

Fall 2006

## Dostoyevsky and the Therapeutic Jurisprudence Confession, 40 J. Marshall L. Rev. 41 (2006)

Amy D. Ronner

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Evidence Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), [Law and Philosophy Commons](#), [Law and Psychology Commons](#), [Legal History Commons](#), [Litigation Commons](#), and the [Public Law and Legal Theory Commons](#)

---

### Recommended Citation

Amy D. Ronner, Dostoyevsky and the Therapeutic Jurisprudence Confession, 40 J. Marshall L. Rev. 41 (2006)

<https://repository.law.uic.edu/lawreview/vol40/iss1/2>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact [repository@jmls.edu](mailto:repository@jmls.edu).

# DOSTOYEVSKY AND THE THERAPEUTIC JURISPRUDENCE CONFESSION

AMY D. RONNER\*

In Fyodor Dostoyevsky's *Crime and Punishment*,<sup>1</sup> Rodion Raskolnikov murders an old woman, a moneylender:

At that point, with all his might, he landed her another blow, and another, each time with the butt and each time on the crown of the head. The blood gushed out as from an upturned glass, and her body collapsed backwards. He stepped back, allowed her to fall and at once bent down over her face: she was dead. Her eyes were goggling out of her head as though they might burst from it, while her forehead and all the rest of her features were crumpled and distorted in a convulsive spasm.<sup>2</sup>

When the victim's step-sister unexpectedly intrudes, Raskolnikov again wielding his axe, makes it a double murder and absconds with the valuables. About twelve days later, Raskolnikov turns himself in and confesses to the police. Raskolnikov is tried, convicted, and sentenced to eight years of penal servitude in Siberia.

## I. INTRODUCTION

*Crime and Punishment*, one of the great classics of world literature, takes place in St. Petersburg, Russia in the summer of 1865, a time in which the country's legal system was undergoing reform.<sup>3</sup> It was also a time in Dostoyevsky's life when he could

---

\* Professor of Law, St. Thomas University School of Law. J.D., 1985, University of Miami; Ph.D. (English Language and Literature), 1980, University of Michigan; M.A., 1976, University of Michigan; B.A., 1975, Beloit College. Before becoming a lawyer, I taught literature at the University of Michigan and University of Miami. I would like to dedicate this article to Monsignor Andrew Anderson, who has been so supportive of my teaching, scholarship, and my academic freedom for so many years. I also wish to thank my research assistant, Elizabeth Matherne, along with law library guru, Ned Swanner, for their invaluable help with this article.

1. FYODOR DOSTOYEVSKY, *CRIME AND PUNISHMENT* (David McDuff ed., Penguin Books 2003) (1866).

2. *Id.* at 94-95.

3. See generally William Burnham, *The Legal Context and Contributions of Dostoyevsky's Crime and Punishment*, 100 MICH. L. REV. 1227 (2002) (describing the legal changes taking place in the 1860s in Russia).

reflect on his own experience with Russian criminal justice.<sup>4</sup> In 1849, already a known novelist, Dostoyevsky had been arrested, tried, and sentenced to death for treason.<sup>5</sup> After about eight months in prison, officials paraded him and others into a public square and tethered them to execution posts before a firing squad. Just before discharging their fatal shots, the soldiers received a command to halt. Thus, by order of Nicholas I, the great Russian novelist and fellow prisoners were spared and their death sentences were commuted to terms of hard labor and exile in Siberia. After serving his full sentence, Dostoyevsky was permitted to return to St. Petersburg and then wrote *Crime and Punishment* between 1864 and 1866, in the wake of his traumatic ordeal.<sup>6</sup>

Although Dostoyevsky was not a lawyer and lacked formal legal training, he undeniably had a unique insight into not just the law and the workings of criminal justice, but also into the psyches of people that commit crimes.<sup>7</sup> Like other literary masterpieces, *Crime and Punishment* transcends time, place, and even subject matter. Although the story takes place in mid-nineteenth century

4. *Id.* at 1228; see also JOSEPH FRANK, DOSTOYEVSKY: THE MIRACULOUS YEARS, 1865-1871 IV (1995) (covering years during which Dostoyevsky wrote *CRIME AND PUNISHMENT* and *THE GAMBLER*).

5. Burnham, *supra* note 3, at 1228; see also FYODOR DOSTOYEVSKY, THE HOUSE OF THE DEAD (Penguin Books 2003) (1861) (describing prison life in Siberia based on personal experience).

6. See Burnham, *supra* note 3, at 1227 n.2; see also FRANK, *supra* note 4. In Dostoyevsky's *THE IDIOT*, Prince Myshkin describes "a man . . . once taken up with others to the scaffold, and the death sentence by firing squad was read out to him, for a political offence" and "[s]ome twenty minutes later a reprieve was read out to him, and a different degree of punishment was fixed, but in the interval between the two sentences, twenty minutes, or at least quarter of an hour, he lived in the unquestionable conviction that in a few minutes time he would face sudden death." FYODOR DOSTOYEVSKY, *THE IDIOT* 70-71 (Penguin Books 2004) (1868).

7. See David McDuff, *Translator's Introduction*, in *THE HOUSE OF THE DEAD*, *supra* note 5, at 7 ("I had got to know something of the convict population back in Tobolsk; here in Omsk I was to live for four years in close proximity to it. These men were coarse, irritable and malicious." (quoting Dostoyevsky's letter to his brother Mikhail, written right after his release from prison in Omsk, Western Siberia)); Burnham, *supra* note 3, at 1228-29 ("[T]he experience in Siberia threw Dostoyevsky together for several years with a wide variety of ordinary and political offenders. This experience undoubtedly informed him well and piqued his curiosity about the nature of both crime and its punishment."); see also *A Criminal Reviews a Book*, SATURDAY EVENING POST, Nov. 24, 1962, at 78 ("Dostoyevsky succeeds in revealing the real cost of crime . . . . Almost every criminal will recognize himself in Raskolnikov, and I wonder if it wouldn't be a real deterrent to a potential thief to read and reread pertinent passages from Dostoyevski's book . . . . [T]he work should be required reading for every person who undertakes to study or do anything about the criminals in our society.").

Russia, its enduring wisdom applies to contemporary American jurisprudence and conveys timeless truths about human nature.

Dostoyevsky's novel has in fact attracted multiple interdisciplinary scholars that have practically analyzed *Crime and Punishment* to death, and done so from diverse perspectives.<sup>8</sup> In fact, this novel, perhaps more than any other in world literature, has amassed a practical cult of scholars trying to parse Dostoyevsky's definition of the meaning of human existence and analyze the author's moral attitude toward his complex and disturbing protagonist, whose crime is ostensibly nihilistic and inexplicable.

---

8. See e.g., LOUIS BREGER, DOSTOYEVSKY: THE AUTHOR AS PSYCHOANALYST 25 (1989) (conducting a psychoanalysis of Raskolnikov, whose crime, "like the creation of a bad mother in the landlady, is an attempt to externalize his overwhelming ambivalence so that he can take action in the world."); FRANK, *supra* note 4 (helping readers understand the novel by focusing on the writer's personal life and the social, cultural, literary and philosophical background of the times.); RICHARD H. WEISBERG, THE FAILURE OF THE WORD 54 (1984) (focusing primarily on Porfiry Petrovich, lawyer and officer of the court, who "plays a game of life and death within the context of a perfectly respectable professional position."); I. Atkin, *Raskolnikov*; *The Study of A Criminal*, 5 J. OF CRIMINAL PSYCHOPATHOLOGY 255 (1943) (analyzing Raskolnikov "as a living being who is at odds with his environment" and discussing the "social determinants of crime"); Vera Bergelson, *Crimes and Defenses of Rodion Raskolnikov*, 85 KY. L.J. 919, 921 (1996-97) (attempting "to read *Crime and Punishment* and the Model Penal Code together, conducting a hypothetical 'retrial' of Rodion Raskolnikov."); Burnham, *supra* note 3 (analyzing the novel through examination of the legal system and the rules of evidence existing at the time); Margaret Church, *Dostoyevsky's "Crime and Punishment" and Kafka's "The Trial"*, 19 LITERATURE AND PSYCHOL. 47 (1969) (analyzing the parallels between *Crime and Punishment* and Kafka's *The Trial*); Hugh Mercer Curtler, *The Artistic Failure of Crime and Punishment*, 38.1 J. OF AESTHETIC EDUC. 1 (arguing that Raskolnikov's freedom is an "artistic failure"); Jeanne Gaakeer, "The Art to Find the Mind's Construction In the Face," *Lombroso's Criminal Anthology and Literature: The Example of Zola, Dostoyevsky, and Tolstoy*, 26 CARDOZO L. REV. 2345, 2346 (2005) (examining Cesare Lombroso's view that Dostoyevsky "was a criminal anthropologist who, in the character of Raskolnikov... depicted a fine specimen of the occasional criminal"); Kathleen Donnellan Garber, *A Psychological Analysis of a Dostoyevsky Character: Raskolnikov's Struggle for Survival* 14 PERSPECTIVES IN PSYCHIATRIC CARE 16 (1976) (focusing on "the psychological disintegration of Raskolnikov" before and after the crime); Jeffrey C. Hutzler, *Family Pathology in Crime and Punishment*, 38 AM. J. OF PSYCHOANALYSIS 335, 335 (1978) (suggesting that "the concept of family pathology explains Raskolnikov's odd symptoms (diagnosis), his motivation for the murders he committed (dynamic) and the resolution of his conflict"); David Kiremidjian, *Crime and Punishment: Matricide and the Woman Question*, 33 AM. IMAGO 403 (1976) (analyzing Raskolnikov's infantile dependencies and his matricidal impulses); Peter Lowe, *Prufrock in St. Petersburg: The Presence of Dostoyevsky's CRIME AND PUNISHMENT in T.S. Eliot's "The Love Song of J. Alfred Prufrock"*, 28 J. OF MODERN LITERATURE 1 (2005) (describing how T.S. Eliot borrowed from Raskolnikov in composing his best known modernist poem, "The Love Song of J. Alfred Prufrock").

This article acknowledges that while *Crime and Punishment* entails a brutal murder of two women, the real focus is not on the crime itself, but on its aftermath, on Raskolnikov's psychological anguish, and on what eventually preempts all else — the murderer's need, or rather obsessive compulsion, to confess. Raskolnikov probably could have escaped detection and gotten away with murder; but it is Raskolnikov himself who sabotages that possibility. There is something that propels Raskolnikov to do himself in, re-visit the crime scene, make incriminating insinuations to a police clerk in a bar, and bring himself to the attention of and even tease Porfiry Petrovich, who is the formidable examining magistrate assigned to the case.

*Crime and Punishment* is not really about crime or even punishment *per se*. Its veritable subject is one human being's overwhelming need to come clean and transform himself. The novel, however, is not just an exposé of the subliminal forces that propel a criminal to accept responsibility for a heinous act. This great Russian novel is a veritable testimonial to confession as a celebrated event, as the prime catalyst for deep moral, spiritual, and psychological regeneration.<sup>9</sup>

This article broadly proposes that Dostoyevksy's *Crime and Punishment* sheds light on something that has always troubled the United States Supreme Court and vexed criminal justice scholars — namely, confessions. In fact, a substantial component of just about any criminal procedure curriculum is devoted to the due process cases predating *Miranda v. Arizona*,<sup>10</sup> and the United States Supreme Court's quest for ways to regulate police extractions of incriminating statements from suspects.<sup>11</sup> A thorough study of criminal procedure will also at least entail a close look at confessions in connection with the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel.

---

9. Robert F. Cochran, *Crime, Confession, And The Counselor-At-Law: Lessons From Dostoyevsky*, 35 HOUS. L. REV. 327, 365-66 (1998) ("Though Dostoyevsky's characters emphasize the psychological and rational effects of confession, some of his characters [like those in CRIME AND PUNISHMENT] recognize eternal implications."); Douglas Robbins, *Resurrection From a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115, 1161 (2001) (arguing that after confession and punishment "a new man is born with a moral outlook entirely foreign to his former self").

10. 384 U.S. 436 (1966).

11. See generally JAMES J. TOMKOVICZ & WELSH S. WHITE, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF (2004). The author of this article teaches Criminal Procedure and uses that fine text book, and especially appreciates its coverage of confession and self-incrimination.

This article, divided into five parts, will place Dostoyevsky's thesis in *Crime and Punishment* in the context of criminal confession jurisprudence. It will show how the novel is a valuable tool that can shed light on confessions and give criminal defense attorneys a fresh perspective on them.

Part II begins with therapeutic jurisprudence, which is a relatively new field of legal study that already has had an impact on the courts and on nearly all areas of the law.<sup>12</sup> The basic premise of therapeutic jurisprudence is that the law often "function[s] as a kind of therapist or therapeutic agent" and that "legal procedures . . . constitute social forces that, whether intended or not, often produce therapeutic or antitherapeutic consequences."<sup>13</sup> Some criminal defense lawyers have welcomed therapeutic jurisprudence into their practice and have implemented a more holistic approach to their clients, one that aims to foster individual well being and healing.<sup>14</sup> Therapeutic jurisprudence can also discredit to some extent the attitude of the traditional criminal defense bar toward client confessions and suggest that in certain instances, they might be welcomed, or at least, not squelched.

---

12. See generally LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996) (an anthology of therapeutic jurisprudence articles in a variety of legal areas); ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1991) (applying therapeutic jurisprudence to various issues in mental health law); BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW (Bruce J. Winick ed., 1997) (showing how therapeutic jurisprudence can help us understand and restructure mental health law); *Special Issue on Therapeutic Jurisprudence*, 37 COURT REV. 1, 1-68 (2000) (collection of articles on how therapeutic jurisprudence can affect the courts and judicial decisions); Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999) (applying therapeutic jurisprudence to criminal justice); Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499 (2000) (applying therapeutic jurisprudence to appellate practice); The Honorable Juan Ramirez, Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville's Tribute To The Sixth Amendment*, 41 CAL. WESTERN L. REV. 103 (2004) (showing how therapeutic jurisprudence can add a dimension to law and literature and help us understand Melville's novella); Amy D. Ronner, *Songs of Validation, Voice and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89 (2002) (applying therapeutic jurisprudence to juvenile justice).

13. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 185 (1997).

14. See generally David B. Wexler, *Therapeutic Jurisprudence And the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743 (2005) (exploring how criminal defense lawyers can integrate therapeutic jurisprudence into their practice).

Part III makes a seeming detour into a brief re-examination of the history of confession jurisprudence, beginning with the pre-1964 concerns that prompted the United States Supreme Court to determine when and how certain incriminating statements violated the Due Process Clause. The article revisits later developments during the mid-1960s, in which the Court held that both the Fifth Amendment and the Sixth Amendment governed the constitutional admissibility of confessions. The article here will explore the Court's attempt to control what it viewed as "the potential evils of incommunicado interrogation" and most importantly, link this with voluntariness and fairness, concepts that also comprise the very fundament of therapeutic jurisprudence.<sup>15</sup>

Part IV is a study of Raskolnikov before, during, and after the commission of the crime. It shows how Dostoyevsky's anguished protagonist is consumed with the need to confess, a condition even predating his serious contemplation of the crime. In essence, Dostoyevsky gives us a psychological portrait of someone, who, although a unique human being, is also a species of offender, the kind that craves confession, acceptance of responsibility, and ultimate transformation. He is the sort that can benefit from therapeutic jurisprudence.

Part V presents a new angle on law and literature.<sup>16</sup> It engages in a therapeutic jurisprudence analysis of Dostoyevsky's *Crime and Punishment*, further exploring Raskolnikov's compulsion to confess. In this context, the article will delve into the significance of confession, which is not just a putative prosecutorial tool for closing a crime file, but is and can be the very catalyst to healing and rehabilitation. This part will also analyze other characters in Raskolnikov's world and show how they serve as therapeutic agents facilitating a slow but meaningful redemptive process. It is here that the article will once again bring in therapeutic jurisprudence and landmark Supreme Court confession cases, emphasizing that they and Dostoyevsky are not at odds, but share some of the same vital concerns.

Part VI of this article will essentially conclude where it began by revisiting Raskolnikov's seemingly senseless murder and suggest that therapeutic jurisprudence can help us make sense out of that brutal crime. The conclusion further aspires to extract from Dostoyevsky a message that can assist and even elevate therapeutic criminal justice.

---

15. Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 102-3 (1967) (quoting WALTER V. SCHAEFER, *THE SUSPECT AND SOCIETY* 10 (1967)).

16. See Ramirez & Ronner, *Voiceless Billy Budd*, *supra* note 12 (attempting a therapeutic jurisprudence analysis of Melville's novella).

## II. THERAPEUTIC CONFESSIONS: VOLUNTARINESS AND FAIRNESS

The founders of therapeutic jurisprudence, Professors Winick and Wexler, trace the origin of their interdisciplinary movement to mental health law.<sup>17</sup> Pioneering scholars criticized aspects of mental health law, which they saw as spawning antitherapeutic results for the very people that it aimed to help.<sup>18</sup> Later therapeutic jurisprudence spread to other contexts, like criminal, juvenile, and personal injury law.<sup>19</sup> It is now a full-fledged approach to all areas of the law and has its own well-respected body of literature. This article will show that it also coexists quite nicely with another interdisciplinary niche — law and literature.<sup>20</sup>

### A. *The Foundation of Therapeutic Jurisprudence*

In a book advancing the application of therapeutic jurisprudence to the enterprise of judging, Professors Winick and Wexler, explain:

Therapeutic jurisprudence focuses our attention on the traditionally under-appreciated area of the law's considerable impact on emotional life and psychological well-being. Its essential premise is a simple one: that the law is a social force that can produce therapeutic or antitherapeutic consequences. The law consists of legal rules, legal procedures, and roles and behaviors of legal actors, like lawyers and judges. Therapeutic jurisprudence proposes that we use the tools of the behavioral sciences to study the therapeutic and antitherapeutic impact of the law, and that we think creatively about improving the therapeutic functioning of the law without violating other important values . . . .<sup>21</sup>

All areas of law that have imbibed therapeutic jurisprudence, along with criminal justice, share a core philosophy. That is, there are basic common-sense truths undergirding any process or lawyering movement that cares about healing and the promotion of individual well-being. For example, an individual's sense of voluntary participation in what is experienced as a fair procedure

---

17. BRUCE J. WINICK & DAVID B. WEXLER, *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 7 (2003).

18. *Id.*

19. *Id.* (“[T]herapeutic jurisprudence soon found easy application to other areas of the law — criminal law, juvenile law, family law, personal injury law — and has now emerged as a therapeutic approach to the law generally”); see also *supra* note 12 (providing examples of the expansiveness and diversity of therapeutic jurisprudence scholarship).

20. See also Ramirez & Ronner, *Voiceless Billy Budd*, *supra* note 12, at 108 (explaining that the article “hone[s] in on what is Melville’s core message and advocate[s] more broadly how [therapeutic jurisprudence] and certain literature can be a profound contributor to legal education and to our justice system”).

21. WINICK & WEXLER, *supra* note 17, at 7.



is the heart and soul of all therapeutic jurisprudence scholarship and its practical applications.<sup>22</sup>

Therapeutic jurisprudence scholars point out that when individuals participate in a judicial process, what influences them the most is not the result, but their assessment of the fairness of the process itself.<sup>23</sup> Professor Tom Tyler, a social psychologist and a main proponent of the psychology of procedural justice, elaborates:

Studies suggest that if the socializing influence of experience is the issue of concern (i.e., the impact of participating in a judicial hearing on a person's respect for the law and legal authorities), then the primary influence is the person's evaluation of the fairness of the judicial procedure itself, not their evaluations of the outcome. Such respect is important because it has been found to influence everyday behavior toward the law. When people believe that legal authorities are less legitimate, they are less likely to be law-abiding citizens in their everyday lives.<sup>24</sup>

Professor Gould, dealing with similar concepts in criminal sentencing, has concluded that those who "experienced a legal procedure that they judged to be unfair . . . had less respect for the law and legal authorities and are less likely to accept judicial decisions."<sup>25</sup> The problem is that such feelings can impede an individual's rehabilitation and "lead to a gradual erosion of obedience to the law."<sup>26</sup> In contrast, when individuals see the legal system as fair and feel that they have been treated with respect and dignity, the effect is bound to be therapeutic. Participants in such a process tend to be more inclined to accept responsibility for their own conduct, take charge, and change.<sup>27</sup> Of course, all of this

22. See Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 437 (1992) (focusing on the psychological consequences of commitment hearings); see also Amy D. Ronner, *Punishment Meted Out for Acquittals: An Antitherapeutic Atrocity*, 41 ARIZ. L. REV. 459, 472-77 (1999) (discussing how unfair procedures engender disrespect for the law, disregard for human life, rage, and a sense of helplessness); Ronner & Winick, *supra* note 12, at 501-03 (discussing how proceedings that instill a greater respect for the law provide litigants with incentive to move forward and improve their own situation).

23. See Ronner, *Songs of Validation, Voice and Voluntary Participation*, *supra* note 12, at 93-96 (discussing "the three V's: namely, a sense of voice, validation, and voluntary participation").

24. See Tyler, *supra* note 22, at 437.

25. Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835, 865 (1993); see also Ronner, *supra* note 22, at 474 (pointing out the negative effects of unfair legal procedures).

26. Gould, *supra* note 25, at 865 (quoting Daniel W. Shuman & Jean A. Hamilton, *Jury Service — It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors*, 46 SMU L. REV. 449, 451 (1992)).

27. See, e.g., E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); JOHN THIBAUT & LAURENS WALKER,

is not just confined to the one individual that happens to be interacting with the legal system, but spreads to society at large, instilling public confidence in the laws, attorneys, and courts.

Listening skills, so intermeshed with fairness, is something that therapeutic jurisprudence praises and cultivates. For example, Professor Nathalie Des Rosier, who has done remarkable work in appellate therapeutic jurisprudence, has emphasized “the need for the tribunal to listen fully to all the concerns of the participants and to recognize the value of such expression.”<sup>28</sup> According to Des Rosier, it is essential that parties know that they have a voice and that it is not being silenced.<sup>29</sup>

Akin to voice is the concept of validation.<sup>30</sup> When individuals believe they have been genuinely listened to, heard, and taken seriously, they feel validated. Consequently, when litigants emerge from a legal proceeding with a sense of voice and validation, they are more accepting of the outcome.<sup>31</sup> Voice and validation foster something essential — a sense of voluntary participation — which occurs when an individual experiences the proceedings as less coercive.<sup>32</sup> When individuals feel that they

---

PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 83-84, 94-95, 118 (1975); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); E. Allen Lind et al., *Voice, Control and Procedural Justice: Instrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990). For application of these principles to civil commitment hearings, see generally Tyler, *supra* note 22 (focusing on the psychological processes of commitment hearings); Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 46-47 (1999) (discussing such principles and the role of counsel in civil commitment hearings).

28. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Rule of Courts in Minority-Majority Conflicts*, 37 COURT REVIEW 54, 56 (2000); see also Ronner & Winick, *supra* note 12, at 501 (“Equal with voice is ‘validation,’ or the feeling that the tribunal has really listened to, heard, and taken seriously the litigants’ stories.”); see also Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U.L. REV. 1145, 1158 (1997) (discussing coerced mental health treatment).

29. Nathalie Des Rosier, *supra* note 28, at 57.

30. See Ronner & Winick, *supra* note 12, at 501 (explaining the feeling “that the tribunal has really listened to, heard, and taken seriously the litigants’ stories”); see also Bruce J. Winick, *supra* note 28, at 1158 (demonstrating the direct correlation between voice and validation).

31. Winick, *supra* note 27, at 48.

32. *Id.* Recent work by the MacArthur Network on Mental Health and the Law on patient perceptions of coercion have found that even in coercive situations like civil commitment, people do not feel coerced when they see the state actors as benevolent and when they are treated with dignity and respect. *Id.* at 47-50. See generally BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 149-54 (2005) (discussing the “psychological effects of coercion and voluntary choice”); Nancy S. Bennett et al., *Inclusion, Motivation and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAV. SCI & L. 295 (1993) (providing patient accounts of the morality of mental hospital admissions); William Gardner et

voluntarily partake in a process that engenders a result or a judicial pronouncement that affects their own lives, they tend to heal better and even ameliorate their behavior patterns. In general, human beings flourish when they are making, or at least participating in, their own decisions.<sup>33</sup>

In therapeutic jurisprudence, the attorney is key — it is he or she who can help give clients that sense of voice, validation, and voluntary participation.<sup>34</sup> It is the attorney that can help effectuate the client's participatory interests and implement ways of making proceedings seem fair and less coercive. Further, where appropriate, such attorneys can and should encourage certain clients to accept responsibility for their own actions.<sup>35</sup> Such acceptance can be both the trigger for and the crowning achievement of a true healing process.

Principles of therapeutic jurisprudence are now operating in many areas of criminal justice and can boast of positive results. In fact, some criminal defense attorneys have already embraced this movement with its emphasis on the "emotional life and

---

al., *Two Scales for Measuring Patients' Perceptions for Coercion During Mental Hospital Admission*, 11 BEHAV. SCI. & L. 295, 307 (1993) (presenting patient experiences with coercion in mental hospital admissions); Steven K. Hoge et al., *Perceptions of Coercion in the Admission of Voluntary and Involuntary Psychiatric Patients*, 20 INT'L J.L. & PSYCHIATRY 167 (1997) (examining the role of coercion in hospital admissions processes); Charles W. Lidz et al., *Perceived Coercion in Mental Hospital Admission: Pressures and Process*, 52 ARCHIVE GEN. PSYCHIATRY 1034 (1995); John Monahan et al., *Coercion and Commitment: Understanding Involuntary Mental Hospital Admission*, 18 INT'L J. L. & PSYCHIATRY 249 (1995) (exploring the relationship between coerced admission and justice); John Monahan et al., *Coercion to Inpatient Treatment: Initial Results and Implications for Assertive Treatment in the Community, in COERCION AND AGGRESSIVE COMMUNITY TREATMENT: A NEW FRONTIER IN MENTAL HEALTH LAW* 1, 13 (Deborah L. Dennis & John Monahan eds., 1996) (discussing perceived coercion and legal status); see also Winick, *supra* note 28, at 1158-59 (describing the MacArthur coercion study and patient variables correlated with perception of coercion).

33. See generally BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAWS* 68-83 (1977) (exploring the expansion of therapeutic jurisprudence and its importance); Ronner & Winick, *supra* note 12, at 502 (describing the importance of voluntariness in the legal process); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1755-68 (1992) (pointing to the psychological value of choice).

34. See Ramirez & Ronner, *supra* note 12, at 121 ("It is the attorney who can help effectuate such individuals' participatory interests and give them voice and validation. It is also the attorney as the voice that can make legal proceedings seem less coercive and increase the likelihood that the results will be perceived as fair."); Ronner & Winick, *supra* note 12, at 502 ("On appeal, as in the trial itself, the lawyer typically functions as the instrument of the client's voice.").

35. See generally Wexler, *supra* note 14 (discussing the importance of acceptance of responsibility to the offender on the road to rehabilitation).

psychological well-being” by turning to behavioral science tools to facilitate what they accept as a legitimate goal — a therapeutic legal process.<sup>36</sup> One such place is the drug treatment court, which, aiming to halt the vicious cycle of addiction and crime, provides a drug addicted individual with court-monitored help. According to Martin Reisig, a former drug-court defense attorney, therapeutic jurisprudence is compatible with criminal defense work as long as there exists a balance between the goals of due process and healing.<sup>37</sup> Here Reisig stresses the importance of voluntary participation in a fair process:

The overall well-being of the individual is of paramount value. The potential outcome is so good that it is easy to forget the setting. When the setting includes a guilty plea and a felony as the cost of admission to a drug treatment court the process becomes as important as the potential outcome. A defendant must fully participate in the decision to enter a drug treatment court, trust that he has been provided with full information and perceive that his views have been fully heard. The therapeutic or antitherapeutic aspects of the process deserve attention, so as not to undermine the potential good of drug treatment courts.<sup>38</sup>

What Reisig proposes is that without voice, validation, and voluntary participation, the drug treatment courts, even with their laudable objectives, can backfire and do harm. For him, these courts can only work through “caring and thorough representation.”<sup>39</sup>

There are lawyers that have taken therapeutic jurisprudence beyond the contours of problem solving courts and have built an actual therapeutic jurisprudence criminal law practice.<sup>40</sup> For example, Dallas, Texas attorney, John McShane, once observed that with respect to habitual driving under the influence offenders, alcoholism is a disease that can spawn redundant arrests.<sup>41</sup> McShane’s law firm, aiming to treat not just the symptoms, but the disease itself, refuses to represent defendants battling alcoholism unless they sign a contract

---

36. WINICK & WEXLER, *supra* note 17, at 7.

37. See Martin Reisig, *The Difficult Role of the Defense Lawyer in a Post-Adjudication Drug Treatment Court: Accommodating Therapeutic Jurisprudence and Due Process*, 38 CRIM L. BULL. 216 (2002) (discussing therapeutic jurisprudence along with Due Process).

38. *Id.* at 223.

39. *Id.* at 224.

40. See generally David B. Wexler, *supra* note 14 (discussing how therapeutic jurisprudence has been applied to criminal defense practice).

41. *Id.* at 744-45 (discussing JOHN V. MCSHANE, *THE HOW AND WHY OF THERAPEUTIC JURISPRUDENCE IN CRIMINAL DEFENSE WORK* (2000)). This article’s author has participated in numerous speaking engagements with therapeutic jurisprudence lawyer John McShane and bases some of the information in this article on what she learned from those conferences.

agreeing to a therapeutic jurisprudence plan.<sup>42</sup> If a potential client declines, the firm makes a referral to a competent lawyer who will then represent that client in the traditional way.<sup>43</sup> The same kind of referral is made when such a defendant has a viable defense.<sup>44</sup> In short, McShane's *modus operandi* is tailored to a certain kind of repeat offender that wants help and chooses to change.

Once the therapeutic jurisprudence contract is executed, however, the case centers on rehabilitation plus mitigation of punishment.<sup>45</sup> In this practice, the client, owning up to his or her problem, consents to evaluation, treatment, and a relapse prevention program.<sup>46</sup> McShane then defers the disposition of the case to give the client maximum recovery time and assembles a packet of information on the rehabilitation for the prosecutor at plea bargaining, or the judge at the sentencing hearing.<sup>47</sup> What is key here is the client's voluntary participation and acceptance of responsibility for his or her actions. For McShane's system to work, clients must stop lying to themselves and others about their problem and commit themselves to changing their lifestyles and focusing on getting better.<sup>48</sup> Basically, they have to own up and follow through.

Still other criminal lawyers, even ones with a more traditional practice, have integrated therapeutic jurisprudence tools into their work. In his superb article, Professor David Wexler discusses the criminal defense lawyer's potential rehabilitative role in multiple aspects or stages in the process.<sup>49</sup> He explains that criminal lawyers can be effective agents of positive behavioral change through "encouraging active and meaningful client participation" and through "fostering client hope and expectancy."<sup>50</sup>

Wexler advises lawyers to educate themselves about treatment programs available in their jurisdictions and be knowledgeable of informal and formal programs for diversion.<sup>51</sup> With respect to pleas and sentencing, a therapeutic jurisprudence criminal lawyer should be adept at assembling a rehabilitation-oriented packet to help secure a favorable plea arrangement or fair

---

42. *Id.* at 744.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 744-45.

48. *Id.*

49. Wexler, *supra* note 14.

50. *Id.* at 748; see also Michael D. Clark, *A Change-Focused Approach for Judges*, in WINICK & WEXLER, *supra* note 17, at 137-47 (discussing such factors and their efficacy in the context of drug court programs).

51. Wexler, *supra* note 14, at 749.

sentence.<sup>52</sup> In this regard, Wexler, borrowing from the McShane prototype, suggests an effort to defer sentence and compile a record of post-offense rehabilitation.<sup>53</sup> He also underscores that post-offense rehabilitation can lead to “[t]he sanction of probation, [which] when legally available for a given offense, is chock-full of Therapeutic Jurisprudence considerations, [and] . . . can inform and enrich the role of the defense counsel.”<sup>54</sup>

According to Wexler, after conviction, and especially after a jail sentence, there exist therapeutic jurisprudence opportunities in the dialogue between lawyer and the client.<sup>55</sup> If an appeal is anticipated, there is also the possibility of conveying the importance of voice and validation to an appellate tribunal that might do something more productive than merely issue a per curiam summary affirmance.<sup>56</sup> Further, when a client is facing incarceration, the therapeutic jurisprudence lawyer and client can discuss the sentence and the future.<sup>57</sup> What Wexler here proposes is that the rehabilitative involvement of the lawyer should “extend[] beyond sentencing, into corrections, conditional or unconditional release, and to life in the community.”<sup>58</sup> His model, both holistic and healing, invites a peaceful merger between traditional and therapeutic approaches in criminal practice.

### *B. Therapeutic Jurisprudence and Confession*

Therapeutic jurisprudence can also shed light on the role of confessions. But before venturing forth, it is an opportune time to

---

52. *Id.* at 753.

53. *Id.* at 753. According to Wexler, “[c]losely related to [pleas] is sentence leniency, often given for a defendant’s ‘acceptance of responsibility,’ which will kick in more clearly if it occurs early in the process, and is perceived as genuine rather than as purely strategic.” *Id.* at 754 (citing *United States v. Jeter*, 236 F.3d 1032 (9th Cir. 2001)).

54. Wexler, *supra* note 14, at 756-57; *see also* Faye S. Taxman & Meredith H. Thanner, *Probation From A Therapeutic Perspective: Results From the Field*, 7 CONTEMP. ISSUES IN L. 39 (2004) (arguing the importance of community standards).

55. David B. Wexler, *supra* note 14, at 766-69.

56. *Id.* at 767 (discussing Ronner & Winick, *supra* note 12). A per curiam affirmance, known as a PCA, occurs when the appellate court issues an order that simply says one word — affirmed. *See generally* Ronner & Winick, *supra* note 12, at 500-501 (analyzing “the antitherapeutic impact of the PCA . . . [by] delving into the psychology of procedural justice . . . , [by] show[ing] how a PCA had a negative psychological impact on an actual appellant in a criminal case . . . , [and] by proposing an alternative to the antitherapeutic PCA.”); *see also* Amy D. Ronner, *Therapeutic Jurisprudence On Appeal*, 37 CT. REV. 64, 64-66 (2000) (discussing how an “appellate court served as a therapist for a client represented by a law school in-house appellate litigation clinic” when it did not merely issue a PCA, but instead authored an opinion that acknowledged and responded to the client’s position).

57. Wexler, *supra* note 14, at 769-73.

58. *Id.* at 772.

anticipate and acknowledge a certain mind set: it is at this juncture or even earlier in the article that seasoned lawyers, especially ones that see themselves more as hired guns, might balk at the depiction of defense counsel as healer, as a player in a rehabilitative process. In fact, those of us claiming to be proponents of therapeutic jurisprudence are accustomed to rebutting what constitutes an almost reflex response on the part of certain members of the traditional bar, which is "I'm a lawyer — not a therapist, not a social worker, not a nursemaid."<sup>59</sup> This unsurprising rejoinder conceivably has its roots in the older law school curriculum in which "[l]awyers trained to be professionals have not been trained in how to respond to . . . anxiety, hurt feelings, and other emotions."<sup>60</sup>

Contemporary legal education, however, is evolving. Now law schools do offer classes in therapeutic jurisprudence and even incorporate it into other courses, like law school clinics, which are the places in which students interact with real life clients. Professor Leslie Larkin Cooney asserts that "the application of Therapeutic Jurisprudence to clinical teaching can have far ranging results"<sup>61</sup> and opposes what has been a near banishment of emotions from training and legal practice:

Emotions do have a powerful impact on the attorney-client relationship and students need to learn how to identify them and the role they play in the relationship. Feelings of rejection and abandonment, a sense of failure, loss of a dream, and helplessness are all emotions that may keep the client from focusing on the legal goals. If students fail to address these emotions in a counseling session, and choose only to focus on reasoning, arguing, or giving advice, clients feel ignored or minimized and the relationship is damaged. Therapeutic Jurisprudence teaches students that supportive denial is not likely to be helpful, and may make matters worse.<sup>62</sup>

While opponents of therapeutic jurisprudence may still adhere to the notion that emotions and counseling sessions do not fit the job description of lawyer, the reality is that a whole new breed of lawyers are emerging from law schools with an appreciation of therapeutic jurisprudence or "the use of social science to study the extent to which a legal rule or practice promotes the psychological

---

59. *Id.* at 747 ("A typical initial response to a proposed broadening of the traditional role of defense counsel is, 'Hey, I'm not a therapist.'").

60. Robert Eli Rosen, *And Tell Tchaikovsky The News: The Wedding of Therapeutic Jurisprudence and Preventive Lawyering*, 5 *PSYCHOL. PUB. POL'Y. & L.* 944, 946 (1999); see also Leslie Larkin Cooney, *Heart And Soul: A New Rhythm For Clinical Externships*, 17 *ST. THOMAS L. REV.* 407 (2005) (describing the history of therapeutic jurisprudence).

61. Cooney, *supra* note 60, at 407.

62. *Id.* at 419-20.

and physical well-being of the people it affects.”<sup>63</sup> This does not just mean that graduates will have more refined listening and interpersonal skills, but also that some future lawyers will be more in touch with themselves, more introspective, more questioning, and more creative. They are also more likely to be receptive to new ideas or at least open to a healthy re-evaluation of conventional methods, even ones that have become entrenched in our legal system.

One thing indelibly ingrained in the minds of some of the more traditional criminal defense practitioners is that their main job is about keeping the client out of jail, or at least doing reasonable damage control by obtaining the best possible sentence. Of course, others, who define themselves as defense lawyers with a broader calling, also equate their mission with the protection of constitutional rights. This author does not intend to demean in any way such goals, which are, of course, completely valid and commendable. But the point is that this whole school of thought can tend to bring with it a certain mindset with respect to client confessions. Succinctly put, the criminal defense attorney has been trained to treat client confession as a Pandora’s box that should remain hermetically sealed at all costs. In a provocative article, Professor Robert F. Cochran explains that “the common practice of lawyers is to rush to the police station or corporate office and tell the client not to talk to anyone about the offense,” and “many lawyers tell their clients that they do not want to know whether the client committed the crime.”<sup>64</sup> Stated otherwise, when

---

63. *Id.* at 408-409 (quoting Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL’Y. & L. 193, 196 (1995)).

64. Cochran, *supra* note 9, at 331. Cochran explains that since pursuant to the professional responsibility rules, “a lawyer may not knowingly present a client’s false testimony to the court” and [i]f a client gives perjured testimony, the lawyer must disclose it[,] . . . some lawyers tell their client not to tell them whether the client has committed the crime.” *Id.* 348-49. According to Cochran, this is “a highly questionable practice” because it “may enable lawyers to assist the client in perjury, the very thing that the rules are designed to prevent,” and it may also “place[] the lawyer at risk” because a “lawyer [that] fails to discover exculpatory evidence . . . could be vulnerable to a claim of ineffective assistance of counsel.” *Id.* at 349. Courts, lawyers, and scholars have struggled with the ethical dilemmas inherent in prohibition against knowingly presenting perjury to a court. *See* Orange County Bar Association, Formal Op. 2003-1 (Client Perjury and the Criminal Defense Attorney) (2004) (stating that “[i]f the client refuses to follow the attorney’s advice and insists on providing perjurious testimony, the attorney may seek to withdraw from representation, but this Opinion recommends that the attorney instead proceed with a ‘narrative’ presentation of the testimony after providing a recommended set of advisements and admonishments to the client.”); *see also* Monroe H. Freedman, *Controversial No More — The Perjury Trilemma Revisited*, 9 No. 4 PROF LAW. 2, 2 (1998) (describing “the ethical trilemma — the lawyer is required to know everything, to keep it in



it comes to confession, the client is silenced and good defense work is equated with accomplishing this as swiftly and efficiently as possible. Although Cochran acknowledges that there are some sound reasons for this approach, he believes that confession has its value because it “can bring peace, joy, forgiveness, reconciliation, and a renewed sense of one’s identity.”<sup>65</sup>

Cochran further points out that the “liberal lawyering model” in which “the lawyer is neutral, the autonomy of the client is the highest good, and the state procedure (i.e., the adversary system) is trusted to yield the good” is actually inimical to the actual practice of criminal defense attorneys, who take measures to ensure that the client has no opportunity to confess.<sup>66</sup> Cochran, suggesting that “[l]awyers who prohibit client confession” actually do “make an authoritarian choice” and “limit the client’s freedom,” instead proposes that lawyers engage in moral discourse with a client.<sup>67</sup>

---

confidence, and to be candid with the court, specifically with regard to client perjury” and concluding that “it is impossible for a lawyer to obey all three rules”); Ward Henneker, *Criminal Defendant Perjury: What Does One Do?*, 28 J LEGAL PROF. 165 (2003-2004) (suggesting that the tactic of disclosing intended perjury and the goal of being a zealous advocate for the client by protecting confidences are hopelessly at odds and that a lawyer will choose which of the rules he or she values most); Peter J. Henning, *Lawyers, Truth, and Honesty In Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POLY 209, 215 (2006) (proposing that “[t]he principle of honesty, rather than truth, can provide a further means, in addition to the lawyer’s own ethical judgment, to accommodate the dual roles of the attorney as an advocate for a client and an officer of the court”).

65. Cochran, *supra* note 9, at 333. Cochran acknowledges that confession “can also bring damage to reputation, stress, criminal punishment, and damage to family,” *id.*, and that “some lawyers [who] see the defense lawyer’s role as protecting society and clients from the powers of the state” believe that “almost any impediments to the state are good because they limit the ability of the state to abuse its prosecutorial power” and that confessions should be blocked because they “ease[] the burden of the state.” *Id.* at 349-50. He also points out that others believe that “the injustice of the state’s punishment system justifies a lawyer’s strong presumption against confession,” which “may lead to an unjust result because penalties may be excessive, judges have increasingly limited discretion as to sentencing, conditions in prison are unreasonably harsh, and some clients are subject to the death penalty.” *Id.* at 350. Cochran, however, takes the position that although the lawyer should apprise the client of the possible penalties and the reality of prison conditions, the decision should be made by the client. *Id.*

66. *Id.* at 330.

67. *Id.* at 331. *But see* PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE (2000). According to Brooks, “what we learn about confession from literature, from the religious tradition, and from the psychotherapeutic culture, suggests that where confession is concerned, the law needs to recognize that its conceptions of human motivation and volition are particularly flawed, even perhaps something of a fiction.” *Id.* at 5. Brooks suggests that the “heavy reliance on confessions in criminal justice creates a certain unease.” *Id.*

What Cochran brands as quite commonplace — namely, defense counsel's silencing of even the mere whisper of a confession — oppugns some philosophical tenets of therapeutic lawyering with its emphasis on voice, validation, and voluntary participation.<sup>68</sup> In essence, what transpires in the world that Cochran debunks is a lawyer despotically imposing choices on clients and blocking voices and stories. Such an approach can have the effect of excluding clients from the very decision-making that will determine their own futures. In short, the traditional confession taboo can under certain circumstances stifle healing, growth, and change. It can conflict with the therapeutic jurisprudence model in which potential clients are given the choice of or opportunity to choose the acceptance of responsibility route by admitting their problem and addressing its underlying causes.<sup>69</sup> For some clients (of course, not all), defense counsel's confession taboo can unwittingly ruin a human life by obstructing a rare and redemptive option.

### III. THE CONSTITUTION AND CONFESSIONS: VOLUNTARINESS AND FAIRNESS

Any student of criminal procedure will not fail to notice that the typical syllabus comprehensively covers the constitutional standards applied to confessions. Up until the mid-1960s, the Due Process Clause was the sole basis for deeming incriminating statements unconstitutional. Later, the United States Supreme Court found that both the Fifth Amendment Privilege Against Self-Incrimination and the Sixth Amendment Right to Counsel also preside over the constitutionality and admissibility of confessions. As in therapeutic jurisprudence, the constituent concerns are with voluntariness and fairness.

A focus in seminal Supreme Court decisions from the early Due Process Clause era to the present is on the distinction between a voluntary and a coerced confession. On a more subtle level, even the Sixth Amendment case law harbors such a concern. There is, however, another omnipresent thread running through all the confession cases — namely, the importance of safeguarding what we, as Americans, perceive as a fair accusatorial procedure.

#### A. *Confessions and Due Process*

At common law, courts excluded coerced confessions from evidence because they believed them to be untrustworthy. In

---

68. See *supra* notes 22-35 and accompanying text (describing the philosophy that underlies therapeutic jurisprudence).

69. See *supra* notes 22-35 (describing the goals of therapeutic jurisprudence).

1936, in a landmark case, *Brown v. Mississippi*,<sup>70</sup> police officers brutally beat the defendants until they confessed to dictated statements. In overturning the convictions under the Due Process Clause, the Court opined that confessions extracted that way were likely to be unreliable. But later cases, examining the dangers of coerced confessions, suggest that untrustworthiness is not the only reason to bar such improper confessions.

