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Sound Amplifiers Reconsidered

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the concept becomes readily apparent upon a examination of the large number of cases based on it in the State of Florida alone. The logical construction of this phrase and the varied application of the broad underlying principle must be thoroughly understood in order to guarantee the right. The procedural machinery, since the issue is basic, should be promptly and accurately set in motion.

At the same time, efficient administration of our criminal law is fostered by paying careful heed to the limitations involved. Although Anglo-American jurisprudence strongly prefers to allow some of the guilty to go free rather than to convict an innocent person, the defense of double, or former, jeopardy is not available as a shield against only one prosecution per offense. After this one prosecution, but not before then, the protection of the Constitution may be invoked to prevent oppressive criminal actions.

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SOUND AMPLIFIERS RECONSIDERED

Within a period of seven months the United States Supreme Court has rendered two decisions¹ affecting the regulation of sound trucks.² Despite the fact that these cases are confusing and possibly contradictory, they merit the fullest consideration, since they bring into sharp relief the conflict between two divergent concepts, the preservation of freedom of speech and the protection of the public from nuisances.

People v. Saunders, 4 Park. Cr. Rep. 196 (N. Y. 1859); State v. Lewis, 9 N. C. 98 (1822); Commonwealth v. Robinson, 85 Pa. Super. 424 (1925); Olney v. State, 51 Okla. Cr. 309, 1 P.2d 799 (1931); State v. Chaffin, 2 Swan 493, 32 Tenn. 352 (1852); Mason v. State, 29 Tex. App. 24, 14 S. W. 71 (1890); State v. Smith, 43 Vt. 324 (1870); BISHOP, CRIMINAL LAW §1050 (7th ed. 1882); 4 BL. COMM. *336 (1832); see State v. McLaughlin, 121 Kan. 693, 249 Pac. 612, 614 (1926); State v. Noel, 66 N. D. 676, 268 N. W. 654, 656 (1936); Crowley v. State, 94 Ohio St. 88, 113 N. E. 658 (1916); State v. Magone, 33 Ore. 570, 56 Pac. 648, 649 (1899); State v. Campbell, 40 Wash. 480, 82 Pac. 752, 753 (1905); cf. State v. Gleason, 56 Iowa 203, 9 N. W. 126 (1881).

¹Kovacs v. Cooper, 69 Sup. Ct. 448 (1949); Saia v. New York, 334 U. S. 558 (1948).

²The Saia case was discussed and criticized in Note, 2 U. OF FLA. L. REV. 103 (1949).

In *Kovacs v. Cooper*³ an evenly divided state court sustained the defendant's conviction under an ordinance⁴ of the city of Trenton prohibiting the use of sound trucks, sound amplifiers, or any other instrument emitting loud and raucous noises on the public streets. On appeal, the Supreme Court of the United States affirmed the judgment, four justices dissenting. There was no majority opinion — merely a judgment and five separate opinions.⁵ Broadly stated, Justice Reed, writing for three of the majority justices, agreed with the minority that the ordinance does regulate freedom of speech. He regarded the regulation, however, as a necessary and reasonable exercise of the police power based on the inherent right of a municipality to control the use and operation of its streets.⁶ The chief flaw in the opinion, after he properly admits that the interpretation of the effect of the statute by the highest court in New Jersey is controlling, lies in his construing the ordinance in precisely the opposite manner.⁷

Justices Frankfurter and Jackson, in separate opinions, concurred in the judgment but on somewhat different grounds. They both insisted that mechanical sound amplification is not encompassed by freedom of speech. A logical result of this view is that the regulation of sound itself or of the physical sound equipment⁸ is a simple exercise of the police

³135 N. J. L. 584, 52 A.2d 806 (1947).

⁴"That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned." Ordinance No. 430, City of Trenton, N. J.

⁵It is interesting to note that the deciding vote in each instance was cast by the Chief Justice, although on neither occasion did he personally write an opinion.

