

9-1-1996

## Trial by Jury in the New Russia: A Travelogue

Gary S. Gilden

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>



Part of the [Comparative and Foreign Law Commons](#)

---

### Recommended Citation

Gilden, Gary S. (1996) "Trial by Jury in the New Russia: A Travelogue," *Penn State International Law Review*: Vol. 15: No. 1, Article 4.  
Available at: <http://elibrary.law.psu.edu/psilr/vol15/iss1/4>

This Travelogue is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact [ram6023@psu.edu](mailto:ram6023@psu.edu).

# Travelogue

## Trial by Jury in the New Russia: A Travelogue

Gary S. Gildin\*

### I. Introduction

Travel, in the younger sort, is part of education; in the elder, a part of experience. He that travelleth into a country before he hath some entrance into the language, goeth to school, and not to travel.

Francis Bacon

In 1993, the Supreme Soviet authorized trial by jury for serious criminal cases in nine of the eighty-nine regional courts (*oblasts*) in Russia. Jury trials, first introduced by Tsar Alexander II in the Judicial Reform Act of 1864, had been moribund since the October Revolution of 1917.

In April of 1996, I had the honor, under the auspices of the American Bar Association Central and East European Law

---

\* Professor, The Dickinson School of Law; J.D., Stanford University; B.A., University of Wisconsin. In April of 1996, The American Bar Association selected Professor Gildin to teach trial advocacy in Russia through the A.B.A.'s Central and East European Law Initiative. In June of 1996, Professor Gildin taught "Advanced Advocacy Training Skills for Russian Lawyers" to Russian criminal defense advocates visiting Washington, D.C. Finally, in November of 1996, Professor Gildin travelled to Minsk, Belarus under the auspices of the A.B.A. to teach a program on jury trials in criminal cases.

Initiative, to be part of a three-lawyer team teaching seminars in Kaluga and Tver designed to impart to Russian criminal defense attorneys ("advocates") the art of advocacy in trial by jury. On the final day of that visit, I observed a jury trial in the Moscow *oblast*. Much scholarly work has been done on the resurrection of the jury trial. This modest commentary, based on observation and anecdote unfettered by legal research or citation, offers a traveler's guide to the state of trial by jury in the Russian Federation.

## II. Transportation

Such extremes characterize Russia - extremes of geography, of politics, of temperament, and even of weather - that it ultimately defies characterization.

Fodor's 1996, Moscow, St. Petersburg, Kiev.

Arrival at the Sheremetyevo International Airport portends little has changed since the advent of perestroika and glasnost. The single runway, surrounded by muddy fields, presages the bleak, austere interior of the airport. A maze of solitary passageways leads to the Passport Control line, guarded by a stern, unsmiling, dark-green uniformed officer barking orders. The official responsible for inspecting passports and visas sits grimly in a glass enclosed booth, viewing with suspicion every entrant, every paper. After documentary authorization to enter the country has been supplied, an arbitrarily lengthy waiting period is terminated by a sharp nod from the booth, signaling freedom to pass into the luggage area. The bureaucratic process endures after the retrieval of luggage, as visitors fill out mandatory customs forms certifying the amount of currency that is being imported; these forms must be safeguarded and produced by all travelers upon departure from the country.

Having weathered the ingress procedures, the traveler is then introduced to the modern Russian taxi system. While a few vehicles are adorned with a placard identifying the vehicle as an authorized cab, a more vast free enterprise system prevails. Unmarked cars are parked haphazardly outside the airport entrance, their drivers hawking transport to the city. This phenomenon stretches beyond the borders of the airport. Anywhere in Moscow, one can stand curbside and raise a hand to hail a taxi. The first driver to pull over becomes your cabbie. The fare is determined not by regulated meter but rather by individual

negotiation. Apparently, revenue is derived not solely from transportation but also from occasional muggings. Tourists are forewarned never to get in a car where someone other than the driver is present; security may be maximized by sitting in the front seat with access to the gearshift in case it becomes necessary to grind the car urgently to a stop should the driver unilaterally choose a destination other than that designated by the passenger.

