

NOTES

PUSSY RIOT AND THE FIRST AMENDMENT: CONSEQUENCES FOR THE RULE OF LAW IN RUSSIA

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On February 21, 2012, members of the Russian punk band Pussy Riot stormed the historic Cathedral of Christ the Savior in Moscow and performed a “punk prayer” to protest the policies of Vladimir Putin’s government. The band members’ subsequent arrests and prosecutions set off a global firestorm of criticism. While some critics focused on the disproportionate sentences handed down by the court following the band’s convictions, or the meaning of justice meted out by an unjust regime, the mainstream reaction was by and large one of disbelief at such an apparently egregious crackdown on free speech. This Note argues that such criticism largely missed the mark by casting the Pussy Riot affair in terms of free speech, despite the likelihood that the punk rockers would have faced a similar fate even under American free speech law—a tradition of protected speech more robust than any other. Instead, criticism of the injustice perpetrated by the prosecutions is better aimed at the inadequate procedural protections of a Russian judiciary in desperate need of reform. As Russians are already aware of the deficiencies in their judicial system, they would likely be much more amenable to international criticism that acknowledges that the Pussy Riot prosecutions did not trample on free speech rights but were nonetheless unjust due to the lack of procedural safeguards accorded to the band members. Such an approach, by more accurately criticizing the real issues Russia’s fledgling democracy faces, promises to further Russia’s development by keeping lines of communication open between the Russian electorate and the West.

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INTRODUCTION

On the evening of February 21, 2012, five young women burst into the historic Cathedral of Christ the Savior in Moscow, Russia. The women, members of the punk rock collective Pussy Riot,¹ stormed to the front of the cathedral, where the golden iconostasis formed the gateway to the church’s holy sanctuary.² Clad in brightly colored dresses and tights, their faces hidden by equally bright balaclavas, the women performed what the international media referred to as a “punk prayer,” *Holy Shit*.³ The song protested the increasingly cozy relationship between the Russian Orthodox Church and Russian President Vladimir Putin’s regime through ecclesiastical language beseeching the Virgin Mary to remove Putin from power.

While the cathedral was sparsely populated at the time of the prayer, a video of the performance with an added audio recording of the song subsequently uploaded to YouTube⁴ instantly went viral, bringing Pussy Riot to the attention of the masses both at home and abroad. Russian authorities arrested three women for their alleged

¹ True to their punk rock roots, the women of Pussy Riot have engineered their look and style to generate extreme attention. From the explicit name to the colorful balaclavas that have become the band’s trademark, Pussy Riot members demand strong reactions wherever they go. In fact, despite the American media’s frequent reference to Pussy Riot as “an all-female punk band,” the group’s history more resembles that of pure agitprop than an actual musical act. See Melena Ryzik, *Carefully Calibrated for Protest*, N.Y. TIMES, Aug. 26, 2012, at AR1 (noting that Pussy Riot is “only nominally a band”); see also Dorian Lynskey, *Pussy Riot: Activists, Not Pin-Ups*, GUARDIAN (Dec. 20, 2012, 1:35 PM), <http://www.guardian.co.uk/music/2012/dec/20/pussy-riot-activists-not-pin-ups> (“Pussy Riot are, like only a handful of western bands—Crass, Public Enemy, the Last Poets—political provocateurs first and musicians second.”). The band has yet to record or release an album, and it did not release its first single—an incendiary track, *Putin Lights Up the Fires*—until after three of its members were arrested for their “punk prayer” in the Cathedral of Christ the Savior. *Id.*

² See Barry Cooper, *Why Most Russians Don’t Support Pussy Riot*, CALGARY HERALD, Aug. 22, 2012, at A12 (describing the details of the protest).

³ *Police Detain Two More Pussy Riot Activists*, RIA NOVOSTI (Mar. 4, 2012, 12:08 PM), <http://en.ria.ru/russia/20120304/171715882.html>.

⁴ Garadzha Matveeva, *Pank-moleben “Bogorodica, Putina progoni” Pussy Riot v Hrame*, YOUTUBE (Feb. 21, 2012), <http://www.youtube.com/watch?v=GCasuaAczKY>.

role in the performance.⁵ Nadezhda Tolokonnikova, Maria Alyokhina, and Yekaterina Samutsevich were charged with the crime of hooliganism motivated by religious hatred⁶ and held in pretrial detention. News of their arrest quickly captured attention abroad, and by the time their trial began on July 30, 2012, the three women—and the band they represented—were transformed into international stars.⁷

As the trial proceeded, the women of Pussy Riot became a cause célèbre in the West. Dozens of celebrities—including the likes of Paul McCartney, Sting, and Madonna—publicly declared their support for the band.⁸ Prominent government officials in Western Europe and the United States expressed their concern with the way the Kremlin had handled the situation.⁹ Hundreds of people gathered all over the world in brightly colored balaclavas to protest the prosecution and show solidarity with the beleaguered group.¹⁰ The women's guilty verdict and two-year prison sentence only heightened the international outcry. While some critics focused on the disproportionate sentence or the meaning of justice meted out by an unjust regime, the mainstream reaction was disbelief at the prosecutions themselves as an undemocratic crackdown on freedom of speech.¹¹ The general feeling, as expressed by Catherine Ashton, the European Union's High Representative for Foreign Affairs and Security Policy, was that the verdict ran "counter to Russia's international obligations as regards respect for freedom of expression."¹²

This Note argues that mainstream Western criticism, by focusing on the Pussy Riot prosecutions as an abridgment of *substantive* free speech rights, has missed the point. I argue that the prosecutions were not antithetical to Western values of free speech by demonstrating

⁵ See Sophia Kishkovsky, *Punk Riffs Take on God and Putin*, N.Y. TIMES (Mar. 20, 2012), <http://www.nytimes.com/2012/03/21/world/europe/21iht-letter21.html> (describing the circumstances of the band members' arrest). UGOLOVNIY KODEKS ROSSIYSKOI FEDERATSII [UK RF] [Criminal Code] art. 213 (Russ.).

⁶ See UGOLOVNIY KODEKS ROSSIYSKOI FEDERATSII [UK RF] [Criminal Code] art. 213 (Russ.) (setting forth the provision under which they were charged).

⁷ See *infra* Parts I.A–B (describing the circumstances of and reaction to the arrests).

⁸ See *infra* Part I.B (describing the international reaction to the prosecutions).

⁹ See *infra* Part I.B.

¹⁰ See, e.g., Nadja Sayej, *Quiet Rioters: A Colorful Show of Support in Berlin*, N.Y. TIMES (Aug. 9, 2012, 2:00 PM), <http://tmagazine.blogs.nytimes.com/2012/08/09/quiet-rioters-a-colorful-show-of-support-in-berlin> (describing a parade of hundreds of supporters donning such balaclavas in Berlin).

¹¹ See *infra* Part I.B (describing international objections to the prosecutions on free speech grounds).

¹² Press Release, European Union, Statement by EU High Representative Catherine Ashton on the Sentencing of "Pussy Riot" Punk Band Members in Russia (Aug. 17, 2012), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/132192.pdf.

that the band's speech would not have been protected even in the United States, which boasts the most speech-protective jurisprudence in the developed world.¹³ This distinction is not merely semantic; by inaccurately targeting their criticism at the free speech aspects of the Pussy Riot prosecutions, as opposed to the flagrant disregard for basic procedural protections throughout the trial, international critics threaten to embitter ordinary Russians against international voices altogether, cutting off a valuable source of information as Russia struggles toward full-fledged democracy.

Part I lays out the Pussy Riot affair in detail. Part II demonstrates that the band's speech would not have been protected even in the United States, the developed country with the strongest tradition of free speech jurisprudence.¹⁴ Finally, Part III explores why, beyond a general preference for accuracy, international commentators should not conflate substantive free speech issues with other possible injustices suffered by Pussy Riot at the hands of an unjust judicial system in desperate need of reform. This kind of misguided criticism, by conflicting with the views of ordinary Russians, threatens to sour Russians to Western opinions on Russia's development and undermine Western efforts to aid political reform in Russia by strengthening Russian resolve in the status quo. By contrast, Russians are fully aware of the deficiencies of their judicial system¹⁵—meaning that accurate criticism targeted at the procedural problems of the Pussy Riot prosecutions are more likely to find a receptive audience amongst the Russian electorate.

I

THE PUSSY RIOT AFFAIR

A. *Pussy Riot's Punk Prayer and Trial*

The name Pussy Riot is not a translation from Russian; rather, the group transliterates the English name into Russian using Cyrillic characters.¹⁶ Pussy Riot maintains a loose membership, with up to twenty members active at any time.¹⁷ Members of the group wear

¹³ See *infra* note 87 and accompanying text (describing the expansiveness of the American free speech tradition relative to that of other countries).

¹⁴ *Infra* note 87 and accompanying text.

¹⁵ See *infra* Part III.B (detailing public opinion toward the judiciary in Russia).

¹⁶ Sarah Kendzior, *Manic Pixie Dream Dissidents: How the World Misunderstands Pussy Riot*, ATLANTIC (Aug. 20, 2012, 8:14 AM), <http://www.theatlantic.com/international/archive/2012/08/manic-pixie-dream-dissidents-how-the-world-misunderstands-pussy-riot/261309/> ("In Russian, Pussy Riot's name is the English words 'Pussy Riot' written in Cyrillic, where they carry the same connotation.").

¹⁷ See Lynskey, *supra* note 1 ("The five who performed in the cathedral . . . are only part of a shifting collective that numbers up to 20.").

colored balaclavas and use pseudonyms like “Orange” to maintain their anonymity.¹⁸ The group has a staunchly antiauthoritarian, anti-capitalist stance. As a result, according to one anonymous band member: “[T]he only performances we’ll participate in are illegal ones. We refuse to perform as part of the capitalist system, at concerts where they sell tickets.”¹⁹

Founded in 2011, the band first gained national notoriety during the December 2011–January 2012 protests of the legislative election process. During a gathering on Red Square, members of the band performed an impromptu concert of their anti-Kremlin song, *Putin Got Scared*,²⁰ on a large stone platform (originally used for announcing Tsarist decrees) while waving a purple flag and setting off colored smoke bombs.²¹ Police arrested the members involved in the performance and levied a pair of 500-ruble (\$17) fines on them for “holding an unauthorized rally.”²²

On February 21, 2012, five members of Pussy Riot stormed into the Cathedral of Christ the Savior to perform what they called a “punk prayer.”²³ The five women, clad in brightly colored balaclavas, lip-synched a version of their song, *Holy Shit*.²⁴ The song, intended to

¹⁸ *Id.*

¹⁹ *Id.* An e-mail interview with the *St. Petersburg Times* on February 1, 2012 (before the punk prayer) provides further insight into the group’s ideology and tactics: “As far as we can see, Putin is scared only of unsanctioned rallies. That’s why we promote holding unauthorized protests in our songs. We are not happy about what happens in the sphere of civic protests, which have now turned into sanctioned rallies.” Sergey Chernov, *Female Fury*, *ST. PETERSBURG TIMES* (Feb. 1, 2012), http://sptimes.ru/index.php?action_id=2&story_id=35092. The band’s commitment to the practice of holding unsanctioned rallies is so strong that its spokesperson criticized the Sex Pistols’ infamous 1977 boat concert protesting Queen Elizabeth’s Silver Jubilee on the grounds that the Pistols rented the boat themselves. *Id.* “There’s no connection to Pussy Riot in this, because we didn’t rent and are not going to rent anything,” said the band member, “we come and take over platforms that don’t belong to us and use them for free.” *Id.*

²⁰ Sergey Chernov, *Chernov’s Choice*, *ST. PETERSBURG TIMES* (Jan. 25, 2012), http://www.sptimes.ru/index.php?story_id=35053&action_id=2. The song’s Russian title, *Putin Zassal*, has alternatively been translated as *Putin Chickened Out* and *Putin Has Pissed Himself*. See, e.g., Mansur Mirovalev, *A Guide to Pussy Riot’s Oeuvre*, *DAILY TRIBUNE* (Aug. 18, 2012, 4:03 PM), http://www.dailytribune.com/article/20120818/NEWS05/120819465/a-guide-to-pussy-riot-s-oeuvre#full_story (translating the title as the former); *Russian Female Punk Band Arrested for Performing Anti-Vladimir Putin Song*, *DAILY TELEGRAPH* (Jan. 20, 2012, 3:12 PM), <http://www.telegraph.co.uk/news/worldnews/europe/russia/9028106/Russian-all-girl-punk-band-Pussy-Riot-arrested-for-performing-Vladimir-Putin-song.html> (translating the title as the latter).