The basic tension in confessions law is between the interests in the protection of individual rights and the facilitation of law enforcement efforts to solve crimes.<sup>71</sup> Those prone to tip the scale in law enforcement's favor fear imposing restraints on police that could impair their ability to effectively interrogate suspects.<sup>72</sup> For them, the reliability of the evidence is and should be the deciding issue. Professor Fred Inbau is a prime progenitor of the position that the only types of police interrogation that should be proscribed are those likely to lead to false or unreliable confessions.<sup>73</sup> Inbau once suggested that interrogators should ask the question: "Is what I am about to do, or say, apt to make an innocent person confess?"<sup>74</sup> For Inbau this is "the only test that is fair both to the public and to the accused or suspected individual."<sup>75</sup>

---

70. 297 U.S. 278 (1936).

71. See *Spano v. New York*, 360 U.S. 315, 315 (1959) (stating that the Court is "forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement"); Daniel W. Sasaki, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593, 1595 (1988) (discussing the "classic struggle . . . between the protection of constitutionally-based individual rights and the facilitation of effective law enforcement").

72. See Sasaki, *supra* note 71, at 1595.

73. FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 217 (3d ed. 1986); see also *Miranda v. Arizona*, 384 U.S. 436, 449 (1966) (discussing the methods described in the manuals by Inbau, et al. as "reflect[ing] their experiences and [being] . . . the most effective psychological stratagems to employ during interrogation"); Yale Kamisar, *Fred E. Inbau: "The Importance of Being Guilty"*, 68 J. CRIM. L. & CRIMINOLOGY 182, 183 (1977) ("Inbau taught criminal procedure and its constitutional dimensions — all the while he yearned for, and fought for, the day when criminal procedure would have no (or at least very few) constitutional dimensions."); Sasaki, *supra* note 71, at 1595 (describing Inbau as "the chief advocate of" the "pro-prosecution approach").

74. INBAU ET AL., *supra* note 73. See also Sasaki, *supra* note 71, at 1595 (quoting Professor Inbau's advice to interrogators about interrogation tactics).

75. *Id.*; see Sasaki, *supra* note 71, at 1595 (citing Inbau's contention of the test's fairness); see also BROOKS, *supra* note 67, at 13 (discussing the police interrogation manuals by Fred E. Inbau, John E. Reid, and Charles E. Ohara, "works which at the time of *Miranda* had attained a circulation of over forty-four thousand copies (and in their revised editions continue to be widely used)")

Reliability, however, is not the sole fixation in the landmark Due Process confession trilogy: *Ashcraft v. Tennessee*,<sup>76</sup> *Spano v. New York*,<sup>77</sup> and *Colorado v. Connelly*.<sup>78</sup> Such cases scrutinize the conduct of the interrogators themselves and stress not just the unreliability of what is extracted, but also the necessity of preserving what is sacrosanct — namely, public confidence in this country's penal system. In these cases, the Court either explicitly or implicitly inquires as to whether official methods used to obtain the confession were consistent with our notions of what constitutes a fair system of criminal justice. The Court has stated that coercive methods result in an "involuntary" confession and this is true irrespective of whether they did or could have made an innocent person falsely confess.

In *Ashcraft*,<sup>79</sup> Ashcraft, charged with having hired a man to murder his wife, was convicted as an accessory before the fact. Ashcraft argued that his alleged confession was "extorted" from him in violation of due process.<sup>80</sup> In reversing his conviction, the Court agreed and based the decision on the totality of the circumstances, which were indeed quite egregious.

Police officers had placed Ashcraft into custody and held him there for thirty-six hours. During that time, he was kept incommunicado and deprived of sleep or rest. There were relays of experienced investigators and lawyers, who questioned him practically without respite from Saturday evening until Monday morning. The record reflects that the reason the officers worked in shifts was because they themselves became exhausted and needed breaks.

In concluding that if Ashcraft confessed, it was not voluntary but compelled, the Court said that such a situation "is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear."<sup>81</sup> In Justice Black's decision, it is apparent that what troubled the Court was not just the potential unreliability of such a compelled confession, but its contravention of something sacrosanct:

There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of

---

and stating that "[t]he tactics preached by these manuals are as chilling as one might imagine").

76. 322 U.S. 143 (1944).

77. 360 U.S. 315 (1959).

78. 479 U.S. 157 (1986).

79. 322 U.S. 143.

80. *Id.* at 145.

81. *Id.* at 154.

crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.<sup>82</sup>

Similar concerns surface in *Spano*,<sup>83</sup> which involved a post-indictment confession and a first-degree murder conviction of a 25-year-old Italian immigrant. In that case, a team of experienced officers and prosecutors interrogated Spano, who had a limited education and was “emotionally unstable and maladjusted.”<sup>84</sup> Questioning did not take place during regular business hours, but began in early evening and ended about eight hours later. Further, the interrogators persisted despite Spano’s repeated refusals to answer on the advice of his attorney and despite his requests to contact his retained counsel.

The coercion in *Spano* had the added ingredient of deception: the interrogators instructed Bruno, Spano’s buddy, who was a “fledgling police officer,” to falsely inform Spano that his “telephone call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child.”<sup>85</sup> Spano essentially buckled under such repeated entreaties and lies.

The Court considered “all the facts in their post-indictment setting” and found that Spano’s “will was overborne by official pressure, fatigue and sympathy falsely aroused.”<sup>86</sup> While the Court did not conceivably believe that all of this made Spano confess to something he did not do, Chief Justice Warren’s decision clarified that “the use of involuntary confessions does not turn alone on their inherent untrustworthiness.”<sup>87</sup> Rather, “it also turns on the deep-rooted feeling that the police must obey the law while enforcing the law,” and “that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.”<sup>88</sup> As in *Ashcraft*, the *Spano* Court did not see reliability as the lynchpin of the Constitutional question, but rather frowned upon the coercive techniques themselves because they undermine fairness and criminal justice.

*Connelly*,<sup>89</sup> a post-*Miranda* decision, further demotes the reliability factor in determining the admissibility of confessions. Unlike the situation in *Ashcraft* and *Spano*, in *Connelly* it was the

---

82. *Id.* at 155.

83. 360 U.S. 315.

84. *Id.* at 322 n.3.

85. *Id.* at 317, 319.

86. *Id.* at 323.

87. *Id.* at 320.

88. *Id.* at 320-21.

89. 479 U.S. 157.

defendant himself, “without any prompting,” that initiated police contact.<sup>90</sup> Basically, Connelly just walked up to an officer, announced that he had murdered someone, and said that he wanted to discuss it. When the officer advised him of his *Miranda* rights, Connelly said that he understood, but still wanted to discuss the murder. After a detective arrived and reiterated his rights, Connelly told him that he had come all the way from Boston to confess. While in police headquarters, Connelly detailed his story to the police and even gave them the precise location of the murder.

The next day, however, when Connelly became disorientated during an interview with the public defender’s office, they sent him to a hospital for evaluation. Connelly revealed to the psychiatrist that he was listening to the “voice of God” when he confessed.<sup>91</sup> On the basis of the psychiatrist’s testimony that Connelly suffered from a psychosis that impaired his ability to make free and rational choices, the trial court found that his initial statements and custodial confession were “involuntary.”<sup>92</sup> The court suppressed the incriminating statements even though the police had not done anything improper or coercive. Also, the court believed that Connelly’s mental illness vitiated his putative waiver of the right to counsel and privilege against self-incrimination. The Colorado Supreme Court affirmed,<sup>93</sup> but the United States Supreme Court reversed and remanded.<sup>94</sup>

The Supreme Court concluded that there was no due process violation because there was no coercive police activity, which is “a necessary predicate to the finding that a confession is not ‘voluntary.’”<sup>95</sup> Justice Rehnquist, authoring the opinion, interpreted “the cases over the 50 years since *Brown v. Mississippi* [as focusing] upon the crucial element of police overreaching” and said that while the defendant’s mental condition can be a “significant factor in the ‘voluntariness’ calculus,” that by itself is not controlling.<sup>96</sup>

The *Connelly* Court found that the Colorado Supreme Court had also erred with respect to finding an invalid waiver of *Miranda* rights. In so doing, the Court faulted the state court for “importing into this area of constitutional law notions of ‘free will’

---

90. *Id.* at 160.

91. *Id.* at 161.

92. *Id.* at 162. Relying on the decisions in *Townsend v. Sain*, 372 U.S. 293 (1963) and *Culombe v. Connecticut*, 367 U.S. 568 (1961), the Court held that a “confession is admissible only if it is a product of the defendant’s rational intellect and ‘free will.’” *Id.*

93. *People v. Connelly*, 702 P.2d 722 (1985).

94. *Connelly*, 479 U.S. 157.

95. *Id.* at 167.

96. *Id.* at 163-67 (discussing *Brown v. Mississippi*, 297 U.S. 278 (1936)).

that have no place there” and emphasized that while “*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment[,] it goes no further than that.”<sup>97</sup> The Court said that *Connelly*’s “perception of coercion flowing from the ‘voice of God,’ however important or significant such a perception may be in other disciplines, is a matter to which the United States Constitution does not speak.”<sup>98</sup>

While the *Ashcraft* and *Spano* Courts suggest that voluntariness does not rest solely on reliability, they do not altogether dispense with that factor. What they do is simply add on another layer of reliability by demanding that the methods used to extract a confession comport with our “deep-rooted feeling that the police must obey the law while enforcing the law.”<sup>99</sup> The *Connelly* decision, however, appears to demote reliability by suggesting that the Constitution might tolerate an untrustworthy confession as long as it was not obtained through police overreaching.

After *Connelly*, there are two species of involuntary confessions: the first is constitutionally infirm because it is rendered involuntary by outside forces — namely, coercive law enforcement tactics. The second is internally involuntary and thus, has no constitutional import because mental illness is what has derailed the individual’s ability to make a free and rational choice and is what prompted the self-incrimination. As discussed below, in *Crime and Punishment*, Dostoyevsky eradicates that demarcation between the two types of involuntary confessions.<sup>100</sup> For Dostoyevsky, coercion from the outside, like police pressure, and internal compulsion, like a mental illness that obliterates free will, can both equally produce confessions that do and should amount to nullities.<sup>101</sup>

97. *Id.* at 169-70.

98. *Id.* at 170-71.

99. *Spano*, 360 U.S. at 320.

100. See *infra* note 283 and accompanying text (explaining that Porfiry believes voluntary confessions are of utmost importance and that confessions resulting from coercion or psychosis are involuntary); see also *infra* Part V.A (describing Porfiry’s therapeutic jurisprudence and his understanding that a confession has to really be an act of free will and thus not coerced by outside forces or delusional inner voices).

101. See *infra* Part V.A; see also BROOKS, *supra* note 67, at 170 (suggesting that *Connelly* may, because of its special facts, be something of an aberration in Supreme Court rulings on confessions, “[b]ut it once again points to, and creates, an unease about confessional speech and the wisdom of holding it to a standard of ‘voluntariness’ that seems better designed for almost any kind of speech”). Brooks asks: “Is the psychotic’s discourse voluntary? Is that of any criminal suspect? Do we care?” *Id.*

### B. Confessions and The Fifth Amendment

The totality-of-the-circumstances approach to the due process inquiry, however, proved to be somewhat unwieldy: courts found it difficult to consistently apply and law enforcement officers had trouble conforming their conduct to its unpredictable dictates. Consequently, in the mid-1960s, the United States Supreme Court turned to the Fifth Amendment privilege against self incrimination as a basis for regulating police practices used to obtain incriminating statements from suspects.<sup>102</sup>

In the famous case of *Miranda v. Arizona*,<sup>103</sup> the Court set forth required procedures for police to follow to assure that individuals are not being compelled to incriminate themselves in violation of the Fifth Amendment. In so doing, Chief Justice Warren's opinion emphasized the coerciveness inherent in police custody, stressing that the pressure can be mental as well as physical. The Court was especially concerned with the fact that interrogation takes place in privacy, which means that there is a "gap" in our awareness of what transpires in the interrogation chamber.<sup>104</sup>

The Court, turning to various police manuals and texts documenting successful techniques, summarized the tactics that effectively extract incriminating statements from suspects. While abandoning the totality-of-the-circumstances approach, the *Miranda* Court nevertheless echoed the old due process concerns with securing trustworthy evidence and with safeguarding the unfettered exercise of free will. The Court made it clear, however, that of integral and paramount value is the preservation of public faith in the fairness of our accusatory system of justice:

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles — that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.<sup>105</sup>

The *Miranda* Court called the Fifth Amendment privilege "the essential mainstay of our adversary system" with its underlying

---

102. See generally Sasaki, *supra* note 71, at 1604 (discussing how "in *Miranda*, the Court sought to obviate the necessity for making a voluntariness determination").

103. *Miranda*, 384 U.S. 436.

104. *Id.* at 448.

105. *Id.* at 457-58.



foundation being governmental respect for the “dignity and integrity of its citizens.”<sup>106</sup> This privilege, which protects “the inviolability of the human personality” and “our accusatory system of criminal justice,” means that the “government seeking to punish . . . individual[s] [must] produce the evidence against [them] by its own independent labors, rather than by the cruel, simple expedient of compelling it from [their] own mouth[s].”<sup>107</sup> As such, the Court set forth the requisites for effectively apprising the accused of his or her rights and for honoring an accused’s exercise of such rights.

More recently, in *Dickerson v. United States*,<sup>108</sup> the Supreme Court deemed *Miranda* a constitutional decision, declined to overrule it, and rejected Congress’ attempt to essentially revive the totality of circumstances test. But after *Miranda* and even after its putative apotheosis in *Dickerson*, Supreme Court decisions have diluted the rule of and principles behind *Miranda*, have demoted the decision to a mere prophylaxis,<sup>109</sup> and have even given police leeway to circumvent a suspect’s invocation of the privilege.<sup>110</sup> By way of example, there exists an impeachment

---

106. *Id.* at 460.

107. *Id.*

108. 530 U.S. 428.

109. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (admitting that the Court has “created several exceptions to *Miranda*’s warnings requirement and [has] repeatedly referred to the *Miranda* warnings as ‘prophylactic’ . . . and ‘not themselves rights protected by the Constitution’” (citing *New York v. Quarles*, 467 U.S. 649, 653 (1984) and *Michigan v. Tucker*, 417 U.S. 433, 444 (1974))); *see also* *Dickerson*, 530 U.S. at 438 n.2 (listing other cases in which the Court had undermined *Miranda*’s Constitutional status). Responding to *Dickerson*, Kamisar comments:

Civil libertarians had hoped all the exceptions to *Miranda* based on the assumption it was not really a constitutional decision would no longer be good law after *Dickerson* was decided. But the Supreme Court has now made it clear that what it reaffirmed in *Dickerson* was not the *Miranda* doctrine as it burst onto the scene in 1966, but rather *Miranda* with all its post-Warren court exceptions frozen in time.

Yale Kamisar, *Miranda’s Reprieve*, 92 A.B.A. J. 48, 51 (2006).

110. Some commentators, like Professor Cassel, have also assailed *Miranda*. *See generally* Paul G. Cassell, *Miranda’s “Negligible” Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POL’Y 327 (1997) (blaming *Miranda* for decreasing the amount of successful interrogations, lowering police clearance rate for violent offenses, and increasing the crime rate itself); Paul G. Cassell & Brett S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of Miranda*, 43 UCLA L. REV. 839, 843 (1996) (reporting a study’s conclusion that “the *Miranda* decision, despite the promises of the Court and its defenders, has yet to be empirically justified as the proper balance between the competing interests of criminal suspects and society at large”). *But see* Stephen J. Schulhofer, *Bashing Miranda is Unjustified — and Harmful*, 20 HARV. J.L. & PUB. POL’Y 347 (1997) (praising *Miranda* as the benefactor of all of the legal actors in the criminal justice system); Stephen J. Schulhofer, *Miranda’s Practical Effect:*

exception. In *Harris v. New York*<sup>111</sup> and *United States v. Havens*,<sup>112</sup> the Court held that the state can use suspects' statements taken in violation of *Miranda* to impeach their credibility if they choose to testify at trial on their own behalf.

In other cases, the Court has deemed admissible certain evidentiary fruit of a *Miranda* violation as long as it is not the confession itself. As such, in *Michigan v. Tucker*,<sup>113</sup> the police discovered the identity of a prosecution witness when they obtained the accused's statement without full compliance with *Miranda*. In finding that the introduction of the third-party witness testimony did not violate the Fifth Amendment, the Court enervated *Miranda's* exclusionary rule. In *United States v. Patane*,<sup>114</sup> the Court found that the failure to give *Miranda* warnings did not require suppression of physical evidence, like a gun, which was the fruit of the suspect's statements. Both cases give police license to fish around without *Miranda* safeguards so that they can secure admissible third-party witnesses or physical evidence.

Other cases, like *Oregon v. Elstad*,<sup>115</sup> go further by condoning actual police tricks to evade *Miranda* rules. *Elstad* allows the police to first question suspects without administering *Miranda* warnings and then deliver the warnings later after suspects incriminate themselves. Under *Elstad*, while the unwarned statements themselves are to be excluded, if the suspect later waives his or her rights and repeats the same statements after proper warnings, they are admissible. For police, this creates a viable way of circumventing *Miranda* because suspects that have

---

*Substantial Benefits and Vanishingly Small Costs*, 90 NW. U.L. REV. 500, 563 (1996) (rebutting Cassell and concluding that "*Miranda* is — and deserves to be — here to stay"); see also Peter Arenella, *Miranda Stories*, 20 HARV. J.L. & PUB. POL'Y 375 (1996-1997) (analyzing the Cassell-Schulhofer debate and concluding that Schulhofer is correct).

111. 401 U.S. 222 (1971).

112. 446 U.S. 620 (1980).

113. 417 U.S. 433 (1974); see also Kamisar, *supra* note 109, at 50 ("Another Rehnquist opinion that built on *Tucker* was *New York v. Quarles*, 467 U.S. 649 (1984) . . . [which] recognized a public safety exception to the need for *Miranda* warnings in a prosecution of a defendant who answered a question by police officers who had chased him into a supermarket.").

114. 542 U.S. 630 (2004); see also Kamisar, *supra* note 109, at 51 ("A majority of the [*Patane*] Court (including Rehnquist) seemed to attach no significance whatever to the fact that only a few years earlier, Rehnquist, speaking for the Court, had told us that *Miranda* had 'announced a constitutional rule.'").

115. 470 U.S. 298 (1985); see also *id.* at 321 (Brennan, J., dissenting) ("Today's decision, in short, threatens disastrous consequences far beyond the outcome in this case.").

already confessed are likely to feel that there is nothing to be gained if they later heed the warnings and remain silent.<sup>116</sup>

While it is this author's opinion that such cases whittling away at the Constitutional *Miranda* rules are poorly reasoned and disingenuous, such an argument is bromidic and also not really germane to this article's thesis. What is significant here, however, is the fact that most of the cases arguably annihilating or at least debilitating *Miranda* harbor reminders that the due process voluntariness inquiry is still (at least, theoretically) intact. In this respect, the *Elstad* Court stressed that the unwarned questioning was not coercive and said that it did not "condone inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke his rights once they are read to him."<sup>117</sup>

Voluntariness is also alive and well in *Missouri v. Seibert*,<sup>118</sup> a more recent case in which the Court, although declining to overrule *Elstad*, found that the particular question-first tactic employed was impermissible for the very reason that it "effectively threaten[ed] to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted."<sup>119</sup> Here the *Seibert* facts are worth visiting because, as discussed below, they bear some resemblance to the plot in *Crime and Punishment*.

As in *Crime and Punishment*, the *Seibert* case involved a tragedy that spawned more tragedy. It began when Seibert's child, Jonathan, who had cerebral palsy, died in his sleep. Fearing that she would be charged with neglect because of Jonathan's bedsores, Seibert, along with her teenage sons and their friends, concocted a scheme to incinerate the body by torching the mobile home. Donald, a mentally ill teenager, was also living with Seibert, and the team planned to leave him in the burning house so that it would not appear that Jonathan had been left unattended. Here, as in *Crime and Punishment*, the project claimed an extra victim when Donald perished in the fire.<sup>120</sup>

---

116. See *id.* at 325 (Brennan, J. dissenting) ("One of the factors that can vitiate the voluntariness of a subsequent confession is the hopeless feeling of an accused that he has nothing to lose by repeating his confession, even where the circumstances that rendered his first confession illegal have been removed."); see also *id.* at 365 (Stevens, J., dissenting) (accusing the Court of "denigrat[ing] the importance of one of the core constitutional rights that protects every American citizen from the kind of tyranny that has flourished in other societies"). See generally Kamisar, *supra* note 109, at 51 ("The *Elstad* case seemed to say — as had Rehnquist's earlier opinions — that a violation of *Miranda* is not a violation of a constitutional right, but only of a procedural safeguard designed to implement a constitutional right.").

117. *Elstad*, 470 U.S. at 317.

118. 542 U.S. 600 (2004).

119. *Id.* at 617.

120. In CRIME AND PUNISHMENT, Raskolnikov refers to his plan to murder the old money-lender as a "project," and his premeditated murder

Five days later, the police entered the picture. They awakened Seibert at about three in the morning and arrested her. The officer, who was instructed to refrain from giving Seibert *Miranda* warnings, left her alone in an interview room for a while. An officer then questioned Seibert without *Miranda* warnings for about thirty to forty minutes while continually squeezing her arm and reiterating “Donald was also to die in his sleep.”<sup>121</sup> Once Seibert gave incriminating admissions, the officer rewarded her with coffee and a cigarette. After that, the officer turned on a tape recorder, gave Seibert the *Miranda* warnings, and obtained her signed waiver. When he resumed questioning and confronted her with her prewarned answers, Seibert incriminated herself again.

The state charged Seibert with first-degree murder for her role in Donald’s death and Seibert, like Elstad, sought to exclude both her pre- and post-warning statements. At the suppression hearing, the officer testified that he consciously withheld the *Miranda* warnings to do what he had been trained to do — to question first and warn later. Following *Elstad*, the trial court suppressed only the prewarning statements and a jury convicted Seibert of second-degree murder. The Missouri appellate court affirmed, but the state supreme court reversed,<sup>122</sup> finding that the second statements should also have been suppressed.

The Supreme Court, agreeing with the Supreme Court of Missouri, noted that the purpose of the question-first technique, which was already gaining popularity, was to render *Miranda* warnings ineffective and to essentially divest suspects of a meaningful choice between speech and silence. It enabled law enforcement to secure a confession that suspects would not ordinarily make had they understood their rights, and then with that confession already in hand, the interrogator could basically count on getting a duplicate confession after simply reciting the warnings. As the Court explained, “a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.”<sup>123</sup>

The *Seibert* Court construed *Elstad* as involving an officer’s good faith failure to warn and said that in that context the delayed warnings did not necessarily obliterate the choice between following up or staying silent. The Court contrasted the facts in *Elstad* with the police strategy aimed at Seibert that was specifically designed to nullify *Miranda* and exploit the impression

---

inadvertently claims an extra victim, his intended target’s step-sister, who happened to walk in at the wrong time. See *infra* Part IV.B (discussing Raskolnikov during the commission of the crime).

