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The Jury as Catalyst for the Reform of Criminal Evidentiary Procedure in Continental Europe: The Cases of Russia and Spain

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The modern notions of due process, and "Rechtsstaatlichkeit" in criminal procedure, that have gained general international recognition in national constitutions and international human rights conventions, have their origins for the most part in Anglo-American concepts which developed in the context of an adversarial trial by jury:
(1) the presumption of innocence;
(2) the privilege against self-incrimination;
(3) equality of arms;
(4) the right to a public and oral trial;
(5) the accusatory principle;
(6) independence of the judge from the executive (investigative agency). The classic separation of powers within the adversarial criminal process between a neutral judge, responsible for deciding questions of law and punishment, and a panel of non-legally-trained lay persons responsible for questions of fact and guilt, also gave rise to Common Law rules of evidence relating to hearsay and relevance and exclusionary rules relating to excessively prejudicial and illegally-gathered evidence[1] and to the principle of "intime conviction" or "free evaluation of the evidence."[2] Important developments in the substantive criminal law which affect the presentation and evaluation of evidence such as the separation of factual from legal questions[3] and the breaking-down of criminal offenses into their various constitutive elements, both objective and subjective, arguably have their roots in the need for the judge to instruct the jury on how to apply the law to the facts of the case.[4]
Though most of these principles have been accepted into the formerly inquisitorial criminal procedures of civil law countries, the structural framework in which they originated – the adversarial trial by jury – has largely been rejected by the same countries as being alien to certain other principles of the inquisitorial criminal process:
(1) the duty of the State (prosecutor, judge, investigating judge) to ascertain the truth;
(2) the necessity of reviewability of judgments, as reflected in the requirement of giving reasons for findings of guilt or innocence,[5] and, to some extent, in the need to compile an official dossier containing all relevant and admissible evidence taken in the inquiry. Juries have largely been abolished or converted into a form of lay participation more conducive to the adherence to the aforementioned principles: the "mixed court" of professional judges and lay assessors, collectively responsible for all questions of law, fact, guilt and sentence.
To what extent, however, are the universally-accepted principles derived from Common Law criminal procedure dependent on the classic separation of powers in the adversary jury trial?[6] Can you have a presumption of innocence and an independent fact/guilt finder in a professional judge who has studied the investigative file and determined, before the trial, that it includes sufficient evidence for a finding of guilt?[7] Is the classic jury a useful catalyst in cementing the independence of the judge from the executive (investigative) branch, so as to provide a foundation for an objective "ascertainment of the truth?"[8] If judge and investigator have a duty to find the truth and the defendant invokes his/her right to remain silent, how effective is this right when the judge is also the finder of guilt?[9] What is the meaning of "intime conviction" in a "mixed court," where the presiding judge has unique access to the dossier, and is responsible for drafting the judgment (even in the unlikely event he/she has been overruled by the lay assessors) so it will withstand the formal requirements of appellate scrutiny?[10]

Although the introduction of lay participation into the Continental European criminal trial was largely a tool in the hands of the bourgeoisie to weaken the monarchy's control of the courts[11] and its reintroduction in Russia was partially aimed at freeing the judiciary from its former subservience to party, and local administrative control, this paper will concentrate on the dialectic between the search for truth, adversarial procedure, and lay participation in the preparation, presentation and evaluation of evidence in the criminal trial. Its primary focus will be on the reintroduction of trial by jury in two classic inquisitorial criminal justice systems which had earlier rejected it this century, Russia (1993)[12] and Spain (1995)[13], as a catalyst in those countries' move to adversary procedure. I have exhaustively traced the legislative history of the new Russian Jury Law, described its provisions as compared with the Tsarist juries which existed in Russia from 1864 until 1917, and analyzed the results of the first 114 trials (from December 1993 through October 1994) based on my own observations, study of the files and interviews with judges, prosecutors and defense counsel in a previous article.[14] Here I will only allude to my findings there and supplement them with with new material gleaned from the jurisprudence of the Cassational Panel of the Supreme Court of the Russian Federation, and reports of evidentiary rulings in trials after October 1994.[15] I will discuss the following aspects of the new jury system: (1) its effect on the preparation of evidence for trial and in reforming sloppy and illegal investigative practices, among other things through the application of the new rule providing for exclusion of illegally-seized evidence; (2) its effect on the presentation of evidence at trial, evidenced by the diminution of importance of the dossier, tightening of the rules of evidence, adversarial empowerment of the parties and the elimination of the judge's duty to find the truth and; (3) its effect on the evaluation of the evidence as evidenced by problems in the separation of powers between judge and jury in decisions of fact, law and guilt.

Since the first Spanish trials will not take place until December 1995 at the earliest, I will merely refer to the text of the Jury Law and the accompanying commentary.[16]

1 The Modern Russian Jury Trial and its Evidentiary Implications (with Comparative References to the New Spanish Law)

1.1 Preparation of the Evidence for Trial

1.1.1 The Preliminary Hearing as Screening Mechanism

After a Russian accused demands trial by jury[17] at the close of the preliminary investigation, a preliminary hearing is set before the trial judge, who on the basis of the case dossier must decide whether sufficient competent and admissible evidence exists to bind the defendant over for trial.[18] To my knowledge, no judge has actually dismissed a case or count due to insufficient evidence at the preliminary hearing. A more common practice is to return the case to the investigator for supplementary investigation.[19] In addition, the judge must confirm the defendant's choice of trial by jury.[20]

Thus, the Russian preliminary hearing has not been an effective mechanism to screen weak cases through judicial dismissals. The practice of returning cases to the investigator for supplementary investigation, discussed in greater detail *infra*, was criticized in Soviet times for amounting to a ducking of responsibility for deciding guilt and innocence by the trial court in close cases.[21]

While the preliminary investigation in the new Spanish jury trials will remain under the supervision of an investigative judge ("Juez de Instrucción") with, however, broad possibility for defense and prosecution intervention in the form of motions to adduce or suppress evidence,[22] the new law does provide for a preliminary hearing ("audiencia preliminar") in which a judge evaluates the evidence adduced at the preliminary investigation and, if deemed

sufficient, will issue a holding order ("auto de apertura de juicio oral"). The judge will also determine the admissibility of evidence, can order new evidence to be investigated, and decides which of the documents in the dossier may be read at trial due to their irrepeatability.[23]

