

Chapter 18

LEON PETRAŻYCKI'S THEORY OF LAW

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18.1. Introduction

Leon Petrażycki (1867–1931) was active not only as a legal theorist but also as a scholar of Roman law (e.g., Petrażycki 1892, 2002), as a forerunner of economic analysis of law (e.g., Petrażycki 1895, 2002), as a political and theoretical supporter of women's rights (e.g., Petrażycki 1915, 2010d), as a philosopher of science (e.g., Petrażycki 1908), as a philosopher of logic (e.g., Petrażycki 1939), as a psychologist (e.g., Petrażycki 1908), as an economist (e.g., Petrażycki 1911), and as a general sociologist (see Lande 1935, 42–3; 1959b, 1975).

Petrażycki set out six sciences meant to deal with legal phenomena: (1) the general theory of law, (2) descriptive legal science, (3) the history of law, (4) legal prophecies,¹ (5) legal policy, and (6) legal dogmatics.

In this text I will focus almost exclusively on Petrażycki's theory of law. Owing to space limitations, I will not discuss his conception of legal policy (and of the role of love within it).² As for Petrażycki's conception of legal dogmatics, it will be discussed from a strictly theoretical point of view. As for his contribution to the psychology and sociology of law, these are so intertwined with his legal theory that to a good extent discussing the latter amounts to discussing the former as well.³ In fact, it would not be entirely inaccurate to maintain that Petrażycki's theory of law is a psycho-sociology of law. As for his logic and his philosophy of science, these will be discussed here only to the extent necessary to understand how he devises legal-theoretical concepts. Therefore,

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¹ In his *Teorija prava* (Theory of law) Petrażycki did not mention legal prophecies (Petrażycki 1909–1910, 648; Petrażycki 1955, 298–9). He would mention them in Petrażycki 1939, 111. A discussion of these different legal sciences can be found in Fittipaldi 2013a.

² See Petrażycki 2010a and 2010b. See also Kojder (1995, 106–23) and Fittipaldi 2015.

³ To be sure, Petrażycki rejected the concept of *sociology of law*, and to my knowledge he used this term only once (Petrażycki 1939, 104). His rejection of that concept is connected with his classification of the sciences, a classification we need not discuss here. The reader should only bear in mind that the Petrażyckian term *theory of law* overlaps to a large extent with what would now instead be called socio-psychology of law, comparative legal science, and history of law. On Petrażycki's attitude towards sociology "of law" see Timoshina 2013a.

I will focus exclusively on his concept of an adequate theory and on a few related concepts.

18.2. The Concept of an Adequate Theory

Petrażycki proposed many stipulative definitions of terms that traditionally belong to general jurisprudence. In particular, he proposed new definitions for such terms as *law* (*pravo*),⁴ *morality* (*nравственность*), *ethics* (*этика*), *positive law* (*pravo pozitivnoe*), *authority* (*vlast'*), *public law* (*publičnoe pravo*), and *private law* (*častnoe pravo*),⁵ among others.

When Petrażycki proposes new definitions for old terms, his goal is neither to grasp some essence nor to describe some linguistic usage. True, most of his definitions do present an “approximate coincidence”⁶ with linguistic usage, but this is not Petrażycki’s aim.

His aim is exclusively to develop concepts suitable for *adequate theories*. Only these concepts are *scientific* concepts, as opposed to the *practical* concepts that emerge out of clusters of the most diverse practical needs.⁷ So in or-

⁴ Russian words will be written in accordance with the orthographic reform of 1918. Transliterations into the Latin alphabet will be made according to the standard ISO 9 of 1968. When quoting Petrażycki, I will always indicate the pages of both the Russian original and the English translation contained in Petrażycki 1955. If no reference is made to Petrażycki 1955, it means that I am quoting passages that have not been inserted in that compilation.

⁵ To be precise, Petrażycki distinguished between *public-legal* and *private-legal* authorities. See Section 18.11 below.

⁶ This term, *approximate coincidence* (*priblizitel'noe sovpadenie*), was used on at least one occasion by Petrażycki (1909–1910, 139; 1955, 91), when discussing his distinction between moral and legal phenomena, a distinction that will be discussed in Section 18.7 below.

⁷ For a classic example see Petrażycki’s discussion of the concept of “vegetable” as a practical—i.e. nonscientific—concept: “Professional linguistic usage naturally adapts itself to the particular practical needs and goals that are specific to its given special sphere of practical life. From the point of view of such needs and goals the *most diverse objects* (diverse as to their nature and objective properties) may have *identical* practical importance, identical value, etc., and may also be used in identical practical dealings (behaviours), and *similar* objects may have *different* importance and different practical dealings. In this way the corresponding special practical linguistic usage becomes consistent, unifying what is different and separating what is similar, according to how this is useful and proper from the point of view of a certain practical need and goal, and only from this point of view. For example, from the culinary point of view, the most diverse plants, and in particular different parts of plants of different *genera* and *species*, etc., are unified into one group and receive the same name, ‘vegetable,’ etc., because all of them are appreciated as material for the preparation of dishes or for some sort of culinary need (e.g., as spices, etc.); and innumerable other plants that are similar as to their nature are excluded from the group, and the corresponding name is not used; some of them because they do not taste good; a second group is excluded because the plants in it need to be boiled for a very long time, or else because it is so difficult to prepare them or because the nutritional or gastronomical result is not worth the effort; a third group of plants is excluded because they are spiny, hard, etc.; a fourth group because the plants in it cause stomach ache, headache, etc.; a fifth group because consumption of these plants is impeded by particular customs, prejudices, ignorance of their qualities, etc.” (Petrażycki 1908, 52; my translation).

der to understand how Petrażycki sets out his concepts, we must first become acquainted with his concept of an adequate theory (*adekwatnaja teorija*).⁸

By *adequate theory* Petrażycki means

a theory in which what is stated [*vyskazyvaetsja*] (the logical predicate [...]) [...] is stated in a true and precise way [...] about a class of objects [...], to the effect that if something is stated about one [class], while that statement actually holds true [...] for a broader class, or if the mismatch goes in the opposite direction, the theory is not adequate. (Petrażycki 1908, 67; my translation)

In other words, a theory predicates a certain property of a certain class of objects.⁹ If the class used in the theory is too narrow, Petrażycki calls the theory *limping* (*bromajuščij*) because it *fails to cover* all the phenomena for which it holds true. If the class used in the theory is too broad, Petrażycki calls the theory *leaping* (*prygajuščij*) because it *goes beyond* the phenomena for which it is true.¹⁰ A theory is instead adequate if its class (*klass-podležaščee*) is determined with the proper generality (*nadležaščaja obščnost'*) (Petrażycki 1908, 69). An amusing and often quoted example of a limping theory given by Petrażycki in regard to 10-gram-weighing cigars:

As regards 10-gram-weighing cigars [...] we could produce a large mass of true statements and develop so many theories that it would take more than one thick volume to write them all down. We could say about 10-gram-weighing cigars that if set in motion they would tend to maintain a uniform direction and velocity (due to inertia), or that they are subject to gravity and thus fall down according to certain laws (i.e., they tend to fall if there is no air friction or other complication), or that they undergo thermal expansion, and so on. [...]. Such a science, however, would be a mere parody, a splendid illustration of how not to construct scientific theories. (Petrażycki 1908, 67–8; translation adapted from Nowakowa and Nowak 2000, 400)

Limping theories are not false: they are simply too narrow.¹¹ Leaping theories are instead too broad, and hence partly false. An example of a leaping theory might be a theory stating that water boils at 373.15 degrees Kelvin (my example). Such a theory holds only at 1 atmosphere of pressure. It “leaps” for differ-

⁸ To be precise, Petrażycki discusses, not how concepts are arrived at, but rather their *scientific legitimacy* (*naučnaja legitimost'*) (see Timoshina 2012, 193).

⁹ Petrażycki (1939, 62) distinguished two kinds of classes, (i) realistic classes and (ii) ideological ones, depending on whether (i) they comprise *both* externally existing objects of thought (such as currently existing *dogs*) and externally nonexistent ones (such as past, future, or purely imaginary *dogs*) or (ii) they comprise *solely* externally nonexistent objects of thought (such as *triangles*, to use Petrażycki's example). On the possible connections between Petrażycki's concept of an object of thought (*przedmiot myśli*) or thought-object (*myslimyj obiekt*), and the similar concepts developed by Brentano, Meinong, and Husserl, see the extensive discussion in Timoshina 2012, chap. 3, sec. 3.

¹⁰ A theory may also be at once limping and leaping (Petrażycki 1908, 81).

¹¹ Kortabiński (1969, 1975) showed that the concept of a limping theory had been anticipated by several authors, including Aristotle and Bacon.

ent pressures. Likewise, a sociological theory is leaping if it picks out as relevant only one factor (for example, the economy) out of many that are relevant.¹²

Although Petrażycki did not make any use of the language of *set theory*, I think his definitions can be made clearer by using it:

– A theory is *limping* if it ascribes a certain property to only a *subset* of the phenomena that have that property.

– A theory is *leaping* if the phenomena that have a certain property form only a *subset* of the set of the phenomena to which that theory ascribes that property.

– A theory is *both leaping and limping* if the set of the phenomena that have a certain property only *intersects* with the set of the phenomena to which that theory ascribes that property.¹³

We will see in Section 18.8 that the criterion according to which Petrażycki selects legal emotions, as opposed to nonlegal (i.e., moral) ones, makes it possible to select phenomena that play a role in several adequate theories in Petrażycki's sense. As I said, all the redefinitions Petrażycki offers of certain traditional concepts are intended to have this property.

There has been much discussion about Petrażycki's concept of an adequate theory (see Motyka 1993). An objection that has been often raised against it is that adequacy is too demanding a requirement to meet—one that, if taken seriously, would hamper the development of science. For instance, Kotarbiński observed that “[l]aws that are applicable to entire classes of objects often emerge out of partial laws, which are therefore ‘lame,’ since they ascribe a given property to only some objects in that class” (Kotarbiński 1975, 20). Kotarbiński makes the example of the general laws of genetics, which were first established only with reference to certain plant species.

In my opinion the requirement that theories be adequate can be given a less demanding interpretation. Suppose that:

1. we are using a *naive label* (e.g., *solid*¹⁴) to refer to the members in a certain class C,
2. the membership in class C depends on meeting a certain criterion *a*, or on meeting at least a certain number of criteria within a given set of criteria a_1, a_2, \dots, a_n ¹⁵ (imagine, in our example, that one of these criteria is the property of being possibly found in the biosphere),

¹² On the difference between limping and leaping theories in Petrażycki see Section 16.2 in Tome 1 of this volume.

¹³ Thus, as pointed out by Kojder (1995, 58), a theory, according to Petrażycki, may be (1) adequate, (2) limping, (3) leaping, (4) both limping and leaping, and (5) completely wrong.

¹⁴ My example.

¹⁵ This is typically the case of such naive concepts as that of *vegetable* (see footnote 7 above). To use a modern terminology, according to Petrażycki naive concepts *usually are* polythetic, while scientific ones *should all be* monothetic. As is known, this latter requirement is too demanding. For example, polythetic concepts are used in psychiatry. But this does not touch on the issue of whether the principle of adequacy is itself too demanding.

3. about the members in C we state the feature *b* (in our example, having a certain melting point).

Suppose also that we find out that even *objects other than the members in C* have *b* (e.g., solid oxygen). In this case Petrażycki's principle of adequacy simply requires that the label we use to refer to the members in C should be used to refer also to these new-found objects (or else it should be replaced or modified), and that we should search for a criterion other than *a* (or a_1, a_2, \dots, a_n) or *b*¹⁶ to establish the membership in C. We should not *stubbornly* refuse to include these new-found objects in the class referred to by that label just because we are used to our traditional, or practical, categories, or we think that these further objects are somewhat "unworthy" of being associated to that label.¹⁷ By the same token, if we discover some "exceptions" (e.g., glass, which has no melting point) the class will need be narrowed in order to make it cover solely the objects for which the theory holds. Also such discoveries will require the search for a criterion of membership in C other than *a* (or a_1, a_2, \dots, a_n) or *b*, as well as the replacement, modification or qualification of the usage of the traditional labels (think again of glass, which is not considered a solid *in a strict sense*).¹⁸

According to Petrażycki the concept of an adequate theory is relevant as well in the teleological sciences. In this connection he showed that limping statements may be quite dangerous because of the *argumentum a contrario*—an argument that in fields other than law "is not expressed but has practical application" (Petrażycki 1985b, 414; my translation). If I just tell you that a certain mushroom is toxic when eaten *raw* (while it is toxic not only when raw but also when cooked), you might infer that if you cook it, it will no longer be toxic (my example).

With that background in place, we are equipped to examine Petrażycki's general theory of law.

18.3. Ethical Emotions

The first redefinition we encounter is that of *ethics* (*étika*), along with its adjectival form, *ethical* (*etičeskij*). Petrażycki uses these terms as hypernyms to refer to both moral (*nравственные*) and legal (*правовые*) phenomena. I will use all these terms in the same way as Petrażycki.

Now, Petrażycki's legal psychologism should rather be called an *ethical* psychologism because he argued for the psychological reduction of all ethical phenomena and treated legal phenomena as a mere subclass of ethical ones.

¹⁶ If *b* were adopted to define C we would end up with a class with no theory attached to it.

¹⁷ We shall see that this method led Petrażycki to include among legal phenomena the rules of games, the rights a child ascribes to his or her doll, and the obligation some person may experience to give his soul to the devil, among other examples.

¹⁸ On the question of how classes should be *named*, see Petrażycki 1908, 86–96.

The starting point for his whole theory is the concept of emotion (*emocija*) or impulsion (*impul'sija*), two terms he used as synonyms. Petrażycki tried to distinguish emotions from other psychological phenomena, such as sensations (*čuvstva*), cognition (*poznanie*), and volition (*volja*). According to him, emotions are different from these other psychological phenomena because emotions are *active-passive*. An example of an emotion in his sense is hunger, as it comprises both a *passive* experience (feeling hungry) and a drive toward a certain action, namely, eating (cf. Petrażycki 1908, 175ff.).

In addition to emotions such as hunger, thirst, and sexual appetite, Petrażycki holds that there are also *ethical* emotions.

Just like other kinds of emotions, ethical emotions may be either appulsive (*appul'sivnyj*) or repulsive (*repul'sivnyj*).¹⁹ Let us look at a key passage where Petrażycki describes how a repulsive ethical emotion works:

If an *honest* man (in exchange for money or some other benefit) is invited to commit deceit, perjury, defamation, homicide by poisoning, or the like, the very representation of such “foul” and “wicked” conduct will evoke in him repulsive emotions that reject these acts; moreover, that rejection will be so powerful as to either forestall both the attractive impulsions (the ones directed to the promised benefit) and the corresponding teleological [*celevoj*] motivation or crush such motives if they do appear. (Petrażycki 1909–1910, 20; translation adapted from Petrażycki 1955, 30; italics added)²⁰

Petrażycki does not provide a correlative description of ethical “appulsions.” Examples of such appulsions could be the emotion we may experience toward paying the check at the restaurant or helping a friend in need.²¹

Now, ethical emotions form the core of Petrażycki’s ethical psychologism. According to him, *law and morality are made up of ethical emotions and therefore exist exclusively within each Subject’s*²² *psychical reality*. It follows that law and morality are purely individual phenomena:

In general, every kind of law, all legal phenomena [*pravovye javlenija*]—including legal judgments [*pravovye suždenija*] that gain the consent and approval of others—are purely and exclusively individual phenomena from our [Leon Petrażycki’s] point of view, and the possible consent

¹⁹ He also uses the terms *repul'sija* (repulsion) and *appul'sija* (appulsion).

²⁰ To avoid misunderstandings, it should be stressed that nowhere does Petrażycki contend that ethical emotions are always successful in counteracting other kinds of motivation. I italicized the term *honest* in order to stress that in a not-so-honest man, repulsive ethical emotions—provided he can experience them—may not be able to counteract other kinds of emotions. Such cases may eventuate in regret, a phenomenon Petrażycki sometimes mentions.

²¹ A totally different example of an ethical appulsion seems to be the emotion experienced by a right-holder where his own behaviour is concerned, as when he experiences, say, he has a right of way or some political liberty. See in this regard Section 18.9.3 below.

²² In this discussion the term *subject* will be uppercased when meaning “each of us as a solipsistic ego”; it will instead be lowercased when referring to a subject as an object of predication in a judgment, or else when referring to a participant in a legal relationship (where by *participant* is understood also a possible third spectator).

and approval on the part of others are irrelevant from the point of view of defining and studying the nature of legal phenomena. [...] Every sort of psychical phenomenon appears in the psyche [*psibika*] of one individual and only there: Its nature does not change depending on whether or not something happens somewhere else between individuals, or above them, or in the psyche of others, nor does it depend on whether or not other individuals exist, etc. (Petrażycki 1909–1910, 105; translation adapted from Petrażycki 1955, 75)

This is why Petrażycki's theory of law can be called a *solipsistic theory of ethics* (or *ethical solipsism*).²³

When it comes to distinguishing ethical emotions from other kinds of emotions,²⁴ Petrażycki mentions the following criteria:

1. Ethical emotions seem to “proceed as from a source [...] extraneous to our prosaic ego” (Petrażycki 1955, 37–8; 1909–1910, 34).
2. They are experienced as if provided with “some [...] voice addressing us and talking to us” (ibid.).
3. They are experienced as “an inward impediment to freedom—as a particular obstacle to the free exercise of a preference and the free selection and free following of our propensities, appetences, and purposes” (ibid.).
4. They have a “unique mystic-authoritative character, [...] they [...] possess a mystical coloration, not without a tinge of fear” (ibid.).
5. Unlike other emotions such as hunger, thirst, or sexual appetite, ethical emotions are “blanket” emotions, meaning that they “can serve as stimuli to any conduct whatever” (Petrażycki 1955, 27; 1909–1910, 11–2).
6. They “are similar to the imperative emotions (*povelitel'nye émocii*) aroused by commands or prohibitions addressed to us” (Petrażycki 1955, 38; 1909–1910, 35–6).

As regards point (6), it should be stressed, in order to avoid misunderstandings, that according to Petrażycki “[n]either law nor morality has anything in common with commands and prohibitions as such” (Petrażycki 1955, 158;

²³ To my knowledge, the first author who used the term *solipsyzm* to refer to Petrażycki's legal theory was Rozmaryn (1949, 17, quoted in Seidler 1950, 21). Unlike these authors, I do not use this term in a derogatory way. Olivecrona did not use the term *solipsism* but criticized Petrażycki on such grounds (see Olivecrona 1948, 178, and the discussion of Olivecrona's criticism in Fittipaldi 2012a, 12 n. 9). Znamierowski (1922, 59) used the term *solipsyzm* in order to show that Petrażycki's ethical solipsism is logically conducive to general metaphysical solipsism. Against this objection, see Fittipaldi 2012a, 114. On Olivecrona and Znamierowski see respectively Chapter 14 and Section 20.2 in this tome.

²⁴ According to Petrażycki ethical emotions are a subclass of the broader class of normative emotions. The class of normative emotions also takes in aesthetic emotions, which Petrażycki does not classify as ethical emotions because of their lack mystic-authoritativeness, which according to Petrażycki is the *differentia specifica* of ethical emotions. In this essay, if not otherwise specified, I will use the terms *normative* and *ethical* as synonyms.

1909–1910, 332). There are plenty of ethical phenomena where no command whatsoever can be found. Petrażycki gives the example of custom (*ibid.*).²⁵

Moreover, from the above it follows that legal and moral behaviours have nothing to do with either teleological or aesthetic behaviour²⁶:

If larceny, defamation, or coarse treatment of a servant is rejected as uncomely, ugly, or inelegant—if, in other words, the relevant impulsion is a negative aesthetic impulsion—the judgments [*suždenija*] are then neither moral nor legal: They are aesthetic experiences. The same utterances [*izrečeniya*] may in general be based on opportunistic [*opportunističeskie*], or teleological [*celevyje*], judgments [...]. If a person saying, “One should not steal” merely contemplated that the relevant conduct might entail a term in prison, punishment in the life to come, or the like, and by reason thereof [...] when he formed the judgment “One should not steal,” there arose in his psyche neither an ethical [...] nor an aesthetic emotion, but the repulsive motorial excitement of a fearful nature that generally accompanies the idea of a term in prison or of torture in Hades, and this motorial excitement were here extended to larceny, his judgment “One should not steal” would be the an opportunistic and teleological [*teleologičeskoe*] experience [*pereživanie*][—]a judgment of worldly prudence and calculation—and not a normative [*principl’noe*] experience at all. (Petrażycki 1909–1910, 82–1; translation adapted from Petrażycki 1955, 60–1)

In other words, by definition there can be no ethical behaviour without ethical emotions.