One of the evolutionary developments in Russian transportation is the traffic jam. Car ownership is increasingly within the aspirations and means of the Russian citizenry; hence, the number of cars on Moscow streets is rising at a rate of thousands each month. While public and private works abound, roadways have not been widened to accommodate the hike in demand. Although the Volga remains the standard issue, the emergent Russian upper class exhibits its newfound wealth in the form of Volvos, Mercedes, or BMWs. This expense is justified by roaring from a stop and reaching as high a speed as possible in the brief interregnum before all vehicle traffic inevitably is brought to a halt. Pedestrians are well advised to walk defensively and to take advantage of the underground passageways.

Anyone venturing onto a highway must be prepared to stop for reasons apart from traffic. Visitors should not labor under the false assumption that the waning of the authority of the KGB has been accompanied by the abolition of arbitrary law enforcement. Traffic police on a random basis may, and with some frequency do, signal a vehicle to pull over. Just as cab fare was a product of bargaining, alleged infractions of motor vehicle laws may be resolved on-site by individual negotiation and immediate payment to the officer. Such alternative dispute resolution is motivated by tradition as well as ambiguity as to what is or is not forbidden. Every foray onto the highway is likely to be punctuated by at least one random stop, terminated upon a hushed conversation between driver and authority.

The jewel of Russia's transportation system is the Metro. For a price of 1500 roubles (about 30 cents), one can be whisked away to the far reaches of Moscow, never waiting more than one minute for the next train. Each station is a veritable art museum, graced by such exhibits as crystal light fixtures, frescoes, marble walls, terra cotta sculptures, or mosaics. Unlike most American urban underground systems, not a whit of graffiti is visible. This is not the result of the graffiti-proofing of the stations, but rather by the absence of citizens who would deign to deface them. The Metro offers a political vestige of the past — at the foot of the escalators

lie metal pocket doors capable of converting the hub of transportation into a bomb shelter.

### III. The Law of Evidence

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.

*Silverthorne Lumber Co. v. United States*,  
251 U.S. 385, 392 (1920) (Holmes, J.)

The United States and Russia are currently moving in opposite directions with respect to the rights of persons accused of crimes, at least as reflected in positive law constraining evidence-gathering by police. The United States Supreme Court has carved a consistent path of increasing the power of law enforcement to engage in searches and seizures without a warrant or probable cause; likewise the Court has contracted the limitations on eliciting confessions imposed by *Miranda*.

As a result of widespread abuses of official authority, however, the Russian legislature promulgated a Code of Criminal Procedure that cabins the power of the state to muster evidence. Searches must be observed by two neutral witnesses as a prerequisite to admitting the fruits of the search at trial. Specific protocols must be followed for forensic examinations. *Miranda*-like protections shield witnesses from self-incrimination once they become suspects. Statements by persons under the age of sixteen may not be offered into evidence unless an adult was present during the questioning.

Beyond the protections of positive law, the realpolitik affords the Russian defense attorney productive avenues to deflect harmful evidence. The argument that a defendant's confession was beaten out of him is likely to be greeted with skepticism in most arenas in 1990's America; in Russia, however, jurors are receptive to such claims, probably because each juror has a friend or relative who has been a victim of official coercion. Even judges are gradually becoming socialized to the concept of suppression. Indeed, the newfound power to exclude evidence in trials by jury has increased the receptivity of judges to similarly exclude illegally acquired evidence in non-jury trials.

These advances in evidentiary protections for criminal defendants are unfortunately undermined not only by the Russian advocates' inexperience in identifying suppression issues, but also

by the manner in which counsel raise objections at trial. In a Moscow trial we observed, the prosecution sought to offer into evidence a prior inconsistent statement of the defendant's alibi witness. The court and counsel debated whether the contradictions were "substantial," required by the law of evidence as a predicate to admissibility to impeach. Because the argument was conducted in the presence and full hearing of the jury, including disclosure of the text of the previous statement, the judge's eventual ruling was moot. Conducting the argument at sidebar, a reflexive precaution for the American attorney, is a radical innovation for Russian advocates, who have never practiced in a milieu where decision-making is bifurcated between judge and jury.

#### IV. Lodgings

The hotel scene in Moscow is currently undergoing a major shake-up following the collapse of the Soviet Union. Western hotel management groups are entering into joint ventures with Intourist and other Russian partners, with the aim of raising the quality of service and efficiency to levels comparable to those in the West.