1.1.2 The Exclusion of Illegally Gathered Evidence

The Russian law provides for the exclusion of evidence gathered in violation of the constitution or the UPK.[24] The motion can be made at the preliminary hearing, if the determination can be made on the basis of the preliminary investigation dossier alone (§ 432 UPK) and also at trial, where the testimony of witnesses can aid the decision.[25] The motion can be made by the defense, prosecution, or by the judge unilaterally,[26] without reference to whether the moving party's rights were infringed by the illegal acts as in the U.S.[27] Thus, prosecutors in many cases have moved to exclude evidence gathered in violation of an accused's rights. This becomes controversial, when the prosecutor successfully excludes evidence *favorable to the accused*, because of errors committed by investigative authorities.[28]

The confession of the accused remains the centerpiece of nearly all Russian criminal investigations and, despite the existence of a constitutional right to remain silent since 1992,[29] all Russian accuseds talk with the police and nearly all confess at one time or the other, either through coercion or more subtle manipulations of the law.[30] The SCRF has put a damper on the early practice of especially the courts of suppressing many such statements by reversing acquittals based on the alleged error of the trial judge in suppressing confessions: (1) because the accuseds had not been advised of their right per Art. 51 Const.RF to remain silent;[31] (2) because of violations of the right to counsel;[32] and (3) due to other manipulative investigative practices.[33]

A Saratov judge not only suppressed otherwise very probative evidence, because it was gathered by police without proper authorization from the criminal investigator, but even applied the doctrine of the "fruit of the poisonous tree" to suppress evidence resulting from scientific tests performed on the items.[34] Judges have occasionally excluded expert forensic opinions either for failing to advise the expert witness of the duty to render expert testimony under the penalty of perjury (§§ 181,182,187 UPK) or because the defendant was not advised of the appointment of the expert until after the investigative acts or psychiatric interviews had been performed, thereby depriving the defendant of the ability to submit questions (§§ 184,185 UPK)[35]

As can be seen by the rulings of the SCRF, which have at least four times reversed acquittals because the judge excluded arguably inadmissible evidence, the defense runs a risk in moving to exclude evidence, that a favorable verdict will be reversed on appeal. For this reason, the defense often elects to simply argue the lack of a confession's credibility to the jury and reveal the unlawful police tactics.[36] Suppressing a confession which is the only evidence in the case at the preliminary hearing need not necessarily lead to a dismissal[37] as would be the case in the U.S. The judge could, on the contrary, cite the same "substantial violation of the criminal procedure law by the investigative organs" which led to the confession[38] as foundation for returning the case back to the investigators who had violated the law in the first place. Defendants who had "confessed" to the police have been acquitted of capital murder charges in a number of cases after the jury had been convinced that the confession was not true.[39]

1.2 The Presentation of Evidence at Trial

The Jury Law's implementation of Russia's constitutional move to "adversary procedure"[40] has transformed the trial judge into a neutral arbitrator no longer duty-bound to determine the "truth" of the charges in the indictment.[41]

The new law *inter alia* prevents the court upon its own motion from returning a case for supplementary investigation after trial has begun (§ 429 (para.3 UPK) and requires the judge

to grant a prosecutor's motion to dismiss in the absence of an objection by the aggrieved party.[42] The inadequacies of both of these provisions were illustrated in the second Moscow jury trial and discussed in length in my previous article.[43]

I have criticized the practice of returning the case for supplementary investigation, especially after a jury has been sworn and evidence taken, as arguably constituting a violation of the presumption of innocence[44] and of the provisions of Art. 47, Const. RF, which links in one article the defendant's right to a jury and to his or her "rightful judge."[45] The Russian practice, which could undermine the legitimacy of trial by jury in the eyes of the public, is a vestige of an inquisitorial system which presumes the guilt of the defendant and gives law enforcement repeated chances to prove that which is tacitly presumed.[46] Dismissals and acquittals in cases where the investigators have conducted sloppy or illegal investigations should lead to an improvement of criminal investigative work and thus obviate the necessity for this doubtful practice.

Though defendants in the first jury trials are still asked to enter a plea[47] in front of the jury and, in seeming contradiction to the notion that the burden of proof is on the prosecution and that the defendant is presumed to be innocent and has a right not to testify, are usually asked to, and give testimony before the prosecution has presented any evidence of guilt,[48] Russian trial courts have been giving the defendant the right to testify after the prosecution has presented its case and more and more are beginning to avail themselves of this option.

Unlike in cases before the mixed court[49] the parties are the first to ask questions of the defendant and witnesses in jury cases (§ 446 (para. 3,4) UPK). In the first jury cases questioning usually began with a narrative by the defendant or witness, typical of the Russian non-jury trial, but some judges have from the beginning turned the questioning over to the proponent of the evidence and have only rarely used their right to question the witnesses.

Jurors may submit questions in writing to be asked by the judge[50] and they have been quite active in doing so in some cases, often making up for inadequate questioning by the parties in cases in which the judge takes a passive role.[51]

Judges in the first trials have gradually restricted three practices which are particularly dangerous in trials in which illegally gathered evidence and circumstances related to a defendant's prior criminal record (§ 446 (para.6) UPK) are inadmissible at trial.[52] Besides restricting narrative testimony, there has been a tightening of the use of material in the investigative dossier, especially prior testimony, where no foundation for its admissibility has been propounded,[53] and a restriction on the use of character evidence which is irrelevant to the guilt question. The SCRF has resolved this problem by prohibiting the introduction of such evidence before the jury, as well as evidence which "could effect the objectivity and impartiality of the jury."[54]

Despite these efforts, in many of the first cases witnesses, the defendant himself, but most often the aggrieved have divulged the defendant's prior criminal record, including prior murders and dangerous recidivist status.[55]

1.3 Evaluation of the Evidence and Judgment of the Court

1.3.1 Formulation of the Question List

After the argument of the parties, the judge prepares the list of questions to be answered by the jury. The following three *basic* questions must be included as to each crime charged: (1) Has it been proved, that the charged acts took place?; (2) Has it been proved, that the defendant committed the acts?; and (3) Is the defendant guilty of committing the acts? These three parts may be included in one basic question as to the guilt of the defendant. Furthermore, questions may be asked concerning circumstances which aggravate or mitigate the level of guilt, change its character or reduce the level of crime, or excuse or justify the defendant's actions.[56] Questions regarding prior convictions, recidivist status or "*other questions* requiring juridical

qualification" may not be posed, but are left to the judge following a guilty verdict (§ 449 (para.5) UPK). The problems which have arisen in formulating the first "question lists" have rekindled old debates regarding the respective provinces of judge and jury in evaluating the evidence and reaching judgment in jury trials.