²¹ Chernov, *supra* note 19.

²² *Id.*; see also КОДЕКС РОССИЙСКОЙ ФЕДЕРАЦИИ ОБ АДМИНИСТРАТИВНЫХ ПРАВОНАРУШЕНИЯХ [KOAP RF] [Code of Administrative Violations] art. 20.2 (Russ.).

²³ *Police Detain Two More Pussy Riot Activists*, *supra* note 3.

²⁴ *Id.* The music and vocals were added later to the YouTube video of the protest. See Polly McMichael, *Defining Pussy Riot Musically: Performance and Authenticity in New Media*, 9 *DIGITAL ICONS* 99, 108–09 (2013), <http://www.digitalicons.org/issue09/files/2013/>

criticize the relationship between the Russian Orthodox Church and the Putin regime, included lyrics such as “Holy Mother, Blessed Virgin, chase Putin out!”²⁵ Wearing boots, colorful miniskirts, and tights, the women danced in front of the large golden Holy Doors that mark the entrance to the cathedral’s sanctuary.²⁶ While the members were able to escape the cathedral without incident,²⁷ the police opened an investigation of the event and detained members of the group in the following days.²⁸ Altogether, the performance lasted less than a minute.²⁹

After their arrest in early March 2012,³⁰ Maria Alyokhina, Nadezhda Tolokonnikova, and Yekaterina Samutsevich were charged with hooliganism motivated by religious hatred, a crime carrying a maximum penalty of seven years in prison.³¹ The Pussy Riot trial was, by Western standards, a highly suspect affair.³² The accused spent five months in prison before the trial began on July 30, 2012,³³ in Moscow’s Khamovnichesky Court.³⁴ The defendants, as is customary

06/DI_9_6_McMichael.pdf (recounting the debate over whether Pussy Riot actually performed the song and noting that one of the critical pieces of the group’s defense was that “the action . . . was a pantomime . . . laid down without sound” (first alteration in original) (quoting *Special Correspondent* (Channel One television broadcast Apr. 21, 2012) (Russ.))).

²⁵ McMichael, *supra* note 24.

²⁶ Cooper, *supra* note 2 (describing the details of the protest).

²⁷ *Police Detain Two More Pussy Riot Activists*, *supra* note 3.

²⁸ *Police Open Criminal Probe into ‘Punk Prayer’ at Christ the Savior Cathedral*, RIA NOVOSTI (Feb. 26, 2012, 2:24 PM), <http://en.ria.ru/russia/20120226/171537723.html>.

²⁹ See Ryzik, *supra* note 1 (calling the performance a “40-second lip sync”).

³⁰ Maria Alyokhina and Nadezhda Tolokonnikova were arrested on March 3, 2012, just days before the election that would see Putin regain the presidency. See Kishkovsky, *supra* note 5 (“The timing—a day before the presidential election won by Mr. Putin—seemed to anxious Russians a sign that this case was important to the Kremlin . . .”). The third member, Yekaterina Samutsevich, was arrested two weeks later on March 16. *Third Member of ‘Pussy Riot’ Charged over Punk Prayer*, RT (Mar. 16, 2012, 9:36 PM), <http://rt.com/news/prime-time/third-member-pussy-riot-765>.

³¹ See Kishkovsky, *supra* note 5 (describing the details of the charges). For the exact language of the statute, see *infra* note 93 and accompanying text.

³² Unfortunately, Russian authorities have yet to publish any trial documents as of the time of this writing. Independent journalists were present in the courtroom throughout the proceedings, however. See, e.g., *Judge Requests Reporting Limits in Pussy Riot Trial*, RIA NOVOSTI (Aug. 1, 2012, 5:49 PM), <http://en.ria.ru/russia/20120801/174902846.html> (requesting that journalists refrain from quoting witness testimony verbatim until after trial).

³³ Associated Press, *Pussy Riot Trial: A Glance at the Case Against Anti-Putin Feminist Rockers*, N.Y. DAILY NEWS (July 30, 2012, 5:50 PM), <http://www.nydailynews.com/news/world/pussy-riot-trial-glance-case-anti-putin-feminist-rockers-article-1.1125140>.

³⁴ Miriam Elder, *Pussy Riot: Trial That’s Putting Vladimir Putin’s Crackdown in Spotlight*, GUARDIAN (July 30, 2012, 1:32 PM), <http://www.guardian.co.uk/music/2012/jul/30/pussy-riot-trial-vladimir-putin>. The Khamovnichesky court has gained some notoriety as a particularly political court, having previously conducted the controversial trial of Russian

in the Russian criminal justice system, sat in a glass enclosure throughout the trial.³⁵ Kalashnikov-wielding special forces stood guard outside the courtroom.³⁶ A marshal with a leashed rottweiler stood guard inside.³⁷ These apparently draconian measures match the nature of the criminal justice system in Russia, where less than one percent of trials result in acquittal.³⁸ Protesters gathered outside the courthouse throughout the trial, resulting in periodic interruptions, as when a handful of protesters scaled a three-story building across from the courthouse and fired flares at the courtroom windows.³⁹ A bogus bomb threat and a paramedic visit due to the defense attorneys' reports of their clients' "extremely low blood sugar" also prompted delays.⁴⁰

All three defendants pleaded not guilty to the charge of hooliganism, but apologized for any offense they may have caused Orthodox believers, saying that was not their intent.⁴¹ In written statements, the women insisted that the protest was political. Tolokonnikova wrote that it was "a protest against illegitimate elections and Patriarch Kirill's endorsement of President Putin."⁴² But she also wrote that she was "ready to recognize that we committed an ethical mistake" if the performance offended anyone.⁴³ In her written statement, Samutsevich objected that the prosecution represented "political censorship from the side of the authorities, the start of a campaign of authoritarian, repressive measures aimed at lowering the

oil tycoon Mikhail Khodorkovsky. See Mikhail Khodorkovsky, *Pussy Riot Trial: I've Been There – How Can These Women Endure It?*, GUARDIAN (Aug. 6, 2012, 7:11 AM), <http://www.theguardian.com/commentisfree/2012/aug/06/pussy-riot-trial-shame-russia> (relating his own experience in the very same Khamovnichesky courtroom to the band members' experience).

³⁵ See Elder, *supra* note 34 ("The glass cage holding Pussy Riot, dubbed 'the aquarium,' was chained shut . . .").

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Andrew Roth, *Unruly Proceedings in Trial of Russian Punk Group*, N.Y. TIMES, Aug. 4, 2012, at A6.

⁴⁰ *Id.*

⁴¹ Associated Press, *supra* note 33.

⁴² Masha Lipman, *The Absurd and Outrageous Trial of Pussy Riot*, NEW YORKER (Aug. 7, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/08/the-absurd-and-outrageous-trial-of-pussy-riot.html>. Kirill I, as the Patriarch of Moscow and all of Russia, is the spiritual leader of the Russian Orthodox Church. See Natalya Krainova & Nikolaus von Twickel, *Kirill Named Orthodox Patriarch*, MOSCOW TIMES (Jan. 28, 2009), <http://www.themoscowtimes.com/news/article/kirill-named-orthodox-patriarch/373944.html> (describing Kirill's election as Patriarch in January 2009).

⁴³ David M. Herszenhorn & Andrew Roth, *Trial Begins over an Anti-Putin Song*, N.Y. TIMES, July 31, 2012, at A7.

level of political activism and provoking a feeling of fear among citizens who hold opposition views.”⁴⁴

The prosecution presented ten witnesses who it said suffered “moral damage” as a result of Pussy Riot’s performance.⁴⁵ Nine were inside the Cathedral of Christ the Savior during the performance—most of them working as security guards or cleaning staff⁴⁶—while the tenth saw only a YouTube video of the performance.⁴⁷ Rather than stress the secular ills perpetrated by the band’s act, the prosecution (and the judge herself) put the alleged harm to the victims’ religious faith front and center. All of the witnesses testified as to their commitment to the Orthodox faith, a fact one Western critic thought “was needed to confirm the indictment’s message that the performance was an insult to all Orthodox believers.”⁴⁸ Among the harms the witnesses claimed to have suffered were the style of the women’s dress (bare armed), the color of their tights (too garish), and the way the women moved (kicking their legs such that “everything below waist is showing”).⁴⁹ The YouTube witness spoke about how viewing the clip had pained him and said that Pussy Riot had gone to the church to declare “war on God.”⁵⁰ And in a moment that strained credulity, one of the witnesses, when asked how she had recognized the balaclava-wearing women, answered that she knew Alyokhina “by her calf muscles.”⁵¹ Ultimately, the prosecutors requested a three-year sentence, which they portrayed as lenient based on the maximum sentence of seven years.⁵²

In the end, the court returned a guilty verdict that Judge Marina Syrova defended on the grounds that the “political comments were spliced into the video later, and that the action in the church was therefore motivated by religious hatred.”⁵³ In sentencing them to two

⁴⁴ Elder, *supra* note 34.

⁴⁵ Herszenhorn & Roth, *supra* note 43.

⁴⁶ Elder, *supra* note 34.

⁴⁷ Lipman, *supra* note 42.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Nataliya Vasilyeva, *Prosecutors Ask for 3 Years for Anti-Putin Rockers*, BLOOMBERG BUSINESSWEEK (Aug. 7, 2012), <http://www.businessweek.com/ap/2012-08-07/russian-prosecutors-ask-for-3-years-in-punk-case>. The band qualified for a maximum sentence of seven years under the statute because they acted as a group. See UGOLOVNYI KODEKS ROSSIJSKOI FEDERATSII [UK RF] [Criminal Code] art. 213(2) (Russ.) (providing a longer maximum sentence for perpetrators who commit an act of hooliganism as part of an organized group). For a more in-depth discussion of the statute, see *infra* note 93 and accompanying text.

⁵³ David M. Herszenhorn, *Anti-Putin Stunt Earns Punk Band Two Years in Jail*, N.Y. TIMES, Aug. 18, 2012, at A1. As of this writing, the court has not made the transcript of the

additional years in prison, Judge Syrova said that the women of Pussy Riot posed a danger to society for their willingness to commit “grave crimes,” including “the insult and humiliation of the Christian faith and inciting religious hatred.”⁵⁴ She said that the band’s “complete lack of respect” for the feelings of Orthodox believers “crudely undermined social order.”⁵⁵ Shouts of “Shame!” came immediately from both inside and outside the courtroom upon Judge Syrova’s pronouncement, demonstrating outrage at the verdict.⁵⁶

B. International Reaction

The arrest and trial of the band members sparked immediate outrage abroad and catapulted Pussy Riot to international stardom. Members of the Western media compared the situation to the Dreyfus Affair,⁵⁷ the prosecution of a Jewish officer for allegedly revealing military secrets that divided France around the turn of the twentieth century.⁵⁸ Other comparisons included the show trials of the Stalinist era,⁵⁹ witch hunts,⁶⁰ and the Spanish Inquisition.⁶¹ Critics called the prosecutions “outrageous” and “ridiculous”⁶² and labeled the trial a “travesty of justice”⁶³ and “a farce.”⁶⁴ Perhaps most striking about the

verdict available to the public. The text of Judge Syrova’s decision, however, has been made available through the defendants’ attorneys. See Prigovor Imenem Rossiiskoi Federatsii Khamovnichesky raionnovo suda gor. Moskviiy delo no. 1-170/12 ot 17 avgusta 2012 g. [Verdict in the Name of the Russian Federation of the Moscow Khamovnichesky District Court in the Matter of 1-170/12 of Aug. 17, 2012], <http://pravo.ru/store/interdoc/doc/355/Binder1.pdf> (containing the factual findings and sentence of the court).

