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Come on Feel the Noise: The Problem with Municipal Noise Regulation

Aaron C. Dunlap

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COME ON FEEL THE NOISE: THE PROBLEM WITH MUNICIPAL NOISE REGULATION

AARON C. DUNLAP*

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I. INTRODUCTION

“Noise is in the ear of the beholder”¹

Noise. This simple word conjures up a myriad of images and sounds that affect the everyday lives of people throughout the United States. From car alarms² and car stereos³ to the neighborhood restaurant or bar,⁴ noise is a common part of life, and a continual problem. Although many noise complaints revolve around urban life, the rural parts of our nation have an equally large problem with noise.⁵ In addition to the common noise producers (such as a live band in a restaurant) other less obvious sources are

¹ David G. Cotter, *Shooting Sports Versus Suburban Sprawl – Is Peaceful Coexistence Possible?*, 15 T.M. COOLEY L. REV. 21, 24 (1998) [hereinafter Cotter, *Shooting Sports*].

² See Steven N. Brautigam, Note, *Rethinking the Regulation of Car Horn and Car Alarm Noise: An Incentive-Based Proposal to Help Restore Civility to Cities*, 19 COLUM. J. ENVTL. L. 391, 391 (1994).

³ See William J. Bratton, *The New York City Police Departments Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL’Y 447 (1995); Brautigam, *supra* note 2, at 395; MICHAEL S. SCOTT, DEP’T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERV., LOUD CAR STEREOs (2004), available at <http://www.cops.usdoj.gov>.

⁴ See Alina Matas, *Nightclub Case is Symbolic of Larger Struggle Between Club and Restaurant Owners, Condo Residents That Will Define Miami Beach’s Future*, BROWARD DAILYBUS. R., July 17, 2003, at 1; Beach J. Wires, *This Anti-Noise Ordinance Passes Constitutional Muster*, N.J. LAW.: WKLY NEWSPAPER, Apr. 11, 2005, at 24; Ron Friedman, *The Sounds of Silence*, RESTAURANT BUS., Aug. 15, 2000, at 23.

⁵ See generally Cotter, *Shooting Sports*, *supra* note 1; David G. Cotter, *Outdoor Sport Shooting Ranges Under the Environmental Gun—The Final Assault or Merely a Manageable Dilemma?*, 20 T.M. COOLEY L. REV. 453 (2003) [hereinafter Cotter, *Environmental Gun*]; David G. Cotter, *Outdoor Sport Shooting Ranges: An Endangered Species Deserving of Protection*, 16 T.M. COOLEY L. REV. 163 (1999) [hereinafter Cotter, *Endangered Species*].

becoming problematic. Leaf blowers,⁶ Jet-skis,⁷ and privately owned wind turbines⁸ (just to name a few)⁹ have been at the center of noise discussion.

The U.S. Supreme Court has recognized that government “ha[s] a substantial interest in protecting its citizens from unwelcome noise.”¹⁰ So to combat this ever-present and growing problem, communities and local governments around the United States are attempting to regulate noise. Some communities focus on regulating noise through zoning-based ordinances, while others continue with the time-honored tradition of policing noise through common law nuisance actions. Others use product-specific bans or regulations in an attempt to regulate noise on a limited basis, depending on community needs.¹¹ No matter how noise regulations have been enacted or enforced, problems abound with the variety of measures taken to control this seemingly necessary evil of a developed society.

This Article will show the various sources, complications, and problems with noise regulation in the United States. It will only focus on the aspects of noise that local municipalities and cities are able to regulate, because many local jurisdictions are superseded by federal enforcement in the areas of public roadways, aircraft, and railroads.¹² The Article will concentrate on the dichotomy between a zoning approach of restrictive noise ordinances and common law regulation through nuisance actions. But before introducing the two major approaches to noise regulation, Part II will highlight the numerous problems associated with noise. Between the physical and mental damage of noise, the historical idea of the free use of one’s property, the

⁶ See Eileen White Read, *The Big Noise Over Leaf Blowers – Rules Aim at Lowering the Din; But Will Quiet Tools Sell? Doubling as a Tennis Cannon*, WALL ST. J., Sep. 28, 2001, Weekend Journal, at W10; Cindy Chang, *Agency Offers a Cleaner, Quieter Leaf Blower*, N.Y. TIMES, Feb. 22, 2006, at A11.

⁷ See U.S. GEN. ACCOUNTING OFFICE, *FEDERAL LANDS: AGENCIES NEED TO ASSESS THE IMPACT OF PERSONAL WATERCRAFT AND SNOWMOBILE USE*, RCED-00-243 (Sept. 2000) [hereinafter GAO, FEDERAL LANDS].

⁸ See David R. Bliss, *Tilting at Wind Turbines: Noise Nuisance in the Neighborhood After Rassier v. Houim*, 69 N.D. L. REV. 535 (1993); Steve Blankinship, *Relaxed Noise Restrictions Could Boost Wind Projects*, POWER ENGINEERING, Oct. 2004, available at <http://pepei.pennnet.com>; see also *Rassier v. Houim*, 488 N.W.2d 635 (N.D. 1992).

⁹ See also Jennifer Knight, *Motorcycle Riders and City of Colorado Springs Look for Compromise on Noise Ordinance*, THE COLORADO SPRINGS BUS. J., Aug. 27, 2004; Brad Carlson, *Boise Businesses Express Concerns Over Proposed Noise-Control Law*, THE IDAHO BUS. REV., Feb. 12, 1996.

¹⁰ See *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (quoting *City Council of Los Angeles v. Taxpayers*, for *Vincent*, 466 U.S. 789, 806 (1984)); see also *Dupres v. City of Newport*, 978 F. Supp. 429, 435 (D.R.I. 1997); Jason A. Lief, Note, *Insuring Domestic Tranquility Through Quieter Products: A Proposed Product-Nuisance Tort*, 16 CARDOZO L. REV. 595, 606 (1994).

¹¹ See, e.g., Read, *supra* note 6.

¹² ERIC M. ZWERLING, *LOCAL NOISE ENFORCEMENT OPTIONS AND MODEL NOISE ORDINANCE*, 6 (Rutger’s Cooperative Extension) (n.d.).

problem of squaring regulations with the First Amendment, and the disaster of the Federal Noise Control Act, noise regulation has become a minefield that communities must traverse to effectively regulate the problem. Part III will show a variety of regulations that communities have implemented in an attempt to handle specific and unique noise problems. Part IV compares the two major theories behind noise regulation: nuisance versus noise ordinance. For each regulatory approach, both the positive and the negative aspects will be explained as well as the necessary requirements to regulate effectively under each method. Finally, Part V will propose that the only truly effective way to regulate noise in our society is through the promulgation of very specific noise ordinances. This community-based approach is the best way to ensure that noise, though impossible to silence, can be managed in a way to increase the quality of life throughout the United States.

II. BASIC PROBLEMS WITH NOISE AND NOISE REGULATION

A. *A General Discussion on Noise and Its Associated Problems*

1. MEASURING NOISE AS SOUND

Noise has been defined as unwanted sound¹³ or any sound which interferes with one's hearing of something else;¹⁴ it has even been described as "[A] byproduct or waste created by various human activities."¹⁵ Although these are not technical definitions, they aptly describe the discussion surrounding noise. The descriptive definitions do not emphasize the actual study of noise, but there is a definitive standard to measure its impact. The main unit to measure sound is the decibel (dB), which actually measures sound as pressure.¹⁶ Generally speaking, the more decibels a sound registers, the more intense the sound.¹⁷ For example, a conversation roughly registers somewhere between 55 and 60 dB while a vacuum cleaner is much closer to 70 dB. Because an increase of 10 dB doubles the "loudness" of a sound, an increase of just a few decibels is a large change in the actual volume the

¹³ U.S. GEN. ACCOUNTING OFFICE, TRANSPORTATION NOISE: FEDERAL CONTROL AND ABATEMENT RESPONSIBILITIES MAY NEED TO BE REVISED, RCED-90-11 (Oct. 1989) [hereinafter GAO, TRANSPORTATION NOISE].

¹⁴ MERRIAM WEBSTER'S NEW COLLEGIATE DICT., 787 (10th ed. 1999).

¹⁵ GAO, TRANSPORTATION NOISE, *supra* note 13, at 10.

¹⁶ *Id.* at 11.

