when the ordinance proscribes or regulates expression protected by the First Amendment because “the transcendent value to all society of constitutionally protected expression is deemed to justify allowing ‘attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with requisite narrow specificity.’” *Los Angeles Police Dept. v. United Reporting Publ’g Corp.*, 528 U.S. 32, 38 (1999) (quoting *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972)).

¹⁸¹*See* VILL. OF KELLEYS ISLAND, OHIO, ORDINANCES § 132.13(A)(2) (2002).

¹⁸²*See* CINCINNATI, OHIO MUN. CODE § 910-9 (2003).

¹⁸³*See* CINCINNATI, OHIO MUN. CODE § 910-10 (2003) (“no person . . . shall cause or permit any noise to emanate from the motor vehicle in such a manner as . . . to create unreasonable noise or loud sound . . .”).

¹⁸⁴Since music, as a manner of expression, is equivalent of speech, these Audible Outside the Vehicle Ordinances, in effect prohibit the driver of a motor vehicle from having a conversation with another individual standing next to the vehicle. It is hard to imagine that an ordinance prohibiting two individuals from engaging in conversation in public without any limit on the time, place or manner, could withstand constitutional challenge. *See* *State v. Hendrix*, 760 N.E.2d 43 (Ohio Ct. App. 2001), *supra* note 141 and accompanying text, regarding the “absurd applications” which an Audible Outside the Vehicle Ordinance can create.

¹⁸⁵752 So.2d 124 (Fla. Dist. Ct. App. 2000).

¹⁸⁶SARASOTA, FL, ORDINANCE 97-40193, § 322.1(a) (2003).

“Amplified Sound” was defined to include “any amplified radio, phonograph, tape player . . . or similar device which is amplified,” and the ordinance required “all doors and windows of a business to remain closed, except for normal ingress and egress.”¹⁸⁷

In finding the ordinance unconstitutional, the Court of Appeals relied upon the United States Supreme Court’s decisions in *Ward v. Rock Against Racism*¹⁸⁸ and *Saia v. New York*.¹⁸⁹

The City’s ordinance is flawed not simply because it sanctions some constitutionally-protected conduct, but because it is founded upon the mistaken premises that all amplified sound in nonenclosed structures is unreasonable during certain hours of the day and can be prohibited regardless of the First Amendment rights that it suppresses.¹⁹⁰

Similarly, the Supreme Court of New Hampshire, in *State v. Yee*,¹⁹¹ found unconstitutional that portion of the City of Manchester’s noise ordinance which provided that a *prima facie* case would be established if sound was “plainly audible outside the physical limits of the building or structure on which it is located” between the hours of 11:00 p.m. and 7:00 a.m.¹⁹²

In *Yee*, the appellant was charged with violating City of Manchester Codified Ordinance Section 16-3(b), as amended, which made unlawful, among other things, “. . . operating or permitting to be played . . . any radio . . . or other . . . device for the producing . . . of sound in such manner as to disturb the peace, quiet and comfort of the neighboring inhabitants . . .”¹⁹³

The appellant, the owner of a restaurant, was cited for sound emanating from a five-piece band playing inside the restaurant. Testimony at the trial ranged from witnesses who could hear the band “very faintly” immediately outside the restaurant

¹⁸⁷*Daley*, 752 So.2d at 125.

¹⁸⁸491 U.S. 781 (1989).

¹⁸⁹334 U.S. 558 (1948).

¹⁹⁰*Daley*, 752 So.2d at 126. The Court observed that the ordinance, by limiting its application to amplified sound (as opposed to simply sound, whether amplified or unamplified) did not achieve the City’s purported objective of regulating unreasonable sound: “We point out that in the absence of any objective criteria, such as decibel limitation, unamplified sound greater in volume than amplified sound is permissible under the ordinance.” *Id.* at 126, n.1.

¹⁹¹523 A.2d 116 (1987)

¹⁹²*Id.* at 118.

¹⁹³The ordinance went on to provide that:

the operation of any such . . . phonograph, machine or device by a commercial establishment between the hours of 11:00 p.m. and 7:00 a.m. in such a manner as to be plainly audible outside the physical limits of the building or structure in which it is located shall be prima facie evidence of a violation of this Section.

Prior to its amendment, this section created a prima facie violation when the sound was “plainly audible at a distance of fifty (50) feet from the building, . . .” *Id.*

to a witness who could distinctly hear the band at his residence 290 feet from the restaurant.¹⁹⁴ The appellant was found guilty and appealed.

In reversing the appellant's conviction, the Supreme Court of New Hampshire found the last sentence of the ordinance to be "unconstitutionally overbroad," noting that:

There is no apparent objective to empower cities and towns to regulate sound that neither penetrates beyond the boundaries of the noisemaker's own premises . . .¹⁹⁵

The final sentence of the Manchester Ordinance, however, would penalize production of just such sound. Sound may be plainly audible outside the building in which it originates without carrying to premises in which someone other than the noisemaker has an interest, . . .¹⁹⁶

As previously discussed, in *State v. Hendricks*,¹⁹⁷ the appellant, in a Motion to Dismiss, challenged the constitutionality of the City of Hamilton's Audible Outside the Vehicle Ordinance on the basis that such ordinance was both "vague and overbroad." The trial court denied the appellant's Motion to Dismiss, and after pleading no contest and being found guilty, he appealed.¹⁹⁸

Unfortunately, on appeal the appellant did not raise the First Amendment "overbreadth" challenge, and the Court of Appeals did not address the issue. However, Court of Appeals left open the issue for future challenges:¹⁹⁹

"[Appellant] . . . has not raised an overbreadth argument before this Court as he did in the trial Court.

* * *

Consequently, we find that Appellant lacks standing to challenge Section 509.14 as unconstitutionally vague on its face, . . .

* * *

Although Appellant points out, and the Court agrees, that a fair number of absurd applications of the Ordinance can be contrived, . . . such applications are better suited to an overbreadth argument than the vagueness argument that Appellant has offered.²⁰⁰

¹⁹⁴*Id.* at 117.

¹⁹⁵*Id.* at 118.

¹⁹⁶*Id.*

¹⁹⁷760 N.Ed.2d 43 (Ohio Ct. App. 2001). *See supra* note 141 and accompanying text.

¹⁹⁸*Id.* at 45.

¹⁹⁹*Id.* at 47.

²⁰⁰*Id.* at 44-47.

In addition, in his dissent in *State v. Cornwell*,²⁰¹ Judge Donofrio found unconstitutional the second part of the City of Youngstown's car stereo Ordinance which prohibited sound "which is plainly audible to persons other than occupants of said vehicle."²⁰² The majority, however, did not address the constitutionality of this second part of the Ordinance but rather found the first part of the Ordinance, which prohibited sound which "disturbed the quiet, comfort or repose of other persons" constitutional and affirmed the appellant's conviction.

The door has been left open for a First Amendment challenge to Audible Outside the Vehicle Ordinances, and, based on the analysis applied by the Florida and New Hampshire Courts, such Ordinances are clearly vulnerable.

Would the Audible at a Distance Ordinances (i.e., those ordinances which make unlawful sound from a vehicle which is audible or plainly audible at 50 or 75 or 100 feet from the vehicle) have a better chance at withstanding a challenge to their constitutionality under the First Amendment? Two decisions from courts outside Ohio indicate that when the distances are relatively short, they might not.

In *Duffy v. City of Mobile*,²⁰³ the Alabama Court of Criminal Appeals found unconstitutional the City of Mobile, Alabama anti-noise ordinance because it provided that, among other things, a "prima facie case of noise nuisance" exists when the sound is plainly audible outside a radius of fifty feet from the noise-making device in any "premises, structure, office, business or vehicle. . . ."²⁰⁴ In finding the ordinance to be unconstitutionally overbroad, the Court noted:

²⁰¹149 Ohio App.3d 212,221 (Ohio App. 7th Dist. 2002). *See supra* text accompanying note 157.

²⁰²*Id.* at 224. *See also* *City of Youngstown v. Brown*, Case No. 00TRD2980, Youngstown Municipal Court (January 18, 2001) (unreported), where Judge Kobly found the "plainly audible to persons other than occupants of said vehicle" portion of Youngstown's Ordinance unconstitutional because "it bans virtually all audio sound emanating from an automobile," whether or not the sound is audible "at a distance of one foot or 100 feet." *But see* *State v. McDowell*, 150 Ohio App.3d 413, 418, 419 (Ohio App. 7th Dist. 2002) (finding that other Youngstown Municipal Court judges are not bound by Judge Kobly's decision).

²⁰³709 So. 2d 77 (Ala. Crim. App. 1997).

²⁰⁴*Mobile City Code* § 39-96, as amended by Ordinance No. 39-045. This Section, which specifically covers sound from car stereos, makes unlawful:

any noise which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of any law enforcement officer or other individual of normal sensibilities, . . .

and goes on to specify the two general types of noises that are unlawful: Those which exceed specific decibel levels and those which are plainly audible outside a radius of 50 feet from the noise-making device.

The defendant had been cited for "preaching on the sidewalk." When the arresting officers approached, the defendant claimed he was "using a decibel meter to remain below the proscribed decibel limits of the ordinance, and he offered to let them use the meter to verify this fact. However, the officers did not have any training in the use of decibel meters, and they refused to use the meter to verify his statement. Instead, they charged the appellant with violating the noise ordinance because he could be "heard at a distance of fifty feet." Apparently, the "City had previously determined that it would be impractical to try to implement the use of decibel meters, and therefore followed a policy to base charges for violation of the noise ordinance on the alternative measure of being heard at over fifty feet." Most interestingly, the Court noted that "the arresting officer never actually testified that the

The standard before us for consideration is whether a police officer is disturbed or annoyed at a noise audible at fifty feet. In fact, subsection (a) provides that if the sound is merely “plainly audible” at a distance of 50 feet, it is prima facie evidence of a violation of the ordinance, which seems to remove or negate the requirement that anyone be annoyed or disturbed by the noise . . . [T]he Mobile ordinance is an absolute prohibition of any amplified sound that is plainly audible at greater than fifty feet, anywhere in the city and at any time of day or night. This sweeping restriction of sound is not narrowly drawn, and restricts constitutionally protected speech ‘beyond the point necessary to accomplish the objective for which the ordinance was created.’²⁰⁵

In *Easy Way of Lee County, Inc. v. Lee County*,²⁰⁶ the Florida District Court of Appeal found unconstitutionally overbroad and vague that portion of the Lee County, Florida noise control ordinance which made unlawful any sound which was “plainly audible” 50 feet from its source.²⁰⁷

The appellant operated a night club in a commercial shopping center between the hours of 1:30 a.m. and 6:30 a.m. The shopping center was adjacent to a residential neighborhood. The club hired an independent disc jockey who played pre-recorded music, and no external loud speakers were used. Residents who were living in the adjacent residential neighborhood testified that they could hear sound 200 to 300 feet away from the club, and one resident stated that he could “regularly hear a base

noise annoyed or disturbed him, and was of the opinion that the appellant violated the noise ordinance because he could be heard over fifty feet away.” *Duffy*, 709 So.2d at 80. At least this Court understood the difference between a “prima facie” and a “per se” violation of the Ordinance. *See supra* text accompanying note 113.

