

# DOSTOEVSKY AS JUVENILE JUSTICE ADVOCATE AND PROGENITOR OF THERAPEUTIC JURISPRUDENCE

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## INTRODUCTION

In *The Brothers Karamazov*, Ivan Karamazov delivers a diatribe on theodicy: assailing Christianity and faith in a God who lets innocent children suffer, he states that there is a “peculiar quality [that] exists in much of mankind—this love of torturing children, but only children.”<sup>1</sup> Undeniably, the physical and psychological abuse of children is a recurrent theme in Fyodor Dostoevsky’s fiction and journalism, particularly in his *Writer’s Diary*.<sup>2</sup>

In this Article, I explore this fixation with childhood suffering and suggest that Dostoevsky implicitly predicted the core tenets of a relatively new legal movement, called “therapeutic jurisprudence” (“TJ”),<sup>3</sup> and I

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1. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 241 (Richard Pevear & Laura Volokhonsky trans., Farrar, Straus and Giroux 2002) [hereinafter *BROTHERS KARAMAZOV*].

2. See [1877-1881] 2 FYODOR DOSTOEVSKY, *A WRITER’S DIARY passim* (Kenneth Lantz trans., Northwestern Univ. Press 1994) [hereinafter *A WRITER’S DIARY 2*]; see also *BROTHERS KARAMAZOV*, *supra* note 1.

3. See *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., Carolina Acad. Press 1996) (applying therapeutic jurisprudence to various mental health law issues); see also *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., Carolina Acad. Press 1996) [hereinafter *LAW IN A THERAPEUTIC KEY*] (applying therapeutic jurisprudence to mental health law, criminal law and procedure, sexual orientation law, disability law, personal injury and tort law, law of evidence, and other areas); *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (Bruce J. Winick & David B. Wexler eds., Carolina Acad. Press 2003) [hereinafter *JUDGING IN A THERAPEUTIC KEY*] (applying therapeutic jurisprudence to newly emerging problem-solving courts); *AMY D. RONNER, LAW, LITERATURE, AND THERAPEUTIC JURISPRUDENCE* (Carolina Acad. Press 2010) (focusing on Herman Melville, Fyodor Dostoevsky, Arthur Miller, W.H. Hudson, and others, and showing how therapeutic jurisprudence is a valuable tool for analyzing literature and stimulating the legal imagination); *infra* Part II (exploring the ever-growing body of TJ scholarship).

broach the question of why this matters. In an effort to provide an answer, I identify Dostoevsky as an early ombudsman for therapeutic juvenile justice and link him to the voiceless “polyphonic” voices in *The Brothers Karamazov* and to what I denominate the poly-personae of *A Writer’s Diary*.<sup>4</sup>

#### I. TIMELESS VOICELESS, INVALIDATED, AND INVOLUNTARY CHILDREN

Although child abuse has always existed, efforts to redress it only began to make real strides in the nineteenth century.<sup>5</sup> Industrialization and an increasingly urbanized economy increased stress on families and made child welfare a societal concern.<sup>6</sup> Conterminously, the *parens patriae* doctrine<sup>7</sup> gave states the right and obligation to protect members of society who could not fend for themselves.<sup>8</sup> As the Mary Ellen saga<sup>9</sup> will illustrate, old mechanisms that putatively ministered to neglected, abandoned, or abused children did not merely falter, but also not infrequently, exacerbated children’s suffering.<sup>10</sup> Early state laws

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4. See MIKHAIL BAKHTIN, PROBLEMS OF DOSTOEVSKY’S POETICS 3–4 (Caryl Emerson ed. & trans., U. of Minn. Press 11th prtg. 2009) (describing the specialized study of Dostoevsky’s poetics and polyphonic artistic thinking); see also AMY D. RONNER, DOSTOEVSKY AND THE LAW 43–44 (Carolina Acad. Press 2015) (discussing how “Bakhtin created an idiom for elucidating the Dostoevsky phenomenon,” which “lets Dostoevsky induce disquieting uncertainty, and frees him to be the very doubter that he was”).

5. See Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society’s Response*, OHIO N. UNIV. L. REV. 819, 822 n.4 (2010) (defining “child abuse” as “encompass[ing] all forms of recognized child maltreatment, including physical abuse, neglect, sexual abuse, and psychological abuse”); see also FLA. STAT. § 39.01(2) (2015) (defining “abuse” of a child as “any willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that causes or is likely to cause the child’s physical, mental, or emotional health to be significantly impaired,” which is either identical or similar to definitions in other jurisdictions); Curt Richardson, *Physician/Hospital Liability for Negligently Reporting Child Abuse*, 23 J. LEGAL MED. 131, 132 (2002) (“Greek and Roman records suggest the predominance of child abuse during those times.”). “‘Child maltreatment’ is a phrase frequently employed by researchers in the field, in part because of concerns that the use of the phrase ‘child abuse’ will be incorrectly viewed as implying a focus on physical abuse while the more predominant occurrence of child neglect, as well as other forms of abuse, are overlooked.” See Hafemeister, *supra*.

6. See Hafemeister, *supra* note 5, at 830.

7. *Parens patriae*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit.”).

8. See Mason P. Thomas, Jr., *Child Abuse and Neglect Part I—Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 306 (1972) (discussing the doctrine that all orphans, dependent children and incompetent persons are within the special protection, and under control, of the state).

9. See *infra* notes 16–53 and accompanying text.

10. See Thomas, *supra* note 8; see also Hafemeister, *supra* note 5, at 831 (explaining that early state laws “authoriz[ing] the . . . placement of neglected, destitute, abandoned, and vagrant

authorizing the removal of neglected or abused juveniles from families were either ignored or resulted in placing children in institutions, which were designed more for adults and thus failed to accommodate the needs of their fragile young wards.<sup>11</sup> In fact, some facilities were so abysmal that they caused harm and even premature death.<sup>12</sup>

In the United States, as in Dostoevsky's Russia, parents were presumed to have absolute control over their children.<sup>13</sup> Nineteenth-century statutes enacted to protect minors from assault and neglect tended to be underutilized partly because the legal system viewed offspring as

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children in [institutions]" focused on "reforming children who appeared to be on a criminal trajectory" and that "these efforts often resulted in the placement of these children in harsh settings that were relatively indistinguishable from those used to incarcerate adults").

11. See Hafemeister, *supra* note 5, at 831; see also Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1, 5–7 (2005) (stating a history of laws shows a practice of removing children from their homes). Hafemeister points out that these facilities "may have enhanced criminal tendencies and did little to protect and address the needs of children who had been abused or neglected." Hafemeister, *supra*.

12. See, e.g., U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE ARTHUR G. DOZIER SCHOOL FOR BOYS AND THE JACKSON JUVENILE OFFENDER CENTER, MARIANNA FLORIDA (Dec. 1, 2011) (finding, *inter alia*, excessive and unnecessary uses of force, unlawful uses of isolation, deliberate indifference to youth at risk of self-injurious and suicidal behaviors, disciplinary and punitive measures in violation of youth's due process rights, unconstitutional frisk searches, inadequate medical and mental health services, failure to provide necessary rehabilitative services, and unlawfully unsanitary and unsafe conditions); see also S. 708, 2016 Leg., 180th Sess. (Fla. 2016) (authorizing "to reimburse the next of kin of children whose bodies are buried and exhumed at the Dozier School for the costs associated with funeral services and reinterment"). When it became apparent that many children were reported missing from the Dozier School and after it closed, there was a forensic investigation and excavations, which yielded fifty-five bodies, and "representatives of children formerly held at the Dozier School have estimated that there could be 100 more bodies on the grounds of the school[.]" S. 708.

13. See Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 181 (2004) (explaining that "[e]ven in the context of the modern child welfare system, the constitutional rights of parents frequently subsume the legal rights of their children" and the "legal presumption that parents speak for their children does not fully evaporate once the children come to the attention of a child welfare agency, or even once a child enters foster care"); see also Catriona Kelly, *CHILDREN'S WORLD: GROWING UP IN RUSSIA, 1890–1991* 26–28 (2007) (describing the legal rights of children and the power their parents possessed over them in Russia); Robin Feuer Miller, *Children*, in DOSTOEVSKY IN CONTEXT 139, 140 (Deborah A. Martinsen & Olga Maiorova eds., Cambridge Univ. Press 2015) (stating that with respect to Russia "in the second half of the nineteenth century . . . [p]arents' control was more or less absolute, although their power was tempered by a responsibility to provide children with food, clothing, and moral and religious guidance"); Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 FAM. CT. REV. 540, 541 (2004) ("The U.S. Supreme Court has held that the Due Process Clause of the 14th Amendment to the U.S. Constitution provides a fundamental right to 'family integrity,' a right of parents and children to be free of unwarranted governmental interference in matters of child rearing.").

chattel and thus gave “owners” nearly limitless dominion over children.<sup>14</sup> There exists, in fact, a legion of United States Supreme Court decisions cementing that ownership mindset in place: these not only sanctify family autonomy, but also recognize parental rights to custody of their children, to keeping the family together, and to controlling child-upbringing.<sup>15</sup> Consequently, states refrained from meddling in family business or even questioning the longstanding bastion of parental despotism.

The eye opener occurred in 1873 when a humanitarian, Etta Angell Wheeler, met nine-year-old Mary Ellen Wilson, who is the immortalized emblem of child-protectionism.<sup>16</sup> Mary Ellen was born in New York City

14. See Hafemeister, *supra* note 5, at 831 (discussing how the non-penal statutes designed to protect children were underutilized and explaining that “[s]ociety, acting through its legal system, was generally unwilling to support intrusions into the sanctity of the family and reluctant to second-guess parental decisions”).

15. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 69–70 (2000) (faulting the state court for failing to give special weight to a mother’s determination of her daughters’ best interests and stating that if a fit parent’s decision becomes subject to judicial review, the court must accord some special weight to the parent’s own determination); *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (“[A] natural parent’s ‘desire for and right to ‘the companionship, care, custody, and management of his or her children’ is an interest far more precious than any property right.” (quoting *Lassiter v. Dep’t of Soc. Serv. of Durham Cty., N.C.*, 452 U.S. 18, 27 (1981))); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’” (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 862–63 (1977))); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503–06 (1977) (recognizing a fundamental right to keep the family together, a right which includes extended families); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (recognizing that parents have a fundamental right to custody of their children); *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972) (giving great deference to parents, the Supreme Court held that Amish parents had a constitutional right to exempt their fourteen-year-old and fifteen-year-old children from a compulsory school attendance law); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (recognizing that family autonomy involves the fundamental right of parents to control the educational upbringing of their children). *But see Prince v. Massachusetts*, 321 U.S. 158, 168–70 (1944) (upholding the child labor laws as applied to a nine-year-old girl who was soliciting for the Jehovah’s Witnesses at the direction of her parents); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (“The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.”).

16. *Mary Ellen Wilson: How One Girl’s Plight Started the Child-Protection Movement*, AM. HUMANE SOC’Y, <https://web.archive.org/web/20101220063434/http://www.americanhumane.org/about-us/who-we-are/history/mary-ellen.html> (last visited Apr. 27, 2017) [hereinafter *Mary Ellen Wilson*]; see also *The Story of Mary Ellen: The Beginnings of a Worldwide Child-Saving Crusade*, AM. HUMANE SOC’Y, <https://web.archive.org/web/20101204222429/http://www.americanhumane.org/about-us/who-we-are/history/etta-wheeler-account.html> (last visited Apr. 27, 2017) [hereinafter *The Story of Mary Ellen*] (recounting Etta Wheeler’s encounter with Mary Ellen, who “inspired the founding of the first ‘Society for the Prevention of Cruelty to Children’”); Hafemeister, *supra* note 5, at

in 1864 to Francis and Thomas Wilson.<sup>17</sup> When Mary Ellen's father died, her mother, compelled to enter the workforce, found that she could no longer care for her infant.<sup>18</sup> As was "common practice" in those days, Francis boarded her baby with another woman.<sup>19</sup> But when Francis defaulted in payments and stopped visiting her daughter, the caretaker deposited Mary Ellen with the City's Department of Charities.<sup>20</sup>

The Department of Charities made a decision with catastrophic consequences: with practically no due diligence or documentation, the Department placed Mary Ellen in the home of a woman named Mary and her husband, Thomas McCormack, who claimed to be the child's biological father.<sup>21</sup> In what is a creepy form of déjà vu, that putative father died shortly after he and his wife took the baby.<sup>22</sup> When the widow next married Francis Connolly, the couple moved to a tenement that became Mary Ellen's torture chamber.<sup>23</sup> Neighbors actually knew of the atrocities that transpired there, but said nothing and did nothing.<sup>24</sup> Eventually, the Connolly family moved elsewhere.<sup>25</sup>

One day, a poor working woman, an original Connolly neighbor, met Mrs. Etta Angell Wheeler and told her about a little girl, imprisoned in a dark room, who was repeatedly whipped.<sup>26</sup> Mrs. Wheeler managed to find the family in their new location and on a bitterly cold December day saw a nine-year-old who was so emaciated that she appeared to be only four or five<sup>27</sup>:

From a pan set upon a low stool she stood washing dishes, struggling with a frying pan about as heavy as herself. Across the table lay a brutal whip of twisted leather strands and the child's meagre arms and legs bore many marks of its use. But the saddest part of her story was

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832–34 (providing an excellent account of the Mary Ellen story).

17. See *supra* note 16 and accompanying text.

18. See *supra* note 16 and accompanying text.

19. See *Mary Ellen Wilson*, *supra* note 16 ("No longer able to stay at home and care for her infant daughter, Francis boarded Mary Ellen (a common practice at the time) with a woman named Mary Score.").

20. *Id.*

21. *Id.* ("The Department made a decision that would have grave consequences for little Mary Ellen; it placed her illegally, without proper documentation of the relationship, and with inadequate oversight into the home of Mary and Thomas McCormack[.]").

