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# THE LEGAL CONTEXT AND CONTRIBUTIONS OF DOSTOEVSKY'S *CRIME AND PUNISHMENT*

*William Burnham\**

CRIME AND PUNISHMENT. By *Feodor Dostoevsky*. New York: W.W. Norton. 1989. Pp. 694. \$12.95.

Dostoevsky's *Crime and Punishment* is of more than average interest to lawyers.<sup>1</sup> The title perhaps says it all in terms of content. The chief protagonist, the murderer Raskolnikov, is a law student on a break from his studies. And the pursuer of the murderer is a lawyer, an examining magistrate. But the more subtle and more important legal aspects of *Crime and Punishment* concern the time period in Russian legal history in which the novel was written and is set. The 1860s in Russia were a time of tremendous legal change.<sup>2</sup> Among other things, an 1861 decree emancipated the serfs and monumental reform of the court system took place in 1864.

Dostoevsky was not a lawyer, nor did he have any formal legal training. Still, law played a major role in his life. Dostoevsky spent a great deal of time watching trials and had contact with some of the greatest lawyers of his time.<sup>3</sup> Whether from some innate fascination with the human condition as revealed in criminal cases or from his own personal run-ins with the law, the real cases of his day inspired

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1. All references to and quotes from the novel are from the Jesse Coulson English translation published in FEODOR DOSTOEVSKY, *CRIME AND PUNISHMENT*, THIRD EDITION, A NORTON CRITICAL EDITION (George Gibian ed., 1989) [hereinafter DOSTOEVSKY (Gibian ed.)] and the Russian original available on the Internet at <http://kulichki.com/moshkow/LITRA/DOSTOEWSKIJ/prestup.txt>. All other translations of Russian text are mine, except as noted.

2. Dostoevsky wrote *Crime and Punishment* between 1864 and 1866 and the novel is set in the summer of 1865. It was first serialized in the journal *Ruski Vestnik* [*Russian Messenger*] in 1866 and then published in two volumes in 1867.

3. Anatolii Fedorovich Koni, procurator, defense lawyer and later judge, and perhaps the most famous lawyer in all of Russian history, was one with whom he had a positive relationship. See *infra* text at notes 41, 55; V.I. SMOLIARCHUK, A.F. KONI AND HIS CONTEMPORARIES 160-66 (1990). Vladimir Spasovich, a brilliant law teacher and defense lawyer, but somewhat less noted than Koni, would be vilified by Dostoevski in the 1870s for his defense in some of the more important jury trials of the day. See Harriet Murav, *Legal Fiction in Dostoevsky's Diary of a Writer*, 1 DOSTOEVSKY STUDIES 155 (1993).

much of Dostoevsky's work and he was painstaking in his efforts to reflect the legal context of those cases accurately.<sup>4</sup> Dostoevsky, of course, had the "benefit" of experiencing the criminal justice system first-hand from the wrong side of it, personally traversing most of its stages as a criminal defendant. In 1849, after achieving considerable notoriety as a novelist,<sup>5</sup> he was arrested, tried, and sentenced to death for treason. After eight months in prison, he and his fellow conspirators were marched out to a public square to be shot. They were tied to execution posts in threes before a firing squad. Just before the order to fire, however, the soldiers received a sudden command to disperse and Dostoevsky and his fellow prisoners had their death sentences commuted to terms of imprisonment at hard labor and exile in Siberia, by order of Nicholas I.<sup>6</sup> Dostoevsky served his full term, only being permitted to return to European Russia and then to St. Petersburg in 1859.<sup>7</sup>

Dostoevsky was not quite the hardened criminal or revolutionary the gravity of his offense and sentence might indicate. In fact, the factual basis for the charges was "taking part in conversations against the censorship, of reading a letter from Byelinsky to Gogol, and of knowing of the intention to set up a printing press."<sup>8</sup> He simply had the misfortune of broadening his reading tastes at an inopportune time — in the wake of antimonarchist developments in Western Europe and on the stern watch of the autocratic Nicholas I, against whom the *coup d'état* attempt of the Decembrists had been directed.<sup>9</sup> Nonetheless, the

4. See Murav, *supra* note 3.

5. His novel *Poor Folk* had been published in 1845 to great critical acclaim, as had *The Double* in 1846.

6. Writing to his brother Mikhail, Dostoevsky states:

They snapped swords over our heads, and they made us put on the white shirts worn by persons condemned to death. Thereupon we were bound in threes to stakes, to suffer execution. Being the third in the row, I concluded I had only a few minutes of life before me. I thought of you and your dear ones and I contrived to kiss Plestcheiev and Dourov, who were next to me, and to bid them farewell. Suddenly the troops beat a tattoo, we were unbound, brought back upon the scaffold, and informed that his Majesty had spared us our lives.

One of the prisoners, one Grigoryev, went insane as soon as he was untied, and never regained his sanity. *Translator's Preface* to FYODOR DOSTOEVSKY, CRIME AND PUNISHMENT (Constance Garnett trans.) [hereinafter Garnett, *Translator's Preface*], available at [http://www.ebooks3.com/cgi-bin/ebooks/ebook.cgi?folder=crime\\_and\\_punishment&next=1](http://www.ebooks3.com/cgi-bin/ebooks/ebook.cgi?folder=crime_and_punishment&next=1); see also JESSE COULSON, DOSTOEVSKY: A SELF-PORTRAIT 56 (1962).

7. The experience made Dostoevsky a firm supporter of the monarchy — even a reactionary. See Czeslaw Milocz, *Dostoevsky and the Western Intellectuals*, in CROSS CURRENTS: A YEARBOOK OF CENTRAL EUROPEAN CULTURE 5, 493-505 (1986), reprinted in DOSTOEVSKY (Gibian ed.), *supra* note 1, at 670.

8. Garnett, *Translator's Preface*, *supra* note 6, at 1. The winds of new political, philosophical, and sociological thought blowing through Russia at the time are outlined in Andrzej Walicki, *Russian Social Thought: An Introduction to the Intellectual History of Nineteenth Century Russia*, 36 RUSSIAN REV. 1-45 (1977).

9. See ALEXANDER E. PRESNIAKOV, EMPEROR NICHOLAS I OF RUSSIA: THE APOGEE OF AUTOCRACY (Judith C. Zacek trans., 1974). The Decembrists were so called because

experience in Siberia threw Dostoevsky 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.

Following his return to St. Petersburg in 1859, Dostoevsky showed continued interest in the law. He followed closely the important 1864 legal reforms of Nicholas I's successor, Alexander II. Later in his career, as those legal reforms played out, his monthly journal, begun in 1875, *The Diary of a Writer*, devoted around a third of its coverage to issues of law.<sup>10</sup> Much of its content set out Dostoevsky's observations and rather strong opinions about prominent trials of the day. In a case of life imitating art, in one jury case on retrial following appellate reversal of a conviction that Dostoevsky had bitterly criticized, Dostoevsky attended the retrial. The prosecutor felt constrained in his closing argument to inveigh the jury — unsuccessfully as it turned out — “not to yield to the influence of ‘certain talented writers.’ ”<sup>11</sup>

The novel that followed the *Diary* and flowed directly from it was *The Brothers Karamazov*. The law and legal procedures occupy a place far more prominent in that novel than in *Crime and Punishment*. The final and climactic Book XII is an entire jury trial, which follows on Book IX, “The Preliminary Investigation,” a complete description of the quasi-judicial pretrial investigation that is the prelude to a criminal trial. By comparison, *Crime and Punishment* barely mentions law or the legal system explicitly. Perhaps part of the reason for this greater focus on the legal system in his later writings is a result of the

they launched their coup attempt in December of 1825. Their secret revolutionary society was formed after the Napoleonic Wars by officers who had served in Europe and had been influenced by Western liberal ideals. While they were not all of one mind on the details, they advocated the establishment of representative democracy and favored emancipation of the serfs. When they marched against the tsar, they were easily crushed by artillery fire. Five of their leaders were executed and others were banished to various parts of Siberia.

