

STUDI
E
RICERCHE

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EVERYDAY LEGAL ONTOLOGY

A PSYCHOLOGICAL AND LINGUISTIC INVESTIGATION
WITHIN THE FRAMEWORK
OF LEON PETRAŹYCKI'S THEORY OF LAW

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TABLE OF CONTENTS

1. Everyday legal ontology as a challenge to normative solipsism	9
1.1. Normative solipsism	9
1.2. Three open questions of Petrażycki’s legal theory	18
1.3. The subject-matter of this book	26
1.4. The major ontological kinds and the way they are mirrored in naïve language	33
2. Ethical illusions produced by projective processes	53
2.1. Introduction	53
2.2. What can projections explain?	53
2.3. Petrażycki’s projective process	55
2.4. The degree of stability of projective qualities and its linguistic consequences	58
2.5. Two constituents of the stability of projective qualities	60
2.6. The connection of subjective stability and intersubjective diffusion with the psychological development of realism	73
3. Illusions produced by the features of the super-ego	85
3.1. The limits of Petrażycki’s projective hypothesis	85
3.2. The <i>differentiae specificae</i> of ethical emotions	87
3.3. Why the explanation here proposed to the illusions of imperatives and prohibitions is different from Petrażycki’s	98
3.4. The illusions of norms and the role of the concept of norm as a basic theoretical concept	99
3.5. Ethical emotions, aggressiveness and ethical sadism	114
3.6. Shame, guilt, pride, anger and indignation	121
3.7. Is the hypothesis of a super-ego falsifiable in Popper’s sense?	130
4. Illusions produced by the features of legal emotions	137
4.1. Naïve legal entities	137
4.2. Moral <i>vs.</i> legal experiences	144

Table of Contents

4.3. Features associated to moral <i>vs.</i> legal experiences, respectively	154
4.4. Kinds of legal relationships	161
4.4.1. <i>facere-accipere</i> (obligatedness/obligatoriness)	165
4.4.2. <i>nonfacere-nonpati</i> (prohibitedness)	171
4.4.3. <i>pati-facere</i> (permittedness)	174
4.4.4. <i>pati-nonfacere</i> (omissibility)	186
4.4.5. Absence-of-ethical-phenomena and ethical indifference	197
4.5. Pure attributive phenomena	200
4.6. The degree of cognitive salience of the different kinds of legal relationship and the factors conducive to the detachment of debts	205
4.6.1. Bilaterality	210
4.6.2. Transferability	223
4.6.3. Transitoriness	227
4.6.4. Fungibility	230
4.6.5. Transformability	232
4.7. Duties	235
4.8. Rights <i>vs.</i> powers?	241
4.9. The factors conducive to the detachment of permittednesses/authoritativenesses into illusions of free-standing entities	251
4.9.1. Bilaterality	252
4.9.2. Transferability	259
4.9.3. Transitoriness	261
4.9.4-5. Fungibility and transformability	261
4.10. Statutes, commands and the wishes of an autocrat	262
4.11. The illusions of the amendment of a command/statute	267
4.12. A case of undetachment: ownership	272
Appendix: Moneyness as a naïve non-legal phenomenon	281
References	287
Index of names	299

Allegretto con spirito (♩ = 126-138)

Klavier

The image shows a musical score for piano, consisting of two systems of music. The first system is labeled 'Allegretto con spirito (♩ = 126-138)' and 'Klavier'. It features a treble and bass clef with a key signature of two flats. The music is characterized by dense, complex chords and rapid sixteenth-note passages. The second system continues the piece, marked with 'ff (non dim.)' and 'sf', indicating a fortissimo dynamic with a non-diminishing instruction and a sforzando accent. The notation includes various ornaments and complex rhythmic patterns.

Max Reger, *Klavierkonzert* (1910), Satz 3, Allegretto con spirito, Takt 1-10.
Source: Ed. Bote & G. Bote, Berlin, assigned to Associated Music Publishers Inc.,
New York, 1938.

1. EVERYDAY LEGAL ONTOLOGY AS A CHALLENGE TO NORMATIVE SOLIPSISM

1.1. NORMATIVE SOLIPSISM

In this book I will argue for *normative solipsism*¹ by trying to answer the questions posed to it by naïve legal ontology – as described through prototype linguistics. My answers will draw largely, though not exclusively, on modern psychology.

The terms *everyday ontology* and *naïve ontology* will be used as synonyms. Also the adjectives *ethical* and *normative* will be used as synonyms. Moreover, they will be used as hypernyms for the adjectives *moral* and *legal*. The practical and theoretical reasons for this usage will become clear throughout this book.

Legal solipsism is a general hypothesis about legal realities². By this term I understand *legal qualities* such as being prohibited, obligatory, mar-

¹ Supporting *legal solipsism* does not imply supporting *metaphysical solipsism*, namely «that subvariety of idealism which maintains that the individual self of the solipsistic philosopher is the whole of reality and that the external world and other persons are representations of that self having no independent existence» (Wood 1962: 295).

Actually, all my works are based on a strong *realism* that supports not only the *current existence*, but also the *historical existence* of plenty of non-legal realities. I contrast this kind of complete realism with *currentist realism*, or *currentism*, that is a realism that takes into account exclusively current realities.

² In this book I will mostly use the term *reality* without adjectives as a hypernym for *any kind of concrete, spatio-temporally individuatable entity, quality or process that is assumed to exist or take place outside the subject*. Therefore, *reality* tout court is to be understood as meaning *external entity, quality or process*. Realities can be physical or psychic. A physical external reality is the chair on which I sit. A psychic external reality is the sadness of some friend of mine. The *internal* reality of the subject can as well be physical (his heart) or psychic (his sadness). Sometimes I will use *external reality* in the sense of *physical external reality* and *internal reality* in the sense of *psychic internal reality*, for instance when I contrast external reality with the internal reality of the subject. This usage will be clear from the context.

Since I am a nominalist, I will not discuss *abstract* legal realities, such as the *idea* of a debt or the *idea* of a right. *Justice* and *equity*, besides being abstract ideas, raise additional problems and will not be discussed in this book. I will deal here exclusively with *concrete*

ried, president, in force, void, etc., *legal entities* such as imperatives, rights, norms, corporations, M1, etc. and *legal processes*³ such as repealing, sentencing, the running of the statute of limitations, promulgating, etc.

By '*legal solipsism*' I understand the hypothesis according to which legal realities exist exclusively in the psyche of each individual.

The kind of legal solipsism that will be supported in this book will be a *psychological* one, namely a sort of legal solipsism that methodologically assumes that it is worth trying to explain any kind of conjectured legal reality in the terms of psychic processes (based or not on some mismatch with perceived physical realities).

*This is the reason why throughout this book I will use the word 'psyche' rather than the word 'mind'*⁴.

This approach implies that the conjectures I will make in this book are open to refutation by psychological empirical research.

Psychological legal solipsism (henceforth: *legal solipsism* tout court) can be considered a consequence of *radical empiricism*.

In particular, it is a consequence of the assumption that every reality must be either physical or psychic⁵.

(i.e. individuable) legal realities, such as a certain debt that Robert owes Johanna. The problem of the principium individuationis of legal realities is discussed elsewhere (Fittipaldi — a), as it involves the conflict-producing nature of legal phenomena (see below).

The fact that legal realities are *res quae tangi non possunt* (Gaius, *Inst.*, 2.14) does not entail that they are abstract. To my knowledge this point was first made Czesław Znamierowski: «[I]n the field of social and legal ontology ... the objects that are investigated are not ..., as some people say, "abstract" [*abstrakcyjne*] (are we living in the "abstraction", while living in society?), but they have all the features of invisibility [*niepoglądowość*]». [Znamierowski 1922: 3]

³ This term is not used here in a legal sense. See sec. 1.4.

⁴ In this book I will not be concerned with neurosciences. The reasons are explained just below and in sec. 3.4, fn. 28.

⁵ This point was first made by Czesław Znamierowski when discussing Petrażycki's *legal solipsism*: «In his method, Prof. Petrażycki is an empiricist, and a very radical one. He does not recognize any knowledge that is not based on experience, and therefore he searches for *legal realities* in experience. He conceives experience in the following way. It can give knowledge only about physical or psychic phenomena and about nothing else, and *objects can only be either physical or psychic*. Now, since professor Petrażycki does not want to identify legal objects with physical ones, he is forced to identify them with psychic ones ...». [Znamierowski 1922: 27, emphases added]

The *main* reason why the kind of critical rationalism I support (Hans Albert's) recommends *reductionism* is not an esthetical conception of truth based on simplicity or economy. The reason is that reductionism is (or ought to be) nothing but an attempt to *explain* the results of a theory in the terms of another. This implies that reductionism is a way for *cross-testing theories* and an antidote against *cognitive protectionism* (*kognitiver Protektionismus*) – to use Albert's beautiful expression (1987: 155; see also Fittipaldi 2003: § 4.5).

There is a *further* important reason for reductionism, that holds especially true for this book. Reductionism is an attempt, not only to test a theory through another, but also to *cross-fertilize different approaches*. Reductionism is also a heuristic tool.

According to legal solipsism, qualities such as *obligatory*, *prohibited*, *chief of State*, are not physical features of courses of action, things, people. *Legal* or – more generally speaking – *ethical qualities* are not like, say, weight and volume, that are objective features of things. By the same token, according to this hypothesis, realities like *rights*, *debts*, *entitlements*, *norms*, *corporations*, etc. are not physical entities.

If legal realities, unlike really existing realities, do not belong to the realm of physical reality, then the hypothesis must be made that they exist only in the psyches of each of us and that the fact that we happen to share certain legal opinions is a very *interesting sociological problem* that requires an explanation that is *different* from the explanation that is usually given to the phenomenon that there exist relatively shared opinions about, say, the existence of the Atlantic ocean or the name of the person who killed Julius Caesar. The fact that in either kind of case there seems to be a *convergence* of the opinions of different independent people does not imply that the explanation for these convergences should be the same.

The scholars who have supported *legal solipsism* in the most radical, explicit and consistent way are Leon Petrażycki (1867-1931) and Enrico Pattaro (1941-)⁶. Motyka (1993: 100) makes a similar statement exclusively about Leon Petrażycki. The works where Pattaro has expressed his views in the most systematic way are *The Law and the Right* (2005) and *Opinio iuris* (2011).

Motyka uses the term *psychologizm* (“psychologism”). I prefer to use the term *solipsism* in order to cover both Petrażycki’s and Pattaro’s

As for legal solipsism, it is a falsifiable hypothesis. If certain phenomena were discovered or could be produced in a laboratory that seem to be *explainable* only by making use of the hypothesis of the existence in the external world of certain legal realities (or by making use of the hypothesis that there exists a realm-of-ought-to-be), legal solipsism should be rejected. Actually, in Fittipaldi (— a) I try to show that many institutional legal illusions must be explained by taking into account *historical (i.e. past) physical realities*.

A kind of reductionism that is firmly rejected here is *dismissive reductionism* or *nothing-else-but-reductionism*. According to this kind of reductionists, certain phenomena are not worth being investigated if “in the last resort” they can be dismissed as being *nothing else but* some other reality such reductionists are better acquainted with or they just prefer (this is what seems to be currently going on with neurosciences). Even when the reduction is possible and correct, this does not entail that the stages between the “last resort” and the phenomenon is *not* worth being investigated. This book is an attempt to seriously investigate these intermediate stages, whereas *dismissive reductionists* would just advocate the complete uselessness of the discovery, the description and – possibly – the explanation of seemingly unfamiliar phenomena. In this sense, dismissive reductionism can be considered a kind of cognitive protectionism. Much legal realism has been severely affected by dismissive reductionism.

Rudziński (1976) argues that Petrażycki’s “strict ontological dualism” (111) can be traced back to Descartes’s basic split in reality (109). In my opinion there is no reason to assume that Petrażycki would have not supported – in the last resort – the goal of reducing all phenomena to physical realities.

⁶ To be sure, Pattaro does not use the term *solipsism*.

approaches. To my knowledge, Petrażycki did not use this term to refer to his conception. The term *solipsyzm* was meant as a criticism to Petrażycki's theory (Baum 1967: 74, fn. 21, and Kowalski 1963: 190). The first author who used the term *solipsyzm* to refer to Petrażycki's legal theory seems to have been Rozmaryn (1949: 17, quoted in Seidler 1950: 21)⁷. Here I will use the terms *legal* and *ethical solipsism* without any negative connotation.

In my opinion, if Petrażycki's and Pattaro's approaches are kinds of *ethical solipsism*, Petrażycki's theory is a *psychological theory of law* in a strict sense, while Pattaro's is a *psychologistic conception of law*. By the term *psychologistic conception of law* I understand a *kind of ethical solipsism that does not draw on current psychological research*⁸.

Instead, by the term *psychological theory of law* I understand a *kind of ethical solipsism that takes into account its contemporary psychological research*, even if without adhering to it. Petrażycki, in his *Vvedenie* (1908), did thoroughly discuss most psychological theories available at his time, but rejected them and tried to develop one of his own. (Sigmund Freud's theory of a *Über-Ich* was made explicit as late as in 1923. Hence no wonder that Petrażycki did not discuss it).

That is why I consider Petrażycki's a psychological theory of law, while Pattaro's a psychologistic conception of law⁹.

⁷ Znamierowski used the term *solipsyzm* in order to show that Petrażycki's ethical solipsism is logically conducive to general metaphysical solipsism (1922: 59). This objection is completely wrong. Cf. above, fn. 1, as well as below, sec. 3.4.

⁸ It is worth stressing that Pattaro in his works draws much more on sociology than on psychology.

⁹ Some hints to a conception similar to Petrażycki's and Pattaro's as regards norms are present in Karl Olivecrona.

See, for instance, the following passage taken from Olivecrona's *Law as Fact*: «It is impossible to ascribe a permanent existence to a rule of law or any other rule. A rule exists only as the content of a notion in a human being. No notion of this kind is permanently present in the mind of anyone. The imperative appears in the mind only intermittently. Of course, the position is not changed by the fact that the imperative words are put down in writing. The written text – in itself only figures on paper – has the function of calling up certain notions in the mind of the reader. That is all». [Olivecrona 1939: 47-48]

Despite this strong statement, Olivecrona, in his discussion of Petrażycki's ideas, seems to consider legal solipsism impossible and therefore not to believe that Petrażycki was consistent with his legal solipsism: «[I]t is pertinent to ask whether Petra[ży]ck[i] ... really hold[s] to the identification of "law" and "law convictions". If so, the term "law" would denote nothing but the broad stream of ever-changing, purely individual ideas of rights and duties among millions of people. But, at most, what Petra[ży]ck[i] calls intuitive law answers this description». [Olivecrona 1948: 178]

The question whether ethical solipsism is tenable and scientifically fruitful is the subject-matter of this book. Here I want to stress that *Petrażycki did support legal solipsism also with regards to positive law* and I share his point of view. Here is a quotation where this view is clearly expressed. (For an explanation of the distinction between positive and intuitive law, as well as of the concept of *normative fact*, see below, sec. 2.4). This text is present also in the English edition of Petrażycki's works edited by Timasheff (Petrażycki 1955+*), of which Olivecrona seems to have taken no notice in the second

According to Pattaro, «the existence of a norm presupposes that at least one person believes it to be binding *per se*» and, «if something is a norm there must be at least one subject in whom it is a belief» (2005: 98). But Pattaro does not discuss contemporary psychology (with the exception of few hints to Freud). This omission can be explained by the fact that Pattaro «believe[s] ... that much, if not all, of psychology is destined, in the progress of scientific knowledge to be supplanted by neurosciences» (xxvii, fn. 9).

I disagree. The reason why chemistry cannot be reduced to physics, or sociology/economics cannot be reduced to psychology is that the former deal with the *emergence of complex phenomena* that are caused by interactions whose investigation does not pertain to the realm of the latter. I think that to some extent this is also the case of (and for) psychology against neurosciences. Moreover, I think that neurosciences do need psychology in order to establish the problems worth being investigated (see below sec. 3.4, fn. 28).

Now, *since I support a strict psychological theory of law, my starting point will be Leon Petrażycki's ethical solipsism, rather than Pattaro's*. Nonetheless, it is difficult to overstate the importance of Pattaro's *The Law and the Right*. Here and there I will complete and correct Petrażycki's conceptions by drawing on Pattaro's.

The fact that Petrażycki's ideas will be the theoretical starting point of this book does not imply that the goal of this book is to expose his ideas.

edition of *Law as Fact* (1971): «[I]ntuitive law [*intuitivnoe pravo*] remains individual – individually diverse – in content: it is not standardized law, and there may be said – as to the content [*soderżanie*] of the whole of intuitive legal convictions – to be as many intuitive laws [*prawa*] as there are individuals. (To avoid misunderstanding as to the expression “individual”, it may be noted that *law of every sort – even positive law – is individual in the psychological sense*, as every sort of psychological experience is a phenomenon of the individual psyche: we are here concerned with the content [*soderżanie*] of the relevant individual experiences)». [Petrażycki 1909-10: 480, 1909-10*: 226 f., emphasis added, translation modified]

However, even if Olivecrona had read this passage, he could not have understood the theoretical purport of legal solipsism, as the passages where Petrażycki discusses its sociological implications have not been inserted in Timasheff's compilation of Petrażycki's works (1955†*).

For instance, Petrażycki argued – and convincingly so – that the *very same normative fact* (for instance, a statute) can cause different positive legal experiences in different people both at the same time and in different times: «[O]ne single normative fact may be and often is ... the source of diverse, in content, ... positive legal experiences ... Therefore, from the point of view of the evolution of law it can be said that, even though the normative facts on which a certain positive law rests remain unchanged, that law can nevertheless change its content, in particular, it can evolve, produce new branches, get continuously enriched with new content, etc.». [Petrażycki 1909-10: 525]

Furthermore, it should be stressed that Petrażycki shows that the very same normative fact can cause in certain people *legal* experiences, while in other people *moral* experiences (below sec. 4.2) – or even esthetical ones (1909-10: 526).

*This book has not the goal of presenting Petrażycki's ideas, but rather to fix some of their problems*¹⁰. In general, the ideas of Petrażycki that I consider no longer fruitful will not be discussed. This book is not about Petrażycki, but it is based on his main tenets. Petrażycki's general psychology will not be discussed here, as I consider it a typical 19th-century psychology that is hardly compatible with the research that has been done in 20th century. It is worth recalling that not even Krzysztof Motyka mentions Petrażycki's psychology among the main tenets of Petrażyckianism (Motyka 1993: 198).

I hope this book will be understandable without having previously read the compilation of Petrażycki's texts made by Nicholas S. Timasheff (Petrażycki 1955†*) or my introductions to Petrażycki's legal theory (2012 and — b). Each specific theoretical idea formulated by Petrażycki of which I will make use in this book will be explained by extensive quotation of his works¹¹. Of course, extensive quotation of his works will be all the more necessary for those theoretical ideas that have been exposed in texts that have not yet been translated in English.

Before discussing the problems of legal solipsism that I will try to fix in this book, let us read a quotation by Petrażycki where his legal solipsism is stated in the clearest way.

In general, every kind of law, all legal phenomena [*pravovye javlenija*] – including legal judgments [*pravovye suzdenija*] that encounter consent and approval from others represent purely and exclusively individual phenomena from our point of view, and the possible [*éventual'nyj*] consent 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 psychic phenomenon appears in the psyche [*psibika*] of one individual and only there: its nature does not change as something else does, or does not, happen somewhere – between individuals, above them, in the psyche [*psibika*] of others, or not, or if other individuals do exist or not, etc. [Petrażycki 1909-10: 104, 1909-10*: 74 f., translation modified]

This shall be the theoretical starting point of this book.

According to Petrażycki (and me) legal realities are illusions in a technical sense. For the existence of a legal phenomenon it is necessary the existence of no more than one individual. Moreover, the animate entities to whom

¹⁰ An introduction to Petrażycki's ideas can be found in Motyka 2007 as well as in Fittipaldi 2012 and — b.

¹¹ Russian – as well as original texts in languages other than English – will be reproduced only when strictly necessary. 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 1995.

When quoting Petrażycki I will always indicate the pages of both the Russian original and of the English translation. If no reference is made to Petrażycki 1955†*, it means that I am quoting pages that have not been inserted into Timasheff's compilation.

some individual may ascribe rights or duties do not necessarily have to exist in the physical world. It suffices that these animate entities exist in the fantasy (i.e. in the psyche) of the individual who ascribes the rights or duties (sec. 4.2).

Legal phenomena exist only in the psyches of the persons experiencing them and only to the extent they actually or potentially experience them.

An important aspect of Petrażycki's legal solipsism is his idea that *the only really existing*¹² ethical realities are certain kinds of repulsive and appulsive impulsions.

Maintaining that ethical impulsions are the only really existing ethical realities is not to deny that physical realities can affect them in some way. What matters – according to Petrażycki (and I share his view) – is not whether certain ethically relevant physical realities or happenings really take place, but whether they *are believed* to take place¹³. What matters is solely whether certain ethical impulsions are caused¹⁴.

Since we will discuss Petrażycki's distinction between law and morality in ch. 4 it is useful to point out here that *Petrażycki used the term 'ethics' as a hypernym for both 'morality' and 'law'*. I will do the same.

There is no need to give more details here. Petrażycki's theories will be critically assessed, developed and – when necessary – modified in the next chapters.

What I wish to stress in this first chapter is that *Petrażycki's approach is fruitful because it raises issues that from a different point of view are not considered issues at all*. This approach opens new fields of research without necessarily denying the legitimacy of other already existing fields of research.

As I said, according to ethical solipsism, the fact that in a certain set of people certain ethical opinions (i.e. the opinions about what by whom can, should or should not be done) may be more or less similar in content cannot be explained in the same way we explain the convergence of certain opinions about really existing realities.

The opinion that in Egypt there flows a quite big river is shared because in Egypt there really is quite a big river. By the same token, the opinion that the earth revolves around the sun, and not the other way

¹² By the term *really existing reality* I mean a reality that really is the current physical reality that it seems to be. If it seems to be a current physical reality but it is, instead, a psychical or historical reality I do not call it a 'really existing reality' but rather an *illusory reality*. By the term *illusory reality* I refer as well to realities that are assumed to be neither physical nor psychical but rather to exist in some realm-of-the-ought-to-be.

¹³ For a short discussion of an important aspect of this point see sec. 2.5, fn. 11.

¹⁴ It goes without saying that, if the ethical impulsions EI are caused by the *perception* of certain *external realities*, since the taking place of external realities is often positively correlated with their being perceived, their taking place is in turn positively correlated with the elicitation of the ethical impulsions EI.

round, eventually prevailed because it is objectively true that the earth revolves around the sun. In the sociology of science, the *sociological epoché* can play but a lesser role than in, say, the sociology of religion. A sociologist of religion who were to causally explain the success of the Christian religion with the hypothesis that Jesus was God in the flesh would not be a sociologist at all. Of course, it is not necessary to be atheist to be a good sociologist (or psychologist) of religion. Sociological epoché, along with other scientific epocháí, can be just a methodological option. Pierre Bovet, whose hypotheses about the origin of the religious sentiment will be discussed at length in ch. 3 was not an atheist at all.

Now, since legal realities do not really exist, we *cannot* explain the fact that certain opinions about them appear to be shared through the *truth* of these opinions. This is the way we can – not even in a fully accurate way¹⁵ – explain the eventual success of Copernicanism over heliocentrism. Instead as for legal opinions the following sociological question arises: *how is it possible that certain legal opinions about not-really-existing legal realities seem to be relatively shared?* (Of course, nothing prevents an adversary of legal solipsism to accept such a question as the corollary of a purely methodological sociological epoché – just as Pierre Bovet did in the context of the psychology of religion).

Petrażycki's incomplete answer to this question is the following: because of the *conflict-producing nature of law* (that I will also call *polemogenousness*), differences in legal opinions cause very harmful consequences, like wars, conflicts, vengeance, etc.¹⁶ According to him, the natural polemogenousness of law is to some extent contained by what he called the *unifying tendency of law*.

A psychic source of destruction, malice, and vengeance – a dangerous explosive material – is latent in ... legal psyche where the opinions and convictions held by individuals or by masses do not coincide; unquestionably many millions have suffered death on earth, and countless human groups have been destroyed or exterminated, because of the non-coincidence [*nesovpadenie*] of opinions regarding the existence and compass of mutual obligations and rights.

Associated with this, 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.

¹⁵ A purely sociological, if extreme, explanation of Galileo's successful defense of Copernicanism can be found in Feyerabend 1975 (for instance, § 11).

¹⁶ A similar point, as regards rights, has been made also by Scandinavian realists. See Pattaro 1974 (225, fn. 13). (As regards the polemogenousness of legal phenomena see also below sec. 4.3).

This tendency ... may be called briefly the *unifying ... tendency* [*unifikacyjna tendencja*]. [Petrażycki 1909-10: 172 ff., 1909-10*: 113, translation modified, emphasis added]

Petrażycki mentioned four “tendencies” that – if imperfectly – contain what I call the *natural drift of legal opinions* (see Petrażycki 1909-10: 173 ff., 1909-10*: 112):

1. the tendency for a *single pattern* of norms to develop, as is the case of positive and official law¹⁷;
2. the tendency of legal concepts toward *precision and definiteness of content and compass*;
3. the tendency to make the “existence” of legal obligations and rights dependent on facts *susceptible of proof*;
4. the tendency toward «subjecting disputes to the jurisdiction of a disinterested third party» (Motyka 2007: 33).

Petrażycki does not explain what causes these tendencies and, therefore, seems to commit a *functionalist fallacy*.

Be as it may, it is not the goal of this book to try to explain the causes of these tendencies¹⁸. I considered it necessary to give here a very short answer to the question how legal solipsism is compatible with a certain degree of coincidence of legal opinions as I guess that at first glance Petrażycki’s approach may puzzle some readers. Nevertheless, *this book will be devoted neither to the problem of the convergence of legal opinions nor to the legal realities that can be conjectured to be a by-product of the conflict-producing nature of law*. I deal with this issues in *Jurisprudential Ontologies, Historical Realism and Sociology* (— a). That book deals with the intersubjective by-products of the conflict-producing nature of legal impulsions, namely the *jurisprudential ontologies*.

A crucial assumption for the cohesion of the present book is that *many important legal illusions come into existence because of the mere operation of certain intrinsic features of legal impulsions, and therefore that the explanation of the experience of these illusions does not involve the hypothesis of the conflict-producing nature of law*. Thus, I decided to devote this book to this topic, without discussing the jurisprudential illusions that are caused

¹⁷ The Petrażyckian concept *official law* will not be discussed here, as it hardly has anything to do with naïve legal ontology. I discuss it elsewhere (2012: ch. 4, and — a).

¹⁸ Znamierowski was wrong when saying that Petrażycki’s defective explanation of the unifying tendency of law is a necessary consequence of the logical and metaphysical foundations of his theory (1922: 58 f.). Even though Petrażycki’s explanation of this tendency is definitely defective, his conception permits to establish an important socio-legal problem: *what factors do cause that under certain circumstances many people happen to have similar or complementary psycho-legal experiences?*

In Fittipaldi 2009, I have developed an explicative hypothesis of the second and third tendency pointed at by Petrażycki by strongly modifying Priest’s (1977) theory about the causes that allegedly lead common law towards economic efficiency.

by the conflicts of *at least two (incompatible) legal experiences*. Jurisprudential illusions confront us with quite peculiar problems and that is why, as I said, I decided to deal with them elsewhere.

1.2. THREE OPEN QUESTIONS OF PETRAŽYCKI'S LEGAL THEORY

In this book I will try to answer three questions left open by Petrażycki. Trying to answer them will lead us to tentatively explain *naïve legal ontology* as well.

By the term '*ontology*' I understand the investigation of the very general conceptions a given individual (or a given set of individuals) has about reality/realities. In the way I use this word, ontology is a cross-disciplinary science made up of the most diverse contributions coming from linguistics, psychology, sociology, physics, biology, etc. In my opinion, after the scientific revolution, there is no room for ontology as a purely philosophical enterprise. Sometimes I will also use the term '*ontology*' to refer directly to some individual's conceptions, rather than to the investigation thereof.

We can now turn to the three questions left open by Petrażycki.

First, Petrażycki held that *legal qualities* and *entities*, such as *obligatoriness*, *wrongness*, *permittedness*, etc., and *norms*, *rights*, *entitlements*, *obligations*, *duties*, *debts*, *imperatives*, *permissions*, etc. are but *outside projections* of certain kinds of impulses.

According to Petrażycki they are all legal illusions¹⁹.

¹⁹ To my knowledge, such terms as *pravovaja illuzija* or *pravovij obman* have not been used by Petrażycki. In his *Vvedenie*, though, he wrote the following: «The science content of traditional legal science is tantamount to an optical illusion [*optičeskij obman*]: it does not see legal phenomena where they actually occur [i.e. in the psyches], but discerns them where there is absolutely naught of them – where they cannot be found, observed, or known – that is to say in the world external to the subject who is experiencing the legal phenomena ... [T]his optical illusion [*optičeskij obman*] has its natural psychological causes, precisely as the optical illusion [*optičeskij obman*] (in the literal sense of the word) is perfectly natural when people ignorant of astronomy suppose ... that the sun “rises” in the morning and revolves around us». [Petrażycki 1908: 25, 1908*: 8, translation modified]

Petrażycki gave also a technical definition of the term *illusion* that is based on his distinction between *oščuščenija* (“sensations”, i.e. what we directly experience through our external or internal senses) and *vosprijatija* (“perceptions”). Here is Petrażycki's definition of *vosprijatje*: «Usually we do not experience individual, isolated sensations [*oščuščenija*], but rather more or less complicated complexes of them, that produce Gestalten [*obrazy*] of different objects [*predmety*] and phenomena, for example, of a tree, of a cloud, of a musical melody; the experiences of these Gestalten are called perceptions». [Petrażycki 1908: 118]

According to Petrażycki, when we are having a perception, we are virtually never experiencing all the sensations that constitute its Gestalt (its basis). We obtain a perception

Unfortunately, Petrażycki did not go very much into the details about how projective processes actually work.

To my knowledge, this criticism was first made by Czesław Znamierowski. This author is considered the main critic (*główny krytyk*) of the psychological theories of law (Motyka 1993: 27).

Here is Znamierowski's criticism:

It remains unexplained ... in ... Petrażycki's work what ... "projecting onto the outside" means. We do not find a positive and more detailed description of the nature of these projections. He states repeatedly that projections are nothing real, that they are a fiction. And as regards them, which as fictions do not exist, it can undoubtedly be justified that he does not occupy himself closer with their essence. On the other hand, though, it is incomprehensible why he discusses in such detail and so seriously the classification of these – *sit venia verbo* – nothingnesses [*nicości*]. [Znamierowski 1922: 29, see also 57]

Znamierowski is definitely right.

On one hand, Petrażycki does not really explain how it occurs that each of us, because of his own legal impulsions, starts feigning the objective existence of legal qualities and entities. On the other, he spends much time in making distinctions between them.

More in general, Znamierowski was right when contending that it is not quite clear what projections are. Therefore in this book I will address and try to answer the following subquestions:

- *What are projections?*
- *How do they work?*
- *What can they explain?*

Moreover, in the next chapter I will contend that projections are a mechanism closely related to the way each of us in his childhood becomes a realist (i.e. develops the hypothesis that there exist external realities independent of himself).

Let us now discuss the *second* question left open by Petrażycki.

If legal realities are nothing but the result of the legal impulsions each of us experiences independently of any other, why is it so hard even to think within the categories of legal solipsism?

Let us read what Znamierowski has written about this issue.

by adding to the sensations we are experiencing some representations that are stored in our memory. According to him, the source of possible illusions lies here: «If the completion of the basis [*bazis*] of the sensations with elements of representations [*predstavlenija*] takes place in a wrong way, if it does not correspond to reality, the corresponding perception is called illusion [*illjuzija*]». [Petrażycki 1908: 123]

In my opinion, this definition is compatible with the *general conjecture* lying at the basis of this book (see next sec.).

[Petrażycki] himself says that, if we wished to present the whole theory of law on the basis of the theory of ethical emotions, we would encounter “difficulties of thinking and of language” and even that that theory could seem “a discourse in an incomprehensible language” [20]. [Znamierowski 1922: 32]

Znamierowski made this criticism in order to show that Petrażycki’s theory is wrong. Znamierowski believed that pointing to the fact that Petrażycki’s theory is not mirrored in naïve language suffices to accomplish a *reductio ad absurdum* of his theory.

That Znamierowski really thought this way can be shown also with his example of the concept of a musical piece. The problems raised by musical pieces are strictly connected with the problems raised by jurisprudential illusions (see Fittipaldi — a), but I think that a short discussion of this point will help the reader to better understand the subject-matter of this book too. In fact, the issue is pretty much a *methodological one*.

Znamierowski discusses musical pieces because he – correctly – holds that they can be fruitfully compared with (jurisprudential) legal entities. Here is what he wrote:

The category of thing [*rzecz*] can be applied to non-physical objects too. There are, namely, particular objects, that are difficult to define and about which a serious doubt arises as regards the way, in general, they should be classified from an ontological point of view, without falling in any *coarse mythology* [*gruba mitologia*]. We are thinking of objects such as – for instance – musical works. It would be immensely inconvenient to talk about these objects only in terms of sequences of present musical notes, as if only sequences of musical notes actually existed, since in this case it would be necessary not only to re-invent the whole hitherto-used [*dotychczasowy*] relevant terminology [*słownik*], but we would be necessarily in contradiction with the *reliable correct feeling* [*pewne słuszne poczucie*] that finds expression [*znajduje wyraz*] in the way of talking we have used up to now [*dotychczasowy*]. If we were to consider a musical work as a *sequence of present musical notes*, we could not talk of its continued existence, about which, after all, we talk when we assert that it was composed in a certain year or that in that other year, say, it was lost without traces. It would be necessary to talk about the fact that in a certain year signs on music paper were writ-

²⁰ Here is Petrażycki’s complete quotation: «In the domain of ethics, it is generally true that mankind inclines – as in habits of representation and thought [*prawycki przedstawienia i myślenia*], terminology, and speech – to the projection viewpoint, broadly speaking, and – ignoring the actual psychic processes – stubbornly assumes that prohibitions, commands, and obligations (corresponding to the motorial impulsions) really exist. There has been such a complete adjustment to this point of view that to start an examination of problems of ethics from the teaching of scientific psychology (that these phantasmatic prohibitions, commands, obligations, etc., do not exist, and that the only real existence is that of the peculiar impulsions in the psyche of the person attributing the obligations in connection with certain intellectual processes) is to raise difficulties of thinking and of language and in substance to “talk in an incomprehensible language” [*reč na neponjatnom jazyke*]». [Petrażycki 1909-10: 43, 1909-10*: 43, translation modified]

ten by the hand of the composer, that later similar marks [*znaczkę*] were printed on other paper and that at a certain moment both its manuscript and its printed copies ceased to be at people's disposal, that, though, in the meantime, between the coming into existence of the manuscript and the disappearance of the last copy, mutually resembling sequences of musical notes from time to time came into being – the fact that the player possessed one of the copies of the manuscript being a necessary condition for the coming into existence of these mutually resembling sequences of musical notes. In such a conception the only object really existing in a continued way would be the printed pages of paper. The sequences of musical notes would be only aggregates similar to each other, *rather than one and the same object*, because they would consist of phenomena different to each other. In this conception the continuity of existence of the work would vanish, as well as the bond – so to speak – that melts the individual sequences into the whole [*całość*] that *according to the common sense* [*według potocznego poczucia*] exists. [Znamierowski 1922: 47 f., all emphases added]

As is evident from this text, the reductionist conception of a musical piece, according to Znamierowski, is wrong because it does not correspond to the common sense (*potoczne poczucie*). According to him, common sense is reliable and finds expression in the way we have hitherto spoken (*dotychczasowy sposób mówienia*).

Now, Znamierowski contends that, just as for the common sense a musical piece exists also when it is not being performed (or listened to) by anybody, also legal realities do exist even when nobody is thinking of them. Instead, Petrażycki's ethical solipsism *seems* to imply that legal realities exist exclusively insofar they are actually experienced by somebody²¹.

²¹ It could be argued that Petrażycki contradicted himself. At least one time he wrote that: «obligations are something continuous [*dlitel'nyj*] that does not exist only when the obligated person thinks of them». [1909-10: 359, see a discussion in Motyka 1993: 110 f.]

This quotation could be taken as evidence that Olivecrona was right when he held that it is impossible to be a self-consistent legal solipsist (see above, fn. 9).

It is not the goal of this book to show that Petrażycki's conceptions are devoid of contradictions. Nonetheless, in my opinion, here there is none. This quotation was intended to be nothing more than a *reductio ad absurdum iuxta propria principia* of what Petrażycki calls a naïve-realistic (*naivno-realističeskij*) legal theory. I would sum up (and somewhat clarify) this polemical argument in the following way: *a theory is deemed naïve-realistic if it identifies certain realities whose sphere of existence is unknown (henceforth: realities₂) with physical or psychic phenomena external to the subject who experiences them, while these realities₂ should be explained through (though not identified with) psychic phenomena internal to the subject.*

In the case of obligations, Petrażycki shows that the *properties* with which they are experienced cannot be explained with the nature of the external realities with which it has been tried to identify them. Therefore obligations should be explained as projections (i.e. illusions) produced by phenomena internal to the subject. I think that the *continued existence* to which the above quoted passage refers is an example of such a property. (See also below, sec. 2.6, and Fittipaldi 2012, where I stress the role of the *stability of normative convictions*).

Znamierowski relies too much on common sense. He does not recall in this context David Hume's sceptical doubt about the existence of external reality. Do really existing realities exist also when I do not think of them? In sec. 2.6, among others, I will show that realism is a falsifiable hypothesis. Instead, I do not understand how the hypothesis that legal realities have some current external existence could be falsified²².

Be as it may, it would be all too easy to dismiss this objection just by recalling that *the fact that we experience the sun as rising and going down, as well as the fact that it would be cumbersome to change our language in order adapt it to heliocentrism, are not at all a reductio ad absurdum of the theory according to which the earth and the other planets revolve around the sun.*

What matters here is explaining where these illusions come from.

As for the "movements" of the sun, Galilean invariance explains also this illusion – let alone the excellent way heliocentrism explains why planets are experienced as vagabonds²³!

As for *all* legal illusions Petrażycki thought that a good explanation could be given in the terms of projections. Unlike him, I think that *his theory of projections is incomplete and that a theory of projective mechanisms – if completed – would still be unable to explain all kinds of legal illusions.* This book is an attempt to say something more about the causes of legal illusions.

Znamierowski is right when contending that Petrażycki did not take seriously enough the issues raised by the fact that legal languages do not correspond to what Petrażycki considered the *true* nature of legal phenomena.

Now, the main difference between my position and Znamierowski's is that *I consider as a fascinating and fruitful problem for legal solipsism what for Znamierowski is a conclusive argument for its refutation.* Hence, in this book I will try to answer the following questions:

- *Why do we experience and treat linguistically legal qualities and entities as if they existed outside ourselves?*
- *What causes these illusions?*

While according to Znamierowski language is an evidence of the "ontological" status of certain realities, including legal and musical realities, according to me it is just an *index* of our "habits of thought"²⁴. This assumption is very far from the so-called Sapir-Whorf hypothesis that assumes that language constitutes (i.e. causes) the conceptual system of

²² Therefore I contend that legal realities are illusions produced either by current psychical-internal phenomena or by past (i.e. historical) phenomena. In this book I focus on the first explanation. I deal with historical realism elsewhere (— a).

²³ The vey term *planet* derives from the Ancient Greek verb *πλανῶν* ("to ramble").

²⁴ I am hinting at Petrażycki's expression *privyčki predstavlenija i myšlenija* (see fn. 20).

each of us. In this book it will be assumed that *language is a "source of evidence" of (i.e. is caused by) the "conceptual system" each of us has*²⁵, without necessarily assuming that it causes it²⁶.

More specifically, it will be assumed that *the lexical categories of the terms used to refer to legal realities can be used – to some extent – as indexes of the way each of us experiences (i.e. ontologically codes) the corresponding realities* (below, sec. 1.4).

In order to better treat naïve ethical language as an object-language I will avoid any meta-linguistic use of a certain naïve ethical term until a detailed conjecture has been proposed as regards the cause of the illusion that naïve ethical term refers to.

This method has one disadvantage, but two advantages.

The disadvantage is that I will use such cumbersome terms as *imperativesidedness, attributivesidedness, authoritativeness, obligatoriness/obligativeness*, etc. – sometimes also in their even more cumbersome plural forms.

The first advantage is that this method makes it possible to prove Znamierowski – as well as Petrażycki himself! – wrong as regards the impossibility to expose a psychological theory of law without using the naïve terms meaning the ethical illusions that such a theory is called to explain.

The second and even more important advantage is that this method is heuristically fruitful. It permits to detect problems and phenomena that other kinds of terminology prevent the researcher from seeing.

We can now come to the *third* question left open by Petrażycki.

Petrażycki assumed the existence of *ethical* repulsions and appulsions. Repulsions and appulsions are ethical impulses/emotions (Petrażycki's used these terms as synonyms).

Petrażycki discussed them right after discussing *esthetical* impulses and maintained that ethical impulses have *two* characteristic properties.

First, ethical impulses – unlike esthetical ones – have a mystic-authoritative nuance²⁷:

[Ethical] impulses and incitements are of unique mystic-authoritative character: they stand opposed to our emotional propensities and appetencies [etc.] as impulses with the loftiest aureole and authority, proceeding as from a source unknown and mysterious, and extraneous to our prosaic ego, and possessing a mystical coloration not without a tinge of fear. [Petrażycki 1909-10: 34, 1909-10*: 37 f.]

²⁵ About this approach see also Lakoff & Johnson 1980 (3).

²⁶ However, I do not exclude that there can be some special cases in which language really causes our way of thinking, as is the case of courtesy forms in certain languages.

²⁷ A similar point was made by Hägeström 1917* (194). At this regard see also Pat-taro 1974 (177).

This is a hypothesis. Testing it requires a specific psychological methodology and is not within the scope of this book. In ch. 3 we shall see that this hypothesis matches to a good deal of extent with some of Jean Piaget's hypotheses about the development of ethics (in his terms, *morality*) in the child.

Second, Petrażycki maintained that ethical impulses are experienced as an internal impediment to freedom, similar in this regard to the imperative impulses aroused by commands or prohibitions²⁸:

The class of [ethical] impulses ... is characterized further by the property that 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 – and as a strong and undeviating pressure toward ... conduct ... In this regard ethical impulses are similar to the imperative impulses aroused by commands or prohibitions addressed to us. [Petrażycki 1909-10: 35 f., 1909-10*: 38, translation modified]

According to Petrażycki, one more specific feature of ethical impulses is that they can have whatever content – in other words they are *blanket emotions*. This is one more reason why they are so different from thirst, hunger, sex excitation, etc. Blanketness is a feature ethical emotions share with the emotions typically experienced by the addressee of commands, prohibitions, advices, etc.:

Besides the very numerous impulses to which there are definite responses (though sometimes these are definite only in general character and direction), there are others which play an extremely important part in life. *Per se* the latter predetermine, neither the details, nor even the general character and direction, of the actions – they can serve as stimuli to any conduct whatever ... *These will we term "abstract" or "blanket" impulses*. They include the impulses aroused by commands or prohibitions addressed to us ... Positive commands arouse impulses which incite to corresponding action; negative commands (prohibitions) arouse restraining impulses – that is to say repulsions – with reference to the movements or other actions inhibited ... [T]he impulses *which make up the essential elements of moral and legal experiences and evoke moral and legal conduct belong to the class of blanket impulses*. [Petrażycki 1909-10: 11 f., 1909-10*: 27]

Saying that ethical impulses share this feature with impulses aroused by real commands and prohibitions is *not* tantamount to saying that ethical impulses are the same thing as the latter. There is plenty of legal

²⁸ A similar point was made by Hägerström 1917* (127) (see also below, sec 4.10).

phenomena (like custom²⁹) where people issuing commands can hardly be found³⁰.

According to Petrażycki, the cause of the phenomenon that people (and jurists) believe in the external existence of imperatives and prohibitions when they are experiencing ethical impulsions *even in the case no actual linguistic phenomena are at hand* is that the experience of ethical emotions *resembles* the experience of emotions aroused by real commands and prohibitions issued by really existing people.

The nature and the specific attributes of the norms of law – as well as of moral norms, aesthetic norms, and so forth – can in general be known and correctly defined only on the basis of familiarity with the relevant impulsions and their properties, and in particular with their capacity to produce phantasmata of a particular class: impulsive projections. Like all other norms, legal norms are impulsive phantasmata. *In conformity with the peculiar authoritative-mystical character of ethical impulsions and their likeness ... to the impulsions evoked in us by commands and prohibitions, the idea ... emerges that certain higher "commands" and "prohibitions" are present and exert pressure over people and over other beings (including deities). In reality we have only specified impulsive-intellectual processes.* [Petrażycki 1909-10: 330, 1909-10*: 158, emphasis added, translation modified]

Even if this explanation were to be considered correct, there would still be two questions left unanswered by Petrażycki:

- *Why do ethical impulsions have a mystic-authoritative character?*
- *Why does the way we experience ethical impulsions resemble the way we experience impulsions aroused by commands and prohibitions?*

Answering these questions will be tantamount to explaining where ethical emotions come from – an issue about which Petrażycki *hypothesises non finxit* (see Rudziński 1976: 127).

²⁹ As regards custom Petrażycki wrote the following: «Jurists have succeeded in finding in statutory law what they deem a suitable reality [*realnoe*] of [legal] experiences related to the commands of monarchs and the like ... In customary law there is not such a reality to be related to the [legal] experiences ...». [1909-10: 331, 1909-10*: 158, translation modified]

³⁰ Petrażycki explicitly said that «Neither law nor morality has anything in common with commands and prohibitions as such [*kak takovye*]». [Petrażycki 1909-10: 332, 1909-10*: 158, emphasis in the original]

The qualification “as such” is very important, because – as we have seen and we will see again – according to Petrażycki, law and morality do have something in common with commands and prohibitions, but not *as such*.

1.3. THE SUBJECT-MATTER OF THIS BOOK

The subject-matter of this book is to attempt to answer the questions left open by Petrażycki's legal solipsism. All the issues raised in sec. 1.2 will be addressed in order to answer the following general question.

If there is no other legal reality but certain legal emotions each of us individually experiences, why does each of us feign³¹ legal realities and treat them as if they were external realities?

Petrażycki tried to answer this question with the *projection hypothesis*. Unfortunately – as Znamierowski correctly pointed out – the very concept of projection is not very clear. I will try to improve Petrażycki's theory of projective phenomena in ch. 2.

Nonetheless, I think that even an improved theory of projections cannot explain all kinds of legal illusions.

In particular, I think that it cannot explain why ethical impulses produce *illusions of free-standing imperatives and prohibitions* where nobody issued any command or prohibition whatsoever. In ch. 3, I will try to show that this kind of ethical illusions can be better explained through Sigmund Freud's theories about the super-ego and that Freud's approach provides also an explanation for the distinctive features of *ethical* impulses as distinguished from other kinds of impulses. Other authors' theories, *when relevant to the explanation of everyday ontology*, will be also drawn on. This is the case, for instance, of Jean Piaget's (while, in my opinion, it is not of Lawrence Kohlberg's).

I will draw only on Freud's least controversial hypotheses. For example, I will not make use of the theory of the role of castration anxiety in super-ego formation and of its "infamous" (Barnett 2007: 59) corollaries as regards women's super-ego since it has been empirically falsified (see below, sec. 3.2, n. 8, and 3.7).

Ch. 4 will be devoted to discussing the psychoanalytic explanation of Petrażycki's ethical impulses in the context of his stipulative distinction between law and morality, on one hand, and his sub-distinction of three kinds of legal impulses, on the other. In this context, I will make some conjectures about what particular features of legal impulses may cause the illusions of free-standing debts, duties, powers and rights.

The questions I will try to answer in this book can therefore be reorganized as follows:

1. *What are projections and what kind of legal illusions can they explain?* (Ch. 2)
2. *What psychological mechanism can explain the distinctive features of ethical emotions and what kind of illusions can it explain?* (Ch. 3)

³¹ I use *to feign* in its archaic meaning in order to stress my continuity with David Hume (1739-40: § 1.4.2, 208). See also below, sec. 2.6.

3. *What illusions can be explained through certain stipulatively-defined features of legal emotions and how?* (Ch. 4)

As turns out from these questions, different kinds of legal illusions are distinguished depending on the kind of psychological mechanism involved.

Not all legal illusions can be explained through their *intrinsic psychological features*. Some of them are the by-product of a certain *extrinsic sociological feature* of theirs, namely their *conflict-producing nature*.

The distinction between intrinsic and extrinsic features of legal impulses rests on the fact that, according to Petrażycki (and me), *from a functional viewpoint*, a legal impulse, in order to exist, does not require more than one individual. This does not exclude that, *from a genetic viewpoint*, the very capability of experiencing such impulses rests on the formation of a super-ego in the individual – this formation being first caused by the interaction of the small child with at least one caretaker (this topic will be discussed in ch. 3).