1994 Berlitz Pocket Guide, Moscow and St. Petersburg.

Moscow offers the traveler a choice of the old Soviet or the new Russian regime. Those nostalgic for the past will revel in the Moskva Hotel, an imposing, architecturally unremarkable edifice looming over the heart of the city. Astride each entrance are several uniformed persons; it is unclear to the traveler whether they are hotel employees or law enforcement officers. As if sentries for the old Soviet regime, these officials glower at each person who enters as if he or she poses a security threat. Without exception, they fail to offer assistance to patrons who struggle to maneuver luggage through the single open door. (Persistent throughout the country is the pathology of keeping one of two entry doors in a permanently locked position.)

Each floor of the Moskva, its hallways gloomy because of dim lighting and deep brown panelling, is separately monitored by a matron commanding totalitarian control over the key. Unless preventative measures are taken, guests are awakened at six in the morning by ominous voices broadcast over the hotel-wide radio system, an experience reminiscent of the legend of Big Brother propagandizing the masses. The massive pillared eating hall would

benefit communist party bosses plotting the latest purge, served by waiters with the mien of a grim and efficient manservant.

At the opposite extreme is the recently opened joint-venture East-West Hotel on Tverskoy Bulvar. Western European in decor and attitude, the exterior is graced by stucco; hallways and rooms are bright and refreshingly unguarded. While the furnishings may be slightly tarnished, the conveniences are new and modern. American travelers may be surprised to find single beds in the room. The staff, if not consistently cheery, at least is not permanently affected by the hostile, suspect demeanor typifying the employees of the Moskva.

Once outside of Moscow, choices narrow considerably. Foreigners, while providing much needed revenue, are viewed warily. In fact, the rate structure may afford preferential treatment to residents of the country and quasi-permanent expatriates. The quality of accommodations is likely to mirror the economic state of the particular region. The premiere hotel in Kaluga, reminiscent of a college dormitory constructed in the 1950's, is evidence of the decline of the city's once-thriving aerospace industry. Accommodations in Tver, situated on the road from Moscow to St. Petersburg and not dependent upon a single industry, are more akin to a respectable low-budget American motel franchise.

## V. The Courtroom

Above all, the courthouse: the center, the focus, the hub; sitting looming in the center of the county's circumference like a single cloud in its ring of horizon, laying its vast shadow to the uttermost rim of horizon; musing, brooding, symbolic and ponderable, tall as a cloud, solid as a rock dominating all: protector of the weak, judicate and curb of the passions and lusts, repository and guardian of the aspirations and the hopes.

William Faulkner, *Requiem for a Nun* 40 (1951)

The legal profession has long been one of the least revered in Russia. This is attributable in part to the fact that its members are predominately female and furthered by the socialist dogma deeming non-proletariat workers less valuable contributors to society. Within the legal system, the prosecutor (*procurator*) stood

at the pinnacle, followed by investigators, criminal defense attorneys, and at the nadir, judges.

The courtroom in Tver rests anonymously amongst a panoply of government social service and regulatory offices. Nothing distinguishes the entrance to the courtroom from the door to the restroom. The walls are painted the universal institutional shade of green. The lone indicator of reform is the new red, blue and white-striped Russian Federation flag, pinned to the wall behind the judge's bench. Indeed, the most prominent vestige of past regimes remains in the form of "the cage," a jail cell in the courtroom in which the defendant is confined throughout the trial.

Tver lies in one of the *oblasts* which for many years has been scheduled for, but has not yet implemented, trial by jury. In contrast, the Moscow courtroom represents the state of the art for trial by jury. If anything, however, the interior and exterior of the courthouse in Moscow are less generous than Tver. The building, located outside the ring demarcating Moscow's central city, is of mustard-painted brick that could easily be mistaken for an old warehouse. The hallways are dim and drab and, as in Tver, contain no markings to distinguish the courtroom from storage rooms.

The Moscow courtroom, formerly used as a meeting room, was selected to house jury trials solely on the strength of being the largest room in the building. Furniture was scavenged and placed to approximate the contours of a courtroom. The judge's bench consists of nothing more than a table and simple chair. The jury is seated in two rows of hardbacked chairs with one row slightly elevated above the other. The witness stand is a lectern behind which the witness literally stands while testifying.