According to Witold Rudziński (1976, 127) a problem with Petrażycki’s theory of ethical emotions is that he did not explain where they come from. Moreover, drawing on Piaget’s (1985) distinction between *morality of constraint* and *morality of cooperation*, Rudziński wrote that one would be tempted to hazard the view that the kind of ethical experience Petrażycki is talking about “is an infantile relic in our adult life” (Rudziński 1976, 96). On the other hand, by drawing not only on Piaget but also on Freud and other modern psychologists it could be argued that Petrażycki’s ethical appulsions and repulsions should be reduced to more basic ethical emotions, such as guilt, shame, anger, indignation, etc. (Fittipaldi 2012a).²⁷

²⁵ We will see below (Section 18.11) that commands are involved in a particular kind of legal relation that Petrażycki calls *authority*.

²⁶ On aesthetic emotions, see footnote 24 above. It should be also recalled that Petrażycki’s distinction between *normative* (i.e., aesthetic + ethical) and *teleological* motivation can be compared to Alfred Schütz’s distinction between *Weil-Motive* and *Um-zu-Motive* and to Max Weber’s distinction between *Wertrationalität* and *Zweckrationalität*. See in this regard Timoshina 2013b, 452ff.

²⁷ For example, if the Subject experiences an ethical repulsion toward the action of some other individual, that repulsion should be understood as the Subject’s *anger* or *indignation* (among other emotions) toward that action. By the same token, if the Subject’s repulsion is directed toward an action of the Subject himself, that repulsion should be understood as the Subject’s anticipated *guilt* or *shame* (among other emotions) for carrying it out. On a Petrażyckian passage supporting the reduction of ethical repulsion to indignation, see also footnote 76 below).

18.4. The Theory of Projections

Petrażycki contends that all ethical phenomena should be explained in terms of ethical emotions. Such an approach raises an obvious question: If law and morality are made up of ethical emotions, where are the ethical realities jurists and laypeople usually talk about? Here is a passage where Petrażycki addresses this issue:

Let us suppose that we are dealing with the following judgments:

“The landlord A has the right [*imeet pravo*] to receive from the tenant 5,000 rubles as a price for the rental” or “The tenant B is obliged [*objazan*] to pay to the landlord A the rental price of 5,000 rubles agreed on in the contract.” According to the legal terminology between A and B there exists [*suščestvuet*] a legal relationship [*pravootnošenie*].

In this case there is a legal phenomenon [*pravovoe javlenie*], but where is it? Where can it be found in order to investigate it?

It would be wrong to think that it is situated somewhere in the space between A and B—for example, if the landlord A and the tenant B are in the province of Tambov, then to think that the legal phenomenon in this case is [*imeetsja*] precisely in this province—or to think that the legal obligation which in the cited judgment was ascribed to the tenant B is something that is situated near to this person and that the right to receive 5,000 rubles is something that exists and can be found near to the tenant A, in his hands, in his soul or somewhere around or in him. (Petrażycki 1908, 24; translation adapted from Petrażycki 1955, 7)

Here Petrażycki mentions three possible mistakes: (1) the debt is believed to exist between A and B; (2) it is believed to exist somewhere in the province where A and B reside; (3) it is split into two entities, namely, a debt and a credit, one near to the debtor, the other near to the creditor.²⁸

According to Petrażycki, all these answers are wrong. This also applies to the epistemological status of the traditional *scientia juris*, which in his view deals with *illusions of a special kind*:

The content of the science of law, along with the issues it gives rise to and the solutions devised in the attempt to address them, appears to be an optical illusion [*optičeskij obman*] consisting in the following: It does not see legal phenomena where they actually take place, and it sees them where they in no way are, nor can they be found, observed, and known, i.e., *in the world external to him who experiences* [*pereživajuščij*] *the legal phenomena* [...]. This optical illusion has [...] its natural psychological causes [...], just as, for example, completely understandable and natural is the optical illusion (in the literal sense of the word) by virtue of which people ignorant about astronomy think (as did the very science of astronomy prior to Copernicus) that the sun revolves around us, that it “rises” in the morning, and so on [...]. (Petrażycki 1908, 25; translation adapted from Petrażycki 1955, 8; italics replacing spaced in the original)

²⁸ In order to avoid misunderstandings it should be stressed that Petrażycki does not mention a fourth possibility, namely, that the debt is believed to exist in some of realm-of-the-ought-to-be (*Bereich des Sollens*). As will be explained shortly in this section, Petrażycki’s projectivism only makes it possible to explain why we add further entities to *this* world. This is a major difference between Petrażycki and Hägerström, as the latter maintains that *objectifications* (a concept loosely equivalent to Petrażycki’s *projections*) lead us to conjure up a world of duty as existing *in distinction* to the world of facts but parallel to it (see Sections 13.2.3 and 13.3.1 in this tome).

Now, according to Petrażycki, moral and legal illusions can be all explained by way of a single mechanism, that of *projections*:

[The emotions],²⁹ aroused in us by various objects (by perceptions or by representations of those objects) or experienced in reference to them, communicate [*soobščajut*] a particular coloration [*okraska*] or particular nuances (*ottenki*) to the perceptions or representations corresponding to those objects, such that the objects themselves appear to us as if they objectively possessed the relevant qualities. Thus, if a certain object such as a roast (its perception, appearance, smell, and so forth) arouses appetite in us, it then acquires a particular aspect in our eyes, and we ascribe particular qualities to it and speak of it as appetizing, as having an appetizing appearance, and the like. If the same object or another object offered to us as food awakens in us the contrary (negative) emotion instead of appetite (the physiological condition of our organism being different), and if this negative emotion is relatively weak, we will then attribute to the object the quality of being unappetizing, whereas if the [emotion] is more intense, we will confer on the object the quality of “loathsomeness” (Petrażycki 1909–1910, 38; translation adapted from Petrażycki 1955, 40).

According to Petrażycki, all kinds of emotions are more or less conducive to projections, and ethical emotions are no exception. It bears recalling that a similar mechanism was pointed out by Axel Hägerström in connection with norms.³⁰ That is no surprise, considering that projectivism is an explanation typically invoked by *empiricists* and *ethical emotivists*—starting from David Hume, who as far as I know is never quoted in this regard by Petrażycki.³¹ Now, unlike these authors, Petrażycki holds that if all kinds of emotions are somewhat capable of producing *projective qualities*, ethical emotions can even bring about *illusions of entities* (or things):

The ethical emotional projection [...] is not restricted to the representations of the existence [...] of obligatedness³² [*objazannost'*, *dolženstvovanie*] as a specific state [*sostojanie*] of submission [*podčinennost'*] [...]. It goes further into fantastic production. What we could call a materialization [*oveščestvlenie*, *materializacija*] of the obligation [*dolg*] takes place. As is apparent from the etymology of the structure of the word *ob(v)jazannost'* (*obligatio*, and the like), as well as from the diverse usages of the words *objazannost'* and *dolg* (for instance, *na nem ležut objazannost'* [lit. “the obligation lies on him”], *tjaželyj dolg* [lit., “heavy debt”], *byt' obremenennym objazannost-jami, dolgami* [lit., “to be burdened with obligations, debts”], and the like); there is here—in the place where the projection is directed, near the individuals onto whom the obligatedness is being

²⁹ Petrażycki uses here the term *motornoe razdraženie* (motor excitation), which he uses as synonymous with *émocija* or *impul'sija*.

³⁰ See, for instance, the following quotation: “The norm [...] acts through its power to attach reverence or respect. Esteem is attached to right action, and disesteem to wrong action” (Hägerström 1953d, 194; in this translation this text is mistakenly identified as bearing the title *Till frågan om den gällande rättens begrepp*). On Hägerström's conception of norms see Section 13.3 in this tome.

³¹ Cf. Hume 1978, sec. 1.3.14, 167. On the different ways the term *projection* is used in psychology, see Piaget 1985, 47 (also quoted in Fittipaldi 2012a, 55 n. 3). On the role of projections in legal realism see also Section 12.5 in this tome.

³² Throughout this text (as well as in Fittipaldi 2012a), I use the term *obligatedness* to refer to an *individual's* “deontic” projective quality (his being obligated), while I use *obligatoriness* to refer an *action's* “deontic” projective quality (its being obligatory). This corresponds to different Russian terms used by Petrażycki.

projected—the representation of the presence of objects of the sort that have weight, of some sort of material object, such as a rope or chain, through which those individuals are obligated and burdened. (Petrażycki 1909–1910, 42; my translation and italics added)

Unfortunately, Petrażycki failed to explain why ethical emotions are supposed to be more productive than other kinds of emotions.³³

Another flaw in Petrażycki's theory is that he failed to expound it in any non-projective terminology. His use of terms such as *obligation*, *right*, and *power* comes without qualification. According to him,

[t]here has been such a complete adjustment to this point of view [the projectional point of view] that to start an examination of the problems of ethics from the teaching of scientific psychology [...] would be to raise difficulties of thinking and of language and in substance to “speak in an incomprehensible language” (Petrażycki 1909–1910, 43; translation adapted from Petrażycki 1955, 43).

This is why, even while contending that ethical qualities and entities are illusory phenomena, Petrażycki proceeded from the projectional point of view in presenting his theory.

According to Czesław Znamierowski (1888–1967), recognized as the most important critic of the psychological theories of law (cf. Motyka 1993, 27), the fact that Petrażycki couldn't present his theory without recourse to projective terminology proves that his psychological theory of law is untenable (Znamierowski 1922, 32).³⁴ If a theory developed to explain any set of phenomena is tenable, it must be possible to describe these phenomena in terms of that theory itself. I think this objection is sound. But I also think that it *is* possible to present Petrażycki's theory without recourse to the projective point of view.³⁵ Even so, I will keep using Petrażycki's “projective” terminology so as to avoid having to introduce cumbersome and unusual neologisms.

18.5. Norms and Normative (or Ethical) Convictions

Leon Petrażycki's psychological theory of law differs from the other most complete psychological theory of law as yet proposed, namely, Pattaro 2005,³⁶ in that in Petrażycki's theory the concept of a norm plays but a *secondary* role.

³³ It could be objected that projections can produce solely illusions of ethical *qualities*, and that the illusions of legal *entities* should be explained in different ways. In Fittipaldi 2012a, chap. 4, I attempted to show that it is possible to explain the illusions of legal entities with hypotheses other than projections, while still remaining within the framework of Petrażycki's theory of law.

³⁴ On Znamierowski see also Section 20.2 in this tome.

³⁵ In Fittipaldi 2012a, I addressed some legal-ontological problems within the framework of Petrażycki's theory of law, without adopting the projective point of view. This made it necessary to adopt such cumbersome neologisms as *attributivesidedness* or *imperativesidedness*. On the view that projective beliefs, though “ontologically suspect,” may be “useful, and indeed rational, for a practical reasoner,” see Sartor 2005, 101.

³⁶ To be precise, Pattaro's is a psychological theory of (*what is*) *right* as distinguished from *law*. A comparison between Pattaro's and Petrażycki's conceptions can be found in Timoshina 2011, 68ff. On this issue, see also footnote 19 in Section 20.1.5 in this tome.

Let us read a passage where Petrażycki gives his own definition of a *norm*, as well as other definitions we will make use of in this and the next section:

The existence [*suščestvovanie*] and operation in our psyche [*psibika*] of immediate combinations [*sočetanija*] of action representations [*akcionnye predstavlenija*] and emotions (rejecting or encouraging the corresponding conduct—i.e. repulsive or appulsive) *may be manifested* in the form of judgments [*suždenija*] rejecting or encouraging a certain conduct *per se*—and not as a means to a certain end: “a lie is shameful”; “one should not lie”; “one should tell the truth”; and so forth. Judgments based on such combinations of action representations with repulsions or appulsions we term [...] normative-practical [*principl’nye praktičeskie*] (i.e. that determine behavior) judgments or, briefly, normative judgments [*normativnye suždenija*]; and their contents [*soderžanija*] we term normative-practical rules of behavior [*principl’nye pravila povedenia*], principles of behavior [*principy povedenia*] or norms [*normy*]. The corresponding dispositions [...] we term principle-practical or normative convictions [*normativnye ubeždenija*]. (Petrażycki 1955, 30; 1909–1910, 20–1; italics added)

For Petrażycki *the core phenomenon is the combination of action representations and ethical emotions*. He uses the term *normative conviction* to refer to the stable presence of such combinations in our psyches.³⁷ The term *norm* is instead reserved to the *contents* of the projective judgments based on these combinations (cf. in this regard Section 12.4 in this tome).

According to Petrażycki, “judgments are emotional acts [*émocional’nye akty*]” (Petrażycki 1908, 248; my translation):³⁸

[E]motions are the essential element of judgments. Positive, affirmative judgments—statements of something about something, of the form S (subject) is P (predicate), such as “The Earth is a sphere” or “The earth revolves around the sun”—are *appulsive*-emotional acts. Negative judgments, of the form S is not P , such as “the earth is not a sphere,” are *repulsive*-emotional acts. The psychological scheme of the former is $S \leftarrow P$, where S designates the representation of the subject, P means the representation of the predicate, and the arrow between them means the attractive, acceptive emotion, bringing the second representation into connection with the first one, that is, “stating” [*“utverždajusčij”*] the second one as regards the first one. The psychological scheme of negative judgments is $S \dashv P$, where the sign between S and P designates a refusing, rebutting emotion.

[...]

It is possible [...] to discover [...] the presence of extremely different [...] [judgment] emotions. A judgment emotion like “Hunger is an emotion” (a *theoretical* judgment, or theoretical emotion) has a character completely different from the judgment emotion “We should forgive our neighbors for the wrong they have done” (a *moral* judgment, or moral emotion), which in turn has a different character from the judgment emotion “I have the right to do that” (a *legal* judgment, or legal emotion), etc. (Petrażycki 1908, 246–7; my translation and italics added)

³⁷ The terms *normativnyj* (normative) and *étičeskij* (ethical) are not perfect synonyms in Petrażycki (see footnote 24 above).

³⁸ Petrażycki kept working on these issues throughout his whole life. See his posthumous work *Nowe podstawy logiki i klasyfikacja umiejętności* (New foundations of logic and a classification of competences: Petrażycki 1939) where he proposed to replace the concept of judgment with the more basic concept of *position* (*pozycja*). As regards the similarities and differences between Petrażycki’s concept of *position*, on one hand, and Russell’s and Wittgenstein’s concepts of *atomic proposition* and *Elementarsatz* (elementary proposition) see Timoshina 2012, 56ff. (see also Section 20.1.2 of this tome).

As emotional acts, *judgments*, in Petrażycki's use of this word, are *experiences* (*pereživanija*), and *not sentences* (*predloženiya*). The expression of a judgment without the underlying emotions is not to be viewed as an authentic (*podlinnyj*) judgment in his sense (Petrażycki 1908, 253). By the same token, judgments can be experienced even without a corresponding utterance.³⁹ They can be “mute.”⁴⁰

In the case of normative judgments, some illusory ethical predicate is experienced about some person or some course of action.⁴¹ As noted, Petrażycki calls the *content* of this experience a *norm*. Now, *since in Petrażycki's terminology normative judgments are projective phenomena, norms cannot play a central role in his theory.*

A crucial role in his theory is instead played by *normative convictions*. In order to understand this concept, we should first read a passage where Petrażycki explains his general concept of *conviction*:

The judgments we experience [...] have the tendency to leave corresponding “tracks,” dispositions, e.g., the ability to experience the same judgment—the same pairing of representations and affirmative/acceptive or negative/refusive emotions—in case the corresponding occasions [*povody*] should present themselves again [...]. *We shall call “convictions” (ubeždenija) the corresponding dispositional cognitive-emotional pairings.* (Petrażycki 1908, 248; my translation)

It is difficult not to think of psychological associationism when reading such a passage. Nonetheless one can give it also a more modern interpretation. For example, think of the role of disgust in the socialization of children (M. Lewis 1992, 110). If every time a child attempts to play with his poo his parents make him feel ashamed by virtue of their disgusted faces, he will probably develop a stable disposition to experience that activity as shameful. However, even if adapted to modern psychological approaches, psychological associationism is far to being an exhaustive account of how ethical dispositions (i.e., convictions) emerge in human animals.⁴²

³⁹ Petrażycki holds that judgments are strictly connected with our reactions to food, and in this regard he quotes Darwin's 1872 *The Expression of the Emotions in Man and Animals* (see Petrażycki 1908, 248 n. 1).

⁴⁰ Petrażycki (1939, 31) also maintained that judgments—made up as they are of three different psychical acts (the act of formulating a subject, the act of formulating the predication, and the emotion connecting the latter to the former)—originate from the development of language. Needless to say that to hold that judgments—as distinguished from positions (footnote 38 above)—*originate* from language does not amount to holding that judgments *always* need to be expressed linguistically.

⁴¹ This ethical predicate exists exclusively within the Subject, without any externally existing (i.e., objective) counterpart. If normative judgments are formulated as if their predicate had not only an internal existence but also an external one—as is mostly the case—they are simply *erroneous* (*blędy*) objective judgments (Petrażycki 1939, 36; cf. also 18 n. 7). In this regard see also Section 12.7 in this tome.

⁴² For an attempt to reconcile Petrażycki's theory with Freud's and Piaget's theories on the emergence of ethical emotions in the child, see Fittipaldi 2012a. In passing, it should be recalled

To conclude this section, a few words are in order on the question whether Petrażycki's conception of a norm is compatible with the conception set out in Pattaro 2005. In my opinion the difference between them is chiefly terminological. What Pattaro calls a *norm* roughly corresponds to what Petrażycki's calls a *normative conviction*. According to Pattaro a norm is a motive of behaviour, namely, the belief (*opinio vinculi*) that a certain type of action must be performed, in the normative sense of the word, anytime a certain type of circumstance is validly instantiated. And this must be so unconditionally, regardless of any good or bad consequences that may stem from the performance in question (Petrażycki 2005, 97).

For Pattaro a norm is made up of the following three elements: (1) a type of circumstance, (2) a type of action, and (3) a conception or experience of that type of action as binding per se. It might seem that in Pattaro's definition of norms, emotions do not play the crucial role they play in the context of Petrażycki's normative convictions. But Pattaro also writes:

With regard to a belief in a norm, some prefer to say "acceptance" rather than internalization. [...] I prefer "internalization" [because, among other reasons] an internalization will not always be conscious or determined by reasoning; it is rather often unconscious and *determined by emotions*. (Pattaro 2005, 100; italics added)

My conclusion is therefore that Petrażycki's and Pattaro's psychological theories of normativeness are compatible in this regard.⁴³ Since Enrico Pattaro can be recognized as a consistent developer of Scandinavian realism, this compatibility is one further argument for introducing the historiographical concept of a *Continental* or *psychological realism* to refer to both Petrażyckian and Hägerströmian legal realisms (see in this regard also Chapter 12 in this tome).

18.6. The Structure of Normative Convictions and the Distinction Between Positive and Intuitive Ethics

According to Petrażycki *the minimal psychological structure of ethical experiences consists of the representation of some behaviour coupled with an appulsive or repulsive ethical emotion*.

The behaviour in question can also be psychical—a purely *mental* action (Petrażycki 1909–1910, 45). For example, I may experience an ethical repulsion toward some thought of mine: "Thou shalt not *covet*" (thy neighbour's house, and so on).

that Petrażycki seems to have denied the existence of blanket emotions, and therefore also of ethical emotions, among animals (see Piętka (without date), 229).

⁴³ Another minor difference seems to be that since Pattaro also includes the type of circumstance in the structure of norms, all norms in his view seem to be somewhat hypothetical, whereas Petrażycki holds that there can be also *categorical* ethical convictions (see Section 18.6.1 below).

Furthermore, a normative conviction may involve three different kinds of cognitive elements (*poznawatel'nye elementy*): (1) the representation of a normative hypothesis, (2) the representation of addressees, and (3) the representation of a normative fact. Let us take these up in turn.

18.6.1. Normative Hypotheses

A *normative hypothesis* is a “representation of the circumstances [...] upon whose presence the obligatoriness of a certain conduct depends” (Petrażycki 1955, 44; 1909–1910, 47).

