



# Religion and the Discourse of Human Rights

Editors:

Hanoch Dagan | Shahar Lifshitz | Yedidia Z. Stern



THE ISRAEL  
DEMOCRACY  
INSTITUTE

*Religion and Human Rights Discourse*

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# The Tension between Religious Freedom and Noise Law

## The Call to Prayer in a Multicultural Society

Alison Dundes Renteln

### Introduction

In pluralistic societies clashes often occur over various types of sound. This is a particularly sensitive topic if the sounds happen to be associated with religious practices. When objections are raised to sounds that are integral to the faiths of religious minorities, there is a legitimate concern about whether the anti-noise law is a subterfuge for discrimination. As a consequence, the government may be compelled to intervene to strike the proper balance between noise and silence. This essay considers disputes about religious sounds that have been interpreted as noise, focusing largely on the Islamic call to prayer, and asks what types of government regulation are permissible in democratic political systems. Analyzing the disputes requires paying close attention to differing conceptions of the ideal soundscape,<sup>1</sup> the culturally constructed realm within which sounds occur. This study is intended to provide a small contribution to the relatively new field of acoustic jurisprudence.<sup>2</sup>

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1 The term “soundscape” was coined by R. Murray Schafer, *The Soundscape: Our Sonic Environment and the Tuning of the World* (Rochester, VT: Destiny Books, 1976).

2 For a proponent of this field, see James Parker, “The Soundscape of Justice,” *Griffith Law Review* 20 (2011): 962–993.

I begin with the importance of sound for society, including a consideration of sounds regarded as problematic. I then discuss the interpretation of objectionable sounds or “noise” in the context of legal doctrine, such as “nuisance,” and of environmental regulations. In these contexts it is conceivable that notions of excessive sound are both culturally constructed as well as subject to objective measures of demonstrable harms; I explore both of these possibilities. If religious sounds ostensibly constitute a nuisance or noise pollution, then the next question often is whether they should be banned or accommodated with a religious exemption. I consider the motivations behind a strategy of limiting religious sounds to see if it masks insidious discrimination: a desire to deter members of religious minorities from migrating to and residing in urban spaces.<sup>3</sup>

I analyze how these conflicts play out by turning to disputes in which governments have sought to prevent religious sounds as well as to policies that have banned the construction of buildings or structures from which the sounds are projected. In actual disputes related to religion and noise one can observe whether political systems have seen fit to make a specific exception either on an occasional basis or to grant a general religious exemption from noise laws, as they balance the protection of religious freedom and the state interest in noise abatement.

This discussion is followed by a consideration of international and domestic legal approaches to this question. I call attention to the lack of adequate government justifications for the limitation on loud religious sounds. The presumption that restrictions are valid has allowed theorists and policymakers to avoid justifying anti-noise laws. Yet, if the right to religious freedom is a fundamental right, then one must ask why anti-noise policies should be administered in communities in such a way as to infringe upon this right. Indeed, religious sounds deserve at least comparable protection to ordinary sounds, and should warrant even greater protection in the absence of a sufficiently compelling state interest. Yet, such an interest may exist if there is a human right to quiet. Thus, to justify the limitation of religious sounds, I will suggest that these anti-noise laws reflect an implicit customary right to quiet.<sup>4</sup> The challenge ultimately will be to weigh these competing rights appropriately so as to justify lowering the volume of loud religious sounds.

In the penultimate section, I propose compromise policies that would permit the call to prayer via new forms of social media. I argue that governments should

3 In some places one may also inquire as to the motivations of minorities seeking to make loud religious sounds. Some may wonder whether their motivation reflects primarily religious concerns or serves to promote a political cause, or both. When conflicts arise in pluralistic societies, there is bound to be suspicion about motivations on both sides.

4 The right may be formulated as a right to quiet enjoyment or to peace and tranquility. There are analogues to the right to quiet.

support a policy of maximum accommodation, which here may be achieved by means of new technologies, as long as the relevant religious minority communities consider them acceptable. At the end, I contend that the entire issue may eventually require a reconceptualization of the main question. International law may need to recognize a new human right to quiet to justify existing anti-noise laws.

## Noise as a Social Problem

Noise is defined as unwanted sound, which begs the question of what constitutes unwelcome sound. When sound is referred to as noise, this usually has negative connotations.<sup>5</sup> As one scholar put it, “Noise is often a term of abuse, especially applied to music one does not like.”<sup>6</sup> Or, as another explains: “If we define *sound* as anything we can hear, then noise is the kind of sound that is disorderly.”<sup>7</sup> The challenge, then, is to determine when noise is the proper designation for the phenomenon; there are likely to be differing views when it comes to religious sounds. In general, sounds that are familiar tend not to attract attention whereas sounds that are unusual do.<sup>8</sup> Once people become accustomed to new sounds, they sometimes fade into the background and people cease to be aware of them. When this occurs in multicultural societies, it forces us to confront the culturally constructed nature of the soundscape. Yet, even if some initially strange sounds, after becoming familiar, are no longer irksome, this does not preclude the possibility of cross-cultural agreement that some loud sounds are excessive and harmful.

- 5 This was not always the case: Americans, until the mid-twentieth century, associated urban noise with progress. Isaac Weiner, *Religion Out Loud: Religious Sound, Public Space and American Pluralism* (New York: New York University Press, 2014), 91.
- 6 Stuart Sim, *Manifesto for Silence: Confronting the Politics and Culture of Noise* (Edinburgh: Edinburgh University Press, 2007), 15. Sim prefers the terms “noise” and “silence” to “sound” and “quiet” because of their general usage and the emotional connotations they evoke. He points out, interestingly, that “noise” is derived from the Latin term “nausea,” or sea sickness, *ibid.*, 16.
- 7 He goes on to suggest that “All sound is either the one or the other or a mixture of the two.” Siegmund Levarie, “Noise,” *Critical Inquiry* 4 (1977): 21–31. Although noise is commonly understood to be loud, noise is not necessarily loud, *ibid.*, 21.
- 8 George A. Spater, “Noise and the Law,” *Michigan Law Review* 63 (1965): 1373–1410. He explains that individuals tolerate noise that is familiar; thus, city dwellers may find that barnyard noises awakened them, while those from rural areas may find it difficult to sleep in the city (*ibid.*, 1375.).

Although not consciously acknowledged, the modern condition involves considerable noise of all sorts, what some have called the “new noisiness.”<sup>9</sup> In large cities, individuals are often bombarded with all different types of loud sounds: sirens of fire engines and ambulances, car alarms and the honking of horns, and police helicopters. Furthermore, when inside buildings such as airports, doctors’ offices, elevators, hotels, and restaurants, one cannot escape “muzak.” The new levels and types of noise raise genuine concern about their impact on individuals and the quality of social life in general. Because of possible threats to public health and to individuals’ wellbeing, commentators emphasize the importance of protecting society from noise. The magnitude of the problem has increased to such an extent that some worry that “. . . silence is a threatened phenomenon.”<sup>10</sup> The trend toward more and more noise associated with a “24-hour society” seems virtually inevitable, partly because it reflects pressures exerted by market forces. Criticisms such as these are often based on a tacit assumption that a culture of serenity is superior to one of cacophony.

The quest for a proper balance between noise and silence requires considering the scope of the social problem as well as the value some cultures place on silence. For instance, George Prochnik, in his provocative book, *In Pursuit of Silence: Listening for Meaning in a World of Noise*, argues convincingly that we should recognize the importance of silence partly because it is vital for deliberative democracy. Other scholars suggest that the shift to the consideration of the auditory experience is critical for understanding the role of “the self” in modernity; they contend that this depends upon the emergence of new acoustic technologies.<sup>11</sup>

The threat to the “culture of silence,” in the sense of freedom from excessive noise, has been exacerbated by the technological innovation of amplification.

9 George Prochnik, *In Pursuit of Silence: Listening for Meaning in a World of Noise* (New York: Doubleday, 2010), 18.

10 Sim, *Manifesto for Silence* (above n. 6), 1. For more on the social significance of noise in the United States, see Hillel Schwartz, “On Noise,” in *Hearing History*, ed. Mark M. Smith (Athens: University of Georgia Press, 2004), 51–53. See also Schwartz’s impressive treatise, *Making Noise: From Babel to the Big Bang & Beyond* (Brooklyn: Zone Books, 2011).

11 See, e.g., Steven Connor, “The Modern Auditory I,” in *Re-writing the Self: Histories from the Renaissance to the Present*, ed. Roy Porter (London: Routledge, 1997), 203–223. For a popular overview of noise and quiet with a noise time line in world history, see Garret Keizer, *The Unwanted Sound of Everything We Want: A Book about Noise* (New York: Public Affairs, 2010). See also Emily Thompson, *The Soundscape of Modernity: Architectural Acoustics and the Culture of Listening in America, 1900–1933* (Cambridge, MA: MIT Press, 2002), especially chapter 3.

With the advent of this technology, the volume of sound from some sources has increased dramatically. The intensification of sound has had serious repercussions. For some, loudness has sinister connotations and is associated with evil. Prochnik, for example, argues that Hitler's rise to power was accomplished partly by means of microphones.<sup>12</sup> It is also well known that US military personnel used loud music as part of the "enhanced interrogation" or torture of enemy combatants who were detained on the military base in Guantanamo Bay, Cuba.<sup>13</sup>

The use of amplification in music emerged in jazz in the 1940s, but it was not until it was deployed in rock music that it led to much social consternation. Widespread use of microphones at large-scale concerts and festivals gave cause for concern.<sup>14</sup> In some parts of the world loud music is perceived as aggressive, and this is exacerbated by the use of microphones.

## Government Interests in Regulation

The most common rationale for regulation is that noise pollution is associated with adverse health consequences. Much of the literature concerned with "community noise" focuses on sounds related to transportation, often emanating from aircraft and highways.<sup>15</sup> In 1999 the World Health Organization (WHO) issued a report, *Guidelines for Community Noise*, that compiled data showing the extraordinary threat noise poses to public health and provided a general overview of noise-

12 "Hitler himself once remarked that without the loudspeaker he could not have conquered Germany, and his loud voice was a treasured property of the rising Nazi Party." Prochnik compares Hitler's loudness to other political leaders at the same time and notes that no one was as loud as he. Prochnik, *In Pursuit of Silence* (above n. 9), 69–70.

13 "Deafening music was played on the loudspeakers directly into their ears and they were told to dance around the room," in Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review of Books, 2004), 15. For a trenchant critique, see Suzanne C. Cusick and Branden W. Joseph, "Across an Invisible Line: Music and Torture," *Grey Room* 24 (2011): 6–21. They mention that the Society for Ethnomusicology and the American Musicology Society adopted resolutions condemning "no touch" torture interrogation that involves music. Sim believes that sound can constitute torture: "Unsought noise is mental torture," *Manifesto for Silence* (above n. 6), 5.

14 *Ibid.*, 116. When the US soldiers tried to induce Manuel Noriega to leave the Vatican embassy, Nunciatura, they blared loud rock music as part of their effort to dislodge him. Ronald H. Cole, *Operation Justice Cause Panama*, (Washington, DC: Joint History Office, Office of the Chairman of the Joint Chiefs of Staff, 1995 ). Acoustic weapons were used in the war in Fallujah, Iraq, Keizer, *Unwanted Sound* (above n. 11), 269.