The lectern, however, is not the sole outpost from which a witness may offer testimony. A handcuffed man standing between two armed guards testified from the front row of wooden spectator seats well behind the counsel tables. Neither the prosecutor nor the defense counsel ever turned to look at the witness. Instead, they stared forward as if examining the front wall, not a particularly effective tactical choice for the defense counsel to utilize when presenting the defendant's chief alibi witness.

Most significantly, "the cage" remains in full view of the jury, where the defendant is seated cell-bound throughout the trial. If defense counsel wishes to consult with her client, she must walk over to the cell and whisper to the defendant between the bars. Any attempt to sway the jury's rapt attention from the prisoner is futile. The judge, following examination of each witness by defense



counsel, turns to ask the defendant whether he wishes to pose any questions from his cell.

Attempts to ameliorate the prejudicial impact of the cage rarely succeed. While the entire courtroom is cleared when the defendant is brought into the cage, the security officers, in full view of the jurors, handcuffed the defendant while in the cage before escorting him to a holding area during a recess. One of the Russian advocates related that she had filed a motion to have the defendant sit at counsel table throughout the trial. In the one instance where the judge had agreed, the security forces refused, apprising the judge, "You have your instructions, I have mine."

## VI. Shopping

For foreigners who are horrified by the empty counters of Russian shops there are special shops where they can buy nearly everything.

Insight Guides: Moscow (1994) at 281.

One expecting to find a shortage of goods in Russia will be shocked to find that, from a shopper's perspective, it would be easy to mistake Moscow for New York City. Historic GUM (*Gosudarstvenny Universalny Magazin*) forms the northeast boundary of Red Square. Formerly the leading Russian State Department Store, GUM now houses hundreds of small storefronts along its three stories and passageways, offering overwhelmingly western goods such as Benetton, Reebok, Citizen watches, Barbies, cutlery, and designer fashions. Ironically, the items most difficult to locate are those manufactured in Russia. Lining the main streets of Moscow are the beckoning new windows of Guy Larouche and Giorgio of Beverly Hills. Perhaps the largest public works project under construction is an underground shopping mall, resting at the foot of Tverskaya Boulevard at the entrance to Red Square.

A ten minute Metro ride whisks one to *VDNKh*. Formerly an exposition center lauding the success of Soviet commercial and scientific achievement, the collection of pavilions and kiosks is akin to an American outlet mall. One can purchase items ranging from toiletries to televisions, computers, furniture, and even automobiles. A bit more downscale is the flea market at Ismailovsky Park, where those in search of rugs would be hard pressed to find better values.

To shop, however, one need only walk along or cross the street. Moscow is literally a free market. Apart from the omnipresent kiosks, vendors may display wares seemingly without

limitation on sidewalk tables. Every crossing of the street via one of the ubiquitous underground passageways confronts a gauntlet of merchandise — a single copy of *Cosmopolitan* magazine, a sprig of watercress, or a kitten. Even clothing and shoes are sold from underground kiosks.

Perhaps the most manifest evidence of the new political and economic freedom occurs as one walks through Red Square. In the shadow of Lenin's tomb and its armed guards, vendors covertly approach passersby seeking to ply *matriochka* nesting dolls featuring Czar Nicholas inside of Lenin, surrounded by Stalin, embraced by Khrushchev, coddling Brezhnev, hugged by Gorbachev, and finally cupped by Yeltsin.

The highway outside Moscow serves also as a mobile marketplace. A car may sit at the side of the road, its open trunk displaying three one-quart containers of oil. Elderly men spend entire days standing before wooden crates displaying handfuls of potatoes. Time is the truly readily available commodity; it is money that is scarce.

## VII. Jury Selection

Choosing jurors is always a delicate task. The more a lawyer knows of life, human nature, psychology, and the reactions of human emotions, the better he is equipped for the subtle selection of his so-called "twelve men, good and true." In this undertaking, everything pertaining to the prospective juror needs to be questioned and weighed.

Clarence S. Darrow, "Attorney for the Defense," *Esquire*, May 1936.

