

# Law, Conscience, and Russian National Identity: “Higher Justice” in the Shadow of the War

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In the official Russian discourse on the illegal annexation of the Crimean peninsula in 2014 and the full-scale war that has followed, the land grab is presented as a fulfillment of “higher [historical] justice.” Consider the following example. On October 7, 2023, the pro-Kremlin war blogger and aspiring rock musician Ruslan Ostashko uploaded a video with congratulations to Putin on his seventy-first birthday. Projecting vigor and guerilla chic, the blogger-rocker Ostashko thanked Putin for all he had done for him “personally and for [his] family”—above all “for Crimea and Donbass.” These are “our historical lands,” Ostashko explained as the clip of his band, spliced with images of young children and brawny amputees, flashed across the screen. The “reintegration” of Crimea and Donbass is “a fulfillment of Higher historical justice,” the text below the video further elaborated.<sup>1</sup>

While Ostashko’s message to Putin may exceed the usual levels of bootlicking and cringe typical of the genre, his language cannot be more of a cliché. Along with references to Crimea’s (and Ukraine’s) historical “belonging” to Russia and variations on the theme of a long-awaited return—“to the home harbor,” “to the one big family”—the invocation of “higher justice” is a staple of this discourse. It is routinely used by the regime’s loyalists of all ranks and stripes: from Kremlin functionaries, heads of regional administrations, and university presidents in official addresses to private citizens in social media posts.<sup>2</sup>

The optional “historical” in “higher historical justice” betrays the trope’s implication in historicism, a quasi-religious belief in the existence of a meaning-imparting historical

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<sup>1</sup> S Dnem Rozhdeniia, Vladimir Vladimirovich! “My s vami v etoi bitve s vragami,” Oct. 10, 2023 (<https://crimea-news.com/society/2023/10/07/1204738.html>).

<sup>2</sup> See, e.g., Sud’ba Kryma v odnoi fraze Grefa, July 7, 2017 (<https://perma.cc/8TSJ-62EY>); Den’ vossoedineniia Kryma s Rossiei, Mar. 18, 2023 (<https://kolchugino.bezformata.com/listnews/vossoedineniya-kryma-s-rossiei/115330581/>); Krymskaia vesna v VGSPU: fotovystavka i “Razgovory o vazhnom,” Mar. 19, 2023 (<https://perma.cc/SHC5-2SAH>); Dolinsk torzhestvenno otmetil 7-letie vkhozhdeniia Kryma v sostav RF, Mar. 26, 2021 (<https://perma.cc/V28M-8QAD>); Leningradskii obkom otpravil v Novorossiia ocherednuiu partiiu gumanitarnoi pomoshchi, sobrannoi zhiteliامي Lenoblasti, Mar. 15, 2019 (<https://perma.cc/2CQU-WYDU>); Zachem Krym prishel v Rossiia: teoriia spravedlivosti, Aug. 24, 2018 (<https://perma.cc/ZL4N-55JV>); Ta, kotorai, Vse, chto seichas proiskhodit Twitter (now X), Sept. 16, 2020 (<https://perma.cc/Z8QC-MHB9>).

pattern long diagnosed by Isaiah Berlin as an “addiction” of Russian intellectual culture.<sup>3</sup> More crucially, however, the figure of “higher justice” on which the historicist element may or may not be overlaid implies an inferior counterpart, frequently left unstated because readily understood. This lesser foil is justice worked out within the framework of the law. Here is how the matter is put by a pro-regime website: “Who knows how much time lawyers in various international courts could have wasted in futile arguments if once again people hadn’t got down to business themselves. . . . This was a long road home, but higher justice triumphed,” *Political Russia* wrote about the 2014 Crimea unlawful referendum and the annexation that followed. As the last word on the subject, the website quoted Putin’s “terse but ample” remarks: “People have determined the future of Crimea. They voted for unification. That is all. Period.”<sup>4</sup>

In this paper, I consider the cultural provenance of this propagandistic trope. I argue that the talk of “higher justice” as superior to its legal counterpart is tied to the discourse of Russian national identity as it has been articulated, with some modifications, for nearly two hundred years. In this discourse, “higher” justice (and its various analogues: “inner justice,” “living justice”) has been associated with a presumably non-judicial and non-formalistic Russian worldview and contrasted to a lesser, law-bound justice of the West. In fact, the inferior legal justice often figures in this discourse as something of a misnomer, as “true” justice in its robust moral sense, the alleged province of the Russian spirit, is said to be not merely distinct from but antithetical to law. And it is this opposition that renders familiar propagandistic alchemy that converts cynicism about law into a national virtue.

A clarification is in order. I am not offering an account of how law has been practiced in real-life Russian institutions across time. Nor do I take a position on how much we can really learn about broad cultural attitudes from empirical evidence (of people’s pragmatic use of the courts, of everyday legal practice, etc.), offered by some historians and sociologists as refutations of the common view of Russia’s weak legal culture or as proof of its special sort of legality that cannot be evaluated by reference to Western notions.<sup>5</sup> My goal is to trace one single strain in an admittedly more complex cultural discourse of justice—but a strain with a long history, a considerable staying power, and a capacity to fuel a vicious demagoguery that enables the transfiguration of thuggish politics into triumphs of morality.

This paper has another goal as well. To the extent that Russian literature has been among the most influential purveyors of the ideology of “higher justice,” I also aim to contribute to its ongoing reassessment spurred on by the war with Ukraine. Against the

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<sup>3</sup> See Isaiah Berlin, *The Addiction of Russian Intellectuals to Historicism in Four Lectures on Russian Historicism*, The Isaiah Berlin Virtual Library (<https://perma.cc/CG7T-KSMK>).

<sup>4</sup> Slavnaia istoriia, Mar. 17, 2016 (<https://perma.cc/4D73-BAG9>).

<sup>5</sup> See, e.g., Nancy Shields Kollman, *Crime and Punishment in Early Modern Russia* (2012); Jane Burbank, *Russian Peasants Go to Court: Legal Culture in the Countryside, 1905-1917* (2004); Kathryn Hendley, *Everyday Law in Russia* (2017); Sergei Antonov, *Bankrupts and Usurers of Imperial Russia: Debt, Property and the Law in the Age of Dostoevsky and Tolstoy* (2016).

background of daily atrocities committed by Russian forces, scholars have been reconsidering Russian literature's humanistic pathos, its long-standing reputation as a defender of spiritual values, as well as the popular understanding of its separateness from the state. More than ever before, the celebrated figures of the Russian canon have come under scrutiny for their implication in the imperialist and expansionist mindset, for the promotion of national narcissism, and for the hubris of casting the Russian people in the role of the spiritual savior to the corrupt and godless West. What has received less attention is the darker side of Russian literature's moralism, which has been historically lauded as evidence of its unusually intense commitment to moral absolutes. When taken to be a drawback, the tradition's moralism has been typically seen as aesthetically stifling, an impediment to valuing literariness for its own sake.<sup>6</sup> But the ease with which the trope of "higher justice" has been absorbed into a propaganda of Russian supremacy and violent conquest reveals something else too. As they denied law any moral grounding (or social value) and championed its displacement with a nebulous morality whose sources lie with "the People," Russian writers did more than fuel the messianic ambition of a nation presumably endowed with a unique spirituality. They helped lay the groundwork for a public culture ready to vindicate all manner of brutalities by high-minded appeals to a singularly acute sense of justice lodged somewhere deep in the Russian heart.

