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"The Laws Are the Same for Everyone" : Regulating Protest in the United States and Russia

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“The Laws Are the Same for Everyone”: Regulating Protest in the United States and Russia

I. Introduction

“For resistance to succeed,” writes historian Timothy Snyder, “...people must find themselves in places that are not their homes, and among groups who were not previously their friends. Protest can be organized through social media, but nothing is real that does not end on the streets.”¹ The specter of change from the streets has hovered before both Russian and American policy-makers with special force in recent years. Politicians in both nations have wrestled with the discontent and raw emotion emanating from mass street protests from Moscow’s Bolotnaya Square to the steps of the Capitol in Washington, DC.

Beyond simply experiencing similar waves of public protest, though, lawmakers in Russia and the United States have in several instances structured their responses in precisely the same manner—rewriting law so as to criminalize certain acts of protest. In Russia, the Duma has instituted this change on the federal level, designing a new statutory scheme that transforms formerly-administrative offenses into criminal ones. In the United States, multiple state legislatures have proposed or passed statutes that serve essentially the same function, shifting regulation of certain types of protest to the criminal system and allowing jail time to result from the use of certain protest tactics. Interestingly enough, these laws rose to the forefront (either through promulgation or first-time use) almost simultaneously, in late 2016-17.

¹ Timothy Snyder, *On Tyranny* (New York: Tim Duggan Books, 2017), 84.

These developments pose difficult questions both in terms of guaranteeing freedoms of speech and assembly in each country, and in how two systems with such fundamentally different conceptions of those freedoms could enact the same limiting structures. This intersection between the United States' well-developed First Amendment jurisprudence and Russia's fledgling post-Soviet speech protections illuminates the limitations and motivations of activists and lawmakers alike, perhaps suggesting that the institutions and rights at stake in each nation's debate over speech freedoms are not so different. I will proceed by first detailing the legal structure of the relevant American and Russian provisions criminalizing certain forms of public protest, their use and prevalence, and what we know about the legislative intent behind these measures. I will then put these laws in the broader context of each country's jurisprudence regarding freedom of speech and association, a backdrop against which the similarity of these provisions appears stranger and stranger. Finally, I will discuss the troubling implications of the appearance of these strikingly similar regulations in both nations.

II. Legislative Reaction and Statutory Constructions

On December 7, 2015, Ildar Dadin became the first and only person to be convicted under Article 212.1 of the Russian Criminal Code.² Dadin, a prominent figure in Russia's political opposition, was originally sentenced to three years' imprisonment³ for taking part in multiple "unauthorized" protests.⁴ Each of these violations separately would previously have constituted an administrative offense punishable by a fine; after the passage of Article 212.1 of the Russian

² "Статья 212.1 УК РФ Упразднила Свободу Собраний В России," accessed April 22, 2017, <http://old.memo.ru/d/253431.html>.

³ His term was later reduced to two and a half years' confinement on appeal. "Russian Supreme Court Scraps Conviction of Opposition Activist," *Reuters*, accessed April 22, 2017, <http://uk.reuters.com/article/uk-russia-politics-activist-idUKKBN1610WX>.

⁴ Amnesty International, "Russian Federation: Constitutional Court Ruling - An Opportunity to Annul Criminalisation of 'Unauthorised' Peaceful Protest" (Amnesty International, January 23, 2017), <https://www.amnesty.org/en/documents/document/?indexNumber=eur46%2f5542%2f2017&language=en>.

