

# Prosecuting Raskolnikov: A Literary and Legal Look at “Consciousness of Guilt” Evidence

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In all literature, there is perhaps no more vivid example of a man wrestling with the knowledge of his own guilt than that of Raskolnikov in Dostoyevsky’s *Crime and Punishment*.<sup>2</sup> The nineteenth century Russian novel begins with the brutal murder of an old pawnbroker and her sister, and then unfolds into a remarkable tragedy in which the author explores the nature of crime, the human condition, and a young law student’s guilt. Literary scholars have noted that what separates this novel from Dostoyevsky’s later works is the author’s obsessive focus on the murder.<sup>3</sup> That focus, however, does more than add to the artistic economy and structural cohesion of the novel, it emphasizes the importance of Raskolnikov’s guilt and the way in which it drives him and influences his actions.

The commission of a crime leaves usually upon the consciousness a moral impression that is characteristic. The innocent man is without it; the guilty man usually has it. Its evidential value has never been doubted. The inference from consciousness of guilt to "guilty" is always available in evidence. It is a most powerful one, because the only other hypothesis conceivable is the rare one that the person's consciousness is caused by a delusion, and not by the actual doing of the act.<sup>4</sup>

It is sometimes remarked that Raskolnikov felt no guilt or was not, at least, conscious of his guilt.<sup>5</sup> This article disputes the notion that Raskolnikov was not consciously aware of his guilt, while addressing and explaining the use of ‘consciousness of guilt’ evidence in contemporary criminal practice. The reader is invited to cast an inquisitorial eye upon a nineteenth century literary murder and prosecute Raskolnikov—illuminating not only a great work of literature, but also an area of the law that is critical for successful prosecution of the modern malevolent.<sup>6</sup>

Raskolnikov’s crime is an exceptionally apt subject, not only because the novel is replete with evidence of guilty behavior, but also because his heinous crime was committed in the nineteenth century—before the availability of fingerprint evidence<sup>7</sup> or DNA evidence.<sup>8</sup> Further, the crime was committed in such a way as to leave no living witnesses who could

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<sup>2</sup> See FYODOR DOSTOYEVSKY, *CRIME AND PUNISHMENT* (Jessie Coulson trans., 1989) (1866). Raskolnikov, the main character of the book, wrestles with guilt after killing an old pawnbroker and her sister. Raskolnikov eventually confesses to the crime to free himself from his guilt.

<sup>3</sup> See, e.g., Phillip Rahv, *Dostoyevsky in Crime and Punishment*, 27 *PARTISAN REV.* 393-425 (1960).

The crime is murder. But in itself this is in no way exceptional, for the very same crime occurs in nearly all of Dostoyevsky’s novels. . . . Where this novel differs, however, from the works following it is the totality of the concentration on that obsessive theme. Virtually everything in the story turns on Raskolnikov’s murder of the old pawnbroker and her sister Lizaveta, and it is this concentration which makes the novel so fine an example of artistic economy and structural cohesion.

*Id.*

<sup>4</sup> See *United States v. Baldwin*, 54 M.J. 551, 555-56 (Army Ct. Crim. App. 2000) (citing 2 JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 173 (1983 ed.)).

<sup>5</sup> See A. Bem, *Das Schuldproblem bei Dostojevskij*, 12 *ZEITSCHRIFT FÜR SLAVISCHE PHILOGIE* 251, 273-77 (Irene Verhovskoy trans., 1935).

[The] fact [of his guilt] does not penetrate Raskolnikov’s soul and conscious mind, but conceals itself in his subconscious as a potential force of his conscience. His intellect feels no repentance until the very end; even after being sentenced compulsory labor Raskolnikov is still under the spell of the idea which justified the murder. Yet his whole being, his moral structure, is shaken by the moral aspect of murder.

*Id.*

<sup>6</sup> Such an exercise is one of which Dostoyevsky would doubtlessly have approved. See Richard Weisberg, *The Brilliant Reactor: The Inquisitor in Crime and Punishment*, from *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* 48-54 (1984) (“Foreshadowing the theme fully expressed in his final work, and in Camus’ novels about the law, Dostoevski indicates that the process of legal investigation contains the potential for imaginative artistry.”).

<sup>7</sup> See GlobalSecurity.org, *Homeland Security: Fingerprint Identification Systems*, <http://www.globalsecurity.org/security/systems/fingerprint.htm> (last visited Nov. 16, 2005) (noting that first known systematic use of fingerprint identification began in the United States in 1902).

<sup>8</sup> See Chemical Science and Technology Laboratory, *Brief History of Forensic DNA Typing*, <http://www.cstl.nist.gov/biotech/strbase/ppt/intro.pdf> (last visited Nov. 16, 2005) (noting that the use of DNA for forensic purposes began in the 1980s).

testify as to what occurred.<sup>9</sup> Therefore, without a great deal of physical evidence or direct evidence, a prosecutor would need to turn elsewhere to adduce enough proof to assure a conviction. It is in such situations that the effective use of “consciousness of guilt evidence” is critical.