Discussing extrinsically caused legal illusions requires special kinds of conjectures, such as *historical realism*, namely the *hypothesis that*, not only there objectively exists an actual reality independent of each of us, but also (1) *that past happenings have objectively existed* and (2) *that what happened continues having happened for ever*. That is why I decided to deal with jurisprudential ontologies elsewhere (— a).

I distinguish jurisprudential ontology from naïve legal ontology depending on whether the explanation of the illusions that make up either ontology does or does not require historical realism. I define stipulatively ‘naïve legal ontology’ as the ontology that can be explained by making use exclusively of currentism (cf. above fn. 1). I think that this stipulative definition presents a satisfying degree of overlap with the linguistic phenomena pertaining to naïve legal ontology³².

In general, the basic underlying hypothesis of this book is that *there is not one simple explanation for all illusions of legal realities*.

Most of the works of legal realists have aimed at showing that jurists deal with non-existing realities. Legal realists, though, have not paid enough attention to the question of what actually causes these mistakes³³. When they dealt with this question they usually thought that nothing more

³² Some use of historical realism, though, will be made in sec. 4.11, when dealing with the *illusion of the transformation of commands*. (See also sec. 4.8).

³³ An approach to some extent similar to Petrażycki’s was proposed by Axel Hägerström in his *Till frågan om den objektiva rättens begrepp* (1917^{*}: 127 ff., see also Opalek 1992: 27). In his English translation Broad mistakenly quotes the Swedish title of this work as *Till frågan om den gällande rättens begrepp* (see Pattaro 1974: 120, fn. 1).

In other works, Hägerström stressed certain similarities between legal and magical thinking in order to explain certain legal illusions. In this book I will try to explain legal illusions without this kind of hypotheses (see below, fn. 44).

than a dismissive explanation was necessary (about dismissive reductionism see above fn. 5).

I hope I will be able to show that explaining the different kinds of legal illusions is neither an easy nor an uninteresting task.

The *general conjecture* on which this book rests is the following: *a belief in the existence of a certain legal reality emerges when a certain legal experience resembles in a salient way the clusters of experiences that make us believe in the existence of naïve realities*³⁴.

This resemblance produces legal illusions³⁵.

It is very important to stress that we are here concerned with *naïve realism*³⁶, i.e. with the *conception of reality and knowledge each of us has and uses in everyday life*. I am *not* concerned here with *critical realism*, namely a *theory of reality and knowledge* that takes into account the *limits* of human perceptive and cognitive apparatus by drawing on any science (such as biology, physics, psychology, neurology, etc.) that can give some contribution to achieving a *scientific* understanding of reality as it really is *beyond* perceptions³⁷.

A good definition of *naïve realism* has been given by Hans Albert in his *Kritik der reinen Erkenntnislehre*:

The simplest conception of the nature of knowledge is *naïve realism*. According to this conception reality is by and large as it appears in our perceptions. According to it the sky without clouds is objectively blue, the water of a brook is really ice-cold, sugar is sweet and food is more or less tasty. Therefore, sensorial qualities are conceived as properties of certain objects. [Albert 1987: 45]

Hans Albert stresses that naïve realism and critical realism share certain features. In the context of this book the most important of them is that in both «experience is considered as an index [*Indiz*] of a reality that exists independently of it» (Albert 1987: 45).

³⁴ That legal realities are somehow created on the model of physical realities is a thesis that has been proposed by Mario Bretone: «Conceptual entities, qua things, keep looking at corporeal things. They retain a bond with them. They compose, on their model, a universe of their own. Legal construction is ... imitative and analogical». [Bretone 1996: 124]

As regards the role of mimesis in legal ontology see also Roversi 2012a (ch. 4) and 2012b.

³⁵ Compare Petrażycki's definition of *illusion* given above (fn. 19).

³⁶ To my knowledge, the first author who distinguished *naïve realism* (*naïver Realismus*) from *critical realism* (*kritischer Realismus*) is Külpe 1923 (186 ff.), whose excellent description of both is still well worth reading today. The concept of naïve realism is related with the Anglo-Saxon concept of common sense, as well as with the concept of *naivnaja kartina mira* ("naïve picture of the world") that the Russian-Armenian linguist Jurij Derenikovič Apresjan developed in the sixties of the 20th century (see Apresjan 2006: 34 ff.).

³⁷ See Albert 1987 (43 ff.).

A crucial difference between *critical* and *naïve* realism is that *critical realism looks for refutations, while naïve realism looks for confirmations.*

In naïve realism conjectures about realities get changed only if they are *somewhat incompatible with the welfare of the individual* (and sometimes not even in that case³⁸), while in critical realism such conjectures are supposed to be tested even for, so to say, the mere sake of knowledge.

While critical realism tries to be *falsificationist*, naïve realism is *verificationist*, and sometimes in a strongly selective way.

This is probably a cause of the phenomenon that naïve realism may find entities, qualities and processes, where critical realism does not find any – superstitions being but the simplest example.

Now, *the beliefs in the existence of legal realities are in most cases, not only useful, but sometimes even strictly necessary for the social welfare of the individual, as they often increase his degree of compliance with social rules*³⁹ or at least his ability to avoid sanctions.

In this way we have identified two basic features of naïve realism:

1. According to naïve realism experience mirrors reality as it is.
2. Naïve realism makes use of verification rather than falsification.

One more feature of naïve realism that should be mentioned here, as it will play a crucial role in this book, is that it distinguishes *three major ontological kinds*⁴⁰:

- a. *entities* (also called *things, substances*),
- b. *qualities* (also called *properties*) and
- c. *processes* (also called *actions*, as most of them involve an active animate entity).

We are not concerned here with the question of whether this kind of metaphysics holds true also for critical realism or whether for entities we are to accept a bundle theory à la Berkeley or Hume – as I actually do. The fact that many naïve entities have no right of citizenship in modern science and that the latter is mainly concerned with processes, rather than with entities, does not necessarily imply that the idea that at least some entities do exist must be given up.

³⁸ There is now plenty of empirical research about the way naïve common sense (but sometimes even hard sciences) makes and retains conjectures despite contrary evidence. An old but still very useful compilation of articles about this topic is Kahneman *et al.* 1982.

³⁹ By *social rule*, I understand an ethical conviction that in a certain society exists – in a more or less similar way – in the psyches of a qualified percentage of people. What percentage may depend on the most diverse descriptive and explanatory sociological goals.

⁴⁰ I use John Taylor's terminology (2002: 178).

See also William Benzon's entry *Common Sense* in Burkhardt and Smith's *Handbook of Metaphysics and Ontology*: «[T]he common sense world is organized in terms of one set of object categories, predicates, and events, while the scientific accounts of the same phenomena are organized by different concepts». [Benzon 1991: 160]

A crucial difference between naïve realism and critical realism is that *in naïve realism the fact that under certain circumstances a certain phenomenon is coded in the terms of, say, an entity does not exclude that under other circumstances that very same phenomenon may be coded in the terms of a process or a quality*. This seems to be the case of heat or cold ⁴¹, as well as of many other legal realities. We shall see, though, that certain inconsistencies can be explained by introducing a sort of fourth basic naïve ontological kind, namely *states*.

The categorization of naïve realism can be inconsistent and so can be the conception of legal realities. *We are not at all concerned here with a consistent axiomatization of these conceptions*. I am not denying that *from a certain point of view* a rigorous axiomatization of common sense, as well as of legal realities, may be an enterprise worth being tried. I am just saying that it lies outside the scope of this book.

That is why this book does not have anything to do with so-called *analytical ontology*.

Analytical ontologists seem to mix up four different issues:

1. The issue of faithfully describing the way certain phenomena are experienced and conceived of by people.
2. The issue of making hypotheses about what of these phenomena scientifically exists, either physically, or psychologically.
3. The issue of explaining why there is, if any, a mismatch between how science conceives something and how it is experienced by people.
4. The issue of finding the so-called “logical structure” of certain phenomena by reducing them to a system of simpler (primitive?) logic units.

This book will be about the *third* issue.

As regards the *first* issue some answers will be given in the next paragraph.

The answer to the *second* issue is the very adoption of the standpoint of normative solipsism. I will not discuss the reasons why I consider normative solipsism correct. This would require a specific book. Moreover, it is my strong conviction that even people who do not share at all this hypothesis can consider it to be a useful *heuristic tool* to discover new phenomena and problems worth being investigated.

The *fourth* issue will be discussed, neither here, nor anywhere else, because I just do not understand it. An example of a philosopher who seems to extensively deal with such “issues” is John Searle. He seems to understand the term *social ontology* as meaning a sort of philosophical science that tries to “account for” the “stunning variety of human forms of social existence” by searching for a single “logical principle that underlies all of them”, in other words by searching for their “logical structure”

⁴¹ As regards heat and cold see next section and below, sec. 4.6.3.

(Searle 1995; 2010: 122). As a legal realist, I understand neither the idiom *to account for*, nor the term *logical structure*. For me science needs but *explanations based on nomological hypotheses*⁴².

Finally, in order to avoid misunderstandings three more points must be made.

First. This book has *synchronic aims*. In this book there will be no attempt to give a historical description of the evolution of legal illusions.

I am here concerned with the psychological factors causing these illusions. Some of these factors may play a role only under certain historical circumstances. This means that many conjectures that are made in this book can be tested also through historical and comparative legal research. In particular, they would be falsified in the following cases: if under proper historical circumstances certain legal illusions did not arise.

The emergence of certain legal illusions under circumstances different from those conjectured in this book would not be a direct falsification of my relevant conjectures, but it would nevertheless be evidence that they are incomplete.

I also wish to stress that I do not *assume historical inertia*⁴³ *in order to explain legal illusions*⁴⁴.

This is nothing more than a *heuristic-methodological restriction*. In order to best explore what legal illusions can be explained through a

⁴² A consistent realist must conceive also mathematics and logic as empirical sciences. This is what I contended in my *Scienza del diritto e razionalismo critico* (2003). That is also why I consider untenable Hernández Marín's legal realism. He denies that legal entities are ideal entities, but he concedes that mathematical and logical entities are (2002: 46).

⁴³ I use the term *inertia*, but this kind of approach is often referred to with the term *doctrine of survivals*. The author who seems to have first expressed this view has been Edward B. Tylor: «When a custom, an art or an opinion is fairly started in the world, disturbing influences may long affect it so slightly that it may keep its course from generation to generation, as a stream once settled in its bed will flow on for ages. This is mere permanence of culture ... [A]n idea, the meaning of which has perished ... may continue to exist, simply because it has existed ... For an ethnographer's purpose ... it is ... desirable to introduce [the] term 'survival' ... to denote the historical fact ... that the civilization of the people [certain customs, ideas etc.] have been observed among must have been derived from an earlier state, in which the proper home and meaning of these things are to be found». [Tylor 1871: 70-72, quoted in Hogden 1931: 307]

⁴⁴ See, for instance, what was written by Olivecrona about the relationship between magic and law nowadays: «It would be a mistake to identify modern conceptions with those of primitive society ... But the affinity is probably greater than is generally realised. The chain of development has never been broken. We cannot say: here magic stops and wholly rational thinking begins. Modern thinking in legal matters is far from being wholly rational. We actually use the notions of rights, duties, without being aware that these notions are imaginary. Perhaps we should come as near as is possible to the truth if we were to say that we have retained the outer structure of magic in legal matters while the specific belief in supernatural forces has faded out». [Olivecrona 1939: 115]

psychological approach. I provisionally refrain from using a more eclectic approach.

If my conjectures will prove insufficient this will definitely leave room for other hypotheses, including hypotheses based on some sort of historical inertia.

Moreover, because of the synchronic and psychological aims of this book, this is not a book of anthropology of law. Many topics I will discuss here are investigated also by legal anthropologists. But here I am concerned exclusively with the psychological causal conditions possibly determining the coming into existence of legal illusions. Nonetheless, through the anthropology of law many hypotheses I make here can be tested and falsified.

Second. Because this book is not about Petrażycki, rather it is an attempt to defend and develop his kind of ethical solipsism, I am not committed to all his ideas, even though I definitely do share most of them.

I will present and use Petrażycki's ideas only to the extent I consider them correct and useful to try to solve the problems this book is about.

In particular, I will not discuss Petrażycki's conception of emotions/impulsions as «*motoric drives ... th[at] are composite but inseparable psychological units, at once receptive and propelling, passive (stimulus) and active (reaction) (pati-movere)*» (Rudziński 1976: 112). This conception is typical of a 19th-century minded psychologist. Instead, I will draw largely on 20th-century psychology, especially as regards concepts such as shame, guilt and pride.

I think that the implantation of 20th-century psychology can make many points of Petrażycki's psychological theory of law more tenable.

Third. As I said at the very beginning of this chapter, I will use the adjective *ethical* as a hypernym for both *moral* and *legal*. In this way, I will follow Petrażycki's usage (1909-10: 37 f., 1909-10*: 40).

I will use the adjective *normative* as synonymous with *ethical*. The nouns *normativeness* and *ethics* will be used in different ways. I will use *normativeness* to refer to the quality of being ethical (i.e. involving supererogative emotions). The noun *ethics*, instead, will not be used often here, since this book deals with *concrete legal illusions* only (see fn. 2).

Moreover, it bears repeating that the terms *naïve ontology* and *everyday ontology* will be used as synonyms.

The same will be done with the terms *emotions* and *impulsion* (just as Petrażycki did).

1.4. THE MAJOR ONTOLOGICAL KINDS AND THE WAY THEY ARE MIRRORED IN NAÏVE LANGUAGE

Since in this book I will use the *way we talk* about legal realities as an index of the *way we experience* them, it is necessary to clarify what method I will use to make and to somewhat test the hypotheses about the way people conceive certain realities.

As I said in the former section, my starting point will be that naïve realists (as I think everybody is in everyday life) think that the world is made up of *entities* and of *qualities* these entities manifest. A naïve world made up only of entities and qualities would be a static world. That is why naïve realism includes a third kind of reality, namely, *processes*. Processes prototypically involve time. (As regards the scientific view of the world, instead, it could be argued that its program consists of explaining all kinds of phenomena in the terms of processes).

My assumption therefore will be that naïve realism distinguishes:

1. entities,
2. qualities,
3. processes.

Even though certain realities – such as *heat* or *cold* – may be considered to have a hybrid status, many of them happen to be conceived *mainly* as, *either* entities, *or* qualities, *or* processes. For example, this is the case of apples, tallness and eating. They are respectively conceived in the terms of entities, qualities and processes. Actually, it will be argued that apples, tallness and eating are not just experienced as *mainly* belonging to, respectively, the set of entities, the set of qualities and the set of processes. Rather, they are very close to being *best examples* or *prototypes* of these *basic ontological kinds*. I will assume that naïve realism is mirrored in language and, following William Croft's ideas, that – in order to avoid a priori prototyping – a property of language that can be drawn on in order to find prototypes is *markedness* (Croft 1984: 54)⁴⁵, as developed by Joseph Greenberg. To answer the question whether a certain reality is conceived as closer to a prototypical entity, to a prototypical quality or to a prototypical process I will make use of markedness⁴⁶.

Greenberg discussed this concept – first originating from Trubeckoj – both in the field of phonology and in the field of morphosyntax. We will be concerned exclusively with morphosyntax.

Here are the 8 criteria for markedness proposed by Greenberg and developed by Croft.

⁴⁵ About the history of this concept see Croft 1996.

⁴⁶ Croft, instead of the terms *entity*, *quality* and *process*, uses the terms *object*, *property* and *action*, respectively. In most quotations taken from Croft's works I will systematically substitute his terms with mine by inserting my terms into square brackets.

1. *Zero Value*. «The realization of the marked value versus the unmarked value ... involve[s] at least as many morphemes as the realization of unmarked value» (Croft 1991: 56). *Tallness* is marked, while *tall* is not.

The presence of a copula in the case of the predication of nouns (“This is an apple”) and adjectives (“The table is white”), as against its absence in the case of the predication of verbs (“He grows”), is evidence of the markedness of “This is an apple” and “The table is white” as compared with “He grows”.

I define this criterion in the following way: *form₂ is marked as compared with form₁, if form₂ involves more morphemes than form₁.*

Before examining the other criteria for markedness, it should be emphasized that *markedness is gradable*. If the term *obligatory* is more marked than *oblige*, it is less marked as compared with *obligatoriness*. This holds also for other criteria of markedness.

2. *Syncretization*. «The marked member ... displays syncretization of its inflectional possibilities with respect to the unmarked member» (Croft 1991: 56).

The fact that «[i]n classical Latin the dative and ablative cases, in general distinct in the singular, are syncretized in the plural» (Greenberg 1966: 27) is a good example of the markedness of plural in Latin. In Italian the syncretization of the plural and the singular in the nominalizations of the adjectives produced with the suffix *-ità* (e.g.: *santo/santità*) is an index that this nominalization is more marked than the adjective it stems from.

I define this criterion in the following way: *form₂ is marked as compared with form₁, if the inflectional possibilities of form₂ are more syncretized than the inflectional possibilities of form₁.*

3. *Facultative use*. «The form that normally refers to the unmarked value ... refers to either value in certain contexts» (Croft 1991: 57).

For example, in many languages, the term for “man” in the singular can be sometimes used to refer to *men* in the plural.

I define this criterion in the following way: *form₂ is marked as compared with form₁, if only form₁ can be used to refer at once to the reality meant by form₁ and to the reality meant by form₂.*

4. *Contextual neutralization*. «In certain grammatical contexts only the unmarked value appears» (Greenberg 1966: 29).

I slightly modify Greenberg’s definition by adding the *qualification*⁴⁷ that we have an occurrence of grammatical neutralization if in a certain

⁴⁷ As regards the qualification I am about to make it could be asked *why we are to expect that logic does at least sometimes influence language*. Attempting to answer this

context only the unmarked value appears, *while out of strict logical reasons the marked value should be expected.*

Greenberg gives the following example: «[i]n Hungarian, Turkish and certain other languages only the singular form of nouns may appear with cardinal numbers» (29).

I think that an example taken from English is that the expression “[*n*]-year old” is usually preferred to “[*n*]-years old” when in attributive position:

He’s a 56 year old man

Instead, in predicative position this neutralization does not occur and the logically expected marked value appears:

That man is 56 years old

I define this criterion in the following way: *form₂ is marked as compared with form₁, if in certain grammatical contexts form₁ appears, while in those contexts out of logical reasons form₂ should be expected.*

5. *Number of allomorphs.* «An unmarked form ... ha[s] at least as many allomorphs or paradigmatic irregularities as the marked form» (Greenberg 1966: 29).

Greenberg’s example is dative in German. While dative plural in German is uniformly *-n* or *-en* depending on phonological factors, dative singulars vary with gender and declensional class.

I define this criterion in the following way: *form₂ is marked as compared with form₁, if form₂ involves less allomorphs or paradigmatic irregularities than form₁.*

6. *Defectivation.* «An unmarked form will display at least as great a range of grammatical behavior as the marked form» (Greenberg 1966: 29).

Greenberg’s example is French subjunctive that lacks a future.

I define this criterion in the following way: *form₂ is marked as compared with form₁, if form₂ displays a smaller range of grammatical behavior than the form₁.*

7. *Dominance.* «The plural form of the unmarked gender is used to refer to collections consisting of objects of both genders» (Croft 1991: 57).

For instance, the Italian masculine plural *amici* (“friends”) can be used to refer to both male and female friends. Instead, the feminine plural *amiche* can be used to refer exclusively to female friends.

question (along with the connected question of why mathematics and logic are empirical sciences) would take us too far afield.

I define this criterion in the following way: *form₂ is marked as compared with form₁, if only the plural of form₁ can be used to refer to a collection of entities of both genders.*

8. *Frequency.* «In text counts, the unmarked value will be at least as frequent as the marked value» (Croft 1991: 57).

I define this criterion in the following way: *form₂ is marked as compared with form₁, if in text counts form₂ is less frequent than form₁.*

There is a way to connect all these features of markedness with each other, as well as with the *salience* of the realities to which unmarked terms refer. Let us read Croft's discussion of this point:

The higher frequency/less marked a form is, the more deeply *entrenched* the form will be in memory ... [This⁴⁸] model gives a psychological account of frequency effects and also of analogical restructuring^[49], and provides an important link between the natural salience explanations of frequency ... and the specific grammatical manifestations of markedness ...

Of course one must still ask why some situations are talked about more frequently than others. Such situations are presumably more perceptually or culturally normal or salient ... The psychological properties of the storage of grammatical structures are ultimately a consequence of their function in discourse, that is communicative interaction. [Croft 2003: 115]

Markedness can be used to make conjectures about the way people conceive realities if we assume that *unmarkedness is positively correlated (with) prototypicality*⁵⁰.

If we also assume that we conceive reality in terms of entities, qualities and processes, respectively, *we can make a conjecture as to whether a certain reality is mainly conceived as an entity, a quality or a process, respectively, by drawing on the degree of markedness of the noun, adjective or verb meaning that very same reality.* For example, if the noun is less marked than both the adjective and the verb, we can make the conjecture that the

⁴⁸ He is referring to Bybee 1985, 1994, 2001.

⁴⁹ An example of such a restructuring could be the possibility of a plural for the Italian term *dovere* (see below, sec. 4.1).

⁵⁰ Croft-Greenberg's theory of markedness is not without "exceptions". Croft himself recalls that in Castilian «gender distinctions are found in the first and second plural forms but not in the singular». According to him, «[t]his phenomenon has a historical explanation[,] ... [n]evertheless, it is surprising that the historical process did not follow markedness in this case» (2003: 96, fn. 2).

Another counterexample is unmarked plurals in some Slavic languages. For instance, the genitive plural of the Polish noun *zjawisko* has a zero-form morpheme: *zjawisk*. In this case the exception may be perhaps explained through some degree of operation of the Neogrammarian principle of the blindness of phonetic changes.

Of course, these "exceptions" should be explained through real theories, not through ad hoc hypotheses. For the purpose of the present book I will accept Croft's theory as a statistical one.

reality we are dealing with is mainly conceived as an entity, rather than as a quality or a process. This theory is based on the conjecture that *the prototypical realities to which nouns, adjectives*⁵¹ *and verbs refer are, respectively: entities, qualities and processes.*

In table 1.1 (below, p. 42), I exemplify how the degree of unmarkedness of a certain term can be used to make a conjecture as regards how a certain reality is conceived. Table 1.1 is based on Croft 1991 (53) and Taylor 2002 (179), but I have adopted my terminology and changed one example⁵².

From table 1.1 it can be argued that the fact that among (1) *tallness* (2) *tall* and (3) *be tall*, *tall* is the least marked form means that English native speakers conceive *tallness* as a quality, rather than as an entity, or a process. In the case of such realities as *vehicle* and *destruction* it turns out that they are conceived in the terms of entities and processes, respectively.

In table 1.2 (below, p. 42) we can see how markedness may manifest itself in the different morphosyntactic functions.

The theory seems to be particularly strong because it also indicates some independent ontological features that affect the different degrees of belonging to the three major ontological kinds (see table 1.3 at p. 42): (1) *valency*, (2) *stativity*, (3) *persistence* and (4) *gradability*.

If, say, a certain reality has all the features of a quality, it is a *prototypical* quality and we can predict that in most, if not all (see fn. 50), languages the adjectives referring to it *will not be more marked* than the verbs or nouns referring to that very same reality.

Some of these features clearly trace back to Aristotle's *Categories*. Here, to define them, I will keep drawing on Croft (199: 62 ff.) and Taylor (2002: 178).

By *valency* Croft understands the *inherent relationality of a concept*. Here is how Croft explains this feature:

A concept is inherently relational if its existence or presence requires the existence or presence of another entity ... For example, *hit* is inherently relational because its existence requires the existence of two entities, the hitter and the object hit. Likewise, *red* is inherently relational because its existence requires the existence of another entity, namely, the object that possesses the property. [Croft 1991: 62 f.]

⁵¹ As regards languages that allegedly have no adjectives see Dixon 1982.

⁵² Croft uses *white*, *whiteness* and *to be white*, instead of my examples (*tall*, *tallness*, *to be tall*). The reason why I changed Croft's example is that in certain languages there seem to be nouns for colors that are less marked than the corresponding adjectives. I owe Aneta Gawkowska (personal communication) the example of the Polish terms *biały* (adjective) and *biel* (noun). Now, it should be noticed that in Polish there is also the term *białość* that is marked as compared with *biały*. Moreover, much as in Polish, in English the term *white* can be used as an unmarked noun capable of plural (*I like his whites* – in the sense of the color *white*, not of “white wines”). This issue may be related to the issue of detachability discussed ch. 4 (cf. sec. 4.6.2).

Croft talks of concepts, rather than of realities. I accept this usage, as what matters are our *representations*.

Now, if we bear in mind that when I talk of *realities* I always mean the way we conceive them (i.e. their *concepts*) and if we use the terminology adopted in this book (see fn. 46), we can rephrase this quotation in the following way:

A [certain reality] is inherently relational if its existence or presence requires the existence or presence of another [reality] ... For example, hit is inherently relational because its existence requires the existence of two [realities], the hitter and the [entity] hit. Likewise, *red* is inherently relational because its existence requires the existence of another [reality], namely, the [entity] that possesses the [quality].

What matters here is not whether a certain reality is scientifically more or less inherently relational. What matters is what conception each naïve realist has in everyday life. As I said, the very same reality may be conceived as a quality, as an entity, or as a process, depending on several circumstances.

For example, *heat* and *cold* can be conceived sometimes as qualities inherent to certain entities, some others as free-standing entities. A cause of the phenomenon that *heat* and *cold* may be conceived as free-standing entities may be the fact that they seem to be able to move from one thing to another. In other words they are transferable in the sense discussed below in sec. 4.6.2. Another, if related, explanation is that they belong to a fourth – somewhat hybrid – ontological kind: *states* (see below, sec. 2.5 and sec. 4.6.3). In this sense, it could be hypothesized that – much as being in a gas, liquid or solid state – heat and cold, in naïve ontology, are experienced as *states of matter*.

Be as it may, an index of the fact that heat and cold can be experienced in different ways is that the *nouns* referring to heat and cold, in many languages, do not display a higher degree of markedness than the *adjectives* referring to these very same realities.

This means that a reality that some philosopher or scientist, a priori, could conceive as strictly relational, might not (or not exclusively) be conceived as such in naïve ontology.

This is definitely the case of debts. In naïve legal ontology debts appear to be conceived as prototypical legal *entities*. They are experienced as being inherently non-relational realities, much as apples are. In all languages I know, the terms meaning “debt” have a very low degree of markedness: *debt* (English), *dette* (French), *dlug* (Polish), *dolg* (Russian), *deuda* (Spanish), *debito* (Italian). In English, the term *debt* is unmarked, while the terms meaning the corresponding quality (*debtorial*) or the corresponding activity (*to be a debt*) are not⁵³.

⁵³ As for the German term *Schulden* we will see that it is the classical exception that proves the rule (sec. 4.1).

The phenomenon that the terms for “debt” are unmarked is an index of the fact that debts are experienced neither as qualities of the debtor nor as qualities of what the debtor owes. They are experienced as free-standing entities. This topic will be discussed in detail in ch. 4.

By *stativity* (vs. *processuality*) Croft understands the presence or absence of change over time in the state of affairs grasped by the concept.

We oppose here more *stative* to more *processual* realities.

Prototypical *entities*, such as *apples, chairs, mountains*, etc., typically do not undergo any change over time (*ceteris paribus*), whereas, prototypical *actions*, such as *going, eating*, etc., do.

This criterion is crucial when it comes to distinguishing prototypical processes from prototypical qualities and entities.

Since somebody might object that apples, unless eaten, in the long run get rotten, I propose to define stativity in a slightly different way. *A certain reality is processual if its representation necessarily involves the representation of a certain interval of time in which it takes place, while a reality is stative if its representation can be atemporal, punctual.* The representation of a stative reality does not involve time, while the representation of a processual one does.

In other words, when we think of an apple we create a mental *picture*, whereas when we think of eating, moving, etc. we can but create a short mental *movie*.

Persistence (vs. *transitoriness*), according to Croft (1991: 61), «describes how long the process is likely to last over time».

I propose a just slightly different definition: *a certain reality is transitory if its representation necessarily involves the thought that at a certain moment it will cease to exist, while it is persistent if its representation does not involve such a thought.*

We oppose here *more persistent* to *more transitory* realities. In order to better understand this concept it is useful to compare it with stativity and to inquire into all four possible combinations between them (see table 1.4 at p. 42).

In order to distinguish terms referring to persistent realities from terms referring to transitory ones Croft proposes a test with the adverb *always*.

John is always sick

John is always eating potato chips

**John is always tall*

In these cases *always* means iteration of the predicated reality and according to Croft «iteration is incompatible with the description of a persistent concept but acceptable with a transitory one since the transitory one can reasonably be expected to occur again» (1991: 65).

In other words, it does not make sense to predicate some persistent reality of some other reality as occurring again and again, since the persistent reality, by definition, is always in the reality of which it is predicated⁵⁴. Instead, it does make sense to state that a certain transitory reality starts, stops and then starts existing again in the reality of which it is predicated. If we bear in mind table 1.4 (below, p. 42) we can state that in naïve ontology, while tallness belongs to cell 1 (stative and persistent), sickness belongs to cell 2 (stative and, hopefully, transitory).

This may explain why sickness is expressed in certain languages through unmarked adjectives (as is the case of English), while in others through verbs, either unmarked or slightly marked, as is the case of Latin and Polish:

Paulus aegrotat (Latin)

Pavel choruje (Polish)

Certain languages, such as Spanish, distinguish between persistent and transitory predicates.

Ser enfermo (stative)

Estar enfermo (transitory)

While *ser enfermo* means to be temporarily ill, *estar enfermo* means to be permanently or mentally ill (since mental illness is thought to be permanent).

Realities that are both stative and transitory are somewhat in between prototypical verbs and prototypical entities. We will see below (sec. 2.5) that for these realities (when having nonzero valence) Croft has introduced a further ontological kind, namely that of *states*, as well as that these realities may be expressed also through root nouns in possessive constructions.

⁵⁴ Croft (1991: 64) reports that Carlson (1979) proposed a different test. He distinguishes «[p]redicates requiring the copula ... that allow a generic bare plural subject and those that prohibit it»: *Elephants are grey* / **Elephants are sick*.

Since sickness is a transitory quality, it does not allow a generic subject.

According to Croft, Carlson's test «is not completely accurate» as it «yields those predicates that help define the generic type». Now, if «[t]he predicates defining the generic type are always persistent properties (excluding habitual actions ... [as is the case of sentences such as *Bats fly at night*])», the opposite is not true. «[N]ot all persistent properties define the generic type» (Croft 1991: 64). Croft gives the example of a *green binder*. Greenness is a persistent quality of some binder, but it is not a generic property of binders. For such a test, according to Croft, Carlson's test would fail (**Binders are green*).

The *qualities that define the types of entities* are much more persistent than the normal persistent qualities required by Croft for the definition of *persistence*.

It may be worth stressing that there are certain qualities the lack of which makes it impossible, not only to conceive a certain entity as belonging to a certain type, but even to conceive the very existence of the entity itself. This seems to be the case of the qualities that in the philosophical tradition are called *primary* (see sec. 2.6).

If we use my definition of stativity, we can describe realities fitting into cell 2 as realities *the representation of which does not involve the representation of a certain time interval in which they take place, but that involve the thought that they, at a certain moment, will cease to exist*⁵⁵. We will see that the being-in-force of a certain statute and the obligatedness/obligatoriness in the case of debts and duties are states in this sense (sec. 2.5 and 4.6.3).

Let us now discuss the other cells. Actually, while it is quite easy to find realities that fit into cell 4, it is quite hard to find realities that easily fit into cell 3. Croft writes that «[i]t is ... a fact about the world that persistent or relatively permanent processes, the type that would most clearly distinguish change and transitoriness, are extremely rare or non-existent» (281). With my definition of stativity, we can rephrase this statement in the following way: *In naïve ontology, only few realities do exist the representation of which involves the representation of the interval of time in which they take place, but that do not involve the thought that they will cease to take place.*

Croft gives a few examples of realities that are at once processual and persistent: *living* and *loving* (281). The following examples are mine

He talks always

**He lives always*

He eats always

**He always loves his wife*

Living cannot be thought of but in a certain interval of time. In the case of the verb *to love*, it seems that when a sentence with this verb and the adverb *always* is acceptable, the verb *to love* acquires a slightly different meaning, such as “He does not stop the persistent action of loving his wife” (i.e. “He still loves his wife”/ “He hasn’t stopped loving her”), rather than “He keeps loving his wife all the time”.

Of course, it could be objected that both life and love unfortunately end. I think that this objection can be rejected if we stick to my definition. A reality is conceived as persistent if its representation does not involve the thought that at a certain moment it will cease to take place. I did not say anything about the *cause* of the fact that this thought does *not* arise – the cause of this non-emergence possibly being the fact that we just *wish* not to think of certain things. This can also explain why apples are persistent. My hypothesis is that most people, when thinking of apples, do not think that apples will sooner or later get rotten (or, hopefully, eaten).

I sum up the examples for the four cases we have discussed in table 1.5.

⁵⁵ This implies the hypothesis that *sickness* is not represented through a *short movie* but with a *punctual picture* (e.g. the picture of a man on a hospital bed).

Table 1.1. – Correlation between prototypicality and unmarkedness (Croft 1991).

	NOUNS	ADJECTIVES	VERBS
ENTITIES	<i>vehicle</i>	vehicular of/in/etc. the vehicle	be a vehicle
QUALITIES	tallness	<i>tall</i>	be tall
PROCESSES	destruction	destroying destroyed	<i>destroy</i>

Table 1.2. – Manifestations of markedness of terms used to refer to realities coded in a non-natural way (Croft 1991).

	NOUNS	ADJECTIVES	VERBS
ENTITIES	[unmarked nouns]	<i>genitive adjectivizations prepositional phrase</i>	<i>predicate nominal</i>
QUALITIES	<i>deadjectival nouns</i>	[unmarked adjectives]	<i>predicate adjectives</i>
PROCESSES	<i>action nominals infinitives gerunds</i>	<i>participles relative clauses</i>	[unmarked verbs]

Table 1.3. – Features affecting the ontological coding of a certain reality (adapted from Croft 1991).

	ENTITIES	QUALITIES	PROCESSES
VALENCY	0	1	≥1
STATIVITY	stative	stative	processual
PERSISTENCY	persistent	persistent	transitory
GRADABILITY	nongradable	gradable	gradable

Table 1.4. – Combinations of stativity/processuality with persistency/transitoriness.

REALITY	PERSISTENT	TRANSITORY
STATIVE	1	2
PROCESSUAL	3	4

Table 1.5. – Examples for the four possible combinations of table 1.4.

REALITY	PERSISTENT	TRANSITORY
STATIVE	being an apple being tall	being sick being obligated/obligatory [debts/duties] being in force [statutes]
PROCESSUAL	living loving	eating going

By *gradability* Croft seems to understand the fact that a certain reality can be manifested in degrees (such as height, coldness, etc.).

Unlike qualities, in naïve ontology, prototypical entities have clear boundaries (see also Croft 1991: 102).

It is impossible not to recall here what Aristotle, in his *Categories*, wrote about substances:

Δοκεῖ δὲ ἡ οὐσία οὐκ ἐπιδέχεσθαι τὸ μᾶλλον καὶ τὸ ἥττον

Substance does not appear to admit of variation of degree [Arist., *Cat.*, 5]

Prototypical *existence* is non-gradable. Either something exists or does not exist⁵⁶.

That is why, I prefer to refer to prototypically non-gradable realities with the term *entity*, stemming from the Latin verb *esse*, rather than with the term *object*, used by Croft.

In the case of not-really-existing (and therefore not observable) realities – as is the case of legal realities – we can conjecture that they are conceived as close to prototypical (1) entities, (2) qualities or (3) processes (and hence as provided with the prototypical features of each of them), if, when expressed with the morphosyntax of (1) a noun, (2) an adjective or (3) a verb, respectively, they display a degree of markedness lower than when expressed in the two other morphosyntaxes.

In other words, if we are to make a conjecture as to the way a certain reality is conceived by naïve people, we first look for three words with the morphosyntaxes of a noun, an adjective and a verb, respectively, referring to that very same reality.

If a word with one of these morphosyntaxes does not exist, we can exclude that the reality we are considering is conceived in the corresponding way. For example, from the fact that in English there is no single word with the morphosyntax of a verb referring to “appleness” it follows that apples are not conceived as a processes.

Instead, if words with all three morphosyntaxes do exist, we single out the term (or terms) with the lowest degree of markedness. If this term is a noun we conjecture that that reality is conceived mainly as an entity. If it is an adjective the conjecture is that it is conceived as a quality. Finally, if it turns out to be a verb, the conjecture is that we are presented with a reality experienced in the terms of a process.

Croft’s theory excludes that a term referring to a prototypical entity can be more marked when having the morphosyntax of a noun, than when having

⁵⁶ By the way, this prototype is the ontological background of two-valued logic.

the morphosyntax of an adjective or a verb. Likewise it excludes that terms referring to either prototypical qualities or prototypical processes can be more marked when having the morphosyntaxes of either an adjective or a verb, respectively, than when having the two other morphosyntaxes.

This conception is closely related to the traditional ontological characterization of (morpho-)syntactic categories. Here is the way Croft describes the traditional approach:

The traditional definitions for the major syntactic categories are purely semantic, based on commonsense ontology of types of entities [here: *realities*]: nouns denote persons, places, or things [here: *entities*]; adjectives denote properties or qualities; verbs denote actions [here: *processes*]. [Croft 1991: 38]

Of course, the traditional approach has its shortcomings:

This purely semantic approach, intuitively attractive as it is, is inadequate as it stands. For example, the noun *motion* denotes an action as much as does the verb *move*, and the noun *whiteness* denotes a property or quality as much as does the adjective *white*. For this reason, the traditional definition is generally discarded. [Croft 1991: 38]

Croft's approach, therefore, consists of using Greenberg's concept of markedness in order to show that the traditional approach is to some extent correct.

[T]he traditional semantic account of syntactic categories is partly correct; it correctly identifies which lexical semantic classes will be unmarked for each pragmatic function. [Croft 1991: 62]

The concept of pragmatic function Croft uses here is strictly connected with the answer to a very complex question: why are markedness and unmarkedness distributed in this way? Croft's answer is that morphosyntax is motivated by pragmatic causes.

According to Croft, *nouns*, *adjectives* and *verbs* correspond to three basic pragmatic functions: (1) reference, (2) modification and (3) predication. These pragmatic functions, according to Croft (1991: 51), are not structural linguistic categories. They are externally motivated ones.

1. *Reference* is «to get the hearer to identify a [reality] as what the speaker is talking about»⁵⁷.
2. *Predication* corresponds to «what the speaker intends to say about what he is talking about».

⁵⁷ Reference must be distinguished from denotation: «The action of referring is a property of discourse, not the semantics (i.e. the thing referred to): it is a possible function of a word in the utterance. Denotation, on the other hand, is intended to signify a relation between a word (i.e. a string of sounds) and the [reality] or class of [realities] that it names ...». [Croft 1991: 51]

3. *Modification* is «an accessory function to reference and predication: restrictive modification helps to fix the identity of what one is talking about (reference) by narrowing the description, while nonrestrictive modification provides a secondary comment (predication) on the head that it modifies, in addition to the main predication».

We can sum up the connection of these pragmatic functions with prototypicality in the following way⁵⁸:

1. Prototypical *entities* are mostly talked about.
2. Prototypical *processes* are mostly predicated of entities.
3. Prototypical *qualities* are mostly used for goals of modification⁵⁹.

A problem we must now discuss is how we are to interpret the fact that many legal (and moral) realities are referred to with such verbs as *have to*, *can*, *should* followed by a verb or a clause.

Before discussing the issue of how I am going to interpret this phenomenon, two important points must be made.

First, I shall use the term *deontic modal* in a broad sense, as referring to both English modals in a strict sense, like *must*, *may*, *should*, etc., and to “honorary” modals (Talmy 1988: 77), like *to be allowed to*, *to have to*, etc. The linguistic phenomena typical of English modals do not concern us in this context.

Second, I will be concerned with these verbs when used in a sentence the function of which is *describing law (or ethics) as it is experienced to be*. Deontic verbs used to *change* or *create new law or ethics* (i.e. to bring about legal or ethical convictions) will not concern us here. I will refer to these two different uses of normative language with Hans Kelsen’s terms *Rechtssatz* and *Rechtsnorm* (1960, § 16), respectively⁶⁰. (As regards Kelsen’s concept of a *Rechtsnorm* see also below, sec. 4.11).

⁵⁸ See also the quotation (taken from Sapir) that Croft (1991) himself introduces at p. 36: «There must be something to talk about and something must be said about this subject of discourse once it is selected. This distinction is of such fundamental importance that the vast majority of languages have emphasized it by creating some sort of formal barrier between the two terms of the proposition. The subject of discourse is a noun. *As the most common subject of discourse is either a person or a thing, the noun clusters about concrete concepts of that order.* As the thing predicated of a subject is generally an activity in the widest sense of the word, a passage from one moment of existence to another, the form which has been set aside for the business of predicating, in other words, the verb, clusters about the concepts of activity. No language wholly fails to distinguish noun and verb, though in particular cases the nature of the distinction may be an elusive one». [Sapir 1921: 119, emphasis added]

⁵⁹ It should be recalled that Croft (1991: 130) considers adjectives a less prototypical class. I cannot discuss this topic here.

⁶⁰ In Kelsen 1960* ‘Rechtssatz’ and ‘Rechtsnorm’ are translated with ‘rule of law’ and ‘legal norm’.

The existence of these two different uses does not raise great problems in English as in this language modals display a certain degree of specialization. For instance, the verb *to have to* seems to be used to describe law (or ethics) as it is, while *must* seems to be used more often than not to express «a speaker-imposed obligation» (Dirven & Taylor 1994: 544; see also Sweetser 1990: 65):

If you do not guess the answer, you must pay me ten pounds (= I require this) [Dirven & Taylor 1994: 544]⁶¹

You have to pay me for my work!

The same seems to hold for the verbs *can* vs. *may*:

It's his bungalow. He can go there when he wants to (objective permission) [Dirven & Taylor 1994: 543]

The defendant may appeal against the verdict (= the speaker grants permission) [Dirven & Taylor 1994: 544]

Dirven and Taylor use the term *objective permission* to refer to the mere description of the permittedness of a certain course of action, and to this effect only *can* can be used⁶².

In other languages the distinction is not mirrored in language as clearly as it is in English.

In this book I will be exclusively concerned with modal verbs expressing *Rechtssätze*, namely modal verbs used to describe the law as the speaker believes it is. Below, in sec. 4.4.4, though, I will spend some words about *must*, because as a non-native speaker of English I have the impression that it can be also used to describe some *strict* obligatedness/obligatoriness.

Since in the next two chapters of this book I will be concerned with morals and law at once, I will also use Kelsen's broader term *Sollsatz* ("ought-judgment"). He opposed this term to *Sollnorm* ("shall-norm") (1979: § 38, II). By the term *Sollsatz* I understand a pure description of morals or law as the speaker believes they are.

⁶¹ At p. 551 the authors observe that *must* may be used also to express a subjective obligation felt from within. This may occur especially when *must* is used in the first person. Palmer (1979) has proposed an explanation for this phenomenon. He says that *must* is usually used in a performative way (in the terminology adopted in this book: in the context of *Rechtsnormen*). But «[g]enerally speaking we do not lay obligations upon ourselves» (91) and this may explain why *must*, when used in the first person, can be used almost exclusively to form a *Rechtssatz*.

⁶² Another author who stresses that «*may*, if not epistemic, is usually clearly performative; it gives permission» is Frank Palmer (1979: 58, 148). Some (Italian) colleagues, though, objected to me that, in English, *may* can be used, not only to grant permissions, but also to "objectively" describe permittednesses, just as the German verb *dürfen*. According to Jonathon Keats (personal communication) this usage of *may* is a form of hypercorrection.

The reason why we will be chiefly concerned with *Sollsätze* should be clear. We are first of all interested in how people experience naïve ethical realities, not in the (often linguistic) tools of which people make use in order to (pretend to) change them. *Sollsätze* are the most direct index of how people experience ethical phenomena.

I will not capitalize anymore the nouns *Rechtssatz*, *Sollsatz*, *Rechtsnorm* and *Sollnorm*, and therefore I will treat them just as other German nouns that have entered the English language (*ersatz*, *schadenfreude*, etc.).

We can now discuss how we are to interpret the phenomenon that we often express our ethical attitudes through *modal verbs*.

Two questions must be distinguished:

1. How are modal verbs to be interpreted in the theoretical frame of normative solipsism?
2. Can we use modal verbs as indexes of some ontological coding of the realities they refer to, in the same way we can do in general with nouns, adjectives and “normal” verbs?

Let us start with the first question.

As I said, my basic assumption is that ethical phenomena are made up of *ethical psychic experiences* and that these ethical experiences cause ethical illusions.

My provisional starting point will be Petrażycki’s conjecture that these experiences are either *ethical appulsions* or *ethical repulsions* towards certain courses of actions. For instance, when a person states that X should not be done, he states his ethical repulsion to that action.

Now, *no trace* of these ethical appulsions/repulsions can be found in the way deontic modalities are expressed in the languages I have been able to take into account. This would be the case if the person experiencing an ethical appulsion/repulsion played a morphosyntactic role in deontic modal verbs, as, instead, is the case of verbs expressing non-ethical appulsions/repulsions such as *to disgust* or *to like*.

In the case of modal verbs everything seems to take place outside the subject.

This point can be better understood by making a comparison with the verb *to disgust*.

As can be seen in table 1.6, there is no way to use *should* with the experiencer in the first person. Other verbs, like *to allow*, *to prohibit*, can be used in the first person, but the sentences in which they occur can exclusively be interpreted as expressing *sollnormen* (in this case: performatives)⁶³.

⁶³ An idiom whereby it is possible to express in the first person a reaction to a certain violation is to *be indignant with somebody at something*. I will discuss indignation in

Table 1.6. – Morphosyntactic presence vs. absence of the experiencer.

FIRST PERSON	1.1. I would be disgusted by such an action of yours	2.1. –
SECOND PERSON	1.2. You would disgust me with such action of yours	2.2. You shouldn't do this action
UNANIMATED REALITY	1.3. Such an action of yours would disgust me	2.3. This action shouldn't be done (by you)

The phenomenon that in deontic modal verbs the person who experiences the ethical appulsion/repulsion is not mirrored in the morphosyntax is an index of the fact that naïve people do not conceive these phenomena as something internal to the speaker.

In general, *I will consider the fact that in all the languages I have been able to take into account the subject who makes the ethical experiences is not mirrored in the morphosyntax of the deontic modal verbs as an index of the fact that the realities to which deontic modal verbs refer are experienced as something pertaining, rather than to the internal reality of the subject, to some reality external to him*^{64, 65}

This interpretation is compatible with the interpretation of modal verbs in terms of force dynamics that has been given in cognitive linguistics (see Johnson 1987: 56; Sweetser 1984; Talmy 1988; Croft & Cruse 2004).

In this conception, verbs like *ought to*, *have to*, *should*, are used by the speaker in order to mean that some force compels some X-person (if expressed in the sentence) toward a certain course of action (Johnson 1987: 56), whereas the X-person's wishes may be different. Leonard Talmy (1988: 86) talks of "force opposition". In the case of *ought not to* or *should not* the force operates against that course of action and the wishes of the X-person.

In certain cases the speaker may represent this force as operating in somebody else's (or even his own) split self. Here is Talmy's discussion:

sec. 3.6. What matters here is that it can hardly be affirmed that the following sentences have the same meaning: (1) *You shouldn't behave in this way*, (2) *I would be indignant at this behavior of yours*.

These two sentences just do not cover the same kind of situations.

While in (1) we have the "objective" description of the legal or moral quality (modality) of a potential behavior, in (2) we find the description of the *subjective reaction* to some behavior.

⁶⁴ The phrase *external to the subject* may also mean psychically internal to some individual other than the subject. See above, fn. 1.

⁶⁵ The same holds true in the case of languages in which certain modalities are expressed in an impersonal third person: for instance, Modern Greek "πρέπει να πας σπίτι" lit. "it ought that you go home".

See also Petrážycski about the latin verb *decere* and the Russian verb *sledovat* (1909-10: 41, 1909-10*: 42).

Where the [speaker] and the [X-person] are the same person, as in sentences like (*I think*) *I should leave* and *He thinks he should leave* the force opposition is introjected into the self, [T]he self is then conceived as divided, with a *central part* [emphasis added] representing the inner desires and a *peripheral part* [emphasis added] representing the self's sense of responsibility. [Talmy 1988: 86]

In ch. 3 I will give an interpretation of these phenomena by using Freud's concepts of *ego*, *super-ego* and *id*. The conjecture that the super-ego compels the ego not to comply with the requests of the id is consistent with the phenomenon that the experiencer's viewpoint is not explicit in the morphosyntax of modal verbs.

