

## Truth, Facts, and Authenticity in Russian Imperial Jurisprudence and Historiography

EKATERINA PRAVILOVA

How do historians think? How do judges arrive at their decisions? What can a historical comparison between the methods of reasoning and substantiation in two contiguous disciplines contribute to our understanding of Russia's politics and culture? This article focuses on the use of evidence and the different ways of seeking truth and justice in historical studies and jurisprudence to reveal and explain the effects of legal and political governance on intellectual life and the processes of decision making. Instead of dealing with such visible and obvious frames and mechanisms of control as censorship and policing, the article analyzes more subtle methods, revealing the role of power in the creation of epistemic regimes. My research traces the transition from a regime circumscribed by the formal theory of proofs—under which a judge or a historian was forced to operate by registering, recording, and summarizing proofs—to a freedom in the interpretation of evidence that verged on extreme and was unseen elsewhere in Europe. Both regimes, as we will see, led to debates and discontent.

At the same time, as this article suggests, the influence of power was never all-encompassing: intellectuals, lawyers, and writers learned how to adapt their rhetorical means to the rules and, more importantly, developed new methods in dialogue with one another. Historians of European thought have shown that the development of rhetoric and the methods of reasoning in modern Europe resulted in the emergence of common “evidential paradigms” across

---

This article has gone through many rounds of revision, and I am extremely grateful to the colleagues who have helped me with it: all the *Kritika* editors and an anonymous reviewer, Tatiana Borisova, Igor Fedyukin, Michael Gordin, Igor Khristoforov, Nathaniel Knight, Elena Vishlenkova, Paula Vedoveli, Mikhail Velizhev, Ilya Vinitzky, Richard Wortman, and many others.

several disciplines, including history and jurisprudence.<sup>1</sup> The Russian case shows a similar trajectory: historical studies and jurisprudence did not only continuously borrow jargon and tools from each other, they also drew ideas and inspirations from common sources such as logic, philosophy, philology, and the sciences and contributed to the general development of epistemology in the social sciences and humanities. A small world of intellectuals was permeated with ideas that circulated from one field to another, and this was especially true for the methods of source analysis and the examination of authenticity of things, texts, and facts.<sup>2</sup> Vladimir Spasovich—one of the most outstanding jurists and writers of his time—in a series of lectures on the theory of evidence (1860) pointed out that the methods of cognitive activity were universal. “The question of legal proof is not essentially a judicial one. It belongs to the sphere of logic and anthropology, while its roots go deep into the philosophical soil.”<sup>3</sup> As he observed, “the history of legal proof is the history of the national mind.”<sup>4</sup>

Yet the Russian case and its specifics need further exploration. First, the way in which Russian lawyers and scholars connected the issues of cognition and rhetoric with the freedom of thought and civil freedom in general deserves our attention. The liberation of the mind from the stifling pressure of the formal theory of proof was one of the main motives driving historiographical debates in the 1820s–30s and the principle of the legal reform in 1864. In the late 19th century, intellectuals interpreted the proposed reintroduction of the rules concerning the use of evidence in courts as a limitation on their

<sup>1</sup> Carlo Ginzburg, “Clues: Roots of a Scientific Paradigm,” *Theory and Society* 7, 3 (1979): 273–88; Ginzburg, “Checking the Evidence: The Judge and the Historian,” *Critical Inquiry* 18, 1 (1991): 79–92; Barbara J. Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships between Natural Science, Religion, History, Law, and Literature* (Princeton, NJ: Princeton University Press, 1983); Mary Poovey, *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society* (Chicago: University of Chicago Press, 1998). Several historians have explored the problem of using legal rhetoric in historical works. See, among many, Robin W. Winks, ed., *The Historian as Detective: Essays on Evidence* (New York: Harper and Row, 1969); Donald R. Kelley, *Historians and the Law in Postrevolutionary France* (Princeton, NJ: Princeton University Press, 1984); Peter Novick, *That Noble Dream: The “Objectivity Question” and the American Historical Profession* (New York: Cambridge University Press, 1988); and Ia. S. Lur’ė, “O tak nazyvaemoi prezumptsii nevinovnosti istochnika,” in his *Izbrannye stat’i i pis’ma* (St. Petersburg: Izdatel’stvo Evropeiskogo universiteta, 2011), 91–97.

<sup>2</sup> For the analysis of debates on authenticity in the context of art, see Ekaterina Pravilova, “The Trouble with Authenticity: Backwardness, Imitation, and the Politics of Art in Late Imperial Russia,” *Journal of Modern History* 90, 3 (2018): 536–79.

<sup>3</sup> V. D. Spasovich, “O teorii sudobno-ugolovnykh dokazatel’stv v svyazi s sudoustroistvom i sudoproizvodstvom,” in *Sochineniia V. D. Spasovicha* (St. Petersburg: Brat’ia Rymovichi, 1890), 3:167.

<sup>4</sup> *Ibid.*, 173.



free will, even though the absolute freedom of judging in jurisprudence often conflicted with one of the main premises of the judicial system—legality. Second, the dichotomy of freedom/unfreedom in the interpretation of sources and evidence was often seen in religious dimensions, where belief was opposed to reason. In the official pre-reform historical literature, history, being based on belief in tradition and consensus, made the issue of authenticity irrelevant. Third, and most importantly, the issues of truth and authenticity often had strong moral connotations. The centrality of the tension between the two kinds of truth in Russian culture has been observed many times. It corresponded to two different words designating truth in Russian: *istina*, factual (or cognitive) truth, and *pravda*, moral truth.<sup>5</sup>

### Belief

Although the bulk of my analysis is focused on the 19th century, it is necessary to begin with a short overview of the philosophical foundations of jurisprudence and historical studies laid down in the 18th century. The development of epistemology in history and law in the 18th century was to a great extent shaped by the spirit of the well-ordered police state, which saw virtue in the minute regulation of human activity as well as in the desubjectivization of decision making. Its quintessence was expressed in the works of several European philosophers—in particular, in the logic of Christian Wolff, which had reached Russia through translations and various interpretations, Wolff's rationalism and empiricism encouraged orderliness and fed into the mechanistic view of society that served as the main ideological principle of Peter I's reforms. Logic, fundamental to Wolff's philosophy, acquired the quality of a universal scholarly discipline. Russian textbooks and treatises on logic of that period, most importantly, Friedrich Christian Baumeister's multiple publications, broke down Wolffian philosophy into a set of even more straightforward and pragmatic rules of reasoning.<sup>6</sup>

According to these principles, the methods of cognition and the practices of reasoning were classified into two categories: "historical reasoning," which

<sup>5</sup> For the meaning of *pravda* and *istina* in Russian imperial political culture, see Richard Wortman, "Pravda and the Rhetoric of Moral Transcendence," in *The Power of Language and Rhetoric in Russian Political History: Charismatic Words from the 18th to the 21st Centuries* (New York: Bloomsbury Academic, 2018). On the distinction between *pravda* and *istina*, see also Anna Wierzbicka, "Russian Cultural Scripts: The Theory of Cultural Scripts and Its Application," *Ethos* 30, 4 (2002): 414; and Svetlana Boym, *Common Places: Mythologies of Everyday Life in Russia* (Cambridge, MA: Harvard University Press, 1994), 96–99.

<sup>6</sup> In Gustav Shpet's unfavorable characterizations, Baumeister was one of "hundreds of Wolff's dull followers," "boring and narrow-minded" (*Ocherk razvitiia russkoi filosofii* [Moscow: ROSSPEN, 2008], 89).

represented the most “primitive” form of human cognition, was contrasted to “philosophical” and mathematical reasoning. History, in this interpretation, referred to all things that had happened in the past—historical events, natural processes, or crimes. The rules of historical cognition involved only sensory perception of narratives and images related to these events. Therefore, as Baumeister’s textbook on logic suggested, historical “probability” should have been defined only by the genuineness of experience reflected in authentic sources.<sup>7</sup> The Russian edition of Christian Wolff’s *Vernünfftige gedanchken von den kräfte[n] des Menschlichen verstandes und ihrem richtigen Gebrauche in erkantniss der Wahrheit* (published in German in 1736, written in 1712) emphasized that historical descriptions (*pisaniia*, or *povesti*), in contrast to scholarly works (*ucheniiia*), are based on belief. “One cannot know historical truth [*spravedlivost* ], but can only *believe* in it” (emphasis added); therefore the rules of historical work were reduced to the assessment of the trustworthiness of witnesses’ accounts and the detection of lies.<sup>8</sup> Historical cognition was not supposed to break into the sphere of “philosophical” reasoning, which implied analytical operations other than simple sensory observation. Information mined from reliable sources was, therefore, deemed identical to the reality that they reflected.<sup>9</sup>

In jurisprudence, the application of Wolffian logic resulted in the rationalization of criminal jurisprudence on the basis of the so-called formal theory of proofs. The introduction of the “formal theory of proof” by Peter the Great in 1716 was a great achievement of the police state: it imposed rigid rules of “objective” justice on unreliable judges to eliminate arbitrariness. The law, obviously, could not list all the criteria of truth or the kinds of proof needed to support it, because crimes represented free and random deviations from a norm and, therefore, were unforeseeable.<sup>10</sup> The range

<sup>7</sup> See the translation of Friedrich Christian Baumeister’s *Institutiones philosophiae rationalis, methodo Wolfii conscriptae* (1765), published in Russian as *Logika Bavmeistera*, trans. Iakov Tolmachev (Moscow: A. Reshetnikov, 1807), 3–4, 150–55; 1st ed., trans. A. Pavlov, 1760. In Russian forensic medical terminology, “historical” meant “descriptive.” See Elisa Becker, *Medicine, Law, and the State in Imperial Russia* (Budapest: Central European University Press, 2011), 65.

<sup>8</sup> [Christian Wolff], *Razumnyye mysli o silakh chelovecheskogo razuma i ikh ispravnom upotreblenii v poznanii pravdy*, trans. Matvei Begichev (St. Petersburg: Tipografia Artilleriiskogo i inzhenernogo shliakhteskogo kadetskogo korpusa, 1765), 215. See also chap. 7, “O nauke, vere, mneniiakh i zabluzhdeniakh”; and chap. 10, “Kak o pisanii rassuzhdat’ dolzhno.”

<sup>9</sup> As the Russian historian A. S. Lappo-Danilevskii observed, Wolff and his followers “mixed history-as-existence” with “history-as-knowledge,” assuming that history embraced “only what has happened or exists in reality” (*Metodologiiia istorii* [Moscow: ROSSPEN, 2010], 150–51). See also V. A. Zhuchkov, “Metafizika Vol’fa i ee mesto v istorii filosofii Novogo vremeni,” in *Khristian Vol’f i filosofiiia v Rossii*, ed. Zhukov (St. Petersburg: Izdatel’stvo Russkogo khristianskogo gumanitarnogo instituta, 2001), 16.