## I. Consciousness of Guilt Evidence

Evidence of consciousness of guilt has long been admissible in criminal trials for the purpose of proving the guilt of an accused. As early as 1896, the U.S. Supreme Court spoke of its use as a foregone conclusion, though warned of attaching to it too much significance.<sup>10</sup>

American criminal courts have continued to recognize the validity of such evidence, consistently allowing into evidence facts that tend to establish an accused’s consciousness of guilt.<sup>11</sup> In federal criminal courts, evidence of an accused’s consciousness of guilt is admitted under Federal Rule of Evidence 404(b).<sup>12</sup> Rule 404(b) expressly allows the use of evidence of other crimes, wrongs, or acts for purposes of proving things other than character or propensity to commit crime (such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).<sup>13</sup> While rule 404(b) does not expressly list consciousness of guilt as a permissible purpose for introducing evidence of other crimes or acts, the list of factors articulated within the language of the rule is illustrative rather than exclusive. Accordingly, other crimes, wrongs, or acts are admissible for other purposes—such as demonstrating consciousness of guilt.<sup>14</sup>

Military courts have also long recognized that evidence showing an accused’s consciousness of guilt can be used as circumstantial evidence of guilt.<sup>15</sup> In courts-martial, evidence of other misconduct, crimes, or acts that show an accused’s consciousness of guilt is admissible under the military counterpart to the federal rule, Military Rule of Evidence 404(b).<sup>16</sup> The analysis of MRE 404(b) in Appendix 22 of the Uniform Code of Military Justice expressly states, “Rule 404(b) provides examples rather than a list of justifications for admission of evidence of other misconduct. Other justifications, such as the tendency of *such evidence to show the accused’s consciousness of guilt of the offense charged*, . . . remain effective.”<sup>17</sup> There is a three-part test for determining the admissibility of consciousness of guilt evidence. The evidence must reasonably support a finding by the court members that the accused committed the prior crimes, wrongs or acts; the evidence must make a fact of consequence more or less probable; and the probative value of the evidence must substantially outweigh the danger of unfair prejudice.<sup>18</sup> Consciousness of guilt evidence is inadmissible if it does not satisfy all three standards.

<sup>9</sup> Raskolnikov brutally murdered Alena Ivanovna by striking her multiple times with an axe. He then murdered her sister, Lizavetta, who happened upon her sister’s corpse while Raskolnikov was still in Ivanovna’s apartment.

<sup>10</sup> See *Hickory v. United States*, 160 U.S. 408 (1896).

<sup>11</sup> See *United States v. Smith*, 1997 U.S. Dist. LEXIS 1392 (1997) (noting that there is a lengthy history, in American criminal courts, of allowing evidence of an accused’s consciousness of guilt.); see also *United States v. Martinez*, 681 F.2d 1248 (1982).

<sup>12</sup> See, e.g., *United States v. Hayden*, 85 F.3d 153, 159 (4th Cir. 1996); *United States v. Guerrero-Cortez*, 110 F.3d 647, 652 (8th Cir.) (acknowledging that “an effort to intimidate a witness tends to show consciousness of guilt” and therefore is admissible under Rule 404(b)); *United States v. Mickens*, 926 F.2d 1323, 1329 (2d Cir. 1991) (holding that an effort to intimidate a key Government witness is relevant to the issue of the defendant’s state of mind and therefore admissible under Rule 404(b)).

<sup>13</sup> See FED. R. EVID. 404(b).

<sup>14</sup> See *supra* note 11; see also *United States v. Van Metre*, 150 F.3d 339 (4th Cir. 1998).

[Federal Rule of Evidence] 404(b) prohibits the introduction of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith. Such evidence may be admissible, however, for other purposes. These include, but are not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Because this list is illustrative, rather than exclusive, Rule 404(b) is considered a rule of inclusion.

*Id.*

<sup>15</sup> See *United States v. Hurt*, 27 C.M.R. 3, 21 (C.M.A. 1958) (holding statements appellant made that later proved false were “clear-cut evidence of a consciousness of guilt.”); see also *United States v. Daniels*, 56 M.J. 365 (2001) (noting that subsequent false statements by an accused were admissible evidence demonstrating an accused’s consciousness of guilt.); *United States v. Cook*, 48 M.J. 64 (1998) (noting that non-testimonial acts can demonstrate consciousness of guilt and are, therefore, admissible under Military Rule of Evidence 404(b)).

<sup>16</sup> See *United States v. Johnson*, 1991 CMR LEXIS 386 (CMR 1991).

[Military Rule of Evidence] 404(b) states that evidence of other acts are admissible to establish . . . proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The rule offers examples, rather than an exclusive list, of bases for admission of evidence of other misconduct. Other justifications remain effective, such as the tendency of such evidence to show the accused’s *consciousness of guilt* of the offense charged.

Therefore, there is a firm legal foundation for the admissibility of evidence of consciousness of guilt in federal criminal practice and courts-martial. Trial and defense counsel should acutely observe the accused's post-crime activity—even the most seemingly banal acts—to discover those actions that may be indicative of a criminal's consciousness of guilt.

Throughout *Crime and Punishment*, Dostoyevsky provides examples of physical actions and reactions that demonstrate Raskolnikov's consciousness of his guilt. Some of these examples, such as Raskolnikov's psychosomatic illness and his internal monologue, are not things ordinarily susceptible to proof in a criminal trial and, therefore, are not extensively addressed in this article. Rather, this article focuses on those clearly discernable reactions and overt acts by Raskolnikov that demonstrate his knowledge that he committed a brutal crime. This article examines four separate categories of action that are, and have historically been, considered admissible for purposes of demonstrating a criminal's consciousness of guilt: disposing of the evidence, giving false exculpatory statements, flight, and evidence of the accused's demeanor.

