SAVED BY THE BELLS: A LOOK AT CAMPANOLOGICAL RIGHTS OF U.S. CHURCHES

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I. INTRODUCTION: AN OVERVIEW OF CHURCH BELLS IN CULTURE AND COURT

It would be hard for someone living in medieval Europe to envision a future where a Christian bishop would be imprisoned simply for ringing the bells of his church. After all, bells were among the first musical instruments known to humankind.[1] The melodious and often thunderous sounds they produce have influenced the very course of history itself.[2] Bells have been used throughout history as symbols of status and social dominance, as weapons against evil, as effective and often elaborate communicatory devices, as musical instruments, and as tools of religious devotion.[3] Yet in 2009, in Phoenix, Arizona, Bishop Rick Painter was imprisoned for ten days for ringing the bells of Christ the King Church in violation of a local noise ordinance.[4]

In *Saint Mark Roman Catholic Parish v. City of Phoenix*,[5] Bishop Painter and two other local churches hauled the City of Phoenix into federal court to defend its noise ordinance.[6] The result: an injunction against the city preventing it from enforcing its noise ordinance against "sound generated in the course of religious expression."[7] Although at first blush this seems like a coup for religious freedom of expression advocates, the ruling was largely due to deficiencies in the ordinance itself that seemed to exempt certain institutions, while leaving religious ones out in the

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1 SATIS N. COLEMAN, BELLS: THEIR HISTORY, LEGENDS, MAKING, AND USES 10–11 (1928).

2 In 610 A.C.E., King Clotaire of the Franks laid siege on the city of Sens in Burgundy, but his army was frightened away by the clamor of the bells of the city's church of Saint Stephen's. *Id.* at 36.

3 *See generally id.*

4 Eric Felton, *Court of a Peal: Driven Bats by the Belfry*, WALL STREET J. (Mar. 10, 2010), http://www.wsj.com/articles/SB10001424052748704784904575112282804814078.

5 No. CV 09-1830-PHX-SRB, 2010 U.S. Dist. LEXIS 145304 (D. Ariz. Mar. 3, 2010).

6 *See supra* note 5.

7 *Saint Mark*, 2010 LEXIS 145304, at *55.

cold.[8] The court plainly held that if the ordinance had been written differently it would not have been unconstitutional, at least not under religious freedom of expression.[9]

The *Saint Mark* case also touched on an important campanological distinction: bell ringing as a religious activity as opposed to bell ringing as a musical activity.[10] The difference may seem insignificant, but the legal analysis changes dramatically depending on whether the bells were being rung atonally for religious reasons (like the ringing of the Angelus Bell),[11] or being rung for musical purposes (like a church carillon chiming melodious hymns). This distinction is inapposite, however, when the Constitution is not invoked as a defense, which is another reason why the Phoenix case was so groundbreaking.[12] Up until *Saint Mark*, the common law doctrine of nuisance was the only legal bat in a church's belfry.[13] *Harrison v. Saint Mark's* was the first case wherein a church had to defend its bell ringing, and the constitutionality of religious bell ringing was not addressed; *Harrison* was merely a common law nuisance case.[14] Every such case up until *Saint Mark* was analyzed the same way—under nuisance law.[15] In the wake of *Saint Mark*, can private nuisance still be a factor in these decisions, or did *Saint Mark* finally break the dam of constitutional avoidance that kept church bells outside of the First Amendment discussion for so many years?

This note will examine the history of bells in Christianity and society's rapidly changing view of bells in Christianity; for as industrialization changed America's cityscapes, so too changed the way the religious, and irreligious, believed "good" religion should be practiced.[16] This fundamental shift in attitude moved churches from the offensive—using their influence to enforce Sunday laws to ensure quiet, peaceful Sabbath days—to the defensive, fighting

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8 *See id.* at *35–36.

9 *Id.*

10 *See id.* at *21–22.

11 *See* COLEMAN, *supra* note 1, at 98–100.

12 If the Constitution is not invoked as a defense then no constitutional analysis will apply, and the case will be examined under nuisance law wherein the distinction between music and religious sound is not considered. *See infra* note 101.

13 For a comprehensive discussion of cases, *see* John C. Williams, *Bells, Carillons, and the Like as Nuisance*, 95 A.L.R.3D 1268 (1979).

14 12 Phila. 259 (Pa. 1877). *See infra* note 87 for a more in-depth look at the *Harrison* case.

15 *See* Williams, *supra* note 13.

16 ISAAC WEINER, RELIGION OUT LOUD: RELIGIOUS SOUND, PUBLIC SPACE, AND AMERICAN PLURALISM 7 (2014).

for their very right simply to participate in the loud hustle and bustle of modern American cities.[17]

In the wake of such immense cultural and technological change, the right of churches to make noise is uncertain. Church bells are hardly in the vanguard of religious freedom discussions, but as similar, more modern challenges arise, like the muezzin's call to prayer in Islamic institutions,[18] the church bell discussion could rear its head once more. As I will explain, absent exemptions from the noise ordinances themselves, or other statutory protections, the Constitution alone will not safeguard churches from being silenced.[19] As a result, as society becomes more and more secular and protective of its increasingly scant peace and quiet, the future of these age-old instruments in church is hardly clear as a bell.[20]

II. A HISTORY OF BELLS

It is a classic association: the ringing of bells and church. The two seem to go hand-in-hand. But what role, if any, do bells actually play in Christian rituals? Are they simply anachronisms—vestiges of medieval superstition and primitive communication? There are actually multiple types of bells in the context of Christian worship.[21] It is critical to the constitutional analysis to explore the differences and similarities between these types of bells, the roles bells played in ancient Judeo-Christian rituals, and the role they continue to play in modern Christian liturgy.

A. Ancient Bells and Their Origins

The history of bells changes depending on how one defines a bell. Merriam Webster defines a bell as "a hollow metallic device

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17 *See id.* at 29.

18 *See, e.g.*, David A. Graham, *For Whom the Muezzin Calls*, THE ATLANTIC (Jan. 15, 2015), http://www.theatlantic.com/politics/archive/2015/01/for-whom-the-muezzin-calls-duke-muslim-call-prayer/384562/.

19 *See infra* note 143.

20 According to one study, 86% of American adults identified as Christians in 1990. By 2008 that figure had dropped to 76%. Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey [ARIS 2008]: Summary Report*, INST. FOR THE STUDY OF SECULARISM IN SOC'Y & CULTURE (2009).

21 *See, e.g.*, *infra* note 62.

that gives off a reverberating sound when struck."[22] However, the first percussion instruments resembling bells were likely made of wood or shells.[23] Ancient man from all over the world likely used similar materials like hallowed pieces of wood to make primitive bells, drums, rattles, gongs, and other percussion instruments.[24] However, the first hollowed metal objects that one could rightfully call a bell did not appear until sometime between the twenty-first and the eighteenth-centuries.[25] The earliest known bells originated from China sometime around the late third millennium B.C.E. in a region that presently comprises the Shanxi, Henan, and Anhui provinces, but metal bells developed in other parts of the world as well.[26] The famous British archeologist, Sir Austen Henry Layard, found about eighty bronze bells while excavating the ancient Assyrian city of Nimrud. [27] Ancient Egyptians used bells ritualistically to worship various goddesses by incorporating them into a small instrument called a *sistrum*.[28] This instrument was indispensible in ancient Egyptian religious ceremonies, and modern versions of this instrument are still used in some Coptic sects of Christianity.[29]

B. Bells in Christianity

Early Christians could not practice their religion openly due to Roman persecution of Christians.[30] It was not until the Emperor Constantine adopted the practice of Christianity that it became safe to practice the religion openly.[31] Bells had long been

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22 *Bell*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/bell (last visited Nov. 13, 2015).

23 *See* COLEMAN, *supra* note 1, at 10–11.

24 *Id.*

25 JOHN GOUWENS, CAMPANOLOGY: A PUBLICATION OF THE NORTH AMERICAN CARILLON SCHOOL 1 (2013).

26 LOTHAR VON FALKENHAUSEN, SUSPENDED MUSIC: CHIME-BELLS IN THE CULTURE OF BRONZE AGE CHINA 132 (1993).

27 COLEMAN, *supra* note 1, at 22–23; *Sir Austen Henry Layard*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/333136/Sir-Austen-Henry-Layard (last visited Nov. 14, 2015).

28 COLEMAN, *supra* note 1, at 24. A *sistrum* is a "U-shaped" rattle with crossbars hung with "jingles" "that sound when the instrument is shaken." *Sistrum*, ENCYCLOPEDIA BRITTANICA, http://www.britannica.com/EBchecked/topic/546743/sistrum (last visited Nov. 14, 2015).

29 COLEMAN, *supra* note 1, at 24.

30 *Id.* at 34.

31 *Id.*

used in the Roman Empire for various purposes.[32] Christians eventually adopted the use of bells for the purpose of summoning other Christians to worship.[33] It is likely that bell ringers would run through the streets ringing a handheld bell to call the faithful to mass.[34] Around 400 A.C.E., Paulinus, The Bishop of Nola, decided to abolish bell ringers and he instead ordered one giant bell to be hung from the top of the church, so that everyone could easily hear it.[35] Eventually this use of bells spread throughout Europe, and the bell's uses became increasingly varied—including uses in the actual worship itself.[36]

1. Bells in Christian Rituals

There are only a few references to bells in the Bible. Exodus 39:25 describes the robe of ephod worn by Aaron to approach the Arch of the Covenant saying, "[t]hey also made bells of pure gold, and put the bells between the pomegranates upon the skirts of the robe . . . for ministering; as the Lord had commanded Moses."[37] In modern Judaism, the Torah is sometimes ornamented with *rimonim* (Hebrew for pomegranate), which are adorned with small bells to symbolize the bells mentioned in Exodus.[38] When the congregation hears the bells they know the Torah has been brought out so they can come attend services.[39] Psalms 98:4 instructs its readers to, "[m]ake a joyful noise to the Lord, all the earth; break forth into joyous song and sing praises!"[40] Lastly, Psalms 150:5–6 says, "[p]raise him with sounding cymbals; praise him with loud clashing cymbals!"[41]

By the thirteenth-century, bells had been incorporated into the actual mass itself.[42] To this day, many churches, particularly Catholic churches, ring what is called the Sanctus Bell.[43] This

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32 *See id.* at 26–30.

33 *Id.* at 34–35.

34 *Id.*

35 *See* COLEMAN, *supra* note 1, at 35.