22. *Id.*

23. See *supra* note 16 and accompanying text.

24. See *supra* note 16 and accompanying text.

25. See *supra* note 16 and accompanying text.

26. See *The Story of Mary Ellen*, *supra* note 16; see also *Mary Ellen Wilson*, *supra* note 16 ("[O]ne of their original neighbors asked Etta Angell Wheeler, a caring Methodist mission worker who visited the impoverished residents of the tenements regularly, to check on the child.").

27. See *The Story of Mary Ellen*, *supra* note 16.

written on her face in its look of suppression and misery, the face of a child unloved, of a child that had seen only the fearsome side of life.<sup>28</sup>

Although New York law permitted the removal of neglected children from their caregivers, Mrs. Wheeler could not get the authorities to act.<sup>29</sup>

Seizing on a novel idea, Mrs. Wheeler's niece convinced her aunt to seek help from Mr. Henry Bergh,<sup>30</sup> a leader of the animal humane movement and founder of the American Society for the Prevention of Cruelty to Animals ("ASPCA").<sup>31</sup> Her niece pleaded, "You are so troubled over that abused child, why not go to Mr. Bergh? She is a little animal surely."<sup>32</sup> Bergh, along with Elbridge T. Gerry, the ASPCA lawyer, swooped in armed with a petition for a writ of *homine replegiando*,<sup>33</sup> an old English device for freeing a person from the custody of another.<sup>34</sup> Bergh and Gerry, with significant ties not just to the legal system, but also to the press, alerted *New York Times* journalists and others, who published accounts of the wretched, scarred child.<sup>35</sup>

When Mary Ellen first appeared at her hearing, she was still in her shredded rags and had bruises all over her body.<sup>36</sup> She also displayed a fresh deep gash from her left eyebrow all the way down her cheek because Mary had recently lacerated the child with scissors, narrowly missing her eye.<sup>37</sup> Long before TJ<sup>38</sup> was even conceived, presiding Judge Lawrence intuitively did something right: he encouraged Mary Ellen to tell her story in her own voice:

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28. *Id.*

29. *See Mary Ellen Wilson, supra* note 16; *see also* Hafenmeister, *supra* note 5, at 832.

30. *See Mary Ellen Wilson, supra* note 16.

31. *See id.*; *see also* 1866: ASPCA is Founded, HISTORY, <http://www.history.com/this-day-in-history/aspc-is-founded> (last visited Apr. 27, 2017) ("On April 10, 1866, the American Society for the Prevention of Cruelty to Animals (ASPCA) [was] founded in New York City by philanthropist and diplomat Henry Bergh, 54.").

32. *See Mary Ellen Wilson, supra* note 16.

33. *See id.*

34. *See Homine replegiando*, BLACK'S LAW DICTIONARY (10<sup>th</sup> ed. 2014) ("A writ to replevy a man out of prison, or out of the custody of a private person."); *see also* Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1, 35 n.157 (1995) (stating that this writ was sometimes used by antislavery activists to release African Americans who had been wrongfully enslaved).

35. *See Mary Ellen Wilson, supra* note 16.

36. *See id.*

37. *See American Humane Society: The Story of Mary Ellen*, DEFEND THE CHILDREN, <http://defend.dot5hosting.com/id3.html> (last visited Apr. 27, 2017) ("Her body was bruised, her face disfigured, and the woman, as if to make testimony sure against herself, had the day before, struck the child with a pair of shears, cutting a gash through the left eye-brow and down the cheek, fortunately escaping the eye.").

38. *See supra* note 3 and accompanying text.

I don't know how old I am. I have no recollection of a time when I did not live with the Connollys . . . . Mamma has been in the habit of whipping and beating me almost every day. She used to whip me with a twisted whip—a raw hide. The whip always left a black and blue mark on my body. I have now the black and blue marks on my head which were made by mamma, and also a cut on the left side of my forehead which was made by a pair of scissors. She struck me with the scissors and cut me[.]<sup>39</sup>

Mary Ellen said that she had never been kissed or caressed, never went outside, and knew that she would be whipped if she ever tried to speak to anyone.<sup>40</sup> More than a century before TJ, the judge imbued this soul with what we now call the empowerment elements: that is, he gave her “voice, validation and voluntary participation” in the very proceeding that would change her life.<sup>41</sup> When Mary Ellen said, “I do not want to go back to live with mamma, because she beats me so,”<sup>42</sup> the judge genuinely listened, heard, and took her seriously. Evoking the *homine replagiando* provision of the Habeas Corpus Act, he had the child extricated from her abuser.<sup>43</sup> Initially, he sent Mary Ellen to a shelter while “mamma” was convicted of felonious assault and sentenced to one year of hard labor in the penitentiary.<sup>44</sup>

The next phase of Mary Ellen's life is what might be considered a near anomaly in abuse scenarios: namely, a tripartite happy ending. First, while these victims can and do end up irreversibly destroyed or dead, Mary Ellen flourished.<sup>45</sup> When the court wanted to house Mary Ellen in a shelter for adolescent girls, Mrs. Wheeler again interceded.<sup>46</sup> She persuaded the

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39. See *Mary Ellen Wilson*, *supra* note 16.

40. See *id.* (“I have no recollection of ever having been kissed by any one—have never been kissed by mamma. I have never been taken on my mamma's lap and caressed or petted. I never dared to speak to anybody, because if I did I would get whipped . . . . I do not know for what I was whipped—mamma never said anything to me when she whipped me.”).

41. See Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499, 501 (2000) (setting forth the importance of the “three Vs” in judicial proceedings); Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002) (applying the “three Vs” to juvenile justice).

42. See *Mary Ellen Wilson*, *supra* note 16.

43. See Hafemeister, *supra* note 5, at 833.

44. *The Story of Mary Ellen*, *supra* note 16 (“The child was rescued, but what was to be done with her?”).

45. See *id.* (noting that although there were offers of adoption, “[t]he neglected, hindered child would require painstaking and patience, and those uncertain offers were declined[,]” and that “[s]ome attempts to obtain her through claims of relationship were investigated by Judge Lawrence and proved fictitious.”).

46. See *id.* (“After a short time [Mary Ellen] was put in a home, not one for young children, but for grown girls, some of them wayward, who were being trained for service.”).

judge to let Mary Ellen reside with her own mother, Sally Angell, “whose heart and home were always open to the needy.”<sup>47</sup> When Angell died, Etta’s sister and her husband stepped in to provide Mary Ellen with a stable and nurturing environment.<sup>48</sup>

Second, while abuse is typically transmitted from one generation to another, Mary Ellen defied the pattern by raising three happy, healthy children.<sup>49</sup> When she was twenty-four, Mary Ellen married a good man, a widower, and had two daughters, Etta (named after Etta Wheeler) and Florence, who both became teachers.<sup>50</sup> She also served as a foster parent to another child, Eunice, who became a businesswoman.<sup>51</sup> Mary Ellen’s children and grandchildren “described her as gentle and not much of a disciplinarian,” or in Etta’s words, “[I]t has been [Mary Ellen’s] joy to give a happy childhood in sharp contrast to her own.”<sup>52</sup> Third, but more expansively, Mary Ellen’s story alerted the world to a hidden epidemic, that of child abuse, and the need for radical legal reform.<sup>53</sup>

The United States Supreme Court once said that it should not “discard wholesale those pages of human experience that teach that parents generally do act in the child’s best interests.”<sup>54</sup> Today, the millions of

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47. *See id.*

48. *See id.*

49. *See supra* note 16 and accompanying text; *see also* Cindy S. Lederman & Joy D. Osofsky, *Infant Mental Health Interventions in Juvenile Court: Ameliorating the Effects of Maltreatment and Deprivation*, 10 PSYCHOL. PUB. POL’Y & L. 162, 165 (2004) (explaining that “maltreatment often is a family tradition” and the “rate of intergenerational transmission of abuse is estimated to be 30%” and thus, “[o]ne third of the individuals who were abused and neglected as children can be expected to abuse their own children”).

50. *See Mary Ellen Wilson, supra* note 16.

51. *See id.*

52. *See Mary Ellen Wilson, supra* note 16; *The Story of Mary Ellen, supra* note 16.

53. *See The Story of Mary Ellen, supra* note 16 (asking Mr. Bergh at the end of the case “if there could . . . now be a Society for the Prevention of Cruelty to Children[?]” and he answered by taking her hand and stating “very emphatically: ‘There shall be one.’”); Hafemeister, *supra* note 5, at 833–38 (describing how “[t]he publicity surrounding the beating and neglect experienced by Mary Ellen spurred the establishment of charitable organizations that worked to prevent cruelty to children[.]” how “[t]he Progressive Era of the early twentieth century spawned the commencement of further efforts to redress child abuse[.]” how “in 1909, President Theodore Roosevelt convened the first White House conference to address the needs of children[.]” and how in 1962, a landmark article by pediatrician C. Henry Kempe and four colleagues made child abuse “a matter of widespread concern”); *see also* C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS’N 17 (1962), *reprinted in* C. Henry Kempe et al., *The Battered-Child Syndrome*, 9 CHILD ABUSE & NEGLECT 143 (1985).

54. *Parham*, 442 U.S. at 602–03; *see also* Richard E. Redding, *Children’s Competence to Provide Informed Consent for Mental Health Treatment*, 50 WASH. & LEE L. REV. 695, 718–19 (1993) (“Empirical evidence refutes the assumptions [in the *Parham* case] that interests of the parents and child coincide, that children are not ‘dumped’ into hospitals, that psychiatric hospitals are generally well-staffed and provide quality care, that children and family relationships will be

Mary Ellens out there, so few with happy endings, shed some doubt on the Court's bald contention. Professor Hafemeister's research discloses that "[r]oughly 2,400 children are found to be victims of abuse per day, three to five children die from child abuse every day (44% of which are younger than one year of age), and 18,000 children per year sustain disabilities as a result of child abuse."<sup>55</sup> While numbers speak volumes, the wreckage of Baby Brianna,<sup>56</sup> Lauren Kavenaugh,<sup>57</sup> Terrell Peterson,<sup>58</sup> and a child of Mayra Solis<sup>59</sup> convey a lot more. Sadly their narratives are not *sui generis*,<sup>60</sup> but instead paradigmatic, and in an uncanny way almost plagiarize the evidentiary vignettes that Ivan Karamazov presents in "courtroom," to Alyosha.

Baby Brianna, who perished in New Mexico, survived only 153 days.<sup>61</sup> Her father and uncle raped her repeatedly and stuffed rags in her mouth when she shrieked in agony.<sup>62</sup> One evening, while the parents were drinking beer, Brianna's father and uncle "play[ed] a little rough," hurled the infant against the ceiling, and let her fall to the floor.<sup>63</sup> Medical

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harmful by an adversarial hearing, and that procedural safeguards do not decrease the incidence of inappropriate admissions."); Charles Robert Tremper, *Respect for the Human Dignity of Minors: What The Constitution Requires*, 39 SYRACUSE L. REV. 1293, 1337 (1988) (discussing how "[t]he value of immediate physical liberty . . . received short shift" in *Parham*); cf. *Addington v. Texas*, 441 U.S. 418 (1979) (discussing the involuntary commitment of adults). In the *Parham* case, the issue was what type of procedural due process must be accorded to children when their parents commit them to an institution. See *Parham*, 442 U.S. at 587. In an earlier case, *Addington*, the Supreme Court held that except in emergencies, adults cannot be committed to an institution without notice and a hearing. See *id.* at 603. In *Parham*, the Court set forth a different rule for children because it believed that parents act in the best interest of children when they commit them to an institution. *Id.* at 602–04. Consequently, the Court concluded that when parents institutionalize a child, there need only be a screening by a doctor or neutral factfinder. *Id.* at 606–10. The child, unlike an adult, needs neither notice nor an evidentiary hearing. *Id.* The dissenting opinion, authored by Justice Brennan (joined by Justices Marshall and Stevens), said that institutionalization entails a "massive curtailment of liberty" and due to the need to protect children from erroneous commitment, there should be "a fair opportunity to contest the legitimacy of their confinement." *Id.* at 626, 638 (Brennan, J., concurring in part and dissenting in part).

55. Hafemeister, *supra* note 5, at 823–24. He further adds, "78% of the incidents of child abuse are caused by biological parents, with biological parents causing 72% of the cases of physical abuse and 91% of the cases of neglect." *Id.* at 826.

56. See *infra* notes 61–64 and accompanying text.

57. See *infra* notes 65–73 and accompanying text.

58. See *infra* notes 74–79 and accompanying text.

59. See *infra* notes 80–85 and accompanying text.

60. *Sui Generis*, BLACK'S LAW DICTIONARY (10th ed. 2014) (meaning "of its own kind").

61. See *State v. Lopez*, 164 P.3d 19, 21 (N.M. 2007). At the time of her death, Baby Briana lived with her mother and father in the home of her father's mother. *Id.* The couple shared one bedroom with Baby Briana, their eighteen-month-old son, and the mother's twin brother. *Id.*

62. See *id.* at 23.

63. *Id.* at 22. When the "[f]ather was also shown a photo of Baby Briana's anus . . . [he]

examiners found Brianna with fifteen human bite marks all over her little body, rib fractures, broken thigh bones, a cracked bone in her arm, extensive head trauma, skull fractures, bleeding in her brain and around the nerves of the eye, and injuries to her anus and vagina.<sup>64</sup>

Little Lauren Kavanaugh inhabited a closet.<sup>65</sup> Her mother forced her to urinate and defecate in her cell and sleep under a soaked blanket.<sup>66</sup> Periodically, her mother released her to be raped and burned with cigarettes.<sup>67</sup> Practicing a form of homemade waterboarding, her mother held Lauren's head under the faucet.<sup>68</sup> Lauren was not permitted to eat, but subsisted on crumbs that she somehow found and hid in her closet.<sup>69</sup> Although her mother gave her macaroni and cheese to chew on, Lauren was not allowed to swallow but forced to spit it out.<sup>70</sup> One day, Lauren's step-father revealed what he called "[his wife's] secret" to a visitor, who saw:

[A]rms . . . [that] appeared to be no bigger than an inch wide to me. She was naked. She had a towel or a blanket that was real small wrapped around her, the back of her rear and her legs. And she was kind of sitting with her legs up to her chest, but she wasn't holding her legs. She was giving herself leverage, and I could tell she had nothing covering her. And her privates were showing, and she had one eye that was partially open . . . And then her left eye was completely closed with yellowish and green goo coming out of her eyes. And her hair was all matted to one side.<sup>71</sup>

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became very upset and profane, saying to police that they were "not going to find any semen" and the uncle stated that "he could not remember starting a sex act with Baby Briana, but he remembered stopping because he realized what he was doing was wrong." *Id.* at 23.