10. See Murav, *supra* note 3, at 156; V.A. Tunimanov, *Publitsistika Dostoevskogo, Dnevnik pisateilia [Dostoevsky's Journalism: Diary of Writer]*, in DOSTOEVSKII-KHUDOZHNIK I MYSLITEL: SBORNIK STATEI [DOSTOEVSKY: ARTIST AND THINKER: A COLLECTION OF ARTICLES] 205-06 (1972) (the three broad topics of the *Diary* were law, politics, and literature).

11. Igor Volgin, *Pis'ma chitatelei k F.M. Dostoevskomu [Readers' Letters to F.M. Dostoevsky]*, 9 VOPROSY LITERATURY [LITERARY ISSUES] 196 (1971). In fact, as also discussed in this source, the appeal of the original verdict had been at the instance of Dostoevsky. Dostoevsky had one more personal brush with the law in 1873, when he was convicted of publishing comments made by Tsar Alexander II in his newspaper *The Citizen* without obtaining prior permission of the minister of the royal household. He was sentenced to pay a 25 ruble fine and two days in jail. Anatolii F. Koni, noted lawyer of the day, but more importantly at that time procurator of the circuit court overseeing execution of sentences, and an admirer of Dostoevsky's work, heard of the rather acute financial and personal difficulties Dostoevsky was experiencing at the time. He intervened and withheld execution of the sentence until Dostoevsky found it more convenient to serve it. See SMOLIARCHUK, *supra* note 3, at 162-63; see also *infra* text accompanying notes 41, 55 for Koni's laudatory comments on *Crime and Punishment*.

banality of the legal system before the 1864 reforms. As outlined below, its formalistic nature and outmoded institutions made its processes quaint and predictable. In this respect, the pre-reform tsarist system had a great deal in common with the Soviet system before the reforms following the 1991 "second Russian revolution." And it was precisely these sorts of characteristics of the Russian legal system under Soviet power that made it of limited interest to legal scholars.

Unlike the rich, explicit presentation of legal procedures in *The Brothers Karamazov*, the legal aspects and significance of *Crime and Punishment* lurk in the background and are more subtle. Because of this, a legal guide to *Crime and Punishment* is perhaps more necessary than would be the case with more overtly law-related works, if harder to write.

### I. THE STORY

The story of *Crime and Punishment* fails the normal test of what one might expect of a murder mystery or crime drama by immediately letting us know "whodunit." It is Raskolnikov, a promising but impoverished law student of twenty-four, who for reasons that are not entirely clear has for the last six months cut off all contact with his previous life, including his studies and his friends and relatives. From the outset of the novel, he has been thinking of killing Alyona Ivanovna, an old woman-pawnbroker with whom he had pawned several items to get money to live. After scouting out the pawnbroker's premises, assuring himself that she will be alone, and carefully borrowing an ax from his landlady's woodshed, he goes to her apartment one evening on the pretense of pawning another item and murders her. He then murders her meek and borderline retarded sister, who has the misfortune to walk in on the crime. Raskolnikov, nervous throughout, unskillfully rifles a locked trunk (overlooking a purse around the old woman's neck), coming up with money and a few items pawned by others. He hides these items and destroys all other evidence of the crime. He would be home free except for some indiscreet statements he makes to a police clerk in a bar and the fact that everyone who had a record of pawning items with the old woman is an immediate suspect. These facts bring him to the attention of Porfiry Petrovich, the examining magistrate assigned to the case. Porfiry makes three skillful "passes" at Raskolnikov on the subject of the crime that ultimately result in his full confession to the crime. Sentenced to eight years of hard labor working in a military fortress in Siberia, he suddenly — and somewhat implausibly — finds his moral and psychological redemption one year into his sentence.

On a psychological level, the novel is about why Raskolnikov killed and, resultingly, what explains his sudden redemption, literally on the last page of the novel. Two reasons emerge and coexist

throughout the novel. The first might be called the “selfless” theory. Raskolnikov sees good people suffering all around him because they are poor — his mother and sister, the Marmeladov family and particularly Sonya Marmeladov, who must resort to prostitution to support her stepmother and younger siblings, and Razumikhin, his law student friend who must take in students and perform translations to support himself in law school. 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.<sup>12</sup>

The second reason is the “selfish” or “Napoleonic” theory. This is an idea derived from Napoleon III’s 1865 book, *The Life of Julius Caesar*, just released in a Russian edition at that time. As explained by Porfiry, the theory of the book is that

people are divided into two classes, ‘ordinary’ and the ‘extraordinary’. The ordinary ones must live in submission and have no right to transgress the laws, because, you see, they are ordinary. And the extraordinary have the right to commit any crime and break every kind of law just because they are extraordinary. (p. 219)

Raskolnikov sees himself as one of the extraordinary people — like Napoleon and Caesar — on his way to great things. Because of this, he, like them, can commit even mass killings to survive and prosper.<sup>13</sup>

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. Logically, in his mind, if he is one of the “extraordinary” people, killing the pawnbroker was “no crime” (p. 61) and he need not worry about the pangs of conscience. He finds out too late that he is not “extraordinary.” Meanwhile, the conflict is so great within him that he becomes physically ill after the murder for reasons he fails to understand (he is referred to as “feverish” throughout), even passing out at the police station when called there the day after the murder on the unrelated matter of his unpaid rent. He also finds himself “say[ing] too much” (p. 282) and dropping clues here and there, something that he has already noted “ordinary” people do because, try as they might,

12. This is shown in the anonymous conversation between the student and the officer in the tavern, overheard by Raskolnikov, that presages the killing: “Kill her, take her money, on the condition that you dedicate yourself with its help to the service of humanity and the common good: don’t you think that thousands of good deeds will wipe out one little, insignificant transgression?” P. 56. Raskolnikov is “deeply disturbed” when he hears “that particular talk and those particular ideas when there had just been born in his own brain *exactly the same ideas*.” P. 56; see also p. 351 (desire to help his family).

13. See Sergei V. Belov, *Roman F.M. Dostoevskogo “Prestuplenie i Nakazanie”: Kommentarii [F.M. Dostoevsky’s Novel “Crime and Punishment:” A Commentary]* 22-29 (1984), translated and reprinted in part in DOSTOEVSKY (Gibian ed.), *supra* note 1, at 488-93.

they accept deep down the validity of the rules they are breaking (pp. 60-61).

Even when Raskolnikov finally confesses, he remains unconvinced he has done anything wrong. It is only after a year in prison and the doting love of Sonya, who has moved to Siberia to be close to him, that he finally accepts his guilt and surrenders to the moral sense within him. At least the surface explanation of this development is that it is only through suffering that redemption is possible — a consistent Dostoevskian and Russian theme. On a slightly more abstract level, the lesson is that in a contest between reason and conscience, conscience will win out.<sup>14</sup>

*Crime and Punishment* has been exhaustively analyzed on many different levels and from many standpoints — literary, ideological, philosophical, and psychological.<sup>15</sup> Not being a specialist in any of these fields, I will stick to law. On this score, in the foregoing brief description and characterization I feel, like Raskolnikov, that I have perhaps “sa[id] too much” already.<sup>16</sup>

## II. LEGAL ASPECTS

By all accounts, the Russian legal system during the reign of Nicholas I (1825-1855) was a mess that cried out for reform.<sup>17</sup> Nicholas I is perhaps not to blame. He inherited it, mostly from none other than Peter the Great (Peter I). But the fact that a legal system has existed without alteration since 1716 should have put any ruler in the 1850s on inquiry notice that perhaps there were some outmoded procedures and provisions. A major complaint of the unsuccessful Decembrist coup plotters was the judicial system, particularly as it related to criminal justice. Nicholas I, reactionary though he was in his dealing with the Decembrists, by all accounts took the Decembrists' critiques

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14. Some would substitute “religious faith” for “conscience.” Dostoevsky speaks of the struggle between “nature” and “wit.” Pp. 289-90.