36 *See infra* note 46.

37 *Exodus* 39:25 (Revised Standard Version).

38 *Ritual Objects*, THE SHERWIN MILLER MUSEUM OF JEWISH ART, http://jewishmuseum.net/collections/permanent-collection/permanent-collections/ (last visited Nov. 14, 2015).

39 *Id.*

40 *Psalms* 98:4 (Revised Standard Version).

41 *Psalms* 150:5 (Revised Standard Version).

42 MATTHEW D. HERRERA, SANCTUS BELLS: HISTORY AND USE IN THE CATHOLIC CHURCH 2 (2004).

43 *Id.* at 7.

occurs first during the *epiclesis*—the point in the mass where the celebrant (a priest, bishop, or the pope) prays over the bread and wine for its transubstantiation.[44] The Sanctus Bell is rung again during the Elevation of the Host.[45] The use of the Sanctus Bell serves three distinct purposes: (1) it redirects the attention of congregants inside the church to the miracle of the transubstantiation happening on the altar,[46] (2) it accentuates the particular sanctity of that portion of the mass, and (3) it alerts those unable to attend mass that the consecration of the host is taking place so they might pause in adoration.[47] The Council of Trent (held 1545–1563) formally mandated the use of Sanctus Bells during the mass.[48] Eventually Sanctus Bells became smaller, sometimes becoming affixed to a rood screen or above the credence table, or appearing in the form of "gloria wheels,"[49] although steeple bells are still used as Sanctus Bells in some churches.[50]

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44 *Id.* at 5.

45 *Id.* at 6. *See also* COLEMAN, *supra* note 1, at 97.

46 HERRERA, *supra* note 42, at 3. Until the conclusion of the Second Vatican Council in 1965, mass was conducted in Latin and the celebrant faced the altar, not the congregation, during the celebration of the mass. *Id.* at 8. Additionally, in medieval times, many churches and cathedrals celebrated the Anaphora under a ciborium or baldachin (a high altar of sorts), which was surrounded by curtains. These curtains were to be drawn during certain parts of the mass. The Sanctus Bells therefore were necessary to alert the congregation of the most sacred moments of the mass, which the non-Latin speaking congregation could neither understand, nor see. Franz Bock, *The Hangings of the Ciborium of the Altar*, *in* 29 THE ECCLESIOLOGIST 297–99 (1868).

47 *See* HERRERA, *supra* note 42, at 3. *See also* Archpriest Roman Lukianov, Rector, Address at the Northeast Regional Meeting of The American Bell Association International, Inc. (May 22, 1999), *in* 57 THE BELL TOWER no. 4 (1999):

> The bells not only called people to the beginning of worship, but by means of ringing different bells or different ringing patterns, they instructed those who could not make it to church, which important parts of the service were being celebrated, so that absentees could mentally and spiritually participate in the services. Thus one can say that the bells spread the walls of the church as far as they could be heard.

Id.

48 HERRERA, *supra* note 42, at 3.

49 *Id.* The use of gloria wheels was especially common in Spain and was also incorporated into the missions in early Spanish California. *Id. See also* COLEMAN, *supra* note 1, at 98.

50 *See* HERRERA, *supra* note 42, at 2.

2. Bells in Eastern Orthodox Denominations

The use of bells during mass is also important in the Eastern Orthodox denominations, who use bells for a purpose similar to that of a *shofar*, a ram's horn used in ancient Judaic rituals as an instrument of praise.[51] Although, Eastern Orthodox churches long used large hanging wooden percussion instruments, called *semantrons*, for this purpose instead of bells.[52] It was not until long after bells were commonplace in Roman Catholic churches that they became widely used in Eastern Orthodox denominations.[53] In addition to Sanctus Bells, the *thuribles* in many Eastern Orthodox churches are adorned with twelve bells to represent the twelve apostles of Jesus.[54] This creates a "joyful noise to the Lord"[55] as the *thurible* is swung and draws the congregation's attention to the activity of the service.[56]

3. Other Religious Uses of Bells in Church History

Mass is not the only time in which the use of bells are employed. Eventually bells came to be used for a variety of different purposes. For instance, the early morning bell used to wake the parishioners in the morning was called the Gabriel bell.[57] Another bell was rung to tell the parishioners to pray for absolution of sins; this was called the Pardon Bell.[58] A peal of bells let the community know when someone had been baptized (the Christening peal),[59] or when someone had died (the Death knell).[60] There were storm bells,[61] fire bells, seeding bells, harvest bells,

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51 *See* Lukianov, *supra* note 47. *See also* Sidney B. Hoenig, O*rigins of the Rosh Hashanah Liturgy*, 57 THE JEWISH Q. REV. 312–31 (1967).

52 Lukianov, supra note 47.

53 *See id.*

54 HERRERA, *supra* note 42, at 7. A *thurible* is a censer used to burn frankincense that is swung gently from a chain by an alter server (called a *thurifer*) at various points during the mass. Particularly in Eastern Orthodox denominations, *thuribles* have a thirteenth bell that is incapable of producing sound. This silent bell is used to represent Judas Iscariot. *Id.* at 7–8.

55 *Psalms* 98:4 (Revised Standard Version).

56 HERRERA, *supra* note 42, at 8.

57 *See* COLEMAN, *supra* note 1, at 97.

58 *Id.*

59 *Id.* at 98.

60 *Id.* at 101.

61 *See* WALTER ISAACSON, BENJAMIN FRANKLIN, AN AMERICAN LIFE 137 (2003). St. Thomas Aquinas once attested, "[t]he tones of the consecrated metal repel the demon and avert the storm and lightning."

pudding bells, alarm bells, curfew bells, and even a pancake bell.[62] It seems there was a bell for every occasion. Of particular relevance, in 1472 King Louis XI ordered that the Latin prayer, *Angelus* (a devotional prayer to the Virgin Mary), be recited daily at 6 a.m., noon, and 6 p.m.[63] In response, the Angelus Bell was tolled at those hours to notify the people to stop whatever they were doing and pray.[64] The melodies of these bells were often a welcome reprieve for many people who so often did not have the best quality of life.[65]

Another type of bell commonly used by churches was the Passing Bell, used as someone was passing from life into death.[66] The Passing Bell served a dual purpose: it notified the community that someone was dying and to pray for that person's soul, and it was also believed to ward off evil spirits who were waiting to prey upon the soul of the newly departed.[67] It was believed that by ringing the church Passing Bell the evil spirits would be warded off.[68] Of course, the louder the Passing Bell, the farther away the evil forces would be driven.[69]

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62 *See* COLEMAN, *supra* note 1, at 97–115. The Pancake bell was tolled on the evening of Shrove Tuesday—the day before Ash Wednesday when the fasting period of Lent begins—to let the people know the period of fasting had begun and the traditional Shrove Tuesday consummation of pancakes must cease. *Id.* at 106.

63 *Id.* at 99.

64 *Id.* This seems analogous to the muezzin's call to prayer and is still practiced by some churches. *See supra* note 18.

65 *See* Lukianov, *supra* note 47 ("For people who accepted the teaching of Christ with their whole hearts, who made an effort to live their daily lives in accordance with God's commandments, a call to prayer was a welcome relief from the harsh realities of daily existence. Bells called people to another world, the heavenly world of beauty in the churches. The churches for them were heaven on earth, places where salvation was being taught, where sins were being forgiven and one was sanctified.").

66 COLEMAN, *supra* note 1, at 100–01.

67 WILLIAM ANDREWS, OLD CHURCH LORE 214–15 (1891).

68 *Id. See also* COLEMAN, *supra* note 1, at 100–01. Bells were (and still are, in some places) actually baptized before being hung in the bell tower. These rituals were often elaborate, requiring the bishop to wash the bell with holy water, anoint the outside of the bell with sacramental oil, anoint the inside of the bell with chrism, bless the bell, and finally burn frankincense underneath it. This "baptism" was believed by some to endow the bell with the power to ward off evil spirits, which, among other things, caused thunder and lightening. *Id.* at 84–85. *See also* HERRERA, *supra* note 42, at 13.

69 *See* ANDREWS, *supra* note 67, at 215. Of course even during this time in history many regarded this practice as superstitious nonsense. In a letter to Sir Henry Wotton, one Englishman wrote with respect to the tolling of the Passing Bell:

C. Bells in America

By the time of the colonization of America, bells were an absolutely integral part of secular and non-secular European society.[70] They were used to warn villagers of advancing armies, fires, and storms, toll the hours of the day, and celebrate the coronation of kings and queens and other festivals of church and state.[71] In Colonial America, the bells were used to define the boundaries between wilderness and civilization.[72] Some colonial settlements forbade their inhabitants from living outside earshot of the town's church bells.[73] The use of bells in colonial America was also a useful way to organize militias and enforce curfews.[74] Eventually, the factory whistles and clocks of industrialized American cities made church bells outmoded, at least in their functional, non-liturgical capacities.[75] Among the hustle and bustle of America's growing cities, church bells not only began to become unnecessary, but they began to become viewed by some as another unwanted noise in an already loud and increasingly secular society that valued peace and quiet over antediluvian church practices.[76] However, many churches had a much different position and still regarded the tolling of bells as critical.[77] This tension caused a very novel legal issue to arise in America: are church bells a nuisance?

> It is to be hoped that this ridiculous custom will never be revived, which has been most probably the cause of sending many a good soul to the other world before its time; nor can the practice of tolling bells for the dead be defended upon any principle of common sense, prayers for the dead being contrary to the articles of our religion.

Id. at 215–16.

70 *See* WEINER, *supra* note 16, at 21–23.

71 *See id.*

72 *See id.* at 23.

73 *Id.*

74 *Id.*

75 *Id.* at 55.

76 *See* WEINER, *supra* note 16, at 38–39.

77 One Catholic priest expressed how important bells were in his church, and in his community at large. For example, his church still rings its Angelus Bell three times daily. Telephone Interview with Father Roy Snipes, Lead Priest at Our Lady Of Guadalupe Catholic Church (Feb. 24, 2015).

III. CHURCH BELLS AS A NUISANCE

Nuisance is a very old common law tort grounded in the idea that a property owner should be entitled to the peaceful enjoyment of his own property without unreasonable interference from others' use of their neighboring properties.[78] Noise, odors, and pollutants are but a few examples of possible nuisances.[79] A church loudly tolling its bells certainly has the potential to interfere with a neighbor's peaceful enjoyment of his property and is thus susceptible to civil nuisance actions.[80] But how did churches and church bells go from being such a dominant presence in western civilization to becoming legal nuisances? Before discussing nuisance law itself, we must briefly understand how and why church bells came to fall within the ambit of nuisance doctrine in the first place.