## II. Disposing of the Evidence

The admissibility of evidence of an accused's attempt to cover up a crime is not new to the law. In 1896, the U.S. Supreme Court noted the following:

It is undoubted that acts of concealment by an accused are competent to go to the jury as tending to establish guilt, yet they are not to be considered as alone conclusive, or as creating a legal presumption of guilt; they are mere circumstances to be considered and weighed in connection with other proof with that caution and circumspection which their inconclusiveness when standing alone require.<sup>19</sup>

A number of federal court decisions interpreting Federal Rule of Evidence 404(b) have ruled that evidence of subsequent conduct, in which an accused attempts to obfuscate the facts surrounding his initial crime, is admissible to show the accused's consciousness of guilt. "Elaborate efforts at concealment provide powerful evidence of their own consciousness of wrongdoing."<sup>20</sup> Military courts have also held that such evidence is admissible to prove an accused's guilt.<sup>21</sup>

Turning to Dostoyevsky's novel, the reader can identify several incidences of deceptive behavior in the immediate aftermath of the crime that are clear examples of the perpetrator's consciousness of guilt. The first and most obvious act was Raskolnikov washing the blood from his hands, from the blade of the axe, and from his boots.<sup>22</sup> Next, Raskolnikov returned to his apartment, examined his clothing, and cut from his clothing the blood-stained portions.<sup>23</sup> He also hid all the sundry

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*Id.* (emphasis added).

<sup>17</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) analysis, at A22-34 (2005) (emphasis added).

<sup>18</sup> *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

<sup>19</sup> See *Hickory v. United States*, 160 U.S. 408 (1896).

<sup>20</sup> *United States v. Olson*, 925 F.2d 1170, 1176 (9th Cir. 1991) (quoting *United States v. Dial*, 757 F.2d 163 (7th Cir. 1985); see also *United States v. Glass*, 128 F.3d 1398 (10th Cir. 1997) (noting that an accused's use of an alias to conceal his identity from law enforcement officers is relevant as proof of consciousness of guilt); *Willingham v. Johnson*, 2000 U.S. Dist. LEXIS 21688 (2000) (noting that an accused's attempt to conceal drug or alcohol use immediately after the death of his three daughters in a fire that he managed to escape from with only minor injuries would be relevant as evidence of consciousness of guilt).

<sup>21</sup> See, e.g., *United States v. Garland*, 39 M.J. 618 (A.C.M.R. 1994).

<sup>22</sup> See DOSTOYEVSKY, *supra* note 2, at 68-69.

[W]hen he glanced into the kitchen and saw a pail half full of water on a bench, it gave him the idea of washing his hands and the axe. His hands were sticky with blood. He put the head of the axe in the water, then took a piece of soap that lay in a broken saucer on the window-sill, and began to wash his hands in the pail. When he had washed them he drew out the axe and washed the blade and then spent some three minutes trying to clean the part of the handle that was blood-stained, using soap to get the blood out. After this he wiped it with a cloth which was drying on a line stretched across the kitchen, and then spent a long time examining it carefully at the window. There were no stains left, but the handle was still damp. With great care, he laid the axe in the loop under his coat. Then, as well as the dim light in the kitchen allowed, he examined his overcoat, trousers, and boots. At first glance there was nothing to give him away, except for some stains on his boots. He wiped them with a damp rag.

*Id.*

<sup>23</sup> *Id.* at 75-76.

items that he took from the dead pawnbroker's apartment in a hole in his wall.<sup>24</sup> Such actions were clearly designed to conceal the facts surrounding his crime—clearly demonstrating that Raskolnikov knew that he was guilty of a criminal act.

In *United States ex rel. Foster v. De Robertis*,<sup>25</sup> the Seventh Circuit considered its own salacious murder prosecution, in which the defendant murdered his former lover and then disposed of her 300-pound body by dismembering it, wrapping the pieces in sheets, and hiding the pieces of her corpse in the trunk of a car. The court held that evidence demonstrating that the defendant concealed evidence (the body) was probative of his consciousness of guilt and could be used against him.<sup>26</sup> Other federal decisions echo the general consensus of this view.<sup>27</sup>

In *United States v. Garland*, the Army Court of Military Review considered the case of a rape suspect who clipped his fingernails and attempted to hide his bed linen to avoid the inculpatory use of such physical evidence.<sup>28</sup> The Court of Military Review held that the lower court was correct in ruling that such conduct was admissible under Military Rule of Evidence 404(b) as evidence of consciousness of guilt. Likewise, in *United States v. Bridges*, the Air Force Court of Criminal Appeals faced a situation in which an accused, immediately after stabbing a man in the chest, hid the knife he used to commit the crime. The court stated that such an act showed the accused's consciousness of guilt and served to corroborate his confession.<sup>29</sup>

There would be no reason for Raskolnikov to wash the blood from the murder weapon if he did not know that what he had done was criminal. Further, there would be no need for Raskolnikov to hide evidence if he did not know that evidence could lead to his conviction. Because Raskolnikov knew he committed a crime, however, he intentionally covered up potentially inculpatory facts and evidence. Such acts were clearly designed to obfuscate the facts surrounding his crime. Therefore, under both federal and military law, Raskolnikov's conduct would be admissible as proof of his guilt.

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[H]e undressed completely and examined his clothes again. He scrutinized them minutely, down to the last thread, turning them over and over, and, unable to trust himself, repeated the process three times. But there seemed to be nothing, not a trace, except that the ragged fringes at the bottom of his trouser legs were covered stiff and clotted with dried blood. He took out his big clasp-knife and cut off the fringes.