<sup>10</sup> Ia. I. Gurliand, *Iuridicheskii leksikon*, no. 8 (Odessa: Russkaia tipografia, 1888), 288.

of evidence available to judges was very limited and included confession, testimonies, the cleansing oath, and written documents—which, unless these were official, could be used as evidence only if they were supported by witnesses' testimonies. Every proof had its value; some proofs were counted as “complete”—that is, indisputable and sufficient to secure an accusation—while others were “incomplete” and could be taken into account only if they were numerous or accompanied a “complete” proof. An accused person's confession had the highest value, while a witness's testimony was considered incomplete unless it was complemented by another witness's account. If two witness accounts coincided, they made up a complete proof sufficient for conviction. Circumstantial evidence (*uliki*), including material objects, never had the status of either a complete or an incomplete proof, because judges were not given the freedom to weigh the value of evidence and give their own opinions: as a result, in the absence of any “complete” proof, a criminal could walk away, even if the indirect evidence left no doubt of his or her culpability. As a Russian legal periodical characterized this system, “judges acted as automatons or, better, as arithmetical counters dealing with numbers through the elementary operations of addition and subtraction.”<sup>11</sup> In contrast to the formal theory of proof, the system of free evaluation of evidence that existed in British common law and spread across the European continent after the French Revolution allowed judges and juries to consider evidence and make their own decisions based on *l'intime conviction*.<sup>12</sup> The system of the judge's free discretion rested on a set of completely different epistemological principles; these assumed that, although the absolute truth cannot be fully attained, judges should strive to reach a state of mind closest to full conviction of the impossibility of a different decision or conclusion.

The formal theory of proof, its good intentions to eliminate judicial arbitrariness notwithstanding, suffered from several major defects. Its heavy reliance on witnesses' testimonies strikes a modern reader as naïve: it was assumed that if two people testified the same, they must have been telling the truth, since it is impossible that “two witnesses are mistaken in their sensory perception [*chuvstva*] of the same subject.”<sup>13</sup> Similarly, the historian's task consisted in putting together narratives in order while muting his own voice. However, attempts to eliminate the subjectivity of authorship could result in

<sup>11</sup> *Iuridicheskoe obozrenie*, no. 2 (1881): 35. Barbara Shapiro described the continental evidential system, which Russian legislation dutifully imitated, in similar terms: it “involved a kind of numerical calculation, the judge being a kind of accountant who totaled up the fractions” (*Probability and Certainty in Seventeenth-Century England*, 174).

<sup>12</sup> Spasovich, “O teorii,” 236.

<sup>13</sup> A. G. Krivorotov, *Rassuzhdenie o znachenii svidetelei v ugovnom sudoproizvodstve, po nachalam rimskogo i rossiiskogo sudoproizvodstva* (Khar'kov: Universitetskaia tipografiia, 1832), 71.

just the opposite. Aleksei Tolochko's innovative study of Vasilii Tatishchev's *Istoriia rossiiskaia*—the first modern compendium on Russian history—shows that although Tatishchev tried to create the appearance of compilation (i.e., trustworthiness), he sneaked into his text a substantial number of invented and stylized descriptions and statements.<sup>14</sup> Tolochko interprets Tatishchev's forgery (or creativity) as an example of remarkable historical thinking, very atypical for his time. From our perspective, it is nevertheless important that to ensure the trustworthiness of his work, Tatishchev pretended that he had not added anything of his own. Therefore, the strict application of the formal rules of evidence did not eliminate creativity in historical writing, just as it could not preclude arbitrariness in criminal practices.

### Doubt

In the early 19th century, Kantian philosophy slowly penetrated the university teaching of philosophy, imbuing scholars with doubt of the possibility of authentic knowledge. August Schlözer, a prominent German scholar and a representative of the historical *Aufklärung*, led the way in Russian scholarship with his critical study of the multiple copies (*spiski*) of Russian chronicles compiled in the 11th century and publication of the medieval Primary Chronicle.<sup>15</sup> The original text written by Nestor the Chronicler did not survive, while the copies—the earliest dated to the 13th century—contained multiple interpolations and alterations. Schlözer's research followed a two-step analytical strategy: the first, “lower critique” was aimed at eliminating errors and slips of the copyists' pens through the comparison of copies, while the “higher critique” was meant to restore the semantic and the textual integrity of the source by purging any additions made to the original text.<sup>16</sup> Schlözer's critique also assumed the analysis of the text's genesis: from a *predanie* (orally transmitted tradition) to a chronicle. One of the criteria that he used in distinguishing *basnoslovie* (legend) from *predanie* was the trustworthiness of witnesses and their chronological proximity.<sup>17</sup>

<sup>14</sup> Aleksei Tolochko, “*Istoriia rossiiskaia*” *Vasilii Tatishcheva: Istochniki i izvestiia* (Moscow: Novoe literaturnoe obozrenie, 2005), 8–20. Tolochko discusses Wolff's influence on 252, 407–9.

<sup>15</sup> On the “anti-Wolffian posture” of *Aufklärung* historians, including Schlözer, see Peter Hanns Reuill, *The German Enlightenment and the Rise of Historicism* (Berkeley: University of California Press, 1975), chaps. 1–3.

<sup>16</sup> A. L. Shlozer [Schlözer], *Nestor: Russkie letopisi na drevle-slavenskom iazyke* (St. Petersburg: Imperatorskaia tipografiia, 1808), xviii. For the most comprehensive analysis of the development of the study of chronicles, see Varvara Vovina-Lebedeva, *Shkoly issledovaniia russkikh letopisei, XIX–XX vv.* (St. Petersburg: Dmitrii Bulanin, 2011)

<sup>17</sup> Schlözer commented on the criteria of verisimilitude in relation to orally transmitted tales in an ironic comparison with his grandmother's tales: “My late grandmother told me a lot about

The emergence of a critical trend in the historical literature led first to heated debates about the authenticity of chronicles and the verisimilitude of events that they described. New philosophical trends created an interesting amalgam of Kantian idealism and Wolffian epistemology.<sup>18</sup> In these initial debates historians, while critically examining the authenticity of narratives, extrapolated the authenticity of sources from the plausibility of historical events, therefore applying the rules of Wolffian logic, which assumed an immediate and direct linkage between evidence and facts. If a source was doubtful, it meant that the events it described had never happened, and a historian was not allowed to hypothesize or fill in gaps in the historical timeline left by sources; however, the trustworthiness of sources was often defined, quite arbitrarily, on the basis of the author's reputation. Mikhail Kachenovskii, emulating Barthold Georg Niebuhr's critique of biblical sources, declared that since the earliest available copies of the initial Russian chronicles of the 11th century had been made only in the 13th century—that is, at least a century and a half later and three to four centuries after the events they described—the entire history of the formation of the Russian state and its early development was no more than a myth (*predanie*).<sup>19</sup> Therefore, if Schlözer admitted the possible authenticity of an oral tradition that was later recorded, for Kachenovskii and his pupils that tradition and chronicles based on them were not trustworthy.<sup>20</sup> There was no Russian state with its princes, or, if they did exist, no one could know for sure what was real in the description of its first rulers' lives and deeds.

Kachenovskii's and his allies' disavowal of early Russian history as “not trustworthy” (*nedostovernaia*) combined Schlözer's criticism with Wolff's

---

the Thirty Years War: I believed it, because she had heard about it from her grandmother, who lived during this war. But if she had tried to tell me something about the times of Charles V or even Charlemagne, then ... Out of respect for her, as a child, I would remain silent [*Detskoe pochtenie zastavliaet menia molchat* ] (*Nestor*, ng [pages in the introduction marked by letters]).

<sup>18</sup> One example of such a philosophical hybrid, Petr Lodyi's textbook on logic, defined “historical authenticity” as “a state of mind in which we recognize the sameness of our thought with a certain object” (P. D., *Logicheskie nastavleniia, rukovodstvuiuushchie k poznaniuiu i k razlicheniiu istinnogo ot lozhnogo* [St. Petersburg: Ion Ioannesov, 1815]). On the eclectics of Wolffianism and Kantianism in Russia, see Shpet, *Ocherk razvitiia*, 135, 167, 192. Some studies have suggested that the rupture brought about by the “Kantian revolution” was not so abrupt, and Kant's epistemology drew heavily on Wolff's psychology. See, e.g., Thomas P. Saine, *The Problem of Being Modern or the German Pursuit of Enlightenment from Leibnitz to the French Revolution* (Detroit: Wayne State University Press, 1997), 122.

<sup>19</sup> M. T. Kachenovskii, “Ob istochnikakh dlia russkoi istorii,” *Vestnik Evropy*, no. 5 (1809): 14–15; Kachenovskii, “O pol'ze izucheniiia rossiiskoi istorii v sviazi s vseobshchei: Rassuzhdenie iz klassa rossiiskoi istorii prepodavaemoi professorom Kachenovskim,” *Uchenye zapiski Imperatorskogo moskovskogo universiteta*, no. 4 (1833): 25, 28–29.

<sup>20</sup> Vovina-Lebedeva, *Shkoly*, 110.

worship of logic and syllogisms. The Skeptics, as this school came to be known, claimed that their denial of the chronicles' veracity was based solely on the application of simple rules of logic and accused the other party of using "false syllogisms," by which they meant connecting an array of unproven facts into a logical sequence (the existence of Nestor the Chronicler, his authorship of the original chronicle, and the later chronicles' reliance on this primary text). However, by planting a kernel of doubt as to the authenticity of chronicles, the Skeptics, who stood apart from politics, inadvertently undermined the official historical narrative of the court—above all, Nikolai Karamzin's.<sup>21</sup>

One of the Skeptics' most radical methodological innovations was an attempt to apply speculative thinking to the analysis of authenticity and, more precisely, the inherent authenticity of facts, not only sources. Kachenovskii developed this principle in a series of articles that undermined Karamzin's claims regarding the existence of leather money in pre-Mongol Russia.<sup>22</sup> This seemingly insignificant claim carried an important epistemological and political message. Kachenovskii argued that the existence of leather money was impossible due to the condition of Russian culture and society: the circulation of state-branded leather money required an ability to operate with abstract notions of credit. The Russian medieval mind could not comprehend these notions; therefore, leather money was a myth.<sup>23</sup> Elsewhere, Kachenovskii expressed this thought even more strongly, defining the "highest" critique of sources as the analysis of the probability of a source's account: that is, its conformity with the general laws of the development of a certain society.<sup>24</sup>

An argument based on the probability of an event or a phenomenon as defined by external conditions was novel and, inadvertently, subversive.

<sup>21</sup> S. M. Stroev [Sergei Skromnenko], "O mnimoi dostovernosti, pervobytnom sostoianii i istochnikakh nashikh letopisei," *Syn otechestva*, no. 11 (1835): 19–42; Stroev, *O nedostovernosti drevnei russkoi istorii i lozhnosti mneniia kasatel'no drevnosti russkikh letopisei* (St. Petersburg: Grech, 1834).

<sup>22</sup> M. N. Karamzin based his claims on the interpretation of foreign narrative sources and, most importantly, on an analogy with the existing monetary system. The existence of leather money in medieval Rus' was meant to support the government's right to print paper assignats not backed by metallic bullion and dismiss Mikhail Speranskii's ideas of basing monetary circulation on the silver standard. Karamzin's historical claim was a projection of his political stance on this issue (*Istoriia gosudarstva rossiiskogo*, 4th ed. [St. Petersburg: Smirdin, 1834; 1st ed. 1819], 5:387; Karamzin, *Karamzin's Memoir on Ancient and Modern Russia: A Translation and Analysis*, ed. Richard Pipes [Ann Arbor: University of Michigan Press, 2005], 171–74).

<sup>23</sup> M. T. Kachenovskii, "O kozhanykh den'gakh," in his *Dva rassuzhdeniia o kozhanykh den'gakh i o Russkoi Pravde* (Moscow: Universitetskaiia tipografiia, 1849), 20.

<sup>24</sup> M. T. Kachenovskii, "Istoricheskie spravki ob Ioanne Ekzarkhe Bolgarskom," *Vestnik Evropy*, no. 13 (1826), quoted from Ia. S. Lur'e, "Problemy kritiki istochnika," in *Izbrannye stat'i i pis'ma*, 24. A similar claim was made in the work of Kachenovskii's most capable disciple, Skromnenko (Stroev), in *O nedostovernosti*.