The term *normative hypothesis* is mine. Petrażycki simply uses the term *gipotesa*, setting it in contrast to *dispozicija*, which is the *normative consequence*, namely, the obligatoriness of a certain conduct. Petrażycki's *gipotesa* corresponds to what German and Italian jurists call *Tatbestand* and *fattispecie astratta*,⁴⁴ respectively, as well as to what Wesley N. Hohfeld (1964) called an *operative fact*. As for *dispozicija*, this term somewhat corresponds to the German *Rechtsfolge*.⁴⁵

That Petrażycki's concept of a normative hypothesis corresponds to the concepts of *Tatbestand*, *fattispecie astratta*, and *operative fact* does *not* mean that it thereby *coincides* with them. Unlike these terms, which refer to actual facts external to the Subject, Petrażycki's normative hypotheses are *objects of representations* within the Subject. This implies that, according to Petrażycki, in order for an obligation—understood as a psychic phenomenon, namely, a projection—to come into psychical existence, it suffices that the Subject *believe in the truth* of the representation of some normative hypothesis that brings that obligation about (e.g., Mark's breaking of John's window). The actual truth of the representation is instead completely irrelevant from a psychological point of view (Petrażycki 1909–1910, 457; 1955, 212).⁴⁶ The Subject's

⁴⁴ On this issue, cf. Pattaro 2005, 16 n. 8.

⁴⁵ I say *somewhat* because, according to Petrażycki not only legal norms but also moral norms may have a hypothetical structure, whereas *rechts-* in *Rechtsfolge* might convey the idea that hypothetical norms can be found solely in the domain of law (*Recht*).

⁴⁶ This is not to say that its truth—understood as correspondence with external reality—is not relevant from other points of view, such as that of *legal dogmatics*. Quite the contrary. What Petrażycki and Lande state as regards the *legal-dogmatic* relevance of the *truth of normative facts* (on the concept of normative fact see Section 18.6.3 below) holds also for the other cognitive elements of normative convictions (cf. Section 18.12 below, and Fittipaldi 2013d, par. 1.2, where Reinach's (1989, [178] 149) classical objection against legal psychologism is discussed). However, Petrażycki's contention that the *truth* of these representations is *completely irrelevant from a psychological point of view* may seem too radical. It could be objected that an ethical conviction based on the *false belief* in the instantiation of its hypothesis is less stable than an ethical conviction based on a *true belief*. At the end of the day, a false belief seems to be more amenable to change than a true one. Be that as it may, a change of belief does not touch on the existence of the ethical phenomenon until the belief it is based on actually gets changed. And this is precisely

believing in the truth of a representation of his makes this a *realistic* representation (*przedstawienie rzeczywistościowe*) as opposed to a *fantastic* representation (*przedstawienia fantastyczne*)—to use a terminology Petrażycki would introduce in his later lectures on logic (Petrażycki 1939, 26ff., 109).

Petrażycki distinguishes *categorical* normative convictions from *hypothetical* ones.⁴⁷ Only hypothetical normative convictions comprise the representation of a normative hypothesis. Categorical ones do not. A Petrażyckian example of a categorical normative conviction is |Thou shalt not kill|.⁴⁸

It is in order here to recall that Hans Kelsen—like many other modern legal theorists—would oppose the very idea of a categorical norm, and that Kelsen’s arguments could be used also against Petrażycki’s idea of a categorical ethical conviction. Kelsen maintained that

omissions cannot be prescribed unconditionally. Otherwise they could be complied with or violated unconditionally, which is not the case. An individual cannot lie, commit theft, murder or adultery always, but only under definite circumstances. If moral norms prescribing omissions established unconditional, that is to say, categorical obligations, an individual during his sleep would fulfil these obligations—sleeping would be an ideal state from the point of view of morality. (Kelsen 1950, 11)

It is not clear whether Kelsen’s statement concerning sleeping as an ideal state from the point of view of morality is to be taken as a *reductio ad absurdum*. If I have the categorical ethical conviction that one should not kill, and nonetheless I wish or dream of killing someone, I may perfectly feel guilty or ashamed for that wish or dream. These emotions are symptoms of the existence within myself of a corresponding categorical conviction. More generally speaking, having the *categorical ethical conviction that one should not kill* is one thing, having the *hypothetical ethical conviction that if one has the opportunity to kill somebody he should abstain from doing that* is quite another one. There is reason to think that Petrażycki would have rejected the transformation of the former into the latter as *arbitrary reinterpretations of facts* (cf. Sections 18.7 and 18.9.3 below).⁴⁹

Petrażycki’s point. From another point of view, one could observe that Petrażycki’s emphasis on the Subject’s *belief in the truth* of his representations rather than on their *actual truth*, is perfectly compatible with the research that Sigmund Freud was doing in those very years. Indeed, Freud went even further, showing that, for example, the need for atonement in certain individuals may arise not only as a consequence of their realistic representation of having committed some crime (i.e., having instantiated a normative hypothesis) but also by virtue of the mere *wish* to commit it, when that wish is backed by a narcissistic overvaluation of one’s own psychical acts (e.g., Freud 1966, sec. 4.7).

⁴⁷ But see (earlier than Petrażycki) Zitelmann 1879, 222, and Bierling 1894, 76.

⁴⁸ I shall use the pipe (|) character to signal that I am referring to a normative conviction, not to some linguistic phenomenon.

⁴⁹ Another option is to hold that categorical normative convictions are hypothetical normative convictions whose normative hypotheses are constantly being instantiated. In this case, however, the difference is retained, if in a cognitively less salient way.

Now, I think that Petrażycki's distinction can be upheld considering that there is at least one psychological difference between a hypothetical normative conviction and a categorical one. *If you have a hypothetical normative conviction, you can try to avoid the instantiation of the normative hypothesis without experiencing some ethical repulsion toward this attempt.* This does not hold for circumstances eliciting ethical emotions in the case of categorical normative convictions. Consider the categorical conviction |Give alms to the beggars you run into|. This is different from the normative conviction |*If you run into a beggar, you should give him alms*|. In this latter case, you would not feel guilty if you should decide to change your usual route in order to avoid running into a certain beggar. If some third spectator should hold such a hypothetical normative conviction, this person would neither be indignant at you for doing that nor disapproving of you. In the case of a categorical normative conviction, instead, such a behaviour could be disapproved of as a form of *normative avoidance*.⁵⁰

In my opinion, Petrażycki's conception implies that the question whether a conviction is categorical or hypothetical should be viewed as an empirical one. A certain normative conviction is categorical if—when transformed into a hypothetical one—the avoidance of the instantiation of its “normative hypothesis” elicits ethical repulsion. It is instead hypothetical if such avoidance does *not* elicit any ethical repulsion.

Finally, it should be remarked that it is perhaps easier to conceive categorical normative convictions concerning abstentions from action than concerning engagements in action (but recall |Love thy neighbor as thyself|). This may be why the only example Petrażycki gives is |Thou shalt not kill|. ⁵¹

18.6.2. Addressees

As a second possible cognitive element Petrażycki mentions the representation of the *addressees* of a certain normative conviction, namely, the “representation of individuals or classes of people [...] or other beings [*suščestva*] [...] from which a certain conduct is ethically required [*ětičeski trebuetsja*]” (Petrażycki 1955, 44; 1909–1910, 47). This element he calls *subjectual representation* (*sub”ektnoe predstavlenie*).

Since Petrażycki draws a distinction according to whether the subjectual representation concerns (1) certain spatiotemporally individuated beings, (2) the class of all beings, or (3) certain subclasses thereof, this cognitive ele-

⁵⁰ Needless to say that this phrase is modelled on *tax avoidance*. On the phenomenon of *command avoidance*, see Section 18.11 below.

⁵¹ Petrażycki neglected to discuss the case of categorical normative convictions that admit of exceptions (|Thou shalt not kill, except in self-defense|). I think that in order to accommodate such phenomena a distinction should be made between *affirmative*-hypothetical normative convictions and *negative*-hypothetical ones, the latter being like categorical normative convictions in every respect except that they leave room for exceptions.

ment makes it possible to distinguish three kinds of normative convictions corresponding, *mutatis mutandis*, to the traditional concepts of (1) an *individual norm*, (2) a *general norm*, and (3) a *special norm*.⁵²

Now, it may be asked whether special normative convictions can be transformed into general hypothetical normative ones, or the other way around. We should devote a few words to this important issue, which unfortunately was left unattended by Petrażycki.

Consider the following ethical conviction: |Employees must wash their hands before returning to work|. It could be argued that the concept of an addressee can be replaced by the concept of a normative hypothesis, and that the historical event of having been employed is one element of the normative hypothesis making up that normative conviction (the other element being having gone to the restroom). Conversely, consider the example Petrażycki gives when discussing hypothetical normative convictions: |In God's temple we must conduct ourselves thus and so|. This normative hypothesis could be transformed into the following one: |The class of people who are in God's temple must conduct themselves thus and so|. Likewise, |Ye shall kindle no fire throughout your habitations upon the Sabbath day| (Exodus 35:3) could be transformed into |The class of people who are on Sabbath day ought to kindle no fire anywhere in their habitations|. Now, since addressees are necessarily *animate entities*, while normative hypotheses seem to be able to encompass whatever *reality* (if by *reality* we understand a hypernym for the three main naive ontological kinds: entities—whether or not animate—, qualities and events), some purported principle of economy of thought might seem to require that we should do away with the concept of an addressee and replace it with an all-embracing concept of a normative hypothesis.

Arguably, even in this case (cf. the previous Section 18.6.1) Petrażycki might have replied that such a reduction is an *arbitrary reinterpretation of psychological facts* (cf. Sections 18.7 and 18.9.3 below).

I think that Petrażycki's distinction can be maintained if we adopt the framework of prototype psycholinguistics and, among others, its concept of *inherent relationality* (Croft 1991, 62–3, see also Fittipaldi 2012a) as a *distinctive feature of prototypical qualities*. The fact that *being-on-Saturday* is construed as an event rather than as a quality necessarily inherent to something or somebody⁵³ is mirrored by the fact that the (pseudo-)quality of *being-on-Saturday* cannot

⁵² Since according to Petrażycki (see Section 18.7 below) whatever object (*predmet*) represented as animate (*oduševlennyj*) can be experienced (on this use of *experienced* see footnote 64 below) as a duty-holder (or as a right-holder), it follows that a true *general* normative conviction has as its addressees the class of all beings the Subject represents to himself as animate. It is hardly necessary to stress how this approach is compatible with the research done by Jean Piaget (1973) on child animism.

⁵³ According to Croft, events *may or may not be* inherently relational to something or somebody, while qualities must necessarily be inherently relational to *one* being (animate or not).

be expressed with an acceptable linguistic construction (*?Jobn is on Saturday*). Generally speaking, the passage of time—and the consequent succession of the days of the week—is usually construed as an *event*, and events need not be relational to anything or anybody. Now, since within ethical convictions *events* (*sobyttija*) play the cognitive role of *normative hypotheses* rather than that of addressees, the occurrence of Saturday must be regarded as a normative hypothesis.⁵⁴ By contrast, some individual's *being-an-employee* is typically construed by most people as a quality (or a state)⁵⁵ inherent to that individual rather than as a historical event having occurred to him (his having being employed by someone somewhere at sometime in the past). Therefore the slot of being-an-employee within an ethical conviction is that of an addressee—if we are to take psychology seriously.

Such a defense seems to be implied by Petrażycki's theoretical and methodological tenets.

18.6.3. Normative Facts

We can now turn to the third possible cognitive element of a normative conviction: the *normative fact* (*normativnyj fakt*), which Petrażycki also calls *norm-creating fact* (*normoustanovitel'nyj fakt*).⁵⁶ He gives the following examples:

1. |We must act thus *because it is so written in the New Testament, the Talmud, the Koran, or the Code of Laws.*|
2. |We must act thus *because our fathers and grandfathers did so.*|
3. |We must act thus *because the assembly of the people has so ordained.*|

Ethical experiences that comprise representations of normative facts are termed by Petrażycki *positive* (*pozitivnye*) ethical experiences.⁵⁷ Ethical experiences that do not comprise such representations are called by him *intuitive* (*intuitivnye*) or *nonpositive* (Petrażycki 1939, 111) ethical experiences.

In this case, too, Petrażycki is proposing a redefinition of traditional concepts. His distinction between *positive* and *intuitive* ethical experiences roughly corresponds to the traditional distinction between *positive law* and *natural*

⁵⁴ Of course, this holds for those people who regard Saturday as the instantiation of a Sabbath where the term *Sabbath* is to be understood as the *nomen iuris* of a particular normative hypothesis.

⁵⁵ On Croft's (1991, 137) concept of state from a Petrażyckian perspective, see Fittipaldi 2012a (67).

⁵⁶ On norm-destructing normative facts see below in this section and Section 19.4 in this tome.

⁵⁷ To be sure, according to Petrażycki, there may be normative facts also in the domain of aesthetic phenomena. On aesthetic emotions as a subclass of normative emotions, see footnote 24 above.

law. Indeed, according to Petrażycki, what natural law theorists called *natural law* was nothing but the complex of their own *intuitive* ethical experiences.⁵⁸

Let us read a passage where Petrażycki explains his distinction:

[I]f anyone ascribes to himself an obligation to help those in need, to pay his workers the agreed wage punctually, or the like, independently of any outside authority whatsoever, the corresponding judgments, convictions, obligations and norms are then [...] intuitive ethical judgments etc.; whereas if he considers his duty to help the needy “because this was the teaching of our Savior,” or to pay his workers punctually “because it is so stated in the statutes,” the corresponding ethical experiences (obligations and norms) are then positive [...]. (Petrażycki 1955, 44–5; 1909–1910, 47–8)

Petrażycki did not explain what precisely it means to “refer to” (*ssylat’sja na*) some normative fact as the foundation of one’s ethical conviction.⁵⁹ In my opinion, for something to be a normative fact in some individual it must *at once* (1) actually bring about a normative conviction in him or her and (2) be experienced by him or her as its foundation.

Since Petrażycki’s concept of a normative fact seems to be made up of two elements, we could ask whether there can be solely *causative* normative facts and solely *foundational* ones. As regards the former Petrażycki mentioned the possibility that over time positive ethical convictions become intuitive, through

processes, where the intuitive law is produced out of the positive law, [...] in which legal experiences [...] take an independent character, and appear *qua* intuitive law independently of the corresponding normative fact. (Petrażycki 1909–1910, 501; translation adapted from Petrażycki 1955, 238)

In this case, however, he is referring to *historically* causative normative facts, while neglecting to address the issue of *currently* causative normative facts, despite their not being drawn on by the Subject to found some ethical conviction of his. By the same token, Petrażycki neglected to discuss the issue of solely *foundational* normative facts such as, say, the Koran when erroneously used to justify female genital mutilation (cf. Fittipaldi 2012b, 39–40).

⁵⁸ To be precise according to Petrażycki “legal natural doctrines are based [...] on *legal*-intuitive psyche. The foundation of these systems is a dogmatics of intuitive *law*, namely the systematic presentation of the autonomous-*legal* convictions of their authors” (Petrażycki 2002, quoted in Timoshina 2013b, 467, my translation, italics added). Nonetheless, when one thinks of such authors, like Immanuel Kant who held that homosexuality should be punished with castration, it is difficult not to view certain natural law theorists as presenting not only their own *legal* but also their own *moral* intuitive convictions (in a Petrażyckian sense). This is so because one could ask who is to be regarded as an attributive side when it comes to the prohibition of homosexuality.

⁵⁹ He also used the term *opredeljat’sja* (“to be determined”). See in this regard also the following passage: “in the domain of positive law the rules of conduct are experienced [*soznajutsja*] as binding [*objazatel’nye*] depending on [*v zavisimosti ot*] certain facts represented as authoritative-normative [*avoritetno-normativnyj*] and on the grounds [*na osnovanii*] of them” (Petrażycki 1955, 228; 1909–1910, 484).

Petrażycki's concept of a normative fact *roughly* corresponds to the traditional concept of a *source of law*. It is Petrażycki himself who held that "it is possible to retain the usual [...] term 'source of law' [*istočnik prava*], but only if it is referred to normative facts and if it is strongly distinguished from the law itself, from the customary law, from the statutory law, etc." (Petrażycki 1909–1910, 519; my translation). As much as the term *normative fact* may correspond to the traditional concept of a source of law, the same cannot be said of such terms as *statutory law* and *customary ethics*. By these terms Petrażycki refers not to the classes of statutes or customs but to the classes of *positive ethical psychical experiences referring to them*.

But that is only a terminological difference. A much more important difference between the traditional concept of a source of law and Petrażycki's concept of a normative fact is that in his view the "term *normative fact* must be understood to mean, not external, objective events as such, but rather *the contents [soderžanija] of the corresponding representations, the represented facts, independently of their actual existence*" (Petrażycki 1909–1910, 521; translation adapted from Petrażycki 1955, 249 and italics added). As in the case of normative hypotheses, in the case of this possible element of an ethical conviction we also are dealing with *realistic* representations (see Section 18.6.1 above).⁶⁰

This has the significant implication that the normative fact may not exist at all in the reality external to the Subject. In other words, the realistic representation may be false and, despite its being false, it may nonetheless bring about positive-ethical convictions in the Subject.

Moreover, Petrażycki holds that (irrespective of whether a given normative fact exists or existed in external reality) the *most diverse norms*—whether or not mutually compatible—may be extracted from the *same* normative fact. On the case where *incompatible* norms may be extracted, see below, Section 18.12. Here, let us read his example of the extraction of *compatible* norms from a provision (i.e., a normative fact) under which he who commits larceny should be subjected to a certain punishment. From it one could extract such norms as:

(1) that all persons are bound, with regard to owners, to refrain from corresponding encroachments: that owners have a right to a corresponding abstention on the part of others; (2) that one who has committed larceny is bound to tolerate the corresponding punishment: that the subject of the punitive authority has the right to punish; (3) that a judge is obligated to the state to condemn the thief to the corresponding punishment; (4) that the public prosecutor is obligated to charge the person who has committed larceny and to obtain his *punishment*; and (5) that the police are bound to conduct investigations, make arrest, and so forth. (Petrażycki 1955, 142ff.; 1909–1919, 229)

⁶⁰ Since Petrażycki speaks of *contents* of representations, it would be more precise to speak of normative facts as *objects* of realistic representations. Generally speaking, Petrażycki's adoption of the noun *fact* in the phrase *normative fact* is misleading, as it conveys the idea that normative facts should exist outside the Subject. Other terms, such as *normative object* or *norm-active object* would be preferable. In this essay, I shall stick to Petrażycki's terminology.

I will address some of these issues in greater detail when discussing the different kinds of normative facts described by Petrażycki (Sections 18.10 and 18.11).

In addition to norm-creating normative facts, Petrażycki also discusses such norm-destructing normative facts as repealing statutes (which will be discussed below in Section 18.9.4).

18.7. Moral vs. Legal Phenomena

We can turn now to Petrażycki's distinction between moral and legal phenomena.⁶¹

Petrażycki viewed his distinction as *stipulative*.⁶² Although he maintained that his distinction roughly coincides with nontechnical usage, it is *not* meant to so coincide but is rather meant to select classes of phenomena with the proper degree of generality for adequate theories (see Section 18.2 above). This is the only criterion by which his distinction should be evaluated.

Here is how Petrażycki drew the distinction between moral and legal phenomena:

Obligations conceived as free with reference to others—obligations as to which nothing appertains or is due from obligors to others—we will term *moral obligations*.

Obligations which are felt as unfree with reference to others—as made secure on their behalf—we shall term *legal obligations*. (Petrażycki 1955, 46; 1909–1910, 50)

In other words, while in the case of moral obligations there is exclusively an *imperative side* (a duty-holder), in the case of legal obligations there is *also* an *attributive side* (a right-holder), who, as it were, “owns” the imperative side’s obligation. The *imperative side* (*imperativnaja storona*) and the *attributive side* (*atributivnaja storona*) are Petrażycki’s own terms.

Although Petrażycki is not the first to have proposed bilaterality as a criterion for distinguishing legal from moral phenomena,⁶³ his conception is by far the most systematically developed one.

⁶¹ I use *law* to render *pravo* and *legal* as the adjective of *law* (even if *legal* is not etymologically related to *law*). Indeed, as Enrico Pattaro (2005) has shown, it is misleading to translate *Recht*, *droit*, *diritto*, etc., with *law*. This holds as well for the Russian *pravo* (and the Polish *prawo*). In the case of Petrażycki, the best choice would be to translate *pravo* (and *prawo*) with the term *Right* (uppercase) and to use *jural* as its adjective. This terminological choice would make it possible to use the English term *law* to refer to Petrażycki’s *positive Right* or to his *official Right* (on the concept of official “law,” see Section 18.12 below), or to some combination of them (e.g. positive-official Right, with the exclusion of intuitive-official one). Here I shall keep using *law* and *legal* instead of *Right* and *jural*, so as not to depart too much from Babb’s translation of Petrażycki 1955.

⁶² This is not the term he used, but see footnote 6 above.

⁶³ As concerns other authors who espoused a correlativist conception before Petrażycki, see Motyka 1993, 138ff., and Opalek 1957, 424 n. 8. To be sure, Petrażycki never used the term *koorelatywność* (Motyka 1993, 138 n. 172). A conception somewhat similar to Petrażycki’s would subsequently be advanced by Bruno Leoni (2004), as well as by Giorgio del Vecchio and Gustav Radbruch (see Ossowska 1960).