⁵⁴ Herszenhorn, *supra* note 53.

⁵⁵ *Pussy Riot Members Jailed for Two Years for Hooliganism*, BBC NEWS (Aug. 17, 2012), <http://www.bbc.co.uk/news/world-europe-19297373>.

⁵⁶ Miriam Elder, *Pussy Riot Sentenced to Two Years in Prison Colony over Anti-Putin Protest*, GUARDIAN (Aug. 17, 2012, 4:13 PM), <http://www.guardian.co.uk/music/2012/aug/17/pussy-riot-sentenced-prison-putin>.

⁵⁷ Masha Lipman, *Putin’s Religious War Against Pussy Riot*, NEW YORKER (July 24, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/07/putins-religious-war-against-pussy-riot.html>.

⁵⁸ See generally GEORGE R. WHYTE, *THE DREYFUS AFFAIR: A CHRONOLOGICAL HISTORY* (2005) (describing the history and legacy of the Dreyfus Affair).

⁵⁹ Miriam Elder, *Pussy Riot Trial ‘Worse than Soviet Era,’* GUARDIAN, Aug. 4, 2012, at 20.

⁶⁰ Simon Shuster, *Russia’s Pussy Riot Trial: A Kangaroo Court Goes on a Witch Hunt*, TIME (Aug. 2, 2012), <http://world.time.com/2012/08/02/russias-pussy-riot-trial-a-kangaroo-court-goes-on-a-witch-hunt>.

⁶¹ Pyotr Verzilov, *Pussy Riot: ‘Russian Courts Are Boring . . . but This Week It’s Been like an American Movie,’* GUARDIAN (Aug. 4, 2012), <http://www.guardian.co.uk/music/2012/aug/05/pussy-riot-court-diary>.

⁶² Lipman, *supra* note 42.

⁶³ Masha Gessen, *The Shame of Putin’s Courts*, N.Y. TIMES (Aug. 6, 2012, 10:10 AM), <http://latitude.blogs.nytimes.com/2012/08/06/the-shame-of-putins-courts>.

⁶⁴ Editorial, *A Russian Farce*, WASH. POST, Aug. 19, 2012, at A12.

reactions of the international media was the virtual unanimity of their condemnation of the prosecutions and verdict.⁶⁵

While some of these commentators focused on the questionable processes employed during the trial,⁶⁶ the general target of criticism was what Westerners saw as an antidemocratic crackdown on freedom of expression.⁶⁷ Amnesty International USA accused “Putin and his cronies” of “stifl[ing] free speech in Russia,”⁶⁸ while its parent organization charged that “Russian authorities’ enthusiasm to silence, harass and detain the women is an indisputable violation of their right to free speech.”⁶⁹ In line with Catherine Ashton’s statement that the verdict ran “counter to Russia’s international obligations as regards respect for freedom of expression,”⁷⁰ German Chancellor Angela Merkel called the prosecutions “[incompatible] with the [Western] values of democracy and the rule of law.”⁷¹ British Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs Alistair Burt said that the British government had “repeatedly called on the Russian authorities to protect human rights, including the right to freedom of expression,” and that the “verdict call[ed] into question Russia’s commitment to protect these fundamental rights and freedoms.”⁷²

Given the pairing of a punk band and an apparent suppression of free speech, the intense reaction of the Western community—both public and private—is perhaps unsurprising. At a sold-out concert in Moscow, Madonna called the women’s act “courageous,” and showed

⁶⁵ See, e.g., *Press Aghast at Pussy Riot Verdict*, BBC NEWS (Aug. 18, 2012), <http://www.bbc.co.uk/news/world-europe-19307077> (highlighting negative reactions to the Pussy Riot verdict from media outlets around the world).

⁶⁶ See, e.g., Lipman, *supra* note 42 (criticizing various aspects of the trial process, including actions and decisions by the judge that the author deemed unfair to the defendants).

⁶⁷ See, e.g., Herszenhorn, *supra* note 53 (“[T]he case has allowed critics of Mr. Putin to portray his government as squelching free speech”); Rizwan Syed, *Analysts See Freedom of Speech in Russia Slowly Eroding*, VOICE OF AM. (Aug. 17, 2012), http://www.voanews.com/content/analysts_see_freedom_of_speech_in_russia_slowly_eroding/1490461.html (“Analysts say the ‘hooliganism’ trial in Moscow for three punk musicians who staged a protest in a Russian Orthodox cathedral weakens Russia’s freedom of speech”).

⁶⁸ *Musicians and Artists Unite to Free Pussy Riot!*, AMNESTY INT’L USA, <http://www.amnestyusa.org/our-work/campaigns/individuals-at-risk/musicians-and-artists-unite-to-free-pussy-riot> (last visited Jan. 25, 2014).

⁶⁹ *What You Should Know About Pussy Riot*, STYLIST, <http://www.stylist.co.uk/people/what-you-should-know-about-pussy-riot> (last visited Apr. 25, 2013).

⁷⁰ Press Release, *supra* note 12.

⁷¹ Mary Ellen Synon, *So How Would We Handle a Pussy Riot in Clonskeagh?*, DAILY MAIL, Aug. 20, 2012, at 12.

⁷² Dina Rickman, *Pussy Riot Trial: Punk Trio Sentenced to Two Years Each for Anti-Putin Song*, HUFFINGTON POST (Aug. 17, 2012, 4:00 PM), http://www.huffingtonpost.co.uk/2012/08/17/pussy-riot-punk-trio-sentenced-two-years-each_n_1796470.html.

solidarity with the group by wearing a balaclava and donning a black bra with the band's name written in bold letters on the back.⁷³ Other celebrities to voice support for Pussy Riot included British rockers Paul McCartney⁷⁴ and Sting and Canadian singer Bryan Adams.⁷⁵ In Berlin, four hundred people marched through the streets wearing colorful balaclavas and chanting "Free Pussy Riot!"⁷⁶ In New York, hundreds turned out for a solidarity event hosted by the proprietor of the website FreePussyRiot.org⁷⁷ and for a fundraiser sponsored by Amnesty International.⁷⁸ Meanwhile, the student wing of Amnesty International handed out colored balaclavas on college campuses across the United States.⁷⁹ In perhaps the broadest show of solidarity, protesters in over sixty cities demonstrated on the streets and outside of embassies for "Global Pussy Riot Day."⁸⁰

Putin, for his part, shot back at this deluge of Western criticism, saying that the media's handling of the situation was hypocritical.⁸¹ A handful of Western observers took a similar view.⁸² Simon Jenkins,

⁷³ David M. Herszenhorn, *In Russia, Madonna Defends a Band's Anti-Putin Stunt*, N.Y. TIMES, Aug. 8, 2012, at A3. The Kremlin did itself no public relations favors in its response: Deputy Prime Minister Dmitry Rogozin called Madonna a "whore" in a Twitter post. Herszenhorn, *supra* note 53.

⁷⁴ Paul McCartney, *Paul Sends His Support to Russian Band Pussy Riot*, PAULMCCARTNEY.COM (Aug. 16, 2012), <http://www.paulmccartney.com/news-blogs/news/16743-paul-sends-his-support-to-russian-band-pussy-riot>.

⁷⁵ Alex Dobuzinskis, *Madonna Adds Her Voice to Critics of Russian Female Punk Rock Band Verdict*, REUTERS, Aug. 19, 2012, available at <http://in.reuters.com/article/2012/08/19/entertainment-us-russia-pussyriot-reacti-idINBRE87H07X20120819>.

⁷⁶ Sayej, *supra* note 10.

⁷⁷ Melena Ryzik, *On Eve of Sentencing, an Artistic Show of Solidarity for Russian Punk Band*, N.Y. TIMES (Aug. 17, 2012), <http://www.nytimes.com/2012/08/18/arts/music/in-new-york-a-show-of-solidarity-for-russian-punk-band.html>.

⁷⁸ Melena Ryzik, *Pussy Riot Fund-Raiser at Chelsea Gallery*, N.Y. TIMES, Aug. 29, 2012, at C2.

⁷⁹ Melena Ryzik, *An Award and More Support for Pussy Riot*, N.Y. TIMES (Sept. 21, 2012, 4:34 PM), <http://artsbeat.blogs.nytimes.com/2012/09/21/an-award-and-more-support-for-pussy-riot>.

⁸⁰ Harvey Morris, "We're All Pussy Riot Now," N.Y. TIMES (Aug. 17, 2012, 7:26 AM), <http://rendezvous.blogs.nytimes.com/2012/08/17/were-all-pussy-riot-now>.

⁸¹ David Hearst & Miriam Elder, *Pussy Riot Coverage 'Shows Western Media's Hypocrisy'*, GUARDIAN, Oct. 26, 2012, at 27. As proof of this hypocrisy, Putin specifically pointed to the lack of protest regarding the treatment of Nakoula Basseley Nakoula, the producer of the anti-Islamic *Innocence of Muslims* video that caused riots across the Middle East, who was sentenced by a U.S. judge to a year in prison for violating the terms of his probation. *United States v. Youssef*, No. CR 09-617-CAS (C.D. Cal. Nov. 7, 2012). See generally Victoria Kim, *'Innocence of Muslims' Filmmaker Gets a Year in Prison*, L.A. TIMES L.A. NOW (Nov. 7, 2012, 3:00 PM), <http://latimesblogs.latimes.com/lanow/2012/11/innocence-muslims-filmmaker-sentenced.html> (describing the filmmaker's prison sentence).

⁸² In the *New York Times* opinion pages, for example, Vadim Nikitin expressed concern that "[t]wenty years after the end of the Cold War . . . dissident intellectuals [are] once again in danger of becoming pawns in the West's anti-Russian narrative." Vadim Nikitin,

writing for *The Guardian*, argued that “[i]f a rock group invaded Westminster Abbey and gravely insulted a religious or ethnic minority before the high altar, we all know that ministers would howl for ‘exemplary punishment’ and judges would oblige.”⁸³ Mary Ellen Synon posed a similar hypothetical, wondering how Pussy Riot might have fared had they agitated in Clonskeagh, a suburb of Dublin, rather than in Moscow:

Try it with three young Irish women instead of three young Russian women. Imagine they are opposed to present Government policy which allows large-scale Muslim immigration into this country. Active in their political “collective,” the three young women announce they are a band. They burst into the mosque at Clonskeagh. They rush to the mihrab, the niche indicating the direction of Mecca, and roar out a song that attacks our Government leadership, blasphemes and abuses the Islamic faith, and deeply insults believers. The Imam calls the police. Result?⁸⁴

According to Synon, such demonstrators would be prosecuted under Irish law for “incitement to hatred,”⁸⁵ subject to trial without jury, and sentenced to up to two years in prison.⁸⁶ The parallels to Russia’s law prohibiting religious hatred are obvious and raise an interesting question of comparative law at the crux of this Note: How would the Pussy Riot affair have played out in the West? Part II considers this question at length.

II

EVALUATING THE PUSSY RIOT PROSECUTIONS THROUGH THE LENS OF AMERICAN FREE SPEECH JURISPRUDENCE

This Part demonstrates that criticism of the Pussy Riot prosecutions on free speech grounds is misplaced by arguing that the punk rockers’ speech would not be protected even under liberal free speech principles, as articulated by modern American free speech law. I focus on American law not out of any normative judgment about its superiority over other legal systems, but because modern American free

The Wrong Reasons to Back Pussy Riot, N.Y. TIMES (Aug. 20, 2012), <http://www.nytimes.com/2012/08/21/opinion/the-wrong-reasons-to-back-pussy-riot.html>. He also pointed out that some of the band’s members have affiliated with a group that has conducted activities, such as setting fire to police cars and vandalizing bridges in Saint Petersburg, that “would get you arrested just about anywhere, not just in authoritarian Russia.” *Id.*

⁸³ Simon Jenkins, *The West’s Hypocrisy over Pussy Riot Is Breathtaking*, GUARDIAN (Aug. 21, 2012, 3:30 PM), <http://www.guardian.co.uk/commentisfree/2012/aug/21/west-hypocrisy-pussy-riot>.