The lawyer privileged to conduct a trial before a jury in Russia receives only a list of the names, ages, and occupations of the twenty-eight prospective jurors. The limited utility of this scant information is further diminished by the fact that, to eliminate the risk of graft, the lawyers are not told the identity of the prospective jurors in the courtroom. Consequently, the advocate cannot even match the minimal information on the list to the anonymous jurors. The *voir dire* is conducted by the judge with counsel occasionally permitted to ask follow-up questions of an individual juror who responds affirmatively to the judge's inquiry. Hence the keystone advocacy skill is proper formulation of proposed *voir dire* questions to be submitted to the court.

While new to the skill, the advocates in Kaluga and Tver proved adept at identifying likely sources of potential juror prejudice. Questions posed included the following:

1. Do you believe in jury trial?
2. What do you think of trial by jury?
3. Are you afraid of your responsibility as jurors?
4. Is a steel cage a good thing for persons accused of crime?
5. If your relative was put in a cage, would she be obliged to prove her innocence?
6. Have you ever been a lay assessor?
7. Does a refusal to testify show the defendant's guilt?
8. In whose favor should doubts be resolved?
9. Is it better to convict an innocent person or have a crime go unsolved?

While demonstrating this early sophistication in the art of generally conditioning and educating the jury panel, the advocates were far less refined in identifying the specific traits they would look for in choosing among the prospective jurors. Rather than employing particular stereotypes, vocations, or life experiences as barometers, the advocates relied on generic traits such as integrity and honesty as the most desirable juror characteristics. Upon reflection, their approach makes perfect sense. After enduring a lifetime of "telephone justice," where the fate of the client often rested in a call to the judge by a party boss, a neutral, uncorrupted panel would be more than could be hoped for. The notion of selecting a jury that might actually be biased in favor of the defendant is not even to be contemplated.

## VIII. Food

The dining scene in the Russian capital continues to change, almost convulsively. From the state-run restaurants, once the only kind available, to the collectively-owned cooperatives that followed perestroika, to the private-enterprise restaurants proliferating now, the changes are nothing short of astonishing. . . . The contrasts, however, may leave you a bit wobbly.

Fodor's '96: Moscow, St.  
Petersburg, Kiev

As with every aspect of its society, Russia has its foot in at least two gastronomic universes. Moscow offers every style of restaurant: the elegance of the *Evropeisky Zal* at the Hotel Metropol and the *Savoy* at the Savoy Hotel; ethnic delights at Chinese, Indian, German and Italian restaurants; and accessible fast food from Pizza Hut and McDonalds. The latter appear to be the most popular with, or at least the most affordable to, the masses. Amidst a rainstorm, hundreds of persons stood in line outside of the McDonalds at Pushkinsky Playa, reputedly the largest in the world. In an effort to withstand the invasion of the Western fast food industry, The Russian Bistro now offers native fare with the same expeditiousness.

Out of the city, a steady diet of strictly Russian fare should be expected. As was true of lodgings, the quality and diversity of the cuisine tracks the economic health of the locale. The most persistent ingredients in meals in economically depressed Kaluga, whether breakfast, lunch or dinner, are gravy and peas. *Kashi* is a popular filler, as are *bulishka*. Tver, while offering higher quality fare, still exhibits remnants of the Soviet regime. The proprietress of a restaurant in a modern office building still calculated the bill on an abacus; she hastily pulled shut the drapes we had opened in an effort to lend some outside light to the din, issuing the admonishment "it is forbidden."

Groceries too may be acquired in both the old and new style. Traditional Russian stores continue to offer the inconvenience of "three-stop shopping." One first identifies the good and learns its price from the salesperson behind the counter. He then goes to a cashier, empty handed, and pays the assigned price in exchange for a receipt. Returning to the first vendor, the receipt is then

exchanged for the product. Analogous to the aisles of the American supermarket, different stations exist for meats, cheeses, canned goods, coffee and tea, fruits, vegetables, candy, and other categories of foodstuffs. The same three prong procedure is rigorously followed at each of these stations.

Those lacking time or patience will prefer shopping at one of the newer joint venture supermarkets. Interestingly, most of the abundant packaged food at these enterprises is imported from France and the United States. Even the smoked fish, which one would assume would originate from Russian fishing channels, was imported from Brooklyn. However, the familiar convenience of one stop shopping literally has a price attached; a pound of pasta, for example, runs about \$4.50.