15. Literary critiques of the novel include MICHAEL HOLQUIST, *DOSTOEVSKY AND THE NOVEL* 75-101 (1977); George Gibian, *Traditional Symbolism in Crime and Punishment*, 52 *PMLA* 979-96 (1955); and Simon Karlinsky, *Dostoevsky as Rorschach Test*, *N.Y. TIMES*, June 13, 1971, § 7, at 1 (describing other authors' reactions to Dostoevsky). Ideological aspects are explored in Joseph Frank, *The World of Raskolnikov*, *ENCOUNTER* 30-35 (1996), and Philip Rahv, *Dostoevsky in Crime and Punishment*, 27 *PARTISAN REV.* 393-425 (1960). Psychological issues are discussed in KAREN HORNEY, *NEUROSIS AND HUMAN GROWTH* 118-20 (1950).

16. P. 282. The only legal analyses I have been able to find are in RICHARD WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* 48-54 (1984), and Dennis Whelen, *Crime and Punishment: The Missing Insanity Defense*, in *O RUS! STUDIA LITTERARIA SLAVICA IN HONOREM HUGH MCLEAN* 270-80 (Simon Karlinsky et al. eds., 1995).

17. See Samuel Kucherov, *Administration of Justice Under Nicholas I of Russia*, 7 *AM. SLAVIC & E. EURO. REV.* 125-38 (1948).

to heart. He made sure that the law reform commission he appointed received and considered the Decembrists' views on the legal system. He was so reactionary, however, that he was never able to get any reforms off the drawing board before his death in 1855.<sup>18</sup> It fell to his more progressive successor, Alexander II, to develop and implement reforms and create for Russia its first post-feudal, modern legal system.<sup>19</sup>

#### A. *The Rules of Evidence at the Time of Crime and Punishment*

Great mistrust of judges led Peter the Great and his successors to search for ways to avoid giving them any real power of adjudication. To do so, Russian law in 1716 borrowed from German law at the time and constructed an elaborate system of evidence designed, in the words of Professor Spasovich, "to reduce the work of the judge to a matter of simple arithmetic."<sup>20</sup> The Russian writer Ivan Aksakov, who in his youth sat as a judge, hinted at the workings of the system in a less academic way. Describing a typical day at the court, he noted that

the old chicaner charged with the preliminary investigation is preparing the false basis for the future sentence according to all the formal rules of the law . . . . If all the evidence required by the law . . . was presented, and the accordance with the form was unimpeachable, in spite of the reproaches of your conscience, nothing remains except to pronounce a sentence which is an iniquity.<sup>21</sup>

According to the formal hierarchy of evidence, a person could be convicted only if there was complete proof (*sovershennye dokazatel'stva*). Complete proof was possible by means of a judicial confession by the criminal defendant, which the law described as "the best

18. Kucherov, *supra* note 17, at 134. Kucherov, who did extensive research on the period, concludes that Nicholas I "gained the reputation of being the most reactionary tsar the Russian Empire has ever had. The eminent historian S.M. Solovyov called him 'the new Nebuchadnezzar.'" *Id.* at 125.

19. 39(II) *Polnoe sobranie zakonov Rossiiskoi Imperii* [Complete Collection of Laws of the Russian Empire], Nos. 41475, 41476-41478 (Nov. 20, 1863). "Progressive" is a relative term when applied to Russian tsars. As late as 1858, Alexander II, in reaction to the comments of a minister that some provision of the law was incompatible with progress, prohibited the use of the word "progress" in any official government documents and in the press as well. SAMUEL KUCHEROV, LAW AND LAWYERS UNDER THE LAST THREE TSARS 22 (1957).

20. Vladimir D. Spasovich, *O teorii sudebno-ugolovnykh dokazatel'stv v svyazi s sudoustroistvom i sudoproizvodstvom: Publichnye lektsii chitannye v S. Peterburgskom universitete (sentiabr i oktrabr 1860 g.)*, in V.D. SPASOVICH, IZBRANNYE TRUDY I RECHI (2000) [On a Theory of Criminal Evidence in the Court System and in Litigation: Public Lectures Delivered at St. Petersburg University (September and October of 1860) in V.D. SPASOVICH, SELECTED WORKS AND SPEECHES 49 (2000)]. Spasovich's evidence lectures are a withering critique of the pre-reform evidence regime and make fascinating reading. The outline of evidence law that follows is taken from those lectures. See also IVAN YA. FOINITSKII, KURS UGOLOVNOGO SUDOPROIZVODSTVA [COURSE ON CRIMINAL PROCEDURE] 37-43 (1896).

21. 4 I.S. AKSAKOV, SOCHINENIIA [WORKS] 656-57 (1860-1886), translated and quoted in KUCHEROV, *supra* note 19, at 130.



evidence in the world.”<sup>22</sup> The only other practical form of complete proof was the consistent testimony of two eyewitnesses.<sup>23</sup> If criminals are at all circumspect about their crimes, they will not commit them in front of witnesses, so this latter requirement would in general be very difficult to satisfy. But the task of doing so in Russia at that time was made even more difficult by the fact that the law disqualified several classes of people from serving as witnesses. The complaining witness and anyone else with something to gain or lose from the outcome of the case, including codefendants, could not testify. Not only the feeble-minded and insane, but also the deaf and dumb, children under fifteen, and foreigners whose stay in Russia was too short to do a background check were incompetent to testify. Also considered incompetent were people convicted of murder, robbery, theft, perjury or subornation of perjury, destroying land markers, any other crimes of moral turpitude, and any offense punishable by public flogging.<sup>24</sup> This last category of incompetent witnesses would often disqualify perhaps the most fertile source of proof — fellow criminals.<sup>25</sup> Physical evidence that could be observed by the court or investigator was ranked higher than competent testimony, but it was often of limited usefulness, since it served only to establish the fact that a crime took place, not who perpetrated it.<sup>26</sup> The courts considered any other evidence — from circumstantial evidence to extrajudicial confessions — incomplete, thus serving only to establish suspicion.<sup>27</sup>

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22. Art. 316, 15 *Svod zakonov, Izd. 1857 goda, kn. II, gl. 3, otdel. 2* (15 Law Code of 1857 ed., book II, chapter 3, section 2) [hereinafter Code of 1857].

23. Art. 329, Code of 1857, *supra* note 22. If the trial was in certain parts of the empire and testimony was given by a Muslim, it took four witnesses to equal two Christian witnesses. Art. 219, 220, Code of 1857. Also, a parent’s testimony against the accused was considered to be complete evidence. Art. 330(3), Code of 1857; Spasovich, *supra* note 20, at 43. See generally M. Brun, *Dokazatel’siva* [Evidence], 20 *ENTSKLOPEDICHESKII SLOVAR’ [ENCYCLOPEDIA DICTIONARY]* 881 (1890-1904) (proof from “three women equaled two men; a judicial confession was full evidence, a non-judicial one only half. There was talk of 3/4, of 1/4, and of 1/8 evidence”).

24. See Art. 336, Code of 1857, *supra* note 22; Spasovich, *supra* note 20, at 39-46. Also deemed incompetent were persons banished from Russia. However, as Spasovich notes, this category had very little practical meaning, since there was no such punishment in the law. Spasovich suggests that this provision was there just because it was in the original 1716 military version of the law and had been carried forward unthinkingly.