⁸⁴ Synon, *supra* note 71.

⁸⁵ *Id.*; see also *infra* note 101 (describing Ireland’s anti-hate speech law).

⁸⁶ Synon, *supra* note 71.

speech law is the most speech-protective tradition in the developed world.⁸⁷ First, I apply American free speech standards to the hooliganism law under which the band was prosecuted to consider the constitutionality of that law both as written and as applied. Then, I consider how even a liberal free speech regime like the one in place in the United States already restricts protest speech similar to that of Pussy Riot's punk prayer. Despite Western outrage at Russia's alleged free speech suppression throughout the affair, I will show that the United States would also ban the punk prayer in a way it sees as consistent with liberal free speech principles.

A. *Evaluating Russia's Hooliganism Law*

This section considers the constitutionality of the hooliganism law under which the band was prosecuted, both on its face⁸⁸ and as applied to Pussy Riot.⁸⁹ One of the greatest obstacles to this analysis, however, is the tangled state of modern First Amendment jurisprudence itself. One commentator, calling free speech law a "labyrinth," gave some indication of the myriad distinctions that have frustrated students, practitioners, and even judges for years:

[T]he Supreme Court has developed a dense mass of overlapping doctrines: drawing distinctions between content-based and content-neutral restrictions; drawing further distinctions between fully-protected and "low-level" categories of expression; creating separate bodies of precedent (overbreadth, vagueness and prior restraint)

⁸⁷ See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 3 (1986) ("No other free society permits [extremist speech] to nearly the same degree [as the United States]."); Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L.J. 1, 15 (2011) ("The American commitment to freedom of speech and political association is stronger than the European view."); Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 960–61 (2007) ("The United States is probably the most protective of (most) speech rights among Western democracies"); *Freedom of Expression—ACLU Position Paper*, AM. CIVIL LIBERTIES UNION (Jan. 2, 1997), <http://www.aclu.org/free-speech/freedom-expression-aclu-position-paper> ("[The United States] is the most speech-protective country in the world.").

⁸⁸ Litigants bringing a facial challenge against the constitutionality of a statute must show that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Facial challenges are generally disfavored. See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450–51 (2008) (explaining that facial challenges are disfavored because they "rest on speculation," "run contrary to the fundamental principle of judicial restraint," and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented").

⁸⁹ Litigants bringing an as-applied challenge to the constitutionality of a statute argue that the statute, "even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances." *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 n.16 (Tex. 1995).

that focus on impermissible *methods* of regulation; requiring particular solicitude for controversial speakers (the “hostile audience” cases); and creating special rules for special settings (the public forum doctrine and the discrete lines of precedent governing students, soldiers, prisoners, and public employees).⁹⁰

Because of the complexity of the way these doctrines interact with one another, this Note uses Kevin Francis O’Neill’s First Amendment “compass,” an analytical framework for evaluating free speech questions,⁹¹ to examine the Pussy Riot prosecutions under liberal free speech principles. The relevant questions for our purposes are: “(1) Is the regulation content-based or content-neutral? (2) If content-based, does the regulation restrict speech or compel speech? (3) If content-restrictive, is the regulation direct or indirect?”⁹²

1. *Russia’s Hooliganism Statute on Its Face*

Article 213 of the Russian Criminal Code defines “hooliganism” as “a flagrant violation of public order, expressing clear disrespect for society, accompanied by the use of violence against citizens or threat of its use, as well as destruction of or damage to another’s property.”⁹³ I argue that despite the outcry from Western critics surrounding the Pussy Riot prosecutions,⁹⁴ the hooliganism law as written would have passed constitutional muster in the United States.

⁹⁰ Kevin Francis O’Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 Sw. U. L. REV. 223, 225–26 (2000) (footnotes omitted).

⁹¹ See *id.* at 225 (explaining the five questions of the First Amendment compass).

⁹² *Id.* at 226. O’Neill’s framework contains two additional questions: “(4) Does the regulation include characteristics of overbreadth, vagueness, or prior restraint? (5) Does the regulation pertain to one of the settings for which the Supreme Court created special rules?” *Id.* I have omitted these questions because they contribute little to the overall analysis.

⁹³ UGOLOVNIY KODEKS ROSSIYSKOY FEDERATSII [UK RF] [Criminal Code] art. 213 (Russ.). The Russian Criminal Code lists hooliganism in the chapter dealing with “Crimes Against Public Security.” *Id.* ch. 24. Other crimes against public safety include terrorism, mass riots, and vandalism. See *id.* arts. 205, 212, 214. The crime of hooliganism itself is no stranger to Russian law; the original 1922 penal code of the Russian Soviet Federative Socialist Republic listed hooliganism as an offense punishable by one year of forced labor or imprisonment. See UGOLOVNIY KODEKS RSFSR [UK RSFSR] [Criminal Code] art. 176 (Russ.), translated in THE CRIMINAL CODE OF THE RUSSIAN SOCIALIST FEDERATIVE SOVIET REPUBLIC (O.T. Raynor, trans., 1925) (defining hooliganism as “contumelious acts accompanied by flagrant disrespect towards society”). Hooliganism’s inclusion in the first Soviet penal codes is unsurprising given its development as an increasingly troubling social ill during the waning years of the Russian Empire. See generally JOAN NEUBERGER, HOOLIGANISM: CRIME, CULTURE, AND POWER IN ST. PETERSBURG, 1900–1914 (1993) (describing the emergence of hooliganism in early twentieth-century Russia).

⁹⁴ See *supra* Part I.B (describing the negative reaction outside Russia to the prosecutions).

Content-based restrictions on speech⁹⁵ face a much higher constitutional hurdle in the form of strict scrutiny.⁹⁶ Demonstrating that a given law is content-neutral,⁹⁷ therefore, is the easiest way to avoid running afoul of the First Amendment. Courts determine whether a regulation is content based by looking to whether it distinguishes favored speech from disfavored speech “on the basis of the ideas or views expressed.”⁹⁸

Looking to the terms of the statute, Russia’s hooliganism law obviously distinguishes between favored and disfavored forms of speech on the basis of the ideas expressed: Speech that expresses “clear disrespect for society” is disfavored and subject to regulation.⁹⁹ In this sense, the hooliganism law is comparable to the Espionage Act of 1917¹⁰⁰ or German laws prohibiting Holocaust denial and the display of Nazi symbols.¹⁰¹

As the hooliganism law would almost certainly qualify as a content-based restriction under liberal free speech principles, we must

⁹⁵ Content-based restrictions depend on the content of certain speech. A restriction is considered content based if “the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A restriction is considered content neutral if it restricts only the “time, place, or manner of protected speech,” without regard for its content. *Id.* “The government’s purpose is the controlling consideration.” *Id.* Thus, a requirement that any person or group obtain a permit before holding a rally on a public square would likely be considered content neutral, while a requirement that only Communists obtain a permit before holding such a rally would likely be considered content based.

⁹⁶ *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455 (2002) (Souter, J., dissenting) (“[S]trict scrutiny leaves few survivors.”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”).

⁹⁷ Content-neutral restrictions apply equally to *all* forms of speech, regardless of content. *See supra* note 95 for more detail on what makes a restriction content neutral.

⁹⁸ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994).

⁹⁹ UK RF art. 213 (Russ.), *supra* note 93.

¹⁰⁰ *See* Espionage Act of 1917, Pub. L. No. 65-24, ch. 30, tit. 1, § 3, 40 Stat. 217, 219 (1917) (criminalizing the encouragement of insubordination and refusal to serve in the military during wartime) (codified as amended at 18 U.S.C. § 2388(a) (2012)).

¹⁰¹ The German Criminal Code lists “[i]ncitement to hatred” as “incit[ing] hatred against segments of the population or call[ing] for violent or arbitrary measures against them” or “assault[ing] the human dignity of others”; the offense carries a punishment of up to five years imprisonment. STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT I [BGBl. I] 3322, § 130 (Ger.), *translated in German Criminal Code, GESETZE IM INTERNET*, http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf (last visited Feb. 1, 2014) (Michael Bohlander, trans.). Sections 86 and 86a prohibit the dissemination of Nazi propaganda and the display of Nazi symbols, respectively. *Id.* §§ 86–86a. Other European countries have similar prohibitions against racial or ethnic hatred. *See, e.g.,* Prohibition of Incitement to Hatred Act 1989 (Act No. 19/1989) (Ir.), *available at* <http://www.irishstatutebook.ie/1989/en/act/pub/0019/index.html> (criminalizing written and verbal speech that incites hate based on race, ethnicity, religion, or sexual orientation); Public Order Act, 1986, c. 64, §§ 17–29 (U.K.) (prohibiting verbal and written hate speech against any racial or ethnic group).

consider whether the law restricts or compels speech. In the past, American courts have shown a particular hostility toward state attempts to compel speech.¹⁰² The hooliganism law, by restricting speech through prosecution for utterances that fall within the language of the statute, does not run afoul of this particular constitutional nettle.

A better question, therefore, is whether the hooliganism statute directly or indirectly restricts speech. The difference, as O'Neill explains, depends on whether the government directly restricts expression by "targeting particular topics or viewpoints," or indirectly restricts expression by "punishing a speaker for the *reaction* produced by a controversial message."¹⁰³ The former category includes restrictions on the airing of certain political views¹⁰⁴ or topics like labor speech¹⁰⁵ and hate speech.¹⁰⁶ The latter category, often known as the "hostile audience" cases, includes statutes prohibiting breaches of the peace¹⁰⁷ and disorderly conduct.¹⁰⁸

¹⁰² See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (striking down a law preventing New Hampshire residents from covering up the state motto, "Live Free or Die," printed on all state license plates); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (holding that the state could not compel the NAACP to disclose a list of its members); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

¹⁰³ O'Neill, *supra* note 90, at 249.

¹⁰⁴ See, e.g., *Boos v. Barry*, 485 U.S. 312, 318–19 (1988) (striking down a statute prohibiting political protests outside foreign embassies as a restriction on a particular topic of speech); *Stromberg v. California*, 283 U.S. 359, 369–70 (1931) (striking down the portion of a statute prohibiting the display of red flags or banners as symbols of protest against organized government).

¹⁰⁵ See, e.g., *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 94 (1972) (striking down a ban on labor picketing outside school buildings).

¹⁰⁶ See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1199, 1207 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) (striking down a village ordinance prohibiting speech promoting hatred of certain peoples according to ethnicity). *Collin v. Smith* was the federal companion case to *National Socialist Party of America v. Village of Skokie*, an Illinois state case that led to a Supreme Court ruling. 432 U.S. 43 (1977). The highly publicized cases featured a controversial challenge by the American Nazi party and the American Civil Liberties Union to a Skokie law banning hate symbols. See Lee C. Bollinger, *The Skokie Legacy: Reflections on an 'Easy Case' and Free Speech Theory*, 80 MICH. L. REV. 617, 617–18 (1982) (book review) (describing the nature and national impact of the Skokie cases).

¹⁰⁷ See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963) (reversing a breach of peace conviction against civil rights protesters).

¹⁰⁸ See, e.g., *Gregory v. City of Chicago*, 394 U.S. 111, 111–12 (1969) (reversing a disorderly conduct conviction against civil protesters who had picketed outside the mayor's house); *Feiner v. New York*, 340 U.S. 315, 317, 321 (1951) (upholding petitioner's disorderly conduct conviction for criticizing President Harry Truman and other political officials before a large group of hostile onlookers).