²⁰⁵*Duffy*, 709 So.2d at 81 (citations omitted). The Court also found unconstitutional similar anti-noise ordinances in two other municipalities because they did not contain reasonable time, place and manner restrictions. *Moore v. Gulf Shores*, 542 So. 2d 322 (Ala. Crim. App. 1998); *Campa v. City of Birmingham*, 662 So.2d 917 (Ala. Crim. App. 1993), *rehearing denied, cert. writ quashed*, 662 So.2d 919 (Ala. 1995).

²⁰⁶674 So.2d 863 (Fla. Dist. Ct. App. 1996).

²⁰⁷Lee County Noise Control Ordinance 94-17, Section 3, which provides, in pertinent part:

In the case of any radio receiving set, musical instrument, television, phonograph, drum, stereo loudspeaker, or other device for the production or reproduction of sound, it shall be unlawful to create or permit to be created any noise . . . between the hours of 12:01 a.m. and the following 10:00 a.m. . . . as to be plainly audible across property boundaries . . . or plainly audible at fifty (50) feet from such device when operated within a public space or within a motorboat. . . . For purposes of subsection 3 above, the term “plainly audible” shall mean any sound produced, including sound produced by a portable soundmaking device that can be clearly heard by a person using his or her normal hearing faculties, at a distance of fifty (50) feet or more from the source.

* * *

The ordinance also provides that it shall be unlawful to create or permit to be created any noise that exceeds “60dbA during the hours of 10:00 a.m. to 10:00 p.m. from the property line of the noise source” and “55dbA during the hours between 10:00 p.m. and 12:00 a.m. from the property line of the noise source.” *Id.* at §§ 3a and 3b.

boom beat which physically vibrates the pillow in his bedroom.”²⁰⁸ But no effort was made by the police to determine whether the offending sound exceeded the specified decibel level.²⁰⁹

In reversing the lower court and finding the “plainly audible at 50 feet” portion of the ordinance unconstitutional, the Court held:

We hold that the “plainly audible” standard in the Lee County ordinance represents exactly such a “subjective standard, prohibiting a volume that *any individual* person ‘within the area of audibility’ happens to find *personally* disturbing,” . . . We likewise find it objectionable for being both overly broad and vague and, accordingly, declare that that portion of the Lee County ordinance emphasized earlier as being unconstitutional.²¹⁰

B. The Annoying Problem with Vagueness and the Fourteenth Amendment

Studies of the “annoyance effect” or “annoyance reaction” to noise have been conducted with respect to various cities, city airports, and military air bases. In these noisy areas, about one quarter of the residents stated that they were not bothered by noise. This is true, regardless of how noisy the area was. Thus these persons were happily undisturbed by noise from truck routes, airplane flight paths, and elevated railroads. At the opposite pole, about one tenth of those interviewed were annoyed by any noise,

²⁰⁸*Easy Way*, 674 So.2d at 865.

²⁰⁹*Id.* at 864.

²¹⁰*Id.* at 867 (emphasis in original). *But see* Moore v. City of Montgomery, 720 So.2d 1030 (Ala. Crim. App. 1998) (upholding § 27-6(a) of the Montgomery Municipal Code making it unlawful to “operate or play any radio, musical instrument or similar device, whether from a motor vehicle or by a pedestrian, in such a manner as to be plainly audible to any person other than the player or operator of the device at a distance of five feet (5’) in the case of a motor vehicle or ten feet (10’) in the case of a pedestrian.”) The court distinguished its decision in *Duffy v. City of Mobile*, 709 So.2d 77 (Ala. Crim. App. 1997) because although the ordinances “are similar in that they both rely on distance standards to determine whether a violation of ordinance has occurred . . . [T]he noise ordinance in *Duffy* specifically included the amplification of the human voice, . . . [while] the challenged portion of the Montgomery noise ordinance covers only noise coming from radios, musical instruments, and similar devices. Therefore, the prohibitions in . . . Montgomery Municipal Code, are not as broad and sweeping as those found in the Mobile ordinance. Furthermore, the breadth of the ordinance is not unreasonable even though it does not limit its application to certain times or to certain areas.” *Moore*, 720 So.2d at 1032; *see also* Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980), *rehearing denied*, 638 F. 2d 762 (1981); Schrader v. State, No. 03-99-00780-CR, 2000 WL 1227866 (Tex. Ct. App. 2000) (finding that while the City of Austin, Texas Municipal Code § 10-5-40, which made unlawful sound from a motor vehicle stereo system which is “audible at a distance of 30 feet or, when operated, causes a person to be aware of the vibration accompanying the sound at a distance of 30 feet . . .” may “restrict some First Amendment activity,” was nevertheless constitutional because “it may also reduce one form of public unrest – road rage. Traffic, frustration with traffic, passionate opinions regarding music and politics, and ever-more powerful vehicle radio sound systems create the need for some regulation of the sphere in which drivers may impose their listening preferences.”) Schrader, 2000 WL 1227866 at *1, 5.

*however slight, made by persons other than themselves. This group also tended to complain about many other conditions in their environment.*²¹¹

The challenge that an ordinance is unconstitutional because it is “vague” is based on the premise that enforcement of the ordinance will deprive a defendant of “liberty and property without due process of law, in violation of the Fourteenth Amendment to the federal Constitution; . . .” and that an ordinance “which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess its meaning and differ as to its application violates the first essential of due process of law.”²¹² In addition to the problem that vague ordinances do not provide “adequate warning of what the law requires,” they also allow “arbitrary and discriminatory enforcement” because “[A]s common sense and experience both tell us, unless by its terms a law is clear and positive, it leaves virtually unfettered discretion in the hands of law enforcement officials.”²¹³ When ordinances, such as ordinances restricting sound from car stereos, are involved, the First Amendment “overbreadth” concept is “related to, but analytically distinct from,” the void for vagueness doctrine.²¹⁴ Thus if an ordinance which regulates expression, such as music, is vague, such vagueness may result in the proscription of constitutionally protected expression under the First Amendment. Under such circumstances, a court may be required to “more carefully scrutiniz[e] the allegedly vague ordinance than if no First Amendment claim were involved.”²¹⁵

In Ohio, many car stereo (as well as general) noise ordinances prohibit noise or sound which is determined to be simply “annoying” or “disturbing” or causing some

²¹¹*Community Noise*, *supra* note 6, at 200. Even the United States Department of Justice recognizes that “[h]ow annoyed people get about noise [from loud car stereos] depends on a number of factors, including the following:

The inherent unpleasantness of the sound. This varies widely among individuals and groups. What is music to one is noise to another.

* * *

The meaning listeners attribute to the sound. The information content of the noise influences annoyance, so if listeners do not like the message of the music being played, they are more likely to be annoyed by loud car stereos If listeners associate loud car stereos with people they think are dangerous, the noise problem seems even more serious.

* * *

Applying these factors to loud car stereos, one can see how the same sound can affect people quite differently: some will enjoy it, while others will hate it.”

Michael S. Scott, *Loud Car Stereos, Problem-Oriented Guides for Police Series No. 7*, U.S. Department of Justice, Office of Community Oriented Policing Services (2001) at 3, 4 (citations omitted) available at <http://www.cops.usdoj.gov> [hereinafter *Loud Car Stereos*].

²¹²*Connally v. Gen. Constr. Co.*, 269 U.S. 385, 390-91 (1926) (*citations omitted*).

²¹³*People v. New York Trap Rock Corp.*, 442 N.E.2d 1222, 1225 (N.Y. 1982) (citing *People v. Cruz*, 399 N.E.2d 513 (N.Y. 1979), *app. dsmd.*, 446 U.S. 901; *United States v. Pertillo*, 332 U.S. 1, 7 (1877); *People v. Illardo*, 399 N.E.2d 59 (N.Y. 1979)).

²¹⁴*People v. New York Trap Rock Corp.*, 442 N.E.2d at 1226, n.4 (*citations omitted*).

²¹⁵*Id.*

other subjective reaction to the police officer or other person seeking enforcement.²¹⁶ While Ohio courts have not been very receptive to constitutional challenges to Annoyance Ordinances on the basis of vagueness, courts in a variety of other jurisdictions have struck down similar Annoyance Ordinances for that very reason.

In *People v. New York Trap Rock Corp.*,²¹⁷ the New York Court of Appeals struck down an ordinance of the Town of Poughkeepsie which prohibited the making of “any excessive or unusually loud sound or any sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a person” because it was “permeated with vagueness,” “would support a conviction on any sound which annoys another person, for it could rest solely on the ‘malice or animosity of a cantankerous neighbor’, or ‘boiling point of a particular person,’ situations which are the product, not only of imprecise standards, but no standard at all.”²¹⁸

In *Thelen v. State*,²¹⁹ the Supreme Court of Georgia found the Clayton County, Georgia Noise Ordinance²²⁰ unconstitutionally vague in a case involving a commercial pilot and instructor who had been found guilty of violating the noise ordinance in connection with the landing and taking off of his private helicopter.