¹⁷ *Id.*

hearer perceives.¹⁸ Furthermore, the threshold for physical pain is measured at roughly 130 dB.¹⁹ Although physical pain occurs at very high decibel levels, hearing loss actually begins at a significantly lower level, around 75 dB and higher as measured on the Ldn scale.²⁰

2. PHYSICAL AND MENTAL PROBLEMS CAUSED BY NOISE

The dangers of noise range from being a mild irritant to a major health concern. However, what may be just an irritation to some has been linked to a variety of health concerns, problems, learning disabilities, and other such ailments in others.²¹ As early as the 1970's the American public voiced their concern about noise; in fact 34% of 60,000 respondents to a poll said street noise was a condition in their neighborhood, and 60% that noise was disturbing, harmful or dangerous.²² The most common focus of noise damage is hearing loss. When noise becomes too "loud" or maintains a certain decibel level over an extended period of time, hearing loss can occur.²³ This focus is especially important because it is possible that "[o]ver 25 percent of the American population suffers enough noise-induced hearing loss by the age of 65 to be materially impaired in the ability to communicate under everyday listening circumstances."²⁴ It has also been

¹⁸ Personal Watercraft Industry Association, *Power of Sound*, <http://www.pwia.org/issues/sound3.html> (last visited Oct. 4, 2006) [hereinafter PWIA, *Sound*].

¹⁹ *Id.* Although these standards are a bit hard to grasp, other descriptions of decibels may be more helpful. One article makes an observation that a reduction of ten decibels is roughly equivalent to cutting the loudness of a noise in half. See Leo O'Conner, *Putting a Lid on Noise Pollution*, MECHANICAL ENGINEERING, June 1991, at 46.

²⁰ See GAO, TRANSPORTATION NOISE, *supra* note 13, at 12. There are various ways to measure decibels, which actually adds to the confusion. To accurately measure sound, it must be determined what standard is going to be used. Decibels (dB) measure sound pressure logarithmically, while dBA (also called A weighted sound level) is adjusted for the sensitivity to the human hearing capacity for different frequencies. Sidney A. Shapiro, *Lessons From a Public Policy Failure: EPA and Noise Abatement*, 19 ECOLOGY L.Q. 1, 4 n.17 (1992); STEVEN FERREY, 1 L. INDEP. POWER § 6.125 (2006). Ldn measures sound over a 24 hour period where sound is measured and then averaged; for this measurement 10 dB are added to nighttime noises because of their increased annoyance. GAO, TRANSPORTATION NOISE, *supra* note 13, at 11.

²¹ See Joe Wilensky & Metta Winter, *Quiet Zones for Learning*, 29 HUMAN ECOLOGY Issue 1, at 15 (2001); Sandy Moretz, *Decibel Damage; The Slow Slide into Silence*, 52 OCCUPATIONAL HAZARDS Issue 9, at 41 (1990); O'Conner, *supra* note 19, at 46; Stephen A. Stansfeld & Mark P. Matheson, *Noise Pollution: Non-Auditory Effects on Health*, 68 BRITISH MEDICAL BULLETIN 243 (2003).

²² Shapiro, *supra* note 20, at 6 n.36.

²³ Moretz, *supra* note 21, at 43. Without going too in-depth into the science of hearing loss, once noise reaches a certain loudness nerve endings in the inner ear begin to die; as more and more die, hearing ability decreases and can eventually lead to permanent damage. *Id.*

²⁴ O'Conner, *supra* note 19, at 50.

estimated that “[T]hree million children and eleven million adults suffer from some form of hearing loss,” and that roughly 14.7 million workers face noise threats to their hearing while on the job.²⁵

As important as the focus on noise-induced hearing loss is, there are other equally damaging consequences of being exposed to too much noise. There has been a growth in research about the effects of noise on children.²⁶ The focus is not on the possibility of hearing loss (because the levels of noise being measured are not enough to cause such problems), but instead on their ability to learn and read.²⁷

There is also a study on the “non-auditory” effects of noise.²⁸ This study explains that noise pollution can affect people in such obvious ways as sleep disturbance and their ability to concentrate, but it also suggests the idea that noise can raise adrenaline levels and blood pressure.²⁹ In addition to these specific problems, noise can arguably be a major cause of a decreased quality of life, heightened anxiety, and possibly even hostile reactions.³⁰ In fact, some of the more interesting noise-related incidents include an individual that broke into his neighbor’s aviary and strangled birds and another where a person stormed into a noisy neighbor’s house and doused the carpet with gas while threatening to start a fire because of the continuous loud parties.³¹ It has even been proposed that noise can contribute to mortality rates in people who experience excessive noise throughout their lifetimes.³²

3. MEASURING THE NOISE PROBLEM AND HIGHLIGHTING ITS DANGERS DOES NOT MEAN THE PROBLEM IS BEING FIXED

There are many ways to measure noise, and many studies have been conducted that showcase the damage noise causes to both the body and the psyche. However, an actual solution to the problem proves elusive. Also, it has been noted that the United States lags behind other countries with

²⁵ LINDA A. MALONE, 1 ENVTL. REG. OF LAND USE §11.3 (2005).

²⁶ See, e.g., Wilensky, *supra* note 21 (discussing learning problems with children because of noise).

²⁷ *Id.* at 16. The Wilensky article describes the idea of an ability to tune out noise. It highlights the idea that although it is a good thing to be able to ignore noise, it may also become a hindrance in child development because children have begun to unconsciously tune out their teachers, parents and friends. *Id.*

²⁸ Stansfeld, *supra* note 21, at 245.

²⁹ *Id.*

³⁰ Shapiro, *supra* note 20, at 5.

³¹ Lief, *supra* note 10, at 602.

³² *Id.* at 598.

respect to both noise research and general regulations.³³ There are different ideas about why noise has seemingly become a low priority, but many have been supplanted into the general problem of noise “apathy.”³⁴

One particular idea for the lukewarm response is that, as of yet, there is no technological fix for noise.³⁵ However, this could not be further from the truth. For the person worried about the amount of noise they produce, a restaurant owner for example, can purchase a reasonably priced decibel meter at almost any electronics store.³⁶ There are also low-noise leaf blowers³⁷ and a continual body of growing research concerning noise cancellation technology, which could be implemented into exhaust systems, headphones, and other products.³⁸ In addition to new technologies and the commercial availability of noise measuring devices, a common and simple solution to many vehicular noise problems are mufflers. Although mufflers are equipped on many machines, operators often use aftermarket mufflers or illegally alter them for a louder exhaust.³⁹ By simply leaving the stock, unaltered mufflers on vehicles such as motorcycles, personal watercraft (Jet-skis), and cars, an entire problem area of noise could be handled efficiently and quickly.⁴⁰

Another excuse for a lack of noise solutions is the “Political Ideology.”⁴¹ At one point, the federal government – in a tepid attempt to regulate and impose some restrictions on non-occupational noise polluters – stuck its ample foot into the waters of general noise regulation. However, this

³³ Wilensky, *supra* note 21, at 17.

³⁴ See Brautigam, *supra* note 2, at 400–405. Brautigam laboriously marches through a list of reasons why there is not more emphasis put on noise regulation, at least in the context of car horn and car alarm noise. His reasons are: urban noise is not on environmentalist’s agenda, indifference by the media, and people “exiting” rather than complaining. *Id.* There is even a part which attempts to blame the problem with car horns on cultural factors and the amount of immigrant taxi-cab drivers. *Id.* at 407.

³⁵ *Id.* at 400.

³⁶ See Friedman, *supra* note 4, at 23 (Ninety-nine dollar meter); Rob Jordan, *Damnation by Decibel: From Hear to Eternity, Miami is Hell on Your Aural Health*, MIAMI NEW TIMES, Jan. 5, 2005 (reporter using fifty dollar meter to measure noise around the city of Miami).

³⁷ Read, *supra* note 6.

³⁸ See O’Conner, *supra* note 19; Lief, *supra* note 10, at 608.

³⁹ See Press Release, National Marine Manufacturer’s Ass’n, NMMA Guidelines for Boat Noise (May 13, 2003), available at <http://www.nmma.org/news/> (last visited Oct. 4, 2006) [hereinafter NMMA]; PWIA, *Sound*, *supra* note 18; Knight, *supra* note 9; Bratton, *supra* note 3.

⁴⁰ Cities and municipalities have tried ordinances and laws that prohibit changes, alterations, and removal of mufflers with varying success. See Jordan, *supra* note 36; cf. Bratton, *supra* note 3 (the New York City PD having great success with checking mufflers); Knight, *supra* note 9 (possibly hurting Colorado Springs’ tourism because of its ordinance).

