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Notes: Constitutional Law — First Amendment Freedom of Speech — Statute Prohibiting "Loud and Unseemly" Noises Is a Content-Neutral Regulation of Protected Speech. Eanes v. State, 318 Md. 436, 569 A.2d 604 (4-3 decision), cert. denied, 110 S. Ct. 3218 (1990)

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NOTES

CONSTITUTIONAL LAW - FIRST AMENDMENT FREEDOM OF SPEECH - STATUTE PROHIBITING "LOUD AND UNSEEMLY" NOISES IS A CONTENT-NEUTRAL REGULATION OF PROTECTED SPEECH. *Eanes v. State*, 318 Md. 436, 569 A.2d 604 (4-3 decision), *cert. denied*, 110 S. Ct. 3218 (1990).

Assume for the moment that it is 1965 and Jerry Wayne Eanes is a civil rights advocate. At midday he gives a loud speech on a sidewalk in downtown Hagerstown, an area that contains both homes and businesses. After receiving some complaints about the noise from residents and workers, the police warn Eanes that he is too loud. Eanes refuses to end his speech and is arrested and convicted for violating a broadly written statute that prohibits "loud and unseemly noises." Would the Court of Appeals of Maryland have upheld the conviction under a first amendment challenge? Surprisingly, from what the court hints in *Eanes v. State*,[1] it might have.

The above scenario is exactly what occurred in *Eanes*, except the date and subject of the speech were different. The actual date was 1988, and Eanes was speaking out against abortion in front of an abortion clinic. The court held that the breach of the peace statute under which Eanes was convicted is a content-neutral regulation of speech, meaning it regulates how a speech can be given, not what can be said in that speech.[2] A reading of the *Eanes* decision, however, leaves one with the lingering impression that it may have been precisely the content of Eanes' speech that led the court to find that the statute was "content-neutral."

The statute at issue in *Eanes* was section 121 of Article 27 of the Maryland Annotated Code, which makes it unlawful for anyone to "wilfully disturb any neighborhood in [any Maryland] city, town or county by loud and unseemly noises."[3] In *Diehl v. State*[4] the court construed "loud and unseemly noise" to be conduct such as advocating imminent lawless action and inciting a breach of the

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1. 318 Md. 436, 569 A.2d 604, *cert. denied*, 496 U.S. 938 (1990).
2. *Id.* at 448-49, 569 A.2d at 609-10.
3. MD. ANN. CODE art. 27, § 121 (1987) [hereinafter *section 121*].
4. 294 Md. 466, 451 A.2d 115 (1982), *cert. denied*, 460 U.S. 1098 (1983).

peace.[5] *Diehl* involved a police officer who was confronted by a belligerent passenger after stopping a car for a traffic violation.[6] The passenger exited the car and screamed obscenities at the officer, who twice asked the passenger to return to the car.[7] When the passenger refused the second time, the officer arrested him for violating section 121.[8] In reversing the conviction, the court concluded that Diehl's speech did not qualify as loud and unseemly noise under section 121, and could not permissibly be regulated because it did not advocate lawless action or incite a breach of the peace.[9] As a result of this decision, the court limited the ability of section 121 to regulate the content of speech. The question of whether section 121 could also act as a content-neutral regulation of the volume of speech, however, was left open.

Such a regulation is constitutional only if it can be shown that the challenged statute or regulation is necessary to serve a compelling interest and narrowly drawn to achieve that end.[10] A state may enforce regulations affecting the time, place and manner of expression if they are content-neutral, narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.[11]

In a series of cases involving state regulation of the manner of expression, the Supreme Court found that states have a significant interest in protecting citizens from unwelcome noise. In *Saia v. New York*,[12] the Court found unconstitutional a penal ordinance that forbade the use of sound amplification devices without the permission of the chief of police.[13] The Court reasoned that, because sound amplification devices are indispensable to effective public speaking, any abuses created by such devices could only be controlled by narrowly drawn statutes.[14] The statute in *Saia* created a potential for abuse because it provided the chief of police with too much discretion.[15]