As for *moral* phenomena, Petrażycki gives the examples of the obligation to help someone in need, the obligation of almsgiving, and the following ones taken from the Gospel:

But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also. And if any man will sue thee at the law, and take away thy coat, let him have thy cloke also. (Matthew 5:39–40; see also Luke 6:29)

Petrażycki comments thus:

In the psyche of persons who have advocated and experienced or who are presently experiencing such ethical judgments, the underlying norms do not of course mean that corresponding claims [*prijazanija*] in behalf of the offenders have been established: that the offenders have been endowed with the right to demand that the other cheek be offered by the smitten, or that someone who has taken another's coat should thereby be rewarded with the injured person's cloak as well (or otherwise has a rightful claim to that cloak). (Petrażycki 1909–1910, 57; translation adapted from Petrażycki 1955, 46)

As for *bilateral* ethical (i.e., *legal*) phenomena, they are phenomena where some individual's obligation is *experienced* as belonging to some attributive side. The attributive side is *experienced*⁶⁴ as entitled to some behaviour on the part of the imperative side.

Petrażycki gives the example of paying an agreed wage to a worker or a manservant. Another easy example (my own) could be the obligatoriness of the payment of the check at a restaurant:

1. The *owner of the restaurant* experiences
 - himself as an attributive side and
 - the customer as an imperative side.
2. The *customer* experiences
 - himself as an imperative side and
 - the owner of the restaurant as an attributive side.
3. A *third spectator*, if any, experiences
 - the owner of the restaurant as an attributive side and
 - the customer as an imperative side.

It is of paramount importance to stress that in Petrażycki's psychological theory of law, *in order for a legal relationship to exist it suffices that one Subject exist*. No more than one Subject is necessary. This Subject may experience him-

⁶⁴ Throughout this text I am using the verb *to experience*—in both its active and its passive form (*to be experienced*)—to render Petrażycki's usage of *perežívat'* and *soznavat'*. The verb *perežívat'* contains the same root as *žizn'* ("life"), and thus somewhat corresponds to the German verb *erleben*, as used by phenomenologists. As for the verb *soznavat'*, Petrażycki uses it in the sense of "to have the consciousness of", and its structure fully parallels the Latin etymology of the English adjective *conscious* (*cum-scire*).

self as an imperative side, as an attributive side, or as a third spectator. *The other two participants may also exist exclusively as objects of some realistic representation within the psyche of the only existing participant, and the only existing participant may also be the third spectator.*

As to who or what can be the subject of legal relationships [*pravootnošenija*], obligations, and rights, the psychological theory holds that subjectual representations can correspond to all possible representations of a personal [*personal'nyj*] [...] character [...]. These can be objects that are not actually alive but are represented as animate [*oduševlennyj*] (such as stones, plants, and so forth), animals and their spirits, persons (including their embryos and their spirits after death), human societies and institutions, and various deities and other incorporeal spirits. Everything depends on the level of culture, religious creed, and individual peculiarities of the given man, his age and so forth (in *child law* [*detskoe pravo*] *there are such subjects of rights as dolls, which are not found in the legal mind of adults, and vice versa*). (Petrażycki 1909–1910, 416; translation adapted from Petrażycki 1955, 189–90 and italics added)

Thus the subject in a legal relationship is not necessarily some really existing person. The subject is whatever *animate entity* is the object of some realistic representation on the part of the Subject—which Subject, I should reiterate, can be the imperative side, the attributive side, or some third spectator. If the Subject should represent to himself a right of subject₁ in relation to subject₂, it suffices that subject₁ and subject₂ exist within the Subject's psyche, in his logical reality (to use Pattaro's terminology: see Section 13.5 in this tome).

In this way Petrażycki does away with the old jurisprudential issue of what a juristic person—as opposed to a natural one—should be deemed to be. According to him the *theory of law* should deal with people, animals, corpses, dolls, associations, states, corporations, or treasuries in the same *empirical* way. What matters is only the empirical issue of whether and in what way they are experienced by somebody as animate entities involved in legal relationships. Let us read in this regard a passage by Petrażycki:

As a subject of a right, the “treasury” must not be interpreted to mean that the subject is the state: this would be an *arbitrary reinterpretation* [*proizvol'noe peretolkovyvanie*] contrary to reality. [...] When we ascribe rights to the treasury in relation to ourselves or to others, we are concerned with a representation that is completely different from the representation to which the word “state” ordinarily corresponds. The representation of a state ordinarily comprises the representation of a territory and a people.⁶⁵ There is nothing of that in the representation of the treasury, which is akin to the idea of a cashbox and the like. The nature of other so-called juristic persons—monasteries, churches, and so forth—is misinterpreted in yet another sense if they are understood as combinations of persons, social organisms, and the like. In reality, the content of the relevant representations is different; thus the representation of buildings and so forth enters into the representation of “monastery,” especially if it is a particular monastery known to the individual. (Petrażycki 1909–1910, 413–4; translation adapted from Petrażycki 1955, 188 and italics added)

⁶⁵ In order to avoid misunderstandings it should be pointed out that this is the way Petrażycki reconstructs the *naive concept* of a state. On Petrażycki's stipulative class of states (which includes also certain nomadic peoples), see footnote 138 below.

Therefore, according to Petrażycki, the question of what a juristic person *is* should be translated into the question of what is *experienced as* a juristic person, and should thus be solved in a purely psychological way. In this way Petrażycki's conceptualization is a suitable tool for *anthropology of law*. It recommends to take seriously—as objects of investigation—the legal beliefs of all peoples on earth, even when they are totally incompatible with the scientific view of the world.

As for the completely different question of what *should be* regarded as a juristic person, Petrażycki holds that it rather pertains to *legal dogmatics* (or *legal policy*).⁶⁶ For example, a judge wishing to decide in accordance with the official law of the state he or she works for might have to refrain from recognizing a doll, a monastery, or an unborn individual as a legal subject. But this kind of issue does not as such pertain to the theory (i.e., psycho-sociology) of law (cf. Section 18.12 below).

Another point of paramount importance that must be stressed if we are to avoid misunderstandings is that *there is no a priori reason why a certain behaviour should be experienced as morally or legally obligatory*. True, certain kinds of behaviour are mostly experienced as *legally* obligatory, while others are instead mostly experienced as *morally* obligatory. But, according to Petrażycki's theory, *any* kind of behaviour can be experienced in *either way*:

In order to avoid misunderstandings in regard to [...] the examples of the two kinds of consciousness [*soznanie*] of obligatedness [*dolženstvovanie*]*—one's consciousness of the obligation [dolg] to pay an agreed wage to a worker or a manservant, on the one hand, and one's consciousness of the obligation [dolg] to help someone in need or not to refuse almsgiving, on the other—*it is necessary to remark that we can imagine subjects whose psyche is such that, when they are faced with beggars asking for alms or the like, they experience a consciousness of obligatedness according to which the other side has a right to receive what he is asking for; the other side may [rightfully] claim that help be given to him, and the like; by the same token, we can imagine subjects who—when dealing with servants claiming payment of the agreed wage, and the like—experience a consciousness of obligatedness according to which nothing is owed to the other side: the latter may not [rightfully] claim payment, and the like. From the point of view of our (psychological) classification, such a consciousness of obligation toward beggars should be classified as the consciousness of a *legal* obligation; such a consciousness of obligation toward servants should be classified as the consciousness of a *moral* (not a legal) obligation. (Petrażycki 1909–1910, 51 n. 1; my translation and italics added; see also Petrażycki 1909–1910, 106 and 1955, 75)

⁶⁶ Petrażycki (1895, 462–3) also devised a specific concept of juristic person for his *legal policy*, which can, by rights, be called an *economic analysis of law, ante litteram*. Even in this context he rejected the distinction between natural and juristic persons. Here *a person is nothing but an ideal station of goods in the process of distribution*. This is why he called the person a *Vertheilungsstation* (or *Güterstation*), namely, a “distribution station” (or “station of goods”). This station is something ideal (*ideell*), that is, something existing exclusively within the Subject as the object of some representation of his (cf. also Petrażycki 2010a, 565). Also ideal is the *Verbindung* (connection) between rights, claims, legal transactions (*Rechtsgeschäfte*), etc., and the *Vertheilungsstation*. All this implies that nothing prevents policymakers from creating a *Vertheilungsstation* with the *name* of some god or whatever they like. Generally speaking, “in the modern world there are more *Güterstationen* than people” (Petrażycki 1895, 464; my translation). It is hardly necessary to stress that this concept somewhat resembles Kelsen's concept of *Zurechnungspunkt* (point of ascription).

Now, Petrażycki's distinction between moral and legal phenomena has been criticized as too overly skewed toward private law (see the authors discussed in Motyka 1993, 146ff.). The distinction has been argued to be incompatible with criminal law, administrative law, and the obligations of the judge.

These objections can be discarded if we bear in mind the two points that have just been made:

1. In order for a legal relationship to exist, it suffices that *one* Subject exist.
2. The question whether a certain behaviour is experienced as legally or morally obligatory is an empirical one—it cannot be solved theoretically.

If these two points are borne in mind, it is quite easy to reply to Ziemiński's objections to Petrażycki's distinction. Ziemiński's starting point is that obligations such as the obligation to display the nation's flag on private buildings on national holidays or the obligation not to pollute the environment can only be *legal* obligations (Ziemiński 1980, 350, quoted in Motyka 1993, 150). Since Ziemiński fails to find a right-holder, he concludes that Petrażycki's distinction is wrong. Ziemiński completely misses the point. He looks for a priori answers to questions that can be answered only a posteriori, namely, the question whether these obligations are experienced as moral or legal ones and the question of who is experienced as an attributive side—provided that those obligations are actually experienced as legal ones.

As regards the judge's obligations, we may begin by noting that, from a Petrażyckian perspective, the judge is probably to be regarded as an attributive side in an authority relationship. Authority relationships are a kind of legal relationship in Petrażycki's terms (Section 18.11 below). By those very terms, that suffices to call this a *legal* phenomenon. As for the obligation of the judge to decide in accordance with the (official) law⁶⁷, rather than according to personal preference, the question whether the judge experiences this obligation as a moral or a legal one is, again, empirical. Moreover, nothing excludes that the judge might abide by the (official) law out of non-ethical reasons (cf. Lande 1925a, 347). Likewise purely empirical, in case the judge should experience his or her obligation as a legal one, is the question whether entities like a god, the people, the truth, the state, or the party who is in the right, are experienced by him or her as attributive sides, attributive sides having the "right" that he or she decides in accordance with what he or she deems to be the (official) law.

Two final remarks are in order here.

First, Petrażycki's stipulative distinction between law and morality implies that *games* are *legal* phenomena:

⁶⁷ On Petrażycki's concept of official law and its connection with legal dogmatics, see Section 18.12 below. There is also addressed the difficult problem arising from the fact that on Petrażycki's definition of official law whatever law the judge applies is turned into official law by definition.

The rules of games (such as games of cards, checkers, chess, dominoes, lotto, forfeits, bowls, billiards, cricket, etc.), which determine [*opredeljajušče*] who can and should, in what order and how, accomplish the various actions involved therein [...], all represent, from our point of view, legal norms. They are of an imperative-attributive character. (Petrażycki 1955, 64; 1909–1910, 88–9)

Second, *Petrażycki denied that there can be such a thing as purely attributive phenomena*. Jacek Kurczewski, by contrast, pointed to some phenomena that cannot be understood except in these terms. As Kurczewski puts it: “Rightful claims need not be correlated with duties. Thus a soldier has the right to kill the enemy but any duty of the killed to submit to the killer would negate the essence of war, and slaughter would take place instead” (Kurczewski 1976, 7; a discussion of pure attributive phenomena can be found in Fittipaldi 2012a, sec. 4.5 and 274, and 2012b, 50).

18.8. Features Associated with Moral vs. Legal Phenomena

As noted, Petrażycki set out his distinction between moral and legal phenomena in order to select with the proper degree of generality phenomena that fit into adequate theories. In this section I will give an account of six properties that according to Petrażycki correlate with moral or legal phenomena.

18.8.1. Possible Fulfilment of Some Legal Obligations on the Part of Persons Other than the Imperative Side

Petrażycki contended that the presence of a right-holder diverts *attention* away from (a) the behaviour expected of the duty-holder toward (b) the *concrete result* that is the main concern of the right-holder.

Aside from (or instead of) having a representation of the behaviour owed by the duty-holder, the right-holder represents to himself the useful effects that will result when the imperative side complies with its obligation. It is these useful effects that matter to the right-holder.⁶⁸ For the right-holder the duty-holder’s fulfilment of an obligation “is merely a means of attaining these effects” (Petrażycki 1955, 203; 1909–1910, 443). The duty-holder knows that and focuses on these effects as well. Therefore, *while in the case of moral phenomena the focus is on the behaviour of the duty-holder, in the case of legal phenomena the focus may be exclusively on the useful effects pursued and expected by the right-holder*.

An important corollary of this theory is that in law, unlike in morality, there may be cases where *it does not matter who actually fulfils an obligation*. It just matters that it be fulfilled.

⁶⁸ Elsewhere (Fittipaldi 2012a, 218ff.), I argued that this may be why in some languages the term for *debt* stems from the idea of the usefulness the attributive side may draw from the imperative side’s action (as is the case with the Ancient Greek *χρέος*) or from the representation of the thing the imperative side is to give to the attributive side (as is the case with the Latin *aes*).

Thus, if what is owed to the right-holder is furnished to him by others (and not by the duty-holder), as where the amount due to the creditor is paid to him not by the debtor but by his kinsman or acquaintance, all is then well from the point of view of the law, and the proper performance has been rendered (Petrażycki 1909–1910, 71; translation adapted from Petrażycki 1955, 54).

In other words, “the fulfilment of legal obligations is possible without participation and without any sacrifice by the imperative side, provided that what is due to the right-holder is furnished by someone” (Petrażycki 1955, 100–1; 1909–1910, 154).

This theory does not exclude that in certain cases the right-holder may have an interest that a certain obligation—by reason of its strictly personal nature—be fulfilled by a specific person. Petrażycki’s hypothesis only excludes that *a moral obligation can be fulfilled without personal involvement of the duty-holder*. To this extent, this theory is falsifiable in Karl Popper’s sense.

18.8.2. *The Possibility of Representation in the Field of Legal Phenomena*

In the case discussed in Section 18.8.1 third persons act “in their own name and account,”⁶⁹ without the duty-holder even knowing that some third person may wish to pay for him. Now, if that is possible, “it is understandable and natural that [legal] obligations can be fulfilled [...] through representatives—third persons acting by virtue of special legal relationships to the duty-holder, in his name and for his account” (Petrażycki 1955, 101; 1909–1910, 155).

But representation is something more than the mere possibility for a person other than the duty-holder to “terminate” (by payment) the right-holder’s obligation.⁷⁰ A representative is also regarded as able to “create” obligations in the name and on the account of the prospective duty-holder, who in turn is not regarded as a duty-holder by any participant until the representative’s activity is carried out. Moreover, in addition to “representation of the imperative side [be it prospective or not] [...], there may also be legal representation of the attributive side” (ibid.). These two aspects of representation explain why “a contract may create obligations between two newborn infants” (ibid.).

What Petrażycki neglects to explain is how the attributiveness of certain ethical phenomena (i.e., their being *legal* phenomena) explains the emergence of representation not only for the termination of obligations but also for the creation of new ones.⁷¹

⁶⁹ Babb’s translation contains a mistake here. He refers the reflexive possessive adjective *svoj* in the phrase *postoronnimi licami, dejstvujuščimi ot svoego imini i na svoj sčet* to the duty-holder rather than to the third persons (i.e., the *postoronnye lica*. Cf. Petrażycki 1909–1910, 155 and 1955, 101).

⁷⁰ In order to avoid this “projective” terminology, we should rephrase the last part of this sentence as follows: “to terminate (by payment) some or all participants’ belief in the existence of the right-holder’s obligation”.

⁷¹ This issue is probably bound up with that of the emergence of illusions of legal entities (e.g., obligations) as distinguished from projective qualities (e.g. obligatedness or obligatoriness), as well as with that of the emergence of legal illusions unrelated to current legal convictions.

18.8.3. *The Possibility of Coercion in the Field of Legal Phenomena*

Petrażycki contends that only legal phenomena involve coercion (*prinuždenie*), or coercive fulfilment (*prinudetel'noe ispolnienie*).

The attributive side usually does not care whether or not the imperative side fulfilled its obligation voluntarily. What matters to the attributive side is just to reap his “useful effects”. That is why in the field of legal phenomena coercion can play a role. That is in contrast to the field of moral phenomena, where if the duty-holder

is not doing the bidding of the moral imperative, but is subjected to physical force which leads to the same outward result as if he had fulfilled his obligation—as where what he should have given voluntarily is taken from him by force—this does not constitute a realization of the imperative function (the only function which exists in morality) and there is no fulfillment of a moral obligation. (Petrażycki 1955, 102–3; 1909–1910, 156–7)

Now, it could be objected that Petrażycki draws this conclusion because he only takes into account those moral obligations that have as their object *actions*. Had he also taken into account moral obligations that have as their object *abstentions from actions* (e.g., the abstention from using contraception), then he would have been forced to admit that coercive fulfilment may take place in the field of morality as well.

But I think that this does not invalidate Petrażycki’s hypothesis, if taken in a weaker version under which *coercion positively correlates with imperative-attributive phenomena*. That is so simply because, if in the case of moral and legal phenomena alike there can be *indignant* third spectators, it is only in the field of legal phenomena that there can *also* be attributive sides who are more likely than third spectators to resort to violence, because as attributive sides they aim to get what they feel entitled to (or require that violence be used in order to let them get it).

In order to avoid misunderstandings, it should be stressed that Petrażycki’s concept of coercion is much more restrictive than the broad concept of *Zwang* (“coercion”) used, for instance, by Hans Kelsen (1960b, 34). Petrażycki’s concept of coercion does not encompass such phenomena as revenge or punishment.⁷² As for revenge, Petrażycki deals with it under the heading of the conflict-producing nature of legal phenomena (Section 18.8.6 below), whereas he deals with punishment under the headings of *pati – facere* legal relationships (Section 18.9.3) and that of authority (Section 18.11).

18.8.4. *The Role of Intentions in the Field of Moral Phenomena*

According to Petrażycki “a legal obligation can be fulfilled also if the behavior of the imperative side [i.e., the duty-holder] took place fortuitously without his

⁷² A similar nonconflation of coercion and punishment can be found in Axel Hägerström. See in this regard Section 13.6 in this tome.

wish and intent, as where he acted absentmindedly or mechanically, or otherwise independently of intent (Petrażycki 1909–1910, 158; 1955, 103).

This is so because in the field of legal phenomena what matters is only that the attributive side reaps the “useful effects” deriving from the fulfilment of the obligation. A moral obligation, by contrast, can never be fulfilled unintentionally.

18.8.5. *The Role of the Motives of Fulfilment in the Field of Moral Phenomena*

While “the satisfaction of the moral duties requires the presence of moral motives,” the “law is indifferent to the motives of fulfillment” (Petrażycki 1955, 104; 1909–1910, 159).

This hypothesis is different from the hypothesis discussed in Section 18.8.4. That hypothesis concerns the possible *lack* of any intention whatsoever in the field of legal phenomena. This one instead concerns the *kind* of intention the duty-holder must have, *provided he has one*. While in the field of moral phenomena the duty-holder must have the *right* intention, that need not be the case in the field of legal phenomena. As Petrażycki puts it, the action of a legal duty-holder may be “evoked by extraneous motives entirely unrelated to law (such as egoistic motives, a desire to attain some advantage for himself, or fear of disadvantage) or even by evil motives (such as the wish to compromise the obligee)” (ibid.). Instead, if some moral duty-holder fulfils his obligation out of reasons other than the proper ones, this will elicit ethical repulsion (i.e., indignation) in third spectators.

It bears stressing, in order to avoid misunderstandings, that neither in this case nor in the case of a duty-holder acting mechanically or absentmindedly are we dealing with any *ethical* phenomenon whatsoever within the imperative side’s psyche. The *legal* phenomenon is located within the psyche of one or both of the other possible participants (i.e., the attributive side or the third spectator) and consists in the appulsion that one or both of them may experience toward fulfilment, irrespective of its taking place for ethical or nonethical causes.⁷³

18.8.6. *The Conflict-Producing Nature of Legal Phenomena vs. the Peaceableness of Moral Phenomena (and the Unifying Tendency of Law)*

Petrażycki sets up a contrast between law and morality by noting that in the domain of *morality* there is a tendency for fulfillment (when it amounts to furnishing material advantages) to arouse gratitude, love, sympathy, while non-fulfillment does not arouse malicious or vengeful reactions. In the domain of

⁷³ By the same token, in the case of moral phenomena, the moral psychic phenomenon consists of some third spectator’s ethical repulsion toward some duty-holder who fulfils an obligation out of nonethical reasons.

law, by contrast, there is no tendency for fulfilment to arouse gratitude, while there is a tendency for “non-fulfilment [...] to [be] experienced [...] as a loss [...], as an aggressive action”, thus possibly prompting malicious or vengeful reactions (Petrażycki 1955, 111; 1909–1910, 169–70).