25. The law also specified what should be done in the event of a conflict in testimony of competent witnesses: “preference is to be given to the testimony of a man over that of a woman, of a high-born person over a low-born one, an educated person over a uneducated one and a man of the cloth over a lay person.” Art. 333, Code of 1857, *supra* note 22.

26. Spasovich, *supra* note 20, at 36.

27. See Art. 241, 341, 343, Code of 1857, *supra* note 22 (extrajudicial confession quoted *infra* note 34). In fact, although Art. 308 stated that several pieces of circumstantial evidence could equal complete proof if there was no doubt about guilt, courts in practice never found such evidence to be strong enough. Spasovich, *supra* note 20, at 54.

In fact, “under suspicion” was not just the legal label attached to the state of the evidence in a given case. It was a formal outcome of a criminal trial as well — a kind of purgatory between conviction and acquittal.<sup>28</sup> Not only did defendants so labeled have to carry around that official imprimatur, they were also subject to immediate retrial should complete proof appear at any point.<sup>29</sup> Far from unusual and perhaps not surprising considering the evidence rules, a majority of criminal defendants who were tried fell into this category. As Foinitskii reports: “According to the Ministry of Justice statistics covering the time when the [pre-reform] laws were in effect, courts pronounced guilty verdicts in only 12.5% of cases, while the remaining 87.5% were primarily judgments of under suspicion.”<sup>30</sup>

The high percentage of “under suspicion” judgments represented a failure of the system in reaching definitive decisions. In less squeamish times, when the formal evidence system was first devised, it worked better at producing definitive decisions because judges in inquisitorial systems in Russia and Germany, from which the system was borrowed, were permitted to apply torture to obtain a confession.<sup>31</sup> However, the problem was — if one can call it a problem — that Russia outlawed torture in 1801.<sup>32</sup> Western European systems had long ago revised their proof systems to accommodate the abolition of torture and to provide for “free evaluation” of evidence, which is the mark of most modern legal systems, whereby all relevant evidence is to be weighed by the court without any strict predetermination of its weight. Russia

28. Art. 313, 341, Code of 1857, *supra* note 22. The under suspicion outcome was borrowed from medieval canon law. Spasovich, *supra* note 20, at 54.

29. Art. 319, Code of 1857, *supra* note 22. In addition, “[w]hen more serious charges were involved and the defendant was found to be under suspicion, the defendant was sometimes punished, though less severely than specified for the crime. Being found under suspicion also involved placing the person under special police supervision.” See *Podozreniie* [Suspicion], 47 ENTSKLOPEDICHESKII SLOVAR’ [ENCYCLOPEDIC DICTIONARY] 95 (1890-1904).

30. Foinitskii, *supra* note 20, at 40. Presumably, the reference to the 87.5% comprising “primarily judgements of under suspicion” means that some small number of acquittals is included in the 87.5% figure. The evidence regime was not always applied with absolute precision. As Spasovich notes in his lectures, “I know that the practice sometimes departs from this rule; I know that judges have sometimes convicted solely on the basis of incomplete evidence formed by the preponderance of the evidence, but they are acting in such an instance contrary to the commands of the law.” Spasovich, *supra* note 20, at 50.

31. Spasovich, *supra* note 20, at 38. Not only was the system borrowed from Germany, the law was originally printed in parallel columns in Russian and German. See *5 Polnoe sobranie zakonov Rossiiskoi Imperii* [Complete Collection of Laws of the Russian Empire], No. 3006 (Mar. 20, 1716).

32. In what is the tsarist version of “read my lips,” Alexander I’s decree abolishes torture and goes on to say “so that finally the very word torture, which has brought shame and reproach to humankind, shall be erased from the memory of the people.” *26 Polnoe sobranie zakonov Rossiiskoi Imperii* [Complete Collection of Laws of the Russian Empire], No. 20022 (Sept. 27, 1801).

eventually did this as well in the 1864 reforms.<sup>33</sup> These reforms, however, were not yet in place at the time of *Crime and Punishment*. Under the law applicable at the time of *Crime and Punishment*, then, Russian courts retained the old torture-oriented formal proof regime, but the law required confessions be (1) voluntary, (2) consistent with the factual circumstances of the case, and (3) judicial. The judicial requirement meant that the confession had to be made either in open court or in formal testimony given before an examining magistrate during the pretrial investigation stages of the case.<sup>34</sup>

The reader familiar with *Crime and Punishment* can perhaps see the relevance of this state of evidence law for the novel. First, it explains Dostoevsky's focus on the interaction between Porfiry Petrovich and Raskolnikov and Porfiry Petrovich's dogged efforts to get a formal, judicial confession from Raskolnikov. Undoubtedly Dostoevsky had his literary reasons for concentrating on a formal confession as essential to his idea that confession is good for the soul and essential to gaining redemption. And confessions of criminal offenders are useful and welcomed in all legal systems. What makes *Crime and Punishment* a true psychological thriller, however, is the fact that the confession before Porfiry Petrovich is a *legal necessity* for Raskolnikov's undoing. Porfiry Petrovich tells Raskolnikov exactly what he is after in their second encounter, and the evidence rules tell us why:

Well, suppose there is evidence; but evidence, you know, old man, cuts both ways for the most part. I am only an investigator, and fallible like everybody else, I confess; I should like to produce deductions that are, so to speak, mathematically clear; I want to have evidence that is like two plus two make four! (p. 286)

Moreover, Raskolnikov, who is schooled in the law, is aware of what form of proof is legally required. This knowledge makes him a more formidable than average adversary and explains — along with his desire to be one of the “extraordinary” people — his taunting attitude toward the authorities.

An example early in the novel is his attitude toward the physical evidence in the case — evidence that, if observed in his possession, is strong proof against him.<sup>35</sup> Its importance is also demonstrated by the fact that Porfiry Petrovich seeks to obtain such evidence in surreptitious searches of Raskolnikov's room (p. 378). However, Raskolnikov hides all the physical evidence under a rock off of the premises and breaks out in uncharacteristic glee:

33. Brun, *supra* note 23, at 882.

34. Art. 317, Code of 1857, *supra* note 22; Spasovich, *supra* note 20, at 38. Art. 323 provides: “An extra-judicial confession is invalid; but if it is attested to by witnesses who are worthy of belief, it constitutes ‘half proof.’”

35. See *supra* text at note 26 and *infra* text at note 38.

A violent, almost unbearable rejoicing filled him for a moment . . . “My tracks are covered! . . . And even if they found the things, who would think of me? It’s all over; there’s no evidence,” and he laughed. (p. 92)

When Raskolnikov leaves after his first contact with Porfiry Petrovich, he and Razumikin try to determine why Porfiry Petrovich made a “reckless and bare-faced” effort to get Raskolnikov to confess:

If they had had facts, real facts, to go on, or any kind of foundation for their suspicions, they would indeed have tried to hide their game, in the hope of a still greater victory (but they would long ago have made a search of my room!). But they have no facts, not one — it is all ambiguous and illusory . . . Perhaps he [Porfiry Petrovich] was furious at not having any facts and his annoyance made him break out. (p. 227)

Later in the novel Sonya encourages Raskolnikov to turn himself in — to “[a]ccept suffering and achieve atonement through it” (p. 355) — but he says: “I will not give myself up. I will fight them again, and they won’t be able to do anything. They have no real evidence . . .” If they arrest him, he says, “I shall stay there for a little and then they will let me go . . . because they haven’t one real proof, and they won’t have, I promise you. And *it’s impossible to convict anybody with what they have*” (p. 356; emphasis added).