*Id.*

Raskolnikov goes on to tear out the stained lining of his pocket and the loop that he had sewn into his coat. *Id.*

<sup>24</sup> *Id.*

Suddenly he remembered that the purse and all the things he had stolen from the old woman's trunk were still in his pockets. Till that moment it had not even occurred to him to take them out and hide them. He had not remembered them even while he was inspecting his clothes. How could that be? He hurriedly began to pull them out and throw them on the table. When he had emptied his pockets and even turned them inside out to satisfy himself that there was nothing left in them, he carried the whole heap into a corner. There, near the floor, the wallpaper was torn where it had come loose from the wall; hastily he crammed everything under the paper, into this hole; it all went in.

*Id.*

<sup>25</sup> See *United States ex rel. Foster v. De Robertis*, 741 F.2d 1007 (7th Cir. 1984).

<sup>26</sup> *Id.*

Finally, petitioner claims that his actions in concealing Patterson's body do not support an inference that he committed the murder. We cannot agree. Petitioner's concealment of the murder, coupled with his bizarre and inconsistent explanations of the murder, support the inference that he was responsible for the death of Patterson. We have long recognized that a defendant's attempt to conceal a crime is probative of a consciousness of guilt. That petitioner offered an explanation for his involvement in concealing the body that was consistent with his claim of innocence of the murder is irrelevant on review of the jury's verdict. The jury was not required to believe petitioner and could instead reasonably infer that his actions were indicative of guilt.

*Id.* (internal citations omitted).

<sup>27</sup> See *Lewis v. Anthony Wayne Buick Co.*, 1992 U.S. Dist. LEXIS 3494 (1992) ("It is a general principle of law applicable in criminal cases, which this certainly is not, as well as civil cases, that concealing evidence, the concealing of evidence, hiding of evidence, is some evidence of consciousness of guilt.").

<sup>28</sup> See *United States v. Garland*, 39 M.J. 618 (A.C.M.R. 1994).

<sup>29</sup> See *United States v. Bridges*, 24 M.J. 915 (A.F. Ct. Crim. App. 2001).

### III. Lying to Law Enforcement

American criminal courts have historically ruled that an accused's false exculpatory statements are admissible as evidence of the accused's consciousness of guilt. In 1896, Chief Justice Shaw was quoted in the Webster case, as saying the following:

To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion without just cause on other persons; all or any of which tend somewhat to prove consciousness of guilt, and when proved exert an influence against the accused.<sup>30</sup>

Since that early pronouncement of the law, and assuredly long before it, Federal courts have held that false exculpatory statements may be used as circumstantial evidence of consciousness of guilt and may strengthen inferences supplied by other pieces of evidence—though they do not alone prove guilt.<sup>31</sup> Military courts have echoed this rule of law, noting that “the fabrication of false and contradictory accounts by an accused criminal, for the sake of diverting inquiry or casting off suspicion is a circumstance always indicative of guilt.”<sup>32</sup> Both Federal and military jurisprudence, however, have distinguished between false exculpatory statements and general denials of guilt, noting that the latter are not considered admissible.<sup>33</sup>

The key distinction between the two types of statements is that general denials of guilt have never been considered admissible in American criminal law. “If a defendant is charged with crime, and unequivocally denies it, and this is the whole conversation, it cannot be introduced in evidence against him as an admission.”<sup>34</sup> In contrast, false statements in which a suspect actually articulates falsehoods, rather than merely denying culpability, are admissible against him.

An examination of Raskolnikov's interaction with law enforcement reveals examples of various statements, some of which would be admissible as evidence of his consciousness of guilt, and some that would not.

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<sup>30</sup> See *Hickory v. United States*, 160 U.S. 408 (1896) (citing *Commonwealth v. Webster*, 5 Cush. 295, 316 (1850)). It should also be noted, however, that the same court tempered its language with the following cautionary advice:

But this consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs. Such was the case often mentioned in the books and cited here yesterday, of a man convicted of the murder of his niece, who had suddenly disappeared under circumstances which created a strong suspicion that she was murdered. He attempted to impose on the court by presenting another girl as the niece. The deception was discovered and naturally operated against him, though the actual appearance of the niece alive afterwards proved conclusively that he was not guilty of the murder.

*Id.* at 417.

<sup>31</sup> See *United States v. Glenn*, 312 F.3d 58 (2d Cir. 2004); see also *United States v. Gordon*, 987 F.2d 902, 907 (2d Cir. 1993) (finding that “circumstantial evidence may include acts that exhibit a consciousness of guilt, such as false exculpatory statements”).

<sup>32</sup> *United States v. Elmore*, 31 M.J. 678 (A.C.M.R. 1990); see *United States v. Daniels*, 56 M.J. 365 (2002) (noting, “[t]he variations in [statements made by the accused] could be viewed by the members as evidence of his consciousness of guilt.”); *United States v. Phillips*, 53 M.J. 758 (A.F. Ct. Crim. App. 2000) (plainly noting, “A false statement is evidence of consciousness of guilt.”); *United States v. Potosky*, 2001 CCA LEXIS 135 (A.F. Ct. Crim. App. 2001); *United States v. Lepresti*, 52 M.J. 644 (N-M Ct. Crim. App. 1999); *United States v. Baldwin*, 54 M.J. 551 (Army Ct. Crim. App. 2000) (holding that subsequent false statements were admissible evidence of consciousness of guilt). The *Military Judges' Benchbook* offers, in part, the following evidentiary instruction concerning false exculpatory statements:

If an accused voluntarily offers an explanation or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt. You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his/her innocence.

U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-22 (2002).