A. Bells: A Fall From Grace

One of the most important things to understand about church bells is the societal posture of the ones ringing them: churches. Not only did churches once enjoy nearly unfettered bell ringing rights, but they were also able to effectuate and enforce Sunday laws—compelling citizens to do things like refrain from making noise or refrain from working on the Sabbath.[81]

By the mid-nineteenth-century, cities were becoming increasingly crowded and the mindset of their Protestant inhabitants was also changing.[82] Protestants began to deviate from

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78 1 JAMES H. BACKMAN & DAVID A. THOMAS, A PRACTICAL GUIDE TO DISPUTES BETWEEN ADJOINING LANDOWNERS—EASEMENTS § 9.03 (2014)

79 *See* Traetto v. Palazzo, 91 A.3d 29, 33 (N.J. Super. App. Div. 2014) ("Noise may constitute an actionable private nuisance."); Jordan v. Ga. Power Co., 466 S.E.2d 601, 606 (Ga. Ct. App. 1995) ("[N]oise, odors and smoke which impair the landowners' enjoyment of his property are also actionable nuisances."); Machipongo Land & Coal Co. v. Dep't of Envtl. Prot., 799 A.2d 751, 773 (Pa. 2002) ("[A]cid mine discharge into . . . public waters . . . constitute[s] a public nuisance.").

80 *See* Harrison v. Saint Mark's, 12 Phila. 259 (Pa. 1877) (enjoining church from excessive bell ringing in a nuisance action brought by neighbors).

81 For example, in 1797 a multi-denominational group of ministers petitioned the Pennsylvania General Assembly requesting that the churches be able to enforce a "zone of quiet" around their properties. The Assembly granted their request. *See* WEINER, *supra* note 16, at 26–27.

82 *See* ALEJANDRO PORTES & RUBÉN G. RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 302 (2006).

traditional communal and material forms of religious worship, which were more external, and they shifted their focus inward to embrace a more internalized method of religious devotion.[83] Church bells were not exempt from this new Protestant mentality, and Protestants came to view them as just one more unwanted source of urban clamor.[84] So ironically, the initial push against church bell ringing came from devout Protestants, not atheist rabble-rousers.[85] The ringing of bells came to be regarded by some as a "bad" religious practice—perhaps not even religious at all, but purely superstitious.[86] The contention over religious bell ringing in the U.S. came to a head in 1877 when a prominent Philadelphia Episcopal Church had bells installed, and parishioners of the church itself sued for an injunction.[87]

B. The Anatomy of Nuisance Law

Today in America's ever-expanding cities and suburbs it is increasingly hard to imagine *not* being a nuisance to some neighbor at one point or another. However, just because one person considers his neighbor's actions to be annoying does not necessarily create a legal nuisance.[88]

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[83] *See* WEINER, *supra* note 16, at 56.

[84] *Id.*

[85] *See id.* at 22. In 1791 England's Second Catholic Relief Act actually forbade Catholic chapels from having steeples or bells altogether. *Id.*

[86] *See id.* at 55–56. Weiner explains that, "[t]his framework was developed by nineteenth-century scholars in the emerging field of scientific study of religion but was embraced by Protestant leaders in the United States . . . ." Accordingly, "[i]f religion was properly internalized and intellectualized, then it had no need to be practiced out loud." *Id.*

[87] Harrison v. Saint Mark's, 12 Phila. 259 (Pa. 1877), was the first U.S. case in which a church was sued for ringing its bells. The church lost the case, which was ironically brought against it by a prominent Philadelphia Episcopalian. WEINER, *supra* note 16, at 50–51. The lower court analyzed the case under nuisance law and determined, based on hundreds of affidavits, that neighbors of the church suffered actual harm "which is not imaginary or only felt by the hyper-sensitive." *Id.* at 51, 67. The Pennsylvania Supreme Court upheld the lower court's injunction in part, but amended it to allow the church to continue ringing its bells on Sundays and for a few specific special occasions. *Id.* at 69–70. Although as a technical matter, the injunction remains in effect to this day, the bells of Saint Mark's were restored in 1999 and have been ringing unfettered ever since, with only a few complaints (during a very protracted rehearsal for the inauguration of the new bells). *Id.* at 76.

[88] Impellizerri v. Jamesville Federated Church, 428 N.Y.S.2d 550, 551 (N.Y. Sup. Ct. 1979) ("The use made of property may be unpleasant, unsightly, or, to some extent annoying and disagreeable to occupants of neighboring property

Nuisance was originally a common law doctrine, but many states enacted statutes to provide a cause of relief.[89] Although the law is often different from state to state, this section discusses some of the key elements and factors required to successfully prosecute an American nuisance claim, and examines case law that breathes life into some of those factors.

Nuisance law is comprised of different categories of nuisance, particularly public nuisance and private nuisance.[90] As the name suggests, public nuisance refers to the "unreasonable interference with a right common to the general public."[91] Public nuisances often arise in cases where the defendant is in violation of a law or ordinance; therefore, they are rarely actionable by private citizens. [92] For instance, an adult entertainment establishment operating illegally in a residential zone might be considered a public nuisance.[93] If the ringing of church bells was found to be a nuisance, it would ostensibly be one affecting the public at large; counter intuitively, however, a public nuisance is an offense against the State, so a private citizen can almost never institute a public nuisance claim without showing that he has sustained a unique injury distinct from the injury suffered by the rest of the public.[94] In addition, the mere fact that someone may have suffered a more acute injury does not necessarily qualify that injury as unique.[95] Although the semantics may be confusing, the

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without creating a nuisance." (citing McCarty v. Nat. Carbonic Gas Co., 189 N.Y. 40, 50 (N.Y. 1907))).

89 Albert C. Lin, *Deciphering the Chemical Soup: Using Public Nuisance to Compel Chemical Testing*, 85 NOTRE DAME L. REV. 955, 973–74 (2010).

90 *See* Elizabeth A. Trainor, Annotation, *Sewage Treatment Plan as Constituting Nuisance*, 92 A.L.R. 5TH 517 (2001).

91 RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

92 *See* BACKMAN & THOMAS, *supra* note 78.

93 *See, e.g.*, City of New York v. J & J Tummy Yummies, Inc., 679 N.Y.S.2d 807 (N.Y. Sup. Ct. 1998) (granting City of New York a temporary injunction against an adult entertainment establishment operating in a residential zone, which constituted a public nuisance).

94 Hoffman v. United Iron & Metal Co., 671 A.2d 55 n. 9 (Md. App. 1996) (holding "[a] private person may seek an injunction . . . if he owns property injured by the nuisance . . . and has suffered from it some special and particular damage, different not merely in degree, but different in kind, from that experienced in common with other citizens." (internal citations omitted)). *See also* Copart Indus., Inc. v. Consolidated Edison Co. of New York, 362 N.E.2d 968, 971 (N.Y. 1977).

95 Caldarola v. Town of Smithtown, No. CV 09-272(SJF)(AKT), 2010 WL 6442698, at *16 (E.D.N.Y. July 14, 2010) ("Differences in degree do not suffice. There must be difference in kind . . . peculiar to public nuisance claims raised by a private plaintiff." (internal citations omitted)).

important thing to understand is that, in the instance of bell ringing, any relief would most likely have to be obtained in an action for private nuisance.[96] So for the purpose of this discussion, any further reference to nuisance refers to private nuisance, unless otherwise specified.

Curiously, there are only a handful of published cases in U.S. history wherein a private actor brought a nuisance claim against a church for pealing its bells.[97] Of those cases only two resulted in injunctive relief against the church; the rest of the cases were dismissed or won by the church on summary judgment.[98, 99] This makes it tangibly harder to explore what differentiates acceptable church bell ringing from unacceptable church bell ringing within the parameters of nuisance law. Of course the mere absence of successful private nuisance claims against churches for ringing their bells is illustrative in and of itself. A look at common law nuisance doctrine in the context of these few cases will show just how hard it is to make these nuisance claims successful.

A private nuisance case is very fact specific, and must be considered in light of the circumstances.[100] Although different jurisdictions will vary slightly in their approach, to establish liability for nuisance a plaintiff will generally have to prove:

1) that the defendant engaged in conduct (usually action, but sometimes inaction),
2) such conduct was the legal cause,
3) of interference with the plaintiff's private use and enjoyment of his land, and
4) such conduct was intentional and unreasonable.[101]

With respect to the ringing of church bells, the first element (as well as the intentionality component of the fourth element) is

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96 *See id.* (dismissing public nuisance claim brought by private citizen against a neighboring church for, *inter alia*, use of an electric carillon in violation of a town ordinance, because plaintiff failed to allege that her injuries were unique).

97 *See* Williams, *supra* note 13 (listing table of said cases).

98 Summary judgment is "a judgment granted on a claim or defense about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law." *Summary Judgment,* BLACK'S LAW DICTIONARY (9th ed. 2009).

99 *See* Williams, *supra* note 13.

100 *See* BACKMAN & THOMAS, *supra* note 78.

101 *Id.*; RESTATEMENT (SECOND) OF TORTS, §§ 822–28 (AM. LAW INST.1979).

pretty straightforward—the church is ringing the bells (unless Quasimodo is living in the belfry). The second element is similarly satisfied—the bell ringing is what is causing the alleged injuries in these nuisance cases. The third element requires the plaintiff to establish that he sustained (or continues to sustain) some type of injury as a result of the bell ringing. Courts tend to maintain a high bar for what constitutes an actionable "injury" versus a mere annoyance.[102] Furthermore, the injury cannot be unique to the plaintiff due to some special sensitivity, like a neurological disorder.[103] Rather, the injury must be one that any ordinary person would sustain under the same circumstance.[104] Typically there are other neighbors within a similar distance from, or perhaps even closer to the church. Whether or not these other neighbors join in the complaint can be of great importance to a court in finding an injury, or lack thereof.[105] A final factor, which can be used to negate the plaintiff's alleged injury, is the possible presence of other noises, like automobile traffic.[106] If the defendant church can introduce evidence that these other noises are equal to or greater in volume and frequency than the church bells, then it may be able to obtain summary judgment in its favor.[107]

Finally, the reasonableness element takes into consideration multiple factors surrounding the circumstances of both parties. For example, the suitability of the environment for bell ringing (i.e., is the alleged nuisance occurring in Vatican City or a quiet residential neighborhood?), the social utility of bell ringing (providing a pleasing melody to the community, perhaps), and also the practicability of avoiding causing the nuisance (e.g., limiting the frequency, volume, or duration of the bell ringing).[108] Additionally, courts may want to know which property owner was there first, and when the nuisance began: this concept is called "coming to the nuisance."[109] For instance, a court will not likely

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102 *See, e.g.*, Weinhold v. Weinhold, 347 B.R. 887 (Bankr. E.D. Wis. 2006) (holding the neighboring property owners creation of a "navigation hazard" was merely an annoyance, not actionable as nuisance).