As written, the hooliganism law appears to be a direct restriction on speech. The law's restriction on speech that expresses "disrespect for society"¹⁰⁹ bears some resemblance to the laws classified as direct restrictions and struck down as unconstitutional in *Boos v. Barry*¹¹⁰ and *Collin v. Smith*.¹¹¹ For example, section 22-1115 of the District of Columbia Code, the statute at issue in *Boos*, prohibited display of:

any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party, or organization . . . within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government.¹¹²

In similar fashion, Skokie Village Ordinance No. 77-5-N-995, at issue in *Collin*, prohibited the "dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so."¹¹³

But even direct, content-based restrictions on speech are not necessarily unconstitutional; such restrictions can pass constitutional muster if the regulated speech falls within one of the Supreme Court's designated categories of unprotected or lower-value speech.¹¹⁴ Of these categories, the hooliganism statute most clearly implicates the advocacy of imminent lawless action, an area governed by the Supreme Court's landmark decision in *Brandenburg v. Ohio*.¹¹⁵ In *Brandenburg*, the Court overturned a Ku Klux Klan leader's ten-year sentence for violating Ohio's criminal syndicalism statute,¹¹⁶ and articulated a new formulation of Justice Oliver Wendell Holmes's famous clear and present danger test.¹¹⁷ The Court held that the gov-

¹⁰⁹ UK RF art. 213 (Russ.), *supra* note 93.

¹¹⁰ 485 U.S. 312 (1988).

¹¹¹ 578 F.2d 1197.

¹¹² D.C. CODE § 22-1115 (1981) (repealed 1988).

¹¹³ Skokie, Ill., Ordinance 77-5-N-995 (May 2, 1977), *reprinted in* BOLLINGER, *supra* note 87, at 251 n.47.

¹¹⁴ O'Neill identifies seven categories of "low-level" speech: advocacy of imminent lawless action, obscenity, child pornography, fighting words, defamatory statements, commercial speech, and lewd or indecent expression. O'Neill, *supra* note 90, at 251-52.

¹¹⁵ 395 U.S. 444 (1969).

¹¹⁶ See OHIO REV. CODE ANN. § 2923.13 (LexisNexis Supp. 1972) (making it a crime to advocate "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform") (current version as amended at OHIO REV. CODE ANN. § 2917.01 (West 2006)).

¹¹⁷ *Brandenburg*, 395 U.S. at 444-45, 447. Holmes's clear and present danger test comes from the seminal case of *Schenck v. United States*, 249 U.S. 47 (1919), the first U.S. Supreme Court case to recognize that the First Amendment provided some protection

ernment may not restrict subversive advocacy “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹¹⁸ Looking to the hooliganism statute, the requirement that the contemptuous speech be attended by “violence . . . or by the threat of its use,”¹¹⁹ squares neatly within the requirements of *Brandenburg* by making imminent lawless action an element of the offense. Indeed, some commentators have questioned the continuing functional importance of the *Brandenburg* imminence test, as many lower courts considering such cases post-*Brandenburg* have instead simply classified the statements as true threats, which receive no First Amendment protections.¹²⁰ In any event, the strength of the violence requirement language in the hooliganism statute makes it likely that it could fit under the true-threat doctrine. On its face, then, the statute is consistent with liberal free speech principles even as articulated by the unfriendly confines of American free speech jurisprudence.

against after-the-fact criminal prosecutions. *See id.* at 51–52 (1919) (“It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose.”). In his famous opinion citing the example of “falsely shouting fire in a theatre,” Justice Holmes pronounced that the First Amendment protects subversive speech from prosecution unless the “words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” *Id.* at 52. Justice Holmes himself was a late convert to the ideas he expressed in *Schenck*, having previously expressed the Blackstonian view of free speech as preventing *only* prior restraints on speech by the government when writing for the Court twelve years prior. *See Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (“[T]he main purpose of [the First Amendment] is ‘to prevent all such previous restraints upon publications as had been practiced by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.” (quoting *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 313–14 (1825))).

¹¹⁸ *Brandenburg*, 395 U.S. at 447. By setting such a high bar for restrictions on subversive speech, the *Brandenburg* decision ushered in the modern, highly speech-protective era of the Supreme Court’s First Amendment jurisprudence. The Court had previously upheld as constitutional a similar criminal syndicalism statute in *Whitney v. California*, 274 U.S. 357 (1927). Justice Louis Brandeis’s famous *Whitney* concurrence, in which he argued for a much stronger formulation of the clear and present danger test, formed the basis of the *Brandenburg* opinion. *See Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

¹¹⁹ UK RF art. 213 (Russ.), *supra* note 93.

¹²⁰ *See, e.g.,* Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L.Q. 339, 339 (2011) (“[M]uch of the protection offered by *Brandenburg* can easily be swallowed up by the true threat doctrine, which provides the basis for a robust exception to First Amendment protections.”). The Fourth Circuit, for instance, has recently observed that “[p]rotecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur” are fundamental concerns about the security and safety of individual citizens that place “threats of violence . . . outside the First Amendment.” *United States v. White*, 670 F.3d 498, 507 (4th Cir. 2012) (second alteration in original) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

2. *The Hooliganism Statute as Applied to Pussy Riot*

The as-applied analysis proceeds somewhat differently but reaches the same conclusion. Because of the nature of the performance, it is not entirely clear that the trial court's formulation of the hooliganism statute was content based. While it is true that the band members insisted their act was a political protest against Putin,¹²¹ the protesters only lip-synched inside the cathedral, with the politically charged lyrical track added later to the YouTube footage of the performance.¹²² This lack of actual spoken words would thus bring the Pussy Riot decision within the realm of the *Spence v. Washington* test, which is used to determine when conduct is so expressive that it must be considered speech under the First Amendment. Under *Spence*, nonverbal conduct will only be considered expressive (and thus trigger First Amendment scrutiny) if “[a]n intent to convey a particularized message was present,” and if “the likelihood was great that the message would be understood by those who viewed it.”¹²³

While it seems inarguable that the Pussy Riot performers intended to convey a particularized message, it is less clear that there was a great likelihood that that message would be understood by those present in the cathedral given that the women only pantomimed their performance. Without the express lyrics to guide them, it is hard to say with any certainty that the witnesses would have understood this performance, which amounted to a group of provocatively dressed individuals jumping and kicking in front of religious icons, as a political attack on Russia's president. Such conduct is less obviously intended to convey a political message than, for example, burning a draft card¹²⁴ or burning a flag.¹²⁵ And indeed, at least one of the witnesses testified that “the women did not sing about Putin in the Cathedral”; rather, “the subject was added to the [YouTube] clip.”¹²⁶ In general, the prosecution and even the judge herself focused less on

¹²¹ See *supra* notes 41–44 and accompanying text (detailing the defendants' statements in court and in writing).

¹²² See McMichael, *supra* note 24 (recounting the debate over whether they actually performed the song and noting that one of the critical pieces of the group's defense was that “the action . . . was a pantomime . . . laid down without sound” (first alteration in original) (quoting *Special Correspondent* (Channel One television broadcast Apr. 21, 2012) (Russ.)); Ryzik, *supra* note 1 (calling the performance a “40-second lip sync”).

¹²³ *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

¹²⁴ See *United States v. O'Brien*, 391 U.S. 367, 375–76 (1968) (holding that burning a draft card was not, on its face, an expressive activity protected by the First Amendment).

¹²⁵ See *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (holding that burning an American flag was expressive conduct protected by the First Amendment based on the context surrounding the event).

¹²⁶ Prigovor Imenem Rossiiskoi Federatsii Khamovnichesky raionnovo suda gor. Moskvii delo no. 1-170/12 ot 17 avgusta 2012 g. [Verdict in the Name of the Russian

the political message of the YouTube video's song and more on the defendants' dress and movements (in other words, their conduct).¹²⁷ It is altogether likely, then, that Pussy Riot's "punk prayer" would not have been considered expressive conduct within the realm of the First Amendment under American law.

But the decision would not have created a First Amendment violation under American law even if the conduct were deemed expressive. In such a case, the analysis proceeds much along the lines of the facial challenge, at least initially. The trial court's formulation of the hooliganism statute was clearly content based.¹²⁸ This formulation was also speech restrictive, seeking to censure rather than compel the band's speech. Whether the hooliganism statute as applied to Pussy Riot restricted speech directly or indirectly is a more complicated question. As discussed, the *language* of the hooliganism law seems to focus on the content of the speech, not the effect it has on listeners.¹²⁹ As it was *applied* to Pussy Riot throughout the trial, however, the hooliganism law actually displays some characteristics of the typical American "hostile audience" case.

Terminiello v. City of Chicago,¹³⁰ the foundational case of the hostile audience line of precedent, illustrates the point. In that case, the Supreme Court considered the defendant's conviction for breach of the peace, formulated by the trial court in an instruction to the jury as any misbehavior that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."¹³¹ Father Arthur W. Terminiello, the "radio Priest of

Federation of the Moscow Khamovnichesky District Court in the Matter of 1-170/12 of Aug. 17, 2012] 9, <http://pravo.ru/store/interdoc/doc/355/Binder1.pdf>.

¹²⁷ See *supra* notes 45–52 and accompanying text (detailing the nature of prosecution's case in chief); see also Prigovor Imenem Rossiiskoi Federatsii Khamovnichesky raionnovo suda gor. Moskvii delo no. 1-170/12 ot 17 avgusta 2012 g. [Verdict in the Name of the Russian Federation of the Moscow Khamovnichesky District Court in the Matter of 1-170/12 of Aug. 17, 2012] 10, <http://pravo.ru/store/interdoc/doc/355/Binder1.pdf> (giving a detailed description of the women's dress and noting that it was of a type "categorically forbidden to [be worn] in a cathedral").

¹²⁸ If anything, the court's specification that the women's hooliganism was motivated by religious hatred compares even more favorably to other Western content-based restrictions like the United Kingdom's recent prohibition on religious hatred. See Racial and Religious Hatred Act, 2006, c. 1, sch. 1 (U.K.) (amending the Public Order Act to prohibit "threatening words or behaviour" intended to "stir up religious hatred," defined as "hatred against a group of persons defined by reference to religious belief or lack of religious belief").

¹²⁹ See *supra* notes 109–13 (discussing the language of the hooliganism statute).

¹³⁰ 337 U.S. 1 (1949).

¹³¹ *Id.* at 3 (internal quotation marks omitted).

the South,”¹³² had delivered an anti-Semitic, racist speech to a capacity crowd of 800 in a Chicago auditorium.¹³³ Paired with an angry crowd of one thousand protesters outside, the incendiary speech caused “several disturbances.”¹³⁴ Showing a hostility to the trial court’s formulation of the statute that has come to characterize the Court’s indirect restriction cases, the Court reversed the conviction, holding that “[t]here is no room under our Constitution for a more restrictive view” than Justice Holmes’s clear and present danger test.¹³⁵

Like in *Terminiello*, much of the Pussy Riot trial was devoted to elucidating the shocked and angry reactions of the witnesses present in the church.¹³⁶ The prosecution called a parade of witnesses to the stand and asked them to discuss their Orthodox Christian faith and reactions to the protest.¹³⁷ This presentation went beyond simply establishing what the women had said and where they had said it—the YouTube video footage alone could have done that. The prosecution was trying to show that witnesses were truly offended by Pussy Riot’s antics. In proving their point, prosecutors even went so far as to question a “witness” who was not present at the cathedral about his reaction to the YouTube footage.¹³⁸ In this sense, the Pussy Riot proceedings somewhat resemble the proceedings in *Terminiello*.¹³⁹

But there is another way to interpret the prosecution’s presentation of its case in chief. While it is true that much of the case focused on the reaction of the witnesses rather than the content of the punk prayer, such evidence was arguably relevant insofar as it demonstrated the incendiary nature of that content. The hooliganism statute, after all, requires the disfavored speech be accompanied by “violence . . . or the threat of its use.”¹⁴⁰ The prosecution was therefore tasked with demonstrating that the protest posed a danger by the

¹³² *City of Chicago v. Terminiello*, 79 N.E.2d 39, 41 (Ill. 1948), *rev’d*, 337 U.S. 1 (1949).

¹³³ *Terminiello*, 337 U.S. at 3; *Terminiello*, 74 N.E.2d at 50–51.

¹³⁴ *Terminiello*, 337 U.S. at 3.

¹³⁵ *Id.* at 4.

¹³⁶ See *supra* notes 45–52 and accompanying text (detailing the prosecution’s case in chief).