In any other evidence system, there would have been rather substantial evidence against Raskolnikov. There are the incriminating statements Raskolnikov makes in the tavern to chief police clerk Zametov. They strongly suggest that Raskolnikov is the killer, especially when he volunteers “what if it was I who killed the old woman and Lizaveta?” (p. 141). This is taken by Porfiry Petrovich, as he describes it later, as a demonstration of “open daring [that was] particularly striking: well, how could anyone blurt out in a tavern, ‘I killed her!’ ” (p. 382). There is the full confession to Sonya, which Porfiry Petrovich could force her to reveal by issuing a subpoena and interrogating her.<sup>36</sup> The confession is also overheard by Svidrigailov, the dissipated rake and scoundrel, and Raskolnikov’s sister Dunya’s former employer and disappointed suitor. And Svidrigailov is such an immoral character that he might well have used his knowledge of Raskolnikov’s confession to pressure Raskolnikov to convince Dunya to accede Svidrigailov’s advances. However, this evidence counts for very little under the Russian rules of evidence at the time. As the author tells us, “Svidrigailov disturbed him, but not from that point of view” (p. 377). Certainly, Raskolnikov is not sweating the sweat of

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36. 35(I) *Polnoe sobranie zakonov Rossiiskoi Imperii* [Complete Collection of Laws of the Russian Empire], No. 35890 (June 8, 1860) [hereinafter Law of June 8, 1860]. While not entirely clear, it is also possible that Sonya would have been incompetent to testify, since she was registered with the police as a prostitute and carried the “yellow card.” P. 15.

someone in another system who has confessed to a crime in the presence of two people and has implied as much to the head police clerk.<sup>37</sup>

The formal rules of evidence come to Raskolnikov's assistance in another way: Porfiry Petrovich has the "best evidence in the world" that *someone else* committed the crime. The peasant turned apartment painter Nikolay (also called Mikolay), has made a full, judicial confession to him. Physical evidence ties him to the crime and supports his confession, since Nikolay pawned earrings that belonged to the murdered woman. In addition he tried to hang himself when he was accused by the authorities.<sup>38</sup> Razumikhin summarizes the compelling nature of the evidence against Nikolay under the law at that time. He also complains of the inability of the law to take account of inferential evidence, based on the fact that Nikolay was happily engaged in horseplay with his fellow painter just minutes after he would have to have committed the two murders:

But do you think, from the character of our law that they will accept, or are capable of accepting, a fact of that kind — based solely on psychological impossibility, a mental disposition — as irresistible evidence, demolishing all incriminating material evidence of whatever kind? No. They will not have it on any account because they have found a box [of earrings] and because a man tried to hang himself . . .<sup>39</sup>

The surprise of Nikolay's confession certainly prolongs and heightens the psychological tension of the novel and it gives Dostoevsky the opportunity — through Porfiry Petrovich — to rail against religious fanatics (pp. 383-84). But it is also a searing indictment of the formal evidence system. It is indeed chilling to contemplate that Nikolay the painter could well have been bound for execution or a long sentence at hard labor if Porfiry had taken the mechanical approach to evidence permitted by the rules at that time. Certainly, a lesser examining magistrate or the pre-1860 police investigator could well have closed the case with that confession and looked no further for suspects.<sup>40</sup> It is

37. See *supra* note 34 (extra-judicial confession is invalid, but if attested to by witnesses, it constitutes "half proof").

38. Pp. 116-17. See Art. 317, Code of 1857, *supra* note 22, discussed *supra* note 34.

39. Pp. 119-20. I have changed one term in the Coulson translation to reflect legal reality. Where I have written "law," he had "judicial authorities." The original Russian is *iurisprudentsia* or "jurisprudence," which at least in the context it is used here is closer to just "law." While "jurisprudence" means case law in Western European legal systems, such "judicial authorities" at the time were referred to as *sudebnaia praktika* or judicial practice.

40. Part of why Nikolay confessed is because he felt he would be convicted anyway. Dostoevsky addressed the need for judicial reforms explicitly through Porfiry:

Well, he felt afraid, he tried to hang himself! He tried to run away! What can be done about the way the common people think of our justice? Some of them find the mere word 'trial' terrifying. Whose fault is that? The new courts may make some difference. God grant that they may!

equally frightening that Raskolnikov, the real killer, against whom there would seem to be considerable circumstantial evidence and at least one overheard extrajudicial confession, could well have gone free had Porfiry Petrovich not kept at him, overcome him psychologically, and finally obtained a judicial confession from him. Dostoevsky 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 that time (pp. 331-41).

Dostoevsky’s message of criticism of the formal evidence system was not lost on the lawyers of the day. Judge Anatolii Koni notes in his 1881 comments on the novel:

Just what sort of evidence fatal to justice if subjected to only surface examination is shown masterfully in the scene with the unfortunate Sonia on the day of the burial of her father, when we have everything — her [prostitute’s] “yellow card,” two witnesses, *caught red-handed* with the banknote in her pocket, all of which comes together to clearly *prove* her guilty of theft. Look at the inner strength of “the best evidence in the world” — the confession of Mikola [Nikolay], forthright and clearly *consistent with the facts of the case* — produced by his fear that they will convict him anyway and his particular psychological pathology causing him to crave cleansing his soul.<sup>41</sup>

Dostoevsky was knowledgeable about evidence law at the time and was squarely aligned with the legal reformers in favor of changing it. He uses his knowledge in *Crime and Punishment* both to heighten the psychological drama and to demonstrate the shortcomings of that system.

### B. *The Role of Porfiry Petrovich, the Examining Magistrate*

The formal evidence system had effects beyond creating a wide gap between reality and what the law accepted as proof. It went to the heart of judicial independence and, indeed, to the very core of what a

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41. ANATOLII F. KONI, 6 SOBRANIE SOCHINENIIE V VOS'MI TOMAKH [COLLECTED WORKS IN EIGHT VOLUMES] 414-15 (1968), originally delivered as a lecture, “F.M. Dostoevski as a Criminalist,” before a general meeting of the Law Society of St. Petersburg University on February 2, 1881. Koni was perhaps the most famous Russian lawyer of all time, being enshrined in 1994 as “the knight of Russian law” with the unveiling of his statue at Moscow State University. MARK G. POMAR, ANATOLY FEDDOROVICH KONI: LIBERAL JURIST AS MORALIST 4 (1996). Unfortunately, as Pomar notes, except for his short monograph and one unpublished dissertation, there are no published works on Koni in English. He is discussed in some detail, however, in KUCHEROV, *supra* note 19, at 223-25. Koni could well have gone farther than he did, perhaps even becoming Minister of Justice, except for the way he presided over a jury acquittal of Vera Zasulich, a revolutionary who shot a high tsarist official. Kucherov describes the Zasulich case on the cited pages. *See also* Anatolii F. Koni, *The Case of Vera Zasulich*, *supra*, volume 2 at 48-193. Koni wrote three laudatory articles on Dostoevsky. Aside from his purely legal comments, he praised Dostoevsky’s portrayal of the psychological reality of crime in all its aspects, particularly his humanization of offenders.

court is supposed to be. Until 1860, it was the police who gathered the required evidence. If evidence in the legally specified form was in the police record, the court was bound by it. Aksakov's earlier-quoted reference to the police official in charge of the preliminary investigation as "the old chicaner" who "is preparing the false basis for the future sentence according to all the formal rules of the law" suggests that a major secondary effect of the formal evidence system was that, at the very least, it caused police investigators to try to pound square pegs into round holes. At worst, they fabricated evidence or reverted unofficially to earlier, more brutal methods of gaining "the best evidence in the world."<sup>42</sup>

Any such violations of defendants' rights were facilitated by the rules of trial. Trials were a review of the written record compiled by the police. This led Spasovich to remark about the pre-reform courts:

If one had asked us at that time: what is a court? where is it? we would have been put into an embarrassing position and would not have known what to say. A real law court did not exist, but only an almighty and powerful police. . . . The settlement of the case of the accused began and ended with the police. In the meantime, something resembling court proceedings took place . . . *pro forma*, which consisted in the police records concerning the accused being put on the court table covered with a red or green cloth round which men in gold-embroidered uniforms were seated. These men, without having questioned or seen the accused, would deliberate among themselves, decide something, and then send the records back to the police again [to carry out the sentence]. It was a court only in name . . .<sup>43</sup>

The reformers of Russian criminal justice in the 1860s sought to deal with this fundamental defect in the criminal justice system. Their approach was two-pronged. The first was to create greater professionalism, legality and objectivity in the investigatory stages of the case. The second was to change the rules of evidence to place proof of crime on a more realistic basis.