64. *Id.* at 21. Although the mother told the attending physician and nurse in the emergency room that the injuries were due to Baby Briana falling out of bed, the forensic pathologist found that to be impossible and said that many of Baby Briana's injuries "were the result of her limbs being forced, twisted or yanked." *Id.*

65. *See Atkinson v. State*, 107 S.W.3d 856, 858 (Tex. Ct. App. 2003); *see also* Tara Dodrill, *Lauren Kavanaugh: Texas Woman Raped, Tortured, Starved, and Held Captive Inside Closet for Five Years*, INQUISITR (Jan 8, 2015), <http://www.inquisitr.com/1738254/lauren-kavanaugh-texas-woman-raped-tortured-starved-and-held-captive-inside-closet-for-five-years> (quoting Lauren Kavanaugh, who called the closet her "new home").

66. *See Atkinson*, 107 S.W.3d at 857 (noting the neighbor's testimony that the "closet smelled like feces and strong urine"); *see also* Dodrill, *supra* note 65 (explaining that Kavanaugh had to sleep in the closet under a urine-soaked blanket because she had to use the closet as a bathroom).

67. *See* Dodrill, *supra* note 65.

68. *See id.* (noting Kavanaugh's recollection of her mom pushing her head under the water while she was in the bath).

69. *See id.*

70. *See id.*

71. *Atkinson*, 107 S.W.3d at 857.

When the police rescued the eight-year-old that day, she weighed twenty-two pounds and was only thirty-six inches tall.<sup>72</sup> With organs shutting down, she required the kind of supervised feeding that had once been administered to holocaust survivors.<sup>73</sup>

Five-year-old Terrell Peterson, who shared a home with siblings, his aunt and his aunt's mother and boyfriend, arrived at the hospital in cardiac arrest and then died.<sup>74</sup> The medical examiner determined the "death to be a homicide from chronic and acute abuse, with recent and remote blunt impact injuries to the head, trunk, and extremities," and the treating physician said that these were the worst signs of child abuse that he had ever seen.<sup>75</sup> Little Terrell had "a recurring pattern of abrasions from the back of his head to the bottom of his feet, which indicated that a telephone cord, belt, and dog collar were used to beat him."<sup>76</sup> He exhibited bruises and scars all over his face "in varying hues of purple" along with "[l]igature marks [on] his wrists" and "[s]wollen lips and lacerations to the mouth."<sup>77</sup> It turned out that Terrell's aunt had shackled the boy to a banister every day and made him sleep on a pallet in the hallway.<sup>78</sup> She forced him to eat waste from the toilet and stand on a heating grate, which once scorched his foot so badly that he needed a skin graft to save it.<sup>79</sup>

There is also the three-year-old child of Marya Solis, whose babysitter was Francisco Rios-Covarrubias, the mother's boyfriend.<sup>80</sup> When a visitor detected a stink in the home and saw a child bound with duct tape, Rios-Covarrubias asked him if he'd like to have sex with the little prisoner.<sup>81</sup> The witness declined, but after having sex with Rios-

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72. *See id.* at 858.

73. *See id.* (noting that during the next week to ten days after her initial examination, Lauren was required to go through a "refeeding" process).

74. *See* Peterson v. State, 647 S.E.2d 592, 594 (Ga. 2007); *see also* *State of Neglect: A 5-Year-Old Boy Is Beaten To Death*, CBS (Jan. 3, 2000), <http://www.cbsnews.com/stories/2000/01/03/60II/main145616.shtml> ("When Terrell was brought to an Atlanta emergency room, doctors struggling to restart his heart noticed that he was covered with cuts, bruises, and cigarette burns.").

75. *Peterson*, 647 S.E.2d at 594.

76. *Id.*

77. *Id.*

78. *Id.*

79. *See id.* The aunt "treated Terrell this way because she believed that he was not actually her nephew, but had been fathered by someone other than her brother." *Id.* at 287-88.

80. *See* Phil Benson & Jonathan Lowe, *Mesa PD: Bound Child Found in Bag of Feces 'Shocks the Soul'*, CBS5AZ (Jan. 20, 2016, 7:53 AM), <http://www.cbs5az.com/story/30997789/mesa-pd-bound-child-found-in-bag-of-feces-shock-the-soul>; *see also* Brent Corrado, *Mother, Boyfriend Plead Not Guilty in Child Abuse Case that 'Shocks the Soul'*, FOX10 (Feb. 2, 2016, 2:51 PM), <http://www.fox10phoenix.com/news/arizona-news/83956392-story>.

81. *See* Benson & Lowe, *supra* note 80.

Covarrubias, he notified the police.<sup>82</sup> When the police arrived, they found a tiny being in a trash bag smeared with human feces.<sup>83</sup> When a pediatric forensic doctor examined her, he saw scratches on her back and knee, bruising on her face and body, a severe blistering rash on and near her vagina and buttocks, and a tear to the vagina and upper frenulum, which suggested penetration.<sup>84</sup> This little girl was literally voiceless—that is, not able to talk.<sup>85</sup>

## II. THERAPEUTIC JURISPRUDENCE FOR ABUSED CHILDREN

TJ,<sup>86</sup> an interdisciplinary approach to law, focuses on healing in lieu of combat and punishment. “Its founders, Professors Bruce Winick and David Wexler, trace its origin to mental health law.”<sup>87</sup> Early TJ pioneers criticized aspects of mental health law, which they felt were producing anti-therapeutic results for their intended beneficiaries, and sought to improve the justice system. In their book applying TJ to judging, Winick and Wexler defined it as follows:

The law consists of legal rules, legal procedures, and the 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>88</sup>

Problem-solving courts were among the first to use TJ to maximize healing and provide judges with new approaches to litigants appearing

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82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.* (according to the Probable Cause Statement, “a forensic interview was attempted with the vic[tim] but she was nonverbal” and “[i]t is unknown at this time if she is unable to speak or will not speak due to the emotional and physical trauma she has sustained”).

86. *See supra* note 3.

87. RONNER, *supra* note 3, at 17; *see* JUDGING IN A THERAPEUTIC KEY, *supra* note 3, at 7.

88. JUDGING IN A THERAPEUTIC KEY, *supra* note 3, at 7; *see also* James P. Cooney III, *Foreword*, in REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE xii (David B. Wexler, ed., Carolina Acad. Press 2008); RONNER, *supra* note 3, at 26 (“Therapeutic jurisprudence aims to burnish skills so that counselors can be better at taking measures to ensure that the legal process is as healing, validating, and self-determinative as possible . . . [and it] will change the image of lawyers and the way law is taught and practiced.”). James P. Cooney III states that “[h]andling, coaching, coaxing, and above all else counseling another human being is the essence of the practice of law,” that trial work particularly “is as much about psychology and therapy as it is briefs and motions,” and that “in the end, no matter the case, it is always about human beings and their emotions—and the cases will always be decided by other human beings and their emotions.” Cooney, *supra*.

before them.<sup>89</sup> These courts do not merely slap band-aids on wounds, but in conjunction with mental health experts, try to analyze individuals, diagnose conditions, and integrate rehabilitation into the process.<sup>90</sup> Now, TJ has its own well-developed body of scholarship; has migrated into diverse areas in both civil and criminal law, including appellate practice, estate planning, transactional legal skills; and has been employed to empower members of the gay, lesbian, bisexual and transgendered community.<sup>91</sup>

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89. See Gregory Baker & Jennifer Zawid, *The Birth of Therapeutic Courts Externship Program: Hard Labor but Worth the Effort*, in REHABILITATING LAWYERS, *supra* note 88, at 281 (“Problem solving courts, also called therapeutic courts, have become an important feature of the American court landscape.”); Tamar M. Meekins, “*Specialized Justice*”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, in REHABILITATING LAWYERS, *supra* note 88, at 47 (“The so-called specialty courts or ‘problem-solving courts’ are the embodiment of the therapeutic and restorative justice movements at work.”); Tamar M. Meekins, *You Can Teach Old Defenders New Tricks: Sentencing Lessons from Specialty Courts*, in REHABILITATING LAWYERS, *supra* note 88, at 144–45 (discussing courts using comprehensive plans that address specific issues in defendants’ lives). At present, it is estimated that thousands of problem solving courts exist today, ones that specialize in issues like drug addiction, domestic violence, sexual dysfunction, nuisance crimes and homelessness. See Meekins, *supra*, at 144. Meekins estimates that “[t]here are nearly 2,000 specialty courts now operating in the United States.” *Id.*

90. See Baker & Zawid, *supra* note 89, at 281–82 (“[The problem solving] dockets are used to address a variety of needs facing juveniles, adults, and families whose mental health or substance abuse problems contribute significantly to their legal problems.”); Martin Reising, *The Difficult Role of the Defense Lawyer in Post-Adjudication Drug Treatment Court: Accommodating Therapeutic Jurisprudence and Due Process*, in REHABILITATING LAWYERS, *supra* note 88, at 161 (“Today 50% to 60% of addicted offenders commit further crimes after their release from jail or prison” and “[t]he approach of locking them up and then dropping them back into society is a costly and inhumane failure.”). Certain individuals who enter problem-solving courts tend to have issues that have spun out of control. See Baker & Zawid, *supra*. They may suffer from addictions, like alcoholism or substance abuse, which trigger other issues, including criminal recidivism, child abuse, domestic violence, or homelessness. See *id.* They often lose a grip on their lives because they are either blind to or lack the skills and resources to confront issues. See *id.*

91. See AMY D. RONNER, *HOMOPHOBIA AND THE LAW* 20 (Carolina Acad. Press 2005) (noting that therapeutic jurisprudence has been applied to estate planning, counseling, and transactional work to help empower sexual minorities); Jennifer K. Robbenolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventative and Therapeutic Approach*, 41 ARIZ. L. REV. 417, 452 (1999) (using therapeutic jurisprudence in estate planning); Bruce J. Winick, *The Expanding Scope of Preventive Law*, 3 FLA. COASTAL L. J. 189, 195 (2002) (comparing preventative medicine to preventative law and showing how therapeutic jurisprudence can foster an increased psychological sensitivity in all aspects of lawyering and the attorney-client relationship); LAW IN A THERAPEUTIC KEY, *supra* note 3, at xvii (naming workers’ compensation laws, fault-based tort compensation schemes, and contracts law as areas that have been brought together by the conceptual framework of therapeutic jurisprudence).

### A. The “Three Vs” of TJ

Areas of the law which have embraced TJ share a core philosophy, one rooted in the psychology of procedural justice: specifically, an individual’s sense of voluntary participation in what is experienced as a fair procedure lies at the heart of all TJ scholarship and practical applications.<sup>92</sup>

TJ scholars agree that when individuals participate in a judicial proceeding, what influences them most is not the result, but their assessment of the fairness of the process itself.<sup>93</sup> Extending this insight to criminal sentencing, Professor Gould 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>94</sup> The problem is that such negativity can impede rehabilitation or healing and even lead to a “gradual erosion of obedience to the law.”<sup>95</sup> Criminologists have found that offenders, who feel that they have been silenced or ignored, sometimes respond with “defiance” and commit new offenses, even ones more severe.<sup>96</sup>

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92. See Kristin Henning, *Defining the Lawyer-Self: Using Therapeutic Jurisprudence to Define the Lawyer’s Role and Build Alliances that Aid the Child Client*, in REHABILITATING LAWYERS, *supra* note 88, at 329 (“[W]hen children believe the legal system has treated them with fairness, respect, and dignity, they are more inclined to accept responsibility for their conduct and engage in the process of reform.”); RONNER, *supra* note 3, at 20–24 (discussing the importance of voluntary participation in what is experienced as a fair proceeding and how it ministers to human needs, like healing and the promotion of individual well-being).

93. See Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 437 (1992) (“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.”).

94. 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. OF HUM. RTS. 835, 865 (1993); see also Amy D. Ronner, *Punishment Meted Out for Acquittals: An Antitherapeutic Jurisprudence*, 41 ARIZ. L. REV. 459, 473–80 (1999) (discussing how unfair procedures create “disrespect for the law, rage, helplessness, and disregard for human life”).

95. See Gould, *supra* note 94.

96. See David B. Wexler, *Therapeutic Jurisprudence Review: Therapeutic Jurisprudence and Readiness for Rehabilitation*, 8 FL. COASTAL L. REV. 111, 113–14 (“underscore[ing] the importance of procedural justice elements on an offender’s judgment as to whether the process was fair and on his or her acceptance of and compliance with even adverse judgments” and how there can be a “‘defiance’ effect of persistent, more frequent, or even more serious violations” when a process is perceived to be unfair). See generally Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. OF RES. IN CRIME & DELINQ. 445 (1993) (noting that the theory of “defiance” may explain instances where punishment increases crime).