¹³⁷ See *supra* notes 45–51 and accompanying text (describing the prosecution’s presentation of witnesses).

¹³⁸ See *supra* note 50 and accompanying text (discussing how the prosecution elucidated the YouTube witness’s opinion that the band had gone to the church to declare “war on God”).

¹³⁹ The *Terminiello* trial, for instance, as evidenced by the appellate court’s review of the record, focused at length on the offensive nature of the preacher’s speech, including introducing a shorthand reporter’s transcription of the speech into evidence. See *Terminiello*, 74 N.E.2d at 50–53 (recounting the evidence presented in the trial documenting the nature of the defendant’s speech and its effect on the crowd).

¹⁴⁰ UK RF art. 213 (Russ.), *supra* note 93.

nature of its content. In this sense, then, the witnesses' hostile reactions were not evidence of the crime itself, but rather informed the central legal issue in the case: whether the band's speech expressed "clear disrespect for society" accompanied by the threat of violence.¹⁴¹ Despite any resemblance to the typical hostile-audience case, therefore, the hooliganism law as applied to Pussy Riot was still a direct restriction on speech.

Facially, the hooliganism statute meets the standards of a liberal free speech regime by requiring violence (or threat of violence), the rule of *Brandenburg*. But from this perspective, the convictions are somewhat problematic: However offensive the punk prayer may have been, it hardly seems to reach the level of violence (or threat of violence) required under both the hooliganism statute itself and under *Brandenburg*. The fact that the trial court sustained a conviction under the statute, however, suggests that Judge Syrova made the factual findings the law requires, however dubious those findings might be.¹⁴² If anything, the problematic aspect of the conviction is not the way the law was applied to the band, but the questionable *factual* finding of the trial court that Pussy Riot's conduct constituted a threat of violence under the statute. This is not a constitutional issue, but one of proper judicial process,¹⁴³ a conclusion I will discuss at length in Part III.

B. *Restrictions on Protest Speech in the United States*

The discussion so far has focused only on the band members' free speech rights and on whether or not the government could impinge upon them. But to analyze the Pussy Riot affair only in terms of a state seeking to punish politically subversive speech is to appreciate only part of the dynamics at play. While the women maintained

¹⁴¹ *Id.*

¹⁴² See, e.g., Prigovor Imenem Rossiiskoi Federatsii Khamovnichesky raionnovo suda gor. Moskviiy delo no. 1-170/12 ot 17 avgusta 2012 g. [Verdict in the Name of the Russian Federation of the Moscow Khamovnichesky District Court in the Matter of 1-170/12 of Aug. 17, 2012] 27, <http://pravo.ru/store/interdoc/doc/355/Binder1.pdf> (calling the performance "not only a breach of the peace, but also an act of vandalism aimed at the desecration of the church premises"). The reference to vandalism is telling, as the Russian Criminal Code defines it as "the defiling of buildings" or "the spoilage of property." UGOLOVNIY KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 214 (Russ.). This suggests one way Judge Syrova may have justified the hooliganism verdict, as its violence (or threat of violence) requirement may be satisfied by "destruction or damaging of another's property." UGOLOVNIY KODEKS ROSSIISKOI FEDERATSII [UK RF] [Criminal Code] art. 213 (Russ.).

¹⁴³ In the United States, for example, the standard of review for findings of facts is the "clearly erroneous" standard. FED. R. CIV. P. 52(a)(6).

throughout the trial that their stunt was solely political,¹⁴⁴ people who witnessed the punk prayer perceived it as an offensive and highly personal attack on religious believers.¹⁴⁵ That the protest took place inside a church—a church demolished by Stalin and rebuilt by donations from thousands of Russians—seems to have had a larger impact on the State’s decision to prosecute than any political message expressed by the song. After all, the band’s performance in Red Square but two weeks earlier was more public, more politically incendiary (having accused Putin of having pissed himself), and more violent (having set off a smoke bomb yards away from the seat of the Russian government), yet it resulted in nothing more than a twenty-dollar fine.¹⁴⁶ Even the charge of hooliganism supports this point: Russian authorities could have cited the band members for another unauthorized concert or simply prosecuted them for trespassing.

Protecting the rights of believers to worship in peace is hardly alien to liberal free speech regimes like the United States’s. Indeed, we need not engage in the same kind of hypothetical inquiry as in Part II.A to ascertain whether a government could protect churchgoers from unwanted protests without compromising liberal free speech values: The U.S. Courts of Appeals for the Sixth and Eighth Circuits have recently upheld a pair of statutes that do just that. These unsuccessful challenges demonstrate that even liberal, speech-protective regimes like the United States’s *already* restrict protest speech substantially similar to Pussy Riot’s political protest.

The cases *Phelps-Roper v. Strickland*¹⁴⁷ and *Phelps-Roper v. City of Manchester*¹⁴⁸ tested the constitutionality of a pair of statutes placing restrictions on funeral protests. The cases shared the same plaintiff—Shirley Phelps-Roper, spokesperson for the notorious Westboro Baptist Church.¹⁴⁹ At issue in *Strickland* was Ohio’s

¹⁴⁴ See *supra* notes 41–44 and accompanying text (describing the band members’ statements during the trial).

¹⁴⁵ See *supra* notes 48–51 and accompanying text (describing witnesses’ testimony during the trial).

¹⁴⁶ See *supra* notes 20–22 and accompanying text (describing the band’s Red Square performance and its aftermath).

¹⁴⁷ 539 F.3d 356 (6th Cir. 2008).

¹⁴⁸ 697 F.3d 678 (8th Cir. 2012) (en banc).

¹⁴⁹ Ms. Phelps-Roper was also a defendant in *Snyder v. Phelps*, a controversial case in which the Supreme Court held on First Amendment grounds that the plaintiff could not sustain a tort action against the Westboro Baptist Church for its protest of his son’s military funeral. 131 S. Ct. 1207, 1219 (2011). The Westboro Baptist Church has picketed more than 600 funerals over a twenty-year period in order to protest homosexuality. *Id.* at 1213. The church members typically carry signs with slogans such as “‘God Hates the USA/Thank God for 9/11,’ ‘America is Doomed,’ ‘Don’t Pray for the USA,’ ‘Thank God for IEDs,’ ‘Thank God for Dead Soldiers,’ ‘Pope in Hell,’ ‘Priests Rape Boys,’ ‘God Hates Fags,’ ‘You’re Going to Hell,’ and ‘God Hates You.’” *Id.*

“Funeral Protest Provision,”¹⁵⁰ which prohibited “picketing” or “other protest activities” within 300 feet of a funeral service, from one hour before to one hour after the service.¹⁵¹ Despite the fact that the statute targeted only protest speech, Phelps-Roper did not argue that the regulation was content based, instead conceding it to be content neutral.¹⁵² The Sixth Circuit concluded that the Ohio law was content neutral because the statute “is not a regulation of speech, but rather a regulation of the places where some speech may occur”; because it “was not adopted because of disagreement with the message the speech conveys”; and because Ohio’s asserted purpose of protecting its citizens from disturbances during funeral services was “unrelated to the content of a funeral protestor’s speech.”¹⁵³

Having found the protest provision to be content neutral, the court applied the less rigorous intermediate scrutiny standard of review, which allows the government to place restrictions on the time, place, or manner of speech so long as the restrictions are narrowly tailored to serve a significant governmental interest and leave open alternative channels for communication.¹⁵⁴ Addressing each point in turn, the Sixth Circuit first affirmed the district court’s finding that the government had a significant interest in protecting the citizens of Ohio from disruption during funeral services. The logic of the district

¹⁵⁰ *Strickland*, 539 F.3d at 358.

¹⁵¹ OHIO REV. CODE ANN. § 3767.30 (West Supp. 2013). The statute also contained a provision for a “floating buffer zone” of 300 feet around any funeral or burial procession, but the district court found that restriction unconstitutionally overbroad and severed it from the statute. *Phelps-Roper v. Taft*, 523 F. Supp. 2d 612, 620 (N.D. Ohio 2007), *aff’d sub nom.* *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008). Violation of the funeral protest statute is a fourth-degree misdemeanor, § 3767.99, which carries a maximum jail sentence of thirty days, § 2929.24.

¹⁵² *See Taft*, 523 F. Supp. 2d at 615 (“Plaintiff alleges that the statute’s provisions are facially content-neutral, yet overbroad in their time, place, and manner regulations of speech because they are not narrowly tailored to serve a significant government interest and do not leave open alternative channels for communication.”). In a later case, *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008), *overruled by Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012), Phelps-Roper did argue that the regulation was content based, and the Eighth Circuit rejected the argument and found an analogous funeral protest statute to be content neutral on its face. *See id.* at 690–91 (“We reject Phelps-Roper’s contention that section 578.501 is content-based because it targets funeral picketing and was enacted for the purpose of silencing her speech in particular. The plain meaning of the text controls, and the legislature’s specific motivation for passing a law is not relevant, so long as the provision is neutral on its face.”).

¹⁵³ *Strickland*, 539 F.3d at 361 (quoting *Hill v. Colorado*, 530 U.S. 703, 719, 720 (2000)) (internal quotation marks omitted). In making this determination, the court relied on the Supreme Court’s decision in *Hill v. Colorado*, which upheld a Colorado statute prohibiting abortion protests within eight feet of a healthcare facility as a content-neutral restriction on speech. 530 U.S. at 712–13.

¹⁵⁴ *Strickland*, 539 F.3d at 361–62 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

court's ruling rested on its finding that the funeral attendees "are a captive audience that cannot avert their eyes to avoid the unwanted communication because [they] have a personal stake in honoring and mourning their dead."¹⁵⁵

The court then held the statute narrowly tailored, given that it "restricts only the time and place of speech directed at a funeral or burial service."¹⁵⁶ The court noted that the statute reached only protests directed *at* a funeral service, such that "the mere fact that one holds a picket sign within 300 feet of a funeral or burial service during the relevant time period, without more, will not support a conviction under [section] 3767.30."¹⁵⁷ Notably, the court rejected Phelps-Roper's argument that other provisions of the Ohio Revised Code—including Ohio's version of *Brandenburg*-style incitement to violence¹⁵⁸—already adequately protected funeral-goers: "Phelps-Roper misses the point of the Funeral Protest Provision. Its purpose is not simply to protect funeral attendees from physical acts, but from the harmful psychological effects of unwanted communication when they are most captive and vulnerable."¹⁵⁹

Finally, the court held that the ordinance left open ample alternative channels for communication. Noting that Phelps-Roper "is not entitled to her best means of communication,"¹⁶⁰ the Sixth Circuit affirmed the district court's reasoning that she was free to express her message "outside of the times and places set forth in the statute" and to use "other means to deliver her message to the public" besides protest.¹⁶¹ The court cited door-to-door proselytizing, mail solicitations, and the Internet as other possible means of spreading her message.¹⁶² The Eighth Circuit, reviewing a virtually identical Missouri statute en

¹⁵⁵ *Id.* at 362 (internal quotation marks omitted). *Strickland* extended the captive audience logic of *Frisby v. Schultz*, 487 U.S. 474 (1988), beyond the home, recognizing that individuals can be effectively held captive in certain public contexts. *See* 539 F.3d at 363–65.

¹⁵⁶ *Strickland*, 539 F.3d at 368.

¹⁵⁷ *Id.* In other words, a labor-union picket line outside a factory less than 300 feet from a funeral home would not qualify for punishment under the statute.

¹⁵⁸ *Id.* at 371 n.3. Phelps-Roper cited, *inter alia*, section 2917.01 of the Ohio Revised Code, *id.*, which prohibits "knowingly engag[ing] in conduct designed to urge or incite another to commit any offense of violence when . . . the conduct takes place under circumstances that create a clear and present danger that any offense of violence will be committed." OHIO REV. CODE ANN. § 2917.01 (West 2006).

¹⁵⁹ *Strickland*, 539 F.3d at 371–72.

¹⁶⁰ *Id.* at 372 (citing *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981)).

