PERMISSIBLE SCOPE OF SOUND-TRUCK ORDINANCES*

No highly-organized community can allow completely unfettered exercise of free speech, especially when modern mechanical instruments are used to implement its exercise. Every large city is today confronted with excesses in the use of sound-amplification devices.[1] Their expanded use in recent years has made some form of control imperative. Ordinance draftsmen, confronted with this problem, have been exploring recent court opinions to discover what methods of control a community constitutionally may employ.

In *Saia v. New York* [2] the Supreme Court held that a city may not allow a police chief unrestricted discretion to grant or refuse permits for non-commercial use of sound-trucks on city streets. The court found that the challenged ordinance,[3] which banned all use of sound-amplifying devices unless permission was obtained from the Chief of Police, was unconstitutional on its face, as a previous restraint on the right of free speech.[4]

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

1. No major treatise on this and related problems has been published. The National Noise Abatement Council, 9 Rockefeller Plaza, New York, N. Y., has issued a series of pamphlets dealing with the problem of noise. For studies of the effect of sound in general, see BARTLETT, THE PROBLEM OF NOISE (1934); McLACHLAN, NOISE (1935); and Kaye, *The Measurement of Noise* in ANNUAL REPORT OF THE SMITHSONIAN INSTITUTION 159 (1932).

2. 334 U.S. 558 (1948). The decision was five to four, with Mr. Justice Douglas speaking for the majority. Mr. Justice Frankfurter wrote a dissenting opinion, concurred in by Justices Reed and Burton. Mr. Justice Jackson wrote a separate dissenting opinion.

The case arose from the following facts: appellant, a minister of the Jehovah Witness sect, was arrested, convicted, and fined for violating the Lockport, New York, noise ordinance on four separate occasions. On each occasion he was amplifying a religious address at a public park through a device attached to the top of his car; he had been denied a permit to do so on the ground that his previous, licensed use of the loud-speaker at this site had brought complaints of the noise from the users of the park. Following his conviction in Municipal Court, he appealed through the County Court to the New York Court of Appeals; judgment was affirmed in both appellate courts. The Court of Appeals decision is reported in 297 N.Y. 659, 76 N.E.2d 323 (1947); both the County Court and the Court of Appeals affirmed without opinion.

3. PENAL ORDINANCE No. 38, CITY OF LOCKPORT, NEW YORK provided in part:

"Section 2. Radio Devices, etc. It shall be unlawful for any person to maintain and operate in any building, or any premises or on any automobile, motor truck or other motor vehicle, any radio device, mechanical device, or loud speaker or any device of any kind whereby the sound therefrom is cast directly upon the streets and public places and where such device is maintained for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of the travelers upon any street or public places or of persons in neighboring premises."

"Section 3. Exception. Public dissemination, through radio, loud speaker of items of news and matters of public concern and athletic activities shall not be deemed a violation of this section provided that the same be done under permission from the Chief of Police."

4. "The ordinance . . . has all the vices of the ones which we struck down in *Cant-*

By way of dictum, the Court declared that loud-speakers are "indispensable instruments" of effective public speech.[5] It indicated that possible excesses in the use of loud-speaker equipment can be controlled by narrowly-drawn statutes, but that when a city attempts to limit these excesses by granting uncontrolled discretion to an official, it "sanctions a device for suppression of free communication of ideas." [6] The ordinance, the Court said, prescribed no standards for the exercise of the official's discretion; it was not narrowly-drawn to limit the "hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted." [7]

Not only is the opinion so drawn as to cast doubt on the constitutionality of many existing sound-amplification regulations,[8] but it also points the way to the drafting of a constitutionally acceptible ordinance. Under the holding, future sound-truck ordinances must be carefully drawn to avoid interference with the liberties protected against state action by the Fourteenth Amendment. Specifically, they must be drafted to avoid the inference that city officials may be allowed opportunity to discriminate among various groups. Moreover, in view of the Court's dictum that loud-speakers are "indispensable instruments" of effective public speech, it is doubtful that a

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well v. *Connecticut*, 310 U.S. 296 [1940]; *Lovell* v. *Griffin*, 303 U.S. 444 [1938]; and *Hague* v. *C.I.O.*, 307 U.S. 496 [1939]." 334 U.S. 558, 560 (1948). In the *Cantwell* case the Court held void a state statute which made it a crime to solicit funds for charitable or religious purposes without first getting approval of a public official; the official was given discretion to determine whether the cause was religious. *Lovell v. Griffin* held void a city ordinance forbidding distribution of handbills without permission of the city manager. In *Hague v. C.I.O.*, although a majority of the Justices could not agree on a choice of proper constitutional grounds, the Court struck down an ordinance which required a license from a local official for a public assembly on streets, highways, public parks, or public buildings. The official could refuse a license if he believed that denial would prevent "riots, disturbances, or disorderly assemblage."