In contrast, when individuals perceive the legal system as fair and emerge from it with their respect and dignity intact, the effect is therapeutic. Participants in such a process are more inclined to take charge of their lives, heal, and change.<sup>97</sup> According to Professor Michael King, “[p]eople see social institutions and people in authority with whom they interact as important in valuing their identity and status in the community” and when we “treat[] them with an ethic of care[,] [it] confirms their status as a valued member of society worthy of respect.”<sup>98</sup>

There are three core components of therapeutic justice, ones which Professor Bruce Winick and I have coined “the three Vs”: namely, voice, validation, and voluntary participation.<sup>99</sup> A therapeutic procedure commences with individuals having a real sense of “voice” or an opportunity to tell their story to a decision-maker.<sup>100</sup> A by-product of voice is validation, which occurs when participants feel that they have been genuinely listened to, heard, and taken seriously.<sup>101</sup> When litigants emerge from a proceeding with the dual blessings of voice and validation, they tend to be more at peace and optimistic about the future. Voice and validation thus co-foster something else that is essential—a sense of voluntary participation—which occurs when an individual views an experience as less or even non-coercive.<sup>102</sup>

It is apodictic that human beings thrive when they exercise volition and feel that they are making, or at least participating in, decisions that

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97. See Ronner & Winick, *supra* note 41, at 501–03 (discussing how proceedings that instill a greater respect for the law provide litigants with an incentive to improve their own lives and heal). See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) (discussing psychology in relation to how people are more interested in processes than outcomes); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (Yale Univ. Press 1990) (discussing people’s interactions with legal authorities and their view of the legitimacy of those interactions).

98. Michael S. King, *Therapeutic Jurisprudence, Criminal Law Practice and the Plea of Guilty*, in *REHABILITATING LAWYERS*, *supra* note 88, at 231.

99. See Ronner & Winick, *supra* note 41, at 500–01 (defining the all-important “three Vs”); see also Ronner, *supra* note 41, at 94–95 (explaining why the “three Vs” are crucial to the juvenile justice system”).

100. See Ronner & Winick, *supra* note 41, at 501; see also King, *supra* note 98 (“Procedural justice research emphasizes the importance litigants place on being able to tell their story to an attentive court or tribunal who is genuinely concerned about the litigant’s situation, treats the litigant with respect, is interested in hearing the litigant’s story and denominates that the story has been taken into account in the court or tribunal’s decision-making process.”).

101. RONNER, *supra* note 3, at 23; see also Ronner & Winick, *supra* note 41, at 500 (explaining the feeling that the story has been listened to, heard, and taken seriously); Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 *DENV. U. L. REV.* 1145, 1158 (1997) (elaborating on the direct correlation between voice and validation).

102. RONNER, *supra* note 3, at 23–24; see also Henning, *supra* note 92, at 330.

shape their lives.<sup>103</sup> According to the McArthur Network on Mental Health and the Law research, people can be made to feel non-coerced even in inherently coercive situations.<sup>104</sup> This happens when they see state actors or authorities as benevolent, listening, and respectful. In such circumstances, individuals tend to modify their destructive behavior, and victims heal more readily from trauma.<sup>105</sup> In therapeutic justice, attorneys hold the key because they are the ones who can foster the precious three Vs.<sup>106</sup>

Scholars know about TJ's diametric opposite: the divestiture of voice, validation, and voluntary participation is antitherapeutic and can equal torture. At this juncture, we might note that there exists a common thread in the scourging of Mary Ellen Wilson, Baby Brianna, Lauren Kavanaugh, Terrell Peterson, Marya Solis's child, and, as discussed below, in Dostoevsky's anguished fledglings. Embedded in these violent scenarios, there is overtly or covertly an element of sexual release on the part of the tormentors.<sup>107</sup> Also, whether it be by scissors, rapes, starvation, whips, bondage, cigarette burns, smeared excrement, or closet-gulags, abusers systematically render victims voiceless.<sup>108</sup> They either do it figuratively or literally by stuffing rags in their mouths.<sup>109</sup> In issuing a death-sentence or a

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103. RONNER, *supra* note 3, at 23–24 (discussing the importance that participants in legal procedures feel as non-coerced as possible); *see also* King, *supra* note 98 (“Self-determination is seen to be important for motivation and achievement. It can inspire a person to engage more fully in a course of conduct.”); Henning, *supra* note 92, at 330 (“Studies in the psychology of choice indicate that people who make choices for themselves function more effectively and have greater satisfaction.”); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1755–68 (1992) (analyzing the psychological value of choice).

104. *See* BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 149–54 (Carolina Acad. Press 2005) (discussing the psychological effects of coercion and voluntary choice); Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 47–50 (1999) (discussing the work by the MacArthur Network on Mental Health and the Law with respect to patient perceptions of coercion even in coercive situations, like civil commitment).

105. RONNER, *supra* note 3, at 23–24 (discussing the healing power of the “three V’s”); *see* King, *supra* note 98 (explaining that “[b]y taking a coercive or paternalistic approach . . . [the] risk [is that] of implying that those who are the subject of this approach are incompetent to make adequate decisions concerning their wellbeing” and that if they accept this message, it may “reinforce[] doubts [that] they have . . . [the] ability to lead a constructive . . . life”).

106. *See* Ronner, *supra* note 41, at 95 (noting that in the juvenile context as well, the attorney helps effectuate participatory interests); *see also* Ronner & Winick, *supra* note 41, at 502 (“On appeal, as in the trial itself, the lawyer typically functions as the instrument of the client’s voice.”).

107. *See, e.g.*, Lopez, 164 P.3d at 22–23 (noting that the father and uncle of Baby Brianna sexually assaulted her and caused an overwhelming amount of physical injuries and her death).

108. *See supra* notes 61–85 and accompanying text (discussing various cases of young children being gruesomely abused, both physically and sexually, by their own family members).

109. *See supra* notes 61–85 and accompanying text.

life sentence of relentless agony, they strip their victims of choices and nullify their humanity.<sup>110</sup> The end result is a husk-like condition, one that the psychologist Martin Seligman has labeled “learned helplessness.”<sup>111</sup>

In his study, Seligman defines the elements of learned helplessness: “[f]irst, an environment in which some important outcome is beyond control; second, the response of giving up; and third, the accompanying cognition: the expectation that no voluntary action can control the outcome.”<sup>112</sup> Seligman reports on his experiments with animals that were subjected to pain they could neither control nor avoid. Unlike those in the control group who had a means of egress, the trapped, helpless subjects eventually stopped eating and became limp.<sup>113</sup> Seligman analogizes “learned helplessness” in animals to what can befall human beings: when institutions or individuals duplicate the kind of animal laboratory that produces learned helplessness, they too promote “the expectation that no voluntary action can control the outcome” and that all efforts are useless.<sup>114</sup> Mary Ellen, with her demeanor of despair, Baby Brianna, lifeless on the floor, Lauren Kavanaugh, with shriveled legs pressed to the chest, Terrell Peterson, drained and bruised, Marya Solis’s bound and gagged child, and Dostoevsky’s whimpering callow prey all become apoplectic, like wasted specimens in Seligman’s learned-helplessness laboratory.<sup>115</sup>

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110. See *supra* notes 61–85 and accompanying text.

111. See MARTIN E.P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH* xvii (W.H. Freeman & Co. 1992).

112. *Id.*

113. See *id.* at 41–44 (describing how uncontrollable shock produced more anxiety in rats and resulted in the “breakdown of a well-trained appetitive discrimination”). “[H]elplessness is a disaster for organisms capable of learning that they are helpless. *Id.* at 44. Three types of disruption are caused by uncontrollability in the laboratory: the motivation to respond is sapped, the ability to perceive success is undermined, and emotionality is heightened.” *Id.*

114. See *id.* at xvii, 31 (discussing how helplessness “is a general characteristic of several species, including man”); see also Gould, *supra* note 94, at 873 (“The amotivational system takes over when a person perceives ‘that there is no relationship between behaviors and rewards [or] outcomes. Perceived competence, self-determination and self-esteem tend to be extremely low. People who are amotivational feel helpless, incompetent and out-of-control.’” (quoting Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications of Mental Health Law*, 1 PSYCHOL. PUB. POL’Y & L. 6, 20 (1995))); Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 61 (2000) (“Some victims of domestic or other types of intimate violence develop a form of learned helplessness, a syndrome that limits effective performance in a variety of areas, inhibits motivation, and produces feelings of helplessness, hopelessness, and emotional reactions that mirror clinical depression.”).

115. See *supra* notes 61–85 and accompanying text (discussing the cases of Mary Ellen, Baby Brianna, Lauren Kavanaugh, Marya Solis’s child, and Terrell Peterson); see also RONNER, *supra* note 4, at 273 (paralleling Seligman’s “learned helplessness” with prison conditions and their desiccating effect on Goryanchikov and others in Dostoevsky’s *Notes from the House of the Dead*).

## B. Juvenile TJ

Judge Cindy S. Lederman, an expert in mental health interventions in juvenile court, understands learned-helplessness and its therapeutic antidotes. She and her co-authors explain that “[g]uided by the principle of *therapeutic jurisprudence*, the juvenile court has thus emerged as an institution that can offer children and parents support, guidance, and motivation to begin healing the family”<sup>116</sup> and they elaborate:

*Therapeutic jurisprudence* takes the law out of a legal vacuum and reminds the courts that the law should take into account the consequences for the physical and mental health of the individuals and institutions it affects . . . . In juvenile court, a true problem-solving court since its invention in 1899 in Chicago, success is determined by the ability to modify human behavior. The court is the catalyst and overseer of the healing process, and the judge is the conductor of the process in the courtroom and sometimes in the community as well by leading cross-system collaboration.<sup>117</sup>

Not surprisingly, these child-protectors, knowing that real change should include caretakers, concede that the task of “modifying maladaptive behavior that may have become the norm in these families, passed on from generation to generation” is indeed formidable.<sup>118</sup>

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116. LYNNE F. KATZ ET AL., CHILD-CENTERED PRACTICES FOR THE COURTROOM & COMMUNITY: A GUIDE TO WORKING EFFECTIVELY WITH YOUNG CHILDREN & THEIR FAMILIES IN THE CHILD WELFARE SYSTEM xxv (Paul H. Brookes Publ’g Co. 2011) [hereinafter CHILD-CENTERED PRACTICES].

117. *Id.* at 92 (citing Mary Donnelly, *Best Interests, Patient Participation and the Mental Capacity Act of 2005*, 17 MED. L. REV. 1, 13 (2009)); see also Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach*, 5 PSYCHOL. PUB. POL’Y & L. 951, 955 (1999) (“With its therapeutic goal of permanency and preventive law structure and processes, child welfare law should be an ideal legal field in which to see the operation of TJ and preventive law principles.”); Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 2 (1999) (“If we are to create a brighter future for children in foster care, it is essential that we listen to them and give weight to their thoughts and ideas.”); Andrea Khoury, *The True Voice of the Child: The Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, 36 NOVA L. REV. 313, 314 (2012) (explaining that “[a]buse and neglect court proceedings have a significant impact on the life of a child,” that “children deserve to have their opinions heard, valued, and considered,” and that “children’s attorneys are the voices for the children”); Michael S. King, *Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial*, 32 CRIM. L. J. 303, 314 (2008) (explaining that children have been traumatized by the court experience and have lost faith in the justice system because of the denial of voice, validation and respect in abuse cases).

118. See Lederman & Osofsky, *supra* note 49, at 163 (explaining that “[m]any of the children exhibit signs of traumatic stress, including withdrawn behavior, fearfulness, aggression, and sadness” and that “[o]ften the parents are overwhelmed, traumatized, substance abusing, and victims themselves . . .”).

Judge Lederman, whose life's passion is saving children, shares abrading reality. In Miami, Florida, where she presides, each dependency juvenile judge manages over 1,000 cases per year, which amounts to about 1,700 children annually.<sup>119</sup> She and her co-author describe work where “[e]ach week, more than 100 families appear before each dependency judge, creating an apparent sea of chaos, despair, and uncontrolled emotions, ranging from anger, confusion, and desperation, to hope” and where “it is not unknown for tears to be shed from the bench, from the lawyers’ lecterns, and from the courtroom gallery.”<sup>120</sup> Essentially what Lederman confronts almost daily are not just today’s Mary Ellen, but also “dysfunctional families, emotional impoverishment, and every conceivable form of deprivation a child can endure.”<sup>121</sup>

Those who frequent juvenile courts tend to be incarnate of Dostoevsky’s recurrent theme of the “accidental family,” which, as discussed below, spawns “disorder” and “fragmentation.”<sup>122</sup> Tragically, Judge Lederman and her co-authors have noticed that with the “thousands of adults and children who pass through the courts, it is rare to witness an expression of caring, love, or connection from a parent to a child,” and the “courtroom is rarely the scene of a parental caress, a gesture of concern, or an expression of maternal or paternal pride.”<sup>123</sup>

Judges who embrace TJ partner with welfare professionals, community providers, and clinicians to create programs, like the Nurturing Parenting Initiative or the Child-Parent Psychotherapy, which holistically treat broken families.<sup>124</sup> These and other affiliates, which aspire to teach new skills and modify destructive behaviors, marshal TJ elements: they encourage voices, validate individuals through respect and empathy, and create a sense of voluntary participation in a Janus-like<sup>125</sup> process that simultaneously looks backwards to passed-on behaviors and forwards to positive new behaviors.<sup>126</sup> Child-Parent Psychotherapy, similarly focusing

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119. *See id.*; *see also* Chill, *supra* note 13, at 540 (“On an average day, police officers and child welfare caseworkers throughout the United States remove more than 700 children from the custody of their parents to protect them from alleged abuse or neglect.”).

120. Lederman & Osofsky, *supra* note 49, at 163.

121. *See id.*

122. *See* A WRITER’S DIARY 2, *supra* note 2, at 1041 (explaining what the accidental nature of today’s families are).

123. *See* Lederman & Osofsky, *supra* note 49, at 163.

124. *See infra* notes 125–29 and accompanying text (discussing Child-Parent Psychotherapy and the Nursing Parenting Initiative).

125. *Januslike*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Januslike> (last visited Apr. 12, 2017) (defining *januslike* as “looking or acting in opposite or contrasting ways”).