15 Sanford Fidell, "Community Response to Noise," in *Noise and Society*, ed. Dylan M. Jones and Antony J. Chapman (Chichester: John Wiley & Sons, 1984), 247–277.

related phenomena. A search of the medical literature in the US National Library of Medicine database identified several thousand sources about the detrimental health effects of excess noise.<sup>16</sup>

One of the serious consequences of noise is the loss of hearing.<sup>17</sup> As this is the most common harm, estimates of those afflicted with noise-induced deafness are substantial. Hearing loss is frequently caused by industrial work and excessively loud music.<sup>18</sup> Those who work in factories are known to experience both constant psychic fatigue and hearing impairment as they age.<sup>19</sup> Because of difficulties in measuring the relationship between noise and auditory loss, it is not possible to quantify this accurately.<sup>20</sup>

Some studies claim to have shown a correlation between loud noise and low birth weight. This was evidently the case for babies whose mothers lived near airports in Osaka, Japan, and Los Angeles International airport.<sup>21</sup> While some researchers attribute this to the stress the mothers had experienced, others question the relationship between noise stress and birth weight. Studies that attempt to prove a correlation between aircraft noise and mortality rates have not been entirely conclusive either.

Besides physical consequences, researchers have documented psychological and emotional effects of excessive noise. Their results reveal that exposure to loud noise over time is associated with annoyance, stress, and other emotional disorders. Some medical research suggests long-term exposure to loud noises may cause

16 See Lisa Goines and Louis Hagler, "Noise: A Modern Plague," *Southern Medical Journal* 100 (2007): 287–294.

17 Already in 1998, approximately 15% of American teenagers had permanent hearing damage. A. S. Niskar et al., "Prevalence of Hearing Loss Among Children 6 to 19 Years of Age," *Journal of the American Medical Association* 278 (1998): 1071–1075. The acronym for noise-induced hearing loss is NIHL.

18 Rock music is considered responsible for causing significant hearing loss. See Lucy Kavalier, *Noise: The New Menace* (New York: John Day Co., 1975), 50.

19 Levarie, "Noise" (above n. 7), 24.

20 W. Dixon Ward, "Noise-induced Hearing Loss," in *Noise and Society*, ed. Dylan M. Jones and Antony J. Chapman (Chichester: John Wiley & Sons, 1984), 77. Kary Kryter, *The Handbook of Hearing and Effects of Noise* (New York: Academic Press, 1994). For a more technical discussion of the challenges associated with measurement, see Michael Rettinger, *Handbook of Architectural Acoustics and Noise Control: A Manual for Architects and Engineers* (Blue Ridge Summit, PA: TAB Professional and Reference Books, 1988). See the treatment of community noise and the relationship between annoyance and noise (*ibid.*, 43–53).

21 Charles R. Clark. "The Effects of Noise on Health," in *Noise and Society* (above n. 20), 119–120.



heart disease, hypertension, and ulcers.<sup>22</sup> In extreme cases, loud noise may even function as a provocation, leading those exposed to it to commit acts of violence.<sup>23</sup>

When noise occurs during the night, affecting sleep, that is ordinarily considered a serious health problem. Insofar as unwanted sound disturbs usual sleep patterns, it contributes to chronic insomnia and other problems associated with it. As one study notes: “Long-term psychosocial effects have been related to nocturnal noise.”<sup>24</sup> Indeed, the analysis of nuisance and noise policies invariably mentions the extent to which the sound interferes with sleep patterns.

The most obvious objection to loud noise is that it is distracting. Individuals find that it interferes with their ability to concentrate and be productive. If religious sounds, in and of themselves, do not cause the above health problems and the primary objection is irritation, then one must ask whether an annoyance objection is sufficient to justify the limitation of sounds considered significant for a religious community. Moreover, the question of whether the intensity of noise exceeds standards acceptable to a community is complicated in pluralistic societies comprised of diverse ethnic and religious groups. That is, the response to sound is quite clearly a reflection of culturally variable standards.<sup>25</sup> One must ascertain whether legislating morality with regard to sound can be justified in a democratic polity when there are differing conceptions of the soundscape.

Insofar as culturally different sounds may eventually become familiar and cease to be distracting, the justification for limiting those sounds would appear to be much weaker. When religious sound exceeds established decibel levels of what is deemed safe, regulation is easier to justify. When the loud sounds are beneath levels that cause serious health hazards and are only irksome, the question of whether regulation can be justified is more difficult.

## Acoustic Jurisprudence

Symbols are powerful representations of group identities; as such, they often elicit strong societal responses. Whether the symbol is a building, a linguistic system, or a particular sound, it accentuates a difference. When the majority considers

22 Brent Baughman, “Noise Pollution Hard on Heart as Well as Ears,” *National Public Radio* (May 14, 2011), on the World Health Organization (WHO) report; Jenny Selander et al., “Long Term Exposure to Road Traffic Noise and Myocardial Infarction,” *Epidemiology* 20/2 (2009): 272–279; Frank P. Grad, *Treatise on Environmental Law* (Newark: Matthew Bender, 2011), §5.01.

23 Kavalier, *Noise: The New Menace* (above n. 18), 10.

24 Goines and Hagles, “Noise: A Modern Plague” (above n. 16).

25 W.I. Acton, R.P. Grime, and K. Ratcliffe, “Legal Aspects of Noise,” in *Noise and Society* (above n. 20), 279–302, specifically on 279.

the minority a threat, it often attempts to regulate symbols as part of an effort to undermine the power of the group. Ironically, by clamping down on a community, the government inadvertently causes members of the minority group to rally around the symbol representing it.<sup>26</sup> Historically, majorities have regulated sounds associated with a minority as part of their policies of oppression.<sup>27</sup>

A fascinating field of legal theory is concerned with how the senses influence our understandings of juridical matters.<sup>28</sup> Much of the scholarship emphasizes the importance of visual evidence in courts in comparison to other means by which information can be introduced.<sup>29</sup> In the common law the prohibition against hearsay reflects a presumption about the unreliability of auditory forms.<sup>30</sup> This approach in sensational jurisprudence likewise highlights a distrust of sound (even though we call legal processes “hearings”).

There may be reasons for this. Sometimes, one cannot ascertain the actual meaning of the utterances or sound. Also, people may lie while giving testimony, and recordings may be altered. A special complication may arise when the testimony is given in a language other than that used in court. Interpreters may not provide accurate translations, and there is fear that the court may miss something. Where the meaning of sounds is not apparent, there tends to be excessive fear that the messages may be missed or misconstrued.

## Legal Approaches

The law permits the regulation of sounds if they are disruptive. For quite some time, jurists have acknowledged the social significance of silence and the threat posed by noise.<sup>31</sup> Because individuals are uncomfortable when they hear particular

26 This idea is similar to Johan Galtung’s concept of “rally ’round the flag.”

27 See, e.g., Ruth HaCohen, *The Music Libel Against the Jews* (New Haven: Yale University Press, 2011).

28 See *Law and the Senses: Sensational Jurisprudence*, ed. Lionel Bently and Leo Flynn (London: Pluto Press, 1996).

29 In the brilliant scholarship of Bernard Hibbits, he highlights the prominence of “aurality” in performance cultures in contrast to the Anglo American jurisprudence which privilege visual sense. He also discusses the law of sound as it relates to both speech and music. See also Hibbits, “‘Coming to Our Senses’: Communication and Legal Expression in Performance Cultures,” *Emory Law Journal* 41 (1992): 874–960; and Hibbits, “Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse,” *Cardozo Law Review* 16 (1994): 326–328. His analysis reveals a shift toward more reliance on aural metaphors and highlights analogies between law and music.

30 For discussion of common law preference for eye-witness testimony over hearsay, see Piyel Haldar, “Acoustic Justice,” in *Law and the Senses* (above n. 28), 123–136.

31 For example, Judge Oliver Wendell Holmes wrote a poem “The Music Grinders” on his objections to the noise made by street musicians: *The Complete Poetical Works of Oliver*

sounds,<sup>32</sup> and because the volume of noise has become greater, this has motivated public officials to adopt more anti-noise laws: “The overpowering attack by noise on a defenseless population has evoked an increasing number of protective anti-noise laws in various cities, states, and countries.”<sup>33</sup>

Litigation regarding loud sounds has been addressed via doctrines in the common law such as nuisance (private and public), negligence, and occasionally trespass and strict liability.<sup>34</sup> One commentator notes that dealing with noise is more complicated than other types of nuisance because evaluating it can be highly subjective.<sup>35</sup> In determining what constitutes a nuisance, courts focus on the specific context in which it occurs: whether it is in a residential or industrial area.<sup>36</sup> Primary considerations are whether the sound would bother a “reasonable person” (as opposed to a nervous, hypersensitive one), whether the activity causing the sound has “social value,” and whether the cost of noise abatement would be prohibitive. The dominant view seems to be that loud noise during the night is *prima facie* unreasonable. Also, when factories blew whistles early in the morning, courts generally treated this as a nuisance.<sup>37</sup>

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Wendell Holmes (London: George C. Harrap, 1895). Sim refers to this poem in *Manifesto for Silence* (above n. 6), 3, n. 3; 172–173.

- 32 They can range from grunting in a gym to the noise of aircraft overheard on the Sabbath. Legal systems proscribe verbal utterances such as profanity, ethnic slurs, and insults. Words deemed to be sufficiently offensive both in substance or in the manner uttered, as with “fighting words,” may be subject to regulation. Repugnant utterances are usually analyzed in the framework of freedom of expression. When dealing with sound *per se*, time, place, and manner restrictions of free speech jurisprudence may be applicable.
- 33 Levarie, “Noise” (above n. 7), 29. He discusses the “ascendancy of noise” in society and considers how it entered contemporary music. For a thoughtful treatment of the rise of the anti-street musician movement, see John Picker, “The Soundproof Study: Victorian Professionals, Work Space, and Urban Noise,” *Victorian Studies* 42 (1999): 427–453.
- 34 For a discussion of noise as nuisance, see Bart Kosko, *Noise* (New York: Viking, 2006), §§2, 3. For a superb comparative analysis of noise in the context of nuisance law in South Africa and Scotland, see Hanri Mostert, “Nuisance,” *Bringing Rights Home in Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa*, ed. Elspeth Reid and Daniel Visser (Edinburgh: Edinburgh University Press, 2013), 256–293.
- 35 Spater, “Noise and the Law” (above n. 8), 1373–1410.
- 36 According to Lloyd, the early cases in the United States often involved the metals industries. Hospitals had to be built in such a way as to avoid bothering neighbors with the “groans and moans of the operating room.” William H. Lloyd, “Noise as Nuisance,” *University of Pennsylvania Law Review* 82 (1934): 567–582, especially on 573. He mentions litigation involving the barking of dogs, often deemed a nuisance.
- 37 *Ibid.*, 572; Grad, *Treatise on Environmental Law* (above n. 22), §5.02.

For the most part, what is “reasonable” depends on one’s group membership.<sup>38</sup> Courts also take into account “variables such as the locality of the origin of the noise, the degree of intensity and disagreeableness of the sounds, their times and frequency, and their effect on people of normal sensibilities.”<sup>39</sup> With respect to the issue of “social value” or “social utility of the activity,” there may be a class bias, for instance, in the assessment of what types of music should be construed as an “annoyance.”<sup>40</sup> A leading article on this subject asserts that the noise associated with what is deemed a virtuous cause is unlikely to be treated as a nuisance whereas the noise emanating from race tracks and some types of entertainment lacking social value were more likely to be considered nuisances.<sup>41</sup>

There is a question about how to interpret music with respect to what counts as a nuisance. Although historically it was not obvious that bells should be interpreted as musical instruments, an early case involved the question of whether church bells constituted a nuisance. They had been placed in the roof of a house and were rung five times daily and more often on Sunday. In an old case *Soltau v. DeHeld* (1851), the court issued an injunction barring individuals from ringing them, apparently following precedents on chimes and church bells.<sup>42</sup>

To prevail in a noise action, the plaintiff must prove causation and that the noise was unreasonable. Evidently, the former has not been difficult when the source of noise is clear—as is the case with barking dogs, amusement parks, airplanes, and amplification.<sup>43</sup> However, historically demonstrating that the noise was “unreasonable” sometimes proved to be challenging.