The constitutional prohibition against previous restraint is discussed fully in Near v. Minnesota, 283 U.S. 697 (1931), where the Court held unconstitutional a state law providing for issuance of an injunction prohibiting publication of malicious, scandalous, and defamatory matter.

5. 334 U.S. 558, 561 (1948).

6. *Id.* at 562.

7. *Id.* at 560.

8. New York City has amended its sound-truck ordinance to conform to the *Saia* case. See ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 435-6.0, amended Oct. 1, 1948. Another section of the Code, § 435-5.0, prohibits loud and unnecessary noises, and should be read in conjunction with the amended section. Mount Vernon, New York, has also enacted a new sound-truck ordinance. See ORDINANCES OF THE CITY OF MOUNT VERNON, NEW YORK, CHAPTER L, adopted and approved Oct. 14, 1948.

At least one ordinance giving discretion to city officials, in this case a Board of Police Commissioners, has been held invalid since the *Saia* case was decided on June 7, 1948. People v. Bock, Criminal Appeals File No. 2413, App. Dep't of Calif. Super. Ct., Nov. 4, 1948, lower court opinion noted in 13 MUNIC. L. J. 55, 60 (1948) (Los Angeles ordinance).

city may solve its regulatory problem by completely proscribing non-commercial use of sound-amplifiers.[9]

Majority dicta, to the effect that time, place, and volume of use may be regulated, suggest limitations on sound-truck use which might properly be incorporated into a regulatory ordinance. As to time, the ordinance might provide certain daylight hours for operation,[10] and, in addition, limit the number of hours per day that any given truck may operate. Limitations as to place of use would prohibit truck operation within designated distances of community facilities which are especially susceptible to "aural aggression." [11] Facilities like hospitals, schools, court-houses, and public parks reasonably need such protection.[12]

The opinion also suggests control of volume by regulation in terms of decibels, but this method presents practical difficulties. Quantitative, mechanical measurement of sound has inherent disadvantages. While the measurement can be made, it requires expert services and cumbersome

9. Stolberg v. New Brunswick, Civil Action File No. 11756, D.N.J., Oct. 26, 1948 (political candidate granted injunction restraining enforcement of New Brunswick ordinance, which banned all use of sound-amplifiers for any purpose whatsoever); Imbrie v. Trenton, Civil Action File No. 11571, D.N.J., Aug. 10, 1948, noted in 13 MUNIC. L. J. 64 (1948) (Trenton ordinance, same). *Contra:* Michalowski v. New Britain, 16 Conn. Sup. 9 (1948) (New Britain ordinance). And *see* Van Orden v. Newark, Ch. Bill No. 161/31, N.J.Ch., Aug. 25, 1948, noted in 13 MUNIC. L. J. 72 (1948) (New Jersey Court of Chancery held party challenging sound-truck ordinance had no standing to sue).

One other sound-truck case is now before the Supreme Court. In Kovacs v. Cooper, 135 N.J.L. 584, 52 A.2d 806 (1947), appellant was convicted of using a sound-truck during a labor dispute in violation of an ordinance of Trenton which forbade sound-amplification for any purpose. On appeal the New Jedsey Court of Errors and Appeals divided evenly and, because of the division, affirmed. Appeal to the United States Supreme Court was filed December 30, 1947.

10. Subsection g–5 of the amended New York City ordinance, *supra* note 8, prohibits all operation between ten P.M. and nine A.M. Mount Vernon, in its newly adopted ordinance, *supra* note 8, permits operation only between ten A.M. and one P.M., and between four P.M. and seven P.M. The model ordinance set out in NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS REPORT No. 123 (1948) would permit operation only between eleven-thirty A.M. and one-thirty P.M. and between four-thirty P.M. and six-thirty P.M. *Id.* at 26. Several other ordinances, all adopted before the *Saia* decision, limit operation to daylight hours. See NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS REPORT No. 62 28–34 (1940).