It did not comply with the dominant, formal rules of historical reasoning based on perceptions, and it allowed for a dangerous degree of freedom in the evaluation of evidence. As Pavel Miliukov pointed out, Kachenovskii and his followers “did not completely understand” the importance of their idea and its radicalism; neither did they grasp the political message that their claims conveyed.<sup>25</sup> Nevertheless, Kachenovskii’s conclusions (many of which were indeed false) and nihilism outraged many Russian nationalists, including Mikhail Pogodin—a talented but cynical and opportunistic historian. Supported from above, Pogodin assailed Kachenovskii with sound criticism and ultimate rudeness.

Pogodin’s responses to Kachenovskii’s doubts were especially remarkable in their abundant use of legal rhetoric, as if the debate between the Skeptics and the anti-Skeptics were a trial of chroniclers complicit in forgery. Pogodin himself did not deny the value of the critical reading of sources, and in this sense he followed Schlözer, but the methods of arguing exhibited remarkable “Wolffianism.” Not only the vocabulary but also the ways of putting together arguments pro and contra the authenticity of chronicles replicated the formal theory of proof that constituted the central element of Russian pre-reform judicial procedure. The system of proof was centered on testimonies, and both the Skeptics and the anti-Skeptics had in mind a certain hierarchy of evidence that prioritized the testimonies of witnesses over hearsay evidence, and the testimonies of contemporaries over ones written about events in the past. Mikhail Pogodin argued that even though the testimonies of the first group (immediate witnesses) were missing, the testimonies of secondary value (foreigners) all coincided in their description of events in the Primary Chronicle and, therefore, proved its authenticity. He used the method of summing up “incomplete” evidence (foreign accounts) to substitute for the lack of a complete one (contemporary testimonies)—to the extent that Konstantin Bestuzhev-Riumin called Pogodin’s method “mathematical”—similar to the arithmetical methods of summing up evidence in court.<sup>26</sup> Nestor the Chronicler’s status as a saint also added value to the veracity of the chronicle’s account, although he was revered not as a Christian martyr or hero but as the author of the same chronicle (ironically, this was indeed a logical error). For their part, Kachenovskii and the Skeptics asserted that the second-hand foreigners’ accounts were too scarce and insufficient; as for Nestor, the Skeptics grounded their lack of trust on the assumption that all ancient

<sup>25</sup> P. N. Miliukov, *Glavnye techeniia russkoi istoricheskoi mysli* (Moscow: I. N. Kushnerev, 1898), 239.

<sup>26</sup> K. N. Bestuzhev-Riumin, “Sovremennoe sostoianie russkoi istorii kak nauki,” *Moskovskoe obozrenie*, bk. 1 (1859): 55.

chroniclers were inclined to mythologize. Nestor was an ancient chronicler; therefore, he made up the story.<sup>27</sup>

The standoff between Kachenovskii and Pogodin ended with Kachenovskii's academic downfall. Pogodin took Kachenovskii's professorial position at Moscow University, even though Kachenovskii assumed new administrative posts.<sup>28</sup> The "skeptical school" gradually ceased to exist. Despite this ending, historians of subsequent generations have revered Kachenovskii as a Don Quixote of Russian historiography: an unfortunate, naïve, and noble soldier in the service of truth and an opponent of the stifling officialdom of nationalist history. In 1830, Nikolai Polevoi, the author of *The History of the Russian People*, took the criticism of the existing dogma of official epistemology to the next level and bravely declared that a historian "is not a teacher of logic," "neither is he a judge," but a scholar who pursues "truth" armed with both "speculation and experience" (*umozrenie i opyt*, the inclusion of *umozrenie*—literally, the mind's vision—is significant).<sup>29</sup> This was, indeed, a powerful demarche against Wolff's (or, rather, Baumeister's) logic, the formal theory of proofs and their application to history. But perhaps the most immediate follower of Kachenovskii's ideas was Nikolai Nadezhdin—a prominent historian and philosopher who owned and edited an intellectual almanac, *Teleskop*.<sup>30</sup> Remarkably, Kachenovskii and Nadezhdin did not get along: Nadezhdin was a true public intellectual, well plugged into academic debates and politics, while Kachenovskii consciously stayed away from political matters. Kachenovskii did not welcome the young scholar's fascination with Schelling, while Nadezhdin did not share Kachenovskii's nihilism. But together, their criticism of formal methods forged a new philosophical path for the development of the historical literature.

In late 1836, Nadezhdin wrote an essay "On Historical Truth and Authenticity," in which he objected to the practice of identifying

<sup>27</sup> Vovina-Lebedeva's work shows that, despite disagreements, Pogodin's and the skeptics' approaches to textual analysis had much in common. Both originated—indirectly—in German intellectual tradition (Vovina-Lebedeva, *Shkoly*, 110–22).

<sup>28</sup> M. P. Pogodin, *Nestor: Istoricheski-kriticheskoe rassuzhdenie o nachale russkikh letopisei* (Moscow: Universitetskaya tipografiya, 1839). Kachenovskii kept his position as professor of Slavic languages (Miliukov, *Glavnye techeniia*, 247). On the polemics between Skeptics and anti-Skeptics, see Konstantin Umbrashko, "Skepticheskaia shkola" v istoricheskoi nauke Rossii pervoi poloviny XIX veka (Novosibirsk: Kant, 2006); V. S. Ikonnikov, *Opyt russkoi istoriografii* (Kiev: Tipografiya Universiteta Sviatogo Vladimira, 1891–92), 1, bk. 1; and Ikonnikova, *Skepticheskaia shkola v russkoi istoriografii* (Kiev: Tipografiya Universiteta Sviatogo Vladimira, 1871).

<sup>29</sup> N. A. Polevoi, *Istoriia russkogo naroda*, 2nd ed. (Moscow: Avgust Semen, 1830), 1:xx. Polevoi dedicated his book to Niebuhr.

<sup>30</sup> Miliukov, *Glavnye techeniia*, 240.

historical cognition as merely empirical (*opytnoe*)—that is, limited to the sensory perception of proof, in opposition to speculative or metaphysical (*metafizicheskoe*) cognition that involved analysis and logical construction. Nadezhdin called on historians to complement the examination of historical sources with their own independent judgment of “historical possibility,” which every scholar must be able to assess on the basis of his knowledge of history, geographical, and cultural conditions, as well as other factors.<sup>31</sup> He urged his colleagues to disconnect “facts” from the “authenticity of sources,” since facts themselves can possess their own internal “authenticity.” According to Nadezhdin, the attainment of truth was possible only if both kinds of authenticity—of evidence and facts—were present. In essence, Nadezhdin’s article represented a call for the liberation of a scholar’s mind from the rules of the formal theory of proof and the imposed narratives of the official historical literature. It was also, in his own words, a “revolt” against “[Christian] Wolff and empiricism,” inspired by Kantian and Schellingian philosophies and the belief in the power of human reason.<sup>32</sup>

The idea of judging historical events based on their theoretical possibility (or impossibility) and historians’ subjective views may appear absolutely intolerable today. In 1966, the Soviet historian Iakov Lur’ė returned to the critique of Nadezhdin’s idea of probability, which, if put in the context of Soviet historiographical debates, justified the application of certain “objective” (read: Marxist) laws of history. For historians working under the Soviet regime, empiricism was a shield that allowed them to create a safe space free of ideological pressure.<sup>33</sup> However, in the Nicholaevan Russia of the 1830s, empiricism stood for the enserfment of the mind by the formal rules of proof. Kachenovskii’s and Nadezhdin’s method did not suggest free hypothesizing based on the possibility of facts or sheer “verisimilitude” but instead allowed for a more complex relationship between evidence and reality.

It is not surprising, then, that both historical skepticism and the demands to professionalize knowledge that logically followed from Nadezhdin’s essay came to be seen as assaults against national pride and memory. Nadezhdin, as Mikhail Velizhev and Nathaniel Knight have shown, wrote his essay on historical truth while he was under investigation for the publication of Petr Chaadaev’s “Philosophical Letter to a Lady” in his journal *Teleskop* in October

<sup>31</sup> N. I. Nadezhdin, “Ob istoricheskoi istine i dostovernosti,” *Biblioteka dlia chteniia* 20 (1837): 154.

<sup>32</sup> N. I. Nadezhdin, “Avtobiografiia,” *Russkii vestnik*, no. 2 (1856): 53–54.

<sup>33</sup> Ia. S. Lur’ė, “Kritika istochnika i veroiatnost’ izvestiia,” and “Problemy kritiki istochnika,” in *Izbrannye stat’i i pis’ma*.

1836.<sup>34</sup> Chaadaev's famous article on the relationship between Russia and the West suggested Russia's inferiority—reflected, among other things, in Russian minds' inaptitude for logical thinking. Minister of Public Education Sergei Uvarov—infuriated by the article, to which even the political police remained indifferent—took the lead role in the investigation and trial, which ended with Nadezhdin's exile to a remote northern village, Ust'-Sysol'sk.<sup>35</sup>

In 1850, not long after stepping down from his ministerial position, Uvarov wrote an essay that we can consider a response to Kachenovskii's, Nadezhdin's, and other historians' writings and an explanation of his own views. Uvarov's "Does Historical Authenticity Progress?" identified the "passion for deconstructing [*razlagaiushchii*] analysis" with moral nihilism that, from his point of view, precluded, rather than facilitated, the search for authentic history. Uvarov's essay depicted a dystopian picture of the regression of history: while historical sources became more abundant, uncertainty only increased. "Darkness thickens as the number of [historical] works grows."<sup>36</sup> As a result, every event or personality acquired a dual existence: first in people's memories, and second in the portrayals of historians. For Uvarov, authenticity was not equivalent to precision, which was impossible and therefore misleading. In his interpretation, only history that lived in people's memories as a "chain of tales" (*predanii*) was authentic.<sup>37</sup> "It is futile to seek

<sup>34</sup> Mikhail Velizhev, "'L'affaire du Télescope': Eshche raz o datirovke statei Nadezhdina 1836 g.," *Con Amore: Istoriko-filologicheskii sbornik v chest' Liubovi Nikolaevny Kiselevoi* (Moscow: OGI, 2010), 92–93. The most significant evidence that points out the connection between the investigation of the *Teleskop* affair and Nadezhdin's article on authenticity is a paragraph in which Nadezhdin laments the impossibility of convincing judges to believe personal testimonies. It also draws parallels between historical truth and justice. To quote this article: "And it is you, a living individual, speaking in front of the court of people who know you, and yet you cannot defend the truth that is obvious to you from slander, which is no less than the everyday abuse of criticism. What then can be said about these testimonies that has come down to us from antiquity, sometimes anonymous, or even with names that are dead, dumb, and defenseless?" (*Ob istoricheskoi istine i dostovernosti*, 153).

<sup>35</sup> Nathaniel Knight, "Nadezhdin, Chaadaev, and the Ethnographic Turn," unpublished paper presented at the Northeast Slavic, East European, and Eurasian Studies (NESEEEES) in 2015, 8. I am very grateful to Nathaniel Knight for pointing out that Nadezhdin was under arrest and for sharing this unpublished piece with me.

<sup>36</sup> S. S. Uvarov, *Sovershenstvuetsia li dostovernost' istoricheskaiia?* (Dorpat: Laakmann, 1852), 14. Originally written and published in French as *Le certitude historique, est-elle progrès?* (1850). There were two previous translations into Russian in *Sovremennik*, no. 1–2 (1851), and *Moskvitianin*, no. 1 (1851). See also the publication and commentary in S. S. Uvarov, *Izbrannye trudy*, ed. V. S. Parsamov and S. V. Udalov (Moscow: ROSSPEN, 2010).