121. *Seibert*, 542 U.S. at 605.

122. *State v. Seibert*, 93 S.W. 3d 700 (2002).

123. *Seibert*, 542 U.S. at 613.

that further questioning was a continuation of the earlier ordeal. According to the Court, it would have been “reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before.”<sup>124</sup> What *Seibert* confirmed was that at least theoretically what is at the very heart of *Miranda* and confession law is meaningful choice and the goal of reducing the risk that choiceless confessions are admitted as evidence.<sup>125</sup>

### C. Confessions And the Sixth Amendment

The Sixth Amendment Right to the Assistance of Counsel is another restraint on governmental attempts to admit defendants’ incriminating statements. This emerged even before *Miranda*, when in *Massiah v. United States*,<sup>126</sup> the Court held that the Sixth Amendment mandated the exclusion from admission into evidence of statements that an already indicted defendant made to a government agent. What underlies *Massiah* and its progeny is once again the potent policy of protecting the integrity of our adversarial system of justice. While they may not always be quite so perspicuous in the Sixth Amendment context, voluntariness and choice are likewise prevalent concerns.

In *Massiah*, the Court, relying on the concurrence in *Spano v. New York*,<sup>127</sup> stressed the impropriety of police eliciting a confession after a defendant had been indicted and said that a “Constitution which guarantees a defendant the aid of counsel at . . . a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding.”<sup>128</sup> The Court approved the approach that New York courts had followed after the *Spano* decision, which proscribed the interrogation of indicted defendants without the presence of counsel, and agreed that the “basic dictates of fairness in the conduct of criminal causes and the fundamental rights of

---

124. *Id.* at 616-617.

125. *Id.* at 617 (“These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect’s shoes would not have understood them to convey a message that she retained a choice about continuing to talk.”); see also *Kamisar*, *supra* note 109, at 51 (Stating that “*Patane* is the general rule; *Seibert* is the striking exception,” and that while “*Dickerson* spared *Miranda* the death penalty [,] . . . four years later when *Patane* was decided, *Miranda* took a bullet to the body.”).

126. 377 U.S. 201 (1964); see also *Escobedo v. Illinois*, 378 U.S. 478 (1964) (excluding defendant’s confession after repeated requests by the defendant to consult with retained counsel were refused and after his attorney had actually been turned away at the police station).

127. 360 U.S. at 327 (Stewart, J., concurring); see also *supra* notes 84-88 and accompanying text.

128. *Massiah*, 377 U.S. at 204.

persons charged with crime[s]" required such a constitutional rule.<sup>129</sup>

Eleven years later, in *Brewer v. Williams*,<sup>130</sup> a criminal procedure classic, the Court clarified that the Sixth Amendment right to counsel had survived *Miranda* and was alive and well as a separate restraint on police questioning. *Brewer* involved the brutal murder of a little girl, Pamela Powers, who vanished while attending an event with her family at the YMCA in Des Moines, Iowa. Williams, who had escaped from a mental hospital and was living at the YMCA, was seen leaving the lobby with a large bundle wrapped in a blanket.

After a warrant issued for William's arrest, Williams placed a long-distance call to a Des Moines attorney, Henry McKnight, who advised Williams to turn himself in to the Davenport police. When Williams surrendered, he was booked and given *Miranda* warnings. McKnight again conferred with his client, informing him that Des Moines officers would pick him up and told him not to talk to them about Pamela Powers. The Des Moines police also promised that the officers would not question Williams on the drive back.

After arraignment, the judge again advised Williams of his *Miranda* rights and another lawyer, Kelly, told him not say anything until he could consult with his lawyer back in Des Moines. When the detective and his colleague arrived to get Williams, they met with Kelly and repeated the *Miranda* warnings. Kelly also reiterated to the detective that Williams was not to be questioned about Pamela Powers until he had consulted with McKnight in Des Moines. When Kelly sensed "some reservations" on the part of the detective, he "firmly stated that the agreement with McKnight was to be carried out" and that there was to be no questioning.<sup>131</sup> In fact, Kelly even unsuccessfully tried to accompany Williams in the police car.

En route to Des Moines, the detective, who knew that Williams was deeply religious and had mental problems, delivered what has been denominated the "Christian burial speech" in which he commented on the bad weather, referred to the imperiled task of finding the child's body, and pressed that the child's parents deserved a proper "Christian burial" for their little girl.<sup>132</sup> In

---

129. *Id.* at 205 (quoting *People v. Waterman*, 175 N.E. 2d 445, 448 (N. Y. Ct. App. 1961)).

130. 430 U.S. 387 (1977).

131. *Id.* at 392.

132. *Id.* at 392-93. The Court stated:

And since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting

response, Williams made incriminating statements and described the body's location. The Supreme Court held that the admission of William's statements at his trial violated his right to the assistance of counsel.

*Massiah* and *Brewer* ostensibly eliminate voluntariness and coercion from the Sixth Amendment analysis. In *Massiah*, the Court rejected the government's argument that *Massiah*, unlike *Spano*, was not in custody or subjected to "official pressure" and instead based the decision on notions of fair play.<sup>133</sup> That is, while the government could indeed pursue an investigation of the suspect's criminal activities even after the indictment, it could not fairly and constitutionally use his own incriminating statements as evidence against him at his trial.<sup>134</sup> This was the rule — with or without coercion.

Similarly, in *Brewer*, the Court deemed it "unnecessary to evaluate" whether Williams' self-incriminating statements were involuntary or to pursue a due process or *Miranda*-type inquiry because Williams was "deprived of a different constitutional right."<sup>135</sup> The *Brewer* Court echoed Justice Sutherland's "memorable words" in *Powell v. Alabama*, that the right, "guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice" and "vital" at the pretrial stage.<sup>136</sup>

Despite the fact that early on actual coercion is somewhat estranged from the Sixth Amendment inquiry, the Supreme Court at least implicitly later reintroduces it. The Court later construed *Massiah* as standing for the proposition that there must an investigative technique that constitutes "deliberate" elicitation of incriminating statements, which is the equivalent to coercive interrogation.<sup>137</sup> This is borne out in two companion cases, *United*

---

until morning and trying to come back out after a snow storm and possibly not being able to find it at all.

*Id.*

133. *Massiah*, 377 U.S. at 206.

134. *Id.* at 207.

135. *Brewer*, 430 U.S. at 397-398.

136. *Id.* at 398 (citing *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

137. See, e.g., *United States v. Henry*, 447 U.S. 264, 270 (1980) ("The question here is whether under the facts of this case a Government agent 'deliberately elicited' incriminating statements from Henry within the meaning of *Massiah*."); *Kuhlman v. Wilson*, 477 U.S. 436, 457 (1986) ("The Court in *Massiah* adopted the reasoning of the concurring opinions in *Spano* and held that, once a defendant's Sixth Amendment right to counsel has attached, he is denied that right when federal agents 'deliberately elicit' incriminating statements from him in the absence of his lawyer."). But see *Maine v. Moulton*, 474 U.S. 159 (1985) (rejecting the government's contention that *Moulton* was distinguishable from *Massiah* because *inter alia* the defendant himself initiated the meeting with his co-defendant, who was cooperating with the police).

*States v. Henry*<sup>138</sup> and *Kuhlman v. Wilson*,<sup>139</sup> and in the Court's strained attempt to justify opposite results based on essentially the same set of facts.

In *Henry*, the Court applied *Massiah* to incriminating statements made to a jailhouse informant. The Court agreed with the court below that there was a *Massiah* violation because the informant had engaged the defendant in dialogue and "had developed a relationship of trust and confidence with [the defendant] such that [the defendant] revealed incriminating information."<sup>140</sup> The Court thus found reasonable the conclusions below that the informant "deliberately used his position to secure incriminating information" at a time when defendant's counsel was not present.<sup>141</sup> In *Henry*, the informant had apparently not questioned the defendant, but rather "stimulated" conversations.<sup>142</sup> The Court thus aligned this with *Massiah* because it was tantamount to "indirect and surreptitious interrogation."<sup>143</sup> In essence, the *Henry* informant was putatively active and coercive.

*Kuhlmann*, on nearly identical facts, also involving incriminating statements made to a jailhouse informant, comes out the other way — no Sixth Amendment violation. In *Kuhlmann*, the defendant was arraigned and incarcerated with another prisoner, Lee, who agreed to act as a police informant. At the suppression hearing, it was revealed that Lee had agreed to listen to defendant's conversations and report his remarks to the police. When the defendant began talking to Lee about the robbery, reciting the same story that he had given the police, Lee responded that it "didn't sound too good."<sup>144</sup> Over the next few days, the defendant revised his story. Then, after a visit from his brother, who told him that family members were upset because the defendant had committed murder, the defendant described the crime to Lee and gave incriminating details.

This time the Court, disagreeing with the conclusion below that the right to counsel was violated, faulted the federal appellate court for failing to give the state court's findings the requisite presumption of correctness. In the Court's view, the federal appellate court should have abided by the state court facts that purportedly distinguish the circumstances from those in *Henry*: namely, that the police in *Kuhlmann* already possessed "solid evidence" of defendant's complicity in the crime and that Lee followed the instructions to just listen to defendant's

---

138. 447 U.S. 264 (1980).

139. 477 U.S. 436 (1986).

140. *Henry*, 447 U.S. at 269.

141. *Id.* at 270.

142. *Id.* at 273.

143. *Id.*

144. *Kuhlmann*, 477 U.S. at 439-40.



“spontaneous” and “unsolicited” statements without asking questions.<sup>145</sup> Chief Justice Burger said in his concurrence, the case is “clearly distinguishable” from *Henry* in that there is “a vast difference between placing an ‘ear’ in the suspect’s cell and placing a voice in the cell to encourage conversation for the ‘ear’ to record.”<sup>146</sup> According to the Court, the state court correctly determined that the informant was passive and innocuously non-coercive.

Although possibly untenable in an incarceration context, the Court in *Henry* and *Kuhlmann* draws a line between active and passive jailhouse informants. Essentially, if snitches assert themselves, become a “voice” to oust disclosures, there is “deliberate elicitation.”<sup>147</sup> If, however, the defendant divulges information to a mere passive “ear,” there is theoretically no coercion and what occurs is simply relegated to the category of a rather unremarkable voluntary statement.<sup>148</sup>

In short, while the Due Process Clause and the Fifth and Sixth Amendments are distinct bases for regulating police extraction of incriminating statements, in all three contexts it matters (albeit in varying degrees) that the confession is not coerced and that the methods used to obtain it do not offend our notion of a fair accusatorial system of criminal justice. Distilled down, for both our Constitution and therapeutic jurisprudence, voluntariness and fairness are right at the core.

#### IV. RASKOLNIKOV’S COMPULSION TO CONFESS

For Dostoyevsky, voluntariness and fairness comprise the core of a good criminal justice system. According to him, a voluntary confession plus a fair legal process can engender healing, entirely transform a human being, inspire spiritual regeneration, and elevate society. This is, however, only part of Dostoyevsky’s thesis in *Crime and Punishment*, which he transmits through Rodion Raskolnikov, who is possibly the most complex, enigmatic, and haunting characters in all of world literature.

Historians, literary scholars, philosophers, psychiatrists and psychologists have exhaustively feasted on Raskolnikov, trying to decipher him and his motives for violently murdering the old moneylender, Alyona Ivanovna, and her step-sister, Lizaveta.<sup>149</sup> In fact, the psychologists and psychiatrists comprise a class all their own and tend to ascribe blame to Raskolnikov’s mother: for

---

145. *Id.* at 460.

146. *Id.* at 461 (Burger, J., concurring).

147. *Id.*

148. *Id.*

149. *See supra* note 8.

example, Louis Breger, relying extensively on Freudian psychoanalysis, points to Raskolnikov's "overwhelming ambivalence" to his mother, which has both "sadistic and masochistic components" and creates a dilemma whereby "[h]e can attack the maternal figure or submit to her."<sup>150</sup> In a somewhat similar vein, Kathleen Donnellan Garber "surmise[s] that Raskolnikov's oral needs as an infant were not satisfied," that he is "unable to distinguish himself as separate from his mother" and exhibits "behavior replete with manifestations of infantile dependence."<sup>151</sup> Others add Raskolnikov's entire family to the indictment, or, as Psychiatry Professor Jeffery C. Hutzler puts it, "the inevitable march of powerful family influences force[d] Raskolnikov into survival tactics which result in his crime, punishment, and the resolution of his fearfully pathologic family conflict."<sup>152</sup>

Another approach, one more sociological, is to downplay the inner landscape and focus instead on Raskolnikov's bleak periphery: for example, Dr. Atkin sees Raskolnikov as "a living being . . . at odds with his environment" and suggests that "[j]ust as the causation of criminal behaviour rests both in society and in the individual, so must responsibility be shared by the two."<sup>153</sup> Atkin, refuting more prevalent theories that Raskolnikov is insane, a "distinctly psychopathic personality" or a "manic-depressive" with "systemized delusions of persecution and grandeur of a paranoiac or the dereism and hallucinations of a schizophrenic," focuses on his wretched, poverty-stricken context and the "atmosphere of pessimism [which] could not but have its effect on . . . a type of Russian intellectual who was able to observe the superficial social contradictions, but saw no way out in the fog of Westernism, Slavophilism, Nihilism, Liberalism and other "isms" of the disrupted intelligentsia."<sup>154</sup> According to Professor Gary Saul Morson, however, exterior and interior are fused such that Raskolnikov's "awful room" in St. Petersburg is the objective correlative of a "sordid state of mind."<sup>155</sup> He elaborates:

The ceiling is so low a man can hardly stand up, so Raskolnikov spends all his time lying on a bedraggled yellow couch. In Dostoyevsky, dirty yellow is the color of mental illness, and lying on the couch feeds Raskolnikov's nervous, irritable condition and his mad dreams of murder for the sake of murder, just to show he can do it. He would have done better to put up wall paper.<sup>156</sup>

---

150. BREGER, *supra* note 8, at 24-25.

151. Garber, *supra* note 8, at 16-17.

152. Hutzler, *supra* note 8, at 335.

153. Atkin, *supra* note 8, at 255-56, 279.

154. *Id.* at 262, 278.

155. Gary Saul Morson, *A Russian Literature Scholar Reflects On the Interiors of Crime and Punishment*, INTERIORS, May 1999, at 142.

156. *Id.*

Legal scholars have also explored *Crime and Punishment* and Raskolnikov from diverse perspectives. By way of example, law professor William Burnham, relying on Russian legal history, looks back at the evidentiary rules in place at the time of *Crime and Punishment* and attributes the strategy of Porfiry Petrovich, the examining magistrate, to Russia's stringent requirements for admissible confessions.<sup>157</sup> On the other hand, attorney Vera Bergelson tries to contemporize the novel by conducting a "hypothetical 'retrial'" of Rodion Raskolnikov under the legal and moral principles reflected in the Model Penal Code.<sup>158</sup> Also, law and literature guru, Professor Weisberg, has dealt with Dostoyevsky quite extensively, but with respect to *Crime and Punishment*, dwells primarily on what he sees as the manipulative maneuvers of "inquisitor" Petrovich, a perspective that has sparked an intellectual quarrel.<sup>159</sup>

Cochran's article is really one of the more insightful.<sup>160</sup> He employs several of Dostoyevsky's stories to reconsider defense counsel's approach to client confession along with the inherent conflict between a client's interest in freedom and a client's interest in "forgiveness, reconciliation, and a clear conscience."<sup>161</sup> While Cochran accurately feels that most of *Crime and Punishment* is about "Raskolnikov's punishment at the hands of his own conscience," Dostoyevsky does more than just teach us about "the consequences of unconfessed guilt."<sup>162</sup> Rather, Dostoyevsky shares his invaluable psychological insight into the evolution of an individual, who personifies the human need to therapeutically regenerate through confession. Dostoyevsky puts Raskolnikov's obsession with his crime and his drive to confess under a microscope, revealing how they dominate his very

157. Burnham, *supra* note 3.

158. Bergelson, *supra* note 8, at 921.

159. WEISBERG, *supra* note 8, at 54; *see also* Richard Weisberg, *Comparative Literature: The Figure of the 'Examining Magistrate' in Dostoyevsky and Camus*, 29 RUTGERS L. REV. 237, 241-49 (1975-76) (examining Porfiry's role as an effective inquisitor). *But see* John D. Ayer, *The Very Idea of 'Law And Literature'*, 85 MICH. L. REV. 895, 901 (1987) ("Weisberg tries to show that all of his 'protagonists' share the same *ressentiment* affliction. And he tries to show, or at least he asserts, that this *ressentiment* is a peculiarly lawyerly vice. But for all its asserted coherence, the book has the distinct appearance of being cobbled together."); Robert Batey, *In Defense of Porfiry Petrovich*, 26 CARDOZO L. REV. 2283, 2284 (2005) ("Weisberg does not fairly depict Porfiry Petrovich."); Richard A. Posner, *From Billy Budd To Buchenwald*, 96 YALE L.J. 1173, 1176 (1987) (book review) ("The insinuating style of the European examining magistrate similarly illustrates not the operation of legal technicalities but the power of informal procedures."); *see infra* Part V.A (discussing Porfiry Petrovich).

160. Cochran, *supra* note 9.

161. *Id.* at 332.

162. *Id.* at 360.

existence before, during, and after the gruesome bludgeoning. Through our relationship with Raskolnikov, we, as lawyers, can better understand how to interact with and treat the whole client, especially one charged with crime.

### A. *Before the Crime*

Before the crime, Raskolnikov's life is a miserable sinkhole. He is a threadbare, starving, ex-law student, whose saintly sister, Dunya, is on the brink of prostituting herself for his benefit by marrying an evil man with a modicum of wealth and social standing. Raskolnikov's deplorable living quarters consist of a "room . . . situated right under the roof of a tall, five-storey tenement" and "sooner resemble[s] a closet than a place of habitation."<sup>163</sup> Dostoyevsky elaborates:

It was a tiny little cell, about six paces long, and it presented a most pitiful aspect with its grimy, yellow wallpaper that was everywhere coming off the walls; it was so low-ceilinged that to a person of even slightly above-average height it felt claustrophobic, as though one might bang one's head against the plaster at any moment.<sup>164</sup>

This hovel, in fact, takes on a life (or rather death) of its own: Dostoyevsky reminds us repeatedly of the tomb's stifling wretchedness and we see that it is something that Raskolnikov detests and yet clings to as a refuge. Although Raskolnikov has "in no uncertain terms, withdrawn from everyone, like a tortoise into its shell," all of the players in his world at one point or another meander into and squeeze into his suffocating box.<sup>165</sup> Because Raskolnikov is unemployed, in debt, and in arrears on his rent, his daily life consists of efforts to dodge his landlady and the maid who live on the floor below in a separate apartment. They in turn have stopped providing the meals that come with the room, which not only "irritate[s] him to bile and convulsions," but also "gratifies" him because he is determined to "sink to a lower level of personal neglect."<sup>166</sup> Although in resolute hiding, Raskolnikov periodically foists himself in plain view of his creditors. On top of this, he appears to suffer from seizures that either make him faint or disoriented.

We also learn that Raskolnikov has "been in a tense, irritable state of mind that verged upon hypochondria."<sup>167</sup> In fact, Raskolnikov's name says it all because in Russian *raskol* means split or schism.<sup>168</sup> The problem with Raskolnikov and the reason

---

163. DOSTOYEVSKY, *supra* note 1, at 5.

164. *Id.* at 35.

165. *Id.*

166. *Id.*

167. *Id.* at 5.

168. David McDuff, *Introduction to Crime And Punishment*, in

he is so difficult to pin down is that he is indeed split, at war with himself at all times and in all things. Whatever you can say about him, you can easily say the opposite. Whatever Raskolnikov does, he seeks to retract. He is, in truth, a caricature of self-contradiction.

Raskolnikov is “[s]o absorbed in himself” and “isolated from everyone else” and yet, at the same time “[h]is vital interests no longer concern[] him.”<sup>169</sup> In an infantile way, he is a parcel of self-indulgence and also the epitome of self-deprivation. Despite his campaign to eschew contact and interaction with others, he searches out conversation and once that is accomplished, tends to recoil into a reclusive rage.

Early in the novel, this self-professed hermit ventures into a tavern, meets Marmeladov, and finds himself both irritated with and desirous of his society. Marmeladov is a middle-aged clerk in the advanced stages of alcoholism, who sees Raskolnikov as an affiliate to whom he wants to tell his sob story.<sup>170</sup> Marmeladov, a widower with a fourteen-year old daughter, Sonya, had married Katerina Ivanovna, a widow with three young children of her own. For a while, he supported the family, but eventually drank himself to destitution. After Sonya is pushed into prostitution to save the impoverished family, Marmeladov worsens: he sells his wife’s clothes, steals money from his family, and takes Sonya’s earnings so that he can buy drinks.

Raskolnikov both rebuffs and befriends Marmeladov. On the one hand, Raskolnikov has nothing but revulsion for this drunkard, who has ruined the lives of a consumptive wife and two starving children, and has let his own daughter, Sonya, become a prostitute to “treat [his] hangover.”<sup>171</sup> On the other hand, Raskolnikov is sucked into the whole dysfunctional drama when he escorts wobbly Marmeladov home to a squalid tenement, meets the dying wife and trembling children, and ends up placing his

---

DOSTOYEVSKY, *supra* note 1, at xxviii (noting that *Raskol* means schism, which indicates “[o]ne aspect of Raskolnikov’s revolt against God . . . [because it] is the term used to describe the split that took place in the Russian Orthodox Church in the mid seventeenth century . . .”); *see also* Burnham, *supra* note 3, at 1231 (“Raskolnikov gets his name from the Russian word *raskol*, which means a split or schism, and represents the conflict between his intellectual justifications for the crime and the moral revulsion he feels.”).

169. DOSTOYEVSKY, *supra* note 1, at 5.

170. *See* BREGER, *supra* note 8, at 25. As Breger comments:

On [Marmeladov’s] . . . first encounter with Raskolnikov, he calls attention to the connection between them: they are both educated men, men of talent and abilities despite their poor and disheveled appearance. And, as the story unfolds, it is revealed that the destitution they suffer is not due to external misfortune in any simple way; each had a hand in creating his own plight.