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5. *Id.* at 472, 451 A.2d at 119.
6. *Id.* at 468, 451 A.2d at 116.
7. *Id.* at 468, 451 A.2d at 117.
8. *Id.*
9. *Id.* at 472, 451 A.2d at 119.
10. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).
11. *Id.* at 45. Recently, the Court reiterated that the government's interest must be *significant*. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). However, in deciding that the government's interest in *Ward* was valid, the Court called the interest *substantial*. *Id.* at 796. Apparently, "significant" and "substantial" are synonymous for this analysis.
12. 334 U.S. 558 (1948).
13. *Id.* at 559-60.
14. *Id.* at 562.
15. *Id.* at 560.

About a year later in *Kovacs v. Cooper*,[16] the Court upheld a city ordinance that prohibited the use of sound trucks that emitted "loud and raucous" noise.[17] Concerned with protecting the unwilling listeners in residential areas, the Court reasoned that, without government regulation, the quiet tranquility of residential areas would be at the mercy of advocates of particular religious, social or political persuasions.[18]

More recently in *Ward v. Rock Against Racism*,[19] the Court upheld a regulation giving New York City broad authority to control the volume level at concerts at a Central Park bandshell.[20] The regulation required performers to use sound-amplification equipment and a sound technician provided by the city.[21] The Court upheld the regulation because it was "narrowly tailored to serve the substantial and content-neutral government interest of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground, and the guideline leaves open ample channels of communication."[22] The unifying aspect of these cases is that they involved the regulation of amplified sound. In situations involving unamplified speech, the Supreme Court has been unwilling to uphold broad regulations.

For example, in *Edwards v. South Carolina*,[23] 187 protesters against racial discrimination demonstrated near the South Carolina state house and were arrested after being warned by police that their loud and boisterous conduct was disturbing the peace.[24] The demonstrators sang, clapped and stomped their feet.[25] The Court overturned their convictions after finding that the convictions did not result "from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed."[26]

Two years later in *Cox v. Louisiana*,[27] the Court overturned the similar conviction of a civil rights leader for disturbing the peace.[28]

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16. 336 U.S. 77 (1949).
17. *Id.* at 89.
18. *Id.* at 87.
19. 491 U.S. 781 (1989).
20. *Id.* at 803. The Court made it clear that the narrow tailoring requirement does not mean the regulation must achieve its goal through the least restrictive means. *Id.* at 798. The only requirement is that the regulation not be substantially broader than necessary to achieve the state's desired interest. *Id.* at 802.
21. *Id.* at 784.
22. *Id.* at 803.
23. 372 U.S. 229 (1963).
24. *Id.* at 229-33.
25. *Id.* at 233.
26. *Id.* at 236.
27. 379 U.S. 536 (1965).
28. *Id.* at 537-38.

The leader organized a demonstration involving 2,000 students marching on downtown Baton Rouge, Louisiana.[29] The students sang, cheered and prayed, but were dispersed with tear gas after the leader urged them to conduct a sit-in at stores that would not serve meals to blacks.[30] Comparing the case to *Edwards*, the Court found "the record does not support the contention that the students' cheering, clapping and singing constitutes a breach of the peace."[31]

Standing in apparent contrast to these civil rights protest decisions is *Grayned v. Rockford*,[32] in which the Supreme Court upheld an Illinois anti-noise ordinance forbidding people on grounds adjacent to school buildings from creating noises or disturbances that disturbed classes.[33] *Grayned* is distinguishable from *Edwards* and *Cox*, however, because the statute in *Grayned* was narrowly tailored, not broadly written to prevent any activity that could be construed as a "breach of the peace." As the court emphasized, the ordinance in *Grayned* was limited to grounds adjacent to school buildings, times when schools are in session and only when the noise interfered with the peace and good order of the school.[34]

These Supreme Court decisions indicate a tolerance for the regulation of amplified speech if necessary to protect the public from noise. But the Court does not seem to be as tolerant of the regulation of unamplified speech, especially in situations in which broadly written statutes are used by police to silence demonstrators. Nevertheless, there remains enough uncertainty in these decisions that state courts interpreting them have come to mixed conclusions when deciding the constitutionality of statutes aimed at those who make loud or unusual noise.