<sup>37</sup> After all, as Uvarov concludes, Romulus and Homer will stay alive "in the imagination of the majority," while Niebuhr and Friedrich August Wolf, who questioned their existence, will fall into oblivion (*Sovershenstvuetsia li dostovernost' istoricheskaiia?*, 10). This statement somewhat contradicts Uvarov's earlier reaction to Friedrich Wolf's works, which he accepted,

exact truth in history; the more it is lightened by national consensus, the more it resists any thorough research.” Historians wasted their time and efforts in vain, only proving the impotence of contemporary “criticism” and spreading the spirit of doubt.<sup>38</sup>

Uvarov’s essay—published in Russian in the early 1850s, at the twilight of Nicholas’s reign—conveyed the growing mood of uncertainty and discomfort produced by the emergence of new currents in philosophy and historical thought. Ultimately, Uvarov suggested the existence of two kinds of historical “truth”—one based on national consensus (truth is what people have agreed on), and a second based on critical analysis. The word *predanie*, which he used to define the essence of history in the sense of a tradition transmitted between generations, bore the premise of religious (Orthodox) belief contrasted to knowledge.<sup>39</sup> Uvarov urged historians to abandon their critical zeal, because only the first kind of truth was valuable and constitutive of the national spirit, while the second was dangerous and immoral. Uvarov—with his training in ancient history, languages, and Oriental studies—knew very well the value of critical analysis, so his preference for belief over knowledge was a political choice: doubt appeared to be harmful to autocracy. Minister of Public Education Platon Shirinskii-Shikhmatov, who replaced Uvarov in his office, expressed Uvarov’s idea in an even more straightforward way. In 1850, Shirinskii-Shikhmatov inspected Moscow University and attended Professor Sergei Solov’ev’s lecture on the authenticity of Russian medieval chronicles. Solov’ev said that the chronicles were indeed authentic, but the original text had not survived. The minister took this observation as an expression of skepticism and pounced on Solov’ev with anger. As Solov’ev remembered the encounter, “the infuriated Tatar” yelled, “The government does not want that! The government does not want that!” and did not accept any explanations from the historian.<sup>40</sup>

The works of pre-reform jurists conveyed an anxiety about uncertainty similar to Uvarov’s. By that time, the epistemological optimism of 18th-century legislators and the belief in the power of formal proof had already evaporated. Senator Pavel Degai opened his survey of criminal procedures published in 1847 with a rhetorical question: “Does absolute authenticity exist?” His response was negative. “Absolute proof does not exist: confession

despite regrets about losing the aesthetic pleasure of reading Homer (Vovina-Lebedeva, *Sbkoly*, 138).

<sup>38</sup> Uvarov, *Sovershenstvuetsia li dostovernost’ istoricheskaiia?*, 18.

<sup>39</sup> In Orthodoxy, the Holy (or Apostolic) Tradition (*Sviashchennoe predanie*, ἁγία παραδότης, *sacra traditio*) is seen as a source of *Sviashchennoe pisanie*—the Holy Bible.

<sup>40</sup> Shirinskii-Shikhmatov’s family was a descendant of Tatar beys (princes) (S. M. Solov’ev, *Moï zapiski dlia detei moikh* [Newtonville, MA: Oriental Research Partners, 1980], 139).

can be fictitious, witnesses' testimonies [can be] false, and the judge's intimate conviction [can be] even more erroneous because one individual cannot entail either the experience or the knowledge that are embodied in laws. If the fate of defendants is entrusted to a judge's unconditional arbitrariness, crimes will be punished differently, and people will be afraid of the judge, not of the court."<sup>41</sup> Therefore, for the sake of justice, the state had to circumscribe the truth-seeking process by as many rules as possible. Degai admitted that the more restrictions the law imposes on the use of evidence, "the more obstacles there will be to uncovering the crime."<sup>42</sup> However, he claimed that the principle "it is better to release a criminal than to convict an innocent person" justified the limitation on the judge's freedom of thought. Thus both Degai and Uvarov responded to the challenge of uncertainty by depriving judges and historians of the freedom to reason and the right to assess the probative value of evidence. As we will see, the alternative system of proof based on the principle of "internal conviction" also originated in the presumption of uncertainty and the impossibility of absolute truth. However, the proponents of new ideas dealt with the problem of doubt by empowering a scholar's or a judge's mind rather than circumscribing it by rules or tradition.

As we have seen, new tendencies in historical studies appeared as early as the 1820s despite the dominant official doctrine. Similarly, as Richard Wortman's magisterial study of the "development of a Russian legal consciousness" has shown, the shoots of the new legal thinking sprang up from under the old legal regime to flourish after its demise. Among the first bearers of a new legal ethos and the proponents of new methods in jurisprudence was Dmitrii Meier (1819–56), a young professor of civil law at Kazan University (1845–55), then St. Petersburg University (1855–56).<sup>43</sup> In 1854, Dmitrii Meier published *On Legal Fictions and Presumptions, on Hidden and Pretended Actions*, in which he explored, among other things, the spheres of law in which the judge has to either hypothesize the existence of legal norms in the absence thereof or to reconstruct facts in the absence of direct evidence.<sup>44</sup> While showing the role of presumptions, Meier relied primarily on Roman law, occasionally referring to the presence of some elements in Russian legislation and practice. His observation about the indispensability of discretion for executive authority suggested that the judges should also be given more freedom in making up

<sup>41</sup> Pavel Degai, *Vzgliad na sovremennoe polozhenie ugolovnogo sudoproizvodstva* (St. Petersburg: Tipografiia Ministerstva gosudarstvennykh imushchestv, 1847), 76.

<sup>42</sup> *Ibid.*, 99.

<sup>43</sup> On Meier, see Richard S. Wortman, *The Development of a Russian Legal Consciousness* (Chicago: University of Chicago Press, 1976), 229–30.

<sup>44</sup> D. I. Meier, *O iuridicheskikh vymyslakh i predpolozheniakh, o skrytynykh i pritvornynykh deistviakh* (Kazan: n.p., 1854).

their minds. Indeed, one of the characteristic main features of Russian pre-reform courts was the absence of the explicit possibility of presumptions: this denial was an attribute of Russia's political order and concomitant epistemological regime.

Meier's ideas continued the trend exhibited in Nikolai Nadezhdin's article on historical authenticity. His chapter on "hidden facts" postulated the possibility of proving the authenticity of facts through the analysis of analogies and the linkages between similar facts and phenomena. Therefore, it stretched the cognitive means of jurisprudence far beyond simple observation and arithmetic. The theory of legal fictions, presumptions, and hidden facts was later developed in a number of important juridical and historical works, but the appearance of Meier's book in 1854 was a real breakthrough. A year after its publication, a young expert on criminal law, Aleksandr Zhiriaev (1815–56) published his volume on the theory of circumstantial evidence in criminal law (*Teoriia ulik*). The book, which he defended as a doctoral dissertation, earned him the prestigious Demidov Award and a professorial position at St. Petersburg University. Both Meier and Zhiriaev studied law in Germany and belonged to the same generation of young scholars who developed their philosophical worldview in the stuffy atmosphere of Nicholas I's Russia—the generation of the "remarkable decade" of the 1830s–40s. Zhiriaev took Meier's professorial position when Meier died in 1856 at the age of 37, only to pass away the same year at the age of 41.

A devoted Hegelian, Zhiriaev made an attempt to connect German epistemology (*Wissenschaftslehre*) with criminology and invited his fellow lawyers to consider whether "the truth is attainable at all, and what are the conditions of its cognition: the testimonies of one's own senses or the judgments ... of one's mind."<sup>45</sup> Much like Nadezhdin, who had argued for the expansion of speculative (metaphysical) cognition, Zhiriaev suggested freeing judges' minds from the tenets of formal theory. The Russian formal system of evidence, as we know, attributed no value to circumstantial evidence because it necessitated granting judges the freedom to evaluate its authenticity, meaning, and probative value and to make logical deductions about the relationship between this evidence and the event in question. As Vladimir Spasovich declared in 1860, the introduction of circumstantial evidence into the category of legal proof required from the judge "special mental power": "The substantiation through the use of circumstantial evidence ... [comes from] the mind itself, which has matured and grown stronger and now asserts its rights by saying, 'give me [what is] due, give me

<sup>45</sup> A. Zhiriaev, *Teoriia ulik* (Dorpat: Laakmann, 1855), 9–10.

the [right] to participate directly in the organization of social relations.’”<sup>46</sup> At about the same time as Russian jurisprudence turned to the analysis of circumstantial evidence, historians also started looking for material remnants of events under investigation. Unlike antiquarians and collectors of the early 19th century, these scholars approached archaeological artifacts as sources that had to accompany written evidence. Remarkably, Sergei Uvarov’s son Aleksei pioneered this field in 1851–54 with his pathbreaking exploration of kurgan burials in Vladimir Province—a region that, according to the Primary Chronicle, was populated in the 9th century by a Finnish tribe called the Merya. Excavations confirmed the chronicle’s account, and the semimythical tribe that was later assimilated by its Slavic neighbors turned out to be real.<sup>47</sup>

## Reform

The publication of Meier’s and Zhiriaev’s books on hidden facts, presumptions, and circumstantial evidence—and Spasovich’s series of talks on the theory of proof delivered in 1860 in packed halls and attended by numerous members of the public, including many well-dressed ladies—gave the impression that major changes were already on the way, and the transformation of judicial procedure would have enormous social, cultural, and political meaning. The authors of the legal reform had in front of them a long menu of foreign institutional and procedural models, and they borrowed from them profusely. In the case of proof, the choice was between the Anglo-American model of the “law of evidence” that allowed judges to advise the jury on the relative strength and quality of evidence, and the French model of *l’intime conviction* that let the jury consider any proof or facts directly or indirectly connected to the case. Even Spasovich thought that the complete and abrupt elimination of the formal system of proof would not bring positive results: judges would be left without any normative support, guidance, or restrictions on the use of evidence. Spasovich argued for a compromise between an “objective” (formal) and “subjective” model, similar to the “law of evidence” in British common law, which, while allowing judges to appeal to their own consciences and minds, also offered a set of rules regulating the use of certain kinds of evidence, especially testimonies.<sup>48</sup>

<sup>46</sup> Spasovich, “O teorii,” 249.

<sup>47</sup> A. S. Uvarov, *Meriane i ikh byt po kurgannym raskopkam* (Moscow: Sinodal’naia tipografiia, 1872).

<sup>48</sup> *Ibid.*, 244–45. The key sources on British law of evidence were Jeremy Bentham’s *Rationale of Judicial Evidence* (London: Hunt and Clarke, 1827); and Carl Mittermaier’s *Das englische, schottische und nordamerikanische Strafverfahren* (Erlangen: Ferdinand Enke, 1851), translated and published in Russian in 1864.