¹⁶¹ *Id.* at 372 (quoting *Phelps-Roper v. Taft*, 523 F. Supp. 2d 612, 620 (N.D. Ohio 2007)) (internal quotation marks omitted).

¹⁶² *Id.* at 372–73.

banc four years after *Strickland*, relied on the *Strickland* court's reasoning in arriving at the same conclusion.¹⁶³

Ohio's funeral protest statute provides a model for a constitutionally sound statute prohibiting protests in churches of the type Pussy Riot perpetrated. The Sixth Circuit's captive-audience logic suggests that the State would have an equally significant interest in protecting religious worshippers from unwanted intrusions. In the Pussy Riot case, the believers present in the cathedral similarly could not avoid the punk prayer because they had a personal stake in honoring and worshiping their chosen deity.¹⁶⁴ The *Strickland* court cited the Supreme Court's recognition of the cultural significance of burial rites as "hav[ing] been respected in almost all civilizations from time immemorial."¹⁶⁵ The same can be said of religious worship.¹⁶⁶ Indeed, funeral rites themselves traditionally have been a subset of religious worship: "the conscious cultural forms of one of our most ancient, universal, and unconscious impulses."¹⁶⁷ And while a challenger like Phelps-Roper might argue that religious worship is less tied to a specific location than a given funeral service, the church is, in many religious orders, an essential component of the spiritual experience.¹⁶⁸

¹⁶³ See *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 694–95 (8th Cir. 2012) (citing *Strickland* for support in striking down a funeral protest statute).

¹⁶⁴ It is no answer to say that they could have avoided the unwanted communication by simply leaving the church. The Sixth Circuit expressly rejected this argument in *Strickland*, observing that attendance at a funeral service "cannot be dismissed as nothing more than a 'voluntary' activity" and recognizing the "deep tradition and social obligation" that compels individuals to attend a service. *Strickland*, 539 F.3d at 366. Noting that individuals wanting to take part in the event "must go to the place designated" for the funeral, the court concluded that "[f]riends and family of the deceased should not be expected to opt out from attending their loved one's funeral." *Id.* Once again, the comparison to attending religious worship is apt. As in the case of funeral services, "deep tradition and social obligation" compel religious believers to attend worship, and as in the case of funeral services, individuals wanting to take part in the event "must go to the place designated," namely the church, to participate. *Id.* In short, religious believers should not be expected to opt out from attending religious services just to avoid unwanted intrusions.

¹⁶⁵ *Id.* at 365 (quoting *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167 (2004)).

¹⁶⁶ See generally Walter Harrelson, *Worship*, in 19 ENCYCLOPAEDIA BRITANNICA 1014 (15th ed. 1974) ("Worship, especially in ancient societies, was no matter of indifference to the society at large, for the very continuation of life demanded it."). The Supreme Court itself has time and again stressed the cultural and constitutional significance of religious worship. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that the freedom to adhere to a certain "form of worship as the individual may choose cannot be restricted by law").

¹⁶⁷ Louis-Vincent Thomas, *Funeral Rites*, in 5 ENCYCLOPEDIA OF RELIGION 450 (Mircea Eliade et al. eds., Kristine Anderson trans., 1987).

¹⁶⁸ See Harrelson, *supra* note 166, at 1017 ("A centre for worship takes on a special character, once it has come to be recognized as the place where the Holy regularly appears. In some religions it represents . . . the place that constitutes the meeting place of God and man, heaven and earth. The sanctity of such a place must be preserved.").

Strickland thus demonstrates that even a liberal free speech regime like the United States's *already* restricts protest speech substantially similar to Pussy Riot's in similar times and places. As a protest aimed squarely at the Russian Orthodox Church,¹⁶⁹ Pussy Riot's punk prayer is exactly the type that would be prohibited during religious observances.¹⁷⁰ It is true, however, that unlike the kinds of protests Ohio's Funeral Protest Provision envisioned, the punk prayer took place at a time when no service was actually in progress.¹⁷¹ While such a restriction would be broader than the temporally limited funeral protest provision in *Strickland*, the Sixth Circuit entertained the notion that even an around-the-clock restriction could pass constitutional muster according to prior Supreme Court precedent.¹⁷² And while no organized service was in progress during Pussy Riot's performance, the church doors were open to worshippers at the time.¹⁷³ Like the Sixth Circuit observed in *Strickland*, Pussy Riot is still apparently free to agitate on the streets, in the parks, and on the Internet, where the band has already shown a knack for going viral.¹⁷⁴ As previously noted, in all of the band's prior exploits it had only been cited with a twenty-dollar fine for holding a concert without a permit.¹⁷⁵

In short, even the highly speech-protective tradition of American free speech law would not have protected Pussy Riot's speech under at least two lines of reasoning. A direct restriction on advocacy of imminent lawless action would have at least passed a facial challenge, while a restriction on protests in churches neutral as to time, place,

¹⁶⁹ See *supra* notes 23–29 and accompanying text (describing the nature of the protest).

¹⁷⁰ This is different from an untargeted protest that simply happened to occur nearby the religious observance. See *Strickland*, 539 F.3d at 369 (“[T]he mere fact that one holds a picket sign within 300 feet . . . during the relevant time period, without more, will not support a conviction . . .”).

¹⁷¹ See *supra* notes 25–30 and accompanying text (describing the events of the punk prayer).

¹⁷² See *Strickland*, 539 F.3d at 370 (noting that the Supreme Court had upheld such a perpetual ban in *Frisby v. Schultz*, 487 U.S. 474 (1988)).

¹⁷³ It is particularly common in the Russian Orthodox tradition for individual worshippers to come and go during open hours, often to burn incense in front of icons depicting saints known for certain feats. Russian students, for example, often pray for successful examinations before the icon of Saint Tatiana, the patron saint of students. Sonja Luehrmann, *Restraint and Outpour: Emotions Across Genres of Prayer*, REVERBERATIONS (June 17, 2013), <http://forums.ssrc.org/ndsp/2013/06/17/restraint-and-outpour-emotions-across-genres-of-prayer>.

¹⁷⁴ See, e.g., Liangfei Qiu, Qian Tang & Andrew Whinston, Two Formulas for Success in Social Media: Social Learning and Network Effects 36 (July 1, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2177077 (noting the band's popularity online).

¹⁷⁵ See *supra* notes 20–22 and accompanying text (describing the band's Red Square performance and its aftermath).

and manner would fall within American notions of protecting persons during sacred religious services.

III

CONSEQUENCES FOR THE RULE OF LAW IN RUSSIA

A. *Toward a More Productive International Discourse*

The notion that Pussy Riot's protest would likely not have been protected even under the most liberal free speech regime demonstrates that much of the most highly publicized international criticism of the prosecutions missed the point. Despite the mainstream criticism's focus on Russia's alleged suppression of free speech, any injustice suffered by Pussy Riot stems not from antidemocratic crackdown on dissenting speech, but rather from the shoddy judicial practice of a political system desperately in need of reform—the difference between oppression of the *law* and oppression of a *political system*.

As already touched upon in Part I.A, the due process afforded the women of Pussy Riot left much to be desired.¹⁷⁶ Indeed, the trial featured causes for concern even beyond the relatively superficial elements like the rifle-toting guards, rottweiler dogs, and sequestration of the band members in a glass enclosure.¹⁷⁷ The relationship between the defense and Judge Syrova, for example, quickly became incredibly contentious. When Ms. Alyokhina objected that she could not submit a plea because she did not understand the ideological elements of the charge leveled against her, Judge Syrova rebuked her, saying, “You have a higher education!” and provided no further elaboration of the charge.¹⁷⁸ One defense lawyer, for his part, snapped at the judge not to “tell [him] what to do” after she warned him about using inappropriate language in the courtroom.¹⁷⁹

Judge Syrova also kept defense counsel on a short leash during questioning, dismissing questions about whether Putin's name was said during the prayer and whether Alyokhina's teacher, a witness for the defense, was a religious believer.¹⁸⁰ She was similarly hostile to the defense's witness list, allowing only three of the seventeen originally called to testify.¹⁸¹ By the sixth day of the trial, the defense had

¹⁷⁶ See *supra* Part I.A (summarizing the band's trial).

¹⁷⁷ See Elder, *supra* note 34 (discussing details of the proceedings).

¹⁷⁸ Herszenhorn & Roth, *supra* note 43.

¹⁷⁹ Masha Gessen, *The Shame of Putin's Courts*, N.Y. TIMES (Aug. 6, 2012, 10:10 AM), <http://latitude.blogs.nytimes.com/2012/08/06/the-shame-of-putins-courts>.

¹⁸⁰ Lipman, *supra* note 57.

¹⁸¹ *Id.*

requested seven times that Judge Syrova recuse herself; she refused each request.¹⁸²

This kind of judicial behavior only exacerbates the problem already presented by more superficial indicators of guilt typical of the Russian criminal justice system. As discussed in Part I, the Pussy Riot trial featured rifle-wielding guards from the special forces, police dogs in the courtroom, and a glass cage for the accused.¹⁸³ While the Russian Constitution declares a defendant innocent until proven guilty and boasts that “the accused is not obliged to prove his own innocence,” these practices belie the promise of those lofty words.¹⁸⁴ The Russian criminal justice system treated the members of Pussy Riot as if they were guilty from day one. But what is perhaps most troubling is that none of these practices are unique to the Pussy Riot trial; many of the same issues, from imprisoning the accused in the courtroom to judicial bullying, are present in trials throughout Russia.¹⁸⁵

The lack of procedural protections afforded the members of Pussy Riot represents a much more appropriate target for criticism of the Russian authorities than the substantive merits of the speech at issue. The problem is not one of free speech, but rather one of an unjust political system linked to a lack of procedural safeguards in the criminal justice system. As I will develop in the following section, this distinction is not a mere superficial difference in wording. Misguided outrage at Russia’s alleged free speech violations conflicts with the opinions of ordinary Russians and makes well-meaning, Western criticism appear hypocritical considering that even the United States would likely deem laws prohibiting Pussy Riot’s punk prayer constitutional. By alienating ordinary Russians through such criticism, Western opinion threatens to undermine its own efforts to achieve political reform in Russia and paradoxically strengthens Russian resolve to resist change. On the other hand, ordinary Russian citizens are well aware of the shortcomings of their judicial system and will

¹⁸² *Id.*

¹⁸³ See *supra* notes 35–38 and accompanying text (describing the courtroom procedures).

¹⁸⁴ KONSTITUTSIIA ROSSIYSIOI FEDERATSII [KONST. RF] [CONSTITUTION] Art. 49, §§ 1–2 (Russ.).

¹⁸⁵ See generally Lynda Edwards, *Russia Claws at the Rule of Law*, 95 A.B.A. J. 38, 41 (2009) (noting human rights abuses in various cases, including unlimited pretrial detention, a presumption of guilt by prosecutors and judges, and a lack of respect for the attorney-client privilege). For example, the glass enclosure in which defendants sat replaced the previous iron bar enclosure only after the European Court of Human Rights called keeping defendants behind bars in the courtroom “degrading” and a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms. Khodorkovsky, *supra* note 34; see also Khodorkovsky v. Russia (No. 1), App. No. 5829/04 (2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104983> (ruling on this issue).

likely find criticism aimed towards the farcical procedural protections offered to the women of Pussy Riot more accurate and valuable to instigating much-needed reform.