As regards the modal verb *can*, it is usually considered to «denot[e] positive ability on the part of the doer» (Johnson 1987: 52, quoting Sweetser 1984: 63).

Mark Johnson explains the meaning of *can* by contrasting it with *may*.

Can ... involves a sense of internal power or capacity to act. The agent is a *source of energy* [emphasis added] sufficient to perform some action. Although *can* tends to assume an absence of restricting barriers, its primary focus is on *potentiality* or *capacity to act*. With *may* we emphasize and focus on the *removal* of potential or actual barriers, but with *can* we focus on the potential energy to act. [Johnson 1987: 52, penultimate emphasis added]

The same interpretation holds in the case of the *deontic*⁶⁶ uses of *can* in the context of *sollsätze* as contrasted with the use of *may* in the context of *sollnormen*. In the case of *can*, the speaker describes the deontic capacity to act, whereas in the case of *may* the speaker does *remove* some deontic barrier⁶⁷.

We shall see in ch. 3, as well as in sec. 4.4.3, that a tentative explanation of the perceived energy in the person who can is to be found in the role played by aggressiveness in the functioning of super-ego.

We can now turn to the second question above raised: *can we use modal verbs as indexes of some naïve ontological categorization in the same way as we can do with nouns, adjectives and "normal" verbs?* The question can be rephrased in the following way: do modal verbs express processes/actions, just as verbs like *to hit*, *to give*, *to rain* do?

The theory of force dynamics seems to be compatible with whatever ontological interpretation of modal verbs. Forces can be experienced as qualities, processes or entities. Therefore we have to solve the question with other criteria.

⁶⁶ This adjective should be understood as synonymous with *ethical* or *normative*.

⁶⁷ As regards what Johnson calls the "absence of restricting barriers", it corresponds to the absence-of-ethical-phenomena that I will discuss below in sec. 4.4.5.

I think that we can exclude that these verbs can be used as indexes of illusions of ethical entities of some sort. These verbs do not have anything in common with the morphosyntactic traits of nouns.

Instead, it could be argued that, since deontic modal verbs are quite unmarked verbs, their existence and use should be the index of a conception of the realities they refer to in the terms of processes/actions, rather than in the terms of qualities.

My contention is right the opposite: *modal verbs should be interpreted as referring to qualities, rather than to processes.*

To begin with, the very traditional name of these verbs (i.e. *modal verbs*) suggests that they, rather than express a process or an action on the part of their grammatical subject, do express a quality, a mode of the process/action expressed by the governed verb⁶⁸.

Second, it should be noticed that in languages such as English, Italian or German the role of subject of a modal verb can be played either by the animate entity whose action is being talked about or by an inanimate entity that is involved in the course of action. The modal verb is the same in either case. In the second case, though, the governed verb is turned into the passive voice.

Compare the following sentences:

Robert should park the car in front of the house. (1)

*The car should be parked in front the house (by Robert).*⁶⁹ (2)

In (1) it could be argued that two (related) qualities are being expressed: Robert's *obligatedness* as to the parking of the car in front of the house and

⁶⁸ In languages without the infinitive form (like Modern Greek and Bulgarian) the course of action is expressed through a verb in a finite form (see also the example from Modern Greek in fn. 65): “μπορείς να πας σπίτι”, “you can go home”, lit. “you can that you go home”.

⁶⁹ These two possibilities have been discussed extensively in cognitive linguistics as for the case of “normal” verbs, adjectives and nouns expressing *capabilities*.

Compare the following couples of sentences: (1a) *I can solve this problem* / (1b) *This problem can be solved*, (2a) *I am able to solve this problem* / (2b) *This problem is able to be solved*, (3a) *I have the ability to solve this problem* / (3b) **This problem has the ability to be solved*.

As regards this double possibility the following wrong conjecture is often made: «A passive version of a modal sentence, although it has a different subject from the corresponding active sentence, may nonetheless be given the same modal interpretation: for example both “Harry must wash the dishes” and “The dishes must be washed by Harry” impose an obligation on Harry». [Sweetser 1990: 66, see also Palmer 1979: 68]

As has been noticed by Amedeo G. Conte (1985: 28, see also Lorini 2007: 105) there are counterexamples. Compare the following sentences: (1) *All statutes must be signed by the president*, (2) *The president must sign all statutes*.

While the first sentence refers to the conditions of validity (and, as consequence thereof, of bindingness) of statutes, the second sentence means that the speaker commands that the president sign all statutes. Only in (1) there is what Conte would call an *anankastic ‘must’* (1997: 139). This issue is closely related with the issue of validity and bindingness. See at this regard Fittipaldi 2012 and — a.

the *obligatoriness* of the parking of the car in front of the house on the part of Robert. The quality of *obligatedness* pertains to animate entities, while the quality of *obligatoriness* pertains to courses of actions or inanimate entities involved in them. In (2) the focus is on the obligatoriness of the parking of the car in front of the house and the obligatedness is not necessarily expressed.

The fact that modal verbs can be used to express at once both the quality of an animate entity and the quality of a course of action can explain why in many languages ethical qualities are expressed through verbs rather than adjectives⁷⁰.

Unlike prototypical qualities, ethical qualities are bivalent. An ethical quality is quite often at once both the quality of a person (or a set of persons) and the quality of a course of action (or of a set of courses of action). Since bivalent verbs are readily available in every language, in certain languages some bivalent verbs may be selected and specialized by speakers to refer to ethical qualities.

The hypothesis that modal verbs mean a (non-prototypical) quality rather than a prototypical action on the part of the subject implies that there must be at least some languages in which modalities are expressed by adjectives, rather than by verbs.

As regards *obligatedness*, an example is Russian. Russian hardly has verbs meaning “to have to”. It has the adjective *dolžen* (“obligated”) only.

Я должен подчиниться приказу
 (“I have to obey the order”)

As regards *obligatoriness* we can mention Latin and to some extent Ancient Greek.

In Latin the deontic modality of obligatoriness was mostly expressed by the deverbal adjective called *gerundivum*.

⁷⁰ My contention that modal verbs should be interpreted as meaning a quality of a process can be extended to *non*-deontic modal verbs. Generally speaking, modal verbs are used when qualities of processes have to be expressed, especially when these qualities are bivalent.

Qualities are seldom predicated of prototypical processes. Nonetheless, certain qualities are predicated of processes more often than others. For instance, my wild guess is that the *beauty* of a process is predicated less often than its *possibility*, *inevitability* or *necessariness*. The more frequent the predication of a certain quality of a process, the more probable is that in a given language an unmarked verb, instead of a marked construct, is used to express it. Compare the following examples: (1) *It is beautiful that he has come* (beauty), (2) *His having come is beautiful* (beauty), (3) *He may have come* (possibility), (4) *He must have come* (inevitability).

As regards the ambiguous syntactic status of such English verbs as *help*, *need* and *dare* an explanation could perhaps be given by taking into account also how often a given process is the object of another process.

Sapientes nobis imitandi sunt

Οἱ σώφρονες ἡμῖν μιμητέοι εἰσὶν

(“The wise should be imitated by us”)

Nobis eundum est

(“We should go”)

To some extent this seems to hold true also for *can*. The Latin verb *posse* (“can”) stems from *potis esse*, “to be capable”.

In sec. 2.5, I will give one further reason for interpreting modal verbs as expressing qualities.

In ch. 4 I will try to explain how qualities such as obligatednesses, obligatorinesses or capabilities get detached from entities or courses of action and start being experienced as independent entities such as debts, duties, rights and powers.

A final remark is in order here.

I will extensively use naïve languages as a source of conjectures and hypotheses about how naïve people conceive ethical illusions. Since I am jurist, I am not a linguist, I will draw almost exclusively on languages I am acquainted with, namely Italian and other Romance languages, English, German, Russian, Polish, Latin and Ancient Greek. Of course, all conjectures and hypotheses I will make are open to refutation from evidence coming from languages I have not been able to take into account.

2.

ETHICAL ILLUSIONS PRODUCED BY PROJECTIVE PROCESSES

2.1. INTRODUCTION

In this chapter I will discuss the following problem: *if ethical qualities do not exist in the external world, but only in the psyche of each individual, why does each of us seem to experience them as if they pertained to external courses of actions or animate entities, just in the same way as other qualities that really have their counterpart in the external world, like color, weight, hotness, etc.?*

I will assume that people conceive certain realities in terms of qualities if they use:

1. certain adjectives, such as *wrong, immoral, mandatory, obligatory*, etc.,
2. certain participles, such as *prohibited, obligated*, etc., or
3. certain verbs, such as *can, have to, shouldn't*, etc.

As regards verbs, my assumption will be that people using modal verbs to express *sollsätze* actually pretend to describe objective qualities of a certain animate entity and/or course of action – the course of action being expressed through a verb in the infinitive form (sec. 1.4) ¹.

Since the illusions of ethical qualities are the only kind of ethical illusions that I think can be explained through Petrażycki's theory of *projections*, my starting point in this chapter will be his theory of projections.

2.2. WHAT CAN PROJECTIONS EXPLAIN?

As we already know, Petrażycki denied the external existence of both ethical entities and qualities, and therefore, according to him, what really exists are exclusively certain psychic experiences of an ethical nature.

¹ About languages without the infinitive form see sec. 1.4, fn. 68.

Only experiences [*pereživanija*] of ethical motorial excitements [*etičeskie motornye vozbuždenija*²] – in association with representations [*predstavlenija*] of a certain conduct [*povedenie*] (such as lying) and certain other ideas (of subjects with whose conduct we are concerned and so forth) – really truly exist; but the emotional projection [*émocional'naja proekcija*] makes it seem to one experiencing such processes that somewhere – in a higher space, as it were, above mankind – a corresponding categorical and strict imperative or prohibition exists and holds sway (for example a prohibition against lying), and those to whom such commands and prohibitions seem addressed are in peculiar condition of being bound or obligated [*sostojanie svjazannosti, objazannosti*]. [Petrażycki 1909-10: 42, 1909-10*: 42, translation modified]

According to Petrażycki, only ethical *appulsions* and *repulsions* do exist, and both legal entities, such as prohibitions, imperatives, debts, rights, etc., and legal qualities, such as wrongness, obligatoriness, permittedness, etc., can be explained in terms of projections.

He held that legal illusions can all be explained *in the same way* and, namely, just by maintaining that they are *nothing else but* results of projective processes, i.e. of impulsive phantasies.

The impulsive phantasy [*impul'sivnaja fantazija*] creates not only various qualities [*kačestva*] and attributes [*svojstva*] for objects [*predmety*] and phenomena [*javlenija*] to which various adjectives correspond in language, but also other categories of diverse entities [*veličiny*] which do not in fact exist – including various non-existent objects [*predmety*], situations [*položeniya*] and conditions of objects [*sostojaniya predmetov*], processes [*processy*], ... events [*prošedstvija*] concerning them to which sundry nouns, verbs, and adverbs correspond in popular speech. [Petrażycki 1909-10: 39, 1909-10*: 41]

Unlike Petrażycki, I think that *only ethical qualities can be successfully explained in terms of projections*. Therefore, even when I will be quoting Petrażycki mentioning legal entities as well, the reader should bear in mind that legal *entities* will be discussed in the next two chapters.

Another major difference me and Petrażycki is that he does not explain whether the phenomenon that legal realities are experienced as being “in a higher space”, “above mankind”, and somehow to belong to a different reality, is to be explained by his theory of projections or in some other way.

Actually, I think that *Petrażycki's conjecture about projective processes in general implies that ethical qualities should be experienced as belonging to normal external reality, i.e. as if they were normal external qualities*.

Let us take Petrażycki's example of *appetizingness*. This quality, as we shall see, according to Petrażycki is definitely a projective quality, but it

² This term, along with *motornoe razdraženie*, is used by Petrażycki as synonymous with *émocija/impul'sija*.

does not seem to be above mankind. My conjecture is that ethical qualities seem to be above mankind because of their mystic-authoritativeness. The mystic-authoritativeness of ethical realities will be explained in the next chapter along with certain kinds of ethical entities.

The critical assessment of Petrażycki's theory of projections I will propose in this chapter will show that processes akin to projective processes are at the basis of the way each of us develops the hypothesis of the existence of the very same external reality in which we assume to exist people, stones, rivers, etc. I will argue that what Petrażycki calls *projections* are but *wrong* projections.

The differences between me and Petrażycki can be summed up in the following way:

1. I think that projective processes can explain *ethical qualities only*, while according to Petrażycki they can explain all kinds of ethical illusions, including all kinds of legal illusions.
2. I think that projective processes *cannot* explain why ethical qualities are sometimes and somewhat experienced to be above mankind. In ch. 3 I will search for an explanation of this phenomenon. Petrażycki, instead, did not even raise the problem.
3. I think that all qualities are projective and that what Petrażycki calls *projections* are but *wrong projections*, while according to Petrażycki all projections seem to be by definition wrong.

2.3. PETRAŻYCKI'S PROJECTIVE PROCESS

In order to understand the way Petrażycki conceived the process of projection (*proekcija*)³, let us read a passage where Petrażycki described this process in general.

³ *Projection* is a term that has been used in several different ways by psychologists. Here is Piaget's account of these uses, that according to him have some sort of continuity: «What ... does 'projection' really mean? ... Sometimes there is simply a failure to differentiate between the self and the external world, that is absence of consciousness of self. Thus it is claimed that when a child speaks of himself in the third person, it is because it sees himself not in the role of subject but as from without. In this case 'projection' signifies that the child in question recounts, and perhaps imagines, his own actions as belonging to an external order of things. In other cases, there is 'projection' when we attribute to things characteristics belonging to the self or to thought. Thus the child who places the 'name of the sun' in the sun, 'projects' an internal reality into the external world. Finally, it is difficult to distinguish 'projection' from those cases in which we endow things not only with own characteristics but also with such conscious motives as might occasion the sensation we experience in observing them; thus a child, frightened by the sight of fire, endows the fire with malicious designs. It is not the feeling of fear which is attributed to the fire, rather the child projects into the fire the reciprocal sentiment of maliciousness. It is in the third sense that psychoanalysts have used the word 'projection'. It is a different

Motorial excitements [*motornye razdraženija*] aroused in us by various objects (by perceptions [*vosprijatija*] or representations [*predstavlenija*] of them), or experienced with reference to them, communicate [*soobščajut*] to the corresponding perceptions or representations [*predstavlenija*] a particular coloration [*okraska*], particular nuances [*ottenki*], so that the objects themselves appear to us as if they objectively possessed the relevant qualities. Thus, if a certain object such as a roast (the perception, appearance, sight, smell, and so forth) arouses appetite in us, it then acquires in our eyes a particular aspect, 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 (the physiological condition of our organism being different) or another object offered to us as food awakens in us the contrary (negative) emotion [*émocija*] instead of appetite, we then – if this (negative) emotion [*émocija*] is relatively weak – ascribe to the object the quality of unappetizing, whereas if the motorial excitement [*motornoe razdraženije*] is more intense, we endow the object with the quality of “loathsomeness”. [Petrażycki 1909-10: 38, 1909-10*: 40, translation modified]

According to Petrażycki (and I share his opinion), this process does not depend on language.

This phenomenon – that takes place also in cases and fields of emotional life where no special terms [*nazvanija*] exist in our language for the imaginary [*kažuščiesja*] qualities of the material objects – we will term an emotional or impulsive projection or phantasy. [Petrażycki 1909-10: 39, 1909-10*: 41]

For instance, in Italian there is no simple adjective whereby it is possible to translate the German adjective *gemütlich* or the English adjective *cozy*. This does not imply, though, that Italians are not able to experience such a quality in relation to a room or a house. In my experience, when most Italians learn of the existence of these adjectives, they immediately grasp what they refer to.

As we have seen, Petrażycki thinks (and I share his view) that some projective mechanism operates in the case ethical emotions. *There is a parallelism between the “unappetizingness” of, say, rotten eggs and the “wrongness” of lying.*

If the perception or representation of a certain behavior produces in us a *repulsion*, we project this feeling onto the object of perception or representation, and experience that behavior as itself *wrong*. By the same

sense from the two former but it is obvious that there is a relationship between all three and probably a complete continuity. At any rate in all three cases there is ‘adualism’ between the internal and the external». [Piaget 1926*: 47]

Petrażycki used the term *projection* in the second sense. Hume hinted at a very similar mechanism when he talked of the «great propensity [of the mind] to spread itself on external objects» (Hume 1739-40, § 1.3.14: 167). Among the not many legal thinkers who used this term in a sense similar to Petrażycki’s it is worth recalling here Nussbaum (2004: 336).

token, if the perception or representation of another behavior produces in us a positive impulsion – what Petrażycki calls *appulsion* – we project this feeling onto the object and experience that behavior as *obligatory*⁴.

Let us read how Petrażycki thinks this phenomenon works in the field of ethical phenomena:

In an honest man, invited to commit (for money or other advantage) deceit, perjury, defamation, homicide by poisoning, or the like, the very representation of such “foul” and “wicked” conduct will evoke repulsive emotions which reject these acts; moreover that rejection will be so powerful as not to permit the attractive impulsions (with reference to the promised advantages) and the corresponding teleological [*celewaja*] motivation to arise, or to crush such motives if they do appear. [Petrażycki 1909-10: 20, 1909-10*: 30, translation modified]

This is an example of a *repulsive* ethical emotion producing the ethical qualities of *unjustness*, *wrongness* or *prohibitedness*.

The projective *quality of personal prohibitedness* of somebody as regards a certain course of action as well as the *quality of actional prohibitedness* (i.e. wrongness) of a certain course of action (on the part of somebody) can be inferred from the use of negative modal verbs, such as *shouldn't*, *ought not to* (sec. 1.4).

As regards *appulsive* ethical emotions, we can think of the impulsion we have to pay the check at the restaurant, to help a close friend or relative in need, to restore some damage we caused.

Depending on the fact that an *ethical appulsion* is directed toward the action itself or it is directed toward the person who is supposed to act (including ourselves), we have the projective qualities of *obligatoriness* and *obligatedness*, respectively. (This is a distinction Petrażycki never clearly made).

In the case of an ethical repulsion, depending on the fact that it is directed toward an animate entity or an action, we will have a *personal prohibitedness* or an *actional prohibitedness* (i.e. a *wrongness*), respectively. Unlike with *obligatedness* and *obligatoriness*, with *prohibitedness* the adjectives *personal* and *actional* are necessary, as in English the verb *to prohibit* can have as its object both an animate and an inanimate entity. (Of course, the term *prohibitedness* is used here in a technical sense to the effect that for a prohibitedness to exist it is not at all necessary that somebody issued some linguistic prohibition. From the psychological perspective here adopted, for a prohibitedness to exist it suffices that somebody actually or potentially experiences an ethical repulsion towards some course of action) (See table 2.1).

⁴ I will make detailed conjectures about what these appulsions and repulsions exactly are in the next two chapters.

Table 2.1. – Technical terms for imperative ethical projective qualities.

		APPULSION	REPULSION
EMOTION DIRECTED TOWARD	AN ANIMATE ENTITY	obligatedness	personal permittedness
	AN ACTION	obligatoriness	actional permittedness, wrongness

As we know, an index of the experience of the quality of *obligatedness* is the use of such deontic verbs as *should*, *ought to* and *to have to*, while an index of the experience of the quality of *prohibitedness* is the use of such modal verbs as *should not* and *ought not to*.

The experience of the quality of *obligatoriness* (or *wrongness*) in the course of action can be inferred from the fact that the verb expressing the action of the course of action is *governed* by the deontic modal verb.

Most deontic verbs express at once *obligatedness* (or *prohibitedness*) and *obligatoriness* (or *wrongness*). For instance:

Mark shouldn't park the car in the courtyard

In this case, by the *very same modal verb* are expressed both the *wrongness* of parking the car there (on the part of Mark) and the *personal prohibitedness* of Mark (as regards parking the car there). As we know, ethical qualities usually are *bivalent qualities*.

What I said about *obligatedness* (or *personal prohibitedness*) and *obligatoriness* (or *wrongness*) could be repeated as regards permissions by distinguishing the *personal permittedness* of animate entities from the *actional permittedness* of courses of action (i.e. their *lawfulness*). However, since *permittednesses*, along with *omissibilities*, pertain to the realm of legal (i.e. imperative-attributive) phenomena I will discuss both of them below (sec. 4.4.3 f.).

It is now time to turn to the cause of projective qualities, namely their degree of stability, and to show how their degree of stability is connected with the illusion that projective qualities are like external qualities, and therefore seem to belong to external reality (be it physical or psychical).

2.4. THE DEGREE OF STABILITY OF PROJECTIVE QUALITIES AND ITS LINGUISTIC CONSEQUENCES

Not all projective qualities display the same degree of stability.

Certain representations or perceptions cause certain emotions less systematically than others. For example, many *esthetical* projections display a lower degree of stability than *ethical* projections. This may be connected

to the differentia specifica of *ethical* emotions that will be discussed in the next chapter. Understanding the role of *stability*, though, does not require previously discussing the differentia specifica of ethical emotions.

Even *among esthetical projections* there seem to be different degrees of stability.

For instance, it would be perfectly reasonable that John, who really likes roast, but sees it in a restaurant while still affected by motion sickness after a long mountain trip on the back seat of a car, says:

Roast is definitely my favorite dish but it does not appetize me at all, now! (1)

In this case, the state of being John's *favorite dish* remains unchallenged, while he does not perceive its *appetizingness* at that moment. The two qualities, therefore, display different degrees of stability.

The quality of being one's favorite dish seems to display a degree of stability that compares better with the stability of the wrongness of theft than with the stability of the appetizingness of a roast.

Distinguishing different degrees of stability has a *falsifiable* implication. *If the projective quality q_1 is much less stable than the projective quality q_2 , there should be no language in which the projection point of view is syntactically explicit in the case of q_2 while it is not in the case of q_1 .*

For example, this conjecture excludes that there can be any language in which the projection point of view is explicit in the case of ethical qualities while it is not in the case of gustatory qualities (compare above table 1.6).

It is worth stressing that a language in which the holder of a certain projection point of view shows up in the dative case governed by some verb does *not* count as a language in which the projection point of view is *explicit*.

Such languages are Italian and German:

L'arrosto mi piace (Italian) (2)

Der Braten schmeckt mir (German) (3)

("I like roast")

The role of subject is here played by the inanimate entity onto which the holder of the projection point of view projects his experience. The "action" is performed by the inanimate entity that plays the role of subject of the *intransitive* verb. In both cases the holder of the projective point of view is in the dative case.

In certain languages, such as English, though, the holder of the projection point of view seems to be explicit. This is the case of the verb *to like*.

I like roast (English) (4)

Hence, at least in the case of *to like*, we can say that *no* projection is reflected in language, while this is in the case of adjectives such as *beautiful*, *attractive*, *ugly*.

Why is English different from other languages? Are we to argue that English native speakers are more aware of the projective nature of esthetical qualities than, say, Italian and German native speakers? This awareness might be a feature of Anglo culture mirrored in the English grammar just as other cultural features mirrored, for example, in other phenomena typical of the English language (cf. Wierzbicka 2006). Testing this conjecture lies outside the scope of this book.

Be as it may, it is worth stressing that the verb *to like* is quite far from being a prototypical *transitive* verb.

The prototype of a transitive clause involves the transfer of energy from an Agent (the subject) to a Patient (the object). Prototypical transitive clauses (*The farmer shot the rabbit*) have some well-known properties. One can enquire

- [1] what the Agent did (*What did the farmer do?*),
- [2] what the Agent did to the Patient (*What did the farmer do to the rabbit?*), and
- [3] what happened to the Patient (*What happened to the rabbit?*). [Taylor 2002: 425 f.]

Now, it is clear that the clause “Mary likes the roast” is not quite prototypical, since the following answers seem pretty odd (at least to me, as a non-native English speaker).

- [1] *What did Mary do?* ?*She liked the roast.*
- [2] *What did Mary do to the roast.* ?*She liked it.*
- [3] *What happened to the roast?* ?*It was liked by Mary.*

Therefore, from the phenomenon that in English there is a transitive verb such as *to like* it cannot be plainly inferred that the people sharing the Anglo culture are aware of the projective nature of esthetical qualities. Such an inference would be correct only if *to like* behaved like any other standard transitive verb.

A different explanation for this phenomenon could be that in English, unlike many other languages, «the schema for a prototypical transitive clause (NP_{Ag} V_{trans} NP_{Pat}) has generalized so as to accommodate all manner of relations between entities» (Taylor 2002: 426).

2.5. TWO CONSTITUENTS OF THE STABILITY OF PROJECTIVE QUALITIES

Two factors affect the stability of a projective quality:

1. its degree of *subjective stability* and
2. its degree of *intersubjective diffusion*.

As we shall see in the next paragraph, the cause of this fact is that the more these two factors (especially the first one) are at work, the more the projective quality seems to behave like qualities really having an external counterpart causing their experience.

Let us discuss subjective stability and intersubjective diffusion in detail.

By *degree of subjective stability* of a projective quality I mean *how often that quality is experienced by the subject in association with the representation or perception of a certain really existing entity or course of action*.

That such a factor may play a role in the field of ethical experiences was already argued by Hans Albert.

To understand this point we can start with the way Hans Albert describes the issue.

It can be argued that the fact that experience is of major importance not only for the development of knowledge but also for human morality will not be disputed by anybody. But when we talk in terms of specific *moral experiences*, as is usual in daily life, we have the philosophical problem whether the assumption of this kind of experience has certain ontological consequences, whether it somewhat compels us to recognize *moral facts*. [Albert 2002: 82, emphases added]

Now, the fact that certain persons, as a consequence of their moral experiences, have the attitude to treat “moral facts” – in this context *ethical qualities* –, as if they existed in the same way really existing qualities⁵ do, is explained by Hans Albert in the following way.

Our experience implies always an interpretation of what happens, that is selective and partially influenced by our evaluative points of view, and we are obviously inclined to project [*bineindeuten*] these points of view onto what happens. Thus, *characteristics* of what happens that are morally relevant become *value-qualities* [*Wert-Qualitäten*] with the character of properties, and the corresponding *value judgments* are interpreted as special kinds of *assertions about facts*. *This is made easier by the fact that our evaluations usually are connected to certain factual characteristics and that this connection* [*Verknüpfung*] *in many cases is lasting* [*dauerhaft*]. [Albert 2002: 82 f., emphases added]

⁵ By *really existing quality* I mean a quality the experience of which is caused by some external physical phenomenon *if this experience is more or less the same in each individual*. Colors are really existing qualities in this sense. (This is so independently of whether the subject’s language has or not a term for a certain color. See at this regard John Taylor’s account (2003: § 1.3) of the conclusions arrived at by Brent Berlin and Paul Kay (1969)).

If we think of the history of human civilization it is hard to maintain that what is experienced as ethically repulsive today was always experienced in this way. If certain electromagnetic radiations produce more or less the same experience in everybody, this is definitely not the case of death penalty, torture, homosexuality, etc.

Cf. also above, sec. 1.1, fn. 12, and below, sec. 2.6, fn. 34.

Let us now examine in some detail how this lasting connection (*dauerhafte Verknüpfung*) works.

If every time I look at the capitol dome I perceive it big, I will assume that it has this quality independently of me and that it keeps being big even when I am not staring at it. The same happens in the case of more general qualities. If every time I try to lift lead I perceive it as heavy, I will again assume that lead has this quality independently of me.

I will also assume that lead keeps being heavy and the capitol dome keeps being big even when I am sleeping.

Now, the appetizingness of a dish exhibits a lower stability than the wrongness of theft (as well as of the bigness of the capitol dome and the heaviness of lead). While most of the times I think of stealing I feel something wrong with it, not every time I think of the possibility of eating my favorite dish I necessarily perceive it as appetizing. To give a personal example, although I consider spaghetti with clams to be my favorite dish *at any time of the day*, I hardly find it appetizing *at breakfast*.

We must now ask whether *changes* are compatible with a “*dauerhafte Verknüpfung*”, namely with a *high degree stability*.

In order to answer this question four kinds of *change of the perception of a certain quality* should be distinguished:

1. Changes that seem to depend on the will⁶ *of the subject*.
2. Changes that seem to depend on *happenings internal* to the subject.

⁶ The fact I use the term *will* does not imply that I think there is such a thing as *free will*. I just believe, as was already stated by Freud, that there is a mere *Illusion des freien Willens* (“illusion of free will”, 1919*: sec. 2: 236). At this regard it is also worth reading Freud’s *Psychopathology everyday life*: «Many people ... contest the assumption of complete psychic determinism by appealing to a special feeling of conviction that there is a free will. This feeling of conviction exists; and it does not give way before a belief in determinism. Like every normal feeling it must have something to warrant it. But so far as I can observe, it does not manifest itself in the great and important decisions of will: on these occasions the feeling that we have is rather one of psychic compulsion, and we are glad to invoke it on our behalf ... On the other hand, it is precisely with regard to the unimportant indifferent decisions that we would like to claim that we could just as well have acted otherwise: that we have acted of our free – and unmotivated will». [Freud 1901*: sec. 12.B, 253 f.]

I think that the illusion of free will is experienced, not only in case of “unimportant indifferent decisions”, but also in the case of “important decisions of will” that seem to counter our selfish interests. The latter is typically the case when we act to conform to the requirements of our super-ego. (I am aware that this statement of mine may recall Kant’s view on this subject).

Therefore, my opinion is that that the *illusion of free will* takes place in both the following extreme opposite cases: (1) where one’s unimportant indifferent decision seems to the subject to prevail only slightly over other potential unimportant indifferent decisions, and (2) where the subject’s decision is experienced as imposed by the subject’s super-ego (see ch. 3).

3. Changes that seem to depend on *happenings external* to the subject.
4. Changes that seem to be *completely unpredictable*.

I mentioned the *first* and the *second kind* of change for completeness.

As regards the *first kind of change*, Freud argued that this is the way very small children as well as adults think while dreaming (1899*). There is no reason to discuss these conjectures here (see more below at the end of sec. 2.6). Of course, such a change is fully incompatible with the idea that a certain quality is independent of the subject.

As regards the *fourth kind of change*, it plays hardly any role in the context of naïve ontology either. In the next paragraph we will see how important it is to bear in mind this theoretical possibility. This kind of change is fully compatible with the idea that a certain quality is independent of the subject.

As to the *second kind* of change, it can be argued that appetizingness typically undergoes this kind of changes⁷.

My perception of this quality in the roast seems to me to depend on the way I feel. Sometimes the change in the appetizingness of a certain dish seems to be caused by some external change. This could be the case if I have been traveling on the back seat of a car during a long trip. My conjecture is that most people would not think that travelling on the back seat of a car *directly* causes the roast to cease to be appetizing. They would rather contend that travelling on the back seat of the car causes my internal state that, in turn, directly causes the roast to cease to be appetizing. Therefore, travelling on the back seat of the car is experienced as causing but *indirectly* the cessation of the appetizingness of the roast. Of course, this is a hypothesis that should be empirically tested.

The situation is completely different in the case of the *third kind* of change.

In both cases an obvious assumption is that the individual's decision is affected neither by external (e.g. a robber's threat) nor by internal (e.g. thirst) happenings.

That the illusion of free will takes place in two seemingly opposite cases is no surprise. Also in the second case does the choice imposed by the super-ego prevail only slightly over other potential decisions. The difference is that in this case the subject feels the strength of the opposing drives operating within his ego, while in the first case he does not. For some choice to be experienced as the result of the exercise of one's free will it seems to suffice that that choice is made on the basis of some *slight prevalence* – nothing more than that. There is plenty of super-ego imposed decisions that are not experienced as imposed by the subject's super-ego precisely because of the lack of this slight prevalence. For instance, civilized people seem not to experience their refraining from littering as super-ego-imposed. Why? Because the decision not to litter, that is imposed by the super-ego, does indeed prevail, but it does not prevail *slightly!*

⁷ It should be stressed that also a much more stable quality like being one's *favorite dish* can be lost and acquired by different dishes over one's life. My conjecture is that in this case most people will ascribe this change, rather than to some specific internal change of theirs, to an overall change of themselves.

If someday I see the color of my chair turned into red, I assume that something in the external world happened to it. For instance, I may assume that somebody painted it. This is consistent with the general hypothesis that there exists an external world that is independent of us and functions in a somewhat predictable way.

Only changes of the perception of a certain quality depending on happenings external to the subject are compatible with a strong illusion that the quality is itself external to the subject.

This is the case of the changes involved in what Petrażycki called *positive* ethical emotions.

To get acquainted with this concept, we better start, as usual, with a quotation where Petrażycki explains his concept of a positive ethical experience.

[T]he structure of certain ethical experiences [*étičeskie pereživanija*] comprises the representation [*predstavlenie*] of norm-establishing [*normoustanovitel'nye*], or normative facts [*normativnye fakty*] ... Ethical experiences comprising representations of ... norm-establishing, or normative facts, and the corresponding obligations and norms we shall call ... positive; and the others ... intuitive. [Petrażycki 1909-10: 47, 1909-10*: 44, translation modified]

Positive ethical experiences are distinguished from intuitive ones in that only positive ethical experiences involve normative facts. Intuitive ethical experiences are but non-positive ethical experiences.

The role of a normative fact, according to Petrażycki, can be played by the most diverse external facts, such as whatever kind of text, behaviors of other people, precedents, etc. In sec. 39-43 of his *Teorija prava i gosudarstva* (1909-10, 1909-10*: sec. 34-39) Petrażycki discusses several kinds of normative facts. These pages are among the most interesting pages written by Petrażycki and are still well worth reading today. For the present purpose, though, there is no reason to discuss them here (see Fittipaldi 2012)⁸.

Normative facts are facts that the individual correctly represents to himself as *founding* his ethical experience, in that he has the *true belief* that, if those facts were not taking place or had not taken place, he would not be having that ethical experience. In other words, we shall call a certain fact *normative-for-individual-x* if that fact subjectively founds at least one of his ethical experiences as well as if it is objectively the case that failing that normative fact that individual would not be making that ethical experi-

⁸ Petrażycki's concept of normative fact can be considered very similar to Rodolfo Sacco's concept of legal formant. See Sacco 1991. For an epistemological discussion of Sacco's concept of formant see Fittipaldi 2003.

ence. By *founding* I mean at once “causing” and “justifying”. A certain fact plays the role of a normative fact in *x* if, for example, when asked why he supports a certain descriptive ethical judgment (i.e. a normsatz), *x* would correctly refer that fact⁹.

Positive ethical emotions are experienced *as* caused by the representation¹⁰ of facts external¹¹ to the individual. (Positive ethical emotions may also *suddenly* stop being experienced if the representation of a certain kind of external facts takes place in the psyche of the individual. This is often the case of *repeal*¹²).

Let us think of *insider trading*. In many countries this course of action was not deemed *wrong* until a statute was passed to this effect. Our perception of the wrongness of insider trading seems to depend on *external changes*, rather than on internal changes of ours. Here the cause seems to be an external fact, i.e. a *normative fact*¹³.

⁹ It seems that Petrażycki held that for something to be a normative fact it is necessary that at once: (a) it is referred to by the subject as founding his ethical experience, and (b) it causes his ethical experience.

Besides the term *normoustanovitel'nyi*, Petrażycki uses also the verbs *opredeljat'* and *ssylat' na* (1909-10: 326). The verb *opredeljat'* means “to define”, “to cause”; the term *ssylat' na* means “to refer to”.

Now, in my opinion it may occur that the subject believes that the reason why he – under certain circumstances – experiences a certain ethical emotion is a certain normative fact despite such a belief being but an ethical rationalization. He may experience, say, an ethical repulsion towards some behavior because of causes he does not want to admit to himself. These causes may or may not be (unconscious) *ethical* emotions. In such cases the individual may search for some normative fact to rationalize and justify his repulsion. This may, in turn, cause his repulsion to become an ethical repulsion, especially when it comes to discharges of usually restrained aggressiveness (see next chapter). Homophobia – as an ethical phenomenon – may sometimes be explained this way.

In certain cases the search for some justification may result in some rationalization based, not on some normative fact, but rather of some pseudo-philosophical argument. (Often nature is referred to in such contexts). This phenomenon seems to be different from both intuitive law and positive law, as here reference is made, not to some normative fact, but rather to some philosophical argument.

As regards normative facts that cause but do not found ethical emotions, and the other way round, see Fittipaldi 2012.

¹⁰ On this important point see Petrażycki 1909-10: 456 f.

¹¹ Petrażycki talks of «determinability [of the content of positive law] through the perception of external facts» (Petrażycki 1909-10: 479).

However, it is worth pointing out that according to Petrażycki (and I share his view): «The term *normative facts* must not be understood as meaning external, objective happenings, as such, but rather the contents of the corresponding representation, the represented facts, independently of their actual existence». [Petrażycki 1909-10: 521]

As regards this topic see also below, sec. 3.4.

¹² As regards Petrażycki's conception of repeal see below, sec. 4.4.4.

¹³ Of course, Petrażycki pointed also to the phenomenon that over time positive ethical experiences may turn into intuitive ethical experiences (as well as the other way round) (1909-10: 501, 1909-10^{*}: 238). I conjecture that this phenomenon may have taken place in some countries in the case of insider trading.

This may suffice for the purpose of the present chapter. More words will be devoted to normative facts below (sec. 3.4, 4.8. and 4.10).

We can now stress the strong parallelism between

1. the way we experience the different color of a chair as a consequence of the fact that it has been painted and
2. the way we experience the different ethical quality of a certain course of action as a consequence of the fact that a certain normative fact has taken place.

Positive ethical qualities, just as the changes of really existing external qualities, seem to depend on happenings external, rather than internal to the individual.

Unlike positive ethical experiences, *intuitive ethical experiences seem not to be to be subject to any change* (even if, of course, such changes can and do often actually occur).

Here is what Petrażycki wrote about this topic.

The limitations as to time, space, persons etc., that are connected with the representations of normative facts and their crucial importance in the field of positive legal conscience, are alien to the intuitive legal conscience, that therefore, in the corresponding respects, has an unlimited scope and an unlimited applicability.

Furthermore, this is connected with corresponding differences between positive and intuitive legal projections.

While from the naïve-projective point of view positive rules are conceived [*predstavljajutsja*] as supreme laws, that exist and hold sway over a specific territory, for a certain time, etc., intuitive rules are conceived [*predstavljajutsja*] as supreme laws, that exist and dominate everywhere, at every time, in relation to all, etc. ... [Petrażycki 1909-10: 485, see also 1909-10: 514 f.]

It goes without saying that, according to Petrażycki (and, of course, I share this view), there is no a priori determination of whether a certain ethical experience is positive or intuitive (see Petrażycki 1909-10: § 36, 1909-10*: § 31).

As a matter of fact, there are ethical experiences that are more often positive, and others that are more often intuitive. If I were to give an example of an ethical emotion that is experienced by *most* adult people as intuitive, I would mention the *taboo of incest*¹⁴.

Before discussing the degree of intersubjective diffusion as a constituent of the stability of projective qualities, it is in order here to spend a few words as to the *linguistic purport of Petrażycki's distinction between positive and intuitive ethical experiences.*

¹⁴ Cf. below, sec. 3.2, where I shortly discuss of Freud's hypotheses about the emergence of this taboo.

The illusory realities produced by *positive* ethical experiences are often *transitory*. Their positiveness usually involves the thought that some-day they will or might cease to exist. These illusory realities are also *stative* since their representation does not involve the representation of an interval of time in which they take place (sec. 1.4). Therefore, *while intuitive ethical illusions are to be considered as qualities, positive ethical illusions are to be considered as states*.

In table 2.2 it is possible to compare the major ontological properties of states (like hunger, happiness) with the other core ontological kinds, according to Croft (1991: 137) (I changed some terms)¹⁵.

Table 2.2. – Features affecting the ontological coding of a certain reality, including states (adapted from Croft 1991).

	ENTITIES	QUALITIES	STATES	PROCESSES
VALENCE	zero	nonzero	nonzero	nonzero
STATIVITY	stative	stative	stative	processual
PERSISTENCE	persistent	persistent	transitory	transitory

We saw above that states, in certain languages, can be expressed through verbs (sec. 1.4).

Even though this topic somewhat pertains more to *jurisprudential ontologies*, it may be worth remarking here that the *being in* or *having effect/force of a certain statute*, also called *validity* (English), *validité* (French), *vigenza/validità/vigore/efficacia* (Italian), *dejstvje* (Russian), *Geltung/Gültigkeit* (German), is expressed in many languages through *unmarked* or *slightly marked* verbs¹⁶.

Cette loi vaut (French) (1)

Questa legge vige (Italian) (2)

Dieses Gesetz gilt (German) (3)

Этот закон действует (Russian) (4)
 (“This act in force”)

¹⁵ For a discussion of the meanings of the terms *valence*, *stativity* and *persistence* see above, sec. 1.4.

¹⁶ From the Petrażyckian perspective adopted in this book, *validity* (in the sense of *Verfassungsmässigkeit*) should be distinguished from *bindingness/the-being-in-force* (in the sense of *dejstvje*). See a detailed discussion in Fittipaldi 2012, — a and — b. There I also discuss the linguistic phenomenon first discovered by Amedeo G. Conte that such couples as *Gültigkeit/Geltung*, *ważność/obowiązywanie*, *validità/vigore* are not perfect synonyms.

Here may it suffice to say that a fact is *psychologically* a normative fact for individual-*x* – i.e. it is *binding for* (or *in force in*) *him* – if it is experienced by *x* as a normative fact, regardless of whether – if at all – it was *validly* (i.e. *verfassungsmässig*) “passed”.

In certain cases, the very word for “validity” means, or etymologically used to mean, “being strong” or “healthy”. This is the case of the Latin verb *valere* as well as, of course, of the English term *force*. As for health, unfortunately, health is somewhat transitory, much as sickness is.

By the same token, the *positive state of prohibitedness*, in certain languages, is expressed through verbs in the present passive (or in its functional equivalents)¹⁷.

απαγορεύεται (Modern Greek) (5)

запрещается (Russian) (6)

If phenomena related to positive ethics are experienced as close to states and can thus be expressed through verbs we should expect that phenomena related to intuitive ethics are not.

This implication seems to be contradicted by the existence of deontic modal verbs.

Now, deontic modal verbs do not function at all like verbs expressing states. This can be shown by examining what modal verbs, unlike other verbs, mean when used in tenses other than present. *When we are using a verb meaning a state in the past tense, we imply that that state does not exist anymore, while this is not at all the case of modal verbs.*

In table 2.3, I present some examples where the *past bindingness* of some normative fact and the *past positive prohibitedness* of some course of action are predicated.

Table 2.3. – Examples of predication of past positive ethical phenomena.

“This act was in effect”	“It was prohibited”
<i>Cette loi valait</i>	<i>воспрещалось</i>
<i>Questa legge vigeva</i>	<i>απαγορευόταν</i>
<i>Dieses Gesetz hat gegolten</i>	
<i>Этот закон действовал</i>	

There is no difference at all from the following case:

Paulus aegrotabat (Latin) (7)

(“Paul was sick”)

If we say that Paul *was* sick, we imply that now he is not sick any more, just as if we say that a certain statute *was* in effect we are implying that it is not in effect any more. This seems to hold true for positive prohibitednesses as well.

¹⁷ In this context I do not consider as present passive passives formed with the present of the verb *to be* and *past* participles, such as *it is forbidden* (English), *è vietato* (Italian), etc.

In Russian, also the past participle *zapreščěn* can be used.

Modal verbs do not function at all this way. Consider the following sentence:

Paul had to help John (English) (8)

In (8) we are not implying that under similar circumstances Paul should not do the same now or tomorrow¹⁸. We are probably stating only that at that time certain circumstances were instantiated under which Paul had to help John. John, a friend of Paul, may have been in need, while now he may not be in need any more. In the case of (7) it is the disease, namely the state, that ceased to exist. Instead, in the case of (8), what ceased to exist is not the quality of the obligatoriness of helping friends in need. What ceased to exist is the friend's need itself that occasions the experience of the obligatoriness. Recall what Petrażycki says: "intuitive rules are conceived as supreme laws that exist and dominate ... *at every time*".

It can be argued that deontic modal verbs prototypically refer to ethical *intuitive* qualities of people and courses of actions. If the courses of actions exist they necessarily have that ethical quality. If they cease to exist, so does their ethical quality¹⁹. The same seems to hold for intuitive ethical qualities of people. Think of the intuitive ethical qualities of some parent vis-à-vis his/her child. Intuitive ethical qualities attach very closely to people and courses of actions.

My conjecture therefore is that *deontic modal verbs refer prototypically to intuitive ethical qualities, even though they can be used to refer to positive ethical states as well*.

Throughout this book, if not otherwise stated, I will use the term *ethical quality* to refer to both ethical *qualities* and ethical *states*.

Unlike prototypical entities, qualities and processes – mirrored by unmarked nouns, adjectives and verbs –, states can be expressed through adjectives, verbs and nouns.

In particular, Croft stresses that states are amenable to be expressed in the terms of a *possession relation* between who has the state and the state itself.

¹⁸ Modal verbs in the past tense may, perhaps, express the idea that a certain positive ethical quality/state ceased to exist independently of the instantiation of the course of action to which it attaches only if they are introduced by some further temporal qualification such as "at that time", "for years ago", etc.: *At that time [noun] had to [verb]*.

Modal verbs in the future tense introduced by further temporal qualifications present us with many complications that cannot be discussed in this book.

¹⁹ This contention of mine seems to be compatible with Palmer's contention that «[s]emantically unreality often relates not the modality but to the event» (1979: 101). This is probably so because the modalities (i.e. ethical qualities) prototypically referred to with modal verbs are intuitive rather than positive.

Here is Croft's description and tentative explanation of this phenomenon.

If a state is a root noun^[20], then the modifier construction it will use will frequently be a possessive construction, for example Spanish *tengo hambre* "I am hungry". It may be that for some reason the relation between a state and the possessor of the state is more amenable to metaphoric expression as a possession relation than the relations between a [quality] and the possessor of the [quality]. One possible reason comes to mind. Possession, specifically the *alienable* possession of ownership, is *transitory* ... Thus the *transitory possession of a physical or emotional state* may be more easily expressed by a possessive construction with the state being expressed as a basic noun, than the more permanent possession of a [quality]. [Croft 1991: 139 f., last two emphases added. I adapted the text to the terminology adopted in this book]

Just below Croft writes:

Of course, possessive constructions are used to express *inalienable* possession as well, which is more permanent. However, most languages distinguish between alienable and inalienable possession constructions, albeit in sometimes subtle ways. A strong confirmation of this hypothesis would be to find that languages that have both states and [qualities] as basic nouns and have distinct alienable (or ownership-derived) and inalienable possessive constructions express modification by states with the alienable (ownership) construction and modification by [qualities] with the inalienable construction. [Croft 1991: 140, I adapted the text to the terminology adopted in this book]

Croft does not make any conjecture as regards why "the relation between a state and the possessor of the state is more amenable to metaphoric expression as a possession relation than the relations between a quality and the possessor of the quality". (In sec. 4.6.3 I will make a conjecture at this regard that can perhaps be further generalized).

The fact that Croft does not make any conjecture to explain this hypothesis does make this hypothesis unfalsifiable. Quite the contrary. As for what concerns us here, *it implies that there can be no language that distinguishes between alienable and inalienable possessive constructions and yet uses the former to refer to the possession of intuitive ethical qualities and the latter to refer to positive ethical states.*

One further and broader linguistic implication of the distinction between intuitive and positive ethical experiences is that *there can be no language with only one kind of possessive construction in which such a construction was first used to refer exclusively to intuitive obligatednesses and only later on to positive obligatednesses.*

²⁰ *Root* nouns are formed by adding inflectional endings directly to the root, with no intermediate suffixes. Of course, root nouns are often unmarked.

This excludes that the following constructions could be first used exclusively in the context of intuitive ethical experiences:

He has the obligation to + [inf.] (English)

Er hat die Verpflichtung + [inf.] (German)

Ha l'obbligo di + [inf.] (Italian)

у него обязанность + [inf.] (Russian)

What I said as regards intuitive ethical qualities vs. positive ethical states can be to some extent repeated as regards the bindingness of a certain normative fact.

Normative facts are not identical when it comes to the stability of their bindingness/being-in-force. The way a Muslim may experience the stability of the bindingness of the Qu'rān is probably different from the way the stability of the bindingness of a vertical or horizontal custom is experienced, and in turn the stability of the bindingness of these normative facts is probably experienced in a quite different way from the stability of the bindingness of a certain statute.

The *Qu'rān* is conceived by most Muslims as eternal and uncreated.

As for vertical and horizontal customs, while in vertical customs the principle is the older, the more binding, in horizontal ones the principle is the more widespread, the more binding. See Petrażycki 1909-10 (553 f.) and 1909-10* (264 f.)²¹.