Criminal Code in 2014, receiving more than two of these violations in a 180-day period is a crime meriting up to five years' imprisonment.⁵ Article 212.1 met both domestic and international outcry as a violation of Russians' constitutionally-guaranteed rights to peacefully assemble.⁶ Most observer accounts tie the passage of Article 212.1 to the mass protests that enveloped Russia's major cities, particularly Moscow, in the wake of national elections in 2011 and 2012.⁷

Article 212.1 has been weakened since Dadin's arrest and initial trial, but remains very much in force. In early 2017, Dadin's conviction was eventually overturned on grounds that it was too "formally" applied to his case.⁸ Sending the case to Russia's Supreme Court (*Verkhovnyi sud*) for review, the Constitutional Court (*Konstitutsionnyi sud*) held that Article 212.1 could only be construed as complying with the Russian Constitution if narrowly-enforced based on "principles of necessity, proportionality, symmetry, and security of rights,"⁹ and called on the Duma to rewrite the law to include requirements of criminal intent and proportionality.¹⁰ The Court, however, stopped short of

⁵ Specifically, Article 212.1 elevates violations of Article 20.2 of the Administrative Code of the Russian Federation to criminal status. "УК РФ, Статья 212.1. Неоднократное Нарушение Установленного Порядка Организации Либо Проведения Собраний, Митингов, Демонстраций, Шествий Или Пикетирования," accessed April 22, 2017, http://www.consultant.ru/document/cons_doc_LAW_10699/3c21fcb0be9a995abb345c4d386166206558102d/.

⁶ See, e.g., Amnesty International, "Russian Federation: Constitutional Court Ruling - An Opportunity to Annul Criminalisation of 'Unauthorised' Peaceful Protest."

⁷ "Russian Supreme Court Scraps Conviction of Opposition Activist."

⁸ "Верховный Суд Отменил Приговор Ильдару Дадину," *Коммерсантъ*, February 22, 2017, <http://www.kommersant.ru/doc/3226752>.

⁹ Постановление Конституционного Суда РФ, от 10 февраля 2017 г., по делу о проверке конституционности положений статьи 212.1 Уголовного кодекса Российской Федерации в связи с жалобой гражданина И.И.Дадина [Ruling of the Constitutional Court of the Russian Federation from 10 February 2017, in the matter of the constitutionality of Article 212.1 of the Criminal Code of the Russian Federation in connection with the complaint of citizen I. I. Dadin], Feb. 10, 2017, accessed at <http://doc.ksrf.ru/decision/KSRFDecision261462.pdf>.

¹⁰ "Russia: Court Offers 'chink of Light' in Case Brought by Jailed Protester Ildar Dadin," accessed April 22, 2017, <https://www.amnesty.org/en/latest/news/2017/02/russia-court-offers-chink-of-light-in-case-brought-by-jailed-protester-ildar-dadin/>.

declaring the law unconstitutional¹¹—meaning that authorities can still imprison protesters under Article 212.1.

The litigation team at Moscow’s Institute for Law and Public Policy describes the power of Russia’s new anti-protest laws as one based in public knowledge of the government’s discretion in enforcing it.¹² In the wake of the well-publicized “Dadin Case,” the uncertainty—if you go to this protest, you *could* eventually go to prison—constitutes its primary deterrent.¹³ Dadin’s arrest and prosecution functioned just as much as a signal to potential dissenters as an individually-aimed punitive action. Even after the judicial mandate for law enforcement to apply Article 212.1 only to cases implicating public safety, the image of Dadin lingers. Dadin served 15 months in brutal prison conditions, was allegedly subjected to torture,¹⁴ and for a brief period disappeared within the Russian penal system¹⁵; even with a newly-cleaned slate, his case still serves as deterrent enough to would-be protesters. After all, your conviction could eventually be overturned, but how long, and *where*, would you wait for the courts to intervene?

Article 212.1 and Ildar Dadin offer an eerie analogue to legislative developments in several American states. According to the Washington Post, at least 18 American state legislatures

¹¹ As attorneys at Moscow’s Institute of Law and Public Policy (practicing strategic litigation before the Constitutional Court) explained, the Constitutional Court occupies a strange, delicate mid-ground among the Russian state, populace, and international legal community. On the one hand, the Court does not wish to lose credibility and cede the moral and ethical ground by not ruling in accordance with Russian and international human rights law. On the other hand, the Court implicitly acknowledges that to boldly rule against the Russian government would mean its rulings could never be executed, also costing it credibility. As such, the Court has no choice but to attempt to craft judgments that please all parties, attempting to speak for the constitutional rights of everyday Russians in a manner that may receive grudging acceptance and implementation from the administration. Meeting with Attorneys of the Institute for Law and Public Policy, March 15, 2017.