As Peczenik (1975, 89) summed up this contrast, “the legal psyche is aggressive, while the moral psyche is nonaggressive” (on this point see also Lande 1959b, 874; 1975, 25).⁷⁴ The attributive side experiences the imperative side’s nonfulfilment as an aggression and thus reacts accordingly.

It could be objected to this thesis that aggressive reactions can be observed in the domain of legal and moral phenomena alike. Also in morality it is possible to observe third spectators becoming indignant at the non-fulfilment of some obligation or violation of some prohibition.⁷⁵ Nonetheless, it is only in the domain of legal phenomena that angry attributive sides can be found. Moreover, from a Petrażyckian perspective, in the case of a third spectator becoming indignant⁷⁶ because some person injured a third party, that third spectator is to be regarded as experiencing a legal emotion, not a moral one.⁷⁷

The possible different reactions on the part of an attributive side and a beneficiary in case of satisfaction or disappointment of a normative expectation⁷⁸ are summed up in [Table 1](#).

Table 1. Different reactions in case of satisfaction or disappointment of normative expectations (within round brackets are the phenomena Petrażycki neglected to consider)

		SATISFACTION	DISAPPOINTMENT
BENEFICIARY	Morality	Gratitude, (peace of mind)	Peace of mind, (indignation)
ATTRIBUTIVE SIDE	Law	Peace of mind	Anger

⁷⁴ In this regard, Petrażycki’s conception is similar to Lundstedt’s: see Section 15.2.1 in this tome.

⁷⁵ Cf. Ranulf 1964 (1), who defines *moral indignation* as “the emotion behind the disinterested tendency to inflict punishment”. But Ranulf’s definition embraces also, and foremost, the cases where indignation is aroused by the fact that some person has injured a third party. On this issue, see shortly in text, as well as Fittipaldi 2013b and 2013c.

⁷⁶ To my knowledge, nowhere did Petrażycki distinguish *anger*, as the attributive side’s ethical repulsion, from *indignation*, as the third spectator’s. He seems to use the terms *gnev*, *negodovanie*, *vozmuščenje* as synonyms. This notwithstanding, there is at least one passage where Petrażycki (1909–1910, 89; 1955, 65) uses the term *pravovoe negodovanie* (“*legal indignation*”, italics added). Therefore, one may ask whether in addition to *legal indignation* there is also a *moral* one. Moreover, in the same passage Petrażycki seems to equate an “outbreak of imperative-attributive emotions” (*vsypška imperativno-atributivnyh emocij*) to *pravovoe negodovanie*, therefore this passage is an argument for the reduction of Petrażycki’s ethical emotions to more modern emotions like anger, indignation, etc.

⁷⁷ In the language of modern psychology, we could say that we are facing a phenomenon of identification with the victim.

⁷⁸ I am using here Luhmann’s (1969) terminology to clarify Petrażycki’s point.

Petrażycki's ethical solipsism, along with his criterion for selecting *legal* phenomena, implies that *law is a dangerous phenomenon*. On this view, law is not at all a means *ne cives ad arma ruant*, namely, a means by which to attain peace. More to the point, because opinions as to the existence and compass of mutual obligations and rights may well not coincide, legal phenomena often are “a source of destruction, a dangerous explosive material” (Petrażycki 1955, 113; 1909–1910, 172).

In Petrażycki's theoretical framework, the possible coincidence or compatibility of legal opinions is *not* taken for granted but is rather taken up as a sociological problem, namely, that of describing and explaining the mechanisms that to some extent counteract the natural divergence of legal opinions—a divergence that can be expected even where there is no bad faith in anybody (Petrażycki 1909–1910, 177; 1955, 116). Now, since rights and obligations do not exist in a world external to the Subject (be it psychological or physical), the fact that different Subjects may have coinciding or compatible opinions about the existence (or non-existence) of rights and obligations cannot be explained in the same way as we might explain the coincidence of their opinions about the existence (or non-existence) of, say, chairs, apples, mountains, and the like.⁷⁹

Now, Petrażycki dealt at length with this issue and maintained that, *associated with the conflict-producing nature of legal phenomena*,

on the ground of, and explained by, socio-cultural adaptation [*prisposoblenie*] is the tendency of law to development and adaptation in the direction of bringing legal opinions of the parties into unity, identity and coincidence, and in general toward the attainment of decisions as to obligations-rights which possess the utmost possible degree of uniformity and identity of content from both sides, and—so far as may be—exclude or eliminate discord. (Petrażycki 1955, 113; 1909–1910, 172–3; italics added)

Petrażycki called this tendency a *unifying tendency* (*unifikacionnaja tendencija*). He mentioned the following “subtendencies” that contain the non-coincidence of legal opinions, however much imperfectly (Petrażycki 1909–1910, 173ff.; 1955, 112):

1. The tendency of normative facts and corresponding positive law to develop (this tendency could be called *positivization*; cf. footnote 139 below).
2. The tendency for legal concepts to become precise and definite in content and compass (this could be called *intensional formalization*; cf. Petrażycki 2002, 255–8 and Fittipaldi 2012b, 61–2).

⁷⁹ According to Petrażycki (1939, 36, 38) the principle of non-contradiction (as well as the principle of the excluded middle) holds only for objective-cognitive sciences (i.e., sciences concerned with what exists outside the Subject), and legal dogmatics—understood as a science that describes the legal-dogmatic “existence” of rights and obligations—is not an objective-cognitive science but rather a subjective-relational one. On the distinction between these two kinds of sciences, see also Sections 19.2 and 20.1.2 in this tome. On Petrażycki's ideas on the role played by the principle of non-contradiction in legal dogmatics, see also Section 18.12 below.

3. The tendency for the “existence” of legal obligations and rights to become contingent on facts susceptible of proof (this could be called *extensional formalization*; cf. Petrażycki 2002, 258–60 and Fittipaldi 2012b, 61–2).
4. The tendency toward subjecting disputes to the jurisdiction of a disinterested third party (this could be called *jurisdictionalization*).
5. The tendency of legal dogmatics to bring about the unification of legal convictions (see Section 18.12 below).

Petrażycki did not satisfactorily explain what it is that causes these tendencies to emerge. He did mention socio-cultural adaptation (as we saw), but his explanations are far from convincing.⁸⁰ Be that as it may, it doesn't follow from his failure to explain these phenomena that they do not exist: That we have no explanation for a phenomenon we are describing doesn't mean that the description is thereby false.

18.9. Kinds of Legal Relationships and Compound Legal Relationships

According to Petrażycki (1955, 193; 1909–1910, 426), “all possible classes of conduct can be reduced to three categories: positive actions, abstentions, and tolerances.”⁸¹ That means that the object of one's obligation can be to (1) positively *perform* an action, (2) *abstain* from an action, or (3) *tolerate* an action.

While (1) and (2) can be objects of both a moral and a legal obligation, as they concern a behaviour of the duty-holder, (3) can only be an object of legal obligation, as the action at issue is necessarily the right-holder's.

Thus, Petrażycki set out three kinds of legal relationships depending on whether the right-holder is experienced⁸² as entitled to a *facere*, a *non facere*, or a *pati* on the part of the duty-holder. In the third case the right-holder is entitled to the duty-holder's tolerance of the positive action he or she (the right-holder) performs.

By introducing both the duty-holder's and the right-holder's points of view, Petrażycki gave the following names to the three possible legal relationships: (1) *facere – accipere*; (2) *non facere – non pati*; and (3) *pati – facere*.

It should be reiterated, to avoid misunderstandings, that according to Petrażycki, in order for a legal relationship to exist it suffices that *one* side ex-

⁸⁰ Some hypotheses are advanced in Fittipaldi 2009. There is probably not a simple answer to all these questions. See, for example, the hypothesis that Max Weber (1978, 270) put forward to explain why the ancient Greeks, unlike the Romans, did not develop a formal system of law (see also Fittipaldi 2012b, 59ff.). In regard to jurisdictionalization, it could be observed that it is a long road until two strangers (or social groups)—without kinship or other bonds—accept to subject their dispute to a third stranger qua judge. Also this phenomenon requires an explanation.

⁸¹ This tripartite classification of actions is not original with Petrażycki himself: See Bierling 1894, 242.

⁸² On this use of *experienced*, see footnote 64 above.

ist. Moreover, a legal relationship can exist even exclusively in the imagination of a third spectator.

Let us now discuss the Petrażyckian legal relationships in some detail. After discussing Petrażycki's three kinds of legal relationship, I will address the question of whether Alexander Rudziński—a pupil of Petrażycki—was right to introduce a fourth kind of legal relationship, namely, *pati – non facere*.

18.9.1. *Facere – Accipere*

Here the duty-holder is experienced as obligated to do something for the right-holder and the duty-holder is experienced as entitled to that performance. This may consist of “paying a certain sum of money, furnishing other objects, performing a certain work, of rendering other services,” etc. (Petrażycki 1955, 54; 1909–1910, 71)

Petrażycki did not analyze either this kind of legal relationship or the others in terms of ethical appulsions or repulsions. Had he done so, then perhaps he would have maintained that, in order for this legal relationship to (psychically) exist, the imperative side, the attributive side, or the third spectator must have the disposition to experience an appulsion toward the imperative side's *facere* as well as a repulsion toward whatever else imperative side's action that should be empirically incompatible with the carrying out of that *facere*.⁸³

A further question is whether the duty-holder's *facere* must necessarily consist of some activity that can somehow be received (from *accipere*, “to receive”) by the right-holder.

In my opinion, what matters is only that the attributive side is experienced as entitled to the imperative side's *facere*, not that that *facere* can be somehow “received” by an attributive side. A sentinel, for example, may experience his superior as entitled to have the sentinel himself keep guard, even though there is nothing to be “received” in a strict sense.⁸⁴

18.9.2. *Non Facere – Non Pati*

Here the imperative side is experienced as obligated to abstain from a certain conduct, such as “encroaching on the life, health, honor of the attributive side.” What belongs to the attributive side in these cases is termed by Petrażycki (1955, 55; 1909–1910, 72) “negative freedom,”⁸⁵ “immunity” (*ne-prikosnovennost'*), or “safeguarding” (*obrannost'*).

⁸³ For an analysis of this issue, see Fittipaldi 2012a, sec. 4.4.1.

⁸⁴ A. W. Rudziński (1947, 23) instead distinguished a passive *accipere* of the attributive side from an active one.

⁸⁵ Petrażycki's use of the term *negative freedom* has very little, if anything, in common with the similarly named distinction drawn by Isaiah Berlin (1958). Actually, as will be seen shortly, Petrażycki's definition of *positive freedom* covers certain freedoms that Berlin would instead characterize as *negative* (such as the freedom of speech or the freedom of association).

18.9.3. *Pati – Facere*

Here the imperative side is experienced as obligated to tolerate or suffer certain actions of the attributive side, for example,

uncomplainingly enduring certain unpleasant conducts originating with the right-holder [...] such as reproofs or physical punishments [...]; tolerating oral or printed communications and propagandas by the right-holder of religious, political, and other opinions, the organization of public assemblies, meetings, and so forth. (Petrażycki 1955, 55–6; 1909–1910, 73)

What belongs to the attributive side in this case is termed by Petrażycki “positive freedom” (*položitel'naja svoboda, svobododejstvie*).

In this context, in order to better understand Petrażycki's psychological method, it is in order to recall how Petrażycki criticized Rudolf Bierling (1841–1919) for his contention that the obligation of *pati* can be reduced to the obligation to not encroach on the attributive side's action (*non facere*), on the view that “a request that something be tolerated is *nothing but* [*nichts anderes als*] a prohibition” (Bierling 1894, 243; my translation, italics added).

Understanding Petrażycki's criticism of this kind of reductionism is crucial to understanding the method of his psychological theory of law. According to him the reduction of actions of tolerance to ones of abstainment or non-opposition (where we abstain from engaging in any counteraction) results from the application of an unscientific method. He speaks of an *arbitrary reinterpretation* (*proizvol'noe peretolkovyvanie*) of facts from the point of view of practical considerations (in that forebearances are equivalent to abstentions, or omissions, if measured by their practical result, and the like). The psychological method, by contrast, studies what is found in one's psyche, irrespective of whether this has any practical outcome. What matters is the actual representation of the object of the obligation, or objectual representation (*ob'ektnoe predstavlenie*):

There are [...] cases of the consciousness of a duty of tolerance in a field wherein ordinarily there is not even a thought of opposition or of abstention therefrom, and from which the corresponding association of ideas is excluded: such are cases of the consciousness of a duty to tolerate patiently and without repining—to endure submissively—diseases, ruin, the death of those near to us, and other misfortunes sent down by the omnipotent God. Here the idea of opposition and of abstention therefrom—as in general in the field of the relations with the Almighty—does not *ordinarily* arise at all: it is already forestalled and eliminated by the idea of omnipotence. Moreover it is ordinarily a matter of enduring, not actions or events which are impending (so that the idea of averting or hindering them is admissible), but events which have already taken place. The obligation to endure with submission the death of one who is near, or other unhappiness sent down by God, excludes the thought of opposing or hindering: not merely because the other party is omnipotent, but because the event has already occurred. As to the time prior to the event—for instance, before the onset of the death of one who was dear—the consciousness of a duty to endure misfortunes sent down by God does not exclude resort to the physician and the like, although this means an attempt not to permit the onset of the threatening event. (Petrażycki 1955, 194; 1909–1910, 427–6)

Petrażycki's methodological refusal to arbitrarily reinterpret (psychic) phenomena is the reason why it was previously argued (in Section 18.6) that the reduction of categorical normative convictions to hypothetical normative ones and the reduction of addressees to normative hypotheses (and vice versa) are incompatible with Petrażycki's theory and method.⁸⁶

In this regard it is useful to contrast Bierling's account of the experience of the obligation to tolerate a penalty with Petrażycki's account. According to Bierling:

It must be denied that there are cases where by tolerance we *understand* something *more* than a pure omission, for example, when we talk of the duty of the convicted person to tolerate the penalty. In these cases [...] there is always only a mixture of *action* and *omission*. (Bierling 1894, 243; my translation and italics replacing spaced in the original)

Petrażycki replied that whether or not a convicted person *inwardly* accepts the penalty matters a lot. An innocent convicted person may comply with all the rules of the prison where he is serving his sentence, but he may nonetheless not experience an obligation of tolerance. Let us read a passage that unfortunately was not included in Timasheff's compilation:

If a criminal who has committed a serious crime is sitting shackled in prison, and if circumstances are such that he cannot think of an escape or of any other opposition, this does not in any way exclude that he can experience a more or less emotionally strong and vivid consciousness of the obligation to suffer the punishment. An example could be a person of normal ethical development [...] who has done a bad and evil deed as a consequence of a particular confluence of circumstances. To the jailer and to others it may be completely indifferent whether this person experiences an obligation of tolerance: Any opposition, any attempt to escape, and the like, is ruled out, and that is enough. But from a psychological point of view there is here a peculiar [...] noteworthy phenomenon with further psychic and physical consequences. If somebody who has been jailed does not experience an obligation of tolerance (supposing, for example, that he has been convicted, thrown into disrepute, and jailed as a consequence of a wrongful prosecution and of dirty intrigues, without being guilty), he might turn crazy (as often happens), or die out of despair, or start scraping the walls, ripping his chains, etc. (This would not in any way signify an attempt to *oppose* anything: It would simply be a release [*razryady*] of strong emotions of anger [*gnev*], etc.) (Petrażycki 1909–1910, 428; my translation and italics added)

Therefore, it matters a lot whether or not the jailed person experiences himself as an imperative side in a *pati – facere* legal relationship.

Let us now devote a few words to the right-holder in such a legal relationship. Petrażycki says nothing in this regard. If the right-holder experiences an ethical appulsion toward his own *facere*, this appulsion must be something different from the appulsion experienced by a duty-holder toward his own *facere* in a *facere – accipere* legal relationship. Elsewhere (Fittipaldi 2012a, sec. 4.4.3) I have argued that in *pati – facere* legal relationships the attributive side's ap-

⁸⁶ Quite similarly, I will be arguing (in Section 18.11) that Petrażycki's normative facts cannot be reduced to elements of normative hypotheses.

pulsion toward his own *facere* could be understood in terms of a release of (otherwise restrained) aggressiveness that somewhat backs (or encourages) the attributive side when exercising or standing up for his or her rights.⁸⁷

However that issue is taken, we can conclude by stating that what Petrażycki conceives here is a proper *Recht auf eigenes Verhalten* (a right to one's own behaviour)—a category that a few years later Hohfeld would regularly reduce to either mere *absences of duties* (i.e., “privileges”) and/or to *rights to noninterference*.⁸⁸ According to Hohfeld rights always concern the behaviour of some subject *other* than the right-holder. Thus, for example, some party's right to eat shrimp salad (despite its giving him colic) should be reduced to “that party's respective privileges against A, B, C, D and others in relation to eating the salad” and to his “respective rights [...] as against A, B, C, D and others that they should not interfere with the physical act of eating the salad” (Hohfeld 1964, 41). There is no need to stress that a reconstruction of that kind—as much as Bierling's one—would have been rejected by Petrażycki as an arbitrary reinterpretation of facts.

18.9.4. *Pati – Non Facere, Legal Non-Experience, and Repeal*

We can now turn to the criticism that has been directed at Petrażycki for not recognizing a fourth kind of legal relationship: *pati – non facere*. This discussion will also enable us to discuss Petrażycki's concept of repeal.

To my knowledge, the first author to have stated that Petrażycki's classification should be completed by adding this fourth kind of legal relationship was Alexander Witold Rudziński (1900–1989) in his *Z logiki norm* (On the logic of norms: Rudziński 1947; but see also Szytykgold 1936). This fourth kind of legal relationship, among others, was arrived at by him via negation. He contended that “the negation of a legal relationship produces, on the duty-holder's side, a *right* [...] to the contrary behaviour, and, on the right-holder's side, [...] *an obligation* to the contrary behavior” (Rudziński 1947, 27; my translation).

Thus, if the negation of the *facere* in a *pati – facere* legal relationship brings about a *non facere – non pati* legal relationship, the negation of the *facere* in a *facere – accipere* legal relationship should bring about some sort of *pati – non facere* legal relationship, provided that it is acceptable to equate a *non accipere* to a *pati* (see Table 2; cf. Rudziński 1947, 57).⁸⁹

⁸⁷ This is compatible with Petrażycki's (1904, 57–60) ideas on the role of rights in pedagogy and on their influence on character. Since according to Petrażycki imperative-attributive emotions have a mystic-authoritative nuance his ideas can be compared to Olivecrona's (1939, 98–9; but see also Fittipaldi 2012a, 176). On Olivecrona's conception of rights see Section 14.3 in this tome.

⁸⁸ This might be a result of Bierling's indirect influence on Hohfeld: See Postema 2011, 100.

⁸⁹ In this way we obtain four kinds of legal relationships, which to some extent correspond to the four deontic modalities: *obligatory*, *prohibited*, *permitted*, and *omissible* (cf., in this regard, Fittipaldi 2012a, 164).

Table 2. How Rudziński devised *pati - non facere* legal relationships

DUTY	RIGHT	DUTY	RIGHT
<i>pati</i>	<i>facere</i>	<i>facere</i>	<i>accipere</i>
<i>non facere</i>	<i>non pati</i>	<i>pati</i>	<i>non facere</i>

Among the examples of *pati - non facere* legal relationships given by Rudziński are the (1) the “right” of a wounded soldier not to perform his duty, (2) the “right” of a sick worker not to work, and (3) the “right” of a taxpayer not to pay a given tax after it has been repealed.

I think Rudziński’s completion is necessary. Actually, *facere* and *non facere* exhaust all possible sorts of behavior on the part of the imperative side or of the attributive side, respectively,⁹⁰ while Petrażycki did not explain the *fundamentum divisionis*⁹¹ on which basis he distinguishes three kinds of imperative side’s behaviour (*facere*, *non facere*, and *pati*) that according to him can be the object of an attributive side’s right.⁹²

Jerzy Lande (1953–1954), Petrażycki’s most faithful pupil, instead stuck to Petrażycki’s idea that there are three kinds of behaviour (*facere*, *non facere*, and *pati*) and thus rejected Rudziński’s proposal. According to Lande, Rudziński’s *pati - non facere* legal relationships are nothing but *phenomena consisting in a lack of legal phenomena*.⁹³

In my opinion, Lande and Rudziński are both right, each in his own way. As for Lande, he points to an important phenomenon (better yet, a “non-phenomenon”), namely, *legal non-experiences*. Lande was wrong, however, to reduce Rudziński’s *pati - non facere* legal relationships to phenomena of legal non-experience.⁹⁴ As for Rudziński, he was right to contend that Petrażycki’s distinction of three kinds of behaviour is scientifically unsound.