## I.

The supremacy of "higher" justice over law has long been promoted as part of the Russian cultural code. Its origins can be traced back to the eleventh-century "Sermon on Law and Grace" by the Kyivan Metropolitan Ilarion. A political document staking a claim to equality of the recently baptized Kyivan Rus' with the rest of the Eastern Christian world, the sermon is also an important work of spiritual literature and homiletics that many regard as the beginning of East Slavic literary traditions.<sup>7</sup> It is here that the Pauline antithesis between the Law of Moses and Grace and Truth revealed through Jesus Christ was first turned into a framework for eulogizing the people of Rus'.

The contrast between the two covenants that opens Ilarion's sermon echoes Paul's original framework. Law figures here as a temporary dispensation that has now outlived its mission. Having fulfilled its function as "the precursor and servant" to Grace, Law is destined for oblivion, as are the Jews who continue to cling to it, unable to receive the Truth of Christ.<sup>8</sup> Narrow, exclusivist, and cold, Law is consumed by earthly cares and associated with spiritual servitude. In contrast, Grace and Truth are inclusive, universal, and linked with spiritual freedom. The new covenant entails a reorientation away from the earthly toward the heavenly, to the Kingdom of God. Grace and Truth displace and transcend Law,

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<sup>6</sup> See, e.g., Viktor Erofeev, *Pominki po sovetskoj literature* in *Literaturnaja gazeta*, July 4, 1990 (<https://perma.cc/8G8P-GKDX>).

<sup>7</sup> V. N. Toporov, *Sviatost' i sviatye v Russkoi dukhovnoi kul'ture* (1995).

<sup>8</sup> *Slovo o zakone i blagodati* mitropolita Kievskogo Ilariona (Andrei Iurchenko trans.), in *1 Biblioteka literatury Drevnei Rusi* (D. S. Likhchev ed., 1997).

or, in Ilarion's metaphor, Law gives way to them as the moonlight of the cold night gives way to the warming rays of the rising sun.<sup>9</sup>

Ilarion's association of Rus' and its spirit with the supra-legal categories of Grace and Truth has endured in the culture, resurfacing with special force in nineteenth-century Slavophile thought, a literary and intellectual movement with roots in German Romanticism committed to the idea of a Russian *Sonderweg*. But if for Ilarion, it was Jewish law that served as the negation of Christian spirit, the Slavophiles' chief target was Roman law. For the Slavophiles, who saw Eastern Orthodoxy as the only true Christianity and thus drew a sharp contrast between Russia and the West, the historically different attitudes toward law formed an important aspect of this civilizational clash. Their anti-juridical views (however varied in the degree of their radicalism) were greatly informed by Western conservative thought. But as they in effect essentialized the aversion to law as a peculiar feature of the national "character," the Slavophiles downplayed these connections, as well as the broader Western centuries-old debate about law, morality, and justice with which they indirectly engaged.

Whereas the entire edifice of Western culture was built, they claimed, on the deference to external forms, the traditionally Russian way of life was characterized by the emphasis on the genuine meaning of human activities and relationships. The Western veneration of form was, in the Slavophile account, the legacy of classical Rome, where it pervaded all cultural and social institutions from family to poetry to religion. Law especially was marked by commitment to external formalism. The external consistency and orderliness of legal forms reflected, according to the Slavophiles, the dominance of excessive, death-dealing rationalism over the spiritual and emotional dimensions of human experience. A product of abstract cerebration, "Roman-Western" law was pure artifice and a reflection of the mutilated spirit. Russian laws, in contrast, were said to have sprung from life itself and to express an integral worldview and traditional, already existing "living" relationships and customs.

Of course, when speaking of tradition and organically evolved laws, the Slavophiles did not mean their own contemporary Russia, which itself was tainted by Western rationalism and ensnared in moral and spiritual corruption, but of the vestiges of the pre-modern Russian peasant commune that they believed still survived in the village and that they idealized as a homogeneous, organic, conflict-free society that had little use for law. In their view, the relationship between such society and the monarch had been grounded in mutual trust, unsecured by any formal guarantee. The very idea of such a guarantee was dismissed by the Slavophiles as a negation of the good it was presumed to secure. Nor did the Russian people need law to ensure external liberties because the only freedom that mattered was the inner freedom to fulfill their spiritual destiny to come closer to God. It was a return to this lost ideal, whose ethos was understood to endure in the Russian peasant, that would ensure, Slavophiles claimed, the restoration of authentic Russia.

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<sup>9</sup> Id. at 31.

The distinction between Russian and Western attitudes toward justice was articulated in similar terms: as a contrast between superficial forms and deep values. To the “external” justice of formal law, the Slavophiles opposed “inner justice” divined by conscience. In the words of Ivan Kireevsky, a founder of the Slavophile movement, a characteristic feature of “famed Roman law” was a combination of “the orderliness of external formality, taken to the amazing logical perfection” and an “equally amazing absence of inner justice.”<sup>10</sup> In contrast, the traditional way of life of the Russian peasant commune historically prioritized substantive justice discovered through Orthodox faith and moral intuition over external formality defined by the letter of the law. Based on coercion and violence, legal relationships were contrasted to voluntarily assumed social obligations characteristic of the genuine Orthodox community guided by the law of mutual love. In the Slavophile scheme, written law lacked an ethical and religious foundation and was at odds with the spiritual culture of the Russian people.

## II.

Slavophile ideas about law were part of a broader worldview, which was, to a significant extent, fleshed out through the debates with the “Westernizers,” their intellectual opponents who looked to the West in search of solutions to Russia’s various ills. In that debate, which unfolded between the 1830s and the 1850s, the Westernizer camp is generally understood to have had the upper hand. The next generations of the increasingly radicalized Russian intelligentsia proved more receptive to Western rather than Slavophile ideas. Yet the Slavophile legacy, including their views on law, remained an important undercurrent in much of social and religious philosophy.

This is not to say that Russia entirely lacked its own tradition of liberal legal thought.<sup>11</sup> But the relatively small, if highly accomplished, group of liberal thinkers swam against the tide. As versions of anti-legalism continued to permeate the thinking not only of conservative nationalists, but also of wavering or disillusioned Westernizers, anarchists, Marxists, and Populists of different stripes, late imperial public discourse was rife with dismissive attitudes toward law. One trope that often surfaced in popular discussions was the contrast of *zakon* (law) and *pravda*, one of the two Russian words for “truth” (the other one is *istina*), which can convey both a descriptive sense of an accurate correspondence to reality and a normative sense of justice, i.e., of a moral, social, or religious ideal, of what ought to be.<sup>12</sup> For many, law was a negation of *pravda* in its latter sense of justice, a trend that became especially pronounced in Russian religious philosophy over the next several decades. As twentieth-century philosopher Feodor Stepun remarked in his analysis of the sources of

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<sup>10</sup> I. V. Kireevsky, *O kharaktere prosveshcheniia Evropy i ego otnoshenii k prosveshcheniiu Rossii* (pis'mo k grafu E. E. Komarovskomu) 20 (1852).

<sup>11</sup> For a classic study of Russian liberal legal thought, see Andrzej Walicki, *Legal Philosophies of Russian Liberalism* (1992).

<sup>12</sup> Richard S. Wortman, *The Power of Language and Rhetoric in Russian Political History: Charismatic Words from the 18th to the 21st Centuries* (2019).