126. *See* CHILD-CENTERED PRACTICES, *supra* note 116, at 18–19 (explaining how the far-

on families, tries to unite child and parent to give abused and neglected youth a chance to regain trust and cultivate behaviors that trigger positive attention.<sup>127</sup> It can also incorporate a technique, “speaking for baby,” which helps sensitize caretakers to infant feelings:

Many parents do not understand how important it is to talk to or smile at their infant. So the clinician can talk for the infant, saying, ‘I love it when you talk to me and sing to me, Mommy’ or ‘When you hold me and rock me, I feel much better.’ Speaking for the infant can be used as an indirect way to educate the parent . . . [and] can dramatically change the parent’s understanding of the child and of the meaning of behaviors and emotions.<sup>128</sup>

An intervention, like “speaking for baby,” can grant the “three Vs” even to a nonverbal infant.<sup>129</sup>

### III. DOSTOEVSKY’S PROPHETIC THERAPEUTIC JUVENILE JUSTICE

Dostoevsky wrote *Demons*, *Crime and Punishment*, *The Brothers Karamazov*, and *A Writer’s Diary* in the wake of the Russian legal reforms in 1864.<sup>130</sup> The changes, which were initiated by Alexander II’s

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reaching goals of the Nurturing Parenting Program, which aims to enable parents to replace abuse and neglectful parenting with alternative nurturing skills, are used to curtail recidivism in families receiving social services, reduce the rate of multi-parent teenage pregnancies, reduce the rate of juvenile delinquency and alcohol abuse, and halt the intergenerational cycle of child abuse).

127. See *id.* at 41–44 (explaining how various intervention modalities, like care management, playtime, understanding child development, play therapy, and psychoeducation are incorporated into this parent-child dyad).

128. *Id.* at 42.

129. Compare Bernard P. Perlmutter, *George’s Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 594 (2005) (describing how a law school clinic can serve as a client’s therapeutic agent and empower the child with voice, validation, and voluntary participation); and Carolyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children’s Law Clinic*, 17 ST. THOMAS L. REV. 623, 624–25 (2005) (explaining how the law students in the clinic benefitted tremendously from the teachings of TJ); with CHILD-CENTERED PRACTICES, *supra* note 116, at 41–42 (describing the “speaking for baby” technique and other TJ strategies used for child-parent psychotherapy). Like the juvenile courts, acting in concert with the community in an interdisciplinary effort, law school child-advocacy clinics have welcomed TJ into their programs. See Salisbury, *supra*.

130. See GARY ROSENSHIELD, WESTERN LAW, RUSSIAN JUSTICE: DOSTOEVSKY, THE JURY TRIAL, AND THE LAW 20 (Univ. of Wis. Press 2005) (“As a result of the 1864 reforms, jury trials were opened to the public (*glasnost*). The judicial system attained autonomy.”); LOUISE MCREYNOLDS, MURDER MOST RUSSIAN: TRUE CRIME AND PUNISHMENT IN LATE IMPERIAL RUSSIA 29–32 (Cornell Univ. Press 2013) (discussing the reforms in the Russian Legal system); HARRIET MURAV, RUSSIA’S LEGAL FICTIONS 55 (Univ. of Mich. Press 1998) (“The legal reform . . . initiated by the government of Alexander II transformed the trial from a secret, written proceeding based on the ‘inquisitorial’ principle into an open, public, oral proceeding organized to a far greater degree by the adversarial principle.”); RONNER, *supra* note 4, at 44–55 (discussing

government, installed trial by jury in many cases, the adversarial process, a professional bar, and justices of the peace. They also replaced secret, written proceedings with open, oral court sessions, which the public could attend and follow in newspaper accounts. These developments had a profound impact not just on Dostoevsky's fiction, but also on the *Diary*, which is a mélange of narrative, journalism, autobiography, and advocacy.<sup>131</sup> Ivan's depiction of child abuse in *The Brothers Karamazov* and the coverage of the Stanislav Kronenberg case in the *Diary* show how Dostoevsky anticipated therapeutic jurisprudence, along with its innovative approach to maltreated children.

As Professor Robin Feuer Miller points out, “[c]hildren and the suffering and death of children loom large throughout Dostoevsky's work and life.”<sup>132</sup> While it is next-to impossible to extract from Dostoevsky's life what precipitated his nagging concerns with children, it is conceivable that an early trauma played its part. As a youth, Dostoevsky lived in the outskirts of Moscow where his father worked as a doctor at the Mariinsky Hospital for the Poor.<sup>133</sup> One day, Dostoevsky's playmate, the lovely, nine-year-old daughter of a coachman or cook, bled to death after a drunk raped her. Dostoevsky said: “All my life this memory has haunted me as the most frightful crime, the most terrible sin, for which there is not, and cannot be, any forgiveness . . .”<sup>134</sup> As an adult, the death of his two young children, Sonya and Alexei, devastated Dostoevsky and those losses might have also strengthened his lifelong conviction that childhood is to be

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the Russian legal reforms). “Juries became the most representative of all Russian institutions, with jurors recruited from all sectors of the population.” ROSENSHIELD, *supra*. “An independent judiciary became well-established . . . and more lawyers became trained and rose to distinction.” *Id.*

131. See MURAV, *supra* note 130, at 125–28 (discussing how in the *Diary*, Dostoevsky “is fascinated by the new jury trials and the new institution of the bar”); RONNER, *supra* note 4, at 44–55 (discussing how the reforms affected Dostoevsky's writings).

132. Miller, *supra* note 13, at 139; see WILLIAM WOODIN ROWE, DOSTOEVSKY: CHILD AND MAN IN HIS WORKS viii (NYU Press 1968) (“There is nearly factitious pathos, if not bathos, about many of Dostoevsky's children. They suffer.”).

133. See JOSEPH FRANK, DOSTOEVSKY: A WRITER IN HIS TIME 6 (Mary Petrusiewicz ed., Princeton Univ. Press 2010) (explaining how Dostoevsky grew up in the outskirts of Moscow because of his father's occupation as a doctor).

134. FRANK, *supra* note 133, at 449–50 (telling the story of a crime that occurred to someone Dostoevsky knew by describing the victim as a little girl who was a “delicate, graceful child of nine . . . [a]nd some disgraceful wretch violated the girl when drunk and she died, pouring out blood”); see Miller, *supra* note 13, at 139 (discussing the incident in Dostoevsky's childhood and explaining how “Dostoevsky's biography inevitably raises unanswerable questions”); RONNER, *supra* note 4, at 177–80 (explaining how this childhood incident affected Ivan's theodicy crisis in *The Brothers Karamazov*).

treasured and protected at all costs.<sup>135</sup> Although sifting through biographical sources begets little more than guesswork, what is irrefutable is that children, annexed to “accidental” families, abound in Dostoevsky’s fiction and journalistic writings.<sup>136</sup>

#### A. Polyphonic TJ: Voiceless Voices in *The Brothers Karamazov*

Childhood suffering is very concentrated in *The Brothers Karamazov* (1879–80), especially in the Chapter, “Rebellion,” where Ivan recounts for Alyosha inexplicable acts of mutilation, lashings, and torture.<sup>137</sup> If we borrow from Bakhtin’s lexicon, we might say that *Karamazov* readers get to hear “polyphony” work its magic as Ivan, with his voice as baton,

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135. See Miller, *supra* note 13, at 139 (“[T]he deaths of two of his children – the infant Sonya (1868) and the toddler Alexei (1878) – hover behind *The Idiot* (1868) and *The Brothers Karamazov* (1879–1880), suffusing them with wrenching emotion and informing the complex moral and religious questions these novels pose and attempt to answer.”); see also Letter from Fyodor Dostoevsky to Pavel Isaev (June 21, 1868), in 3 COMPLETE LETTERS, 1868–1871, 78, 80 (David A. Lowe ed. & trans., Ardis Publishers 1990) (noting with respect to Sonya’s death, Dostoevsky wrote a letter to Pavel Isaev (Pasha), in which he said, “God has struck me a blow . . . I’m so depressed and sick at heart that it would be better to die”); Letter from Fyodor Dostoevsky to Pavel Isaev, (May 16, 1878), in 5 COMPLETE LETTERS, 1878–1881, 43, 43 (David A. Lowe, ed. & trans., Ardis Publishers 1991) (noting another time when Dostoevsky was affected by the death of his fourth child, Alyosha, who perished before reaching the age of three, in which Dostoevsky wrote in a letter to Pasha, “[o]ur Alyosha died yesterday, from a sudden fit of epilepsy, which he had never had before”).

136. See, e.g., FYODOR DOSTOEVSKY, POOR FOLK AND OTHER STORIES (Penguin Books, 3d ed. 1989) (exposing the angst of struggling young females); FYODOR DOSTOEVSKY, NETOCHKA NEZVANOVA (Penguin Books 1985) (exposing the angst of struggling young females); FYODOR DOSTOEVSKY, THE INSULTED AND INJURED (Boris Jakim trans., 2011) (showing blighted childhoods, along with fractured families and the consumptive unforgiving Nellie); FYODOR DOSTOEVSKY, CRIME AND PUNISHMENT (Oliver Ready ed. & trans., Penguin Books 2015) (showing Svidrigailov, who admits to a penchant for pedophilia and has a feverish dream of the child voluptuary); FYODOR DOSTOEVSKY, THE IDIOT (David McDuff ed. & trans., Penguin Books 2004) (describing Nastasya Filippovna, who was sexually exploited as a young girl child, and showing her become a deeply troubled adult); FYODOR DOSTOEVSKY, DEMONS (Richard Pevear & Larissa Volokhonsky ed. & trans., 1994) (offering the haunting image of little Matryosha, raving to her mother, “I killed God!” in the once censored chapter containing Stavrogin’s printed confession of seducing a ten-year-old); FYODOR DOSTOEVSKY, THE ADOLESCENT (Richard Pevear & Larissa Volokhonsky trans., 2003) (describing young Arkady who endures paternal abandonment, abuse by his headmaster, Touchard, and episodic bullying by schoolmates).

137. See DOSTOEVSKY, *supra* note 1, at 542–43 (noting other depictions of childhood suffering in *The Brothers Karamazov* such as the physical and emotional pains of sickly Ilyusha Snegiryov and Kolya Krasotkin’s guilt for bullying his former protégé); see also Miller, *supra* note 13, at 45 (“The frail, angelic Ilyusha, though perhaps briefly guilty of cruelty to an animal and of retaliatory violence, and the proud, bullying Kolya offer the clearest answers to the question Dostoevsky poses with Ivan Karamazov’s litany of the unjustified sufferings of children.”).

orchestrates that “*plurality of independent and unmerged voices and consciousnesses*.”<sup>138</sup> But here, Ivan’s rendition of tortured children transcends that “single authorial consciousness” and injects voicelessness into the “polyphony of fully valid voices.”<sup>139</sup> Through the fugue, Dostoevsky does not merely illuminate the sorted libidinous impulses behind child abuse or portray the all-too commonplace perpetrator, he also applies the “three Vs” of TJ to empower vulnerable victims with “consciousnesses” and “equal rights.”<sup>140</sup>

Before embarking on *The Brothers Karamazov*, Dostoevsky amassed facts about children, which his 1878 letter to teacher and writer, Vladimir Vasilievich Mikhaylov, conveys:

I have conceived and will soon begin a long novel in which, among other people, children will participate a lot, and specifically young children, from 7 to 15 years of age approximately. Lots of children will be portrayed. I am studying them and have studied them my whole life, and I love them very much, and I have some myself. But the observations of a person such as yourself will be valuable for me (I realize this). And so, write me what you yourself know *about children*.<sup>141</sup>

About a year later, when Dostoevsky sent his installment of the novel for the upcoming issue of *The Russian Herald* to his editor Nikolay Lyubimov, he explains that Ivan “takes up a theme that *I think* irrefutable—the senselessness of the suffering of children—and derives from it the absurdity of all historical reality.”<sup>142</sup> Dostoevsky, moreover, says that he took each and every grisly detail from an actual case:

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138. See BAKHTIN, *supra* note 4, at 6 (describing the chief characteristics of Dostoevsky’s novels).

139. See *id.* at 6–7.

140. See *id.* at 6 (speaking of that “*plurality of consciousness, with equal rights and each with its own world*”); see also ROBIN FEUER MILLER, DOSTOEVSKY AND THE IDIOT 9 (Harvard Univ. Press 1981) (“Though the voices in a polyphonic composition may be heard separately, they are organically connected. They are composed and carefully orchestrated by a single consciousness that is carrying out a highly structured plan.”).

141. Letter from Fyodor Dostoevsky to Vladimir Mikhaylov (Mar. 16, 1878), in 5 COMPLETE LETTERS, *supra* note 135, at 18; see DOSTOEVSKY, *supra* note 1, at 239 (noting how in *The Brothers Karamazov*, Ivan tells Alyosha, “I’m an amateur and collector of certain little facts; I copy them down from newspapers and stories, from wherever, and save them—would you believe it?—certain kinds of little anecdotes”); see also DOSTOEVSKY, THE NOTEBOOKS FOR THE BROTHERS KARAMAZOV 6–7 (Edward Wasiolek ed. & trans., Univ. of Chi. Press 1971) [hereinafter NOTEBOOK] (“Most of all [Dostoevsky] wrote about children. . . he watches them on the streets, reads about them, pities them, and imagines their lives.”).

