

# EUROPE'S NEW JURY SYSTEMS: THE CASES OF SPAIN AND RUSSIA

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## I

### INTRODUCTION

The recent reintroduction of trial by jury in both Russia (1993) and Spain (1995) is interesting for two reasons. First, it is a surprising reversal in the long-term trend toward the elimination of the classic jury in favor of either courts composed exclusively of professional judges, or of "mixed courts" in which professional judges and lay assessors collegially decide all questions of fact, law, and sentence. Second, it raises the question whether the jury can act as a catalyst in the reform of Continental European criminal procedure, as it did during the nineteenth century in the wake of the French Revolution.

The modern notions of procedural fairness in criminal procedure, which have gained general international recognition in national constitutions and international human rights conventions, have their origins in the following 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) the equality of arms, (4) the right to a public and oral trial, (5) the accusatory principle, and (6) the judge's independence from the executive or 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 lay persons responsible for questions of fact and guilt, also gave rise to common law rules of evidence. For instance, the separation of powers inspired the regulation of hearsay and relevance, the creation of exclusionary rules addressing excessively prejudicial and illegally gathered evidence,<sup>1</sup> and the adoption of the principle of "free evaluation of the evidence" unfettered by formal rules of evidence.<sup>2</sup> Important devel-

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1. John H. Langbein's research has seriously called into question whether the Anglo-American rules of evidence were attributable to the division of labor between the jury and the judge or to the "lawyerization" of criminal trials in the late 18th and early 19th centuries. See John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263, 306 (1978); cf. MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* 26 (1997) ("A space for technical evidence law begins to open up only when the trial court is split into two parts—one lay, the other professional.").

2. Langbein also recognizes that the seeds of "free evaluation of evidence" were being planted in Continental Europe before the introduction of trial by jury with the weakening of the institution of tor-

opments affecting the presentation and evaluation of evidence in substantive criminal law, the separation of factual and legal questions,<sup>3</sup> and the dissection of criminal offenses into their various constitutive objective and subjective elements 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.<sup>4</sup>

Although most of the principles discussed above were 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, such as (1) the duty of the state (prosecutor, judge, and investigating judge) to ascertain the truth, (2) the necessity of reviewability of judgments, as reflected in the requirement of providing reasons for findings of guilt or innocence,<sup>5</sup> and (3) the principle of mandatory prosecution (“legality principle”). The legality principle is antipathetic not only to the unbridled “discretion” of juries to acquit out of sympathy or nullify the harshness of the sentence,<sup>6</sup> but also to the apotheosis of party-control of the criminal trial: plea-bargaining, a practice growing from the same soil as trial by jury in England and the United States.<sup>7</sup> Consequently, juries have largely been abolished or converted into a form of lay participation more conducive to adhering to the aforementioned principles: the “mixed court” of professional judges and

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ture and the rise of “poena extraordinaria.” See JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 59 (1977). On the transformation of the “romantic notion” of *intime conviction* into the “less expansive” notion of *freie Beweiswürdigung*, which required adherence to “extralegal canons of valid inference,” see DAMAŠKA, *supra* note 1, at 21.

3. Though Sir Edward Coke proclaimed “*Ad quaestionem facti non respondent iudices; ad quaestionem juris non respondent juratores*” as early as 1620, and early French and German jury legislation tried to limit juries to deciding naked “historic facts,” leaving the application of the law to the professional bench, German, and later Russian, scholars quickly understood that the jury’s verdict of “guilty” or “not guilty” was a mixed issue of law and fact. The German response was 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 John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, at 13, 34 (Antonio Padoa Schioppa ed., 1987). For a summary of the 19th century German discussion, see Peter Landau, *Schwurgerichte und Schöffengerichte in Deutschland im 19. Jahrhundert bis 1870*, in THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, *supra*, at 241, 279-81, and HUGO MEYER, THAT- UND RECHTSFRAGE IM GESCHWORENENGERICHT, INSBESONDERE IN DER FRAGESTELLUNG AN DIE GESCHWORENEN 109-280 (1860).

4. See Ennio Amodio, *Giustizia popolare, garantismo e partecipazione*, in I GIUDICI SENZA TOGA. ESPERIENZE E PROSPETTIVE DELLA PARTECIPAZIONE POPOLARE AI GIUDIZI PENALI 1, 13 n.30 (Ennio Amodio ed., 1979). The Russian Supreme Court has made the quantum leap to treating the proof of *actus reus* as a factual question for the jury, and *mens rea* as a legal question for the professional bench. See text accompanying notes 90-92.

5. According to Amodio, Article III(1) of the Italian Constitution makes the reintroduction of the classic jury impossible because it requires reasons to be provided for all judicial decisions. See Amodio, *supra* note 4, at 46-48.

6. On jury nullification in the United States, see Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871-75 (1994).

7. On the strange symbiosis of trial by jury and plea-bargaining, see Bernd Schünemann, *Reflexionen über die Zukunft des deutschen Strafverfahrens*, in FESTSCHRIFT FÜR GERD PFEIFFER 481 (1988). (This document was unavailable to staff editors for cite-checking because it could not be retrieved from an archive.)

lay assessors, collectively responsible for all questions of law, fact, guilt, and sentence.

The tension between the principles and the structure of the jury system it has produced in these civil law nations raises significant questions. To what extent are the universally accepted principles derived from common law criminal procedure dependent on the classic separation of powers in an adversarial jury trial?<sup>8</sup> Can a judge, who has studied the investigative file and determined, before the trial, that it includes sufficient evidence for a finding of guilt, preserve the presumption of innocence and act as an impartial fact/guilt finder?<sup>9</sup> Is the classic jury system a useful catalyst for cementing the independence of the judge from the executive or investigative branch in order to provide a foundation for an objective “ascertainment of the truth”?<sup>10</sup> If the judge has a duty to uncover the truth and the defendant invokes his or her right to remain silent, how effective is this right when the judge is also the finder of guilt?<sup>11</sup> What is the meaning of *intime conviction*, the French rendition of a “verdict according to one’s conscience,” in a “mixed court,” where the presiding judge has unique access to the dossier and is responsible for drafting the judgment (even in the

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8. 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 Karl H. Kunert, *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 BUFF. L. REV. 122, 147 (1967); cf. Amodio, *supra* note 4, at 13 n.30; see also K.J. MITTERMAIER, DAS VOLKSGERICHT IN GESTALT DER SCHWUR- UND SCHÖFFENGERICHTE 21 (1866) [hereinafter MITTERMAIER, DAS VOLKSGERICHT]; K.J. MITTERMAIER, ERFAHRUNGEN ÜBER DIE WIRKSAMKEIT DER SCHWURGERICHTE IN EUROPA UND AMERIKA 667 (1865) [hereinafter MITTERMAIER, ERFAHRUNGEN]. Mittermaier felt the principle of oral and public trials could be effectively implemented only in the form of the classic jury trial.

9. Mittermaier doubted that judges, despite their best effort, could protect themselves from forming an unconscious “preconceived opinion as to guilt” imbued by study of the dossier of the preliminary investigation. See MITTERMAIER, DAS VOLKSGERICHT, *supra* note 8, at 22; MITTERMAIER, ERFAHRUNGEN, *supra* note 8, at 683. Modern German views 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, see Schünemann, *supra* note 7, at 482-83, to cautious assertions that the preliminary study of the file, while strongly influencing the presiding judge, does not make him or her incapable of objectively weighing the trial evidence, see CHRISTOPH RENNIG, DIE ENTSCHEIDUNGSFINDUNG DURCH SCHÖFFEN UND BERUFSRICHTER IN RECHTLICHER UND PSYCHOLOGISCHER SICHT 177, 223, 237, tbl. 10 (1993) (This document was unavailable to staff editors for cite-checking because it could not be retrieved from an archive.); cf. Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 U. PA. L. REV. 506, 544 (1973).

10. In the Netherlands, the “pre-prepared version of the truth” is presented to the trial judge in the form of the investigative dossier. See Nico Jörg et al., *Are Inquisitorial and Adversarial Systems Converging?*, in CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY 41, 46-47 (Phil Fennell et al. eds., 1995). 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.” See Schünemann, *supra* note 7, at 475-76, 479.

11. This question is answered by the fact that continental defendants virtually never remain silent during the preliminary investigation or the trial itself. See MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 128 (1986); Damaška, *supra* note 9, at 527.

unlikely event he or she has been overruled by the lay assessors) in such a way as to withstand the formal requirements of appellate scrutiny?<sup>12</sup>

This comparison of the provisions of the 1993 Russian Jury Law<sup>13</sup> and the 1995 Spanish Jury Law<sup>14</sup> will focus on the effect of their implementation and reintroduction of the classic jury system on these questions and problems.<sup>15</sup> The most notorious case to be prosecuted in either country, the case of Mikel Otegi, exemplifies the fragility of the new jury systems. Mikel Otegi, a young Basque nationalist, murdered two Basque policemen and was acquitted on March 7, 1997, on the grounds of diminished capacity caused by intoxication and uncontrollable rage provoked by alleged previous police harassment. The acquittal shocked the Spanish public, prompting calls to amend or repeal the jury law, or at least to suspend it in the Basque Country.

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12. As to the problems inherent in the presiding judge explaining the reasoning of the lay assessors, especially if he or she has been outvoted by them, see Damaška, *supra* note 9, 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 of the laws of nature . . . and . . . probability,” has led to the re-emergence of new “formal rules of evidence,” which it was supposed to have replaced, see *id.* at 540; DAMAŠKA, *supra* note 11, at 20, 55; Kunert, *supra* note 8, at 124. On the “guesswork” involved in the formulation of the judgment in mixed courts, see DAMAŠKA, *supra* note 1, at 42-43. In his early writings, Mittermaier warned against “declaring legally-educated judges to be jurors” by allowing them to decide by *freie Beweiswürdigung*, because this permission would place too much power into their hands. See 1 C.J.A. MITTERMAIER, DAS DEUTSCHE STRAFVERFAHREN 222 (2d ed. 1832).

13. See 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 pravonarusheniakh [Law of the Russian Federation on the Introduction of Changes and Amendments to the Law of the RSFSR on Court Organization of the RSFSR, the Code of Criminal Procedure of the RSFSR, the Criminal Code of the RSFSR, and the Code of the RSFSR on Administrative Infractions], VEDOMOSTI RF, Issue No. 33, Item No. 1313, at 2238-64 (1993) [hereinafter Jury Law]. All citations are from Ugolovny Kodeks Rossiyskoy Federatsii, Ugolovno-protsessual'nyy Kodeks RSFSR, Ugolovno-ispolnitel'nyy Kodeks Rossiyskoy Federatsii, 185-437 (Ministry of Justice of the Russian Federation ed., INFRA/M-NORMA 1997).

The Jury Law amends several Russian codes. The amended codes in the Jury Law will be cited as Law on Court Organization [hereinafter LOC] and Code of Criminal Procedure [hereinafter UPK RSFSR].

The right to jury trial was introduced in only nine of Russia's 89 political units: Ivanovo, Moscow, Riazan, Rostov-on-the-Don, Saratov and Ul'ianovsk Regions, Altay, Krasnodar, and Stavropol Territories.

14. Ley Orgánica del Tribunal del Jurado, B.O.E., 1995, 122 (amended by Ley Orgánica, B.O.E., 1995, 275) [hereinafter LOTJ]; see also LEY DEL JURADO (Victor Moreno Catena ed., 2d ed. 1995).

15. The discussion of Russia will often refer to my own investigation of the first 114 trials in 1993-94. See Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61 (1995) [hereinafter Thaman, *Resurrection*]. For a more concise but more current treatment of the provisions of the new law and its implementation, see Stephen C. Thaman, *Das neue russische Geschworenengericht*, 108 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 191 (1996) [hereinafter Thaman, *Das neue russische Geschworenengericht*]. For a similar in-depth analysis of the new Spanish jury system, see Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241 (1998) [hereinafter Thaman, *Spain Returns*]. The comparison in this article includes new Spanish and Russian material not included in an earlier article. See Stephen C. Thaman, *Geschworenengerichte in Ost und West: Die klassische Jury und das adversarische Verfahren im Strafverfahren Rußlands und Spaniens*, 41 RECHT IN OST UND WEST 73 (1997) [hereinafter Thaman, *Geschworenengerichte*].