When the government itself is responsible for the noise, lawsuits may be barred because of the principle of sovereign immunity, unless that is waived. When the government builds a system of transportation or some other major construction project, questions may arise as to whether the noise interferes with a property owner’s right to enjoy the peaceful use of his property and whether it results in a devaluation of the property. Even if it does, in the United States, if the development

38 Lloyd begins his essay with the formulation as put forward by a student: “The test then is whether this conduct interferes with ordinary comfort, not according to some fanciful standard but according to the plain and sober manners of an English gentleman.” Lloyd, “Noise as Nuisance” (above n. 36), 567.

39 Grad, *Treatise on Environmental Law* (above n. 22), §5.02.

40 Lloyd refers to a case in which the judge asked: “Whether classical music was more distracting than works of a lower class, he could not say,” “Noise as Nuisance” (above n. 36), 578. The mere fact that he posed this query reflects a bias.

41 Although bowling alleys were once regarded as socially unacceptable, the attitude toward them changed over time. In the United States, complaints were often related to barking dogs and rollercoasters.

42 *Soltau v. DeHeld*, 2 Sim. (N.S.) 133 (1851).

43 Grad, *Treatise on Environmental Law* (above n. 22), §5.02.

project is necessary for government functions (constitutes a public purpose), this will not be treated as a “taking” under the Fifth Amendment of the Constitution. The government generally has immunity from lawsuits alleging a nuisance, so long as the noise-creating project is necessary to fulfill its responsibilities.<sup>44</sup>

## Noise Pollution: Codes and Cases

Noise pollution affects millions of people across the globe, and has raised awareness of the value that relative quiet holds for everyone. Throughout the world unwanted sound has been regulated by statutes in various areas of law including public health, occupational safety, and environment. Aircraft in particular have been the target of much of the anti-noise legislation.<sup>45</sup> The WHO has issued community noise guidelines, which established limits on the volume of sound.<sup>46</sup> Noise pollution is a worldwide problem that is receiving increasing attention, sometimes through special events like Ghana’s International Noise Awareness Day in 2006.<sup>47</sup>

Jurisprudence related to noise pollution has begun to develop in this area. In *Hatton and Others v. United Kingdom*, the plaintiffs alleged that night flights at Heathrow Airport constituted “noise disturbance” that exceeded the WHO guidelines and violated their rights guaranteed in the European Convention of Human Rights including Article 8: the right to respect for privacy, family life,

44 For a review of cases discussing the question of whether noise causes damage and whether this constituted a “taking,” see Spater, “Noise and the Law” (above n. 8). In rare cases, plaintiffs allege that the noise constitutes a trespass. This type of suit seldom prevails. “There is no right of recovery for noise from public improvements, whether operated by the government or those acting under government authority,” *ibid.*, 1401. See also commentary on whether the Religious Land Use and Institutionalized Persons Act (RLUIPA) applies to cases involving the power of eminent domain.

45 Grad, *Treatise on Environmental Law* (above n. 22), §5.01.

46 *Guidelines for Community Noise*, eds. Birgitta Berglund, Thomas Lindvall, and Dietrich H. Schwela (Geneva: World Health Organization, 1999). See also Alexander Gillespie, “The No Longer Silent Problem: Confronting Noise Pollution in the 21st Century,” *Villanova Environmental Law Journal* 20/2 (2009): 181–216.

47 See, e.g., Farhad Dabiri, Parvin Nasiri, and Nooshin Ahanrobay, “A Comparative Analysis of the Legal Status of Noise Pollution in Iran and the World,” *International Conference on Environmental Engineering and Applications* (Singapore: ICEEA, 2010), 188–190. Seyed Hamad Mirhossaini et al., “Environmental Noise Pollution in the City of Khoramabad, Iran,” *Journal of Environmental Science and Technology* 1/4 (2008): 164–168; Sanjay Marale et al., “Comparative Analysis of Noise Pollution in Pilgrimage Places from Maharashtra, India,” *Enrich Environment* 4/2 (2011): 3–12. On Ghana, see Keizer, *Unwanted Sound* (above n. 11), 269.

and home.<sup>48</sup> Although the Court initially ruled in their favor, the Grand Chamber disagreed, concluding that the margin of appreciation doctrine required deferring to the UK government's assessment of the threat posed by the night flights.<sup>49</sup> The dissenting opinion highlighted the importance of "environmental human rights." It suggested that the protection of a right against excessive noise was the proper jurisprudential conclusion. Some commentators felt that the reasoning gave too much weight to economic development over environmental human rights.<sup>50</sup>

The European Court of Human Rights subsequently found that excessive sound did violate human rights guaranteed in the European Convention of Human Rights.<sup>51</sup> In *Moreno Gomez v. Spain* (2005), the Court held that the failure of local officials to limit noise emitted by bars, restaurants, and discotheques to legal limits in an "acoustically saturated zone" violated a woman's right to Article 8, the right to respect for private and family life.<sup>52</sup> The Court was influenced by the fact that, for years, the government had been aware that violations of anti-noise policies had disturbed her at night and shirked its responsibility to address the problem.<sup>53</sup>

In the United States where noise is considered a serious public health problem that adversely affects quality of life, numerous statutes that cover noise have been

48 Application no. 36022/97, Oct. 2, 2001, referred to the Grand Chamber Aug. 7, 2003; Grand Chamber judgment, July 8, 2003. 2003–VIII Eur. Ct. Hum. Rts. 189 (July 8). In another case, *Ashworth and Others v. U.K.*, involving a claim of noise pollution related to low-flying aircraft, the Court ruled that the application was inadmissible. 2004–X Eur. Ct. H.R. 327 (2005).

49 The Grand Chamber was persuaded that the UK had mitigated the impact of the flights and had weighed the economic interests against the rights of the individuals who lived near the airport carefully enough. Although the Court found no violation of Article 8, it did find a violation of Article 13, the right to a remedy, due to the inadequate judicial review of the environmental assessment process. It agreed that the plaintiffs should receive attorneys' fees and compensation for other expenses associated with the litigation.

50 See, e.g., Alan Boyle, "Environment and Human Rights," *Max Planck Encyclopedia of Public International Law* (New York: Oxford University Press, 2012), §24; Boyle, "Human Rights or Environmental Rights: A Reassessment," *Fordham International Law Review* 18 (2007): 147–511.

51 Telmo Esteban Fernandez, "Environmental Cases in the ECHR: A Focus in [sic] Noise Pollution," *Yearbook on Humanitarian Action and Human Rights* (2009): 133–146.

52 Case of *Moreno Gomez v. Spain*, European Court of Human Rights, (2005), Application no. 4143/02. (2005) 41 E.H.R.R. 40 (ECHR, 11/16/2004). The Court reversed the burden of proof, noting that the sound level readings, taken by environmental inspectors outside her house, showing noise exceeded legal limits were sufficient; it was unnecessary to assess the decibel level inside her home.

53 Francis McManus, "Noise Pollution and Human Rights," *European Human Rights Law Review* (2005): 575–587.

enacted by various federal agencies including the Federal Aviation Authority, Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), the Secretary of Transportation, the Secretary of the Interior (for National Parks), the Department of Housing and Urban Development. In 1974, the EPA issued the first major report on noise, which called attention to portable air compressors and medium and heavy-duty trucks; it took only a few years to establish standards governing them, though.<sup>54</sup> Among the most important laws are the Federal Noise Control Act of 1972 and the Quiet Communities Act of 1978 to fund and facilitate the development of state local noise abatement programs. The Noise Control Act has been criticized for focusing primarily on the manufacture of products that create noise and for delegating too much regulatory control to state and local authorities. In addition, although the EPA could help with the guidelines concerning noise regulatory standards, the FAA retained considerable control and had the final say. The absence of a specialized agency to handle noise may be part of the problem with inadequate enforcement.

Despite the existence of much legislation on noise, there has been disagreement regarding the maximum decibel levels that the law should allow. In the United States, for example, the OSHA standard was ninety decibels over an eight-hour day, and the EPA has argued that this was not stringent enough.<sup>55</sup> The noise control laws are also subject to the criticism that they have not established objective or quantitative standards. Furthermore, the sanctions are minimal penalties and appear to be an inadequate deterrent. A major treatise concludes that “most anti-noise laws have therefore been almost entirely ineffective.”<sup>56</sup> Noise pollution standards are inconsistent: they vary in the magnitude of the noise permitted and contain differing definitions. They also differ with regard to the places regulated, the times they prohibit loud noise, and other issues.

Cities have taken varying approaches. Chicago adopted the first major city ordinance in the United States in 1971. Interestingly, the city had an imaginative enforcement plan. They would send out teams with portable sound meters to listen for violations. In 1972, New York City adopted a noise control code that relied on setting specific decibel limits for various machinery. The New York policy allowed for exemptions for specific activities. The law allowed individuals to apply for permits to engage in noisy activities.

54 Grad, *Treatise on Environmental Law* (above n. 22), §5.03[1d].

55 Grad, *Treatise on Environmental Law* (above n. 22) §§5, 5.03[1b]. For an overview of noise policies in the United States with an emphasis on Florida, see Paula P. Bentley, “A Line in the Sand: Florida Municipalities Struggle to Determine the Line Between Valid Noise Ordinances and Unconstitutional Restrictions,” *Stetson Law Review* 35 (2006): 461–508.

56 Grad, “Noise,” in *Treatise on Environmental Law* (above n. 55), §5.

Another approach has been to focus on insulating structures to withstand noise, rather than concentrating on the source of the noise.<sup>57</sup> Baltimore adopted a policy that regulated the use of amplification by stores. It stipulated that merchants could not make loud noises before 8 am in the morning, though they may at other times. Street vendors were also prohibited from crying out after 10 pm. Local ordinances on noise pollution that prohibit “unreasonable, raucous, or unnecessary noise” have been challenged on the due process ground that they are overly vague, but in the United States the laws have mostly been upheld.

Having considered some of the existing and emerging policies regarding unwanted sound, I turn now to the matter of loud religious sounds. In what follows I ask how to interpret the call to prayer in established frameworks. Even if the majority thinks religious sound is “noise,” it is not obvious that it should be subject to the policies. The question is simply whether or not officials should grant exceptions because of the motivation for making the sound.

## The Call to Prayer

The question of whether the Islamic call to prayer, or *adhan* (*azan*), deserves a religious exemption from existing noise laws has been fraught with controversy. What has made this especially controversial is the fact that traditionally the *adhan* takes place five times a day every day, from very early in the morning until the late evening.<sup>58</sup> Although some scholars deny that the Quran requires praying five times a day, the Muslim worldview seems to regard this as obligatory for adults.<sup>59</sup> Although one should not assume that all schools of Islamic jurisprudence approach prayer (*salat*) the same way, they do seem to share the view that praying five times a day is obligatory: “The five times of prayer (*miqat*) are defined as

57 Interestingly, insulation is said to be ill-advised for sacred buildings because “excessive use of sound insulation causes sacred spaces to lose one of their most essential qualities: the sense of otherworldliness, the atmosphere that creates conditions for transcendent experience.” Rudolf Stegers, *Sacred Buildings: A Design Manual* (Basel: Birkhauser, 2008), 97.