142. Letter from Fyodor Dostoevsky to Nikolay Lyubimov (May 10, 1879), in 5 COMPLETE LETTERS, *supra* note 135, at 83.

All the stories about the children occurred, took place, were printed in the newspapers, and I can show where. Nothing has been invented by me. The general who hunted down the child with dogs, and the whole fact is a real occurrence, was published this winter, I think, in *The Archive* and reprinted in many newspapers.<sup>143</sup>

Dostoevsky adds that the manuscript contains not a “single *indecent* word” and that even the off-color “*excrement*” comes right from the “current criminal proceeding,” which “all the newspapers” published.<sup>144</sup> He beseeches Nikolay Alexeevich not to muffle victims’ voices nor “soften” reality in any way.<sup>145</sup>

As Ivan articulates his theodicy, assailing Christianity and faith in a God who lets innocent children suffer, there emerges a twofold message, one which is conceivably more rattling than the blow-by-blow renditions of the voiceless, invalidated, and involuntary victims: Ivan discloses the intertwined truths that child abusers derive an orgasmic release from their infliction of pain and that they do not patently present themselves as freakish Gorgons, but instead pass themselves off as everyday folk or even as nobility. As a gestalt, the “Rebellion” chapter, with Ivan’s epiphanic spurts of God-doubt, mingled with “a plurality” of both “independent” voices and non-voices, becomes a potent indictment of the nineteenth-century anti-therapeutic maltreatment of children.<sup>146</sup> Incidentally, Ivan’s dossier of real cases, which are virtual clones of those on today’s juvenile docket, transcends conceivable partitions between time and place.

Ivan’s litany includes the story of a retired general who, after stripping a child naked and ordering a pack of wolfhounds to “hunt him down before his mother’s eyes,” has his dogs “rip the child to shreds.” Here and sporadically throughout the litany, Ivan jolts back and forth from the consciousness of the victim to that of the abuser, thereby exposing the libidinous rapture of the tormentors.<sup>147</sup> In a scene reminiscent of Baby

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143. *Id.*

144. *Id.* at 84.

145. *See id.*

146. *See* BAHKTIN, *supra* note 4, at 6–7.

147. *See* ROBERT L. BELKNAP, PLOTS 136 (Columbia Univ. Press 2016); Nigel King, Trevor Butt & Lorraine Green, *Spanking and the Corporal Punishment of Children: The Sexual Story*, 11 INT’L J. OF CHILD. RTS. 199, 205 (2003); *see also* Philip Q. Roche, M.D., *Sexual Deviations*, 14 FED. PROB. 3, 6 (1950); *Middleburg Hts. v. Bunt*, 2010 WL 4521288 (Ohio Ct. App. Nov. 10, 2010). Robert L. Belknap refers to N.K. Mikhailovsky’s book about Dostoevsky’s “*Cruel Talent*” and the theory that “[c]ruelty and torture always preoccupied Dostoevsky, and did so specifically from the aspect of their attractiveness, from the aspect of the sensual pleasure contained in torturing.” BELKNAP, *supra*. Belknap points out, however, while “Dostoevsky could be abusive and vicious when he lost his temper . . . his documented behavior outside of his writing offers little support for [Mikhailovsky’s] theory.” *Id.* at 137. Rather than attributing

Brianna being redundantly hurled to a ceiling, Ivan describes the Turks, who “start[] with cutting [babies] out of their mothers’ wombs with a dagger, and end[] with tossing nursing infants up in the air and catching them on their bayonets before their mothers’ eyes.”<sup>148</sup> Right after this, Ivan ejaculates: the “Turks . . . have . . . taken a delight in torturing children.”<sup>149</sup> Similarly, after describing the brutal flogging of a seven-year-old with a birch, “covered with little twigs” to make it “smart more,” Ivan bares the ensuing sensuous exhilaration: “I know for certain that there are floggers who get more excited with every stroke, to the point of sensuality, literal sensuality, more and more, progressively . . . they for five minutes, they flog for ten minutes—longer, harder, faster, sharper.”<sup>150</sup> At another point, Ivan distills the veritable aphrodisiac down to the “defenselessness of these creatures that tempts the torturers, the angelic trustfulness of the child, who has nowhere to turn and no one to turn to—that is what enflames the vile blood of the torturer.”<sup>151</sup>

Shifting from the sadist to the “angelic trustful” victim, Ivan evokes the voiceless voice of a “learned-helpless” seven-year-old: “The child is crying, the child finally cannot cry, she has no breath left: ‘Papa, papa, dear papa!’”<sup>152</sup> He also tells of a couple (perhaps kindred spirits of Mary Ellen’s lacerating “mamma”) who “beat [their five-year old-daughter], flogged her, kicked her, not knowing why themselves, until her whole body was nothing but bruises.”<sup>153</sup> Like Lauren Kavenaugh, the abusers’ “little secret,” or young Terrell Peterson, who is forced to eat excrement, or the child of Marya Solis, who is drabbled with waste, the parents in Ivan’s sketch “attained the height of finesse” by forcing their daughter to eat excrement

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sadistic sensual delight to the author himself, it is more persuasive to attribute it to Dostoevsky’s perception that torturers can and do experience sexual arousal when they inflict pain. *See id.* Contemporary experts in behavioral and social sciences have realized this and have pointed it out; from “a constructionist position . . . the availability of a sexual meaning in spanking, both to the spanker and spankee, strengthens the case against the use of corporal punishment.” King, Butt & Green, *supra*. “Children may or may not pick up on the potential sexual meanings of corporal punishment, whether or not the perpetrator has any sexual intentions or is gaining sexual gratification from administering a spanking or beating. . . .” *Id.* at 210. “The sexual sadist has great need to dominate others but cannot do so by ordinary socially adaptive means, nor can he handle his aggression once it is set in motion by sexual excitement.” Roche, *supra*. Courts too have recognized the sexual component of child abuse: “[T]he jury could have easily concluded beyond a reasonable doubt that Bunt’s intent in spanking [the child] was sexual gratification, not discipline.” *Bunt*, 2010 WL 4521288, at \*5.

148. BROTHERS KARAMAZOV, *supra* note 1, at 238.

149. *Id.*

150. *Id.* at 241.

151. *Id.*

152. *Id.*

153. *Id.* at 242.

and smearing her face with it.<sup>154</sup> When the parents “lock[] . . . [their child] all night in the outhouse” in “the freezing cold” and leave her “moaning all night in that vile place,” Ivan, implicitly practicing TJ, “speaks for baby” to give her her own “*independent and unmerged*” voice<sup>155</sup>:

Can you understand that a small creature, who cannot even comprehend what is being done to her, in a vile place, in the dark and the cold, beats herself on her strained little chest with her tiny fist and weeps with her anguished, gentle, meek tears for ‘dear God’ to protect her—can you understand . . . ?<sup>156</sup>

Ivan essentially yokes these small “creature[s]” to his Nekrasov allusion, the poem about the horse, burdened “with too heavy a load” and “stuck in the mud,” and the peasant who flogs her repeatedly on her “meek” eyes “with a knout” until she is left trembling “all over.”<sup>157</sup> Ivan’s tot, beating

154. Compare *supra* notes 65–73 and accompanying text (discussing Lauren Kavenaugh), and *supra* notes 74–79 and accompanying text (discussing Terrell Peterson), and *supra* notes 80–85 and accompanying text (discussing the child of Marya Solis), with DOSTOEVSKY, *supra* note 1, at 242 (discussing another example of abusive parents).

155. See BROTHERS KARAMAZOV, *supra* note 1, at 242; CHILD-CENTERED PRACTICES, *supra* note 116, at 42 (explaining that “speaking for baby” is a technique whereby a clinician speaks for an infant to help the parents understand how the infant is feeling); BAKHTIN, *supra* note 4, at 6 (noting that a defining characteristic of Dostoevsky’s novels is “[a] plurality of independent and unmerged voices”). But see Laurie Langbauer, *Ethics and Theory: Suffering Children in Dickens, Dostoevsky, and Le Guin*, 75 No. 1 ELH, 89, 89 (2008) (“Replaying such scenes [of child-torture] is one way . . . writers try to jar a world apathetic to such horror, but [it is] . . . even more damning that some are actually not indifferent to but fascinated by children’s agony. . . . By displaying these images . . . these writers are caught in an ethical impossibility, repeating what they critique in order to critique it.”).

156. BROTHERS KARAMAZOV, *supra* note 1, at 242; see also NOTEBOOK, *supra* note 141, at 61 (“You know how children cry when they are deeply hurt—in gushes.”). “If you were creating the world, would you have built it on the single tear of a child.” NOTEBOOK, *supra* note 141, at 73. “If it were absolutely necessary to torture to death only one tiny creature . . . that would beat his breasts with his little fists and cry out for God. . . .” *Id.* at 74.

157. BROTHERS KARAMAZOV, *supra* note 1, at 240–41; see also CRIME AND PUNISHMENT, *supra* note 136; LOUIS BREGER, DOSTOEVSKY: THE AUTHOR AS PSYCHOANALYST 31–32 (NYU Press 1989); RONNER, *supra* note 3, at 116; Amy D. Ronner, *The Four Raskolnikovs and the Confessional Dream*, DOSTOEVSKY.ORG (Aug. 30, 2016), <https://dostoevsky.org/the-four-raskolnikovs/> (noting that Ivan refers to Nekrasov’s poem “Till Twilight”). In *Crime and Punishment*, Raskolnikov experiences his dream of the suffering horse, which is quite similar to what Ivan mentions in *The Brothers Karamazov*. See CRIME AND PUNISHMENT, *supra*, at 51–55. In *Crime and Punishment*, the narrator explains, “[s]uch dreams, morbid dreams, always live long in the memory and have a powerful effect on disturbed and already excited organisms.” *Id.* at 51. In the dream, Mikolka savagely beats the horse and when spectators voice objections, Mikolka yells, “She’s my property! I’ll do what like.” *Id.* at 54. The mare, Mikolka’s “property,” senselessly bludgeoned to death on the spine with a crowbar, “sighs heavily and dies.” *Id.* at 55. “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.” BREGER, *supra*. “While the dream reflects the atrocity that Raskolnikov is about to commit, it also prefigures his ultimate regeneration and prescribes what he needs to get

her chest with her tiny fist and weeping “meek” tears akin to that “defenseless” nag, speaks in the idiom of kinesics from a context resembling Seligman’s “learned helpless” laboratory.<sup>158</sup>

In Ivan’s diatribe, what surfaces is not just predictive of core tenets of TJ or a disclosure of the lasciviousness of torture, but it also haunts us as commentary on the omnipresent, all too-ordinary perpetrators. According to Ivan, child torturers can be just average folk, who are not and do not appear to be alien monsters. Rather, they camouflage quite nicely and at times, even seem cultured, groomed, and classy. By way of example, that retired general, who sicced his dogs on the little boy, is “wealthy,” with “high connections,” and ostensibly a gentleman.<sup>159</sup> Ivan introduces the serial floggers as “an intelligent, educated gentleman and his lady,” and others as “most honorable and official people, educated and well-bred.”<sup>160</sup> He maintains that “[t]hese same torturers look upon all other examples of humankind even mildly and benevolently, being educated and humane Europeans, but they have a great love of torturing children, they even love children in that sense.”<sup>161</sup> In an escalating crescendo, Ivan postulates that “this peculiar quality exists in much of mankind—this love of torturing children, but only children,” and that “[t]here is, of course, a beast hidden in every man, a beast of rage, a beast of sensual inflammability at the cries of the tormented victim, an unrestrained beast, let off the chain, a beast of diseases acquired in debauchery—gout, rotten liver, and so on.”<sup>162</sup> As I have suggested elsewhere, his misanthropic coda, which condemns the entire human race, belies Ivan’s deep-seated fear “that that ‘beast of sensual inflammability’ thrashes about within himself as well.”<sup>163</sup>

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there.” RONNER, *supra*.

158. BROTHERS KARAMAZOV, *supra* note 1, at 241; *see also* SELIGMAN, *supra* note 111.

159. *See* BROTHERS KARAMAZOV, *supra* note 1, at 242.

160. *Id.* at 241.

161. *Id.*

162. *Id.* at 241–42.

163. *Id.* at 242; *see also* RONNER, *supra* note 4, at 179 (“Ivan’s outburst, not unlike what happens periodically with Mitya, rises from the suspicion that that ‘beast of sensual inflammability’ thrashes about within himself as well.”); *see also* VICTOR TERRAS, A KARAMAZOV COMPANION 52 (Univ. of Wis. Press 2002) (“On the psychological level, Ivan will readily believe that his brother Dmitry is a scoundrel and murderer—because deep inside he knows that he himself is.”); Deborah A. Martinsen, *Ingratitude and the Underground*, 17 J. OF THE INT’L DOSTOEVSKY SOCIETY 7, 20 (2013) (“The underground man sees humans as ungrateful in part because he projects his self-image onto others.”).

## B. Poly-Personae TJ of *A Writers Diary*

Dostoevsky knew that the novelistic form, even one imbued with what Bakhtin denominated “polyphony,” had limitations.<sup>164</sup> Dostoevsky thus created a new genre, one we might call “poly-personae,” which is a narrative-journalistic-autobiographical-advocating conglomerate, and it is here, in his *Writer’s Diary* that Dostoevsky reinvents himself as the TJ prolocutor of juvenile justice. In fact, Ivan, cognizant of his claustrophobic existence on fiction’s pages, commends the *Diary’s* more expansive possibilities.

In his story of the father who mercilessly flogs his seven-year-old, Ivan tells Alyosha that “through some devilishly improper accident” the case goes to trial.<sup>165</sup> There a lawyer, whom he calls a “hired conscience[,]” who “shouts in his client’s defense” that the case “is quite simple, domestic, and ordinary” and according to Ivan, it is “to the shame of our times” that the matter has even made it into court.<sup>166</sup> In a jab at the bedazzled jurors, who find papa “not guilty,” and at the “public roar[ing] with delight that the torturer has been acquitted,” Ivan sardonically comments, “Ahh, *if I’d been there*, I’d have yelled out a suggestion that they establish a scholarship in honor of the torturer . . . !”<sup>167</sup> But Ivan, effectually cabined in novelistic form, cannot simply prance off the page in the “Rebellion” chapter, *be there* to crash the Kronenberg proceedings, and deliver *his* closing argument in that living, breathing courtroom.