## II

## BRIEF HISTORICAL BACKGROUND

While the liberal Spanish Constitutions of 1812, 1837, and 1869 provided for some kind of trial by jury, the institution only found legislative form in the Code of Criminal Procedure of 1872 and, finally, in the Law on the Jury of 1888. Only the latter law was implemented for any length of time, functioning between 1888 and 1923, when it was suspended by the Primo de Rivera dictatorship, and then again between 1931 and 1936.<sup>16</sup>

Trial by jury was introduced in Russia during Alexander II's judicial reforms of 1864 and survived, despite subsequent legislation removing political and press crimes from its jurisdiction, until the Bolsheviks abolished it in 1917.<sup>17</sup>

Article 125 of the post-Franco Spanish Constitution of 1978 provided for public participation in the administration of justice through the institution of trial by jury.<sup>18</sup> This provision was conceived as the key to democratic reform of the criminal justice system following the Franco dictatorship.<sup>19</sup> However, between 1978 and 1995, the majority of Spanish jurists questioned the appropriateness of using the classic jury system as a catalyst for criminal justice reform. They stressed the perceived inadequacies of the Spanish jury experience after 1888 and maintained either that Article 125 made lay participation optional,<sup>20</sup> or even if Article 125 made lay participation a constitutional mandate, that the "mixed jury" or *escabinado* would be constitutionally adequate as the equivalent of the modern form of popular participation (following the models of Germany, France, Italy, and Portugal).<sup>21</sup>

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16. For a history of jury trial legislation in 19th century Spain, see Thaman, *Spain Returns*, *supra* note 15, at 246-49 (citing JUAN ANTONIO ALEJANDRE, LA JUSTICIA POPULAR EN ESPAÑA: ANÁLISIS DE UNA EXPERIENCIA HISTÓRICA: LOS TRIBUNALES DE JURADOS 79-243 (1981)).

17. See Thaman, *Resurrection*, *supra* note 15, at 64-65.

18. CONSTITUCIÓN ESPAÑOLA [Constitution] [C.E.] art. 125 (Spain).

19. The legislature noted that the suspension, abolition, or limitation of the jury trial in the period 1820-1939 always coincided with limitations of civil rights in periods of monarchic reaction or dictatorship. See LOTJ § I, Exposición de Motivos, *supra* note 14. Indeed, in nearly all Continental European countries, the introduction of trial by jury coincided with liberal reforms, and its abolition with the installation of dictatorial or totalitarian regimes, for example, Bolshevism in Russia (1917), Fascism in Italy (1931), the Vichy Regime in France (1943). The only exception was Germany, in which the democratic Weimar Government abolished the classic jury, albeit in an undemocratic manner, by the Emminger decree of 1924. See Ellison Kahn, *Restore the Jury? Or "Reform? Reform? Aren't Things Bad Enough Already?"*, 108 S. AFR. L.J. 672, 678 (1991).

20. A dubious precedent for the "optional" nature of constitutional commands can be found in the Argentine Constitution of 1858, which called for trial by jury, but was never implemented with legislation. See Thaman, *Spain Returns*, *supra* note 15, at 251 (citing RICARDO J. CAVALLERO & EDMUNDO S. HENDLER, JUSTICIA Y PARTICIPACIÓN: EL JUICIO POR JURADOS EN MATERIA PENAL 43-63 (1988)).

21. For summaries of these discussions, and an argument for the propriety of introducing a mixed court in lieu of trial by jury, see Thaman, *Spain Returns*, *supra* note 15, at 250-56 (citing AGUSTÍN-J. PÉREZ-CRUZ MARTÍN, LA PARTICIPACIÓN POPULAR EN LA ADMINISTRACIÓN DE JUSTICIA: EL TRIBUNAL DEL JURADO 322 (1991); Ernesto Pedraz Penalva, *Sobre el significado y vigencia del Jurado*, in CONSTITUCIÓN, JURISDICCIÓN, Y PROCESO 60-62 (1990)). Although lay judges in the mixed courts of Germany, France, Italy, and Portugal deliberate with the professional bench, the courts in each country are still called by the old name for jury courts. On the German *Schwurgericht*, see §§ 74(2), 74(d) Gerichtsverfassungsgesetz, *discussed in* THEODOR KLEINKNECHT & KARLHEINZ

The movement toward recognizing adversarial trial procedure and trial by jury as constitutional foundations of the Russian administration of justice<sup>22</sup> began during Gorbachev's *perestroika* and culminated in the Russian Jury Law. The reform was aimed at replacing the traditional Soviet "mixed court," which had been completely ineffective as a popular corrective against judicial arbitrariness and party control of judicial decisionmaking.<sup>23</sup>

### III

#### JURISDICTION OF THE JURY COURT

The defendant has a right to a jury trial in Russia in any case tried in Russia's second-level courts of original jurisdiction.<sup>24</sup> The Spanish legislature chose to grant jurisdiction to second-level courts of original jurisdiction, the provincial courts (*audiencia provincial*), on the basis of the magnitude of threatened punishment<sup>25</sup> and limited trial by jury to particular types of crimes, such as crimes committed by public officials in the exercise of their duties, crimes against persons, honor, liberty, and security, and arson.<sup>26</sup>

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MEYER, STRAFPROZEBORDNUNG 1447, 1453 (43d ed. 1997). On the French *cour d'assise*, see § 240 Code de Procédure Pénale, reprinted in CODE DE PROCÉDURE PÉNALE 363 (36th ed. 1994). On the Italian *corte di assise*, see Riordinamento dei Giudizi di Assise (L. 10 aprile 1951, n.287, Gazzetta Ufficiale 7 maggio 1951, n.102), published in CODICE DI PROCEDURA PENALE CON LEGGI COMPLEMENTARI (Bolzano, 1991); see also CODICE DI PROCEDURA PENALE § 5, reprinted in IL NUOVO CODICE DI PROCEDURA PENALE (LA TRIBUNA) 93 (Piacenza, 1995). On the Portuguese *júri*, see Código de Processo Penal Anotado § 51 (Coimbra, 4th ed. 1991).

22. Article 123 of the Constitution of the Russian Federation of 1993 guarantees an adversarial procedure and trial by jury. See Konstitutsiia Rossiyskoy Federatsii (1993) [Constitution] [hereinafter KONST. RF].

23. See Thaman, *Resurrection*, *supra* note 15, at 66-68.

24. See UPK RSFSR arts. 421, 36. These jury cases are mainly capital crimes of aggravated murder and rape. Before the enactment of a new Russian Penal Code in 1996, juries also heard a smattering of cases involving passing counterfeit currency and bribery. Under the new Russian Penal Code, the following crimes are also triable by the jury court: capital murder, aggravated rape, kidnapping, commerce in children, hostage-taking resulting in death, terrorism, crimes of organized criminal gangs, hijackings, mass rioting, piracy, negligent operation of public transportation resulting in death, train-wrecking resulting in death, treason, espionage, attacks against government officials and the police, various types of obstruction of justice, war crimes, genocide, ecocide, and having an accessory after the fact in the commission of a serious offense. See UPK RSFSR art. 36, referring to Ugolovnyy Kodeks Rossiyskoy Federatsii, *supra* note 13, at 3-181, arts. 105(2), 126(3), 131(3), 152(3), 205, 206(2), 206(3), 208(1), 209-11, 212(1), 227, 263(3), 267(3), 275-79, 281, 290(3), 290(4), 294-302, 303(2), 303(3), 304, 305, 316, 317, 318, 321(3), 322(2), 353-58, 359(1), 359(2), 360. The pertinent courts are called "regional courts" or "territorial courts," depending on the type of federal political entity involved.

25. The Law on the Judiciary (Ley del Poder Judicial), before its amendment by the LOTJ, originally provided that the competence of the jury court would be determined in relation to the type of crime and the quantity of the punishment designated. See Ley del Poder Judicial, art. 83(2)(d) (B.O.E., 1985, 157). In the United States, the right to jury trial inures when the crime with which the defendant is charged is punishable by more than six months deprivation of liberty. See *Baldwin v. New York*, 399 U.S. 66, 69 (1970).

26. See LOTJ art. 1. The law has been criticized for including comparatively trivial crimes such as bribery of public officials, and minor threats and trespasses within the jury court's jurisdiction, and excluding serious crimes against the person such as rape. See Thaman, *Spain Returns*, *supra* note 15, at 261-62 (citing Vicente Gimeno Sendra, *La segunda reforma urgente de la Ley del Jurado*, EL TRIBUNAL DEL JURADO 27-28 (1996); JUAN-LUIS GÓMEZ COLOMER, EL PROCESO PENAL ESPECIAL ANTE EL TRIBUNAL DEL JURADO 33-34 (1996)). Prosecutors and courts in Spain have assiduously avoided jury trials for such minor offenses. Fifty-seven of the first 75 trials in Spain of which the

In Russia and the United States, the defendant may waive his or her procedural right to trial by jury. In Russia, a large portion of defendants waive their right to a jury trial, in favor of being tried by the traditional court of lay assessors or by a three-judge panel.<sup>27</sup> In Spain, on the other hand, jury courts have exclusive jurisdiction because the right to a jury trial embodies the citizens' right to participate in the administration of justice as jurors.

#### IV

##### COMPOSITION OF THE JURY COURT

The jury court is composed of nine jurors and two alternates in Spain and twelve jurors and two alternates in Russia. One professional judge presides over the court in both countries.<sup>28</sup>

Voter registration lists serve as the source for prospective jurors in both Spain and Russia.<sup>29</sup> Although the right to vote inures at age eighteen in both countries, Russia has restricted jury eligibility to registered voters who are twenty-five years of age or older.<sup>30</sup> Both countries exempt certain public officials, as well as officials in the legal and law enforcement professions, and allow discretionary excuses for age, hardship, or illness.<sup>31</sup>

In both countries, the jury for a particular case is selected from at least twenty prospective jurors who have been preliminarily screened and summoned to the court on the day of trial.<sup>32</sup> After brief questioning of the juror's ability to be fair and impartial in the case,<sup>33</sup> the prosecution and the defense

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author is aware were for murder. See Thaman, *Spain Returns*, *supra* note 15, at 258-63. In Russia, only twelve of the first 109 jury trials involved noncapital offenses. See Thaman, *Resurrection*, *supra* note 15, at 135-37.

27. It is questionable whether these "waivers" are voluntary; many believe that they are the result of coercion or undue influence exerted by investigators, defense lawyers, or judges at the preliminary hearings. See Thaman, *Resurrection*, *supra* note 15, at 87-88; see also Thaman, *Das neue russische Geschworenengericht*, *supra* note 15, at 195. In 1994, the first full year of jury trials in the nine regions, only 20.4% of defendants chose trial by jury, but the percentage rose to 30.9% in 1995, 37.3% in 1996, and 37% in 1997. The option of being tried by a three-judge panel has not been fully implemented due to a lack of judicial resources. It was exercised only 76 times in 1994 and 61 times in 1995. See *Spravka*, Memorandum of A.P. Shurygin, President of the Cassation Panel of the SCRF (1998) [hereinafter *Spravka*]; *Praktika realizatsii novykh form ugolovnogo sudoproizvodstva* [On Realization of New Forms of Criminal Procedure] 4 (1997) (memo of Cassational Panel of the Supreme Court of the Russian Federation, on file with author) [hereinafter *Praktika realizatsii*].

28. See LOTJ art. 2; UPK RSFSR art. 440. Nineteenth century legislation in both countries provided for a jury of twelve, presided by a three-judge panel. See Thaman, *Spain Returns*, *supra* note 15, at 264.