The Supreme Court of California held that a conviction for making "loud or unusual" noise is constitutional only when the speech causes a "clear and present danger of violence or when the communication is not intended as such but is merely a guise to disturb persons."[35] The California statute at issue provided that "[e]very person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise . . . is guilty of a misdemeanor."[36] While recognizing that content-neutral

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29. *Id.* at 540.
30. *Id.* at 542-44.
31. *Id.* at 549.
32. 408 U.S. 104 (1972).
33. *Id.* at 106.
34. *Id.* at 111-12.
35. *In re* Brown, 9 Cal. 3d 612, 618-19, 510 P.2d 1017, 1021, 108 Cal. Rptr. 465, 469 (1973) (en banc), *cert. denied*, 416 U.S. 950 (1974); *see also* People v. Fitzgerald, 194 Colo. 415, 420, 573 P.2d 100, 104 (1978) (en banc); State v. Marker, 21 Or. App. 671, 678, 536 P.2d 1273, 1277 (1975).
36. *In re* Brown, 9 Cal. 3d at 616, 510 P.2d at 1019, 108 Cal. Rptr. at 467.

limitations on protected speech are permissible, the court concluded that the statute did not constitute a permissible limitation under the first amendment because its scope was too broad.[37]

A similar New Jersey ordinance prohibiting "unreasonably loud and unnecessary noise" was upheld because "[w]hether a given noise disturbs the public peace depends upon the circumstances of the particular case, and it is impractical to spell out rigid legislative criteria."[38] Similarly, a Pennsylvania statute was found to constitutionally prohibit disorderly conduct caused by "loud, boisterous and unseemly" noise because a narrowing judicial interpretation limited it to unprotected speech,[39] and a Seattle disorderly conduct ordinance prohibiting "loud or raucous" behavior that "unreasonably disturbs others" was found not vague because it applied only to activity within a bus.[40] As a result of the *Eanes* decision, Maryland has joined Pennsylvania in upholding the constitutionality of a broadly written anti-noise statute without time, place or manner restrictions.

The *Eanes* case began on May 18, 1988 when Jerry Wayne Eanes took part in an anti-abortion demonstration in front of the Hagerstown Reproductive Clinic located on West Washington Street, "a congested, one-way, two-lane thoroughfare in Hagerstown."[41] Between 10:30 a.m. and noon, Eanes and another man periodically preached loudly, without any artificial amplification, the "gospel of Jesus Christ."[42] After receiving complaints from residents and people working in the area, police requested that Eanes reduce the volume

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37. *See id.* at 620, 510 P.2d at 1022, 108 Cal. Rptr. at 470 (citing Cohen v. California, 403 U.S. 15, 19 (1971) (section 415 "would not inform the ordinary person that distinctions between localities were created")).
38. State v. Holland, 132 N.J. Super. 17, 23, 331 A.2d 626, 629 (1975) (per curiam); *see also* State v. Johnson, 112 Ariz. 383, 542 P.2d 808 (1975) (en banc) (statute which made it a misdemeanor to "maliciously and willfully disturb[] the peace or quiet of a neighborhood, family or person by . . . [l]oud or unusual noise" is not overbroad); Commonwealth v. Jarrett, 359 Mass. 491, 269 N.E.2d 657 (1971) ("disturbers of the peace" is not vague).
39. Commonwealth v. Weiner, 230 Pa. Super. 245, 326 A.2d 896 (1974).
40. City of Seattle v. Eze, 111 Wash. 2d 22, 759 P.2d 366 (1988) (en banc); *see also* Reeves v. McConn, 631 F.2d 377, 383 (5th Cir. 1980) (prohibition of unreasonably loud, raucous, jarring, or disturbing sound limited to certain times and places); State v. Smith, 46 N.J. 510, 218 A.2d 147, *cert. denied*, 385 U.S. 838 (1966) (statute proscribing "noisy or disorderly" conduct limited to places of assembly, including schools, churches, libraries, and reading rooms).
41. 318 Md. 436, 441, 569 A.2d 604, 606, *cert. denied*, 496 U.S. 938 (1990). The clinic shares a building with two other businesses. *Id.* There is also at least one residential apartment in the building, and there is a residential apartment building across the street. *Id.*
42. *Id.* Eanes did not engage in any other activity such as blocking access to the clinic or inciting his listeners to violence. *Id.* at 441 n.2, 569 A.2d at 606 n.2.