Omnipresent in Moscow, and even more prominent in the outlying areas, are kiosks which burgeoned during perestroika. Every neighborhood — or perhaps more accurately every block — features at least one kiosk. The art of market research obviously has not been perfected, as most kiosks offer essentially the same items. Alcohol appears to be in greatest demand, particularly vodka ranging from full bottles to “Russian yogurt,” a single shot in a Dannon-like container. Coffee is another popular item, with Nescafe Gold Instant the choice of connoisseurs.

Outside of Moscow, one can shop for food simply by walking along the street. Fruits, vegetables, canned goods, almost anything other than perishable meat and cheese, is available for the asking. Items are weighed on antiquated scales utilizing small weights; price is calculated by means of an abacus. Foodstuffs are present in abundance; ironically, the only line witnessed was in front of a kiosk selling the day’s fresh bread.

## IX. Witness Examination

[Cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth.

John H. Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* 2:1697-98 (1904).

The most difficult skill for the Russian advocates to grasp was the art of witness examination. The principal stumbling block was not the articulation of questions in the proper form; instead, it was the substance of the interrogation. Effective examination was

stymied by the advocates' inability to shed the mantle of the inquisitorial system.

For their entire careers, the advocates labored under a process in which all the participants — judge, prosecutor, victim and defense counsel — engaged in a collective and cooperative search for the truth. The goal of each individual witness examination was to unearth every fact the witness knew about the offense. Consequently, rather than limit their inquiry to facts helpful to the defense theory of the case, the advocates would ensure that the witness had told the judge and lay assessors all the witness knew, including information harmful to the defense.

Even after training sessions which required them to formulate a defense theory of the case, the advocates had great difficulty confining their examinations to facts consistent with that theory. Helpful witnesses were prodded to expand upon their testimony, often unveiling facts antithetical to the defense. Adverse witnesses were goaded into reiterating their stories, with the repetition of damaging facts obscuring the few nuggets of information that supported the defense theory of the case.

Even when the advocates make the conceptual transition from an inquisitorial mindset to an acceptance of their role as adversaries eliciting "legal truth" through zealous representation of the defendant, several institutional constraints continue to block the pathway to effective advocacy. The first snare is the ban on leading questions - the central weapon of the American advocate provided by the law of evidence to control adverse witnesses and to prevent them from volunteering information harmful to the defense theory of the case. Hence, even if the advocate properly targets the substance of the inquiry, procedurally she may be unable to prevent the witness from damaging the defense.

Most problematic for the effort to confine witness examination to facts advancing the defense theory of the case is that the judge herself examines each witness. In the Moscow trial, the judge's examination of the defendant's alibi witness commenced with the innocuous question, "Tell me everything you know about what happened," followed by the neutral inquiry "Is that all you know?" This was not, however, to be the judge's final word. After the prosecutor, victim, defense counsel, and defendant were offered the opportunity to question the witness, the judge resumed center stage and conducted further follow-up questioning. In both substance and tone, the judge's examination became increasingly piercing. The same rotation was pursued through five rounds, with the judge heads above the prosecutor in dissecting the witness.

After the trial, I asked the judge her objective in examining the witness. She replied that her motive was "to clarify what was already asked by the lawyers, otherwise the jurors would not understand." The judge, who unlike the jury panel was privy to the investigative report, admitted that she found the witness' testimony incredible in light of other evidence embodied in that report. Hence she felt duty bound to make clear to the jury the inconsistencies in the witness' stories.

The judge played a kindred role in the examination of the second witness, the victim of the robbery. In the course of two examinations of the victim, the prosecutor neglected to inquire about the value of the goods stolen, an element that defines whether there are aggravating circumstances. Were this an American trial, the defendant would successfully move for acquittal as to any aggravated charge on the ground that the state had failed to offer proof of the value of the goods. On the third round of questioning, however, the judge supplied the missing element, specifically asking the victim the value of the goods taken from her apartment.

The final obstacle to effective witness examination is the penalty facing the defense counsel who is too successful in advocating the defense theory of the case. For the trial judge has the option, at any time during the course of the trial, to remand the case for further investigation without double jeopardy barring retrial.

## X. Social and Cultural Life

After all the horrors of the Soviet Union — the Gulag, the secret police, the famines, the totalitarian control over every aspect of life — is it possible that the citizens of Russia would voluntarily return power to the Communists? In the coming weeks they may very well do just that, by electing a Communist as their President. What would induce a people to take such a step?