58 For a discussion of surahs in the Quran explaining the injunction for five prayers, see Kenneth Cragg, *The Call of the Minaret* (New York: Oxford University Press, 1964), 106–110. See also Imam Feisal Abdul Rauf, *What’s Right with Islam: A New Vision for Muslims and the West* (New York: Harper San Francisco, 2004), 50. Some scholars maintain that in earlier times, Muslims were required to pray only twice a day, morning and afternoon. See, e.g., Uri Rubin, “Morning and Evening Prayers in Early Islam,” in *The Development of Islamic Ritual*, ed. Gerald Hawting, vol. 27 (Aldershot: Ashgate/Variorum, 2006), 105–129. For the evolution in meaning of *adhan*, see C.H. Becker, “On the History of Muslim Worship,” in *Development of Islamic Ritual*, ed. Gerald R. Hawting, vol. 26 (Burlington, VT: Ashgate Publishing, 2006), 47–94.

59 Cafer S. Yaran, *Understanding Islam* (Edinburgh: Dunedin Academic Press, 2007), 39.



daybreak (*salat al-subh* or *fajr*), noon (*salat al-zurh*), mid-afternoon (*salat al-asr*), sunset (*salat al-maghrib*), and evening (*salat al-siha* or *atmama*), but the precise way in which these times are determined varies.<sup>60</sup> According to most treatises, despite the frequency of the call, it is not necessary to go to the mosque to pray except for on Friday.

The *adhan* is the call outside the mosque, and it is associated with the *iqama*, the beginning of the prayer inside the mosque. The *adhan* is considered a demarcation between the sacred and the profane, and it serves to unify the community.<sup>61</sup> Its importance is suggested by a Muslim custom associated with the birth of a child: “When a child is born in a Muslim family, after the midwife has completed her task, the *adhan*, or Call to Prayer, is pronounced in the child’s right ear and the *iqama*, or the establishment of prayer, in the left one, so that the first thing the child hears is the attestation of faith and the call to worship its creator.”<sup>62</sup>

Although this may not have always been the case, the tradition has evolved so that a Muslim man, the *muezzin*, calls from a tower of the mosque known as a minaret.<sup>63</sup> Historians contend that the *adhan* was inspired by other religious traditions: “The *adhan* itself was copied from the Christians and the Jews. Ibn Hisham tells us that when the first Moslems came to Medinah, they prayed without any preliminary *adhan*. But the Moslems heard the Jews use a horn, and the Christians the Nakus or clapper and they wanted something similar for their own use.”<sup>64</sup>

While in the past the *adhan* was accomplished by the human voice alone, in the mid-twentieth century amplification was used, most likely so as to reach a wider range of followers.<sup>65</sup> After loudspeakers began to be employed in the early 1950s,

60 Andrew Rippin, *Muslims: Their Religious Beliefs and Practices*, 4th ed. (London: Routledge, Taylor & Francis, 2012), 107. Rippin says that it is not clear why there are five times for prayer every day, but posits that it may be associated with the number’s ritual significance in the Muslim culture (e.g., the five pillars of Islam).

61 Muneer Goolam Fareed, “Adhan,” in *Encyclopedia of Islam and the Muslim World*, ed. Richard C. Martain (New York: Macmillan Reference USA, 2004), 13. See also Tong Soon Lee, “Technology and the Production of Islamic Space: The Call to Prayer in Singapore,” *Ethnomusicology* 43/1 (1999): 86–100, especially 86. As-Sayyid Sadiq, *Supererogatory Prayer*, trans. Muhammad Sa-eed Dabas and Jamal al-Din M. Zarabozo (Indianapolis: American Trust Publications, 1989).

62 Yaran, *Understanding Islam* (above n. 59), 46.

63 J. H. Richard and G. Gottheil explain that early on mosques did not have minarets and there was “no mention of a special place for the Muezzin,” “The Origin and History of the Minaret,” *Journal of the Oriental Society* 30 (1910): 132–154.

64 *Ibid.*, 133–134.

65 Mark Sedgwick, *Islam and Muslims: A Guide to Diverse Experience in a Modern World* (Boston: Intercultural Press, 2006), 73; Umar F. Abd-Allah, “Living Islam with Purpose,” *UCLA Journal of Islamic and Near Eastern Law* 7 (2008): 17.

the debate over this custom became even more heated. When individuals lived in residential communities mainly with those belonging to their own faith, this was less likely to be a problem. As people migrated to live in pluralistic societies, the sound of the adhan has sometimes been startling to others. Because of its frequency and volume, there has been, in some quarters, little tolerance for it.

The call to prayer is an enigma to Westerners. First, in trying to classify the sound, some might mistakenly treat it as music. This would be incorrect, however, as Muslims do not regard the recitation of Quran as music; branding it as such, in their eyes, would be sacrilegious.<sup>66</sup> Furthermore, even when Westerners misinterpret the call to prayer as music (often comparing it to the peals of church bells),<sup>67</sup> they tend to treat it as “noise” anyway. They consider it “unwanted” noise; to Muslims, though, adhan is sound and certainly not noise.<sup>68</sup>

## Contemporary Debates

In the twenty-first century, public officials in pluralistic societies have been confronted with new cultural groups seeking to follow religious traditions. In some of most prominent disputes, muezzin simply wished to call members of the community to prayer from a special building. The reaction by the majority to what they regarded as the “acoustic occupation of space” shows that the call to prayer clearly touched a nerve; because the majority has sometimes reacted with overt hostility, these debates deserve careful scrutiny. Since the adoption of the loudspeaker, which considerably increased the adhan’s volume, there have been numerous direct and indirect attempts to regulate the call to prayer. When this happens, some Muslims argue that sanctions infringe upon their right to religious freedom.

Many controversies in the West have revolved around questions such as whether mosques could be built in cities, or whether minarets, the tower on the

66 “The cultural logic here is that labeling the Qur’anic recitation ‘music’ would impugn the Qur’an’s claim of uniqueness. If the Qur’an is truly inimitable, totally unique, and of divine origin, it simply cannot be treated or viewed as comparable to any other object, certainly not a human object. To call its recitation ‘music’ would therefore demean it by classifying it as belonging to a whole range of purely ordinary mundane creations.” Alan Dundes, *Fables of the Ancients? Folklore in the Qur’an* (Lanham: Rowman & Littlefield, 2003), 21.

67 Thus, although the selective enforcement argument that pervades the discussion of sound regulations often compares the peals of church bells to the call to prayer, some Muslims might strongly object to this comparison.

68 Naveeda Khan, “The Acoustics of Muslim Striving: Loudspeaker Use in Ritual Practice in Pakistan,” *Comparative Studies in Society and History* 53/3 (2011): 586.

mosque, could be erected on top of them.<sup>69</sup> Architectural matters have generated remarkable conflict, largely for the symbolic reason that: “[t]he mosque is an interface between the urban environment, Muslim citizens, and religious pluralism.”<sup>70</sup> In Italy, Germany, the United Kingdom, and the United States highly publicized mosque controversies have attracted widespread public attention.<sup>71</sup> In some cases, outright bans were enacted. The explicit justifications for bans varied somewhat, but included objections that the design would be incompatible with other buildings in the surrounding area and that the mosques would cause traffic congestion in particular areas;<sup>72</sup> in other cases, there were more specific objections to the minarets.

Although American and European cities have other tall structures such as church towers and steeples, those are generally viewed as “secular.”<sup>73</sup> By contrast, Islamic structures are often viewed as highly visible religious symbols in public spaces. In an era characterized by “Islamophobia,” minarets are sometimes perceived as threatening.<sup>74</sup> Occasionally opponents admit that they simply do not

69 See, e.g., Special Issue, “Mosque Conflicts in Europe,” *Journal of Ethnic and Migration Studies* 31/6 (2005). See also Katherine Pratt Ewing, “Legislating Religious Freedom: Muslim Challenges to the Relationship Between Church and State in Germany and France,” in *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies*, ed. Richard A. Shweder, Martha Minow, and Hazel Rose Markus (New York: Russell Sage Foundation, 2000), 66.

70 Nilufer Gole, “The Public Visibility of Islam and European Politics of Resentment: The Minarets-Mosques Debate,” *Philosophy and Social Criticism* 37 (2011): 383–392, specifically on 386.

71 The most famous controversy surrounded the Cordoba House, a mosque to be built a few blocks from Ground Zero. Other mosque disputes that attracted media coverage include one in Temecula, California. Phil Willon, “Planned Temecula Mosque Draws Critics,” *Los Angeles Times*, July 18, 2010, A33, A38. Opponents of the erection of an Islamic Center in Tennessee actually denied that Islam was a valid religion. The Obama Administration twice censured the local officials saying that failure to authorize the mosque would violate the civil rights of its members. Thomas Perez, Assistant Attorney General for Civil Rights, noting that mosques had to be treated the same as synagogues, commented: “This is not only common sense. It is required by federal law.” See Richard Serrano, “Justice Department Back Building of Tennessee Mosque,” *Los Angeles Times*, October 19, 2010, A8. On Germany, see Mark Landler, “Germans Split Over a Mosque and the Role of Islam,” *New York Times*, July 5, 2007, A3.

72 See, e.g., Phil Willon, “Mosque OKd Over Protests,” *Los Angeles Times*, January 27, 2010.

73 Todd Green, “The Resistance to Minarets in Europe,” *Journal of Church and States* 52/4 (2010): 619–643. He notes: “few buildings in Europe generate the kind of protest and conflict that mosques do.”

74 Wilfried van Winden, the architect for a mosque in Rotterdam, rejects the idea Muslims should have to hide their identity from the host country. He views “minaret phobia” as

want to attract Muslims to their neighborhoods. These individuals feel that banning the mosques will deter members of religious minorities from moving to their communities. Some publicly admit that they associate the erection of mosques with terrorism.<sup>75</sup> In some instances the explicit concerns involved “noise.” At least one commentator has suggested that the visual presence of minarets accompanied by the acoustic presence of the *adhan* reinforces fears of a Muslim takeover and of the imposition of their value-system.<sup>76</sup> Thus, even disputes ostensibly about other matters may be partly motivated by concerns about loud religious sounds.

One of the cases involving one of the more explicit expressions of hostility occurred in Birmingham, England. Although the city council considered the design consistent with aesthetic standards and gave its official approval, it was subject to the restriction that “no sound reproduction or amplification equipment shall be installed or used on any part of the said minaret at any time.”<sup>77</sup> The Muslim community asked that the restriction be removed, giving two reasons: first, because churches could ring their bells any day of the week, the mosque committee’s request to install amplification “was not unreasonable,”<sup>78</sup> and second,

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a way for the dominant culture to oppress minority cultures in order preserve national identity. Wilfried van Winden, “Freedom Equals Happiness: A Plea for Pluralism in an Open Society,” in *The Mosque*, ed. Ergün Erkoçu and Cihan Buğdaci (Rotterdam: NAI Publishers, 2009), 80–87.