<sup>33</sup> See *United States v. McDougald*, 650 F.2d 532 (4th Cir. 1981) (noting that “general denials of guilt later contradicted are not considered exculpatory statements. . . .”); see also *United States v. Colcol*, 16 M.J. 479 (C.M.A. 1983) (“unlike a false explanation or alibi given by a suspect when he is first confronted with a crime, his general denial of guilt does not demonstrate any consciousness of guilt.”).

<sup>34</sup> *Commonwealth v. Trefethen*, 157 Mass. 180 (1892) (citing *Fitzgerald v. Williams*, 148 Mass. 462 (1889)).

#### A. Raskolnikov's statement to Ilya Petrovich

Raskolnikov's first post-murder encounter with law enforcement comes shortly after the commission of the crime, but for reasons unrelated to it. Raskolnikov is summoned to the local police station because of an unpaid debt to his landlord.<sup>35</sup> At the police station, a police officer notices that Raskolnikov is ill, which results in quick, informal questioning on his health and (incidentally) his whereabouts:

*Ilya Petrovich:* Did you go out yesterday?

*Raskolnikov:* Yes.

*Ilya Petrovich:* When you were ill?

*Raskolnikov:* Yes.

*Ilya Petrovich:* At what time?

*Raskolnikov:* Eight o'clock in the evening.

*Ilya Petrovich:* Where, may I ask?

*Raskolnikov:* Along the street.

*Ilya Petrovich:* Short and plain.<sup>36</sup>

In fact, Raskolnikov went out much earlier than eight o'clock in the evening. He had gone out to the old pawnbroker's residence almost an hour before that time and, by eight o'clock, would have been completing his gruesome act or returning home to dispose of the evidence rather than just going out.<sup>37</sup> Further, he did not just go out along the street, but went to the apartment of Alena Ivanovna where he murdered both her and her sister.<sup>38</sup> This statement, therefore, by Raskolnikov to Ilya Petrovich constitutes a false, exculpatory statement given for the purpose of fabricating an alibi—attempting to convince law enforcement that he was somewhere else, doing something other than murdering and stealing.

It is generally acknowledged, in criminal law, that an attempt to create a false alibi constitutes evidence of the defendant's consciousness of guilt.<sup>39</sup> Like any other false statement designed to obfuscate the facts surrounding the crime and divert inquiry, such lies are admissible to prove the guilt of an accused criminal.<sup>40</sup> Thus, the misleading statements by Raskolnikov to Ilya Petrovich would be admissible to establish his consciousness of guilt.

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<sup>35</sup> See DOSTOYEVSKY, *supra* note 2, pt. 2, ch. 1, at 79-83.

<sup>36</sup> *Id.* at 89.

<sup>37</sup> *Id.* at 62 ("Glancing casually into a shop, he saw from the clock that hung on the wall that it was already ten minutes past seven. He would have to hurry; he wanted to go round about, so as to approach the house from the other side."); *id.* at 63 ("Somewhere a clock struck once. 'What, can it possibly be half-past seven? Surely not; time is really flying!'").

<sup>38</sup> See *id.* pt. 1, ch. 7, at 64-69.

<sup>39</sup> See *Henry v. Poole*, 409 F.3d 48 (2d Cir. 2005) (citing *People v. Loliscio*, 593 N.Y.S.2d 991, 994 (N.Y. App. Div. 1993)); see also *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974) ("It is axiomatic that exculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative force."); 2 F. BAILEY & K. FISHMAN, *CRIMINAL TRIAL TECHNIQUES* § 32:21 (2002) ("Maintaining false alibis to meet a false charge is the way many defendants end up in prison. If the prosecution can establish the falsity of an alibi . . . , your case is as good as lost. Many jurors regard a false alibi as an admission of guilt."); 2 G. SCHULTZ, *PROVING CRIMINAL DEFENSES* P 6.08 (1991) ("There is nothing as dangerous as a poorly investigated alibi. An attorney who is not thoroughly prepared does a disservice to his client and runs the risk of having his client convicted even where the prosecution's case is weak. A poorly prepared alibi is worse than no alibi at all.")

<sup>40</sup> See *supra* note 26.

## B. Raskolnikov's Statements to Porfiry

When Raskolnikov first meets Porfiry, the judicial investigator<sup>41</sup> who is charged with ferreting out the truth, the investigator and suspect engage in a colloquy regarding the crime. Raskolnikov is not, however, immediately (or at least expressly) identified by Porfiry as the suspect at that time.<sup>42</sup> This dialogue, however, does not amount to a classic interrogation and Raskolnikov is not placed in the position of having to confirm or deny his involvement in the murder.<sup>43</sup> In fact, Porfiry's theory of interrogation seems to eschew such direct confrontation in favor of a more asymmetrical approach.<sup>44</sup> Thus, in their initial encounter, Porfiry and Raskolnikov discuss Raskolnikov's health and Porfiry's theory of crime, only obliquely touching on the topic of the old pawnbroker's murder.

Porfiry does, however, confront Raskolnikov later in the novel, directly and dramatically telling him that he knows that he murdered the old woman and her sister:

"Who was the murderer?" he repeated, as though he could not believe his own ears. "But it was *you*, Rodion Romanovich!<sup>45</sup> You murdered them!" he went on, almost in a whisper, but his voice was full of conviction.

Raskolnikov sprang up from the sofa, stood still for a few seconds, and sat down again without a word. His whole face twitched compulsively.

"Your lip is trembling again, as it always does," murmured Porfiry Petrovich almost sympathetically. "I don't think you quite understand me, Rodion Romanovich," he added after a short pause; "That is why you are so thunderstruck. I came on purpose to tell you everything, and bring everything out into the open."