Bolshevism, the idea that “law is the grave of truth (*pravda*), that it is better to be a chest-beating sinner than simply a decent being” had been a central theme running through the entire history of Russian religious thought.<sup>13</sup>

On the other end of the political spectrum, radical journalism also dismissed the law’s potential to strengthen the budding civil society and scorned the very idea of legally secured personal rights and protections as an obsolete notion pertaining to the social and political order that existed on borrowed time and was doomed to imminent extinction. Writing in 1900, Boris Chicherin, one of Russia’s foremost liberal thinkers, remarked that radical journalism, which, depending on political orientation, posited as the only ideal the liberation either of the peasant or the factory worker, presented law as nothing more than “empty words or weapons for realizing other goals.”<sup>14</sup> A decade later, the Ukrainian philosopher and liberal jurist Bogdan Kistiakovsky argued that a purely instrumental view of law that Chicherin had attributed to the radicals was, in fact, shared by broad swaths of the Russian intelligentsia, including even legal professionals. In his famous 1909 essay “In Defense of Law: The Intelligentsia and Legal Consciousness,” Kistiakovsky wrote that the Russian intelligentsia’s maximalist demands, disdain for compromise, and interest in “higher and absolute ideals” as well as peculiarities of Russia’s historical development, had blinded the intelligentsia to the true value of law. “We must acknowledge as a general quality of all of our intelligentsia a failure to understand the significance of legal norms for social life,” Kistiakovsky stated dolefully. “Where is that book that would be capable of . . . awakening legal consciousness in our intelligentsia?” Kistiakovsky wrote referring to the dearth of philosophical writings even remotely comparable in depth and influence to those of Locke, Montesquieu, Kant, or numerous other European philosophers who shaped Western political and legal thought. “Where is our *The Spirit of Laws*, our *The Social Contract*?” Kistiakovsky asked. The intelligentsia’s “spiritual leaders” at best had ignored the questions animating Western thinkers—about constitutionalism, the rule of law, and individual rights—if not displayed open hostility toward them. And as to those few who, like the aforementioned Chicherin, held different views, their influence on the intelligentsia’s legal consciousness was, according to Kistiakovsky, negligible. In fact, he claimed, it was precisely their legal ideas that had the least impact.<sup>15</sup>

### III.

There was however another type of “spiritual leader” whom Kistiakovsky never mentions but who held profound sway over the Russian intelligentsia and who influenced its outlook on law, if not in the way Kistiakovsky wished. This spiritual leader was the Russian writer. In fact, to a great extent, it was precisely under the influence of the writer that other cultural

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<sup>13</sup> F. A. Stepun, *Zhizn’ i tvorchestvo*. Izbrannye sochineniia 414 (V. K. Kantor ed., 2009).

<sup>14</sup> B. N. Chicherin, *Rossiia nakanune XX stoletia* 20 (1900).

<sup>15</sup> B. Kistiakovskii, *V zashchitu prava*. (Intelligentsiia i pravosoznanie), in *Vekhi*. Sbornik statei o russkoi intelligentsii, 125, 129, 132 (1909).

contributors, from religious philosophers to radical journalists and many in between, developed their own views. And as no one had enjoyed a greater cultural and moral prestige among the reading public than the writer, no one had done more than the writer to popularize the skeptical view of law and to entrench it within the discourse of national identity.<sup>16</sup>

To be sure, complaints about law—about its impersonality, technicality, and excessive formalism—were not exclusive to Russian literature. Western novelists shared many of the same concerns: with the limits of legal reasoning; with law’s inability to respond with enough flexibility to the infinite variety of human experience; with the law’s reductive understanding of truth; with moral shortfalls and remainders plaguing legal decisions and solutions. But unlike their Western counterparts, Russian writers went beyond such critique to valorize dismissive attitudes toward the law as a distinguishing feature of Russian national identity: a reflection of a special sensitivity to justice inaccessible to the juridically minded West. It is with this literary imprimatur that the assumption of a presumably unique national instinct for justice has firmly embedded itself in the Russian cultural imaginary.

In fiction and non-fiction, writers across the political spectrum and historical periods—from Alexander Herzen to Leo Tolstoy, from Alexander Solzhenitsyn to Zakhar Prilepin—have portrayed legal solutions and relationships in the Slavophile key: as “cold,” unspiritual, and “un-Russian,” an inadequate foundation for a society conducive to moral and spiritual flourishing. But it was the nineteenth-century classics who first injected these ideas into the cultural bloodstream and ensured their remarkable longevity.

Among the most prominent voices, we must name Feodor Dostoevsky, with his repeated and varied critique of the recently reformed modern courts (more on this below) in both fiction and journalism. Most famously, Mitia Karamazov’s wrongful conviction has been traditionally read as Dostoevsky’s endorsement of “higher” justice, where Mitia’s innocence is dismissed as a mere technicality irrelevant to the judgment about his moral guilt.<sup>17</sup> Delivered by the jury of “the peasants [who] stood up for themselves,” the verdict has been widely understood to express a triumph of superior (even divine) justice over law.<sup>18</sup>

This prevalent reading interprets Dostoevsky’s rendering of the trial through the lens of his Slavophile sympathies. But when it came to law, a writer did not have to share the Slavophiles’ background to be sympathetic to some of their core views. Herzen, for instance, started as a Westernizer but, after the failure of the 1848 revolutions, became disillusioned with the West and came to see the Russian peasant’s fear and mistrust of law

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<sup>16</sup> For a recent discussion of the writer’s cultural and moral prestige in the Russian context, see Gary Saul Morson, *Wonder Confronts Certainty: Russian Writers on the Timeless Questions and Why Their Answers Matter* 41-79 (2023). On how the late imperial writer impacted popular and professional attitudes toward law, see Anna Schur, *The Letters and the Law: Legal and Literary Culture in Late Imperial Russia* (2022).

<sup>17</sup> For an alternative reading of *The Brothers Karamazov* that argues that Dostoevsky is concerned not only with the Western-style court but also with the culturally specific aspects of the Russian courtroom and that his endorsement of Mitia’s erroneous verdict may be less unqualified than has been widely assumed, see Schur, *supra* note 16, ch. 4.

<sup>18</sup> F. M. Dostoevsky, *Bratya Karamazovy*, in 15 *Polnoe sobranie sochinenii v tridsati tomakh* 173 (V. G. Baznov et al. eds., 1972-90).

and its institutions as an important advantage over the West. Living their lives “outside the law,” Russian peasants, according to Herzen, preserved a natural morality untainted by legal relationships. And this, along with hazy ideas about property and property rights, made Russia the likeliest site of the future social transformation.<sup>19</sup>

An echo of these ideas is also audible in Tolstoy, even if he does not typically couch them in terms of the contrast between Russia and the West. In Tolstoy’s world where moral corruption often issues from most unexpected sources—medicine, religion, public service—law proves to be a more predictable culprit. As it legitimates the violence and justifies the exploitation perpetrated with its sanction, law, according to Tolstoy, perverts moral instinct common to all people. “If only they understood that that which is called law is a crude mockery of those eternal laws inscribed in the hearts of all people,” Tolstoy wrote in his diary shortly before his death in 1910.<sup>20</sup> Only outside of legal institutions and relationships can individuals be guided by their inner moral voice. Inside those institutions, the intuitive knowledge of the good is confused, perverted, or rendered powerless, as is illustrated, for instance, in Tolstoy’s last long novel *Resurrection*, where law is portrayed as an implacable machine impervious to human efforts to correct even most obvious and egregious injustices perpetrated in its name.