103 *See, e.g.*, Impellizerri v. Jamesville Federated Church, 428 N.Y.S.2d 550, 551–52 (N.Y. Sup. Ct. 1979).

104 *Id.*

105 *See id.*

106 *See, e.g.*, Langan v. Bellinger, 611 N.Y.S.2d 59, 60 (N.Y. App. Div. 1994).

107 *See id.*

108 *See* BACKMAN & THOMAS, *supra* note 78; RESTATEMENT (SECOND) OF TORTS, §§ 826–28 (AM. LAW INST. 1979).

109 *See* Pre-Club, Inc. v. Elliot Inv. Corp., 1996 Ohio App. LEXIS 1018 at *2–4 (Ohio Ct. App. 1996); *see also* Terhune v. Trs. of Methodist Episcopal Church, 87 N.J. Eq. 195, 199 (N.J. Super. Ct. Ch. Div. 1917).

enjoin a church from bell ringing if the complainant moved across the street from the church decades after it had been ringing its bells every day.[110]

Churches are generally well positioned to defend a nuisance claim brought against them by a private citizen. For example, they are often old, so the likelihood of an existing church losing a nuisance claim to someone who came to the nuisance is minimal.[111] Additionally, there are often other people living in the vicinity of the church who do not join in the complaint.[112] This makes it hard for a plaintiff to establish injury, because the existence of other neighbors in the vicinity who were not disturbed by the noise negates the plaintiff's claim that the noise caused any injury. [113] But what about the State? Although the First Amendment guarantees freedom of speech and free exercise of religion, does the First Amendment adequately protect churches from State action, [114] like a noise ordinance prohibiting bell ringing? As it turns out, the answer is not so straightforward.

IV. THE FIRST AMENDMENT & THE FREE EXERCISE CLAUSE

The First Amendment reads in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."[115] For First Amendment purposes, the Supreme Court regards music as protected free speech.[116] It is therefore important to determine whether the ringing of church bells is purely an act of religious devotion, a musical performance of sorts, or perhaps a hybrid of the two.[117] Additionally, in *Cantwell v. Connecticut*,[118] the

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110 *See, e.g.*, *Terhune*, 87 N.J. Eq. 195. Notably, in the case of *Harrison v. Saint Mark's*, the church was enjoined from ringing its bells even though it was there before the plaintiffs were. WEINER, *supra* note 16, at 47. One reason for this being, among other things, that the church did not originally have any bells in its bell tower to ring until long after the plaintiffs had moved to their respective properties. *Id.*

111 *See, e.g.*, *id.* at 199.

112 *See, e.g.*, Langan v. Bellinger, 611 N.Y.S.2d 59, 60 (N.Y. App. Div. 1994).

113 *Id.*

114 In this note, "state action" refers to any governmental infringement on church bell ringing, including a noise ordinance proscribing such conduct.

115 U.S. CONST. amend. I.

116 *See infra* note 161.

117 For years the Supreme Court muddled free speech and free exercise analyses—making no distinction between the two. For instance in *West Virginia State Board of Education v. Barnette*, a student had been punished for refusing to recite the pledge of allegiance in school because of his religious beliefs. 319 U.S.

Supreme Court held that the First Amendment applies not only to Congress, but also to the several states via the Fourteenth Amendment.[119] Additional layers of constitutional analysis come into play when a church does not merely challenge the constitutionality of a government sponsored noise ordinance, but claims its First Amendment rights should trump state nuisance law challenges brought by individual citizens.[120] How and when can a noise ordinance be unconstitutional under the First Amendment? Can a church's First Amendment rights protect it from nuisance suits? These questions are not always easy to answer.

A. Modern Jurisprudence

Reynolds v. United States[121] was the Supreme Court's first Free Exercise Clause case.[122] In *Reynolds*, the Court held that Congress could pass legislation to regulate behavior that is in violation of social duties or is subversive to good order, regardless of whether or not such legislation conflicts with the religious practices of a particular faith.[123] Nearly a century later the Court developed the *Sherbert* test, which subjected even incidental government infringements of religious free exercise to strict scrutiny.[124] Eventually, the Court abandoned the *Sherbert* test, and returned to the basic approach espoused by the Court in *Reynolds*.[125] Thus, so long as the government does not prescribe or proscribe *beliefs* and does not specifically prohibit religious

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624, 627–30 (1943). The Court jumbled many of the protections of the First Amendment together in holding for the student by stating, "the freedoms of speech and of press, and assembly, and of worship [are] susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." *Id.* at 639. It was not until *Sherbert v. Verner*, 374 U.S. 398 (1963), that the Court finally isolated the Free Exercise Clause as a discrete constitutional mechanism. JESSE H. CHOPER ET AL., LEADING CASES IN CONSTITUTIONAL LAW 774–75 (2013).

118 310 U.S. 296 (1940).

119 *Id.* at 303–04, 307.

120 *See infra* note 196.

121 98 U.S. 145 (1878).

122 Kenneth Marin, Note, *Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1435 (1991).

123 *Reynolds*, 98 U.S. at 164.

124 *See* Marin, *supra* note 122, at 1441.

125 *Id*. at 1465–66.

practices, then even laws that peripherally burden such practices are not offensive to the First Amendment.[126]

Since then, the Religious Freedom Restoration Act of 1993 ("RFRA"), which resurrected the *Sherbert* test, has protected U.S. federal territories.[127] States, however, must individually choose whether or not to implement similar legislation, and many have.[128] For the rest of the states, the First Amendment's Free Exercise Clause no longer affords as much protection to religious institutions as it once did.[129]

1. The *Sherbert* Test

In the 1963 case *Sherbert v. Verner*,[130] the Supreme Court ruled in favor of a Sabbatarian who had been denied unemployment benefits for her refusal to work on Saturdays due to her religious beliefs.[131] The Court then proceeded to establish a definitive test for permissible government encroachment on free exercise.[132] To satisfy the *Sherbert* test, the government must establish that it is acting in furtherance of a compelling state interest, and the means used to achieve that interest are the least restrictive with respect to the imposition on the practice of religion.[133]

The Supreme Court changed course, however, in *Employment Division v. Smith*,[134] when the Court made it clear that the Free Exercise Clause no longer afforded religious practices the rigorous protection from governmental interference as the *Sherbert* test had previously imposed.[135] In *Smith*, members of the Native American Church were fired from their jobs for using peyote for earnest religious purposes.[136] When they were subsequently denied unemployment benefits due to the nature of their terminations they brought suit under the Free Exercise Clause.[137]

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126 *See* Emp't Div. v. Smith, 494 U.S. 872, 878 (1990).
127 City of Boerne v. Flores, 521 U.S. 507, 515 (1997).
128 *See infra* note 232.
129 *See Smith,* 494 U.S. at 878.
130 374 U.S. 398 (1963).
131 *Id.* at 399–401.
132 *See* Sherbert v. Verner, 374 U.S. 398, 406–07 (1963).
133 Marin, *supra* note 122, at 1441.
134 494 U.S. 872 (1990).
135 Marin, *supra* note 122, at 1465–66.
136 *Smith*, 494 U.S. at 874.
137 *Id.*

Justice Scalia, delivering the opinion of the Court, made it clear that the *Sherbert* test was now of dubious applicability.[138] The Court criticized the test's requirement that the burdened religious practice in question be "central" to the individual's religion, opining, "[w]hat principal of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"[139] Furthermore, to subject all federal and state laws and regulations to the strict scrutiny imposed by the *Sherbert* test in such a religiously diverse society as the U.S., the Court reasoned, would be "courting anarchy."[140] It continued, "[w]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[141] The Court therefore held that as long as a law is one of general applicability, and its burden on the practice of religion is merely incidental, then "the First Amendment has not been offended."[142]

Under current jurisprudence, only when a law specifically targets a religion, will it be held to the strict scrutiny of *Sherbert*.[143] This can also occur, however, if a law that is facially neutral has a discriminatory effect.[144] However, even in these situations the Free Exercise Clause no longer requires the law to be the least restrictive means available to advance a compelling governmental interest, but merely requires the law to be "narrowly tailored" to advance a compelling governmental interest.[145] This standard is less exacting on the government.

Of course there is one caveat for the government: the Court held that if a "State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[146] Although it may seem unclear what the Court means by this, at least one federal court used this language to strike down a city noise ordinance because the ordinance specifically exempted some secular noises

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138 *See id.* at 879.

139 *Id.* at 887.

140 *Id.* at 888.

141 *Id.*

142 *Smith*, 494 U.S. at 878.

143 *Id.* at 894.

144 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

145 Saint Mark Roman Catholic Parish v. City of Phoenix, No. CV 09-1830-PHX-SRB, 2010 U.S. Dist. LEXIS 145304, at *36–37 (D. Ariz. Mar. 3, 2010).

146 *Smith*, 494 U.S. at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

(e.g., music produced by ice cream trucks) but not religious noises like church bells.[147]

Although this reasoning seems sound, it leaves little protection available to many religious practices (e.g., the ringing of church bells). So, in response to the Supreme Court's decision in *Smith*, Congress enacted RFRA.[148]

2. RFRA and State Statutes

RFRA passed both houses almost unanimously and was signed into law by President Clinton in 1993.[149] The statute is short and quite simply reinstates the *Sherbert* test.[150] The statute also includes a waiver of sovereign immunity allowing for judicial review of government action that "substantially burden[s] a person's exercise of religion even if the burden results from a rule of general applicability" unless the action is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[151]

In 1997, RFRA (at least as it applies to the states) was struck down by the Supreme Court as an unconstitutional exercise of congressional power in *City of Boerne v. Flores*.[152] The Court in *Boerne* reaffirmed its ruling in *Cantwell* that the Fourteenth Amendment applies the First Amendment Free Exercise Clause to the states, and further that Fourteenth Amendment unambiguously grants Congress the power to enforce the provisions of the Fourteenth Amendment.[153] However, the Court held that RFRA was not enforcing the provisions of the Fourteenth Amendment, but rather substantively changing those provisions to compel the states to abide by a constitutional precept that, as of *Smith*, was nonexistent.[154] The free exercise clause simply does not provide citizens the unfettered religious guardianship RFRA requires of the states.[155]

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147 *See Saint Mark*, 2010 U.S. Dist. LEXIS 145304, at *35.