- 75 When a pastor of a Baptist Church was asked why he objected to the construction of a mosque in Temecula, he responded, “The Islamic foothold is not strong here, and we really don’t want to see it spread. There is a concern with all the rumors you hear about sleeper cells and all that. Are we supposed to be complacent just because these people say it’s a religion of peace? Many others have said the same thing.” Phil Willon, “Temecula Mosque” (above n. 71), A33, A38.
- 76 Green contends that the resistance to minarets is related to the *adhan* but says that this is driven more by “what might be on the horizon rather than by current practice,” “Resistance to Minarets” (above n. 73), 632.
- 77 Richard Gale provides an excellent account of this dispute. Gale, “Planning Law and Mosque Development: The Politics of Religion and Residence in Birmingham,” in *Law and Ethnic Plurality: Socio-Legal Perspectives*, ed. Prakash Shah (Leiden: Martinus Nijhoff, 2007), 127–144. For a consideration of a South African case in which the Muslim community unsuccessfully challenged the validity of a contract clause prohibiting the use of amplification, see *Garden Cities Incorporated Association Not for Gain v. Northpine Islamic Society*, 1999 2 SA 268 [C].
- 78 An important shift in argumentation was the willingness of the planning authority to address the comparison between the call to prayer and church bells, acknowledge that both led to complaints, and distinguish them on the basis of the frequency of the call to prayer, which would likely constitute a nuisance. See Gale, “Planning Law” (above n. 77), 134–137.

because another planning authority had allowed the adhan, thereby setting a national precedent.<sup>79</sup>

During the process of public comment, the city council received numerous letters expressing concerns: “that Muslims don’t live in the area; that to approve the call to prayer would be taking ‘race relations’ too far; that England is still a Christian country, whilst Islam is a ‘false’ religion; that the call would devalue properties and contribute to the degeneration of the area; that the sound of the call is unpleasant and ‘alien’ to English heritage; that this application is the ‘thin end of the wedge’ and will lead to other similar applications elsewhere; and that the sound of the call will be a distraction to motorists, leading to road accidents.”<sup>80</sup>

The strength of the opposition supported the council’s decision not to approve the sound equipment, and so under community pressure, the mosque committee withdrew the application for a sound permit to broadcast the call to prayer. After the passage of several years, and more consultation, the application to broadcast the adhan was approved, after an initial trial period. The community calmed down, and the call to prayer was allowed without further ado.

In some countries the proposal for a ban on the call to prayer via loudspeakers comes from the government itself. In Israel, for instance, a member of Knesset introduced a bill proposing an amendment to the nuisance law in December 2011, which, if enacted, would ban the amplified call to prayer throughout the entire country.<sup>81</sup> The “Muezzin Law” was apparently inspired by concerns over noise pollution, the volume of the speakers used in *adhan*, and originated from: “a world view whereby freedom of religion should not be a factor in undermining quality of life.”<sup>82</sup> As Israel was not reacting to a request from a new religious minority or a new method of handling the call to prayer, it is unclear what motivated the proposal at that particular moment.<sup>83</sup> Reactions to the proposal to bar the use of the public announcement system as part of the call to prayer were strongly negative;

79 Ibid., 132.

80 Gale provides empirical data showing the intensity of public opposition. Some of the points made are disturbing. For example, some held the view that allowing the *adhan* would make the Muslims too prominent in the community, putting them at risk for hate crimes. Refusing to allow the call to prayer thus was said to be in their best interest.

81 Donald Macintyre, “Netanyahu Backs Law to Ban Loudspeakers at Mosques Across Israel,” *The Independent*, December 13, 2011, 30.

82 Ibid.

83 According to one account, the “Muezzin” law was part of “a recent wave of legislation proposed by the Knesset targeting Arabs and leftists groups.” Some Arab religious authorities noted that they had been practicing this tradition for fifteen centuries in Jerusalem. Ibid., “Netanyahu” (above n. 81).

the sponsor of the bill even received death threats.<sup>84</sup> Thousands of Israeli Arabs took to the streets to protest publicly against the bill.<sup>85</sup>

Even if the government does grant a request to allow amplification of calls to prayer, members of the community may object to the accommodation. In Hamtrack, Michigan, after the city council approved the request to broadcast the call to prayer, effectively granting a religious exemption, some citizens objected to this. To minimize conflict, the mosque leadership decided not to broadcast before 6 am or after 10 pm. Because the scheduled times of prayer were available on websites, this ostensibly obviated the need to rely on a broadcast call to prayer. Despite the conciliatory attitude of religious elites at the mosque, some residents were not appeased.<sup>86</sup> The Muslims sponsored an initiative, so members of the community could vote on whether or not to retain the religious exemption from noise ordinances. Although there was some confusion about what they were voting for, the measure was approved, and there has been no further controversy.<sup>87</sup> Whereas this was a religious exemption for Muslims in a city in the United States, it is also conceivable to have an exemption policy at the national level.<sup>88</sup>

The Netherlands is one of the only countries that has authorized the call to prayer, subject to stringent regulations. The adhan can only be sounded on Fridays and cannot exceed the decibel levels of noise laws in effect.<sup>89</sup>

In some countries there is a concerted effort to frame the issue as political rather than religious. Some have asked whether the adhan is actually required by Islam. The logic is that if the call to prayer is not part of the prayer itself, then it must not be religiously required. In some debates there is a tendency to deny that the adhan, minaret, and mosque are religious symbols. If that is the case, then religious freedom would not afford them any protection from laws prohibiting them.

84 Lahav Harkov, "MK Michaeli Faces Death Threats after 'Muezzin Bill,'" *The Jerusalem Post*, April 26, 2012.

85 Arie O'Sullivan, "Silencing the Muezzin," *The Jerusalem Post*, January 1, 2012, 10.

86 Stephanie Simon, "Muslim Call to Prayer Stirs a Midwest Town," *Los Angeles Times* May 6, 2004, A17. One woman said she would move if she could hear the call to prayer in her home.

87 Weiner, *Religion Out Loud* (above n. 5). Chapter 6, 158-194 provides a detailed account of the dispute about the call to prayer and ultimate victory for the religious minority. In a comparative analysis of the legal disputes over religious sound, Weiner shows that Muslims were the only group to win an exemption for religious sound (for the call to prayer) in this town in Michigan.

88 New York City also adopted a religious exemption from its noise code, which generated controversy.

89 Todd Green, "Resistance to Minarets" (above n. 73), 94.

In Switzerland, where the most notorious debate involving Muslim worship took place, the adhan was never allowed because of strict noise laws, and a total ban on the construction of minarets was proposed. Proponents of the ban on minarets insisted that the dispute was not about religion. Describing the structures as political rather than religious, they avoided comparisons to church steeples. They also sought to link the anti-minaret campaign to women's rights issues such as religious garb, forced marriage, and female genital cutting. Hence the campaign emphasized that the minaret represented political Islam and that rejecting this symbol would be to reject the "Islamicization" of Switzerland.<sup>90</sup>

Because the towers had not been used for the call to prayer, the minaret appeared not to serve any religious function.<sup>91</sup> Thus, the refusal to allow their construction did not constitute a violation of religious freedom. While this makes a certain amount of sense, this reasoning is absurd because to Muslims the minarets are still regarded as the site for the projection of religious sounds—even if the dominant culture refuses to allow this to transpire.

Opponents of the ban based their argument on religious liberty, saying it violated the following: the Federal Constitution; the European Convention on Human Rights, principally Article 9—the right to religious freedom; the International Covenant on Civil and Political Rights, specifically Article 18—the right to freedom of thought, conscience, and religion; Article 27—the minority rights provision; and Articles 2, 3, and 26—the right to non-discrimination. Yet the ban prevailed. Proponents said their support of the ban "was an effort to prevent the spread of Islam and the socio-political model it represented."<sup>92</sup> They also rejected the proposition that the minarets were important to religious practice.

The international community was aghast at the ban. The United Nations Human Rights Council adopted a resolution condemning the defamation of religion (without specifically mentioning Switzerland, though).<sup>93</sup> The ban was

90 Jean-Francois Mayer, "A Country Without Minarets: Analysis of the Background and Meaning of the Swiss Vote of November 29, 2009," *Religion* 41/1 (2011): 11–28, especially on 18.

91 *Ibid.*, 14. Mayer notes that as of 2011 there were only four minarets in Switzerland and none had ever been used for the call to prayer.

92 Todd Green "The Resistance to Minarets in Europe," *Journal of Church and State* 52/4 (2011): 640, doi:10.1093/jcs/csq110 (accessed January 5, 2011). For a balanced consideration of whether the minaret ban violates international human rights law, see Marcel Stussi, "Banning of Minarets: Addressing the Validity of a Controversial Swiss Popular Initiative," *Religion and Human Rights* 3 (2008): 135–153. Stussi notes that Switzerland entered a reservation to Article 26, but it may be invalid as inconsistent with the object and purpose of the treaty, *ibid.*, 145–146.

93 Mayer, "Country Without Minarets" (above n. 90), 25. Prior to the vote, the Human

widely criticized as an affront to religious liberty,<sup>94</sup> despite the fact that the issue was, admittedly, complicated, due to the characterization of the minarets as lacking an obvious religious function. Indeed, the minarets had not and could not be used for the adhan because of Switzerland's strict noise pollution laws.

One of the most serious concerns here was the ability of the majority to vote to rescind basic rights through mechanisms of direct democracy. Some commentators recognized that this type of voting on the protection of fundamental rights could undermine the legitimacy of a democratic political order.<sup>95</sup> Because this was the underlying problem in this election, the campaign made every effort to avoid characterizing the minarets as religious symbols, so as to deny that an important human right was at stake. In short, the dominant view in the vast literature on the Swiss minarets was that the ban was motivated by religious discrimination.

## Comparative Jurisprudence

In the legal disputes about "noise," some ask whether Muslims have been singled out and punished for their religious sounds as compared to other groups. The call to prayer is often compared to the ringing of church bells,<sup>96</sup> and much of the commentary highlights the role of church bells in medieval times. In England, cases in the nineteenth century addressed the question of whether bell ringing constituted a private nuisance.<sup>97</sup> Evidently, churches in France sometimes competed

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Rights Committee expressed concern that its adoption would "bring Switzerland into noncompliance with its obligations under Articles 2, 18, and 20 of the ICCPR." Lorenz Weiner, "Panacea or Pathetic Fallacy? The Swiss Ban on Minarets," *Vanderbilt Journal of Transnational Law* 43 (2010): 900.

94 Deborah Ball and Nicholas Birch, "Swiss Ban Minarets in Controversial Vote," *Wall Street Journal*, November 30, 2009, A8. Even before the vote took place, there was widespread condemnation. See Simon Bradley, "Anti-minaret Vote Alarms UN Rights Experts," *Swiss News, World wide*, October 13, 2009, [www.swissinfo.ch/eng/politics/internal\\_affairs/Anti-minaret\\_vote\\_alarms\\_UN\\_rights\\_experts.html?cid=9772](http://www.swissinfo.ch/eng/politics/internal_affairs/Anti-minaret_vote_alarms_UN_rights_experts.html?cid=9772). Switzerland was also attacked for pervasive racism by the European Commission against Racism and Intolerance, the UN Committee on the Elimination of Racial Discrimination, and the UN Human Rights Council.

95 Langer, "Panacea or Pathetic Fallacy" (above n. 94), 907.

96 See, e.g., John Eade, "Nationalism, Community, and the Islamicization of Space in London," in *Making Muslim Space in North America and Europe*, ed. Barbara Daly Metcalf (Berkeley: University of California, 1996), 255. See also the special issue "Limitations on Religious Freedom," *Emory International Law Review* 19 (2005).