The list can go on. In short, nineteenth-century Russian literature, even in its non-Slavophile variants, largely absorbed and further disseminated a Slavophile-like suspicion of law. It tended to displace juridical situations onto the plane of morality, philosophy, and religion, and to prioritize “higher,” i.e., ethical, understanding of justice over the formal fulfillment of law’s letter. It presented legal solutions and instruments as attributes of the soulless and corrupt West, advocated “the rule of conscience” over law, and drew a sharp contrast between law and conscience as the true measure of justice.<sup>21</sup> How much influence these ideas had on the Russian intelligentsia is evident from the fact that they infiltrated even the language of legal professionals and even at the time when Russia bore the closest resemblance to the rule-of-law state: during the period of the Great Reforms, a series of modernizing changes enacted in the 1860-70s.

#### IV.

The Judicial Reform of 1864 was designed as a fundamental overhaul of the preexisting system, broadly loathed for its inefficiency, slowness, and, above all, for its corruptness and arbitrariness. While not uniformly implemented and plagued by many setbacks, the Judicial Reform has been generally regarded as one the most successful of the Great Reforms. It introduced an independent judiciary and the jury trial, replaced the secret, written inquisitorial procedure with an open, oral adversarial process, and created, for the first time, the

<sup>19</sup> A. I. Herzen, *Russkii narod i sotsializm*, in 7 *Sobranie sochinenii v tridsati tomakh* 329 (1954-56); *O razvitií revoliutsionnykh idei v Rossii*, in 7 *Sobranie sochinenii v tridsati tomakh* 251 (1954-56).

<sup>20</sup> L. N. Tolstoy, *Dnevnik i zapisnye knizhki 1910*, in 58 *Polnoe sobranie sochinenii v devianosta tomakh* 58 (V. G. Chertkov ed., 1928-58).

<sup>21</sup> The term belongs to Iu. M. Lotman. *Perspektivy*, in *Semiosfera* 143 (2004).



bar and the professional defense attorney.<sup>22</sup> While the reformers did not set out to create the rule-of-law state, in the struggle to replace arbitrariness with legality, they embraced its principles (equality before the law, predictability, clarity, fairness), even in the face of the countermeasures soon brought on by the rise in political violence.

Although the reform was based on a combination of Western elements, its implementation was impacted by Russian historical, political, and cultural peculiarities. Elsewhere, I have argued that one such peculiarity was the relationship between legal and literary cultures.<sup>23</sup> In the Russian context, the outsize prestige of literature and the tremendous moral and cultural authority of the writer, on the one hand, and the disapproval of lawyering and the infancy of the legal profession, on the other hand, led the lawyer to model elements of his professional identity and practice after the revered figure of the writer. The reputation to which the new lawyer aspired was not that of a legal expert but of a citizen, guardian of morality, psychologist, and artist, something of the writer's proxy in the courtroom, one who speaks not on behalf of a narrow private or state interest, but on behalf of the whole society. Leaning into the discourse of "higher justice" offered a powerful way to lay claim to this image.

As in fiction and in the cultural discourse at large, in the Russian post-reform courtroom, "higher justice" was contrasted to the "dead" letter of the law. Moreover, on the lips of the new lawyer, the familiar concept acquired new meanings. Not only did it refer to Western "formalism," it also came to describe the old, pre-reform process. This process was reviled as doubly "lifeless," both because it was conducted through writing (rather than through the "living," i.e., spoken, word) and because it ignored the living individual on trial. To quote Anatolii Koni, perhaps the most famous jurist of the pre-revolutionary period, the reform "scattered to the winds the heap of papers, records, proposals, decisions, etc., under which the living person, reduced to a case number, was buried."<sup>24</sup>

Echoing the patterns of contemporary psychological prose, the new focus on the "living person" involved heightened attention to motives, intentions, and their qualities, which often took priority over actions and their consequences. And while the two sets of concerns inevitably overlap, this could not help but give a special coloring to the Russian post-reform courtroom. To a considerable extent, the judicial process was a moral inquiry where questions of law and fact could easily recede before considerations of morality and where elucidation of moral character was a key task of the proceedings.<sup>25</sup> In the words of

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<sup>22</sup> For a concise overview of the reform, Samuel Kuchеров, *Courts, Lawyers, and Trials under the Last Three Tsars* ch. 1 (1953).

<sup>23</sup> Schur, *supra* note 16, ch. 1.

<sup>24</sup> A. F. Koni, *Nravstvennye nachala ugovnom protsesse*, in 4 *Sobranie sochinenii v vos'mi tomakh* 49 (V. G. Bazanov et al. eds., 1966-69).

<sup>25</sup> Girish Bhat, *The Moralization of Guilt in Late Imperial Russian Trial by Jury: The Early Reform Era*, 15 *Law & Hist. Rev.* 77 (1997).

Alexander Urusov, a prominent late- nineteenth-century defense attorney, “the most important fact that gets uncovered in a trial” is “a person’s character.”<sup>26</sup> Such uncovering took the shape of lengthy psychological profiles, discussions of social contexts, environmental factors and other similar concerns—all modeled after literary paradigms and considered necessary for gauging moral guilt or innocence. As Petr Alexandrov argued in the trial of Vera Zasulich, the most iconic trial in the Russian cultural memory, as “an echo of divine judgment” the jury trial must concern itself not merely with “the outward aspect of actions but also with their inner meaning, with the individual’s actual criminality.”<sup>27</sup> Petr Sergeich, the author of an influential guide to courtroom oratory (in print to this day), agreed, “Those who had the chance to speak with jurors know that they argue not about the crime the defendant committed but about the sort of person he is.”<sup>28</sup>

Determination of actions’ “inner meaning” was achieved through “conscience,” a ubiquitous concept in the postreform courtroom and in the discourse of the new jury trial. The new courts were described as “courts of conscience,” where jurors were said to perform the role of “public conscience,” and trials frequently ended with the jury instruction to judge “according to conscience.” The latter was a reminder of the juror oath, which was a version of the French *intime conviction* and a reflection of the break from the old process, which relied on formal theory of proofs that imposed strict rules of evidence. The new statutes, in contrast, permitted a degree of freedom that some historians have described as unprecedented in European practice.<sup>29</sup> Moreover, the Russian wording underscored both the subjective approach to judgment and the moral aspect of the process, further highlighting the possibility of supplanting legal considerations with moral ones.

This is what happened in the already mentioned Zasulich trial, an 1878 case that to this day continues to be cited as a quintessential expression of Russian “higher justice.”<sup>30</sup> Tried for shooting and wounding a governor of St. Petersburg, Zasulich was acquitted even though her responsibility for the attempted assassination was never in dispute. The acquittal—the most dramatic verdict of the pre-revolutionary era—was the result of her attorney Alexandrov’s strategy of downplaying the legal dimensions of the case. Calling on the jurors to serve as representatives of “social conscience,” Alexandrov urged them to disregard the fact of the attempted assassination and instead focus on his client’s motives (the shooting was reprisal for the flogging of a political criminal), which he presented as legitimate, even

<sup>26</sup> Rech’ A. I. Urusova v zashchitu Dmitrievoi, in *Sudebnye rechi i izvestnykh russkikh iuristov* 725 (M. M. Vydria, ed., 1957).