⁴¹ Brautigam, *supra* note 2, at 403.

experiment failed miserably.⁴² Although interesting, these excuses do not truly highlight the problems associated with regulating noise consistently and effectively in the United States. The remainder of this Article will more thoroughly examine the real problems with regulating noise effectively as well as what can be done to stop this expansive problem.

B. The Historical Perspective on the Free Use of One's Property and the Problems It Creates with Noise Regulation

Sic utere tuo ut alienum non laedes—Use your property so as not to damage another's.⁴³

Historically, a landowner had the right to use his property as he saw fit.⁴⁴ The United States Constitution further protects this interest in the express language of the Fifth Amendment.⁴⁵ However, the ancient legal maxim qualifies exactly what a landowner can do with his property.⁴⁶ This restriction stems from the common law idea of nuisance actions by people against their neighbors for using their land in a way that disturbed the other's use of the land.⁴⁷ With this simple idea, the courts were able to place restrictions on the unfettered use of land. Courts have acknowledged the right of an individual to use one's land as he sees fit, but "[t]he right, however, is not absolute and one may not make such an unreasonable use of his property that it substantially impairs the right of another to peacefully enjoy his property."⁴⁸

These conflicting rights obviously will put neighbors at odds with each other for a variety of reasons. For example, on Saturdays, owner A invites people over to his house to play rock music in his garage, which is next to

⁴² See discussion *infra* Part II.d.

⁴³ BLACK'S LAW DICTIONARY, Legal Maxims, 1757 (8th ed. 2004); see also, KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 3.3 (4th ed. 2005).

⁴⁴ See *Racine v. Glendale Shooting Club*, 755 S.W.2d 369 (Mo. Ct. App. 1988). The general rule is that a property owner has the right to exclusive possession and control of his property and the right to devote it to any type of lawful use satisfying his interests. *Id.* at 372.

⁴⁵ U.S. CONST. amend. V ("[N]or be deprived of life, liberty, or property...." (emphasis added)).

⁴⁶ YOUNG, *supra* note 43.

⁴⁷ See discussion *infra* Part IV.a. See also, *Champlin Refining Co. v. Dugan*, 270 P. 559 (Okla. 1928) (syllabus by the Court) ("Though everyone has the right to the reasonable use and enjoyment of his own property, he may not use it as to unreasonably deprive an adjacent owner of the lawful use and enjoyment of his property, and one using his property in an unwarrantable manner, and thereby injuring the comfort, health, and safety of another, creates a 'nuisance' which may be enjoined at the suit of the person so injured."); *Racine*, 755 S.W.2d at 372.

⁴⁸ *Racine*, 755 S.W.2d at 372.

owner B's house. Whose rights should prevail? Should owner A simply be able to do what he wishes because it is not illegal to have a garage band? Should owner B be able to enjoy quiet Saturday afternoons reading in his study? Or does he have to put up with the music coming from his neighbor's garage? Both landowners seemingly have the right to do that which is not illegal on his property. If the only major qualification for owner A is to not use his property in a way which impairs owner B's peaceful enjoyment of his property, what exactly is owner A able to do? Can he play his music in his garage with the door closed even if B can still hear it? Can B simply complain anytime he hears music coming from A's garage, no matter what time of day or night or how loud it is? These questions are at the heart of the debate over noise regulation because, though the hypothetical dispute may appear trivial, when extrapolated outward to the entire population of the United States; it becomes a problem of massive proportions which has only been dealt with through a mish-mash of nuisance laws and noise ordinances.

C. *The Problem with Noise Regulation and Free Speech*⁴⁹

In addition to the historical problems with implementing noise regulations, one of the biggest hurdles to accomplishing substantive and effective noise law is the First Amendment.⁵⁰ Although the First Amendment has not been read as an absolute bar against any limiting of speech, it has proven to be a quagmire when considering active and effective noise regulation within the public forum.⁵¹ One of the seminal cases concerning government restriction of free speech in the context of noise is *Ward v. Rock Against Racism*.⁵²

In the cases leading up to *Ward*, the Court made clear the proposition that,

⁴⁹ This is only a summary glance at the ongoing problem with regulating noise within the framework of free speech. The cases and materials cited in this section are in no way all inclusive in relation to free speech. This section is included to show the basic problems with regulating noise within the context of First Amendment protections.

⁵⁰ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

⁵¹ Armando O. Bonilla, Casenote, *First Amendment—Free Speech—Municipal Noise Ordinance Imposing Mandatory Adherence to Sound Amplification Guidelines Constitutes A Valid Time, Place, or Manner Restriction on Protected Speech—Ward v. Rock Against Racism*, 1 SETON HALL CONST. L.J. 451 (1989)

⁵² 491 U.S. 781 (1989). For an excellent discussion of the whole line of cases leading up to *Ward*, see Bonilla, *supra* note 51; see also, *Saia v. New York*, 334 U.S. 558 (1948).

[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample channels for communication of the information.'⁵³

More generally, the important features that must be taken into account are the time, place and manner of the restriction being imposed.⁵⁴ When the restriction is based upon these factors, courts must also ensure that the restriction is content-neutral, narrowly-tailored for a significant government interest, and that several alternative avenues for communication of the regulated act exist (with respect to this Article, the act would be noise).⁵⁵

When the minutia of the standard is scrutinized, it is easy to see why many communities turn away from specific noise ordinances and instead rely on nuisance law to enforce noise issues. Because any restriction on speech in the public forum is constitutionally protected, any restriction thereof must comply with the content-neutrality, narrow-tailored, and alternative avenue test.⁵⁶

1. CONTENT-NEUTRALITY

The first thing a court will look at when determining content-neutrality is "[w]hether the government has adopted a regulation of speech because of disagreement with the message it conveys."⁵⁷ With respect to general noise regulations, this prong can be very easy to overcome. Generally, well-drafted noise ordinances and nuisance laws do not specify any content-specific activity when they regulate noise. Instead, they either regulate a decibel limit or the unreasonableness of the amount or type of noise. For example, while an ordinance would ban sustained noise over 65 decibels in a residential area during the day; it would not attempt to ban loud religious statements. In *Ward*, New York City had a regulation on amplification when

⁵³ *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

⁵⁴ *Bonilla*, *supra* note 51, at 469.

⁵⁵ *Id.* See also *United States v. Doe*, 968 F.2d 86, 88 (D.C. Cir. 1992) (outlining the importance of the *Ward* test).

⁵⁶ *Doe*, 968 F.2d at 88.

⁵⁷ *Ward*, 491 U.S. at 791.

people used the Central Park Bandshell.⁵⁸ The Court focuses on the fact that, “[i]f the City’s regulatory scheme had a substantial deleterious effect in the ability of the band shell performers to achieve the quality of sound they desired, [Rock Against Racism’s] concerns would have considerable force.”⁵⁹ If the quality is a substantial part of the regulated noise (in relation to speech), a regulation that affects it too detrimentally could be read as unconstitutional. So in this respect, content-neutrality can easily be proven by regulating sound amplification while not affecting the quality of the regulated noise.

2. NARROWLY-TAILORED TO SERVE A SIGNIFICANT GOVERNMENT INTEREST

Meeting the narrowly-tailored prong of the test is easy for regulations, seemingly because the Court has chosen to greatly defer to the regulating body. The Court emphatically states in *Ward* that, “it can no longer be doubted that government ‘ha[s] a substantial interest in protecting its citizens from unwelcome noise.’”⁶⁰ This statement clearly and unequivocally shows that the Court recognizes that noise regulation is a very important government function. Then, in a broad-sweeping gesture, the Court goes even further stating: “the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’”⁶¹ In this one sentence, the Court makes the “narrowly-tailored” provision effectively disappear in respect to noise regulations. Since earlier in the opinion, the Court emphasized that regulating noise is a substantial government interest, clearly any sort of regulation that would promote this

⁵⁸ The regulation stated that sound amplification equipment and a sound technician would be provided by New York City. *Ward*, 491 U.S. at 784. Although New York City was attempting to regulate the volume of all performers who used the Central Band Shell, the sponsor of *Ward* attempted to claim that New York City was really trying to regulate the content of the concert. *Id.* at 792. This problem is also displayed in *Carew-Reid v. Metropolitan Transportation Authority*, 903 F.2d 914 (2d Cir. 1990). In *Carew-Reid*, New York passed an ordinance banning the use of amplifiers by musicians on subway platforms. The statute appeared to be content neutral, but a major discussion ensued over whether the ban on amplified music affected the quality, and therefore the content of the speech. *Carew-Reid*, 903 F.2d 914; see also David Hebert, Note, *Carew-Reid v. Metropolitan Transportation Authority: Free Expression Sound and Fury*, 11 PACE L. REV. 643 (1991).