"It was not I who murdered her," whispered Raskolnikov, like a frightened small child caught red-handed in some misdeed.<sup>46</sup>

Obviously, when Raskolnikov denies that he murdered the two women, he is lying. This lie, however, is not one in which Raskolnikov fabricates details or invents new facts in order to divert inquiry into his wrongdoing. Rather, unlike the statement Raskolnikov gave to Ilya Petrovich, his statement to Porfiry is a general denial of guilt.

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<sup>41</sup> See RICHARD WEISBERG, *THE BRILLIANT REACTOR: THE INQUISITOR IN CRIME AND PUNISHMENT*, in *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* 48-54 (1984).

The lay apprehension that Porfiry is a police official, instead of a lawyer and officer of the court, is representative of the public confusion about criminal procedure in general, which contributed to the reforms that Porfiry specifically mentions to Raskolnikov later—"inquisitors are all at any rate to be called something different soon." Here as elsewhere in his works, Dostoevski demonstrates through these variations on the inquisitor's title both interest and competence in procedural law. Indeed, the Code of 1864 denominates the position *sudebni sledovatel'* (literally 'judicial investigator'), a clearer title which Dostoevski uses only for the inquisitor in *The Brothers Karamazov*, published fifteen years later.

*Id.*

<sup>42</sup> See DOSTOYEVSKY, *supra* note 2, pt. 3, ch. 5, at 210. Porfiry initially asks Raskolnikov to make a statement regarding possessions of his that were left with the murdered pawnbroker. *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 287.

But you ought to bear it in mind, my dear Rodion Romanovich, that the average case, the case for which all the legal forms and rules are devised, which they are calculated to deal with, when they are written down, does not exist at all, because every case, every crime, for example, as soon as it really occurs, at once becomes a quite special case, and sometimes it is absolutely unlike anything that has ever happened before. Very comical things of that kind sometimes occur. Now, if I leave one gentleman quite alone, if I don't arrest him or worry him in any way, but if he knows, or at least suspects every minute of every hour, that I know everything down to the last detail, and am watching him day and night with ceaseless vigilance, if he is always conscious of the weight of suspicion and fear, he is absolutely certain to lose his head. He will come to me of his own accord, and perhaps commit some blunder, which will provide, so to speak, mathematical proof, like two and two make four – and that is very satisfactory.

*Id.*

<sup>45</sup> Raskolnikov's full name is Rodion Romanovich Raskolnikov.

<sup>46</sup> See DOSTOYEVSKY, *supra* note 2, pt. 6, ch. 2, at 385.

The law recognizes that, “unlike a false explanation or alibi given by a suspect when he is first confronted with a crime, his general denial of guilt does not demonstrate any consciousness of guilt.”<sup>47</sup> Therefore, in merely denying that he was the one responsible, Raskolnikov does not give any evidence that can be used to prove his consciousness of guilt. In giving a false alibi to Ilya Petrovich, however, Raskolnikov does provide evidence admissible to prove his consciousness of guilt.

#### IV. Fleeing the Scene

In 1896, the United States Supreme Court quoted the Circuit Court for the Western District of Arkansas as informing jurors of the following concerning an individual’s flight:

[T]he law recognizes another proposition as true, and it is, that 'The wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it in this case. Therefore, the law says that if after a man kills another that he undertakes to fly, if he becomes a fugitive from justice, either by hiding in the jurisdiction, watching out to keep out of the way of the officers, or of going into the Osage country out of the jurisdiction, that you have a right to take that fact into consideration, because it is a fact that does not usually characterize an innocent act.<sup>48</sup>

Though the Supreme Court found fault with this rather partisan instruction,<sup>49</sup> the text does articulate, even if a bit too strongly, the fundamental rationale behind the admissibility of evidence of flight.

Contemporary federal courts have consistently ruled that evidence of flight is admissible as evidence of an accused’s consciousness of guilt.<sup>50</sup> Military jurisprudence, likewise, has long recognized the applicability of such evidence at courts-martial.<sup>51</sup> As one legal commentator has noted, while evidence of flight does not give rise to a presumption of guilt, it is “a circumstance which when considered together with all the facts of the case may justify the inference of the accused’s guilt.”<sup>52</sup>

Federal jurisprudence has set up a four-part test the government must meet before a jury can be instructed that they may consider evidence of flight as consciousness of guilt. The evidence must support the following four inferences: “(1) from the defendant’s behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt, to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged, to actual guilt of the crime charged.”<sup>53</sup> Military courts have not adopted this test, but instead have ruled that the factfinder must be fully advised that evidence of flight does not give rise to a presumption of guilt, but is a circumstance that when considered together with all the facts of the case may justify the *inference* of the accused’s guilt.<sup>54</sup>

<sup>47</sup> See *United States v. Colcol*, 16 M.J. 479 (C.M.A. 1983); *United States v. McDougald*, 650 F.2d 532 (4th Cir. 1981) (noting that “general denials of guilt later contradicted are not considered exculpatory statements. . .”).

<sup>48</sup> *Hickory v. United States*, 160 U.S. 408 (1896).

<sup>49</sup> *Id.* at 421.

This instruction was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive, that it was the duty of the jury to act on it as an axiomatic truth. On this subject, also, it is true, the charge thus given was apparently afterwards qualified by the statement that the jury had a right to take the fact of flight into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction that flight created a legal presumption of guilt with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as a matter of law, the court declared they were entitled to have, that is, as creating a legal presumption so well settled as to amount virtually to a conclusive proof of guilt.