<sup>27</sup> Rech’ zashchitnika prisiazhnogo poverennogo P. A. Alexandrova, in 2 A. F. Koni, *Polnoe sobranie sochinenii v vos’mi tomakh* 156 (V. G. Bazanov et al. eds., 1966-69).

<sup>28</sup> P. Segeich, *Isskustvo rechi na sude* 125 (1988).

<sup>29</sup> Ekaterina Pravilova, Truth, Facts, and Authenticity in Russian Imperial Jurisprudence and Historiography, 21 *Kritika: Expls. Russian & Eurasian Hist.* 7 (2020).

<sup>30</sup> Genri Reznik, *O spravedlivosti*, Oct. 7, 2014 (<https://perma.cc/548T-ZTQP>).

noble.<sup>31</sup> Alexandrov was, in effect, backed by the court's chairman, whose role was performed by Koni and who ended up dismissing his own instructions to the jury (including his guidance to consider the facts of the case) as optional "advice" that the jurors were free to take or to ignore. The final word they would deliver, Koni reminded the jury, could not be constrained by anything other than "the voice of conscience."<sup>32</sup>

However sensational and explosive, the Zasulich trial dramatizes a common strategy used to assist jurors in negotiating conflicts between "law" and "justice." When it suited their purposes, Russian trial lawyers (defense attorneys especially) reminded jurors about the primacy of the latter. Here is how the renowned attorney Feodor Plevako put the matter to a jury in a case of his own: "The legislator knows that there are cases when interests of higher justice preclude the application of law. The legislator knows that there are cases when to measure with the measure of law is to make mockery of law and to publicly commit an act of lawlessness."<sup>33</sup>

To be sure, post-reform lawyers were aware of the pitfalls of the Russian courtroom's moralistic ethos. Some worried about what they saw as a misconception of jurors' responsibilities encouraged by their very oath. They advocated educating jurors about relevant legal matters and placing some rational constraints on their unlimited discretion.<sup>34</sup> Others were nervous about the dangers posed by "conscience" constructed along ethnic and religious lines, especially for minority populations and communities. A year after the Zasulich trial, in a blood libel case in the Georgian city of Kutaisi, her defender Alexandrov was no longer comfortable appealing to the jurors' intuitions and calling for "higher justice." Trying the case on the outskirts of the empire before a panel of Christian jurors, he understood that to let the case depend on the whims of the jurors' conscience spelled trouble for his Jewish clients and felt that acquittal was possible only if conventional prejudice was contained by the strictures of legal reasoning.<sup>35</sup>

Still, concerns of this nature were typically reserved for more narrow professional settings, like appeal courts and professional publications, or voiced strictly for pragmatic ends in the context of a particular trial. In speaking to a wider audience—through multiple editions of selected courtroom speeches, literary criticism, journalistic writing, and other public-facing discussions—post-reform lawyers cultivated the image of the morality-centric courtroom and lent their authority to the notion of native "higher justice" (conscience-

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<sup>31</sup> Rech' zashchitnika prisiazhnogo poverennogo P. A. Alexandrova, in 2 A. F. Koni, *Polnoe sobranie sochinenii v vos'mi tomakh* 156 (V. G. Bazanov et al. eds., 1966-69).

<sup>32</sup> Reziiume predsedatelia Koni, in *id.* at 168.

<sup>33</sup> F. N. Plevako, *Delo liutoricheskikh krest'ian*, in *Sudebnye rechi izvestnykh russkikh iuristov*, *supra* note 26, at 552.

<sup>34</sup> See, e.g., V. D. Spasovich's 1884 speech before the Criminal Cassation Department of the Senate in the Mel'nitsky affair. *Delo Mel'nitskikh*, in *Rechi izvestnykh russkikh iuristov* (P. M. Zakharov & E. M. Cherkashina eds., 1985).

<sup>35</sup> Petr Aleksandrov, *Delo Sarry Modebadze*, in *Sudebnye rechi izvestnykh russkikh iuristov*, *supra* note 26, at 80.

based, personalistic, and benevolent) as separate from and superior to law.<sup>36</sup> In this sense, the discourse of the late-imperial lawyer both mirrored and promoted the conflict between law and justice propagated through Russian literature and culture and contributed to entrenching skepticism about the value of law.

## V.

The October Revolution of 1917 spawned its own variant of “higher justice.” It dismantled the old judicial system, abolished most tsarist-era laws, and closed the existing courts. While historians debate just how radical this break with the past really was, at the level of rhetoric, the early Soviet public discourse of justice recycled many of the old tropes. In fact, the new “revolutionary justice” can be seen as the institutionalized triumph of “higher justice”: the victory of spontaneous popular sentiment over law.<sup>37</sup> No longer in need of specially educated, professionally trained cadres, or even of basic legal concepts, the new revolutionary justice relied on mass participation. The popularly elected lay judges and the audience decided cases on the basis of their revolutionary morality, even if now morality was conceived in class terms and the instinct for justice was reframed as a class, rather than national, attribute. Thus, during the Red Terror, which dispensed with written law, it was this very instinct, speciously named “revolutionary legal consciousness,” that served as the basis of blood-soaked revolutionary justice.

Closely related to “revolutionary legal consciousness” was the notion of “revolutionary conscience,” which also continued to permeate the regime’s rhetoric. In fact, “revolutionary conscience” retained certain primacy over law even after the introduction of the first Soviet codes in 1922. As the infamous state prosecutor Nikolai Krylenko said in the 1923 trial of the Catholic clergy, “We cannot adopt the point of view that we in our revolutionary court acting in our revolutionary era must be guided strictly by the exact wording of law articles.” The enactment of the criminal code does not abrogate the relevance of “revolutionary legal conscience” as the foundation for Soviet justice, Krylenko argued. In line with the programmatic and openly declared transformation of law into a weapon of class struggle, Krylenko rejected the notion that written law can impose limits on revolutionary courts. Tapping into the old distinction between the “dead” letter of written law and “living” justice of spontaneous instinct, he scorned “the fetishistic interpretation and formal, dead understanding of the norms we have.” What is needed is “not formal logic,” but “the logic of life, the logic of revolution, the logic of class reality.”

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<sup>36</sup> Koni, for instance, who also wrote extensively on literary matters, saw his literary criticism as an additional vehicle for promoting his own especially cherished ideas about law. See Anna Schur, *Authenticity, Facts, and Politics in the Fin-de-Siècle Pushkin Debate*, 101 *Slavonic & East Eur. Rev.* 622 (2023).

<sup>37</sup> Among those who see the Bolshevik revolution of 1917 as a break with the pre-revolutionary period are Richard Pipes, *Legalised Lawlessness: Soviet Revolutionary Justice* (1986); V. Portnov & M. Slavin, *Stanovlenie pravosudiia Sovetskoi Rossii (1917-1922)* (1990). Those stressing the continuity between the two periods include Harold J. Berman, *Justice in the USSR: An Interpretation of the Soviet Law* (rev. ed. 1963); V. Bukov, *Ot Rossiiskogo suda prisiashnykh k proletarskomu pravosudiiu. U istokov totalitarizma* (1997).