11. Phrase from the dissent of Mr. Justice Frankfurter in Saia v. New York, 334 U.S. 558, 563 (1948).

12. Subsection g–1 of the amended New York City ordinance, *supra* note 8, prohibits operation within "five hundred feet of a school, courthouse or church, during the hours of school, court or worship, respectively, or within five hundred feet of any hospital or similar institution." The Mount Vernon, New York, ordinance provides that "[s]ound shall not be issued within one hundred (100) yards of hospitals, schools, churches or courthouses." ORDINANCES OF THE CITY OF MOUNT VERNON, NEW YORK, CHAPTER L § 2 (d) (4) (1948). NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS REPORT No. 123 recommends barring operation within 300 feet of hospitals, schools, churches, or court-houses. *Id.* at 26.

apparatus.[13] And, because high-pitched sounds are more annoying than low-pitched sounds of the same magnitude, a result arrived at quantitatively, without analysis of this qualitative element, may be a very inaccurate measure of the annoyance factor in sound.[14] In contrast to volume control by regulation in terms of decibels, control by limitation of wattage would be effective and easy, if the limitation were coupled with a provision that the instrument should never be operated so that it would be audible at greater than a specified distance from the sound-projector.[15] With this type of control services of an expert are not required, and the annoyance factor in sound need not be separately considered.

Other limitations, not mentioned in the opinion, might properly be included in a regulatory ordinance. Previous cases indicate that a city may ban commercial operation of sound-amplifiers from its streets entirely,[16] and

13. See, *e.g.*, the apparatus pictured and described in McLACHLAN, *op. cit. supra* note 1, at 30–4.

14. "The sensitivity of the human ear varies very considerably with the pitch of the sound which is being received. It is low for relatively low and also for very high tones, and hence loudness as objectively measured or recorded may fail to give a true picture of the actual perception of noises which have many components." BARTLETT, *op. cit. supra* note 1, at 22–3. "We find at once that there is no simple relation of wide application between physical intensity and loudness. Two pure sounds of different frequencies do not in general produce the same loudness sensation, even if (*a*) their physical intensities are equal, or (*b*) their physical intensities bear the same ratio to their respective threshold values, i.e., if the sounds have equal sensation levels." KAYE, *op cit. supra* note 1, at 170. And, to the same effect, see McLACHLAN, *op. cit. supra* note 1, at 20.

15. Section 2 (d) (6) of the newly adopted Mount Vernon, New York, ordinance, *supra* note 8, provides that "[t]he volume of sound shall be controlled so that it will not be audible for a distance in excess of one hundred (100) yards from the sound truck and so that said volume is not unreasonably loud, raucous, jarring, disturbing, or a nuisance to persons within the area of audibility." Section 2 (d) (7) allows a maximum of "15 watts of power in the last stage of amplification." The NIMLO model ordinance contains similar provisions. NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS REPORT No. 123 26 (1948). The Duluth, Minnesota, ordinance limits maximum audibility to one block. DULUTH, MINNESOTA ORDINANCE No. 6034 § 6.

16. In Valentine v. Chrestensen, 316 U. S. 52 (1942), respondent was arrested for attempting to distribute handbills, on one side of which was printed advertising and on the other a protest against the city authorities, in violation of an ordinance prohibiting the distribution of commercial advertising on the city streets. In dismissing an injunction granted by a United States District Court, the Supreme Court said in part: "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. . . . The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of . . . the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated." *Id.* at 54–5. *See* Schneider v. State, 308 U.S. 147, 165 (1939).

that it may impose a reasonable license fee for non-commercial use.[17] The fee need not be based on a flat rate, but may be on a sliding scale which bears relation to the additional expense entailed in supervision and regulation of the use of sound-amplification devices.[18] It is also probable that a provision limiting the total number of concurrent non-commercial operations would be upheld.[19] In such provision the number of trucks permitted to operate concurrently in a city should be relative to the city's particular space dimensions. A sprawling city like Los Angeles, for example, could reasonably accommodate a proportionally larger number of sound-trucks than could close-knit New York or San Francisco.

While, under the decision, a regulatory ordinance must closely restrict the official's discretion, it need not establish his function as one purely ministerial. Since exceptional circumstances may require the exercise of his limited discretion to preserve the health or safety of the community, these circumstances should be provided for. Cases of unusually heavy traffic [20] or previously-existing public disturbance,[21] for example, require *ad hoc* control

17. Cox v. New Hampshire, 312 U.S. 569 (1941). In the *Cox* case the Court upheld a fee imposed for the expense entailed in supervising a parade held by a religious sect.