⁵⁹ *Ward*, 491 U.S. at 801.

⁶⁰ *Id.* at 796 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984)); see also Bonilla, *supra* note 51, at 473; *Carew-Reid*, 903 F.2d at 917 (stating that the elimination of excessive noise is a substantial and laudable goal); Hebert, *supra* note 58, at 664.

⁶¹ *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1989)); see also Bonilla, *supra* note 51, at 474.

interest in reducing noise would be “narrowly-tailored.” Without any regulation, the interest would only be protected by nuisance law concerning noise and, as later in this Article will show, noise ordinances are a more effective means of achieving the governmental interest in regulating unwanted noise.

3. ALTERNATIVE AVENUES OF COMMUNICATION AVAILABLE

The final prong of the test looks at whether or not the government restriction has left open other available, alternative avenues of communication of the speech. The Court looked at New York City’s guideline in *Ward* and determined that they “[m]erely regulate excessive noise and permit the continual freedom of artistic expression by Bandshell performers.”⁶² In a different case, another court introduced the idea that the First Amendment does not guarantee access to all (or even the best) channels or locations for expression.⁶³ This likely would become an issue for communities attempting to impose an outright ban on *all* amplified speech, or other such ordinances that place a blanket ban on a given, noise creating activity.⁶⁴ It is important to note, “that the use of sound amplification equipment within reasonable limits is protected by the First Amendment.... [and] the mere existence of . . . unamplified speech” is not necessarily an alternate avenue available.⁶⁵

This three-prong standard gives municipalities and communities guidance to follow when enacting noise ordinances, at least to the effect that the ordinances they are promulgating are attempting to either ban or prohibit certain types of noise (speakers, amplification equipment, etc.). However, this is just the beginning of creating a framework of requirements that must be implemented in order for a noise ordinance to be legally valid.⁶⁶

⁶² Bonilla, *supra* note 51, at 476; *Ward*, 491 U.S. at 802.

⁶³ See *Carew-Reid*, 903 F.2d at 919 (citing *Taxpayers for Vincent*, 466 U.S. at 812 for the proposition that the First Amendment does not guarantee access to every or even the best channels or locations for their expression).

⁶⁴ See, e.g., *Daley v. City of Sarasota*, 752 So.2d 124, 125 (2nd Fla. Dist. Ct. App. 2000). Another interesting twist on this idea was a proposed ban in Albuquerque, New Mexico on any and all outdoor speakers, which oddly enough includes fast-food drive-thru intercoms. Friedman, *supra* note 4.

⁶⁵ *Daley*, 752 So.2d at 126 (citing *Saia v. New York*, 334 U.S. 558 (1948)). This statement in and of itself is important for restaurants because intercoms for drive-thru windows are arguably a use of sound amplification equipment within the reasonable limit as proscribed by the Court. See Friedman, *supra* note 4 (discussing the possibility of drive-thru intercoms being banned).

⁶⁶ See discussion *infra* Part IV.b.

D. *The Noise Control Act*

The United States federal government has not remained silent on the issue of noise, but the steps they have taken have been far from adequate, or even helpful, to the communities who want to regulate noise. The Noise Control Act of 1972⁶⁷ [hereinafter NCA] was passed, in part, because the EPA convinced Congress that noise pollution was a serious problem pervasive throughout the United States.⁶⁸ The NCA and the Quiet Communities Act of 1978⁶⁹ “authorized the U.S. Environmental Protection Agency’s (“EPA”) Office of Noise Abatement and Control [ONAC] to investigate the sources of noise, promulgate noise control regulations, impose product noise labeling, and aid local governments in the fight against noise.”⁷⁰ More generally it was supposed to coordinate federal research on noise control, establish noise standards for certain products in commerce, and provide information to the public on noise emission and its reduction.⁷¹ Although this pronouncement may appear to be very helpful and to highlight the problem of noise pollution, the NCA has actually proved extremely ineffective and has quite possibly hindered city and state governments from enacting more effective noise ordinances and regulations. Where these local governing bodies choose to proactively combat noise through regulation, they have lacked the important ally of the federal government in both support and funding.

A mere 5 years (in 1977) after the NCA was passed, the Government Accounting Office (GAO), in a report to Congress, alerted the legislature that implementation of NCA requirements had proven slow and ineffective.⁷² Following this report, Congress passed the Quiet Communities Act of 1978, which allowed ONAC to create grant programs for local and state governments. This was done in an effort to jumpstart local initiatives in the

⁶⁷ Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918 (1972).

⁶⁸ See Shapiro, *supra* note 20, at 8 (giving a much more in-depth and informative discussion on the Noise Control Act, the Office of Noise Abatement and Control, and their subsequent demise).

⁶⁹ 42 U.S.C. §4913 (1978).

⁷⁰ Lief, *supra* note 10, at 596 (citations omitted).

⁷¹ See MALONE, *supra* note 25, at §11.6.

⁷² See U.S. GEN. ACCOUNTING OFFICE, NOISE POLLUTION: FED. PROGRAM TO CONTROL IT HAS BEEN SLOW AND INEFFECTIVE, CED-77-42 (Mar. 1977), available at <http://archive.gao.gov/f1102a/100237.pdf> [hereinafter GAO, NOISE POLLUTION]. This in-depth report goes into such problems as the EPA being over a year late in issuing noise regulations (*id.* at 9), that in four years the EPA only issued four regulations dealing with products (*id.* at 18), and had less expenditures than four other federal agencies for noise research from 1973-1977. *Id.* at 23.

area of noise abatement and to relieve some of the pressure on ONAC.⁷³ ONAC's main problem at this time was that, prior to the Quiet Communities Act, it was attempting to regulate noise from a top-down approach on a national level.⁷⁴ This proved especially difficult because noise itself is a localized problem, which is best combated by local officials and ordinances tailored to the specific local problems, with the help of communities who know the basis and reasons behind the particular noise problem.⁷⁵

When ONAC was finally given the means to work closely with local governments and organizations to fight noise, the NCA was effectively gutted.⁷⁶ In 1981 the Office of Management and Budget (OMB) decided to terminate funding for ONAC and, shortly thereafter, most EPA noise-abatement activities ended.⁷⁷ After funding was stripped from ONAC, state and local efforts to enact noise control programs and ordinances declined, mostly due to lack of federal help (ONAC had been helping draft model noise ordinances and also hosting training programs for local officials to teach them about noise control).⁷⁸

Although funding was stripped from ONAC almost 20 years ago, the NCA remains unrepealed and is still "in effect" today. Though this may not appear to be very important in the larger context of noise control, it actually plays a substantial role in regard to transportation noise issues.⁷⁹ For example, the EPA has federal standards in place for certain designated major sources of highway noise, including: motorcycles, medium and heavy trucks, and interstate motor carriers.⁸⁰ Because the NCA (and with it EPA noise regulations) is still valid, state and local regulation is pre-empted by federal law in regard to certain noise control options.⁸¹ This precludes state and local governments from promulgating laws that are different or impose stricter standards than the EPA standards in relation to this equipment.⁸²

State and local governments must now contend with not only Constitutional issues when regulating noise, but also must keep in mind the NCA and EPA regulations that can pre-empt many local efforts. Although

⁷³ Shapiro, *supra* note 20, at 17.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 2.

⁷⁷ *Id.*

⁷⁸ *Id.* at 19.

⁷⁹ See GAO, TRANSPORTATION NOISE, *supra* note 13. This entire report deals with transportation noise and the impact the defunct NCA has on it. It is split into sections dealing with efforts to control aircraft noise, railroad noise, and traffic noise problems.

⁸⁰ *Id.* at 71.

⁸¹ *Id.* at 3.