*Id.*

171. DOSTOYEVSKY, *supra* note 1, at 28.

only coins “unobtrusively on the[ir] windowsill.”<sup>172</sup> Immediately after his impulsive act of compassion and charity toward the Marmeladov family, Raskolnikov is consumed with regret, pauses on the staircase, almost changes his mind, and nearly takes back the gift. But then in a nanosecond, Raskolnikov retracts his near retraction, “reasoning that he could not possibly take it back now, and that he would not take it back even if such a thing were possible.”<sup>173</sup> The next morning Raskolnikov wakes up “feeling bilious, short-tempered and uncharitable.”<sup>174</sup> As such, at every turn, Raskolnikov rebuts each of his own thoughts and impulses and then even rebuts the rebuttal, thus taking the concept of inner schism to a whole new implosive dimension.

Similarly, Raskolnikov is plagued with ambivalence toward every soul in his radius, oscillating between kindness and abuse. With respect to his associations before the crime, his most obvious targets are his adoring mother and sister, Dunya, who are both treacly sycophantic and willing to endure any form of self-sacrifice for the promising scholar: that is, mother is going blind embroidering for a mere pittance and Dunya has endured humiliation as a governess so that they can fund Raskolnikov’s studies. Although Raskolnikov exhibits glimmerings of love and affection for his family, he also treats them with icy indifference and at least once, banishes them from his claustrophobic container. Also, understanding full-well that mother and sister are themselves nearly impoverished, Raskolnikov guiltily accepts their monetary offering and then guiltlessly squanders it or gives it away.

Most horrific of all, however, is the effectual eviction of his family from his own choices and deliberations: Raskolnikov does not seriously consider how his crime can and will affect their lives. He does, however, in true Raskolnikov fashion, rationalize that the murder is not solely about himself, but rather the spoils of the robbery can save his sister from a sacrificial marriage to a bad man.

Sonya, Marmeladov’s daughter, provides another bond for Raskolnikov. For him, she is part of his obsession, his salvation, and a hybrid — both prostitute and angel. Throughout most of the novel, Raskolnikov platonically courts her and psychologically tortures her. Although Sonya’s role intensifies after the commission of the crime, even early on Raskolnikov intuits that Sonya is to be the catalyst for his regeneration. Despite this, Raskolnikov does not resist the urge to pulverize her magnificent spirit.

---

172. *Id.* at 34.

173. *Id.*

174. *Id.* at 35.

Another cherished victim is his old friend, Razumikhin, who for some inexplicable reason is fanatically devoted to the destitute intellectual. Raskolnikov conscripts the all-too good natured Razumikhin into the role of caretaker and mercilessly exploits him. Although Razumikhin unconditionally loves and believes in his friend, comes to his rescue with food, new clothes, medicine, and a doctor, and even nurses him bedside, Raskolnikov sporadically gives this votary a tongue lashing and frostily pushes him away.

Two other characters figure into the pre-crime calculus: both of these men, who have links to Dunya — her past and potential future — also have causal ties with one another. Such connexity is quite significant here because Dostoyevsky believes that our past and future are entangled and that all that we do and have done bears fruit in the form of future consequences. As discussed later, this apodictic fact is something that Raskolnikov both embraces and seeks to bury in deep denial.<sup>175</sup>

One of the men, Svidrigailov is a sociopathic landowner, who had employed Dunya to work as his household governess when she needed money for her brother.<sup>176</sup> Svidrigailov, however, became infatuated with Dunya and unsuccessfully tried to seduce her. Svidrigailov's wife, Martha, who overheard some of his lascivious entreaties but did not realize that the governess was innocent, ejected Dunya from the house and retaliated with vicious gossip. When Martha later learns the truth, she befriends Dunya, begs her forgiveness, and painstakingly labors to undo the harm.

Martha's benevolent crusade leads to Luzhin, whom she secures for Dunya as a suitor.<sup>177</sup> In a letter to her son, Raskolnikov's mother describes the fairly affluent fiancé as a "respectable man, just a bit arrogant and on the gloomy side" who aspires to marry a girl "without a dowry."<sup>178</sup> As mom explained, Luzhin wants "the kind of girl who already knew what poverty was like; because . . . a husband must in no way be beholden to his wife, and it's always far better if the wife views the husband as her benefactor."<sup>179</sup>

Both of these Dunya-linked villains are to some extent connate: they are both predators that thrive on exploiting, overpowering, and controlling others. In a sense, they live their

175. See *infra* notes 333-35 and accompanying text.

176. See BREGER, *supra* note 8, at 42-44 (suggesting that Svidrigailov is "Raskolnikov's double" and that he "functions as a representation of impulse unchecked by morality, as a man without God" and that "just as Marmeladov runs out the possibilities of dependence and masochism to their end, Svidrigailov plays out the drama of amorality and self-indulgence").

177. *Id.* at 30 ("Luzhin is . . . a crass version of the type who controls others with obligation and indebtedness; for him this takes the place of love.").

178. DOSTOYEVSKY, *supra* note 1, at 44-45.

179. *Id.* at 45.

lives in the way that Raskolnikov seeks to live just once in that fragmented instant in which he terminates a human life. Although Raskolnikov has more contact with Svidrigailov and Luzhin after the murder, he acquaints himself with them earlier. Due to his heightened intellect and partly due to his misanthropy, Raskolnikov, reading between the lines of mother's letter, knows exactly what those two vipers are all about and works himself into a murderous frenzy. Later, however, when Raskolnikov confronts Svidrigailov and Luzhin face to face, he is, as usual, seriously conflicted, experiencing raw hatred along with morbid fascination. This propels him to alienate these specimens and also pull them in close for study.

Before the crime, Raskolnikov feels trapped by his poverty, his living conditions, and by other people.<sup>180</sup> He is likewise torn asunder by a need for isolation and companionship, and even his definition of both states is paradoxical. That is, Raskolnikov's social and psychological disabilities render him incapable of and resistant to human ties, so much so that his pangs of isolation are in fact more acute not when he is not alone, but when he is ostensibly engaged with others: when they enter his miserable garret, when they talk to him, when they nurse him, when they give to him, when they argue with him, Raskolnikov is simply not there. Raskolnikov might be judging, analyzing, disdaining, insulting, or tolerating, but he is outside of it all and effectively impenetrable. For him, this kind of aloneness is the desired sanctuary and a bastille of agony.

One sure thing we can say about Raskolnikov is this: every fiber in his entire being tells him that he can not indefinitely endure this dreadful state. Raskolnikov wants change and needs it desperately. Dostoyevsky's genius is this creation of a human being, who is both anomalous and uncomfortably familiar. If we are ruthlessly honest with ourselves (and Dostoyevsky deserves that), we sense that despite that morass of freakish abnormality, there is something of Raskolnikov in all of us. If we can handle it, we begin to not just read, but actually live the novel, and live it as if we are Raskolnikov by pushing him out while we are compelled to invite him in. Dostoyevsky also lets us not just read about, but actually endure, Raskolnikov's mounting cognitive dissonance with its cathartic crescendo and a coda of meaningful change.

At least unconsciously, Raskolnikov knows what he needs to sire his own deliverance. Shortly before the crime, Raskolnikov experiences what has become famous in world literature — his dream of the suffering horse. Dostoyevsky underscores the

---

180. See Atkin, *supra* note 8, at 265 ("When we are introduced to [Raskolnikov], he has already been reduced to the lowest level of poverty . . . . Clad in rags, so that he was often mistaken for a professional beggar in the streets, pent up with accumulated bitterness and humiliation . . . .").



momentousness of “[d]reams such as these — the morbid ones — [that] invariably remain in the memory long afterwards, and have a powerful effect on the individual’s deranged and already overstimulated organism.”<sup>181</sup> It is this terrible dream that predicts the future and prescribes a cure.

In the dream, Raskolnikov is a boy visiting the countryside with his father and passing a tavern, loaded with drunken, partying peasants. Mikolka, the owner of a large wagon, hitched to a skinny old horse, invites the rowdies to pile in and go for a ride. Although it is obvious that the horse cannot drag the overloaded wagon, Mikolka savagely beats the horse to a pulp. The incident turns into a self-defeating vicious cycle: the more Mikolka delivers lashes, the less the horse can budge, and the less the horse can budge, the more the angered Mikolka delivers the lashes. When spectators voice their objections, Mikolka yells, “She belongs to me!”<sup>182</sup> The mare, Mikolka’s “property,” senselessly bludgeoned to death on the spine with a crowbar, emits a “heavy sigh,” and dies.<sup>183</sup>

In the dream, child Raskolnikov, traumatized and dashing out from the crowd, makes a futile attempt to save the horse. Eventually, he lunges at the murderer:

With a howl he forced his way through the crowds toward the little grey mare, flung his arms round her dead, bloodied muzzle and kissed it, kissed her on the eyes, on the lips . . . then he suddenly leapt up and rushed at Mikolka, hammering at him with his little fists. At that point his father, who had been chasing after him for a long time, finally seized hold of him and carried him away from the crowd.<sup>184</sup>

When Raskolnikov wakes up, he instantly annexes the dream to the very murder he has been contemplating:

“Oh God!” he exclaimed. “Will I really do it, will I really take an axe and hit her on the head with it, smash her skull in? . . . Will I slip on her warm, sticky blood, break open the lock, steal the money and tremble; then hide myself, covered in blood . . . with the axe . . . Oh, Lord, will I really?”<sup>185</sup>

Psychoanalyst, Breger, points out that in Raskolnikov’s “own interpretation he sees himself as Mikolka, the dream portraying his plan to kill the aged and useless old pawnbroker.”<sup>186</sup> While the dream surely mirrors the atrocity that Raskolnikov is about to

181. DOSTOYEVSKY, *supra* note 1, at 67.

182. *Id.* at 70.

183. *Id.* at 72.

184. *Id.*

185. *Id.* at 73.

186. BREGER, *supra* note 8, at 31.

commit, it also prefigures his ultimate regeneration and prescribes what he needs to do to get there.

There are four Raskolnikovs in this dream: one, the Mikolka-Raskolnikov who seeks to assert power over and ownership of others through the irrational oppression of another's life; two, the mare-Raskolnikov, who feels helplessly trapped and beaten down; three, the boy-Raskolnikov, who compassionately leaps forth to try to spare a life; and four, the father-Raskolnikov, who swoops in to squelch the boy's heroic benevolence.<sup>187</sup> In the dream, the most important Raskolnikov in the quadrille is, of course, the boy, who identifies himself, comes forth, takes responsibility, and tries (albeit in futility) to right a wrong. He is, after all, the antidote to Mikolka's murderous tantrum, and he is, like the spirit of confession, a courageous personification of what is best in human nature. It is significant that the boy kisses the mare "on the eyes" and "on the lips," acts which extol both vision and speech as faculties that assist heartfelt redemption.<sup>188</sup> In essence, Raskolnikov's soul and psyche need this little boy to "force[] his way" out.<sup>189</sup> The dream tells Raskolnikov, even before he has committed the offense, that what he needs to do to change his entire life is to come forth, confront Mikolka, and confess.

The dream is also prophetic because it is Raskolnikov four, the father, who prevails by banishing the boy, by rendering him invisible, by silencing the symbolic confession, and by halting a humane outburst. It is only after the dream-father has trumped the dream-boy that Raskolnikov awakens to realize that he is heading down the Mikolka path and might actually "take an axe" to bring his horrific project to fruition.<sup>190</sup> The dream, however, is more significantly a prescription than it is a prognostication. It counsels Raskolnikov to lash out at his own Mikolka-like instincts, come clean, and embrace love. As such, even before the crime, Raskolnikov needs to confess and desperately wants to join the human race.

### *B. The Crime*

Just about every commentator accepts what is seductively basic: namely, that Raskolnikov needs to confess because he has

187. *But see id.* at 31-32 (suggesting that "[s]ince a dream arises entirely from the mind of the dreamer, its different characters and emotions represent different sides of his personality" and that there are three such sides in the Mikolka dream: "Raskolnikov is not only the angry attacker, he is also the innocent young boy who loves the maternal figure and is horrified at the violence visited upon her. And he is, as well, the victim, the beaten old mare").

188. DOSTOYEVSKY, *supra* note 1, at 72.

189. *Id.*

190. *Id.* at 73.

committed a crime.<sup>191</sup> They have in fact put the cart before the horse (pun intended). The real truth, and indeed the kernel of Dostoyevsky's wisdom, is that Raskolnikov commits the crime because he needs to confess. Raskolnikov's problem before the murder is that any confession he might make would be ethereally devoid of content. So, in essence, Raskolnikov murders to fill his confession with substance. This is the reason why it is virtually impossible to find in *Crime and Punishment* a plausible motive for Raskolnikov's brutal act.

For a long time, scholars have asked why Raskolnikov did what he did and have answered by adopting one of the perpetrator's spurious rationalizations for his own crime.<sup>192</sup> The scholarship on and the novel itself posit essentially four possible motives, and as Dostoyevsky probably intended, all of them are plainly unconvincing.

Raskolnikov's first putative motive is simply personal: he murders Alyona Ivanovna because he hates her and there are undeniably indications of that in Dostoyevsky's portrayal of the woman and in Raskolnikov's encounters with her. When we first see her through the starving ex-student's eyes, she is repulsive and cadaverous: "a tiny, dried-up little old woman of about sixty, with sharp, hostile eyes, a small, sharp nose and no head covering."<sup>193</sup> Her "whitish hair" is "abundantly smeared with oil," and her "long, thin neck . . . resemble[s] the leg of a chicken."<sup>194</sup> It is, of course, plain that Raskolnikov doesn't particularly like her. But it is more accurate to say that he negates her as a human being.

Although Raskolnikov purportedly visits Alyona to pawn his watch, he is really there to do reconnaissance and plan the attack. Throughout his dealings with Alyona, he is non-emotional, business-like, and even mechanical. This is Raskolnikov's suppression of any emotional investment in his victim, who to him is more like a thing of neutral valence — a non-person. When Raskolnikov departs, he does not acknowledge any hatred for his Alyona, but rather unleashes it all on himself:

"Oh God! How loathsome all this is! And could I really, could I really . . . . No, its nonsensical, its absurd!" [H]e added, firmly, "Could I really ever have contemplated such a monstrous act? It

---

191. See, e.g., Cochran, *supra* note 9, at 357-359 (describing Raskolnikov's crime, followed by his struggle with his conscience, his contemplation of suicide, and then his confession). Almost all scholars and commentators focus on Raskolnikov's need to come clean because he has committed murder.

192. See *infra* notes 190-213 and accompanying text (discussing Raskolnikov's putative reasons for murdering the old money-lender).

193. DOSTOYEVSKY, *supra* note 1, at 9.

194. *Id.*

shows what filth my heart is capable of, though! Yes, that's what it is: filthy, mean, vile, vile!"<sup>195</sup>

If anything, what Raskolnikov reviles are his own Mikolka-like impulses — not this little old lady, who is really nothing to him. Commentator Peter Lowe's suggestion that Raskolnikov equates Alyona with all of the oppressive adversity in his life<sup>196</sup> rings true, but it does not make sense that that is why Raskolnikov decides to bludgeon *her* (and *her* of all people) to death with an axe. After all, in Raskolnikov's mind, there are all sorts of St. Petersburg specimens — both known and unknown — who are equally culpable and just as ripe for execution.

A second, but related, theory is one with which psychologists and psychiatrists seem to be quite smitten. They attribute the murder to Raskolnikov's tortured feelings towards his mother. For example, Kathleen Garber explains that Raskolnikov needs to "project inner destructiveness (death instinct) and finds the old pawnbroker suitable for this purpose"<sup>197</sup> and elaborates:

She is a harsh, miserly old woman (the bad mother) who treats her step-sister shamefully. Thus, Raskolnikov's self-hate becomes externalized and projected onto the pawnbroker. In killing her, he commits a symbolic suicide. It was not her death he really sought so much as relief from his intolerable rage at the introjected "bad mother" from whom he learned the concept of "bad self" and self-contempt.<sup>198</sup>

Undeniably, Raskolnikov loves and abhors his mother and unconsciously cordons mother to that wicked Mikolka facet of himself, but Alyona is not the only conceivable maternal surrogate. Rather, as Breger has pointed out, *Crime and Punishment* is replete with mothers, ones, like the landlady, the "bad" mother, the "source of food, shelter, and comfort, . . . whose care is bound up with anger, fear and guilt" and the landlady's maid, the "good" mother, who "attends to [Raskolnikov's] needs in a simple and straightforward manner."<sup>199</sup> Why didn't Raskolnikov go on a rampage and exterminate all of the mothers in the book?

Essentially, most of the scholarship on Raskolnikov's mother detect what underlies the obvious — namely, that Raskolnikov

195. *Id.* at 12-13.

196. Lowe, *supra* note 8, at 8.

197. Garber, *supra* note 8, at 16.

198. *Id.*

199. BREGER, *supra* note 8, at 23; *see also* Hutzler, *supra* note 8, at 337 ("[A]fter murdering the pawnbroker and her daughter (symbolically mother and sister?) Raskolnikov realizes that in this act he has cut himself off from his mother and sister."); Kiremidjian, *supra* note 8 (Raskolnikov lives out his matricidal impulses); Robert B. Lower, *On Raskolnikov's Dreams in Dostoyevsky's Crime and Punishment*, 17 J. AMERICAN PSYCHOANALYTIC ASSOC. 728 (1969) (Raskolnikov acts out his sadomasochistic oedipal fantasy).

despises the Mikolka-self and the mothers of the world that birthed this evil Mikolka.<sup>200</sup> At the same time, Raskolnikov cherishes Mikolka because only Mikolka's evil can activate boy-Raskolnikov and conceive what he so desperately needs — the emergence of a regenerative process.

The third putative motive assigned to the impoverished Raskolnikov is monetary.<sup>201</sup> Raskolnikov even tries to persuade himself that murder, along with the robbery, is his logical economic escape hatch. There are even scholars, like Dr. Atkin, who call this a "social crime" and argue that "[h]ad Raskolnikov not been a ragged, starving ex-student whose sister was about to prostitute herself for his benefit, no murder would have been committed, and his youthful ambitions would have taken a different course altogether."<sup>202</sup> For Atkin and others, Raskolnikov, who has "already been reduced to the lowest level of poverty," feels as if he is "driven into a cage like a rat to starve to death" and believes that only Alyona's bounty can set him free.<sup>203</sup> Dostoyevsky, however, lets us know that none of that is true.

While Raskolnikov is in the throes of plotting, he ventures into a pub and eavesdrops on a conversation in which two men are coincidentally discussing Alyona and what a great idea it would be to kill her and steal her money. These men, however, do not envision pocketing her wealth, but rather envision altruistically disseminating it to those that are poor, sick, and needy:

Hundreds, possibly even thousands of lives that could be set on the right road; dozens of families saved from poverty, breakup, ruin, depravity, the venereal hospitals — and all of that with her money. If one were to kill her and take her money, in order with its help to devote oneself to the service of all mankind and the common cause: what do you think — wouldn't one petty little crime like that be atoned for by all those thousands of good deeds? Instead of one life — thousands of lives rescued from corruption and decay.<sup>204</sup>

It is here that Raskolnikov has an epiphany, believing that "predestination" is at work and that "inside his own head there had been engendered . . . *precisely those very same thoughts*."<sup>205</sup> This scene is poignantly one in which Raskolnikov, adopting the

200. *Id.*

201. See Atkin, *supra* note 8 (blaming Raskolnikov's crime on poverty and other social factors).

202. *Id.* at 256-57.

203. *Id.* at 365. In one of his meetings with Raskolnikov, Porfiry, the examining magistrate, suggests a monetary motive for the crime. See DOSTOYEVSKY, *supra* note 1, at 315 ("[T]hen is it really possible that you might also have decided — oh, because of some everyday setback or financial difficulty, let's say, . . . to step across an obstacle? . . . Well, by robbing and murdering someone, for example? . . .").

204. DOSTOYEVSKY, *supra* note 1, at 80.

205. *Id.* at 81.

conversation as his own inner dialogue, signs on to a supposedly more altruistic incentive — that of casting his abomination into a noble act of charity. What he identifies with here is not the sacrifice of Alyona for his own or even Dunya's sake, but for the betterment of humankind.<sup>206</sup> In essence, evoking the dream of the dead horse, this is the boy-Raskolnikov, who can radiate a sordid tragedy with beneficence.

While the overheard conversation and Raskolnikov's reaction to it suggest that the crime is not propelled by a desire for economic self-betterment, the same thing is borne out by Raskolnikov's behavior throughout the entire novel. To say that Raskolnikov is not materialistic is technically a *litotes* because one of the few consistent things about the supposedly destitute scholar is that whenever he does get his hands on a few coins, he almost instantly gives them to some needy subject, or just throws them away.<sup>207</sup>

It is also apparent that the murder is not about money because after all that dreadful work, Raskolnikov exhibits no interest whatsoever in the spoils of the robbery: he hides the purse and valuables under a brick and never even bothers to retrieve them. At his trial, it comes out that Raskolnikov failed to “remember the details of any of the goods he had stolen” and was “even mistaken as to their number.”<sup>208</sup> Also, he had never once even tried to peek into the purse, and by effectually abandoning it, “the largest denominations had suffered serious water damage.”<sup>209</sup> In short, Raskolnikov puts himself through living hell for something, but it is surely not for material gain.

The fourth putative motive is philosophical — Raskolnikov's Napoleonic theory — probably borrowed from Napoleon III's book, *The Life of Julius Caesar*, which was popular among the Russian intelligentsia at the time Dostoyevsky was writing *Crime and Punishment*.<sup>210</sup> Commentators have suggested that Raskolnikov, suffering from deep-seated feelings of inferiority, conjured up this

---

206. See Burnham, *supra* note 3, at 1231 (describing the “selfless theory” of why Raskolnikov killed and suggesting that “Raskolnikov figures that since the pawnbroker is old and rich from preying on human suffering, there is nothing wrong with killing her so that he can use her money to relieve suffering.”).

207. See, e.g., DOSTOYEVSKY, *supra* note 1, at 140 (“Making an automatic movement with his hand, he suddenly felt the twenty-copeck piece that was clutched in it. He unclenched his fist, stared fixedly at the little coin and, with a swing of his arm, hurled it into the water . . .”); see also *infra* Part V.B (describing Sonya refuting the putative monetary motive for the crime).