In reversing the trial court and finding the ordinance unconstitutionally vague, the Georgia Supreme Court noted:

By prohibiting “any . . . unnecessary or unusual sound or noise which . . . annoys . . . others”, the ordinance . . . fails to provide the requisite clear notice and sufficiently definite warning of the conduct that is prohibited. . . . “The adjectives ‘unnecessary’ and ‘unusual’ modifying the noun ‘noises’ are inherently vague and elastic and require men of common intelligence to guess at their meaning. The same may be said of the verb ‘annoys;’” . . . Conduct that annoys some people does not annoy others. . . . The language of a criminal ordinance “cannot be so ambiguous as to allow the determination of whether a law has been broken to depend upon the ‘subjective opinions of complaining citizens and police officials, . . .’”²²¹

²¹⁶See *supra* note 32 and accompanying text. Other subjective words or phrases used in Annoyance Ordinances include “inconvenience” (CINCINNATI, OHIO, MUN. CODE § 910-10 (2003)), “[u]nusually loud sound” or sound which “endangers the comfort” of a person (TOWN OF POUGHKEEPSIE, NEW YORK, ORDINANCE § 3.01 (1996)).

²¹⁷442 N.E. 2d 1222 (N.Y. 1982).

²¹⁸*Id.* at 1226-27 (citations omitted).

²¹⁹526 S.E. 2d 60 (Ga. 2000).

²²⁰The Ordinance provides, in relevant part:

It shall be unlawful for any person to make, continue to make or cause to be made any loud, unnecessary or unusual sound or noise which either annoys, disturbs, injures, or endangers the comfort, repose, health, peace or safety of others in the county, and which is audible to a person of normal hearing ability more than 50 feet from the point of origin of the sound or noise.

²²¹*Id.* at 62 (citations omitted). Compare, *Thelen*, 526 S.E.2d with *Dupres v. City of Newport*, 978 F. Supp. 429, 433(II)(C)(1), (D.R.I., 1997) (suggesting that a “noise ordinance which specifies a decibel level is not unconstitutionally vague.”).

While pure Annoyance Ordinances present the most obvious vagueness issues, Audible at a Distance Ordinances, because of numerous factors that can affect the transmission and detection of sound, can also fail to provide adequate warning of what the law requires. Although challenges to Ohio's Audible at a Distance Ordinances on the grounds of vagueness have not been successful, this has not always been the case in other jurisdictions.

For example, in *Village of Southampton v. Tekworth*,²²² the court found that the Village of Southampton's law regulating sound from places of entertainment and making unlawful sound emanating therefrom between the hours of 11:00 p.m. and 7 a.m., which was plainly audible from a distance of 100 feet from the building, unconstitutionally vague because

The court doubts that any person can reasonably comply with such provision, since it requires a completely subjective test, and is subject to numerous variables and changing conditions. The distance a sound will travel depends on several factors which are never constant.²²³

Similarly, in *Easeway of Lee County, Inc. v. Lee County*,²²⁴ the court found unconstitutional, on the grounds of being both overly broad and vague, an ordinance which made unlawful sound which, among other things, was "plainly audible at a distance of 50 feet or more from the source."

On the other hand, courts of appeals for Hawaii and Washington have upheld Audible at a Distance Ordinances specifically directed at car stereos against constitutional challenges based on vagueness.

In *State v. Ewing*,²²⁵ the defendant was found guilty of playing "reggae" music in his Honda in violation of Honolulu's Audible at a Distance car stereo ordinance.²²⁶

At trial, the officer testified he "heard music from a distance," and that the car was "approximately forty feet away." The appellant testified that the officer was ten to fifteen feet away, and a witness for the appellant testified that there were other cars behind the appellant's vehicle playing "lots of music."²²⁷

²²²329 N.Y.S. 2d 225 (N.Y. Sup. Ct. 1972).

²²³*Id.* at 227.

²²⁴674 So.2d 863 (Fla. Dist. Ct. App. 1996); *see supra* note 206 and accompanying text.

²²⁵914 P. 2d 549 (Haw. Ct. App. 1996).

²²⁶Revised Ordinances of Honolulu ROH § 41-31.1 which provides, in pertinent part:
(a) It shall be unlawful for any person or persons to play, use, operate, or permit to be played, used, or operated, any radio, tape recorder, cassette player, or other machine or device for reproducing sound, if it is located in or on any of the following:

* * *

(2) Any motor vehicle on a public street, highway or public space; and if the sound generated is audible at a distance of 30 feet from the device producing the sound.

* * *

The Ordinance also provides a fine of \$100 for the first offense and, for the third offense within one year of the first offense, a combination of forfeiture and fine to total \$1,000. *See discussion infra.*

²²⁷914 P.2d at 552.

On appeal, the Court of Appeals affirmed the appellant's conviction finding that the Ordinance was neither overbroad nor void for vagueness:

The ordinance is not void for vagueness. The applicable test is whether the law 'give[s] [a] person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that he or she may choose between lawful or unlawful conduct. . . . "The ordinance here is specific and clear. The terms used are susceptible of ordinary understanding. . . . The thirty-foot distance beyond which noise may not be audible is easily ascertainable. . . . To reiterate, the ordinance before us is specific, definite and subject to ordinary understanding, and, thus would not be susceptible to arbitrary enforcement or application by a police officer or by judicial trier of fact."²²⁸

The Court also found that the Ordinance was not overbroad in violation of the First Amendment because "Here, the ordinance does not regulate the content of the sound from the reproducing device. Where a statute does not proscribe constitutionally protected conduct, no issue of overbreadth arises."²²⁹ More importantly, the appellant conceded in her brief that no First Amendment rights are implicated by this ordinance."²³⁰

Similarly, in *Holland v. City of Tacoma*,²³¹ the Washington Court of Appeals found the City of Tacoma's Audible at a Distance Ordinance²³² neither overbroad nor vague.

In upholding the Tacoma ordinance against the challenge that it was unconstitutionally vague, the Court found that the ordinance "has clear guidelines . . . [and] [a] person of ordinary intelligence knows what it means for sound to be 'audible' at more than 50 feet away,"²³³ and distinguished the Florida Court of Appeals' decision in *Easyway of Lee County, Inc. v. Lee County*²³⁴ finding a similar Florida statute unconstitutionally vague because, unlike the Florida statute, the Tacoma ordinance had no subjective requirement of being "disturbing".²³⁵

²²⁸*Id.* at 556-57 (citations omitted).

²²⁹*Id.* at 557.

²³⁰*Id.* But see *supra* note 205 and accompanying text.

²³¹954 P.2d, 290 (Wash. Ct. App. 1998).

²³²TACOMA, WASH., MUNICIPAL CODE § 8.12.060(E) (1998). The ordinance provides, in relevant part:

The following sounds are determined to be public disturbance noises:

* * *

(E) Sound from motor vehicle sound systems, such as tape players, radios, compact disc players, operated at a volume so as to be audible greater than 50 feet from the vehicle itself; . . .

²³³*Id.* at 544.

²³⁴674 So.2d 863 (Fla. Dist. Ct. App. 1996); see note 206 *supra*.

²³⁵*Id.* The Court noted:

[The appellant] . . . and the amicus curiae argue that the because sound travels different distances on different days and in different places, a person sitting in the car playing a radio would not know if it could be heard 50 feet away. [The appellant] . . .

C. Car Stereo Noise Versus Other Vehicle Noise: Equal Protection Under the Fourteenth Amendment.

Many municipalities which have anti-noise ordinances specifically aimed at car stereos also have anti-noise ordinances regulating any noise from vehicles, regardless of the source. Unlike the vast majority of car stereo ordinances, the all encompassing vehicle anti-noise ordinances are generally Decibel Ordinances; i.e., a violation occurs only when the offending noise exceeds a specified decibel level.

For example, the City of Shaker Heights, Ohio has both an ordinance specifically aimed at noise from car stereos²³⁶ (which makes unlawful sound which is plainly audible at 50 feet from the vehicle), as well as an ordinance which makes any noise from a vehicle unlawful if such noise or sound exceeds 80 decibels.²³⁷

Under the Fourteenth Amendment of the Constitution of the United States, “no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws,”²³⁸ and equal protection claims arise when different legal standards are arbitrarily applied to similarly situated individuals.²³⁹ The critical issue is whether the law which differentiates or discriminates is supported by sufficient justification. If the classification at issue

cites *Easyway of Lee County, Inc. v. Lee County* for support. In *Easyway*, the Court found the language of a sound ordinance overly broad and vague when the conduct made illegal music played in such a way that it was “unreasonably loud, raucous, jarring, disturbing, or a nuisance to persons within the area of audibility.” The court reasoned that this standard “represents exactly such a ‘subjective standard, prohibiting a volume that any individual person’ ‘within the area of audibility’ happens to find personally disturbing.” The Tacoma ordinance differs from the Florida sound ordinance in that this ordinance has a clear standard – audible more than 50 feet away from the source – and there is no subjective element such as “unreasonably” or “disturbing.” *Id.* at 544 (citations omitted).

The Court also dismissed the appellant’s First Amendment overbreadth challenge, both “as applied” and “facially.” With respect to the “as applied” challenge, the Court noted that the appellant had “asserted at oral argument that he was not trying to communicate a message to others by operating his radio when he was arrested. Indeed, he asserted that he was not attempting to express anything, he was merely listening.” *Id.* at 539. The Court then noted that although the appellant “has not asserted any claim to expression” he may nevertheless challenge the overbreadth of the ordinance on facial grounds. *Id.* at 541. However, the Court found that the ordinance was not facially overbroad because “[t]he volume of sound from a car stereo or sound system is not ‘commonly associated with expression.’ Because this ordinance is not directed ‘narrowly and specifically at expression,’ it is not readily vulnerable to a facial challenge.” *Id.* at 542 (footnote omitted); *see also* *Davis v. State*, 710 So.2d 635 (Fla. Dist. Ct. App. 1998) (finding that the Florida car stereo anti-noise statute (Fla. Stat. § 316.3045, 1997) which made unlawful playing a “car radio so loudly that it is plainly audible to another standing 100 feet or further away” was neither unconstitutionally vague or overbroad). *But see* *White v. State*, 619 So.2d 429 (Fla. Dist. Ct. App. 1993).