⁸² *Id.* at 71.

some municipalities have avoided this dilemma by only regulating alterations to standard parts on motorcycles,⁸³ this alone will not stop transportation noise issues; especially with aftermarket exhaust systems available for those who want to pay the money. Other transportation issues regarding noise exist, but these again are preempted by federal regulation.⁸⁴ Because of these and other sources, transportation noise is a significant part of the noise problem in the United States. However, as more people move from the city into suburbs many other noise problems will begin to take precedence over transportation issues.⁸⁵

III. MUNICIPAL ATTEMPTS AT REGULATING NOISE: GENERAL AND SPECIFIC PROVISIONS

As a premise to Part IV's comparison of noise ordinances and noise nuisance actions, Part III will highlight attempts that communities and municipalities have made in regulating specific noise problems. The problems discussed in this section involve gun and shooting ranges, Jet-skis, and car stereos; all of which cause a variety of community-related noise problems.⁸⁶

A. Gun Ranges and Shooting Clubs

In an urban environment, noise can come from a variety of common sources, such as traffic, car alarms, and construction. Some people, when they tire of the everyday grind and noise of the city, move for a change of pace in their life; for quiet and solitude. Little do these individuals know that the world they believed offered nothing but peace and quiet is actually under fire from a noisy, though esteemed, tradition and hobby: sport shooting.⁸⁷

⁸³ See Knight, *supra* note 9 (ordinance banning noise-enhancement exhaust modifications); Bratton, *supra* note 3, at 462 (regulating illegally modified exhaust systems and teaching police how to investigate this during traffic stops).

⁸⁴ See 42 U.S.C. § 4916 (1996).

⁸⁵ See generally Brautigam, *supra* note 2, at 397; Cotter, *Environmental Gun*, *supra* note 5, at 453; Cotter, *Endangered Species*, *supra* note 5, at 163; Cotter, *Shooting Sports*, *supra* note 1.

⁸⁶ The problems in Part III may not be the most common noise-related issues, but they introduce some very interesting problems regarding noise regulation. Traffic, industrial noise, aircraft, and construction noise are more common but this section is intended to show that a variety of factors and issues must be considered when attempting to regulate noise in an effective manner. Although traffic noise is itself a substantial and difficult problem, it will not be addressed in this Article.

⁸⁷ See Cotter, *Environmental Gun*, *supra* note 5, at 453; Cotter, *Shooting Sports*, *supra* note 1, at 21.

Although one may think of shooting ranges as a place where the local firearms aficionado goes to fire off a few rounds to relieve stress, this may be far from true. Some shooting clubs boast a membership upwards of 200 to 300 members;⁸⁸ still other shooting ranges are often contracted out by police SWAT teams for practice.⁸⁹ While these circumstances may be infrequent, many shooting clubs regularly host large meets and competitions with weapons ranging from handguns and rifles to automatic weapons and high-powered rifles.⁹⁰ In addition to the variety of weapons fired at these ranges, the number of meets and the amount of ammunition fired can also prove to be problematic. At some of these events, a rate of 125 firearm discharges every twelve minutes is not uncommon.⁹¹ At other events, over 2,000 shots could be fired over a two-day span.⁹²

Although these facts may appear to stack the odds against shooting ranges (just the sheer number of shots fired could make someone reading this think of a war going on next door, if they lived next to a shooting range), the actual noise problem with ranges is not as serious as one would believe.⁹³ In fact, a psychology professor studying the problems associated with exposure to sound and noise made two very astute observations: 1) the predictability of noise will impact the degree of irritation caused by the noise, and 2) that psychological attitudes and beliefs about the source of noise can be an equal or greater factor than the intensity of the noise itself.⁹⁴ When these factors are considered in light of shooting ranges, it is highly possible that an inherent fear of weapons and the sporadic nature of shooting can be attributed to the perceived problem with noise from these establishments.⁹⁵

When the exodus from the noise-riddled city meet the arms bearing shooting range enthusiasts, lawsuits abound, sometimes resulting in the closure of ranges or a reduction in the amount of activities allowed at the

⁸⁸ See *Racine v. Glendale Shooting Club*, 755 S.W.2d 369 (Mo. Ct. App. 1988); *Anne Arundel County Fish & Game Conservation Ass'n v. Carlucci*, 573 A.2d 847 (Md. Ct. Spec. App. 1989).

⁸⁹ See *Kolstad v. Rankin*, 534 N.E.2d 1373 (Ill. App. Ct. 1989).

⁹⁰ See *Racine*, 755 S.W.2d at 369; *Kolstad*, 534 N.E.2d 1373.

⁹¹ See *Davis v. Izaak Walton League*, 717 P.2d 984, 985 (Colo. Ct. App. 1985); Cotter, *Shooting Sports*, *supra* note 1, at 26.

⁹² See *Smith v. Western Wayne County*, 158 N.W.2d 463, 467 (Mich. 1968); Cotter, *Shooting Sports*, *supra* note 1, at 29.

⁹³ Of course this is dependant upon the actual proximity of a shooting range next to a residential property. If a house sits directly adjacent to a shooting range it is quite possible that it would sound as if a civil war broke out next door every time a meet was held.

⁹⁴ Cotter, *Shooting Sports*, *supra* note 1, at 24-5, 48 n.21 (citing Prof. Sheldon Cohen, *Sound Effects on Behavior*, 15 PSYCHOL. TODAY 38, 38 (1991)).

⁹⁵ *Id.*

ranges.⁹⁶ But instead of leaving the noise regulation to sporadic lawsuits based on either nuisance laws or even specific shooting range ordinances, local governments have taken a proactive stance to insure that both the shooting ranges and their neighbors are able to co-exist without placing an outright ban on ranges. This idea plays an integral role where new residents are attempting to bring a claim against a shooting range.

Noise regulation for shooting ranges most commonly manifests itself in the form of general ordinances, or in some cases specific shooting range ordinances. However, shooting clubs have proactively turned to legislatures for assistance in maintaining sport shooting as a viable pastime.⁹⁷ As a result, there have been protections implemented to protect shooting ranges from noise complaints and violations in thirty-seven different state legislatures.⁹⁸ These protections take the form of either statutes providing shooting ranges immunity from criminal prosecutions and civil liability based on noise or noise pollution (which protect both nuisance claims based upon noise and specific noise related actions),⁹⁹ or special statutory protection for shooting ranges totally exempting them from both state and local noise control laws.¹⁰⁰ These exemptions allow ranges able to survive numerous challenges to the noise they cause.

It must be recognized that noise regulation is itself a very important function for governments to undertake, but it is equally important that they recognize that there must be a balance struck between regulating noise and keeping local businesses a part of the community. This is especially important for shooting ranges because of the type of businesses they are and the challenges that arise in operating such an establishment. Altering noise laws has proven both effective and beneficial for both the ranges and their neighbors.

B. *Jet-skis and Motor Boats*

Personal watercraft (commonly referred to as Jet-skis or PWC's) and motorboats are a common sight on waterways throughout the United States. Although an enjoyable recreational activity, both government and professional associations realize that the amount of noise created by machines can

⁹⁶ See Cotter, *Endangered Species*, *supra* note 5, at 163.

⁹⁷ See *id.*

⁹⁸ *Id.* at 164.

⁹⁹ *Id.* at 164 n.11 (giving a complete list of states that immunize shooting ranges from criminal and civil liability).

¹⁰⁰ *Id.* at 164 n.13 (giving a complete list of states that exempt shooting ranges from state and local noise control laws).

do extensive damage. In 2000, the GAO completed a massive study on the impact of Jet-skis and snowmobiles on federal lands (national parks, etc).¹⁰¹ This study points out that in 1999, an estimated 10 million adults used Jet-skis in the United States.¹⁰² In light of this, it was decided that agencies needed to examine the impact of Jet-skis (and snowmobiles) on federal lands. An example the GAO cites as a reason for the impact assessment is that noise caused by Jet-skis has unduly stressed wildlife in national parks.¹⁰³ This was especially important for the GAO because it also noted that 342 out of the 1,018 federal parks that responded to the GAO survey had Jet-ski usage taking place.¹⁰⁴

Although this study highlights both the use and popularity of Jet-skis in national parks, it also points out the important by-product of this use: noise. However, focusing only on generalized Jet-ski noise is insufficient, as many other factors must be taken into account. The Personal Watercraft Industry Association (PWIA)¹⁰⁵ is an organization that is attempting to provide information and ideas about how many issues concerning Jet-skis (including but not limited to noise) can be reconciled with local governments in order to placate both users of Jet-skis and those affected by their use.

The PWIA acknowledges that noise is a major issue with Jet-skis, but also disputes this by claiming that current models are up to 70% quieter than those produced in 1998.¹⁰⁶ These claims are attributed to redesigned intake and exhaust systems, noise-cancellation devices, and other noise-suppression materials.¹⁰⁷ In addition to increased use of technology, the PWIA expresses its endorsement of local governments enacting shoreline sound measurement laws and even references one such model ordinance.¹⁰⁸ The PWIA further claims that firming up noise laws will not combat the problems that coastal residents complain of when addressing Jet-ski noise problems. The organization also acknowledges that noise is an industry concern and that

¹⁰¹ GAO, FEDERAL LANDS, *supra* note 7.