a. *Three Questions or One Question?*

(l) The trifurcation of the guilt question was criticized by pre-revolutionary legal scholars as being French legalistic casuistry, rejected by Germany, which allowed the jury to acquit even when all elements of the crime were proved.[57] This loophole for a kind of "jury nullification" was, however, championed by the famous judge A.F. Koni, who presided over the acquittal of Vera Zasulich in 1878, which had been a result thereof."[58] In the Case of Kraskina (Ivanovo Regional Court), the jury found that the defendant's husband had been killed by a knife-wound to the neck and that she perpetrated the killing after having specially prepared a knife therefor, having been dissatisfied with her husband's drunkenness and extortion of money from her. In answer to the third question as to guilt, however, they unanimously found her "not guilty." The prosecutor appealed the verdict, which was upheld by the SCRF as not being contradictory.[59]

The SCRF has indicated a preference for the formulation of all three questions and insists that if the court formulates just one question it must contain the elements of *corpus delicti*, perpetration and guilt.[60]

b. *Amount of factual detail required*

Judges in the first jury trials were in disagreement as to whether jurors had to find all of the factors to have been proved, which must be addressed in the descriptive part of the judgment.[61] The choice of this opinion led to very complicated questions usually phrased precisely in the terms of the indictment, including detail not crucial to the jurors' answering of the three fundamental questions which are their responsibility.[62] The SCRF adopted this interpretation, however, ruling that the court, in writing the judgment, may only refer to facts found to be true by the jury[63] and has reversed several cases, including a death sentence, for failing to do so.[64] The pre-revolutionary Cassational Senate also required the questions to include all facts in the lengthy indictments which could be relevant to guilt and sentence[65] but scholars accused the courts of trying to bury jurors in a morass of concrete facts in which esssential and non-essential were indistinguishable,[66] and chopping up questions into a myriad of chunks so as to reserve the final determination of guilt unto themselves.[67] Legal scholars stressed that the questions should be restricted to facts relating to the legal elements of the charged offenses and should be phrased in understandable language.[68] This has also been suggested by modern Russian scholars[69] and has been followed by a minority of courts.

c. *The Guilt Question/ Affirmative Defenses/ Lesser Homicide Offenses*

Many of the first Russian jury trials resulted in convictions of lesser homicide offenses or raised self-defense issues.[70] Some courts formulated questons relating to the allegedly provocative act of the victim, which underlay a claim of self-defense or heat of passion, so as to require positive proof that it took place, for example: "has it been proved that the victim attacked the defendant?", etc. The courts would then formulate tripartite questions relating to the necessary elements of the lesser offenses. Other courts framed the question in terms of probability, believing this was more consonant with the presumption of the defendant's innocence: "*Is it probable* that the acts were carried out in self-defense?"[71] Following an affirmative answer (this form was also used in relation to defenses of alibi, accident and heat of passion), the judge would either find the defendant guilty of a lesser offense or enter an acquittal in the event of justifiable self-defense.[72]

Errors in the phrasing or location of the guilt question in the question list have also given rise to problems in the first trials. Some courts foreclosed the jury from answering questions as to self-defense, accident or heat of passion, if they had determined that the defendant had *intentionally* killed the victim, or killed him as a result of an argument.[73] In a Saratov Case the

jury was asked first if the defendant was *guilty* of intentionally stabbing the victim to death, before the self-defense questions were formulated.[74]

When the jury is asked to find a defendant guilty or not guilty of a violation of a certain section of the criminal code, as in the U.S., then no ambiguity is possible. Where, however, the jury is asked to determine whether a certain concatenation of facts charged in the indictment, or adduced in court, has been proved, and whether the defendant is guilty thereof, problems arise, for the fact situation might not fully include all the elements of the charged offense, or negate possible affirmative defenses and thus *no criminal guilt may ensue.*

d. *The Resolution of Factual and Legal Questions*

The upshot of the dispute in this area has been whether the judge in the summation should instruct as to the elements of the charged crimes, and then let the jury decide as to whether the they have been proven, or whether the questions should only address the factual side of the defendant's alleged conduct (the amount of stab wounds, descriptions of cruelty, etc.), leaving the decision to the judge at the post-verdict hearing as to whether, for instance, the aggravated murder, or any mitigating or exonerating circumstances had been proved.[75]

The SCRF has interpreted the prohibition against formulating "*other questions*, requiring juridical evaluation by the jurors in the rendering of their verdict," as prohibiting:

"the use of such juridical terms as intentional or negligent murder, intentional murder with exceptional cruelty, intentional murder with hooliganistic motivation or for personal gain, intentional murder committed in the heat of passion, murder using excessive force in self-defense, rape, robbery, etc."[76]

With its Opinion No. 9, and the reversal of several cases the SCRF has revived an ancient dispute, but has taken the side which had been rejected by legal science in the last century.

Although English and American jurists often refer to the jury as the "trier of fact" and the judge as the arbiter of questions of law, it has long been recognized that Anglo-American juries are the judges of guilt, and in doing so must of necessity apply the law, as explained in the judicial summation, to the facts it determines to have been proved. When the French adopted the jury after the 1789 revolution they endeavored, following Montesequieu, to restrict the jury to answering pure fact questions, leaving application of the law to the judge.[77] First German,[78] and then Russian legal scholars rejected this interpretation in the 19th C., holding that the jurors' decision on the question of guilt must encompass an application of the law to the facts found to be true and that the jury was properly seen as the judges of guilt and the professional judges as the determiner of *sentence.*[79]

The SCRF interpretation of the statute has effectively removed the guilt determination from the jury arguably in violation of Art. 20 of the Const. RF.[80] The SCRF's decision also seems to contradict § 451(para.2) UPK, which requires the judge in the summation to instruct the jury as to the "content of the criminal statute which assigns responsibility for the commission of the crime of which defendant is charged."[81]

1.3.2 The Judge's Summation and the Question of Lenience

Before the jury retires to the jury room for deliberations the judge gives a summation or "parting word (§ 451 UPK)," in which the jury must be instructed on their ability to grant either "lenience," or "special lenience" if they return a guilty verdict.[82] In connection with the instructions on "lenience," the judge tells the jurors the possible range of sentences for each crime charged, including the possibility of the death penalty.[83]

Allowing the jury to recommend lenience in a way helps to eschew the "scandalous acquittals" or "pious perjury" (guilt-findings contrary to the facts as to lesser-included offenses), commonly returned by jurors in the 19th C. to circumvent the death penalty or, for instance, hard labor in Siberia.[84]