²³⁶SHAKER HEIGHTS, OHIO, ORDINANCE § 1131.45 (2003). *See supra* note 31.

²³⁷SHAKER HEIGHTS, OHIO, ORDINANCE § 755.05 (2003). For vehicles over 10,000 pounds the level is 86 decibels. *See supra* note 39.

²³⁸U.S. CONST. AMEND. XIV, § 1.

²³⁹*City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985); *Smith v. Severn*, 129 F.3d 419, 428 (7th Cir. 1997).

involves race or gender, or infringes upon fundamental rights, it must meet a heightened or strict scrutiny test;²⁴⁰ but when the classification does not involve such class or rights, a classification will survive constitutional challenge “if there is any reasonably conceivable state of facts that could provide a rational basis for classification.”²⁴¹

Is there a basis for an equal protection challenge when the same sound from a car stereo violates a municipality’s cars stereo ordinance but does not violate (or is permitted by) the same municipality’s general, all encompassing vehicle anti-noise ordinance? Although the argument can certainly be made, the few courts that have been faced with this factual situation have not directly addressed the issue, either because equal protection was not argued and/or the ordinance was held unconstitutional on other grounds.

In *State v. Ewing*,²⁴² the appellant was convicted of violating the County of Honolulu’s local Audible at a Distance car stereo ordinance,²⁴³ even though the offending sound was not, presumably, in violation of the State of Hawaii’s statute and rules establishing the “maximum sound levels that vehicles should be allowed to emit . . . and which were applicable “to all vehicles wherever operated. . . .”²⁴⁴

On appeal, the appellant did not challenge the Honolulu car stereo ordinance on the basis of “equal protection,” but rather on the basis that the local ordinance was

²⁴⁰*Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

²⁴¹*FCC v. Beach Comm., Inc.*, 508 U.S. 307, 313 (1993); *Heller v. Doe*, 509 U.S. 312, 320 (1993). A number of cases suggest that the challenge must also make a showing that the discrimination is intentional. *See Washington v. Davis*, 426 U.S. 229, 240 (1976); *see also Baston v. Kentucky*, 476 U.S. 79, 93-94 (1968).

There is some controversy on this point among commentators. One view of equal protection focuses on equal treatment, and takes the traditional line that there must be a discriminatory purpose before a law violates equal protection. The other view focuses on equal results, and would find an equal protection violation for a facially neutral law that has a discriminatory impact. Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of “Diversity,”* 1993 WIS. L. REV. 105, 148-50; Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1735-1737 (1989). Discriminatory impact is more likely to apply where laws violate fundamental constitutional rights, and particularly where the disparate impact is the result of a race-based or gender-based differentiation.

²⁴²914 P.2d 549 (Haw. Ct. App. 1996); *see supra* note 225 and accompanying text..

²⁴³Honolulu, Haw., Rev. Ordinances, Haw., (ROH), § 41-31.1 (1995). The Ordinance makes unlawful the use or operation of any radio, tape recorder, cassette player or other machine or device in “[a]ny motor vehicle on a public street, highway or public space; and if the sound generated is audible at a distance of 30 feet from the device producing the sound.” *Id.* Subsection (2). The Ordinance provides for a “fine of \$100 for the first offense, \$500 for the second offense within six months of the first offense, and \$1,000, or forfeiture of the sound system or components of the sound system up to \$1,000 in value, or a combination of forfeiture and fine to a total of \$1,000 for conviction of the third offense within one year of the first offense.” ROH. Section 41-31.3

²⁴⁴Title 11, Administrative Rules, Department of Health, Chapter 42, Vehicular Noise Control for O’ahu (“DOH Rules”), adopted pursuant to HAWAII REV. STAT. (HRS) § 342-42 (1985).

unenforceable because it was in conflict with, and therefore preempted by, the Rules adopted under the State statute governing excessive noise from vehicles.²⁴⁵ However, what appears to be a plain misreading of the State statute,²⁴⁶ the Court rejected appellant's "preemption" argument and affirmed his conviction.²⁴⁷

In *City of Farmington v. Wilkins*,²⁴⁸ the appellant, the owner of a commercial truck wash which broadcasts music through loud speakers, was convicted under a section of the Farmington, New Mexico, City Code²⁴⁹ which made unlawful "any unreasonably loud, disturbing or unnecessary noise . . . as to be detrimental to the repose, life or health of others."²⁵⁰ The Farmington City Code also had another general, all encompassing section which simply proscribe sound or noise only if it exceeded a specified decibel level.²⁵¹

At trial, the parties stipulated that while various private citizens who resided in the immediate vicinity of the truck wash would testify that the noise from the speakers was "loud, extremely irritating and continuously disturbing" to their "comfort and repose," they also stipulated that the sound created "by the loudspeakers was within the legally permissible decibel levels" set out in the "decibel" section of the Farmington City Code. The appellant argued that (1) the "decibel" ordinance, since it was enacted later, superseded the "annoyance"

²⁴⁵The State statute provided that, while a county could adopt ordinances and rules governing any matter relating to excessive noise control which was not governed by DOH Rules, all laws, ordinances and rules which were inconsistent or conflicted with or regulated by the State statute or DOH Rules were "void and of no effect." See HAW. REV. STAT. § 342F-20.

²⁴⁶The Court acknowledged that the rules promulgated under the State statute regulated noise from "any auxiliary device attached to or required for the operation of . . . [a] vehicle . . ."; that an "auxiliary device" includes an "appliance"; and that an "appliance" included "a car stereo or similar device . . ." but misread the phrase "attached to or required for the operation of said vehicle" as requiring such appliance to be "attached to the operation of said vehicle" as opposed to simply "attached to said vehicle:"

A car stereo is not "attached to" the operation of the vehicle, because it is independent of the operation of the vehicle. It is also clear that a car stereo is not "required for" operating a vehicle. In other words, a stereo is not necessary for a vehicle to operate or function or inherent in the operation or functioning of the vehicle involved.

* * *

We hold, then, that neither HRS Chapter 342(F) nor the rules promulgated pursuant to HRS § 342-42 for "vehicular noise" extend to sounds reproduced by an automobile's stereo and regulated under ROH § 41-31.1.

State v. Ewing, 914 P.2d 549, 556 (Haw. Ct. App. 1996).

²⁴⁷The Court also rejected appellant's arguments that the local statute was unconstitutionally vague and unconstitutionally overbroad. *Id.* at 556-57. See *supra* note 228 and accompanying text.

²⁴⁸740 P.2d 1172 (N.M. Ct. App. 1987).

²⁴⁹Farmington, New Mexico City Code §§ 21-48 and 21-49 (2003).

²⁵⁰*Id.* § 21-48. Section 21-49 of the Code listed certain specific acts which were proscribed, including "playing of any radio . . . in such manner or with such volume as to disturb the quiet, comfort or repose of persons in any dwelling, . . ." *Id.* § 21.49(b).

²⁵¹*Id.* § 20A-6.

ordinance, (2) that he could not be convicted under the “annoyance” ordinance because his conduct was specifically made legal under the “decibel” ordinance, and (3) the “annoyance” ordinance was “unconstitutionally vague” unless construed with reference to the “decibel” ordinance, but did not make any argument based on a violation of the equal protection clause of the Fourteen Amendment.²⁵²

In affirming the appellant’s conviction, the Court found that the ordinances did not “prohibit the same conduct, but, . . . are distinct offenses,” because the “annoyance” ordinance concentrates “on the character of the noise” and its affect on others, while the “decibel” ordinance addresses only “decibel levels, regardless of the sound’s character or effect on others.”²⁵³

In *Duffy vs. City of Mobile*,²⁵⁴ the court examined the City of Mobile, Alabama’s antinoise ordinance which made unlawful noise from radios, car stereos or other sound amplifying equipment which either exceeded specific decibel levels or annoyed or disturbed the comfort or repose of any law enforcement official or other individual of normal sensibilities.²⁵⁵ The ordinance also provided that a prima facie violation occurred if the offending noise was “plainly audible” outside a radius of 50 feet from its source.²⁵⁶

In *Duffy*, the appellant had been convicted in Municipal Court for preaching on the sidewalk in violation of the City’s anti-noise ordinance. At the time of his arrest, appellant was using a decibel meter to remain below the proscribed limits of the decibel portion of the ordinance, and permitted the police to use the meter to verify this fact. Since they had no training, the officers refused to use the meter, and instead charged the appellant under the “annoyance” portion of the ordinance because it could be heard at a distance of 50 feet.²⁵⁷

The Court reversed the appellant’s conviction on the grounds that the ordinance was unconstitutionally overbroad and that it regulated “constitutionally protected speech more broadly than necessary to achieve the governmental interest in regulating noise.”²⁵⁸ While the court suggested that antinoise ordinances based on decibel levels, specifying the hours during which sounds exceeding such decibel

²⁵²740 P.2d at 1173-74.

²⁵³*Id.* It is difficult to understand the basis for this distinction, since all sound has an “effect on others,” and the decibel levels established in Decibel Ordinances represent simply a determination that the “effect on others” of sound in excess of such levels is sufficiently “disturbing” so as to be prohibited.

²⁵⁴709 So.2d 77 (Ala. Crim. App. 1997). *See supra* note 203.

²⁵⁵MOBILE, ALA., CITY CODE, as amended § 39-96 (1991). Subsection 1(a) specifically made unlawful any sound which either exceeds (i) 62 decibels (dbA) at any property line within any residential district of the City or any public streets within or bordering upon any residential district within the City during the hours of 10:00 p.m. until 7:00 a.m., (ii) 70 decibels (dbA) during the hours of 7:01 a.m. until 9:59 p.m. in such district or public streets within such district or (iii) 80 decibels (dbA) within any commercial/ business district of the City or streets located within such district.

²⁵⁶*Id.* at § 39-96(1)(a).

²⁵⁷709 So.2d at 80.