29. See LOTJ art. 8; LOC art. 80.

30. See LOTJ art. 8; LOC art. 80.

31. See LOTJ arts. 9-12; LOC art. 80.

32. See LOTJ art. 38; UPK RSFSR art. 434.

33. The judge conducts this questioning in Russia. See UPK RSFSR art. 438. In Spain, as in many U.S. jurisdictions, the judge turns over questioning to the parties. See LOTJ art. 40. Jury selection in Spain has lasted anywhere from 30 minutes to nearly seven hours in the first trial in Bilbao. See Thaman, *Spain Returns*, *supra* note 15, at 291 (citing Interview with Jose Maria Alavrez Seijo, Presiding Judge of Oviedo Provincial Court, Oviedo (June 9, 1997); Interview with Remigio Conde Salgado, President of Lugo Provincial Court, Lugo (June 10, 1997); JAVIER MUÑOZ, *!Una sola puñalada y la mato, caramba!*, EL CORREO, Apr. 8, 1997). Some Spanish lawyers have hired psychologists to aid

may exercise challenges for cause, or peremptorily challenge a limited number of prospective jurors (two each in Russia, four each in Spain).<sup>34</sup>

## V

### PRELIMINARY INVESTIGATION AND PRELIMINARY HEARING IN JURY CASES

The Russian jury law did not introduce changes in the procedure of the preliminary investigation, in which a legally trained official in the Ministry of the Interior or the Procurary independently and inquisitorially (that is, guided by a duty to seek the truth) collects evidence and determines whether a charge will be referred to the Procurary for indictment.<sup>35</sup> The Spanish Jury Law, on the other hand, has provided for the active participation of both the defense and the prosecution following the investigative judge's determination that the crime charged is subject to the jury court's jurisdiction.<sup>36</sup> Once the parties are notified of the court's jurisdiction, the law provides for adversarial proceedings in which the parties may solidify their accusatory and defense pleadings and request further investigative measures.<sup>37</sup>

The preliminary hearing in Spain is conducted by the investigative judge and is considered an extension of the preliminary investigation. The hearing takes place after the performance of indispensable investigative acts and the defendant's submission of a provisional response to the accusatory pleadings.<sup>38</sup> At the hearing, the parties may request that the investigative judge perform further investigative acts, move to dismiss the charges or the entire accusation, or amend the charges to include a separate crime related to the "justiciable facts."<sup>39</sup> If the evidence is sufficient to charge the defendant with a crime subject to the jury court's jurisdiction, the judge issues an order setting the defendant's case for trial.<sup>40</sup>

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them in *voir dire* and have often probed the biases and prejudices of the jury in a sophisticated manner. See Thaman, *Spain Returns*, *supra* note 15, at 288-91 (citing Salvador Enguix, *Juicio al Jurado*, LA VANGUARDIA, June 2, 1996, at 4-5).

34. See LOTJ art. 40; UPK RSFSR art. 439.

35. At the conclusion of the preliminary investigation, the investigator, a legally-trained official in the Ministry of the Interior or the Procurary, advises the defendant of his right to a jury trial in the mandatory presence of his counsel. See UPK RSFSR arts. 423, 424.

36. See LOTJ art. 25-28.

37. See *id.* art. 29. This "adversarialization" of the preliminary investigation, and the corresponding limitation of the powers of the investigative judge, has been criticized on grounds of equal protection (in that nonjury accuseds do not have similar rights), and as being beyond the scope of a law to introduce trial by jury. See Thaman, *Spain Returns*, *supra* note 15, at 273-74 (citing VICENTE GIMENO SENDRA, LEY ORGÁNICA DEL TRIBUNAL DEL JURADO, COMENTARIOS PRÁCTICOS AL NUEVO PROCESO PENAL ANTE EL TRIBUNAL DEL JURADO 165-66 (1996); Victor Fairén Guillén, *Comentarios al "Anteproyecto del Ley del Jurado,"* 2 REVISTA DE DERECHO PROCESAL 462 (1994)).

38. See LOTJ arts. 30-31. Unlike the procedure in nonjury trials, where the investigative judge must investigate the alleged crimes "with all the circumstances which could influence its qualification and the guilt of the criminals," L.E. CRIM. art. 299, the jury procedure provides for investigation only upon motion of one of the parties, and only of subject matter relevant to probable cause to charge the crime, see LOTJ art. 27.

39. See LOTJ art. 31.

40. See *id.* art. 32.

The Russian preliminary hearing is conducted by the trial judge, who reviews the entire dossier of the preliminary investigation before deciding whether to set the case for trial and what evidence will be admissible at trial. Though the hearing is adversarial in nature, no new evidence is adduced and rulings suppressing evidence must be based on the contents of the investigative dossier. If the judge determines that there is insufficient evidence to proceed to trial, he or she may dismiss the case. However, the more common remedy is for the judge to return the case to the investigator for supplementary investigation.<sup>41</sup>

The Russian legislature has left the central role of the investigative dossier intact, but the Spanish legislature has modeled its preliminary hearing on that of the Italian Code of Criminal Procedure of 1988<sup>42</sup> by largely eliminating the investigative dossier from the trial to reinforce the principal of immediacy and orality of the trial in the jury court.<sup>43</sup> During the preliminary hearing, the investigative judge prepares a "trial file." This file includes evidence that cannot be repeated at trial or that needs to be ratified at trial, or other evidence the parties intend to use at trial.<sup>44</sup>

The Russian constitutional prohibition against the use of evidence seized in violation of the Russian Constitution or the Code of Criminal Procedure has been remarkably implemented through the Russian preliminary hearing.<sup>45</sup> In particular, numerous defendants' admissions and confessions have been held inadmissible because they were elicited in violation of the defendant's right to

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41. Supplementary investigation was performed in 18% of all cases tried from November 1, 1993, to January 1, 1995, according to the statistics of the Russian Supreme Court [hereinafter SCRF]. See Thaman, *Das neue russische Geschworenengericht*, *supra* note 15, at 195. The Russian Ministry of Justice contends that 36.1% of jury cases were returned for further investigation in 1994 and 36% in 1995. See A. Gagarsky, *Miniust podvodit itogi raboty sudov*, 8 ROSSIYSKAIA YUSTITSIIA 4 (1996) [hereinafter ROSS. IUST.]. The percentage has fallen to 25.8% in 1996 and 22.5% in 1997. See *Spravka o praktike rassmotrenii del sudami prisiashnykh v 1997 godu*, Memorandum prepared by G.P. Ivanov, Judge of the SCRF 3-4 (Mar. 21, 1998) (on file with author) [hereinafter *Spravka*].

42. In Italy, however, the preliminary hearing judge (*giudice per le indagini preliminari*) is separate from the trial judge, presiding only over matters arising during investigation. This difference ensures a greater amount of structural independence. See Stephen P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345, 364-65 (1994). For analysis of the "double file" innovation in the new Italian Code of Criminal Procedure, see Hans-Heinrich Jescheck, *Grundgedanken der neuen italienischen Strafprozeßordnung in rechtsvergleichender Sicht*, FESTSCHRIFT FÜR ARTHUR KAUFMANN ZUM 70. GEBURTSTAG 659 (1993); Alessandro Honert, *Der italienische Strafprozeß: die Fortentwicklung einer Reform*, 106 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 427, 436 (1994). (The last document was unavailable to staff editors for cite-checking because it could not be retrieved from an archive.)

43. See LOTJ III: Exposición de Motivos. The principal of immediacy and orality ensures that the evidence will be heard first-hand through the testimony of witnesses, rather than through the reading of documents.

44. See LOTJ art. 34. For more detail on preliminary hearings, see Thaman, *Spain Returns*, *supra* note 15, at 279-82.

45. See KONST. RF art. 50. The constitutional right to exclude illegally gathered evidence was codified in UPK RSFSR arts. 69, 433. For a discussion of this emerging body of law, see Thaman, *Das neue russische Geschworenengericht*, *supra* note 15, at 196-97, and Thaman, *Resurrection*, *supra* note 15, at 90-94.

counsel, which adheres in capital investigations from the moment of arrest,<sup>46</sup> or because the suspect was not advised of his or her constitutional right to remain silent.<sup>47</sup> Russian courts have also explicitly applied the “fruits of the poisonous tree” doctrine in suppressing certain evidence, such as semen or blood stains on clothing or objects that were not handled according to code specifications when they were gathered.<sup>48</sup> Motions to suppress evidence may also be made at trial, where witness testimony often reveals that evidence was illegally seized. Testimony regarding the motion is required. The illegality of investigative methods is often first revealed through witness testimony, and the parties may call additional witnesses in support of, or in opposition to, the motion.<sup>49</sup>

Motions to suppress evidence which allege the violation of a fundamental right during the preliminary investigation are made in Spain in preliminary proceedings in the trial court.<sup>50</sup> The efficacy of this remedy has been doubted because the trial judge does not possess the full investigative dossier and there are no provisions for hearing oral testimony.<sup>51</sup> Thus, it is generally conceded that such motions will have to be resolved at trial, though, to the author’s knowledge, defendants have made no such motions during the first year of jury cases.<sup>52</sup>

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46. All persons have a right to counsel upon arrest. See UPK RSFSR art. 47. Those charged with capital crimes have a right to a court-appointed lawyer from the time of the filing of an accusatory pleading. See *id.* art. 49(5). The right inures in jury cases from the time the investigation is completed. See *id.* art. 426.

47. See KONST. RF art. 51. The SCRF has held that all suspects must be advised of their right to remain silent before being questioned during the preliminary investigation, or the statements are inadmissible in court. See Decision No. 8 of the Plenum Verkhovnogo Suda RF, O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiyskoy Federatsii pri osushchestvlenii pravosudiia, 1 BIULL. VERKH. SUDA RF 3, 6 ¶ 18 (1996). Evidence was suppressed on constitutional or lesser statutory grounds in approximately one third of all jury cases in 1994 and 1995, not including those cases returned for further investigation. See V. Voskresenskiy, *Uchastie prokurora v rassmotrenii del*, 7 ROSS. IUST. 4 (1996). The main author of the Jury Law estimates that evidence has been suppressed in 70% of all jury cases. See S.A. Pashin, *Dokazatel'stva v rossiyskom ugolovnom protsesse*, in 2 SOSTI-AZATEL'NOE PRAVOSUDIE 311, 368 (S.A. Pashin et al. eds., 1996) [hereinafter SOST. PRAVO.].

48. See U. Liakhov & V. Zolotyykh, *Sud prisiazhnykh—put' k spravedlivoy yustitsii*, 3 ROSS. IUST. 10-11 (1997).

49. The SCRF approved this practice in Decision No. 9 of the Plenum Verkhovnogo Suda RF, O nekotorykh voprosakh primeneniia sudami ugolovno-protsessual'nykh norm, reglamentiruiushchikh proizvodstvo v sude prisiazhnykh, 3 BIULL. VERKH. SUDA RF 2, 4, ¶ 7 (1995) [hereinafter SCRF Decision No. 9].

50. See LOTJ art. 36(1).

51. See Thaman, *Spain Returns*, *supra* note 15, at 283-84 (citing GÓMEZ COLOMER, *supra* note 26, at 99).

52. According to the President of the Provincial Court of Málaga, Manuel Torres Vela, the lack of motions to suppress based on search and seizure violations has been due to the fact that no narcotics charges are heard by juries, and that the typical Spanish murder case, involving “crimes of passion” or bar-room fights, seldom involve searches or wiretaps. See *id.* at 284.