1.3.3 Judicial Evaluation of the Verdict and Judgment

The jury is instructed to try to reach a unanimous verdict (§ 453 UPK), but, if this is not possible in three hours, they may answer the questions by majority vote, at least seven votes needed for a guilty verdict or an answer contrary to the defendant's interests, with votes of 6-6 inuring to the benefit of the defendant (§ 454 UPK). At the post-verdict hearing, the judge qualifies the verdict, taking into consideration evidence not submitted to the jury: such as the official position of the defendant, prior criminal record, and whether or not "lenience" or "special lenience" has been recommended.[85]

As in most Continental European countries, the judgment of the Russian jury court must, as is the case with the mixed court, contain reasons, based on the court's evaluation of the evidence. I believe the SCRF's attempt to reduce the jury to a trier of purely historical facts, and its insistence that the judge be virtually the trier of guilt by juridically applying the law to the facts found true by the jury, is motivated by its attempt to square the court's duty to issue reasoned judgments, subject to review in cassation, with the new jury procedure.

This is no mean feat.[86] Interestingly enough, the new Spanish jury will return, along with its verdict, a succinct rendition of the reasons why the facts were deemed to have been proved or not proved.[87] A similar provision is contained in Austrian law.[88]

2 Conclusion

Acquittals in the first modern Russian jury trials have occurred approximately 20 times more often than in cases before the mixed court with people's assessors in Russia.[90] The relative lenience of the Russian jury, unexpected by many of its critics, can only have a salutary effect on the the work of the police and criminal investigators, responsible for preparing the criminal cases for trial. The sloppiness and illegality of many of the investigations indeed led to acquittals or otherwise lenient verdicts and was one of the reasons for the movement to reform criminal procedure which began during Gorbachev's reign.

The Russian notion of "adversariness," which originally signified an institutionalization of equality of arms, and the clear definition of roles in the criminal process, has come more closely to resemble its Anglo-American embodiment, arguably due to the presence of the jury. Though the preliminary hearing has not played its desired role as a stage for weeding out weak cases, it has been the staging ground for development of a jurisprudence relating to judicial control over the acts of criminal investigators, through the vehicle of the exclusionary rule. Though many of the more radical interpretations have been overruled by the SCRF, the closer scrutiny of questionable investigative methods can only have a positive effect on the collection of evidence.

Judicial rulings aimed at excluding unduly prejudicial material from the jury, at restricting prosecutorial reliance on the investigative dossier in presenting their cases, and at restricting the use of otherwise irrelevant character evidence at trial have also forced prosecutors and investigators to think twice before charging a questionable capital case in the jury courts.

The judge, who in the mythical search for truth had to willy-nilly play the role of investigating, charging, prosecuting, defending and punishing authority in the Soviet criminal justice system, has been stripped of most prosecutorial functions, and the prosecutorial authorities (investigator and procurator) can less and less rely on the court to bail out poorly or illegally investigated cases. Therefore prosecutors have been forced to take critical looks at the cases turned over to them by investigators, send back poorly investigated cases for further investigation or more realistic charging or amend the charges in the trial court to conform with the proof or the realistic expectations of the evidence.

Finally, the role of the jury in using its collective "intime conviction" to evaluate the facts must await the final outcome of the "battle between bench and jury" over who will actually

make the ultimate decision as to guilt. The demise of the classic jury on the European Continent in the late 19th and early 20th Century was a result of the assertion of dominance by professional judges as being the sole appliers and interpreters of the substantive law and the perceived necessity to have verdicts reasoned and thereby subjective to effective appellate review.
Whether the jury can perform its traditional function in a system which demands reasoned verdicts and insists on a strict separation of questions of law and fact, restricting the jury to deciding only the latter, will have to await the fates of the new Russian and Spanish juries. Whether a truly adversary system in the Anglo-American sense can exist without a division of the court into a neutral professional judge responsible for deciding questions of law and a neutral lay panel responsible for deciding questions of fact *and guilt*, must await the fate of the new Italian Code of Criminal Procedure and other countries who have tried to erect an adversary system without lay participation (like Japan), as well as the Russian and Spanish experiments.

NOTES

1 The research of John H. Langbein has seriously called into question, however, whether the Anglo-American rules of evidence were attributable to the division of labor between jury and judge, or rather to the "lawyerization" of criminal trials in the late 18th and early 19th centuries. *Langbein, John H.* "The Criminal Trial before the Lawyers". 45 Univ. of Chicago L. Rev. 263, 306 (1978) (hereafter *Langbein*, "Criminal Trial").

2 Langbein also sees the seeds of "free evaluation of evidence" being planted in Continental Europe before the introduction of trial by jury with the French Revolution, with the weakening of the institution of torture and the rise of "poena extraordinaria." *Langbein, John H. Torture and the Law of Proof.* Chicago and London. 1977, at 59 (hereafter *Langbein, Torture*).

3 Though Sir Edward Coke as early as 1620 proclaimed "Ad quaestionem facti non respondent judices; ad quaestionem juris non respondent juratores," and early French and German jury legislation tried to reduce juries to merely the judges of "historic facts," leaving the application of the law to the facts to the professional judge, German, and later Russian scholars jurists quickly understood that the jury's verdict of "guilty" or "not-guilty" was a mixed issue of law and fact, which led the Germans to replace the classic jury with the mixed court or *Schöffengericht* in which professional judges and lay assessors decide all issues of law, fact, guilt and sentence in joint session. See *Langbein, John H.* "The English Criminal Trial Jury on the Eve of the French Revolution" in Schioppa, Antonio Padoa (ed.) *The Trial Jury in England, France, Germany 1700-1900.* Berlin. 1987, at 34)(hereafter *Langbein*, "English Criminal Trial"); for a summary of the 19th Century German discussion, see *Landau, Peter.* "Schwurgerichte und Schöffengerichte in Deutschland im 19. Jahrhundert bis 1870", in Schioppa (*supra*, this note), at 279, and *Meyer, Hugo. That- und Rechtsfrage im Geschworenengericht, insbesondere in der Fragestellung an die Geschworenen.* Berlin. 1860; for the Russian discussion, see *infra.*

4 See *Amodio, Ennio*, "Giustizia popolare, garantismo e partecipazione" in Amodio, Ennio (ed.) *I giudici senza toga. Esperienze e prospettive della partecipazione popolare ai giudizi penali.* Milan. 1979, at 13 (f.n. 30).

5 According to Amodio, Art. III (1) of the Italian Constitution requiring reasons to be given for all judicial decisions, makes the reintroduction of the classic jury impossible. *Amodio* (fn. 4, *supra*), at 46-48).