of his speech.[43] Eanes continued and was arrested shortly thereafter.[44]

On August 2, 1988, the District Court of Maryland for Washington County convicted Eanes of violating section 121.[45] On *de novo* review, the Circuit Court for Washington County also found Eanes guilty.[46]

In affirming[47] Eanes' conviction, the court of appeals began its analysis by determining that section 121 is a content-neutral regulation of the manner of speech.[48] The court found that "loud" refers to a high volume level of speech and that "unseemly" "requires the meaning of 'loud' to be informed by the circumstances."[49]

Since the court found that section 121 regulates only the manner, not the content, of speech, the statute would pass constitutional muster if it were also found to be narrowly tailored to serve a substantial government interest and if it provided alternative means of communication.[50] The court found a substantial government interest in protecting captive audiences — unwilling listeners or viewers who cannot readily escape from the undesired communication — from noise.[51] Then, noting that a regulation is narrowly tailored if it promotes a government interest that would be achieved less effectively without the regulation, the court determined that "[s]ince the character of open public places may differ widely, . . . only a flexible approach to volume control can adequately serve the myriad circumstances which the State can legitimately regulate."[52] The court concluded that section 121 carries out such an approach to volume control because the particular circumstances in question define what is "loud and unseemly" speech.[53] Finally, the court found that the

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43. *Id.* at 441-42, 569 A.2d at 606. In addition, the administrator of the clinic and at least one resident complained directly to Eanes. *Id.* at 441, 569 A.2d at 606.
44. *Id.* at 442, 569 A.2d at 606.
45. *Id.* at 442, 569 A.2d at 607.
46. *Id.* at 442-43, 569 A.2d at 607.
47. Judge Adkins wrote the majority opinion and was joined by Chief Judge Murphy and Judges Rodowsky and McAuliffe. *See id.* at 436, 440, 569 A.2d at 604-06. Judge Eldridge wrote a dissenting opinion and was joined by Judges Cole and Blackwell. *Id.* at 436, 569 A.2d at 604.
48. *Id.* at 448-49, 569 A.2d at 609-10. Section 121 does not regulate the time or place of speech. *Id.* at 449, 569 A.2d at 610.
49. *Id.* at 448-49, 569 A.2d at 610.
50. *See supra* notes 10-11 and accompanying text.
51. Eanes v. State, 318 Md. 436, 449, 569 A.2d 604, 610, *cert. denied*, 496 U.S. 938 (1990).
52. *Id.* at 454, 569 A.2d at 613.
53. *Id.* In a commercial district, one may speak at a higher volume during business hours than at midnight. *Id.* at 455, 569 A.2d at 613. In a quieter environment, such as a residential neighborhood, the prohibited volume level becomes lower. *Id.*

statute permits alternative avenues of communication, because it would allow other forms of communication, such as addressing passersby, distributing literature, or carrying a sign.[54]