Now, it seems to me that the bindingness of Qu'rān and of a vertical custom is quite a different phenomenon from the bindingness of a horizontal custom. Much as the Ten Commandments, the Qu'rān can be repealed by God only. As for customs, while a vertical custom is probably experienced as susceptible of repeal only on the part of some parliament, horizontal customs are probably experienced as both susceptible of repeal on the part of some parliament and as susceptible of gradual desuetude.

The situation is quite different in the case of statutes. Statutes are mostly experienced as losing their bindingness by the operation of some statute that is believed to repeal them in quite a sudden way²².

This may explain why the bindingness of statutes is expressed in many languages, not only through verbs (see above in this section), but also

²¹ I use these adjectives to translate Petrażycki's adjectives *starobraznyj* and *novo-obraznyj*, respectively. These adjectives stem from the noun *obraz* ("shape") and the adjectives *staryj* ("old") and *novyj* ("new").

I assessed Petrażycki concept of custom in Fittipaldi 2012. There is no reason to discuss this issue here.

²² The phenomenon of *repeal* pertains to both the psychological theory of ethics and the theory of ethical dogmatics. I deal with the latter elsewhere (2012 and — a). As regards the legal-psychological concept of repeal see below, sec. 4.4.4 and 4.11.

through possessive or similar constructions. Just think of the following constructions:

The statute has force (English)

The statute has effect (English)

La legge ha efficacia (Italian)

The statute takes effect (English)

It is worth remarking that in English and Italian bindingness may be also expressed through the metaphor of some movement:

The statute comes into effect (English)

The statute comes into operation (English)

The president signed the statute into law (English)

La legge entra in vigore (Italian)

This is again perhaps related to the fact that the bindingness of statutes, just as the location of some movable, is experienced as transitory²³. Further research is required as regards whether only *state-as-a-location metaphors* can explain further constructions across different languages or whether the way bindingness is treated in English as well as in other languages should be rather explained through the *existence-as-a-location-here metaphor* «according to which things *come into* existence and *go out of* existence» (Lakoff & Johnson 1999: 367). The reference to Kelsen's statement «Mit dem Worte 'Geltung' bezeichnen wir die Spezifische Existenz einer Norm» («By the word 'bindingness' I mean the specific existence of a norm») comes spontaneously to mind (1960: 9, 1960*: 10). But Kelsen's is a highly technical jurisprudential ontology, while the conjecture that in naïve legal ontology the bindingness of some fact (i.e. the being a *normative* fact thereof) is experienced in the terms of existence requires empirical investigation. Nonetheless such constructions as the following are striking:

The law [comes into/]goes out of effect[/force] (English)

It [comes into/]goes out of existence (English)

More about transitoriness can be found in sec. 4.6.3.

We can now turn to the second factor that affects the degree of stability of a projective quality: its *degree of intersubjective diffusion*. By this term I mean the *amount of people that are believed by the subject to experience a certain quality as associated to a certain person or course of action*.

²³ It is worth remarking that the term *transitory* stems from the Latin verb *transire* ("to pass by", lit. *trans-ire*: "to go beyond").

If in a certain community a certain dish is considered good by the overwhelming majority of the people, it is possible that people start thinking that the *cause* of this overwhelming majority is the very fact that that dish is *objectively* good. A corollary will be that if a person happens not to like that dish, that person must be somewhat sick – for instance, affected by some sort of color-blindness to food.

The degree of intersubjectivity may be related to one's reference group and may play an important role in the case of such kinds of food as *casu marzu*, a delicious Sardinian cheese riddled with live insect larva. It is quite probable that the way this food is considered varies dramatically depending on whether we ask a person from Sardinia (or from a country with a similar cheese) or not.

The more the perception of a certain quality in some person or course of action is diffused in a given community, the more probable it is that this quality will be considered to be an objective external quality of the entity or course of action, rather than a subjective evaluation projected onto the person or course of action. This diffusion will also imply that a different perception will be thought to be caused by a perturbation of the process of perception itself, rather than simply by a different attitude.

In general, I think that *intersubjective diffusion* plays a lesser role than *subjective stability* as to the general degree of stability of ethical qualities because subjective stability is much more deeply entrenched in the childhood of each of us. This remark takes us to the topic addressed in the next section.

2.6. THE CONNECTION OF SUBJECTIVE STABILITY AND INTERSUBJECTIVE DIFFUSION WITH THE PSYCHOLOGICAL DEVELOPMENT OF REALISM

The purposes of this paragraph are:

1. Showing why the degree of subjective stability plays a more important role than the degree of intersubjective diffusion.
2. Showing why ethical (projective) qualities are to be considered but wrong projective qualities, since Petrażycki's concept of projection leads to consider all qualities as projective.
3. Showing why, while realism is a not-yet-falsified falsifiable hypothesis, the hypothesis that legal realities have some external existence is a falsifiable and falsified hypothesis.

To attain these goals it is necessary to shortly discuss how each of us develops his own hypothesis of the existence of an external reality.

Each of us makes the first reality hypothesis by himself, when he is a small child.

It is very important to stress that each of us makes his hypothesis of realism independently of any other. This allows us to avoid Searle's mistake of thinking realism in the obscure terms of a *Background Condition of Intelligibility* (Searle 1995: 177 ff.), as well as the mistake of denying that realism is a true *hypothesis*²⁴ (178).

Searle's mistake consists of believing that the standard argument for realism is what I called the *degree of intersubjective diffusion* of certain perceptions:

A standard argument, perhaps the standard argument for realism is that convergence in science provides a kind of empirical proof of realism. The idea is that because different scientific investigators working at different times and places come up with the same or similar results, the best explanation for their doing so is that there is an independently existing reality that causes them to converge on the same hypotheses and theories. The difficulty with this argument is that in our understanding of the possibility of there being such phenomena as either convergence or failure of convergence, we are already presupposing realism. In order for us even to raise the question whether scientific investigation does converge in the suggested fashion, we have to presuppose an independently existing reality of investigators engaging in investigations ... [T]he entire discussion of convergence presupposes realism. [Searle 1995: 178 f.]

This should not be considered *the* standard argument for realism.

As a critical rationalist, I do not think that we should search for arguments *for* realism, but rather for ways to falsify (i.e. to test) it.

However, if it were methodologically correct to search for *positive* arguments for realism, such an argument should be, not the *external convergence of many people's perceptions*, but rather the *internal consistency of my own perceptions*.

The fact that what really matters is the subjective consistency of perceptions becomes pretty clear if we just read Hume and Berkeley (who was a realist *sui generis*, but still a realist²⁵).

For Hume and Berkeley convergence was not at all the standard argument for realism.

As to the way each of us develops realism, let us read Hume.

Our memory presents us with a vast number of instances of perceptions perfectly resembling each other, that return at different distances of time, and after considerable interruptions. This resemblance gives us a propension to consider these interrupted perceptions as the same; and also a propension to connect them by a continued existence, in order to justify this identity, and avoid the contradiction, in which the interrupted appearance of these

²⁴ As regards the way I use the term *hypothesis*, as opposed to the term *mere conjecture*, see below, sec. 3.7.

²⁵ See Albert 1987 (47, fn. 7).

perceptions seems necessarily to involve us. Here then we have a propensity to feign the continu'd existence of all sensible objects; and as this propensity arises from some lively impressions of the memory, it bestows a vivacity on that *fiction*: or in other words, makes us believe the continued existence of body. If sometimes we ascribe a continu'd existence to objects, which are perfectly new to us, and of whose constancy and coherence we have no experience, it is because the manner, in which they present themselves to our senses, resembles that of constant and coherent objects; and this resemblance is a source of reasoning and analogy, and leads us to attribute the same qualities to similar objects. [Hume 1739-40: § 1.4.2, 208 f.]

Actually here Hume is arguing that realism cannot be ultimately *founded*. Yet it is apparent that according to him, if there is to be a “standard” argument for realism, this argument is not intersubjective convergence, but rather the infrasubjective consistency of the subject’s perceptions.

Hume’s considerations are also a very interesting *psychological hypothesis* about the way each of us develops realism. This is the issue I wish now to focus on.

We can take as our starting point George Berkeley’s psychological philosophy.

Berkeley starts from a very broad concept of idea, as including both *perceptions* and *representations*. I think that this broad concept of *idea* perfectly parallels to Piaget’s concept of *adualism*²⁶, and can be used also in an exclusively psychological-developmental context.

Berkeley distinguishes two kinds of Ideas (1734: § 29):

1. ideas that are completely dependent on the will of each of us and
2. ideas that do not have such a dependence.

Now, as regards the second kind of Ideas Berkeley writes:

When in broad daylight I open my eyes, it is not in my power to choose whether I shall see or not, or to determine what particular objects shall present themselves to my view; and so likewise as to the hearing and other senses; the ideas imprinted on them are not creatures of my will. [Berkeley 1734: § 29, 259 f.]

In the context of the development of the child, we assume that the small child does not distinguish these two subsets within the broad set of Berkeleyan ideas. Only over time does the small child distinguish the subset of the ideas that do not depend on his will. It can be argued that the *experi-*

²⁶ See above, sec. 2.3, fn. 3, and below, in this section, fn. 32.

It may be worth recalling that Piaget somewhat knew Petrażycki’s conceptions. Unfortunately, due to the language barrier, his accounts of Petrażycki’s conceptions are often far from being accurate. See, for instance, Piaget’s account of Petrażycki’s concept of a normative fact (Piaget 1950: 238).

*ence of Ideas not depending on one's will is the very beginning of the psychological development of realism*²⁷.

This experience causes the development of realism, but it cannot methodologically found it (since nothing can be ultimately founded according to Hans Albert's critical rationalism, that I fully accept). From an *epistemological* point of view, though, we can remark that the interruption of this experience would be tantamount to a falsification of realism²⁸. *If someday I were to realize that all my Ideas depend on my will, I should reject realism*. In other words I would consider realism wrong if I suddenly were to realize that everything I wish comes true. We could call this solipsism *wishful solipsism*²⁹.

²⁷ Compare, at this regard, the following statements by Sigmund Freud: «An infant at the breast does not as yet distinguish his ego from the external world as the source of the sensations flowing in upon him. He gradually learns to do so, in response to various promptings. He must be very strongly impressed by the fact that some sources of excitation, which he will later recognize as his own bodily organs, can provide him with sensations at any moment [i.e. depend on his will], whereas other sources evade him from time to time – among them what he desires most of all, his mother breast – and only reappear as a result of his screaming for help. In this way there is, for the first time set over against the ego an “object”, in the form of something that exists “outside” and which is only forced to appear after a special action». [Freud 1929*: 67]

Just below Freud writes also: «A further incentive to a disengagement of the ego from the general mass of sensations – that is, to the recognition of an “outside”, an external world – is provided by the frequent, manifold and unavoidable sensations of pain and unpleasure the removal and avoidance of which is enjoined by the pleasure principle, in the exercise of its unrestricted domination. A tendency arises to separate from the ego everything that can become a source of such unpleasure, to throw it outside and to create a pure pleasure ego which is confronted by a strange and threatening “outside”». [Freud 1929*: 67]

²⁸ In general, I prefer to formulate Hans Albert's *Prinzip der kritischen Prüfung*, “Principle of critical test” (1968, 1968*) in a subjective way like the following: *a person who makes a hypothesis should declare the conditions under which he will admit that his hypothesis is wrong or else admit that he is making a mere conjecture and recommend the quest for such conditions* (see below, sec. 3.7).

Of course, it remains open to discussion: (1) whether these conditions have been fulfilled or not, and (2) whether these conditions are really connected to the truth or falsehood of the hypothesis.

I am using here the term *falsification*. But it should be borne in mind that there is not such a thing as an ultimate foundation or *falsification* for any kind of theory, including realism. As Hans Albert has written: «Even in case of falsification of some hypothesis it is not gained any certainty at all that it is wrong». [Albert 1982: 63]

²⁹ It would be wrong to consider the concept of *wishful solipsism* but a wild philosophical speculation. The concept of wishful solipsism is closely related to Freud's concept of *omnipotence of thoughts* (*Allmacht der Gedanken*). According to Freud the principle of omnipotence of thoughts governs both the child's mind and magical thinking (1912-13*: 85).

If this is true, it could be asked why magical thinking seems to develop into sets of complicated techniques. Why do wishes not suffice?

Freud provides us with some clues to make a conjecture to answer this question: «As time goes on, the psychological accent shifts from the *motives* for the magical act on to the *measures* by which it is carried out – that is, on the act itself. (It would be perhaps

It is worth remarking that, not only the small child does experience a subset of ideas that seem not to depend on his will, but that the ideas belonging to this subset seem to display a high degree of *consistency*.

Thus, we have two kinds of ideas. Ideas that seem to depend on our will, that Berkeley calls *ideas of the imagination*, and ideas that do not depend on our will but display a high degree of consistence. Berkeley calls the latter kind of ideas *ideas of Sense*.

The high degree of consistence of *ideas of Sense* (that we also call *perceptions*) is the *second* cause of the development of realism in each small child.

As regards this point it is again worth reading George Berkeley:

The ideas of sense are more strong, lively, and distinct than those of the imagination; they have likewise a steadiness, order, and coherence, and are not excited at random, as those which are the effects of human wills often are, but in a regular train or series ... [30].

This gives us a sort of foresight which enables us to regulate our actions for the benefit of life. And without this we should be eternally at a loss; we could not know how to act anything that might procure us the least pleasure, or remove the least pain of sense. That food nourishes, sleep refreshes, and fire warms us; that to sow in the seed-time is the way to reap in the harvest; and in general that to obtain such or such ends, such or such means are conducive – all this we know, not by discovering any necessary connexion between our ideas, but only by the observation of the settled laws of

more correct to say that it is only these measures that reveal to the subject the excessive valuation which he attaches to his psychic acts)». [Freud 1912-13*: 84]

Why does the focus go from the wishes to the means? What is the connection of this change of focus with the subject's overrating of his psychic acts?

I make the following conjecture.

The subject that develops magical thinking starts from some sort of wishful solipsism. When the subject develops the reality principle, he accepts the idea that reality must be manipulated with some technique in order to attain what he wants. If he wants a toy he must go the room where the toy his. If he wants water he must open the water tap. If he wants the mum, he has to "scream for help".

In this way the subjects realizes that some *technique* is necessary in order to attain certain goals.

When it comes to certain wishes that do not come true, the subject, rather than conclude that his wishes cannot come true by themselves, may conclude that he did not wish the correct way. He may explain the fact that his wishes did not come true by the ad-hoc hypothesis that he did not do something that should have attached to that wish. For instance, he should dress exactly in the same way he dressed the last time he enjoyed what he is currently wishing.

The technique becomes more and more complicated at the pace with the subject's realization that his wish sustained by the former technique did not come true. Actually, the complication of the technique is but the result of a process of immunization of the original theory of the omnipotence of thoughts by the way of ad-hoc hypotheses.

About magical thinking cf. also below sec. 3.2, fn. 18.

³⁰ I do not quote the passages where Berkeley mentions the hypothesis of god, because the God hypothesis is not really necessary, once we accept critical rationalism as developed by Hans Albert. However, it is not necessary to discuss this issue in this context.

nature, without which we should be all in uncertainty and confusion, and a grown man no more know how to manage himself in the affairs of life than an infant just born. [Berkeley 1734: § 30-31: 260]

Berkeley mentions only complex laws of nature, such as the fact that food nourishes, that sleep refreshes, that fire warms, etc., but our capability of foresight relies on much simpler hypotheses, such as the hypothesis of the *continued existence of objects ceteris paribus*.

To grasp this point we just have to recall the above-quoted passage of Hume, where he stresses that our memory confronts us with *a vast number of instances of perceptions perfectly resembling each other that return at different distances of time, and after considerable interruptions*. These resemblances are a much more extraordinary and deeply entrenched phenomenon, than that food nourishes, that sleep refreshes, etc. Sure, if food did not nourish, sleep did not refresh, fire did not warm, sowing in the seed-time were not the way to reap in the harvest, we would hardly survive in reality, but if we did not experience plenty of ideas of Sense perfectly resembling each other, we might not even believe that some reality does exist. Yet, this phenomenon is so deeply entrenched in our psyches that we are not even aware of it³¹.

The stream of the perceptions of each of us is so consistently complicated that nobody could even imagine that it stems from his own self.

George Berkeley, from a foundationist point of view, thought that the consistency of the stream of our perceptions implies the existence of some God author of our perceptions. Discussing Berkeley's foundationist point of view does not lie within the scope of this book. It is worth remarking here, though, that *if someday the stream of my perceptions were to become fully inconsistent and unpredictable, I should again reject realism*. This kind of situation could be called *chaotic solipsism*, and could be compared with some sort of bad trip.

For instance, I should reject realism, if all things I usually deal with started to change, appear or disappear in completely unforeseeable ways. This is a second reason why realism is a falsifiable hypothesis.

There is a *third* cause of realism.

The ideas that Berkeley calls *ideas of Sense* (and that we call *perceptions*) seem to be independent of the my *internal changes*. Think of such changes as getting sick, sad, hungry, etc. These changes are not suitable to be controlled by my will³².

³¹ This also explains why it is so difficult to discard the idea that mathematics and logic are formal sciences, whereas they simply are empirical sciences concerned with the properties of whatever is capable of continued existence.

³² As regards the child's adualism, consisting of the confusion of internal and external, see Piaget 1926* (especially ch. 3 regarding the origin of dreams).

Internal experiences – completely independent of the experiences made through the five senses as they seem to be – cause the small child to assume that there exists a reality experienced through the five senses that is independent of his internal states. (In the process of causation of this belief a major role is probably played by the phenomenon that the experiences produced by the five senses are consistent with each other).

Again, this is but the description of the cause of the *psychological* development of realism by each of us, and cannot be at all a *foundation*, since no ultimate foundation of anything is possible. Yet, from an *epistemological* point of view, we can remark that if *someday I were to realize that all my Berkeleyan ideas get excited as a consequence of my internal changes, I should reject realism*. I would call such a situation *projective solipsism*.

Now, in some languages, like Polish, Italian and German, there are such idioms as:

widzieć wszystko w ciemnych barwach (Polish)

Vedere tutto nero (Italian)

Alles schwarz sehen (German)

(lit. “To see everything black”)

Are we to think that the existence of such expressions implies that when Polish, Germans and Italians are pessimistic about something they really start seeing everything black? Of course not. These are metaphorical idioms precisely because these people do not start seeing everything black. If they really started seeing everything black, they would be affected by some sort a transitory blindness. But this is obviously not the case, as can be inferred from the practical behavior of the people who claim to be seeing “everything black”.

Once each of us has made the first step and starts believing that there exist objects and people independent of himself, the reality hypothesis gets enriched with a further hypothesis, namely the hypothesis that reality causes similar perceptions in other people too³³.

³³ From an epistemological point of view, it is not necessary to believe that perceptions resemble reality. It is enough to believe that the same realities *cause* similar perceptions in different individuals, so that theories can be discussed on that basis: «[W]e can [in no way] come back to the idea of a theory-free observational basis ... [T]he perception as the lowest degree of knowledge is determined also by superindividual and genetically set theories. Thus the scientific practice can always draw on a *common* [emphasis added] *empirical basis*, that is *neither atheoretical, nor errorless*, but that *nevertheless* makes it possible to compare different theoretical conceptions». [Albert 1987: 101]

As for *naïve realism*, the hypothesis can be made that naïve people believe that perceptions *do* resemble reality and that the same realities cause precisely identical perceptions in everybody.

Only now do we start to take into account other people's opinions and behaviors in order to obtain information about reality and to test ours about it, as well as only now is the degree of intersubjectivity of a certain perception considered as an index of the existence of some (external) reality which causes it.

This explains once again why, between subjective stability and intersubjective diffusion, it is subjective stability that is by far more deeply entrenched in the childhood of each of us and crucial when it comes to explaining the coming into existence of the illusions of projective ethical qualities.

What happens with the hypothesis of the existence of objects (and people), happens with their qualities too.

The fact that not all qualities have the same *degree* of subjective stability (as well as of intersubjective diffusion) may have led some philosophers to make a distinction between *primary* and *secondary* qualities.

It seems pretty clear to me that John Locke's *primary qualities* are qualities that display the highest degree of stability.

Qualities thus considered in Bodies are, First such as are utterly inseparable from the Body, in what estate soever it be; such as in all the alterations and changes it suffers, all the force can be used upon it, it constantly keeps; and such as Sense constantly finds in every particle of Matter, which has bulk enough to be perceived, and the Mind finds inseparable from every particle by our Senses. *v.g.* Take a grain of Wheat, divide it into two parts, each part has still *Solidity, Extension, Figure, and Mobility*; divide it again, and it retains still the same qualities. For division (which is all that a Mill, or Pestel, or any other Body, does upon another, in reducing it to insensible parts) can never take away either Solidity, Extension, Figure, or Mobility from any Body, but only makes two, or more distinct separate masses, reckon'd as so many distinct Bodies, after division make a certain Number. These I call *original* or *primary Qualities* of Body, which I think we may observe to produce simple *Ideas* in us, *viz.* Solidity, Extension, Figure, Motion or Rest, and Number. [Locke 1700: sec. 2.8.9: 134 f.]

According to Locke, therefore, primary qualities "are utterly inseparable from the body": "Division can never take away either Solidity, Extension, Figure, or Mobility from any Body."

To use Croft's word, we could say that primary qualities are the qualities that display the *maximal degree of relationality*. If *solidity, extension, figure* are the most persistent kinds of qualities, it could be asked why they are expressed through philosophical words only, and not through words belonging to naïve language. I am thinking in the first place of *extension*.

My answer is that these qualities make up the very (belief of) existence of entities. This is why they do not need to be expressed through adjectives.

The very perception of these qualities is considered tantamount to an index of the existence of something and therefore the hypothesis of the

existence of something is strictly connected with the perception of these qualities.

The question I will try to answer in ch. 4 is why such entities as debts, duties, rights and powers, which seem to have no solidity, extension, figure, motion/rest, are nonetheless experienced as capable of existence.

After this discussion of the reality hypothesis we are now equipped to discuss the connection between realism and the theory of projections.

From a psychological point of view we tend to assume that some quality, as well as the entity endowed with it, is external to us depending on the degree the following conditions are fulfilled:

1. The quality seems to be independent of the will of each of us.
2. The quality seems to have continued existence – *ceteris paribus*.
3. The quality seems not to be connected to internal changes of each of us.
4. The quality seems to be the same for everybody.

What causes each of us to think that certain ideas (I keep using this word in Berkeley's broad meaning) are produced by something external to us is a certain set of *structural features* of the experience of these ideas.

The first three factors make up what I called the degree of subjective stability of a quality, the fourth one constitutes its degree of intersubjective diffusion.

It should be clear that from a psychological point of view each of us develops the wrong belief of the external existence of ethical qualities in the same way each of us develops the correct belief of the external existence of really existing primary and secondary qualities³⁴.

All qualities are projective because *qualities (as well as other real or illusory entities) are a way the subject projects some order into the stream of his perceptions*. From a scientific point of view, of course, ethical qualities do not exist in external reality, while primary and secondary qualities do. That is why I think that *ethical qualities are but wrong projections of our ethical appulsions and repulsions*.

³⁴ It is in order here to stress that I consider secondary qualities, such color, bitterness, warmth as really existing qualities, since the objective features that cause them produce more or less the same experience in all individuals (cf. fn. 33). This happens because of our common perceptive apparatus. Instead, ethical qualities are experienced merely because of the existence of a super-ego (ch. 3) that not necessarily has the same content or structure for each individual. In this sense it would be better to call ethical qualities (along with other qualities such as the taste for certain comfort foods or some kinds of music) *tertiary qualities*.

It should be remarked that the term *tertiary quality* has been already used in Gestalt psychology (e.g. Koffka 1940 and Bozzi 1990: 100). If this theory is to be accepted, then ethical qualities should be perhaps called *quaternary*. But it cannot be excluded that – even without adhering some sort of natural law theory – some of them are tertiary in the sense of Gestalt psychology.

If my analysis is correct, then Petrażycki was wrong when he contended that the obligatoriness of helping one's close relative is just as the appetizingness of a roast. The obligatoriness of helping one's close relative does not seem to usually depend on the internal changes of the individual, while the appetizingness of the roast does. *This explains why people think that helping one's close relative is obligatory even when nobody thinks of it, while a roast is appetizing only insofar there is somebody who is currently "appetized" by the roast.* Ethical qualities are believed to exist even when we are sleeping, qualities such as the appetizingness of the roast are not.

This point is closely connected to a second one.

Ethical emotions are often very stable and consistent. This is why they can be used to explain ethical qualities. Now, some legal philosophers have tried to explain ethical realities with a different psychical phenomenon: *will*. It has been contended that legal realities should be explained in the terms of the *will of the obligated person*³⁵.

It was very easy for Petrażycki to discard these theories. Here is a quotation where Petrażycki criticizes such a theory:

We ascribe [*pripisyvaem*] to ourselves and to other people several different legal obligations even in the absence of any sort of order, menace, etc. This is so independently of both the fact that the obligated person knows anything about that and of the fact that there is any corresponding "will" [*volja*] (among others, "will" is a transitory [*prebodjaščij*] psychic phenomenon, while obligations are something continuous [*dlitel'nyj*] that does not exist only when the obligated person thinks of them). [Petrażycki 1909-10: 358 f.]

Here Petrażycki is not denying that the illusions of obligations are a psychic phenomenon. He is denying that obligations are *that* psychic phenomenon³⁶. According to him, positive/negative wills and ethical appulsions/repulsions are just psychically different phenomena³⁷.

Only *ethical* appulsions and repulsions can explain the illusions of projective qualities that are believed to exist even when nobody is thinking of them. This is so because *ethical emotions result from stable dispositions (i.e. convictions) to experience them every time a certain behavior is perceived or represented* (see next chapter).

³⁵ See at this regard Fittipaldi 2012 (24).

³⁶ From a psychological point of view it is worth stressing that it is not even correct to state that commands declare the *will* of the person who commands. A person may be forced to order something he actually does not want. This point was first made by Axel Hägerström and Karl Olivecrona (see Pattaro 1974: 121 ff. and 124, fn. 5).

³⁷ It should also be stressed that the will of the obligated person would be an internal phenomenon only for the obligated person, while it would be an external phenomenon for some third spectator. Ethical solipsism contends, instead, that ethical phenomena are internal to each participant in the legal phenomenon (see ch. 4). This is why Petrażycki calls such a theory *naïve-realistical* (cf. above, sec. 1.2, fn. 21).

The question that shall be addressed in the next chapter is why ethical emotions have such structural features as to produce the projective mechanism here described.

We shall see that Freud's theory of a super-ego can, among others, explain:

- What the stable disposition to experience ethical emotions is.
- Why ethical experiences seem to be independent of the will (i.e. the ego) of each of us.
- Why ethical experiences display some sort of consistency.
- Why ethical experiences seem to be independent of the internal states of each of us.
- Why ethical experiences display some degree of intersubjective diffusion.

We can now spend a few words to show why, while realism is a not-yet-falsified falsifiable hypothesis, the hypothesis that legal realities have some external existence is a falsifiable and falsified hypothesis.

I said above that wishful solipsism would amount to a falsification of realism.

Now, *to some extent we are able to change our ethical attitudes*. Think of some parent who always experienced some ethical repulsion towards a certain sexual orientation. When he discovers that his beloved child has that very sexual orientation, he might try to change his hitherto stable internal ethical repulsion out of love for him/her. This may take time, but it is possible. In the case of external realities, instead, the only way to change them is acting in the external reality itself.

Second. *The fact that convergence is no argument for the external existence of at least something (i.e. minimal realism) does not exclude that non-convergence is an argument for the purely internal existence of something*. The non-convergence of ethical convictions is such a widespread phenomenon that it is convergence, rather than non-convergence, that requires a sociological explanation (above, sec. 1.1).

These two arguments are my case for ethical solipsism.

3.

ILLUSIONS PRODUCED BY THE FEATURES OF THE SUPER-EGO

3.1. THE LIMITS OF PETRAŻYCKI'S PROJECTIVE HYPOTHESIS

As we have seen in sec. 1.3, Petrażycki's held that projective mechanisms can explain both the *illusions of ethical qualities* ascribed to people/behaviors (*obligatedness, obligatoriness, prohibitedness*) and such *illusions of ethical entities* as the illusions of linguistic imperatives and prohibitions, as well as other illusions that will be discussed in ch. 4.

My contention, instead, is that the process through which we project our ethical emotions onto people or courses of actions is *simpler* than the process that causes us to experience the illusions of linguistic imperatives and prohibitions.

After discussing projective qualities in ch. 2, we can now turn to the following problem: *why do some people experience illusions of linguistic imperatives and prohibitions (henceforth: 'imperatives') where no such linguistic phenomena took place in the external reality?*

Of course, that some people do experience this kind of illusions is itself a conjecture that should be empirically tested. Testing it does not lie within the scope of this book. I will take the truth of this conjecture for granted, just as so many authors with the most diverse approaches did. But I am aware of this conjectural nature.

Now, my main contention in this chapter will be that, while the explanation of the illusions of ethical qualities does not require the discussion of the *differentia specifica* of *ethical* experiences as against other psychic experiences, the explanation of the illusions of imperatives does.

The goals of this chapter are the following:

1. Explaining the mystic-authoritativeness¹ of ethical emotions.
2. Showing that the cause of the mystic-authoritativeness of ethical emotions is also the cause of the illusions of linguistic ethical imperatives.

¹ Above, sec. 1.2.

3. Showing that that cause causes the blanketness² of ethical emotions as well.

Since, unlike me, Petrażycki held that the illusions of imperatives are but a normal projective phenomenon that is not related to the differentia specifica of ethical experiences, he was forced to hold that illusions of imperatives can be found also in realms of experience other than ethical phenomena. If he had been consistent with his own principle that theories should not be limping³, he should have predicted that even appetizingness can cause illusions of imperatives. Instead, he made this prediction just as regards esthetical phenomena:

[I]n the field of the esthetic psyche (where, in general, impulsive projection plays no small part), not only are fantastic ... attributes [*svojsťva*] ascribed to objects and phenomena but there are fantastic processes in operation; confusing representations [*predstavlenija*] of some demanding [*trebovanie*] and obtaining [*dobyvanie*] of a certain conduct from subjects, or of not permitting – and of rejecting for some reason – certain behaviors originating from somewhere. [Petrażycki: 1901-10: 39, 1901-10*: 41, translation modified]

The very fact that Petrażycki, in this context, uses the word *trebovanie*, a term that has a strong legal connotation in Russian and that in English could be translated with such terms as *legal claim*, *pretension*, etc., shows that he was here trying to show that the creation of such *trebovanija* is but a natural consequence of projective processes in general⁴.

Petrażycki does not give any explanation as regards why illusions of imperatives are found more often in the realm of ethical emotions than in the realms of other kinds of emotions. Therefore his theory of projective phenomena turns out to be jumping. It claims to cover a set a phenomena that is broader than the phenomena for which it holds true without providing an explanation for the exceptions.

In this chapter I will attempt to explain where *ethical* emotions stem from and thus explain as well why there are illusions of linguistic imperatives endowed such features as mystic-authoritativeness, blanketness, etc.

² Above, sec. 1.2.

³ As regards the concepts of a limping and a jumping theory see below, sec. 4.2 and Fittipaldi 2012.

⁴ Unlike Petrażycki I think that the phenomenon of claims is closely related to the attributiveness of legal phenomena. Some words about claims will be spent below in sec. 4.8, fn. 130.

3.2. THE DIFFERENTIAE SPECIFICAE OF ETHICAL EMOTIONS

As I said, Petrażycki held that ethical experiences seem to have a mystic-authoritative character. Let us read a quotation where Petrażycki discusses this feature, along with other ones.

[Ethical] motorial excitements [*vozbuzdenija*] and incitements [*ponukanija*] are of unique mystic-authoritative character [*mističesko-avtoritetnyj barakter*]: they stand opposed to our emotional propensities and appetences [etc.] as impulses with the loftiest aureole and authority, proceeding as from a source unknown and mysterious, and extraneous to our prosaic ego [*ja*], and possessing a mystic coloration not without a tinge of fear. This character of ethical impulses finds expression among others in popular speech, poetry, mythology, religion, and similar creations of the human spirit in the form of phantastic ideas, and particularly in the idea that in such cases some being other than our ego [*ja*] is also present opposing our ego [*ja*] and inciting it to a certain conduct: some mysterious voice [*golos*] addressing us and talking to us. [Petrażycki 1909-10: 34, 1909-10*: 37 f.]

It is easy to recognize in this description a similarity with Sigmund Freud's hypothesis of a super-ego⁵.

⁵ I shall not discuss here Adam Smith's hypothesis of an impartial spectator. The reason is not that I consider it wrong or incompatible with Sigmund Freud's theory. My impression is that they are both true and describe two different modes of psychological development of ethics. Adam Smith describes the way a clever person, who did not undergo the processes hypothesized by Freud, might develop ethical sentiments, if such a person desires to be loved and to be lovely (i.e.: to be a «natural and proper object of love», Smith 1790: § 3.2.1, 166).

Also the kind of person discussed by Adam Smith differentiates a part of his self and gives it the role of a judge of his actions. This happens, according to Smith, because of the following mechanism: «When I endeavour to examine my own conduct, when I endeavour to pass sentence upon it, and either approve or condemn it, it is evident that, in all such cases, *I divide myself, as it were, into two persons*; and that I, the examiner and judge, represent another character from that other I, the person whose conduct is examined into and judged of. The first is the spectator, whose sentiments with regard to my own conduct I endeavor to enter into by placing myself in his situation, and by considering how it would appear to me, when seen from that particular point of view. The second is the agent, the person whom I properly call myself, and of whose conduct, under the character of a spectator, I was endeavouring to form some opinion». [Smith 1790: § 3.1.6, 164 f., emphasis added]

According to Smith, once this mechanism is stabilized we start having "a man within the breast" as a stable "inmate". Even though from certain points of view Freud's super-ego and Smith's man within the breast are similar (for instance, they are both very "well-informed", not only about our deeds, but also about our intentions), there are some huge differences, among which I must mention the period in a person's life when they get developed.

While – as we shall see –, according to Freud's approach, people with a super-ego develop it when they are small children *by interaction with their first caretakers*, according to Smith the "man within the breast" gets developed much later: «A very young child has no self-command, but, whatever are its emotions, whether fear, or grief, or anger, it endeavours always, by the violence of its outcries, to alarm, as much as it can, the attention

In particular, Sigmund Freud's theory is able to provide us with some conjectures about the following features of ethical emotions⁶:

1. The phenomenon that they seem to stem from something *different from the ego*.
2. The phenomenon that they seem to exist *linguistically*, as if provided with some sort of *voice*.
3. The phenomenon that they seem to have a *tinge of fear (authoritativeness)*.
4. The phenomenon that they seem to have a *mystic coloration*.
5. The phenomenon that they seem to be *blanket* emotions (above, sec. 1.2).

of its nurse, or of its parents. While it remains under the protection of such partial protectors, its anger is the first, and, perhaps, the only passion which it is taught to moderate. By noise and threatening they are, for their own ease, often obliged to frighten it into good temper; and the passion which incites it to attack, is restrained to its own safety. When it is old enough to go to school, or mix with its equals, it soon finds that they have no such indulgent partiality. It naturally wishes to gain their favour, and to avoid their hatred or contempt. Regard even to its own safety teaches it to do so; and it soon finds that it can do so in no other way than by moderating, not only its anger, but all its passions, to the degree which its play-fellows and companions are likely to be pleased with». [Smith 1790: § 3.3.22, 203-204]

This means that according to Smith the only ethical impulsion the child can develop by interaction with its first caretakers is an impulsion to counter his natural aggressiveness (for a discussion of the relationship between aggressiveness and super-ego according to Freud see below sec. 3.5). However, Smith thinks that the child, in this context, would counter his aggressiveness only because of what Freud called *real anxiety*, and not because of *ethical anxiety* (see discussion just below in text).

I consider it plausible that persons who develop a "smithian" ethics do not attach to "ethical" emotions the mystic-authoritative feature Petrażycki talks about.

Smith's morality seems pretty similar to Piaget's (1932*) morals of cooperation (*moral du respect mutuel*). Piaget opposed this morals to the morals of constraint (*moral de l'autorité*). While Piaget's morals of constraint stems from the child's interaction with his caretakers and has the mystic-authoritative features that according to Petrażycki characterize all ethical emotions, both Smith's ethics and Piaget's *moral du respect mutuel* seem to be devoid of these features.

All this seems to imply that there can be *ethical emotions devoid of mystic-authoritative features*. I think it preferable, though, to call these emotions *quasi-ethical*. In general, I think that there can hardly be pure quasi-ethical emotions. The reason for this is that I accept Freud's contention that the specialization of a part of the ego to the task of controlling the ego, once developed about certain imperatives and prohibitions (such as the ones about cleanness), can later on get enriched with new contents, that get subsequently enforced by the super-ego in the same way the first ones do. A corollary of this theory is that there is not much room left for a *pure* Piagetian moral du respect mutuel or a pure Smithian morality to develop.

⁶ I am aware that I am assuming here that ethical emotions have these features without providing any evidence for this. Searching for this kind of evidence does not lie within the scope of this book, as I am here trying to answer questions left open by Petrażycki's ethical solipsism. One of these questions is *why* ethical emotions should have the features Petrażycki attributes to them, not *whether* they actually have these features. If they do not have these features, the lack of an explanation cannot be considered as a shortcoming of Petrażycki's ethical solipsism.

These features can be explained if we make the conjecture that *Petrażycki's ethical emotions are caused by Freud's super-ego*. The motorial excitements people experience toward certain persons or courses of actions could be considered to be the result of the activity of the super-ego.

In order to understand why Freud's super-ego may produce the features that Petrażycki considers typical of ethical emotions we must examine the origin of the super-ego. *According to Freud, individuals are not born with a super-ego*. Super-ego is the result of the interactions of the child with his caretakers (mostly his parents); it is the result of the *internalization* of the caretakers by the child.

Let us read Freud:

[Y]oung children are amoral and possess no internal inhibitions against their impulses striving for pleasure⁷. The part which is later taken on by the super-ego is played by an external power, by parental authority. Parental influence governs the child by offering proofs of love and by threatening punishments which are signs to the child of loss of love and are bound to be feared on their own account. This *realistic anxiety* [*Realangst*] is the precursor of the later *ethical anxiety* [*Gewissensangst*]. So long as it is dominant there is no need to talk of a super-ego and of a conscience. It is only subsequently that the secondary situation develops (which we are all too ready to regard as the normal one), where the external restraint is internalized and the super-ego takes the place of the parental agency and observes, directs and threatens the ego in exactly the same way as earlier the parents did with the child. [Freud 1932*: § 31: 62, translation modified, emphasis added]

Before showing how the theory of the super-ego can give answers to the questions left open by Petrażycki it is in order here to spend a few words as regards the way the process of internalization is held to take place⁸.

In many psychoanalysts' opinion, a crucial role to the development of super-ego is played by the cleanness imperatives issued by the parents. This opinion has been supported by some of Freud's followers already in the twenties. Sándor Ferenczi considered *sphincter morality* as a precursor of the super-ego.

⁷ Freud does not mention here child's aggressive impulses. I discuss them in sec. 3.5.

⁸ I will not discuss here the role of castration complex in the development of the super-ego because this aspect of Freud's theory has been falsified. Freud's hypothesis that the fear of castration plays a specific causal role in the development of the super-ego implies that women have a weaker super-ego than men, as Freud explicitly contended (Freud 1932*: § 33), and therefore women are less prone than men to experience guilt and shame. This implication, though, has been empirically falsified and thus Freud's hypothesis about the role of castration complex has been falsified too. See Tangney & Dearing 2002 (128, fn. 1) and Tangney (1994). (It goes without saying that the fact that I do not adopt in this book a gender-neutral language does not at all imply that, when I discuss the development of super-ego in children, I am thinking exclusively of male children).

All this implies that Popper's idea that psychoanalysis is not falsifiable is completely wrong. It is falsifiable and sometimes has been falsified. As to this issue see below, sec. 3.7.

The anal and urethral identification with the parents ... appears to build up in the child's mind a sort physiological forerunner of the ego-ideal or super-ego. Not only in the sense that the child constantly compares his achievements in these directions with the capacities of his parents, but in that a severe sphincter-morality is set up which can be only contravened at the cost of bitter self-reproaches and punishments by conscience. It is by no means improbable that this, as yet semi-physiological, morality, forms the essential groundwork of later purely mental morality ... [Ferenczi 1925: 379]

Carl Müller-Braunschweig explicitly considered the *Reinlichkeitsangewöhnung* (getting into the habit of cleanness) of the child a crucial factor to the coming into existence of the super-ego⁹ in the individual, as much as the resolution of Oedipus-complex:

It seems to me that in the history of the individual the experience of getting into the habit of cleanness – that starts so early – competes with the experiences stemming from Oedipus-complex. [Müller-Braunschweig 1922: 249 f.]

Let us discuss very shortly the role of cleanness and of the Oedipus-complex as regards the emergence of the super-ego¹⁰.

Joseph Sandler (1960) makes the example of cleaning one's hands.

When the child decides to wash his hands he reaps two different advantages:

- a. He does what his mother wants (*he retains his mother's love*).
- b. He becomes (clean) like his mother (*narcissistic advantage*).

The first factor plays a crucial role, because in this way the child can avoid punishment and obtain love.

The second factor plays also a crucial role because of the way the child conceives his caretakers. The child, by making his caretakers' imperatives his own, can pretend to possess to some extent the magnificent features he ascribes to them and that we will discuss just below in this paragraph. In this way the *sense of duty* will be explained in the terms of a narcissistic emotion (below sec. 3.6) and thus reduced to pride.

⁹ Müller-Braunschweig could not use the term *Über-Ich* as this term was first used by Freud in 1923.

¹⁰ In this context it is worth recalling the work done by J. Heidi Gralinski and Claire B. Kopp (1993) in their *Everyday Rules for Behavior: Mothers' Requests to Young Children*. The authors have empirically examined how mothers socialize young children toward behavioral self-regulation. They have individuated the following areas: (i) child safety, e.g. not touching dangerous things; (ii) protection of personal property, e.g. not coloring on walls; (iii) respect for others, e.g. not taking toys away from other children; (iv) food routines, e.g. not playing with food; (v) delay, e.g. not interrupting others' conversations; (vi) manners, e.g. saying "please", "thank you", etc.; (vii) self-care, e.g. washing up when requested; (viii) family routines, e.g. putting toys away.

The authors show that "safety", "possessions" and "respect" are emphasized the most by mothers. In the frame adopted in this book, of course, "respect" is closely related to the goal of taming the otherwise unrestrained child's aggressiveness.

It is quite strange that these authors seem not to mention anything explicitly related to the sphincter morality discussed in text.

As regards the Oedipus-complex, I will sum up this hypothesis in a way palatable to modern ears:

1. The child wants his parents at his complete disposal.
2. He is forced to accept, at least sometimes, the exclusion from his parents' (not only sexual) intimacy.
3. This experience is a humiliation for the child.
4. He reacts to this humiliation by transforming this practical exclusion into a general ethical rule (i.e. the taboo of incest), that holds for him vis-à-vis his own parents, for his parents vis-à-vis their own parents, as well as for everybody vis-à-vis his own parents. The rule reads: *it is wrong for everybody to have sexual intimacy with one's own parents*¹¹.

In this way, again, the child

- a. accepts what his parents want, i.e. an exclusion from their intimacy (*he retains his parents' love*) and
- b. becomes like them, in that he accepts a rule that is the same for him, for them as well for everybody (*narcissistic advantage*).

We can now turn to the features of ethical emotions that can be explained through the hypothesis of a super-ego.

The very conjecture that the psyche can be split into more parts, and that one part can control the other, is able to answer the *first question*, namely why ethical emotions are perceived to stem from something different from the ego.

As regards the *third question*, namely the *tinge of fear* (i.e. *authoritativeness*) that seems to characterize ethical emotions, it can be explained with the hypothesis that the child complies with the prohibitions and imperatives of his caretakers because of two reasons:

1. the fear of losing their love and
2. the fear of their punishment.

An explanation can be reached if we assume that the super-ego somewhat retains the power to produce in the ego a fear similar to the fears that the child experienced towards his caretakers.

If we accept the conjecture that the super-ego is the result of the *internalization* of the caretakers, we can also give an answer to the *second question*, namely why ethical emotions seem somewhat to exist *linguisti-*

¹¹ In pathological cases the resolution of Oedipus-complex may imply the development of a complete taboo about sex. In this case the child develops the feeling that sex itself is wrong. The success of the dogma of the virginity of Mary has probably its roots in the resolution of the Oedipus complex. In a psychoanalytical perspective the virginity of the mother is what every male-child dreams of. It could be argued that it is only the physical superiority of men over women that prevented complementary religious myths regarding masculine animate entities from having a success similar to that enjoyed by the dogma of the virginity of Mary. (In passing, let me recall that this dogma is accepted even in the Qu'raṅ. See, e.g. 3,47).

cally – as if provided with some sort of *voice*. The super-ego is experienced as if having a voice, since it *mostly*¹² stems from the parents' voices¹³.

Here is a passage where Carl Müller-Braunschweig explicitly contends that in the moral conscience the voices of the caretakers come back.

*The voices of the educators come back in the conscience of the person to the extent the people around the child, especially the educators of the child are active in the Ego-Ideal*¹⁴. This phenomenon has been shown by Freud in the pathological distortion of paranoia. The voices that the paranoid believes he hears are the demands of the conscience re-projected onto the outside. They reveal through their typical content the source of conscience: the voices of the educators or of other people of childhood. [Müller-Braunschweig 1922: 248, emphasis added]

It is also well worth reading what Freud wrote about the way he developed his conjecture of a super-ego:

[There are] patients [who] suffer from delusions of being observed. They complain to us that perpetually, and down to their most intimate actions, they are being molested by the observation of unknown powers – presumably persons – and that in hallucinations they hear these persons reporting the outcome of their observation: “now he’s going to say this, now he’s dressing to go out”, and so on. Observation of this sort is not yet the same thing as persecution, but it is not far from it; it presupposes that people distrust them, and expect to catch them carrying out forbidden actions for which they would be punished. How would it be if these insane people were right, if in each of us there is present in his ego an agency like this which observes and threatens to punish, and which in them has merely become sharply divided from their ego and *mistakenly displaced into external reality*?

¹² *Mostly* does not mean “always”. For example, Michael Lewis shows that «a disgusted face is widely used in the socialization of children» (1992: 110). Disgust seems to be used the most in the context of bodily functions (114). According to Lewis, disgust is conducive to the development of shame (rather than to the development of guilt). That is why the bodily functions elicit mostly shame, rather than guilt, reactions. (As regards shame *vs.* guilt, see below sec. 3.6).

Another case of a rule merely inferred by the child, without the necessity of any clear statement on the part of the parents, is the degree of *acceptability of crying in men* as compared with women. On this issue see again Lewis (233).

Finally, I think that another merely-inferred rule is the *taboo of suicide*. Parents do not want their child to hurt himself. It has been empirically found that safety is a priority for mothers (Gralinski & Kopp 1993: 582). I think that this priority gets generalized by the child into a general taboo of suicide. Provided that it is correct to hypothesize that the taboo of suicide is the strongest in monotheistic contexts, the role of safety in child rearing could explain why in the context of non-monotheistic religions the taboo of suicide is weaker than in the context of monotheistic religions. Monotheistic mythical narratives seem to be more rooted than animistic ones in the structures of the relations of the child with his parents.

¹³ A similar explanation was given by Hägerström 1917* (see also Pattaro 1974: 211).

¹⁴ Here Müller-Braunschweig uses the term *Ideal-Ich*, because Freud had yet not introduced the term *Über-Ich*.

[... U]nder the powerful impression of this clinical picture, I formed the idea that the separation of the observing agency from the rest of the ego might be a regular feature of the ego's structure ... [Freud 1932*: § 31: 59, emphasis added]

All this seems enough to explain (1) why ethical emotions seem to stem from something *different from the ego*, (2) why they seem to exist *linguistically*, as if provided with some sort of *voice*, and why (3) they seem to have a *tinge of fear (authoritativeness)*.

We are still to explain (4) their mystic nuance and (5) their blanketness.

Freud explained the connection between religion and ethics in the following way:

The third main item in the religious programme [after giving people information about their origin and some sort of protection in and beyond life], the ethical demand, also fits into th[e] *childhood situation* with ease. I may remind you of Kant's famous pronouncement in which he names, in a single breath, the starry heavens and the moral law within us. However strange this juxtaposition may sound – for what have the heavenly bodies to do with the question of whether one human creature loves another or kills him? – it nevertheless touches on a great psychological truth. The same father (or parental agency) which gave the child life and guarded him against its perils, taught him as well what he might do and what he must leave undone, instructed him that he must adapt himself to certain restrictions on his instinctual wishes, and made him understand what regard he was expected to have for his parents and brothers and sisters, if he wanted to become a tolerated and welcome member of the family circle and later on of larger associations. The child is brought up to a knowledge of his social duties by a system of loving rewards and punishments, he is taught that his security in life depends on his parents (and afterwards other people) loving him and on their being able to believe that he loves them. All these relations are afterwards introduced by men unaltered into their religion. Their parents' prohibitions and demands persist within them as a moral conscience. With the help of this same system of rewards and punishments, God rules the world of men. The amount of protection and happy satisfaction assigned to an individual depends on his fulfillment of the ethical demands; his love of God and his consciousness of being loved by God are the foundations of the security with which he is armed against the dangers of the external world and of his human environment. [Freud 1932*: § 35, 163 f., emphasis added]

According to Freud there exists a connection between *ethics* and *monotheisms*, the role of the father being basically the same in both.