Until 1862, procedural reform projects insisted on the preservation of the compromised model, obliging the judge “to take as truth only what has been legally proven” by “legal evidence.”<sup>49</sup> Lawmakers explained their choice by the underdevelopment of legal studies and education, which did not allow for “leav[ing] the judges without any legally established instruction on the power and the meaning of proof.”<sup>50</sup> However, the projected law also stressed that the main criterion of legal authenticity was the judge’s “internal conviction.” As one commentator noted, the two principles—the recognition of some proof as “legal” (and, consequently, other types of proof as “illegal”), on the one hand, and the reliance on the judge’s free conscience and reason, on the other, did not work, because the classification of evidence limited the judge’s free will.<sup>51</sup> Ultimately, the compilers of the penal code of procedure approved in 1864 chose the French model in its most radical form and imposed zero restriction on the choice of evidence and the evaluation thereof. Even the initially drafted instruction “on the strength of evidence”—which was supposed to have strictly advisory meaning for a jury—disappeared from the code, which emphasized that “legal authenticity” (*ugolovno-iuridicheskaia dostovernost’*) could not “have the character of mathematical certainty” (*matematicheskaia nesomnennost’*).<sup>52</sup>

In other words, truth could not be calculated: as Vladimir Spasovich put it, truth was “a photographic snapshot of nature on the optical lens of our conscience.”<sup>53</sup> Importantly, *l’intime conviction* of jurors was not identical to impression: “conscience” (*sovest’*) was deemed to be a state of mind, rather than a sensory condition.<sup>54</sup> This understanding of the meaning of truth

<sup>49</sup> “Sud’ia pri reshenii dela obiazan prinimat’ za istinu tol’ko to chto zakonnym obrazom dokazano,” art. 37, *Zapiska Gosudarstvennoi kantseliarii ob osnovnykh nachalakh sudoustroistva i sudoproizvodstva grazhdanskogo i ugolovnogo* (no publication date), 151.

<sup>50</sup> *Ibid.*, 134.

<sup>51</sup> N. Butskovskii, “O teorii dokazatel’stv v ugolovnom protsesse [1861–62],” in *Materialy po sudebnoi reforme v Rossii 1864 goda* (St. Petersburg: Tipografiia Gosudarstvennoi kantseliarii, 1866), 17:2.

<sup>52</sup> I. Ia. Foinitskii, *Kurs ugolovnogo sudoproizvodstva* (St. Petersburg: Senatskaia tipografiia, 1910), 2:188; A. F. Koni, “Istoriia razvitiia ugolovno-protsessual’nogo zakonodatel’stva v Rossii,” in his *Sobranie sochinenii*, 8 vols. (Moscow: Iuridicheskaia literatura, 1967), 4:335, 336; “Sudebnye ustavy s izlozheniem rassuzhdenii, na koikh oni osnovany,” in *Materialy po sudebnoi reforme v Rossii 1864 goda* (St. Petersburg: Tipografiia Gosudarstvennoi kantseliarii, 1866), 72:iv. According to the *St. Petersburg Bulletin*, the Instruction was drafted by N. Butskovskii (*Sankt-Peterburgskie vedomosti*, no. 303, 17 [29] November 1865, 2).

<sup>53</sup> Spasovich, “O teorii,” 239.

<sup>54</sup> Girish N. Bhat, “The Moralization of Guilt in Late Imperial Russian Trial by Jury: The Early Reform Era,” *Law and History Review* 15, 1 (1997): 77–113; Anatolii Koni’s speech as a presiding judge at the trial of Vera Zasulich, published in F. A. Gallinin, ed., *Protess Vera Zasulich: Sud i posle suda* (St. Petersburg: Sovremennik, 1906), 17.

assumed that any person with a healthy mind and basic education could participate in legal trials. At the same time, the judge's *intime conviction*, while subjective, was not arbitrary: lawyers tried to draw a thin line between "personal view" and "conviction," as the latter assumed the necessity of taking into account general notions about proof and evidence. The introduction of the jury court was supposed to mitigate subjectivism and ground the verdict in the opinions of several individuals. Another innovation of the new courts that also followed from the new principles on probation was the introduction of oral procedures: only the immediate perception of evidence—oral testimonies of the defendant and witnesses or expert accounts, the contemplation and analysis of material evidence or documents first hand—could leave a dent on human conscience and produce the state of mind characterized as the highest degree of certainty in the impossibility of a different course of events.

Legal reform, like many other institutional innovations of the 1860s, has often been seen as a product of changes in the empire's political climate, a peaceful revolution from above. The concurrence of political changes with an epistemological break may not seem unique: the evolution of the systems of proof in other countries suggests that the principles of cognition and substantiation, despite their seemingly nonpolitical nature, to a great extent depended on the political regime and, more precisely, on the degree of trust between the state and its subjects.<sup>55</sup> The French Revolution ended the absolute dominance of the formal theory of proof on the European continent; in Germany, the formal system of proof was gradually abolished after the Revolution of 1848. The theory of the free evaluation of evidence assumed that the state trusted its citizens and their ability to analyze and to judge conscientiously—a condition that was intrinsic to certain political systems and lacking in others.

The reforms of the 1860s demonstrated the Russian government's willingness to invite the public to participate in civil and political matters and, therefore, revealed a major shift in the relationship between the state and society. What was specific to the Russian case, however, was a persistent and strong urge to restore truth in all spheres of social and political relations. Alexander II's famous declaration "may justice and mercy [*pravda i milost* ] rule in [Russia's] courts" emphasized that legal reform would not concern only the formal, factual, and institutional aspects of the legal system: in the context of this declaration, *pravda* designated both moral and judicial

<sup>55</sup> See this argument in Heikki Pihlajamäki, *Evidence, Crime, and the Legal Profession: The Emergence of Free Evaluation of Evidence in the Finnish Nineteenth-Century Criminal Procedure* (Helsinki: LUND, 1997), 55.

categories, close to the kindred concept of *spravedlivost'*.<sup>56</sup> As Richard Wortman's recent study of "charismatic words" in Russian politics and culture suggests, in the vocabulary of the reform era concepts designating truth as both moral (*pravda*) and cognitive (*istina*) "assumed ideological meaning and emotional force as sacred principles violated by the Russian state, *pravda* most strikingly by the rank injustice of serfdom, *istina* by the concealment and the distortion of the truth perpetrated by a closed administrative regime."<sup>57</sup> Thus the two sides of truth—cognitive and moral—came to be deeply intertwined, and the desire to attain *pravda* came along with the dissatisfaction with the pre-reform epistemological order (*istina*). The two "truths" could not and should not be separated. As Vladimir D. Nabokov observed, commenting on the pre-reform order, the application of the formal system of evidence resulted in the emergence of a "monstrous theory of two truths—material and 'juridical'—from which only the second was the object of investigation in ... legal proceedings."<sup>58</sup> The reform was supposed to put an end to this separation. Similarly, in historical writings the pursuit of cognitive truth came to be associated with the development of source criticism, while the search for history's moral meaning assumed the freedom of interpretation and attention to big and meaningful themes in history that concerned not only state but primarily the public and society at large.

The introduction of new procedural norms and principles in the humanities created an interesting paradox: they overlapped with increased interest in positivism and the sciences, yet introduced at the same time a model that relied on the extreme subjectivism and freedom of decision making. The built-in tension between objectivity and subjectivity was somewhat mitigated by new works on psychology, which ensured that even decision making based on "conscience" was not entirely uncontrollable or hidden. The most important role in the education of the new generation of jurists was played by the works of Herbert Spencer, which appeared in Russian translation in a seven-volume edition between 1866 and 1869, and John Stuart Mill's *A System of Logic* (2 vols., 1865–67), which provided new epistemological background for the development of the new methods of finding and proving

<sup>56</sup> Richard Wortman, "The Great Reforms and the New Courts," in *Dostoevsky in Context*, ed. Deborah A. Martinsen and Olga Maiorova (Cambridge: Cambridge University Press, 2015), 13. On *pravda* as *spravedlivost'* (justice), see Natal'ia Pecherskaia, "Spravedlivost': Mezhdru pravdoi i istinnoi," in *"Pravda": Diskursy spravedlivosti v russkoi intellektual'noi istorii*, ed. N. S. Plotnikov (Moscow: Kliuch-S, 2010), 15–48.

<sup>57</sup> Wortman, "Pravda and the Rhetoric of Moral Transcendence," 141.

<sup>58</sup> V. D. Nabokov, "Raboty po sostavleniiu sudebnykh ustavov: Obshchaia kharakteristika sudebnoi reformy," in *Sudebnaia reforma*, ed. N. V. Davydov and N. N. Polianskii (Moscow: Ob"edinenie, 1915), 566.

the truth. Spencer's *The Principles of Psychology* subjected the processes of cognition through feelings and reasoning to scientific examination, while Mill's *A System of Logic* offered the possibility of reconciliation between the subjectivism of perception and the objective orderliness of the laws of logic. Historical (and judicial) authenticity could now be considered to be inferred rather than intuitive, even though it was originally based on the immediate perception of events reflected in primary sources or testimonies.<sup>59</sup> Mill's positivism empowered the human mind with the conviction that the process of cognition is related to the facts of external nature rather than one's own thinking about them. It was not the "objectivism" of the formal system of proof: it assumed the scholar's or the judge's active involvement; neither did *l'intime conviction* appear as a dent on a passive mind but as an act of volition and mental labor. Lawyers admitted that their (and the jurors') perceptions and *intime conviction* were subjective; historians encouraged their colleagues to abandon theoretical constructions and to "record the impression made on one's spirit and imagination" by the remnants of the past while remaining authoritative in the treatment of testimonies.<sup>60</sup> The subjectivism of sources had to be trumped by the subjectivism of the researcher.<sup>61</sup>

The methods and rhetoric of defense often demonstrated strong affinities with historical methods. In a trial of Nina Andreevskaiia's murderers in Tiflis in 1878, Spasovich appealed to the judges of the cassation court and called on them to apply the rules of "historical investigation" based on the analysis of sources. By then, Andreevskaiia had been dead for more than two years, and her death belonged to history. "There was a fact in history, and from it a story, a tale, a legend has emerged ...; lies have become intermingled with the truth. What does a historian do? He rejects the legend, scrupulously restoring the truth from sources, and presents the facts in a new light."<sup>62</sup> In his defense speeches, Vladimir Spasovich often used the terms *predanie* or *legenda* in regard

<sup>59</sup> John Stuart Mill, *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation*, vol. 1 (1843), published in Russian as Mill, *Sistema logiki*, trans. Petr Lavrov (St. Petersburg: M. O. Vol'f, 1865); Gerbert Spenser, *Sobranie sochinenii v sem' tomakh, predpriniae po soglaseniiu s avtorom i pri ego sodeistvii*, trans. and ed. N. L. Tiblen (St. Petersburg: N. L. Tiblen and N. Nekliudov, 1866–69).

<sup>60</sup> V. Fuks, "Sostoianie istoricheskoi nauki i noveiskie istoricheskie trudy vo Frantsii," *Vremia* 12 (1862): 104.

<sup>61</sup> As V. D. Spasovich observed in one of his defense speeches, "Any narrative, word, [or] testimony is not the description of things and objects but only our thoughts and representations about this object; they are colored by our *self* [*Ia*], permeated by our subjectivity and are only a product of external impressions and our subjectivity" ("Delo ob ubiistve Niny Andreevskoi (1878)," in *Sochineniia*, 6: *Sudebnye rechi* [St. Petersburg: Brat'ia Rymovichi, 1894], 264).

<sup>62</sup> *Ibid.*, 181.

to narratives concerning an event that had happened in the past, criminal or not. In the context of Russian epistemological debates, the term *predanie* assumed a new meaning: it defined historical sources that reflected someone's perception of a certain fact and was contrasted with the historical "remains" of the fact (circumstantial evidence, in legal parlance) that a historian could access himself and, through immediate perception, form his own opinion about the fact. As Spasovich explained, "All history is nothing else than a tale [*predanie*]. We are often ready to give preference to it over the conclusions of our reason and the testimony of our own senses. *Predanie* requires criticism more than immediate sensory experience [*chuvstvennyi neposredstvennyi opyt*] because truth, transmitted via *predanie*, gets distorted by passing through the prism of someone's conviction."<sup>63</sup> Interestingly, Spasovich's observation echoes that of Sergei Uvarov, with the important difference that for Uvarov history, as *predanie*, ought to remain in the sphere of belief, while Spasovich opposed it to reason.