148 Gregory P. Magarian, Article, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1911 (2001).

149 *Id.*

150 *Id.*

151 The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (1993).

152 521 U.S. at 536; *see also* Magarian, *supra* note 148, at 1912.

153 *Boerne*, 521 U.S. at 519.

154 *Id.*

155 *See id.*

Today, RFRA only applies to the federal government.[156] In response, many states passed their own versions of RFRA.[157] Consequently, these states and U.S. federal territories afford greater protections to religious practices (bell ringing included).[158] The question is what happens to religious practitioners who do not live in an RFRA/*Sherbert* jurisdiction?

B. Bells, Music & The First Amendment

The First Amendment provides individuals with various protections from government interference, including protection from the abridgment of freedom of speech.[159] Church bells may be religiously significant in worship, but they are also, or at least are all capable of being used as, musical instruments.[160] Music is considered "speech" for First Amendment purposes.[161] As such, bells could find safe haven under the First Amendment's Free Speech Clause, notwithstanding an absence of RFRA protection.[162]

However, there are limits on when, where, and how music can be communicated. Thus, even as music, church bells are not entirely exempt from government regulation. For example, in *Ward v. Rock Against Racism*,[163] the Supreme Court held:

> [E]ven in a public forum the government may impose reasonable restrictions on the time, place, or

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156 42 U.S.C. § 2000bb-3(a) (2000).

157 *See infra* note 232.

158 Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 343 (2013).

159 *See* U.S. CONST. amend. I.

160 GOUWENS, *supra* note 25, at 16:

> The earliest written record of bells being played by just one person from some crude form of keyboard is found in the archives of Antwerp Cathedral (Flanders) where, in 1482, a small set of bells (8–10) was connected to "an arrangement of ropes and sticks," and a wide variety of tunes was played on these bells . . . .

Id.

161 *See* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989). *See also* David Munkittrick, Note, *Music as Speech: A First Amendment Category unto Itself*, 62 FED. COMM. L.J. 665, 676–77 (2010).

162 *See, e.g.*, Saint Mark Roman Catholic Parish v. City of Phoenix, No. CV 09-1830-PHX-SRB, 2010 U.S. Dist. LEXIS 145304, at *21–22 (D. Ariz. Mar. 3, 2010).

163 491 U.S. 781 (1989).

> manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[164]

In *Ward*, the Supreme Court upheld a City of New York regulation that required anyone performing in Central Park to use a private sound technician, hired by the City, in order to keep noise levels down.[165] The Court emphasized, "[t]he government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[166]

It seems clear then that even if church bells are being legally analyzed as musical instruments they would not necessarily enjoy more First Amendment protections than they would strictly as tools of religious worship.[167] Thus, a neutral, blanket noise ordinance could still silence the music of church bells.

C. Applying the First Amendment to Church Bells: The Phoenix Case

The doctrine of constitutional avoidance means federal courts are loath to address constitutional issues unless the court cannot resolve the case by any other avenue.[168] Perhaps this is the reason the case law is so scant on the constitutionality of noise ordinances being enforced against churches for tolling their bells.[169] There is, however, one case that finally addressed the issue.

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164 *Id.* at 791 (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

165 *Id.* at 787.

166 *Id.* at 791.

167 *See id.*

168 *See* Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 181–82 (2009). This is also known as the "avoidance canon." *Id.*

169 *See* Williams, *supra* note 13.

In *Saint Mark's Roman Catholic Parish v. City of Phoenix,*[170] a federal district court addressed the constitutionality of a city noise ordinance head on.[171] The case, as discussed in the introduction, involved a Phoenix, Arizona noise ordinance that at least two churches violated.[172] The churches filed a motion for a preliminary injunction against the city, while the city moved to dismiss the case altogether.[173]

The court first addressed the issue of bells as music—a form of protected First Amendment expression.[174] The court found that the bells were indeed music, and were indeed protected by the First Amendment's free exercise provisions, unequivocally stating, "[c]hurch bells produce music, and courts have determined that music is expression for the purposes of First Amendment analysis."[175] The court also noted, however, that unless the noise ordinance regulated the *content* of the affected expression, the regulation would not offend the First Amendment, despite incidental burdens on the church's free expression rights.[176]

However, the Phoenix noise ordinance was peculiar in that it allowed for certain exemptions if the noise produced "a pleasing melody" (e.g., from ice cream trucks).[177] The court found this provision to inject a subjective component into the ordinance that not only permitted city officials to decide what music they found "pleasing," but it actually required such subjective decision-making.[178] This alone was enough to deny the city's motion to dismiss and grant the church's motion for a preliminary injunction, but the court was not finished.

Addressing the religious issues, the court held that the noise ordinance was violative of the First Amendment's Free Exercise Clause, notwithstanding the fact that the law was facially neutral.[179] The court cited to a line in the Supreme Court's decision in *Smith*, which held, "where the State has in place a system of

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170 No. CV 09-1830-PHX-SRB, 2010 U.S. Dist. LEXIS 145304 (D. Ariz. Mar. 3, 2010).

171 *Id.*

172 *Id.* In fact, Bishop Rick Painter was imprisoned for his violation of the ordinance. *Id.*

173 *Id.* at *1.

174 *See supra* note 161.

175 *Saint Mark*, 2010 U.S. Dist. LEXIS 145304, at *21. The court also noted that even purely instrumental music is also protected. *Id.* at *21–22.

176 *Id.* at *22–24.

177 *Id.* at *25–27.

178 *Id.*

179 *Id.* at *34–36.

individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason."[180] Since the noise ordinance specifically exempted some noise (like that produced by ice cream trucks, street work, and city vehicles), it must also allow for religious exemptions, the court reasoned.[181] Because it did not, the ordinance was subject to strict scrutiny.[182] The court then held that the church alleged a First Amendment violation sufficiently to survive the city's motion to dismiss.[183]

Lastly, the court examined the church's claim that the ordinance violated the State's Free Exercise of Religion Act ("FERA"), which basically echoed the *Sherbert* test.[184] Under FERA, the church is required to demonstrate that its actions were (1) religiously motivated, (2) the religious beliefs were sincerely held, and (3) the government's action substantially burdened the exercise of religious beliefs.[185] The burden then shifts to the government to establish that its law was in furtherance of a compelling governmental interest and was the least restrictive means of furthering that interest.[186] Because the court was only ruling on a motion to dismiss, however, all the church needed to do was allege the elements of FERA in its complaint.[187] The court held that the church sufficiently alleged a FERA complaint so it denied the city's motion to dismiss.[188] Unfortunately, this does not tell us much about whether or not the city actually violated FERA, but it is safe to assume it did based on the various aforementioned exemptions in the ordinance.[189]

The *Saint Mark* case is extremely instructive in the sparsely adjudicated area where constitutional law and religious campanology intersect. The case reminds us that in defending against a facially neutral noise ordinance, even in a non-RFRA state, a church should make sure the ordinance does not create any exemptions because if it does, the church is similarly entitled

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180 *Saint Mark*, 2010 U.S. Dist. LEXIS 145304, at *35.

181 *Id.* at *49–51.

182 *Id.* at *36. *But see supra* note 148 (the strict scrutiny triggered by an alleged Free Exercise violation only requires the law in question to be *narrowly tailored* to further a compelling state interest, not the least restrictive means to do so).

183 *Saint Mark*, 2010 U.S. Dist. LEXIS 145304, at *37.

184 *See id.* at *38–39.

185 *Id.*

186 *Id.* at *38–39.

187 *Id.* at *39–40.

188 *Id. at* *39–40.

189 *Saint Mark*, 2010 U.S. Dist. LEXIS 145304, at *51.

to such exemptions under the Free Exercise Clause.[190] We are also reminded that the "narrowly tailored," not the "least restrictive means," standard applies to Free Exercise cases, even if the law in question is *not* neutral.[191] One final constitutional question remains, however. The Constitution promises individuals Free Exercise from *governmental* interference.[192] If a private citizen seeks to obtain an injunction for nuisance, the court—an arm of the government—ultimately issues the injunction.[193] Is this not governmental intrusion upon free exercise? How does the court system balance and reconcile a private citizen's state law nuisance claim against a church, when the church uses the First Amendment as an affirmative defense?

D. State Tort Law & the First Amendment as an Affirmative Defense

The very illegality of a tort, even if not embodied in a statute, is considered "state action" for the purpose of First Amendment analyses.[194] Thus, if a state recognizes the common law tort of nuisance in a court of equity, the state has acted.[195] Pursuant to the Free Exercise Clause, some courts, during the reign of the *Sherbert* test, refused to enforce tort law against churches for their actions against private citizens.[196] In the wake of *Smith*, however, it became clear that as long as the tort was equally applicable to everyone, tort claims against churches would not be dismissed on account of the Free Exercise Clause.[197] With respect to free speech, the First Amendment can serve as a defense to private tort suits.[198] One might find it curious then that no church has ever tried to defend its tintinnabulation on the grounds of either free speech or free exercise in a private nuisance suit.[199]

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190 *Id*. at *49–50.

191 *Id.* at *36–37.

192 U.S. CONST. amend. I.

193 An injunction is defined as "[a] *court order* commanding or preventing an action" (emphasis added). *Injunction,* BLACK'S LAW DICTIONARY (9th ed. 2009).

194 *See* Paul v. Watchtower Bible & Tract Soc., 819 F.2d 875, 880 (9th Cir. 1987).

195 *Id.*

196 *Id.* at 883–84.

197 *See*, *e.g.*, Smith v. O'Connell, 986 F. Supp. 73, 77–78 (D. R.I. 1997).

198 Snyder v. Phelps, 562 U.S. 443, 443–44 (2011).

199 *See* Williams, *supra* note 13 for a comprehensive list of nuisance actions against churches for bell ringing. Although these defenses were asserted in the *Saint Mark* case, the church's opponent in that case was the City of Phoenix, not a private citizen.