¹⁰² *Id.* at 5.

¹⁰³ *Id.* at 8 (“[R]esearchers at the Fish and Wildlife Service’s Great White Heron National Wildlife Refuge in the Florida Keys noted that disturbances by personal watercraft contributed to the poor reproductive success of nesting ospreys.”).

¹⁰⁴ *Id.* at 10 tbl.2. By adding the 196 parks which said they had only personal watercraft use with the 146 parks which reported both personal watercraft and snowmobile use. It should also be noted that 1,018 parks responded to the survey, but close to 1,200 surveys were sent out to federal parks. *Id.* at 3.

¹⁰⁵ Personal Watercraft Industry Association, <http://www.pwia.org> (last visited Oct. 4, 2006).

¹⁰⁶ Personal Watercraft Industry Association, The Facts About PWC and Sound, <http://www.pwia.org/issues/sound1.html> (last visited Oct. 5, 2006) [hereinafter PWIA, *The Facts*].

¹⁰⁷ *Id.* This statement is exactly what was explained *supra* Part II.a.iii about market self regulation when economics are concerned.

¹⁰⁸ *Id.* The reference is to the National Marine Manufacturing Association Model Noise Act. *Id.* There is also another model act for motorboat noise. See NMMA, *supra* note 39.

only through conscientious use of the machines will a balance be reached between Jet-ski users and the people who complain of their operation.¹⁰⁹ They also endorse actual enforcement of proximity laws, the laws that limit how close to the shore operators can use their machines.¹¹⁰ However, this creates its own problem because if a municipality uses a proximity law in combination with a decibel limit, Jet-ski's may still not be able to run near shore. As a PWIA study shows, one Jet-ski operating at 50 feet from the shore still results in level of 71 dBA perceived by individuals at the shoreline.¹¹¹ If a shore side residential community had an ordinance that prohibited noises above 65 dBA even if the operating boundary was followed, the noise ordinance would still be broken in the situation described above. It should be noted that the study relied upon by the PWIA was conducted in 1995, and the PWIA currently claims that, "personal watercraft manufacturers have achieved a 70% reduction in sound levels since 1998."¹¹²

In the same vein as sport-shooting regulations, a balance must be struck between those who operate watercraft near populated areas and residents choosing to live close to water (both inland lakes and coastal regions). Although the manufacturers of Jet-skis and other watercraft appear to be doing their best to control the noise output of their products (at least according to industry supporters), the onus of the problem still lies with the operator and conscientious use of the product. Municipalities also have their own burden to carry in regard to the types of regulations they impose. Although outright bans would eliminate the problem, it would likely hurt the local economy by eliminating programs (rental units) that hotels and other businesses use to attract guests, or it could even alienate residents themselves because beachfront units would not be able to use their own watercraft. Accordingly, a straight decibel limit would prove difficult to meet and enforce.¹¹³ But a combination of shore distance regulations and

¹⁰⁹ PWIA, *Sound*, *supra* note 18. The PWIA also gives four general ways that Jet-ski operators can help reduce noise on their own, and are mostly common sense: keep the stock exhaust on the vehicle, approach and leave shore slowly, concentrate high speed sprints away from shore, and avoid early morning and evening riding near residential areas. *Id.*

¹¹⁰ PWIA, *The Facts*, *supra* note 106.

¹¹¹ Personal Watercraft Industry Association, *Sound Level Comparisons*, <http://www.pwia.org/issues/sound2.html> (last visited Oct. 5, 2006) [hereinafter PWIA, *Comparisons*].

¹¹² *Id.*

¹¹³ The difficulty would come from a variety of factors: Would different decibel limits be in place depending on the number of watercraft currently operating in the area? How would you enforce it when after a complaint is made, when the operator could simply speed away before the enforcement officer arrives? These and many other questions are the type that must be answered in order for a decibel limit to be used effectively.

watercraft speed limits within certain areas close to the shore would be optimal (possibly coupled with restrictive hours of operation). Effective regulation is possible, but all people involved in the process need to recognize that only through a combination of measures and common understanding will the regulation benefit all parties and allow the continuation of watercraft use in populated areas.

C. Car Stereos

Transportation noise is in and of itself a major cause of this nation's noise problems, however, one cause of noise that has been increasingly prevalent is that of amplified car stereos.¹¹⁴ It has been claimed that loud car stereos pose a public safety and health risk because the driver cannot adequately hear emergency sirens, sustains damage to his hearing, and also disturbs and annoys the people who are affected by the loud music and feel the bass the stereos create.¹¹⁵ Cooperation between stereo advocates and residents who complain of the noise is not a feasible option as it was for residents and shooting range operators or watercraft operators. This is mostly because those who put in the amplified stereos do so for recognition from their peers, as an act of social defiance, or even to win a sponsored contest.¹¹⁶

These problems lead directly to confrontational approaches to regulating loud car stereos,¹¹⁷ which have, in some instances, even resulted in the seizing and holding of vehicles in violation of the noise regulations.¹¹⁸ New York City has enacted such a regulation by limiting cars from operating a stereo in a way that it measures 80 decibels from 50 feet away.¹¹⁹ When the offending car is measured above 80 decibels, the police are allowed to seize the car as evidence for the proposition that it committed the offense. The police hold the offending vehicle until a summons is issued, which is usually within one day.¹²⁰ Once the summons is adjudicated, the car is then

¹¹⁴ This problem is so prevalent that the Dept. of Justice, through the Office of Community Oriented Policing Services, issued a guide specifically aimed at helping local enforcement agencies regulate loud car stereos. SCOTT, *supra* note 3.

¹¹⁵ See The Noise Consultancy, LLC., Code Drafting Tip for 2004: Boom Cars—Boom Boxes, http://www.noiseconsultancy.com/code_tips_m.htm (last visited Oct. 5, 2006); see also Bratton, *supra* note 3, at 460.

¹¹⁶ Scott, *supra* note 3, at 2. There are many contests that are promoted by stereo equipment manufacturers with the loudest car wining prizes and in some instances even gaining sponsorship. *Id.*

¹¹⁷ Loud car stereos will mean amplified car stereos throughout the rest of this Article.

¹¹⁸ See Bratton, *supra* note 3, at 461.

¹¹⁹ *Id.* at 460.

¹²⁰ *Id.* at 461.

returned to its owner.¹²¹ A one-day seizure would be, at best, inconvenient for the owner, but such seizure creates a greater effect when a car is seized on Friday because it will likely not be returned until Monday, leaving the owner without a car for the weekend.¹²² Although this is an extreme example of regulating loud car stereos, it has proven effective in New York City.

Although New York City has used a decibel-cap approach to regulate car stereos, there are other standards available to local enforcement agencies. Other examples include laws prohibiting “plainly audible” car stereos from a specified distance,¹²³ enhancing current penalties for stereo violations in specified zones (schools, hospitals), or enhancing penalties for repeat violators of current regulations.¹²⁴ Other less regulatory approaches include the issuance of written warnings, the requirement of stereo dealers to provide information about the health and legal consequences of playing car stereos at extreme volumes, and posting of warning signs where loud cars are common.¹²⁵ It has even been suggested that police should work in conjunction with sponsored car stereo competitions because the participants may not truly understand how their hobby affects others or do not know what volumes break decibel limits that may be in place.¹²⁶ These methods are less confrontational because they are less of an authoritarian approach to regulating car stereos. Instead of instigating owners to blatantly disrespect and break regulations by playing their stereos loudly and only turning it down when they see police, the warning and educational approach will help alert all of those affected (both stereo owners and the residents who are affected by the loud music) that the enforcement community is available and willing to work cooperatively with car stereo aficionados.

IV. NUISANCE REGULATION VS. ORDINANCE REGULATION: THE BATTLE BETWEEN REGULATORY NORMS

This section will outline, critique, and compare the two most common ways that communities have used to regulate noise, as described in this Article thus far: regulation through nuisance action, and regulation through municipal noise ordinances. Each subsection will focus on the aspects and

¹²¹ *Id.*

¹²² *Id.*

¹²³ See FLA. STAT. § 316.3045 (2005) (stating that car stereos plainly audible at 25 feet are unlawful).

¹²⁴ Scott, *supra* note 3, at 12-14.