## VI THE TRIAL

### A. The Changing Roles of the Participants

One of the key aims of the Russian legislature was to strip the trial judge of the inquisitorial duty of seeking the truth and to eliminate the accusatory role the Soviet-Russian procedure had imposed on the court. Therefore, the judge no longer reads the accusatory pleading nor dominates the questioning of the defendant and the witnesses in the new jury trials. The judge may no longer prevent the prosecutor's abandonment of the case, act as a prosecutor by necessity when the prosecutor does not appear for trial, nor return the case to the investigator on his or her own motion.<sup>53</sup>

The Spanish criminal trial was perhaps the most adversarial on the European Continent even before the passage of the jury law.<sup>54</sup> Although the Spanish jury law kept the trial procedure basically unchanged, the trial judge's ability to control the collection of evidence has been drastically impeded by the lack of access to the investigative dossier. The trial begins not only with the reading of the prosecution's accusatory pleadings, but also with the pleadings of the defendant and the private prosecutor, usually representing the alleged victim, the victim's family, or their representatives.<sup>55</sup>

Russian and Spanish jury trials are greatly impacted by the empowerment of the victim or aggrieved party in criminal procedure.<sup>56</sup> In both countries, a prosecutorial motion to dismiss may be granted only if the aggrieved (the private prosecutor) agrees.<sup>57</sup> In the Russian trial, the aggrieved is usually uneducated, not represented by counsel, and often has no knowledge of the investigation and evidence. The aggrieved party has had a disturbing effect in many trials by displaying unpredictable outbursts of emotion, blurting out inadmissible or suppressed evidence, and necessitating laborious explanations by the

53. See Thaman, *Das neue russische Geschworenengericht*, *supra* note 15, at 199-201. I have criticized the judge's excessive discretion to remand a case for further investigation even after the jury has been sworn and has heard evidence. Such practice violates the presumption of innocence and the right to one's lawful judge, as guaranteed by Article 47 of the KONST. RF. See Stephen Thaman, *Sud prisi-zhnykh v sovremennoy Rossii glazami amerikanskogo yurista*, in 2 GOSUDARSTVO Y PRAVO 67, 70-71 (1995). Russian commentators have expressed similar criticism. See U. Liakhov, *Sudebnoe sledstvie v sude prisi-zhnykh*, in SOSTIAZATEL'NOE PRAVOSUDIIE 63, 80-81 (S.A. Pashin et al. eds., 1996); see also Thaman, *Resurrection*, *supra* note 15, at 100-01.

54. The duty of the judge to ascertain the truth was phrased in terms of "conducting the trial taking care to prevent discussions which are impertinent or do not aim at establishing the truth, without restricting the liberty necessary for the defense." Art. 683 of the Ley de Enjuiciamiento Criminal (B.O.E. 1882, 126) [hereinafter L.E. CRIM]. Very similar language has been adopted by the new Russian jury law. See UPK RSFSR art. 429.

55. See L.E. CRIM. art. 649. The aggrieved party also has the right to court-appointed counsel in case of indigency. See *id.* art. 119.

56. In the United States, the aggrieved is not a party in criminal proceedings, has no right to question witnesses, make a statement, or argue to the jury. The aggrieved's only input would be as a witness. For criticism of this state of affairs, see GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIM'S RIGHTS IN CRIMINAL TRIALS 248-50 (1996).

57. See UPK RSFSR art. § 430; LOTJ art. 51.

judge about every aspect of the proceeding.<sup>58</sup> Whereas the Russian Supreme Court has winked at the victim's illegal disclosure of the defendant's prior criminal record to the jury to the point of affirming a death sentence in the face of such a procedural error,<sup>59</sup> it has reversed acquittals because the trial judge continued the case in the absence of the aggrieved party.<sup>60</sup>

In Spain, the aggrieved party is invariably represented by counsel in the trial and has had a strong impact on the jury in several of the first cases. In particular, the presence of the aggrieved in the courtroom has weakened the defendant's supposed advantages in being the sole "common citizen" arguing to a jury of his peers against the prosecutor, the representative of the state. The presence of the victim's counsel has created a "good cop-bad cop" situation, where the public prosecutor pursues a "just resolution" of the case and the private prosecutor screams for blood.<sup>61</sup> This situation also allows the victim's counsel to push a certain theory of the case primarily aimed at a greater monetary award.<sup>62</sup>

## B. Proceedings Preliminary to the Taking of Evidence

Russia and Spain follow the Continental European model of evidentiary proceedings. The proceedings commence with the reading of the accusatory pleading and the defendant's plea, and continue with the interrogation of the defendant and the testimony of witnesses and experts. The trial closes with the summations and the last word of the defendant.<sup>63</sup> The provisions of the extant Codes of Criminal Procedure remain in force in both countries to the extent they are not in contradiction with the provisions of the new jury laws.<sup>64</sup>

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58. On the role of the victim, see Thaman, *Resurrection*, *supra* note 15, at 107-08.

59. The RF Supreme Court affirmed the death penalty in the Case of Stepanenko (Saratov Regional Court), although the aggrieved revealed the defendant's criminal record to the jury. The judge interrupted the aggrieved and instructed the jury to disregard the statement. Supreme Court Decision of Sept. 17, 1996 (Case of Stepanenko), Case No. 32 kp-096-7sksp.

60. See Supreme Court Decision of Nov. 3, 1996 (Case of Karakaev), Case No. 18 kp-096-87sp (reversing the acquittal of the Krasnodar Territorial court); Supreme Court Decision of Oct. 8, 1996 (Case of Bulychev), Case No. 32 kp-096-55sp (reversing the acquittal of the Saratov Regional Court in a double-murder case).

61. In the first case in Granada, the prosecutor and the defense asked the jury to acquit a 71-year-old woman on insanity grounds after all three psychiatric experts agreed she was completely irresponsible when she stabbed her 86-year-old neighbor to death. The private prosecutor asked for a guilty verdict based on partial lack of responsibility, and the jury returned a guilty verdict. See Thaman, *Spain Returns*, *supra* note 15, at 397-99. The private prosecutor invariably requests a higher prison sentence and damages than the public prosecutor and sometimes pleads more serious criminal charges. See *id.* at 399-400.

62. In the second Barcelona trial, the private prosecutor was represented by a former television personality who was successful in convincing the jury that the defendant was guilty of only attempted murder of a taxi-driver, in order to support his civil suit for 50 million pesetas against the city government and the taxi company for causing the death by being dilatory in getting an ambulance to the scene. See Thaman, *Spain Returns*, *supra* note 15, at 399-400 (citing Carmen Muñoz, *La fiscal pide una pena menor por la muerte del taxista*, EL PERIÓDICO, Sept. 20, 1996, at 26; Blanca Cia, *El jurado dice que el acusado no quiso matar al taxista*, EL PAÍS (Catalan Edition), Sept. 21, 1996, at 1,7).

63. For a summary of the Russian procedure, see Thaman, *Das neue russische Geschworenengericht*, *supra* note 15, at 202-04. For a summary of the Spanish procedure, see L.E. CRIM. arts. 688-93.

64. See UPK RSFSR art. 420; LOTJ art. 24.

In Spain, the parties, including the victim, are allowed to make an opening statement, following the reading of the pleadings. The statement grants the parties an opportunity to explain their pleadings, list the facts they believe will be proved, and state the verdict and sentence they believe will be just; they may even propose the hearing of new evidence.<sup>65</sup> The Russian legislation does not provide the parties with the same opportunity.

### C. Pleas of Guilty

In both countries, the defendant is first asked if he or she admits the charges brought against him or her.<sup>66</sup> In Spain, pleas of guilty conforming to the pleadings and the longest requested sentence of either the prosecutor or the private prosecutor are permitted in jury and nonjury trials if the sentence does not exceed six years of deprivation of liberty and there is no question as to the presence of a *corpus delicti* for the crime or any objection from the defense counsel. Upon reaching conformity, or *conformidad*, the trial is terminated and sentence is imposed.<sup>67</sup> The Spanish practice of *conformidad* is similar to one of the new Italian forms of abbreviated procedures, the *applicazione della pena su richiesta delle parti*.<sup>68</sup> Coupled with the early and active adversarial participation of the defense, prosecution, and victim in both the preliminary criminal investigation and the trial, the practice is the best example of a “reprivatization of the criminal law” on the basis of a consensual model proposed by some German commentators.<sup>69</sup> Although the Russian law allows a defendant to plead guilty before the jury and condones, with the consent of the judge and all the

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65. See LOTJ art. 45. Opening statements are also a part of the U.S. criminal trial.

66. See UPK RSFSR art. 278; L.E. CRIM. arts. 688-90.

67. See L.E. CRIM. arts. 694-95. The Jury Law only mentions *conformidad* after the evidence has been taken, see LOTJ art. 50, and some courts have deemed it necessary to select a jury and hear the evidence before resolving an undisputed case. This was done in the first Madrid case, the second Castellón case, and the second Bilbao case; the Bilbao judge openly condemned this perceived necessity. See Thaman, *Spain Returns*, *supra* note 15, at 314-15 (citing *Un juez de Bilbao pide que se eviten vistas con jurado “sin contenido.”* EL CORREO, May 23, 1997). Most commentators have deemed that such an interpretation of the law would be uneconomical and would lead defendants to test the waters at trial before agreeing to plead guilty. See Thaman, *Spain Returns*, *supra* note 15, at 312 (citing GIMENO SENDRA, *supra* note 37, at 191-92). In practice, the great majority of minor nonhomicide cases are resolved either through a *conformidad* or by manipulating the charges to avoid the jury court's jurisdiction. See Thaman, *Spain Returns*, *supra* note 15, at 311-12.

68. For discussion of the “application of punishment upon the request of the parties,” see Frecero, *supra* note 42, at 372-74, and William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 23-26 (1992).

69. A guilty plea would follow a thorough criminal investigation in which the defendant and the victim would have full participatory rights, rights of discovery, and an opportunity to have their own evidence evaluated. A trial would be the last resort for difficult cases, but all evidence taken with the participation of both parties in the preliminary investigation would be admissible. See JÜRGEN WOLTER, ASPEKTE EINER STRAFPROZESSREFORM BIS 2007, at 65-91 (1991); Thomas Weigend, *Die Reform des Strafverfahrens*, 104 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 486, 496-511 (1992). (The last document was unavailable to staff editors for cite-checking because it could not be retrieved from an archive.) For detail, see Thaman, *Spain Returns*, *supra* note 15, at 309-16.

parties, an abbreviated trial or even the taking of no evidence, the jury must still deliberate and decide the defendant's fate.<sup>70</sup>

#### D. The Taking of the Evidence

Trials in both countries begin with an admonition to the defendant of his right not to testify and his privilege against self-incrimination.<sup>71</sup> If the defendant waives these rights, the prosecutor begins the examination of the defendant.<sup>72</sup> The defendant has given a statement waiving his or her right to testify and to avoid self-incrimination in nearly all of the first Spanish trials. The same was true in all but one of the first 114 Russian trials, though some judges allowed the defendant to hear the prosecution's case before deciding whether to testify, as is the practice in the United States. For criminal justice systems that place emphasis on the presumption of innocence, the prosecution's burden of proof, and the defendant's right to remain silent, the interrogation of the defendant before any incriminating evidence has been presented to the factfinder is a lingering inquisitorial vestige in these two systems.<sup>73</sup>

In both Russian and Spanish jury trials, the questioning of the witnesses is initially left to the parties, with the opponents having a right to cross-examine. The judge intervenes only after the parties have finished their questioning.<sup>74</sup> Russian judges have maintained a dominant, inquisitorial role much more so than their Spanish counterparts.<sup>75</sup> Both jury laws allow jurors to submit writ-

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70. See UPK RSFSR art. 446. A jury acquitted a Russian man of capital murder and rape after his guilty plea. See Thaman, *Resurrection*, *supra* note 15, at 104-05, 159-60. In the pre-revolutionary Russian jury system, Russian defendants used to plead guilty and express their remorse, winning an acquittal from the jury. For instance, one woman, charged with attempting to poison her husband, ignored her lawyer's advice to plead guilty and denied the charges in her testimony. The jury convicted her and sentenced her to hard labor in Siberia. When her lawyer asked why she did such a stupid thing, she replied that if she were acquitted, she would have to go back to living with her husband! See N.P. TIMOFEEV, *SUD PRISIAZHNYKH V ROSSII. SUBEBNYE OCHERKI* 23-25 (1881). (This document was unavailable to staff editors for cite-checking because it could not be retrieved from an archive.) In up to 95% of all criminal cases in the United States, the defendant elects to waive his right to trial by jury and enters a "plea bargain" in exchange for a sentence guaranteed to be less than if the defendant had gone to trial and was convicted. See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 625 (3d. ed. 1993).