6 For the proposition that French and German reformers, enamored with the Anglo-American jury system, lost sight of the "interdependencies" between that system and the procedural and evidentiary maxims of the adversary system, which were otherwise rejected, see *Kunert, Karl H.* "Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of 'Free Proof' in the German Code of Criminal Procedure". 16 Buffalo L. Rev. 122, 147 (1967); cf. *Amodio* (fn. 4, *supra*), at 13 (fn. 30).

7 Views in Germany as to this fact range from the ultra-pessimistic contention that German criminal procedure is a Potemkin facade and the trial an orchestrated blessing of the results of the preliminary investigation, *Schünemann, Bernd* "Reflexionen über die Zukunft des deutschen Strafverfahrens" in *Festschrift für Gerd Pfeiffer.* Köln/Berlin/Bonn/München. 1988, to cautious assertions that the preliminary studying of the file, while strongly influencing the presiding judge, does not make him/her incapable of objectively weighing the trial evidence. *Rennig, Christoph. Die Entscheidungsfindung durch Schöffen und Berufsrichter in rechtlicher und psychologischer Sicht.* Marburg. 1993, at 177 (Tab. 10), 223, 237. Cf. *Damaska, Mirjan* "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure". 121 Univ. of Pennsylvania L.Rev. 506,544 (1973) (hereafter *Damaska*, "Evidentiary Barriers").

8 The "pre-prepared version of the truth" presented to the trial judge in the form of the investigative dossier, *Jörg, Nico/Field, Stewart/ Brants, Chrisje.* "Are Inquisitorial and Adversarial Systems Converging?" in Harding, Christopher/ Fennell, Phil/ Jörg, Nico/Swart Bert (ed.) *Criminal Justice in Europe. A Comparative Study.* Oxford. 1995, at 46-47, the "Schulterschluß" between the trial judge and the prosecutor, and the "systematic distortion of the processing of information, caused by the judicial reconstruction of an historical situation" all constitute, according to its critics, "weaknesses of truth-finding hindered by inquisitorial procedure with an accusatory facade." *Schünemann* (f.n. 7, *supra*), at 475-6, 479).

9 The fact that continental defendants virtually never remain silent, either during the preliminary investigation or the trial itself answers this question. See *Damaska, Mirjan. The Faces of Justice and State Authority.* New Haven/London. 1986, at 128 (hereafter *Damaska, Faces of Justice*); and *Damaska*, "Evidentiary Barriers" (fn. 7, *supra*), at 527.

10 As to the problems inherent in the presiding judge logically explaining the reasoning of the lay assessors, especially if he/she has been outvoted by them, see *Damaska*, "Evidentiary Barriers" (fn. 7, *supra*) at 540, 543; as to how the "freie Beweiswürdigung" of the judge, through the necessity of its having to be based in "rules of logic, experience and/or laws of nature or probability," has led to the re-emergence of new "formal rules of evidence" which it was supposed to have replaced, see *Damaska*, "Evidentiary Barriers" (fn. 7, *supra*, at 540), and *Faces of Authority* (fn. 9, *supra*) at 20, 55; *Kunert*, (fn. 6, *supra*), at 124.

11 See *Pedraz Penalva, Ernesto.* "Sobre el significado y vigencia del Jurado" in *Constitución, jurisdicción y proceso.* Madrid. 1990, at 69.

12 Zakon Rossiyskoy Federatsii. O vnesenii izmeneniy i dopolneniy v Zakon RSFSR O sudoustroystve RSFSR, Ugolovno-protsessual'nyy kodeks RSFSR, Ugolovnyy kodeks RSFSR i Kodeks RSFSR ob administrativnykh pravonarusheniiakh. *Vedomosti S"ezda narodnykh deputatov Rossiyskoy Federatsii i Verkhovnogo Soveta Rossiyskoy Federatsii.* No. 33, 1313, 2238-2264 (19. Aug. 1993). The Jury Law amends several Russian codes, most notably for the purposes of this article, the Code of Criminal Procedure (UPK). All citations from UPK from *Ugolovno-protsessual'noe zakonodatel'stvo.* Moscow. 1994. The right to jury trial was introduced in only nine of Russia's some 84 political units: Ivanovo, Moscow, Riazan, Rostov-on-the-Don, Saratov and Ul'ianovsk Regions, and Altay, Krasnodar, and Stavropol Territories.

13 See Ley Orgánica 5/1995, del Tribunal del Jurado. BOE núm. 122. 23 Mayo 1995, pp. 15001-15021 (hereafter Spanish Jury Law).

14 *Thaman, Stephen C.* "The Resurrection of Trial by Jury in Russia". 31 Stanford Journal of International Law 61-274 (1995); for a conciser but more current treatment of the provisions of the new law and its implementation, see *Thaman, Stephen C.* "Das neue russische Geschworenengericht" in Zeitschrift der gesamten Strafrechtswissenschaft", Vol. 108, No. 1 (1996).

15 Chairman of the Cassational Panel of the Supreme Court of the Russian Federation, Aleksey P. Shurygin graciously allowed me to review all of the Panel's (largely unpublished) written decisions following appeal of jury judgments in September 1994 and again in April 1995. Another source of recent information has been the "Letopis' Suda Prisiazhnykh" (Chronical of Jury Trial) published periodically by the State Legal Department of the President of the Russian Federation. I have reviewed the first 5 editions of this Chronical which were published in 1994 and 1995. Portions of the "Letopis'" have been published in the monthly magazine of the Russian Ministry of Justice, *Rossiyskaia Yustitsiia.*

16 For a detailed history of the origins of the Spanish jury until its abolition during the Franco regime, see *Alejandre, Juan Antonio. La justicia popular en España. Analisis de una experiencia historica: los tribunales de jurados.* Madrid. 1981. For a summary of the arguments for and against the classic jury and a discussion of the various draft laws proposing the classic jury and the mixed court in the 17 years since the granting of the right to jury trial in Art. 125 of the Spanish Constitution of 1978, see *Pérez-Cruz Martín, Agustín-J. La participación popular en la administración de justicia: el tribunal del jurado.* Madrid. 1992

17 In all cases before the intermediate level Regional/Territorial Courts (primarily aggravated murder cases punishable by death) the defendant may opt for trial before a jury of 12 sitting with one professional judge, § 440 UPK, or before the Soviet-era mixed court (one professional court with 2 "people's assessors) or a panel of three professional judges. § 423 UPK. The Spanish Jury will be composed of 9 jurors sitting with one professional judge. § 2, Spanish Jury Law (fn. 13, *supra*).