¹² Ibid.

¹³ Ibid.

¹⁴ Sarah Rainsford, “Russia Activist Ildar Dadin Accuses Prison of Torture,” *BBC News*, November 1, 2016, sec. Europe, <http://www.bbc.co.uk/news/world-europe-37836739>.

¹⁵ “Куда Исчез Ильдар Дадин,” *Настоящее Время*, accessed April 22, 2017, <http://www.currenttime.tv/a/28211616.html>.

introduced bills designed to curb public protest after the 2016 elections.¹⁶ As of yet,¹⁷ none have been signed into law—but several have passed state House or Senate votes, including bills that would create criminal penalties for protest in a manner similar to that of Article 212.1.¹⁸

Part of this wave has seen state legislators proposing new criminal statutes for protest-related offenses or enhancing protesting without permits into criminal offenses. The Arizona Senate passed State Bill 1142 (SB 1142) in February, making “participating in or helping organize a protest that turns into a riot” a crime chargeable under state RICO statutes.¹⁹ Key to SB 1142’s new offense of Riot is its lack of an overt act requirement and the stiff criminal penalties and forfeitures the state can impose after a conviction.²⁰ ²¹ Senators voting against the bill asserted it would chill speech and fail to withstand constitutional scrutiny.²² Florida’s SB 1096 proposes that any protester who obstructs streets, highways, or other public thoroughfares without a permit has committed a second-degree misdemeanor.²³ Georgia’s Senate passed a bill penalizing obstructing highways as a

¹⁶ Christopher Ingraham, “Republican Lawmakers Introduce Bills to Curb Protesting in at Least 18 States,” *Washington Post*, February 24, 2017, <https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states/>.

¹⁷ Information regarding US state legislation in this piece is current as of the writing of this paper in late April 2017.

¹⁸ I will not be discussing the multiple provisions introduced which, for example, release motorists of liability for striking and injuring or killing protesters. Ingraham, “Republican Lawmakers Introduce Bills to Curb Protesting in at Least 18 States.” For examples of these bills, see George Gainer, “The Florida Senate,” Pub. L. No. SB 1096, accessed April 22, 2017, <http://www.flsenate.gov/Session/Bill/2017/1096/?Tab=BillText>; Nina Agrawal, “In North Dakota, It Could Become Legal to Hit a Protester with Your Car,” *Los Angeles Times*, February 3, 2017, <http://www.latimes.com/nation/la-na-bills-protest-criminal-20170201-story.html>; “Tennessee Bill Would Make Drivers Immune from Civil Liability If They Hit Protesters in Street,” *FOX31 Denver*, February 14, 2017, <http://kdvr.com/2017/02/13/tennessee-bill-would-make-drivers-immune-from-civil-liability-if-they-hit-protesters-blocking-street/>.

¹⁹ “Arizona a Step Closer to Making Violent Riots a Serious Crime,” *US News & World Report*, accessed April 22, 2017, <https://www.usnews.com/news/arizona/articles/2017-02-22/arizona-senate-oks-racketeering-charges-for-riots>.

²⁰ *Ibid.*

²¹ The Arizona legislature explicitly exempted the new Riot offense from the statutory requirement of an overt act in order to be charged under its racketeering laws; the only other such offenses are felonies, Burglary in the First Degree, and Arson of an Occupied Structure. “SB1142 - 531R - S Ver,” 11, accessed April 22, 2017, <http://www.azleg.gov/legtext/53leg/1R/bills/SB1142S.htm>.

²² “Arizona a Step Closer to Making Violent Riots a Serious Crime.”

²³ Gainer, The Florida Senate.