71. See L.E. CRIM. art. 688.

72. See *id.* arts. 699-700; UPK RSFSR arts. 278, 446.

73. For Russian criticism of this practice, see Liakhov, *supra* note 53, at 69; V. Zolotykh, *Sudebnoe sledstvie v sude prisiazhnykh*, in 3 VESTNIK SARATOVSKOY GOSUDARSTVENNOY AKADEMII PRAVA 189, 191 (C.V. Naumov et al. eds., 1996) [hereinafter VESTN. SAR. GOS. AKAD. PRAVA]; cf. Thaman, *Spain Returns*, *supra* note 15, at 297.

74. See UPK RSFSR art. 446; L.E. CRIM. art. 708.

75. In the four Spanish trials I saw (the first trials in Palma de Mallorca, Valladolid, Granada, and Córdoba), the trial judges asked few if any questions, leaving the conduct of the evidentiary portion of the trial entirely in the hands of the prosecutor and lawyers. See Thaman, *Spain Returns*, *supra* note 15, at 307. Russian judges have been criticized for first asking witnesses to give a general explanation of their knowledge of the case, and then asking follow-up questions to "clarify" matters, leaving little opportunity for the parties to dispel the opinion already created in the minds of the jury. See S.A. Nasonov, *Sudebnoe sledstvie v sude prisiazhnykh: zakonodatel'stvo, teoriia, praktika*, in 3 VESTN. SAR. GOS. AKAD. PRAVA, *supra* note 73, at 170, 174. However, some Russian judges adopted a completely passive role, as would befit a U.S. judge. See Thaman, *Resurrection*, *supra* note 15, at 102-09; Thaman, *Das neue russische Geschworenengericht*, *supra* note 15, at 202-03.

ten, unobjectionable questions to be asked by the presiding judge.<sup>76</sup>

The Russian jury law does not attempt to limit the jury court's access to the preliminary investigation file, nor to regulate the use of prior statements of witnesses or defendants included therein.<sup>77</sup> In Spain, however, the trial judge does not conduct the preliminary hearing and the evidentiary file is not physically present at the trial. Thus, the trial judge's knowledge, as well as that of the jurors, is restricted to the evidence introduced at trial. This difference in procedure effectively prevents a Spanish judge from assuming the inquisitorial role of his Russian counterpart.

Although the Spanish jury law allows the parties to question witnesses about prior statements that contradict their testimony at trial, these statements may not be read into evidence, nor are they admissible for the truth of the matter stated.<sup>78</sup> The new procedure has presented problems, however, for the lawyers. In the three murder trials I observed in Valladolid, Granada, and Córdoba, the defendants, while testifying, denied that they remembered what happened on the day of the homicide. Without being able to use the statements from the preliminary investigation, prosecutors found it very difficult to impeach the alleged lack of memory of the defendants, leading to an interrogation confusing for jurors and audience alike.<sup>79</sup>

The new Russian law prohibiting the introduction of illegally gathered evidence presents some complicated tactical problems for Russian defendants because jury acquittals can be appealed by the prosecutor or the aggrieved. First, many acquittals have been reversed by the Supreme Court of the Russian Federation ("SCRF") because the trial judge excluded evidence which the high

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76. See LOTJ art. 46(1). In a study of 54 cases in 1994, it was determined that jurors were much more active than lay assessors in Russian "mixed courts" in questioning witnesses and defendants. Of the questions asked by the court, 56% were asked by the presiding judge and 43% by the jurors. See M.V. NEMYTINA, ROSSIYSKIY SUD PRISIAZHNYKH 32 (1995). One Saratov judge noted that the more he let the parties examine the witnesses, the more jurors intervened with questions in response to the lawyers' inability to cover crucial areas of testimony effectively. See Thaman, *Resurrection*, *supra* note 15, at 106. Active jury questioning happened in Spain on occasion, but was not the rule. See Thaman, *Spain Returns*, *supra* note 15, at 304-06.

77. In cases where witnesses failed to appear in court in the first Russian trials, extensive reading from the dossier was common in order to impeach the defendant or witnesses. See Thaman, *Resurrection*, *supra* note 15, at 107.

78. See LOTJ art. 46(5). The same evidentiary procedure was introduced in the Italian Code of Criminal procedure of 1988, only to be annulled by the Constitutional Court and by subsequent legislation. See Honert, *supra* note 42, at 436. In Spanish trials before professional judges, prior statements may be read in court to impeach in-court statements. See L.E. CRIM. art. 714.

79. Even prior trial testimony is inadmissible in a retrial. Thus, in the first retrial of a Spanish jury case in Castellón, the defendant changed his testimony to improve his self-defense claim and the prosecution could not use his prior testimony because it was unsworn, as Spanish defendants are not required to testify under oath, and because the reversal of the defendant's conviction had rendered the case a "nullity." The defendant was acquitted the second time around. See Thaman, *Spain Returns*, *supra* note 15, at 300 (citing Interview with Antonio Gastaldi Mateo, Public Prosecutor in the Castellón Provincial Court (June 20, 1997)). For detail on the banishment of the investigation dossier from the trial court and the problems it has caused, see Thaman, *Spain Returns*, *supra* note 15, at 298-301.

court's Cassational Panel deemed admissible.<sup>80</sup> Thus, lawyers must carefully evaluate whether to move to exclude questionably prejudicial evidence. In addition, in some early trials, defense lawyers would sometimes wait until trial to move to exclude the evidence so the judge would not return the case for further investigation, and so the jury could hear the testimony about the unlawful tactics of criminal investigators.<sup>81</sup> In several cases, the Cassational Panel of the SCRF has reversed acquittals because the defense had unsuccessfully moved to exclude allegedly coerced confessions and then had, either through the testimony of the defendant, other witnesses, or through the defense lawyer's closing argument, alluded to the allegedly unlawful actions of the interrogators.<sup>82</sup>

Finally, the Russian legislation prohibits mention of a defendant's past criminal record before the jury.<sup>83</sup> To achieve parity, the SCRF ruled *en banc* that the defendant may not introduce good character evidence before the jury.<sup>84</sup>

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80. The following acquittals have been reversed for this reason: Supreme Court Decision of Sept. 1, 1994 (Case of Bulochnikov), Case No. 51kp-094-68sp (reversing acquittal of the Altay Territorial Court for murder of two persons); Supreme Court Decision of Nov. 24, 1994 (Case of Shchepakina), Case No. 41-kp-094-112sp (reversing acquittal of Rostov-on-the-Don Regional Court for murder); Supreme Court Decision of Dec. 13, 1994 (Case of Sushko), Case No. 19-kp-094-72sp (reversing an acquittal of the Stravopol Territorial Court for the murder of two persons); Supreme Court Decision of Jan. 18, 1995, Case No. 32-kp-094-70sp (reversing acquittal of the Saratov Regional Court for an attempted murder and theft); Supreme Court Decision of Oct. 26, 1995 (Case of Volkov), Case No. 4-kp-095-94sp (reversing acquittal of the Moscow regional Court for the murder of two persons, arson, and destruction of property); Supreme Court Decision of Feb. 20, 1997 (Case of Nikitin/Savchenko/Bovisov/Grishin), Case No. 4-kp-097-13sp (reversing acquittals of the Moscow Regional Court for murder, destruction of property, and other crimes); Supreme Court Decision of Apr. 16, 1997 (Case of Vlasov/Vlasov/Kovalev), Case No. 41-kp-097-32sp (reversing convictions of Rostov-on-the-Don Regional Court for robbery-murder).

81. See Thaman, *Resurrection*, *supra* note 15, at 92.

82. The President of the Cassational Panel of the SCRF discusses several such cases in A. Shurygin, *Zashchita v sudoproizvodstve s uchastiem kollegii prisiazhnykh zasedateley*, 9 ROSS. IUST. 6 (1997). Human rights activists, aware of the fact that criminal investigators in Russia still employ torture and other tools in their "technology of confessions," have sharply criticized these rulings for depriving juries of evidence about the voluntariness of confessions and the credibility of the defendant. See Pashin, *supra* note 47, at 344; Stanislav Velikoredchanin, *Sud prisiazhnykh v Rossii*, in 25 PRAVA CHELOVEKA V ROSSII: INFORMATSIANNAIA SET' 11, 11-12 (Stanislav Velikoredchanin ed., 1997). The following acquittals were reversed for this reason: Supreme Court Decision of Nov. 24, 1995 (Case of Zhevak), Case No. 41-kp-096-24sp (reversing acquittals of the Rostov-on-the-Don Regional Court for murder); Supreme Court Decision of May 14, 1996 (Case of Kornilov/Nikilenko/Gerner), Case No. 41-kp-96-39sp (reversing the acquittal of the Rostov-on-the-Don Regional Court for the murder of several people in a bombing); Supreme Court Decision of Apr. 19, 1997 (Case of Antipov), Case No. 41-kp-097-27sp (reversing the acquittal of the the Rostov-on-the-Don Regional Court for the rape of a minor); Supreme Court Decision of May 7, 1997 (Case of Grigoriev), Case No. 51-kp-097-26sp (reversing the acquittal of the Altay Regional Court for the rape of a minor); Supreme Court Decision of May 29, 1997 (Case of Popov), Case No. 32-kp-097-21sp (reversing the acquittal of the Saratov Regional Court for a robbery-murder).

83. See Thaman, *Resurrection*, *supra* note 15, at 103. For instance, the defendant's criminal record must be omitted from the reading of the indictment. See UPK RSFSR art. 446. On the other hand, the jury has received questions related to proving prior convictions of defendants in Spanish cases when the aggravating circumstance of recidivism is pleaded. Thus in the Ugal/Martinez case in the Barcelona Provincial Court, the jury proved four prior convictions for Ugal and nine for Martinez. See Thaman, *Spain Returns*, *supra* note 15, at 347.

84. See SCRF Decision No. 9, *supra* note 49, ¶ 16. In the case of Gusiev/Poliakov, an acquittal for robbery-murder was reversed because the defense read records of the defendant's illness to the jury and told the jury that an earlier conviction had been reversed by the SCRF. See Supreme Court Deci-

This ruling hinders the defense in presenting “sympathy” evidence to the jury inducing them to recommend leniency. Since “sympathy” evidence can help eliminate the possibility of the death penalty, its omission has been strongly criticized.<sup>85</sup> For example, the SCRF has even upheld the conviction of an arguably “battered” woman for the aggravated murder of her husband even though she was prevented from introducing evidence of his bad character. The court held that admission of such evidence would turn the case into a trial of the victim.<sup>86</sup>

#### E. The Role of Judge and Jury in Rendering Judgment

Both the Russian and Spanish legislatures have rejected the Anglo-American general verdict of “guilty” or “not guilty.” Instead, Russia and Spain have followed the French model, later adopted by most Continental European countries in the nineteenth century, whereby the jury is presented with a list of questions or propositions.<sup>87</sup>

Before arguments and the defendant’s last word, the Spanish judge prepares a verdict form (*objeto del veredicto*) in the form of a list of propositions, some designated as favorable to the defendant, some as unfavorable. The jury must then decide whether they were proved or not proved during the trial. The propositions are restricted to the facts presented by the various parties during the trial and relate to the elements of the crimes charged, conditions which modify or exclude guilt, and statutory factors that aggravate or mitigate the defendant’s criminal responsibility. Finally, the jury is asked to affirm or deny the proof of the defendant’s guilt as to the “criminal acts” (*hechos delictivos*) contained in the parties’ pleadings. If the jury believes that guilt has been proved as to one or more of the allegations, it may nevertheless recommend a suspension of sentence (*remisión condicional de la pena*) or ask that the government grant complete or partial amnesty for the offense (*recomendación del indulto*).<sup>88</sup> The judge’s proposed verdict form must be discussed with the parties; the parties’ objections to the form’s contents may form the basis for an appeal.<sup>89</sup>

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sion of Apr. 30, 1997 (Case of Gusiev/Poliakov), Case No. 19 kp-097-15sp (reversing decision of Stavropol Territorial Court).