²⁵⁸*Id.* at 80; *see supra* note 205 and accompanying text.

levels would be prohibited, and including an “intent and purpose” section,²⁵⁹ would have a better chance of withstanding challenge on First Amendment grounds, the court did not address equal protection or other constitutional issues affecting the ordinance.²⁶⁰

While a challenge to a municipality’s car stereo noise ordinance on the grounds it violates the equal protection clause of the Fourteenth Amendment because the offending sound is permitted under a more general vehicle noise ordinance of the same municipality may be possible, under current law it will not be easy. Under the rational review test, the ordinances will survive an equal protection challenge if the municipality can establish any reasonably conceivable set of facts that could provide a rational basis for the classification. However, notwithstanding a rational basis for the classification, if in fact the municipality only enforces its noise ordinances against owners of vehicles with loud car stereos, a challenge for a violation of equal protection based on selective enforcement may be more viable.²⁶¹

D. Forfeiture of Car Stereos and/or the Vehicles in Which They are Installed and the Eighth Amendment

As previously discussed, the penalties for violating Ohio’s Municipal Car Stereo Ordinances often include provisions which permit the Court to order the car stereo equipment (and, in some cases, the motor vehicle in which such equipment was installed) to be forfeited.²⁶²

²⁵⁹*Id.* at 81; *see* State v. Ewing, 914 P.2d 549 (Haw. Ct. App. 1996).

²⁶⁰*See also* Town of Normal v. Stelzel, 441 N.E.2d 170, 173 (Ill. App. Ct. 1982) (rejecting appellant’s argument that an ordinance which made unlawful “loud and raucous sounds at a distance of 50 feet” violated his right to equal protection under the Fourteenth Amendment because it permitted sounds which were merely “loud” but not “raucous”); Croman v. City of Kansas City, 29 F. Supp. 2d 587, 591 (W.D. Mo. 1997) (rejecting plaintiff’s argument that an ordinance which prohibited the use of any sound amplifying device on public property in a specific area of the City, but not on private property in such area, violated his right to equal protection: “The Court also finds that the ordinance is supported by a rational basis. The City could have . . . rationally decided that it would treat amplification on public rights -of-way differently from amplification on private property because it has a greater interest in regulating public rights-of-way.”)

²⁶¹*See, e.g.,* State v. Hendricks, 760 N.E.2d 43 (Ohio Ct. App. 2001), *supra* note 141 and accompanying text, (finding that the City of Hamilton, Ohio’s Audible Outside the Vehicle car stereo ordinance “[G]rants police officers a high level of discretion. . . . [C]ontaining no objective distance or decibel standard to guide police officers in its enforcement, [it] . . . is highly susceptible to selective enforcement and prosecution.”); White v. State, 619 So.2d 429, 430 (Fla. Dist. Ct. App. 1993) (finding that a police officer’s stop of a vehicle for allegedly violating Florida’s car stereo noise ordinance (FLA. STAT. § 316.3045) because the “windows on his patrol car were vibrating” was “pretextual” since the vehicle was the only one the police officer had “ever stopped because of a loud stereo” and never “pursued the purported basis for the stop by issuing a citation or a warning for the loud music”); *see also* Rosenbaum v. City and County of San Francisco, Case No. 00-15147, 2001 WL 406963 (9th Cir. April 19, 2001). *But see* Croman v. City of Kansas City; Whren v. United States, 517 U.S. 806 (1996) (finding that for Fourth (but not necessarily Fourteenth) Amendment purposes the “constitutional reasonableness of traffic stops does not depend on the actual motivations of the officers involved;” i.e., “pretextual” stops are proper).

²⁶²*See supra* note 46 and accompanying text.

The United States Supreme Court, in *Austin v. United States*²⁶³ held that since forfeiture—especially forfeiture *in rem*—is considered punishment despite any deterrent or remedial purposes such forfeiture might also serve, it is subject to the excessive fines clause of the Eighth Amendment of the United States Constitution, which provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.²⁶⁴

While the Supreme Court in *Austin* declined to establish a multifactor test for determining whether forfeiture is excessive, leaving that decision for the lower courts,²⁶⁵ five years later, in *United States v. Bajakajian*,²⁶⁶ the Supreme Court found

²⁶³509 U.S. 602 (1993)

²⁶⁴U.S. CONST. amend. VIII. In *Robinson v. California*, 370 U.S. 660 (1962), and *Harmelin v. Michigan*, 501 U.S. 957 (1991), the United States Supreme Court found that the Eighth Amendment prohibitions against cruel and unusual punishment are incorporated into the Fourteenth Amendment guarantees and thus applicable to the states. The Court has not, however, decisively resolved whether the excessive fines clause of the Eighth Amendment is also incorporated and applicable to the states.

In *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989), the court declined to decide whether the Eighth Amendment's prohibition on excessive fines applies to the several states through the Fourteenth Amendment. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) the court assumed without specifically ruling that:

Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

Id. at 434. *Furman* involved criminal sanctions (specifically, the death penalty) along with cruel and unusual punishment concerns, however, and *Cooper* involved a state court jury award of damages authorized by federal trademark statutes. *Cooper* cites *Browning-Ferris* only for the standard of review, and does not acknowledge *Browning-Ferris's* explicit recognition that the court has not addressed the incorporation of the excessive fine clause.

Treatise authors Nowak and Rotunda, writing pre-*Cooper* but post-*Furman*, interpret the state of the law on this question as follows:

The Court has not determined whether the “excessive fine” provision of the Eighth Amendment is applicable to the states. However, because the provision seems logically intertwined with the other provisions of that Amendment, it may already have been impliedly made applicable to the states.

JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW, 341-342 (5th ed. 1995). The *Cooper* decision, given that the law in question was federal, may reflect this “implicit” incorporation.

The Ohio Constitution, however, specifically prohibits excessive fines:

* * *

Excessive bail shall not be required; *excessive fines shall not be imposed*; and cruel and unusual punishments shall not be inflicted. Ohio Const. Art. I, § 9 (emphasis added).

²⁶⁵The Court cited *Yee v. Escondido*, 503 U.S. 519 (1992), as authority for leaving that decision to the lower courts. However, in his dissent in *Austin*, Justice Scalia suggested that the measure of excessiveness should be the relation of the forfeited property to the offense, but

that the “amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish” and held that “a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the defendant’s offense.”²⁶⁷

In *City of Akron v. Turner*,²⁶⁸ the appellant was convicted in Akron Municipal Court for violating Akron’s car stereo ordinance.²⁶⁹ In addition to imposing a fine, Akron’s ordinance provides that:

In any violation of this Section involving sound equipment in a motor vehicle, both the sound equipment and the motor vehicle are hereby deemed contraband and subject to seizure and forfeiture under Ohio Revised Code §§ 2933.41 through 2933.43.²⁷⁰

Following his conviction, and after a hearing on the City’s Motion for Forfeiture, the trial court “ordered the stereo equipment forfeited to the City ‘for its destruction or sale at auction without further order of the court.’”²⁷¹

On appeal, the appellant argued that the City had not complied with the notice requirements of Ohio Revised Code § 2933.43(C)²⁷² and that the trial court had “incorrectly granted forfeiture without making a specific finding that the forfeiture at

the Court refused to limit the Court of Appeals from “considering other factors in determining whether forfeiture of Austin’s property was excessive.” *Austin*, 509 U.S. at 623, n.15.

²⁶⁶524 U.S. 321 (1998).

²⁶⁷*Id.* at 334.

²⁶⁸623 N.E.2d 1374 (Ohio Ct. App. 1993).

²⁶⁹AKRON, OHIO, CITY CODE § 132.16 (2002).

²⁷⁰AKRON, OHIO, CITY CODE § 132.16(E). Ohio Revised Code § 2933.41, entitled “Disposition of Property Held by Law Enforcement Agency,” describes how property which has been lawfully seized or forfeited shall be kept, disposed of, or used by law enforcement agencies; Ohio Revised Code § 2933.42, entitled “Offenses Involving Contraband; Forfeiture of Property used in Committing Violation,” provides, among other things, that if a motor vehicle is used to transport contraband, such vehicle shall be deemed contraband, and, if the underlying offense is a felony shall be subject to seizure and forfeiture; and Ohio Revised Code § 2933.43, entitled “Procedure for Seizure and Forfeiture of Contraband; Law Enforcement Agency Authorized to Use, Destroy or Sell Forfeited Contraband; Distribution of Proceeds of Sale,” describes the procedures and requirements for seizure and forfeiture of contraband, including the requirement that the prosecuting attorney or other party seeking forfeiture “shall give notice of the forfeiture proceedings by personal service or certified mail, return receipt requested, to any persons known, because of the conduct of the search, the making of inquiries, or otherwise, to have an ownership or security interest in the property, and shall publish notice of the proceedings once each week for two consecutive weeks in a newspaper of general circulation in the county in which the seizure occurred.” OHIO REV. CODE § 2933.43(C) (Anderson, 1996). “Contraband” is defined in Ohio Revised Code § 2901.01(A)(13)(c) to include “Property that is specifically stated to be contraband by a section of the Revised Code or by an ordinance, regulation or resolution” The Akron Ordinance has, of course, defined “both the sound equipment and the motor vehicle” to be “contraband.”

²⁷¹*City of Akron*, 632 N.E.2d at 1375.