“misdemeanor of a high and aggravated nature.”²⁴ One Iowa bill would transform blocking highways into a felony punishable by up to five years’ imprisonment.²⁵ This bill, Senate File 111, thus creates a Class D felony from what was formerly a nuisance.^{26 27}

The Russian experience of Article 212.1, then, is not so unique: across the United States, we are witnessing state-level lawmakers crafting essentially the same types of restrictions on public protest, either by creating new criminal offenses or enhancing penalties in place of what were formerly nuisances or fines. What makes these developments so curious is that they are taking place in two countries with dramatically different conceptions of the twin freedoms of speech and assembly, developed along historical trajectories that, in hindsight, seem to be moving in direct opposition to one another. And yet, each has arrived at the same place.

III. US and Russian Histories: Two Conceptions of Freedom of Speech

Expressive freedoms, like so much in the Russian justice system, represent the ambition of a young post-Soviet republic. Article 29 of the Constitution of the Russian Federation guarantees:

1. To each citizen is guaranteed the freedom of thought and speech.
2. Propaganda or agitation that incite social, racial, national or religious hatred and enmity is not allowed. Propagation of social, racial, national, religious or linguistic superiority is prohibited.

²⁴ Kristina Torres, “Senate Backs New Police Safety Effort That Some Worry Hurts Protesters,” *Ajc*, accessed April 22, 2017, <http://www.ajc.com/news/state--regional-govt--politics/senate-backs-new-police-safety-effort-that-some-worry-hurts-protesters/9kJm3MZyVWTyQLJo6jZd4M/>.

²⁵ “Iowa Bill: 5 Years in Prison for Highway Protesters,” *Des Moines Register*, accessed April 23, 2017, <http://www.desmoinesregister.com/story/news/politics/2017/01/23/iowa-bill-5-years-prison-highway-protesters/96956940/>.

²⁶ “Iowa Legislature - Senate File 111,” Pub. L. No. SF 111, accessed April 23, 2017, <https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=SF%20111>.

²⁷ A Mississippi Senate bill, later amended to remove the protest-related provision, would have amended the law to provide that “an intentional act of malice, including, but not limited to, a person sitting, standing or lying in a public road or highway that would impede or hinder the passage of emergency vehicles, the violation shall be a felony punishable by a fine not to exceed Ten Thousand Dollars (\$10,000.00) or imprisonment not to exceed five (5) years, or both.” “SB 2730 - Mississippi 2017 Regular Session,” accessed April 22, 2017, </ms/bills/2017/SB2730/>.

3. No one shall be compelled to express or reject his opinions and beliefs.
4. Every citizen has the right to freely seek, receive, transmit, produce and disseminate information in any lawful way. The list of information constituting a state secret is determined by federal law.
5. Freedom of the media is guaranteed. Censorship is prohibited.²⁸

Article 31 in turn protects freedom of assembly: “a citizen of the Russian Federation has the right to gather peacefully and unarmed, to conduct meetings, protests, demonstrations, marches, and picket lines.”²⁹

In the broader sweep of Russian history, the explicit guarantee of these rights is extremely new—far more typical is the explicit limitation of any such rights to bar political criticism or protest. Reaching back to the tsarist era, speech was rigorously censored for political content. Russia’s first successful codification of the laws, the “Body of Laws” (*Svod zakonov*) of 1832, “instituted political repression and persecution against those whose views were considered dangerous from the point of view of the imperial authority.”³⁰ In the period of reaction to the reforms of the 1860s, press violations of censorship laws actually lost the right to trial by jury.³¹ Harold Berman, the famous scholar of Russian and Soviet legal history, finds the roots of Russia’s lack of historical press or speech protections in the autocratic nature of the imperial system; the emperor was an absolute ruler by divine right, and criticism of him was akin to criticism of God.³²

²⁸ Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] Art. 29.

²⁹ *Ibid.*, Art. 31.

³⁰ Harold J Berman, *Justice in the U.S.S.R., an Interpretation of Soviet Law*, A Russian Research Center Study (New York: Vintage Books, 1963), 206–11.