18 §§ 433, 221-239 UPK. Of the 1,860 cases which were filed in the nine regional/territorial courts in the period 1.1.94 to 1.1.95, in only 379 (20%) did the defendant(s) opt for trial by jury. Jury Trial Statistics as of January 1, 1995. Compiled by the Supreme Court of the Russian Federation (SCRF) (hereafter SCRF Jury Trial Statistics). Unpublished, but summarized in *Rudnev, Valeriy.* "Prisiazhnye zasedateli – eto ne 'dobren'kie diadi'" (Jurors – they aren't 'kind uncles'). Izvestiia. 16.March 1995, at 5. For a discussion of the reasons for this reluctance of defendants to excerise their right to jury trial, see *Thaman* (fn. 14, *supra*), at 88-89.

19 § 232 UPK.

20 Nearly 18% of all cases with jury requests were returned for further investigation at the preliminary hearing. In 83 of the 379 (21.8%) cases with jury requests that were filed as of 1.1.95 defendants withdrew their requests at the preliminary hearing. SCRF Jury Trial Statistics (fn. 18, *supra*).

21 *Thaman* (fn. 14, *supra*) at 67.

22 See §§ 24-20, Spanish Jury Law (fn. 13, *supra*).

23 §§ 30-34 Spanish Jury Law (fn. 13, *supra*). According to the "Exposición de Motivos" attached to the legislation, the object of the preliminary hearing is to as much as possible exclude the investigation dossier from the oral trial, limiting its function to that of providing a basis for the indictment. See Spanish Jury Law, at 15003 (fn. 13, *supra*). This provision is reminiscent of the provisions in §431 of the new Italian Code of Criminal Procedure which instituted a "double file" regime.

24 §§ 69 (para.3), 432, 433 UPK. The U.S. exclusionary rule applies only when the constitutional rights of the defendant have been violated.

25 The judge has the duty to exclude illegally seized evidence at trial, § 435 (para.3) UPK, and a party can move for a hearing out of the presence of the jurors to admit evidence previously suppressed at the preliminary hearing, §446(para. 5) UPK.

26 See Postanovlenie No. 9 Plenurna Verkhovnogo Suda Rossiyskoy Federatsii o nekotorykh voprosakh primeneniia sudami ugolovno-protsessual'nyx norm, reglamentiruiushchikh proizvodstvo v sude prisiazhnykh" (Opinion No. 9 of the Plenary Session of the SCRF: "On Some Questions of Judicial Application of the Criminal Procedural Norms Regulating Trial by Jury") (hereafter Opinion No. 9 SCRF) § 6, published in *Sbornik postanovleniy plenumov verkhovnykh sudov SSSR i RSFSR (Rossiyskoy Federatsii) po ugolovnym delam*. Moscow. 1995, at 569-580.

27 See *Rakas v. Illinois*, 439 U.S. 128 (1978).

28 The SCRF rules that this was not grounds for reversal in Case of Sokolov (Rostov Regional Court) SCRF No. 41-kp-094-124sp (26.12.94), discussed as ROSTOV-17 in *Thaman* (fn. 14, *supra*) at 93-94, 227-8.

29 See Art. 51. Const. RF (1993).

30 *Thaman* (fn. 14, *supra*), at 91-92, 105-06 (see fn 275).

31 Case of Bulochnikov (Altay Territorial Court), SCRF No. 51-kp-094-68sp (1.9.94), reported in *Thaman* (fn. 14, *supra*) as ALTAY-6 at 91, 151-152.

32 Case of Shchepakin (Rostov Regional Court), SCRF No. 41-kp-094-112sp (24.11.94), discussed aas ROSTOV-15 in *Thaman* (fn. 14, *supra*), at 225-26, involving practice of getting accuseds to "recreate the crime" at the crime scene without presence of counsel.

33 For instance, using promises of the mitigating effect of a "self-denunciation" upon turning oneself in (§ 38(9) Criminal Code of RSFSR, all citations from *Administrativnoe i ugolovnoe zakonodatel'stvo*. Moscow. 1994)(hereafter UK), to get defendants to confess long after they have been arrested. Case of Darchuk (Saratov Regional Court), SCRF No. 32-kp-094-70sp (6.2.95).

34 The murder victim's shirt, and ballistic tests showing she was shot at a close distance were suppressed in the Case of Semenychev (Saratov Regional Court), reported as SARATOV-2 in *Thaman* (fn. 14, *supra*), at 233-34; the same judge also suppressed the alleged murder weapon (a sawed-off shotgun) and ballistics tests performed thereon in another case. Case of Aleksandrov (Saratov Regional Court). Decision of 1. Dec. 1994. Both decisions reported in Rossiyskaia Yustitsiia, Vol. 6 (1995), at 6-7)

35 The SCRF recently reversed a rape conviction on the latter ground in relation to an expert examination of the victim and other physical evidence where sperm was detected which could have belonged to the defendant. Case of Suvorov/Shkalikov (Saratov Regional Court), Decision of SCRF of 31.5.85, reported in Letopis' Suda Prisiazhnykh (fn. 15, *supra*), Vol. 5, at 44-45.

36 See discussion *Thaman* (fn. 14, *supra*) at 92.

37 This would be the proper result per §§ 433 (para. 1), 221(5), 234, 208(2) UPK.

38 §§ 433(para.1), 221(2), 232(1,2) UPK.

39 I am aware of 10 of such cases among the 95 capital cases I reviewed. See *Thaman* (fn. 14, *supra*) at 92.

40 Art. 123(3) Const. RF: "Court procedure is realized on the principals of adversariness and equal rights of the parties."

41 § 429 (para.1) UPK. Opinion No. 9 SCRF (fn. 26, *supra*), § 15. Thus various "accusatory" functions of the truth-seeking judge in Russia's court with people's assessors relating to charging, dismissing, returning a case for supplementary investigation and conducting the case in the absence of the prosecutor, §§ 280,283,289 UPK have been curtailed or abolished. See *Thaman* (fn. 14, *supra*) at 88-9.

42 § 430(para.2) UPK. According to the new Spanish Jury Law, prosecutorial refusal to prosecute the case results in mandatory dismissal by the court, without regard to the wisehes of the aggrieved party. § 51 Spanish Jury Law (fn. 13, *supra*).

43 Case of Gusev/Gerasimov/Saltykov (Moscow Regional Court), discussed as MOSCOW-2 and the retrial as MOSCOW-22 in *Thaman* (fn. 14, *supra*) at 100-101, 174-75, 193-94.