Freud's hypothesis *does not imply (though it does not exclude either)* any connection between religion and ethics in the context of animism or polytheistic religions.

[W]e may suppose that even in th[e] days [of the animistic mode of thought] there were ethics of some sort, precepts upon the mutual relations

of men; but nothing suggests that they had any intimate relation with animistic beliefs. [Freud 1932*: § 35, 166]

Freud's hypothesis, therefore, seems unable to explain the mystic nuance with which ethical emotions may be experienced by animists or by atheists – provided that there really exist animists or atheists who experience ethical emotions this way.

My opinion, though, is that Freud's basic idea that the super-ego (and therefore ethical emotions) can be explained by examining the *childhood situation* can be used also to explain the fact that there may be people who have not been raised in a monotheistic culture who nevertheless experience a mystic nuance in ethical experiences.

I think that the connection between the super-ego and the mystic nuance of ethical emotions can be best highlighted if we take into account Pierre Bovet's *Le sentiment religieux et la psychologie de l'enfant* (1925*)¹⁵.

If we consider Bovet's ideas, we can state that one basic feature of the childhood situation is that the child ascribes to his parents (or more broadly: caretakers): *omnipotence, omniscience and moral perfection*¹⁶.

When we endeavor to formulate the child's ideas of his father and mother, we find them to include the divine attitudes of classical theology: omnipotence, omniscience and moral perfection. [Bovet 1925*: 26]

According to Bovet the child ascribes to his parents *omnipresence and eternity* as well.

Bovet – like other psychologists (including Freud) – held that the attitude of the child towards his parents is characterized by a fusion of *love* and *fear*. Bovet called this fusion of *love* and *fear* “respect” (Bovet 1925*, 46: «th[e] blending of love and fear constitutes respect»).

All this implies that the attitude the child has towards his parents already has all the features that some people would later transfer to the monotheistic god, provided that they happen to be in the right context.

According to Bovet *the religious sentiment is basically the filial sentiment*¹⁷.

¹⁵ Bovet's *Les conditions de l'obligation de conscience* (1912) is of lesser importance for us in this context.

It is worth recalling that Bovet himself considered his work compatible with Freud's. (See Bovet's introduction to 1925*).

¹⁶ See also Freud: «[the super-ego] is the vehicle of the ego ideal by which the ego measures itself, which it emulates, and whose demand for ever greater perfection it strives to fulfill. There is no doubt that this ego ideal is the precipitate of the old picture of the parents, *the expression of the admiration for the perfection which the child then attributed to them*». [Freud 1932*: 64 f., emphasis added]

¹⁷ It should be pointed out that Bovet thought that showing that the religious sentiment originates from filial sentiment is not at all tantamount to showing that the object of religious worship does not exist (see Bovet 1925*: 126-127). Such a statement would have been the commission of a negative genetic fallacy (see Grünbaum 1987). In Fittipaldi 2003 I have contended that the negative genetic argument is not necessarily a fallacy, though.

[T]he religious sentiment is the filial sentiment. The first object of this sentiment is, for the child, his parents. The father and the mother are, for the child, his gods, possessed with all the divine perfections. But the experience of life compels the child to change, if not his religion, at least his god, and to transfer to a more remote being the wonderful attributes with which, in the first place, he endowed his parents. [Bovet 1925*: 46]

Hence, according to Bovet, rather than talking of *divinization of the parents*, we should talk of *paternization of god* (43)¹⁸.

If this is true, this implies that the super-ego, once developed, retains a mystic characterization even in non-monotheistic contexts. This might be so because the mystic-religious nuance pertains to the way the child experiences everything that comes from his parents, including their imperatives and prohibitions.

Jean Piaget, in his *Le jugement moral chez l'enfant*, found evidence fully compatible with Bovet's hypothesis.

Piaget interviewed a sample of Swiss children about a marble game. It is worth quoting here a part of the interview with one child (Fal) in order to better understand Piaget's argument.

Who invented the game of marbles? – *My Daddy did.* – Who is the oldest person in Neuchâtel? – *I dunno* – Who you think? – *God* – Did people know how to play marbles before your daddy? – *Other gentlemen played ...* – In the same way as your daddy? – *Yes* – How did they know how to? – *They made it up* – Where is God? – *In the sky* – Is he older than your daddy? – *Not so old.* [Piaget 1932*: 46 f.]

Here is Piaget's discussion:

Fal ... has a great respect for rules. He attributes them to his father, which amounts to saying that he regards them as endowed with divine right

¹⁸ How does this transfer take place? Why does the child make such a transfer, rather just giving up the idea that such beings exist? I cannot answer these questions, but a few remarks are in order here.

First, it should be noticed that *only* monotheistic religions propose a pattern that strictly corresponds to the child's adoration of his parents.

Second, Bovet's hypothesis does not predict that each individual develops monotheisms individually (ontogenetically).

Third, Bovet's hypothesis is not a *unicausal* theory explaining phylogenetically the existence of monotheism. It just provides us with one factor, among others, that can explain why it spread so easily in many areas of the world. However, I think that Bovet's hypothesis would be falsified if we were to find out that much more people convert from monotheistic religions to animistic ones than the other way round.

The second and third point can be perhaps highlighted if we think of the connection between the omnipotence of thoughts and magical thinking (above sec. 2.6, fn. 29).

Even if the omnipotence of thoughts seems to be a necessary stage of the psychological development of each of us, not all people retain this mode of thinking in their adulthood. The stage of the omnipotence of thoughts is but one of the factors that cause magical thinking to phylogenetically emerge and survive in a given culture.

[*droit divin*]. Fal's curious ideas about his father's age are worth noting in this connection; his daddy was born before his grand-dad, and is older than God! These remarks, which fully coincide with those collected by M. Bovet, would seem to indicate that in attributing the rules to his father, Fal makes them more or less contemporaneous with what is for him the beginning of the world ... One should be careful, of course, not to read into these remarks more logic than they contain: they simply mean that rules are sacred and unchangeable because they partake of paternal authority. [Piaget 1932*: 47 f.]

Now we can also try to explain why we talk of a *mystic* nuance of ethical emotions without necessarily attributing to them a divine or *religious* nuance. (I use the adjective *mystic* to refer to a religious nuance devoid of explicit reference to any personal god). We can make the conjecture that, if the super-ego becomes autonomous from the imperatives and the prohibitions of the parents, it may still retain a religious nuance devoid of any such personal reference, and that, therefore, the ethical emotions produced by such a super-ego retain such a *mystic* nuance.

It bears recalling here that Piaget held that the child, after the kind of ethics that he called *moral de l'autorité* ('morals of constraint' or 'of authority', in the English translation), develops a second kind of ethics, that he called *moral du respect mutuel* ('morals of cooperation') (see also above, fn. 5), that, according to him, does not have such a mystic nuance.

Instead, I adhere to the Freudian contention that that the super-ego, once developed, can get enriched with new contents, even completely incompatible with the first parental imperatives and prohibitions. The super-ego retains its basic way of functioning throughout its changes of content. Among what is retained by the super-ego is the mystic nuance of ethical emotions. In this sense, the mystic nuance is just one more psychological "survival" or "relic" that characterizes ethical emotions. In Piaget's terms, but unlike his contentions, I hardly believe that there can be a *moral du respect mutuel* completely independent of the *moral de l'autorité*¹⁹. Moreover, we will see below that Piaget himself relates the phenomenon of the desire for atonement to the moral of authority (sec. 4.4.3). But, of course, atonement is not exclusively an infantile phenomenon. Piaget has taken such terms as *expiation* and *atonement* from the ethical world of the

¹⁹ Rudziński (1976: 128), instead, argues that putting Petrażycki and Piaget's views together one would be almost tempted to risk the view that the kind of ethical experience Petrażycki talks about «is an infantile relic in our adult life».

Hägerström argued that «the feeling of conative impulse which belongs to the idea of duty ... acquire[s] a special sanctity» and this is «foreign to the recipient of a command as such» (1917*: 194, see also Pattaro 1974: 177). Instead, I conjecture that every sort of authority, even in the adulthood, is endowed with some sort of sacredness and that this sacredness is much an infantile relic. (See also below sec. 4.8).

adults, and this amounts to admit that the structure of adult ethical mentality is rooted in infantile ethical mentality.

We can now try to make a conjecture as to the last issue raised in sec. 3.1: *why do ethical emotions seem to be blanket emotions, namely emotions suitable to whatever content?*

If we accept the hypothesis that the super-ego originates from the prohibitions and imperatives issued by the first caretakers, we must also take into account the fact that the child, because of his fear and love towards his parents, has the attitude to obey²⁰ to whatever prohibition or imperative they issue, even when the child has no idea of their rationale.

For the child, the only thing that really matters is that a certain imperative or prohibition has been issued *by his caretaker*.

According to Piaget this fact is the cause of what he called the *moral realism* of the child (that with Petrażycki's terminology we should call *ethical realism*). Piaget (1932*: ch. 2) says that moral realism is made up by the following elements:

1. *Heteronomy*: what matters for the child is that a certain imperative or prohibition has been issued by the caretaker.
2. *Literalism*: what matters for the child is not the spirit, but rather the letter of the imperative or prohibition.
3. *Strict liability*²¹: what matters for the child is only the objective compliance with the imperative or prohibition issued by the caretaker, regardless of culpability.

Here I wish to explain why the blanketness of ethical emotions may be connected with *heteronomy*, on one hand, and with *literalism*, on the other.

As regards *heteronomy*, if *whatever* imperative or prohibition issued by the caretaker is enough to produce in the child certain emotions that are the forerunners of the super-ego, we can make the conjecture that the same kind of blanketness will characterize super-ego as well.

As regards *literalism*, we can notice that, if the imperatives and prohibitions issued by the caretaker produce an attitude to obey regardless of their rationale, this amounts to removing *whatever* teleological limit to what can be requested by the caretakers. This may result in the blanketness of the super-ego.

According to Piaget, such phenomena are inevitable, even in the case the caretaker does his best to avoid authoritarianism.

[I]t should be noted that, however adverse one may be in education to the use of any constraint, even moral, it is not possible completely to

²⁰ Of course, having an *attitude* to obey does not imply that one *always* obeys.

²¹ In the English translation *responsabilité objective* is translated with *objective liability*.

avoid giving the child commands that are incomprehensible to it. In such cases – which are almost the rule in the traditional form of education based on authority – the mere fact of accepting the command almost invariably provokes the appearance of moral realism. [Piaget 1932*: 174]

Many of the imperatives and prohibitions issued by the caretaker to the small child, even if they have their own rationale, inevitably appear to the small child arbitrary, and this may be the cause of both moral realism in the child and of the blanketness of ethical emotions in the adult as a psychological relic of the former.

3.3. WHY THE EXPLANATION HERE PROPOSED TO THE ILLUSIONS OF IMPERATIVES AND PROHIBITIONS IS DIFFERENT FROM PETRAŻYCKI'S

According to Petrażycki, «[n]either law nor morality has anything in common with commands and prohibitions as such» (Petrażycki 1909-10: 332, 1909-10*: 158). Because of this, the question arises why so many people (and jurists) conceive law, and more generally ethics, in terms of imperatives and prohibitions. I think this can be explained by making use of the theory of super-ego, as it has been presented in the foregoing section.

Here it is in order to spend a few words as regards why this explanation is different from Petrażycki's.

First of all, it must be stressed that these illusions are *not* the results of projective processes. Unlike projective ethical qualities, the illusions of imperatives are not the result of the projection onto external reality of some ethical emotion of the subject. They are more like a sort of “recollection” of the imperatives and prohibitions that the caretakers really issued to the child. The illusions of imperatives and prohibitions stem from facts that took place in the external reality.

My conjecture is therefore that the illusions of linguistic imperatives and prohibitions are the result of the substitution of the caretakers with an internal super-ego.

Even if the super-ego gets enriched with new contents that do not originate from anybody's linguistic imperative or prohibition, as may be the case of custom, as soon as these new contents start being managed by the super-ego, they may be experienced much in the way we experience real imperatives and prohibitions.

In this way we can explain the likeness of the emotions evoked in us by real imperatives to the emotions evoked in us by ethical emotions – a likeness that Petrażycki was not able to explain, but only to describe.

In conformity with the peculiar authoritative-mystical character of ethical impulses and their likeness ... to the impulses evoked in us by commands and prohibitions, the idea ... emerges that certain higher “commands” and “prohibitions” are present and exert pressure over people and over other beings (including deities). In reality we have only specified impulsive-intellectual processes. [Petrażycki 1909-10: 332, 1909-10*: 158]

According to Petrażycki ethical emotions and the emotions evoked in us by really issued prohibitions and imperatives are different phenomena. They have in common the way they are experienced, and this likeness produces the illusion of linguistic imperatives and prohibitions also where there is none.

Like Petrażycki, I think that ethical emotions and the emotions evoked in us by really issued prohibitions and imperatives are different phenomena. Unlike him, who said nothing at this regard, I think that ethical emotions originate from the experience of really issued imperatives in the childhood – this experience being one of the causes of the development of the super-ego. From my point of view, therefore, the illusion of linguistic imperatives is not caused by the likeness Petrażycki talks about, but rather by the fact that the super-ego originates from really issued imperatives and prohibitions and this origin affects the way we experience ethical emotions, even when they are not elicited by any intentional issuing of imperatives or prohibitions – as is the case of custom or any other ethical emotion originating from non-linguistic phenomena.

The explanation here given can be summed up in the following way: *since the super-ego originates mostly from certain caretakers' linguistic activities, ethical emotions are often illusorily assumed to be related to certain linguistic activities.*

I will say something more about the likeness of the experience of ethical emotions and the emotions produced in us by real imperatives in sec. 4.10.

What I said here about imperatives and prohibitions could be to some extent repeated as regards permissions. Permissions, though, will be discussed in sec. 4.4.3-4, where I will discuss the causal role played by attributiveness as to the coming into existence of certain legal illusions.

3.4. THE ILLUSIONS OF NORMS AND THE ROLE OF THE CONCEPT OF NORM AS A BASIC THEORETICAL CONCEPT

Thus far I have been discussing the causes of the illusions of imperatives, but I have neither discussed the concept of *norm*, nor tried to define it. I tried to avoid using the terms *norm* and *rule* altogether.

In this section I will discuss the following questions:

1. Are there illusions of norms and – if yes – what causes them?
2. Is it possible to identify ethical behavior by making use of a concept of norm independent of the concept of super-ego?
3. What is the role of norms in a legal theory based on Petrażycki’s ethical solipsism?

If the term *norm* is to be understood as meaning “positive” or “negative imperative”, the illusion that there exist norms in this sense, even where there are no linguistic phenomena at all, is just nothing else but the very illusion of imperatives and prohibitions. Therefore, the answer to the first question should be *yes*.

At first glance, this very trivial contention of mine could be considered similar to the explanation that Theodor Geiger gave to the phenomenon that many legal theorists conceive norms in the terms of imperatives.

A short discussion of Geiger’s explanation of this mistake will help us both to clarify the scope of my explanation and to introduce the second question.

Geiger distinguished (1) *Normen* from (2) *Normsätze* (normative sentences), and within the set of the latter distinguished (2.1) *deklarative Normsätze* and (2.2) *proklamative Normsätze*.

He called *deklarative Normsätze* the linguistic descriptions of ethical phenomena, like the description of a certain custom, while he called *proklamative Normsätze* normative sentences or utterances that aim at changing the social world by introducing new norms²².

Here is Geiger’s explanation of the fact that many people conceive norms in terms of imperatives:

The conception of norm as an imperative originates from the fact that only the *proklamative Normsatz* is taken into account. Only here can the impression arise that some authority has issued commands to the addressee of the norm. The same misunderstanding cannot arise if it is thought of the state of affairs the *deklamative Norm[satz]* refers to. It ascertains only the existence of a usual, subsistent norm and thus it cannot be considered as a command or an imperative. Nobody did in this case ever command that $s \rightarrow g$ ^[23] *should* [*solle*] to be observed. [Geiger 1964: 65]

According to Geiger, the reason why norms are conceived in terms of imperatives, is that actually only *proklamative Normsätze* are taken into account, even though there are fields, as is the case of custom, where nothing like this can be found.

²² Geiger’s distinction between *proklamative Normsätze* and *deklarative Normsätze* somewhat corresponds to Kelsen’s distinction between *Sollnormen* and *Sollsätze*.

²³ By *s* Geiger refers to the German loanword *Situation* (“Situation”). By *g* he refers to the German term *Gebaren* (“behavior”). $s \rightarrow g$ must be read in the following way: in the situation *s* the action *g* must be performed.

This explanation could seem similar to mine, because my conjecture is based on the idea that the super-ego is caused by the imperatives and prohibitions first issued by the child's caretakers. These imperatives and prohibitions, in accordance with Geiger's terminology, could be definitely called *proklamative Normsätze*.

By adopting Geiger's terminology, I could formulate my conjecture in the following way: *people have the illusion that all ethical phenomena are of a linguistic nature because the super-ego stems from proklamative Normsätze*.

Now, such an interpretation of Geiger would be wrong.

Geiger did not explain why only *proklamative Normsätze* are taken into account.

I guess that, if asked, rather than mentioning the importance of *proklamative Normsätze* first issued to the child by its caretakers, he would have referred to the important role of legislation in the Western culture.

If I guess correctly, this difference mirrors a much deeper difference between my approach and Geiger's as regards the concepts of *norm* and the role of psychology when it comes to explaining *ethical phenomena*.

While according to the approach here supported the basic elements that constitute ethical phenomena are the ethical emotions caused by the super-ego (regardless of the fact that they actually have some impact on external behavior), Geiger thought that the basic elements of ethical phenomena are norms, and had a behavioral conception of norm.

I think that in order to understand the specificity of the approach supported in this book it is useful to shortly point to some shortcomings of Geiger's behavioral conception of *norm*.

In this way I hope I will be able to show that the very concept of norm (and of normative behavior) presupposes the concept of ethical emotion caused by some sort of super-ego.

In Geiger's language a *norm* $s \rightarrow g$ exists if, and to the extent that,
– either the action g is actually performed by the addressees of the norm,
– or, in case of non-compliance, some negative reaction occurs to the addressees²⁴.

Therefore, according to Geiger, it is possible to define *ethical phenomena*, in general, and *normative behavior*, more specifically, without making use of psychology.

Let us read how Geiger tries to describe these phenomena *without making use of psychology*.

[I]n the life of every family certain regularities will be observed that can be attributed neither to the civil code nor to explicit orders of the head of the family. Certain correlations of the type $s \rightarrow g$ got developed *by way*

²⁴ This conception implies that the existence of a norm is matter of degree.

of *habit*, through custom. It could seem that this real order [*Realordnung*] does not correspond to any system of norms. But the existence of such a system becomes apparent as soon as a member of the family departs or is going to depart from the model $s \rightarrow g$. In this case the person who acts experiences that *internal insecurity that is often called "bad conscience"* [*schlechtes Gewissen*]. If the person, despite the warning of his conscience does not comply with $s \rightarrow g$, his surroundings get upset. All this points at the fact that the person who acts, as well as the spectators, conceive g as the proper course of action for s , as the course of action right for it. This means that $s \rightarrow g$ is alive as an idea of norm [*Normvorstellung*]. However, the norm is not necessarily expressed through words. [Geiger 1964: 58 f., emphases added]

The only psychological fact that Geiger seems here to take into account is what he calls *Normvorstellung* (the representation of the norm), namely the fact that people anticipate that some unpleasant reaction could occur to the trespasser.

Geiger's concept of *bad conscience*, though, has nothing to do with psychology. There is no way to relate it to some concept of a super-ego because Geiger seems to have reduced *schlechtes Gewissen* to some sort of insecurity related to the anticipation of the reactions other people could have in case of non-compliance, rather than to something that takes place inside the psyche of the individual.

Actually, *Geiger reduced conscience to social anxiety*²⁵:

Gewissen is soziale Angst. [Geiger 1964: 57]

Conscience is social anxiety

Now, *stating that conscience is social anxiety is tantamount to reducing ethical behavior to teleological behavior.*

In this way the specificity of ethical phenomena is lost.

The approach adopted in this book, instead, imposes to sharply distinguish *social anxiety* from *ethical anxiety*, and this distinction is the criterion through which teleological behavior can be distinguished from ethical behavior – a distinction that was clearly made by Petrażycki²⁶. A

²⁵ Geiger makes this statement in the context of the discussion of free will, that he conceives as a fiction that contrasts or erases other impulses (1964: 56-57).

²⁶ Here is a relevant quotation: «If larceny [*kraža*], defamation [*kleвета*], or coarse treatment of a servant is rejected, as uncomely, ugly, or inelegant – if, in other words, the relevant impulse is a negative aesthetic impulse – the judgments [*suždenija*] are then neither moral nor legal: they are aesthetic experiences. The same utterances [*izrečenija*] may in general be based on opportunistic [*oportuničeskie*] or teleological [*celevyje*] judgments [*suždenija*] ... If a person, making such a judgment as "one should not steal", contemplated merely 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 made the judgment "one should not steal", in his psyche arose neither an ethical ... nor an aesthetic emotion, but the repulsive motorial excitement of fearful nature which generally accompanies the idea of a term in prison or tortures in Hades and this motorial excitement were here

person who acts out of social anxiety acts teleologically, while a person who acts out of ethical anxiety acts ethically (or normatively).

The difference between *schlechtes Gewissen* (bad conscience) and *soziale Angst* (social anxiety) is beautifully explained in the following Freudian quotation:

How is th[e] judgment [that what is bad is something that must not be carried out] arrived at? ... What is bad is often not at all what is injurious or dangerous to the ego; on the contrary, it may be something which is desirable and enjoyable for the ego. Here, therefore, there is an extraneous influence at work, and it is this that decides what is to be called good or bad. Since a person's own feelings would not have led him along this path, he must have had a motive for submitting to this extraneous influence. Such a motive is easily discovered in his helplessness and his dependence on other people, and it can best be designated as fear of loss of love. If he loses the love of another person upon whom he is dependent, he also ceases to be protected from a variety of dangers. Above all, he is exposed to the danger that this stronger person will show his superiority in the form of punishment. At the beginning, therefore, what is bad is whatever causes one to be threatened with loss of love. For fear of that loss, one must avoid it ...

This state of mind is called "bad conscience" [schlechtes Gewissen]; but actually it does not deserve this name, for at this stage the sense of guilt [Schuldbewußtsein] is clearly only a fear of loss of love, "social anxiety" [soziale Angst]. In small children it can never be anything else, but in many adults too, it has only changed to the extent that the place of the father or the two parents is taken by a larger human community. Consequently, such people habitually allow themselves to do any bad thing which promises them enjoyment, so long as they are sure that the authority will not know anything about it or cannot blame them for it; they are afraid only of being found out ...

A great change takes place only when the authority is internalized, through the establishment of a super-ego ... Actually, it is not until now that we should speak of conscience [Gewissen] and sense of guilt [Schuldgefühl]. [Freud 1929: § 7, 124 f.]*

Therefore, my contention is that *the only way some concept of norm can be used to distinguish ethical behavior from teleological behavior is to make use of a concept of norm strictly connected with the concepts of super-ego and superegoic emotions.*

This is precisely what Geiger did not do.

The answer to the second question is therefore *no*: ethical behavior cannot be identified with a concept of norm independent of the concepts of super-ego and superegoic emotion.

extended to larceny, his judgment "one should not steal" would be the an opportunistic [*opportuničeskoe*] and teleological [*teleologičeskoe*] experience [*pereživanie*] – a judgment of worldly prudence and calculation – and not an experience of principle [*principal'noe*] at all». [Petrażycki 1909-10: 82 f., 1909-10*: 60 f.]

Petrażycki used the adjective *principal'nyj* (often in connection with the adjective *praktičeskij*) as a synonym of *normativnyj* (see the next Petrażyckian quotation in text).

Before discussing the third question and in order to better understand the point I have just made, it is in order here to stress that even a psychological conception of norm cannot avoid taking into account such superegoic emotions as guilt and shame.

This can be shown by a short discussion of the shortcomings of the most serious and systematic attempt known to me to develop a *psychologicalistic*²⁷ *conception of norm*. I am talking of the conception of norm as belief proposed by Enrico Pattaro in his book *The Law and the Right*.

According to Pattaro, a norm is a belief (2005: 98).

He defines *belief* as follows:

[A] belief is our commitment and adhesion to an idea, and so also the trust we place in this idea by our acceptance or rejection of it: A belief is the internalization of an idea. [Pattaro 2005: 96]

He defines *norm* as follows:

[A] norm is ... a motive of behavior. It is 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 gets validly instantiated. This must unconditionally be so, regardless of any good or bad consequences that may stem from the performance in question. [Pattaro 2005: 97]

For a norm to exist «there must be at least one subject in whom it is a belief».

With a perfectly consistent terminological choice Pattaro calls *deviants* (as opposed to “abiders”) the persons who

1. have inside their minds a norm *n*,
2. according to the content of *n* have a certain duty,
3. but nevertheless «do not practice *n* despite the fact that they believe in it» (2005: 110).

Pattaro writes:

[E]ven if norm *n* is violated, it will still exist ... in [a believer in it and duty-holder according to it] as long as [the believer in it and the duty-holder according to it], though a deviant, believes it binding per se to comply with *n*. [Pattaro 2005: 111]

According to this terminological proposal a deviant is, for example, a person who happens to steal, despite the fact that he experiences theft as wrong.

Now my question is, *from an operational point of view, how is it possible to test whether it is or is not the case that a person believes in a norm even if he violates it, without taking into account shame or guilt (or some other superegoic emotion)?*

²⁷ I am using the adjective “psychologicalistic”, instead of the adjective “psychological”, because of the reasons explained above in sec. 1.1. See also below in text and footnotes.

In this context, Pattaro mentions neither guilt nor shame, and therefore the reader does not know whether Pattaro thinks that a norm can exist and be violated even when the trespasser experiences *no* ethical emotion at all.

If Pattaro were to consider a deviant even a person who, for example, steals without experiencing either shame or guilt, I should admit that I would not be understanding what sort of phenomenon Pattaro's deviancy is.

What would it mean to believe in a norm, to violate it and not to experience guilt or shame? What would *belief in a norm* mean in such a context?

My impression is that Pattaro's concept of deviancy presupposes some sort of ethical emotions.

That Pattaro's concept of norm is theoretically dependent on the assumption of some sort of ethical emotion I think can be shown also by reading what he writes about *unconscious norms*.

The author concedes that a norm can exist also at an unconscious level:

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

In this case Pattaro mentions explicitly emotions, without talking of shame and guilt, though. Also in this case, emotions, rather than beliefs, play a crucial role to the proper identification of ethical phenomena.

Of course, Pattaro might reply by saying that emotions are caused by norms and not the other way round.

In my opinion, though, such a monistic approach fails to capture the complex way the five basic ethical emotions – guilt, shame, pride, anger and indignation – that will be discussed below (sec. 3.6 and 4.4.1 ff.) interact with each other.

Pattaro does not discuss anywhere in his book how the psychological phenomenon that he calls *norm* causes people to experience – depending on the circumstances – one of these five emotions. I do not know how Pattaro would answer this question and I will not try to give this answer on his behalf. I will try, instead, to show how the concept of norm can be reduced to these five ethical emotions and how heuristically fruitful for further empirical research my approach can hopefully be.

As regards Pattaro's concept of *norm*, it could be further observed that it seems to be too broad because it comprises *compulsions* as well²⁸.

²⁸ Pattaro does not mention Freud (especially 1912-13*) in the contexts where he contends the possible connections between what he calls *normativeness* and compulsive disorder. A possible explanation of this omission is that Pattaro seems not to rely so

Pattaro considers compulsive neuroses as «phenomena not entirely unlike normative beliefs» (120).

I have no problem to concede that these are phenomena “not unlike” normative beliefs, but the question is: can compulsions be distinguished from normative phenomena?

Pattaro seems to give no answer to this question.

According to the approach and the terminology adopted in this book *ethical phenomena can be distinguished from compulsive neuroses depending on whether, in case of non-compliance, the subject experiences (i) guilt/shame or (ii) some sort of fear of dire consequences*. Only in case (i) are we dealing with an ethical phenomenon proper.

Here is the symptomatic description of the obsessive-compulsive disorder given by the *Diagnostic and Statistical Manual of Mental Disorders IV*:

Compulsions as defined by (1) and (2)

- (1) repetitive behaviors (e.g. hand washing, ordering, checking) or mental acts (e.g., praying, counting, repeating words silently) that the person feels driven to perform in response to an obsession, or according to rules that must be applied rigidly
- (2) the behaviors or mental acts are aimed at preventing or reducing distress or preventing some dreaded event or situation; however, these behaviors or mental acts are not actually connected in a realistic way with what they are designed to neutralize or prevent or are clearly excessive. [QRDC 2000: § 300.3]

Again, the *differentia specifica* of ethical phenomena lies on ethical emotions²⁹. Sufferers of obsessive-compulsive disorder seem to experience fear, rather than guilt or shame, in case of non-compliance.

much on psychology and prefers just to hope that neurosciences will someday be able to shed light on all phenomena related to normativeness (Pattaro 2005: 383 and 396, fn. 44).

I reply that, even if psychology were to be considered unscientific, it should still be considered useful for science in a way that Pattaro seems not to take into account. For other allegedly “true” sciences to give *proper explanations* of psychological phenomena, psychologists must have first of all *described* them. Even if the explanations given by psychologists were to be considered wrong, or just pseudo-explanations, their descriptions would still be a subject-matter for other sciences, including neurosciences.

Neurosciences will always make use of psychological descriptions at least as a source of subject-matters for research. For example, in the next section we shall see that Freud connects the functioning of ethics with aggressiveness. This may be right or wrong, but it is worth being tested by neurosciences. If Freud had never done these wild speculations, we should just be waiting for this connection to miraculously (inductively) emerge from data, rather than try to search for this connection directly.

Here lies a major difference between the verificationism of neopositivism and the falsificationism of critical rationalism. According to the former, first come data, then theories, according to the latter, first come theories, then data.

²⁹ To be sure, Pattaro, does sometimes ascribe some role to emotions (2005: 138 and 396), but just a secondary one. This approach is opposite to the Petrażyckian one adopted here, where a primary role is given to emotions and a secondary one is given

According to the definition here given a *compulsive behavior* can be considered an *ethical* (or *normative*) *behavior* only if the actor complies with the compulsion in order to avoid shame or guilt, or because of other superegoic emotions. If the person complies with it in order to avert some dreaded event, this person cannot be said to be performing an ethical action.

In general, my opinion is that *the general theory of ethics must make use of ethical (i.e. superegoic) emotions as basic ethical concepts, rather than of any kind of concept of norm, even if understood in a psychologistic sense.*

Unfortunately, as we shall see in ch. 4, superegoic emotions (guilt, shame, pride, anger and indignation) do not correspond in a straightforward way to the various kinds of ethical phenomena. They are intertwined with each other in a very multifaceted way.

I think, though, that this is not a shortcoming of my proposal, but rather a feature of the complexity of ethical phenomena themselves. There is no simple clear-cut way to deal with them.

A simple and elegant psychological concept of *norm* is at once a dangerous philosophical delusion and an interesting psychological illusion.

As regards the concept of norm as a dangerous philosophical delusion, its danger consists of preventing the researcher from asking how a certain ethical phenomenon should be further broken down into more elementary superegoic emotions. As I hope I will be able to show in the rest of this book, this sort of analysis is at once difficult and heuristically fruitful.

As regards the concept of a non-linguistic norm as an interesting illusory hypostatization, I will say something more at the end of the next section.

We can now turn to the *third* question.

The theoretical proposal of this book implies that:

1. Ethical emotions, rather than Enrico Pattaro's normative beliefs, should play the role of basic concepts in the general theory of ethics.

to norms. As may be already clear and will be more thoroughly discussed below, my approach differs from Petrażycki's in that I do not adopt as basic ethical concepts ethical appulsions and repulsions (to be compared with Hägerström's conative impulses: 1917*: 127 ff.). I consider appulsions and repulsions but consequences of guilt, shame, sense of duty and anger – understood as superegoic emotions.

As I said (fn. 28), Pattaro does not use psychology because he relies on neurosciences.

Pattaro is not fully consistent in his rejection, though. He states that discussing Freud's ideas is not within the scope of his book (356), but this does not prevent him from discussing Gerth and Mills ideas (374 ff.), who – as Pattaro himself concedes – drew inspiration among others from Freud.

Pattaro even tries to give an explanation of the origin of ethical experiences in *psychological* terms. In his opinion: «[t]he idea of the reality that ought to be is ... an outcome of the anxiety that humans experience when they become conscious of the ineluctability of death» (249). But, Pattaro, in order to make this point, instead of making use of psychological literature, prefers to make use of philosophy and literature.

2. Theodor Geiger's concept of norm must be rejected since it prevents the social scientist from distinguishing teleological behavior from ethical behavior.

The question is: *is there in a general theory of ethics based on Petrażycki's ethical solipsism room for some concept of norm as well for such terms as 'norm', 'rule', etc.?*

The answer is yes.

Let us read Petrażycki's proposal ³⁰:

Существование и действие в нашей психике непосредственных сочетаний акционных представлений и отвергающих или одобряющих соответственное поведение, репульсивных или аппульсивных, эмоций проявляется, между прочим, в форме суждений, отвергающих или одобряющих соответственное поведение, не как средство для известной цели, а само по себе, напр., "ложь постыдно", "не следует лгать", "следует говорить правду" и т.п. Суждение, в основе которых лежат такие сочетания акционных представлений и репульсий или аппульсий, мы называем принципиальными практическими (т.е. определяющими поведение) суждениями, или, короче, нормативными суждениями, а их содержания принципиальными правилами поведения, принципами поведения, или нормами. Соответственные диспозиции ... мы называем принципиальными практическими или нормативными убеждениями. [Petrażycki 1909-10: 20 f.]

The existence [*suščestvovanie*] and operation [*dejstvie*] in our psyche [*psihika*], of immediate combinations of action representations [*akcionnye predstavlenija*] and emotions [*émocii*] (rejecting or encouraging the corresponding conduct – i.e. repulsive or appulsive) *manifests itself*, among others, 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 [*suždenija*] based on such combinations of action ideas with repulsions or appulsions we term, principle-practical [*principlial'nye praktičeskie*] (i.e. that determine behavior) judgments or, briefly, normative judgments [*normativnye suždenija*]; and their contents [*soderžanija*] we term practical rules of behavior [*principlial'nye pravila povedenia*], principles of behavior [*principy povedenia*] or norms [*normy*]. The corresponding dispositions ... we term principle-practical or normative convictions [*normativnye ubeždenija*]. [Petrażycki 1909-10*: 30, emphasis added]

In order to understand Petrażycki's concept of *norm as the content of a normative judgment* it is necessary to examine his general concept of *judgment*.

First of all it must be stressed that according to Petrażycki (1908: 248), «judgments [*suždenija*] are emotional acts [*émocional'nye akty*]», which are not necessarily linguistic.

³⁰ Because of both the importance of this quotation and of the fact the last sentence has been omitted in the English translation I present here the complete Russian text.

Let us read what Petrażycki wrote about his concept of judgment:

Motorial excitements [*motornye razdraženija*], emotions are the essential element of judgments. Positive [*položitel'nye*], affirmative [*utverditel'nye*] judgments, statements [*utverždenija*] of something about something, *S* (subject [*sub'ekt, podležaščee*] is *P* (predicate [*predikat, skazuemoe*], for example, “earth is a sphere”, “earth revolves around the sun” are appulsive-emotional acts; negative [*otricatel'nye, otvergajuščie*] judgments: *S* is not *P*, for example “earth is not a sphere”, are repulsive-emotional acts. The psychological scheme of the first ones is $S \leftrightarrow P$, where *S* designates the representation [*predstavlenie*] of the subject, *P* means the representation of the predicate, and the arrow between them means the attractive, acceptative emotion, leading the second representation into connection with the first one, i.e. “stating” the second one as regards the first one. The psychological scheme of the negative judgments is $S \dashv P$, where the sign between *S* and *P* designates a refusing, rebutting emotion.

...
[I]t is possible ... to discover ... the presence of [I] extremely different ... emotions [of judgment]. The judgment emotions [*émocia suždenii*] like “hunger is an emotion” (a theoretical judgment, a theoretical emotion) has a character completely different from the judgment emotion “We should forgive our neighbors the wrong done” (moral judgment, moral emotion); and in turn has a different character from the emotion of the judgment “I have the right to do that” (legal judgment, legal emotion), etc. [Petrażycki 1908: 246 f.]

Judgments (suždenija) in Petrażycki’s use of this word – as emotional acts – are experiences (*pereživaniija*), and not sentences (*predloženija*). The expression of a judgment without the underlying emotions is therefore not to be considered an authentic (*podlinnyj*) judgment (see Petrażycki 1908: 253).

By the same token, judgments can be experienced even without a corresponding utterance³¹. They can be “mute”.

Petrażycki calls *norm* the *content* of the experience that he calls *normative judgment* where a *normative judgment is to be understood as an emotional act (be it appulsive or repulsive) regarding the connection of such a subject S as an animate entity or a behavior and such a predicate P as an ethical “projective” reality*³².

As can be seen, in Petrażycki’s theory the term and the concept of *norm* do play a role, though a secondary one.

I will depart from some of Petrażycki’s terminological proposals³³.

³¹ Petrażycki holds that judgments are strictly connected with our reactions to food and quotes in this respect Darwin’s *The Expression of the Emotions in Man and Animals* (1872) (see Petrażycki 1908: 248, fn. 1).

³² I put *projective* within brackets because, as the reader knows, according to me (and unlike Petrażycki), not all legal illusions can be explained in the terms of projections.

³³ A minor flaw in this brilliant chain of definitions is that, to my knowledge, Petrażycki fails to give a definition of *content*. I do not feel committed to give one on his

First, I will use the term *normative convictions* in the plural as synonymous with *super-ego*. I will do this way because I reject Petrażycki's conjecture as regards how (all) convictions emerge.

For Petrażycki convictions are but the effect of repeatedly experienced *judgments*.

The judgments we experience ... have the tendency to leave corresponding "tracks", dispositions, e.g. the ability to experience again the same judgment, the same pairing of representation and affirmative/acceptative or negative/refusive emotions, in case of presence of the corresponding circumstances [*povody*] (... according to the general law of contiguity, association). We will call convictions [*ubeždenija*] the corresponding dispositive cognitive-emotional pairings, the dispositive judgments [*dispozitivnye suždenija*]. [Petrażycki 1908: 248]

Petrażycki's concept of conviction is incompatible with the conjecture that there can be normative convictions other than the simple replication of past ethical experiences, such as the mere emergence of ethical phenomena within the individual psyche. Examples of such emergence phenomena may be the taboo of incest, the taboo of suicide and the taboo of masculine crying (above sec. 3.2 and fn. 12).

In such cases, the subject may be *not* even aware of certain normative convictions of his. He may become aware of them only if the corresponding normative expectations are frustrated³⁴.

This is why I prefer to treat Petrażycki's concept of *normative convictions* in the plural as synonymous with Freud's concept of super-ego.

I will depart from Petrażycki also in that I will not use *norm* as meaning the content of a normative judgment. We can recall that Petrażycki also defines a normative conviction as the disposition to experience ethical appulsions and repulsions in association with the perception or representation of certain actions. I will use the term *norm* in a way compatible with both this statement and my treatment of normative convictions in the plural as synonymous with super-ego.

Thus, *by the term 'norm' I will refer to the stable disposition to experience a superegoic emotion with the perception or representation of an action or inaction*³⁵. I will use the terms *norm*, *normative conviction*, *ethical conviction*, *normative expectation*, *stable disposition to experience ethical emotions*, *potential experience of ethical emotion* as synonyms.

behalf because, as I explain just below in text, I shall use *norm* as a synonym of *ethical conviction*.

³⁴ Theodor Geiger was probably thinking of something similar when he introduced the concepts of *latente Norm* and *potentielle Reaktion* (1964: 96 f.). But I cannot understand how such phenomena can be theorized without some psychological concept of norm.

³⁵ Petrażycki's concepts of *categoric* and *hypothetical norm* will not be discussed here. A discussion can be found in Fittipaldi 2012.

This definition has also the advantage to be more compatible with Enrico Pattaro's definition of *norm* given above. The main difference between Pattaro's and my definition is not in the definition itself, but rather in that, while in Pattaro the concept of *norm* has a primary theoretical role, in this book it plays but a secondary one as compared with the five superegoic emotions. When it is being talked of norms, it must always be asked what superegoic emotions are involved.

From the aforesaid, it follows that Petrażycki's *normative judgments* should not be confused with imperatives.

Normative judgments are emotional acts that can be manifested through either *sollsätze* or *sollnormen* (i.e. *imperatives*). It depends on what the person who experiences the normative judgment actually wishes or is able to do. Consider the case I ethically dislike a certain behavior. I can call it *wrong* if I experience the illusion that it is "objectively" wrong, while I can prohibit it, if I think it necessary and I am able so to do. (This ability will be discussed below in sec. 4.8. It corresponds to Petrażycki's concept of *vlast'*).

It is in order here to discuss four more points:

1. Imperatives should not be confused with normative facts, as the set of imperatives is a mere subset of the set of normative facts³⁶.
2. Normative facts are symbolic.
3. The causal role of a normative fact is not played by the normative fact itself, but rather by the way the individual represents it to himself.
4. The concept of imperative does not belong to naïve ethical ontology and is scientifically useless.

To address the first point, let us start with a quotation taken from Petrażycki that I have already quoted above (sec. 2.5), though in a shortened version:

[T]he structure of certain ethical experiences [*étičeskie pereživaniija*] comprises the representations [*predstavlenija*] of norm-establishing [*normoustanovitel'nye*], normative facts [*normativnye fakty*]: thus "We must act thus because it is so written in the New Testament, in Talmud, in the Qu'rān, or in the Code of Laws ...", or "because our fathers and grandfathers acted so", or "because the assembly of the people has so ordained". Ethical experiences comprising representations of these and similar normative facts [*normativnye fakty*] ... we shall call ... positive [*pozitivnye*]; and the others ... intuitive [*intuitivnye*]. Thus, if 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

³⁶ To be sure, the set of "imperatives" presents but an intersection with the set of normative facts. See at this regard Fittipaldi 2012.

judgments [*suždenija*], convictions [*ubeždenija*], obligations [*objazannosti*] and norms [*normy*] 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 1909-10: 47 f., 1909-10* 44 f.]

Here Petrażycki mentions several diverse kinds of normative facts. The sentence “because our fathers and grandfathers acted so” is a clear reference to the concept of *vertical custom* (about this concept and the concept of *horizontal custom* see above 2.5, and Fittipaldi 2012). Now, it is clear that hardly have *vertical* and *horizontal custom* anything to do with imperatives. The same can be said of several other kinds of positive ethics discussed by Petrażycki, such as *book law* (*knižnoe pravo*) or *precedential law* (*precedentnoe pravo*)³⁷. As regards the latter it is worth reading the following quotation:

If in a certain situation – at the card table, in the university council or faculty, in parliament, etc. – for a certain legal problem (for whose solution no ready pattern exists) a certain factual solution [*faktičeskoje rešenje*] in a certain concrete case was reached ... and similar circumstances later recur, a corresponding positive legal psychic attitude [*psihika*] is already operative, insisting upon the same conduct with reference to the precedent – asserting that was thus done in the first instance, and claiming that this should “therefore” be followed in the new situation as well. [Petrażycki 1909-10: 607, 1909-10*: 289, translation modified]

It should be stressed that for a certain fact to play the role of a precedent it is not at all necessary that the persons who were involved in that precedent were aware of being solving a legal problem. Such a solution can have been arrived at even by chance. This is why Petrażycki talks of a *factual* solution³⁸.

Also in this case, there is hardly any imperative on the part of anybody.

Imperatives have one thing in common with all normative facts. As Jacek Kurczewski pointed out, normative facts are *symbolic* (1977b: 103), though in a very broad sense. For some fact to play the role of a normative fact it is necessary that it is suitable to be interpreted, namely that it is possible to argue that that fact “means” that a certain behavior has a certain

³⁷ Petrażycki uses the term *pravo*, but what he says can be generalized for ethics in general. The reason why Petrażycki theorizes these kinds of ethics in the context of law is that he holds that the conflict-producing nature of legal phenomena causes more often their positivization as compared with moral phenomena (see above, sec. 1.1). Contending that legal phenomena correlate more often with positivization than moral phenomena, though, is not to exclude the existence of positive moral phenomena.

³⁸ It goes without saying that precedential law has nothing to do with *stare decisis* (1909-10: 574, 1909-10*: 272). He calls this *stare-decisis* law *pravo ot del'nyh precedij*. I think that this term could be translated with the term *prejudicial law* (see Fittipaldi 2012).

ethical quality. With this qualification, virtually whatever fact can play the role of a normative fact³⁹.

I already said (sec. 2.5) that, since according to ethical solipsism the only really existing ethical phenomena are the emotions experienced by the individuals, *what really matters* is not whether a certain normative fact really exists (or existed), but rather *whether the individual experiencing a certain ethical emotion believes both that that fact exists (or existed) and that that fact founds, can justify his ethical emotion* (even if neither is true)⁴⁰.

I wish to add something at this regard.

A positive ethical emotion can be experienced even by mistake⁴¹.

Here is what Petrażycki wrote about positive law (but the same holds true for morality).

[W]e must keep in view that not only are legislative imperatives [*zakonomdatel'nye velenija*] and other facts, whose representations [*predstavlenija*] enter into the content of positive law experience, not identical with positive law itself: they are not even so connected therewith causally that there is necessarily parallelism between them in fact ...

... [*W*]hat is significant in positive law, as the bases of obligations and determinants of conduct, is not the corresponding objective events (imperatives of legislators and so forth), but the representations of them as present or past events. Accordingly, if the representation of a corresponding fact as a real event is present – such as the imperative of some monarch or deity, or a custom of ancestors and so forth – it is then immaterial, as regards the existence and operation of the corresponding positive law (statutory or customary) whether or not this fact actually occurred: not only may themselves exist only in legend or myth but the ancestors may have known nothing whatever of the custom ascribed to them or have acted in a completely different way. [Petrażycki 1909-10: 519 f., 1909-10*: 248 f.]

Strictly speaking, in the terminology of ethical solipsism real imperatives are not normative facts. Only their *representations* are normative facts, provided that they are experienced by the individual as causing his ethical emotions. This implies that, not only can the role of a normative fact be played by facts that never occurred, but also that facts that did occur may not play the role of normative facts because they have been forgotten:

³⁹ As regards the issues of what can play the role of a normative fact and the difference between a normative fact and the ought-hypothesis of a hypothetical norm see Fittipaldi 2012, — a and — b.

⁴⁰ As we know, for the representation of some fact to qualify as a normative fact it must also be the case that that representation causes the individual's emotion (and ethical conviction).

⁴¹ It could be asked whether it makes sense to talk of normative mistakes in the context of normative solipsism. The answer is yes. *A certain individual has made a certain positive ethical experience by mistake if that individual would himself call that ethical experience "a mistake", were he to discover that the normative fact with reference to which he made his ethical experience does or did not exist.* I discuss this topic elsewhere, but cf. below sec. 4.6.2, fn. 113.

[C]onversely, if the relevant fact had place in reality (if a certain statute had been promulgated and not abrogated) but there was neither the corresponding knowledge nor a corresponding representation [*predstavlenie*] (as, for example, if the statute was forgotten) – then the corresponding positive law neither does nor can exist and operate. In certain stages of culture – before and even after – the development of writing and prior to the invention and spread of printing, it is not without significance as a destructive factor in the development of positive law that legislative orders and other normative facts have been forgotten. [Petrażycki 1909-10: 520, 1909-10*: 249, translation modified]

It goes without saying that these statements are fully compatible with critical rationalism. According to critical rationalism the hypothesis of the existence of an external reality implies but an approximate convergence of the representations caused by external realities in different people⁴².

In many cases there can be correspondence between really issued imperatives and the way they are represented by certain individuals, but this is not necessarily always the case.

Omitting the distinction between normative facts, on one hand, and their representations, on the other, would be tantamount to rejecting the point of view of general legal theory and adopting the point of view of legal dogmatics. According to Petrażycki (legal) dogmatics pertains to what-ought-to-be in a *pravavoe gosudarstvo* (*Rechtstaat* in German, *stato di diritto* in Italian). Discussing Petrażycki's idea of dogmatics (*dogmatika*), that he also called *jurisprudence in a strict sense* (*jurisprudencija v tesnom smysle*) (1909-10: 648, 1909-10* 298 f.) does not lie within the scope of this book⁴³.