¹²⁵ *Id.* at 14-16.

¹²⁶ *Id.* at 16.

requirements of regulation methods, as well as both the positives and negatives associated with each.

A. Nuisance Regulation of Noise

Nuisance, as a way to regulate property uses, has been used for at least 800 years.¹²⁷ Nuisance is defined as, “A condition, activity, or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property....”¹²⁸ Considering noise is explicitly mentioned in the definition of nuisance, many communities have used this way to regulate noise, at least as much as the theory permits. Initially, at least in the United States, excessive noise was controlled through nuisance law.¹²⁹

1. ASPECTS AND REQUIREMENTS FOR A NOISE NUISANCE

Nuisance law is split into two primary categories: public and private nuisances.¹³⁰ A private nuisance is an action (such as noise) that affects an individual, or limited number of individuals and enjoyment of their property.¹³¹ A public nuisance affects the rights of a larger community.¹³² Individuals traditionally bring a private nuisance action while public nuisance actions are usually filed by the state.¹³³ Noise is an action that is mostly considered a private nuisance, because it rarely reaches a magnitude that would affect a community in any significant way.¹³⁴

“The courts have described the elements of a private nuisance cause of action as ‘(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person’s property right to use and enjoy land, (5) caused by another’s conduct in acting or failure to act.’”¹³⁵ Generally speaking, whether a noise constitutes a nuisance or not is usually

¹²⁷ See Lief, *supra* note 10, at 609.

¹²⁸ BLACK’S LAW DICTIONARY, Nuisance, 1096 (8th ed. 2004).

¹²⁹ Jeffrey Jahns & Judy Gale Hester, *Noises Off: The Property Manager and Noise Regulation*, 53 J. OF PROP. MGMT. 79 (1988).

¹³⁰ See Bliss, *supra* note 8, at 536.

¹³¹ See *id.*

¹³² See *id.*

¹³³ See *id.*

¹³⁴ The most obvious public nuisance of noise would be airplane noise near airports, but this has been effectively exempted from the nuisance category under FAA regulations. See generally GEN. ACCOUNTING OFFICE, NOISE POLLUTION: FEDERAL PROGRAM TO CONTROL IT HAS BEEN SLOW AND INEFFECTIVE, CED 77-42 (1977), available at <http://archive.gao.gov/f1102a/100237.pdf>.

¹³⁵ 41 AM. JUR 3D *Proof of Facts* §4 (2005) (internal citations omitted).

a question of both degree and locality.¹³⁶ For a determination of whether a noise is excessive enough to be considered a nuisance, various factors must be taken into account under a totality-of-the-circumstances approach.¹³⁷ More generally, and in addition to these factors, the entire idea behind nuisance regulation is the reasonableness of the conduct involved.¹³⁸ So a noise nuisance in one neighborhood (incessant guitar playing in a gated retirement community) may be entirely acceptable in another community (an apartment complex inhabited primarily by artists in an urban setting). This distinction is especially poignant because simply because noise is audible, does not mean that it can be considered a nuisance.¹³⁹ In establishing a noise nuisance complaint, one must remain vigilant of all the surrounding factors because although something may be irritating, it does not necessarily mean that it will be viewed as a nuisance when all the factors are taken into account.

2. POSITIVES IN REGULATING THROUGH NUISANCE

Although this Article advocates the use of regulating noise through noise ordinances, there are a few positive aspects nuisance regulation. The major issue that is solved by simply using nuisance law to regulate noise is that there are virtually no problems with First Amendment issues. Another benefit provided by nuisance regulation is that fewer complaints could reach the judicial system, because unless the noise is especially egregious, an individual would not want to spend the money to litigate actions relating to noise.¹⁴⁰

Nuisance law could also free up law and code enforcement officials to regulate more pressing needs within the community, without worrying about incessant complaints of possible violations of the noise ordinance. In addition to this, code-enforcement board hearings will be streamlined as complainants would have to go to the judicial system for relief.

¹³⁶ See *Caldwell v. Knox*, 391 SW.2d 5, 9 (Tenn. Ct. App. 1965).

¹³⁷ Some of the most common factors to be taken into account are "(1) the locality, (2) the character of the neighborhood, (3) the nature of the use causing the noise, (4) the extent and frequency of the injury, (5) the time of day when the noise occurs, and (6) the effects on the enjoyment of life, health, and property of those affected by the noise." *West v. Luna*, No. M2002-02734-COA-R3-CV, 2003 WL 23119315, at *3 (Tenn. Ct. App.) (internal citations omitted).

¹³⁸ *Rassier v. Houim*, 488 N.W.2d 635, 637 (N.D. 1992).

¹³⁹ *People v. Donna Mason*, 124 Cal. App. 3d 348, 354 (Cal. Ct. App. 1981).

¹⁴⁰ Obviously this could also pose substantial problems. People may feel that they must take matters into their own hands in an attempt to control their neighbor's noisy habits. Another possibility is that an actual nuisance is never taken care of.

3. PROBLEMS WITH REGULATING THROUGH NUISANCE

With the good also comes the bad, especially with regulating noise through nuisance law. The whole of nuisance law really comes down to the duty to act reasonably and not to interfere with another's use of property, which is wholly dependent upon the surrounding circumstances.¹⁴¹ This introduces a huge problem in regard to community expectations for uniform noise enforcement. Without standardized limits on noise, no one can really know what will be considered a noise nuisance. Instead, noise nuisances turn on an "I know it when I see it"¹⁴² moment (or rather I know it when I hear it) for community members attempting to restore peace and quiet to their neighborhoods. This is not comforting to neighbors who want to sleep in on the weekends, but instead are forced to deal with the incessant droning of a leaf blower at 8 a.m. Also, if regulation is achieved through nuisance only, the instance described above would not be a nuisance because it could be reasonable for a fastidious neighbor to blow the dirt and leaves out of his driveway on the weekends. From another viewpoint, the positives previously set forth¹⁴³ could also be viewed by some as extreme negatives. In this view, people will be less likely to bring a case for a private nuisance, thereby perpetuating a noise problem in the community for lack of enforcement options.

Finally, another problem with nuisance occurs where one moves to a nuisance already in place. If a person moves to a current nuisance (as in a shooting range), they will be estopped from filing a claim of a noise nuisance.¹⁴⁴ This gives rise to the argument that the individual knew of the nuisance when they relocated close to it, therefore they are estopped from claiming it as a nuisance.

B. Ordinance Regulation of Noise

The second common method of regulating noise is through the use of municipal, city, or county noise ordinances. Some states have even regulated certain aspects of noise on the state level.¹⁴⁵ The majority of noise

¹⁴¹ *Rassier*, 488 N.W.2d at 637; *West*, 2003 WL, at *3.

¹⁴² *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (describing how he knows what is obscene and what is not).

¹⁴³ *Infra* Part IV.A.ii.

¹⁴⁴ *Rassier*, 488 N.W. 2d at 638; see also *Bliss*, *supra* note 8, at 538.

¹⁴⁵ See FLA. STAT. § 316.3045 (2005) (making it a civil traffic violation to either operate a car stereo at a plainly audible level at a distance of 25 feet or to operate it at louder than necessary for convenient hearing).

ordinances, however, are done on a local level because the people of the community know what the exact noise problems are.

1. ASPECTS AND REQUIREMENTS FOR NOISE ORDINANCES

Noise ordinances have two basic forms. The first would be one which specifies acceptable decibel limits for certain periods of the day, while the second would be more general, banning noise of a loud, unnecessary, continuous or unusual nature. Both of these forms have their advantages and limits, but each poses a better alternative than nuisance regulation and its inherent vagaries.

Courts have generally approved of decibel limit ordinances because they give an objective standard for measuring noise.¹⁴⁶ However, these decibel ordinances must still pass constitutional scrutiny.¹⁴⁷ Another aspect that is usually included in decibel ordinances are specifications outlining exactly where the noise measurements will be taken and with what type of measuring device.¹⁴⁸ This ensures that the readings will be consistent and as uniform and correct as possible. It also assists business owners, and even private property owners, enabling them to purchase their own decibel meters and measuring whether they are in compliance with the specifications set out in an ordinance. Another option that many localities have used lies in a combination of decibel limits with outright bans on certain activities. An example of this alternative would be limiting noise to 70 dB's during the day (8 a.m. to 10 p.m.) and 60 dB's at night, but banning the use of lawnmowers and other such machines past 10 p.m.¹⁴⁹

For ordinances not having specific decibel limitations, things become a bit more complicated. These ordinances mostly contain bans on "loud and raucous" noises, many times coupled with a "reasonable person" standard. In fact, the U.S. Supreme Court has upheld the constitutionality of "loud and raucous" as a valid noise standard.¹⁵⁰ Numerous other jurisdictions have

¹⁴⁶ Mark A. Gruwell, *The First Amendment Strikes Back: Amplified Rights*, 31 STETSON L. REV. 367, 379 (2002).