44 Art. 49(1) Const.RF; § 451 UPK (judge obligated to instruct jurors about the presumption of innocence in summation).

45 In doing so I called attention to the American notion of jeopardy attaching upon the swearing of the jury as articulated in *Green v. United States*, 355 U.S. 184 (1967). See *Thaman, Stephen*, "Formirovanie skam'i prisiazhnykh v Rossii i CShA" (Jury Selection in Russia and the U.S.) in Rossiyskaia Yustitsiia, Vol. 7, (1994) at 5; and "Sud prisiazhnykh v sovremennoy Rossii glazami amerikanskogo yurista." (The Jury Trial in Contemporary Russia through the Eyes of an American Jurist" Gosudarstvo i pravo. Vol. 2. (1995) 67, 70-71.

46 John H. Langbein has uncovered a very similar practice on the part of English judges in the late 17th and early 18th Centuries, *Langbein*, "Criminal Trial" (fn. 1, *supra*) at 287. Considering the further lengthy incarceration this Soviet-Russian practice usually precipitates, see *Thaman* (fn. 14, *supra*) at 131-5), one could also see an ancient precursor thereof in the French 16th Century practice of imposing an order entitled "plus amplement informé" or "for further investigation" when the evidence was insufficient to torture the suspect. See *Langbein, Torture* (fn. 2, *supra*), at 52-3.

47 A "plea of guilty" does not result in dismissal of the jury and imposition of sentence as in the U.S. If guilt is absolutely clear, the judge may, with the consent of the parties, limit the evidence adduced, or even proceed directly to argument of counsel. § 446 UPK. Full trials on the evidence followed "guilty pleas" in two aggravated murder indictments in Ivanovo, which ended in acquittals. See discussion of IVANOVO-3, in *Thaman* (fn. 14, *supra*) at 104-5, 159-60 and Case of Kraskina (Ivanovo Regional Court), reported in Letopis' Suda Prisiazhnykh (fn. 15, *supra*) Vol. 5, at 20-1, as well as in *Ovcharov, Mikhail*, "Sud prisiazhnykh reshil: Khoroshego muzha zhena ubivat' ne stanet" (The jury decided: A wife doesn't murder a good man" Izvestiia, 21. July 1995, at 6. Defendant admitted killing her drunken husband in a premeditated fashion following years of spousal abuse and drunkenness.

48 Unlike in trials before a court with people's assessors, where the defendant is advised only of his right to "give an explanation as to the indictment," §§ 273,46 UPK, in jury trials judges must advise them of their right not to testify in conformance with Art. 51 Const.RF. § 446 (para. 3) UPK.

49 The court first questions the defendant and all witnesses in non-jury cases. §§ 280,282,283 UPK.

50 § 446 (para. 4) UPK. The same procedure is foreseen in § 46(1) of the Spanish Jury Law (fn. 13, *supra*).

51 See *Thaman* (fn. 14, *supra*) at 106.

52 The parties are prevented from calling the jurors' attention to evidence which has been excluded. § 435 (para. 4) UPK.

53 A preliminary foundation of inconsistency is required by § 286 UPK, before prior testimony may be read. The New Spanish Jury Law (§ 45(5) (fn. 13, *supra*) attempts to remove the impact of the dossier in the trial by allowing prior inconsistent testimony only for impeachment, and not for the truth of the matter stated. A similar Italian provision (former § 500(3) Ital. C.p.p) was annulled by a decision of the Constitutional Court, Decision No. 255. Corte Costituzionale (3.6.92), and the amended code allows such statements for the truth of the matter stated.§ 500(4) Ital.Cpp.(Amended 1992).

54 Opinion No. 9, SCRF (fn. 28, *supra*) §§ 15,16.

55 See discussion of cases in *Thaman* (fn. 14, *supra*) at 106-7, 112.

56 § 449 UPK. Jury questions in pre-revolutionary Russian law followed essentially the same pattern. §§ 750-753 Ustav ugolovnogo sudoproizvodstva (1864), published in *Polnyy svod Sudebnykh Ustavov*. Moscow. 1868 (hereafter UUS 1864).

57 *Foinitskiy, Y. Ya Kurs uglovnogo sudoproizvodstva* (Textbook on criminal procedure). Vol. 2. Petrograd. 1915, at 454-5.

58 *Koni, A.F. Sobranie sochinenii*. Moscow. 1967. Vol. 4, at 201 (1880). Koni supported a move to the simple English verdict form in which the jury votes guilty or not-guilty without being submitted any list of specific questions. *Id.* Vol. 4, at 273.

59 The trial judge said after the trial, that the court with lay assessors would have had to convict the defendant on the evidence adduced. See *Ovcharov* (fn. 47, *supra*).

60 Opinion No. 9, SCRF (f.n. 26, *supra* §17.

61 § 462 UPK, referring to § 314 (para. 1) UPK: "The descriptive part of the judgment of guilt should contain a description of the criminal act, which has been proved, describing the place, time, means of its commission, character of guilt, motive and results of the crime." It should further include such information as is necessary to resolve the joined civil suit if necessary.

62 See *Thaman* (fn. 14, *supra*) at 116.

63 Opinion No. 9 SCRF (fn. 26, *supra*) §24.

64 Case of Brovkin/Minkin (Stavropol Territorial Court) SCRF No.19-kp-094-42sk sp (13.12.94), discussed as STAVROPOL-5 in *Thaman* (fn. 14, *supra*), at 258-9.

65 *Selitrennikov, M. O postanovke voprosov na sude ugolovnom, po resheniiam Kassatsionnogo Senata* (On the formulation of questions in the criminal trial, according to the decisions of the Cassational Senate). St. Petersburg. 1875, at 14.

66 *Koni, A.F.*(fn. 58, *supra*), Vol. 4, at 273.

67 *Foinitskiy, Y.Ya. Kurs ugolovnogo sudoproizvodstva.* Vol. 1 St. Petersburg. 1912, at 386-387. Modern Russian jury trials have contained as many as 19 questions in a one-count case, and 41, 52 and 87 questions in multi-count, multi-defendant cases. See *Thaman* (fn. 14, *supra*) at 116-17.

68 *Foinitskiy*, Vol. 2. (fn. 57, *supra*) at 451.

69 I.B. Mikhaylovskaia in *Alekseeva, L.B./Vitsin, S.Ye./Kutsova, E.F./Mikhaylovskaia, I.B. Sud prisiazhnykh. Posobie dlia sudey* (Trial by Jury. Manual for Judges). Moscow. 1994, at 96-7.