97 *Soltau v. De Held* (1851) (NS) 133. For commentary on the status of bells, see Thomas Watkin, "A Happy Noise to Hear? Church Bells and the Law of Nuisance," *Ecclesiastical*



to have the loudest chimes in order to convey the importance of their parishes.<sup>98</sup> Even in the twenty-first century, church bells can be fairly loud and may ring every fifteen minutes in some countries, like Switzerland,<sup>99</sup> historically, they chimed as early as 5 am.<sup>100</sup> However, it is also true that when there have been complaints about their peals, courts have on occasion prohibited the ringing of the church bells.<sup>101</sup>

In a nineteenth-century case in the United States, St. Mark's Church argued that the church bells were based on a thousand years of tradition, and as sacred noise were not subject to government regulation. Moreover, the community tolerated industrial noise, which was at least equally as loud. However, the neighbors who objected to the bells argued that the bells posed a threat to public health, and submitted to the court affidavits of over twenty doctors that attested to the serious adverse health effects of the bells. The judge considered whether the bells caused a cognizable injury and whether the court could regulate the church. Ultimately the judge issued an injunction barring the defendants from ringing the bells. Although the Supreme Court of Pennsylvania upheld the injunction, it gave the church the right to ring the bells on Sunday for very brief periods but not for early morning services.<sup>102</sup> As time went on, the Court granted more and more accommodations, so that the prohibition was transformed to an assessment as to the legitimate time the church could ring the bells. The culmination of the lawsuit was a compromise that allowed for bell-ringing within certain limits defined by the Court.

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*Law Journal* 4 (1996): 545–555; Sara Thomas and Thomas Glyn Watkin, “Oh Noisy Bells, Be Dumb: Church Bells, Statutory Nuisance and Ecclesiastical Duties,” *Journal of Planning and Environmental Law* (1995): 1097–1105.

98 Alain Corbin, *Village Bells: Sound and Meaning in the Nineteenth-Century French Countryside* (New York: Columbia University Press, 1998), 211.

99 Joanna Pfaff-Czarnecka, “Accommodating Religious Diversity in Switzerland,” in *International Migration and the Governance of Religious Diversity*, ed. Paul Bramadat and Matthias Koenig (Montreal: McGill-Queen's University Press, 2007), 225–257.

100 See H. B. Walters, *Church Bells* (London: A. R. Mowbray & Co., 1908). Walters discusses how bells were used in medieval times to tell time, even before clocks were invented. For the early bell at 5 AM, see p. 100.

101 An example of litigation over church bells involved St. Mark's Church in Philadelphia. See chapter 2, pp. 40–76 of Weiner, *Religion Out Loud* (above n. 5), who gives a detailed account of this interdenominational conflict among Protestants. See also A. Thomas Miller, “Bells on Trial, Bells Restored: The Story of the Bells of Saint Mark's Church Philadelphia,” (unpublished paper, 2000).

102 *Harrison v. St. Mark's* 34 Leg. Int. 222 (Pa. 1877). See also Weiner, *Religion Out Loud* (above n. 5), 50–71.

Occasionally in the Jewish community there have been requests for exemptions from noise laws.<sup>103</sup> For example, in *R. v. Rottenberg*, a rabbi was prosecuted on several counts of noise nuisance.<sup>104</sup> Although he initially received a two-year conditional discharge and was ordered to pay the costs of the litigation, upon appeal the Crown court found that the noise did not constitute a nuisance under the Environmental Protection of 1990 and thereby avoided addressing the question of whether the prosecution violated his right to religious freedom under Article 9 of the European Convention of Human Rights.<sup>105</sup>

The question of whether legal systems should grant exemptions to religious and cultural communities has also come up in other countries such as India.<sup>106</sup> In some appellate decisions, the Indian Supreme Court grappled with whether there could be amplified sound in religious buildings. When presented with the argument that enforcing a noise law violated religious freedom, the Court held that the right was not absolute and could not be exercised in such a way as to disturb the peace of others.<sup>107</sup> Moreover, the fact that other communities failed to enforce noise laws was not a reason to dispense with it in this community. The Court considered whether religious festivals such as Diwali deserve exemptions from noise laws. In considering the specific types of noise involved and whether it was necessary for the performance of the tradition, the Court reasoned that it was a celebration involving lights and did not require the use of noisemakers such as firecrackers.

Deciding whether to authorize an exemption for a holiday that occurs once a year is quite different than deciding on religious exemptions from noise laws for customs that occur multiple times every single day. If the religious event is only once a year, then perhaps the government should grant a permit. The problem, however, is when the sound is frequent, intense, and during nocturnal hours. It remains to be seen whether existing international law and constitutional rights support granting them in either circumstance.

103 There was a controversy in Brooklyn, New York. Jesse Serwer, "Sabbath Sirens: Madness in Midwood," *Brooklyn Skyline*, March 8, 2004.

104 *R. v. Rottenberg*, [2007], EWHC (Admin) 166 [3], [9].

105 For a detailed account of the case and its significance, see Samantha Knight, "Sacred Space and the City: Religious Buildings and Noise Pollution," *Harvard International Law Journal* 49 (2008): 50–55.

106 Other countries have adopted noise laws that were applied to religious congregations, e.g., "Ghana: Churches Comply with Ban on Noise Making," *Ghana News Agency (GNA)*, May 13, 2007, [www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=123973](http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=123973). The US Department of State Religious Freedom Report, available at <http://www.state.gov/j/drl/rls/irf>, makes reference to similar limitations in Costa Rica, Cuba, Nicaragua, and Uganda. I thank Jonathan Fox for bringing these examples to my attention.

107 *In Re: Noise Pollution Restricting Use of Loudspeakers v. India* (2005) 5 SCC 733.

## Religious Freedom

The right to religious freedom is generally understood to allow individuals the right to hold particular beliefs and to act on them unless this interferes with compelling or significant government interests. In the International Covenant on Civil and Political Rights, the right to religious freedom is guaranteed in Article 18. The right encompasses both beliefs and their manifestations and appears broad in scope. However, Article 18 (3) contains a restrictions clause permitting limitations on the grounds of public health, safety, order, and morals. These exceptions could effectively narrow the scope of what would otherwise seem to be an expansive liberty. To provide direction, the Human Rights Committee issued General Comment 22 giving an interpretation of Article 18. It interprets practice as covering a “broad range of acts”; in its list of acts it explicitly mentions “the right to build places of worship.” Furthermore, General Comment 22 stipulates that the restrictions may not be applied in a discriminatory manner. Although there is no reference to religious sounds *per se*, it does explicitly recognize exemptions from military service. This suggests that jurists embraced policies that recognize the importance of religious motivations.

With regard to the call to prayer, regulation may be justifiable if it is deemed incompatible with public morals or public health. Some might argue that the frequency of the calls deserves consideration. Because the call is traditionally five times a day, every day, this arguably constitutes an intrusion in the way of life of those who do not subscribe to this religion. The non-Muslims are effectively a captive audience and cannot easily shield their ears. For those who prefer tranquility, the call to prayer, when amplified on a daily basis, interferes with their way of life. In those countries in which the dominant culture decides on what constitutes “public morals,” there may be a basis for at least restricting the manner in which the calls are conveyed. For those who favor a culture of silence, there may be reason not to allow the call to prayer, at least in its amplified form.

While there is overwhelming evidence of the deleterious health effects of noise pollution in general, evidence regarding the health effects of the call to prayer is non-existent or inconclusive; it is hard to separate the noise levels it produces from general measures of community noise. Yet there are, most assuredly, adverse physical and psychological consequences for those who find the sounds objectionable. Should there be a determination that the decibel level regularly exceeds internationally agreed-upon standards, as appears to have been the case in Pakistan, then that might provide a basis for limiting the call to prayer.

Article 9 of the European Convention of Human Rights and Fundamental Freedoms contains a strong provision that protects acts that are “motivated and influenced by a religion or belief.” This might afford protection to the call

to prayer.<sup>108</sup> In *Mannoussakis v. Greece*, the European Court of Human Rights rendered a decision that might apply to the call to prayer. It held that denying a permit to erect a place of worship constituted a violation of the “right to worship and observance.”<sup>109</sup> Another argument is that the treatment of Muslims seeking to build mosques differs from that of other religious communities. That might constitute a violation of the prohibition of discrimination in Article 14. The European Court has also held that the right to religious freedom includes the right to proselytize.<sup>110</sup> If it encompasses a right to persuade others to join a faith, presumably it would also protect the right to call members of one’s own faith to prayer.

Analyzing this question in the framework of international law and European law, it appears that there is no basis for banning the call to prayer entirely. There may, however, be some basis for lowering the volume. In international law, the limitations clause might provide a rationale for a limitation on sound level. In European law the margin of appreciation of doctrine could also be applied to support policies stipulating that groups lower the volume of their projected religious sounds.

There is some basis for religious exemptions in the international jurisprudence. Whether states would make exception in the case of nuisance or noise pollution for the loud sounds of religious minorities remains to be determined.

In American constitutional law, the case law regarding the First Amendment can provide guidance on this issue; decisions on the grounds of both free exercise and free speech show American approaches to this issue. To see the extent to which existing doctrines offer protection to those wishing to engage in the adhan, one begins with the belief-action distinction associated with late nineteenth-century decisions about polygamy. Insofar as religious conduct violates criminal law, the US Supreme Court held that it may be proscribed. Religiously motivated actions are, for the most part, not protected when they conflict with a neutral law of general application. In *Smith v. Oregon*, the US Supreme Court presented its “hybrid” analysis to justify lowering the standard of review. Setting aside the compelling state interest, it noted that religious freedom had previously been afforded the highest degree of protection because since cases in which it was invoked also involved other constitutional rights.

After *Smith*, a coalition of liberal and conservative forces lobbied Congress to pass the Religious Freedom Restoration Act (RFRA), which the Supreme Court

108 Some scholars contend that Article 9 would likely protect the call to prayer, church bells, and religious architectural features like minarets and steeples. See, e.g., Langer, “Panacea or Pathetic Fallacy?” (above n. 93), 887.

109 *Manoussakis v. Greece*, 1996–IV Eur. Ct. H.R. 1346 §36.

110 *Kokinnakis v. Greece*. 17 EHRR 397, 1994 Application no. 14307/88.

subsequently struck down in *Boerne v. Flores*, insofar as it applied to the states. Despite evolving jurisprudence in the United States,<sup>111</sup> most states still require a compelling state interest to justify policies that impinge upon religious freedom, sometimes on the basis of states' Religious Freedom Restoration Act (RFRA) laws. The question, then, is whether the call to prayer in the various states might receive constitutional protection under this higher standard of review.

At the federal level, some degree of protection might be afforded by the Religious Land Use and Institutionalized Person Act of 2000 (RLUIPA). Adopted by Congress in the midst of the turmoil over legal protection for religious freedom, the law was enacted to protect religious minorities from discrimination in zoning and landmark policies. It protects the groups from governmental policies that burden groups in their use of land for religious purposes by mandating use of the compelling-state-interest test. RLUIPA applies to mosque disputes insofar as municipalities might attempt to prevent the construction of the buildings.<sup>112</sup> It is less clear, however, whether it would vindicate the rights of those who wish to continue with the call to prayer.

To my knowledge, there has not been any appellate decision on the call to prayer that invokes the free exercise of religion clause. The decisions that provide more relevant analysis for the treatment of the call to prayer involve freedom of speech instead. Insofar as this case law affords insight into a constitutional approach, it deserves consideration. It may seem intuitively appealing to approach the issue in this fashion. As discussed earlier, laws that ban the adhan outright would be overt religious discrimination. But if the issue is the volume of the sound, it makes a certain amount of sense to analyze the issue within the free speech framework, at least in the context of US constitutional law.

One might consider the possibility that the adhan is a question of religious speech. If laws regulate it on the basis of its content, this would clearly constitute an impingement on freedom of speech. However, mandating a lower decibel limit might well be acceptable under time, place, and manner restrictions. In the case of *Saia v. New York*, the issue was whether a Jehovah's Witness could preach in a park where people were having picnics.<sup>113</sup> The loudspeakers employed by

111 In *Smith v. Oregon*, the US Supreme Court presented its "hybrid" analysis to justify lowering the standard of review. Setting aside the compelling state interest, it noted that religious freedom had previously been afforded the highest degree of protection, but the case in which it was implicated also involved other constitutional rights.