Thus the work of a lawyer, as well as a historian, was to analyze texts and reveal how the narrator's perception of events affected the representation of historical facts. Vasilii Kliuchevskii (1841–1911), the son of a priest and a former dropout from the spiritual academy, focused his second dissertation, *Old Russian Saints' Lives as a Historical Source* (1871), on the analysis of published and unpublished hagiographic narratives that documented the role of the Church in the colonization of the Russian North. The key method of Kliuchevskii's inquiry was the analysis of hagiographers' attitudes toward *facts*: he tried to dig up facts from the mass of didactic homilies and myths by reconstructing the motives, goals, and biases of the hagiographers and analyzed the process of remembering, collecting, and recording memories, as well as their verification by church authorities. As Kliuchevskii showed, the reconstruction of facts often had a rather marginal meaning for hagiographers, who did not perceive events as facts separated from the present by a "chronological distance," since the authenticity of hagiographical texts did not rest on veracity but rather on the spiritual presence of the saint. Nevertheless, Kliuchevskii in no way suggested discarding these very valuable and unique sources: "The analysis of the biographer's view of historical phenomena and his attitude toward fact shows where to search in this description for the traces of reality."<sup>64</sup>

Many historical sources once seen as reliable fell under the scrutiny of young scholars who approached historical sources as facts in their own right,

<sup>63</sup> Spasovich, "O teorii," 169.

<sup>64</sup> V. O. Kliuchevskii, *Drevnerusskie zhitiiia sviatykh kak istoricheskii istochnik* (Moscow: K. T. Soldatenkov, 1871), 437.

then analyzed the reflection of historical facts in narratives by scanning the narrator's consciousness. The development of this methodology in the 1890s allowed Aleksei Shakhmatov to solve the puzzle of the Russian chronicles. Through the comparison of multiple versions of *The Tale of Bygone Years*, he established the existence of and reconstructed in its entirety the text of an older source, the "Initial Book" of the 11th century, which had not survived, and proved the existence of an even older original, the "Eldest Book." Interestingly, in a departure from his predecessors' technique, Shakhmatov repudiated attempts to check the veracity of the chronicles' accounts and abandoned his accusatory rhetoric, trying instead to explain the chronicler's motives for including and excluding passages and fragments, "the causality of one or another movement of the text."<sup>65</sup> As Varvara Vovina-Lebedeva has explained, Shakhmatov understood authenticity "as the authenticity of reconstruction, the restoration of texts that had disappeared," through analysis of the chronicler's work.<sup>66</sup>

The development of the "reconstruction" technique in historical studies became possible through the borrowing of special analytical methods (comparative linguistics and textology, the studies of perception and memory, etc.) and, in general, the expansion of the methodological horizons of analysis. The very idea that a historian might fill the gaps left by sources would have appeared blasphemous a few decades earlier. The concept of presumptions, as we have seen, first appeared in jurisprudence in the 1850s; in 1877, Sergei Muromtsev, in *On the Study of Hidden Historical Facts Applied to the History of Civil Law*, introduced the category of "hidden facts" that were not reflected in sources but could be established by analogy, by inference from known facts, through the analysis of connections between different phenomena, or by other logical operations.<sup>67</sup> Muromtsev specifically emphasized the difference between facts recorded in inauthentic sources, on the one hand, and hidden facts that were either omitted or not reflected in documents, on the other: the former required critical examination, while the latter needed the application of logic and the building of hypotheses. As Nikolai Kareev, a historian and philosopher who spotlighted Muromtsev's contribution, observed, "the sphere of hidden facts is dominated by hypotheses, which are indispensable

<sup>65</sup> Ibid., 199, 206.

<sup>66</sup> Vovina-Lebedeva, *Shkoly*, 199.

<sup>67</sup> S. A. Muromtsev, "Ob issledovanii skrytykh istoricheskikh faktov v primenenii k istorii grazhdanskogo prava," in his *Ocherki obshchei teorii grazhdanskogo prava* (Moscow: Indrikh, 1877), 64. Muromtsev wrote about the history of civil law; he did not discuss the application of analogy to criminal law. On the limits of applying the methods of analogy in criminal law, see F. P. Dubrovin, "O razmerakh dopustimosti analogii pri primenenii ugolovnogo zakona," *Zhurnal Ministerstva iustitsii*, no. 5 (1899): 6.

to any area of scholarship [*liubaia nauka*] where an experiment is useless, observation is impossible, and direct testimonies are absent.”<sup>68</sup> This was the essence of Shakhmatov’s method, with the difference that Muromtsev’s analysis concerned legal facts (institutions), and Shakhmatov’s study focused on sources, which he also treated as historical facts in their own right, rather than simply material for recovering events.

## Facts

This new approach to facts became a distinctive feature of later historical studies. Kliuchevskii called for a distinction between the notions of “historical fact” and a “historical event or accident”: the former was much broader than the latter. “Historical facts are not merely events: the ideas, views, feelings, [and] impressions of people at a certain period of time are also facts, very important and equally requiring critical treatment.”<sup>69</sup> This new notion of “fact” emerged not only in history and jurisprudence but, more generally, in public perception and rhetoric in the last three decades of the 19th century.

Russian intellectuals—historians and lawyers—were not secluded in the bubble of scholarly theories, while their ideas also fed into the intellectual and rhetorical milieu of Russian educated society. Therefore, certain changes in methods and ideas may have come from other areas of knowledge and practice, as well as literature and art. Ol’ga Evdokimova’s study of the problem of authenticity in Russian 19th-century literature and Petr Patlievskii’s work on the role of documents in literary and artistic life spotlight important changes in the understanding of the notion of fact introduced by the sudden increase in the flow of information. The word “fact” came into fashion in the late 1860s and early 1870s.<sup>70</sup> Evdokimova specifically points to Fedor Dostoevskii’s obsession with this phenomenon, particularly evident in *The Diary of a Writer*: “The word ‘fact’ permeates all its narrative, becoming a

<sup>68</sup> N. I. Kareev, *Istorika (teoriia istoricheskogo znaniia)* (Petrograd: M. M. Stasiulevich, 1916), 91.

<sup>69</sup> This observation concerned the work of his junior colleague Sergei Platonov on “sagas and tales” about the 17th-century Time of Troubles, in which Platonov classified his sources as “literary facts” and not historical ones. See S. F. Platonov, *Drevnerusskie skazaniia i povesti o Smutnom vremeni XVII veka kak istoricheskii istochnik* (St. Petersburg: V. S. Balashov, 1888); and V. O. Kliuchevskii, “Otzyv issledovaniia S. F. Platonova ‘Drevnerusskie skazaniia i povesti o Smutnom vremeni XVII veka’ kak istoricheskii istochnik,” in *Otzyvy i otvety: Tretii sbornik statei* (Petrograd: P. P. Riabushinskii, 1918), 360. The analysis of Kliuchevskii’s preoccupation with the concept of “fact” could be a subject of a separate study. M. M. Bogoslovskii specifically commented on Kliuchevskii’s views on this subject in his short memoir (*Pamiati V. O. Kliuchevskogo* [Moscow: Kushnerev i Ko., 1912]).

<sup>70</sup> Google Ngram Viewer detects an increase by ten times in the usage of this word in Russian between 1860 and 1870.

certain signal of authenticity.<sup>71</sup> Raffaella Vassena's analysis of *The Diary* also points out that the reliance on regular facts was meant to persuade readers "of the likelihood of his prophecies"—that is, the authenticity of moral truth (ironically, Dostoevskii's attempts to impose on readers his own judgment of facts was not welcomed: critics scorned him for "inaccuracy" and for sneaking in ideal reality instead of pure facts).<sup>72</sup> Indeed, Dostoevskii's understanding of "reality" and "facts" differed from colloquial interpretations: among those meaningful "facts" that Dostoevskii presented to his readers, there were not only events but also his own perceptions of other phenomena—for instance, Lev Tolstoi's *Anna Karenina*. As Dostoevskii wrote in 1877, "That *fact* of my impression from the novel ... in my soul overlapped with ... the enormous fact of the declaration of the current war."<sup>73</sup> Petr Patlievskii has also pointed out how Dostoevskii explored the independent, artistic nature of facts that reached him through the medium of newspapers.<sup>74</sup> Of course, Dostoevskii, himself an editor, was aware of the flimsy verisimilitude of these texts. However, he endowed newspaper articles with a very specific type of authenticity and perceived them as facts in their own right and with enormous public importance.

How does this new—expanded—quality of facts relate to methods of substantiation in jurisprudence and historical studies? We have seen the application of this method in Kliuchevskii's work. Similarly, the analysis of fact-as-narrative, which did not always directly reflect facts-events but nevertheless explained the mindset of the people who had either created or perceived them, became a key component of judicial defense. Let us consider, for instance, the trial of Vera Zasulich (1879)—arguably the most famous court case in Russian history. Zasulich's shot at General Fedor Trepov was in revenge for his illicit order to flog a prisoner, Arkhip Bogoliubov, at the House of Temporary Detention in St. Petersburg. Since Zasulich made no

<sup>71</sup> Ol'ga Evdokimova, "Problema dostovernosti v russkoi literature poslednei treti XIX v. i 'Dnevnik pisatel'ia' F. M. Dostoevskogo," in *Dostoevskii: Materialy i issledovaniia*, ed. V. G. Bazanov and Georgii Fridlender (Leningrad: Nauka, 1974–91), 8:178.

<sup>72</sup> Raffaella Vassena also points out that despite Dostoevskii's meticulous treatment of facts, he fictionalized many facts of his own biography (*Reawakening National Identity: Dostoevskii's "Diary of a Writer" and Its Impact on Russian Society* [Bern: Peter Lang, 2007], 54, 59, 87, 89). I am grateful to Mikhail Velizhev for the reference to this important study.

<sup>73</sup> Dostoevskii, "Dnevnik pisatel'ia za 1877 g.," *Polnoe sobranie sochinenii*, 30 vols. (Leningrad: Nauka, 1972–90), 25:195, quoted in Evdokimova, "Problema dostovernosti v russkoi literature," 187. See also Dostoevskii, "'Anna Karenina' kak fakt osobogo znachenii," in "Dnevnik pisatel'ia," 25:198–202; and more on facts in "Dnevnik pisatel'ia," 25:246, 247.