We can finally turn to the fourth point.

The concept of imperative has a big disadvantage. It is neither technical, like the concept of normative fact, nor does it pertain to naïve ethical ontology. It is somewhat in between. Unlike such terms as *command* or *statute*, it does not select a salient subset of naïve ethical phenomena. In sec. 4.10, I will argue that *commands* and *statutes*, rather than just belong to the set of “imperatives”, are opposite prototypes on a continuum.

3.5. ETHICAL EMOTIONS, AGGRESSIVENESS AND ETHICAL SADISM

It is now time to discuss an issue that will play a major role in the remainder of this book: the relationship between ethical emotions, super-ego and human aggressiveness.

⁴² This also shows why supporting ethical solipsism does not imply supporting some sort of general metaphysical solipsism, as wrongly maintained by Znamierowski (cf. above, sec. 1.1, fn. 1 and fn. 7, as well as sec. 2.6, and fn. 33 in that section).

⁴³ As regards Petrażycki's concept of legal dogmatics see also Peczenik 1969, Fitipaldi 2010, 2012 and — a.

According to Sigmund Freud the unpleasant ethical emotions (he talks most of guilt) the individual feels in case of non-compliance with the standards⁴⁴ set by his super-ego are the result of the individual's aggressiveness re-directed against the individual himself.

Sigmund Freud made the *hypothesis* that the functioning of the super-ego is strictly connected to the individual's aggressiveness.

There is no doubt [*gewiss*] that, when the super-ego was first instituted, in equipping that agency use was made of the child's aggressiveness towards his parents for which he was unable to effect a discharge outwards on account of his erotic fixation [*Liebesfixierung*] as well as of external difficulties; and for that reason the severity of the super-ego need not simply correspond the strictness of the upbringing. [Freud 1932*: § 32, 109]

In other words, the child often has to comply with requests or prohibitions that he does not like or understand. In these cases he might like to discharge his aggressiveness against the caretaker who issued those requests. But the child cannot, both because he loves him and because his caretaker is obviously stronger than he is. Thus the child's aggressiveness ends up to be re-directed against the child himself⁴⁵.

This is why, Freud's approach seems to imply that the severity of super-ego, correlates, rather than with the strictness of the upbringing, with the strength of the individual's aggressiveness: *the more the individual's aggressiveness, the bigger the chance that, if the individual will develop a super-ego, it will be a strong one*, i.e. a super-ego that causes intense guilt/shame.

According to Freud, the super-ego discharges against the individual the aggressiveness that the individual – had his super-ego not been constituted – would have discharged against others. In this way the individual's aggressiveness is not reduced, but only re-directed:

What happens [in the individual] to render his desire for aggression innocuous? His aggressiveness is introjected, internalized; it is, in point of fact,

⁴⁴ The term *standard* in this context refers an illusion. We will get rid of this illusion in the next section.

⁴⁵ This point may be clearer if we bear in mind the following two points.

First, the very discharge of aggressiveness may produce some sort of pleasure (by relief) regardless of whether it takes place against others (sadism) or against the individual himself (masochism: cf. Freud 1924*).

Second, the child, by punishing himself through the discharge of his aggressiveness against himself, can pretend to be like his caretaker at least for a while. Since, as we have already seen, the child considers his caretakers like gods, this may be tantamount to a narcissistic satisfaction. That is why it can be argued that there exists a connection between super-ego and narcissism (cf. Freud 1925*: B).

Of course, these conjectures hold true only if we assume that the individual can split his own psyche in such a way that the part that punishes can enjoy the pleasure of punishing the other part.

sent back to where it came from – that is, it is directed towards his own ego. There it is taken over by a portion of the ego, which sets itself over against the rest of the ego as super-ego, and which now, in the form of “conscience”, is ready to put into action against the ego the same harsh aggressiveness the ego would have liked to satisfy upon other, extraneous individuals. [Freud 1929*: 123]

However, this seems to be but the final stage of the development of the super-ego.

It has been hypothesized that there is an *intermediate stage* at which the individual is aggressive against others’ non-compliances, without being aggressive towards his own ones.

Let us see how Anna Freud described this intermediate stage:

[In this case the ego’s] intolerance of other people is prior to its severity towards itself. It learns what is regarded as blameworthy but protects itself by means of this defense-mechanism from unpleasant self-criticism. Vehement indignation at someone else’s wrong-doing is the precursor of and substitute for guilty feelings on its own account. Its indignation increases automatically when the perception of its own guilt is imminent. This stage in the development of morality [i.e. – in our terminology – ethics] is a kind of preliminary phase of morality. True morality begins when the internalized criticism, now embodied in the standard exacted by the super-ego, coincides with the ego’s perception of its own fault. From that moment, the severity of the super-ego is turned inwards instead of outwards and the subject becomes less intolerant of other people. But, when once it has reached this stage of development the ego has to endure the more acute “pain” occasioned by self-criticism and the sense of guilt.

It is possible that a number of people remain arrested at the intermediate stage in the development of the super-ego and never quite complete the internalization of the critical process. Although perceiving their own guilt, they continue to be peculiarly aggressive in their attitude to other people. In such cases the behavior of the super-ego towards others is as ruthless as that of super-ego towards the patient’s own ego in melancholia. [A. Freud 1936*: 128 ff.]

We can summarize Anna Freud’s hypothesis in the following way: we first see the motes that are in our brothers’ eyes and only later on – if at all – do we see the beams that are in our own eyes. An implication of this hypothesis seems to be that the development of super-ego should be correlated with a decrease of anger and indignation and an increase of guilt and shame. This is a falsifiable hypothesis⁴⁶.

⁴⁶ The different way still nowadays parents seem to deal with their child’s aggressiveness, depending on whether it is male or female, implies that women should be more likely than men to develop a super-ego that inhibits the development of anger/indignation as well as unrestrained discharges of aggressiveness. (As regards this latter point, just think of women’s crime rates as compared with men’s).

Moreover, Freud’s theory of guilt/(shame) as resulting from the re-direction of the individual’s aggressiveness towards the individual himself has the falsifiable implication

Throughout this book my hypothesis will be that the development of a super-ego, usually, does not imply a complete disappearance of anger and indignation. Most people are able to experience, depending on the circumstances *anger/indignation* or *shame/guilt*.

Sigmund Freud's hypothesis implies that the connection between the super-ego and aggressiveness can be in either direction:

1. against others in case of their non-compliance with one's ethical convictions⁴⁷ and
2. against the individual himself in case of his non-compliance with his own ethical convictions⁴⁸.

I shall call the first phenomenon *ethical sadism*⁴⁹, the second one *ethical masochism*⁵⁰. Moreover, I will use the term *sadistic ethical emotions* to refer to *anger* and *indignation* and the term *masochistic ethical emotions* to refer to *shame* and *guilt*.

The fact that I adopt this terminology does not imply that I accept Freud's metaphorical idea that guilt (and shame) take their "energy" from the individual's aggressiveness. I think that Freud's hypothesis of a super-ego holds even without this hypothesis.

*An alternative explanation of the unpleasantness of guilt/shame is that they are a sort of re-experience of the child's unpleasant fear of having lost his caretaker's love*⁵¹. In this case no re-direction of the child's aggressive-

that women are more prone to guilt/shame than men. This is consistent with empirical findings, and it is instead inconsistent with Freud's contention that the fear of castration plays a key role in the development of super-ego (see above sec. 3.2, fn. 8).

⁴⁷ My impression is that Konrad Lorenz, who did accept many points of Freud's theories, would have accepted this point as well. I think that what he said about the connection between *militant enthusiasm* and aggressiveness, holds true for ethical feelings as well: «That indeed is the Janus head of man: The only being capable of dedicating himself to the very highest moral and ethical values requires for this purpose a phylogenetically adapted mechanism of behavior whose animal properties bring with them the danger that he will kill his brother, *convinced that he is doing so in the interests of these very high same values*». [Lorenz 1963*: 274, emphasis added]

⁴⁸ In this case we are dealing with a *deviant* in Pattaro's sense.

⁴⁹ Piaget used the term *sadism* while discussing child rearing: «How can one fail be struck on such occasions by the psychological inanity of what goes on: the efforts the parents make to catch their children in wrong-doing instead of anticipating catastrophies and preventing the child by some little artifice or other from taking up a line of conduct which his pride is sure to make him stick to; the multiplicity of orders that are given (the "average parent" is like an unintelligent government that is content to accumulate laws in spite of the contradictions and the ever-increasing mental confusion which this accumulation leads to); the *pleasure* taken in using authority and the sort of *sadism* which one sees so often in perfectly respectable folk ...». [Piaget 1932*: 190, emphases added]

⁵⁰ The way I use this term is slightly different from the way Freud used the term *moralischer Masochismus* (1924*). Freud referred only to certain pathological states, whereas I use it to refer to the normal functioning of the super-ego.

⁵¹ Even if we accept this different explanation of guilt and shame, in either case my proposal excludes that there can be such phenomena in non-human animals. Some ethologists (e.g. Lorenz), though, argued that dogs are capable of experiencing guilt. According

ness is involved. Since the question of the truth of the theory of the re-direction of aggressiveness seems not to have been yet settled, I will keep using the term masochistic ethical emotion to refer to guilt/shame without implying that this theory is correct or necessary for what I will be arguing in the rest of this book.

In order to better understand the way I am going to understand the term *ethical sadism*, I think it is useful to shortly discuss an idea of one of the most notorious philosophical supporters of ethical sadism: Immanuel Kant⁵².

Kant's ethical aggressiveness was directed, not only towards criminals⁵³, but also towards such innocent people as homosexuals⁵⁴ and babies.

The last case deserves a short discussion, as it permits to see some more connections with what has already been said in this chapter.

A child that comes to the world apart from marriage is born outside the law [*Gesetz*] (for the law is marriage) and therefore outside the protection of the law. It has, as it were, stolen into the commonwealth (like contraband merchandise [*verbotene Ware*], so that the commonwealth can ignore its existence (since it rightly [*billig*] should not have come to exist this way), and therefore ignore its annihilation [*Vernichtung*]. [Kant 1797*: 144 f.]

According to Kant, if the child was born outside the wedlock, the law can also ignore its killing. From a strictly logical and psychological point of view this amounts to stating some mere *absence-of-prohibitedness*⁵⁵. This should imply that Kant here is just expressing his own non-experience of ethical phenomena at the regard of the killing of a child that has come to the world apart from marriage. In my opinion, though, it could also be argued that this absence is but a cover for the strive of Kant's inhibited aggressiveness for discharge. (Two phenomena that should be compared

to others, instead, «[t]he behavior of dogs after transgression is ... best regarded not as an expression of guilt, but as a typical attitude of hierarchical species in the presence of a potentially angry dominant: a mixture of submission and appeasement that serves to reduce the probability of attack» (de Waal 1996: 108).

This is not to say that animals are incapable of superegoic emotions. My proposal only excludes that they are capable of masochistic and narcissistic ethical emotions. Many of them, instead, are capable of sadistic ones (cf. below fn. 66). The very fact that in the last quoted passage by de Waal he uses the term *angry* is evidence of this.

⁵² This point was already made by Paul K. Feyerabend: «Kant ... creates a ... monstrous caricature of what human being should mean and uses it as a justification for being cruel without any feeling of regret, on the contrary, with the wonderful feeling of having done the right thing». [Feyerabend 1989, this sentence is not contained in Feyerabend 1979]

(Compare this quotation with Lorenz's in fn. 47).

⁵³ He was a strong supporter of death penalty (see 1797*: 143).

⁵⁴ He supported the castration of homosexuals (see 1797*: 169) – as it is quite probable that he used the term *päderastie* to refer to homosexuality.

⁵⁵ As regards the possibility that a phrase that strictly logically means absence-of-prohibitedness is used to mean permittedness cf. below, sec. 4.4.4, fn. 59.

with Kant's attitude towards illegitimate children are *Rechtslosigkeit* and *sacertas*).

In general, it can be argued that ethical sadists do *hope* that trespasses take place in order to have a "good" reason to discharge their aggressiveness (cf. above, fn. 49).

A closely related phenomenon is that *ethical aggressiveness may be directed, not only towards trespassers, but also against the results of the trespass*.

I think that this phenomenon can be explained through the following conjecture: *since the super-ego originates when individuals are small children, it retains, not only the features we have discussed in sec. 3.2, but also typically childish modes of reasoning*.

One mode of reasoning characterizing small children is *participation* (that, along with animism, is one of the bases of children's magical thinking).

Here is Piaget's definition ⁵⁶:

[W]e shall give the name "participation" to that relation which primitive thought believes to exist between two beings or two phenomena which it regards either as partially identical or as having direct influence on one another, although there is no spatial contact nor intelligible cause connection between them. [Piaget 1926*: 157]

The hypothesis that this is the mode of thinking operating when the super-ego gets developed may explain why a developed super-ego may fail to distinguish between the actual trespasser, on one hand, and any kind of factual result of the trespass itself, on the other. This failure may lead the individual to choose a "wrong" object onto which to discharge his aggressiveness. When it comes to the discharge of aggressiveness, the ethical repulsion does not clearly distinguish among the trespass itself, what has been brought about by the trespass and – in the case of primitive thinking – even whatever has been "contaminated" by any sort of contact with the trespasser.

It goes without saying that, from a utilitarian point of view, killing children born outside the wedlock hardly brings any advantage to society.

This is not always the case, though.

A primitive mode of thought similar to Kant's can be found in the fruits-of-the-poisonous-tree doctrine of common law, namely

[t]he rule that evidence derived from an illegal search, arrest, or interrogation is inadmissible because the evidence (the "fruit") was *tainted* by the illegality (the "poisonous tree"). Under this doctrine, for example, a murder weapon is inadmissible if the map showing its location and used to find it

⁵⁶ Piaget took the term and the concept of *participation* from Lévy-Bruhl 1910, 1922, 1931.

was seized during an illegal search. [BLD 2004: entry *fruits-of-the-poisonous-tree doctrine*, emphasis added]

In this case we have the magical idea that some sort of “contamination” has taken place. It goes without saying that the fact that this rule may be justified from a utilitarian point of view is but a fortunate coincidence.

The concept of *contamination* calls for a short discussion of the concept of *disgust*. At first glance, disgust seems to be a non-ethical repulsive emotion.

As we know, though, Michael Lewis has shown that a disgusted face is widely used in the socialization of children (above, sec. 3.2, fn. 12).

The connection between contagion and disgust is immediate. Actually, Paul Rozin talks of *disgust contagion* and convincingly shows that it is negatively biased:

Contagion is negatively biased. Ask yourself, What is the opposite of disgust contagion? What could you touch to a bunch of awful stuff that would make it good to eat? For example, what would be the opposite of the worm on the mashed potatoes? Nothing. A Nebraska car mechanic summed it up when he said, “A teaspoon of sewage will spoil a barrel of wine, but a teaspoon of wine does nothing for a barrel of sewage”. [Rozin 1997: 42, see also at this regard Nussbaum 2004: 93]

Further research is required to ascertain what the connection is between disgust and aggressiveness as well as to ascertain whether there is a connection between disgust – that is a typical way to shame people –, disgust contagion and the contagiousness of shame that will be discussed in the next paragraph. I will treat ethical disgust as a discharge of aggressiveness aimed at producing shame. This treatment allows for the conjecture that the role of aggressiveness can perhaps explain why disgust contagion is negatively biased.

Be as it may, ethical phenomena seem to be deeply rooted in childishness and aggressiveness⁵⁷.

⁵⁷ One could ask whether human beings can get rid of aggressiveness.

According to Lorenz aggressiveness is a hereditary evil of the human species: «Above all, it is more than probable that the destructive intensity of the aggression drive, still a hereditary evil of mankind, is the consequence of a process of intra-specific selection which worked on our forefathers for roughly forty thousand years, that is, throughout the Early Stone Age. When man had reached the stage of having weapons, clothing, and social organization, so overcoming the dangers of starving, freezing, and being eaten by wild animals, and these dangers ceased to be the essential factors influencing selection, an evil intra-specific selection must have set in. The factor influencing selection was now wars waged between hostile neighboring tribes. These must have evolved in an extreme form of all those so-called “warrior virtues” which unfortunately many people still regard as desirable ideals». [Lorenz 1963*: 42 f.]

According to Lorenz, not only do human beings retain an aggressiveness that is now completely uselessness, but it may also be that this aggressiveness has been further

3.6. SHAME, GUILT, PRIDE, ANGER AND INDIGNATION

Let us now discuss in some detail the *five* emotions produced by the super-ego: guilt, shame, pride, anger and indignation. I will first discuss *masochistic ethical emotions* (guilt and shame). Then I will discuss pride that, if sometimes resulting in masochistic behaviors, is first of all a *narcissistic ethical emotion*. Finally, I will discuss *sadistic ethical emotions* (i.e. anger and indignation). (As I said in sec. 3.5, the fact that I use the term ‘masochistic ethical emotion’ does not imply that I accept Freud’s conjecture that guilt/[shame] is the result of the re-direction of the individual’s aggressiveness towards the individual himself).

Let us start with *shame* and *guilt*.

Freud did not develop a distinction between shame and guilt, and mostly talked of guilt (*Schuldgefühl*).

Since the path-breaking works of Piers & Singer (1953) and H.B. Lewis (1971) much research has been done and psychologists have been able to distinguish shame and guilt both from a theoretical and from an operational point of view.

Many contemporary psychologists agree on characterizing shame and guilt in the following way (I am drawing chiefly on Tangney & Dearing 2002)⁵⁸:

1. Both are ethical emotions.
2. Both are self-conscious, self-referential emotions.
3. Both are negatively balanced emotions.
4. Both involve internal attributions of one sort or another.
5. Both are typically experienced in interpersonal contexts.

The negative events that give rise to shame and guilt are highly similar.

This is what shame and guilt have in common. Let us now discuss the features characteristic of shame and guilt, respectively.

First of all, *shame* and *guilt* seem to differ as regards their *focus of evaluation*. This seems to be the feature that in a way determines all the others. Shame focuses on the global self (“I did that horrible thing”), while guilt focuses on a specific behavior (“I *did* that horrible *thing*”). A person that experiences shame about something he did considers that deed but an *index* of what he really is.

increased with the process of selection occurred throughout the Early Stone Age. (In ch. 14, though, Lorenz discusses some ways human aggressiveness could be re-directed into harmless modes of sublimation or discharge).

⁵⁸ A precious source of information is also Nussbaum’s *Hiding from Humanity* (2004). The subject-matter of Nussbaum’s book, though, is completely different from mine. Her concern is the role that shame, disgust, guilt, etc. should play in legal policy. This book, instead, has not the goal of recommending anything to the lawmakers.

Shame, unlike guilt, involves some sort of negative ego-ideal (Tangney & Dearing 2002: 13). This implies that shame should correlate with narcissism.

It has been suggested that the narcissistic personality disorder is a defense against shame. Empirical research conducted in this field, contrary to this theory, has shown that guilt-proneness is unrelated to narcissism, while shame-proneness – surprisingly – is *negatively* correlated with narcissism.

Here is Tangney and Dearing's commentary on this topic:

This negative relationship between shame and narcissism was surprising, to say the least, especially in light of so much clinical observation and theory to the contrary. One possibility is that the rather dramatic defenses inherent in narcissism are in fact quite effective in short-circuiting shame-like reactions⁵⁹. Highly narcissistic individuals may not frequently experience shame. A second possibility, however, is that these theoretically inconsistent results are an artifact of difficulties in the measurement of both narcissism and shame and guilt. [Tangney & Dearing 2002: 73]

According to Michael Lewis:

when shamed, the narcissist is likely to employ the emotional substitutions of depression or rage. Given our cultural constraints, in general female narcissists are likely to employ depression, males rage. [M. Lewis: 1991 169]

As regards the kind of pain experienced, the person experiencing shame feels shrinking, small, worthless, while the person experiencing guilt feels tension, remorse, regret.

Others may play very different roles in shame and guilt, respectively. While a person experiencing shame is just concerned with *the way others evaluate him*, the person who experiences guilt is concerned with *the way he affected others*.

It should be stressed, though, that shame, as much as guilt, can be *private*.

Since the opinion that shame is public is quite widespread – especially among sociologists –, it is worth quoting M. Lewis's reported example of private shame:

Jeannette gave a lecture in which she presented some work that she had recently completed. The lecture was well received and her audience thought she had presented the material clearly. As she reported, "Their enthusiasm was extremely high and several people came up afterwards to tell me how well I did." Yet she also reported that she felt she had failed and was ashamed because "she didn't present her work as well as she might have." Her shame derived from her failed internal standard of what she thought she could have done, a standard independent of audience evaluation. [M. Lewis 1992: 75 f.]

By the same token, it should be stressed that not even guilt necessarily requires another person. *A person may feel guilty with himself*. Think of

⁵⁹ As regards this hypothesis see also M. Lewis (165).

the case a person does not comply with a – possibly self-imposed – diet. Many people in the case of such a failure feel guilty with themselves.

Counterfactual thinking. People who experience shame and guilt experience completely different counterfactual thinking. The person experiencing shame tries to mentally undo some aspects of his self, while the person experiencing guilt would like to be able to change the past and undo what he did.

As a consequence, while the persons experiencing guilt would like to confess, apologize or – if still possible – repair, the person who experiences shame would just like to hide, escape or strike back.

One further difference between shame and guilt seems to be that shame is *contagious* while guilt is not (H.B. Lewis 1971: 204 f., M. Lewis 1991: 130). This means that a shame-prone spectator of a shameful behavior may get ashamed, while this does not seem to occur to a guilt-prone spectator of other kinds of unethical behaviors. Rather non-shameful unethical behaviors elicit indignation. The connection between shame and disgust (sec. 3.5) seems to be compatible with the phenomenon that shame is contagious, while guilt is not. The main differences between shame and guilt are summed up in table 3.1.

We shall see that it could be tried to relate shame and guilt to Petrażycki's distinction between legal and moral experiences. I will discuss this issue in sec. 4.2.

Table 3.1. – Guilt vs. shame.

	GUILT	SHAME
FOCUS OF EVALUATION	focuses on a specific behavior	focuses on the whole self
FEELINGS EXPERIENCED	tension, remorse, regret	feeling shrinking, small, worthless
KIND OF COUNTERFACTUAL THINKING	wish to undo what one has done	wish to be different
ACTIONS DESIRED	wish to confess, apologize, repair	wish to hide, escape, strike back
FEELINGS PRODUCED IN THIRD SPECTATORS	indignation	(contagious) shame, indignation
RELATED WITH DISGUST	no	yes
POSSIBLY ASSOCIATED DISORDERS (SEE ALSO H.B. LEWIS 1971: 91)	obsession, paranoia	depression, narcissistic personality disorder
CORRELATION WITH EITHER LAW OR MORALITY IN PETRAŻYCKI'S SENSE (SEE BELOW, SEC. 4.2)	no correlation	may correlate more with morality

As regards shame and guilt it is worth anticipating here a point I will elaborate upon in the next chapter.

My conjecture will be that *shame and guilt can be experienced, not only ex post, but also ex ante*. This implies that I will treat the Petrażyckian ethical repulsion that an individual may experience towards his own potential action as nothing else but anticipated guilt or shame.

Shame will play a role as regards third spectators as well, as their ethical repulsion towards some person or behavior will be sometimes treated as contagious shame.

We can now turn to *pride*. Pride is closely related to what is usually called *sense of duty*⁶⁰. Sense of duty cannot be reduced to the mere anticipation of shame or guilt on the part of the individual. A person performing a certain action out of sense of duty does that in order to experience the pleasant experience of pride. In psychoanalytic terms *pride* can be defined as the pleasant emotion deriving from the belief of being attaining the goals set by one's positive ego ideal (here understood as a part of one's super-ego).

I propose to analyze the sense of duty in the terms of *anticipated pride*. Hence, the sense of duty is neither a masochistic nor a sadistic ethical emotion, but rather a narcissistic one. Sure, out of this narcissistic emotion a person may carry out the most extreme kinds of sadistic or masochistic⁶¹ activities, but there is a huge difference between sadistic or masochistic ethical emotions proper and an emotion that just causes masochistic and sadistic behaviors. The former coincide with discharges of the individual's aggressiveness or with re-experiences of the child's fear of losing his caretaker's love. The latter, instead, are caused by the individual's self-love or love for his ego ideal.

It is easy to relate pride-related sense of duty to narcissism. Above we have seen that the child gets to two advantages from the internalization of his parents' imperatives and prohibitions:

1. He reduces the fear of losing his parents' love
2. He can pretend to be, in a way, like his parents.

If we accept Bovey's hypothesis that the child conceives his parents like gods, we can argue that if he has internalized his parents' imperatives and prohibitions the compliance with them – *especially when they are hard to comply with* – may give the child some sort of narcissistic satisfaction.

It is worth reading at this regard what Michael Lewis writes about the relationship between pride, joy, sadness and shame:

⁶⁰ See Hägerström 1917 (127 ff.) for a psychologistic approach that does not connect sense of duty to pride.

⁶¹ As regards an example of an explanation in terms of narcissism of phenomena of religious masochism see Mancia's (2010: 85) discussion of Dodds *Pagan and Christian in an age of anxiety* (1965).

Increasing evidence indicates that pride and shame are different from joy and sadness. Recently we conducted a study with 3-year-old children. They were given two types of task, easy ones that could be readily solved and more difficult ones. Several findings bear on this question of the timing of emergence of evaluative emotions. When children succeeded in solving a problem they showed joy; however, *when they succeeded with a difficult task they showed pride*. This finding suggests that pride is related to achievement on a task *the child himself evaluated as difficult to do*. Likewise, when the children failed a task they showed sadness; however, *when they failed an easy task they showed shame*. Both pride and shame were related to the children's evaluation of the task difficulty, but this is not the case of joy and sadness. [M. Lewis 1991: 94]

My conjecture is that the person who acts, not out of fear of potential shame or guilt, but out of sense of duty, acts primarily in order to gain the *narcissistic satisfaction of thinking himself better than others*⁶². Acting in accordance with one's own sense of duty is tantamount to seeking the pleasant experience of pride.

In the remainder of this book I will sometimes use the term *pride-related sense of duty* rather than *pride* alone because more often than not pride is associated with *becoming a certain kind of person*, rather than just with performing *a certain kind of action*. Pride is an ethical emotion also when it is related to an ideal of oneself rather than to a specific action⁶³. In this book I am chiefly concerned with *actions* associated to ethical emotions. The stable association of an action representation or perception to ethical emotions, as we know, is what I call *norm* (and what Petrażycki called *normative conviction*). I will use the term *pride-related sense of duty* to refer to the pride associated to the performance of a certain action. It goes without saying that, according to these definition, there is not such a thing as a sense of duty that is not pride-related.

⁶² I have taken this expression from Freud's *Civilization and its Discontents* and the whole passage is well worth reading: «The commandment, "love thy neighbor as thyself" is the strongest defense against human aggressiveness and an excellent example of the unpsychological proceedings of the cultural super-ego. The commandment is impossible to fulfil; such an enormous inflation of love can only lower its value, not get rid of the difficulty. Civilization pays no attention to all this; it merely admonishes us that the harder it is to obey the precept the more meritorious it is to do so. But anyone who follows such a precept in present-day civilization only puts himself at disadvantage as compared with the person who disregards it. What a potent obstacle to civilization aggressiveness must be, if the defence against it can cause as much unhappiness as aggressiveness itself! "Natural" ethics, as it is called, has nothing to offer here except the narcissistic satisfaction of being able to think oneself better than others». [Freud 1929*: 143]

Freud is here contrasting "natural ethics" with the «ethics based on religion [that] introduces its promises of a better after-life».

⁶³ I use the term *ego ideal* to refer to the contents of the super-ego about what one should *be* or *become*. It could be terminologically opposed to the *normative super-ego* as the part of the super-ego concerning what one should, can, cannot *do*.

Table 3.2. – *Hubris, shame, pride and guilt according to M. Lewis (1991).*

FOCUS OF EVALUATION	COMPLIANCE WITH STANDARDS AND RULES	
	SUCCESS	FAILURE
GLOBAL	<i>hubris</i>	<i>shame</i>
SPECIFIC	<i>pride</i>	<i>guilt</i>

Michael Lewis contrasts *pride* with *hubris*. He proposes to use the term *pride* to refer to «the consequence of a successful evaluation of a specific action», while the term *hubris* should be used to refer to «a consequence of an evaluation of success according to one’s standards, rules, and goals where the focus is the global self» (78). Hence, he finds between *pride*, *hubris*, *guilt* and *shame* the structural relationship summed up in table 3.2.

Hubris is definitely an ethical emotion, but since it seems to be a pathological one it will not be further discussed in this book (see M. Lewis 165 f.).

Some remarks now about *anger* and *indignation*.

As we have seen in the preceding paragraph, anger and indignation seem to be “less-developed” ethical emotions. Some people at certain stages of their lives, if not throughout their entire lives, may be able to experience anger or indignation without being able to experience guilt or shame.

From a terminological point of view, I wish to stress that I use the term *anger* in the sense of *righteous anger*⁶⁴. In my terminology *anger is a discharge of one’s usually restrained aggressiveness*. The super-ego controls whether the usually restrained aggressiveness is or is not discharged. If some individual’s aggressiveness is not usually restrained, my terminology excludes that his discharge of aggressiveness can be called *anger*. In this case I would rather use the term *rage*⁶⁵. For a norm to exist it suffices that one’s usually restrained aggressiveness gets discharged under certain circumstances, and under certain circumstances only. Moreover, in the case of anger, the amount of aggressiveness discharged is usually not unrestrained. It is just higher than average⁶⁶.

I stipulatively distinguish *anger* and *indignation* in that *anger* is typically experienced by an actual or potential victim, while indignation is typically experienced by a third spectator⁶⁷.

It is worth recalling that Petrażycki himself sometimes used the verb *negodovat’* (“to indignate”) to refer the kind of phenomena I am here dis-

⁶⁴ Cf. Piaget’s quotation below in sec. 4.4.3 where he uses the term *juste collere*.

⁶⁵ As regards rage see Lewis’s (1992) discussion of Retzinger 1987.

⁶⁶ Ethical anger, as opposed to unrestrained rage, seems to be experienced by chimpanzees. See at this regard de Waal 1992 (45).

⁶⁷ Third spectators can also experience contagious shame.

cussing. Even though the concept of *power* (*vlast'*) will be discussed in sec. 4.8, it is in order here to quote the passage where he uses this term:

people's legal mentality endows with rights of authority ... a host of persons in the state – not only monarchs, ministers, governors, and the like, but even district, city, or village policemen and ... these persons in exactly the same manner ascribe to themselves the corresponding rights, act under the consciousness of their rights, and *indignate* [*negodujut*] if others are unwilling to submit to commands corresponding to their rights. [Petrażycki 1909-10: 216, 1909-10*: 136, emphasis added]

According to the distinction here adopted, instead, stating the existence of a norm according to which the policeman's commands should be obeyed amounts to stating that in case of disobedience either the policeman *gets angry* or some third spectator *indignates* (or experiences contagious shame)⁶⁸. If we are to follow my terminological choices, the policeman whose command is disobeyed cannot *indignate*, he can only *get angry*⁶⁹.

Both anger and indignation are discharges of aggressiveness allowed by the super-ego. Such discharges occur when the subject perceives a certain kind of behavior on the part of somebody else.

It is worth stressing that I would be committing a *petitio principii* if I were arguing that anger and indignation are discharges of aggressiveness occasioned by somebody's failure to comply with a certain *standard*. The standard does exist in the psyche of the subject precisely because his super-ego under certain circumstances unleashes a discharge of aggressiveness that is usually restrained.

My concept of *anger* is close to Schlicht's (1998). Since a discussion of Schlicht's concept requires being acquainted with Petrażycki's distinction between law and morality, I will discuss it in sec. 4.4.1. There (as well as in sec. 4.12) I will say something more as regards the distinction between anger and indignation.

After discussing *shame, guilt, pride, anger* and *indignation* the question could be raised whether there are further ethical emotions. The answer is yes. I have already mentioned *hubris*. Another candidate could be *embarrassment*. Since there is not enough psychological literature on this subject and because of the minor role that embarrassment plays in our everyday lives as compared with the major five ethical emotions, I will leave this topic aside (see M. Lewis 1992: 81). As regards *ethical disgust* see sec. 3.5.

Finally, two differences between my proposal and standard contemporary psychology must be discussed.

⁶⁸ Or else the addressee of the command feels ashamed or guilty for disobeying.

⁶⁹ Another occurrence of the concept of indignation (*negodovanie*) can be found in 1909-10: 193, fn. 1.

In the first place, it should be pointed out that *my definition of 'ethical emotion' as superegoic emotion – including anger and indignation – is different from the concept of self-conscious emotion adopted in current psychology.*

Many psychologists distinguish between primary and secondary (or self-conscious) emotions. Primary emotions are joy, sadness, disgust, interest, fear and *anger*. They appear early in human development and, if requiring cognitive activity, they do not rely on self-consciousness (M. Lewis 1992: 9). Primary emotions do not involve the *self*, while secondary emotions do (M. Lewis 1992: 236; Plutchnik 1962).

My psychoanalytical definition of *ethical emotion* in terms of an emotion regulating one's extrajected or introjected aggressiveness (or regulating the re-experience of the fear of losing the caretaker's love) is not meant to dispel the distinction between primary and secondary emotions. It is just different. An emotion can be superegoic without requiring self-consciousness. We have already discussed (sec. 3.5) Anna Freud's hypothesis about the different stages of development of ethical anger and guilt.

In the second place, it should be pointed out once again that *in the psychological theory of ethics I am proposing norms cannot exist independently of at least one individual actually or potentially experiencing an ethical emotion.* This is a plain consequence of the definition of norm I gave above (sec. 3.4).

Psychologists, instead, hypostatize norms, as they assume that they exist independently of ethical emotions and in a way cause them.

Let us read, for example, the following quotation:

The function of guilt and shame is to interrupt any action that violates either internally or externally derived standards or rules. The internal command, which I call bringing into consciousness, says "Stop. What you are doing violates a rule or a standard." This command, then, serves to inhibit that action. [M. Lewis 1992: 35]

In my (Petrażyckian) psychological theory of law, instead, a norm exists if at least one person exists who,

- in case violation, would experience guilt, shame, anger or indignation, or
- in case of compliance, would experience pride.

The phenomenon that in certain contexts a certain behavior on the part of a given individual *systematically* produces *guilt* or *shame* in that individual, *anger* in a person negatively affected by that behavior and *indignation* in third spectators, may cause the hypostatization of norms, i.e. the illusion that something ideally objective exists that has been violated, while nothing more exists than a *consistently complementary combination* of these emotions. I call this kind of illusion the *illusion of objectively existing non-linguistic norms*.

A similar explanation seems to have been suggested by Pattaro:

We should notice, having identified norms with certain psychological states of individuals – with their normative beliefs – that it proves convenient

to apply the term “norm” not only to individual beliefs, but also to such normative beliefs as are *shared by different individuals*. This is so because numerically different beliefs of numerically different individuals will often *have the same content*. And just as it seems natural to say that numerically different beliefs having the same content are in a sense the same belief, so it seems natural to say that numerically different norms having the same deontic content *are in a sense the same norm*.

I use the term “norm” to refer to a deontic propositional content believed by at least one person to be normative: I will say that a deontic propositional content is a norm (and hence a norm exists) when this content is believed by at least one person. This person is a believer in the norm. The believers in a norm have a particular psychological state which I characterize as a norm, or normative belief. Let me reiterate: *People who believe in a norm (and so have a normative belief) may view what they believe in ... as having a non-empirical existence, namely, an existence independent of anybody's belief*. This idea is misguided, I submit: Normative deontic propositional contents do not designate any non-empirical reality, nor do they have any independent reality on their own. [Pattaro 2005: 99 f., emphases added]

The fact that several people believe in norms with similar contents causes the illusion that they actually share the *very same norm* and that that norm is outside the individuals themselves. I accept this explanation without accepting Pattaro's psychologism. As we already know (sec. 1.1 and 3.4), the major difference between my approach and Pattaro's is that Pattaro's is a *psychologistic* rather than a *psychological* theory of law. It is just psychologistic because it does not take into account psychology. It takes into account neither contemporary psychology nor ethical emotions. My proposal is somewhat in between Pattaro's psychologism and modern psychology in that in my opinion any psychological theory of law has to take into account psychology, but at the same time it cannot share the naïve illusion of modern psychology that norms exist independently of ethical emotions.

Another difference between me and Pattaro, as we know (sec. 3.4), is that the concept of *norm* for him plays the role of a primary theoretical concept. For me the primary theoretical concepts are shame, guilt, pride, anger and indignation. That is why my explanation of the illusion of objectively existing non-linguistic norms, though similar to Pattaro's, is more complicated than his. This is so because mine does not require *sameness in content* among several different normative convictions. It requires their *complementariness*. More details will be given below in sec. 4.4.1. ff.

A final remark is in order here as regards an objection that could be raised against my reduction of Petrazycki's ethical compulsions and repulsions to the five ethical emotions.

It could be objected that my contention that emotions emerge through the interaction of the child with his caretaker amounts to admitting that

ethical solipsism is untenable. In other words, it could be argued that since the existence of ethical emotions requires at least two individuals (the child and his caretaker), I am not any more within the theoretical frame of ethical solipsism⁷⁰.

This objection would fail to distinguish a *genetic ethical solipsism* from a *functional ethical solipsism*. Supporting the latter, as I do (Petrażycki does not say anything about this issue), does not involve supporting the former.

The fact that for the *faculty* of experiencing ethical emotions to emerge more than one individual is necessary does not imply that that faculty for its functioning – once it has set in – requires more than one individual.

Normative solipsism does not imply general solipsism (sec. 1.1, fn. 1). Stating that the ethical world exists exclusively inside the psyche of each individual is not to contend that other individuals do not exist (or did not exist in the past).

3.7. IS THE HYPOTHESIS OF A SUPER-EGO FALSIFIABLE IN POPPER'S SENSE?

Since the methodology of this book is inspired by Hans Albert's version of Karl Popper's critical rationalism, one could ask whether the hypothesis of a super-ego is falsifiable.

Here is what Karl Popper famously wrote about the ego, the super-ego and the id:

[A]s for Freud's epic of the Ego, the Super-ego, and the Id, no substantially stronger claim to scientific status can be made for it than for Homer's collected stories from Olympus. These theories describe some facts, but in the manner of myths. They contain most interesting psychological suggestions, but not in a testable form. [Popper 1969: 50]

Does the fact that I make use of the concept of super-ego imply that I am inconsistent with the critical rationalism I claim to adhere to? I do not think so.

First of all critical rationalism has hardly something to do with neopositivism. That is why Popper did not contend that Freud's "epic" is *meaningless*. Here is what Popper writes just after the already quoted statement:

At the same time I realized that such myths may be developed, and become testable; that historically speaking all – or very nearly all – scientific theories originate from myths, and that a myth may contain important anti-

⁷⁰ Compare with Komarnicki's objection to Petrażycki as reported by Motyka (1993: 105).

pations of scientific theories ... I thus felt that if a theory is found to be non-scientific, or "metaphysical" (as we might say), it is not thereby found unimportant, or insignificant, or "meaningless", or "nonsensical". But it cannot claim to be backed by empirical evidence in the scientific sense ... [Popper 1969: 50 f.]

A metaphysical theory can become a scientific theory if some way is found to test it. In order to find a way to test a theory that does not yet have any we must first of all *understand* it. Therefore, testability and significance are different things. A not-yet-testable theory may be capable of being understood and thus is not necessarily meaningless.

In this book, as well as in all works of mine:

1. I use the term *mere conjecture* to refer to a statement about reality for which some testing method has *not yet* been found.
2. I use the term (*scientific*) *hypothesis* to refer to a statement about reality for which some testing method has already been found.
3. I use the term *conjecture* as a hypernym for both *mere conjecture* and (*scientific*) *hypothesis*.
4. I call *theory* a set of statements about reality; thus we can have *merely conjectural* as well as *scientific* theories.

I will not use the adjective *metaphysical* to refer to mere conjectures since a *mere conjecture may become a hypothesis over time*.

Let us read what Hans Albert wrote as regards the related issue of testability:

The issue of observability [*Beobachtbarkeit*] is itself a theoretical problem. Theoretical progress itself can broaden the possibilities of observability and push forwards the borders of observability. If we take into account this point, we have a reason not to consider the empirical content of a theory as a property independent of the context. Instead, this content may change along with the development of knowledge and theories that were first untestable [*unprüfbar*] *can reach the area of empirical testability* [*Prüfbarkeit*]. Moreover the quest for suitable situations that can count as tests [*Prüfungssituationen*] and the production of corresponding testing conditions [*Prüfungsbedingungen*] pertains to the realm of *theoretically inspired fantasy*. [Albert 1987: 107, emphases added]

This implies, among others, that there are no black-and-whites when it comes to testability. *Testability is matter of degree*⁷¹.

From the point of view of critical rationalism, making mere conjectures is not at all prohibited. *It is prohibited to sell such mere conjectures as (scientific) hypotheses*.

This work is more a book of legal-philosophical psycholinguistics than a book of legal psycholinguistics in a strict sense. Whenever my theoreti-

⁷¹ See also Albert 1979 (66).

cally inspired fantasy helped me, I have hinted and shall hint at empirical evidences that could dispel my conjectures. Nevertheless, showing whether and how my statements can be tested does not lie within the strict scope of this book. I do not claim that all the conjectures made in this book have the status of scientific hypotheses.

Now, since the contention of the untestability of psychoanalysis is quite common, it is still worth reading Adolf Grünbaum's *The Foundation of Psychoanalysis* at this regard ⁷².

Grünbaum, by using Popper's very arguments, shows that it is impossible to demonstrate that psychoanalysis is untestable.

[W]hat proof, if any, did Popper actually offer for his ... emphatic reiteration that the Freudian theoretical corpus is wholly devoid of empirically testable consequences? To furnish such a proof, it would be necessary to establish the *falsity* of the claim that there exists at least one empirical statement about human behavior among the logical consequences of the psychoanalytic postulates. But as Popper has admonished elsewhere, an existential statement asserting that an *infinite* class *A* has at least one member that possesses a certain property *P* cannot be deductively falsified by any finite set of "basis" evidence sentences, each of which *denies* that some individual in *A* has *P*. Yet Popper has committed himself *tout court* to the *falsity* of the following *existential* statement: the infinite Tarskian consequence class of the psychoanalytic theoretical corpus does contain at least one member that qualifies as an empirical statement about human behavior. [Grünbaum 1984: 113 f.]

This is why the very same person can at once support Popper's epistemology and accept some of Freud's theories. Actually what is wrong is not Popper's epistemology but his malicious lack of knowledge of Freud's work.

More in general, Grünbaum correctly points out that the fact that philosophers are not able to show a way a theory could be tested does not imply that the theory is intrinsically untestable.

Let us read again Grünbaum:

At the 1980 Popper Symposium, I asked what *proof* Popper has offered that *none of the consequences* of the theoretical Freudian postulates are empirically testable, as claimed by his thesis of nonfalsifiability. One of Popper's

⁷² It should be stressed that Grünbaum's goal was not to defend psychoanalysis, but rather the following: «[I] trust it will become clear from the scrutiny of clinical validation I shall offer in this essay just why Popper's application of his falsifiability criterion is too insensitive to exhibit the most *egregious* of the epistemic defects bedeviling the Freudian etiologies, interpretation of dreams, theory of parapraxes, etc. Indeed, as I shall argue, time honoured inductivist canons for the validation of causal claims have precisely that capability». [Grünbaum 1984: 124 f.]

Discussing whether the inductivistic approach supported by Grünbaum is better than Popper's lies outside the scope of this book. Since I adhere to Hans Albert's version of Popper's critical rationalism, I do not feel committed to reply to Grünbaum's criticism (on such issues see Albert 1978: 30).

disciples in effect volunteered the reply that this untestability is known by direct inspection of the postulates, as it were. To this I say that the failure of some philosophers of science to identify testable consequences by such inspection may have been grounds for suspecting untestability, but it is hardly adequate to furnish the required proof of nonfalsifiability.

Indeed, the examples of falsifiability I have already adduced have a quite different moral: the inability of certain philosophers of science to have discerned *any* testable consequences of Freud's theory betokens the insufficient command or scrutiny of its logical content rather than a scientific liability of psychoanalysis. It is as those with a rather cursory exposure to physics concluded by inspection that its high level hypotheses are not falsifiable, just because *they* cannot think of a way to test them. For instance, both expertise and ingenuity made it possible to recently devise tests capable of falsifying the hypothesis that neutrinos have a zero rest mass ... By the same token, I reject the hubristic expectation that if high-level psychoanalytic hypotheses are testable at all, then almost any intellectually gifted academic ought to be able to devise potentially falsifying test designs for that. Failing that, some Popperians rashly suggest that the presumption of inherent nontestability is strong. [Grünbaum 1984: 113]

There is no need to discuss here the examples of testability given by Grünbaum (see 1984: 108-113) because none of these examples pertains to super-ego.

From Grünbaum's line of reasoning it follows that, even if I were to be considered "intellectually gifted", this would not imply that "I ought to be able to devise potentially falsifying test designs for the theory of super-ego". Nonetheless I think it useful to hint at some ways this hypothesis could be tested. Of course, I am sure that much smarter ways to test this conjecture can be found.

Generally speaking, a theory can be tested in several ways. Among them, I wish to mention the following:

1. One can search for contradictions *within* the theory.
2. One can search for contradictions *between* the theory and other existing theories⁷³.
3. One can search for some *implications* of the theory and make an experiment.
4. One can search for a *broader*⁷⁴ theory that can explain the set of phenomena explained by the theory.

Can we expect that the hypothesis of a super-ego will someday become testable according to one of these standards? I think so.

⁷³ Actually, according to me, there are no real differences between these two methods. About this topic see Fittipaldi 2003 (sec. 4.2). This contention of mine is closely related to my contention that logic is an empirical science (see above sec. 1.3, fn. 42). There is no reason to discuss this issue in this book.

⁷⁴ By *broader* I refer to the fact that the alternative theory can explain a larger set of phenomena, including the phenomena already explained by the theory under scrutiny.

Actually, some minor parts of it have already been falsified.

As we already saw, for instance, the role of the *castration complex* in the development of the super-ego implies that women are less prone to experience masochistic ethical emotions than men. This implication has been empirically falsified along with the hypothesis of the role played by the castration complex. (See sec. 3.2, fn. 8).

We have also seen that the theory of super-ego implies a positive correlation between shame-proneness and narcissism and that some research instead has shown a negative correlation between them (sec. 3.6). I think that the somewhat ad-hoc explanations given to this finding are worth further investigation. Nonetheless if these findings were to be confirmed the theory of super-ego should be rejected.

Here are five other ways to falsify the theory of the super-ego I tried to figure out.

First. According to Freud's theory of super-ego what I call masochistic ethical emotions result from the aggressiveness directed towards the individual himself. This implies that neurosciences should be able to test whether the experiences of shame or guilt are related to the areas of the brain where aggressiveness gets activated⁷⁵.

Without the theory of a super-ego nobody would even think to search for a connection between aggressiveness and shame/guilt. Hence, even if the super-ego were to be considered a "metaphysical construct", it would still play a crucial role as to the orientation of research. Without such merely conjectural theories no investigation could be made because the researcher would have no idea what to search for.

The hypothesis of a connection between aggressiveness and the development of ethical emotions also implies that masochistic and narcissistic ethical emotions cannot be experienced *before* sadistic ethical emotions. This is a *second* possible test.

A *third* example: we have seen that, according to Freud, the super-ego stems from the internalization on the part of the child of his caretaker/s. This implies that a child raised without caretakers should not be able to experience any ethical emotion. We should expect only unrestrained anger.

The fact that such an experiment cannot be made because of ethical reasons does not make the theory of super-ego theoretically untestable. It makes it *ethically* untestable. The theory of super-ego excludes that feral children (Wolfskinder) are able to experience either narcissistic or masochistic ethical emotions.

⁷⁵ In this case, I do not think that the whole theory of super-ego would be falsified, but only the conjecture that guilt/(shame) is the result of the re-direction towards the individual himself of the individual's own aggressiveness. See above sec. 3.5.

A *fourth* example. According to the theory of super-ego, ethical emotions stem from the condition of helplessness and dependency of the child vis-à-vis his parents. This theory excludes that a person that has not already developed masochistic and narcissistic ethical emotions during adolescence develops them later. Such a person might develop only the quasi-ethical emotions involved in a Smithian ethics or Piagetian morals of cooperation (see above sec. 3.2, and fn. 5).

Finally, the theory of the super-ego implies that all five ethical sentiments here discussed stem from the very same condition of helplessness and dependency of the child. It excludes that one of these emotions can be explained in a different way through a completely different theory. This can be argued especially for the ethical emotions that drive the individual to behaviors that seemingly have nothing to do with his pursuit of happiness (i.e. all ethical feelings but anger). As for anger, challenges to the approach proposed in this chapter could be found in ethological research concerning the way aggression is controlled among non-human animals⁷⁶.