The Russian system's attempt to accomplish the first aim followed the Western European continental approach. Continental European systems commonly have a quasi-judicial official who controls and directs the investigation. These officials often have the power to do things that would normally be performed in our system only by judges,

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42. Another problem was simple competence. As Koni notes in his memoirs, the police investigations of that time were characterized by "irresponsible arbitrary actions, unconsidered deprivations of freedom, fruitless searches and the absence of any system and excess cases." ANATOLII F. KONI, *ZA POSLEDNYIE GODY* [IN THE LAST FEW YEARS] 265 (1893); see also A. Timofeev, *Sudebnaia reforma v Rossii* [Judicial Reform in Russia], 62 *ENTSKLOPEDICHESKII SLOVAR'* [ENCYCLOPEDIA DICTIONARY] 910 (1890-1904) ("During [police] investigations, all manner of illegal methods were used for obtaining a confession from the defendants; they were subjected to threats and beatings.").

43. VLADIMIR D. SPASOVICH, *ZASTOL'NIE RECHI* [AFTER-DINNER SPEECHES] 12 (1903).

such as subpoenaing witnesses and suspects and ordering searches, arrests, and pre-trial detention. And they are often considered to be and have the same training as judges, as is the case with the Italian examining magistrate and the French *juge d'instruction*.<sup>44</sup> In continental systems, just as in Russia, the idea of entrusting criminal investigations to an examining magistrate rather than leaving them to the tender mercies of the police was to gain greater objectivity, professionalism, and legal expertise.<sup>45</sup>

In pursuit of this objective, Alexander II, in 1860, created the office of *sudebnyi sledovatel'*, literally "judicial investigator."<sup>46</sup> Required to be trained in law, 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.<sup>47</sup> They 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. The police and judicial medical and other experts were required to carry out their directions and in general could act only at their direction.<sup>48</sup> And any evidence taken before them, including confessions, had the status of judicial evidence if taken in strict compliance with the specified procedures.<sup>49</sup> There is no exact equivalent for Porfiriy

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44. See generally JOHN P. MERRYMAN, *THE CIVIL LAW TRADITION* 124-32 (2d ed. 1985).

45. In common-law systems, the police investigate crimes and do so independently of the court and even of the prosecutor. Common-law systems do not worry so much about potential police excesses because the police have much less power. The most intrusive investigatory activities, such as searches and compulsory process, can only be accomplished with a court order. Also, the evidence gathered in the pre-trial stages does not "count." It is only after it is presented in open court through live witnesses and tested on cross-examination that it is accepted as evidence.

46. 35 *Polnoe sobranie zakonov Rossiskoi Imperii* [Complete Collection of Laws of the Russian Empire], No. 35890 (1860); see also Timofeev, *supra* note 42, at 911; A.S. Lykoshin, *Sledovatel' sudebnyi* [Judicial Investigator], 59 *ENTSKLOPEDICHESKII SLOVAR'* [ENCYCLOPEDIA DICTIONARY] 456-57 (1890-1904). The introduction to the law implies criticism of the police: "Wishing to provide the police with better tools for fulfilling their responsibilities, which is so important for order and the peace of all residents, we completely remove all [criminal] investigatory responsibilities of all court cases from police responsibility" and give it to the examining magistrates attached to the courts. Law of June 8, 1860, *supra* note 36, at 710.

47. Art. 2, Law of June 8, 1860, *supra* note 36.

48. Art. 19-20, Law of June 8, 1860, *supra* note 36.

49. Art. 17, Law of June 8, 1860, *supra* note 36. Descendants of the tsarist examining magistrates exist in the modern Russian legal system in the personage of law-trained "criminal investigators," who, together with the procurators who oversee them, have many of the same powers. However, while they are charged with investigating all sides of the case in a quasi-judicial fashion, they are not associated with the court in any way, nor do they act as if they were. See GENNADY M. DANILENKO & WILLIAM BURNHAM, *LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION* 418 (2d ed. 1999) ("In terms of education, pay and inclination, the Russian criminal investigator varies considerably from the continental



Petrovich's position in any English-speaking country, but the revised Coulson translation's term "examining magistrate" probably captures the idea.<sup>50</sup>

Although Porfiry Petrovich is just such an examining magistrate, he is erroneously portrayed in some English translations of *Crime and Punishment* as a "detective" or "police investigator." Even the prestigious Ardis Press's *Dostoevsky Dictionary* calls him "the chief detective of the local police."<sup>51</sup> This incorrect impression springs from the common-law orientation of the English translators or, more likely, their legal advisors. Dostoevsky makes clear that we are dealing with the new office of examining magistrate when he has characters distinguish between going to the police and going to the examining magistrate (pp. 205, 212). He is not entirely consistent, however. Razumikhin slips up and calls Porfiry Petrovich *pristav*, the former name of the police investigator, but quickly adds that "he's a graduate of the College of Jurisprudence" (p. 113). In other places, Porfiry Petrovich is just called and refers to himself as *sledovatel* or "investigator," without any reference to any association with a court. In fact, the term *sudebnyi sledovatel'* occurs only twice. The first time is when two visitors to the pawnbroker stand outside her door during the commission of the crime. The younger of them suspects foul play and in support of his suspicions states "I am studying to be an examining magistrate" (p. 72). The second is where Raskolnikov uses the term when complaining to Porfiry Petrovich of society being "too well supplied with the weapons of exile, prisons, the examining magistrate, hard labour" (p. 224). But the inconsistent use of the terms is probably part of the realism of the novel in the sense that creation of the office was recent and the public only dimly aware of the legal system's details.<sup>52</sup>

Porfiry Petrovich's role as an examining magistrate rather than a police detective is important for at least three reasons. First, it makes the intellectual level of his interaction with Raskolnikov more believable. Reading Raskolnikov's article on crime, understanding it, being able to discuss it, picking up on the stray philosophical point made to-

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[European] ideal," and few "act as if their job is anything other than finding and compiling as much evidence against the defendant as possible.").

50. Professor Gibian "made some alterations in the Jesse Coulson translation to suit [corrected] information about technical legal terms." See DOSTOEVSKY (Gibian ed.), *supra* note 1, at 683 n.2. This was apparently the result of Richard Weisberg's work, *supra* note 16, which is reprinted in Professor Gibian's edition of the translation.

51. RICHARD CHAPPLE, A DOSTOEVSKY DICTIONARY 182 (1983).

52. Porfiry Petrovich makes a statement that might seem to conflict with the fact that the reform of the investigative stage of criminal procedures had already taken place: "There is a reform on the way, and we are all to be at any rate to be called something different. He, he, he!" P. 285. However, this is an obvious reference to the more subtle effects that the 1864 reforms of the *court* system were to have on examining magistrates, since the magistrates were considered members of the court, the names and structure of which were in fact changed. See KUCHEROV, *supra* note 19, at 49 for the new court system.

ward the end of it (pp. 216-25), and crediting such an intellectual reason as a motive for murder are all much more believable coming from an examining magistrate than from a police detective. It is certainly unlikely that a police detective would be browsing through *Periodical Discourse* (*Periodicheskaya rech'*), the journal in which Raskolnikov's article had appeared.