²⁷²See *supra* note 270.

issue was not excessive.”²⁷³ In reversing the appellant’s conviction, the Court of Appeals not only found that the City had failed to comply with the specific notice requirements of Ohio Revised Code § 2933.43(C), but also had failed, in violation of the appellant’s due process rights, to make the determination that the forfeiture of the stereo equipment was not subject to the excessive fine provision of the Eighth Amendment to the United States Constitution:

Upon remand, if the city again seeks forfeiture of the stereo equipment from defendant’s automobile and complies with the notice requirements of R.C. 2933.43(C), the trial court should, before ordering forfeiture, determine that [excessive fine] issue.²⁷⁴

A year after its decision in *Turner*, the Ohio Court of Appeals for the Ninth District again considered the forfeiture provisions of Akron’s car stereo noise ordinance in *State v. Fry*.²⁷⁵

In *Fry*, the appellant was stopped for violating Akron’s car stereo noise ordinance,²⁷⁶ and in connection with an inventory search pursuant to an “arrest” and “seizure” of the vehicle,²⁷⁷ the officer discovered crack cocaine in the vehicle’s glove

²⁷³*City of Akron*, 632 N.E.2d at 1376. In the trial court (but apparently not in the court of appeals), the appellant had also argued that § 132.16(E) of the Akron City Code was unconstitutional because it provided “for forfeiture of substantial property rights for violation of a minor misdemeanor.” *Id.*

²⁷⁴*Id.* at 1376. On remand, the city again filed a Petition for Forfeiture in the Akron Municipal Court, and the appellant objected on the grounds, *inter alia*, that requiring the appellant to defend himself and his property in a second forfeiture proceeding “would be violative of this Defendant’s Fifth Amendment rights under double jeopardy.” However, the Akron Municipal Court did not have to decide the second forfeiture petition or address the defenses raised therein because the parties reached an agreement of settlement whereby appellant simply forfeited the cash sum of \$500, and all orders relating to the forfeiture or seizure of the appellant’s stereo system and vehicle were rescinded. *See* the appellant’s Motion to Dismiss Petition for Forfeiture and the Court’s Order of Forfeiture and Release of Vehicle in Akron Municipal Court Case No. 92 CRB 12621 (unreported).

²⁷⁵No. 16718, 1994 WL 700089 (Ohio Ct. App. Dec. 14, 1994).

²⁷⁶AKRON, OHIO, CODE § 132.16 (2002). The officer testified that he was in an “unmarked cruiser when he heard loud music coming from a Blazer approximately ten car lengths away.” *Fry*, 1994 WL 70089, at *1.

²⁷⁷Under procedures issued by the Akron Police Department, officers stopping a vehicle for violation of Akron’s car stereo ordinance were required to not only issue a citation to the driver, but also list the stereo equipment in the vehicle, perform an inventory of the entire vehicle in conjunction with a tow report, and have the vehicle towed. When the tow report is received by the police department, a search is made to determine whether the driver has a past conviction for violation of the car stereo noise ordinance, and if such past conviction exists, the stereo equipment listed on the tow report must be surrendered before the vehicle will be released. *Id.*; *see also* *State v. Harris*, No. 65520 1994 WL 110938 (Ohio Ct. App. 1994), *supra* note 98, wherein an officer for the City of East Cleveland, Ohio testified that “it is standard departmental practice to make an arrest when a stop is made for loud music.”

compartment. The trial court denied the appellant's motion to suppress and, after pleading no contest to a lesser charge of drug abuse,²⁷⁸ was convicted.

On appeal, the appellant argued, among other things, that his vehicle was unlawfully seized pursuant to Akron's car stereo noise ordinance because violation of such ordinance is only a minor misdemeanor, and the seizure and forfeiture provisions of Ohio Revised Code §§ 2933.41 through 2933.43 are applicable only to felonies.

While the court acknowledged that Ohio Revised Code §§ 2933.41 through 2933.43 apply only to seizure and forfeiture when the underlying offense is a felony, and that "Akron's attempt to make motor vehicles involved in a noise ordinance violation forfeitable 'contraband' pursuant to such statutes arguably conflicts with state law,"²⁷⁹ the court nevertheless concluded that such sections did not prevent the mere "seizure," as opposed to "forfeiture," if a vehicle has been involved in criminal activity, even a misdemeanor, such as violation of a noise ordinance, and affirmed the appellant's conviction:

Since search and seizure, and not forfeiture, are at issue here, and since search and seizure are authorized other than by statute alone . . .

* * *

. . . the seizure and search of the Appellant's automobile was appropriate
 . . .²⁸⁰

While the Ohio Court of Appeals for the Ninth District has addressed certain aspects of the seizure and forfeiture provisions of Akron's car stereo noise ordinance, the Ohio courts have yet to address the fundamental issue of whether a forfeiture of a defendant's car stereo system and/or vehicle would constitute an excessive fine which is "grossly disproportional to the gravity of the offense" and thus prohibited by the excessive fines provision of the Eighth Amendment of the United States Constitution.²⁸¹

²⁷⁸It is not clear whether the appellant was ever cited, or convicted, of violating Akron's car stereo ordinance for which he was stopped and arrested.

²⁷⁹*Fry*, 1994 WL 700089, at *4. Although Ohio Rev. Code § 2933.42 permits forfeiture when the underlying offense is a felony, it does not prohibit forfeiture when the underlying offense is a misdemeanor, and a municipal "misdemeanor" forfeiture ordinance adopted under the municipalities "home rule" power and not tied to Ohio Rev. Code §§ 2933.41 through 2933.43 should not "conflict with state law." *Id.*

²⁸⁰*Id.* at *4, *5.

²⁸¹*In rem* forfeitures have also been challenged on the grounds that they constitute "double jeopardy," a violation of the Fifth Amendment to the United States Constitution which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. Generally, if the forfeiture provision is deemed to be civil/remedial in nature, and not criminal/punitive, it will be upheld, and a civil/remedial forfeiture "that has some punitive aspects will not necessarily violate double jeopardy provisions if it still serves important non-punitive goals." *Hawes v. 1997 Jeep Wrangler*, 602 N.W.2d 874, 878 (Minn. App. 1999). However, a forfeiture may be "so punitive in fact that it may not legitimately be viewed as civil in nature." *United States v. Ursery*, 518 U.S. 267, 290 (1996).

Historically, *in rem* forfeitures were not considered punishment against the individual for a criminal offense; rather, it was the property, not the individual, that was the object of the prosecution on the basis of a legal fiction that a property was “guilty and condemned as though it were conscious instead of inanimate and insentient.”²⁸² In fact, the owner of the property could be innocent of any crime.²⁸³

Because such forfeitures were “viewed as non-punitive, such forfeitures traditionally were considered to occupy a place outside the domain of the Excessive Fines Clause.”²⁸⁴ But forfeiture of a car stereo and/or the vehicle in which it is located is specifically tied to conviction of a crime – the crime of emitting excessive sound or noise – and in the absence of such conviction, there can be no forfeiture.

The crime of “excessive sound or noise” is only a misdemeanor. It is not a crime of violence. The offenders do not fit in the categories of money launderers, drug traffickers or tax evaders, who are the subject of most modern-day forfeiture laws.²⁸⁵ Also, continued use of a car stereo, and/or the vehicle in which it was located, does not pose a threat of serious injury or death to members of the public, as is the case of individuals convicted of operating an automobile while intoxicated.²⁸⁶

Would forfeiture of a \$5,000 sound system for violation of a car stereo noise ordinance, which imposes a maximum fine of \$100,²⁸⁷ be “grossly disproportional to the gravity of the offense?” Would the answer change if the forfeiture included a \$40,000 automobile in which the car stereo system is located?²⁸⁸ Or cause the offender to lose his ability to make a livelihood? In light of the United State Supreme Court’s decision in *Bajakajian*, the answer would appear to be “yes” (in some, if not

²⁸²*Waterloo Distilling Corp. v. United States*, 282 U.S. 577, 581 (1931).

²⁸³*See United States v. Bajakajian*, 524 U.S. 321 (1998).

²⁸⁴*Id.* at 331.

²⁸⁵*See generally United States v. Bajakajian*, 524 U.S. 321 (1998).

²⁸⁶*See generally*, Brian L. Porto, *Validity, Construction and Application of Statute Permitting Forfeiture of Motor Vehicle for Operation of Vehicle While Intoxicated*, 89 A.L.R. 5th 539 (2001); *City of New Brighton v. 2000 Ford Excursion*, 622 N.W.2d 364 (Minn. Ct. App. 2001).

²⁸⁷AKRON, OHIO, CODE § 132.16(D) (2002) provides that a first time violation of its car stereo noise ordinance is a minor misdemeanor, for which the Court can impose a maximum fine of \$100 and no confinement. Nonetheless, under AKRON, OHIO, CODE § 132.16(E) (2002), the Court has the power to also order the forfeiture of the sound equipment and/or the motor vehicle in which such sound equipment is located. *See supra* note 270 and accompanying text.

²⁸⁸*See City of New Brighton v. 2000 Ford Excursion*, 622 N.W.2d 364 (Minn. Ct. App. 2001). The Court of Appeals for Minnesota upheld the forfeiture of a \$40,000 Ford Excursion after the owner was arrested and convicted for driving while intoxicated. The Court described the facts of the case as follows: “After leaving the dealership, [the appellant] drove to a bar and consumed alcohol. He then drove home, parked the vehicle in his driveway and went inside his house. [The appellant] returned to his vehicle later that evening with some compact disks to test the vehicle’s stereo system. A neighbor called the police complaining of loud music. The police arrived at . . . [appellant’s] home and found him sitting in the driver seat of his vehicle listening to music. [Appellant] submitted to a blood alcohol test . . . [and] was arrested for driving while intoxicated.” *Id.* at 367.

all, of the foregoing scenarios) because such forfeitures are, in fact, “grossly disproportional to the gravity of the offense.”

But *Bajakajian* does not prohibit all forfeitures, and a forfeiture provision of the type contained in the City of Honolulu, Hawaii’s car stereo ordinance, which limits “forfeiture of the sound system or components of the sound system up to \$1,000 in value,”²⁸⁹ would probably not run afoul of the excessive fines provision of the Eighth Amendment to the United States Constitution.²⁹⁰

E. Car Stereo Ordinances as a Reaction to Rap Music and its Challenge to White Culture

Rap music, sometimes known as hip-hop,²⁹¹ is a “form of rhymed storytelling accompanied by highly rhythmic, electronically based music” that “articulates many of the facets of life in urban America for African Americans situated at the bottom of a highly technological capitalistic society . . .,” and “often takes on a deeply political character because of the rappers’ social, racial, and gender locations.”²⁹² Many white leaders view rappers as “social menaces” and their music as “sick”²⁹³ and “vile and despicable.”²⁹⁴ Rap music is characterized by “volume, looped drumbeats and, bass frequencies,”²⁹⁵ and this “sonic power” is as much a part of rap and its message as are its lyrics.²⁹⁶ While rap music traces its origins to the 1970s in South Bronx, New

²⁸⁹HONOLULU, HAW., REV. ORDINANCES § 41-31.3 (1995) which mandates the following penalty for an individual found in violation:

[A] fine of \$100 for the first offense, \$500 for the second offense within six months of the first offense, and \$1,000 or forfeiture of the sound system or components of the sound system up to \$1,000 in value, a combination of forfeiture and fine to total \$1,000, for conviction of the third offense within one year of the first offense.