In a version of Plevako's argument, Krylenko claimed that law itself grants the Soviet court an unfettered freedom to mete out justice "on the basis of revolutionary conscience."<sup>38</sup>

The reign of "revolutionary legal consciousness" was succeeded by a turn toward "socialist legality," i.e., regularization of legal practice, return of professionalism, and other elements of law's restoration.<sup>39</sup> But despite the efforts to strengthen the observance of legal norms—and to keep law separate from terror—culturally, the most striking performances of Soviet law of the Stalin era were the show trials of the 1930s, where law provided only the thinnest of veneers to thoroughly politicized morality tales of the confrontation between good and evil ratcheted up to melodramatic proportions.<sup>40</sup> In these manufactured battles of malice and innocence, the very appeal to facts was demonized as "lawyering," and the source of genuine justice again was placed with "the people's" instincts.<sup>41</sup> Wrapping up his closing speech at the third, most grandiose of the "Moscow trials," Andrei Vyshinskii, another prosecutor infamous for his brutality, couched his call on the judges "to shoot [the defendants] like vile dogs" as a plea of "our entire country, young and old." "Our people demand one thing: squash the accursed reptile!"<sup>42</sup>

While, following the death of Stalin in 1953, the period of relative liberalization known as the Khrushchev Thaw intensified the rhetoric of "Soviet legality" (now constructed as a corrective to the excesses of the personality cult), the notion that a special sensitivity for justice is vested with the masses endured in the public culture well beyond the Stalinist era. In one of the more colorful illustrations, the novelist and Nobel laureate Mikhail Sholokhov expressed disappointment with what he saw as an overly lenient sentence his fellow writers, the dissidents Andrei Siniavsky and Iulii Daniel, received for their literary activities in a trial that marked the end of the Thaw: seven and five years of labor camps respectively. Speaking to the Twenty-Third Party Congress (1966) in the aftermath of the Siniavsky-Daniel trial, Sholokhov fantasized about what true justice for the "traitors-dissidents" should look like. If now were the 1920s, "these thugs would be tried not based on the criminal code but on the basis of revolutionary legal consciousness," Sholokhov said to an especially long bout of applause from the audience. The supra-legal feeling for justice would ensure that "these werewolves" would not come off so easily.<sup>43</sup>

<sup>38</sup> N. V. Krylenko, *Sudebnye rechi* 14-15, 26, 26-27, 27 (1931).

<sup>39</sup> Eugene Huskey, *Russian Lawyers and the Soviet State* chs. 3 & 5 (1982).

<sup>40</sup> On the relationship between law and terror in the 1920s and especially in the 1930s, see, e.g., Peter Solomon, *Soviet Criminal Justice and the Great Terror* 46, 391 (1987). Robert Sharlet describes the efforts to restore legality in the midst of the Great Purges as a paradox. See his *Stalinism and Soviet Legal Culture*, in *Stalinism: Essays in Historical* 155 (Robert C. Tucker ed., 1999).

<sup>41</sup> See the account of the 1936 Party Plenum, the precursor to the 1938 Bukharin-Rykov trial, in J. Arch Getty & Oleg V. Naumov, *The Road to Terror: Stalin and the Self-Destruction of the Bolsheviks, 1932-1939*, at 134 (2d ed. 2010).

<sup>42</sup> A. Ia. Vyshinskii, *Sudebnye rechi* 562 (1955).

<sup>43</sup> See Andrei Nikitin-Perenskii, Mikhail Aleksandrovich Sholokhov, *Vystuplenie na XXIII s"ezde KPSS o Siniavskom i Daniele*, 1966, *ImWerden*, Dec. 14, 2016 (<https://perma.cc/82BV-92MW>) (documentary footage of Sholokov's speech).

The Soviet experience made the ultimate mockery of the promise of a gentler, more merciful “higher justice” based on shared intuitions and values. The violence and arbitrariness it unleashed laid bare the dangers that had always lurked in the cultural narrative I have been tracing: one that braided together appeals to a higher mystical morality with a scorn for the very idea of law presumably severed from any moral sanction and cast as a foil to an unspoiled spirituality. In the shadow of the revolution, this narrative, long endorsed and disseminated by some of the most influential works of Russian literature, appears before us in a different, menacing aspect.

## VI.

The post-Soviet period has seen a considerable uptick in the rhetoric of legality. Since the late 1990s onward, the official discourse, including under Putin, has been emphasizing the importance of law and of transforming Russia into a *pravovoe gosudarstvo*, a loose and somewhat problematic equivalent to “the-rule-of-law state,” itself, of course, a much-debated concept. But whatever margin might have existed (or even continues to exist) for the regular functioning of legal institutions in ordinary, non-political cases, it has been continually shrinking in the face of hyper-politicization of ever greater areas of life, especially in recent years.<sup>44</sup> Still, even as law assumes its familiar place of subordination to politics—be it when a single father is sentenced to two years of penal colony for his child’s anti-war drawing,<sup>45</sup> or when a human rights activist is tried twice for the same Facebook anti-war post because the first sentence is deemed too lenient,<sup>46</sup> or when a neighboring state’s territories are shamelessly written into the Russian constitution to create a “legal” pretext for their ongoing occupation and further conquest<sup>47</sup>—the regime continues to mouth the language of “law’s supremacy” at home and internationally.<sup>48</sup>

More relevant to this discussion, however, is that alongside this rhetoric, the same period has witnessed a simultaneous resurgence of the neo-Slavophile paradigm that resurrected the old, nineteenth-century language and sentiment essentially unchanged. To be sure, this paradigm has never been fully extinguished. Not only did it endure in the conservative nationalist wing of the underground dissident movement of the 1960s-1980s; it was also reflected in state-approved cultural production, like the highly acclaimed works of “village-prose” writers who, unlike other nonconforming literary groups, did receive the

<sup>44</sup> On present-day Russia as “the dual state,” see Jeffrey Kahn, *The Rule of Law Under Pressure: Russia and the European Human Rights System*, 44 *Rev. Cent. & East Eur. L.* 275 (2019).

<sup>45</sup> *Otsu shkol’nitsy iz Efremova, narisovavshei antivoennuiu kartinku, dali dva goda kolonii. On “sbezhal” do prigovora*, Mar. 28, 2023 (<https://perma.cc/PW6M-HX7Q>).

<sup>46</sup> Natalia Zotova, *Pravozashchitnika Olega Orlova prigovorili k dvum s polovinoi godam kolonii*, Feb. 27, 2024 (<https://perma.cc/ALD6-LQHZ>).

<sup>47</sup> Putin utverdil ratifikatsiiu dogovorov o priniatii okkupiravonnaykh territorii v sostav Rossii, Oct. 5, 2022 (<https://perma.cc/Q3GE-5R78>).

<sup>48</sup> Pavel Zubov, *Putin zaiavil ob otstaivanii Rossiei verkhovenstva zakona*, *Gazeta.ru*, June 26, 2024 (<https://perma.cc/X5M6-JZ3L>).

official sanction and enjoyed popular success. Their position on law was powerfully expressed by Alexander Solzhenitsyn, the most influential conservative dissident who shared some of the core ideas of the village-prose movement, even if his complex and multifaceted writing career far surpassed the narrow label.