Even though the court had found that section 121 was content neutral, narrowly tailored to serve a significant government interest, and that it did not inhibit the use of alternative channels of communication, the statute could still be found to violate the first amendment if its words "loud and unseemly noise" rendered it vague or overbroad.[55] Dealing with the possibility of vagueness first, the court held that section 121 is not impermissibly vague because the common understanding of the words "loud and unseemly" give sufficient notice of what conduct is prohibited.[56] The court conceded, however, that "a speaker exercising the legitimate rights of free speech may be unaware that his or her volume has reached a prohibitive level and has become unlawfully disruptive."[57] To remedy this problem of fair notice, the court found that the application of section 121 requires a prior warning from the police.[58] Also, as a precaution against oppressive action by government, the court held that the police may act under this statute only after receiving a complaint giving them a reasonable belief that the speaker has violated section 121.[59]

The court did not give as much attention to the possibility that the statute was overbroad.[60] An overbroad statute prohibits conduct that may not be punished under the first and fourteenth amendments.[61] The danger is that such a statute will have a chilling effect on free expression.[62] The court found no such danger exists with section 121 because it "is neither without applicable enforcement standards nor can it be permissibly applied when the objection to speech is solely based on its content."[63] If section 121 is properly

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54. *Id.* at 458, 569 A.2d at 614-15. If the intent is to reach area residents or merchants, a speaker can reach them through the mail, by telephone, or in person. *Id.* at 458, 569 A.2d at 615.
55. *Id.* at 458, 569 A.2d at 615.
56. *Id.* at 461, 569 A.2d at 616. The court cited several cases from other states which held that statutes similar to section 121 were not vague. *Id.* at 462-63, 569 A.2d at 617; *see also infra* notes 70-72 and accompanying text for a brief discussion of these cases.
57. *Eanes*, 318 Md. at 463, 569 A.2d at 617.
58. *Id.*
59. *Id.* at 464, 569 A.2d at 617-18.
60. *See id.* at 464, 569 A.2d at 618. The court stated, "We need not dwell long on Eanes's claim that § 121 is overbroad." *Id.*
61. Grayned v. Rockford, 408 U.S. 104, 114-15 (1972).
62. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 796-98 (1984).
63. *Eanes*, 318 Md. at 465, 569 A.2d at 618.

applied, the court stated, it "reaches only that conduct which can be regulated consistent with the rights of free speech and does not reach beyond."[64]

Finally, after rejecting all facial challenges to section 121,[65] the court still had to consider whether section 121 was constitutional as applied to Eanes. Relying on the analysis of the circuit court judge, the court of appeals held that the noise created by Eanes was "unreasonably loud under the circumstances" and that "Eanes was warned to lower his voice by a police officer whose action was based on complaints from members of the captive audience."[66] As a result, the court concluded that he was properly convicted under section 121.[67]

On a theoretical level, the *Eanes* decision makes sense. The court has construed section 121 as a content-neutral regulation of speech. The statute can only be invoked to suppress speech when a citizen complains about a speaker's noise and the police have given that speaker a warning.[68]

On a pragmatic level, however, the *Eanes* decision creates a danger to freedom of expression. The judicially imposed elements requiring a prior police warning and a citizen complaint give complainants and police a powerful weapon for suppressing speech. Either the police or a citizen, acting under the guise that a speaker is too loud, could silence a speaker because they do not like the speaker or agree with what the speaker is saying.[69] This might have been exactly what happened in *Eanes*.

The majority opinion relied heavily on *Ward*, *Saia* and *Kovacs* to support its theme that the government has an interest in protecting its citizens from unwelcome noise. While it is true that those cases permit the regulation of sound, they also contain a common thread that the majority fails to consider — sound amplification.[70] *Ward* involved the amplification of sound in a Central Park bandshell,[71] *Saia* involved the amplification of lectures in a public park[72] and *Kovacs* involved the use of a sound truck to broadcast music and to comment on a labor dispute.[73] Even though the *Kovacs* opinion