208. DOSTOYEVSKY, *supra* note 1, at 638.

209. *Id.*

210. See Burnham, *supra* note 3, at 1231 (suggesting that the “selfish” or “Napoleonic” theory comes from Napoleon III's 1865 book).

ideology prefiguring Nietzsche, and murdered to proclaim his own greatness and superiority.<sup>211</sup>

The theory, in an article that Raskolnikov authored after leaving the university, suggests that there are certain people in the world who “have a perfect right to commit all sorts of atrocities and crimes, and that it’s as if the law did not apply to them.”<sup>212</sup> Despite the fact that Raskolnikov did not put his name on the paper, but had merely initialed it, Porfiry, the examining magistrate, manages to find it, read it, and describe it:

The whole point of his article is that the human race is divided into the “ordinary” and the “extraordinary”. The ordinary must live in obedience and do not have the right to break the law, because, well, because they’re ordinary, you see. The extraordinary, on the other hand, have the right to commit all sorts of crimes and break the law in all sorts of ways precisely because they’re extraordinary.<sup>213</sup>

Porfiry taunts Raskolnikov with the article and Raskolnikov defends it, stating that “all the law-makers and guiding spirits of mankind, starting with the most ancient ones, and continuing with the Lycurguses, the Solons, the Mahomets, the Napoleons and so on, were all every one of them criminals” because they, “in propounding a new law . . . were violating an old one that was held in sacred esteem by society.”<sup>214</sup> Porfiry, playfully suggests that Raskolnikov committed a crime to prove that he was one of those great extraordinary Napoleon men:

What I mean is, sir, that when you were writing your article, it couldn’t just possibly have been, could it — ha, ha! — that you too considered yourself — oh, just the merest bit — to be one of the “extraordinary” people who can say a *new* word — in the sense you’ve explained . . .<sup>215</sup>

Here Dostoyevsky, speaking through Porfiry, summarizes and deflates the conjectured motives for the crime, essentially admonishing that its perpetration was neither monetary nor altruistic nor philosophical.<sup>216</sup> Porfiry (and Dostoyevsky as well) mocks Raskolnikov’s distended equation between the slaying of an old lady with the sacrifice of soldiers under Napoleon’s command. In essence, this pivotal scene on a literal level tells us not just that

211. See Atkin, *supra* note 8, at 271 (suggesting that we follow the “fuller development of Raskolnikov’s ideas by Nietzsche[,]” who “also envisages a society which is divided into two distinct classes, an aristocratic ruling caste (the ‘free spirits’) and an inferior slave class” and that “Raskolnikov’s theory is thus seen as a foreshadowing of the ideology of a fascist society.”).

212. DOSTOYEVSKY, *supra* note 1, at 307 (Porfiry’s description).

213. *Id.* at 308.

214. *Id.* at 309.

215. *Id.* at 315.

216. See also *infra* Part V.B (discussing how Sonya also pokes holes in Raskolnikov’s self-professed motives for his crime).

Porfiry knows “who done it,” but also that Raskolnikov’s claimed rationalizations are disingenuous.

But if we closely inspect the sparring between murderer and examining magistrate, Raskolnikov unwittingly exposes the forces at work inside himself. Raskolnikov tells Porfiry that only the ordinary people make mistakes, that at times “a certain capriciousness of temperament” deludes them into believing that they are one of the extraordinary “progressive” types, and that such posturing does not “represent any significant threat.”<sup>217</sup> According to Raskolnikov, the ordinary caste has its own code of self-flagellation:

Of course, it would do them no harm to give them a thrashing now and then, to punish them for getting carried away and to remind them of their rightful place, but no more than that; one doesn’t even need a whip-master for the job — they’ll whip themselves, because they’re very well-behaved; some of them will perform this service for one another, while others do it for themselves with their own hands . . . . Moreover, they impose various public acts of penitence on themselves — the effect is both splendid and edifying and, in short, you have nothing to worry about . . . .<sup>218</sup>

What Raskolnikov does here is foreshadow his own regenerative evolution, comprised of “mistake,” confession, “acts of penitence,” and finally “splendid” edification.<sup>219</sup> Beneath the surface of this, Raskolnikov concedes that he himself is “ordinary,” or at least that there is no genuine demarcation between the ordinary and extraordinary, and that what he seeks to bring about for himself is a good whipping.

When we look at the crime itself, we see that it adheres to his own recipe: Raskolnikov makes mistakes, yet charges forth to make more mistakes so that he can get caught and be flagellated. Raskolnikov’s crime is indistinguishable from his confession, and remember that even before he conceived of the crime, he had already effectually confessed by planting evidence against himself by making sure that his self-incriminating Napoleonic treatise was published and out there to be discovered.

The murder begins when Raskolnikov comes to Alyona’s apartment with a phony silver cigarette-case to pawn. It is then that he “los[es] his head and almost make[s] a fatal blunder,” and soon thereafter things spiral out of control.<sup>220</sup> After bashing in Alyona’s head, Raskolnikov fumbles for her keys and starts haphazardly grabbing at valuables. Although he had it planned so that he could arrive when Alyona’s step-sister would be absent, Lizaveta unexpectedly barges in and stares at the dead body. As

---

217. DOSTOYEVSKY, *supra* note 1, at 311-12.

218. *Id.* at 312.

219. *Id.*

220. *Id.* at 92.



Lizaveta backs away with hands raised, Raskolnikov shatters her skull as well.

With all his supposed meticulous conniving, Raskolnikov has mistakenly claimed a second, unanticipated victim and this totally unnerves him. He becomes confused, cannot finish confiscating the lucre, and instead mistakenly retards his own escape by obsessing over the blood on his weapon, hands, and clothes. In the interim, two men startle him by banging on the apartment door. Raskolnikov almost gets caught, but hides until they leave, and then makes his get away.

Although the whole thing is embarrassingly clumsy and amateurish, Raskolnikov might have gotten away with it.<sup>221</sup> But here Raskolnikov made a serious, although not necessarily fatal, mistake. That is, he failed to even consider that the old miser could have some record of her customers and that police would, of course, call such folks for questioning. While the mere fact of his being the victim's customer is not enough unto itself to convict him, it would at least guarantee that Raskolnikov would have a chance to wrangle with the police, who might in turn help him consummate his true desire by squeezing out that blessedly damned confession. In short, Raskolnikov, like the "ordinary" man, makes his mistakes, and secures his own whipping. He does not murder because he hates either Alyona or his mother, because he wants money, or because he wants to prove his own Napoleonic stature. He plans and commits a crime to secure content for a confession that will serve as the precursor to punishment and eventually repentance.

It is no coincidence that while marching to Alyona's with the concealed axe, Raskolnikov likens himself to a convict "being led to the scaffold."<sup>222</sup> He knows where he is headed and unconsciously grasps why this is his destination. The profound paradox, however, inheres in the fact that his thanatotic act is also the catalyst to life-affirmation. For him, only a deathblow will deliver that therapeutic re-birth. For him, only evil Mikolka can awaken the compassionate little boy.

### *C. After the Crime*

After the crime, Raskolnikov becomes even more of a self-saboteur. He is tortured by an overwhelming desire to get caught and confess. When Raskolnikov returns to his room right after the crime, Raskolnikov returns the axe to its spot under the yard keeper's bench. But he admits to himself that if the yard keeper

---

221. See *id.* at 181 (Razumikhin, discussing the crime, states: "[I]n my opinion, he's neither skilled nor experienced, and he's probably a first-time . . . . If, on the other hand, you assume he was inexperienced, it looks as though it was only chance that saved him from disaster . . . .").

222. *Id.* at 90.

had been there to greet him, “he would probably have simply handed him the axe.”<sup>223</sup> Early on, Raskolnikov has yearnings for a witness or for his commission of a mistake that will dutifully betray him.

Later, in his own room, Raskolnikov obsesses over clues that he might have overlooked, which is something that he both dreads and desires:

A strange thought suddenly came into his head: what if all his clothes were covered in blood, what if there were many stains, only he could not see them, could not find out where they were because his reason had grown feeble, broken apart . . . his mind grown darkened . . . Suddenly he remembered that there had been blood on the purse, too. “Ah! That means there must be blood in my pocket, too, because I shoved the purse into it while it was still wet!” In a flash he turned out the pocket, and in its lining discovered, as he had known he would — traces of blood, whole stains!<sup>224</sup>

Before he decides to stuff his spoils under a brick, Raskolnikov considers where he can hide the blood-stained scraps and comes up with crannies that are likely to be discovered, like the household stove, “the first place they’ll start rummaging about in.”<sup>225</sup> Part of him wants to plant evidence against himself to ensure that the authorities will get hold of it.

Right after the crime, there is a disturbing coincidence: the police summon Raskolnikov to the station, but unbeknownst to him, it has nothing to do with the murders, but rather involves his debt to his landlady. En route, Raskolnikov, who is “trembling,” and whose head is “spinning and aching with fever,” fears that he might “go and say something stupid” and then decides that if they do ask him about “it,” he might just get it over with and tell them everything.<sup>226</sup> He dreads and desires confession.

While in the police station, contending with the landlady issues, Raskolnikov has an impulse to go over to one of the officials and “tell[] him everything that had happened the day before, down to the last detail, and then tak[e] him to his lodgings and show[] him the gold objects in the corner, inside the hole.”<sup>227</sup> In fact, this urge to do himself in is “so strong that he actually [stands] up in order to put it into action.”<sup>228</sup> Then, when he overhears officials discussing the Alyona and Lizaveta murders, he swoons, drawing suspicion to himself. When he regains consciousness and leaves the station, he knows that he has now graduated to suspect status

---

223. *Id.* at 106.

224. *Id.* at 111.

225. *Id.* at 112.

226. *Id.* at 115.

227. *Id.* at 127.

228. *Id.*

and even anticipates a search of his room. In a sense, he marches out like someone who has secured a promotion.

From there on, Raskolnikov, wracked by guilt, is consumed with a desire to be ensnared and confess, and his actions become increasingly reckless and self-incriminating. Raskolnikov meets a police clerk in a bar and sardonically confesses to the crime and then pretends it was all joke. Unable to leave well-enough alone, Raskolnikov even returns to the scene of the crime, goes right up to the workmen repairing Alyona's apartment, questions them about the blood on the floor, and makes a memorable ruckus, which he hopes will be reported to the police. After that episode, Raskolnikov, somewhat relieved, "know[s] for a certainty that it would all very soon be over."<sup>229</sup> Later, he seeks to ascertain whether, Porfiry Petrovich, the examining magistrate knows that "[he] went to that old witch's apartment . . . and asked about the blood."<sup>230</sup>

One of Raskolnikov's main partners in this pre-confession tango is indeed Porfiry, who is assigned to the case. Porfiry, who is highly intelligent and also a natural psychologist, presents a formidable match for the ex-law student, and it is he who appears to know just how to manipulate his suspect.<sup>231</sup> In their first long confrontation, Porfiry, revealing that he is familiar with the article on the Napoleonic theory, toys with Raskolnikov's feelings of inferiority, mocks his grandiose justifications for crime, and then wacks his suspect with a blunt hint that he knows the horrific secret.

Right after the first of three significant tangles with Porfiry, Raskolnikov meets an artisan on the street, who stops and calls him a "murderer."<sup>232</sup> While initially unclear how much of this encounter is real or hallucinatory, what it foretells is that Porfiry will be one of the catalysts to outed truth — that his sessions with Porfiry will lead to Raskolnikov's acknowledgment that he has succumbed to the Mikolka within.

---

229. *Id.* at 210.

230. *Id.* at 293.

231. *See generally* Burnham, *supra* note 3, at 1241-42 (describing the role of examining magistrate, which has "no exact equivalent . . . in any English-speaking country."). Burnham explains that "these investigators were attached to and considered to be members of the local court, even being qualified to sit as a judge in that court on cases that they themselves had not investigated." *Id.* at 1241. Also, individuals like Porfiry "had the power to subpoena any member of the public to appear before them to give evidence, as well as the power to visit crime scenes, document other evidence, and order searches and arrests." *Id.* Significantly, "any evidence taken before them, including confessions, had the status of judicial evidence if taken in strict compliance with the specified procedures." *Id.*

232. DOSTOYEVSKY, *supra* note 1, at 324.

Although Raskolnikov loathes him, he nevertheless cannot stay away from Porfiry, who is both nemesis and co-conspirator. While Porfiry seeks to win, out, and then exile the Mikolka-Raskolnikov, he understands (and Raskolnikov does too) that inquisitor and suspect are in cahoots, that both seek the same end — a confession. Porfiry works not through overt coercion, but through manipulation and by giving Raskolnikov enough rope with which to hang himself.

In the second of three significant interviews, Porfiry makes a real breakthrough and brings Raskolnikov to the very edge of self-incrimination. It occurs soon after the mysterious artisan accuses Raskolnikov of murder. Raskolnikov, filled with delusions of grandeur, decides to bless Porfiry with a visit. But upon arrival at the police station, Raskolnikov is “rather surprised that it [takes] so long for anyone to attend to him” and that “people [come and go], seeming not to take the slightest interest in him.”<sup>233</sup> When Porfiry admits the now deflated Raskolnikov, he is cordial and welcoming, and definitely in control, telling his suspect, “[w]e’ve all the time in the world, sir, all the time in the world.”<sup>234</sup>

In the course of this second meeting, Raskolnikov becomes fiercely enraged and accuses Porfiry of exploiting a hackneyed technique, one used by all state investigators, designed to make a suspect feel confident before “suddenly hit[ting] him bang on the head in a thoroughly unexpected way with the most fatal and dangerous question.”<sup>235</sup> From there, Raskolnikov begs Porfiry to interrogate him, shouting “to put it bluntly: be so good as either to ask your questions or let me go, this instant . . . and if you are going to question me, then do it according to the proper form, sir!”<sup>236</sup> Although Porfiry appears somewhat shaken and “babble[s] on persistently,” he is still performing, still in control.<sup>237</sup> Porfiry actually tells Raskolnikov point blank what he is up to: “But what good are formal methods? You know, in many cases, formal methods are just rubbish. Sometimes one gains more from simply having a friendly chat.”<sup>238</sup> From there Porfiry elaborates on his methods, which are not in the legal textbooks, but instead are designed to give him “evidence that looks as straightforward as two times two”<sup>239</sup> and flexibly accommodate the

---

233. *Id.* at 394.

234. *Id.* at 397.

235. *Id.* at 398.

236. *Id.* at 399.

237. *Id.* at 402.

238. *Id.* at 401.

239. *Id.* at 403. See also Burnham, *supra* note 3, at 1233-34 (describing the rules of evidence in place at the time of CRIME AND PUNISHMENT). According to Burnham, “a person could be convicted only if there was complete proof,” which was “possible by means of a judicial confession by the criminal

idiosyncrasies of each case:

Say, I leave a certain gentleman completely alone: I don't arrest him and I don't trouble him, but I make damn sure that every hour and every minutes he knows, or at least suspects, that I know everything, the whole seamy story, and that I'm keeping an eye on him night and day, watching him unremittingly, and if he's conscious of the never-ending suspicion and terror in which I'm keeping him, I tell you, sir, he'll go off into a whirl, he'll come running of his own accord, and he may even do something that will look like two times two, and will, as it were, have a mathematical appearance — that's always most gratifying.<sup>240</sup>

In all of this, Porfiry confesses what he is in the very process of doing to Raskolnikov and prognosticates the precise effect it will have on his suspect, who will not and can not escape. Porfiry understands that Raskolnikov can not “abscond psychologically,” because what he needs is to be trapped enough to come clean.<sup>241</sup> Porfiry, likening his suspect to a moth near a candle-flame, tells Raskolnikov, “that's the way he'll be with me, hovering, circling around me like a moth at a lighted candle.”<sup>242</sup> For pawky Porfiry, such a suspect will eventually “come to the station himself and ask: ‘Why are they taking so long to arrest me?’”<sup>243</sup>

At this juncture, Raskolnikov, like the moth circling into the Porfiry flame, tells him directly:

It is clear to me now that you definitely suspect me of having murdered that old woman and her sister Lizaveta. For my part, I will tell you that I grew heartily sick of all this a long time ago. If you believe that you have the right to prosecute me, then please do so; if you are going to arrest me, arrest me.<sup>244</sup>

From there, canny Porfiry tries to placate his victim by assuming a maternal tone and giving him the information that he seeks: Porfiry mentions Raskolnikov's little visit to the murder scene to ask about the blood. After Porfiry shifts similes, now likening his moth to a “child that wants to play with matches,” Raskolnikov begins to beg for incineration and release: “Arrest me, search my lodgings, do as you please, but do it according to the rule-book . . . .”<sup>245</sup> When Raskolnikov is just about to walk out, Porfiry taunts him with a little surprise in the form of mysterious evidence behind a locked door. It seems that this could have been the coup de grace that expels what both inquisitor and suspect

---

defendant” and “[t]he only other practical form of complete proof was the consistent testimony of two eyewitnesses.” *Id.* at 1233-34.

240. DOSTOYEVSKY, *supra* note 1, at 404.

241. *Id.* at 405.

242. *Id.*

243. *Id.* at 408.

244. *Id.*

245. *Id.* at 415.

desire — *the* confession. Here, however, something transpires that Dostoyevsky denominates “a denouement” and while it effectively derails the cathartic ouster, it also precipitates what will be Raskolnikov’s therapeutic regeneration.<sup>246</sup>

## V. DOSTOYEVSKY’S LESSONS IN THERAPEUTIC JURISPRUDENCE

At the end of his second interview with Porfiry, Raskolnikov fails to discover what is behind the door. Almost *deus ex machina*, there is a sudden commotion, caused by Nikolai, the apartment painter, who insists on confessing to Raskolnikov’s crime. Porfiry, forced to shift his ken to Nikolai, the false-confessor, releases Raskolnikov and in so doing, admonishes, “we’ll be seeing each other again.”<sup>247</sup> The astute Porfiry knows that Nikolai is innocent and is unreliably taking credit for a crime that he did not commit. It is at this juncture that Dostoyevsky begins to deliver his real lesson on criminal justice, confessions, and therapeutic jurisprudence.

### A. *Porfiry’s Therapeutic Jurisprudence*

Through Nikolai, Dostoyevsky presents a different species that can and does infiltrate the criminal justice system — one who falsely confesses. In some respects, the false confessor is reminiscent of Raskolnikov before the murder: Nikolai, like Raskolnikov, apparently harbors a free-floating compulsion to confess. But, unlike Raskolnikov, Nilolai does not have to commit an offense to fill his confession with content, but rather does his atoning by eloping with someone else’s crime.

Porfiry (and Dostoyevsky as well) sense that the Nikolai types imperil criminal investigations by effectually painting over the truth. The examining magistrate, who describes Nikolai as someone who just “wants to ‘accept his suffering,’” knows that he is “not our man.”<sup>248</sup> Nikolai is linked to Raskolnikov’s theoretical race of “ordinary” men because he tends to self-flagellate.<sup>249</sup> Nikolai is all about punishment, but without a crime. Nikolai, however, is the very antithesis to Sonya. This comes across when Sonya, accused of a crime that she did not commit, declines to cave in and falsely confess. This occurs when Luzhin, Dunya’s fiancé, tries to frame Sonya for theft, presents witnesses, and even pulls

246. *Id.* at 417.

247. *Id.* at 421.

248. *Id.* at 543. See also BROOKS, *supra* note 67, at 6 (“Unless the content of the confession can be verified by other means, thus substantiating its trustworthiness, it may be false — false to fact, if true to some other sense of guilt. The law records many instances of false confessions — and no doubt many have gone unrecorded.”).

249. See *supra* notes 217-18 and accompanying text (describing how the ordinary man seeks self-flagellation).

the stolen money from her pocket.<sup>250</sup> Sonya, however, unrelentingly proclaims her innocence.

Through this scene, Dostoyevsky suggests that not everyone is a Nikolai or a Raskolnikov, that not all souls tropistically lean toward confession. Porfiry, who is not privy to this scene, would, of course, understand this and realize that in an imperfect legal system, a false accuser, like lawyer Luzhin, can “serve up” that perfect evidence or “nice, mathematical formula like two times two” and thus, even foster a false conviction.<sup>251</sup> Porfiry must sadly acquiesce in the fallibility of the criminal justice system and in the imperfections of his own vocation.<sup>252</sup>

Porfiry is masterful, but also tragically trapped, and he knows it. He understands that getting confessions is tricky business and that he must be cautiously adept at sifting the genuine from the ersatz. After Nikolai falsely confesses, Raskolnikov tells the examining magistrate that his job is “comical” because after Nikolai claims to be the murderer, Porfiry is now forced into “picking him to little pieces again, telling him that he’s lying, that he’s not the murderer.”<sup>253</sup> Porfiry understands that “comedy” all too well, knows that although he has been handed that “direct and irrefutable proof” in the form of Nikolai’s self incrimination, such evidence is unreliable laquer and that he must begin the task of

250. See Burnham, *supra* note 3, at 1239 (“Dostoyevsky also cleverly demonstrates the perversity of the formal evidence system in the extended scene with Sonya, in which Luzhin tries to frame her for theft with what would be ‘complete evidence’ under the law of the time”).

251. DOSTOYEVSKY, *supra* note 1, at 405.

252. In *THE HOUSE OF THE DEAD*, there is one man, who is accused and convicted of murdering his father so that he can “get his hands on his inheritance.” DOSTOYEVSKY, *supra* note 5, at 37. His father’s “body was found in a ditch” and “[i]t was dressed and neatly arranged, the grey-haired head had been cut off and laid against the torso” and “under the head the murderer had placed a pillow.” *Id.* The convict “had made no confession; had been stripped of his nobility and government service rank, and had been sentenced to twenty years’ deportation and penal servitude.” *Id.* It later turns out, however, that although “the facts were so clear that there could be no doubt about [his guilt],” this convict was innocent: “the true perpetrators of the crime had apparently been found and had confessed” after the one that was falsely convicted “had [already] suffered ten years of penal servitude for no reason.” *Id.* at 391-92. The narrator comments that there is “[n]o need to expatiate on the tragic profundity of this case, on the young life ruined by such a dreadful accusation.” *Id.* at 392.

253. DOSTOYEVSKY, *supra* note 1, at 421-22. Brooks asks:

What is the truth of confession? Doesn’t the requirement to confess suggest that there is always more than enough guilt to go around — since indeed once initiated, confession produces guilt as well as dissipating it? You may find yourself confessing to something else, something other than the supposed referent of your confession. You may damn yourself even as you seek to exculpate yourself.

BROOKS, *supra* note 67, at 6.

chipping away at it.<sup>254</sup> Significantly, when Raskolnikov ultimately delivers the true confession, he does not come to Porfiry. Rather, Raskolnikov gifts what is to some extent the fruit of Porfiry's labor to someone else — a police underling. In so doing, Dostoyevsky tells us what Porfiry ostensibly has come to accept— that his dream, hope and vision of that perfect, unequivocal truth will never and can never land in his lap.