Evident in many of his works, Solzhenitsyn's distaste for Western-style judicial rationalism received the most concise articulation in his 1978 Harvard speech. Here, Solzhenitsyn channeled both the Slavophiles and Tolstoy in his own argument for the inferiority of "external" law and the superiority of morality-rooted justice. Even as he briefly acknowledged the horrors of living in a society lacking an "objective legal scale," he directed his critique elsewhere: against the West that, he argued, knows no other scale than the legal. "Grounded in law and not reaching any higher," Western societies fail to take full advantage "of the heights of human potential." Using the familiar Slavophile formula, Solzhenitsyn described law as "too cold and formal to have a beneficial influence on society. When all of life is permeated with legal relationships, there emerges an atmosphere of spiritual mediocrity that deadens the best human aspirations."<sup>49</sup> Twelve years later, in *How Should We Organize Russia* (1990), a related idea was given special significance as the concluding thought of the treatise. "Moral principles must take priority over legal ones. Justice involves conformance with moral law before juridical law," Solzhenitsyn concluded with his trademark aphoristic didacticism.<sup>50</sup>

Such revival of Slavophile critique of the "juridical" West anticipated a broader return to the claims of Russia's "special path" in post-Soviet public discourse. In the last decade especially, declarations of Russia's "civilizational" uniqueness have become increasingly shrill, in proportion to the escalating aggressiveness toward Ukraine and the "collective" West. Part and parcel of the revived narrative has once again been the assertion of a unique relationship with justice and an exceptionally acute sense of conscience from which it springs forth. From Putin all the way down, the official public discourse endlessly reproduces the idea that a special instinct for justice is a distinguishing attribute of national identity, now conceived anxiously in both ethnic and imperial terms, at least at the highest levels. A case in point is Putin's clarification when describing an unusually strong aspiration for justice as "a dominant feature of the Russian person, and in general of the Russian citizen (*rossiianin*), be it a Tatar, a Chechen, a Mordvinian, or a Dagestani."<sup>51</sup>

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<sup>49</sup> A. I. Solzhenitsyn, Rech' v Garvarade na assamblee vypusnikov universiteta, 8 May, 1978, in 1 Publitsistika v trekh tomakh 314 (T. N. Spirina ed., 1995).

<sup>50</sup> A. I. Solzhenitsyn, Kak nam obosnovat' Rossiui, in 1 Publitsistika v trekh tomakh 597. For a rare critical assessment of this prescription and its internal incoherence, as well as of the dangers of Solzhenitsyn's view on law and morality more broadly, see Mikhail Epstein, Aleksandr Solzhenitsyn, in *Filosofia: An Encyclopedia of Russian Thought* (Alyssa DeBlasio & Mikhail Epstein eds., 2020) (<https://perma.cc/722Y-T9AD>).

<sup>51</sup> Putin schitaet stremlenie k spravedlivosti samoi iarkoi chertoii Rossiian, Sept. 5, 2016 (<https://perma.cc/522U-WGU2>).

More frequently, however, the ethnic (and religious) implication dominates. Justice is said to be “in the Russians’ blood,”<sup>52</sup> and conscience—“a national idea.”<sup>53</sup> Russian Orthodoxy is declared to be incompatible with Western-style rule of law.<sup>54</sup> Mass media is awash with reminders of the dual meaning of *pravda* (as “truth” and as “justice”) spuriously declared to be unique to the Russian language and adduced as evidence of a special national feeling for justice. Private citizens opine in social media posts on “the Russian person’s heightened sense of justice,”<sup>55</sup> blaming it, only half-jokingly, for all Russian misfortunes.<sup>56</sup> And academics declare Russian identity under threat from Western juridical ideas polluting national culture and advocate a return to a more intuitive, conscience-based mentality—to what one scholar has called an “instinctive law-feeling,” a concept hailing from Ivan Il’in, a twentieth-century ideologue of Russian fascism.<sup>57</sup>

Even the anti-war, pro-democratic wing of the opposition has not shied away from downgrading the rule-of-law ideal and from rhetorical sublimation of “the people’s” insight as the source of authority on justice, even if it keeps its language free from the inflections of authoritarian patriotism mandatory in mainstream expression. When an influential lawyer critical of the regime extolls the Zasulich case as an example of “higher justice”;<sup>58</sup> or when a sociologist argues (with reference to none other than Carl Schmitt) that only “the people” and their “inner ideas” can ground the link between law and justice and thus serve as a safeguard against elevation of arbitrary command into law, we recognize the common ethos connecting these discussions with the official narrative.<sup>59</sup>

Rooted in a centuries-long tradition of variously denigrating law as formalistic, lifeless, cold, harsh, bourgeois, Judaic, Roman, and Western—and contrasting it to justice conceived as spiritual, living, moral, merciful, revolutionary, Soviet, and most importantly Russian, present-day discourse on law and justice is overpowering in its monotony, intensity, and sheer volume. As if to screen the deeply unjust, cut-throat realities of daily life at

<sup>52</sup> Chuvstvo spravedlivosti o russkikh v krovi: Ul’ianovski obshchestvennik Alexander Dashko, Aug. 1, 2022 (<https://ultoday73.ru/chuvstvo-spravedlivosti-u-russkih-v-krovi-ulyanovskij-obshchestvennik-aleksandr-dashko/>).

<sup>53</sup> Andrei Boets, Sovest’. Russkaia ideia, July 18, 2017 (<https://perma.cc/EH5A-NGBH>); N. A. Red’ko, Sovest’ kak kliuchevaia dominanta russkoi natsional’noi kartiny mira, in *Mir russkogo slova* 2 (2019) (<https://perma.cc/U67H-4LW9>); Zhit’ po sovesti—natsional’naia ideia dlia Rossii, Dec. 30, 2019 (<https://perma.cc/FQR3-S8YZ>); Sovest’ national’naia ideia russkogo naroda (<https://perma.cc/Y6ZH-KQ3V>).

<sup>54</sup> Zapad i pravoslavie, May 13, 2011 (<https://perma.cc/2AR2-WUAS>).

<sup>55</sup> Russkii: krov’ ili kul’tura?, June 26, 2013 (<https://topwar.ru/30001-russkiy-krov-ili-kultura.html>).

<sup>56</sup> Chuvstvo spravedlivosti u russkikh, June 23, 2020 (<https://perma.cc/AAT4-Y2HR>).

<sup>57</sup> A. A. Korol’kov, *Filosofia prava: Zapadnoevropeiskaia i russkaia traditsii*, in *Russkaia filosofia prava* 434 (A. P. Al’bov et al. eds., 1999).

<sup>58</sup> See supra note 30.

<sup>59</sup> G. Iudin, *Demokratiia v Rossii. Chto poshlo ne tak?* (<https://perma.cc/VQJ8-KHSJ>).



home and the war of aggression abroad, thousands of articles, websites, posts, and blogs continue to rehearse the idea of a special Russian capacity for justice.

Behind all of this proliferation, it is easy to detect the often implicit but sometimes perfectly explicit influence of the Russian classics. Interspersed with the familiar platitudes, we find the names of the Russian writers, exhortations to read them, or even quotations from the especially revered figures. The most common by far comes from Dostoevsky: “The highest and the most striking characteristic feature of our People is the feeling of justice and a thirst for it.”<sup>60</sup> This quotation from *Notes from the House of the Dead*, a lightly fictionalized autobiographical narrative of Dostoevsky’s prison experience which marked a turning point in his thought and to which his idealization of the Russian people dates back, is reproduced with and without attribution, sometimes verbatim and sometimes with slight variations, in innumerable websites, on-line periodicals, social media forums, and personal media blogs.