70 Murder in the heat of passion (§ 104 CC), murder using excessive force in self-defense (§ 105 CC), negligent murder (§ 106 CC) are lesser offenses to intentional murder (§ 103 CC) and of course aggravated capital murder (§ 102 CC). Necessary defense, if proved, constitutes a complete defense (§ 13 CC). See *Thaman* (fn. 14, *supra*), at 136-37.

71 For a detailed discussion, see *Thaman* (fn. 14, *supra*), at 118-9

72 The SCRF has since ruled that questions should not be formulated in terms of probability. Opinion No. 9 SCRF (fn. 26, *supra*), § 18. The Cassational Senate came to a similar decision before the 1917 Revolution. *Selitrennikov* (fn. 65, *supra*), at 231-33.

73 See *Thaman* (fn. 14, *supra*) at 118-19. In Case of Sokolov (fn. 28, *supra*), the SCRF upheld conviction on appeal despite the preclusion of self-defense questions.

74 The jury found perfect self-defense following its finding of "guilt." The SCRF reversed the acquittal, holding that the question of self-defense and excessive force are legal questions for the judge and not the jury. Case of Yefremov (Saratov Regional Court), discussed as SARATOV-14 in *Thaman* (fn. 14, *supra*), at 119-20, with facts at 247-48.

75 See *Thaman* (fn. 14, *supra*) at 121-2 for a discussion of this problematic in light of the aggravating circumstances of "hooliganistic motivation" and "exceptional cruelty." §§ 102(b,g) UK.

76 Opinion No. 9, SCRF (fn. 26, *supra*), §18.

77 Cf. Art. 9, sec. 5 of the Constitution of 3. Sept. 1791: "Après l'accusation admise, le fait sera reconnu et déclaré par des jurés. L'application de la loi sera faite par des Juges." Cited in *Palausov, V.N. Postanovka voprosov prisiazhnym zasedateliam po russkomu pravu* (Formulation of jury questions according to Russian law). Odessa. 1885, at 47.

78 Limiting the jury to mere factual questions reduced it to a "bloßes Spiel," which left the judges "ganz allein Herren und Meister über Schuld oder Nichtschuld des Angeklagten." *Feuerbach, Anselm Betrachtungen über das Geschwornengericht.* Landshut. 1813, at 170.

79 *Palausov*, (fn. 77, *supra*) at 55-56, 76ff; *Foinitskiy*, Vol. 2 (fn. 57, *supra*) at 448-449; *Bobrishchev-Pushkin. Empiricheskie zakony deiatel'nosti Russkogo suda prisiazhnykh* (Empirical Laws of the Function of Russian Juries). Moscow. 1896, at 583; *Selitrennikov* (fn. 65, *supra*) at 18-33.

80 Art. 20 Const. RF grants defendants the right of trial by jury when facing a possible death sentence. I have alleged the unconstitutionality of this practice in an earlier article. See *Thaman, Stephen.* "Postanovka voprosov pered kollegiey prisiazhnykh" (Formulation of the Questions for the Jury), Rossiyskaia Yustitsiia. Vol. 10 (1995), at 8-11.

81 Pre-revolutionary Russian law also required the judge to explain the statutory elements of the charged crime to the jury, § 801 UUS 1864 (fn. 56, *supra*), and legal scholars pointed out this contradiction in criticizing the practice of the Cassational Senate as well. *Selitrennikov* (fn. 65, *supra*) at 29-30; *Foinitskiy*, Vol. 2 (fn. 57, *supra*) at 448-449.

82 A verdict of lenience means the sentence may not be higher than one-half of the average of the highest and lowest term of deprivation of libarty, and the death penalty may not be imposed. A verdict of special lenience means that the judge must sntence the defendant to less than the minimum statutory sentence, or impose a more lenient form of punishment. § 460 UPK.

83 According to A.F. Koni, it took 45 years for pre-revolutionay courts to finally adopt the practice of telling juries the range of sentences threatening the defendant. See *Koni* (fn. 58, *supra*), Vol. 1, at 333.

84 On such "sanction nullification" in early English trials, see *Langbein*, "English Criminal Trial" (fn. 3, *supra*) at 37 and *Green, Thomas A.* "The English Criminal Trial Jury and the Law-Finding Traditions on the Eve of the French Revolution" in *Schioppa* (fn. 3, *supra*) at 44. For the same practice in pre-1917 Russian trials, see *Timofeev, N.P. Sud prisiazhnykh v Rossii. Sudebnye ocherki.* Moscow. 1881, at 267-70. To prevent such "scandalous acquittals" the French passed a reform in 1932 allowing the jury to sit with the professional judges in passing sentence, but this is generally seen as the first step in the transformation of the classic jury into a mixed court, which eventually took place under the Vichy regime in 1941. *Lombard, François. Les jurés, justice représentative et reprréntations de la justice.* Paris. 1993, at 273.

85 Although drunkenness is a statutory aggravating factor in sentencing, § 39(10) UK), and is invariably cited as such in the judgments, a rough count I made of the first jury cases showed, that of 89 defendants in 76 cases that were charged with having been drunk at the time of commission of the crime, 47 were recommended lenience or special lenience by the jury and 11 were acquitted. Pre-revolutionary observers of jury trials in Russia also found that the "views of jurors about the condition of drunkenness at the moment of the commission of a crime are diametrically opposed to those provisions of the law dealing with this object." *Timofeev* (fn. 84, *supra*) at 381; *Bobrischev-Pushkin* (fn. 79, *supra*) at 355-56.

86 In the 19th Century, jurists felt that requiring juries to give reasons for their verdicts would negate the principle of "free evaluation of the evidence" or "intime conviction" and constitute a kind of return to formal rules of evidence. *Landau* (fn. 3, *supra*) at 263-64.

87 § 61(d) Spanish Jury Law (fn. 13, *supra*).

88 § 331(3) Austrian StPO. It is a contested point, however, whether the reasons stated in the "Niederschrift" may be used as a basis for attacking the factual findings of the jury. See *Steininger, Einhard* "Die Anfechtung mangelhafter Tatsachenfeststellungen im Geschworenenverfahren". 47 Österreichische Juristenzeitung 687, 688-91 (1992).

89 *Rudnev* (fn. 18, *supra*). For a detailed analysis of the verdict patterns, the amount of lesser-included offenses, lenience verdicts, see *Thaman* (fn. 14, *supra*) at 135-8.