³¹ *Ibid.*, 214.

³² The relevant section of the *Svod zakonov* begins, “The All-Russian Emperor is an autocratic and unlimited monarch. Obedience to his supreme power not only from fear but also from conscience is ordained by God Himself.” *Ibid.*, 211.

Ultimately, this system of absolute divine autocracy came undone as a result of public protest. In the winter of 1905, workers in St. Petersburg marched on the Winter Palace to petition Tsar Nicholas II. After imperial guards opened fire on the protesters, strikes broke out throughout the Russian Empire; the ensuing Revolution of 1905 brought an end to absolute monarchy, as Nicholas signed a constitution for the first time in Russia's history. Nicholas himself pledged to form a government of "the unshakable foundations of civic freedom based on the principles of real personal inviolability, freedom of conscience, speech, assembly, and union."³³ The new constitution would soon guarantee Russian citizens "the right to hold meetings for purposes not prohibited by law, peacefully and unarmed."³⁴ But barely a decade later, Tsar Nicholas II would abdicate and the country would launch itself into the chain of events that would bring about the Bolshevik revolution.

Freedom of assembly fared no better under socialism than it did under the tsar. While the Soviet constitution did purport to protect rights of speech and assembly, it did so with clear limitations and in the context of a justice system that quite often considered political dissent an anti-revolutionary crime. The 1936 Soviet Constitution promised:

In accordance with the interests of workers and for the purposes of strengthening the socialist system, Soviet citizens are guaranteed by law:

- A) Freedom of speech;
- B) Freedom of the press;
- C) Freedom of assembly and meetings;
- D) Freedom of street processions and demonstrations.

These rights of citizens are secured by the provision to workers and their organizations of printing houses, paper stocks, public buildings,

³³ Zigurds L. Zile, *Ideas and Forces in Soviet Legal History: A Reader on the Soviet State and Law* (New York: Oxford University Press, 1992), 47.

³⁴ *Ibid.*, 48.

streets, communications and other material conditions necessary for their implementation.^{35 36}

Berman traces the Soviet attitude towards expressive freedoms to both the Russian and Marxist traditions. In line with the imperial ethos, “Russia’s cultural heritage stresse[d] collective consciousness, common faith,” and updated for the new era with the slogans of the new socialist state, “Soviet paternalism minimize[d] the freedom of the individual mind or will.”³⁷

Over the course of its brief life, Soviet law strove to minimize that individual freedom of the mind by criminalizing dissent. The Russian constitution³⁸ of 1918 claimed to guarantee freedom of assembly and speech by placing public gathering places, presses, and other necessary infrastructure at the disposal of the people,³⁹ but it would quickly become clear that these promises did not translate into genuine expressive and political rights. The 1922 Criminal Code “built upon [the tsarist] tradition [of censorship] but carried it further,” creating a broadly-defined set of “counter-revolutionary” crimes that allowed authorities to “politicize almost any crime.”⁴⁰ In the 1930s, speaking publicly against the new policy of collectivization meant a charge of anti-Soviet agitation under Article 58 of the Criminal Code.⁴¹ Even in the era of de-Stalinization, “agitation or propaganda” against the Soviet government was criminalized—simply possessing materials deemed

³⁵ Konstitutsiia SSSR (1936) [Konst. SSSR] [USSR Constitution], accessed at <http://www.hist.msu.ru/ER/Etext/cnst1936.htm#10>.

³⁶ This is from the 1936 Constitution (sometimes known as the Stalin Constitution). It remained in force, substantially unaltered, until 1977. The 1977 Constitution did not meaningfully alter speech freedoms, aside from adding access to radio and television to the enumerated means of communication. Konstitutsiia SSSR (1936) [Konst. SSSR] [USSR Constitution, accessed at <http://www.hist.msu.ru/ER/Etext/cnst1977.htm#7>.

³⁷ Berman, *Justice in the U.S.S.R.*, 378.