Now, if on the one hand we accept Petrażycki’s contention that obligations of tolerance (*pati*) are ethical phenomena not susceptible of reduction to obligations of action (*facere*) or abstention (*non facere*), but on the other hand we also argue that Petrażycki’s distinction of legal relationships according to his threefold distinction of behaviours into actions, abstentions, and tolerances

⁹⁰ In other words the object of the right may be either the attributive side’s own *facere* or *non facere*, or the imperative side’s *facere* or *non facere*.

⁹¹ I am drawing here on a logical tool that Petrażycki himself very often makes use of in his work, as in Petrażycki 1909–1910, 668 n. 1. Cf. Petrażycki 1908, 174 n. 1.

⁹² This point was also made by Rudziński (1947, 22), but he also held that *pati* should be reduced to *facere* and *non facere*. I instead think that Petrażycki’s contention of the irreducibility of *pati* is an important contribution to the theory of law.

⁹³ To be sure, Lande avoids a psychological language by using the phrase *stan pozbawiony regulacji prawnej* (state devoid of legal regulation) (Petrażycki 1953–1954, 992).

⁹⁴ On the distinction between legal non-experiences and *pati - non facere* legal relationships, as well as on the linguistic purport of this distinction, see Fittipaldi 2012a, 186–200.

lacks a clear *fundamentum divisionis*, we must ask the question of *how we are to accommodate the obligations of tolerance (pati)*.

In my opinion the solution is to *deny* that the obligation to *pati* is present *exclusively* in *pati – facere* and *pati – non facere* legal relationships. The obligation to *pati* should be understood as an obligation to *acknowledge (or inwardly accept) the attributive side's right*, irrespective of whether the attributive side is experienced as entitled to his own behaviour or to the imperative side's. In the case of a legal relationship of the *facere – accipere* kind, for example, the imperative side *usually* has an obligation not only to *perform* the *facere* but also to *acknowledge* that he owes that *facere* to the attributive side. If the attributive side experiences this entitlement, too, he might become angry at the imperative side if the latter should perform the *facere* out of nonethical reasons and afterward regret having done that (but see the previous discussion beginning in Section 18.8.1), or else challenge⁹⁵ the “existence” of the attributive side's right.⁹⁶

But what exactly does the difference between a legal non-experience and a *non facere – pati* legal relationship consist in? The answer is that, when an *ethical* (i.e., legal or moral) *non-experience* is at hand, *no* ethical emotion is expected to be elicited. Instead, when a *non facere–pati* legal relationship is at hand, the opposite is true. In the case, say, a wounded soldier or a sick worker is experienced as entitled not to fight or work, we can expect that even the simple *request* to fight or work may elicit *legal indignation* within that soldier or worker, or within third spectators (on legal indignation, see footnote 76 above). Here we have a *dispensation* as the object of a right.

Rights to a *non facere* have sometimes even been explicitly stated in normative facts.⁹⁷ The example that comes to mind is the one that Kazimierz Opalek (1957, 418) took from Article 70 of the Polish Constitution of 1952: *Nobody may be compelled to participate in religious activities or rites*. Here we are not dealing with a dispensation but with a full-fledged right to abstention.

Let us now turn to Rudziński's third example, which will also give us an opportunity to spend a few words on Petrażycki's concept of *repeal*. According to Rudziński we have a *non facere – pati* legal relationship even when a previous obligation to *facere* has been repealed.

⁹⁵ On the attributive side's legal indignation in case of *osparivanie* (“challenge”) of his rights, see Petrażycki 1909–1910, 89.

⁹⁶ Another aspect of this duty to *pati* is the imperative side's duty to endure without lamenting the attributive side's *claim* that he perform the *facere*. In my opinion, this is the way Hägerström's observations in this regard can be worked within the framework of Petrażycki's theory. On this see also Section 13.5.1.2 in this tome.

⁹⁷ To be precise, this sentence should be rephrased as follows: “Texts have been produced by people who have the legislation in their hands to the goal of bringing about imperative-attributive convictions concerning a prospective attributive side's *non facere*.” In passing, it is worthwhile to recall that Petrażycki used the phrase *imejušcie v svoib rukah zakonodatel'stvo* (“those who have legislation in their hands”) at least twice (Petrażycki 1985d, 468; 1909–1910, 498), and that that phrase was not inserted in Petrażycki 1955.

To understand what is wrong with Lande's objection to Rudziński (namely, that in this case we are dealing with nothing but legal non-experiences) it is first necessary to get acquainted with Petrażycki's conception of a *repealing statute*.

According to Petrażycki *repealing statutes are normative facts. They are not normative convictions (or norms). The function of repealing statutes is to purify (očičat') the legal psyche of certain legal convictions.* That is why once the legal psyches have been purified, there is no reason to keep republishing them (Petrażycki 1909–1910, 328; 1955, 157).

Repeal is a psychological phenomenon. If a repealing statute is aimed at repealing another one, repeal is accomplished in some individual's psyche once the (realistic representation of the) previous statute ceases to produce any effect in that psyche. Aside from psychological repeal, Petrażycki's conception also allows for a sociological concept of repeal. A repealing statute may be described as *sociologically efficacious* if to a sufficient degree the psyches of people in a certain community are "purified" of the normative convictions that the repealing statute aims to remove, and the cause of this purification is the repealing statute itself. Now, if a repealing statute is efficacious in some psychological or sociological sense, Lande is right. There is ethical non-experience (or absence, in my equivalent use of those two terms) of ethical phenomena.

But the efficaciousness of repealing statutes cannot be taken for granted. Repealing statutes are often thought to bring about an *immediate* state of affairs (e.g., Conte 1989; see also Section 12.6 in this tome). But this is what is believed to happen in the *Bereich des Sollens* (domain of "ought"). In other words, this is the point of view of legal dogmatics (see Section 18.12 below).

In the *Bereich des Seins* (domain of "is"), by contrast, repealing statutes may be more or less efficacious.

To be sure, in modern states the inefficaciousness of repealing statutes is an unusual phenomenon, and this may be why the point of view of legal dogmatics is taken as correct for the theory of law as well. But according to Petrażycki this is wrong.

Indeed, there are examples to be found of the inefficaciousness of repealing statutes. Petrażycki so describes the situation after the repeal (*otmena*) of serfdom in Russia:

Some peasants—chiefly those who were aged—preserved for decades, and to the end of their lives, the earlier mentality of the law of serfdom and were unwilling to know and to acknowledge the reform, declaring to their former masters that they considered it their sacred duty to serve faithfully and truly also for the future (Petrażycki 1955, 240; 1909–1910, 503).

All this implies that there is no purely theoretical way to know a priori whether a repealing statute (*a*) produces no effect whatsoever, (*b*) produces the experience of *pati – non facere* or *facere* legal relationships, or (*c*) completely removes certain normative convictions.

We are now equipped to analyze Rudziński's third example. If a statute aims to repeal some tax, we can usually expect its effect to be quite immediate, such that from that point onward officials will no longer be trying to collect that tax. But this is an empirical hypothesis. It cannot be ruled out that in some inefficient state certain officials might keep collecting taxes that have been officially (or, better yet, *legal-dogmatically*) repealed. If some citizens should *rebel* against that because they know about the repealing statute, they may be experiencing repulsive ethical emotions. This could be viewed as amounting to the existence of a *pati – non facere* legal relationship within those citizens' psyches.

18.9.5. Compound Legal Relationships

18.9.5.1. Ownership

Even ownership, according to Petrażycki, is a purely psychological phenomenon. It exists solely in the psyche of one who attributes a right of ownership to himself or to another.

Ownership is a *compound* legal relationship. A person who ascribes a right of ownership to the individual X with regard to the thing T (*a*) experiences himself and others as obligated to tolerate any kind of action by X with regard to T (*pati – facere*), and (*b*) experiences himself and others as obligated to abstain from every sort of action with regard to T (*non facere – non pati*) (Petrażycki 1909–1910, 190; 1955, 124).

In other words, according to Petrażycki the right of ownership consists of “two legal relationships bound up with each other: the first one of the *pati – facere* kind, the second one of the *non facere – non pati* kind” (Lande 1959b, 877; my translation).

From an internal point of view, Petrażycki's conception of ownership has been criticized as being too narrow. First, it does not cover phenomena of *relative ownership*: X may be the owner of thing T vis-à-vis Y, but not vis-à-vis Z (Kurczewski 1977a, 366). Second, the range of actions permitted to the attributive side may be restricted. This is why Jacek Kurczewski called Petrażycki's conception a *monistic conception* (*monistyczna koncepcja*) and attempted to generalize Petrażycki's definition in the following way: “Between two persons the owner of the thing as for actions of the kind K is the person who has the freedom to carry out those actions—a freedom that others must respect [*respektować*]” (Kurczewski 1975, 162; my translation).

In my opinion, Kurczewski's definition has two easy-to-fix problems. It mentions neither *non facere – non pati* legal relationships nor *pati – non facere* ones. That is why I think that Kurczewski's definition could be improved in the following way: *X is experienced as the owner of a certain thing T vis-à-vis the imperative side Y if X is experienced as the attributive side in some*

pati – facere, pati – non facere, or non facere – non pati *legal relationship involving T*.⁹⁸

18.9.5.2. Authority

Another compound legal relationship is authority (*vlast'*). Since its discussion presupposes a detailed discussion of the different kinds of normative facts, it will be discussed in Section 18.11.

18.10. The Different Kinds of Normative Facts and Positive Ethical Phenomena

In this section I will discuss in some detail the kinds of normative facts and positive ethics discussed by Petrażycki. Petrażycki discusses them in the context of legal phenomena because, as we know, legal phenomena are in his view much more conducive to positivization than moral ones (see Section 18.8 above). I prefer to use the broader term *positive ethical phenomena* in order to call the attention to the fact that, according to Petrażycki, next to positive *legal* phenomena there also exist positive *moral* ones. Moreover, as he explicitly states, the very same (representation of a) normative fact may bring about moral phenomena in one individual and legal ones in another.

18.10.1. Statute (Zakon)

Statutes are defined by Petrażycki as “*someone’s legal directives [rasporjaženija]—qua objects of representation [predstavljaemye]—insofar as they play the role of [javljajutsja] normative facts (i.e., insofar as those [podležaščie] representations exert a corresponding influence on someone’s legal psyche by arousing, removing, or modifying imperative-attributive experiences)*”⁹⁹ (Petrażycki 1909–1910, 543, my translation and italics added; cf. 1955, 258–9). Statutory law (*zakonnoe pravo*) is the class of “imperative-attributive experiences referring [*so ssylkoj*]

⁹⁸ More on Petrażyckian ownership can be found in Fittipaldi 2013b, 2013c, and 2012a, 272–80. Perhaps the redefinition offered in text should be further broadened so as to also include *facere – accipere* relationships, where the owner X of T, as a consequence of his being the owner of T, is entitled to a certain (kind of) *facere* on the part of the imperative side Y (who in turn may also be somehow connected to T). This further broadening would make it possible to also accommodate certain legal phenomena such as serfdom.

⁹⁹ I use the phrase *qua objects of representation* to render the Russian present passive participle *predstavljaemyj* (being represented) of the verb *predstavljat'* (to represent)—a term systematically used by Petrażycki in order to point out that he is speaking of *representations* and their *contents*. Babb in his translation (Petrażycki 1955) often neglects to translate these terms. Further, Babb translates in most cases the noun *predstavlenie* (“representation”) with *idea* (a term that rather corresponds to the Russian term *ideja*).

to someone's unilateral legal directives—qua objects of representation [*predstavljajemye*]—as normative facts” (ibid.).¹⁰⁰

Petrażycki sharply criticizes the idea that in order for some directive to be a statute, it would have to be enacted in accordance with the constitution, or *verfassungsmäßig* (Petrażycki uses this German term in 1909–1910, 534, 536; cf. 1955, 254–5). As an argument, he points to the possibility that, as a matter of fact, a certain directive may be experienced as a statute without having been enacted in accordance with the constitution, while another one may *not* be experienced as a statute despite its having been enacted in accordance with it.¹⁰¹ Moreover, he also points out that on this definition a constitution should not be considered a statute at all. That is because not only

constitutions of revolutionary origin [but also] constitutions of peaceful origin have been compiled and promulgated without the observance of the established form, for the simple reason that, prior to the publication of the constitution, there was no form of any sort established for the publication of statutes. (Petrażycki 1955, 254–5; 1909–1910, 534, 536)

According to Petrażycki “[w]hat is essential for the presence of a statute and of statutory law is not the enactment [*izdanie*] in the established form, but the presence of corresponding imperative-attributive experiences, the presence of the legal-psychical action [*dejstvie*] of a certain provision, as a normative fact” (Petrażycki 1909–1910, 537, my translation; cf. 1955, 255–6).¹⁰²

In order to avoid misunderstandings, it is of paramount importance to stress that Petrażycki sharply distinguishes—if not always explicitly—(a) the question of whether a certain (thought) object instantiates a certain kind of normative fact, and so it is a statute, a custom, a judgment, etc., from (b) the question of whether a certain normative fact, like a statute, is experienced as *binding*¹⁰³ by a certain individual, by people at large, by a certain set of indi-

¹⁰⁰ In order to avoid misunderstandings, I should recall the fact previously pointed out (in Section 18.6.3) that Petrażycki consistently uses the term *law* (*pravo*) to refer to a class of *psychical experiences*. Consistently, a term such as *statutory law* (and others like it, such as *customary law*) refers *not* to collections of normative facts but to a certain subclass of legal experiences so caused and justified, i.e., the legal experiences caused by the representations of statutes and justified on that basis.

¹⁰¹ On Petrażycki's examples, see at greater length Fittipaldi 2013a.

¹⁰² As pointed out by Cotterrell (2015, 11): “A Petrażyckian approach would not focus on identifying ‘pedigree tests’ of what is to count as legal or non-legal by looking to see from what social sources the regulation in question has been brought into being. Instead it would focus on the subjective experiences of those who encounter the regulation”.

¹⁰³ Petrażycki uses a variety of terms to refer to a normative fact's *playing the role of a normative fact* within someone's psyche. For example, he uses (a) the following nouns or adjectives+nouns: *dejstvie*, *prestizh*, *avtoritet*, *sila*, *objazatel'noe značenie*, *normativnoe značenie*, (b) the following participles or adjectives: *deystvujuščij*, *objazatel'nyj*, and (c) the following verb: *deystvovat'*. In order not to confuse the reader, I will constantly use the terms *bindingness*, *binding*, and *to bind*. In this connection one might ask whether a normative fact that does not play the role of a normative fact in anybody's

viduals (such as officials), or else, from (c) the question of whether a certain normative fact has been enacted *verfassungsmäßig* (as well as whether it at all exists or existed in external reality).

Since also *Verfassungsmäßigkeit* (namely, constitutionality, the quality of being in accordance with the constitution) indeed plays some role in Petrażycki's overall conception of law, for the sake of simplicity, I will refer to that feature by the more general term *validity*.¹⁰⁴ This role will be explained below in Section 18.12. For the time being, we can say that, according to Petrażycki, what matters in the *theory of law* (i.e., psychosociology of law) is only the *psychological bindingness* of a statute (or of any other kind normative fact), while its *validity*—namely, its having been produced or recognized in accordance with some procedure—plays a role solely within the domain of *legal dogmatics*.

The way Petrażycki sharply sets in contrast *bindingness*, on one hand, to *Verfassungsmäßigkeit*, or *validity*, on the other, could be criticized for neglecting the possible *causal connection* between *validity* and *bindingness*—a causal connection pointed out by Axel Hägerström (see Section 12.6 in this tome). In other words, there is no reason to rule out the possibility that a directive's constitutional enactment (its having been *validly* enacted) has any *causal* significance in explaining why someone might experience it as binding.

In order to avoid misunderstandings it should also be stressed that nowhere does Petrażycki maintain that the bindingness of a statute (or of some other normative fact) amounts to its *efficaciousness*, namely, its causing people to comply with it.¹⁰⁵ The bindingness of a statute means only that it is experienced as the cause and justification of an individual's normative conviction, but having a normative conviction does not unfailingly causes the people who have it to comply with it.

psyche is still a normative fact. The answer is that here it becomes apparent that Petrażycki is setting out types (or εἶδη) of normative facts by a sort of phenomenological epoché (or bracketing) that sets aside not only the assumption of their external existence but also that of their bindingness. On the possibility of a phenomenological interpretation of Petrażycki see Timoshina 2011, 2012, 2013a, 2013b and Section 20.1 in this tome. See also, in this regard, Walicki 1992, 236–7.

¹⁰⁴ I am borrowing this way of using the term *validity* from Enrico Pattaro, who calls a directive *metonymically* valid if it has been validly enacted through activities that congruently instantiate the type of circumstance (a type of procedure, for example) set forth in a competence norm (Pattaro 2005, 149 and chap. 2).

¹⁰⁵ I use the term *efficaciousness* to refer to what Pattaro (2005, 109) calls *effectiveness* in the context of directives (in the context of norms he uses *efficaciousness* in the way I do here). He calls *effective* those directives “that contribute to carrying a conative effect” (ibid., 197), and according to him “the production of such effects [amounts to] the directive being complied with” (ibid., 196). On this last point there is perhaps a difference between Petrażycki and Pattaro. Petrażycki *never* contends that experiencing an ethical appulsion toward (or a repulsion for) a certain action unfailingly causes the performance of that action (or the abstention therefrom). Nor, as I point out in text, does Petrażycki contend that the bindingness of a normative fact unfailingly causes its efficaciousness or effectiveness.

18.10.2. Custom (Obyčaj)

Petrażycki's definition of custom is one of his most original contributions to legal theory. He defines *customary law* as *the class of imperative-attributive experiences involving the representation of a mass conduct as a normative fact*: "I (or we, or he, or they) have a right to this, or are bound to that, because it was always heretofore observed, because our forebears acted so, etc." (Petrażycki 1955, 263; 1909–1910, 553).

This definition is completely different from any other definition hitherto proposed. Nonetheless, it captures an important aspect of the naive conception of custom, namely, its role when it comes to the justification of the Subject's conduct ("I did that because everybody does"). What the people object of representation *actually* do or have done in the past does not matter. What matters is only what the Subject *realistically represents to himself*,¹⁰⁶ what he believes to have taken place. Whether that belief is true or not does not matter from the point of view of the theory of law.¹⁰⁷ The Subject's "ancestors may have known nothing whatever of the custom ascribed to them or have acted in a completely different way" (Petrażycki 1955, 248–9; 1909–1910, 519–20).

Thus Petrażycki's customary law is a purely psychological phenomenon.

In order to avoid misunderstandings, it should be stressed that *customary law is a completely different phenomenon from intuitive law*. In intuitive legal phenomena there is no representation of a fact that causes and justifies an individual's normative conviction. For example, in Petrażycki's conceptualization, the taboo of incest could be hardly viewed as a phenomenon of *customary law* (or morality). In most—if not all—cases it should be regarded as a phenomenon of *intuitive law* (or morality).¹⁰⁸ In passing, it bears recalling here that according to Petrażycki (1909–10, 481) intuitive law adapts itself more easily than customary law to historical evolution (*istoričeskoje razvitie*).¹⁰⁹

Finally, it is worth recalling that Petrażycki distinguished two kinds of customary law: (1) *staroobraznyj* (modelled on antiquity) and (2) *новообразnyj* (modelled on novelty). In the first kind of customary law the principle is *the*

¹⁰⁶ On the concept of realistic representation, see Section 18.6.1 above.

¹⁰⁷ But it usually matters from the point of view of legal dogmatics. See Section 18.12 below.

¹⁰⁸ From a Petrażyckian perspective, it goes without saying that the conceptualization of the taboo of incest as a legal or a moral phenomenon depends on the presence or absence of the representation of an attributive side (experienced as having the right that incest does not occur). If we read Freud (1966, cf. also De Waal 1998, 162) from this perspective, the attributive side may have been the father (or the chief of the "primal horde") up to the age when the taboo of incest has become a moral phenomenon. Nowadays, in case of incest with minors, it is perhaps the minor who is experienced as an attributive side.