85. Defense lawyers still manage to present “sympathy” evidence before the jury. See generally Nasonov, *supra* note 75, at 183-85; Pashin, *supra* note 47, at 385.

86. See Supreme Court Decision of June 3, 1997 (Case of Shayko), Case No. 80 kp-097-28sp (affirming conviction handed down by Ul’ianovsk Regional Court). The woman, in an earlier trial, had been convicted of murder in the heat of passion, caused by a serious insult delivered by her husband. The SCRF reversed the conviction, finding that the “nature” of the questions asked constituted an abuse of the judge’s authority. See Supreme Court Decision of Sept. 24, 1996 (Case of Shayko), Case No. 80-kp-096-33sp (Ul’ianovsk Regional Court).

87. See MEYER, *supra* note 3, at 48-108.

88. See LOTJ art. 52. Unlike the Spanish “recommendation,” the Russian jury’s finding of “lenience” or “special lenience” binds the judge in substantially lowering the sentencing parameters. See UPK RSFSR arts. 449, 460; see also Thaman, *Das neue russische Geschworenengericht*, *supra* note 16, at 206.

89. See LOTJ art. 53.

The Russian "question list" requires the posing of three basic questions: (1) whether the *corpus delicti* of the crime has been proved; (2) whether the defendant's identity as perpetrator of the crime has been proved; and (3) whether he or she is guilty of having committed the crime.<sup>90</sup>

Both legislatures resorted to the "question list" verdict form to give the professional judge a factual foundation for the imposition of a reasoned judgment. The factual foundation is a statutory or constitutional requirement in both countries.<sup>91</sup> Both legislatures equivocated, however, on whether they actually wished to limit the jury to deciding mere "naked historical facts" or allowing it to make a finding of "guilty" or "not guilty" as to each charged offense. While the Russian statute prohibits the judge from posing questions which require "strictly juridical evaluations," it also requires the judge to instruct the jury on the substantive law as it applies to the acts imputed to the defendant, thus seeming to indicate that the jury is to apply the law to the facts. The SCRF, however, has interpreted the statutory language to reduce the jury to deciding only "naked historical facts," depriving it even of deciding "internal fact elements" or *mens rea*, by characterizing it as a "question of law."<sup>92</sup>

Spanish courts have wrestled with similar problems. Most courts have tried to phrase questions of guilt in terms of the defendant's "having caused the death" of the victim and have eschewed using the *nomen juris* in their formulations. This has not been true in questions related to mitigating and aggravating circumstances, however, and juries have been asked directly whether a murder was committed with treachery (*alevosía*) or excessive cruelty (*ensañamiento*), often including definitions phrased in legal terminology within the question itself. Spanish courts have also not shied away from asking juries directly about the defendant's mental state, for example, whether a homicide was committed intentionally, recklessly, with gross negligence, with simple negligence, or accidentally.<sup>93</sup> According to some commentators, one of the main reasons for several of the more criticized verdicts in the country is jurors' hesitance to find "intent" in the domestic and bar-room "crimes of passion" typical of many

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90. See UPK RSFSR art. 449. For a detailed discussion of the problems encountered by Russian judges in drafting the question lists in the first trials, see Thaman, *Resurrection*, *supra* note 15, at 114-23.

91. See CONSTITUCIÓN ESPAÑOLA [C.E.] art. 120(3) (Spain); UPK RSFSR arts. 314, 462.

92. In SCRF's Opinion No. 9, *supra* note 49, ¶ 18, the Court held that the jury lacked competence to decide "juridical questions," such as whether a murder was intentional, negligent, or committed in the heat of passion or for financial gain, whether it was committed with a "hooliganistic" motivation, extreme cruelty, or excessive force in self-defense, or whether an act amounted to robbery or rape. I have criticized the jurisprudence of the SCRF, drawing on the pre-revolutionary practice and theory discussed in Stephen Thaman, *Postanovka voprosov v sovremennom Rossiyskom sude prisiazhnykh*, 10 ROSS. IUST. 8-11 (1995) [hereinafter Thaman, *Postanovka voprosov*]; see also Thaman, *Das neue russische Geschworenengericht*, *supra* note 15, at 205-06. For similar criticism, see NEMYTINA, *supra* note 76, at 83. While *mens rea* is a "question of fact" for the jury to decide in U.S. trials, the U.S. Supreme Court has recently decided that it does not violate due process to statutorily prevent the jury from hearing evidence relevant to the proof of the defendant's mental state, for example, evidence of intoxication. See *Montana v. Egelhoff*, 518 U.S. 37, 42-44 (1996).

93. See Thaman, *Spain Returns*, *supra* note 15, at 320-51, for a detailed study of the Spanish question lists. See *id.* at 335-46 on questions relating to mental states.

Spanish homicides. This has led judges to instruct juries seriously as to the difference between intentional and reckless murder, as well as the difference between homicide with gross or simple negligence.<sup>94</sup>

The Russian system separates the guilt question into three component parts, thereby permitting implicit jury nullification by allowing an acquittal even though the jury has determined that the *corpus delicti* and the defendant's perpetration of the criminal acts has been proved. In the famous *Vera Zasulich* case of 1878, the jury acquitted a young revolutionary sympathizer of shooting a Tsarist official by availing itself of this option of a "not guilty" verdict, even though all of the elements of the crime had been proved.<sup>95</sup> Spanish law treats contradictions between the questions of *corpus delicti*, the identity of the perpetrator and guilt as a defect in the verdict which the jury is instructed to correct.<sup>96</sup>

The Spanish system is more explicit in reducing the jury's role in determining "guilt" by limiting the scope of the jury's involvement to finding that the defendant committed a certain criminal act rather than a finding that a "crime" was committed in the juridical sense.<sup>97</sup> The stricter "anti-nullification" approach of the Spanish legislature did not, however, prevent the stunning acquittal of Mikel Otegi of the murder of two policemen in the Basque Country. The jury was able to acquit the young man, despite clear evidence of an intentional double murder, because questions of *mens rea*, including questions of diminished capacity and insanity as a complete excuse for criminal conduct, are considered to be "questions of fact" for the jury to decide. Spain also permits a complete excuse on grounds of temporary insanity, even when caused by volun-

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94. This was the opinion of the President of Sevilla Provincial Court. See Thaman, *Spain Returns*, *supra* note 15, at 340, 355 (citing Miguel Carmona Ruano & José Manuel De Paúl, Informe sobre las Causas Juzgadas por el Tribunal del Jurado 68-69 (1997) (unpublished draft commissioned by CGPJ, on file with the author)).

95. For discussions of pre-revolutionary Russian jury nullification in the context of the new statute, see Thaman, *Resurrection*, *supra* note 15, at 114-15; Thaman, *Postanovka voprosov*, *supra* note 92, at 9. In a case from the Ivanovo Region, a jury affirmatively answered the *corpus delicti* and perpetration questions. The victim had been stabbed to death, his woman friend, the defendant, had perpetrated the killing, and no legal excuses or justifications had been proved. Nevertheless, the jury found her "not guilty" of the murder and the SCRF upheld the judgment. See Thaman, *Geschworenengerichte*, *supra* note 15, at 79 n.66. In commenting on the SCRF decision affirming this case, the chief author of the jury law noted that one interpretation of the "not guilty" verdict under the Russian law is that "the act contains all the elements of the crime in its totality, but the jury, for reasons known to them, deprived the state of the right to achieve a conviction and apply the sanctions of the special part of the Penal Code." S.A. Pashin, *Postanovka voprosov pered kollegiey prisiazhnykh zasedateley*, in 1 SOST. PRAVO., *supra* note 47, at 89, 90-91.

96. See LOTJ art. 63(1)(d). This happened in the second Málaga trial, a prosecution for trespass and threats, in which the jury found the principle fact questions to be proved, yet returned a verdict of "not guilty." The judge returned the verdict for "correction," explaining its supposed contradictoriness, and the jury blithely found the principle fact questions (as to *corpus delicti* and perpetration) to be "not proved" and revalidated its acquittal. See Carmona Ruano & De Paúl, *supra* note 94, at 7. On the Spanish attempt to prevent jury nullification, see Thaman, *Spain Returns*, *supra* note 15, at 376-80.

97. LOTJ art. 60(1) originally called for a finding of guilt or lack thereof as to each "charged crime" (*delito imputado*). In November 1995, the language was changed to "charged criminal act" (*hecho delictivo imputado*) to effect a clean separation of questions of law from questions of fact. See Thaman, *Spain Returns*, *supra* note 15, at 336. Thus, as one critic noted, it is no longer a guilt-finding in the strict meaning of the word and is actually superfluous in the technical sense. See Thaman, *Spain Returns*, *supra* note 15, at 378 n. 609 (citing GÓMEZ COLOMER, *supra* note 26, at 122).

tary intoxication or other causes.<sup>98</sup> In Russia, the judge must discharge the jury and initiate psychiatric commitment procedures if evidence of mental illness eliminating criminal responsibility arises.<sup>99</sup> Until the promulgation of a new penal code in 1996, the question of voluntary intoxication, a veritable national pastime in Russia, was only presented to the jury as a circumstance that aggravates the defendant's level of guilt. Despite this statutory aggravating factor, which also existed before the Russian Revolution, Russian jurors have tended to mitigate the responsibility of intoxicated defendants and have generally recommended lenience.<sup>100</sup>

As in the first Russian trials, some Spanish judges have limited the propositions in the verdict form to those absolutely necessary to prove the elements of the offenses and the mitigating or aggravating circumstances,<sup>101</sup> whereas others have had the jurors affirm or reject virtually every assertion contained in the prosecution and defense pleadings. For example, of the fifty-four propositions submitted to the first Valladolid jury, several had no relation to important elements of the offense.<sup>102</sup> Interviews of the jury in the notorious Otegi case in San Sebastián revealed they had great trouble understanding the ninety-five questions submitted to them.<sup>103</sup>

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98. In the Otegi Case, the bulk of the defense's 64 questions related to defendant's drinking the evening and morning before the killings and his prior encounters with the Basque police. The jury affirmed by majority vote the following questions: (Q69): Mr. Mikel Mirena Otegi Unanue has a personality with a propensity or predisposition to experience feelings of harrassment and persecution on the part of the *Ertzaintza*; (Q70): In Mr. Mikel Mirena Otegi Unanue there exists a pre-existing pathological condition or an ailment or an underlying psychic disturbance in connection with the aforementioned sense of harrassment and persecution by the *Ertzaintza*, which he experienced in extreme ways intolerable for his personality; (Q76): Mikel Mirena Otegi Unanue consumed an excessive quantity of alcoholic beverages between the afternoon and evening of December 9 and 10, 1995, until he achieved a state of inebriation; (Q77): The conjunction of all of the facts laid out in numbers 69 through 76 of Part C, or, in the alternative, of those which have been declared proved, had as a result that in the moment of firing the weapon Mr. Mikel Mirena Otegi Unanue was absolutely not in control of his actions. See Verdict Form from the Otegi Case in San Sebastián Provincial Court (Mar. 7, 1997) (on file with author).

99. See Thaman, *Resurrection*, *supra* note 15, at 127.

100. Eighty-nine defendants in 76 of the first 109 Russian trials to reach a verdict were found to be intoxicated (an aggravating factor) at the time of commission of the crime. The jury recommended leniency to 47 of those defendants. 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, *supra* note 70, at 381; cf. BOBRISHCHEV-PUSHKIN, *EMPIRICHESKIE ZAKONY DEIATEL'NOSTI RUSSKOGO SUDA PRISIAZHNYKH* 355-56 (1896). (This document was unavailable to staff editors for cite-checking because it could not be retrieved from an archive.)

101. For example, only nine and six propositions, respectively, were submitted to the juries in the first murder cases in Palencia and Granada.