¹⁴⁷ *Id.*; see U.S. v. Doe, 968 F. 2d 86 (D.C. Cir. 1992) (holding low limits as overly broad).

¹⁴⁸ See Bratton, *supra* note 3, at 460 (80 dB measurement at 50 feet from car); Gruwell, *supra* note 145, at 373 (measurement must be taken with an approved sound level meter, at 5 feet above the ground, at or beyond the property line where the sound originated). Some ordinances even go as far as requiring a wind screen over the measurement device to ensure wind noise is not taken into account. Gruwell, *supra* note 145, at 373.

¹⁴⁹ See Lief, *supra* note 10, at 616-618; see, e.g., Dupres v. City of Newport, 978 F. Supp. 429, n.2 (D.R.I. 1997) (explaining the Newport Rhode Island ordinance as having a 65 dBA residential limit from 7am to 10pm, and 55 dBA from 10pm to 7am, while the commercial district had a 75 dBA at all times).

¹⁵⁰ Kovacs v. Cooper, 336 U.S. 77, 85 n.6 (1949); see also Doe, 968 F.2d at 91 (for excessive noise

upheld a “plainly audible” standard as being neither overbroad nor vague; this is because these tests are purely objective.¹⁵¹ Although these standards have been upheld, others have been struck down for being based too much on subjective determinations, such as use of “annoying” as the determining factor for the ordinance.¹⁵²

2. POSITIVES IN REGULATING THROUGH ORDINANCES

Through the use of noise ordinances, municipalities have a variety of mechanisms they can use to ensure noise is regulated in the most standard and efficient manner. By establishing definitive decibel limits, local governments will increase the uniformity of noise regulation throughout their respective jurisdictions. This uniformity can help businesses understand which, if any, of their activities fall outside the prescribed noise limits. Businesses also have the ability to monitor their own noise by purchasing and learning to use decibel meters, in an effort to preempt any enforcement activities against them.¹⁵³

There are also a variety of options when implementing noise ordinances because municipalities can make them as fact-specific as they want. For example, a city could implement regulations based on current zoning laws so that commercial areas have a higher decibel limit than residential areas, or through only regulating certain activities such as the hours power tools can be operated. Also, the creation of new noise ordinances can prove extremely simple with the availability of model noise ordinances of various specifications from a variety of sources.¹⁵⁴ Many of these model ordinances are of the general variety, but some are as specific as explicitly earmarking limits on leaf blowers or boating noise. By creating an ordinance, localities

limits, “[w]hat is excessive must take into account the nature and purpose of the setting, along with its ambient characteristics.”)

¹⁵¹ *Noise Consultancy*, *supra* note 115; *see also* *State v. Ewing*, 914 P.2d 549, 556-57 (Haw. 1996); *State v. Holland*, 331 A.2d 626 (N.J. Super Ct. App. Div. 1975).

¹⁵² *See Fratiello v. Mancuso*, 653 F. Supp. 775, 790 (D. R.I. 1987); *Nichols v. City of Gulfport*, 589 So.2d 1280, 1282 (Miss. 1991) (holding that unnecessary or unusual noise which annoys, injures, or endangers comfort or repose fails to provide clear notice and a sufficient definite warning of prohibited conduct, and therefore the ordinance violated due process); *see also* *Gruwell*, *supra* note 145, at 376. *But see* *YOUNG*, *supra* note 43 at §9:45 (quoting a New York Ordinance which was upheld that contained an “annoying” aspect).

¹⁵³ *Friedman*, *supra* note 4, at 23 (\$99 noise meter); *Jordan*, *supra* note 36 (reporter using \$50 meter to measure noise around the city of Miami).

¹⁵⁴ *See generally* Quest Technologies, Model Municipal Noise Ordinance, <http://www.quest-technologies.com/Standards/NoiseOrdinance.pdf> (last visited Oct. 9, 2006); *Zwerling*, *supra* note 12, at 7; MATTHEW’S MUN. ORDINANCES §§ 36A:14, 36A:15, 36A:15.50, 36A:22.50, 48.25 (2005).

will also receive input from local residents who may shed light on certain activities and ideas, which may be passed over if noise regulation was only possible through nuisance actions.

As stated earlier in this Article, by regulating through noise ordinances, states and communities have an opportunity to grant immunities or exemptions for certain commercial endeavors.¹⁵⁵ Ordinances also give municipalities the option of issuing exemptions in times of emergency, or allow for permits giving permission to exceed noise limits for fireworks or other special occasions. In addition to exemptions and immunities, noise ordinances can also differentiate between continuous and impulse noises, so that short, extremely high decibel bursts as well as continuous decibel levels above the ordinance will also violate the regulation.¹⁵⁶ This helps to ensure that if there is something that only occurs at certain times for a short period of time, enforcement officers will be able to enforce the ordinance.

3. PROBLEMS WITH REGULATING THROUGH ORDINANCES

Just as there are positive aspects of regulating noise through ordinances, there are also a plethora of problems arising out of their use. There is the free speech problem.¹⁵⁷ There is also the time and money that must be expended in order to buy the decibel meters, train enforcement officers, and sway the public (both residential and commercial) into believing in and supporting the system. Local officials themselves may also have to be persuaded that this is the correct route to take for noise regulation as they may feel that by implementing noise ordinances, the economic competitiveness of their city will be stifled.¹⁵⁸ There is also the possibility that even though someone is in compliance with a zoning ordinance, their noisy actions can still constitute a nuisance because of the conditions or manner of their use of property.¹⁵⁹

Actual enforcement of the ordinance can also prove difficult. If a complaint is lodged, the offender may simply turn off the equipment when an enforcement officer arrives.¹⁶⁰ In certain respects, noise ordinances can only do so much in dealing with “drive-by” noise infractions or car alarms,

¹⁵⁵ See generally Cotter, *Endangered Species*, *supra* note 5.

¹⁵⁶ See Gruwell, *supra* note 145, at 373.

¹⁵⁷ See *infra*, Part II.c.

¹⁵⁸ Lief, *supra* note 10, at 616.

¹⁵⁹ 41 AM. JUR. 3D *Proof of Facts* § 5.5 (2005); see also *Tricket v. Ochs*, 838 A.2d 66 (Vt. 2003) (holding that although orchard was in compliance with the zoning ordinance for noise, neighbors could still bring a nuisance action for noise).

¹⁶⁰ Lief, *supra* note 10, at 617.

especially when the actual offender is completely unknown. Because of these reasons, some have been apt to call noise ordinances a sorry collection of restrictions¹⁶¹ or state that noise laws have "been almost entirely unworkable."¹⁶² Many of these problems do stem from poorly drawn ordinances which can be struck down as being overbroad or vague,¹⁶³ but these problems are easily overcome through a careful construction and use of the many model ordinances already available. In any case, the positive aspects associated with the use of ordinances far out weigh the negatives.

V. CONCLUSION

Although there are a myriad of obstacles that hinder adequate regulation of noise, there are also a number of solutions and benefits associated with successfully doing so. Through the use of decibel-specific regulation, a community can be well on its way to curbing one of the most common, but annoying problems that plague its residents. Regulating through ordinances ensures both uniformity and a standard that can be appreciated by all members of the community, while leaving commercial and private interests intact. Although not as fluid as nuisance law, ordinances themselves can be used to enhance the public's enjoyment of their locality, through the use of specific regulations that are pliable enough to make all parties happy.¹⁶⁴ This article has laid out the various problems associated with both noise itself and the regulation of it, but it has also promoted the proactive regulation over the latent reactionary model. Only through municipalities taking the initiative will our communities be able to grow, while residents are able to enjoy some well-earned peace and quiet.

¹⁶¹ *Id.* at 616.

¹⁶² Brautigam, *supra* note 2, at 391 (internal citation omitted).

¹⁶³ See Dupres v. City of Newport, 978 F. Supp. 429, 434 (D.R.I. 1997) (giving a long list of cases where ordinances were struck down).

¹⁶⁴ Such options include special permits to exceed the noise ordinance for special events such as fireworks or emergency situations.