³⁸ The Constitution of the Russian Socialist Federal Soviet Republic—a constituent republic of the larger Soviet Union.

³⁹ Zile, *Ideas and Forces in Soviet Legal History*, 65–66.

⁴⁰ Peter H. Solomon, *Soviet Criminal Justice under Stalin* (New York: Cambridge University Press, 1996), 28.

⁴¹ *Ibid.*, 90.

to “defame” the Soviet system could send an individual to prison.⁴² It took glasnost’, the politics of “publicity” introduced by Mikhail Gorbachev, to begin to truly realize promises of open political speech and protest in Russia.⁴³ But by the time the Soviet government promulgated these new rights and regulations, its world-spanning empire (like that of the tsar before it) had only a short while to live. Once again, citizens taking to the streets tore down the edifice of the state that had denied them for so long, using the right of protest they had only been halfheartedly given to loudly proclaim *no more*.

The story of the right to assemble and speak in Russia, then, cycles through periodic constriction, attempts at controlled liberalization, and implosion; it is a narrative of state allowances, a positive right occasionally granted, rather than the acknowledgement of a negative space in which the state cannot interfere. A historical tradition of content-based restrictions—explicit, targeted repression of political expression—is deeply-ingrained in that cycle.

In contrast, over the course of the 20th century the United States developed a robust, quasi-libertarian jurisprudence surrounding the First Amendment, one that legitimizes content-neutral restrictions rather than content-based. At the beginning of the century, as Russians received the equivalent of First Amendment rights for the first time, Americans were similarly beginning to determine what theirs meant.⁴⁴ Responding to perceived fifth-column threats, President Wilson signed—and the Supreme Court upheld—the Espionage Act (1917) and Sedition Act (1918), each

⁴² Berman, *Justice in the U.S.S.R.*, 72.

⁴³ “Sometimes, when the matter at hand is public openness, one hears appeals for greater caution in talking about our shortcomings and deficiencies, about the difficulties... [t]here can only be one answer to this, a Leninist answer: Under all circumstances, Communists always need the truth. The entire arsenal of the Soviet person’s social, political and personal rights and liberties should serve the tasks of the expansion and further development of socialist democracy.” Mikhail Gorbachev, “Report to the Twenty-Seventh Congress of the Communist Party of the Soviet Union,” February 25, 1986, quoted in Zile, *Ideas and Forces in Soviet Legal History*, 481–82.

⁴⁴ Geoffrey Stone, “Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century Lead Article,” *Pepperdine Law Review* 36 (January 1, 2008): 274.

interpreted extremely broadly to ban “attempting to cause insubordination [] in the military,” making disreputable statements about the government, and transmitting treasonable materials through the mail.⁴⁵ The Court found that these Acts complied with the First Amendment, because the words in question created “a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”⁴⁶ The legislative willingness to clamp down on civil liberties carried over into the 1920 and 1930s, exacerbated by fears of Communism and labor organizing; the courts, however, began to push back, wary of being too permissive in the post-war years.⁴⁷

Ultimately, as the century wore on, strategic litigation and lobbying on the part of organizations like the ACLU⁴⁸ turned to courtroom victories expressing a very different vision of the First Amendment. The new jurisprudence emerged from a “crisis” perspective, having witnessed the excesses of the Wilson years and the subsequent Palmer raids and “structur[ing] First Amendment doctrine to anticipate and guard against the worst of times.”⁴⁹ By the 1970s, the Supreme Court had recognized the distinction between content-based and content-neutral speech restrictions, and held that content-based restrictions would be highly suspect.⁵⁰ Political speech became a realm in which government restriction was all but forbidden: “[t]he First Amendment is

⁴⁵ *Schenck v. United States*, 249 U.S. 47 (1919).

⁴⁶ *Ibid.*, 51. See also *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting) (upholding the “clear and present danger” test but asserting that the appellants did not demonstrate the intent to hinder the United States’ war effort necessary for conviction).