⁶*Jamison v. Texas*, 318 U. S. 413 (1943); *Cox v. New Hampshire*, 312 U. S. 569 (1941); *City Council v. Jackson*, 20 Ga. App. 710, 93 S. E. 304 (1917).

⁷Federal courts must accept a state court's conclusion as to the scope of the ordinance. *E.g.*, *Saia v. New York*, 334 U. S. 558 (1948); *Winters v. New York*, 333 U. S. 507 (1948); *Cox v. New Hampshire*, 312 U. S. 569 (1941). Eleven of the twelve justices of New Jersey's highest state court interpreted the ordinance in the *Kovacs* case as prohibiting sound amplification on or upon city streets without regard to the term "loud and raucous."

⁸For a discussion distinguishing these points and the dissemination of ideas, see Note, 2 U. OF FLA. L. REV. 103, 107-108 (1949).

power. Justice Frankfurter, in discussing the judicial evolution of the phrase "preferred position of the freedoms," demonstrated the danger of syllogistic reasoning, which results in mechanical jurisprudence rather than in a flexible and pragmatic interpretation of the law.⁹

Justice Black, dissenting, cited this ordinance as a "dangerous and unjustifiable breach in the constitutional barriers designed to insure freedom of expression."¹⁰ He admitted that "the 'blare' of this new method of carrying ideas is susceptible of abuse and may under certain circumstances constitute an intolerable nuisance,"¹¹ but he did not define "certain circumstances."

Unquestionably, the traffic problem in business sections is more acute from the safety standpoint than in residential districts. But it is contrary to established principles to contend that, while a municipality may protect its citizens on busy streets, it may not afford the same protection against an invasion of the right to enjoy peace and quiet in the home.¹²

Justice Rutledge in his dissent contended that this case leaves open for future determination the question of whether a state or municipality may prohibit *all* use of sound equipment in public places.¹³ Only three of the justices in the majority considered that the ordinance was limited to those sound trucks found to be "loud and raucous." Justice Frankfurter supported the majority on the ground that no mechanical sound amplification is *per se* protected by the First Amendment, and that it is not within the province of the judiciary to prescribe the exact formula for local regulation, but agreed with the minority that the ordinance prohibits all sound trucks and that the words "loud and raucous"¹⁴ are merely descriptive. Thus the basic problem of sound-truck regulation, namely, whether com-

⁹Kovacs v. Cooper, 69 Sup. Ct. 448, 458 (1949).

¹⁰*Id.* at 461.

¹¹*Id.* at 462.

¹²The thought is well discussed in the leading case of Cady v. Detroit, 289 Mich. 499, 286 N. W. 805, 810 (1939). "Ordinances having for their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear children, the protection of morals and health, the safeguarding of the economic structure upon which the public good depends, the stabilization of the use and value of property, the attraction of a desirable citizenship and fostering its permanency, are within the proper ambit of the police power."

¹³This would include streets, alleys, parks and city picnic grounds as distinguished from theatres, radios and indoor sound amplification.

¹⁴WEBSTER, INTERNATIONAL DICTIONARY (unabridged) (2d ed. 1949) defines "raucous" as follows: hoarse, disagreeably harsh; strident; as, a *raucous* voice.

plete prohibition of all sound amplifiers would be a violation of the First Amendment, is still an open question.¹⁵

Seven of the nine justices indicated in both the *Saia* and *Kovacs* cases¹⁶ that use of sound equipment is inexorably joined with the question of freedom of speech. As a result of the *Kovacs* decision, *Saia* is now of doubtful authority. Four of the justices specifically declared in *Kovacs* that *Saia* was overruled, while, in addition, a fifth, Justice Frankfurter, indicated that he still considered *Saia* wrongly decided, although he did not expressly agree that it was overruled. On the other hand, three of the majority justices in *Kovacs*, even though they dissented in *Saia*, did not regard it as overruled. They distinguished the decisions on the ground that the *Saia* ordinance vested in an administrative official the discretion to grant or refuse licenses to use sound equipment¹⁷ and accordingly constituted a "censorship of speech or religious practices before permitting their exercise,"¹⁸ while the *Kovacs* ordinance flatly prohibited all "loud and raucous" amplifiers on the streets.