There are a few possible reasons why the First Amendment was never raised as a defense in these bell cases. The relevant case law is comprised exclusively of state cases, and many of them predate *Cantwell*, so one reason could simply be that the Fourteenth Amendment had not yet been understood to apply the Free Exercise Clause to state action.[200] Many of the other cases postdated *Smith*, so making the argument in those cases would have been moot.[201] For the few cases in the period when the *Sherbert* test was still good law, the reason could be as simple as bad lawyering.

With respect to free speech however, the First Amendment defense to nuisance fails for a very different reason: the captive audience doctrine.[202] According to the captive audience doctrine, an individual's right to free speech is limited in situations where another person is forced to endure the content of the speech against his will.[203] The quintessential example of this is when one person is in the privacy of his own home, another person is not free to project speech, otherwise protected, into that person's house.[204] Because music is speech for First Amendment purposes, one can only presume that the captive audience doctrine also applies in nuisance cases wherein the plaintiff is forced to endure the church's bell ringing while in the privacy of his own home.[205] Of course this would only be relevant if the church bells were generating "music" as opposed to tolling for other religious purposes, in which case they cannot find sanctuary from state nuisance law anyway for the reasons stated earlier in this subsection.[206] Although this ultimately does not change anything for the churches as far as their rights are concerned, acknowledging how and why the state is able to "act" vis-à-vis the effectuation of nuisance law, notwithstanding the First Amendment, makes the constitutional analysis complete.

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200 *Id.*

201 *See*, *e.g.*, Caldarola v. Town of Smithtown, No. CV 09-272(SJF)(AKT), 2010 U.S. Dist. LEXIS 142531 (E.D.N.Y July 14, 2010); Langan v. Bellinger, 611 N.Y.S.2d 59 (N.Y. App. Div. 1994).

202 *See* Melissa Weberman, *University Hate Speech Policies and the Captive Audience Doctrine*, 36 OHIO N.U. L. REV. 553, 569–70 (2010).

203 *Id.; see also* Pro-Choice Network v. Schenck, 67 F.3d 377, 392 (2d Cir. 1995).

204 Weberman, *supra* note 202, at 571–72.

205 *Id.*

206 *See* Paul v. Watchtower Bible & Tract Soc., 819 F.2d 875, 883–84 (9th Cir. 1987).

V. ANALYSIS & COMMENTARY

One would think that as our society becomes more secular and the percentage of Atheists increases[207] that the cases against churches for making too much unwelcomed noise would also increase. Conversely, these bell cases rarely seem to end up in court these days.[208] Although there have been a few minor incidents in recent years that received some media attention, there has not been a spike in anti-church bell litigation despite the gradually decreasing dominance of Christianity in an ever-expanding U.S. population.[209] In fact, the only two published cases in which churches were ever enjoined from bell ringing occurred over ninety-nine years ago.[210] Why has the church not seen a spike in anti-church bell litigation as the country has become less and less religious? More importantly, under current prototypical state tort laws and U.S. constitutional law, what can churches do to protect their tintinnabulatory rights? And finally, I will discuss why the current system is not fair and what can be done to change it.

A. Why There Has Not Been More Litigation: A Modern Case Study

In November 2013, a neighbor living near Our Lady Of Guadalupe, a Catholic church in Mission, Texas, brought a complaint against the church alleging a violation of the three sections of the city's noise ordinance.[211] The ordinance read in part, "[i]t shall be unlawful for any person to make, continue or cause to be made or continued any loud, unnecessary or unusual noise or any noise which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of others, within the city."[212] The event triggered a local media spectacle, drawing a

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207 *See* Kosmin & Keysar, *supra* note 20.

208 My research uncovered fewer than ten cases where this issue was discussed. Of them, only four of the opinions were issued within the past ninety-nine years. *See*, *e.g.*, Williams, *supra* note 13.

209 *See, e.g.*, Marcy Martinez, *Priest Called to Court for Ringing Church Bells*, KGBT (Nov. 11, 2013), http://valleycentral.com/news/local/priest-called-to-court-for-ringing-church-bells?id=970260.

210 *See* Harrison v. Saint Mark's, 12 Phila. 259 (Pa. 1877); Terhune v. Trs. of Methodist Episcopal Church, 87 N.J. Eq. 195 (N.J. Super. Ct. Ch. Div. 1917).

211 Complaint at 1, State of Texas v. Father Roy Lee Snipes, No. 2013-29860 (Mun. Ct. 2013).

212 MISSION, TEX., CODE OF ORDINANCES art. VI, div. 1, § 42-231 (2003).

large number of church supporters and approximately twenty attorneys, eight of whom entered formal appearances before the court.[213] This case certainly sheds some light on why so many of these cases never make it to trial. The immense show of support for the church from the community, 34.7% of which identified as Catholic, [214] essentially tied the city's hands. [215] After the complainant himself withdrew his complaint,[216] possibly, as one priest at the church theorized, because of the community's immense support in favor of the church, the city's attorney agreed not to proceed and the case was dismissed. [217] The immense political pressure exerted by such a high percentage of the city's voting population made a big difference.[218] Not coincidentally, the city subsequently amended its noise ordinance to make an exemption for churches.[219]

This is a good example of how in highly religious communities it can be very difficult for an individual to enjoin a church from ringing its bells. The converse might be true in more secular communities where churches no longer occupy the same rung on the ladder of social dominance that they once occupied.[220] The church leader must decide whether to make enemies of members of the community, or consider amending the church's practices to appeal to the widest possible number of potential parishioners, the pool of which is steadily declining.[221] It could be that churches would simply rather silence their bells than become pariahs in their own communities, and/or face long and costly litigation.

Whatever the reason, it is somewhat difficult to discuss the sociological factors involved in predicting why a church may or may not end up in court over its bell tolling. Nevertheless, there are a number of things a church can do to find out what acoustic rights it has, if any, with respect to ringing bells.

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213 Telephone Interview with Julian C. Gomez, Attorney for Father Roy Snipes (Mar. 3, 2015).

214 *Mission, Texas*, CITY-DATA.COM, http://www.city-data.com/city/Mission-Texas.html (last visited Nov. 15, 2015).

215 Telephone Interview with Julian C. Gomez, *supra* note 213; *see also* Order of Dismissal at 1, State of Texas v. Father Roy Lee Snipes, No. 2013-29860 (Mun. Ct. 2013).

216 Telephone Interview with Julian C. Gomez, *supra* note 213.

217 Telephone Interview with Father Roy Snipes, *supra* note 77.

218 Telephone Interview with Julian C. Gomez, *supra* note 213.

219 *Id.*

220 *See* Kosmin & Keysar, *supra* note 20; *see also* WEINER, *supra* note 16.

221 *See* Kosmin & Keysar, *supra* note 20.

B. What Churches Need to Know[222]

1. In Private Actions

If a church is threatened with a lawsuit by a private citizen, it should be reassured that very few cases have resulted unsuccessfully for the church.[223] Although case law is scant, there are factors a church can take inventory of to get a better idea of how the case may turn out if it goes to court.

Who was there first? If the church or bells themselves are new additions to the community, established residents will have a much stronger case against the church—especially if the church is located in a predominately residential neighborhood with few other loud noises.[224] If the church has been ringing its bells in the same location for a long time—years or decades—then it probably does not have much to fear.[225] Similarly, if a church is in a city or area where other loud noises are commonplace, the likelihood of a plaintiff succeeding in a nuisance claim against a church is much less.[226]

Also, how many people have complained? If there are many people living closer to the church than the complainant and those people have not joined in the complaint, the likelihood of the complainant successfully obtaining injunctive relief is slim.[227] If

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[222] This section is not intended to provide legal advice. Anyone faced with a lawsuit should consult with a licensed attorney.

[223] *See supra* note 210, and accompanying text.

[224] *But see, e.g.*, Hoffman v. United Iron & Metal Co., 671 A.2d 55, 66 n.11 (Md. App. 1996) ("Maryland does not recognize the defense of 'coming to the nuisance'").

[225] *See, e.g.*, Terhune v. Trs. of Methodist Episcopal Church, 87 N.J. Eq. 195, 199 (N.J. Super. Ct. Ch. Div. 1917) ("As complainant moved into his present residence some time after the bell had been installed and had been rung for years for ordinary church services, I do not find that he has shown his right to have defendants restrained from continuing the ringing of the bell for such purposes . . . .")

[226] *See, e.g.*, Langan v. Bellinger, 611 N.Y.S.2d 59, 60 (N.Y. App. Div. 1994) (holding that a sworn affidavit of, and report by, a noise management expert showing that the sound from passing automobiles produced the same amount of noise as the defendant's church bells was—along with affidavits from several other residents who found the bells to be pleasant—enough to entitle the church to summary judgment).

[227] *See, e.g.*, Impellizerri v. Jamesville Federated Church, 428 N.Y.S.2d 550, 552 (N.Y. Sup. Ct. 1979) (denying plaintiff's motion for an injunction and granting church's motion to dismiss noting that "[t]here are no other

the church can get affidavits from the non-complaining proximate residents stating that the bells do not bother them then the plaintiff's likely success in court is fairly damned.[228] It also bodes well for the church if the bell ringing is associated with non-secular activity, such as calling those to worship or playing melodies from church hymns, as opposed to tolling the hours of the day, for instance.[229]

If these factors seem to weigh evenly so that the outcome seems uncertain, an attempt by the church to reduce the volume, duration, and/or frequency of the bell ringing may at least show the court that a good faith attempt at a compromise has been made, which could possibly lead to more favorable results.[230]

2. In Government Actions

If a church is told by police or otherwise notified that it is in violation of a city or town noise ordinance, there are a number of things the church can do to try and take inventory of its legal rights. The federal government,[231] as well as some states, are bound by the RFRA or a state version thereof.[232] These

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complainants, although there are several neighbors who live closer to the church than plaintiffs.")

228 *See Langan*, 611 N.Y.S.2d at 60.

229 *See Terhune*, 87 N.J. Eq. at 198–99 (granting plaintiff's motion for injunctive relief against church only with respect to ringing church bells to toll the hours of the day, not for ordinary religious purposes).

230 *See, e.g.*, *Impellizerri*, 428 N.Y.S.2d at 551–52 (granting church's motion for summary judgment noting that the church made many attempts to compromise, including moving the speakers of the electronic bell system, and reducing the volume and the length of playing time).

231 *See supra* note 156.