As I said, I am sure that experts can find much smarter ways to test the hypothesis of a super-ego. The fact that this has not yet happened can be explained by the attitude of many psychoanalysts to consider Freud's work more like an unchallengeable body of Sacred Scripture than like a rich set of (often wild) mere conjectures to be worked out into scientific hypotheses.

⁷⁶ See Silverberg & Gray (1992) as well as Schlicht's (1998: 172 ff.) interesting discussion of ownership in ethological perspective.

4.

ILLUSIONS PRODUCED BY THE FEATURES OF LEGAL EMOTIONS

4.1. NAÏVE LEGAL ENTITIES

As I repeatedly stated, I think that there is no simple and unique explanation for all sorts of legal illusions.

In ch. 2, I discussed the ethical illusions that can be explained as a subset of the more general set of *projective* illusions.

In ch. 3, I discussed the ethical illusions that can be explained through the specific features of *ethical* illusions.

I will here discuss the subset of ethical illusions that can be explained by drawing on the specific features of *legal* emotions.

The illusions I will focus on in this chapter are the following: *debts*, *duties*, *powers* and *rights*.

Unlike Petrażycki, I think that the illusions of these entities cannot be explained just by hinting at some sort of projective process. The mechanism of projection, as I have tried to explain it, can lead only to the experience of certain qualities (or states) as inherent to certain courses of action, people or things. This experience is mirrored in language by the use of adjectives or modal verbs.

With *debts*, *duties*, *powers* and *rights* we are confronted with *nouns*, rather than with adjectives or modal verbs.

In my opinion, the grammatical features of these terms show that the realities they refer to are chiefly experienced as entities. In this section, I will try to make this point clear.

I will discuss why the terms for “debt”, “duty”, “power” and “right” in four languages I am most familiar with (namely, English, Italian, German and Russian) can be viewed as indexes of a conception of these realities in terms of entities.

Discussing more languages, either Western or non-Western, either Indo-European or non-Indo-European, either living or dead, is a task that lies outside of the scope of this book. As a critical rationalist, I think that theory must precede rather than follow empirical research. Such further

research, though, is required to test the correctness of the hypotheses I will make in this chapter.

I will discuss also the Ancient Greek and Latin terms for “debt”, “duty”, “power” and “right”, but my focus will be on English, Italian, German and Russian, since I will argue that only *debts* are truly *naïve* entities, while *duties*, *powers* and *rights* should be rather viewed as entities that have *trickled down* onto naïve legal ontology from jurisprudential ontology.

I will discuss in this chapter the terms in table 4.1.

Table 4.1. – The nouns for the four main naïve legal entities in English, Italian, German and Russian.

	“DEBT”	“DUTY”	“POWER”	“RIGHT”
ENGLISH	debt	duty	power	right
ITALIAN	debito	dovere	potere	diritto
GERMAN	Schuld	Pflicht	Macht	Recht
RUSSIAN	dolg	dolg	vlast’	pravo

I will now try to show, *in two steps*, that the grammatical nature of these terms is an index of the fact that the native speakers of these four languages conceive the realities these terms refer to in the terms of entities.

Step 1.

If *at present time* (or at the time being historically examined) the noun for these realities *does not derive* from some verb or adjective meaning “obligatoriness”/“obligatedness” or “permittedness”¹, I argue that the reality to which the noun refers is chiefly conceived as a free-standing one.

I will view terms meaning “being responsible for” as connected to the idea of “obligatoriness”/“obligatedness”. A person responsible for something is obligated to certain courses of action.

I will consider as connected to the idea of “permittedness” also the following terms:

1. Terms meaning “to do”/“to make”, “to master” or “to hold sway”².
2. Terms meaning “straightness”³ and/or “right-handedness”⁴.

¹ In sec. 4.6 I will explain why I will not deal with entities stemming from prohibitions.

² The reasons of this choice will become clear when discussing the case of *patifacere* legal emotions.

³ About the connection between the concept of *right* and the concept of *straightness* see Clark 1883 and Laserson 1921.

⁴ About the connection between the concept of *right* and the concept of *right-handedness* see again Laserson 1921. It is worth recalling that Max Laserson was a pupil of Petražycki (see Baum 1967).

If the nouns meaning “debt”, “duty”, “power” and “right” are *not* experienced as *derivations* from terms meaning “obligatedness”, “obligatoriness” or “permittedness”, then the entities these terms refer to cannot be dismissively explained in terms of projective mechanisms. This is particularly the case if native speakers can not even relate the noun to any other term meaning “to have to”, “can”, “due” or “possible”.

In table 4.2 are the terms that at present time do not derive from any verb or adjective meaning “obligatedness”, “obligatoriness” or “permittedness”:

Table 4.2. – Nouns of table 4.1 that naïve speakers do not experience as derivations from terms meaning “permittedness” or “obligatoriness”/“obligatedness”.

	“DEBT”	“DUTY”	“POWER”	“RIGHT”
ENGLISH	ʔdebt		ʔpower	
ITALIAN				
GERMAN		ʔPflicht		
RUSSIAN	dolg	dolg		

I put a question mark before the terms *debt*, *power* and *Pflicht* because it could be objected that they are somewhat connected to some term meaning “obligatoriness” or “permittedness”.

Such an objection would not hold.

The fact that the English term *debt* etymologically stems from the following chain⁵

English: *debt* ← Old French: *dette* ← Latin: *debita* ← Latin *debere*

does not imply at all that the term *debt* derives from another English term meaning “obligatoriness”. If certain naïve speakers were wrongly to view *debt* as a term *deriving* from the adjective *due*⁶, it could still be argued that *debt* is as marked as *due* (see below, step 2).

By the same token, the fact that the English term *power* stems from the following chain⁷

English: *power* ← Old French: *poeir* ← Vulgar Latin: *potere*

Laserson (23 f.) shows that in no less than eight languages he examines the terms for “straightness”, “being on the right” and “law” are etymologically connected, if not the same. He forgets mentioning the Italian term *dritta*.

⁵ See EE 1986: entry *debt*.

⁶ Of course, from my point of view, it does not matter whether the etymology is correct or not. What matters is only what the speaker believes the etymology is. Think of the concept of *folk etymology*.

By the way, it may be worth recalling that *due* and *debt* both stem from the Latin verb *debere*, and therefore *due* and *debt* do not derive from each other.

⁷ See EE 1986: entry *power*.

does not imply at all that the term *power* in English derives from any English term meaning “permittedness” (or “being able”).

The German term *Pflicht* derives from the verb *pflegen*. This term in contemporary German means “to be used to”, but it used earlier to mean “to answer for”⁸. My hypothesis is that contemporary naïve German native speakers are not aware of this connection. Thus we can consider *Pflicht* as a noun independent of the idea of “obligatoriness”. In the case this hypothesis were to be falsified, it could still be argued that *Pflicht* is as marked as *pflegen* (see, just below, step 2).

Step 2.

If the noun is deadjectival or deverbal but it is not more marked than the adjective or the verb it stems from (or it is etymologically related to), then it can be argued that the reality the deadjectival or deverbal noun refers to is no less conceived as an independent entity than as a dependent quality. As I said above (sec. 1.4), there is no reason to assume that each reality – in naïve ontology – is coded *disjunctively*, either as an entity, or as a quality, or as a process.

In table 4.3, we can see which of the nouns in table 4.1 are probably experienced as deriving from terms meaning “permittedness” or “obligatedness”/“obligatoriness”, but that are either unmarked or display a very low degree of markedness (the barred nouns are the nouns already discussed in step 1).

Table 4.3. – Nouns of table 4.1 that naïve speakers may experience as a derivations from terms meaning “permittedness” or “obligatedness”/“obligatoriness”, but that have a high degree of unmarkedness.

	“DEBT”	“DUTY”	“POWER”	“RIGHT”
ENGLISH	debt	[?] duty/[[?] obligation]	power	right
ITALIAN	debito	[?] dovere	[?] potere	diritto
GERMAN	Schuld [?]	Pflicht	Macht	Recht
RUSSIAN	долг	долг	власть	право

Also here I put a question mark before the terms that require some discussion. Let us discuss them.

The German noun *Schuld* (“debt”, but also “guilt”) derives from the verb *sollen*, but the way *Schuld* derives from *sollen* is no longer productive in German. This means that this term is experienced as unmarked.

⁸ See HV 1997: entry *Pflicht*.

Secondly, I hypothesize that many (if not most) Germans are unaware of this connection.

It could be objected that Germans, to refer to a debt, use the plural *Schulden* rather than the singular *Schuld*, and that the plural *Schulden* is marked as compared with the singular *Schuld*.

Actually, this phenomenon, rather than being an argument against the hypothesis that debts are experienced by Germans as free-standing entities, is a strong argument *in favor* of this hypothesis. To understand why, we have first to get acquainted with an important hypothesis of the usage-based model for language use (see, in general, Croft & Cruise 2004, ch. 11).

An important hypothesis of the usage-based model for language use is that «the entrenchment of word forms is possible even if the word form is predictable from a more schematic grammatical representation[⁹]» (Croft & Cruise 2004: 292).

This is but corollary of the hypothesis of the *independent storage of word forms*:

The hypothesis is that each time a word (or construction) is used, it *activates* a node or pattern of nodes in the mind, and frequency of activation affects the storage of that information, leading to its ultimate storage as a conventional grammatical unit. A word form that occurs frequently enough in use to be stored independently is described as *entrenched* (Langacker 1987: 59 f.). [Croft & Cruise 2004: 292]

We can now come to the explanation of why the fact that *Schulden* is a plural form is not to be interpreted in the terms of markedness of this noun:

A[n] indirect piece of evidence that regular forms are stored independently under some circumstances is that a regularly inflected word form, or regularly derived word form, may diverge semantically from its parent word. For example, «something can be *dirty* without involving dirt at all ... someone can *soil* an item without being anywhere near real soil» (Bybee 1985: 91). Examples of divergence of a former inflectional form are *clothes*, formerly the plural of *cloth*, and *shadow* an Old English oblique case form of *shade* (Croft 2000: 36). Presumably, semantic divergence presupposes the independent representation of the inflected form, which the is free to diverge in meaning. [Croft & Cruise: 2004: 294]

If we also recall that frequency is a criterion of markedness (sec. 1.4), we can safely conclude that *Schulden* can be treated as an unmarked term¹⁰.

⁹ There is no reason to discuss here why the concept of *schematic grammatical representation* is different from the traditional concept of a grammatical rule.

¹⁰ The specialization of the plural in the meaning of “debt” may be connected with the fact that debts are obligatednesses/obligatorinesses involving the giving of fungibles (below sec. 4.6).

Let us now turn to the Italian nouns *potere* and *dovere*. Even though these nouns might at first glance seem substantivized infinitives of the verbs *potere* (“can”) and *dovere* (“to have to”), they are not such any longer because, unlike Italian substantivized infinitives, they can have plural: *poteri* and *doveri*. Thus it can be argued that *dovere* and *potere* lost their markedness, or, to use a new term, they underwent a process of *unmarkedization*, just as *white*, *right* and *wrong* with their plurals *whites*, *rights* and *wrongs*.

The English term *duty* is a deadjectival noun deriving from the adjective *due*, but the morpheme *-ty* is not very productive in English. Actually English native speakers use mostly *-ness* in order to produce deadjectival nouns, even with many terms of Latin origin:

serene: serenity

green: greenness/*greenity

obligatory: obligatoriness/*obligatority

It should be also observed that *duty* does not have just the meaning of “quality of being due”. The term *duty* can also have the specific meaning of *tax*.

Hence, *duty*, cannot be considered a derivation from *due* in a strict sense. *A meaning-changing derivation is not a synchronic derivation*¹¹.

Because of these reasons I think that *duty* can be fairly treated as an unmarked noun.

A few last words are in order here as regards the term *obligation*. This term is more marked than *oblige*. Nevertheless – as is apparent by just googling both terms – *obligation* is much more frequent than *to oblige*. This is not tantamount to showing that *obligation* is not more marked than *to oblige*, but it allows us to assume that obligations are experienced no less as entities than as qualities. The case for treating *obligation* as an unmarked noun would be even stronger if it could be shown that *obligation* has an at least slightly different meaning from *to oblige*.

In this chapter I will try to answer the question *why debts are experienced as independent entities, rather than like qualities attached to courses of actions, people or other entities*. I shall do this by taking into account what Petrażycki viewed as the distinctive features of *legal* emotions as against other ethical emotions.

¹¹ Of course, the mere change of ontological kind is not a meaning-changing derivation.

Before starting the discussion of this question, I would like to shortly discuss a passage of Petrażycki where the shortcomings of the attempt to explain these entities in terms of projections unintentionally emerge:

The ethical emotional projection ... is not restricted to the representations of the existence, on one hand, of the obligatedness [*objazannost'*, *dolženstvovanie*] as a specific state [*sostoianie*] of submission [*podčinennost'*] to prohibitions. It goes further in the 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) and from the diverse contexts of use of the words *objazannost'* and *dolg*, for instance, *na nem ležit objazannost'*, *dolg* ("The obligation lies on him"), *tjaželyj dolg* ("heavy debt"), *byt' obremenennym objazannostjami, dolgami* ("to be overburdened with debts") and the like, there is here the representation of the presence in the place where the projection is directed – near to the subjects onto which the obligatedness is being projected – of some sort of objects that have weight, of some sort of material objects, such as ropes or chains, whereby they are obliged and burdened. [Petrażycki 1909-10: 42, emphasis added]

As we can read here, according to Petrażycki the very same process of projection should explain the illusions of prohibitions (*zaprety*) and the illusions of obligations (*objazannosti*)¹² and debts (*dolgy*) alike. Since I think that projective mechanisms can hardly explain them, in the former chapter I tried to explain in a different way the illusions of imperatives and prohibitions, while in this chapter I shall try to explain the illusions of debts, duties, powers and rights.

As will become clear in my discussion, my opinion is that *debts* are the most natural of the illusions being the subject-matter of this chapter. I think that debts, duties, powers and rights are experienced with different degrees of *thickness*. Explaining these different degrees of thickness is one of the main goals of this chapter.

More in general, *the approach adopted in this book implies that in naïve legal ontology concepts like debt, duty, power and right play a much more important role than more general concepts such as obligation or entitlement.*

In my opinion, the concepts of debt, duty, power and right belong to the *basic level of legal categorization*, while more abstract concepts like *obligation, entitlement*, etc. do not.

¹² Actually the etymology of *objazannost'* Petrażycki hints at in order to establish an etymological parallelism with the Latin term *obligatio* seems to be correct. *Obligatio* derives from the verb *ligare*, "to bind". Petrażycki writes *ob(v)jazannost'* in order to hint at the verb *vjazat'* that among its meanings has "to bind" as well. According to Černyh (1993, entry *obuza*) the Russian verb *objazyvat'* – from which the deverbial noun *objazannost'* stems – derives from the term *obuza*, meaning "burden". The author mentions the connection of this latter term via ablaut with the verb *objazyvat'*.

The idea of a *basic level of categorization* is clearly explained in the following quotation taken from John Taylor's *Linguistic categorization: prototypes in linguistic theory*, where the author compares the approach of prototype theory with the classical one.

[O]n the classical view, there is no reason for assigning special status to any particular level of categorization, except perhaps to the very highest and the very lowest. (The very highest level is superordinate to all other categories, and thus does not contrast with any other category on that level; while terms on the very lowest level refer to individual instances.) The facts of cognition and language use, however, belie this assumption. There is, namely, a level of categorization which is cognitively and linguistically more salient than the others. This is the basic level of categorization.

It is at this basic level of categorization that people conceptualize things as perceptual and functional gestalts (cf. Rosch et al. 1976). Try for example to visualize or to draw a piece of furniture. The task seems absurd. One feels compelled to ask, "What kind of furniture? A table, a chair, a bed? It would not, however, be unreasonable to ask someone to draw a picture of a chair, even though, logically, it would be equally legitimate to ask, "What kind of chair?" A kitchen chair, an armchair? It is similarly absurd to try to describe how one interacts with a piece of furniture, or to name the parts of which a piece of furniture is composed. It thus comes as no surprise that it is the basic level of categorization at which in the absence of specific reasons to the contrary, people normally talk about reality ... If a foreigner were to point to the object I am now sitting on and ask "What do you call that in English?", I would almost certainly answer, "It's a chair." I would not reply "It's an artifact", or "It's a piece of furniture", even though these alternative answers would be equally correct. [Taylor 2003: 50 f.]

I think that a similar line of reasoning can be applied to legal categorizations as well, and that debts, duties, powers and rights pertain to the basic level of categorization of the layman.

4.2. MORAL VS. LEGAL EXPERIENCES

As I said, the main conjecture of this chapter is that there is a certain set of illusions that can be explained by taking into account the specific features of legal emotions. Hence we must first of all get acquainted with Petrażycki's distinction between legal and moral (i.e. non-legal) phenomena.

Before discussing this distinction, it must be stressed that Petrażycki viewed his distinction as *stipulative* (1909-10: 137, 1909-10*: 90). He also maintained, though, that his distinction does have an «approximate coincidence [*priblizitel'noe sovpadenie*]» (1909-10: 139, 1909-10*: 91) with non-technical usage. An inquiry into the degree of this approximation in the different Western and non-Western cultures lays outside the scope of this book.

Petrażycki's distinction is stipulative in that it is devised in order to select classes of phenomena that fit into *adequate theories*.

Therefore let us first shortly discuss Petrażycki's definition of an *adequate theory*¹³:

By 'adequate ... theory' [*adekwatnja teoria*] I understand a theory in which, what is stated ..., is stated in a true and precise way ... about the class of objects of which it is stated ..., to the effect that, if something is stated about a [class] ... while that statement actually holds true ... for a broader class, or, if there is the opposite mismatch [*nesootvestvie*], it is not an adequate theory in our sense. [Petrażycki 1908: 67]

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 *jumping* (*prygajuščij*) because it goes beyond the phenomena for which it is true. A theory can also be at once limping and jumping (81).

Conversely, a theory is adequate if its object-class (*klass-podležaščee*) is determined with the proper generality (*nadležaščaja obščnost'*) (69).

A funny and often quoted example of a limping theory given by Petrażycki regards *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 them, that set in motion they would tend to maintain the direction and uniform velocity (due to inertia), that they are subject to gravity and thus fall down (i.e. tend to fall down if there is no air friction or other complication) according to certain laws, 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 f., translation modified from Nowakowa & Nowak 2000: 400]

While a jumping theory is partially false, a limping theory is not: its problem is that it does not cover all phenomena for which it holds true.

As the reader knows, according to me, an example of a jumping theory is Petrażycki's theory of projections. According to him, projections can explain all ethical illusions. According to me they can explain exclusively ethical illusory qualities.

Consistently with the requirement that theories should be adequate, we will see that Petrażycki treats as plain legal phenomena such phenomena as games (sec. 4.5) – phenomena that are rarely viewed as strictly legal by legal theorist. I fully accept Petrażycki's approach at this regard.

¹³ More can be found in Motyka 1993 (see also Fittipaldi 2012).

Petrażycki did not make use of the terminology of *set theory*. By making use of this theory I wish to rephrase Petrażycki's concepts in the following way:

- A hypothesis is *limping* if the set of phenomena it is about is a subset of the phenomena for which it holds true.
- A hypothesis is *jumping* if the set of phenomena for which it holds true is a subset of the phenomena which it is about.
- A hypothesis is *both limping and jumping* if the phenomena it is about presents but an intersection with the phenomena for which it holds true.

We will see that the criterion according to which Petrażycki selects legal emotions, as opposed to non-legal (i.e. moral) emotions, permits to select phenomena that play a role in several nomological hypotheses. Also other concepts developed by Petrażycki have this property. I am thinking of the concept of a *vlast'*, the concept of an *ethical* emotion, the concept of a *positive* ethical emotion, etc. In this book, I am trying, among others, to show that there are many adequate psychological and linguistic theories in which these Petrażyckian concepts select classes of phenomena with the proper degree of generality.

We can now introduce Petrażycki's distinction between moral and legal phenomena by drawing on his own words.

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 1909-10: 50, 1909-10*: 46].

Petrażycki uses here the term *obligation* (*objazannost'*), but it must be borne in mind that in his use this term is but a quick way to refer to specific repulsions or appulsions.

As I said above (sec. 1.2), in order to prove wrong Znamierowski's criticism on Petrażycki's psychological theory of law, I will refrain from using the "projection point of view". Instead of the term *obligation*, I shall use the term *imperativesidedness*. Consequently, I will call '*imperative side*' the person who experiences himself as having an imperativesidedness. (The reason why I do not use the term *passive side* will be explained in sec. 4.4).

Of course, I will also refrain from using such terms as *right* or *entitlement* to refer to what the *attributive side* feels entitled to. I shall use the term *attributivesidedness*.

The contents of the judgments arising from the experience of moral imperativesidednesses are called by Petrażycki *purely imperative norms* (*čisto imperativnyye normy*) (1909-10: 57, 1909-10*: 46), while the contents of the judgments arising from the experience of legal imperativesidednesses

are called by him *imperative-attributive norms* (*imperativno-attributivnye normy*). As I said above (sec. 3.4), I depart from Petrażycki's terminology as regards the term *norm*. With this term I refer to the stable disposition to experience a superegoic emotion with the perception or representation of an action or inaction.

Petrażycki's distinction between legal and moral (i.e. non-legal) phenomena can be summarized in the following way. Moral phenomena are purely imperative (i.e. unilateral) phenomena. Legal phenomena are imperative-attributive (i.e. bilateral) phenomena¹⁴.

As two examples of purely moral imperativesidednesses Petrażycki recalls what Jesus said according to Matthew 5,39-40:

But I tell you, Do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also. And if someone wants to sue you and take your tunic, let him have your cloak as well. [Matthew 5,39-40, see also Luke 6,29]

Here are Petrażycki's comments:

In the psyche of persons who have advocated and experienced – or are now experiencing – such ethical judgments, the underlying norms do not, of course mean that corresponding claims [*priřazanija*] in behalf of the offenders have been established: that they have been endowed with the right to demand that the other cheek be proffered to the struck, or that as a reward there was deemed to be due to the person who had taken the shirt (or that he ought rightly to get) the outer garment of the injured party as well. [Petrażycki 1909-10: 57, 1909-10*: 46, translation modified]

It is quite easy to imagine examples of *bilateral* ethical phenomena: they are phenomena where some imperativesidedness is experienced as belonging to some attributive side.

¹⁴ A conception in many respects similar to Petrażycki's has been developed in the second half of 20th century by the Italian legal philosopher Bruno Leoni. See for example Leoni 1961. Unfortunately he did not know Petrażycki's works and Leoni's conception is much less developed than Petrażycki's.

Also Wesley N. Hohfeld's fundamental legal conceptions (1913, 1917) are comparable with Petrażycki's. But Hohfeld failed to distinguish different kinds of right - duty legal relationships. Therefore Hohfeld's conceptions are of no help in the context of naïve legal ontology. In particular, it is not clear whether Petrażycki's *pati-facere* legal relationships (see below in text) in Hohfeld's perspective should be viewed as right-duty relations or as privilege-noright ones. Moreover, Hohfeld's concept of *power*, if somewhat overlapping with Petrażycki's concept of *vlast'*, seems to typically pertain to jurisprudential ontology, and therefore does not pertain to the scope of this book. Be as it may, a detailed comparison between Petrażycki and Hohfeld's conceptions would take us too far afield.

As regards other authors who supported correlativism (but Petrażycki never used the term *korelatywność* – Motyka 1993: 138, fn. 172), see Motyka (138 ff.) and Opalek (1957: 424, fn. 8).

Before giving examples it should be recalled that in the context of a consistent normative solipsism for a legal relationship to exist it suffices that at least *one* subject exists. This subject can experience himself as either an imperative side, as an attributive side or as a third spectator. *The other two participants may also exist exclusively in the imagination of the uniquely existing participant.* Bilaterality can also be purely imaginary.

As to who or what can be the subject of legal relationships [*pravootnošenija*], obligations and rights, the psychological theory holds that subject representations [*sub'ektnye predstavlenija*] can correspond to all possible representations of a personal [*personal'nyj*] or individual [*ličnyj*] character: insofar as legal impulses and other representations – object [*ob'ektnye*] representations and so forth – are associated with them, the objects of these representations are the subjects of rights. These can be objects not actually alive but assumed to be 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 upon 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 a right as dolls which are not found in the legal mind of adults and vice versa). [Petražycki 1909-10*: 416, 1909-10: 189 f., translation modified, emphasis added]

Of course, not any kind of represented subject counts as a legal subject in modern Western official laws. However this issue has nothing to do with naïve legal ontology, but rather with jurisprudential ontologies. (I will say something more as regards who the taxpayer experiences as his attributive side in sec. 4.4.1).

With this in mind we can now make some examples of legal relationships without any risk of misunderstanding.

Petrażycki makes the example of the obligatoriness of paying a worker or a man-servant the agreed wage.

Another *typical* case is the imperativesidedness regarding the *payment of the check* at the restaurant:

1. The *owner of the restaurant* typically experiences
 - himself as an attributive side and
 - the customer as an imperative side.
2. The *customer* typically 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.

Certain kinds of course of actions are mostly experienced as *legally* obligatory. Others, instead, are mostly experienced as *morally* obligatory.

But it is of paramount importance to keep in mind that *virtually any kind of course of action can be experienced either way*. The passage where Petrażycki made this point was not included in Timasheff's compilation. I translate it in a way consistent with the terminology adopted in this book:

As regards ... the examples of the two kinds of conscience [*soznanie*] of imperativesidedness [*dolżenstvovanie*]: the conscience of the obligatoriness of paying to a worker or a man-servant the agreed wage, on one hand, and the conscience of the obligatoriness of helping a person in need, the obligatoriness of not refusing giving alms, on the other, in order to avoid misunderstandings it is necessary to remark that we can imagine subjects with such a psyche that, when dealing with beggars asking for alms or the like, experience a conscience of obligatedness according to which the other side has an attributivesidedness as regards receiving from them what he asks for: the other side can claim that help be given to him and the like; by the same token we can imagine subjects that – when dealing with servants claiming the payment of the agreed wage and the like – experience a conscience of obligatedness according to which nothing appertains to the other side: the latter cannot claim for the payment and the like. From the point of view of our (psychological) classification, such a conscience of imperativesidedness towards beggars should be classified as the conscience of a legal imperativesidedness; such a conscience of imperativesidedness towards servants should be classified as the conscience of a moral (not legal) imperativesidedness. [Petrażycki 1909-10: 51, fn. 1]

This does not exclude, though, that there probably are some factors affecting whether a certain imperativesidedness is experienced as a moral or a legal one.

This issue is related to the issue whether certain actions are typically shame-eliciting while others are guilt-eliciting.

It could be argued that guilt is related to *legal* emotions, while shame is related to *moral* ones.

Unfortunately, it does not seem to be that easy. A few remarks about this topic are in order here.

As we know, shame is focused on the whole self, while guilt is on a certain deed. In most cases, guilt-eliciting behaviors are behaviors hurting in some way other people¹⁵.

Now, *the fact that guilt is mostly focused on a certain deed affecting another person does not imply that this person is experienced as the attributive side in some legal relationship*. I can feel guilty for not having given an alms without experiencing the beggar as an attributive side.

On the other hand, though, it could be argued that, if a certain action (or inaction, respectively) elicits exclusively shame in a certain person, the

¹⁵ But recall the case of a person who feels guilty with himself for failing to comply with his self-imposed diet (sec. 3.6.).

person – if any – affected by that action (or inaction, respectively) can in no case be experienced as an attributive side.

If this is the case, it could be argued that *guilt* plays a role in the field of both *moral* and *legal* emotions, while *shame* can play a role *only* in the field of *moral* emotions.

Therefore, if it could be shown that a certain inaction can be exclusively shame-eliciting, it could be contended that the corresponding action can be *but morally* obligatory. It could never be experienced as *legally* obligatory. By the same token, if some action could be shown to be exclusively shame-eliciting, it could be contended that that action cannot be but *morally* prohibited. It could never be experienced as *legally* prohibited. (See table 4.4).

Table 4.4. – Correlation between shame-eliciting behaviors and corresponding projective ethical qualities?

SHAME-ELICITING BEHAVIOR	RESULTING ETHICAL QUALITY
action	moral prohibitedness of the action
inaction	moral obligatoriness of the action

Again, it seems not to be that easy.

It seems that both shame and guilt can be elicited by virtually any sort of behavior.

Let us read what June P. Tangney and Ronda L. Dearing say on this issue.

Do certain kinds of behavior give rise to shame, while other kinds of behaviors give rise to feelings of guilt? Not really, as it turns out. Our analyses of the personal shame and guilt experiences provided by both children and adults indicate that there are very few, if any, “classic” shame-inducing or guilt-inducing situations (Tangney 1992; Tangney et al. 1994). Most types of events (e.g. lying, cheating, stealing, failing to help another, disobeying parents) were cited by some people in connection with feelings of shame and by other people in connection with guilt. Unlike moral [in the terminology of this book, *ethical*] transgressions, which are equally likely to elicit shame or guilt, there was some evidence that nonmoral¹⁶ failures and shortcomings (e.g. socially inappropriate behavior or dress) may be more likely to elicit shame. Even so, failures in work, school, or sport settings and violations of social conventions were cited by a significant number of children and adults in connection with guilt. [Tangney & Dearing 1992: 17]

¹⁶ Of course, the way the authors use the term *moral* is different from mine. Ethical emotions are defined in this book as any kind of emotion that is related to the super-ego. Hence, when the authors talk of *nonmoral failures*, this expression cannot be understood as meaning what *non-ethical failure* would mean in my terminology. A failure is by definition *ethical* if it elicits such super-ego-related feelings as shame and guilt.

Thus there seems to be *but a small set* of behaviors that are specifically shame-related.

A kind of behavior that I guess more probably elicits shame than guilt is linguistic behavior. I think that only very rarely can *grammar mistakes*, such as saying “expresso”, “all of *the* sudden”, “this is just between you and I”, in English, elicit guilt. They mostly elicit shame. I am referring to the subset of grammar mistakes traditionally called *solecisms*. This seems to imply that linguistic norms – if not experienced as merely technical¹⁷ – are experienced as moral norms. By the same token, a certain linguistic norm should be also viewed as moral if it elicits contagious shame in third spectators¹⁸.

The same could be argued as regards culture. Discussing the moral connotation of the Western concept of culture does not lie within the scope of this book (see Bourdieu 1979*).

In my opinion, though, it is just wrong to argue that shame is directly related to moral phenomena. The fact that a certain individual evaluates a certain failure as involving his whole self does not exclude that he may experience some other individual as having an attributivesidedness as regards the behavior that would have prevented that failure. This point of mine will hopefully become clearer by the end of this chapter.

May it now suffice to say that there is probably some correlation between the fact that a certain action (or inaction) is experienced as shame-eliciting and the fact that the corresponding inaction (or action) is experienced as obligatory in a purely moral way. Now, correlation is causation as little as it is reduction, but such a mere correlation might still be worth being further investigated.

Just as it can be asked whether shame correlates more with moral phenomena, it can be asked whether *anger* is specifically related to legal phenomena (table 4.5).

Table 4.5. – *Correlation between anger-eliciting behaviors and corresponding projective ethical qualities.*

ANGER-ELICITING BEHAVIOR	RESULTING ETHICAL QUALITY
action	legal prohibitedness of the action
inaction	legal obligatoriness of the action

¹⁷ As merely technical are be considered rules such as the rule according to which to refer to “dog”, in Italian, the word *cane* and not other words, such as *sedia* (“chair”) or *gatto* (“cat”) should be used. Nota bene: this is the case only if such a mistake does not elicit any superegoic feeling, but just prevents the speaker from making himself understood.

¹⁸ About contagious shame see above sec. 3.6.

As we know (sec. 3.6), my hypothesis is that anger is a discharge of aggressiveness unleashed by a certain person's superego when this person is negatively affected by the behavior of another person. (Indignation, instead, is a discharge of aggressiveness unleashed by the superego of some *spectator*, namely a person who is *not* negatively affected by the behavior of the person onto which the aggressiveness is directed). Do all or most people getting angry because of some damage caused to them by another person experience their attributivesidedness as to a different behavior on the part of the imperative side?

Answering yes to this question involves some problems. It could be objected that such an answer is tautological, as it is closely related to the way I distinguish anger from indignation.

If we define both anger and indignation as discharges of aggressiveness and distinguish them depending on whether this discharge is experienced by an attributive side or a third spectator, then anger is *per definitionem* "related to" legal phenomena.

For this not to be the case we would need an independent conceptualization of anger and indignation. A concept of anger of this sort could be subsequently related to the concepts of a moral and a legal phenomenon. Unfortunately, psychology has devoted much less research to sadistic ethical emotions than to masochistic ones. In 4.12 I will propose a conjecture to distinguish anger from indignation as well as to explain the connection of the former with attributiveness.

When I discussed anger and indignation (sec. 3.6) I avoided using the concept of attributiveness. I used, instead, the term *victim*. Is every victim also an attributive side? I do not think that this question should be solved via simple re-definitions. Instead, I think that further psychological research is required¹⁹.

Some words are now in order to discuss a common objection to Petrażycki's distinction between moral and legal phenomena.

Petrażycki's distinction has been criticized for being too much oriented on private law (see Motyka 1993: 146 ff.)²⁰. In this book I am concerned exclusively with the explanation of naïve legal ontology. Defending

¹⁹ In sec. 4.12 I will argue that the core of the reaction to the infringement of an attributivesidedness lies in the idea of an *aggression to the body*.

²⁰ The young Petrażycki spent much time in Berlin and in this period wrote important books in private law such as *Die Lehre von Einkommen* (1893-95) and *Die Fruchtverteilung beim Wechsel der Nutzungsberechtigten* (1892). In 1897 Petrażycki translated into Russian and improved in many respects his *Fruchtverteilung* that was published with the title *Prava dobrosovestogo vladel'ca na dobody*. A second and even more improved version of this text appeared in Russia in 1902. About Petrażycki's *Civilpolitik* see Giaro 1995. About the relationship between Petrażycki's *Civilpolitik* and modern economic analysis of law see also Fittipaldi 2009. Finally, about the years Petrażycki spent at the Russisches Seminar für römisches Recht in Berlin see Kolbinger 2004.

Petrażycki's distinction is not the goal of this book. What I will try to do, instead, is showing that attributiveness can play a crucial role when it comes to explaining a certain subset of the set of ethical illusions. In other words, I will propose some conjectures about the emergence of a certain subset of the set of ethical illusions and I will argue that these conjectures are adequate, in that they are about a class of phenomena that can be selected with the proper degree of generality by making use of Petrażycki's concept of attributiveness. This means that my conjectures can be taken into consideration also by scholars who do not share Petrażycki's criterion for the distinction between moral and legal phenomena. Such an acceptance would perhaps be easier if I made use of Petrażycki's distinction between imperative-attributive and purely imperative phenomena without using the adjectives *legal* and *moral* for the former and the latter, respectively. I decided not to do this because I believe that Petrażycki was right when contending that his distinction between legal and moral phenomena has an approximate coincidence with non-technical usage²¹. Further research is required on this topic.

As I said, I will not attempt to defend Petrażycki's distinction. But just a few words are in order here.

First. The fact that Petrażycki's criterion of bilaterality may seem ill-suited to criminal law simply misses one of the main points of this distinction: it permits to focus on phenomena that go otherwise unnoticed. If the jailors did not experience themselves as attributive sides in a legal relationship they would never behave the way they do²². From this point of view, Petrażycki's distinction is fully compatible with the findings of the Stanford prison experiment.

Second. It should always be borne in mind that the very same action can be experienced as morally obligatory by one individual and as legally obligatory by another. Therefore, a judge of some supreme court may experience his obligatedness as regards deciding by the law (rather than by his personal preferences) as a *moral* obligatedness, while another judge may experience it as a *legal* obligatedness. The question whether some judge experiences his obligatedness as a moral, a legal or a purely reputational one is purely empirical. It cannot be solved theoretically.

²¹ This is not to say that we are to expect that every language of the world has a noun to refer to the set of legal phenomena and another to refer to the set of moral phenomena. This is to say, instead, that Petrażycki's distinction plays a role in many linguistic phenomena. Some of them are discussed below.

Just one more example: it is well known that Ancient Greek did not have a noun for *law*. Nonetheless, such a term as νόμος could be referred mostly, if not exclusively, to imperative-attributive phenomena. Actually, the very term νόμος stems from the verb νέμειν ("to attribute", "to assign").

²² Recall the "indignation" Petrażycki talks about in the quotation above, sec. 3.6.

Third. It must be always borne in mind that the attributive side may also exist exclusively in the psyche of the imperative side. The judge of some supreme court may even experience the state as his attributive side, and the state can be experienced as some sort of personified entity. Again, what is actually experienced by the imperative side is an empirical question that cannot be solved theoretically.

If these three points are borne in mind, it is quite easy to reply to the objections made by Ziemiński (1980: 350, reported in Motyka 1993: 150) to Petrażycki's distinction. According to Ziemiński such imperativesidednesses as the obligatoriness of displaying the national flag from private buildings on national days or the prohibitedness of polluting nature cannot be but *legal* imperativesidednesses. Since Ziemiński fails to find an attributive side, he concludes that Petrażycki's distinction is wrong. Ziemiński completely misses the point. The issue whether the imperative side thinks of some attributive side as well as the issue regarding the real or imaginary nature of such an attributive side (provided that the imperative side thinks of one) are purely empirical, and therefore cannot be solved theoretically.

My replies can be summed up in a very short way: correlativism cannot be detached from the psychological theory of law.

4.3. FEATURES ASSOCIATED TO MORAL VS. LEGAL EXPERIENCES, RESPECTIVELY

The way Petrażycki distinguishes legal and moral experiences has important implications, in that certain phenomena correlate exclusively or mostly with moral experiences, while others exclusively or mostly with legal ones.

Let us discuss these features in some detail (more can be found in Fitipaldi 2012).

First. Petrażycki noticed that the presence of an attributive side directs the *focus of attention* from the course of action due in itself by the imperative side to the *concrete result* that is the main concern of the attributive side.

Hence, in the case of legal obligations there is mostly a focus on the result that is to be produced to the advantage of the attributive side.

[I]n accordance with the attributive nature of legal impulses, *besides* the representations [*predstavlenija*] of the actions in a broad sense that are exacted from the obligor ..., or *instead* of these representations, in the compound of legal experiences there are also the representations of the positive effects (i.e. of the "receipts" [*polučenija*], in the general sense) that are due to the person who has the entitlement ... The furnishing to the obligees of these *polučenija* ... plays a decisive part in the law. The fulfillment on the

part of the obligors of the actions to which they are bound (i.e. the realization of the objects of the obligation) is merely a means of attaining this effect, so that if the corresponding “receipts” are furnished to the obligee by whatever means (though it be without the fulfillment of the relevant action on the part of the obligor) the legal psyche is satisfied thereby as the appropriate accomplishment of what was required. [Petrażycki 1909-10: 443, 1909-10*: 203, translation modified, emphases added]

The term *polučenje* (plural *polučenija*) stems from the verb *polučat’/polučit’*, meaning “to receive”. Since it is hardly translatable into English, I will sometimes use the Russian term.

The last quoted passage means that in law, unlike in morality, there may be cases where *it does not matter who actually fulfills the obligation*. It just matters that it be fulfilled. In other words, only the *polučenje* matters.

What is important and decisive from the point of view of the legal psyche is not the accomplishment, as such, of the relevant action by the obligor, but the obligee’s obtaining [*polučenje*] what is owed to him. Thus, if what is owed to the obligee [*upravnomočennyj*] is furnished to him by others (and not by the obligor [*objazannyj*]), 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 1909-10: 71, 1909-10*: 54, translation modified]

We will see that this is what might cause that in certain languages the term for “debt” stems, rather than from a verb meaning “to have to”, from some other term meaning directly what the creditor wants. This is the case of the Ancient Greek term *χρῆος* that was connected with the idea of “utility”, as well as the case of the Latin term *aes*, originally meaning exclusively “copper”. In the case of *aes* the focus of the creditor is *on what is to be given to him, rather than on the action of giving*²³.

In other words, «[t]he fulfillment of legal obligations is possible without participation, and without any sacrifice by the obligor provided what is due to the obligee is furnished by someone» (Petrażycki 1909-10: 154, 1909-10*: 100 f.). This contention could be translated in a psychologically non-naïve language in the following way. *A person other than the imperative side can cause the attributive side to cease to experience himself as an attributive side vis-à-vis the imperative side by behaving in the way the attributive side normatively expected the imperative side to behave.*

Petrażycki did not explicitly point out that this hypothesis does not exclude that in certain cases the attributive side may have an interest that a certain obligatedness/obligatoriness be fulfilled by a specific person “by reason of its strictly personal nature” (in civil law countries, in such

²³ As regards both terms see also below, sec. 4.6.1. As regards *aes* only see also sec. 4.6.4.

cases, we use the Latin term *intuitu personae*, stemming from the Latin verb *intueri* “to look at”). *Petrażycki’s hypothesis only excludes that a moral obligation can be fulfilled without a personal involvement on the part of the imperative side.*

It should also be remarked – since *Petrażycki* does not do it – that we cannot talk of a *complete detachment of the legal obligatedness* from the person of the imperative side. Actually, the fulfillment must always be somewhat imputed or ascribed to the imperative side. Otherwise the attributive side could claim to be paid twice from the very same imperative side for the very same imperativesidedness.

A *second* important implication of the distinction between legal and moral emotions is that *representation* (*predstavitel’stvo*, *Vertretung*, *rappresentanza*) in a technical sense is possible only in the field of *legal* emotions:

Representation in the technical sense ... consists in the independent actions of another in the fulfillment of the representative’s own decisions while the legal consequences of those actions are attributed to the principal. If, therefore, the representative of the obligor (even without the knowledge of the latter) furnishes in his name satisfaction to the obligee, the obligor has then concededly fulfilled his obligation (through the representative) and has completely satisfied the requirements of law.

Besides representation of the imperative side [*imperativnaja storona*] ..., there may also be legal representation of the attributive side [*attributivnaja storona*] ... On the other hand, the moral obligation cannot be fulfilled by other persons without the participation of the obligor (even though the action may have been in the name of the obligor): in the field of morality there is no place for representation. [*Petrażycki* 1909-10: 155, 1909-10*: 101]

Petrażycki does not spend many words to explain the connection of this feature with the attributiveness of legal imperativesidednesses:

If, in view of the decisive significance of the attributive function of law, legal obligations can be carried out by third persons in the name and for the account of the obligor (insofar as that which is owing to the obligee is furnished thereby), it is understandable and natural that these obligations can be fulfilled (upon the same condition that proper satisfaction be furnished to the obligee) through representatives ... as is the case of guardians managing the property of the obligor. [*Petrażycki* 1909-10: 154, 1909-10*: 101]

Actually, this point is much the same that has just been made as regards *the possible extinguishment (through fulfillment) of the imperative side’s obligatedness/obligatoriness on the part of a person different from the imperative side himself.*

Representation, though, is something different from the mere possibility that a person other than the imperative side through his own behavior causes the attributive side to cease to experience his attributivesidedness. Representation is about the “creation” and “modification” of “rights”,

“debts”, “obligations” on the part of some sort of representative. In the terms of the psychological theory of law that I support, while the possibility of performance on the part of a person other than the imperative side does not presuppose illusions of entities such as debts and rights, representation does. *The representative creates, manipulates and destroys legal entities on behalf of the represented person.*

Like Petrażycki, I think that representation is caused by attributiveness. Unlike him, though, I think that representation is caused by attributiveness in a complex way. My conjecture is that attributiveness causes thick illusions of entities, such as debts, duties, powers and rights. These illusions, in turn, are amenable to be manipulated as if they were really existing entities. Only when such illusions have emerged is it conceivable that I ask, say, a friend to manipulate on my behalf some of my imperative- or attributivesidednesses, just as I could ask him to create, displace or destroy on my behalf really existing things in my apartment. In neither case is it necessary that I am constantly aware of what my friend is doing for me.

This is my tentative explanation of Petrażycki’s hypothesis. It goes without saying that our ignorance as regards the possible explanation of the truth of this hypothesis does not touch on its falsifiability. Petrażycki’s hypothesis is falsifiable since it excludes that representation plays a role (or a *major* role) in the field of moral phenomena. I prefer to add the adjective *major* since this hypothesis, just as the other four, can be treated as a probabilistic one.

A *third* implication of Petrażycki’s distinction of law and morality is that only legal phenomena may involve coercive fulfillment:

Conformably with the purely imperative nature of morality, the fulfillment of moral obligations cannot be other than voluntary. If the obligor 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 1909-10: 156, 1909-10*: 102]

This is a falsifiable hypothesis. *Although it does not imply that coercion always play a role in law, it does exclude that it plays a major role in morality.*

Petrażycki himself concedes that this feature does not pertain to every kind of legal obligation:

[C]oercive fulfillment should not be deemed possible in all fields of law: its admissibility results from the attributive nature of law only where, and insofar as, that which is owing to the obligee (his proper satisfaction) is thereby

furnished. Where rights are directed specifically at the voluntary fulfillment of something on behalf of the obligor, the attainment of the appropriate external effect through constraint is not the furnishing of what is due – is not the proper satisfaction – and of this character are the rights of parents and superiors to obedience, a respectful attitude, and so forth from children and subordinates. It must, moreover, be borne in mind that even in those fields of law where the element of voluntariness is not an integral part of the object of the claim, laws of nature make the coercive fulfillment of a host of obligations impossible in fact. Manifestly claims whose realization requires the performance of certain intellectual labors on the part of the obligor – such as the claims of the state or other subjects upon judges that they judge in accordance with conscience, or with regard to administrative organs, teachers, and tutors, that they govern, teach and tutor properly – exclude the possibility of any coercive fulfillment since the appropriate intellectual activity cannot be evoked by physical force. The same is true as to many claims directed at external acts – at physical actions by obligors (such as the uttering of certain words and the accomplishment of more or less complicated manual labors and so forth). [Petrażycki 1909-10: 157, 1909-10*: 103]

A *fourth* implication of Petrażycki's distinction is that *intention* plays a much more important role in the field of morality than in the field of law:

If the law can be satisfied by the action of a third party in place of the obligor, or by the coercive procurement of what is required for the obligee, inasmuch as the attributive function is thereby satisfied, then *a fortiori* it is understandable and natural that the legal psyche should be satisfied where the same condition obtains – that is, satisfaction is furnished to the obligee – through the accomplishment of what is required on the part of the obligor even though this occurred fortuitously without the wish and intent of the obligor, as where he acted absent-mindedly or mechanically, or otherwise independently of intent. [Petrażycki 1909-10: 158, 1909-10*: 103]

In other words, while a certain legal imperative side can abide by his legal imperativesidedness even without having any intention to do that, a moral imperative side must always have the intention to abide by his imperativesidedness²⁴.

The falsifiable point here is that intention is always essential to morality. Petrażycki does not deny that intention may play a role in law as well. He just states that in certain cases it may play no role, whereas this is never possible in morality.

Of course, the possible lack of intention on the part of the imperative side does not imply that the satisfaction should not be somewhat imputable to the imperative side (see above in this section).

²⁴ This distinction obviously recalls Kant's (1797*: § 3, xv) distinction between *Moralität* (*Sittlichkeit*) and *Legalität* (*Gesetzmäßigkeit*).

A *fifth* implication is that «law is indifferent to the motives of fulfillment» while «[t]he satisfaction of the moral duties requires the presence of moral motives» (Petrażycki 1909-10: 159, 1909-10*: 104).

This corollary is different from the fourth corollary. The fourth corollary is about the possible absence of any intention whatsoever in the field of legal imperativesidednesses. This corollary, instead, is about what kind of intention the imperative side must have, provided that he has one. Now, while in the field of moral phenomena the imperative side must have the *right* intention, this is not necessary in the field of legal phenomena.

If the obligor has furnished to the obligee that which is due to him, all is well from the point of view of the law, even though the action of the obligor was 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). [Petrażycki 1909-10: 159, 1909-10*: 104]

Of course, both in this case, and in the case of an imperative side who acts mechanically or absent-mindedly, we are not dealing with *legal* phenomena within the imperative side's psyche (see above sec. 3.4, fn. 26). The legal psychic phenomena, if any, are in the psyches of the attributive side and of the third spectator. If the legal imperative side abides by his imperative-sidedness out of reasons other than the proper legal ones, neither does the attributive side get angry, nor does the third spectator experience indignation. This follows from the definitions adopted in this book.

There is still an implication of Petrażycki's distinction between law and morality that Petrażycki himself stressed a lot and is worth being mentioned here. He opposed the odious-repressive tendencies (*odiozno-repressivnye tendencii*) of law to the peaceful (*mirnyj*) character of morality (Petrażycki 1909-10: 168, 1909-10*: 110). This is what I referred to above (sec. 1.1) with the terms *polemogenousness* or *conflict-producing* nature of legal phenomena as opposed to moral ones.