112 For a thoughtful overview see Daniel N. Lerman, "Taking the Temple: Eminent Domain and the Limits of RLUIPA," *Georgetown Law Journal* 96 (2008): 2057–2101.

113 *Saia v. New York*. 334 U.S. 558 (1948). For a detailed account of the case, see Weiner, *Religion Out Loud* (above n. 5), ch. 4.

Mr. Saia to deliver his sermons bothered others in the park. Initially, the lower court considered his sermons to be a nuisance; on appeal, though, the US Supreme Court held that barring him from preaching violated freedom of speech. Empowering law enforcement to prevent individuals from speaking in public places with amplification risked censorship. Consequently, this was deemed to be prior restraint and hence illegitimate. The Court anticipated the widespread use of technology to facilitate political activity.<sup>114</sup>

In subsequent cases the US Supreme has allowed for the regulation of amplification. In *Kovacs v. Cooper* (1949), the Supreme Court upheld against a vagueness challenge a local ordinance banning “loud and raucous” sound amplification.<sup>115</sup> In *Ward v. Rock Against Racism* (1989), the Court held that requiring musical groups to use a city’s sound technician and sound system did not violate their right to freedom of speech.<sup>116</sup> As long as the rules are applied fairly to all groups irrespective of the content of their speech, limits on the decibel level have been held constitutional. This suggests that a challenge to the application of sound limit policies to the adhan would be unlikely to succeed.

## Status of the Call to Prayer in Islamic Law

Scholarship on the Muslim prayer rituals focuses specifically on the verbal formulas they contain and the reason behind their being held five times a day at specific times. There is little explanation for the call to prayer itself. Just because it has not been codified, though, does not mean it is not considered important or required. It may be a form of religious customary law. However, even if the call to prayer is regarded as an indispensable part of a religious tradition, it is unlikely that the use of loudspeakers, invented in the mid-twentieth century, is. Yet, in some places, it may have come to be viewed as essential—even if there is no recorded historical justification for amplification.

Furthermore, selective enforcement of noise ordinances against Muslim calls to prayer—while ignoring Christian church bell ringing—would be illegitimate and constitute religious discrimination. The reason why church bell ringing is not curbed is that communities generally do not mind the peals of the bells. While in past centuries public officials also attempted to limit this type of religious sound, it became a more familiar part of the soundscape. As the bells faded into the background, objections to them diminished as did litigation challenging them.

114 Indeed, the Occupy Wall Street movement encountered resistance to its use of microphones. This led to the much publicized “human microphone.”

115 *Kovacs v. Cooper*, 336 U.S. 77 (1949).

116 *Ward v. Rock Against Racism*, U.S. 781 (1989). See also *Daley v. Sarasota (City)*, 752 So. 2d 124 (Fla. App. 2 Dist. 2000).

Some municipal ordinances in the United States even include exemptions for church bells.

This might suggest that Muslims will have to go through a similar process of socializing the majority to accept their sounds, so that pluralistic societies will no longer be affected by it. Ultimately, this sort of speculation may be wishful thinking. Because of the frequency, intensity, and timing (early morning) of church bells and the adhan, some neighbors will claim to be adversely affected.

With respect to the call to prayer, it is the use of loudspeakers that sparked the most intense conflict. Yet, it is not obvious that use of this technology is necessary for the religious practice.<sup>117</sup> There is no indication in the Quran that the call to prayer requires amplification, so the belief that it is required may be based on customary law. Because it is not based on written authority, it may be easier to propose a modification in the sound level.

As the use of loudspeakers seems almost guaranteed to generate conflict, it might be in the best interest of communities to reconsider the use of amplification. If they should choose to turn down the volume voluntarily, that would reduce tensions in many sectors. It is always preferable for the community to decide on its own to bring about change from within than to have it imposed by external forces. The issue may boil down to the question of what level of religious sound is considered truly necessary.

## Toward a Compromise through Technology

Insofar as individuals have a right to a call to prayer, governments should try to follow a principle of maximum accommodation. In this context, though if the loudspeaker is not critical for the purpose of notifying members of the group of the time of prayer, other modes of communication might serve as well. The use of new forms of technology offers a possible means by which to notify followers effectively without disturbing nonmembers of the religious group. This could be

117 Naveeda Khan observes that the introduction of the loudspeaker in Postcolonial Pakistan was met with ambivalence. See Naveeda Khan, "Acoustics" (above n. 68), 571–594. Some leaders were opposed to its use. In South Africa, the Court enforced the contract clause prohibiting amplification of the call to prayer, because the judge was unconvinced that amplification was essential (it was only permissible). In short, while the agreement did represent a limitation of the right of religious freedom, it was not unreasonable, "because the religious practice was not forbidden but merely a particular form of its expression. The amplification of the call to prayer had thus not been an essential element of Islam." Gerhard van der Schyff, "Limitation and Waiver of the Right to Freedom of Religion: *Garden Cities Incorporated Association Not For Gain v. Northpine Islamic Society*," 1999-2 SA 268 [C], *Journal of South African Law* (2002): 376, 379–380; Lee, "Technology" (above n. 61).

achieved through messages sent on radio broadcast, text messages on cell phones, or those sent via new forms of social media such as Twitter or Facebook.

In a brilliant analysis of the use of media technology in Singapore to serve the interests of a religious community, Tong Soon Lee shows how such a compromise might work with radio broadcast.<sup>118</sup> He demonstrates how leaders in the Muslim community supported alternative means of calling their members to prayer after there were objections to the use of loudspeakers.<sup>119</sup> After a series of consultations with the government about its noise abatement campaign,<sup>120</sup> Islamic organizations agreed to three changes: “(1) Reduce the amplitude of loudspeakers in existing mosques, where they remain facing outside. (2) Re-direct loudspeakers toward the interior of new mosques to be built in the future, and (3) Broadcast the call to prayer five times a day over the radio.”<sup>121</sup>

The new mode of carrying out the call to prayer via radio was liberating because Muslims could choose whether to participate in an “imagined Islamic community.”<sup>122</sup> It also benefited women, who usually did not attend prayers in the mosque, by affording them equal access to the religious experience.<sup>123</sup>

Perhaps most importantly, the new method served as a means of maintaining community identity: “In Singapore the use of the radio broadcast in the call to prayer demonstrates how a community actively employs media technology to maintain collectivity in a pluralistic society; media technology here affirms

118 Lee, “Technology” (above n. 61).

119 Evidently loudspeakers were used starting in the early 1950s. See *ibid.*, 97, n. 7. Although at first the public thought the government was banning loudspeakers in mosques entirely as part of a noise abatement campaign, in fact, the government and Islamic organizations had actually decided to redirect them inward. The government program was also misunderstood as being directed solely at Muslims, when it was applied to other cultural practices and institutions. “Chinese opera, funeral processions, church bells, Chinese and Indian temples, music during weddings, record shops, places of entertainment . . . the recitation of pledges in schools and school sports.” *Berita Harian*, June 14, 1974, quoted in Lee, “Technology” (above n. 61), 90.

120 In Singapore the government imposed a limit of 65 decibels on calls to prayer transmitted via loudspeakers but allowed radio dissemination as a compromise. Thio Li-ann, “Pragmatism and Realism Do Not Mean Abdication: A Critical and Empirical Inquiry into Singapore’s Engagement with International Human Rights Law,” *Singapore Year Book of International Law* 41 (2004): 41–91.

121 Lee, “Technology” (above n. 61), 91.

122 Kong praises Lee for showing that “sacred space can become defined by the aural rather than the visual alone.” Her study investigates the implications of religious uses of technology for a new politics of space. Lily Kong, “Religion and Technology: Refiguring Place, Space, Identity and Community,” *Area* 33/4 (2001): 404–413.

123 Lee, “Technology” (above n. 61).



religious and cultural identity and is absolutely important in the world of Islamic culture production. We might say that Muslims are ‘traditionalizing’ media technology, and they are defining its social significance.”<sup>124</sup> While the incisive analysis of the situation in Singapore suggests that Islamic leaders may be open to alternatives such as radio broadcast, it does not consider the effects of amplification.

By contrast, Naveeda Khan’s careful study of the call to prayer in Pakistan focuses on the role of loudspeakers. In this nuanced analysis, she demonstrates the ambivalence with which they were initially viewed. It was thought undesirable for a machine to replace a human being, and considered possible that their usage might undermine the sense of humility required for prayer. This rich historical treatment identifies a concern among religious leaders that relying on loudspeakers might have the unfortunate result that the adhan would be interpreted as noise, which is precisely what happened.

Colonial authorities did wield power to regulate noise, and this was used to suppress political expression. While early on the adhan was not treated as noise subject to regulation, later with the adoption of the 1965 Loudspeaker Ordinance, exemptions for sounds explicitly associated with ritual practices like the call to prayer, prayer instructions, and *khutba* (sermons) were included.<sup>125</sup> In the late 1990s there continued to be a concern that the adhan might be interpreted as noise. Khan tells of a doctor employed by the Pakistani Environmental Protection agency who turned off her noise meters during those periods when mosques broadcast the call to prayer. The doctor explained: “this was because it was inappropriate for a Muslim to consider the azan [adhan] noise. She added that if the meters were left on, their readings would be off the charts. The volume at which the azan was called would exceed the scientific standards for safe sound levels set by the World Health Organization.”<sup>126</sup>

In Oxford when the controversy erupted, the Imam offered to compromise: he would broadcast the call to prayer once a week, on Fridays. The rationale was not only an attempt to compromise but also a recognition that the times of prayer were usually posted on websites.

Other technological innovations have been proposed. For example, cell phones might serve to notify Muslims.<sup>127</sup> There is the Iikone i800 cellular phone produced

124 Ibid.

125 Khan, “Acoustics” (above n. 68), 582.

126 Ibid., 571–597, 586.

127 Heba El-Sayed, Anita Greenhill, and Chris Westrup, “On the Emergence of Techno-Religious Spaces: Implications for Design and End Users,” in *Reframing Humans in Information Systems Development*, ed. H. Isomaki and S. Pekkola (London: Springer-Verlag, 2011), 17–29.

by a Dubai start-up Samcom with adhan alarm options, which was initially on sale for a discounted price of 292 dollars.<sup>128</sup> Another invention was the LG F7100, a cell phone with a prayer time alarm capability that plays the beginning part of adhan.<sup>129</sup> There is also a special text messaging system publicized in Qatar.<sup>130</sup> Sun Dial, a unique mobile phone-based application to notify Muslims about the time of prayers, is under development (with some glitches in the system to date).<sup>131</sup> While there are attempts to make the devices commercially available, it remains to be seen how widely accepted they will be.<sup>132</sup>

The use of alternative technologies would require that state and private enterprises construct the means by which to convey these messages. When there have been efforts to establish new forms of telecommunications, they have encountered some initial obstacles. For example, in England, when a church was converted to a mosque, there was resistance to the installation of a telephone pole.<sup>133</sup>

In regions where individuals cannot afford to own cell phones or there is insufficient infrastructure to disseminate messages in a reliable manner, governments or international organizations will have to provide the phones and subsidize the construction of towers. This cost may not be insignificant.