The concerns in *Crime and Punishment* mirror those of the United States Supreme Court in its decisions from the early Due Process Clause era to the present. Both Dostoyevsky and the Court focus on the crucial distinction between what is voluntary and what is coerced.<sup>255</sup> The Court, however, believes that through its judicial decisions it can affect law enforcement conduct and thus, increase the likelihood that uncoerced confessions are the ones admitted into evidence. The Russian novelist, with his own personal insight into criminal justice, agrees that the law (and society) covets a voluntary, uncoerced, confession and agrees that such a thing exists, but he does not believe that any legal system or law enforcement official can ever really extract it.

As discussed above, at early common law, courts excluded coerced confessions from evidence because they believed them to be untrustworthy.<sup>256</sup> Certain commentators, like Inbau, have suggested that reliability is the only benchmark and that interrogators need ask one question: "Is what I am about to do, or say, apt to make an innocent person confess."<sup>257</sup> Through Porfiry's encounter with Nikolai, the apartment painter, Dostoyevsky shows us that law enforcement need "do, or say" little or next to nothing to yank self-incrimination out of an innocent man. In essence, Dostoyevsky implicitly understood what Chief Justice Warren expressed in *Miranda* — namely, that police questioning is inherently coercive, and that the psychological pressure is

---

254. DOSTOYEVSKY, *supra* note 1, at 403; *see also* BROOKS, *supra* note 67, at 21-22 (asking "how can someone make a false confession?"). Brooks explains:

Precisely because the false referentiality of confession may be secondary to the need to confess: a need produced by the coercion of interrogation or by the subtler coercion of the need to stage a scene of exposure as the only propitiation of accusation, including self-accusation for being in a scene of exposure. Or, as Talmudic law has recognized for millennia, confession may be the product of the death-drive, the production of incriminating acts to assure punishment or even self-annihilation, and hence inherently suspect because in contradiction to the basic human instinct for self-preservation.

*Id.*

255. *See generally supra* Part III.

256. *See supra* Part III.A.

257. INBAU ET AL., *supra* note 73, at 217; *see also supra* notes 71-75 and accompanying text (discussing Inbau and others that favor giving law enforcement maximum leeway).



omnipresent.<sup>258</sup> For the *Miranda* Court, it is this intrinsically coercive atmosphere that necessitates restraints on the police to assure that individuals are not being compelled to incriminate themselves in violation of the Fifth Amendment. For Dostoyevsky, however, when it comes to dealings with law enforcement, that inherent coercion, which either inspires a false confession or (as discussed below) nullifies a true confession, can not be cured or even tempered. In short, for Dostoyevsky, any confession extracted solely by a law enforcement official is a meaningless event.

Even after the dreadful demolition of *Miranda*, the Supreme Court has at least paid lip service to its condemnation of coercive tactics and its aim to reduce the risk of admitting such involuntary confessions.<sup>259</sup> In the recent *Seibert* decision, when the Court distinguished *Elstad*, it said that in *Elstad* the officer did not offend the Constitution because he did not extinguish the choice between speech and silence.<sup>260</sup> The *Seibert* Court indicated that the very heart of what at least theoretically remains of *Miranda* is meaningful choice and the goal of reducing the risk that choiceless confessions are treated as evidence that looks as straightforward as “two times two.”<sup>261</sup> Dostoyevsky, however, knew that police officials can never present a suspect with a truly viable choice.

When the United States Supreme Court clarified that the Sixth Amendment right to counsel had survived *Miranda* as a distinct control on police interrogation, it at first appeared to delete voluntariness and coercion from the equation.<sup>262</sup> For example, in *Massiah*, the Court rejected the relevance of the argument that the already indicted Massiah was not in custody or subjected to official pressure<sup>263</sup> and in *Brewer*, declined to evaluate whether Williams’ self incriminating statements were coerced or involuntary because that Sixth Amendment right to counsel was simply a “different” kind of protection.<sup>264</sup>

Later, in the context of the *Henry* and *Kuhlman* decisions, the Court indicated that coercion or the “deliberate” elicitation of

---

258. *Miranda*, 384 U.S. 436; see also *supra* notes 103-107 and accompanying text.

259. See *supra* Part II.B; see also BROOKS, *supra* 67 at 5 (“The Supreme Court of the United States has worried about [the] problem and sought to erect procedural safeguards against the coerced confession, yet it is not clear that in the day-to-day administration of justice — pursued in the police precinct, not the Court’s marble chambers — these safeguards make much difference.”).

260. *Seibert*, 542 U.S. 600 (distinguishing *Elstad*, 470 U.S. 298).

261. DOSTOYEVSKY, *supra* note 1, at 405.

262. See generally *supra* Part III.C.

263. *Massiah*, 333 U.S. at 206.

264. *Brewer*, 430 U.S. at 398; see also *supra* notes 126-36 and accompanying text.

incriminating statements can factor into the Sixth Amendment calculus.<sup>265</sup> The Court putatively reconciled those two decisions by characterizing the law enforcement tactic in *Henry* as an active “voice . . . encourage[ing] conversation” and in *Kuhlman* as a passive “ear” simply recording the conversation.<sup>266</sup> For Dostoyevsky, none of that means a damn thing: the Russian novelist, himself once imprisoned in Siberia, understood full well that the human impulse to self-incriminate can be over powering, and that the mere presence of even a supposedly passive, receptive ear, especially for one effectually exiled in jail, is tantamount to active encouragement. One prime example of this is in *House of the Dead*, Dostoyevsky’s biographical account of years spent in a Siberian prison, in which he portrays prisoners regularly spilling their guts and divulging their own offenses to each other at the drop of a hat.<sup>267</sup>

For Dostoyevsky, any confession that any law enforcement agent extracts is always involuntary and coerced — at least under his understanding of what those words mean. As discussed below, such a confession — be it true or be it false — serves no real purpose. If Dostoyevsky were alive today and in law school studying the Supreme Court confession cases under the Due Process Clause and the Fifth and Sixth Amendments, he might commend the attempted proscription of the kind of coercive tactics that lead to the undesirable involuntary admissions, but he would seriously doubt whether any imposed constraints could eradicate the culprit. Porfiry makes peace with precisely this sense of futility during his third and final interview with Raskolnikov.

Professor Richard H. Weisberg, who is pretty rough on Porfiry, portrays him as “fascinated by the criminal mind, perhaps even envious of it, plays a game of life and death within the context of a perfectly respectable professional position,” and creates a situation where “[t]he lines between lawyer and criminal start to blur.”<sup>268</sup> According to Weisberg, Porfiry ends up betraying the very system he serves by depriving the state of its appropriate penalty:

Porfiry, having totally dominated Raskolnikov in the pretrial interviews, has no enduring personal need to see the defendant pay the supreme penalty for what was, after all, at least one premeditated murder. The inquisitor therefore deletes from his

---

265. See *supra* notes 137-48 and accompanying text (discussing *Henry*, 477 U.S. 264 and *Kuhlman*, 477 U.S. 436).

266. *Kuhlman*, 477 U.S. at 461 (Burger, J. concurring); see also *supra* notes 146-48 and accompanying text.

267. See DOSTOYEVSKY, *supra* note 5; see also *supra* notes 4-7 and accompanying text and note 249 (discussing the prisoner in THE HOUSE OF THE DEAD, who was falsely convicted of parricide).

268. WEISBERG, *supra* note 8, at 54.

dossier (and hence keeps from the procurator) his firm insight into the utterly intellectualized nature of the crime. At the trial, Raskolnikov is presented as just another starving student, and thus deserving of a sharply mitigated sentence in exile.<sup>269</sup>

Here what Weisberg depicts as Porfiry's flaws are really his virtues.<sup>270</sup> In fact, Porfiry personifies what a legal system can at its best accomplish. What Dostoyevsky reveals in that third meeting is that Porfiry, even after all the psychological torture unleashed on his suspect, has himself evolved, has gained insight into and genuine compassion for this ex-student with his Napoleonic theories.<sup>271</sup> It is Porfiry's change of heart that paves the way for what Weisberg has derogated as an undeserved "sharply mitigated sentence in exile."<sup>272</sup> In turn, it is that reduced (or rather merciful) punishment that helps engender Raskolnikov's ultimate rehabilitative transformation.

It is also revealed in this climactic third encounter that Porfiry has surrendered to the reality of how little any system of justice can really achieve and how meager — how terribly pedestrian — his own role actually is in the grand scheme. At this last meeting, Porfiry, now ostensibly humbled, dispenses with his cat and mouse routine or the ploy that Professor Burnham has likened to "vintage Columbo,"<sup>273</sup> and instead interacts with Raskolnikov as candidly and as fairly as is humanly possible.

Porfiry visits Raskolnikov's room with a "serious and troubled expression" that "seemed to twitch with sadness," causing Raskolnikov to reflect that "[h]e had never so far seen such an expression on Porfiry's face, and had not suspected him to be capable of it."<sup>274</sup> Although Raskolnikov believes that Porfiry is about to tweak him once more, Porfiry assures him that "it is better for us to be candid with each other."<sup>275</sup> Porfiry tells Raskolnikov that he knows that he is the murderer, asks him to "file a plea of guilty," explains that "[t]hat would be countless times better for you, and better for me, too — because then it would be over and done with,"<sup>276</sup> and then promises leniency:

[H]ow can you ask why you should file a plea of guilty? Have you any idea what a reduction in your sentence that would mean? . . . And I swear to God himself that I'll fabricate a thing or two and arrange it with the authorities so that your plea will come as

---

269. *Id.*

270. See generally *supra* note 156 (describing those scholars and commentators who have disagreed with Weisberg's perspective on Porfiry).

271. DOSTOYEVSKY, *supra* note 1, at 403.

272. WEISBERG, *supra* note 8, at 54.

273. Burnham, *supra* note 3, at 1245.

274. DOSTOYEVSKY, *supra* note 1, at 536.

275. *Id.*

276. *Id.* at 546.

something totally unexpected. We'll completely demolish all that psychology, I'll convert all those suspicions about you into thin air, so that your crime will look like some kind of a brainstorm, because, in all conscience, a brainstorm is what it was.<sup>277</sup>

At the close of this diatribe, Porfiry says, "I'm a decent man . . . and I'll keep my word."<sup>278</sup> After Raskolnikov responds by telling him that he doesn't want a reduced sentence, Porfiry, who, understanding his suspect's proclivity to augment his own suffering, is not surprised and addresses him as much as possible as a friend, saying "don't turn your nose up at life[,] . . . surrender yourself directly to life, without circumspection . . . I simply believe that you still have a lot of living to do yet."<sup>279</sup> Porfiry also lets Raskolnikov know that he is not seriously worried about attempted flight and that he is "certain that . . . [he will] 'accept suffering."<sup>280</sup> Before they part, Raskolnikov reminds Porfiry that he has not made "any kind of confession . . . today."<sup>281</sup> When Porfiry departs, he is "hunched" and apparently resigned to his own limitations.<sup>282</sup>

One of the enigmas of this climactic scene is why Porfiry does not simply arrest Raskolnikov right then and there. Professor Burnham partly attributes Porfiry's *modus operandi* to the law applicable at the time of *Crime and Punishment* and the requirement that "confessions be (1) voluntary, (2) consistent with the factual circumstances of the case, and (3) judicial."<sup>283</sup> Burnham explains the "judicial" dictates that "the confession . . . be made either in open court or in formal testimony given before an examining magistrate during the pretrial investigation stages of the case."<sup>284</sup>

Surely, by the time of that final interview, Raskolnikov, with perhaps just a little cajoling, could have given a confession that qualified as "voluntary" within the meaning of Russian law.<sup>285</sup> In this third investigative rendezvous, the examining magistrate could have still met the standards, even if he gently encouraged Raskolnikov to just get the confession over and done right then and there. But Porfiry does not choose to proceed that way.

Why does Porfiry leave Raskolnikov to his own conscience after suggesting that he confess, accept responsibility, and grab the offer of leniency? To some extent Porfiry's approach in this

---

277. *Id.* at 547.

278. *Id.*

279. *Id.* at 548-49.

280. *Id.* at 550.

281. *Id.* at 551.

282. *Id.*

283. Burnham, *supra* note 3, at 1236.

284. *Id.*

285. *Id.*

third meeting harmonizes with the ones he employed in the previous interviews. Porfiry understands full well that Raskolnikov needs and has always needed to confess. He also intuits on another level that Raskolnikov needs that little boy within to emerge, needs to confront the internal Mikolka-horse beater, and needs to electively embrace life anew. Porfiry gives Raskolnikov enough space to make crucial decisions and thus, ensures that the confession ensues from free will instead of from some mere inquisitorial squeezing. Porfiry understands that voluntariness is sacrosanct and even goes so far as to accept what the Supreme Court denied in *Connelly* — namely, that even when a confession is not the product of law enforcement coercion, but comes from an individual's inner voices or the forces of some psychosis, it is still involuntary.<sup>286</sup> Porfiry is intent on letting things incubate so that Raskolnikov can rationally forge his own resolution.

Contrary to what appears to be Weisberg's view that the examining magistrate ends up sullyng what is a "perfectly respectable professional position,"<sup>287</sup> Porfiry is cognizant of the importance of maintaining a fair accusatorial playing field. In this respect, Porfiry again embodies some of the sacred policies that undergird older United States Supreme Court confession cases — particularly that constituent concern with the existence of and appearance of fair play.<sup>288</sup>

As discussed above, the landmark Due Process confession cases focus not just on the reliability of the extracted statements, but on the conduct of the interrogators themselves and on the promotion of public confidence in this country's penal system.<sup>289</sup> Porfiry too has that "deep-rooted feeling that the police must obey the law while enforcing the law" and that human liberty is "endangered" by reprehensible law enforcement methods.<sup>290</sup> In the Fifth Amendment context, *Miranda* and its progeny clarify that the interest in preserving public faith in our accusatory system of justice is paramount.<sup>291</sup> Porfiry too understands that any interrogation environment "carries its own badge of intimidation" which is "destructive of human dignity."<sup>292</sup> In the Sixth Amendment area, the underpinning of *Massiah* and cases decided in its wake is the policy of safeguarding the integrity of our

---

286. *Connelly*, 479 U.S. 157; see also *supra* notes 89-101 and accompanying text (discussing *Connelly* and how the Court found that the coercion must come from a state actor, not from a suspect's mental condition).

287. WEISBERG, *supra* note 8, at 54; see also *supra* notes 268-69 and accompanying text.

288. See generally *supra* Part III.

289. See generally *supra* Part III.A.

290. *Spano*, 360 U.S. at 320-21.

291. See generally *supra* Part III.B.

292. *Miranda*, 384 U.S. at 457-58.

adversarial justice system.<sup>293</sup> Porfiry too believes that he, although possessed with sufficient evidence to arrest his suspect, must nevertheless comport his conduct with “basic dictates of fairness.”<sup>294</sup>

While Porfiry appears at least implicitly aware of the values that the seminal Supreme Court espouses with respect to fairness and voluntariness, his understanding is more profound and certainly more expansive. Most significantly, in that final, more humane interview with Raskolnikov, who is no longer his mere circling moth, Porfiry promises a mitigated sentence and asserts that he is a man of his word. We learn later that “Porfiry Petrovich fully kept his promise,” that he had a “decisive role in softening the fate of the accused man,” and that Raskolnikov’s sentence “turned out to be more lenient than might have been supposed.”<sup>295</sup>

In essence, Dostoyevksy’s examining magistrate implicitly endorses one of the fundamental tenets of therapeutic jurisprudence: namely that when individuals participate in a judicial process, what is most important is their assessment of the fairness of the process itself.<sup>296</sup> When individuals feel that the legal system has treated them with dignity and respect, the effect is therapeutic: they are more inclined to accept responsibility for their own conduct, take charge, and change.<sup>297</sup> Porfiry, who has genuinely invested himself in his suspect and hopes to see him “surrender . . . directly to life” and let “life . . . carry [him] through,” knows to a point of certitude that by honoring his own promise and by treating Raskolnikov fairly, respectfully, and mercifully, he can participate in a life-affirming rebirth.<sup>298</sup>

When at that final meeting, Porfiry assures Raskolnikov “[h]ave no fear, my good chap; we shall do things your way,”<sup>299</sup> and gives him space and time to come clean on his own terms, Porfiry demonstrates a grasp of what therapeutic jurisprudence scholars tout as a prime ingredient in the recipe for healing — that sense of voluntary participation.<sup>300</sup> When individuals feel that they voluntarily partake in a process that results in a judicial pronouncement that affects their own lives, they are more likely to mend and alter their behavior.<sup>301</sup> Porfiry does not want the confession to be voluntary just because voluntariness is a requisite

---

293. See generally *supra* Part III.C.

294. *Massiah*, 377 U.S. at 205 (quoting *Waterman*, 175 N.E.2d at 448).

295. DOSTOYEVSKY, *supra* note 1, at 639.

296. See *supra* notes 22-27 and accompanying text.

297. *Id.*

298. DOSTOYEVSKY, *supra* note 1, at 548-49.

299. *Id.* at 551.

300. See *supra* notes 32-34 and accompanying text.

301. *Id.*

under *Crime and Punishment's* legal code, but instead appears to appreciate that only a purely voluntary act of coming clean will precipitate that so needed and so desired regeneration.

At the end of this final interview, although Porfiry should realize that the match is over, that he has "won" and that the moth has fallen into his flame, he does not strut out like some victorious conqueror. Rather, Porfiry retreats, "looking somehow hunched" and even slightly diminished.<sup>302</sup> Although hopeful that Raskolnikov will turn himself in, "discharge the duty that justice requires" and ultimately, let life begin anew, the examining magistrate also sadly acquiesces in his own limitations.<sup>303</sup> He knows that neither he nor any prosecutorial agent are the ones that can bring a true therapeutic triumph to fruition. He accepts that he, as the inquisitorial officer, will always be the adversary and that the completion of the real crowning accomplishment is properly delegated to someone else. In real life, it is the defense counsel's job. In *Crime and Punishment*, it is all up to little Sonya.

### B. Sonya as Therapeutic Agent

Professor Robert Cochran's article, suggesting that "lawyer[s] should explore the possibility of confession with a client," even when it "might lead to public disapproval, prosecution, and/or conviction," formulates the "moral discourse of friends" as a "model for lawyer-client moral discourse."<sup>304</sup> Cochran feels that the "lawyer as friend" is a better alternative to the authoritarian model, which is "inconsistent with client dignity . . . and limit[s] moral growth":<sup>305</sup>

The lawyer as friend engages in moral conversation with the client but leaves decisions (including a decision such as whether to confess) to the client. Such a lawyer seeks not to impose. She may give her opinion, but on most issues would make it clear that she would help the client either way. The lawyer recognizes, and tells the client, that most issues in legal representation are issues over which reasonable moral people can differ.<sup>306</sup>

Although Cochran does not relegate his thoughts to the genre of therapeutic jurisprudence, he is implicitly aligned with us through his emphasis on voice, validation, and voluntary participation.<sup>307</sup> Cochran, like therapeutic jurisprudence scholars, stresses that "[t]he greatest moral growth comes if the client chooses to confess, rather than doing so under pressure from the lawyer," and that

---

302. DOSTOYEVSKY, *supra* note 1, at 551.

303. *Id.* at 549.

304. Cochran, *supra* note 9, at 334, 379.

305. *Id.* at 380.

306. *Id.* at 379-80.

307. *See generally supra* Part I.

“deeper moral growth comes when we act morally in freedom, from internal rather than external direction.”<sup>308</sup> Porfiry ascribes to such a philosophy, but understands that because he, as adversary, as the one saddled with the mission of securing the offender’s arrest, can neither be the prototypical lawyer as friend or the pressure-free progenitor of moral growth.

Throughout most of *Crime and Punishment*, Raskolnikov does not interact with a lawyer of his own, and even when Dostoyevsky gives us a redacted summary of the trial, we have no real sense of defense counsel at work. What Dostoyevsky does give us, however, is Sonya, who is Raskolnikov’s “advocate” (in the truest meaning of that word). As mentioned above, Sonya is Marmeladov’s young daughter, who has been forced into prostitution to support her alcoholic father and his other children. Raskolnikov, who sees in Sonya a rare goodness, is attracted to her and also compelled to torment her. What the ex-law student apparently detects in Sonya is her talent for self-sacrifice and her healing qualities, along with that potential to nurture the inner boy-Raskolnikov, the one that can leap forth to counter the inner destructive Mikolka.

Although not literally a lawyer nor a psychologist — like it or not — Dostoyevsky’s noble prostitute wins the award for therapeutic jurisprudence professor of the year. In the first of two salient encounters between the ex-law student and Sonya, Raskolnikov discovers that Sonya, who is deeply religious, was a close friend of Lizaveta, Alyona’s murdered step-sister. Although sympathetic of Sonya and her plight, Raskolnikov reminds her of her hopelessness and even eggs her on toward suicide:

Isn’t it monstrous that you’re living in this filth which you hate and loathe, while all the time you know (you have only to open your eyes) that you’re neither helping nor saving anyone by it? And, I mean, tell me,” he said in a near frenzy, “how such turpitude and vileness can exist in you alongside these other, opposing and holy emotions? I mean, it would be more just, a thousand times more just, and more reasonable to throw yourself head first in the water and have done with it!<sup>309</sup>

Sonya does not try to rebut Raskolnikov’s depiction of her pathetic life, but instead claims that God sustains her. Shortly thereafter, Raskolnikov spots a Russian translation of the New Testament on a chest of drawers, which, as it turns out, was Lizaveta’s gift to Sonya. Seemingly out of the blue, Raskolnikov urges Sonya to read him “the bit about the raising of Lazarus.”<sup>310</sup>

---

308. Cochran, *supra* note 9, at 380.

309. DOSTOYEVSKY, *supra* note 1, at 383.

310. *Id.* at 386.



For Raskolnikov, this gospel session vaticinates his future and eventual moral rebirth. Raskolnikov, sensing that himself, fears that Sonya's righteousness could be "catching" and exclaims, "I'll be turning into a holy fool myself soon . . .!"<sup>311</sup> Sonya, with "shaking" hands and chest "constricted," complies with his command until she reaches the part, "*And he that was dead came forth,*" which "she read loudly and ecstatically, shaking and shivering, as though she were seeing it in real life."<sup>312</sup> When Dostoyevsky describes the candle "shedding its dim light on the murderer and the prostitute who had so strangely encountered each other in the reading of the eternal book," he intertwines their futures and their souls.<sup>313</sup> Raskolnikov tells Sonya, "[y]ou're all I've got now . . . so let's take the road together" and says, "You're necessary to me, and that's why I've come to you."<sup>314</sup> Before Raskolnikov parts, he promises Sonya that if he returns to see her, he will disclose the identity of Lizaveta's murderer:

I know and I'll tell you . . . . You I'll tell, and you alone! I've singled you out. I won't come to ask you to forgive me, I'll simply tell you. I singled you out a long time ago as the person to tell this to, I thought of it back at the time when your father spoke about you and when Lizaveta was still alive.<sup>315</sup>

Raskolnikov, sensing that the prostitute is his salvation and that she will raise him, like Lazarus, from the dead, realizes that Sonya is *the* one, who can release the inner boy-Raskolnikov, help subjugate the inner-Mikolka, and be his true therapeutic agent — his lawyer-friend. She will be the one to hear his confession.