The ordinances also differ in respect to the area they seek to regulate. The *Saia* ordinance covered the city completely — streets, parks, and picnic grounds — whereas the *Kovacs* ordinance was limited specifically to the city streets. The right to regulate the use of its streets has been recognized as conferring on a municipality authority to control activities thereon beyond that embraced in the usual police power.¹⁹ Justice Reed's opinion,

¹⁵The City of Miami enacted an ordinance similar to the one contested in the *Kovacs* case. Circuit Judge Milledge, in an unreported case ordering that the petitioner be remanded to the custody of the Miami police, against his contention that the ordinance forbidding all operation on the streets of vehicles with sound devices in actual operation constituted a violation of his right of free speech, said: ". . . the sound truck is of no value to the speaker unless he obtains and holds the attention of at least some within earshot. Reducing the risk, or rather refusing to permit an additional danger, to those lawfully on the streets using them for their primary purpose is a proper exercise of police power. To be sure the prohibition of sound trucks on the streets is some slight restraint on freedom of speech but no one suggests that this right is subject to no limitations whatever. The constitution assumes an orderly society so there can be a condition in which freedoms may be enjoyed." *State ex rel. Rosenberg v. Headley*, Order No. 765-D (C. C. 11th Fla. Oct. 27, 1948).

¹⁶See note 1 *supra*.

¹⁷For further discussion see Note, 2 U. OF FLA. L. REV. 103, 110-114 (1949).

¹⁸*Kovacs v. Cooper*, 69 Sup. Ct. 448, 451 (1949).

¹⁹*Pensacola v. Jones*, 58 Fla. 208, 50 So. 874 (1909); *House-Wives League, Inc. v. Indianapolis*, 204 Ind. 685, 185 N. E. 511 (1933); *People v. Dmytro*, 280 Mich. 82, 273 N. W. 400 (1937); *Melconian v. Grand Rapids*, 218 Mich. 397, 188 N. W. 521 (1922).

in upholding the constitutionality of the *Kovacs* ordinance, placed great emphasis on this right, thus avoiding the broader issue of impairment of free speech presented in *Saia*.

The opinions in the two cases give no assurance that a majority of the Court would be willing to reconcile them on the basis of the obvious differences in the two ordinances. The majority in *Saia* did not indicate that any issue was involved other than that of freedom of speech, and the dissent in *Kovacs* rested on the same basis. Although three of the majority in *Kovacs* would not concede that any issue was necessarily involved other than the right of a municipality to control its streets, thus implying a distinction based on the limitation of the *Kovacs* ordinance to such an area, Justices Frankfurter and Jackson went considerably further in both cases.

CONCLUSION

Several salient and practical problems concerning the regulation and prohibition of sound trucks and sound equipment remain undecided:

1. May there be any prohibition of other than "loud and raucous" sound equipment on the city streets, assuming, with Justices Black and Rutledge, that an amplifier that does not produce such noises could be devised and would have any users?
2. Does the city have the right to bar from the streets sound itself, as distinguished from the sound-producing equipment, so as to allow prohibition of loud noises emitted onto the streets from abutting property or from airplanes?
3. Is a prohibition, provided it is absolute, valid when it extends to city property other than streets?
4. Is a prohibition, limited to streets, valid if it permits administrative discretion?

Justice Jackson stated that "Comparison of this our 1949 decision with our 1948 decision, I think, will pretty hopelessly confuse municipal authorities as to what they may or may not do."²⁰ Nevertheless, two guiding factors may be utilized in drafting legislation for regulating sound trucks:

Branahan v. Hotel Co., 39 Ohio St. 333, 334, 48 Am. Rep. 457 (1883): "The city is clothed with power over the streets, and is charged with the duty of keeping them open for public use and free from nuisance."

²⁰*Kovacs v. Cooper*, 69 Sup. Ct. 448, 459 (1949).