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64. *Id.*
65. The content-neutral regulation of time, place, and manner of speech, vagueness, and overbreadth analyses all focused on the language of the statute rather than on how it was applied to Eanes.
66. *Eanes*, 318 Md. at 468, 569 A.2d at 620.
67. *Id.*
68. *See supra* text accompanying notes 56-59.
69. *Eanes*, 318 Md. at 477, 569 A.2d at 624 (Eldridge, J., dissenting).
70. *Id.* at 478, 569 A.2d at 625 (Eldridge, J., dissenting).
71. *See supra* text accompanying notes 19-22.
72. *See supra* text accompanying notes 12-15.
73. *See supra* text accompanying notes 16-18.

mentions that a distinction should be made between the regulation of amplified sound and unamplified speech,[74] the court of appeals failed to consider this distinction. Instead, the majority drew the dubious conclusion that the broad regulation of any unamplified sound is permissible, despite it being clear that there "is a constitutionally significant difference between" amplified sound and unamplified speech.[75]

In addition to ignoring this difference, the majority also placed too much emphasis on the *Grayned* decision to support its concern for the well-being of a captive audience. While the Supreme Court did uphold the anti-noise ordinance in *Grayned*, that ordinance is not analogous to the one under consideration in *Eanes*. The ordinance in *Grayned* was limited to grounds adjacent to a school building and to times when school was in session; it was also construed to prohibit noise that interfered with the peace and good order of the school.[76]

The broadly written anti-noise ordinance in *Eanes* is more analogous to the disturbing the peace statutes in *Edwards* and *Cox*. These cases undermine the proposition that mere loudness, accompanied by complaints and warnings, is sufficient to justify the suppression of unamplified political speech.[77] The actions of the demonstrators in *Edwards* and *Cox* were certainly more disruptive than Eanes' speech. Nevertheless, the Supreme Court, while acknowledging that the demonstrators' behavior was probably disruptive, stated that the purpose of free speech is to invite dispute, which is often best accomplished when speech "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[78]

The majority in *Eanes* evidently dismissed the importance of inviting dispute, possibly because Eanes was not as sympathetic a defendant as the civil rights demonstrators in *Edwards* and *Cox*. Eanes was speaking against abortion, an unfavored position in a state that has enacted laws to protect a woman's right to an abortion.[79] The defendants in *Edwards* and *Cox* were promoting civil

74. Kovacs v. Cooper, 336 U.S. 77 (1949). The Court stated, "There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers." *Id.* at 89.
75. *Eanes*, 318 Md. at 482, 569 A.2d at 627 (Eldridge, J., dissenting).
76. *See supra* text accompanying notes 23-25.
77. *See supra* text accompanying notes 26-34.
78. Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963) (quoting Terminiello v. City of Chicago, 337 U.S. 1, 4-5 (1949)); Cox v. Louisiana, 379 U.S. 536, 551-52 (1965) (also quoting *Terminiello* at 4-5).
79. *See* MD. HEALTH-GEN. CODE ANN. § 20-209 (Supp. 1992) (essentially codifying *Roe v. Wade*, 410 U.S. 113 (1973), which granted women the right to an abortion). Although this statute, which survived a November 1992 referendum, was not passed by the Maryland General Assembly until after the court of appeals decided *Eanes*, it is evidence of the popular support for the pro-choice movement in Maryland.

rights, a favored movement in the 1960s that was often aided by the Supreme Court.

As a result of its reliance on *Grayned* and its overlooking of *Edwards* and *Cox*, the majority opinion gave too much weight to the rights of a captive audience at the expense of the first amendment right of free speech. The dissent pointed out that "Eanes was expressing his opposition to abortion, one of the most controversial political and social issues today."[80] Furthermore, by speaking on a public sidewalk in a commercial district of Hagerstown late on a Tuesday morning, "Eanes preached his anti-abortion message in the most appropriate place and at the most appropriate time."[81] Some people live in commercial areas and some people sleep during the day, but if "constitutionally protected speech is limited to that not objected to by such persons, the scope of the First Amendment's free speech clause is extremely narrow."[82]