⁴⁷ Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York: W. W. Norton & Company, 1979), 248–72

⁴⁸ See, e.g., Laura M. Weinrib, “From Left to Rights: Civil Liberties Lawyering Between the World Wars,” *Law, Culture and the Humanities*, May 18, 2016, doi:10.1177/1743872116641871.

⁴⁹ Stone, “Free Speech in the Twenty-First Century,” 278.

⁵⁰ *Ibid.*, 278–79.

really at the very core of political speech, and political speech is at the core of the First Amendment.”⁵¹

If in the early 1900s Russian and American conceptions of expressive freedoms began in the same place, permissive of political, content-based restrictions, they only remained together there briefly. In the inter-war period, as Stalinism rose to its greatest, most terrifying heights in the Soviet Union, American advocates for expressive freedoms were expanding the scope of their litigation beyond safeguarding political speech, challenging an increasingly-broad array of non-political speech restrictions.⁵² Even after World War II and Stalin passed from the scene, the Soviet Union maintained its content-based restrictions on expression until the last gasps of its empire. In that same time period, the United States witnessed a dramatic expansion and reinterpretation of the First Amendment, effectively carving out a powerful zone of governmental non-interference. So how is it that today each nation is facing the same defining debate over what expressive freedoms mean, and confronting the same laws restricting public protest?

IV. Implications: When and Why Lawmakers Restrict Speech

Russia and the United States both began the 20th century with similar limitations on speech and assembly rights, and now, in the early 21st century, halting attempt to circle back to one another. US and Russian lawmakers each experienced a moment in which partisan (or personal) motives and electoral means came together to create the opportunity to enact new restrictive measures limiting public protest.

⁵¹ David Lat, “Judge Kozinski’s Advice To President Trump, Courtesy Of ‘60 Minutes,’” *Above the Law*, accessed April 25, 2017, <http://abovethelaw.com/2017/04/judge-kozinskis-advice-to-president-trump-courtesy-of-60-minutes/>.

⁵² See, e.g., Laura M. Weinrib, “The Sex Side of Civil Liberties: *United States v. Dennett* and the Changing Face of Free Speech,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, April 26, 2012), <https://papers.ssrn.com/abstract=2046806>.

While US bills criminalizing certain aspects of public protest are currently only active in a handful of state legislatures, and not on the federal level, the sudden appearance of so many of these laws (in at least 18 states) points to a common catalyst. Some debate remains as to whether the recent slate of bills specifically responds to the mass movements that erupted in the wake of the 2016 election, or gradually developed as a reaction to disruptive street protests dating back to Occupy Wall Street and the Ferguson protests of 2014.⁵³ But the vocal protest movements of recent months, such as the Water Defenders of the Dakota Access Pipeline, Black Lives Matter, and the Women’s March on Washington, occurring alongside the consolidation of power after electoral victories in 2016, certainly motivated legislators to fend off opposition from the streets. The sponsors of each of the bills discussed in this piece explicitly linked them to checking mass protest.⁵⁴ To Lee Rowland of the ACLU, the bills “represent a ‘fairly unprecedented level’ of action against protestors.”⁵⁵

Russian lawmakers found themselves in a similar position. Massive protests after the 2011 midterm elections frightened the Putin administration into tamping down on domestic opposition.⁵⁶ Meanwhile, the widespread rigging of the 2011 elections gave the ruling party, United Russia, a comfortable perch in the Duma, and President Putin himself was reelected in 2012 (though once again widespread protests greeted the news).⁵⁷ The Duma passed Article 212.1 in 2014, but the new

⁵³ Mitch Smith and Michael Wines, “Across the Country, a Republican Push to Rein In Protesters,” *The New York Times*, March 2, 2017, <https://www.nytimes.com/2017/03/02/us/when-does-protest-cross-a-line-some-states-aim-to-toughen-laws.html>.

⁵⁴ Ibid.

⁵⁵ Elliot Smilowitz, “State Legislators Take Steps to Criminalize Protests,” Text, *The Hill*, (February 24, 2017), <http://thehill.com/homenews/state-watch/321018-state-legislators-take-steps-to-criminalize-protests>.