¹⁰⁹ From this perspective, LGBT rights should be viewed as originating from intuitive legal phenomena, which do not have anything in common with customary legal phenomena.

older, the more binding; in the second one the principle is *the more widespread, the more binding*¹¹⁰ (Petrażycki 1909–1910, 553–4; 1955, 264–5).

18.10.3. *Kinds of Normative Facts Related to the Activity of the Courts*

Petrażycki distinguishes three kinds of normative facts related to the activity of the courts: (1) the practice of the courts (*sudebnaja praktika*), (2) a single *praejudicium* (*otdel'naja prejudicija*), and (3) the *res judicata* (*res judicata*).

The courts' practice assumes the role of a normative fact if certain "legal obligations or rights are ascribed with reference to the fact that such is the court practice—that in this way analogous problems were 'always' decided by the courts or a definite higher court" (Petrażycki 1955, 272; 1909–1910, 573).

This phenomenon is often referred to by civil lawyers by such terms as *ständige Rechtsprechung*, *jurisprudence constant*, etc. (consistent line of court rulings).

Petrażycki sharply distinguished this kind of positive law from the law of a single *praejudicium*. This latter phenomenon is present when the legal experiences refer to individual *praejudicia* (Petrażycki 1909–1910, 575; 1955, 273).

Petrażycki calls *praejudicial law* (*prejudicial'noe pravo*) both the class of legal experiences referring to court practice and the class of legal experiences referring to a single *praejudicium*.

In order to avoid misunderstandings, it is of paramount importance to stress that Petrażycki's claims about *praejudicial law* are *purely theoretical* (i.e., psychosociological). They should not be taken to be *legal-dogmatic* or *legal-political* claims. Let us read a passage where this is expressly stated:

The foregoing statements are statements of legal theory [*teorija prava*] which state the facts (regardless of what seems desirable or proper from the practical point of view) without predetermining questions of legal dogmatics [*dogmatika*] or legal policy [*politika prava*] as to whether or not the binding significance [*objazatel'noe značenie*] of this law should be acknowledged (and, if so, upon what conditions and to what degree). (Petrażycki 1909–1910, 576; translation adapted from Petrażycki 1955, 273–4)

Indeed, this is Petrażycki's consistent approach as to all the normative facts he discusses.

As normative facts, *praejudicia* stand in contrast to a third kind of normative fact related to the courts' activity, namely, *judgments*. Petrażycki calls the resulting kind of law *judicial law* (*judicial'noe pravo*).

Here the judgment referred to is the very judgment sought by the litigants. In the case of *praejudicial law*, by contrast, the legal experiences refer to judgments issued for *other* (previous) litigants.

¹¹⁰ The terms Petrażycki uses here are *prestíž* (prestige), *avtoritet* (authoritativeness), and *emocional'naja sila* (emotional force). On this terminology, see footnote 103 above.

According to Petrażycki, judicial law is a phenomenon closely associated with the imperative-attributive nature of law as well as with the corresponding need to eliminate conflicts and unify legal convictions (see Section 18.8.6 above). In this phenomenon he expressly includes the decisions of any third party called on to decide some legal dispute, *including the “father, mother, nurse or companions in the case of childish legal disputes”* (Petrażycki 1955, 274; italics added; 1909–1910, 577).

As a matter of fact, Petrażycki observes that a judgment “eliminates or renders unimportant the earlier (conflicting) legal views of the parties [...] and substitutes for them a third legal view with reference to the fact that a court or a judge (official or otherwise) has so decided” (Petrażycki 1955, 274; 1909–1910, 576–7).

It is also worth stressing that in Petrażycki’s theory of law (that is, in his psycho-sociology of law) there is no such thing as a *Stufenbau* à la Kelsen.¹¹¹ Nowhere does Petrażycki argue that our experience of judgments as binding is a phenomenon to be explained by having recourse to some other binding normative fact—indeed, a *meta-...* normative fact—by virtue of which judgments, as a matter of fact, happen to be experienced as binding.¹¹²

18.10.4. Books (Knigy)

Even books—that is “collections of legal statements compiled even by a private person—sometimes acquire in legal life a normative significance [*normativnoe značenie*] similar to that of legislative codes” (Petrażycki 1909–1910, 579–80; translation adapted from Petrażycki 1955, 276). In such cases legal experience refers to what is written in such and such a book. Petrażycki mentions, for example, the *Sachsenspiegel* and the *Talmud*. This kind of legal experiences he calls *knižnoe pravo*, literally “book law”.

18.10.5. *Communis Doctorum Opinio*

In addition to books, Petrażycki mentions the opinions accepted in legal science (*nauka prava*): “Earlier jurists held legal science to be a source of law and ascribed binding significance [*objazatel’noe značenie*] to the opinions commonly accepted therein” (Petrażycki 1955, 279; 1909–1910, 586).

¹¹¹ On the compatibility of the idea of a *Stufenbau* with Petrażycki’s legal dogmatics see Section 19.4 in this tome.

¹¹² On the possibility of *meta-...* normative facts as well as of resulting *positive convictions on normative facts* (“positive normative-factual convictions”) in a Petrażyckian theory of law, see Fitipaldi 2014 and 2015.

18.10.6. *Doctrines of Individual Jurists or Groups Thereof*

Here the role of a normative fact is played by “the teaching of such and such a great jurist, or such and such a school of jurists” (Petrażycki 1955, 280; 1909–1910, 587–8).

In this context Petrażycki points to an interesting phenomenon concerning the way different kinds of normative facts may affect one another.

The opinion of some scholar about a certain normative fact (e.g., a statute) may eventually replace that very normative fact in the legal psyches, thereby becoming the only relevant normative fact. Petrażycki gives the example of Roman law, where “jurists interpreted, extended by analogy and developed a positive-law material (statutory or otherwise) which was fairly meager (the law of the Twelve Tables, the praetorian edicts, etc.)” (Petrażycki 1955, 281; 1909–1910, 588). Over time, it came to be that “the original positive bases of law were so thrust into the background and bereft of normative significance that they were no longer referred to as normative facts, and their place was taken by words of eminent jurists of an earlier time (Petrażycki 1955, 281; 1909–1910, 589).¹¹³

Here, too, Petrażycki is merely describing these phenomena from the standpoint of the theory of law. He is not recommending anything from the standpoint of the policy of law or of legal dogmatics.

18.10.7. *Legal Expertise (Juridičeskaja Expertiza)*

According to Petrażycki, one of the functions of legal scholars is to solve “legal questions at the request of private persons or societies, administrative authorities and institutions, and occasionally of the courts” (Petrażycki 1955, 282; 1909–1910, 591). These opinions are not usually experienced as normative facts. Sometimes, however, they “may be raised to that degree [...] and thus [be] acknowledged as binding [*objazatel'nye*] by the court having jurisdiction of the matter which occasioned the request for the expert opinion” (ibid.). Petrażycki gives several examples.

Petrażycki held that expert law is akin to judicial law, and in certain cases, as where schools of law prepare decisions for the courts, it may not be entirely clear whether the phenomenon pertains to judicial or to expert law (Petrażycki 1909–1910, 593; 1955, 283).¹¹⁴

¹¹³ Here Petrażycki also discusses the Laws of Citations. That discussion has not been included in Petrażycki 1955.

¹¹⁴ See also Petrażycki 1909–1910, n. 2, as regards the correct way to view the judgments rendered by courts of cassation.

18.10.8. *Contracts and Treaties* (Dogovory)¹¹⁵

Petrażycki criticizes the theory that contracts create rights, while treaties create law (*ob"ektivnoe pravo*). According to him, treaties, contracts, and even pacts between children, when experienced as normative facts, all bring about the same kind of positive law (Petrażycki 1909–1910, 597–8; 1955, 285).¹¹⁶

Just as in the case of judicial law (above, Section 18.10.3), *nowhere does Petrażycki contend that contracts are experienced as binding because of some other binding normative fact by virtue of which contracts, as a matter of fact, happen to be experienced as binding normative facts*. Thus, Petrażycki's theory does not say anything about whether it is by virtue of Article 1372, first paragraph, of the Italian Civil Code ("Contracts have the force of law between the parties") that Italians ordinarily experience contracts as binding. In the frame of Petrażyckianism the question whether Italian legislators could abolish contracts as normative facts in the psyches of Italians is to be viewed as an empirical one. Petrażyckianism is therefore at odds with Kelsen's idea that "the parties, exercising powers delegated [*delegiert*] to them by statute, set concrete norms that prescribe their reciprocal behaviour" (Kelsen 1934b, 82; my translation).

This difference between Petrażycki and Kelsen can be framed as a difference between the standpoint of the *theory* of law (its psycho-sociology) and the standpoint of legal *dogmatics*. But this is not where the differences between Petrażycki and Kelsen end. Also divergent are their conceptions of legal dogmatics. If we assume—as I do—that Jerzy Lande's conception of legal dogmatics is to a good extent a plain development of Petrażycki's main tenets, we have to conclude that Petrażycki would never have contended that certain normative facts—of whatever kind: contracts, customs, statutes, or the like—were included *a priori* among a Subject's ultimate normative facts as transcendental conditions of that Subject's legal-dogmatic knowledge (cf. Section 19.3 in this tome). This is instead precisely what Kelsen did when contending that the constitution in a legal-logical sense includes even the *unconstitutional custom* (Kelsen 1960b, sec. 35.b, 232–3), such that one might ask why custom should

¹¹⁵ Just like the German term *Vertrag*, the Russian *dogovor* means both "contract" and "treaty." I shall use both terms (*contract/treaty*) whenever necessary.

¹¹⁶ Indeed, it is not clear whether according to Petrażycki contracts/treaties should be regarded as being, at one and the same time, normative facts *and* normative hypotheses. Elena Timoshina has called my attention to a passage where Petrażycki treats a *dogovor* as a normative *hypothesis* (Petrażycki 1909–1910, 340), suggesting the conclusion that contracts/treaties are indeed both (or at least that they *may* be both) a normative fact and a normative hypothesis. In Fittipaldi 2012b, sec. 3.5.8, I argued that normative hypotheses and normative facts must be kept apart. Now, if this Petrażyckian distinction is to be maintained, Petrażycki was wrong not to set contracts and commands in contraposition to treaties and statutes (the former being normative hypotheses and the latter normative facts). The same could be argued about judgments as opposed to *praejudicia* (in which regard, see also Section 18.11 below).

be included, while *pacta sunt servanda* should not.¹¹⁷ Petrażycki's overall philosophical system implies that the question whether it is *advisable* that legal-dogmaticians should include custom, *praejudicia*, contracts, treaties, or other normative facts among their ultimate normative facts should not be worked out by reference to any purported transcendental philosophy,¹¹⁸ but rather by an empirical science of *legal policy*.¹¹⁹

18.10.9. Promises (Obeščanija), Programs (Programmy), and Acknowledgments (Priznanija)

Aside from contracts, Petrażycki mentions *promises*. These are to be distinguished from *programs*, which Petrażycki also refers to as “information about future behaviour.” Writes Petrażycki in this regard:

Sometimes the legal psyche elevates even simple communications of certain persons as to the course of their future actions to the rank of normative facts, ascribing to the authors the obligation to act accordingly as regards those for whom the observance of what is announced is important, who had reason to hope for the observance, and the like. (Petrażycki 1955, 286; 1909–1910, 599)

In other words, the persons for whom the observance of what is announced is important may come to feel *anger* in the event of nonobservance, and this anger—this ethical repulsion, in Petrażycki's language—amounts to a *legal* phenomenon.

The example by which Petrażycki illustrates the way programs may bring about program law (i.e., legal experiences) is the *edictum* and the *ius honorarium* resulting therefrom in Roman law.

Still a different phenomenon, according to him, is *priznanie*, a statement by which someone to whom certain obligations are ascribed recognizes those obligations.

According to Petrażycki, this acknowledgment is an independent and special normative fact, in that “after the act of admission, *claims patently unfounded* become proper and enforceable” (Petrażycki 1955, 287; italics added; 1909–1910, 603).¹²⁰ Examples of such acknowledgments, in the

¹¹⁷ On the parallelism between Kelsen's *Grundnorm* and Grotius's *pacta sunt servanda*, see Pattaro 2005, 48.

¹¹⁸ Petrażycki (1985a) was sharply critical of Kant's philosophy and of that of his followers. See also, in this regard, Section 19.3 in this tome.

¹¹⁹ On Petrażycki's critical stance on custom, see for example Petrażycki 2010c and Timoshina 2013b, 80 n. 10.

¹²⁰ It may be asked what “patently unfounded” (*javno neosnovatel'nyj*) means in the context of legal solipsism. In my opinion it could mean, for example, that the contract one of the participants referred to in order to found her right in relation to the other one was not validly executed. This amounts to the incorrectness of the legal-dogmatic judgment stating the “existence” of that right. On this issue from a Petrażyckian perspective see Section 19.4 in this tome.

view of Petrażycki, are charters of rights when unilaterally granted by a king (Petrażycki 1909–1910, 605; 1955, 605).

18.10.10. *Precedents* (Precedent)

We have a form of precedential law (*precedentnoe pravo*) when someone claims that since a given legal problem was solved in a certain way in a certain situation in the past (and no clear or established standard exists yet for solving that problem), “this [past way of solving the problem] should ‘therefore’ be followed in the new situation as well” (Petrażycki 1955, 289; 1909–1910, 607). So, for example, “if a 10 was left face up when dealing the cards, and similar circumstances occur again, then the corresponding positive legal psyche will operate, referring to the precedent so as to claim that the behaviour should be the same” (Petrażycki 1955, 289; 1909–1910, 607).

This kind of normative fact should not be confused with the single *praejudicium* (Section 18.10.3 above), for in the case of precedents the role of normative fact is not played by a judgment but by some behaviour other than issuing a judgment.¹²¹

18.10.11. *Other Kinds of Normative Facts*

Petrażycki mentions further kinds of normative facts, such as *maxims and proverbs* as well as the *statements and models of conduct of religious-ethical authorities* (Petrażycki 1909–1910, 596; 1955, 283ff.). As regards the latter, Petrażycki offers examples taken from the history of Christendom, but it is not difficult to accommodate here the phenomenon of *Sunnab* in Islamic law.

Petrażycki also mentions the phenomenon that sometimes “claims are made, and obligations are ascribed, with reference to what is ordinarily done ‘in the whole world’ or ‘in all the nations’ or ‘in all civilized countries’ or ‘in all constitutional states’” (Petrażycki 1955, 14; 1909–1910, 596), thus pointing to a phenomenon (so-called “legal transnationalism”) that would subsequently play a role in the spread of human rights.

But there is a kind of normative fact he does *not* mention, namely, *commands*.¹²² To this silence I will devote a few words in the next section.

¹²¹ On the distinction between precedent and custom, see Petrażycki 1909-1910, 609 n. 1.

¹²² Another kind of normative fact Petrażycki does not mention is regulations (*rasporjaženija, Verordnungen, réglements*). This is due, once again, to the absence of anything like a *Stufenbau* in his theory of law (but not so, in his conception of legal dogmatics). He would probably have viewed them as nothing but statutes. As for legislative preparatory works (i.e., legislative history, or parliamentary record) as discussed by Ross see Section 16.4 in this tome, there is no reason not to view these materials as a special kind of normative fact that Petrażycki simply forgot to mention.

18.10.12. *What Do Normative Facts Have in Common with One Another?*

We can now ask whether there are constraints concerning what can play the role of a normative fact. Most normative facts are *symbolic*, though they are so in a broad sense (Kurczewski 1977b, 103). But some are not, not even in a broad sense. Think of precedents. The fact that a 10 was dealt face up is not symbolic of anything. In my opinion, the feature a fact needs to have in order to play the role of a *normative* fact is that *it must be possible to extract from it some pattern of behaviour, even by the way of pure imitation*.¹²³ If this may perhaps be enough to rule out as normative facts (the representation of), say, pencils or steps, this is for sure not enough to rule out such “curious [*kur’eznye*] ‘normative facts’” as (the representation of) a neighbour’s or passerby’s *dixit*, to use Elena Timoshina’s words and examples (Timoshina 2011, 65; see also Section 20.1.5 in this tome). A possible explanation, for Timoshina, is that normative facts are spontaneously selected in such a way as to enhance social coordination, that is, in such a way that they contain the conflict-producing nature of legal phenomena. A different explanation, which nonetheless seems to me to be compatible with Timoshina’s, could be that in order for some fact to be capable of playing the role of a normative fact it must be metonymical or metaphorical of the parental agency or of the significant others encountered by the individual during his or her primary and secondary socialization (on this question, see also the next Section 18.11).

18.11. Authority (*Vlast’*)

As anticipated above (in Section 18.9.5.2) Petrażycki conceptualized two kinds of compound legal relationship: ownership and authority. After discussing the various kinds of normative facts, we are now ready to discuss authority.

Unlike ownership, authority (*a*) does *not* involve things and (*b*) is made up of *all* three kinds (or four, if accept Rudzińzki’s proposal) of legal relationships set out by Petrażycki, in the sense that the attributive side (the authority-holder) is experienced¹²⁴ as entitled to actions, abstentions and tolerances on the part of the imperative side (the subordinate).

Petrażycki distinguished two kinds of authority: *general* and *special* (Petrażycki 1909–1910, 199; 1955, 129).

General authority (*obščaja vlast’*) is a kind of legal relationship involving a *general obligation to obey any sort of command (velenie) issued by the attributive side along with a general obligation to tolerate any sort of action by the attributive side*—including corporal punishments that involve maiming or kill-

¹²³ Petrażycki (1909-1910, 528; 1955, 253), when dealing with this issue uses the verb *izvlekat’* (“to extract”), and the nouns *pravilo* (“rule”) and *šablon* (“template”, “pattern”).

¹²⁴ On this use of *experienced*, see footnote 64 above.

ing. Petrażycki further sub-distinguished general authority into *limited* or *unlimited* depending on whether or not the attributive side's authority is *subject to specific exceptions*.¹²⁵

As for *special authority*, it too involves both kinds of obligations. But it differs from general authority in that the obligations it involves are limited to a specific scope of behaviour (*ograničennye opredelennoj oblast'ju povedenija*). Petrażycki gives the example of the president of a legislative assembly.¹²⁶ This person has the right to have the members of the assembly (a) observe his arrangements and (b) tolerate his actions such as these actions and arrangements “relate to the observance of the proper order of considering the appropriate issues (*and not, for example, such as relate to the private domestic life of the members of the assembly*)” (Petrażycki 1955, 129; 1909–1910, 199; italics added).

Authority is made up of two completely different kinds of *facere* by the attributive side:

1. the *facere* (and *non facere*, if we are to accept Rudzinski's proposal: see the previous Section 18.9.4) involved in *pati – facere* (and *pati – non facere*) legal relationships; and
2. a *facere* consisting of issuing commands to subordinates—thus determining their obligations and prohibitions (*facere – accipere* and *non facere – non pati*), if the authority-holder so wishes or deems it necessary.

Two questions can be raised here: (1) Are commands normative facts and, if so, of what sort are they? and (2) What happens if an authority oversteps the limits—if any—of his authority?

Let us start with the first question. To my knowledge, nowhere in his *Teorija prava* (Theory of law) does Petrażycki state that commands are normative facts.¹²⁷ Nonetheless, two reasons can be adduced to argue that commands are normative facts.

First, Petrażycki sometimes uses the term *rasporjażenie* (provision) when discussing authority (e.g., Petrażycki 1909–1910, 208). This is the same term he uses when he defines statutes (see Section 18.10.1 above).

A second reason is that in *Ogólna teoria prawa* (General theory of law: Kormanicki 1931–1932)—a compilation of lectures based on Petrażycki's theo-

¹²⁵ From a Petrażyckian perspective, it is obvious that one should regard as forms of authority not only the authority of the *paterfamilias*'s in ancient Roman law (which authority also included *ius vitae necisque*) but also the forms of authority discussed by Lonnie Athens (1992, 28) in the context of brutalization: “Submission to authority figures requires not only obeying their commands, but equally important, showing proper respect for them as superiors. When a subordinate is perceived as being disobedient or disrespectful, an authority figure may exert or threaten extreme physical force in a brutal attempt to make the subordinate obedient and respectful”.

¹²⁶ A question that to my knowledge was never discussed by Petrażycki is whether the power of judges should be viewed as a sort of special authority.

¹²⁷ But see Petrażycki 1904, 12, where he mentions a *mother's* commands to her children.

ries—Wacław Kormanicki (1891–1954) holds that statutes, internal provisions of associations, and commands (*rozkazy*) are similar phenomena, and for the positive law that makes reference to them he proposes the term *prawo stanowione* (Kormanicki 1931–1932, 259–60).¹²⁸

But there may be two reasons why in *Teorija prava* Petrażycki does not explicitly state that commands are normative facts.