<sup>74</sup> Petr Patlievskii, "Dokument v sovremennoi literature," in his *Literatura i teoriia* (Moscow: Sovremennik, 1979), 125. On facts and documents in Dostoevskii's works, see also Dmitrii Likhachev, "V poiskakh vyrazheniia real'nogo," in *Dostoevskii: Materialy i issledovaniia*, 1:7–8.



attempt to hide her act and intention, and since the fact of the shooting did not require any clarification, her lawyer, Petr Aleksandrov, focused his defense on the examination of the initial fact in the sequence of events (the flogging) and the connection to the last event (the shooting) via a series of narratives. Zasluch did not know Bogoliubov personally: she had learned about the unlawful act “from a short newspaper report, and then from conversations with different people in St. Petersburg.” Tales about the event to which she had not borne witness drove her to the decision to shoot the general. Aleksandrov, with some, perhaps inadvertent, help from the presiding judge, Anatolii Koni, carefully reconstructed the initial act—the flogging, but, most importantly, the ways and the forms in which the news about it had reached Zasluch.<sup>75</sup> Aleksandrov interrogated the witnesses to the flogging, asked Zasluch about what she had heard, and read aloud the newspaper article that had triggered the assassination attempt. The authorities and conservative jurists allowed Aleksandrov to read the article, and that did not appear to be inappropriate or incompatible with juridical procedure. Aleksandrov’s historical reconstruction was meant to be considered in the context of juridical source criticism: he interpreted all testimonies as tales—that is, the impressions made by a certain event on an individual’s mind and senses. In Zasluch’s case, her testimonies about the final act were inextricably linked to the first act and the traces it had left; therefore, the second fact appeared as an immediate consequence of the first fact, even though the shot followed the flogging by several months. Indeed, the moral aspect of Zasluch’s act played the central role in her acquittal, but Aleksandrov’s strategy was not simply to emphasize the extent of her indignation in response to injustice but also to underline the authenticity of her impressions, and therefore the inevitability of her behavior.<sup>76</sup>

Zasluch’s sensational acquittal had an enormous influence on the government’s and society’s attitudes toward the new courts and increased the polarization between liberal and conservative groups in society. Dostoevskii, who in the late 1870s was increasingly leaning toward conservatism, was shocked by the trial and its outcome: it was another example that demonstrated the immaturity of Russian society and the jury’s inability to bear the burden of judging and punishing people for their crimes. Zasluch’s case, together with several other jury trials, served as the impetus for his extremely critical portrayal of Russian courts in the fictional trial in *The Brothers Karamazov*. The trial’s

<sup>75</sup> Gallinin, *Protess Vera Zasluch*, 34, 44, 47.

<sup>76</sup> On the moral aspect of the trial, see Tatiana Borisova, “Public Meaning of the Zasluch Trial 1878: Law, Politics and Gender,” *Russian History* 43, 3–4 (2016): 221–44. On Aleksandrov’s strategy, see, esp., Gallinin, *Protess Vera Zasluch*, 82.

description reveals a complex, multidimensional picture that, among other things, describes the old (also provincial) and the new (i.e., metropolitan) methods of legal and historical argumentation. The public prosecutor at the trial—Ippolit Kirillovich, local to the small town of Skotoprignonievsk—appears hopelessly old-fashioned despite his attempts to display cutting-edge liberalism. In his speech, he refers to the “historical method” of describing Mitia’s alleged crime (one part of the speech is called “A Historical Survey”) and tries to bury him under the weight of multiple proofs. Mitia’s defense lawyer, Fetiukovich, a star of St. Petersburg jurisprudence, dismisses the prosecutor’s evidence as unreliable. Fetiukovich particularly emphasizes that the court should not be mesmerized by the number (*sovokupnost’*) of proofs but should instead pay attention to their nature.<sup>77</sup> One by one, Fetiukovich undermines the validity of proofs and eventually declares that since no sufficiently reliable evidence of the crime exists, then there was no crime—“no money” that has been stolen, and “no murder.” Fetiukovich’s somewhat paradoxical conclusion about a murder that had never taken place, despite the presence of Fedor Karamazov’s corpse, may remind us of Kachenovskii’s skepticism. In view of Dostoevskii’s conservative and Slavophile sympathies, his genuine interest in Karamzin (Kachenovskii’s main target) and aversion to lawyers, whom he mercilessly criticized in *The Diary of a Writer*, the parallel may appear plausible.<sup>78</sup> Besides, Mikhail Kachenovskii’s son Vladimir was Dostoevskii’s classmate at boarding school, and they resumed contact in the 1870s.<sup>79</sup> In any case, Dostoevskii’s message was clear: unlike the prosecutor who had treated proofs uncritically, simply adding one to another, the defense lawyer correctly grasps the uncertainty of evidence, but in the end both fail to see the moral truth of Mitia’s spiritual fall and salvation.

Dostoevskii’s description of the trial bears an important message about the methods of cognition and the value of truth.<sup>80</sup> Dmitrii Likhachev aptly pointed out that “Dostoevskii paid special attention to source study—

<sup>77</sup> In his *Diary of a Writer*, Dostoevskii referred to the expression “puk (puchok) faktov” (a bunch of facts) (*Polnoe sobranie sochinenii*, 22:163).

<sup>78</sup> A. V. Arkhipova, “Dostoevskii i Karamzin,” in *Dostoevskii: Materialy i issledovaniia*, 5:101–12.

<sup>79</sup> Vladimir Kachenovskii wrote a short memoir about their encounter (“Moi vospominaniia o F. M. Dostoevskom,” in *F. M. Dostoevskii v zabytykh i neizvestnykh vospominaniiaakh sovremennikov* (St. Petersburg: Andreev i synovia, 1993), 30–33. Dostoevskii asked the Literary Fund to pay Vladimir Kachenovskii a pension based on his father’s achievements.

<sup>80</sup> *The Brothers Karamazov* was not only the most legally informed novel. It also contains multiple passages referring to problems of cognition and logic. See Richard Peace, “Dostoevsky and the Syllogism,” *Dostoevsky Studies*, n.s., 9 (2005): 72–80; and Robert L. Belknap, *The Genesis of “The Brothers Karamazov”* (Evanston, IL: Northwestern University Press, 1990), chap. 5.

*istochnikovedenie*—and, while presenting his conclusions to the readers, took care to familiarize them with sources, with the analysis of these sources, with his mode of reasoning, [and] with the documentary lacunas [*istochnikovedcheskie lakuny*].”<sup>81</sup> In his appreciation of sources Dostoevskii, according to Likhachev, stood ahead of contemporary historical scholarship. While I agree with Likhachev’s portrayal of Dostoevskii’s zeal in tracing back facts and sources, I would also stress that this zeal stood in glaring contradiction to his own notion of truth as based on belief rather than knowledge: belief in Mitia’s true innocence, not being supported by evidence, was trumped by “facts”—most importantly, “the document,” Mitia’s letter to Katerina Ivanovna that contained the plan for his father’s murder.<sup>82</sup> Dostoevskii’s epistemological pessimism was one of the forces driving his growing conservatism and nationalism. If we put Dostoevskii in the framework of historical debates on method, he exhibits stances closer to Uvarov’s conservative and Slavophile preference for oral, religious *predanie* and belief than to the rationality of historical criticism associated with liberalism and cosmopolitanism.

### Truth(s)

Dostoevskii’s critique of absurd denials of obvious crimes or the exculpation of murderers by citing other “facts” such as social milieu, poverty, and a poor education highlights the specifics of the postreform law that distinguished between questions of facts and questions of guilt.<sup>83</sup> Questions of facts and laws were certainly inseparable in practice; nevertheless, defense attorneys often rhetorically emphasized their differences.<sup>84</sup> If two lawyers participated in one trial, one of them could mount a factual defense (*fakticheskaia zashchita*), while the other was supposed to describe and analyze moral factors concerning the defendant’s life, past, and social milieu.<sup>85</sup> In the trial of the Polish Catholic *ksiądz* Kazimir Beliakevich, Vladimir Spasovich suggested splitting the task with his partner, Sergei Andreevskii, proposing, “I will be the reason, you the

<sup>81</sup> D. S. Likhachev, “‘Nebrezhenie slovom’ u Dostoevskogo,” in *Dostoevskii: Materialy i issledovaniia*, 2:31.

<sup>82</sup> In the draft notes to the novel, this episode, later called “A Sudden Catastrophe,” is placed under the subtitle “The Document” (Dostoevskii, *Polnoe sobranie sochinenii*, 15:331).

<sup>83</sup> Dostoevskii, “Sreda,” “Dnevnik pisatel’ia za 1873 g.,” *Polnoe sobranie sochinenii*, 21:8–22.

<sup>84</sup> On this distinction (and the lack of thereof), see Kim Lane Scheppele, “Facing Facts in Legal Interpretation,” in “Law and the Order of Culture,” special issue of *Representations*, no. 30 (1990): 42–77. The question of “fact and law” received a lot of attention in Russian juridical literature. For an analysis of this literature, see, e.g., V. Palauzov, “Voprosy fakta i prava na sude prisiiazhnykh po russkomu zakonodatel’stvu,” *Zhurnal grazhdanskogo i ugolovnogo prava*, no. 3 (1884): 1–38.

<sup>85</sup> S. A. Andreevskii, *Dramy zhizni (zashchititel’nye rechi)* (Petrograd: Pechatnyi trud, 1916), 561.

feeling” (*ia budu razum, vy chuvstvo*).<sup>86</sup> Most famously, Fedor Dostoevskii portrayed in a somewhat grotesque manner these two elements of the defense strategy in a fictional speech given by Mitia Karamazov’s defense attorney, Fetiukovich—who in the first, “factual” part of his speech claimed that Mitia had not killed his father, and in the second, “moral” part tried to persuade the jury that even although he had killed him, he deserved mercy.

Fetiukovich, whose figure stands for a collective portrait of Russian lawyers, failed to prove Mitia’s innocence.<sup>87</sup> In practice, however, this defense strategy often succeeded. As Girish Bhat has observed, Russian jurors—much more often than their peers in France, who followed a similar juridical procedure—acquitted defendants who committed crimes and confessed. Bhat explained the leniency of Russian courts by the predominance of “moral” criteria of guilt, which required not simply an analysis of the psychology of the crime but also the examination of broader ethical and social realities.<sup>88</sup> Russian courts often considered and analyzed criminal “facts” not merely as “events” but as causes and consequences of such phenomena of social life as poverty, illiteracy, inequality, domestic violence, and so on. In this way a crime was dissolved in its historical and social context, and the judge had the liberty to interpret it within that context. After all, as one legal scholar observed, “a crime, as it is, does not exist in nature; it designates a certain group of physical and psychological facts that have been artificially selected in the world of events.”<sup>89</sup> Therefore, it was a mental construct, a result of a certain social convention about facts. This approach to crimes was strikingly similar to the historian Aleksandr Lappo-Danilevskii’s definition of historical facts as particulars that were singled out from the mass of others by virtue of their value (for a historian, a certain group that defines its importance and the importance of this fact’s consequences, etc.).<sup>90</sup>

In their attempts to underscore the relational meaning of facts, lawyers often referred to the rhetoric of history. In some cases, when the main fact of the crime and the defendant’s involvement were evident (e.g., in terrorist

<sup>86</sup> *Ibid.*, 545.

<sup>87</sup> It is commonly assumed that Spasovich served as a prototype for Fetiukovich. At the same time, Dostoevskii claimed that both the prosecutor and the defense lawyer represented two “types of our contemporary court (although not copied from anyone in particular) with their morality, liberalism, and perception of their task” (*Polnoe sobranie sochinenii*, 15:446).

<sup>88</sup> Bhat, “Moralization of Guilt.”

<sup>89</sup> D. N. Stefanovskii, *O predelakh issledovaniia v ugovnom protsesse: Ocherk teorii otosimosti dokazatel'stv* (Iaroslavl': Falk, 1894), 16.