*Time Magazine*, May 27, 1996 at 45.

Moscow is a cultural mecca for the tourist and resident alike. Kiosks offering tickets for theater and concerts abound. The world renowned Bolshoi attracts full houses night after night. Smaller theaters are dotted throughout the city. Classical music may be heard nightly at the Tchaikovsky Conservatory, with tickets ranging

from a minimum of two dollars to a top price of six dollars for front row seats.

However, there has been great damage done to the cultural life in Russia by Western television. Morning news shows are interrupted at random by music videos of all stripes. One of the most popular shows (as well as the source of most of the perceptions of the western legal system amongst Russian lawyers) is the syndicated soap opera, *Santa Barbara*.

Newest on the scene is a spate of night clubs, many allegedly sponsored by the most powerful force in Russian economic life, the Mafia. Nary a conversation could be had about modern Russia without reference to the Mafia. Stories abound about new proprietors who, having rejected the offer of "protection," found their businesses, their families and/or themselves eliminated by bombs. Recently, a committee of forty leading businessmen was formed to foster economic growth; after a year, twenty had been assassinated. To the casual observer, it is difficult to detect the presence of the Mafia, although a fixture at each new restaurant was a man seated stonily near the front door, staring piercingly at all who entered.

Hardest to discern is the disruption of the pattern of personal relations. Many have become fabulously wealthy as a result of economic reforms. Others, with their economic safety net torn asunder, long wistfully for a return to the "good old days," which explains the enduring popularity and threat of the Communist Party. Absent altogether is a middle class, the caste necessary to ensure long term stability.

The most telling commentary on the change in daily life came from the van driver who provided transport to the airport for our return flight to America. The driver conceded that much has changed for the good from the new freedoms. However, when he now drives Russian passengers, they immediately inquire with suspicion how he came to own his van. Such comments typify a general transformation of formerly cooperative relations to an ethic of personal competition.

The van driver's disdain for the loss of camaraderie was expressed in a modern version of a traditional Russian parable. A Russian farmer found a lamp, rubbed it, and a genie appeared. In response to the genie's offer of one wish, the farmer asked for a cow. When the farmer's neighbor became disconsolate at his neighbor's good fortune, the genie went to the neighbor. "I will grant you one wish as well, would you like two cows?" "No," was the reply. "I would like you to kill my neighbor's cow." The ethos



of social and economic parity of the masses endures, further burdening the transition to a more competitive society.

## XI. Closing Argument

Extemporaneous speaking should be practised and cultivated. It is the lawyer's avenue to the public. However able and faithful he may be in other respects, people are slow to bring him business if he cannot make a speech.

Abraham Lincoln, "Notes for a Law Lecture," 1 July 1850

Our expectations for the closing arguments by the Russian advocates in Tver and Kaluga were exceedingly low. In most non-jury trials, with guilt a foregone conclusion, advocacy consists of a plea for leniency in sentencing. The advocates had failed throughout the training seminar to adhere to a theory of the case. Surely the closing arguments would be woeful.

To our delight and surprise, the Russian reverence for culture was displayed prominently in the advocates' closing arguments. It was as if all the arts were woven into the fabric of the courtroom, both in the choice of language and the power of presentation. Having struggled so mightily with the concept of painting a theory of the case through witness examination, in closing the advocates were readily able to portray the human motivations that animated the defense theory.

The cadavers of the case file became well rounded human beings. Mikhail Ivanovich Malakhov stood accused of murdering his girlfriend, Elena Borodina. Borodina died several hours after eyewitnesses claim to have seen Malakhov beat her in the yard of their apartment building. The advocates masterfully unfolded the tragic tale of how Borodina died as an inevitable consequence of her alcoholism. Malakhov, who had rescued Borodina from the streets, offering her love, clothing and shelter, could not, would not and did not kill Borodina.

The Russian advocates took great artistic pride in their closing arguments, just as would a painter in a portrait, a playwright in a script, a choreographer in a dance performance. Their greatest difficulty was accepting the ten minute limit on their presentations; some downright refused to stop when time expired. The critiques were viewed by the advocates as an opportunity to elaborate on their speeches. The American instructors were officious intermeddlers.