We find it in the Telegram account of Igor Girkin, the former commander of pro-Russian militia found guilty (in absentia) by a Dutch court of the murder of 298 people on Malaysian Airlines flight MH17, which he and his unit shot down in eastern Ukraine in 2014.<sup>61</sup> We find it on the pages of the pro-government *Independent Newspaper* (*Nezavisimaia Gazeta*), where the chairman of the youth section of the Kremlin-approved party “A Just Russia” (*Spravedlivaia Rossiia*) credits Dostoevsky’s words with serving as his personal “guide to action.”<sup>62</sup> We find it affixed as epigraphs to the writings of legal professionals even when they write on technical legal matters and when Dostoevsky’s words have little discernable connection with their ideas.<sup>63</sup> What we don’t find is any sign of hesitation, resistance, or scrutiny that words such as these could and should, in principle, invite. In my admittedly less than exhaustive study of this quotation’s online use, I have not found a single instance of these words being held at a critical distance or treated as anything other than a charismatic truth. Along with other literary allusions, it forms an important part of the rhetorical background that makes legible even the more farcical instances of the usual fare, like Putin’s assertions of Russia’s current leadership in “the vanguard of building a more just world order”<sup>64</sup> or the vox populi assurances that Russians are incapable of happiness so long as even one instance of injustice is being perpetrated somewhere in the world.<sup>65</sup>

<sup>60</sup> F. M. Dostoevsky, *Zapiski iz mertvogo doma*, in 4 *Polnoe sobranie sochinenii v tridsati tomakh* 121 (V. G. Baznov et al. eds., 1972-90).

<sup>61</sup> In his Telegram account Girkin appears under his nom de guerre Strelkov. I. I. Strelkov, *Novosti #KRP* (<https://tgststat.ru/channel/@igorstrelkov/23232>).

<sup>62</sup> *Spravedlivaia sila*, Apr. 18, 2017 (<https://perma.cc/KT4B-MW96>).

<sup>63</sup> Aidar Sultanov, *Pravosudie ne mozhet byt’ ne motivirovannym*, Sept. 28, 2022 (<https://perma.cc/FV92-69E4>).

<sup>64</sup> Putin zaiavil, chto Rossiia nakhoditsia v avangarde sozdaniia spravedlivogo miroustroistva, Nov. 28, 2023 (<https://perma.cc/XNK9-VN3F>).

<sup>65</sup> Often attributed, with no evidence, to Charles de Gaulle. See, e.g., Elena Khomulo, *Russkii chelovek ne mozhet chuvstvovat’ sebia shchastlivym, esli gde-to tvoritsia nespravedlivost’*. *Beseda s generalom Leonidom Grigor’evichem Ivashovym* (<https://pravoslavie.ru/87857.html>); *Redaktsiia Zavtra*, *Zhit’ po pravde – eto po-*

## VII.

Close to two hundred years ago, Herzen accounted for Russian disregard for law by pointing to the defects and abuses of the legal system itself. “Blatant injustice of one half of laws has taught [Russian people] to hate the other half. . . . Total inequality in court killed in [them] any respect for legality. A Russian, regardless of his class, breaks the law, wherever he can do that with impunity; the government acts in exactly the same manner,” Herzen wrote in 1850.<sup>66</sup> Learnt from life itself, Russian popular disdain for law, Herzen suggested, mirrors the practices of the state, an argument that retains its power to this day.<sup>67</sup>

But Herzen went beyond diagnosing the phenomenon and its causes. Not merely a natural reaction to abuse, unfairness, or mistreatment, these attitudes expressed, he believed, something more important: a deeply running spiritual nobility unavailable to the juridically minded West. Since Herzen and the Slavophiles, the claim to a special sense of morality as a core attribute of a special people became an important element in the construction of Russian national identity, including its image as a redeemer nation. And the comparison between the inferior Western legalism and Russian superior morality, propagated by some of the most influential voices in the Russian literary tradition, has long become a truism of Russian literary studies, largely escaping critical analysis even from scholars in the West.

In the wake of Russia’s invasion of Ukraine, the Russian literary canon has been subjected to renewed scrutiny. While not new, the question of how much responsibility for the imperialist mindset undergirding the war rests on the classics, the writers long revered for their moral insights and humanistic commitments, has been on many minds, and it has received different answers. For some equating Russian culture with Putin’s regime is illegitimate; others acknowledge the role Russian literature’s worst impulses have played in the resurgence of imperialist ideology and have sought to free the field from their spell.<sup>68</sup> But while the spotlight has been rightly cast above all on the entanglements of literary discourses with imperial ideology and colonial practice, the tradition’s moral fundamentalism should also be given a second look.

Often expressed through the downgrading of legal solutions and frameworks, Russian literature’s moralism has been generally seen by scholars in approving, even idealizing terms. Indeed, the view of the tradition’s special investment in moral and spiritual concerns

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russki, Mar. 28, 2022 (<https://perma.cc/HZX4-NNYC>); Vypel-V, Russkie liudi nikogda ne budut shchastlivy, Dzen, Apr. 29, 2022 (<https://perma.cc/DUZ4-XPOX>); Fut Bolist, Russkie liudi nikogda ne budut shchastlivy, VK, Mar. 28, 2013 (<https://perma.cc/SWR5-QKYG>).

<sup>66</sup> Herzen, *O razvitií revoliutsionnykh idei v Rossii*, supra note 19, at 251.

<sup>67</sup> Kahn’s explanation of the present-day popular attitudes toward law follows a similar logic. See Kahn, supra note 44, at 277–78, 293.

<sup>68</sup> For an instance of the first position, see Irina Paperno, *Russian Literature*, *Times Literary Supp.*, Apr. 29, 2022, and of the second position, see Susan Smith-Peter, *What Do Scholars of Russia Owe Ukraine*, Apr. 1, 2022 (<https://perma.cc/5Z7L-VV2U>); Sarah Hudspith, *Dostoevsky and the Idea of Russianness: The Case for a Decolonial Critique*, Oct. 9, 2023 (<https://perma.cc/LCQ4-4UTL>).

(presumed to be displaced or at least attenuated by other, lesser preoccupations in other literatures) continues to inform large swaths of literary scholarship, from panoramic explorations of the canon to more specifically focused studies.<sup>69</sup> Commenting on law-related texts in particular, Western critics tend to embrace the positions of their authors, directly or implicitly endorsing their views on law as mechanistic, inflexible, harsh, and “un-Russian” in its disconnect from morality and inability to deliver genuine, “higher” justice intuited by the Russian heart.<sup>70</sup>

Now that the tropes of higher justice and of a special Russian capacity for it have been implicated in the discourses of Russian supremacy, if not more transparently, certainly more profusely than ever before, the literary and cultural legacies that sustain them demand to be examined anew. It is not merely that a reevaluation of the long-standing assumptions about Russian literature’s views on law may bring to light less examined facets of Russian messianism. Or that a fresh look at the familiar works celebrated for their insistence that morality alone should provide a foundation for an ideal non-judicial society may uncover their authoritarian, theocratic, and generally illiberal implications. Such reconsideration may also help the field that is seeking a greater self-awareness to recognize its own entanglements with “the Russian idea” and to better resist the charisma of a messianic nationalism that grounds its redemptive ambitions in claims of a special yearning for morality, spirituality, and justice.

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<sup>69</sup> A recent example of the former is Morson, *supra* note 16, and of the latter, Anna Berman, *The Family Novel in Russia and England, 1800-1880* (2023).

<sup>70</sup> See, e.g., Gary Rosenshield, *Western Law, Russian Justice: Dostoevsky, the Jury Trial, and the Law* (2005).