In the *Diary*, especially in his analyses of Ekaterina Kornilova, Anastasia Kairova, the Dzhunkovskys – Alexander Afanasevich and Ekaterina Petrovna, and Stanislav Kronenberg, actual legal cases of his time, Dostoevsky (*sans* Ivan) *can* do what was not possible in fiction.<sup>168</sup>

164. See BAKHTIN, *supra* note 4, at 3–4 (discussing Dostoevsky’s poetics and his polyphonic artistic thinking); see also RONNER, *supra* note 4, at 43–44 (discussing how “Bakhtin created an idiom for elucidating the Dostoevsky phenomenon,” which “lets Dostoevsky induce disquieting uncertainty, and frees him to be the very doubter that he was”); see also Liza Knapp, *Realism, in DOSTOEVSKY IN CONTEXT*, *supra* note 13, at 232 (“In letters and in his 1876-7 *Diary of a Writer*, Dostoevsky showed pride in how he had embedded himself in current reality, although he also acknowledged that any artistic representation would always fall short.”).

165. BROTHERS KARAMAZOV, *supra* note 1, at 241.

166. *Id.*

167. *Id.* (emphasis added).

168. See William Mills Todd III, *To be Continued: Dostoevsky’s Evolving Poetics of Serialized Publication*, 18 J. OF THE INT’L DOSTOEVSKY SOCIETY 24 (2014). See generally A WRITER’S DIARY 2, *supra* note 2 (commenting on then current events and legal cases). William Mills Todd II points out that “[t]he Russian word [he] has translated as ‘journalistic’ here, *fel’etonnnyi* . . . [is] much broader than we English speakers may imagine” and that “it encompasses our terms ‘reporter,’ ‘satirical columnist,’ ‘critic,’ ‘essayist,’ and ‘writer.’” Todd, *supra*, at 33. Further, Todd points out that Dostoevsky’s fiction “cannot be viewed independently

While Robin Feuer Miller has pointed out that “in his fiction Dostoevsky always sought to conceal his own voice as a matter of policy,” I suggest here that using the *Diary* as his medium sanctioned a liberating non-concealment.<sup>169</sup> The poly-personae mode allows for the fusion of narrator, journalist, autobiographer, and TJ advocate; it thus freed Dostoevsky to bewail “accidental” families and empower fledgling sufferers in a new way.<sup>170</sup>

Dostoevsky’s fiction and journalism of the 1870s is replete with “accidental families.” Stepan Trofimovich, Dostoevsky’s idealist of the 1840s, has abdicated his parental responsibility and thus serves as just one example of Dostoevsky’s recurrent theme of the “accidental family,” which spawns “disorder” and “fragmentation.”<sup>171</sup> Dostoevsky’s absent fathers, who join families either late or not at all, tend to either propel or contribute to sorted fiascos. In the *Diary*, Dostoevsky views this phenomenon as a blight on Russianness and feels that “the accidental nature of today’s Russian family consists in the loss among contemporary fathers of any common idea about their families—an idea common to all fathers that binds them together, an idea in which they could believe and could teach their children to believe, passing on to them this faith for the rest of their lives.”<sup>172</sup>

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of his career-long engagement with the multi-faceted practice of journalism.” *Id.*

169. See MILLER, *supra* note 140, at 91.

170. See MURAV, *supra* note 130, at 125–55; see also RONNER, *supra* note 4, at 46–59, 285–86 (discussing the Kronenberg, Kornilova, and Dzhnkovsky cases); A WRITER’S DIARY 2, *supra* note 2, at 1041 (explaining the concept of the “accidental family”).

171. DOSTOEVSKY, *supra* note 2, at 1041–42; see Vladimir Golstein, *Accidental Families and Surrogate Fathers: Richard, Grigory, and Smerdyakov*, in THE BROTHERS KARAMAZOV 756, 761 (Susan McReynolds Oddo ed. & trans., 2d ed., W.W. Norton & Co. 2011) (“In the case of Stepan Verkhovensky (*The Demons*), his liberalism is by far less important in the making of his son than his absenteeism . . .”); see also CAROL APOLLONIO, DOSTOEVSKY’S SECRETS: READING AGAINST THE GRAIN 117–18 (Northwestern Univ. Press 2009) (“The new radical socialisms embraced the concept of *fraternité*, of solidarity among radicalized members of the younger generation as they worked to replace the patriarchal structures of the past with a new social order. In his later novels, Dostoevsky depicts broken families with irresponsible or missing fathers as a microcosm of these larger social breakdowns. This exploration of a morally and politically loaded concept of ‘brotherhood’ begins with *Demons*.”); THE ADOLESCENT, *supra* note 136; BROTHERS KARAMAZOV, *supra* note 1. The accidental family also appears in *The Adolescent*, where Arkady Makarovich Dolgoruky, who is raised by foster parents and a tutor and has seen his putative father, Andrei Petrovich Versilov, only once, has not met his legal father, the peasant Makar Dolgoruky. See THE ADOLESCENT, *supra*. Later, the dysfunctional Karamazovs are the focal points of *The Brothers Karamazov*, where Dmitry, who is literally forgotten by his non-father-father, spends his youth “running about without boots on his feet, and his little breeches hanging by one button.” See BROTHERS KARAMAZOV, *supra*, at 674.

172. See A WRITER’S DIARY 2, *supra* note 2, at 1041.

The accidental family takes shape in the case of Stanislav Kronenberg, the nobleman charged with “torturing” his seven-year-old daughter, after he retrieved his illegitimate daughter from Geneva and brought her home to Petersburg.<sup>173</sup> Kronenberg chronically maltreated her and, like abusers today, kept her in a locked room, but the climax reportedly occurred when he discovered that the seven-year-old had taken prunes from her stepmother’s purse.<sup>174</sup> At that point, he snapped and beat her for a quarter of an hour with a rod, comprised of nine rowan switches, halting only when he himself nearly collapsed from exhaustion.<sup>175</sup> The switches, however, “turn[] out not to be switches but *Spitzruten*—that is, proper sticks—absolutely unthinkable to be applied to someone of seven.”<sup>176</sup> After the yard keeper informed police, the case came to a trial in which Vladimir Spasovich, the famous Russian lawyer, secured Kronenberg’s acquittal.<sup>177</sup>

Building on Igor Volgin’s observation that the *Diary* “always and everywhere is about Dostoevsky himself,” Professor Harriet Murav states that here “[t]he persona that Dostoevsky constructs must be understood in terms of its capacity to persuade an audience, that is, its rhetorical force.”<sup>178</sup> Such “rhetorical force” is multifaceted and has the agility to shift back and forth from the consciousness of torturer to that of the victim.<sup>179</sup> In the *Diary*, this accidental father speaks for himself, “I beat her with this bundle of sticks; I beat her severely and, this time, *I beat her for a long time*,

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173. See SUSANNE FUSO, DISCOVERING SEXUALITY IN DOSTOEVSKY 119–61 (Northwestern Univ. Press 2006) (describing the Kronenberg trial in the appendix).

174. See *id.* at 89. Fusso explains that Spasovich “resorts to the strategy of dwelling on Mariia Kronenberg’s own deficiencies,” and several witnesses spoke of “a more mysterious defect,” called “‘evil propensities and habits’ that she acquired from the peasants in Switzerland” while the father testified that “the little child had vices about which he did not wish to speak.” *Id.* At the trial, Nadezhda Suslova, the first woman doctor in Russia, testified and was the only witness who described the child’s “secret nasty vice” explicitly without euphemisms. *Id.* at 91. Suslova said that “the girl had bad habits which had a great effect on her health, namely: she engaged in onanism.” *Id.*

175. *Id.* at 127.

176. [1873–1876] 1 FYODOR DOSTOEVSKY, A WRITER’S DIARY 356 (Kenneth Lantz trans., Northwestern Univ. Press 1994) [hereinafter A WRITER’S DIARY 1]

177. See MCREYNOLDS, *supra* note 130, at 38 (“Spasovich is among the best-known prerevolutionary jurists . . . [who] enrolled in the law faculty at St. Petersburg University in 1845], and quickly ascendant, he defended two dissertations, the first in maritime law and the second on property relations in Poland. . . . [and was also] recommended . . . for a faculty position in criminal law.”); see also RONNER, *supra* note 4, at 195 (discussing how in *The Brothers Karamazov*, Mitya’s defense counsel “Fetyukovich, whose appellation means ‘blockhead,’ is based on V.D. Spasovich, a famous Russian lawyer and law professor at the University of St. Petersburg”).

178. MURAV, *supra* note 130, at 127.

179. *Id.*

*beside myself, unaware of what I was doing, with whatever was at hand.*<sup>180</sup> Then, after testimony reminiscent of that trance-like expulsion that Ivan attributes to his villains, the little girl's pathetic "cries of 'Papa! Papa!' cries that almost drove a simple peasant woman, the porter's wife, into a frenzy of madness," contrastively intercede.<sup>181</sup>

In the *Diary*, which need not play by novelistic rules, the narrative persona collaborates with the persona of the journalist—one who at times (and albeit inconsistently) carps at the post-reform legal system.<sup>182</sup> This persona's agenda is to disparage the defense strategies, courtroom histrionics, and exploitation of rhetoric, whereby lawyers like Spasovich wield their talent to deform truth and recast victims into perpetrators. In the Kronenberg case, this critic assails Spasovich, who seductively persuades jurors that his client, who had selflessly taken custody of his illegitimate child, was innocent and that the lying, thieving, masturbating, "sullen and unsociable," daughter was herself evil incarnate.<sup>183</sup> Spasovich thus leads the jury to conclude that corporal punishment, transpiring within that paternal fiefdom, which broke no bones and inflicted no lasting injury, did not amount to a crime.

The diarist, not complacent to give voice to just the narrator and the journalist, enlists another persona, the autobiographer, to rebut Spasovich and advance the victim's plight. At trial, Spasovich denied the existence of torture and "triumphantly" asserted that the child had no "broken skin," and ridiculed Mr. Lansberg, the examining doctor, who "certified that there was no broken skin on the posterior of the girl's body but *only* some dark-purple subcutaneous spots and red streaks."<sup>184</sup> From there, Dostoevsky reaches into the recesses of his own past, his years spent in the Siberian "Dead House," to share his memory of the swollen, shredded backs of adult prisoners, flogged with rods like Kronenberg's:

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180. A WRITER'S DIARY 1, *supra* note 176, at 377.

181. *Id.* at 378.

182. See RONNER, *supra* note 4, at 48–49; GEIR KJETSAA, FYODOR DOSTOEVSKY: A WRITER'S LIFE 310 (Siri Hustvedt & David McDuff trans., Ballantine Books 1987) (describing how Dostoevsky "horrified his conservative friends by coming out in favor of [Vera Zasulich's] acquittal"); see also Sarah Hudspith, *Dostoevsky's Journalism in the 1860s*, in DOSTOEVSKY IN CONTEXT, *supra* note 13, at 280 ("Journalism offered a natural fit for Dostoevsky's own creative method, in which his fiction and nonfiction writing informed and enhanced each other in terms of content, quality, and significance."). Dostoevsky's *Diary* entries on Ekaterina Kornilova, a pregnant woman initially convicted of pushing her small stepdaughter out of a window, are seemingly at variance with his decrial of the Kronenberg child-abuse acquittal. RONNER, *supra*. Dostoevsky also supported an acquittal for Vera Zasulich, who was indicted for attempting to assassinate the military governor of St. Petersburg. See KJETSAA *supra*,

183. A WRITER'S DIARY 1, *supra* note 176, at 369.

184. *Id.* at 373.

I will inform Mr. Spasovich that in the prisoners' wards of the hospital in Siberia I happened to see the backs of prisoners who had just been administered . . . blows with "spitzrutens" . . . Believe me, Mr. Spasovich, some backs had swollen up nearly two inches (literally), and imagine how little flesh there is on the back. They were precisely this dark-purple color with a few scratches that seeped blood.<sup>185</sup>

Armed with autobiographical data, Dostoevsky adds that fellow prisoners had informed him that the switches, which "have more of a bite," are "incomparably more dangerous" because one could actually die "after only four hundred blows."<sup>186</sup> Next the rhetorical troika of narrator-journalist-autobiographer recruits its fourth member—the TJ advocate—to obliterate "Mr. Defense Attorney[ 's]" non-sequitur—that because the sticks "did not pose a threat to life" and "did not cause even the slightest injury," there was no torture.<sup>187</sup>

As discussed above, TJ research has shown that when individuals participate in legal proceedings what influences them most is not the result, but their assessment of the fairness of the process itself. People tend to deify legal institutions, and when judges and lawyers treat those in their midst with dignity and respect, an "ethic of care" is conveyed, along with a confirmation of the individuals' "status and worth" as human beings.<sup>188</sup> Conversely, when legal agents denigrate or humiliate, individuals are inclined to disrespect the law, resist healing, and at times, bear scars for the rest of their lives. The diarist-advocate's gloss on the Kronenberg trial harmonizes with such TJ findings.

This TJ advocate, divulging the antitherapeutic impact the trial had to have on the Kronenberg child, states his thesis that "the judges . . . almost destroyed all her future happiness, and perhaps they have destroyed it!"<sup>189</sup> Here if we apply Gary Saul Morson's concept of Dostoevsky's "sideshadowing," a technique which "conveys the sense that time is open and that each moment contains real alternatives," we note that Dostoevsky begins with what did *not* occur<sup>190</sup>: *If there had been a guilty verdict and if*

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185. *Id.* at 374; see FYODOR DOSTOEVSKY, *THE HOUSE OF THE DEAD* 239–41 (Penguin Books 2003) (describing how officials flog prisoners to the brink of death and how it "hurts like nothing on earth" and "feels like a fire burning . . . as if your back was being roasted in the hottest of fires"); see also Amy D. Ronner, *Recreating Dead House: The Ouster of Miranda from our Prisons*, 50 CRIM. L. BULL. 1 (2014) (noting Dostoevsky's depiction of flogged prisoners).