Second, Porfiry Petrovich's more exalted status makes him part of the wave of the future in the criminal justice system — the quintessential modern professional. It is clear from the novel and from Dostoevsky's notebooks that he viewed Porfiry Petrovich this way.<sup>53</sup> The legally trained examining magistrate would be more objective and gather all the evidence in the case, not just evidence of guilt. As the 1860 law states, the magistrate's job is to "use all the means provided in the laws . . . and to take all actions necessary to reveal the circumstances of the case completely."<sup>54</sup> To do this, the magistrate would use psychology as necessary to get at the real facts of the case. Judge Anatolii F. Koni referred to this in his laudatory comments on *Crime and Punishment* in 1881:

There is the struggle throughout the novel [of Porfiry Petrovich] with Raskolnikov — and in it we hear constantly a rejection of all the antiquated and outmoded aspects of the system of [criminal] litigation at that time. This includes [Porfiry Petrovich's] slow, methodical gathering of circumstantial evidence in its various forms, with constant skepticism about first impressions, some of it falling by the wayside, some taking on an unexpected shade, that finally lead the investigator to the compelling result — his conviction that Raskolnikov is the perpetrator. Such constant, complex and dispassionate work of deduction and experience, of analysis and imagination, are both the calling and the job of the person who becomes an investigator of crime. This is the real work of the investigator, not the mechanical gathering of the material evidence.<sup>55</sup>

Perhaps the real story of Raskolnikov's downfall is that he deals with Porfiry Petrovich as if Porfiry is engaging only in "the mechanical gathering of the material evidence." All the while, Porfiry Petrovich — almost unknown to Raskolnikov — is involved in a very sophisticated manipulation of Raskolnikov's already tortured psychological state.

The third reason the status of Porfiry Petrovich is significant for the novel is because it creates a conflict — yet another *raskol* — this time between the modern judicial investigation and the antiquated formal evidence system within which he must operate. During the time

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53. See FEODOR DOSTOEVSKY, *THE NOTEBOOKS FOR CRIME AND PUNISHMENT* 167 (Edward Wasiolek trans. & ed., 1967) ("Now with the reform, we need practical people like him.").

54. Art. 19, Law of June 8, 1860, *supra* note 36.

55. KONI, *supra* note 41, at 415.

period in which Porfiry Petrovich is operating — between the creation of the office of examining magistrate in 1860 and the implementation of the 1864 court reforms — legal reformers had acted on only the first prong of their program for judicial independence from the police. They had taken control of the investigatory function away from the police. But they had not yet implemented the second part — changing the formal evidence rules. Thus, Porfiry Petrovich is in the position of being the thoroughly modern examining magistrate in a thoroughly “pre-modern” judicial system and evidence regime. His charge is to investigate objectively and professionally all the evidence, but whatever he produces must still fit the old limited formal types of evidence or it is largely worthless. In short, for the reasons already discussed, Porfiry Petrovich needs a confession, since nothing else will do. And to get it, he has to improvise and use his wits to try to trick or cajole Raskolnikov into giving him one.<sup>56</sup>

To accomplish this, Porfiry Petrovich resorts to decidedly informal and unofficial tactics. He never subpoenas Raskolnikov to appear before him in the capacity of witness or suspect, despite Raskolnikov asking pointedly at their first meeting whether Porfiry Petrovich “wish[es] to interrogate me officially, with all the formalities” (p. 226) and making a similar challenge at their second meeting (p. 285). On the latter occasion, Porfiry Petrovich responds:

But why bother with the formalities? — in many cases you know, they mean nothing. Sometimes just a friendly talk is much more use. The formalities will always be there, if necessary; allow me to assure you of that. But what are they, after all, I ask you? An examining magistrate ought not to be hampered by them at every step. His business is, so to speak, some sort of an art, in its own way . . . he, he, he! (p. 285)

All this sets the stage for a quite hilarious demonstration by Porfiry Petrovich of his informal “art” in a style more than slightly reminiscent of television’s Detective Columbo. There is no rumpled raincoat, but the rest is there. Razumikhin describes Porfiry Petrovich as “an intelligent fellow, very intelligent, nobody’s fool, but he is of a rather peculiar turn of mind . . . He likes to mislead people, or rather to baffle them” (p. 208). Porfiry Petrovich is always laughing through-

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56. Richard Weisberg, on whom Gibian relies to change the translation of Porfiry Petrovich’s position to that of examining magistrate, is correct about the name and the nature of the job. See *supra* note 50. However, Weisberg is mistaken when he suggests that the investigating magistrate or judicial investigator was created by the 1864 judicial reform laws. If so, nothing would have yet changed. The novel takes place in the Summer of 1865. The 1864 law was implemented in St. Petersburg only on April 17, 1866. See FOINITSKII, *supra* note 20, at 50-53; Timofeev, *supra* note 42, at 911-12. Without the 1860 law, the investigation would still have been in the hands of the police at the time of *Crime and Punishment*. See Art. 2, Code of 1857, *supra* note 22; PRAVILA I FORMY DLIA PROIZVODSTVA SLEDSTVII [RULES AND FORMS FOR CONDUCTING INVESTIGATIONS] § 1, at 1 (Y. Kolokolov ed., 1859) (“Conducting the investigation and all the measures related to it are the responsibility of the police.”).

out his interactions with Raskolnikov.<sup>57</sup> Immediately after Porfiry Petrovich's comment on his "art," he indulges in a bit of it with Raskolnikov:

[Porfiry Petrovich] had been running on without a break, now throwing off meaningless empty phrases, now slipping in a few enigmatic words, then again wandering off into nonsense. He was almost running about the room . . . his eyes fixed on the ground, and his right hand thrust behind his back, while his left gesticulated ceaselessly, making various gestures that were always extraordinarily out of keeping with his words. (p. 285)

Except for the absence of an unlit cigar in that left hand, we have Columbo.

The classic sequence is on page 226. After explaining that there is no need for Raskolnikov to make a formal statement, Porfiry changes the subject: " 'Oh yes, by the way!' he exclaimed, suddenly delighted with something; 'I've just this moment remembered what I was going to say' " (p. 226). He then questions Raskolnikov about whether the painters were present the night he went to the old woman's place. According to Raskolnikov's story, the last time he was there was three days before the murders. If he responds that he had seen painters, it would have been a telling answer since they had only been there the night of the murder. Raskolnikov sees the trap and answers that he did not see painters; Razumikin also breaks up the ploy, reminding Porfiry Petrovich that "the painters were working on the very day of the murder, and [Raskolnikov] was there three days before!" (p. 226).

Porfiry Petrovich's response is vintage Columbo:

"Oh, I've mixed it up!" Porfiry struck his forehead. "Devil take it, this business is driving me out of my senses." he went on, turning apologetically to Raskolnikov. "It would have been so important to us, if we could have learnt that they had been seen, in that flat, at some time after seven, that I fancied just now that you could tell us . . . I was quite mixed up!"

"Then you ought to be more careful," remarked Razumikhin in surly tones.<sup>58</sup>

The character of Porfiry Petrovich and his interactions with Raskolnikov in *Crime and Punishment* thus demonstrate how the hopes of the 1860s reformers to place criminal investigation on a more legally professional, objective, and formal basis were dashed on the

57. His laugh is translated as "he, he, he," but in Russian it is more like "heh, heh, heh."

58. P. 226. The description of Porfiry Petrovich has its own comic overtones when we first meet him:

He was a man of about thirty-five, rather short and stout, and somewhat paunchy. He was clean-shaven, and the hair was cropped close on his large round head, which bulged out at the back almost as if it were swollen. His fat, round, rather snub-nosed, dark-skinned face had an unhealthy yellowish pallor, and a cheerful, slightly mocking expression.