<sup>90</sup> For a complex analysis of this category in Lappo-Danilevskii’s *Methodology of History*, see E. A. Rostovtsev, *A. S. Lappo-Danilevskii i peterburgskaia istoricheskaia shkola* (Riazan': P. Tribunskii, 2004), chap. 2, esp. 120–21.

attacks and assassinations) the lawyers' task was necessarily focused on the interpretation of facts that had led to the ultimate event, rather than the event itself. The presiding judge at the Zasulich trial, Anatolii Koni, reminded jurors before they retired to decide on the verdict that "there is a murder, and there is a murder," assuming that a simple statement of a fact, contrary to a common opinion, was not inherently truthful: only the cultural, moral, and historical interpretations of an event could help grasp its legal meaning (Dostoevskii, who attended the trial, may have shuddered at this thought). Koni added that "the present has been shaped by the past," therefore stretching the notion of the fact of Zasulich's shot back into history. Legal codes in 1864 imposed no limitation on the capacity of lawyers to investigate, contextualize, and interpret events, and they could dig deep into the lives of the defendants and/or their victims, the traumas of their childhood and youth, or impressions left on them by encounters with people and books. Sometimes, they went even farther. Zasulich's defense lawyer, Aleksandrov, complemented his analysis of Zasulich's prior life and state of mind on the eve of General Trepov's assassination with an excursus into the "history of the birch rod" and the abolition of corporal punishment, therefore inscribing Trepov's and Zasulich's actions into the history of state violence. As a result, Zasulich's attempt to kill Trepov was not only morally justified but also historically legitimate, because Trepov's violation of the law on corporal punishment (1863), which had launched a series of legal reforms in Russia, was an attempt to throw the country back to the reaction of the pre-reform period.

The analysis of the historical meaning of an event was a staple for all political trials in Russia. The Vera Zasulich court case followed in the wake of a massive trial of 193 defendants—young populist intellectuals and participants in the "going to the people" propagandist movement of 1873–74. The prosecution's premise was to present the large-scale political phenomenon as a single crime and to portray all the defendants as members of one secret radical organization. The task of the defense lawyers and the defendants was to prove that such an organization had never existed. While lawyers focused on the discrepancies and falsehood of evidence presented in the indictment, one of the defendants, Ippolit Myshkin, emphasized that the prosecution erred in its historical interpretation of the movement. The populist movement of the early 1870s was not a single fact that fit a certain definition of a state crime: it was a phase in a long, historical radicalization of the peasantry and the intelligentsia that had started in the early 1860s. Myshkin's famous speech—one of the first historical explorations of the roots and causes of the revolutionary movement in Russia—focused on the absurdity of an idea that a historical phenomenon such

as popular protest could qualify as a crime and underscored the impossibility of putting all the people involved on the defendants' bench.<sup>91</sup>

Myshkin's speech became a template for other revolutionaries who used trials as occasions to deliver a revolutionary message, explain the goals and methods of the revolutionary cause, and therefore shift society's attention from the legal to the historical meaning of their deeds. Andrei Zheliabov, one of the key participants in the assassination of Alexander II in 1881, started his speech with the declaration that "our crime, the event of 1 March, should be considered as a historic event, and it is not a fact but history." "Any social phenomenon should be studied through its causes, and the more complex and serious this phenomenon is, the deeper the analysis of its past should be," declared Zheliabov in his speech. He particularly confronted the distorted representation of the history of the revolutionary party and the "terrorist *fact*" in the indictment.<sup>92</sup> The presiding judge cut short Zheliabov's speech about the development of the movement. In most subsequent political trials, the task of historical interpretation fell on the shoulders of the defense attorneys.

Perhaps the most skillful application of historical analysis one can find is in the defense speeches of Vladimir Spasovich, who participated in numerous political trials, starting with Nechaev's group trial in 1871. Spasovich understood his task differently from Myshkin and Zheliabov. Caring about his defendants' fate, which depended on the classification of their crimes, Spasovich tried to emphasize change over continuity in the development of historical phenomena such as revolutionary movements. In his defense speeches during a series of political trials in 1883, 1884, and 1887, he repeatedly pointed out that Alexander II's assassination had marked a watershed moment in the history of revolutionary activity, and the members of the post-1881 populist organizations could bear no responsibility for the tsar's death. The prosecution failed to note that revolutionary activity "is a phenomenon ... pathological and morbid, but it is also living and constantly progressing, changing its forms, losing some qualities and acquiring others, and it is not static and solid as a rock." To save his defendants from the fate of Zheliabov and other executed members of the People's Will, Spasovich had to go into the analysis of social processes governing the formation of secret organizations, beginning with the "protoplasm" of ideas that people "inhale" and—depending on their susceptibility, age, gender, and temperament—

<sup>91</sup> *Stenograficheskiĭ otchet po delu o revoliutsionnoi propagande v Imperii: Zasedaniia Osobogo prisustviiia Pravitel'stviushchego Senata* (St. Petersburg: n.p., 1878), 1:484–91.

<sup>92</sup> *Delo o sovershennom 1-go marta 1881 goda zlodeianii, zbertvoi koego pal v Boze pochivshii Gosudar' Imperator Aleksandr Nikolaevich* (Kiev: Korchak-Novitskii, 1881), 222, 224–25, 35.

either accept or reject. He specifically emphasized that law was irrelevant in analyzing these processes. The court only “registers separate instances of that enormous and multibranching phenomenon that is preconditioned by the entire flow of contemporary development and our inability to prevent it.”<sup>93</sup> Judges cannot indict a social phenomenon or a movement; therefore, they should consider each individual case without imposing the meaning of preceding events on the actions of other individuals.

Thus the historical and social contextualization of political and non-political crimes often manifested the legal relativism, not to say nihilism, of defense lawyers who, while trying to defend their clients, masterfully used the principle of the free evaluation of proofs, sometimes expanding this category way too far. Experts explaining the abnormally high percentage of acquittals by juries (who after 1878 were allowed to consider political crimes) lamented the lack of the “law of evidence” and the poor elaboration of this subject in Russian theoretical jurisprudence, which often led to the “impressionism” of the courts’ verdicts.<sup>94</sup> Conservative presses and politicians used growing dissatisfaction with the principle of *l’intime conviction*, together with unpredictability and “subjectivism,” as arguments for the abolition (or reorganization) of the jury court.<sup>95</sup> Liberal lawyers, for their part, feared that the introduction of laws of evidence in any form would result in the return to formal theory. Free evaluation of evidence assumed that both a criminal act and the act of judgment were the manifestation of individual will that could not be described by laws with precision. “The freedom of the human spirit is [as] endless as the world in which the human genius is revealed,” stated an editorial article in *Iuridicheskoe obozrenie*.<sup>96</sup> But sometimes this freedom and relativism could undermine the value of the law itself.

Remarkably, though, even as some lawyers, like Spasovich, eschewed the primacy of law in ascribing meaning to facts, historians invoked the rhetoric of court debates to illuminate the historical meaning of events and processes. The use of juridical metaphors was not limited to numerous mock “trials” of historical figures (some of these, who had not been condemned *inter vivos*, were accused by historians, while others, convicted by contemporaries,

<sup>93</sup> V. D. Spasovich, “Rech’ v zashchitu suprugov Pribylevykh,” in *Sem’ sudebnykh rechei po politicheskim delam, 1877–1887* (St. Petersburg: V. Vrublevskii, 1908), 91.

<sup>94</sup> L. E. Vladimirov, *Uchenie ob ugolovnykh dokazatel’stvakh*, 128; “Kritika dokazatel’stv v sude priiaznykh,” *Iuridicheskaiia gazeta*, no. 82 (16 October 1894); no. 83 (20 October 1894).

<sup>95</sup> V. F. Deitrich, “O sude priiaznykh: Vopros o ego reorganizatsii,” *Zhurnal Ministerstva iustitsii*, no. 6 (1895): 1–22. For the response to this and other articles by Deitrich, see G. A. Dzhanshiev, *Sud nad sudom priiaznykh* (Moscow: Tipografia “Russkikh vedomostei,” 1896).

<sup>96</sup> “Ob osnovakh ugolovnogo suda,” *Iuridicheskoe obozrenie*, no. 2 (1881): 34.

were posthumously vindicated).<sup>97</sup> In a more general sense, the historian and philosopher Nikolai Kareev unequivocally identified the “trial of history” as an essence of this discipline, emphasizing its departure from a humanless (Hegelian) type of history writing that focused on processes rather than people.<sup>98</sup> According to Kareev, objectivity in history had to be restricted to methods, but it did not assume the eradication of historians’ opinions. A historian has to “*explain* [Kareev’s emphasis] phenomena that he is studying,” rather than only reveal them.<sup>99</sup> Thus, contrary to Carlo Ginzburg’s assertion that the juridification of history deprives it of explanatory thrust and power, Russian historians emphasized the opposite.<sup>100</sup>

The juridification of history was a metaphor that assumed the restoration of the adversarial ethic of history, its moral value and utility. For historians as well as lawyers, truth and objectivity also acquired the status of a civil right. It is important that the application of new methods of analysis was often intended to recover the voices of people that had been muted and shift focus from the state and rulers to society and its people. Aleksandr Onu, for instance, applied the notion of “presumption of innocence” in relation to sources that had been earlier discarded as useless and unreliable, such as the so-called *cabiers de doléances*—the lists of grievances of the Third Estate that had been collected and recorded, often on the basis of available templates, or taken down from the dictation of educated advisers, on the eve of the French Revolution. Onu showed how the analysis of sources can help uncover hidden layers of truth that, as he demonstrated, should *not* be understood as the exact conformity of texts to the real state of things.<sup>101</sup> As Onu powerfully argued, every historical source should be viewed in a way that offers the guarantee of personal inviolability to the individual.<sup>102</sup> Thus the juridification and, ultimately, moralization of history concerned not only methods but also the social focus of the discipline. The lawyers’ attempts to explain crimes by citing the influence of exogenous facts—poverty, lack of education, and so

<sup>97</sup> Compare to the earlier (pre-reform) discussion on whether a historian should judge or not in Nil Popov, “O biograficheskom i ugovnom elemente v istorii,” *Atenei*, no. 46 (1858): 131–68.

<sup>98</sup> N. I. Kareev, “Sud nad istoriei (nechto o filosofii istorii),” *Russkaia mysl’*, no. 2 (1884): 16.

<sup>99</sup> *Ibid.*, 24.

<sup>100</sup> Ginzburg, “Checking the Evidence,” 81.

<sup>101</sup> Aleksandr Onu, *Vybory 1789 goda vo Frantsii i nakazy tret’ego sosloviia s točki zreniia sootvetstviia istinnomu nastroeniui strany* (St. Petersburg: M. M. Stasiulevich, 1908), 479. On the applicability of legal notions of the “presumption of innocence” in regard to historical sources, see also Lur’e, “O tak nazyvaemoi prezumptsii.”

<sup>102</sup> Onu, *Vybory 1789 goda*, 511.



on—while certainly reflecting fashionable trends in forensic psychology, also betrayed their concern for social injustice.

In Russia, methodological choices were never seen as politically neutral or innocent and always bore an important ethical component in addition to a purely “scientific” one. Perhaps the long preservation and enforcement of the formal theory of proof that regulated the regimes of historical writing and judicial decisions until the mid-19th century played a role in the politicization and moralization of the problem of authenticity. The reforms of the 1860s, while allowing for a total freedom on judgment in courts and historical writings, left unresolved an array of social and political issues, therefore imposing a particular attitude toward the problem of legal and historical justice. Public significance attached to seemingly academic matters of method explains the intensity of cooperation and borrowing between historical studies and jurisprudence, disciplines that were preoccupied with the problem of truth—which, in the Russian case, assumed a double meaning: epistemological as well as moral.

Dept. of History  
104 Dickinson Hall  
Princeton University  
Princeton, NJ 08544 USA  
kprav@princeton.edu

Copyright of Kritika: Explorations in Russian & Eurasian History is the property of Slavica Publishers and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.