*Id.* at 422.

<sup>50</sup> See *Ventura v. AG*, 2005 U.S. App. LEXIS 16605 (11th Cir. 2005) (“As we have noted repeatedly, “evidence of resistance to arrest and flight is admissible to demonstrate consciousness of guilt and thereby guilt”); *United States v. Frazier*, 387 F.3d 1244 (11th Cir. 2004) (en banc) (finding that defendant’s flight from police “was strong evidence of consciousness of guilt”); see also *United States v. Solomon*, 688 F.2d 1171, 1176 (7th Cir. 1982); *United States v. Jackson*, 572 F.2d 636, 639 (7th Cir. 1978); *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977).

<sup>51</sup> See *United States v. Buchana*, 41 C.M.R. 394 (C.M.A. 1970); *United States v. Harris*, 21 C.M.R. 58 (C.M.A. 1956).

<sup>52</sup> See 1 FRANCIS WHARTON, CRIMINAL EVIDENCE § 139 (12th ed. 1955).

<sup>53</sup> *United States v. Halwood*, 2005 U.S. App. LEXIS 13545 (9th Cir. 2005).

<sup>54</sup> See *Buchana*, 41 C.M.R. at 397.

Raskolnikov never “skips town” after committing his crime, though he does consider that particular course of action.<sup>55</sup> In the immediate aftermath of his crime, however, Raskolnikov does flee the scene of the crime—a hurried effort to get out of the old pawnbroker’s apartment before being found.<sup>56</sup> That kind of evasive conduct—flight from the scene of a crime—would likely be admissible in federal or military courts as evidence of Raskolnikov’s consciousness of guilt.<sup>57</sup>

When determining whether such facts would give rise to a flight instruction, the U.S. Supreme Court in *United States v. Halwood* stated the following:

Here, one of the group who assaulted the victim testified that the defendant was involved in beating the victim, and that both he and the rest of the group, including the defendant, fled the scene in order to avoid the police. Another witness testified that he heard the defendant yelling as he ran away from the scene of the crime. The defendant himself admitted that when he left the scene he was aware the victim was seriously injured. That evidence is sufficient to support the flight instruction.<sup>58</sup>

In Dostoyevsky’s novel, by comparison, Raskolnikov murdered two women and then hid behind a locked door until unexpected visitors departed. He then slipped out of the old pawnbroker’s residence and hid in an empty apartment until the coast was clear, before skulking back to his own apartment—actively concealing himself as he fled the scene.<sup>59</sup> Such actions would be admissible against Raskolnikov in any modern court.

## V. Demeanor

Raskolnikov, a law student, when speaking to himself in the police office, understood that his demeanor might be considered as evidence: “Do they know about the flat? I shan’t go away without finding out! Why did I come? But I am getting agitated, and that, perhaps, is evidence!”<sup>60</sup> His speculation was correct.

Like the disposal of evidence, false exculpatory statements, and flight to avoid apprehension, evidence of an accused’s demeanor can be used to prove his consciousness of guilt.<sup>61</sup> Evidence of demeanor for such purposes has a long history in American criminal law. As a court in 1910 noted,

It is truthfully said by learned counsel that there is no standard as to how a defendant upon trial for an infamous crime ought to demean himself; that exhibitions of shame, temperament, and nervous strain are likely to be interpreted as signs of a guilty conscience. The same observation, however, may be made as to a person’s demeanor when arrested or suddenly charged with crime. There is no standard as to how a person ought to behave under such circumstances. Conduct will vary according to sex, age, temperament, and past experience. Still demeanor on such occasions has always been held competent evidence as bearing on the question of the defendant’s consciousness of guilt.<sup>62</sup>

Military courts have, likewise, recognized the validity of such evidence.<sup>63</sup>

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<sup>55</sup> See DOSTOYEVSKY, *supra* note 2, pt. 2, ch. 3, at 107-08 (Raskolnikov thinks, “I must run away at once (...) It would be better to run away altogether...a long way . . . to America, and be damned to them! I must take the bill as well...it will come in useful there.”); see also *id.* pt. 6, ch. 2 (asking “What if I run away?” when confronted by Porfiry).

<sup>56</sup> *Id.* pt. 1, ch. 7, at 70-74.

<sup>57</sup> See *United States v. Henry*, 1998 U.S. App. LEXIS 13185 (4th Cir. 1998).

<sup>58</sup> *Halwood*, 2005 U.S. App. LEXIS 13545.

<sup>59</sup> See DOSTOYEVSKY, *supra* note 2, pt. 1, ch. 7, at 70-74.

<sup>60</sup> *Id.* pt. 3, ch. 5, at 216.

<sup>61</sup> See, e.g., *United States v. Diaz-Carreón*, 915 F.2d 951 (5th Cir. 1990); *United States v. Gutierrez-Farias*, 294 F.3d 657 (5th Cir. 2002) (noting that, based on [the defendant’s] demeanor at the checkpoint and the vagueness of his answers, the jury could have inferred that he knew the marijuana was in the tires but was trying to hide that fact).

<sup>62</sup> See *Waller v. United States*, 179 F. 810 (8th Cir. 1910).

<sup>63</sup> See *United States v. Daniels*, 2001 CCA LEXIS 89 (Army Ct. Crim. App. 2001).