The one ingredient lacking in the closing arguments was analysis of how the facts, so convincingly argued, related to the governing law. This is particularly crucial because the jurors are untrained in law. Unlike the general verdict form utilized in most American criminal cases, the verdict forms in Russia are composed of a lengthy series of special interrogatories in which the jury must determine (a) whether the defendant committed the acts charged in the indictment; (b) whether, having committed the acts, the defendant is guilty of a crime; and (c) whether the defendant deserves leniency. The verdict form in one of the murder cases in the Case File consisted of the following ten questions:

1. Has it been proven that on 1 January 1994, Nikolai Matseev was deprived of his life by force, i.e., murdered?
2. If an affirmative answer has been given to the first question, has it been proven then, that Buynov, G. murdered Matseev, N. premeditatedly, by stabbing him repeatedly in chest until he was dead, and drowned the corpse in the river?
3. If affirmative answers have been given to the first two questions, has it been proved then, that Buynov, G., as he was murdering Matseev, N. was in the state of alcoholic intoxication?
4. If affirmative answers have been given to the first two questions, is Buynov, G. guilty of murdering Matseev, N. premeditatedly owing to personal hostile relations, which started in the course of the quarrel?
5. If a negative answer has been given to the previous question and affirmative answers have been given to the first two questions, was Buynov, G., at the moment of committing the act, in the state of deep mental disturbance, which started abruptly and was caused by violence or a grave insult on the part of Matseev, N. or other wrongful acts, if they caused or could cause grave consequences for Buynov, G. or his relations and friends?
6. If an affirmative answer has been given to the previous question, is Buynov, G., guilty of murdering Matseev, N. premeditatedly in the state of deep mental disturbance, which started abruptly and was caused by violence or a grave insult on the part of Matseev, N. or other wrongful acts, if

- they caused or could cause grave consequences for Buynov, G. or his relations and friends?
7. If a negative answer has been given to the fourth question and an affirmative answer has been given to the first question, did Matseev, N. attack Buynov, G., so that the attack constituted a real danger to his life and health, and Buynov, G. was forced to defend himself?
  8. If an affirmative answer has been given to the previous questions, did Buynov, G. exceed the limits of self-defense?
  9. If an affirmative answer has been given to the previous question, is Buynov, G. guilty of murdering Matseev, N., in excess of self-defense?
  10. If an affirmative answer has been given to questions four, six, or nine, does Buynov, G. deserve leniency or special leniency?

Although we could sensitize the advocates to the imperative of analyzing the law in closing, the Russians unwittingly had taught us to be less cerebral and analytical and to be more in touch with the human drama that lies at the heart of each case.

## XII. Conclusion

From the late 1980s therefore the former USSR has been in a permanent state of crisis. It would be a brave man who would predict the course of events there over the next five years.

Peter Neville, *A Traveller's History of Russia and the USSR* 287

Early returns in trial by jury show great promise for the Russian defense bar. In 1994, the percentage of acquittals in non-jury trials in all of Russia was 1.7%; of all criminal cases tried before a jury, 18% resulted in acquittal. These statistics are made more meaningful by the fact that because truth is the goal, plea bargaining does not occur. Consequently, more cases for which there is no defense proceed to trial. Because of historic abuses, Russian jurors perhaps understand better than contemporary American jurors the rationale for presuming the defendant innocent.

Like every aspect of Russian society, the state of advocacy in trial by jury is burdened by the past as it concurrently seeks to take hold of the future. Trial by jury is imperilled by the same political and economic forces that threaten the new Russian society. The

most consistent theme echoed by the advocates was their fear that, as with all other reforms, trial by jury would be abolished in a return to dominance by the Communist Party. Two months after our visit, President Yeltsin submitted to the *Duma* a draft law which would provide for the introduction of a jury system in 12 additional *oblasts*, including Kaluga and Tver. However, while he survived the Communist challenge to his re-election, President Yeltsin's continuing health problems have generated a behind-the-scenes struggle for power and a return to uncertainty.

The prospects for the future were voiced best by the senior member of the Collegium in Tver. If trial by jury succeeds, he offered, it will mean that democracy has conquered. For trial by the citizenry rather than by edict can thrive only in a larger society governed by its people.