P. 211.

rocks of necessity for their failure to change the underlying judicial system and evidence regime. It is as if they promoted the investigator from second fiddle to first, but forgot to change the music. *Crime and Punishment* wonderfully and entertainingly demonstrates this serious *raskol* in the legal system of the time.

C. *A Broader Lesson About the Rule of Law from Crime and Punishment?*

It has been said that *Crime and Punishment* is the ultimate Russian novel. Aside from its length, one could point to the gloom and doom of it.<sup>59</sup> Raskolnikov and other *Crime and Punishment* characters all have difficult lives, made all the more excruciating by their obsessive worrying. Russia makes its usual appearance as a problem to be solved, with the characters finally concluding, in answer to the question posed by Chernyshevsky just a few years before, that “nothing can be done.”<sup>60</sup> But another “Russian” aspect of the novel occurs to me from my experience working on programs to bring the “rule-of-law” to Russia for the last ten years. It concerns both Raskolnikov’s justification for the murder — the “Napoleonic” idea that there are extraordinary people who quite properly are not bound by the laws — and Dostoevsky’s solution to the problem.

The contemporary version of the problem is the effect of Russian history on the Russian people’s attitude toward the idea of the rule of law. They have collectively suffered centuries of feudalism, followed by a strictly class-based society and system of justice, and then a new “aristocracy” of the communist regime in which the government was controlled at every step by an elite “nomenclatura” of the Communist Party and lesser party members. Today the perception of many within and without Russia is that the true power is wielded by the “kleptocrats,” the rich business oligarchs who operate outside the law. The problem is the attitude of the ordinary citizenry toward law. It can be stated, to modify only slightly Raskolnikov’s idea, by the phrase, “law is for other people.”<sup>61</sup>

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59. There is the one about the depressed Russian writer who committed suicide by jumping off his novel. The oppressive atmosphere of Dostoevsky is even too much for Russians, who have coined the term *dostoevshchina* (“Dostoevskian” or “Dostoevsky-like”) to mean “mental imbalance,” OXFORD RUSSIAN-ENGLISH DICTIONARY 172 (2d ed. 1984), or by some accounts “deliberately difficult, hysterical or perverse.” Karlinsky, *supra* note 15, quoted in DOSTOEVSKY (Gibian ed.), *supra* note 1, at 615.

60. Chernyshevsky’s powerful 1863 work on the impossibility of life in Russia was entitled “What is to be Done?”. See NIKOLAI CHERNIASHEVSKI, CHTO DELAT’? [WHAT IS TO BE DONE?] (1863).

61. The “Russianness” of Raskolnikov’s “Napoleonic” idea is perhaps shown by the immediate appeal that its source, Napoleon III’s *Julius Caesar*, had in Russia. The book appeared in Paris in March of 1865 and in Russian translation just a month later. See DOSTOEVSKY (Gibian ed.), *supra* note 1, at 220. (“The newspaper *Golos* [Voice] had re-

Most important in terms of its impact on today's Russia is that people on both the favored and disfavored sides of the line in Russian social and political history got into bad habits. Those in positions of authority got used to operating as laws unto themselves and those not in positions of authority got used to avoiding them. Getting something done *po blatu* — through connections — became a way of life. It is a rational reaction to such a system to believe that anyone who tries to do things the legal, official way is a fool. Smart people use their influence to bend the system or get around it. Even Russian rulers have resorted to these time-worn techniques.<sup>62</sup>

Russian President Vladimir Putin's solution to this problem is just as Dostoevskian and ultimately Russian as the problem itself. Putin proposes to set up a "dictatorship of the law."<sup>63</sup> It is not known exactly what Putin means by this phrase, but it certainly sounds like a "top-down" program to force people to respect the law by strictly and harshly enforcing it. The attractiveness of this solution has a direct parallel to Dostoevsky's own experience with the criminal justice system in which harsh measures — including his faked execution — turned him into a heartfelt supporter of the monarchy. It also replicates Dostoevsky's thesis in *Crime and Punishment* that Raskolnikov gains his redemption only through hard labor in Siberia. Significantly, neither Dostoevsky nor Putin suggests that the path to redemption resembles anything like the modern American version — a trip to the Betty Ford Clinic, personal psychotherapy, or even educational achievement while in prison.

Both Dostoevsky's and Putin's solution for creating respect for the law is to force people to respect it by creating negative incentives to do so, or in Dostoevskian terms and Sonya's words, to "[a]ccept suffering and achieve atonement through it" (p. 355). What is overlooked in this solution is the notion of people complying with the law and using legal procedures to get what they need because that approach works best

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cently summarized the English *Saturday Review's* analysis of Napoleon's ideas about the right of exceptional individuals (such as Lycurgus, Mahomet and Napoleon I) to transgress laws and even to shed blood. The book appeared in Paris in March of 1865; the Russian translation in April!"

62. See Eugene Huskey, *The State-Legal Administration and the Politics of Redundancy*, 11 POST-SOVIET AFF. 115-43 (1995) (tracing the use of dual executive institutions in Tsarist, Soviet, and post-Soviet times, one the official ministry and another subject to more direct control by the executive personage).

63. Putin's comments were first made at Anatoly Sobchak's funeral on February 25, 2000. Sobchak was a law professor at St. Petersburg (then Leningrad) State University, who early on became involved in the democracy movement in Russia in the 1990s. He was known for his view that the Russian people need a strong hand at the helm and an occasional sting of the lash. Putin's message, perhaps reflective of Sobchak's views, was that "[d]emocracy is a dictatorship of law." He added that: "The stronger the government, the stronger personal freedom . . ." See Vladimir Gelman, *The Dictatorship of Law in Russia: Neither Dictatorship, Nor Rule of Law*, at [www.fas.harvard.edu/~ponars/POLICY%20MEMOS/Gelman146.html](http://www.fas.harvard.edu/~ponars/POLICY%20MEMOS/Gelman146.html).

most of the time and because it is a good thing for society and ultimately for themselves. I am not saying that Putin is wrong in his Russia solution to a Russia problem that he knows far better than I do. Nor do I think that *direct* efforts to convince the Russian people that complying with the law is a good thing would be met with anything but derision by a people bombarded for so long by propaganda.

I realize that it is hard to make generalizations about a whole nation.<sup>64</sup> And the “law is for other people” idea is one that exists to a greater or lesser degree in every society among at least some classes of people, notably politicians and some corporate leaders. But however difficult it is to define and prove, my experience tells me that it is fundamental socio-political attitudes that are shared in the general population that are perhaps the most serious obstacle to the future of law in Russia. In fact, it and other allied aspects of Russian legal culture are more serious obstacles to the rule of law in Russia than are the things that Western rule-of-law assistance programs focus on — training of legal personnel, providing expertise in writing laws, and building official legal institutions such as courts.

It may be that some Dostoevskian efforts to impose the rule of law from the top down are necessary in Russia at this time. But for the long run, I like the wise counsel of Learned Hand:

[B]ut this much I think I do know — that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nature of that spirit, that spirit in the end will perish.<sup>65</sup>

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64. There is a story about an American scholar who went to Russia for three weeks and thought he would write a book. He didn't. Later he returned there for a year and thought that perhaps he would write an article. He has now lived there for nine years and reports that he has difficulty writing a coherent letter to friends in the United States.

65. Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 119 (1959).