B. Prospects for Russian Reaction

A series of polls by the Levada Center, a Russian polling organization, provides insight into the Russian perspective on the Pussy Riot affair and the potential effects of misguided criticism focusing on the ordeal as a free speech issue.¹⁸⁶ While a near majority of Russians surveyed found the potential two- to seven-year sentence appropriate upon the band's arrest in March, that number decreased to 33% of the population by July.¹⁸⁷ When asked what punishment Pussy Riot deserved, a plurality (29%) thought forced labor was the appropriate penalty, 16% favored imprisonment of two years or more, 10% favored imprisonment between six months and two years, 11% favored imprisonment of fewer than six months, and 20% favored a large fine.¹⁸⁸ Perhaps the most surprising figure of all is that only 5% of Russian respondents favored *no* punishment at all.¹⁸⁹

The polls also reveal differences in the way Russians interpreted the politics surrounding the trial. While the story in the Western media was one of collusion between Putin's authoritarian regime and a reactionary Russian Orthodox Church,¹⁹⁰ only 19% of Russians saw the Kremlin or the Church as the driving force behind the prosecutions.¹⁹¹ Instead, a plurality (35%) saw the offended Orthodox community members as initiating the trial of Pussy Riot.¹⁹² And despite the Church's allegedly heavy-handed intervention in state affairs (by Western standards), 70% of respondents reported that their opinion of the Church had not changed as a result of the incident, while only 16% said that their opinion had been worsened.¹⁹³ Six percent actu-

¹⁸⁶ *Rossiyane O Dele Pussy Riot* [Russians on the Pussy Riot Affair], LEVADA CENTER (July 31, 2012), <http://www.levada.ru/print/31-07-2012/rossiyane-o-dele-pussy-riot>.

¹⁸⁷ Forty-six percent of respondents in March and forty-seven percent in April found the sentence appropriate. *Id.*

¹⁸⁸ *Id.* Forced labor, also called "corrective labor," is the most common type of punishment in Russia, with labor camps making up 737 of the country's 1024 penal institutions. See MITCHEL P. ROTH, PRISONS AND PRISON SYSTEMS: A GLOBAL ENCYCLOPEDIA 228, 231-32 (2006) (observing that Russia's labor camps have the capacity to hold 791,615 prisoners).

¹⁸⁹ *Rossiyane O Dele Pussy Riot*, *supra* note 186. Nine percent found the question too difficult to answer. *Id.*

¹⁹⁰ See *supra* Part I.B (describing the mainstream Western reaction to the prosecutions).

¹⁹¹ *Rossiyane O Dele Pussy Riot*, *supra* note 186. An additional 8% thought that Putin himself was behind the action.

¹⁹² *Id.*

¹⁹³ *Id.*

ally responded that their opinion of the Church had *improved*.¹⁹⁴ Perhaps most importantly, Russians were split on their interpretation of the punk prayer, but a plurality thought the intended targets were Orthodox believers.¹⁹⁵

In short, Russians viewed the Pussy Riot affair not as a free speech issue, but rather as a targeted assault on a religious group and a trespass on the rights of religious believers to worship in their holy places unmolested. Accordingly, international criticism focusing on free speech is unlikely to convince ordinary Russians that the affair was, in fact, about free speech. More likely, this basic disagreement in how to view the issue will lead to a hardening of the Russian view of the prosecutions. Such a result would not be out of the ordinary: Putin has routinely been able to build popular support domestically by contradicting Western expectations and criticisms of the country.¹⁹⁶

Of course, the risk that international condemnation might fall on deaf ears and simply strengthen Russian resolve would apply to *both* misguided and well-founded criticism. While there undoubtedly

¹⁹⁴ *Id.* What can explain the startling difference in how the Pussy Riot prosecutions were perceived at home and abroad? One answer is that the Russian people simply do not value freedom of speech as highly as do citizens of mature Western democracies. There is even some support for this view: Twenty-six percent of respondents to the July Levada Center poll agreed that there should be *no right* to protest the relationship of the Russian Orthodox Church to the government *anywhere*. *Id.* But the more likely answer is that Russians, like Americans, are a highly religious people, and see freedom of speech as just one right among a constellation of rights—like the rights to privacy and free exercise of religion—which therefore must exist in a balance. This is why a majority of Russians in that same July poll answered that one *should* be able to protest the Church's relation to the State—just not in a holy shrine. *Id.* This is also why Russians like Moscow resident Vera, identified only by her first name in a *New York Times* piece on mixed Russian reaction, can assert at once that they are “categorically against the existing regime,” and that it was nonetheless “not necessary to go to a church and desecrate it.” David M. Herszenhorn, *Mixed Russian Feelings on Jailed Punk Rock Band*, N.Y. TIMES, Aug. 3, 2012, at A8. Zhenya Nikolayeva, a twenty-three-year-old who has only known life in a post-Cold War world, echoed the latter sentiment: “If they have their own ideas about life they want to express, they should have found another place.” *Id.*

¹⁹⁵ Twenty-three percent of respondents thought the punk prayer was directed at the Russian Orthodox Church and believers. LEVADA CENTER, OBSHCHESTVENNOYE MNIENIYE – 2012 [Public Opinion – 2012] 136 (2012). Nineteen percent thought it was directed at Putin, 20% thought it was directed at the role the Orthodox Church has played in politics, and 19% agreed with all three statements. *Id.* The remaining 19% found it too hard to say. *Id.*

¹⁹⁶ See, e.g., Fyodor Lukyanov, *Interactions Between Russian Foreign and Domestic Politics*, 19 IRISH STUD. INT'L AFF. 17, 21 (2008) (noting that Putin's aggressive foreign policy has been largely rhetorical, not substantive, in order to tap into mainstream Russian disregard for Western criticism); Sergei Guriev, *Just Rhetoric to Rally Russians*, N.Y. TIMES (last updated Mar. 18, 2013, 5:26 PM), <http://www.nytimes.com/roomfordebate/2012/03/05/how-powerful-is-russia/putins-anti-west-rhetoric-was-for-domestic-consumption> (noting how Putin used hostile language toward the West in his most recent presidential campaign “as an easy tool to mobilize support”).

remains a certain segment of the Russian population that has no tolerance for Western opinions of any kind, the negative effect of Western criticism in this case would likely have been lower if the criticism were actually targeted at the procedural injustice—as opposed to the supposed substantive injustice—Pussy Riot suffered.

This is because Russians *agree* that the Russian judicial system routinely fails to fulfill its duties properly. In October 2004, 46% of respondents to a nationwide opinion poll had a negative view of the Russian courts; only 26% answered that they had a positive view of the judiciary.¹⁹⁷ By June 2012—just one month before the Pussy Riot trial began—40% of respondents still held a negative view of the courts, while even fewer (24%) held a positive view.¹⁹⁸ The only category to see a gain during that eight-year period was the group that found the question too difficult to answer.¹⁹⁹

In that same poll, 43% of respondents agreed with the statement that Russian judges often render unjust verdicts, compared to only 26% who agreed that such verdicts happen only rarely.²⁰⁰ Only 46% thought that the law was the first thing Russian judges look to when making their decisions.²⁰¹ In the case of Pussy Riot’s trial specifically, only 44% of Russians believed the court passed judgment in a “fair, objective, and impartial” manner.²⁰²

The shortcomings of the Russian judiciary are so apparent that even the Kremlin has spoken out against them. Shortly after becoming president in 2008, Dmitry Anatolyevich Medvedev, himself a lawyer by profession, called Russia “a country of legal nihilism” and said that “[n]o European country can boast such a universal disregard for the rule of law.”²⁰³ Putin, for his part, routinely stressed the need to develop the rule of law during his first two terms as president in the 2000s.²⁰⁴

¹⁹⁷ Fond Obshchestvennoye Mneniye [Public Opinion Foundation], *O sudakh i sudyakh* [On Courts and Judges], FOM.RU (July 20, 2012), <http://fom.ru/Bezopasnost-i-pravo/10551>. Twenty-eight percent found the question too difficult to answer. *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* Despite the staggeringly low opinion Russians have of the judicial system’s ability to serve justice fairly, this is actually an improvement; in February 2001, 58% of Russians agreed that unjust verdicts were common. *Id.*

²⁰¹ *Id.* Among the other sources respondents thought influenced judicial decisionmaking were the opinions of the prosecutors (19%), the opinions of the regional administration (15%), and the judge’s personal likes or dislikes (10%). *Id.*

²⁰² *Rossiyanе O Dele Pussy Riot*, *supra* note 186, at 138. The rest either thought the court had not, or found it difficult to say. *Id.*

²⁰³ Edwards, *supra* note 185, at 62.

²⁰⁴ See Gordon B. Smith, *The Procuracy, Putin, and the Rule of Law in Russia*, in *RUSSIA, EUROPE, AND THE RULE OF LAW* 1, 10–13 (Ferdinand Feldbrugge ed., 2007) (noting Putin’s outward commitment to developing the rule of law in Russia).

These views on the judiciary square with other studies showing that Russians, despite their support for Putin's authoritarian-leaning regime, support democracy and understand that Russia needs further reform in that regard.²⁰⁵ International criticism focusing on the procedural injustice of the Pussy Riot case (or future cases like it) is therefore much more likely to find a receptive audience that might potentially use the advice as a guide to reform rather than simply ignoring it. International critics are unlikely to convince Russians that the Pussy Riot affair was a free speech issue. Russians simply do not believe free speech was the crux of the issue,²⁰⁶ and, as demonstrated in Part II, the punk prayer would not be afforded free speech protection even in the United States.²⁰⁷ However, Western critics do not need to convince Russians that the band's procedural rights were violated by a shoddy judicial system because they already perceive the inadequacies of their own system. As Susan Larsen, a lecturer on Russia at the University of Cambridge, said, "The country itself is going to mobilize not around freedom of speech but it's going to mobilize around the fight against corruption."²⁰⁸ If the goal of this international discourse is to avoid the injustices of the Pussy Riot affair as Russia continues along its path to achieve the rule of law, targeting criticism at the inadequate process is not only more accurate but also more likely to further progress.

CONCLUSION

This Note has considered the consequences of the Pussy Riot prosecutions for Russia's continued political and legal development. While international reactions to the prosecutions were almost unanimously negative, the criticism from Western pundits and leaders has

²⁰⁵ A 2008 poll found that only 28% of Russians agree with the statement that "Russia is a democratic country today." Henry E. Hale, *The Myth of Mass Russian Support for Autocracy: The Public Opinion Foundations of a Hybrid Regime*, 63 *EUROPE-ASIA STUD.* 1357, 1361 (2011). That number has remained consistently low, with 35% agreeing in 1994, 18% in 1999, and 34% in 2004. *Id.* At the same time, 59% of Russians agree that democracy is a "very good" or a "fairly good" way to govern Russia. *Id.* at 1364. That number rises to 67% among respondents who know what democracy means. *See id.* Most Russians see the current government as a sort of hybrid regime, neither fully democratic nor fully authoritarian, and feel somewhat empowered by the political system. Russians rated their political system a 5.4 on a scale from 0 (complete dictatorship) to 11 (fully democratic). *Id.* at 1362. Fully 75% of Russians surveyed in 2008 agreed or somewhat agreed that voting "can make a difference in what happens." *Id.*

²⁰⁶ *See supra* notes 186–95 (describing public perception of the prosecution among Russians).

²⁰⁷ *See supra* note 87 (describing the strength of American free speech protections as compared with the rest of the developed world).

²⁰⁸ Syed, *supra* note 67.

largely missed the point. Despite allegations that the punishment for the punk prayer was “not compatible with the [Western] values of democracy and the rule of law”²⁰⁹ as a violation of the band’s right to freedom of expression, the *substance* of the prosecutions in fact accords even with the principles of American free speech law, today the most rigorously speech-protective body of law among developed nations.²¹⁰ Instead, any criticism of the injustice perpetrated by the prosecutions is better aimed at the inadequate procedural protections of a Russian judiciary in desperate need of reform.

This point is more than a semantic one. Given contrary Russian popular opinion, misguided international criticism of the kind that surrounded the Pussy Riot affair threatens to undermine Russia’s rule-of-law development. At best, ordinary Russians will ignore it. At worst, the Kremlin will leverage antagonistic Western opinions to draw popular support for antidemocratic measures. As Russians are already aware of the deficiencies with their judicial system, they would be much more amenable to international criticism that acknowledges that the Pussy Riot prosecutions did not trample on free speech rights, but were nonetheless unjust due to the lack of procedural safeguards accorded to the band members. Such an approach, by more accurately criticizing the real issues Russia’s fledgling democracy faces, promises to further Russia’s development by keeping lines of communication open between the Russian electorate and the West.

²⁰⁹ Synon, *supra* note 71.

²¹⁰ See *supra* note 87 (describing the strength of American free speech protections relative to other nations).