102. This subsequently elicited much criticism in the press, and the judge admitted the difficulty he had with the verdict in a newspaper interview. See Thaman, *Spain Returns*, *supra* note 15, at 332-33 (citing Juan Carlos León, *El jurado nos libera de una responsabilidad*, EL NORTE DEL CASTILLO, June 16, 1996, at 10-11).

103. See Thaman, *Spain Returns*, *supra* note 15, at 333 (citing Carmen Gurrucha & Juan Carlos Escudier, *La caótica actuación del jurado del 'caso Otegi*, EL MUNDO, Apr. 22, 1997, at 6-7). In one Russian trial, 1,047 questions were submitted to the jury. See Interview with V.P. Stepalin, Judge of the Cassational Panel of the SCRF (Aug. 20, 1998) (on file with author).

Following the preparation of the verdict form, the arguments of the parties, and the defendant's last word, the presiding judge in Spain instructs the jury in a restrained manner and in a form the jury can understand as to (1) the jury's function, (2) the content of the verdict form, (3) the nature of the facts under discussion, those that determine the circumstances constituting the crime(s) charged and those that refer to allegations of exclusion and modification of guilt, (4) the rules of deliberation and voting, and (5) the form of their final verdict.<sup>104</sup> The judge must be sure to maintain strict impartiality during the summation and must instruct the jurors not to consider any evidence declared inadmissible at trial.<sup>105</sup> The judge also instructs the jurors to resolve all doubts in favor of the defendant.<sup>106</sup> Spanish judges have differing views on whether they should instruct juries on the legal elements of the charged crimes, inasmuch as the law expressly restricts the jury to deciding solely whether the charged acts were committed.<sup>107</sup> Even though the SCRF has in fact reduced Russian jurors to judges of "naked acts," and does not even let them decide *mens rea* questions, the judge still gives a complete instruction on the substantive law during his or her summation. The judge is also required to summarize the evidence and the positions of the parties,<sup>108</sup> a practice adhered to in Spain from 1888 until 1931, when it was repealed because it was seen as tantamount to an ultimate accusation by the supposedly neutral bench at the end of the trial when no response was afforded to the defense.<sup>109</sup> Several convictions have been reversed by the SCRF because of the one-sidedness of the presiding judge's summation, or because he or she neglected to mention some of the evidence.<sup>110</sup>

#### F. Deliberation, Verdict, and Judgment

Jury deliberations in both Russia and Spain are entirely secret. The presiding judge is not allowed to participate and jurors may not reveal any infor-

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104. See LOTJ art. 54.

105. See *id.*

106. See *id.*

107. Thus in the first Granada and Córdoba murder trials, the trial judges scarcely mentioned the elements of the charged crimes. Author's Observations at Trial (May 5-9, 1997). Trial judges in Lugo, Sevilla, and Girona agreed with this interpretation of the law. See Thaman, *Spain Returns*, *supra* note 15, at 354 (citing Interview with Edgar Armando Fernández Cloos, Trial Judge in Lugo Provincial Court (June 16, 1997); Interview with Antonio Gil Merino, Trial Judge in Sevilla Provincial Court (June 16, 1997); Interview with Fernando Lacaba Sánchez, Trial Judge in Girona Provincial Court (June 26, 1997)). On the other hand, the judge in the first trial in Vitoria explained in the judgment how difficult it was to explain to the jury the difference between intentional murder, reckless murder, homicide with gross and simple negligence, and accident. See *id.* at 355.

108. See UPK RSFSR. art. 451; see also Thaman, *Das neue russische Geschworenengericht*, *supra* note 15, at 207.

109. See Thaman, *Spain Returns*, *supra* note 15, at 356 (citing FRANCISCO MARES ROGER & JOSÉ-ANTONIO MORA ALARCÓN, *COMENTARIOS A LA LEY DEL JURADO* 359 (1996)).

110. See Shurygin, *supra* note 82, at 7. A counsel's objection to a lack of objectivity in a summation must be on the record in order to preserve the issue on appeal. See UPK RSFSR art. 451. This objection should be made in the presence of the jury so as to give the judge a chance to correct any possible errors. See *id.*

mation about the deliberations.<sup>111</sup> In Spain, seven of nine votes are required to prove any propositions unfavorable to the defendant, whereas only five votes are needed to prove any proposition favorable to the accused. Jurors are also allowed to alter the propositions submitted to them as long as they do not substantially alter the subject of their deliberations and the alterations do not result in an aggravation of the possible criminal responsibility of the defendant.<sup>112</sup> Similarly, “guilty” verdicts require seven votes while “not guilty” verdicts or recommendations of suspension of sentence and clemency require only five.<sup>113</sup> The jury can request more instructions or clarifications as to the verdict form, and if the jury has not voted after two days of deliberations, the judge can call them into court to determine whether they have had any problems understanding the verdict form.<sup>114</sup>

While the detailed special verdicts used in Spanish and Russian cases certainly enable the sentencing and appellate judges to divine the reasoning process of the jury, Spain has gone one step further and required that the jury give a succinct rationale for their verdict, indicating the evidence upon which the verdict was based and the reasons for finding a particular proposition proved or not proved.<sup>115</sup> Other than a nonbinding statement by the jury provided for in the Austrian Code of Criminal Procedure,<sup>116</sup> this is the clearest attempt yet by a legislature to require that juries justify their verdicts.

While some juries gave fairly elaborate explanations of why they found a charge to be proven (for example, by explaining why they believed a witness, or did not believe the defendant, or by pointing to expert testimony), many juries just provided stock phrases like “testimony of witnesses and experts,” or “evidence, experts, defendant’s testimony.”<sup>117</sup> The ultimate minimalist variant was that of the jurors in the second Málaga case; that jury just wrote: “witnesses.”<sup>118</sup>

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111. See LOTJ arts. 55-56; UPK RSFSR art. 452.

112. See LOTJ art. 59.

113. See *id.* art. 60. A guilty verdict in Russia requires seven of the twelve jurors’ votes, whereas six votes are sufficient for an acquittal or for a finding favorable to the defendant. See UPK RSFSR art. 454.

114. See LOTJ art. 57. Russian jurors must strive for unanimity during the first three hours of deliberation, whereafter they may seek to reach a majority decision. See UPK RSFSR art. 453. Juries seldom deliberate more than the three minimum hours.

115. See LOTJ art. 61(1). This innovation was deemed necessary to comport with art. 120(3) of the Spanish Constitution. CONSTITUCIÓN ESPAÑOLA [C.E.] art. 120(3). It was also deemed necessary to comply with the presumption of innocence guaranteed by art. 24(2) of the Spanish Constitution and art. 6(2) of the European Convention on Human Rights. See *id.* art. 24(2); Eur. Conv. on H.R., Dec. 10, 1948, art. 6(2); Thaman, *Spain Returns*, *supra* note 15, at 364 (citing GIMENO SENDRA, *supra* note 37, at 320).

116. See art. 331(e) 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 Einhard Steining, *Die Anfechtung mangelhafter Tatsachenfeststellungen im Geschworenenverfahren*, 47 ÖSTERREICHISCHE JURISTENZEITUNG 686, 688-91 (1992).

117. See Thaman, *Spain Returns*, *supra* note 15, at 365-67 (citing Carmona Ruano & De Paül, *supra* note 94, at 54), for a list of such “reasons,” categorized as “minimal.”

118. See *id.* at 355.

Prior to the Otegi Case, some commentators opined that requiring juries to give reasons for acquittals would violate the presumption of innocence and the principal of “free evaluation of the evidence,” since an appellate court, when reviewing a jury’s verdict, need only affirm that objective elements of proof exist which could have permitted the jury to reach a certain conclusion.<sup>119</sup> Indeed, many of the acquittal verdicts were phrased in terms of doubt as to the sufficiency of the proof.<sup>120</sup> On June 27, 1997, however, the Superior Court of Justice of the Basque Country reversed the Otegi acquittal based on the insufficiency of the rationale given by the jury, believing that the jury had basically made just bald assertions of reasonable doubt. After lamenting that the jury did not give even a minimal explanation for its answers to the ninety-one factual questions, and provided only a “pseudo-motivation or substitute global motivation,” the Court expounded:

The invocation of doubt and the references to that which the law requires—with which the jury pretends to support its answers, which they forgot to give reasons for before—reveal that the jury, camouflaging with perplexity a psychological state which has nothing to do with serious hesitation, invents the existence of a doubt which it gratuitously prejudges, in order to use the prop of Art. 54(3) of the law. Armed with the protection of this precept, the jury proclaims that it is plagued by doubt, that it finds it impossible to dissipate it and that, because of it, it is resolving the issue in the sense most favorable to the defendant. It does not describe from where the doubt arose, nor the magnitude thereof, nor is any notion apparent of the force employed to overcome the doubt or clear up the difficulties to which it has given rise.<sup>121</sup>

To avoid deficiencies with the verdict, the jury may request that the secretary of the court help them in drafting the verdict.<sup>122</sup> Some commentators have seen this as the first step toward, or a subliminal recognition of what is in their opinion the superiority of the mixed court with lay assessors.<sup>123</sup> Indeed, in a few of the first trials, the legally trained secretary answered substantive legal questions posed by the jury.<sup>124</sup>

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119. See *id.* at 372 (citing José Antonio Díaz Cabiale, *Prueba, Veredicto, Deliberación y Sentencia, in* COMENTARIOS SISTEMÁTICOS A LA LEY DEL JURADO Y A LA REFORMA DE LA PRISIÓN PREVENTIVA 276, 290 (Agustín Pérez-Cruz Martín et. als. eds., 1996); MARÉS ROGER & MORA ALARCÓN, *supra* note 109, at 398).

120. An example would be the acquittal of the defendant in the first Ávila trial for failing to render aid after a traffic accident: “After we heard all the testimony of witnesses and experts, the evidence was not sufficient to declare the defendant guilty.” Verdict Form from the Barrero Case in Ávila Provincial Court (Oct. 7, 1996) (on file with author), *reprinted in* Thaman, *Spain Returns*, *supra* note 15, at 371-72.

121. See Thaman, *Spain Returns*, *supra* note 15, at 373 (citing Aurora Intxausti, *Otegi volverá a ser juzgado por matar a dos “ertzainas,”* EL PAÍS, June 28, 1997, at 13). For a general discussion on the Spanish reasoned verdicts, see Thaman, *Spain Returns*, *supra* note 15, at 364-74. The Otegi reversal was upheld by the Spanish Supreme Court. See STS, Mar. 11, 1998 (B.J.C. 4226, 6-13).

122. See LOTJ art. 61(2).

123. See Thaman, *Spain Returns*, *supra* note 15, at 375 (citing GIMENO SENDRA, *supra* note 26, at 34-35; GÓMEZ COLOMER, *supra* note 26, at 124).

124. The secretary in the second Oviedo trial told me that she not only explained to the jury the effect of recommendations of clemency or a suspended sentence, but also the difference between a complete and partial excuse from criminal responsibility due to psychic disturbance. See Thaman, *Spain Returns*, *supra* note 15, at 375 (citing Interview with Evelia Alonso Crespo, Secretary in Oviedo Provincial Court (June 9, 1997)). See generally *id.* at 374-76.