First, only in the case of commands is the authority-holder experienced as an attributive side. But this seems hardly to apply where the authority-holder is a legislative assembly. It could actually be argued that in the case of a statute the projective quality of being an authority is shifted from the legislative assembly to the documents it produces.¹²⁹ This may be why Petrażycki sometimes uses the term *postoronnye avtoritety* (external authorities) to refer to normative facts (e.g., Petrażycki 1909–1910, 479).¹³⁰

Second, Petrażycki may have suspected that commands are sometimes not full-fledged normative facts. That is because, by “logical” transformation, commands can be transformed into either (a) normative hypotheses (or elements thereof) within (hypothetical) legal convictions or (b) elements of categorical legal convictions.

In case (a) we obtain a hypothetical legal conviction, such as |*If the authority-holder issues a command*, the subordinate should comply with it|. In other words, we have here a *facere – accipere* legal relationship where the *facere*¹³¹ is determined by the attributive side.¹³² In case (b) we obtain a categorical legal conviction such as |The subordinate should do *whatever* the authority-holder commands|.

In my opinion, Petrażycki’s psychological method implies that the question whether a command should be regarded as a normative fact, as an element of a normative hypothesis, or as an element of a categorical legal conviction is purely empirical.

Normative facts are conscious causes and justifications of possibly diverse, and sometimes ever mutually incompatible, normative convictions, while normative

¹²⁸ *Prawo stanowione* should be translated as *statutory law*. Since I view as unsettled the question of whenever legal convictions based on commands should be regarded as *statutory* legal phenomena, I prefer not to translate that term in this way.

¹²⁹ This may carry implications in that, unlike prototypical commands, prototypical statutes are experienced as binding on those who enact them (cf. Fittipaldi 2012a, par. 4.10), and are suitable to analogical construction.

¹³⁰ But recall that the authority we are discussing in this section is called by Petrażycki *vlast’* not *avtoritet*. Petrażycki uses the latter term to refer to the bindingness of normative facts. On the variety of terms used by Petrażycki to refer to the bindingness of normative facts, see footnote 103 above.

¹³¹ This is a *facere* in a broad sense, as it could also amount to a *non facere*.

¹³² On this kind of reduction, see Pattaro 2005, 123ff., 145ff. Pattaro’s line of reasoning (as in Pattaro 2005, 125–6) seems to imply that *all* normative facts, rather than only commands, should be viewed as elements of normative hypotheses.

hypotheses and normative consequences presuppose specific normative convictions and concern the elicitation of ethical emotions. For example, while “Thou shalt love thy neighbour as thyself” (Matthew 22:39) was aimed at bringing about normative convictions, “Rise up, let us go!” (Mark 14:42) probably did not. “Rise up, let us go!” was aimed at giving rise to emotions, not convictions. That may be why in many languages “Thou shalt love thy neighbour as thyself” is not called a *command* but a *commandment*.

In the case where a command is not experienced as a normative fact, we face the question of whether it should be reduced to (a) or (b). In my opinion Petrażyckianism requires to view this question as an empirical one, where the distinction between (a) and (b) can be operationalized by drawing on the criterion of the ethical repulsion towards *command avoidance*—a criterion parallel to that of normative avoidance (cf. above, Section 18.6.1).

We can now turn to the second question: What happens if the attributive side oversteps the limits—if any—of his authority, by issuing a command in an area of conduct that should either *be excluded* from its reach (limited general authority) or *not be included* in it (special authority)? In other words, what happens if an authority acts *ultra vires*?¹³³

My opinion is that Petrażycki’s very definition of a limited or special authority implies that *there must be a factual threshold* beyond which a command ceases to be experienced as binding. If there is no such a factual threshold the authority is by definition an unlimited one.¹³⁴ If this interpretation is correct, it should be applied also to the case where the authority-holder not only issues commands but also *acts* beyond the limits of his authority. In such cases the subordinate will not experience any obligation of tolerance in regard to the authority-holder’s action (e.g., an act of violence will not be experienced as a “punishment”).

Before concluding this section, we should mention that Petrażycki distinguished the forms of authority not only into unlimited, limited, or special ones

¹³³ I know of only one passage where Petrażycki indirectly deals with this issue, and it reads as follows: “In several social organizations [...] a big role is played by the right of certain persons [...] that the holder of a certain authority [*władza*] perform [*wykonywał*] certain acts of authority only if he has obtained the consent of the [holder of the] *ius consentiendi*. Such a right is usually sanctioned by the invalidity [*nieważność*] of any acts performed without the consent of the holder of that right (*ius perfectum, lex perfecta*)” (Petrażycki 1985c, 457; my translation). The problem here is that this is one of the few passages in Petrażycki’s mature works where it is not clear whether he is adopting the point of view of the psychological theory of law or that of legal dogmatics. In other words, is it the case that such an act *would* be or *should* be experienced as invalid and consequently as nonbinding?

¹³⁴ It should be observed that, as famous experiments such as the Milgram or Stanford experiment have shown, the threshold—if any—may not be as clear-cut as Petrażycki would have it. In the case of some forms of special authority there is perhaps a further threshold beyond which the commands issued by the authority-holder cannot even be taken seriously. This could be the case if the president of an assembly—to use Petrażycki’s example—should issue commands that “relate to the private domestic life of the members of the assembly,” as by prohibiting them from having clam chowder for dinner.

but also into *private-legal* (*publično-pravnye*) and *public-legal* (*častno-pravnye*) ones. A public-legal authority is characterized by its being experienced as obligated to act and issue commands *for the welfare of its subordinates*, while in the case of a private-legal authority such an experience of obligation is absent, and so the authority is experienced as entitled to act and issue commands in its own interest (Petrażycki 1909–1910, 728ff.; 1955, 313ff.).¹³⁵

Of course, Petrażycki does not maintain that a public-legal authority *is* always exercised in the interest of its subordinates. In order for a certain authority to be classified as a public-legal one it suffices that that authority's acting upon egoistic considerations be experienced as an abuse (*zloupotreblenie*) (Petrażycki 1909–1910, 733; 1955, 316). In other words, it suffices that such a behavior elicit legal repulsion.

18.12. Official Law and the Role of Legal Dogmatics

Petrażycki sharply distinguished the theory of law from legal dogmatics. He uses the term *science* (*nauka*) to refer to both of them but, while he regards the theory of law as a theoretical, or descriptive science (*nauka teoretyczna*), he regards legal dogmatics as a normative, or prescriptive one (*nauka normatywna*). The correctness of the judgments produced by legal dogmatics does not depend on their correspondence with reality (i.e. their truth) but on the possibility of their *foundation* (*uzasadnienie*) on *normative facts* experienced as binding by the Subject. This is so because according to Petrażycki the judgments¹³⁶ produced by legal theory belong the broader class of *objective-cognitive judgments*, while the judgments produced by legal dogmatics belong to the broader class of *subjective-relational judgments* (see at length Petrażycki 1939, as well as Sections 12.7, 19.3, and 20.1.2 in this tome). Subjective-relational judgments do not describe reality, they rather express the Subject's attitudes in relation to it.¹³⁷

Even though one can conceive dogmatic sciences concerned with the most diverse and curious normative facts, the most developed forms of dogmatic sciences happen to be the ones *concerned with the normative facts produced or recognized by state*¹³⁸ officials (at least in certain legal traditions). This is due

¹³⁵ A work that to my knowledge is yet to be done is to compare these Petrażyckian concepts with Max Weber's (1978, 1006 ff.) concepts of *Herrschaft* (domination).

¹³⁶ To be precise we should be speaking of *positions* (see footnote 38 above).

¹³⁷ It goes without saying that Petrażycki was a relativist (cf. Lande 1959d, 613: "Petrażycki jest relativistą"). On how to reconcile Petrażycki's relativism with his ideal of love, see Fittipaldi 2015.

¹³⁸ Petrażycki offers a stipulative definition of *state*. His starting point for defining states is his concept of an *independent social group*, namely, a group that is united (*ob'edennyyj*) by one *supreme authority* (*verhovnaja vlast'*) (Petrażycki 1909–1910, 210; 1955, 133). Within independent social groups he distinguished groups united by the ascription of legal relationships of kinship (*pripisyvanie pravootnošenij rodstva*), on the one hand, and groups that are not united by

to the conflict-producing nature of legal-phenomena (see Section 18.8.6 above and Chapter 19 in this tome).

Petrażycki also offered a stipulative definition of *official* or *state law* (the two phrases are synonyms in Petrażycki), as distinguished from *unofficial law*. *Official law* is “the law that is the object [podleżańcée] of application [primienie] and support [podderżka] by the representatives of state authority in the line of their duty [po dolgu] to serve society (Petrażycki 1909–1910, 221; cf. 1955, 139).¹³⁹ *Unofficial law* is any other kind of law. In order to avoid misunderstandings, it is of paramount importance to stress that Petrażycki’s definition of official law is a *descriptive definition*. Petrażycki’s class of *official imperative-attributive phenomena* is made up by what state officials *actually* experience in their capacity of public-legal authorities (Section 18.11 above)¹⁴⁰, not by what—from a legal-political or legal-dogmatic point of view—they *should* experience in that capacity. As will be illustrated shortly, from a Petrażyckian perspective, *whatever legal conviction or normative fact state officials apply or support is turned by definition into official law or into an official normative fact*.¹⁴¹ This is so even if from a legal-dogmatic point of view what they do is against the constitution.¹⁴²

such ascriptions, on the other (Petrażycki 1909–1910, 212; 1955, 133–4). He called the latter of *official groups* (*oficial’nye grupy*) or *states* (*gosudarstva*), and included in this class also certain nomadic groups (Petrażycki 1909–1910, 212–3, cf. also 1955, 135).

¹³⁹ In order to avoid misunderstandings, it should be stressed that Petrażycki’s concept of official law is completely independent of his concept of positive law (see Kurczewski 1971). The representatives of state authority may well be officially authorized to draw on their own *intuitive* legal experiences. Petrażycki (1909–1910, 491; 1955, 231–2) makes the examples of sentencing in criminal law and giving marks in school. He also discusses processes of positivization of formerly intuitive-official law, and makes the example of how equity underwent positivization in England.

¹⁴⁰ Claims have been made that Petrażycki’s extra-psychological concepts of a state and of official law are inconsistent with the psychological premises of his theory of law (for references, see Cotterrell 2015, 13; Motyka 2006, 130; 2007, 37). This is a serious objection, but I think that one could reply that, if these claims were correct, then Petrażycki’s theory of law would not allow for the phenomenon of *civil war* (I am thinking, for example, of the Italian civil war of 1943–1945, as characterized by V. Ferrari 2004, 53, in the context of his discussion of legal pluralism). Now, from a Petrażyckian perspective, nothing rules out the possibility of a *civil war*. In case of civil war the Subjects—whether or not representing themselves or others as state officials—represent to themselves the members and the officials of independent social groups (in particular, states) other than their own as obligated to recognize their own supreme authority (in my example: either the king or the “Duce”) and officials. The subjectivism of the Petrażyckian approach requires that we take into account the incompatible ways different Subjects *may* represent to themselves (or construct—one would say in a more modern jargon) their own independent social groups, their own supreme authorities and officials, as well as these authorities’ and officials’ capacities.

¹⁴¹ In order to avoid misunderstandings (cf. footnote 140 above) we should rephrase the sentence in text as follows: “whatever legal conviction or normative fact (the Subject believes the animate entities he represent to himself as) state officials apply or support is turned by definition into official law or into an official normative fact (within that Subject’s psyche)”.

¹⁴² In this not too far-fetched to contend that as for *theory of law* Petrażycki maintains Kelsen’s (1945a, 161) Midas principle that “just as everything King Midas touched turned into

Petrażycki neglected to discuss legal dogmatics in detail and to explain the difference—if any—between the way a legal theoretician and a legal dogmatician are to “choose” their *ultimate normative facts*. This question would be tackled by Jerzy Lande (see also Section 19.3 in this tome and Fittipaldi 2013a). Here I will stick to the scanty observations to be found in Petrażycki’s works.

According to Petrażycki legal dogmatics has both a duty (*zadača*) and a function (*funkcija*):

1. It has a “duty [...] to protect [...] the principle of legality [*princip legal’nosti*] and to cooperate toward its realization” (Petrażycki 1897, 375; my translation).
2. It unintentionally serves the function of unifying our legal convictions (Petrażycki [1909–1910, 231] speaks of a *bessoznatel’naja tendencija*, “unconscious tendency”).¹⁴³

We have seen (Section 18.10.1 above) that Petrażycki, in order to discard the definition of a *statute* in the terms of its *Verfassungsmäßigkeit*, or *validity* (to use a more modern terminology), argued that it may perfectly be the case that a statute is experienced as binding despite its not having been validly enacted, or the other way around. But it would be a huge mistake to conclude that, for Petrażycki, legal dogmatics should acknowledge reality and only take into account those, and only those, normative facts which, as a matter of fact, happen to be experienced as binding by officials and people at large. The opposite is true.

I think it useful to discuss an example in some detail because it may cast more light on the way Petrażycki conceived the bindingness and the validity of normative facts.

In his *Theory of Law and State* Petrażycki devotes an appendix to the situation of official law in Russia. Here he adopts the point of view of legal dogmatics and discusses the questions of the bindingness and of the validity of the *Svod zakonov Rossijskoj Imperii*, a compilation of statutes made during the Russian empire. To understand this example, it should be borne in mind that the commission established in 1832 to make this compilation *was not endowed with legislative power*, and yet it sometimes would make substantial changes to the texts it included in it. These texts began to be experienced as binding in the amended version, while the texts that had *not* been included ceased to be experienced as binding.

gold, everything to which the law refers becomes law”. But there is a huge difference. Kelsen held this view as for legal dogmatics and sociology of law *alike*, while Petrażycki held this view *only as for his theory (i.e., psychosociology) of law*. Indeed, we will be seeing shortly that Petrażycki’s opinion as for legal dogmatics was opposite to Kelsen’s.

¹⁴³ This aspect was stressed by Peczenik (1975, 1969).

Now, when discussing this situation, Petrażycki himself recalled that under Article 86 of the *Osnovnye Zakony Rossiskoj Imperii* (Fundamental Laws of the Russian Empire) read as follows: “No new statute shall follow without the approval of the State Council and the State Duma, nor shall it take effect without the assent of the Emperor” (quoted in Petrażycki 1909–1910, 625 n. 1).

Petrażycki reports that at his time a debate was going on about the legal significance to be attributed to the omissions and the amendments made by the commission.

According to Petrażycki, from the *point of view of the psychological theory of law*, there was no doubt that the “people’s legal psyche [...] deal[s] with the Svod as an autonomous set of statutes that substituted the statutes previously binding [*dejstvujučie*] until the Svod was compiled.” Still from the psychological point of view, Petrażycki remarked that

ancient statutes [...] that were not included in the Svod, or parts of their content that did not end up in the Svod do not play the role of statutes in force [*dejstvujučie zakony*], either in the people’s legal psyche or in state institutions (Petrażycki 1909–1910, 629–30; my translation)

To put it otherwise, from a theoretical point of view, the Svod was turned into an *official normative fact* playing the role of both a norm-creating and a norm-destructing normative fact (see Section 18.6 above and Section 19.4 in this tome). But Petrażycki also held that the *point of view of legal dogmatics* should be different:

Of course, this situation or, better yet, these facts (with which not only a theorist but also a dogmatician who supports the principle of law [*princip prava*] against arbitrariness [*proizvol*] must reckon do not exclude the possibility and the obligation for legal dogmaticians [*juristy-dogmatiki*], for the senate, for the other courts to exact [...] that the original statute [*podlinnyj zakon*], and not the amended one contained in the Svod, be applied, and in particular to refer [*ssylat’sja*] to Article 86 the of *Osnovnye zakony* [the fundamental laws] [...], pointing to the fact that “the approval of the State Council and of the State Duma” never concerned certain propositions [*položeniya*] of the Svod, but exclusively certain propositions of the original statute. (ibid., 630 n. 1; my translation and italics added)

In other words, even though a validly enacted (and not yet validly repealed) statute is *no longer being experienced as binding by the courts, officials, and the people*, it *should be* regarded as binding by *legal dogmaticians*. By the same token, legal dogmaticians *should* regard as *nonbinding* an invalidly enacted statute that is experienced as *binding* by the courts, officials, and the people despite its not having been validly enacted. According to Petrażycki the question of a statute’s *legal-psychological* bindingness must be kept carefully apart from the question of its *legal-dogmatic* bindingness.¹⁴⁴

¹⁴⁴ The term *dogmatycznie obowiązujący* (“dogmatically binding”) was used at least once by Lande. See in this regard Section 19.3 in this tome.

It is apparent that Petrażycki's theory of legal dogmatics is quite different from Hans Kelsen's, who contended, for example, that any legal norm, even a statutory norm, may lose its bindingness by way of desuetude (Kelsen 1945a, 119).¹⁴⁵ Elsewhere (Fittipaldi 2010, 2012b, 2013a) I have given other examples to show that Kelsen's legal dogmatics, unlike Petrażycki's, is not at the service of the principle of legality and that, from a Petrażyckian point of view, it conflates the point of view of the psycho-sociology of law (or theory of law, as Petrażycki would have called it) with that of legal dogmatics.

We can now devote a few words to the unifying function of legal dogmatics.¹⁴⁶ Unification is achieved through activities as follows (Petrażycki 1909–1910, 226ff.; 1955, 142ff.):

1. ascertaining whether or not a normative fact exists or existed in the reality external to the Subject (e.g., the external existence of a custom; see Sections 19.3 and 19.4);
2. identifying normative facts (e.g., establishing the original text of a statute);
3. differentiating the spheres of application of different normative facts in order to avoid conflicts between them;
4. working out precise concepts (i.e., concepts whose scope or meaning cannot be stretched or compressed) for the terms used in legal texts (what I propose to call *intensional formalism*, as discussed in Section 18.8.6 above);
5. enumerating special categories of cases that should be subsumed under a certain term;
6. casuistry (*kasuistika*), namely, finding solutions to hard cases;
7. creating abstract concepts and propositions and bringing them into a systematic order;
8. using these concepts and propositions as premises on which basis to deductively solve cases whose solutions are neither directly contemplated nor predetermined by normative facts (i.e., what Phillip Heck would derogatorily call *Inversionsmethode*);
9. recourse to analogy.

Two points should be made here in order to avoid misunderstandings.

First, Petrażycki was *opposed to the teleological construction of statutes*. In his view a teleological construction of statutes would be “a hypocritical slave, openly cheating his master, and explaining his words according to his own convenience” (Petrażycki 1897; translation by Peczenik in Peczenik 1975, 91; see also at greater length Peczenik 1969).

¹⁴⁵ Here Kelsen uses the term *validity*, not *bindingness*, but I choose the latter term in order to avoid confusion (in this regard, see Pattaro 2005, 156).

¹⁴⁶ The topic is further discussed in Fittipaldi 2012b, sec. 4.3.

Second, Petrażycki *did not hold that legal dogmatics can arrive at objective truths*. Quite the opposite. He held that legal dogmatics is a sort of innocent and unintentional (*neumyšlennaja*) sophistry (*sofistika*) (Petrażycki 1909–1910, 231). For instance, he argued that “*if the main purpose of the doctrinal study of law consisted of an objective, historical study of the content of statutes, etc., it would often be forced to admit plain contradictions between [...] statutes*” (ibid.; translated by Peczenik [1975, 91]; italics added). By the same token, Petrażycki held that legal dogmaticians refuse to admit that there is “*a quantity of ambiguous expressions that can be understood in different ways with the same degree of plausibility*” (ibid.; translated by Peczenik [1975, 91]; italics added).¹⁴⁷

According to Petrażycki, in other words, legal dogmatics assumes that official normative facts do not conflict with one another, are not ambiguous, and do not contain any gaps. These assumptions are often completely false, but they make it possible for legal dogmatics to unintentionally contribute to the unification of legal experiences, thus counteracting the conflict-producing nature of legal phenomena.

¹⁴⁷ One could ask whether these statements are compatible with the statements Petrażycki would make in his posthumous *New foundations of logic* (Petrażycki 1939, see footnote 79 above). In my opinion they are compatible if we understand the principle of non-contradiction in the context of legal dogmatics not as a cognitive-objective hypothesis (i.e., a hypothesis concerning external reality) but as a subjective-relational decision (i.e., a postulate concerning the Subject’s own internal attitudes)—a decision that the Subject may or may not adopt. See in this regard Chapter 19 in this tome, as well as Fittipaldi 2013d and 2013e.

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For ease of reference in the indexes that follow, letters belonging to alphabetic systems having a different arrangement than English have been slotted into the place they would occupy in the English alphabet. To this end we have adopted a criterion of similarity (for example, å = a). If an original work has been translated into English and the contributor has deemed it necessary, the title of that translation will appear next to the original title even if the former is not a literal translation of the latter.

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