186. A WRITER'S DIARY 1, *supra* note 176, at 374–75.

187. *Id.* at 375.

188. King, *supra* note 88.

189. A WRITER'S DIARY 1, *supra* note 176, at 357.

190. Gary Saul Morson, *Philosophy in the nineteenth-century novel*, in *THE CAMBRIDGE COMPANION TO THE CLASSIC RUSSIAN NOVEL* 164 (Malcolm V. Jones & Robin Feuer Miller eds., Cambridge Univ. Press 1998).

the father *had been* sent to Siberia, the advocate asks, “[w]hat . . . would remain in the heart of that daughter . . . for the rest of her life . . . ?”<sup>191</sup> In that event, he projects that “the family [would] have been destroyed by the court itself, an institution which, as we all know, is intended to preserve the sanctity of the family[.]”<sup>192</sup> Opining on faltering justice, he posits that when legal institutions badger victims and muzzle their voices, they do not just scald souls, they also brecciate the family unit, which for Dostoevsky is society’s bedrock and salvation.

With “sideshadowing” at work here where “[t]ime . . . appears as a field of possibilities” and each “moment has a set of possible events that could take place in it,” the child-advocate jilts the “might-have-been[.]” for its alternative (the trial, acquittal, and no exile) which actually *did* occur.<sup>193</sup> This outcome *ipse dixit*<sup>194</sup> is as damaging as its antithesis:

[The child] was dragged into court; she made an appearance; she saw it all, heard it all, and herself admitted: “*Je suis voleus, menteuse.*” The secret vices of this little child (only seven years old!) were revealed by adult, serious, even humane people before all the spectators—how monstrous! *Mais il en reste toujours quelque chose*, for the rest of her life, don’t you see that? And it will remain not only in her heart but, perhaps, be reflected in her fate as well.<sup>195</sup>

While her own “papa” brutally thrashed her, the resultant “dark-purple subcutaneous spots and red streaks” were essentially ephemeral and destined to fade from flesh, but when the larger-than-life courtroom flogged her anew, it “left its mark” on her psyche “forever.”<sup>196</sup>

After exposing manipulative lawyering with its enduring blows to the victim, the *Diary* advocate seeks to mitigate harm by wielding “the three Vs.” Chastising Spasovich, who “in [his] entire speech, never mentioned the moral and emotional damage done to the child” and deflating Spasovich’s allegations that the child “was corrupted” and had acquired “bad habits” from “her upbringing from the age of three in Switzerland by the de Combes,” Dostoevsky gives the “seven-year-old” the voice that legal agents had muted<sup>197</sup>:

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191. See A WRITER’S DIARY 1, *supra* note 176, at 357–58.

192. See *id.* at 358.

193. See Morson, *supra* note 190, at 165.

194. *Ipse Dixit*, ENGLISH OXFORD LIVING DICTIONARY, [https://en.oxforddictionaries.com/definition/ipse\\_dixit#](https://en.oxforddictionaries.com/definition/ipse_dixit#) (last visited Apr. 4, 2017) (defining *ipse dixit* as “a dogmatic and unproven statement”).

195. A WRITER’S DIARY 1, *supra* note 176, at 358.

196. See *id.* at 358, 373.

197. See *id.* at 379–80.

At her age how could she be held to blame for her bad habits? If such is the case, then where is the justness in the father's wrath? I maintain that the girl is not in the least responsible in this case, even if we admit that she had some bad habits, and whatever you say, you cannot dispute the fact that a seven-year-old cannot be held responsible for her actions.<sup>198</sup>

As explained earlier, the by-product of voice is validation, which occurs when participants feel that they have been genuinely listened to, heard, and taken seriously.<sup>199</sup> After admonishing all to “listen” and “respect” because children “teach us much,” the advocate asks, “[d]o you know what it means to abuse a child?” and replies by emphasizing that *someone* heard and took seriously the “grievous shock and tears” to a being with a “heart[] . . . full of innocent, almost unconscious love” and “reason . . . is never capable of grasping their full guilt.”<sup>200</sup> By revealing what “God sees,” hears, and “will count,” the TJ advocate validates the child<sup>201</sup>:

Have you seen a child cowering in a corner, trying to hide, and weeping there, wringing his hands (yes, wringing his hands—I've seen it myself) and *beating his chest with his tiny fist*, not knowing himself what he is doing, not clearly understanding his own guilt or why he is being tormented but sensing all too well that he is not loved?<sup>202</sup>

This is where the narrator, journalist, autobiographer (“I've seen it myself”), and advocate collaborate as a fused persona to foster that ultimate “V” by giving the once voiceless, invalidated child a modicum of participation in a process that will stay with and within her for the rest of her life.<sup>203</sup>

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198. *Id.* at 379.

199. See Ronner & Winick, *supra* note 41, at 500 (elaborating how it feels when the story has been listened to, heard, and taken seriously); Winick, *supra* note 101, at 1158 (explaining the relationship between voice and validation); see also Kate Holland, *Dostoevsky's journalism in the 1870s*, in *DOSTOEVSKY IN CONTEXT*, *supra* note 13, at 290–91 (addressing Dostoevsky's *Diary* discussions of “two prominent acquittals, the first concerning a peasant who beat his wife violently for many years until she hanged herself, the second a peasant mother who burned her child's hand with a samovar to stop it from crying”). Holland explains that Dostoevsky gives “voice to the wife and daughter,” which “allows him to address the terrible wrong done to them by the jury.” Holland, *supra*.

200. See *A WRITER'S DIARY 1*, *supra* note 176, at 379–80.

201. See *id.* at 380.

202. *Id.*

203. *Id.*

## CONCLUSION: THE TRANSCENDENT FIFTH TJ PERSONA

Mary Ellen Wilson,<sup>204</sup> along with other tortured children, like Baby Brianna,<sup>205</sup> Lauren Kavanaugh,<sup>206</sup> Terrell Peterson,<sup>207</sup> and Marya Solis's child,<sup>208</sup> are "voice[less], [in]validat[ed], and [in]voluntary" beings who resemble those tiny martyred souls that Ivan proffers in courtroom Alyosha.<sup>209</sup> In essence, today's sufferers show that Ivan Karamazov's and the Diarist's revelations were not confined to the nineteenth-century or to Russia, but are instead timeless, nationless tragedies. Therapeutic jurisprudence, aiming to bestow the "three Vs" on young victims, seeks to heal "accidental . . . families" and redress the epidemic suffering that tends to be intergenerational.<sup>210</sup>

Well before TJ was born, Dostoevsky intuited its secret potions and sprinkled them into his writings. In *The Brothers Karamazov*, especially in the chapter "Rebellion," Ivan inserts antiphonal voicelessness into that "polyphony of fully valid voices."<sup>211</sup> The resultant composition exposes the sorted impulses underlying child abuse, portrays the omnipresent, all-too-commonplace perpetrator, and applies the "three Vs" of TJ to empower vulnerable victims with "consciousness" and "equal rights."<sup>212</sup> Dostoevsky, moreover, understood that the novel, even one fortified with "polyphony," had limitations. In *A Writer's Diary*, Dostoevsky synthesized a new genre, the poly-personae, which enabled him to reinvent himself as progenitor of therapeutic juvenile justice. For Dostoevsky, however, even that quadrature alloy was itself flawed and fated to disappoint.

Dostoevsky knew that legal constructs, which are mortally created, had shortcomings and inevitably miscarry. Such a tragic realization becomes glaringly obvious in *The Brothers Karamazov*, when the courtroom morphs into an antitherapeutic fiasco, jettisons truth, and wrongfully convicts. In such an earthly arena, the legal players, essentially oblivious to healing and justice, seek to self-aggrandize and awe the

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204. See *supra* notes 16–53 and accompanying text.

205. See *supra* notes 61–64 and accompanying text.

206. See *supra* notes 65–73 and accompanying text.

207. See *supra* notes 74–79 and accompanying text.

208. See *supra* notes 80–85 and accompanying text.

209. See RONNER, *supra* note 3, at 23–24.

210. A WRITER'S DIARY 2, *supra* note 2, at 1041–42.

211. BAKHTIN, *supra* note 4, at 6.

212. *Id.*

audience with their own deific talents.<sup>213</sup> Mitya's presiding judge, who admonishes Ivan that his "words are incomprehensible and impossible in this place," implicitly succumbs to the realization that the human forum can silence voices, occlude truth, and thwart justice.<sup>214</sup>

In *The Brothers Karamazov*, Ivan similarly condemns the legal system: he chronicles the life of another abused child, Richard, who is discarded by his parents at an early age to grow up among Swiss mountain shepherds, who beat him, "[teach] him nothing," and send "him out to tend the flocks in the cold and wet, with almost . . . nothing to eat."<sup>215</sup> Elder Zosima once admonished that when adults even carelessly spew spiteful words in earshot of children, they "may . . . plant[] a[n evil] seed in [them], and it may grow."<sup>216</sup> Not surprisingly, when maltreated Richard attains adulthood, he commits a dreadful crime. After Richard is "caught, tried, and condemned to death," he finds truth in God, "repent[s]" and turns to "Christian" faith, but while the "pious and philanthropic" citizenry rejoice in his transformation and "his brothers" smother him with kisses, icy legal reality intrudes: Richard is "dragged up onto the scaffold, laid down on the guillotine, and his head is whacked off in brotherly fashion."<sup>217</sup> Richard's conversion is thus "incomprehensible and impossible" in the kingdom of *lex* and *jus*.<sup>218</sup>

Dostoevsky believed that it is indeed "comprehensible" and "possible" for all souls—even Richard's—to be reborn, "illuminated by the Lord" and "deemed worthy . . . of receiving grace."<sup>219</sup> In one of his famous letters, Dostoevsky stated his "credo," that "there is nothing more beautiful, more profound, more attractive, more wise, more courageous and more perfect than Christ."<sup>220</sup> For Dostoevsky, the consummation of therapeutic

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213. See RONNER, *supra* note 4, at 283 (explaining how "other quirks . . . make truth 'incomprehensible,' and the dispensation of justice 'impossible,' all of which fall neatly under the heading of excessive self-interest"); see also ROSENSHIELD, *supra* note 130, at 16–17 ("The trial scene in *The Brothers Karamazov* directly addresses the abuse of empathy and narrative in the courtroom.").

214. BROTHERS KARAMAZOV, *supra* note 1, at 686.

215. *Id.* at 239.

216. *Id.* at 319 ("See, here you have passed by a small child, passed by in anger, with a foul word, with a wrathful soul; you perhaps did not notice the child, but he saw you, and your unsightly and impious image has remained in his defenseless heart."); Miller, *supra* note 13, at 141 (discussing Zosima's warning).

217. BROTHERS KARAMAZOV, *supra* note 1, at 240.

218. *Id.* at 686.

219. *Id.* at 240, 686; see Anna Schur, *Punishment and Crime, in DOSTOEVSKY IN CONTEXT*, *supra* note 13, at 35 ("Dostoevsky's emphasis on the criminal's moral reformation remained a permanent element in his thinking" and "he never abandoned the belief that punishment needs to help set the criminal on the path of redemption").

220. Letter from Fyodor Dostoevsky to Natalya Fonvizina (1854), in 1 COMPLETE LETTERS,

justice necessitates the inclusion of his “credo,” the fifth transcendent TJ persona, the voice endorsing faith, compassion, and brotherly love. The poly-personae (narrator, journalist, autobiographer, TJ advocate, plus the transcendent fifth) paint a picture of an alternate justice system, one that imitates Christ and professes boundless faith in a loftier adjudicator. The perfected poly-personae of the *Diary* is ultimately pentad (not merely quadrate) and at times rhymes with Zosima’s gospel:

The human judge himself ought to know that he is not the final judge; that he himself is a sinner; that the measure and the scales in his hands will be an absurdity *if* he, holding that measure and scales, does not himself submit to the law of the yet unresolved mystery and turn to the only solution—to Mercy and Love.<sup>221</sup>

Dostoevsky’s concept of merciful jurisprudence, which grants voice, validation, and voluntary participation to each and every soul, also surfaces when the poly-personae Diarist pens what the presiding judge *should* impart to the Dzhunkovskys, another set of guilty parents who were acquitted of child abuse: “you are acquitted; but remember that apart from this court there is another court—the court of your own conscience. You must act so that this court as well should acquit you, even if only in years to come.”<sup>222</sup> That transcendent fifth, divested of hubris, acquiesces in the fact that “he is not the final judge,” urges the exonerated wrongdoers to “[s]eek out love and store it up in your hearts,” posits that “[l]ove is so all-powerful that it can regenerate even us,” and in so doing, envisions a compassionate, therapeutic justice system for children and adults alike.<sup>223</sup>

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1832–1859, 195 (David A. Lowe ed. & trans., Ardis Publishers 1988) (“[I]f someone proved to me that Christ were outside the truth and it *really* were that the truth lay outside Christ, I would prefer to remain with Christ rather than with the truth.”); see Miller, *supra* note 13, at 60 (discussing Dostoevsky’s letter to Madame Fonzima and explaining that Ivan, “like Dostoevsky . . . maintains that something is more valuable to him than truth; but it is not Jesus, it is his own right not to accept that truth”); RONNER, *supra* note 4, at 177 (explaining that Ivan “pays lip service to the apothegm that non-acceptance of divine justice is a matter of choice and that he can, through sheer volition, refuse to ‘accept’ a truth, even one that unequivocally materializes before his very eyes”).

221. A WRITER’S DIARY 2, *supra* note 2, at 1071; see RONNER, *supra* note 4, at 285.

222. A WRITER’S DIARY 2, *supra* note 2, at 1054; see also MURAV, *supra* note 130, at 142 (discussing the Dzhunkovskii case and how “Dostoevsky’s strategy is to speak from the position of the father and of the state”).

223. A WRITER’S DIARY 2, *supra* note 2, at 1059.