After receiving the verdict from the jury, the judge must review the verdict for defects and ask the jury to make any necessary corrections. In a Spanish case, if the judge returns the jury three times to correct defects in the verdict, and they fail to do so, he or she may dissolve the jury and retry the case before a new jury. If the new jury also fails to reach a verdict due to similar problems, the judge must, on his or her own motion, enter a verdict of acquittal.<sup>125</sup>

The judge's ruling following a guilty verdict in both countries must be based on the facts found to be true by the jury, which the judge then juridically qualifies before imposing sentence.<sup>126</sup> Spanish judges have expressed frustration at having to justify jury verdicts with which they do not agree, a situation which judges could face in mixed courts, in the unlikely event they were outvoted by the lay assessors. In a twenty-six-page judgment, the judge in the thirteenth Barcelona trial expressed his disagreement with a jury's finding that the defendant did not intend to kill, when he stabbed his female companion seven times in areas of her body containing vital organs. The judge lamented, "In the mind of the jurist a certain pain emerges, from the point of view of judicial technique" when one must justify a judgment when the facts "collide with the interpretative criteria which jurisprudence utilizes to determine the intentionality of an agent."<sup>127</sup> The judge in the second Córdoba trial criticized a jury's verdict which compelled him to sentence a man to thirty years in prison as "the sentiments of the common people, struggling in the nadir of a long process of decadence," and added,

There are times when the soul is buffeted about by anxiety when the knowledge of ancestral criteria of the technical application of the law is brought down in an instant by simple inclinations of personal sensibility, replete with honesty, but nevertheless deprived of even the simplest sense of legal culture.<sup>128</sup>

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125. See LOTJ art. 65. The Russian judge may also return the jury to the jury room to correct contradictions in their verdict. See UPK RSFSR art. 456.

126. See LOTJ art. 70; UPK RSFSR art. 459. Judgments of guilt and acquittals may be appealed in both Russia and Spain. Spain provides for a first appeal, in which new evidence may be adduced, an appeal in cassation, and an appeal to the Supreme Court of Spain. See L.E. CRIM. art. 846(a)-(c). Russia provides only one level of appeal in cassation, followed by a direct appeal to the SCRF. See UPK RSFSR arts. 463, 464.

127. Thaman, *Spain Returns*, *supra* note 15, at 385-86 (citing Francesco Peirón, *Un juez critica el veredicto de un jurado que sólo consideró imprudencia matar a una mujer a puñaladas*, EL PAÍS, May 31, 1997). The judgment in the case of Domingo Ortega Perez was reversed by the Superior Court of Catalonia and, upon retrial, he was convicted of murder. See *La Audiencia de Barcelona tiene que repetir un juicio con jurado*, LA VANGUARDIA DIGITAL (visited Sept. 28, 1998) <[http://www.vanguardia.es/cgi-bin/nrp\\_ccr\\_new/dia-hoy&nnk-vb2832a&sec-soc](http://www.vanguardia.es/cgi-bin/nrp_ccr_new/dia-hoy&nnk-vb2832a&sec-soc)>; Francesa Peirón, *El jurado rectifica y condena por asesinato al hombre que mató a su mujer de siete cuchilladas*, LA VANGUARDIA DIGITAL (visited Oct. 3, 1998) <[http://www.vanguardia.es/cgi-bin/nrp\\_ccr\\_new/dia-hoy&nnk-vb032/a&sec-soc](http://www.vanguardia.es/cgi-bin/nrp_ccr_new/dia-hoy&nnk-vb032/a&sec-soc)>.

128. Thaman, *Spain Returns*, *supra* note 15, at 384 (citing *Juez firma sentencia de un jurado por imperativo legal*, IDEAL, June 8, 1997, at 1). On problems related to the judge's justifying his or her sentence, see *id.* at 384-87.

## VII

## CONCLUSION

It is difficult to predict the future of trial by jury in either Russia or Spain. Despite a constitutional anchor in both countries, a decided lack of enthusiasm exists on the part of professors, judges, and lawyers as to whether it is an institution capable of helping to solve the problems plaguing the administration of justice. It also remains to be seen whether it will serve as a genuine catalyst in transforming the criminal trials in both countries into an adversarial proceeding, with increased orality and immediacy and less reliance on the investigative dossier.

Russia's new law has been in effect for five years as of November 1, 1998, yet the institution has not spread beyond the nine original regions.<sup>129</sup> From December 15, 1993 to July 1, 1997, approximately 978 jury trials, involving 1,719 defendants, reached a verdict.<sup>130</sup> Defendants requesting to be tried by a jury in jurisdictions subject to the Regional or Territorial Courts have risen from 20.5% in 1994, to 30.9% in 1995, 37.3% in 1996, and 36.8% in 1997,<sup>131</sup> indicating the increasing popularity of trial by jury at least within one part of the population. The acquittal rate, at 18.2% in 1994, fell to 14.3% in 1995, but then rose to 19.1% in 1996 and to 22.9% in 1997.<sup>132</sup> These numbers must be compared, however, to general acquittal rates of 1.3% in 1994 and 1.4% in 1995.<sup>133</sup> In addition, many of the jury trials ended in convictions for lesser offenses or in verdicts of lenience or special lenience.<sup>134</sup> The relative lenience of Russian juries can perhaps be explained as a reaction to an excessively severe Soviet criminal justice system, coupled with profound mistrust among the population of criminal investigators and police, who are known to engage in brutal coercive tactics in interrogation and are otherwise distrusted in their testimony.<sup>135</sup> The parties themselves becoming more active in the presentation of evidence and examination of witnesses may also have led to a higher acquittal rate.

The appellate jurisprudence of the SCRF has radically restricted the jury's power to decide issues of *mens rea*, the pivotal questions in most murder trials, and aggravating circumstances, which can trigger imposition of the death penalty. These issues include statutory aggravating circumstances, the issue of intention, affirmative defenses such as necessary defense or heat of passion, and others.<sup>136</sup> In 1994, the SCRF reversed 42.9% of all judgments and 20.1% of all acquittals, nine total. While the SCRF reversed only 31.5% of the judgments in

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129. These nine regions are named *supra* note 13.

130. See *Praktika realizatsii*, *supra* note 27, at 4.

131. See *Spravka*, *supra* note 27.

132. See *id.*

133. See Gagarisky, *supra* note 41, at 4.

134. See Thaman, *Das neue russische Geschworenengericht*, *supra* note 15, at 212.

135. See Thaman, *Resurrection*, *supra* note 15, at 66-67, 91-94, 130.

136. I have argued that this could violate Article 20 of the KONST. RF, which guarantees trial by jury in capital cases. See Thaman, *Das neue russische Geschworenengericht*, *supra* note 15, at 205; Thaman, *Postanovka voprosov*, *supra* note 92, at 10.

1995 and 22.2% in 1996, it is still reversing a substantial number of acquittals, 17.3% of those appealed in 1995,<sup>137</sup> 30.7% in 1996, and 48.6% in 1997.<sup>138</sup> Not only does the ability to reverse an acquittal differentiate Russian and Spanish appellate procedure from that in the United States, but in Russia, the issues subject to review by appellate courts are not limited by those framed by the appellants and respondents. This inquisitorial remnant in the new adversarial framework has enabled the SCRF to reverse many cases on issues not briefed by any of the parties.<sup>139</sup>

Other than the verdict in the Otegi Case, Spanish juries have not been excessively lenient in their first year. Of the fifty-two homicide verdicts I analyzed, the jury followed the recommendation of the public prosecutor thirty-four times, three of those prosecutorial recommendations for acquittal by reason of insanity.<sup>140</sup> The jury followed the more severe recommendation of the private prosecutor (victim's representative) only three times. The jury found lesser-included offenses of negligent homicide or infliction of injuries not pleaded by the public prosecutor in seven cases and acquitted ten times, seven of which were not pleaded by the public prosecutor.<sup>141</sup> In two cases, the jury actually returned a verdict more lenient than that requested by the defense.<sup>142</sup> Other commentators have also found only a handful of "deviant verdicts" (that is, verdicts different than a professional court would have returned) among the seventy-seven odd trials in the first year of the new institution (May 27, 1996, through June 1, 1997).<sup>143</sup>

Of course, one of these "deviant verdicts" was the acquittal of Mikel Otegi, which riveted the Spanish public's attention to the new jury courts after the institution had been neglected following the first trials in May of 1996. The Otegi verdict spawned calls by the ruling Popular Party to suspend jury trials in the Basque Country, because of public consensus that the verdict was not based on the evidence, but was due to either juror sympathy with the Basque Nationalists or fear of retribution if they convicted the young nationalist sympathizer.

Other reform proposals include (1) changing venue in such cases, (2) eliminating assaults on police officers and other government officials from the list of crimes subject to the jury court's jurisdiction, (3) restricting the jury's role to deciding only naked factual questions, and leaving the guilt finding and the findings of mitigating circumstances relating to mental disease or intoxication to the professional judge, (4) reforming appellate procedures to allow for

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137. See *Praktika realizatsii*, *supra* note 27, at 4; Gagarsky, *supra* note 41, at 4.

138. See *Spravka*, *supra* note 41, at 7-8.

139. See P.A. Lupinskaia, *Poriadok obzhalovaniia, oprotestovaniia i proverki, ne vstupivshikh v zakonnuu silu prigovorov i postanovleniy, vnesennykh v usloviakh al'ternativnoy formy sudoproizvodstva*, in 3 VESTN. SAR. GOS. AKAD. PRAVA, *supra* note 73, at 239, 240-41.

140. See Thaman, *Spain Returns*, *supra* note 15, at 392-97.

141. See *id.*

142. See *id.*

143. See *id.* at 394 (citing Carmona Ruano & De Paúl, *supra* note 94, at 18-20; Joaquina Prades, *Juicio al Jurado*, EL PAÍS, June 8, 1997, at 3).

broader appeal of acquittals, and (5) transforming the classic jury into a “mixed court.”<sup>144</sup>

The extreme lenience of Spanish law in allowing a defense of not guilty by reason of complete or temporary insanity, whether due to mental disease or defect, alcohol or drug intoxication, or even any other circumstance of analogous significance,<sup>145</sup> has led to the mounting of such defenses in many of the first cases.<sup>146</sup> While such defenses have been rejected by most juries, the Otegi acquittal could conceivably be an impulse for the Spanish legislature to amend its law concerning mental excuses as was done in California following the Dan White verdict and in the federal system following the John Hinckley verdict. This would be a clear example of how the presence of a jury of lay factfinders exercises influence on the definition of crimes and their defenses in the substantive criminal law.

Despite the requirement that murder and certain other cases throughout Spain be tried by jury, there have as of yet been remarkably few jury trials, with several provinces not having held a single trial as of May 27, 1997, the first anniversary of the first trials.<sup>147</sup> Prosecutors have been either charging lesser crimes or reaching agreements with defendants (*conformidad*) in the minor cases of threats, burglary, and bribery to avoid the jurisdiction of the jury court.<sup>148</sup>

Even though there have been relatively few jury trials held to date, the reappearance of juries on the inquisitorial soil of Continental Europe is an important phenomenon, regardless of its reception among law professors, lawyers, judges, and politicians. It breathes life into the overly written, overly bureaucratic structure of European criminal jurisprudence and makes European jurists rethink the procedural and substantive tenets upon which their criminal justice systems are based.

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144. See *id.* at 405-12 (citing Javier Muñoz, *El Gobierno y el PNV abrogan por reformar el jurado para que no se repitan veredictos “absurdos,”* EL CORREO, Mar. 8, 1997; C. Valdecantos, *El PP quiere limitar las competencias del jurado,* EL PAÍS, Mar. 8, 1997; Raimundo Castro, *El Gobierno cambiará la Ley del Jurado por el “caso Otegi,”* EL PERIÓDICO, Mar. 8, 1997; Ferran Gerhard, *Mariscal trabaja ya en la nueva Ley del Jurado,* EL PERIÓDICO, Mar. 9, 1997; Salome García, *El Gobierno baraja sustraer al jurado el ataque a policías,* EL PERIÓDICO, Mar. 11, 1997). On the post-*Otegi* reform proposals, see *id.* at 405-12.

145. Arts. 20-21 of the Código Penal (B.O.E. 1995, 281). Most of the first trials were tried under similar provisions included in the Penal code of 1973, because the 1995 Code went into effect only three days before the first trials began on May 24, 1996.

146. In my study, such defenses were pleaded in 36 of the 57 homicide cases. See Thaman, *Spain Returns*, *supra* note 15, at 343 n.444.

147. I am aware of at least seven of Spain's 50 provinces which had not yet celebrated their first jury trial as of June 1, 1997—Segovia, Jaen, Cuenca, Cantabria, La Rioja, Soria, and Tarragona. See *id.* at 515-16.

148. See *id.* at 404.