Immediately after commission of the crime, Raskolnikov becomes ill and agitated. When called to the police station on the matter of an unpaid debt, he is visibly ill in the presence of law enforcement officials discussing the crime, and answers the most benign questions sharply.<sup>64</sup> Similarly, when first encountering Porfiry, Raskolnikov becomes extremely agitated, feverish, and animated.<sup>65</sup> As noted above, Raskolnikov is quite aware that his unusual demeanor could be evidence of his guilt. It should also be noted, however, that Porfiry, the judicial investigator, is also very interested in Raskolnikov's demeanor—especially his demeanor during the period of time immediately following the crime.<sup>66</sup>

The court in *United States v. Schlesinger*,<sup>67</sup> considered a similar situation in a case involving an arsonist. In that case, the New York City Fire Marshal was investigating the part-owner of a clothing company who was suspected of starting a fire that destroyed a large building in Brooklyn. "After commencing the investigation he attempted to interview the Defendant. Fire Marshal Santangelo stated that the Defendant repeatedly changed the date of the interview and delayed his appointment on several occasions. When the Defendant finally met with Fire Marshal Santangelo, the Defendant tape recorded the meeting without Fire Marshal Santangelo's knowledge. In the interview, Schlesinger told Fire Marshal Santangelo that he was the "Manager of financial operations" and held no official position in the company or on the board of directors. The Defendant also refused to answer several questions and seemed irritated. The Defendant responded to several questions by asking questions back such as "who are you?"<sup>68</sup> It is worth noting that this real-life encounter between Schlesinger and Fire Marshal Santangelo shares dramatic similarities with Raskolnikov's literary encounter with Porfiry.

The *Schlesinger* court stated that a suspect's nervous behavior could be considered as evidence of his consciousness of guilt. "Here, although it may not rise to the level of consciousness of guilt that flight represents, the jury had the right to consider evidence that Schlesinger acted in a suspicious manner when questioned about the fire by Fire Marshal Santangelo."<sup>69</sup>

Military jurisprudence has also addressed cases involving an oddly-behaved suspect. In *United States v. Daniels*,<sup>70</sup> the Air Force Court of Criminal Appeals considered the case of a suspect who exhibited a strange demeanor during an interrogation, acting noticeably "cocky" during the first part of the interview, then becoming "somber, more reserved" when discussing the possibility of trace evidence from his gloves.<sup>71</sup> The court noted that the trial court did not err when admitting evidence of the accused's behavior, finding that it was relevant to his consciousness of guilt.<sup>72</sup>

Like the suspects in the cases discussed above, Raskolnikov displayed agitation, nervousness, and extremely unusual behavior after his crime. This unusual behavior was displayed in—and, perhaps, exacerbated by—the presence of law enforcement officials. Raskolnikov's innate understanding of the criminal process allowed him to understand that such odd behavior in their presence could be used as evidence against him. Modern jurisprudence reveals that his understanding still holds true today.

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The trial judge admitted evidence of the appellant's demeanor as evidence of consciousness of guilt. He found the evidence to be relevant, conducted a balancing test pursuant to Mil. R. Evid. 403, and determined the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to the appellant.

*Id.*

<sup>64</sup> See DOSTOYEVSKY, *supra* note 2, pt. 2, ch. 1, at 79-83.

<sup>65</sup> *Id.* pt. 3, ch. 5, at 213-15.

<sup>66</sup> *Id.*

<sup>67</sup> See *United States v. Schlesinger*, 372 F. Supp. 2d 711 (E. D. N.Y. 2005).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 724.

<sup>70</sup> See *United States v. Daniels*, 2001 CCA LEXIS 89 (Army Ct. Crim. App. 2001).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

## VI. Conclusion

In all literature, there is perhaps no better example of a man wrestling with the knowledge of his own guilt than that of Raskolnikov in Dostoyevsky's *Crime and Punishment*. Within the struggles of the main character, the reader sees numerous examples of behavior that demonstrate a suspect's consciousness of guilt: disposing of the evidence, giving false exculpatory statements, fleeing the scene, and displaying an unusually nervous demeanor. Modern jurisprudence reveals that such behavior is admissible in contemporary criminal trials for the purpose of establishing guilt, highlighting the importance of acute observation of an accused's actions while demonstrating definitively Dostoyevsky's unique insight into the human condition and the criminal mind.<sup>73</sup> Perhaps that is why "[n]o other novelist's work has been so widely drawn upon by fields and disciplines that do not normally draw on fiction for their sources."<sup>74</sup>

The behavioral categories emphasized in this article are by no means an exhaustive list of behaviors that might be considered evidence of consciousness of guilt—there are perhaps as many of such categories as there are human reactions to guilt.<sup>75</sup> The four categories discussed above, however, are firmly rooted in American criminal jurisprudence and are of great utility to practitioners of criminal law. Just as Dostoyevsky used such behavior to convey to the reader the psychological distress and torment of Raskolnikov, so may the modern prosecutor identify such behavior in contemporary criminals and reveal to the factfinder why and how such actions, though silent or even defiant, are pregnant with admissions of guilt.

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<sup>73</sup> See NOCHOLAS BERDYAEV, *DOSTOYEVSKY* (1934) ("Dostoyevsky was more than anything an anthropologist, an experimentalist in human nature, who formulated a new science of man and applied to it a method of investigation hitherto unknown.").

<sup>74</sup> See Simon Karlinsky, *Dostoyevsky as Rorschach Test*, N.Y. TIMES, June 13, 1971.

<sup>75</sup> See, e.g., *United States v. Chauncey*, 2005 U.S. App. LEXIS 18291 (8th Cir. 2005); *United States v. Montano-Gudino*, 309 F.3d 501 (8th Cir. 2002) (noting that evidence of threatening a witness is admissible to show an accused's consciousness of guilt).