The problems with the *Eanes* decision do not end with the majority's treatment of the first amendment. In attempting to cure vagueness problems in section 121, the majority added the prerequisites of a complaint and police warning. These new elements still do not save section 121 from vagueness. Their effect is to put the decision of whether speech is "loud and unseemly" into the hands of the police.[83] Upon reading the statute, therefore, people still cannot determine if their speech will be regulated or not; they must rely on police discretion. This makes the enforcement of section 121 arbitrary. As the dissent explained, "if two speakers, at about the same time of day and in similar neighborhoods, reach the same volume, and persons complain only about one of them, a police officer can use § 121 only against the speaker who was the object of the complaints."[84]

One final reason, as the dissent noted, that Eanes' conviction should have been reversed is because the application of a new interpretation of section 121 violated his due process rights.[85] On the day before the speech that was the subject of the court of appeals' decision, the Circuit Court for Washington County had acquitted

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80. *Eanes*, 318 Md. at 472, 569 A.2d at 622 (Eldridge, J., dissenting).
81. *Id.* at 473, 569 A.2d at 622 (Eldridge, J., dissenting).
82. *Id.* at 474, 569 A.2d at 622 (Eldridge, J., dissenting).
83. Upon receiving a complaint, a police officer may act pursuant to § 121 if the officer reasonably believes that the speaker has violated the statute. *Eanes*, 318 Md. at 464, 569 A.2d at 617-18.
84. *Eanes*, 318 Md. at 490, 569 A.2d at 631 (Eldridge, J., dissenting).
85. *Id.* at 495-500, 569 A.2d at 633-35 (Eldridge, J., dissenting). Although the Ex Post Facto clauses apply only to legislative acts, "a similar limitation applies to judicial action through the operation of the Due Process clauses." *Id.* at 495, 569 A.2d at 633 (Eldridge, J., dissenting).

Eanes for engaging in identical activity.[86] The state had prosecuted Eanes under section 122, which also prohibits "loud and unseemly" noises.[87] Because the circuit court had just held that Eanes' prior conduct was not "loud and unseemly," he was justified in ignoring the police warning to lower his voice.

Nevertheless, the court upheld Eanes' conviction, and as a result expanded the scope of section 121. In *Diehl*, section 121 had been used only to regulate unprotected speech.[88] Now protected speech is also subject to the limitations of section 121. Of the two new elements to section 121 — a prior citizen complaint and a police warning — the requirement of a police warning is likely to have the largest impact. As long as one citizen complains, police will now have the power to end almost any public speech in any traditional public forum whenever they desire.

Rather than changing the statute in an attempt to make Eanes' conduct unlawful, the court should have reversed his conviction. This would have sent a message to the legislature to create a more specific statute. Assuming that Eanes had disrupted the operation of the clinic, his speech could have been regulated by a statute prohibiting noise that disrupts the operation of a medical facility.

In the context of the abortion debate, *Eanes* is a victory for those supporting abortion rights. Previously, police could only stop protesters at clinics if they engaged in unprotected speech, such as blocking access to a clinic or inciting listeners to violence.[89] As a result of *Eanes*, anti-abortion activists, fearing police action, might be limited to less visible and effective means of protest, such as carrying signs and distributing literature. The *Eanes* decision, therefore, stands as a threat to free speech.

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86. *Id.* at 469-70, 569 A.2d at 620 (Eldridge, J., dissenting). The majority neglected to mention this fact.
87. *Id.* at 469, 569 A.2d at 620 (Eldridge, J., dissenting). Section 122 established criminal penalties for "[a]ny person . . . who shall wilfully act in a disorderly manner by making loud and unseemly noises . . . on or about any public place." MD. ANN. CODE art. 27, § 122 (1987). The "loud and unseemly" proscription in § 121 applies to neighborhoods, and in § 122 it applies to public places.
88. *See supra* text accompanying notes 4-9.
89. *See, e.g.*, MD. ANN. CODE art. 27, § 577B (Supp. 1991) (prohibiting "[i]nterference with access to or egress from a medical facility").