18. In Cox v. New Hampshire, *supra* note 17, the Court specifically said that the challenged fee was not unconstitutional because of the fact that the city had used a sliding scale instead of a flat fee. *Id.* at 577. This fee ran from a nominal sum to a maximum of $300. Subsection (h) of the amended New York City ordinance, *supra* note 8, imposes a flat fee of five dollars per day.

Unless the fee is reasonable and bears relation to the additional expense entailed in supervising and regulating the use of loud-speakers, there is a risk that the Court will find it to be a tax. Previous cases indicate that religious activity may not be taxed at all; even a non-discriminatory tax fails. Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

19. Without this provision the city has little safeguard against potential public nuisance in the form of mass use of sound-amplification. Nothing in the *Saia* opinion indicates that the Court intended to weaken the city's control of public nuisances, and the reasonable inference is that the law of nuisance remains unchanged. For the control of noise by means of nuisance law see Lloyd, *Noise as a Nuisance*, 82 U. OF PA. L. REV. 567 (1934); and see, in this connection, the extremely well-reasoned opinion of the Colorado Supreme Court in Hamilton v. City of Montrose, 109 Colo. 228, 124 P.2d 757 (1942), in which the Court declared, "We believe the people of Montrose have the right to protect themselves from concentrated and continuous cacophony." *Id.* at 237, 124 P.2d at 761-2. And see, as to the city's control of offenses affecting the public order and peace, McQUILLIN, MUNICIPAL CORPORATIONS §§ 1069, 1070 (2d ed. 1928).

20. Subsection g-3 of the new New York ordinance, *supra* note 8, permits exercise of discretion to refuse permit for non-commercial operation in the following terms: "[The commissioner shall not issue any permit in] any location where the commissioner, upon investigation, shall determine that conditions of overcrowding or of street repair or other physical conditions are such that the use of a sound device or apparatus will deprive the public of the right to the safe, comfortable, convenient and peaceful enjoyment of any public street, park or place for street, park or other public purposes, or will constitute a threat to the safety of pedestrians or vehicle operators." *See* Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

21. Permission for operation may not be refused because of the mere threat of public

and supervision, and the official should be given authority to prohibit sound-amplification in these and similar instances. But the ordinance should set up clearly defined standards to guide the exercise of official judgment in these special circumstances; an ordinance so constructed probably would not itself be open to successful challenge on constitutional grounds, even though the official's discriminatory exercise of power in a particular instance could be attacked as an abuse of the discretion constitutionally conferred on him.[22]

There is little warrant for the prospective draftsman to infer, as does Mr. Justice Jackson in dissent,[23] that the opinion forbids all regulation of sound-amplification devices. The Court indicates that its principal concern is with the previous restraint permitted by the challenged ordinance and the ensuing possibility of discrimination by an administrative official. While the holding clearly denies unrestricted discretion to city officials, it neither precludes narrowly-drawn regulations nor prohibits investment of the official with powers necessary for the performance of limited police functions. Under the case, the draftsman is allowed considerable freedom to prevent sound-amplification abuse. But ordinances drafted for prevention of mere aural irritation must not open the door to indirect censorship of public utterance.[24]

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disturbance. "[W]hen auditors feel privileged to express their disapproval through riot, it is they, not the speaker, who are pursuing the unlawful course of conduct. The remedy is police protection, not police censorship." Comment, 48 YALE L.J. 257, 270 (1938). See further, Hague v. C.I.O., 307 U.S. 496, 516 (1938); 52 HARV. L. REV. 320 (1938); and Chaffee, *Right of Assembly*, 2 ENCYC. SOC. SCI. 275 (1930).

22. Such abuse of discretion would fall within the rule announced by the Court in Yick Wo v. Hopkins, 118 U.S. 356 (1886): "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Id.* at 373–4.

23. 334 U.S. 558, 566–9 (1948).

24. In Kovacs v. Cooper, 17 U.S.L.WEEK 4163 (U.S. Jan. 31, 1949), lower court opinion *supra* note 9, decided after this note went to press, the Court affirmed a conviction for violation of an ambiguously phrased Trenton ordinance prohibiting sound-amplifiers or "any instrument . . . which emits therefrom loud and raucous noises. . . ." Although a majority affirmed, only a plurality of the Court could agree that the ordinance permitted use of a sound-amplification which does not constitute a "loud and raucous" noise. A majority, however, did agree that municipal regulation by means of nuisance law is constitutionally acceptable. See, in this regard, note 19 *supra*.