²⁹⁰As to what actually happens to the stereo systems that have been forfeited, THE PLAIN DEALER recently reported the following:

Smash Hit: Cleveland police are preparing to sell off hundreds of car-stereo systems seized from noise ordinance offenders. But in Lorain, a court officer happily sledgehammers the stereos out in the parking lot. One of them cost \$2,000. Lorain Judge Mark Mihok says the city isn’t being fiscally irresponsible; cops would rather keep the ear-splitting speakers off the streets than make money off an auction.

Michael K. McIntyre, THE PLAIN DEALER, Cleveland, Ohio, October 13, 2003, at B1.

²⁹¹“Hip Hop” is an “African-American and Afro-Caribbean youth culture composed of graffiti, breakdancing and rap music.” TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA at 2 (1994) [hereinafter BLACK NOISE].

²⁹²*Id.* at 2, 184.

²⁹³*Id.* at 183 (*quoting* President George H. Bush).

²⁹⁴*Id.* (*quoting* a letter signed by sixty congressmen protesting rapper Ice-T’s song “Cop Killer” in the wake of the Los Angeles riots). Black leaders have also criticized rap music because “of its harmful effects on today’s youths.” *Id.* at 184.

²⁹⁵*Id.* at 63.

²⁹⁶*Id.* at 63-64. In BLACK NOISE, author Tricia Rose, an African American, describes the reaction of the white Chairman of the music department after hearing a description of her project to write about rap music:

[T]he department head rose from his seat and announced casually, “Well, you must be writing on rap’s social impact and political lyrics, because there is nothing to the

York, it did not achieve widespread popularity until the late 1980s,²⁹⁷ which roughly coincides with the emergence of car stereo noise ordinances.²⁹⁸ While there is no “smoking gun” upon which one could conclude that any particular car stereo ordinance was adopted as a way to deal with the culture of rap music and those who enjoy it, there is enough circumstantial evidence to at least negate the argument that the emergence of rap music and car stereo noise ordinances is simply coincidental.

First, there are the ordinances themselves, many of which unnecessarily make the detection of “base sounds” a reason for citation, even though lower frequency is less annoying than high pitch sound.²⁹⁹ For example, the City of Parma, Ohio, car stereo noise ordinance,³⁰⁰ which makes unlawful sound which is plainly audible at a distance of 50 feet or more from the motor vehicle, specifically provides that “The detection of rhythmic base reverberating-type sound is sufficient to constitute a plainly audible sound.”³⁰¹

Such ordinances further provide that “The officer need not determine the particular words or phrases being produced or the name of any song or artist producing the sound.”³⁰² From the perspective of the adult white middle class, the

music” He pointed out rap’s role as a social steam valve, a means for the expression of social anger. “But,” he concluded, referring to the music, “they ride down the street at 2:00 A.M. with it blasting from the car speakers, and (they) wake up my wife and kids.

What’s the point of that?”

* * * *

For the music chairman, automobiles with mass like speakers blaring bass and drum heavy beats looped continuously served as an explanation for the insignificance of the music and diminished rap’s lyrical and political salience as well. The music was “nothing” to him on the grounds of its apparent “simplicity” and “repetitiveness.”

* * * *

Let us take his question seriously: What is the point of rap’s volume, looped drum beats and bass frequencies? . . . Rap’s distinctive bass-heavy enveloping sound does not rest outside of its musical and social power. Emotional power and presence in rap are profoundly linked to sonic force and one’s receptivity to it. As Sistah Souljah reminds her audience at the Abyssinian Baptist Church: “When . . . you listen to the music and you don’t hear a call, then you missed the jam.” *Id.* at 62, 63.

²⁹⁷*Id.* at 7-8

²⁹⁸*See supra* note 14, and accompanying text.

²⁹⁹*See supra* note 7.

³⁰⁰PARMA, OHIO, MUNICIPAL ORDINANCE § 669.02 (2002).

³⁰¹*Id.* at § 669.02(d)(3); *see also*, VILL. OF KELLEYS ISLAND, OHIO, ORDINANCE § 132.13 (2002). The emphasis on low pitched (base) sound, as opposed to high pitch (treble) sound, may be even more telling since it is generally believed that “high pitched tones are more annoying . . . than low tones.” *See supra* note 7 and accompanying text.

³⁰²PARMA, OHIO, MUNICIPAL ORDINANCE § 669.02(d)(3) (2002); VILL. OF KELLEYS ISLAND, OHIO, ORDINANCE § 132.13 (F)(3) (2002). *But see* FORT LUPTON, COLO., ORDINANCE § 10-185(b) (2002) (“For the purpose of this Section, the phrase **plainly audible** means that the sound is transferred to the auditor, such as but not limited to being able to understand spoken or sung words, or comprehension of musical rhythm”), and AURORA, COLO., MUNICIPAL CODE § 94-109(c) (2002) (“For the purposes of this Section the term “**plainly audible**” means that the information content of the sound is unambiguously transferred to the auditor, such as but

lyrics of rap, with its slang and inflections that are unique to poor urban African Americans, are hard to understand, and knowing the name of the rap or the artist performing it would be next to impossible.³⁰³

Second, there is the repeated references in the cases to testimony by arresting officers of the “detection of pounding base that shakes the windows,” and in one case, to the fact that the sound “was reggae music.”³⁰⁴

Finally, although statistics on a national, or even statewide, basis of the race of individuals issued citations and/or are arrested for violation of car stereo anti-noise ordinances are not maintained, the records of three Ohio municipalities indicate that a disproportionate number of African Americans are being cited and/or arrested for violation of such ordinances.

For example, African Americans make up approximately 51% of the population of the City of Cleveland, Ohio.³⁰⁵ However, of the 11,034 citations issued between January 1, 2000 and March 21, 2002 for the violation of Cleveland’s car stereo ordinance,³⁰⁶ 8,973, or 81.3%, were issued to individuals whose race was described as “black.”³⁰⁷

In the year 2001, the City of Shaker Heights, Ohio, an upscale suburb of Cleveland whose population is approximately 34.1% African American,³⁰⁸ issued a total of 61 citations for violation of its car stereo noise ordinance,³⁰⁹ of which 54, or 88.5%, were issued to African Americans.³¹⁰ And of the 579 citations issued by the City of Parma, Ohio between January, 2000 and April, 2002, a Cleveland suburb

not limited to understanding the spoken speech, comprehension of raised or normal voices or comprehension of musical rhythms.”)

³⁰³This excludes, however, middle class white teenagers, who, by some estimates, consume 50-70% of rap music. See BLACK NOISE, *supra* note 291 at 7 n.6.

³⁰⁴See *supra* notes 98, 129 and 225, and accompanying text. Rap music has drawn heavily from the reggae music of black Caribbean immigrants and their sound systems, including emphasis on bass tones. See BLACK NOISE, *supra* note 291, at 199 n.31. Rap, like reggae, relies on prerecorded sounds. In the case of rap, the basic beat comes from hard funk rather than “Jamaican rhythms. . . . [J]ust as reggae has bound up with the idea of roots and culture, so rap is rooted in the experience of lower class blacks in America’s big northern cities.” DICK HEBDIGE, *CUT’N’MIX: CULTURE, IDENTITY AND CARIBBEAN IN MUSIC*, at 136 (1987).

³⁰⁵U.S. Census Bureau, *Census 2000* at 1590.

³⁰⁶CLEVELAND, OHIO, MUNICIPAL CODE § 683.02 (1998).

³⁰⁷Letter and attachments from Laura T. Palinkas, Assistant Director of Administration, Department of Public Safety, City of Cleveland to Mark Kessler, Librarian Assistant, Ulmer & Berne LLP (March 25, 2002) (on file with the author). During the same period, a total of 470 individuals were arrested for violation of the Car Stereo Ordinance, of which 374, or 79.6% were African Americans. *Id.*

³⁰⁸U.S. Census Bureau, *Census 2000*, at 2246.

³⁰⁹SHAKER HEIGHTS, OHIO, ORDINANCE § 1131.45 (1998).

³¹⁰Facsimile from Walter A. Ugrinic, Shaker Heights Police Chief to Mark Kessler, Librarian Assistant, Ulmer & Berne LLP (April 3, 2002) (on file with the author).

whose African-American population is approximately 1.1%, 28, or 4.8%, were issued to African Americans.³¹¹

Whether or not one accepts the premise that car stereo anti-noise ordinances are a not so well disguised effort to control the message of rap music and its perceived challenge to the values of white cultural,³¹² the general premises that there are laws which on their face appear to have a race-neutral objective were in fact enacted to limit or restrict the activities of African Americans is not new. Such limitations and restrictions, which include discriminatory regulations of privately owned venues, curfews, and anti-cursing laws, are beyond the scope of this Article, but have been described and documented in the literature.³¹³

IX. CONCLUSION

Whatever its source, “unwanted sound,” or noise, is a problem, especially in urban areas. Noise can be “annoying” or “unnecessary” or cause “inconvenience” or disturb one’s “quiet, comfort or repose.” But more importantly, excessive noise can cause serious health problems, including hypertension, ulcers, indigestion, hallucination and, on occasion, almost homicidal and suicidal impulses.³¹⁴ It has been estimated that noise in the United States is increasing by one decibel per year,³¹⁵

³¹¹U.S. Census Bureau, Census 2000, American Factfinder, *available at* <http://factfinder.census.gov> (visited Nov. 17, 2003). Statistics furnished by the Parma Police Department to Mark Kessler, Librarian Assistant, Ulmer & Berne LLP (April 4, 2002) (on file with the author). *See also* State v. Boggs, No. C-980640, 1999 WL 420108 (Ohio Ct. App. 1999), *supra* note 53, in which the defendants, charged with violating Cincinnati’s car stereo ordinance (Cincinnati Municipal Code § 910-10), introduced evidence that “79% of the persons who were issued ... citations were African American males.” *Id.* at *4. The Court, however, rejected the appellant’s argument that the ordinance was unconstitutional as applied because a disproportionate number of African Americans are cited for violating it because the “appellants offered no other evidence to show an intent to discriminate.” *Id.* *See generally*, Charles Crawford, *Race and Pretextual Stops: Noise Enforcement in Midwest City*, 6 Soc. Path. No. 3 at 213 (2000).