In some countries there have been efforts to orchestrate a single call to prayer largely in order to minimize the sound level. In Egypt, the Minister of Religious Endowments explained the rationale for centralizing the adhan: “We have lost the spirituality of the *Adhan*. These days, muezzins are competing on microphone to

128 “High-Tech Call to Prayer,” *Statesman* (Calcutta, India), September 24, 2005, <http://directory.westlaw.com/>; Sarmad Ali, “New Cellphone Services Put God on the Line,” *Wall Street Journal*, March 27, 2006.

129 “Handy Phone for Muslim Travelers,” *New Straits Times*, April 7, 2005.

130 “Qtel’s Prayer Timing Alert Service Available for Ramadan,” *Al Bawaba News*, September 3, 2008, <http://directory.westlaw.com/>.

131 Susan Wyche, Kelly E. Caine, Benjamin K. Davison, Michael Arteaga, Rebecca E. Grinter, “Sun Dial: Exploring a Techno-Spiritual Design through a Mobile Islamic Call to Prayer Application,” *CHI Proceedings*, April 5–10, 2008, Florence, Italy, 3411–3416. The website explains: CHI (ACM Conference on Human Factors in Computing Systems) is the premier international conference for the field of human-computer interaction. Olivia Rondonuwu, “Indonesia’s Prayer Phone: Special Cellphone Helps Busy Muslims Struggling to Balance Work and the Demands of the Holy Month of Ramadan,” *The Globe and Mail*, September 11, 2008, A2.

132 Susan Wyche, et al., “Sacred Imagery in Techno-spiritual Design” *Proceedings of the SIGCHI Conference on Human Factors in Computing Systems*, Boston, April 4–9, 2009, 55–58.

133 “Mosque Radio Mast Overcomes Enforcement,” *Planning*, March 3, 2006, 19.

see who can sing it loudest.”<sup>134</sup> In Bahrain, the Supreme Council of Islamic Affairs announced it would do this to “avoid disturbing chaotic cacophony” and “eliminate discrepancies.” The plan was to consult both Sunni and Shiite authorities to agree upon a time and convey the call to prayer three times a day over a special radio channel.<sup>135</sup> This plan led to fears among muezzins that they might lose their jobs because fewer would be needed to make calls over loudspeakers. There was also a worry about the ramifications of a state monopoly.

The Muslim Council of Britain noted that many Muslims have chosen to receive the call to prayer by radio or via text message on mobile phones.<sup>136</sup> In the United States and in Europe there have been numerous instances of compromise on the part of Muslims:

For their part, Muslims have adopted an accommodating attitude in the overwhelming majority of conflicts concerning mosques and minarets. They have agreed to relocate proposed mosques to less central (and less visible) locations. They have modified architectural designs so that mosques look, well, less-mosque like. They have kept minarets relatively short so as not to rival church towers and steeples, or they have simply not erected minarets. They have developed creative ways to issue the call to prayer, such as short-wave transmitters and text messaging, to ease concerns from non-Muslims overhearing the call from loudspeakers. In the Marseille mosque under construction, a flashing light will be used to issue the call to prayer.<sup>137</sup>

This type of sincere effort to compromise seems not to receive much public attention.

134 Christian Fraser, “One Voice for Cairo’s Call to Prayer,” *BBC News*, May 11, 2009. See also Neil MacFarquhar, “God Has 4,000 Loudspeakers; the State Holds Its Ears,” *New York Times*, October 12, 2004.

135 “Common Call to Prayer Plan for Sunnis and Shiites,” *Gulf News*, January 31, 2008.

136 Georgina Cooper “Oxford Debates Muslim Call to Prayer,” *Edmonton Journal* (Canada), February 16, 2008.

137 Todd Green, “Anti-Mosque Sentiment in America: Lessons from Europe?” *Huffington Post*, July 31, 2010, [www.huffingtonpost.com/todd-green-phd/anti-mosque-sentiment-in\\_b\\_659617.html](http://www.huffingtonpost.com/todd-green-phd/anti-mosque-sentiment-in_b_659617.html).

## Objections

While technological innovations are appealing, they are not a panacea. Some may object to having the government pay for members of minority religious groups to practice their own religions. Moreover, if the real concern regarding the adhan is the presence of the minority group, then the technological solution will not appeal to its opponents in any case, since it enables Muslims to migrate to other countries and continue to follow their religious traditions.

The most serious problem with this technological proposal is that some schools of Islamic jurisprudence may reject the use of technology as a substitute. It is not clear to what extent any of the new inventions will be well received in Muslim communities. Yet Lee documents the fact that leaders of Islamic organizations in Singapore proposed this strategy.<sup>138</sup> This gives us some hope that this approach of finding alternative ways to achieve the call to prayer could eventually gain widespread support. Moreover, some Islamic countries have enacted laws to limit the decibel level of the adhan.<sup>139</sup>

Using technological innovations would facilitate the Islamic ritual that is central to the religious group, without offending the sensibilities of the majority. Important for the acceptance of this proposal will certainly be the willingness of the group to adopt the technology. Ultimately, governmental support for the means by which the call to prayer will be conveyed will also be crucial.

The issue of the call to prayer may represent a false conflict inasmuch as technological solutions exist. However, it remains to be seen whether religious communities will embrace these alternative methods of facilitating calls to prayer.

138 Lee, "Technology" (above n. 61).

139 According to news reports, Saudi Arabia adopted policies that required lowering the volume of mosque loudspeakers and banned the use of external loudspeakers; some advocated following this example. See "Worth Emulating," *Jordan Times* [World News Connection], September 1, 2010. There has also been criticism of the call to prayer with amplification in Egypt as an "assault on the ears" and type of noise pollution. See Charles Hirschkind, *The Ethical Soundscape: Cassette Sermons and Islamic Counterpublics* (New York: Columbia University Press, 2006), 125. In Indonesia, home to the largest Muslim population in the world and to 800,000 mosques, the head of the Ulema Council expressed concern over complaints about a "loudspeaker war." "Mosques' Loudspeaker Wars Jangle Many Nerves," *Scotsman*, July 25, 2012; Olivia Rondonuwu, "Indonesia's Mosques Seek Sound Quality," *Telegraph-Journal*, Religion, August 4, 2012, G6. There was a movement to ban the use of loudspeakers in part of Malaysia as well, see Salim Osman, "Speaking Up on Loud Calls to Prayer," *Straits Times*, July 25, 2012.

## Religious Exemptions from Noise Laws

The controversies over the call to prayer and the erection of mosques may give the misimpression that the issue is primarily one of discrimination against Muslims or Islamophobia. There have, indeed, been many disputes over noise in various countries that involve religious and cultural sounds.<sup>140</sup> It may be worth considering the implications of this analysis of the adhan for a general approach to the question of whether there should be religious exemptions from noise laws.

When the sound is in the middle of the night or at other times when most citizens of a country sleep (such as countries with an afternoon siesta), the government has a significant reason to avoid or to minimize religious-based noise. There is no question that loud noise is irritating, but it is not obvious whether it reaches the level of justifying the infringement of religious liberty. The challenge is that the state interest in limiting religious practices must meet the highest standards, and it is debatable whether limiting loud sounds can be justified based on rationales such as public morals or public health. Governments often try to justify anti-noise noise regulations based on physical or psychological health; at times it may be possible to defend some policies on this ground.

Another justification for limiting religious sounds might be some version of a public order argument. In Europe, urban security policies have been formulated as part of a general concern to maintain public security and order. Although it is within the realm of possibility that religious sounds of sufficient duration and intensity could jeopardize public order, this would likely be the case in rare circumstances only.

The scholarship on noise pollution also includes a liberty interest. The jurisprudence in the European human rights systems invokes the right to privacy and family life as the primary reason for upholding anti-noise policies. Yet, the right against noise is not accurately characterized as a liberty interest. Ironically, it is the noise-maker who would be more likely to invoke a liberty argument as a basis for challenging laws proscribing loud sounds.

Public morality represents a possible rationale for limiting any minority social practice. Use of this concept invites discrimination against extraordinary groups. It seems dangerous to use this type of argument in the context of the loud religious sounds because the dominant religion may insist that the sounds associated with a minority religion violate “public morals.”

Ultimately then, it is difficult to justify anti-noise laws that are administered in such a way as to infringe upon a fundamental human right. If there is a basis

140 The 2005 decision by the Indian Supreme Court provides a survey of various noise-related litigation.

for doing so, it should be to protect another important human right. With regard to anti-noise policies, one might argue that environmental human rights support the enforcement of these laws. This, however, requires a specific interpretation of the environment, as it presupposes that the absence or limitation of loud sounds is necessary for guaranteeing environmental rights. The risk here is that there may be culturally varying notions as to what constitute ideal soundscapes. All societies may not share the same vision of a utopian existence.

Although the analysis of time, place, and manner restrictions usually applies to freedom of speech, this type of framework may also make sense for religious sound as well. The government should not prevent religious sounds altogether, as this would clearly be an overreaction. However, controlling the time at which sound is conveyed and the volume of the sound may well be reasonable restrictions. Even if one concludes that the government can justifiably impose time, place, and manner restrictions, the government should articulate a compelling state interest for regulating loud religious sounds.

## Toward a Harmonious Soundscape

To justify lowering the volume, there must be an explicit normative basis for this, and that is largely absent in the discussion. It is striking that in the vast literature on noise policies, there is a presumption that the state should be able to regulate loud sounds, which leaves government officials open to attack. Instead of assuming the validity of anti-noise policies, I propose the development of a human right to quiet, which would complement and expand existing rights, and which would directly address the issues raised in this work. This is not a right to complete silence, which implies the total absence of noise, but rather a right to limited noise.<sup>141</sup> This right to quiet as a central concept is inspired by laws designed to protect quiet zones or residential communities.

One way of demonstrating the existence of an emerging norm is by taking a comparative approach, similar to *ius gentium*. In this context, the existence of innumerable noise codes across the globe provides a way to identify a cross-cultural universal—that is, an international standard that would permit states, non-state actors, and individuals to ensure the guarantee of a human right to quiet.<sup>142</sup> The human right to quiet would then justify a threshold by means of

141 While I realize that some dictionaries treat silence and quiet as synonyms, quiet appears etymologically to allow for some sound.

142 For an overview of worldwide noise abatement policies, see, e.g., J. Luis Benton Coelho, “Community Noise Ordinances,” in *Handbook of Noise and Vibration Control*, ed. Malcolm J. Crocker (New York: John Wiley & Sons, Inc., 2007), 1525–1532.

which one could condemn loud sounds that exceed that level. This right deserves support from scholars in acoustic jurisprudence and policymakers concerned with soundscapes. It is my hope that the development of the human right to quiet in future works may help resolve some of the ongoing conflicts addressed here.

## Conclusion

In this essay I have considered policies seeking to limit loud religious sounds. Regulating these sounds merely because they are unfamiliar constitutes a form of discrimination. The phenomenon of outlawing minority sounds sometimes reflects culturally varying notions of the soundscape. Because communities may come to grips with their prejudicial attitudes toward new sounds and no longer find them bothersome, some limitations may turn out to be unjustifiable.

Yet, although many controversies surrounding mosques, minarets, and the call to prayer demonstrate continuing intolerance in multicultural societies, sometimes the call to prayer via amplification may indeed be properly construed as both a nuisance and noise pollution. In those circumstances, established jurisprudence authorizing time, place, and manner restrictions could legitimize requests that the call to prayer be conducted either without amplification or via new forms of technology.

The tension between religious sounds and noise laws appears to be a false conflict. If there is a genuine desire on the part of the majority to reconsider their preconceived notions about the call to prayer, and on the part of the religious minority to try other means of conveying their religious messages, compromises can be found that would allow them to establish a harmonious soundscape.