⁵⁶ “Russian Election: Biggest Protests since Fall of USSR,” *BBC News*, December 10, 2011, sec. Europe, <http://www.bbc.co.uk/news/world-europe-16122524>.

⁵⁷ Kathy Lally and Will Englund, “Putin Wins Election as Russian President; Opponents Claim Widespread Fraud,” *Washington Post*, March 4, 2012, https://www.washingtonpost.com/world/russians-voting--and-watching/2012/03/04/gIQA3j6CqR_story.html.

law did not end the protest problem. Most recently, in March 2017,⁵⁸ thousands of Russians across the country marched in response to an expose by anti-corruption opposition leader Alexei Navalny claiming to show the vast personal (and presumably illegally-gained) holdings of Prime Minister Dmitrii Medvedev.⁵⁹

It is hard to overstate the importance of the distance this newest wave of protest managed to travel: it swept up not only the more liberally-minded major cities of Western Russia (Moscow and St. Petersburg), but also the “regions,” into smaller, more conservative cities with far less access to independent media.⁶⁰ Many of the signs used slogans such as “Dima and Vova, where’s the money?” and “corruption steals our future.”⁶¹ But two signs in particular highlight the motivations behind the Kremlin’s criminalization of unauthorized protest and the hundreds of arrests that came this March: “the laws are the same for everyone,” and “thieves belong in prison.”⁶²

V. Conclusion

Arriving in the present day, we see Russia and the United States struggling to define what exactly the relationship between government and the governed will be as they move forward. An important part of that national soul-searching takes place on the streets, through public protest movements that have generated widespread debate over the limits of expressive freedoms. In spite of the divergent development of each country’s speech and assembly freedoms over the past century, legislators in each country have either enacted or proposed similar laws criminalizing

⁵⁸ These protests took place almost immediately after our International Immersion Program group returned from Russia.

⁵⁹ Julia Ioffe, “What Russia’s Latest Protests Mean for Putin,” *The Atlantic*, March 27, 2017, <https://www.theatlantic.com/international/archive/2017/03/navalny-protests-russia-putin/520878/>.

⁶⁰ *Ibid.*

⁶¹ “От Петербурга До Владивостока. Всероссийская Акция Протеста В Фотографиях,” *Meduza*, accessed April 25, 2017, <https://meduza.io/feature/2017/03/27/ot-peterburga-do-vladivostoka-vserossiyskaya-aktsiya-protesta-v-fotografyah>.

⁶² *Ibid.*

various aspects of public protest. Russia moved first, in 2014, enacting Article 212.1 of the Russian Criminal Code, elevating multiple violations of administrative regulations into a criminal offense punishable by imprisonment. As 2016 turned to 2017, several American states followed suit, drafting statutes that created new crimes for unauthorized or highway-blocking protests, or elevated what would previously have received a fine or nuisance complaint into a criminal offense. These changes came at essentially the same political moment after the 2016 presidential election and the massive protests that had followed, just as Russia's Article 212.1 had followed the 2011 and 2012 elections.

That nations with such radically different historical views of freedom of speech can at times converge demonstrates the malleability of these institutions. Law is what the state, the people, and their advocates make of it—and their needs and goals change significantly over time. The ability to re-cast laws and norms is a double-edged sword. On the one hand, it can entail constriction of freedoms once thought absolute and vital to democratic engagement. On the other, the changeability of interpretation can also offer hope where rights are currently limited. Russia has not yet fully broken with its tradition of limiting expressive rights based on political content, a notion we today find repugnant to notions of free society and democratic governance. But the persistence of the Russian opposition movement and its ability to draw ordinary Russians into the streets show that, outside of the Duma and the Putin administration, there exists a powerful aspiration to true political freedoms and accountability. Perhaps in future, the momentum of this movement can throw off the burdens of the past and translate into an authentic fulfillment of the promises of the modern Russian Constitution.