³¹²Nightclubs which feature hip hop or rap music performers also appear to have been targeted for closure because of alleged “drug sales, underage drinking, loud music, and other conditions which create an atmosphere conducive to crime” when in fact the actual motive may have been to prohibit “hip hop nights” because the police “don’t want niggers in the neighborhood.” *See* Frank Owen, *Crackdown in Club Land: City Hall is Changing The Rules of Nightlife in New York*, VILLAGE VOICE, Feb. 18, 1997, at 34, 35.

³¹³*See e.g.*, Regina Austin, “Not Just For The Fun Of It!”: *Governmental Restraints on Black Leisure, Social Inequality and the Privatization of Public Space*, 71 S. CAL. L. REV. 667 (1998) and authorities cited therein.

³¹⁴*Community Noise*, *supra* note 6, at 187.

³¹⁵*Id.*

and sound created by vehicles, whether from their engines, exhausts, tires, horns³¹⁶ and, yes, stereo sound systems, is undoubtedly a significant source of noise.³¹⁷

Because of the constitutional guarantees of free speech and expression, equal protection, and freedom from laws that are so vague that the prohibited conduct cannot be readily understood, on the one hand, and the complex nature of sound and its effects on human beings on the other, the regulation of sound from any source is difficult, but not impossible. But singling out sound from car stereos, imposing harsher penalties and more aggressively enforcing compliance, only compounds the problem, and gives the appearance, at least, that it is not the sound that is being attacked, but rather the type of music, or worse, the culture or racial makeup of those who enjoy it.³¹⁸

Annoyance Ordinances are not the answer. Studies have shown that there is no way to tell whether specific sounds will or will not annoy or disturb an individual.³¹⁹ The problem, therefore, with Annoyance Ordinances is not that they are based on a vague or imprecise standard, but rather that they are based on “no standard at all.”³²⁰

Audible Outside the Vehicle Ordinances, because they create “absurd applications,” are “violated scores of times each day,” and are “highly susceptible to selective enforcement and prosecution”³²¹ do not provide a workable solution either.

And Audible at a Distance Ordinances, while an improvement over the Annoyance and Audible Outside the Vehicle Ordinances, still suffer from the subjectiveness (and differences in the definitions) of “audible,” “plainly audible” and similar terms,³²² the variations in each individual’s hearing capabilities, and the fact that the distance at which a particular sound is audible is subject to numerous conditions which cannot be controlled.³²³

So what is the answer? A few novel alternatives have been adopted or proposed. The Town of Dover, New Jersey, has enacted an ordinance which makes illegal having a car stereo system in a motor vehicle (other than the system installed by the factory) in which (1) the number of speakers exceeds 4, or (2) any speaker exceeds

³¹⁶See generally, Steven N. Brautigam, *Rethinking the Regulation of Car Horn and Car Alarm Noise: An Incentive-Based Proposal to Help Restore Civility to Cities*, 9 COLUM. J. ENVTL. L. 391 (1994).

³¹⁷*Community Noise*, supra note 6, at 187. See generally, Birgitta Berglund, Thomas Lindvall and Dietrich H. Schwela, *Guidelines for Community Noise*, World Health Organization Geneva (1999), available at <http://www.willful.com.ar/comnoise>.

³¹⁸Even the United States Department of Justice has recognized that for some, car stereos are “a passionate hobby, an important part of their cultural identity and lifestyle.” *Loud Car Stereos*, supra note 211.

³¹⁹*Loud Car Stereos*, supra note 211; *Community Noise*, supra note 6, at 200.

³²⁰*People v. N.Y. Trap Rock Corp.*, 442 N.E.2d 1222, 1227 (N.Y. 1982). The United States Department of Justice has observed that Annoyance Ordinances “require[s] highly subjective police judgments” and are “vulnerable to legal challenges on grounds they are vague and overbroad.” *Loud Car Stereos* at 22.

³²¹*State v. Hendricks*, No. CA2000-07-155, 2001 WL 672833 (Ohio Ct. App. 2001).

³²²See supra notes 31 and 32.

³²³*State v. Dorso*, 446 N.E.2d 449, 452 (Ohio 1983).

6.5 inches in width or height or exceeds 100 watts in power output.³²⁴ But regulation of the design of aftermarket sound systems and components does not assure that such systems, with technological advances in efficiency that allow louder sound without increasing power or speaker number or size, will not, if used to excess, continue to create noise disturbances, but does assure that the car manufacturers will have a distinct (and unfair) advantage over the aftermarket sellers and installers in meeting the needs of those who desire better sound systems in their vehicles.³²⁵

Another alternative that has been suggested would be to make the registered owner, as opposed to the driver, liable for a car stereo noise violation.³²⁶ The rationale for this approach is that “because police are seldom present when loud car stereos are disturbing others, offenders often avoid being cited. The advantage . . . is that police would not have to conduct traffic stops to issue citations: citizens’ complaints could form the basis for citations, and agencies other than the police department could assume some responsibility for enforcing the law.”³²⁷ However, the problems in attempting to impose criminal liability on an owner of a vehicle on the basis of a citizen complainant who heard a sound which he or she found to be “annoying” or “plainly audible,” correctly determined the specific vehicle from which such offending sound emanated, and correctly wrote down the vehicle’s license plate number, are obvious, and would seem to make this approach impractical as well.³²⁸

³²⁴CODE OF THE TOWN OF DOVER, N.J., ORDINANCE 8-1989, § 254-3(B) (2003). The ordinance also makes illegal having any speaker which is “external to the passenger compartment; a speaker contained in an open hatchback vehicle shall be considered ‘external’ for the purpose of this chapter.” *Id.* at § 254-3(B)(3).

³²⁵A bill was recently introduced in Rhode Island, which, among other things, would have prohibited any motor vehicle from being registered which contained a sound amplification system “designed to produce sound in excess of the sound required to be heard by the passengers of such motor vehicle,” prohibited any person from selling, or installing, any “amplification system for music . . . whose sound power is in excess of” the foregoing limits, and created a 16-member oversight committee to “review the problem of noise pollution caused by motor vehicle sound systems” Bill HB 6766, introduced January 16, 2002 by representatives Ginnini, McNamara, Henseler, Trillo & Moran entitled “An Act Relating to Noise Limits from Motor Vehicles.” The 16-member committee would have included, among others, a person who installs motor vehicle sound systems and a person who sells amplification systems, but not a representative of the tens of thousands of people who purchase and enjoy such sound systems. But in committee these provisions were eliminated because of concerns over their ability to withstand legal challenges and other perceived problems, and as finally enacted, this bill simply increased the maximum fine that could be imposed under Rhode Island’s existing car stereo ordinance (Chapter 31-45, General Laws) from \$50 to \$500. *See* H6766 Sub. B as Amend., eff. 6/15/02.

³²⁶*Loud Car Stereos*, *supra* note 211, at 14.

³²⁷*Id.*

³²⁸As previously noted, one jurisdiction has required offenders to “sit in a small room and listen to an hour’s worth of Barry Manilow or the ‘Barney’ theme song.” *See supra* note 45. But even the Department of Justice acknowledges that such an approach requires judges to “have a sense of humor” and “is more likely to generate publicity than to deter offenders.” *Loud Car Stereos*, *supra* note 211, at 21. Other proposals include banning the manufacture of vehicle sound systems that can produce loud sound and to hold manufacturers of vehicle sound systems civilly liable for damage caused by their products. *See Loud Car Stereos* at 7;

When the science of sound and the unscientific definitions of the words “annoying,” “audible,” “plainly audible,” “comfort,” “repose,” “inconvenience,” and the like are considered together against the constitutional mandates of the First and Fourteenth Amendments, a simple Decibel Ordinance³²⁹ which proscribes any sound from motor vehicles above specified limits, although not perfect, is a practical and enforceable solution that would be less susceptible to abuse and violative of constitutional rights than the present alternatives. And if such a Decibel Ordinance gives greater weight to lower frequencies,³³⁰ is coupled with reasonable and appropriate penalties,³³¹ requires that car stereo dealers and installers provide customers with warnings about the legal consequences of playing their sound systems too loudly, and provides that warning signs be posted on roadways where residents are likely to be disturbed, then that elusive balance between the right of individuals to enjoy and express their thoughts and feelings through music in their vehicles, and the right of other individuals to be free from excessive noise, might be achieved.

Regulatory Impact Statement, Proposed Protection of the Environmental Operations (Noise Control) Regulation 2000, New South Wales Environmental Protection Authority, Noise Policy Branch, available at www.epa.nsw.gov.au; Jason A. Lief, *Ensuring Domestic Tranquility Through Quieter Products: A Proposed Product-Nuisance Tort*, 16 CARDOZO L. REV. 595, 628 (1994).

³²⁹See New York City’s Decibel Ordinance and the success in enforcing it, *supra* note 38 and accompanying text.

³³⁰Because high frequencies are believed to be more annoying than low ones, the decibel “A” scale (dbA), which “gives less weight to low tones,” is the scale more commonly used in regulating noise from vehicles, including car stereos. See *supra* note 7 and accompanying text. However, because low frequencies have “remarkably long wavelengths – about 15 feet for a C two octaves below middle C,” they can penetrate walls and other barriers much more effectively than high-pitch frequencies. This is why “the throbbing base of a neighbor’s rock music comes through the wall, but not the lilting melody.” John Sedgwick, *Cut Out That Racket*, THE ATLANTIC MONTHLY (Nov. 1991) 50, 51. Consequently, it is much more difficult for an individual to shield himself against the intrusion of low-bass tones than higher-pitched sounds, and a decibel scale modified to reflect this fact needs to be developed.

³³¹See *supra* notes 287-89 and accompanying text.