As discussed above, listening skills, so intermeshed with fairness, is something that therapeutic jurisprudence aims to cultivate.<sup>316</sup> Michael D. Clark, a social worker and consultant to drug treatment courts, advocates the use of therapeutic techniques by all professionals (including judges, probation officers, and lawyers) who treat offenders.<sup>317</sup> For him, listening, along with "perceived empathy, acceptance, warmth, and self expression" can bring about positive behavior change.<sup>318</sup>

While, of course, no one here preposterously suggests that Sonya is a time-traveling therapeutic jurisprudence scholar or that somehow in mid-Nineteenth Century Russia, she became well

311. *Id.* at 387.

312. *Id.* at 388, 390.

313. *Id.* at 391.

314. *Id.*

315. *Id.* at 393.

316. *See supra* notes 28-35 and accompanying text.

317. Clark, *supra* note 50, at 147.

318. *Id.* at 140.

versed in today's psychology of procedural justice, but the fact remains that Sonya somehow has imbibed the wisdom that listening, along with empathy, acceptance, and encouragement can work miracles — can raise a soul from the dead. It is Sonya, who intuits how to empower Raskolnikov with voice, validation, and voluntary participation. In their next significant encounter, Sonya hears Raskolnikov's confession and in the process of doing so, exhibits therapeutic virtuosity.

Feeling that he "must" confess to Sonya and that he could not put it off any longer, Raskolnikov keeps his promise and discloses Lizaveta's murderer.<sup>319</sup> But, rather than just owning up, Raskolnikov begins by describing the crime in third person, "[h]e didn't mean . . . to kill Lizaveta . . . . He killed her by accident. He meant to kill the old woman."<sup>320</sup> After listening intently and insisting that she is unable to guess the identity of the murderer, Sonya gives him space and an opportunity to come clean.

Once Sonya realizes the truth, she does not shun Raskolnikov or judge him, but rather "move[s] towards him , . . . seize[s] both his hands" and then "thr[ows] herself on his neck, embracing him and gripping him as hard as she could in her arms."<sup>321</sup> Her body language connotes empathy and acceptance and shows that she possesses that rare talent of being able to separate her love for another being from his horrific behavior. Raskolnikov himself points that out when he exclaims: "You put your arms round me and kiss me after I've told you a thing like *that*."<sup>322</sup> When Raskolnikov accuses her of not knowing "what [she] [is] about," Sonya makes it clear that she hears him and knows exactly what she and he are all about:<sup>323</sup> she tells Raskolnikov, "There's no one, no one in the whole world more unhappy than you are now."<sup>324</sup>

What Sonya feels is the torment of both the whipped horse and the inner little-boy Raskolnikov, who has been suppressed by the inner-Mikolka. Understanding his agonizing sense of isolation, Sonya promises him, "I'll never leave you, no matter where you go! . . . I'll follow you everywhere."<sup>325</sup> Through this, Sonya intimates that if he decides to do what he needs to do — to confess and accept responsibility — that he will not be alone. In essence, this is Sonya gently urging him to find the course that is right for him and also instilling in him at least a modicum of hope.

---

319. DOSTOYEVSKY, *supra* note 1, at 485.

320. *Id.* at 489.

321. *Id.* at 490, 491.

322. *Id.* at 491.

323. *Id.*

324. *Id.*

325. *Id.*

Cochran, discussing “lawyer as friend,” asks us to imagine that.<sup>326</sup>

[A] close friend comes to you and confesses that he has embezzled something from his employer. You are likely neither to push your friend to confess, nor to ignore the wrong that your friend has done. You are likely to try to help your friend think through the matter. You might offer an opinion, but you would be likely to do so in a tentative fashion, respecting the dignity of your friend.<sup>327</sup>

Sonya, who does not pressure, order, or dominate, becomes the friend destined to hear the balm of confession. While Sonya does not try to push Raskolnikov, she does not deny the offense, but tentatively suggests that he accept responsibility, and even offers to accompany him to Siberia so that they can “do penal servitude together.”<sup>328</sup> When he indicates that he may not yet be ready to accept that, Sonya neither coerces nor nags, but rather engages him in further dialogue about the murder. What ensues is possibly the most therapeutic event in Raskolnikov’s entire life.

Sonya gently encourages him to discuss or test out his putative motives for the crime. When he contends that his motives were monetary, Sonya doubtfully asks, “Who could ever bring himself to believe it? . . . And how, how could you give away the last copeck you had, yet murder someone in order to rob her?”<sup>329</sup> Like a true therapeutic jurisprudence pro, “[w]ith her whole attention, Sonya listen[s]” until Raskolnikov extracts self-truth’s kernel, “if the only reason I’d killed her was because I was hungry . . . I’d be . . . *happy* now.”<sup>330</sup>

From there, he takes another stab at it, imploring her to indulge him in his Napoleonic theory, and after listening, she tells him, “go on, go on . . . I will understand, I’ll understand it *in my own way*.”<sup>331</sup> Her attentiveness induces Raskolnikov to speak the truth, “[a]ctually, all of what I’ve been telling you is nonsense, almost pure drivel.”<sup>332</sup> It is at that juncture, that Raskolnikov, now an amalgam of friend-client-patient, does what he always seems to do in a pinch: namely, exile himself from the species and dehumanize his victim. He tests this out on Sonya by protesting, “Look, Sonya, all I killed was a louse — a loathsome, useless, harmful louse!”<sup>333</sup> And Sonya responds “But that louse was a

326. Cochran, *supra* note 9, at 378-381.

327. *Id.* at 379.

328. DOSTOYEVSKY, *supra* note 1, at 492.

329. *Id.*

330. *Id.* at 493.

331. *Id.* at 495.

332. *Id.* at 496.

333. *Id.* at 497.

human being!"<sup>334</sup> From there, we detect the incipience of rehabilitative potential: it is here that Raskolnikov concedes that Alyona "wasn't really a louse," that he is "talking nonsense," and that his justification is plain "wrong."<sup>335</sup> Eventually, he admits, "I simply killed; I killed for my own sake, for no one but myself" and in so doing, implies that the crime was a cataclysm precipitating self-transformation.<sup>336</sup> Such candor embryonically prefigures what is to come — the post-confession Raskolnikov, who renounces his lies, accepts responsibility, and births himself anew.

When Sonya observes Raskolnikov recoiling into "a kind of black ecstasy" and "realize[s] that this black catechesis had become his creed and his law," she directs him to consider a power bigger than himself and tells him, "You've strayed away from God . . ."<sup>337</sup> When he explains that he had "wanted to kill without casuistry," and begs her for advice, she admonishes that "casuistry" is not and can not be evaded.<sup>338</sup> Sensing that conflicted Raskolnikov seeks both to divorce the consequences of his own actions and also to court merited self-flagellation, Sonya advises him to dash out in front of the crowd, assail the horse-whipping Mikolka inside, and come clean in a very big public way:

Go immediately, this very moment, go and stand at the crossroads, bow down, first kiss the ground that you've desecrated, and then bow to the whole world, to all four points of the compass and tell everyone, out loud: "I have killed!" Then God will send you life again.<sup>339</sup>

Sonya does not counsel self-deception, silence, hiding, or sham rationalizations, but instead prescribes an *elixir vitae* in the form of redemptive suffering. When Raskolnikov initially rejects the remedy, she does not push, but merely asks, "But how will you live? . . . How will life be possible for you now?"<sup>340</sup> She has truly heard Raskolnikov and does what therapeutic jurisprudence

334. *Id.*

335. *Id.*

336. *Id.* at 500.

337. *Id.* at 498-99; see Cochran, *supra* note 9, at 368-69 (explaining that "[m]ost religious traditions within the United States recognize the value of confession, and it is important to remember that clients may come from one of those traditions"); see also *id.* at 366, 397 n.290 (reporting that a "survey of a wide variety of Los Angeles clergy revealed that all would encourage those who had committed a crime to confess to the victim and to the government authorities," and tracing this to "Christian tradition" and "Judaism"). Cochran points out that although Raskolnikov is an "agnostic rationalist," he nevertheless has "an internal drive to confess" and that "Dostoyevsky suggests that there is a drive to confess, both within the religious and the non-religious." *Id.* at 369-70.

338. DOSTOYEVSKY, *supra* note 1, at 500.

339. *Id.* at 501.

340. *Id.* at 501-02.

scholars advise — namely, the technique of “reflective listening,” which is a way of periodically checking the accuracy of what the listener believes that the client has said.<sup>341</sup> Sonya helps Raskolnikov explore the ramifications of his self-destructive course and warns, “Oh, how you’ll suffer, how you’ll suffer!”<sup>342</sup>

Michael Clark, discussing ways to convey hope in dealing with offenders, suggests creating what he calls “a second door” by just “allowing conflicting feelings and conditions to exist.”<sup>343</sup> He explains by way of example that “[a] client could feel scared and hopeless about his ability to begin abstinence from drugs and yet marshal the confidence to avoid using ‘just for today.’”<sup>344</sup> It is apparent that Sonya in an intuitive way carves out a “second door.” Although Raskolnikov is not yet willing to confess and surrender to exile in Siberia, he is nevertheless able to “marshal” the gumption to spend just a little time in jail. He tells Sonya that “[t]here’s no way I can avoid them putting me in jail . . . . But that’s nothing . . . I’ll do a little time and then they’ll let me out again.”<sup>345</sup> Raskolnikov, of course, still in denial and also embroiled in his internecine war, invites Sonya to visit him in jail and then *ipse dixit* orders her to stay away. But when Raskolnikov parts, there is a sense that this “lawyer as friend” has ignited some healing and that the future might bring hope and salvation.<sup>346</sup> Raskolnikov agrees to let Sonya give him one of her crosses to wear at a later time so that they can “bear [their] crosses together” and “pray and take the road together.”<sup>347</sup>

It is also apparent that Sonya’s therapeutic work is there but dormant in Raskolnikov’s psyche when he later evaluates and rejects the lethal solution that Svidrigailov has chosen for himself.<sup>348</sup> Svidrigailov, sister Dunya’s former employer and

341. See Clark, *supra* note 50, at 140 (applying therapeutic jurisprudence to drug courts, explains how “[p]erceived empathy involves a . . . participant’s belief that they are listened to and understood” and that “reflective listening” is key).

342. DOSTOYEVSKY, *supra* note 1, at 502.

343. Clark, *supra* note 50, at 143 (“discussing the “mindset to conquer, eliminate, or ‘kill’ the problem” and explaining that “[o]ftentimes it is helpful and much more expedient to allow the problem to remain, to coexist with an emerging solution or healthy behavior that is being developed”).

344. *Id.* Clark explains that “creating a second door” is a metaphor that “originated in an old vaudeville routine” in which “[t]wo ingratiating waiters approaching the narrow kitchen door repeatedly defer to the other . . . [and] finally at the same moment, they both decide to act and turn into the door simultaneously, only to wedge their shoulders in the small opening.” *Id.*

345. DOSTOYEVSKY, *supra* note 1, at 503.

346. See generally Cochran, *supra* note 9.

347. DOSTOYEVSKY, *supra* note 1, at 504.

348. BREGER, *supra* note 8, at 42-49 (analyzing Svidrigailov and explaining that “[o]ther characters in the novel can be seen as aspects of Raskolnikov — Marmeladov his masochistic side, Porfiry his accusing conscience — but

rejected suitor, ultimately takes his own life. But before doing so, Svidrigailov confesses to Raskolnikov, narrating his lecherous life story replete with multiple offenses against women and young girls.<sup>349</sup> While Raskolnikov realizes that Svidrigailov's inner torment parallels his own, he repudiates that alternative of suicide and instead marches off to the police station to abide by Sonya's more life affirming antidote.<sup>350</sup> As such, while Sonya's moral discourse with Raskolnikov did not have an immediate effect, it prepared him to evaluate options and freely choose confession.<sup>351</sup>

Professor Wexler, analyzing the rehabilitative role of the criminal defense lawyer, explains that the therapeutic jurisprudence switch does not just shut off with a confession or a conviction and sentence.<sup>352</sup> For "a client . . . confronting an incarcerative sentence, the [Therapeutic Jurisprudence] criminal lawyer should, at some point, engage the client in a dialogue regarding the sentence and the future."<sup>353</sup> As Wexler suggests, the relationship between attorney and client is ongoing, and even during and after incarceration, there are therapeutic opportunities, like discussing an "expected or hoped-for release or conditional release date" or assisting in the process of reentry and readjustment.<sup>354</sup> As such, the bond between the therapeutic lawyer and client is ongoing.

Significantly, in *Crime and Punishment*, Sonya's service as therapeutic agent continues even after Raskolnikov is convicted and sent to Siberia. Like Porfiry, Sonya keeps her promises: she physically accompanies Raskolnikov to Siberia and whenever possible stands by his side or foists herself in his range of vision. While initially other prisoners detest Raskolnikov, who is plagued by a "terrible and impassable abyss that lay between himself and [the others]," it is Sonya who builds the only conceivable bridge between the ex-law student and his new society.<sup>355</sup> As the author explains, the other prisoners, who had "all taken such a liking to Sonya, knew that she had *followed him* [Raskolnikov]" and they nevertheless came to be "on rather closer terms with [her]."<sup>356</sup> As

---

Svidrigailov is the most explicit 'double'; he floats into the action as if he were part of Raskolnikov's mind").

349. *Id.* at 44 (discussing Svidrigailov's "sexual depravity" and describing him as a "Don Juan, an expert at the seduction of women . . . [with] a particular sexual perversion: he is drawn to young girls").

350. *Id.* at 49 ("The path of Svidrigailov has led to death, Raskolnikov is now left with the road that has beckoned him for so long, and which he has been so reluctant to follow: that represented by Sonya.").

351. *See generally* Cochran, *supra* note 9.

352. Wexler, *supra* note 14.

353. *Id.* at 769.

354. *Id.*

355. DOSTOYEVSKY, *supra* note 1, at 650.

356. *Id.* at 651.

discussed below, her tenacity eventually pays off because Sonya's therapeutic mission of engendering Raskolnikov's transformation is ultimately consummated.

## VI. CONCLUSION

*Crime and Punishment*, one of the great classics of world literature, introduces us to the role of confession in the criminal justice system. As discussed above, Dostoyevsky's novel has an affinity with the seminal United States Supreme Court confession cases under the Due Process Clause and Fifth and Sixth Amendments. Dostoyevsky, like the Supreme Court, expresses concern with the crucial distinction between a voluntary and a coerced confession. He, also like our Court, believes in safeguarding public confidence in a nation's penal system.

As discussed above, *Crime and Punishment*, nicely annexed to a relatively new movement called therapeutic jurisprudence, shows how the law can "function as a kind of therapist or therapeutic agent."<sup>357</sup> Dostoyevsky, like the therapeutic jurisprudence scholars, agrees that the legal system should cater to the goal of healing and promoting individual well being. This great Russian author, who himself endured hard labor and exile in Siberia, understood full well that an individual's voluntary participation in what is experienced as a fair process is and should be the veritable goal of criminal justice.

*Crime and Punishment* is a misnomer because it is not really about crime or even about punishment *per se*, but its real subject is one human being's overwhelming need to come clean. Raskolnikov probably could have escaped detection and gotten away with the murder, but he himself effectually sabotages such possibility. Even before the crime, anguished Raskolnikov is obsessed with confession; during the crime, he makes enough mistakes to conceivably betray himself and instigate his own confession; and after the crime, Raskolnikov is compelled to do himself in by revisiting the crime scene, by making incriminating remarks to the police in a bar, and by playing "cat and mouse" games with his formidable nemesis, Porfiry Petrovich.

In the novel, confession mutates into a celebrated event. As Porfiry and Sonya understand, confession is not just a prosecutorial tool for closing a crime file, but is and can be the very catalyst to healing and rehabilitation. Dostoyevsky delivers his lessons in therapeutic jurisprudence partially through Porfiry, who tries as best he can to not coerce, but rather encourage, a confession that comes as close as is possible to a true act of free will. But Porfiry grasps his own limitations as examining magistrate, as Raskolnikov's adversary in the criminal justice

---

357. Winick, *supra* note 13.

system, and knows what our Supreme Court once espoused in *Miranda*: namely, that custodial interrogation is inherently coercive.<sup>358</sup> Porfiry understands that he can merely aspire to elicit what he can never really attain — the therapeutic confession.

According to a whole body of therapeutic jurisprudence scholarship, when individuals believe that they have been genuinely listened to, heard, and taken seriously, they feel validated.<sup>359</sup> When such individuals emerge with a sense of voice and validation, they are more accepting of the outcome.<sup>360</sup> Further, voice and validation foster a sense of voluntary participation, which helps the individual experience the proceedings as less coercive.<sup>361</sup> Such scholars and other proponents of social justice believe that when individuals feel that they voluntarily participate in a process that ends in a judicial decree that affects their own lives, they tend to heal better and even alter destructive behavior patterns.<sup>362</sup>

In therapeutic jurisprudence, the attorney is key — it is he or she who can help give clients that sense of voice, validation, and voluntary participation.<sup>363</sup> In *Crime and Punishment*, Sonya, a non-lawyer, performs that therapeutic role for Raskolnikov. Dostoyevsky shows how Sonya uses “reflective listening,” to give Raskolnikov voice and validation.<sup>364</sup> Sonya also helps to effectuate Raskolnikov’s participatory interests, encourages what he so desperately needs — that voluntary act of confession — and leads him to accept responsibility for his own actions.

As pointed out above, while principles of therapeutic jurisprudence are now operating in many areas of the law, there are criminal defense attorneys that have built an actual therapeutic jurisprudence practice.<sup>365</sup> Others, who are more traditional, have woven therapeutic jurisprudence wisdom into their work.<sup>366</sup> Therapeutic jurisprudence can also give us a new perspective on client confession and help dispel what Cochran has denominated the “authoritarian model,” which impugns “client dignity” and suffocates “moral growth.”<sup>367</sup> Criminal defense attorneys can cultivate the Sonya-esque skills, which can induce healing.

When Raskolnikov first arrives in Siberia, he is still a tortured soul: he feels “no remorse for his crime,” heaps abuse on

---

358. See *supra* Part III.B (discussing *Miranda*, 384 U.S. 436).

359. See generally *supra* Part II (discussing therapeutic jurisprudence).

360. See *supra* notes 22-27 and accompanying text.

361. *Id.*

362. *Id.*

363. See *supra* notes 34-37 and accompanying text.

364. See *supra* note 339 and accompanying text.

365. See *supra* Part II.A.

366. *Id.*

367. Cochran, *supra* note 9, at 380.



Sonya, treating her with “scornful and crudely insulting behavior,” and alienates himself from the other convicts who “dislike[] him and avoid[] him” and “even gr[ow] to hate him.”<sup>368</sup> Raskolnikov is further both perplexed and tormented by the fact that the very convicts that want to “hurl [themselves] at him in a state of rabid fury,”<sup>369</sup> are enchanted with Sonya:

She would smile and greet them back, and they all loved it when she smiled at them. They were even fond of her manner of walking, and would turn round to look after her as she went on her way, passing appreciative comments about her; they often made such comments in connection with her being so small, and indeed could not find enough good things to say about her. They went to see her when they were ill, and she would tend to them.<sup>370</sup>

In Siberia, while Sonya functions as healing agent for the prison population, Raskolnikov remains the proverbial outcast, the exile in exile.

But eventually Raskolnikov transforms. It occurs shortly after an illness, when he dreams in the prison hospital that the whole world is afflicted with “some strange, unheard of and unprecedented plague” and that entire populations are going mad and “kill[ing] one another in a kind of senseless anger.”<sup>371</sup> The symptoms resemble Raskolnikov’s mental state — his self-imposed isolation and his hubristic claim to superiority. That is, under the aegis of such infection, “no one could understand anyone else . . . [and] each person thought that he alone possessed the truth.”<sup>372</sup> After practically everything is destroyed, there are a chosen few that escape to “usher in a new life, to renew the earth and render it pure.”<sup>373</sup> Through the dream, Raskolnikov, welcoming a Lazarus-like renewal, hails the emergence of the inner boy Raskolnikov, who can squelch that rabid mare-beating Mikolka within.

After Raskolnikov recuperates from his own illness, we detect changes. Apparently, for the first time truly cognizant of another human being, Raskolnikov actually notices that he hasn’t seen Sonya in quite a while. He is even worried about someone other than himself, and realizing that he is “waiting for her with anxious concern,” seeks to ascertain her condition.<sup>374</sup> When Sonya, who was ill, learns that Raskolnikov “was so dejected and worried for her sake,” she sends him a note that stirs emotion, making “his

368. DOSTOYEVSKY, *supra* note 1, at 647-50.

369. *Id.* at 650.

370. *Id.* at 651.

371. *Id.* at 651-52.

372. *Id.* at 652.

373. *Id.*

374. *Id.* at 653.

heart beat violently and painfully.”<sup>375</sup> Raskolnikov is beginning to *feel*, to actually care for another human being. After Sonya recovers and meets Raskolnikov again, “he [is] hurled to her feet,” and ends up weeping and hugging her knees.<sup>376</sup>

This moment is the milestone and Sonya knows it: “[h]er eyes beg[in] to shine with infinite happiness” and she is “in no doubt that at last it had arrived,” and that he “loves her infinitely.”<sup>377</sup> Raskolnikov similarly knows that he has “recovered . . . completely with the whole of his renewed being.”<sup>378</sup> Raskolnikov relinquishes “those torments of the past,” opens up the *New Testament*, begins to plan his future with Sonya, and even reconnects with the human race. Dostoyevsky informs us that “all the convicts, his former enemies, now looked upon him differently” and that “[h]e had actually began to talk to them, and they had replied to him in kindly tones.”<sup>379</sup> As such, Raskolnikov’s voluntary therapeutic confession catalyzes what Dostoyevsky depicts as a “new story . . . of a man’s gradual renewal, his gradual rebirth, his gradual transition from one world to another.”<sup>380</sup> Raskolnikov’s voluntary acceptance of responsibility within a penal system that ultimately treated him fairly and mercifully helps him and us make some sense out of a senseless brutal crime.

---

375. *Id.*

376. *Id.* at 654.

377. *Id.* at 655.

378. *Id.*

379. *Id.*

380. *Id.* at 656.