232 States with some version of an RFRA (either statutory or as part of the state's Constitution) include: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. ALA. CONST. amend. DCXXII (Alabama); ARIZ. REV. STAT. ANN. § 41-1493.01 (1999) (Arizona); CONN. GEN. STAT. ANN. § 52-571b (1993) (Connecticut); FLA. STAT. ANN. § 761.03 (1998) (Florida); IDAHO CODE ANN. § 73-402 (2000) (Idaho); 775 ILL. COMP. STAT. ANN. 35/15 (1998) (Illinois); KAN. STAT. ANN. § 60-5303 (2013) (Kansas); KY. REV. STAT. ANN. § 446.350 (2013) (Kentucky); LA. REV. STAT. ANN. § 5233 (2010) (Louisiana); MISS. CODE. ANN. § 11-61-1 (2014) (Mississippi); MO. REV. STAT. § 1.302 (2003) (Missouri); N.M. STAT. ANN. § 28-22-3 (2000) (New Mexico); OKLA. STAT. ANN. tit. 51, § 253 (2000) (Oklahoma); 71 PA. STAT. ANN. § 2404 (2002) (Pennsylvania); R.I. GEN. LAWS § 42-80.1-3 (1993) (Rhode Island); S.C. CODE ANN. § 1-32-40 (1999) (South Carolina); TENN. CODE. ANN. § 4-1-407 (2009) (Tennessee); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (1999) (Texas); VA. CODE ANN. § 57-2.02 (2007) (Virginia).

jurisdictions are guaranteed the rigorous religious protection of the *Sherbert* test.[233] In a typical RFRA jurisdiction, it is likely the church must first establish that ringing church bells is (1) motivated by a religious belief, (2) which is sincerely held, and (3) the noise ordinance substantially burdens the exercise of religion.[234] Once these elements are satisfied, the government bears the burden of demonstrating that the law is in furtherance of a compelling governmental interest and is tailored in such a way that it is the least restrictive means of effectuating that interest.[235]

The ringing of church bells is a long established practice of the church.[236] Few would dispute that such bell ringing is not motivated by sincerely held religious beliefs, and is substantially burdened by a prohibition on bell ringing.[237] The burden should therefore easily shift to the government.[238]

A noise ordinance is very likely to satisfy the compelling state interest element.[239] The government has "a substantial interest in protecting its citizens from unwelcome noise."[240] However, it is arguable that specifically targeting church bells and prohibiting their use goes a step too far in attempting to further the interest of promoting peace and quiet. This is especially true if the city seems to suffer from other noises like automobile traffic, horns, athletic events, concerts, etc.[241] Selective enforcement of such a blanket ordinance could evince a discriminatory purpose on the part of the town.[242] It seems highly questionable whether

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233 *See* 42 U.S.C. § 2000bb-3 (1997).

234 *See, e.g.*, State v. Hardesty, 214 P.3d 1004, 1007 (Ariz. 2009) (en banc).

235 *Id.*

236 *See* COLEMAN, *supra* note 1, at 35.

237 *See*, *e.g.*, Saint Mark Roman Catholic Parish v. City of Phoenix, No. CV 09-1830-PHX-SRB, 2010 U.S. Dist. LEXIS 145304, at *38–39 (D. Ariz. Mar. 3, 2010).

238 *See id.*

239 Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989).

240 *Id.* (internal citation omitted).

241 *See Saint Mark*, 2010 U.S. Dist. LEXIS 145304, at *35–36 (holding because noise ordinance allowed for certain exemptions it also had to allow for religious exemptions).

242 Although its applicability to noise ordinances enforced against churches in First Amendment cases is extremely attenuated, the Supreme Court has held that facially neutral laws that have a discriminatory racial purpose are unconstitutional in equal protection cases. *See*, *e.g.*, Washington v. Davis, 426 U.S. 229, 241 (1976). The Court held that such discriminatory motives could be inferred from the totality of relevant facts. *Id.* at 242. It would not be entirely illogical to presume the same principal might be extended to noise ordinances in

selective enforcement targeting church bells is the least restrictive means of promoting peace and quiet. Additionally, a lack of objectivity could suffice to defeat the least restrictive means requirement (e.g., if instead of prescribing a maximum decibel level within the city limits the ordinance uses a subjective standard like whether the noise is "pleasing").[243] It is certainly possible for a city to enjoin a church from ringing its bells, even in an RFRA jurisdiction, if the city can overcome the very high burden of demonstrating that its noise ordinance is somehow the least restrictive means of furthering peace and quiet, but the odds of this are probably slim because an ordinance could easily carve out narrow exceptions for occasional religious bell-ringing.[244]

In a non-RFRA state, the best option available to the church is to carefully examine the noise ordinance itself. Laws, including noise ordinances, that have the incidental effect of burdening religious practices are constitutional as long as they do not discriminate against any particular religion or religious practice; however, even a facially neutral ordinance may nevertheless be discriminatory in effect.[245] Such an ordinance would be subject to strict scrutiny if its discriminatory effect was felt by a church.[246] A church will feel such a discriminatory effect if the ordinance exempts other types of noise but not the church bells, for example.[247] Selective enforcement of the ordinance may also suffice if churches were targeted for enforcement while other noise-makers were left alone.[248] Generally speaking, a noise ordinance will survive the "compelling governmental interest" prong of strict scrutiny.[249] In non-RFRA jurisdictions, even if the law does discriminate against a religious practice, it need only be "narrowly tailored" to advance the governmental interest, not the

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First Amendment cases if it seemed evident that a municipality was specifically targeting religious sounds, like bells or a muezzin's call to prayer, and not others.

243 *See Saint Mark*, 2010 U.S. Dist. LEXIS 1450304, at *25–27 (discussing the use of objective language contained in the ordinance as a guide for blanket enforcement).

244 *See supra*, note 87 (even after affirming a lower court's ruling to enjoin a church from religious bell-ringing, the Pennsylvania Supreme Court nevertheless amended the injunction to permit the church to ring its bells periodically).

245 *See Saint Mark*, 2010 U.S. Dist. LEXIS 1450304, at *33–34.

246 *Id.*

247 *Id.* at *35–36.

248 *See supra* note 242.

249 "[I]t can no longer be doubted that government 'ha[s] a substantial interest in protecting its citizens from unwelcome noise.'" Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989) (citing City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984)).

least restrictive means of doing so.[250] It is unclear what exactly the difference would look like in the context of a noise ordinance challenge, but it is undeniably less demanding of the government, so the likelihood of a successful injunction against the church is greater than in an RFRA jurisdiction.

If a noise ordinance in a non-RFRA jurisdiction, as well as its enforcement, is truly neutral, it will be enforceable. The best way to handle this from the church's perspective is probably to appeal to the powers that be within the municipal government. For example, the church might decide to circulate a petition to amend the ordinance to exempt church bells, or even lobby city council members and/or the mayor—or possibly concede and muffle the volume of the bells, and/or limit the frequency and duration of their chimes.[251] As a last resort a church could even seek sympathetic candidates to run for city office and displace those who promulgated the unfavorable noise ordinance. However, these last-ditch remedies are political, not legal. Unfortunately, current constitutional jurisprudence does not give much legal protection to religious bell ringing.

C. A Critical Look at Current Jurisprudence

The United States is a diverse nation of religious and irreligious people, including people with neurological disorders, heightened sensitivities, deaf people, and carillonneurs.[252] The right of one member of society to ring bells in celebration of the risen Lord on Easter Sunday may be another citizen's greatest pet peeve, or worse, may aggravate a neurological disease.[253]

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[250] *See Saint Mark*, 2010 U.S. Dist. LEXIS 1450304, at *36–37.

[251] *See*, *e.g.*, Impellizerri v. Jamesville Federated Church, 428 N.Y.S.2d 550, 551–52 (N.Y. Sup. Ct. 1979).

[252] Eboo Patel, *Principled Pluralism: The Challenge of Religious Diversity in 21st Century America*, HUFFINGTON POST (July 2, 2013), http://www.huffingtonpost.com/eboo-patel/principled-pluralism-reli_b_3530332.html; The American Academy of Neurology, Compelling Statistics, https://www.aan.com/uploadedFiles/Website_Library_Assets/Documents/6.Public_Policy/1.Stay_Informed/4.Public_Policy_Resources/compell.pdf (last visited Sep. 25, 2015); GALLAUDET UNIVERSITY LIBRARY, *Deaf Statistics*, http://libguides.gallaudet.edu/print_content.php?pid=119476&sid=1029190 (last visited Sep. 25, 2015); THE GUILD OF CARILLONNEURS IN NORTH AMERICA, *Membership*, http://www.gcna.org/membership.html (last visited Sep. 25, 2015).

[253] *See Impellizerri*, 428 N.Y.S.2d at 551 (noting that the plaintiffs' son allegedly suffered from an undisclosed neurological disorder that was made worse

Currently, citizens of the several states are able to silence the bells in only the rarest of circumstances.[254] Municipal governments may regulate the emission of noise in the form of neutral, blanket regulations, and some states may require further accommodation for religious exercises like tintinnabulation.[255] Is this system fair? Within it, a boy suffering from a neurological disorder on account of a nearby church ringing its bells might be left to suffer, while in another town, a church might be prohibited from ringing bells even though not a single person has complained.[256]

As far as state nuisance laws are concerned, part of the analysis should include a new component, which I call "developing sensitivities." The developing sensitivities doctrine would enable plaintiffs to succeed in a private nuisance claim against a church despite having come to the nuisance, and notwithstanding the fact that other neighbors have not complained. The doctrine would only be available to a plaintiff who can establish: (1) the existence of a legitimate medical illness; (2) which is triggered or substantially aggravated by the bell ringing, not another source of noise, and; (3) the plaintiff either had no knowledge of the illness, or was genuinely unaware that the illness would be substantially aggravated by the bell ringing at the time the plaintiff took possession of his or her property. This doctrine would be much more fair in nuisance cases where a plaintiff purchased property close to a church and only subsequently developed an illness, which the bell ringing made substantially worse. Currently, the law does not accommodate injuries suffered as a result of medical conditions unique to the plaintiff.[257] In other words, nuisance law holds the plaintiff's injury to an objective standard, asking of the fact-finder, "would an ordinary person in the plaintiff's shoes have suffered the same injury?"[258] This is inherently unfair to plaintiffs who initially were not bothered by regularly hearing loud church bells but later developed a medical condition substantially aggravated by such noise. Currently such plaintiffs have two

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by the ringing of the bells. Additionally the boy's mother suffered from migraine headaches, also allegedly from the ringing of the bells).

254 *See supra* note 210.

255 *See supra* note 232.

256 Although all of the cases mentioned in this Note, including the *Phoenix* case, started out because someone did, in fact, complain. Saint Mark Roman Catholic Parish v. City of Phoenix, No. CV 09-1830-PHX-SRB, 2010 U.S. Dist. LEXIS 145304, at *3 (D. Ariz. Mar. 3, 2010).

257 *See* Impellizerri v. Jamesville Federated Church, 428 N.Y.S.2d 550, 552 (N.Y. Sup. Ct. 1979) (holding ordinary person standard applies in nuisance cases).

258 *Id.*

options: move or suffer. This doctrine would allow for an alternative option that does not currently exist.

With respect to governmental action, I advocate for a return to the *Sherbert* test.[259] Strict scrutiny should apply to all government action infringing upon religious free exercise. The *Sherbert* test does not automatically invalidate all government action that incidentally burdens religious free expression; it merely forces the government to carefully tailor its legislation to accommodate religious practices to the extent practicable.[260] As far as noise ordinances are concerned, we already know that they serve a compelling state interest;[261] the question is whether or not they should be carefully drawn to accommodate religious practices. Currently they need not be.[262]

In *Smith*, for instance, the Court acknowledged that many other states already had laws allowing the use of peyote for religious practices.[263] Perhaps instead of eliminating the religious protections of the *Sherbert* test, the Court in *Smith* could have simply forced the state to allow an exception for the religious practices of the Native Americans, rather than force them to sacrifice their religious practices. In these cases someone is going to lose. The question is which party is going to lose and why? The Supreme Court decided in *Smith* that the religious practitioners should lose by default rather than the government.[264] How is this preferable to the reverse, mandated by *Sherbert*?

Applying *Sherbert* to church bells, one can easily assume that the church is ringing the bells as part of a sincerely held

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259 Congress and the President have the means to circumvent the Supreme Court's decision in *City of Boerne v. Flores* and restore RFRA using their treaty power. *Missouri v. Holland*, 252 U.S. 416 (1920), held that Congress can exceed its enumerated powers if doing so in effectuation of a treaty. This power has never been overturned, despite ardent objections to it by several justices of the Supreme Court (*see, e.g.*, Bond v. United States, 134 S. Ct. 2077, 2099 (2014) (Scalia, J., concurring)). If the President were so inclined, and could find another willing State, he could negotiate an international human rights treaty focused on religious freedom. Upon ratification, Congress would need to pass enabling legislation for the treaty to have domestic effect (unless the treaty is self-executing (see discussion in Texas v. Medellin, 552 U.S. 491 (2008))). A nearly identical version of RFRA could constitute the enabling legislation and would be binding on the several states. For a more detailed look into this curious constitutional loophole *see* Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59 (2014).

260 *See* Marin, *supra* note 122, at 1441.

261 *See supra* note 249.

262 *See supra* note 142.

263 Emp't Div. v. Smith, 494 U.S. 872, 906 (1990).

264 Marin, *supra* note 122, at 1465–66.

religious belief.[265] Of course a noise ordinance silencing church bells substantially interferes with that practice. This satisfies the first part of the *Sherbert* test.[266] Thus, the burden will almost by default be on the town or city to establish that the ordinance is the least restrictive means of furthering a compelling state interest. We also know that noise ordinances further a compelling governmental interest. [267] So the only onus placed on the government (i.e., a municipality) by the *Sherbert* test with respect to bell ringing is making sure that any noise ordinance is narrowly tailored so it does not unnecessarily encumber that practice.[268] Perhaps if the people of one town collectively decide that they hate noise, including church bells, a court would find that a blanket noise ordinance that does not exempt anyone—even churches—is the least restrictive means possible to further the town's compelling interest of maintaining peace and quiet. Conversely, in a town where only a few citizens have complained, a court may find such an ordinance is not sufficiently tailored to promote the compelling governmental interest by the least restrictive means possible. These analyses should be done on a case-by-case basis, not by a default rule permitting any neutral legislation to infringe on religious free exercise just because the infringement is incidental.

What if a state wanted to outlaw the importation, sale, and consumption of all alcoholic beverages pursuant to Section Two of the Twenty-First Amendment? [269] The state then brings an enforcement action against every church in the state that continues to serve communion wine. The blanket enforcement is neutral and only incidentally burdens religion. Under current Supreme Court jurisprudence such a law would be constitutional and enforceable. Is this outcome fair or socially desirable? Under *Sherbert*, the state is forced to choose the least restrictive means

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265 In United States v. Ballard, 322 U.S. 78 (1944), the Supreme Court held that the truth or falsity of the defendants' religious beliefs was not a question of fact for the jury. In that same vein, the sincerity of a church's religious beliefs with respect to tintinnabulation should not be a question of fact for determination.

266 Marin, *supra* note 122, at 1435.

267 *See supra* note 249.

268 Marin, *supra* note 122, at 1435.

269 U.S. CONST. amend. XXI, § 2 reads, "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

possible when even incidentally burdening religious practices.[270] This means the law would most likely have to allow for a religious exemption for churches—an arguably fairer result.

A more realistic concern about the *Sherbert* test manifests in the controversial issue of gay rights. It is conceivable that a court could strike down a state or local anti-discrimination statute that prohibits anti-gay discrimination in places of public accommodation—the argument being that the legislation is not narrowly tailored enough to allow for business owners who, for religious reasons, do not wish to serve gay or lesbian patrons.[271] At least one state decided not to pass an RFRA type statute specifically out of fear that the above scenario would play out in that state.[272]

This concern is certainly legitimate. Although some would argue that the Bible does not go so far as to prescribe active discrimination against gays and lesbians, and therefore the religious sincerity of such a practice is dubious, courts will generally not second-guess the sincerity of an individual's professed religious beliefs.[273] It would probably be easier to jump the RFRA's "least restrictive means" hurdle than to discredit someone's religious beliefs and practices. After all, the sole purpose of an anti-discrimination statute is to prevent discrimination, so allowing for any type of religious exemption would seriously undermine the purpose of an anti-discrimination statute. This coupled with the facts that places of worship are often not considered to be places of public accommodation,[274] and that anti-gay discrimination has never historically been a core

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270 Marin, *supra* note 122, at 1435.

271 *See, e.g.*, Jeff Guo, *That Anti-Gay Bill in Arkansas Actually Became Law Today. Why Couldn't Activists Stop it?*, WASHINGTON POST (Feb. 23, 2015), http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/23/that-anti-gay-bill-in-arkansas-actually-became-law-today-why-couldnt-activists-stop-it/.

272 *See* Jim Siegel & Alan Johnson, *Arizona Flap Stops Ohio Religious-Freedom Bill*, THE COLUMBUS DISPATCH (Feb. 27, 2014), http://www.dispatch.com/content/stories/local/2014/02/26/religious-freedom-bill.html.

273 *See supra* note 265.

274 *See, e.g.*, N.J.S.A. 10:5-5(l) (2015) (omitting place of worship from the definition of "place of public accommodation" and specifically excluding educational facilities operated by bona fide religious institutions).

tenet or practice of Christianity[275] should help ease some of the anxiety about the RFRA eviscerating gay rights.[276]

The *Sherbert* test gives a bright line instruction to courts and legislators alike that upholds the protection of religious free exercise guaranteed by the First Amendment, while allowing lawmakers the flexibility to craft laws in such a way that religious practitioners are not unduly burdened.[277] With it, the government may still effectively promulgate laws and maintain order; however without it, although the government enjoys even greater flexibility in its lawmaking authority, religious practitioners who are severely burdened by a law of general applicability have no recourse or protection whatsoever. [278] This result is more consistently unfair to the religious practitioner who, unlike the government during the *Sherbert* era, does not get a second bite at the legislative apple. Therefore, resurrecting the *Sherbert* test would allow individuals the maximum amount of religious freedom, while still empowering the government, the states, and their subdivisions to uphold law and order.

VI. CONCLUSION

Leon Trotsky famously observed, "[e]verything is relative in this world, where change alone endures."[279] It would have been a stretch of Paulinus' imagination to try to envision the modern society in which we live when he hung the first steeple bell from his church 1,600 years ago.[280] Today our iPhones constantly flash, vibrate, and chime, reminding us to do certain things at certain times. Alarms wake us in the morning, and white noise apps put us to sleep at night like the hum of cicadas. Bells, at least functionally, seem to be hopelessly out of place in our high-tech society. Yet there is something romantic about them. Like the

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275 *See generally* DANIEL A. HELMINIAK, WHAT THE BIBLE REALLY SAYS ABOUT HOMOSEXUALITY (2000).

276 Of course the most democratic thing to do to preserve and expand gay rights would be to have Congress amend the Civil Rights Act to protect gays and lesbians.

277 For a detailed look at the *Sherbert* test, s*ee* Michael D. Currie, Note, *Scrutiny Mutiny: Why the Iowa Supreme Court Should Reject Employment Division v. Smith and Adopt a Strict Scrutiny Standard for Free-Exercise Claims Arising Under the Iowa Constitution*, 99 IOWA L. REV. 1363 (2014).

278 *See* Emp't Div. v. Smith, 494 U.S. 872 (1990).

279 LEON TROTSKY, THE REVOLUTION BETRAYED 99 (Max Eastman trans., 1937).

280 *See supra* note 35.

ironically novel appeal of an antique to a young person, or a vintage ensemble that is back en vogue after a forty-year hiatus, church bells still appeal to many people. Evidence of this can be seen from the very persistence of the bells in our modern soundscapes.

Bells will always remain musical instruments, so it is hard to imagine them ever vanishing completely. Furthermore, one need only take a trip to Florence or Rome to witness how long the edifice of a church can survive. Churches do not have much incentive to pay to have the bells removed, so the global campanological infrastructure that exists today will likely persevere through many centuries to come. The role of bells in worship is less certain. As religion changes to meet the needs of a rapidly evolving society, bells seem increasingly antiquated. As our interpretation of the Constitution evolves, we may enjoy less protection of our religious practices. Yet the sheer lack of case law seems to belie any fear that churches should start panicking over losing their rights to tintinnabulation. Whether or not the law undergoes a sea change in First Amendment jurisprudence is not necessarily inimical to church bells. The construct of modern nuisance laws seem to inherently favor churches in private actions, and governmental officials will only pass and enforce blanket noise ordinances affecting churches if those electing them to office call for such action. There does not seem to be much evidence that this is imminent. For now then, it seems Trotsky was wrong—like change, bells may, as they have for millennia, also endure.