Let us read a passage where Petrażycki explains this point.

In morality there is a tendency – where material advantages or other services are furnished by others – to experience caritative impulsions (and a tendency for the corresponding dispositions to be manifested; love, gratitude, sympathy, and so forth), together with the corresponding discharges [*razrjady*] (impulsive actions): expressions of *gratitude*, or other benevolent actions in respect to those who have done good; while in cases where the moral duty is not fulfilled there is no basis for the malicious or vengeful reactions aroused by the consciousness [*soznanie*] that a loss has been suffered and that aggressive acts on the part of others have been suffered.

In the law, on the other hand, there is no ground for the tendency towards the caritative and grateful reactions to be operative in cases of fulfillment,

while a tendency to malicious or vengeful reaction operates in cases of non-fulfillment. [Petrażycki 1909-10: 169 f., 1909-10*: 111, translation modified, emphasis added]

In table 4.6, I sum up the different psychic attitudes of the attributive side/beneficiary towards fulfillment and non-fulfillment in law and morality. Of course, in the case of morality I could not talk of an *attributive side*. That is why I used the term *beneficiary* to refer to the person that receives “material advantages or other services” from the person that is experienced as a unilateral imperative side.

In my opinion Petrażycki was largely correct when he stated that law is conflict-producing.

Nevertheless, if we are to accept Sigmund Freud’s conjecture that the super-ego works mainly through aggressive drives (see sec. 3.5), we cannot state that morality is completely devoid of any kind of aggressive features. The moral indignation of third spectators can be full of aggressiveness.

Table 4.6. – Different reactions of the beneficiary / attributive side to fulfillment and infringement in the fields of moral and legal phenomena, respectively.

		FULFILLMENT	INFRINGEMENT
BENEFICIARY	IN MORALITY	gratitude	peace of mind, [moral indignation] [contagious shame?]
ATTRIBUTIVE SIDE	IN LAW	peace of mind	anger

Yet I think this is only a minor difference between me and Petrażycki. In my opinion the very presence of an attributive side does increase dramatically the amount of aggressiveness correlated with legal phenomena as compared with the aggressiveness correlated with moral ones. Both in moral and legal phenomena there can be indignation in third spectators, but only in legal phenomena can there be anger in an attributive side. This is a plain consequence of the definitions given.

In the last quoted passage Petrażycki mentions an emotion that I did not discuss in ch. 3: *gratefulness*.

Actually, I think that gratefulness can be considered an ethical feeling only if also shame or guilt are somewhat involved.

By the term *gratefulness* I think that we usually refer to two different feelings:

1. A sort of empathic feeling towards the person by whom one has been helped.
2. The subconscious fear that the person by whom one has been helped may undo what he did.

The first kind of gratefulness can be called *ethical* to the extent the helped person would experience shame or guilt in the case he does not experience gratefulness.

The second kind of gratefulness, instead, cannot at all be considered an ethical feeling, even in the case it is factually impossible to undo what has been done. The reader may ask how the helped person may fear that the helper changes his mind and undoes what he did if it is factually impossible to undo it.

My answer (and conjecture) is that the *irreversibility of time* belongs to the reality principle²⁵ and thus it is easily overcome by emotiveness. (I will say something more at this regard below in sec. 4.4.2 and 4.4.3).

4.4. KINDS OF LEGAL RELATIONSHIPS

Because of their bilaterality, legal emotions necessarily establish some sort of relationship between an attributive and an imperative side.

According to the legal-solipsistic approach adopted in this book, *for such a relationship to exist there must be at least either an attributive side, or an imperative side, or a third spectator*. In order to better describe all kinds of legal relationships from all these three points of view, I will assume that all three exist, but it must always be borne in mind that Petrażycki's legal solipsism does not require the existence of more than one individual for a legal relationship to exist.

To my knowledge, Petrażycki did not analyze in detail the specific appulsions or repulsions experienced by the participants in each legal relationship. I will try to do it here. In particular, I shall try to reduce these appulsions and repulsions to the superegoic emotions discussed in ch. 3.

In table 4.7, I sum up the three kinds of legal relationship devised by Petrażycki.

For clarity, from now on I will write *non facere* and *non pati*, as if they were single words: *nonfacere* and *nonpati*.

After the discussion of *pati-facere* legal relationships (sec. 4.4.3), I will introduce and discuss a fourth kind of legal relationship that Petrażycki did not take into account: *non facere - pati* (sec. 4.4.4). Finally, in sec. 4.4.5 I will spend a few words about two more phenomena that were not discussed by Petrażycki: *ethical indifference* and *absence-of-ethical-phenomena*.

My discussion of the kinds of legal relationships devised by Petrażycki will come to the conclusion that we should devise, not three, but four

²⁵ Compare Freud 1932: § 31 (74).

kinds of legal relationship depending on whether the attributive side is concerned with (1) his own action, (2) his own inaction, (3) the imperative side's action or (4) the imperative side's inaction (table 4.8) ²⁶. This is a corollary of the importance of the attributive side's focus when it comes to distinguishing the different kinds of legal relationships.

Since modal verbs are ways to express, not only *modalities* of processes, but also *qualities* of people, I will not use the term *modality*, but rather keep using the term *quality*. As I already contended, modal verbs are ways to express *bivalent qualities*, and ethical qualities are typically bivalent (sec. 1.4). Generally speaking, modalities are but qualities predicated of processes/actions.

Terms, such as *obligatedness*, *permittedness*, *prohibitedness*, etc. seem to evoke *positive*, rather than *intuitive* legal phenomena. This notwithstanding, these terms must be here understood as referring to both positive and intuitive legal phenomena. Throughout this chapter, I will use the terms *permittedness*, *omissibility* and *prohibitedness* to refer to both *actional* and *personal* permittednesses, omissibilities and prohibitednesses. As regards *facere-accipere* legal relationships I will always use the cumbersome term *obligatedness/obligatoriness*, as the term *obligatedness* can be used exclusively to refer to the quality of an animate entity, while *obligatoriness* can be used exclusively for courses of actions.

As I already said (sec. 4.2), I will not use such terms as *obligation* and *entitlement* to refer to what is owed by the imperative side and what is owned by the attributive side, respectively. The cumbersome terms *imperativesidedness* and *attributivesidedness* will be used, instead.

²⁶ In Fittipaldi 2012 I still accepted Petrażycki's idea that there are three kinds of behavior: actions (*facere*), abstentions (*non facere*) and tolerances (*pati*). Thus, I maintained that there should be, not four, but six kinds of legal relationship depending on whether it is the imperative side who has an imperativesidedness as to his *facere*, non *facere* or *pati*, or it is the attributive side who has an attributivesidedness as to his own *facere*, non *facere* or *pati*. Recently I have arrived at the conclusion that Petrażycki's distinction of three kinds of behavior violates Petrażycki's own principle that in every classification there must be but *one* principium divisionis. Thus my conclusion is that *pati* should be understood as the *acknowledgment* on the part of the imperative side of the attributive side's attributivesidedness. Although this "obligation" of recognition is more salient where the object of the attributivesidedness is some behavior of the attributive side himself, such an obligation does exist also where the object of the attributivesidedness is some behavior of the imperative side. In either case, since the focus of the attributive side is on the practical result, this basic obligation may go unnoticed.

My contention that the obligation of *pati* should be understood as an obligation of recognition of the attributive side's attributivesidedness, implies that there cannot be such a thing as a moral obligation of *pati*. Therefore I disagree with Petrażycki's discussion of Jesus's morality at p. 432 f. of 1909-10. In my opinion in the passages of the Gospel discussed there by Petrażycki, Jesus is not creating a moral obligation to tolerate evil; he is rather repealing the *right* not to undergo evil. This repeal, though, does not amount to repealing the obligation to fight evil. Quite the contrary. (As regards this issue, see also below sec. 4.4.3 and 4.9.1).

Table 4.7. – *Kinds of legal relationship devised by Leon Petrażycki.*

NAME GIVEN BY PETRAŽYCKI TO THE LEGAL RELATIONSHIP	TECHNICAL TERM USED BY PETRAŽYCKI TO REFER TO THE “ENTITY” BELONGING TO THE ATTRIBUTIVE SIDE	COURSE OF ACTION FROM THE POINT OF VIEW OF THE:	
		IMPERATIVE SIDE	ATTRIBUTIVE SIDE
positive-attributive	<i>pravopritязanie</i> “legal claim”	<i>facere</i>	<i>accipere</i>
negative freedom	<i>provooobranenie</i> “legal safeguarding”	<i>non facere</i>	<i>non pati</i>
positive freedom	<i>pravomoćie</i> “empowering”	<i>pati</i>	<i>facere</i>

Table 4.8. – *Kinds of legal relationship depending
on the concern of the attributive side.*

CONCERN OF THE ATTRIBUTIVE SIDE	PETRAŽYCKI’S TERM MODAL VERBS NAÏVE ENTITIES	ETHICAL QUALITY OF THE COURSE OF ACTION	ETHICAL QUALITY OF THE PERSON WHOSE BEHAVIOR IS FOCUSED ON	
action (i.e. <i>facere</i>) of the:	attributive side himself	<i>pati-facere</i> “can” powers, rights	actional permittedness, lawfulness (of the attr. side’s <i>facere</i>)	personal permittedness (of the attr. side)
	imperative side	<i>facere-accipere</i> “to have to”, “should”, “ought to”, debts, duties	obligatoriness, mandatoriness (of the imp. side’s <i>facere</i>)	obligatedness (of the imp. side)
inaction (i.e. <i>non facere</i>) of the:	attributive side himself	[<i>pati-nonfacere</i>] “can refrain from” NIL	actional omissibility, (of the attr. side’s <i>facere</i>)	personal omissibility (of the attr. side)
	imperative side	<i>nonfacere - nonpati</i> “should not”, “cannot” wrongs, torts, prohibitions	actional prohibitedness, wrongness, (of the imp. side’s <i>facere</i>)	personal prohibitedness (of the imp. side)

The terms *active side* and *passive side* will not be used either. Petrażycki used these terms, but he sometimes also used the terms *attributivnaja* and *imperativnaja storona* (e.g. Petrażycki 1909-10: 155).

I will use exclusively the terms *attributive side* and *imperative side*, for two reasons. First, because the attributive side can have an attributivesid- edness as regards his own *inaction*. Therefore it would be quite paradoxical to call such a side *active*. Second, because in the case of *facere-accipere*,

the imperative side has to act and it would be paradoxical to call *passive* the side which has to act.

The four kinds of legal relationship I have devised seem to correspond to the four deontic modalities. But the psychological approach adopted in this book is incompatible with most of the axioms of standard deontic logic.

In particular, in my opinion, *it is psychologically wrong to try to define some imperativesidedness in the terms of some attributivesidedness* (and the other way round).

This is what deontic logicians do when, for example, they define the obligatoriness of a certain action in the terms of the negation of the permittedness of the corresponding inaction. This is twice wrong. First, because imperativesidednesses and attributivesidednesses involve mutually irreducible emotions (see sec. 4.4.3). Second, because, strictly logically, the negation of, say, a permittedness is not a prohibitedness, but rather a mere absence-of-permittedness. The phenomenon that constructions strictly logically meaning absence-of-permittedness are used to mean prohibitedness calls for an explanation, just as the phenomenon of non-affirming-double-negations (e.g. “There ain’t be no war”). I will discuss the phenomenon of the use of constructions strictly logically meaning absence-of-permittedness to mean prohibitedness below in sec. 4.4.4.

The only mutual definitions that are, at least to some extent, psychologically tenable are within imperativesidednesses or within attributivesidednesses. I am thinking of the definition of prohibitedness in the terms of the obligatoriness of a certain inaction. This mutual definition corresponds to the way prohibitedness is expressed across several languages: *you should not do it.*

As regards the mutual definition of omissibilities in the terms of permittednesses and the other way round, they play hardly any role in naïve legal ontology because of the lack of salience of omissibilities (see below sec. 4.4.4 f.).

I will say a few words more about why a yet-to-come Petrażyckian deontic logic is incompatible with standard deontic logic in the next subsections.

One final terminological remark is in order here.

Even though the principium divisionis of legal relationships I adopt here is based exclusively on whether the action/inaction of the attributive/imperative side is involved, I will keep using the Latin terms used by Petrażycki. Now, it could be asked why I just do not drop the *accipere* in *facere-accipere*, the *pati* in *pati-facere*, the *nonpati* in *nonfacere-nonpati* and the *pati* in the *pati-nonfacere*, since what only matters are the *facere* or

nonfacere of either side. The answer is that this usage is useful in order not to neglect the other side's experience.

I will discuss the kinds of legal relationship in the following order:

1. facere-accipere (obligatedness/obligatoriness),
2. nonfacere-nonpati (prohibitedness),
3. pati-facere (permittedness),
4. pati-nonfacere (omissibility).

This analysis is the necessary preliminary step to my attempt to answer the question that makes up the topic of this chapter: *why do only some of the qualities involved in these legal relationships get detached from the action/inaction and the attributive/imperative side and eventually result in illusions of free-standing entities?*

4.4.1. facere-accipere (obligatedness/obligatoriness)

Let us start with Petrażycki's description of the object of this kind of legal relationship:

That which obligors are required to do or to furnish consist[s] in doing something for the behoof of the other side: paying a certain sum of money, or furnishing other objects, or performing a certain work, or rendering other positive services. These are positive actions and positive furnishings [*dostavlenija*] in the narrow sense (*facere*). The corresponding positive receipts [*dostavlenija*] – receipts in the narrow sense (*accipere*) – or actions [*dejstvija*] are owed to the obligees ... The relevant legal motorial impulses and the corresponding legal experiences – as well as their projections (norms and legal relationships, legal obligations, legal rights) – we shall call positive-attributive [*položitel'no-pritjazatel'nye*] ... [Petrażycki 1909-10: 71, 1909-10*: 54, translation modified]

In the case of facere-accipere legal relationships, *the imperative side has to perform a certain action (or a certain kind of action) and there is another individual that is experienced as an attributive side as regards that very action*. Here the focus of the attributive side is on the facere of the imperative side. The course of action can be described also in the terms of the result aimed at by the attributive side. In the case the facere consists of giving something the focus can be on the thing to be given. This will play a major role in my discussion of the illusions of debts, below. Nonetheless, it should be borne in mind that since what matters is the action of the imperative side, there may not even be something to be received by the attributive side, as is typically the case of the obligatedness of a sentinel or a lookout.

We have here the following qualities:

1. the *obligatoriness* of the course of action,
2. the *obligatedness* of the imperative side.

In English, as well as in several other languages, both these qualities can be expressed through modal or “honorary” modal verbs such as “to have to”, “should” or “ought to” (see sec. 1.4 and 2.3)²⁷. (See table 4.9).

Table 4.9. – English ways to express obligatedness/obligatoriness.

PERSON	QUALITY	ACTION
George	should ought to has to	pay the check

As I said, standard deontic logic is not compatible with a yet-to-come Petrażyckian deontic logic. In particular, such an axiom as *obligatoriness implies permittedness* does not make any sense in the context of the hypotheses I will make in this and the next three subsections. Nonetheless, it may be worth stressing that in certain cases the modal verb *can* can be used to express an obligatedness/obligatoriness.

Here is a real²⁸ example given by Palmer (1979: 60):

I'm Dr. Edgton now, so you can observe my new status (1)

In my opinion, the reason why in this case *can* can be used to express an obligatedness/obligatoriness in a brusque or somewhat impolite way – as Palmer himself remarks –, is precisely that the attributive side sarcastically treats the imperative side, as if he were an attributive side²⁹.

Let us now turn to the analysis of the psychological phenomena involved in this kind of legal relationship.

If I were to accept Petrażycki's idea that ethical appulsions and repulsions are elementary theoretical concepts and thus cannot be reduced to anything else, I think I should describe the ethical experiences at least one of the three participants has to experience for a *facere-accipere* legal relationship to exist in the following terms: at least one of the three participants (either directly or through identification with the imperative side) must possibly experience

- an *appulsion* towards the imperative side's *facere*,
- a *repulsion* towards the imperative side's *nonfacere*, or

²⁷ It is worth remarking that *should* and *to have to* do not have the same implications when used in the past tense: (1) *John had to come* / (2) *John should have come*.

While (1) implies that John eventually came, (2) implies that he did not. To my knowledge this phenomenon has been first pointed to by Palmer (1979: 101).

²⁸ Palmer used material in the Survey of English Usage located in the Department of English at the University College London (1979: 18).

²⁹ In this context Palmer is discussing *rechtsnormen*, but this point holds for *rechtssätze* as well.

- a *repulsion* towards the imperative side himself if he does not perform his *facere*.

As I said, unlike Petrażycki, I think that ethical appulsions and repulsions should be reduced to the five ethical (i.e. superegoic) emotions discussed in ch. 3. Thus, let us discuss the superegoic emotions that must be potentially experienced by at least one of the three participants for a *facere-accipere* legal relationship to exist.

For a *facere-accipere* legal relationship to exist the *attributive side* must experience:

- *anger* in case of *nonfacere*,
- *peace of mind* in case of *facere*³⁰.

The concept of *anger* I am using in this book is close to Ekkehart Schlicht's concept of *moralistic aggression* – a concept stemming from ethology. Schlicht contends that «anger ... is an important element in the mechanism of moralistic aggression» (1998: 137). He contends – and convincingly so – that «“moralistic aggression” may serve as an effective enforcement mechanism. The parties may be prepared to defend whatever they perceive as their entitlement, even if they cannot expect any immediate benefit, and even if it involves some cost for them» (1998: 30).

Schlicht's example is worth being quoted in a complete way.

The effect of entitlements and obligations is most easily understood by looking at commonplace transactions. Consider, as an example, a taxi ride in an unfamiliar town. A person enters a taxi cab and tells the driver where to go. Upon arrival the taxi driver points to the taximeter and indicates the fare. The customer pays ... The customer leaves, the taxi disappears. Neither party expects to meet the other again, and no-one thinks about the episode any further; this is the usual pattern of behavior ...

Why do both parties honor the contract? The passenger, for his part may consider leaving the taxi without paying, as he has been brought to the place where he wanted to go. He may fear, however, that this would *infuriate* the taxi driver. As the driver appears to be a strong and determined person, this appears too high a risk, and the passenger decides to pay.

However, after having handed over the money, nothing has changed in the mutual bargaining position: the taximeter reading is still the same, the physique of the taxi driver appears as threatening as before, and the passenger still has cash in his pocket. So why does the taxi driver not insist that the passenger pay again, and why shouldn't the passenger comply if he did before?

The taxi driver may think that such a demand would *infuriate* the passenger. The passenger could resist, and could consider legal action. So he is

³⁰ The peace of mind the attributive side experiences in the case of *facere* on the part of the imperative side should be contrasted with the surprise (along with the possible gratitude) a beneficiary would experience in the case of fulfillment of a moral obligateness/obligatoriness to his advantage.

content with what he has obtained and drives away. [Schlicht 1998: 29 f., emphases added]

From my psychological point of view, the existence of rules according to which (1) the taxi driver should not extort the passenger and (2) the passenger has to pay can be reduced:

1. to the fact that, if the taxi driver tries to extort the passenger, the passenger discharges his usually restrained aggressiveness against the driver and
2. to the fact that, if the passenger refuses to pay, the taxi driver discharges his usually restrained aggressiveness against the passenger.

A difference between Schlicht and me seems to be that Schlicht, when referring to the example of the taxi driver, says that «it seems a little far-fetched to talk about morality» (39). In my opinion, instead, if we just recall Anna Freud's hypothesis about the stages development of the super-ego (sec. 3.5), it can be easily argued that anger does belong to the domain of ethics.

Another reason why Schlicht might think that anger does not belong to the domain of ethics is that anger can be a response to such a type of “tension inducing cognitive dissonance” as a «paper jam and subsequent computer breakdown that occurs during an urgent print-out» (137).

In my opinion even this kind of anger can be considered as some sort of ethical emotion if we just make the conjecture that this kind of emotion presupposes an irrational *claim* or *entitlement* towards reality, perhaps childishly experienced in an animistic way.

Karen Horney has analyzed the way the experience of attributiveness (I use Petrażycki's terms) can result in pathology. Horney used the term *neurotic claim*.

Take, for example, a businessman who is exasperated because a train does not leave at a time convenient for him. A friend, knowing that nothing is at stake, might indicate to him that he really is too demanding. Our businessman would respond with another fit of indignation³¹. The friend does not know what he is talking about. He is a busy man, and it is reasonable to expect a train to leave at a sensible time.

Surely his wish is reasonable. Who would not want a train to run at a schedule convenient to his arrangements? But – we are not *entitled* to it. This brings us to the essentials of the phenomenon: *a wish or need, in itself quite understandable, turns into a claim*. Its non-fulfillment, then, is felt as an unfair frustration, as an offense about which we have a right to feel indignant.³² [Horney 1950: 42].

³¹ According to the terminology adopted in this book, Horney should have been using here the term *anger*, and not the term *indignation*. The businessman experiences himself as having an attributivesidedness that trains run at times convenient for him – an attributivesidedness that third spectators should acknowledge.

³² We have here the hypostatization of norms typical of most psychologists (see sec. 3.6). Actually, it is the very fact that we get angry (i.e. we discharge our aggressiveness) under certain circumstances that makes of these circumstances an offense.

Horney talks of «secret claims toward life in general» (46)³³.

If Petrażycki was able to show that legal (as well as moral) phenomena can be found in areas where hitherto no one had imagined there could be any³⁴, the combination of Petrażycki's and Horney's views shows that legal emotions play a major role in many kinds of neuroses.

That is why I, unlike Schlicht, will keep contending that anger (as well as indignation) is a legal emotion in a strict sense and I will treat Schlicht's aggressive reaction in the case of a "paper jam and subsequent computer breakdown that occurs during an urgent print-out" as a legal phenomenon in a strict sense.

We can now turn to the *imperative side*.

For a *facere-accipere* legal relationship to exist, the imperative side must potentially experience at least one of the following emotions:

- *guilt* in case of nonfacere,
- *shame* in case of nonfacere,
- *pride* in case of facere (if the facere is hard to perform) or
- *peace of mind* if, in case of nonfacere, the attributive side discharges aggressiveness (*anger*).

Let us now spend a few words as regards the third kind of participant, namely the *third spectator*³⁵.

For a *facere-accipere* legal relationship to exist the *third spectator* must experience:

- *indignation* in case of nonfacere,
- *peace of mind* in case of facere.

³³ The phenomena Horney points to are different from Kurczewski's pure attributive phenomena that will be discussed below (sec. 4.5). In the case of Kurczewski's pure attributive phenomena there is no imperative side at all – not even a completely irrational one.

³⁴ See 1909-10: § 5 (1909-10*: § 9). The title of the paragraph in the English edition is incomplete. The full title reads: *The scope of law as attributive ethical experiences [pereživaniija]. An overlook of the branches of the legal psyche that are usually not viewed as law [ne odnosimye k pravu]*. (Cf. the concept of child law mentioned in the second last block quotation above in sec. 4.2, as well as below, sec. 4.5, where a quotation can be found where Petrażycki describes the rules of games as *legal norms*).

³⁵ In this case I am discussing a situation in which the feelings of the attributive side, the imperative side and the third spectator have compatible contents.

A completely different question is which side an *impartial* spectator would more go along with. This question may play a crucial role as to the explanation of the selection of legal norms. Adam Smith tried to make some hypotheses at this regard in his *Lectures on Jurisprudence* (1978†). See, for instance, what he says about the sympathy with the promisee (87), with the first possessor (17) and with the injured (475). Even though I think that he does not succeed in explaining why impartial spectators, in general, go more along with promisees, first possessors, and injured people, than with changing-mind promisors, disseizers and offenders, respectively, I do think that his approach is very insightful. However, these issues do not pertain to ontology.

What if there is no human being as an attributive side? To answer this question let us shortly discuss an example taken from public law: the obligation of the taxpayer to pay his taxes.

As regards this case, it could be asked who the taxpayer experiences as his attributive side. To answer this question it must be borne in mind that according to normative solipsism the attributive side – as well as the imperative side (and third spectators) – does not have to exist in the external world (see sec. 4.2). The attributive side may exist exclusively in one's fantasy.

Now, in order to understand who is actually experienced as the attributive side of the legal obligatoriness of paying taxes it should be searched for what the content of the representation of the imperative side (or the third spectator) actually is, even if it is a completely irrational one.

As a subject of a right, the “treasury” [*kazny*] must not be interpreted to mean that the subject is the state: this would be an arbitrary interpretation contrary to reality. [...] When we ascribe to the treasury rights with regard to ourselves or to others, we are concerned with a representation [*predstavlenie*] completely different from the representation to which the word “state” ordinarily corresponds. The representation of state ordinarily comprises the representation of territory and people. There is nothing of this in the representation of treasury, which is akin to the idea of a cash box and the like. The nature of other so-called juristic persons, monasteries, churches, and so forth is misinterpreted in 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 matter of a particular monastery known to the individual. [Petrażycki 1909-10: 413 f., 1909-10*: 188, translation modified]

Hence, the taxpayer owes the taxes to what he represents to himself as his attributive side. The issue of how the content of this representation looks like is an empirical one, that should be solved with psychological methods. In my opinion, Petrażycki's approach implies that, if the taxpayer does not represent to himself any attributive side, the obligation of the taxpayer should be considered a moral one (see above sec. 4.2).

Petrażycki stresses that in certain cases there can be nothing more than “a confused consciousness of the subject” of a legal relationship:

In various fields of law, the application of the scientific-psychological method of study ... reveals varied and heterogeneous beings as subjects ... Thus the subjects of rights and obligations, after the death of a person and before the acquisition of the inheritance by the heirs, may be the dead testator according to one law and the *hereditas iacens* according to another. This should be so stated, without misrepresentation and without fanciful speculation. The attitude of the contemporary legal consciousness as to the legal nature of an estate between death and the receipt of the inheritance often consists, however, in ascribing corresponding rights and obligations neither

to the deceased nor to the *hereditas iacens* as such, but to a subject of less definite nature and approximately corresponding to the pronoun “someone” [*kto-to*]. A confused consciousness [*smutnoe soznanie*] that a certain right – for example, a right of property in something that has been found – belongs to “someone” is a phenomenon which is extremely common and of great importance in legal life. [Petrażycki 1909-10: 414, 1909-10*: 188 f.]

These conjectures raise many issues that cannot be solved here and that require a kind of empirical research that lies outside the scope of this book.

4.4.2. nonfacere-nonpati (prohibitedness)

Let us start from Petrażycki’s description of the object of this kind of bilateral legal relationship:

That which obligors are, in a general sense, to do or to furnish [*dostawienie*] ... consist[s] in not doing something, in refraining from something (as from encroaching on the life, health, honor, of the other side, and the like): negative actions, negative furnishings, restraints (*non facere*). In these cases that which is received [*polučenje*], in the general sense, or the positive effects owed to the obligees, consists in not undergoing – in freedom from – the corresponding effects. These may be termed ‘negative freedoms’³⁶, ‘immunities’ [*neprikosnovennosti*], “safeguardings” [*obrannosti*] (*non pati*). [Petrażycki 1909-10: 72, 1909-10*: 55]

In the case of *nonfacere-nonpati* legal relationships the *imperative side has to refrain from a certain action (or from a certain kind of action) and there is another individual that is experienced as an attributive side as to that very abstention*. Here the focus is on the *nonfacere* of the imperative side.

We have here the following qualities:

1. the *actional prohibitedness* of the course of action,
2. the *personal prohibitedness* of the imperative side.

In English, these qualities can be expressed at once by adding the term *not* after *should*, *ought* or *can* (see table 4.10).

Table 4.10. – English ways to express prohibitedness.

PERSON	QUALITY	ACTION
Robert	should not ought not to cannot	park the car here

³⁶ As is easy understandable, the difference between negative and positive freedom drawn by Petrażycki is purely technical and has hardly something in common with the distinction drawn with similar names by Isaiah Berlin (1958). As will be seen just below, when discussing Petrażycki’s definition of a *positive freedom*, his definition implies that certain freedoms that Berlin would have called *negative* (such as the freedom of speech or the freedom of association) should be rather called *positive*.

It is worth remarking that while in the case of *should* and *ought not to* the particle *not* negates the course of action, in the case of *cannot* the particle negates the ethical quality³⁷. Strictly logically a construction like

x cannot + inf-“ y ”

should mean either that x has an omissibility as regards the action expressed by the infinitive or that the action expressed by the infinitive is simply devoid of some permittedness belonging to x . In sec. 4.4.4 I will propose an explanation for this phenomenon.

If I were to accept Petrażycki’s idea that ethical appulsions and repulsions are elementary and thus cannot be reduced to anything else, I should describe the ethical experiences at least one of the three participants has to experience for a *nonfacere-nonpati* legal relationship to exist in the following terms: at least one of the three participants (either directly or through identification with the imperative side) must experience

- a *repulsion* towards the imperative side’s *facere*,
- an *appulsion* towards the imperative side’s *nonfacere*, or
- a *repulsion* towards the imperative side, in the case the imperative side performs his *facere*.

Since I do not accept Petrażycki’s idea that repulsions and appulsions are elementary, let us discuss the superegoic emotions that must be experienced by at least one of the three participants for a *nonfacere-nonpati* legal relationship to exist.

As regards the attributive side, for a *nonfacere-nonpati* legal relationship to exist the *attributive side* has to experience

- *anger* in case of *facere*,
- *peace of mind* in case of *nonfacere*³⁸.

Anger can be here interpreted in two different ways: it can *either* be a mere discharge of aggressiveness occasioned by the imperative side’s *facere* or be an attempt to undo what has been done by the imperative side.

The irreversibility of the damage caused by the imperative side does not exclude that the cause of the attributive side’s discharge of aggres-

³⁷ This point has been first made by Frank Palmer (1979: 64, 102) with a different terminology. He opposes the negation of the *event* to the negation of the *modality*.

³⁸ Above (sec. 4.4.1, fn. 30), in the context of *facere-accipere*, I contrasted the peace of mind experienced by the attributive side in the case of *facere* of the imperative side with the surprise or gratitude a beneficiary would experience in the case of fulfillment of some moral obligatednesses/obligatoriness. In the case of moral prohibitednesses, though, surprise or gratitude are less probable because inactions are cognitively less salient than actions. Moreover, in case of action, some indignation might be even expected. In this case a theoretically sound distinction between anger and indignation is crucial to the distinction between the attributive side in a legal prohibitedness and the beneficiary of a moral prohibitedness. As regards a possible way to distinguish anger from indignation, see below, sec. 4.12.

siveness is the attempt to force the imperative side to undo what he did. It could be argued that the idea of the *irreversibility of time* is not inborn, but rather belongs to a later acquired principle of reality. It may thus be suspended under stressful conditions. This implies that the irreversibility of the damage does not exclude that revenge is sometimes taken mainly or exclusively in order to force the imperative side to undo what he did. In such cases revenge can be explained as a sort of extreme irrational threat.

This could explain why in the case of irreversible damages (e.g. in the case of murders or aggressions resulting in permanent bodily injuries) the desire for revenge may go far beyond the *limit* of retaliation (i.e. *no more than a life for a life, no more than an eye for an eye, no more than a tooth for a tooth*). The more difficult it is for the imperative side to undo what he did, the more dreadful has to be the threat. In the case of damages impossible to repair the threat must necessarily be infinite, and so the revenge³⁹.

I think that for a *nonfacere-nonpati* legal relationship to exist the *imperative side* must experience, at least,

- *guilt* in case of *facere*,
- *shame* in case of *facere*,
- *pride* in case of *nonfacere*, or
- *peace of mind* if, in case of *facere*, the attributive side discharges aggressiveness (*anger*).

As for *pride* in this kind of legal relationships, I think of phenomena of *narcissistic satisfaction* in the case of religious masochistic abstentions regarding sex, food or alcohol. Of course, in these cases we are dealing with a *legal* phenomenon if some sort of god is experienced as an attributive side to which these abstentions are owed.

We can now turn to the *third spectator*. For a *nonfacere-nonpati* legal relationship to exist, I think that the *third spectator* must experience

- *indignation* in case of *facere*,
- *peace of mind* in case of *nonfacere*.

Petrażycki gives examples taken from criminal law or civil rights. Examples can be also easily given in the field of private law, such as negative easements, liberty from other people's encroachment upon one's ownership, etc. (As regards ownership see sec. 4.12).

³⁹ That people may wish to take revenge also with animals and things can be easily explained in this context by taking into account the animistic mode of thinking that is typical of the childhood of every human being and that keeps working subconsciously in most of us notwithstanding the reality principle.

As regards the animistic mode of thinking and its relationship with magical thinking in everyday life see Piaget 1926* (part 2 and § 4.4).

4.4.3. *pati-facere* (permittedness)

Let us start, as usual, from Petrażycki’s description of this kind of bilateral legal relationship:

T]hat which obligors are, in a general sense, to do or to furnish may further consist in tolerating or suffering certain actions of the obligees, for example, in uncomplainingly enduring certain unpleasant conducts originating with the obligees, such as reproofs or physical punishments, etc.; in tolerating oral or printed communications and propagandas by the obligees of religious, political, and other opinions, the organization of public assemblies, meetings, and so forth: tolerances, *pati*. Here that which is received [*polučenie*], in the general sense of positive effects, which are due to the obligees, consist in the corresponding actions endured by the obligors – in the corresponding freedoms of actions: positive freedoms [*položitel'nye svobody, svobododejstvija*], *facere*. [Petrażycki 1909-10: 73, 1909-10*: 56 f., translation modified]

In the case of *pati-facere* legal relationships *the imperative side has to tolerate a certain action (or a certain kind of action) on the part of the attributive side*. Here the focus is on the *facere* of the attributive side. As we shall see in detail just below, the obligatoriness of the *pati* (i.e. the obligation to innerly accept the attributive side’s *facere*) may imply obligatorinesses as to not hindering the attributive side’s *facere*, but cannot be reduced to them.

We have here the following qualities:

1. the *actional permittedness* of the course of action,
2. the *personal permittedness* of the attributive side.

In English, these qualities can be expressed through the modal verb *can* (see table 4.11). (As regards the reason I do not mention here *may* see above sec. 1.4, fn. 62).

Table 4.11. – English way to express permittedness.

PERSON	QUALITY	ACTION
You	can	enter the field

If I were to accept Petrażycki’s idea that ethical appulsions and repulsions are elementary and thus cannot be reduced to anything else, I think I should describe the ethical experiences at least one of the three participants must to experience for a *pati-facere* legal relationship to exist in the following terms: at least one of the three participants (either directly or through identification with the imperative side) must experience

- a *repulsion* towards any index of a *nonpati* on the part of imperative side,
- a *repulsion* towards the imperative side himself, in the case indexes of *nonpati* occur, or
- an *appulsion* towards the attributive side’s *facere*, in the case the imperative side tries to hinder the attributive side’s *facere*.

Since I think that Petrażycki's appulsions and repulsions should be reduced to superegoic emotions, let us discuss the superegoic emotions that must be experienced by at least one of the three participants for a *pati-facere* legal relationship to exist.

For a *pati-facere* legal relationship to exist the *attributive side* must potentially experience, at least,

- *anger* towards any index of *nonpati* on the part of the imperative side, or
- an *appulsion* towards his own *facere*.

Let us discuss in closer detail the attributive side's appulsion towards his own *facere*. *The appulsion the attributive side experiences in this kind of legal relationship is completely different from the appulsion the imperative side experiences in the case of facere-accipere legal relationships* (think of the appulsion to pay the check at the restaurant). In this latter case the imperative side's appulsion is anticipated shame or guilt for the case of his own *nonfacere*. In the case of *pati-facere* legal relationships, instead, the appulsion should be reduced to a discharge of aggressiveness focusing on the attributive side's own *facere* – a discharge of aggressiveness that somewhat boosts his *facere*.

This difference may explain why in a yet-to-come deontic logic based on a psychological theory of law such an axiom as *whatever is obligatory is also permitted* holds as little as the Euclidean geometry does in the context of the theory of relativity. Neither is an appropriate tool to describe phenomena in accurate way.

The fact that A experiences the obligatoriness of action-*x* to the advantage of the attributive side B does not imply that A experiences the permittedness of action-*x* also against the will of C (as regards this rare kind of Antigonean case cf. below, sec. 4.9.1)⁴⁰.

Sure, we can expect that an imperative side who tries to perform an action in order to avert guilt or shame in case of inaction would discharge his usually restrained aggressiveness against some third who tries to prevent him from his action. In this case, the experience of an obligatedness/obligatoriness would result in a psychic experience somewhat similar to the experience of some permittedness. But still obligatednesses/obligatorinesses and permittednesses are different phenomena. The fact that the former may – under certain circumstances – cause psychic experiences that somewhat resemble the psychic experiences involved in the latter does not entail that the former entail the latter⁴¹.

⁴⁰ Actually it does not even imply that A experiences the permittedness of action-*x* against B, if B has changed his mind.

⁴¹ Cf. above fn. 26 as regards why the "obligation" to resist evil does not imply the "right" to resist it.

The hypothesis that *in the case of permittednesses the appulsion the attributive side must possibly experience should be first of all understood in the terms of a discharge of aggressiveness focused on the attributive side's own facere* can cast some light on certain phenomena concerning rights that Karl Olivecrona beautifully described in his *Law as Fact*:

[A] function of the notion of right must ... be pointed out in this connexion. [It] is used as a means of exciting or damping down feelings. Above all, in conflicts of every kind the idea of having a right to the object in dispute serves to fortify the courage on one's own side and to beat down the will-power of the other side. This is the case in every war. The same is true of the class-struggle. An oppressed class puts on its banners that there is a *right* to freedom, to a full compensation to everyone for his labor, or something like that. A privileged class asserts with equal vehemence the inviolable right of property, perhaps the sacred rights of the monarchy with which it is connected etc. Assertions of this kind have considerable effect on the population. They help to close the ranks of each party and to stimulate confidence. On the other hand, these assertions reach the ranks on the opposite side and often serve to undermine their belief in their cause, e.g. when members of the propertied classes in the innermost soul come to acknowledge the rights of the proletarians to equality.

Now in order to fulfill this function of stimulating and discouraging there is no need for the notion to correspond to a reality. The simple cry of Hurrah! may serve to raise the spirits of an attacking force. What is needed is not a true picture of the actual world, but a stimulant to the feelings of activity and courage or, again, something which has a depressing effect. [Olivecrona 1939: 98 f.]

There is a major difference between my proposal and Olivecrona's. According to Olivecrona, *exciting* the attributive side's feelings is but a *function* of the notion of right – conceived by Olivecrona as a fictitious, ideal or imaginary power (Olivecrona 1939: 90). In my (Petrażyckian) conception, instead, these feelings are the very core of the phenomenon called *permittedness* – a phenomenon that may cause the illusions of *right/powers*.

To put it in another way, *what for Olivecrona is the cause for me is the effect, and the other way round*. He takes for granted that we have “the idea of having a right”. This illusion, instead, is precisely what we still have to explain (below, sec. 4.8 ff.). In his view, this illusion may fortify the attributive side's courage. In my opinion precisely the opposite is true. We have contexts in which we can discharge our usually restrained aggressiveness. This, in turn, may cause the illusion of having a right.

These conceptions can be reconciled if we make the hypothesis that the illusion of having a right can in turn boost one's aggressiveness. But also in this case the basic concept is that of discharge of aggressiveness.

Let us now examine the appulsions and repulsions of the imperative side.

Also for the imperative side the focus can be (1) on the attributive side's *facere* or (2) on *indexes* showing that he is not innerly accepting the attributive side's *facere*.

In both cases we can reduce the imperative side's appulsions and repulsions in the following way. For a *pati-facere* legal relationship to exist the *imperative side* must experience at least:

- *peace of mind* in case of the attributive side's *facere*,
- *pride* for his tolerating the attributive side's *facere*,
- *guilt* in case he does not tolerate the attributive side's *facere*,
- *shame* in case he does not tolerate the attributive side's *facere*, or
- *ethical relief* for his tolerating the attributive side's *facere*.

Several circumstances determine which ethical feeling (or feelings) are actually experienced. As regards the concept of *ethical relief*, see just below.

In order to avoid misunderstandings a remark is in order here.

From a psychological point of view two mistakes must be carefully avoided:

1. reducing the *permittedness* of the attributive side's *facere* to the *obligatoriness* of the imperative side's *pati*, as well as
2. reducing the *obligatoriness* of the imperative side's *pati* to the *prohibitedness* of a set of imperative side's *facere*.

From the aforesaid, hardly will any reader think that the first mistake has been here made.

Let us see what Petrażycki wrote about the second kind of mistake. According to him «all possible classes of conduct can be reduced to three categories: positive actions [*pozytytel'nye dejstviia*], abstentions [*vozderzhanija*], and tolerances [*terpenija*]» (Petrażycki 1909-10: 426, 1909-10*: 193) and in no way can tolerances be reduced to abstentions⁴².

This is the way Petrażycki makes this point.

The reduction of tolerances [*terpenija*] to abstentions from opposition [*vozderzhanija ot soprotivlenija*] results from the application of an unscientific method: the facts are arbitrarily re-interpreted [*proizvol'noe peretol'kovanie faktov*] from the point of view of practical considerations (in that tolerances equal abstentions according to their practical result, etc.), whereas the psychological method studies ... what is in reality found in one's own or in another's psyche.

It is indisputable that obligations to tolerate anything and obligations of abstentions (including obligations to refrain from oppositions) are distinct phenomena from the psychological point of view. The content of their

⁴² As I wrote above (fn. 26), I share this statement only in the sense that *pati* is a phenomenon completely different from an action/inaction. In my opinion *pati* is no conduct or behavior; rather it is the acknowledgment of the attributive side's attributive-sidedness.

object representations [*ob'ektnye predstavlenija*] is completely different. 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 – 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 1909-10: 427, 1909-10*: 194, translation modified, emphases added]

As we know, from a psychological point of view, it could be contended that a person may feel the desire to try to avert some event even if that event has already taken place and its consequences are irreversible. The *irreversibility of time* pertains to the principle of reality, rather than to the deepest strata of the human psyche (sec. 4.3 and 4.4.2). This consideration, though, does not affect the correctness of Petrażycki's statement, because it is psychologically possible to distinguish between the obligatoriness of tolerating a certain action and the obligatoriness of not interfering with it. These are two different psychological phenomena.

Let us first shortly discuss the example given by Petrażycki in the last quotation.

Accepting God's permittedness of inflicting suffering on his "creatures" is tantamount to accepting the obligatoriness of tolerating it (e.g. by not discharging one's aggressiveness through blasphemies and the like). This acceptance, though, does not *necessarily* imply the personal prohibitiveness of the believers as to any attempt to avert or reduce their suffering. An exception seems to be suicide, but it could perhaps be argued that through suicide the believer directly denies God's permittedness as to inflicting suffering, rather than just try to avert or reduce it ⁴³.

⁴³ It is worth stressing that most official legal systems that have death penalty do not allow the suicide of the person sentenced to death. This may be indexical of a conception of suicide as a very refusal of the obligatoriness of the pati, even though paradoxically the condemned person's suicide would lead to the very same result aimed at by the penalty itself. A different explanation may be the general taboo of suicide.

As a second example, we can recall the quotation misattributed to Voltaire:

I disapprove of what you say, *but I will defend* to the death your right to say it

It could be argued that the persons sharing this legal conviction can experience both *peace of mind* towards the *expression in itself* of the opinion of some attributive side and *indignation* towards the *content* of these opinions. Think of those people who think that denying the shoah is an exercise of the freedom of speech, but at the same time experience an extreme moral repulsion as to the way this freedom is actually exercised. Also in this case the obligatoriness of tolerance does not imply the obligatoriness of non-interference.

Let us now discuss a third example, taken from Petrażycki. According to him construing the guilty person's obligatedness to endure the penalty in terms of non-interference is a complete distortion of the way penalties can (or, from certain points of views, are even supposed to) be psychologically experienced.

If a criminal, after having committed a bad crime, sits jailed in chains, and because of the circumstances cannot think of an escape or of another opposition, this does not exclude at all that he can experience a more or less emotionally strong and lively conscience of the obligation [*dolg*] to suffer [*terpenie*] the punishment. An example could be an ethically normally developed person ... who has committed a bad and evil deed as a consequence of a particular confluence of circumstances. For the jailor and other people it may be completely indifferent if he experiences [*soznaet*] the obligation of tolerance [*dolg terpenija*]. Any opposition, any attempt to escape and the like, are out of question, and this is enough. But, from a psychological point of view, here there is a peculiar ... phenomenon, worth of attention, with further psychic and physical consequences. If somebody, who has been jailed, does not experience the obligation of tolerance (because, for instance, he was condemned, dishonored and jailed, as a consequence of a wrong prosecution and dirty intrigues, without being guilty), he might turn crazy (as it often happens), or die out of despair, or begin to scratch the walls, to pull up the chains etc. (This wouldn't mean at all an attempt to oppose anything. It would simply be a discharge [*razrjady*] of strong emotions of anger [*gnev*] etc.). [Petrażycki 1909-10: 428]

Psychologically, we experience events in completely different ways depending on whether we experience ourselves

1. as attributive sides in a nonfacere-nonpati legal relationship, or
2. as imperative sides in a pati-facere legal relationship.

The first case is typically the case of an innocent convicted person.

In this context it may be worth recalling a phenomenon beautifully described by Karen Horney.

She discusses a minor incident that occurred to her during the Second World War. Coming back from a visit to Mexico, because of priorities, she

was put off her flight in Corpus Christi and she eventually had to endure a three-day train ride to New York.

Here is how she describes what she experienced:

Although I considered this regulation perfectly justified in principle, I noticed that I was furiously indignant when it applied to me. I was really exasperated at the prospect of a three-day train ride to New York, and became greatly fatigued. [Horney 1950: 44]

This is her analysis:

As long as I felt it to be an unfair imposition, it seemed almost more than I could endure. Then, after I had discovered the claim behind it – although the seats were just as hard, the time it took just as long – the very same situation became enjoyable ... Certainly there are experiences which are so severe to become crushing. But these are rare. For the neurotic, minor happenings turn into catastrophes and life becomes a series of upsets. [Horney 1950: 58]

In this case Horney is comparing the attitude she had until she experienced herself as an attributive side in a nonfacere-nonpati legal relationship with the attitude she started to have after she ceased having this experience. She is not saying that she started to experience herself as an imperative side in a pati-facere legal relationship where life was the attributive side. Probably she just started experiencing some sort of absence-of-ethical-phenomena (sec. 4.4.5). But it can be contended that her attitude towards the pati would have been still different (perhaps submissive) if she had been thinking that it was God, as an attributive side in a pati-facere legal relationship, who decided that she should endure the three-day train ride to New York.

Thus we can have three completely different attitudes when “life is unfair”:

1. We can experience ourselves as attributive sides in a nonfacere-nonpati legal relationship where life is the imperative side.
2. We can have no ethical experience at all, namely absence of ethical phenomena.
3. We can experience ourselves as imperative sides in a pati-facere legal relationship where life is the attributive side.

In this context it is worth recalling Adam Smith’s statement that an innocent sentenced to death, unlike «[p]rofligate criminals ... over and above the uneasiness which th[e] fear [of death] may occasion, is tormented by his own *indignation* at the injustice which has been done to him» (1790: 175, emphasis added).

In our terminology, according to Smith, the innocent man experiences himself as the attributive side in a nonfacere-nonpati legal relationship, rather than as the imperative side in a pati-facere legal relationship. There-

fore Smith's *indignation* corresponds to our *anger*. And this is the same *anger* (*gnev*) that Petrażycki mentions in the last quotation. In both cases the innocent convicted person experiences himself as the attributive side in a nonpati-nonfacere legal relationship. As for Smith's prototypical profligate criminals, they belong to case 2. They just do not have any ethical experience.

Let us now turn to Petrażycki's argument that from the *practical* point of view of the jailor "tolerances may equal abstentions".

Petrażycki's contention that the obligatorinesses of tolerance cannot be reduced to sets of obligatorinesses of abstentions would be even sounder if it could be shown that there are cases where the psychic fulfillment of an obligatoriness of tolerance also plays a *practical* role.

I think that such examples can be given. Think of the *parole for good behavior*, if by *good behavior* we are to understand, not only any abstention on the part of the prisoner from resisting his own imprisonment, but also *any behavior indexical of his inner acceptance* of the punishment.

Anger can be interpreted as a sort of inner non-acceptance of the punishment. In the last quotation, Petrażycki points correctly out that not any discharge of aggressiveness (he talks of *razrjady sil'nyh emocij gneva*, i.e. "discharges of strong emotions of anger") should be interpreted in terms of opposition. A discharge of aggressiveness on the part of an innocent convicted person can be interpreted as a mere index that he does not experience himself as an imperative side in a pati-facere legal relationship having the content of innerly accepting the punishment. It is not, instead, to be necessarily understood as an index that he does not experience himself as the imperative side in other legal relationships, such as the obligatoriness of not trying to escape (nonfacere-nonpati), of not possessing contraband (nonfacere-nonpati), of keeping his cell neat (facere-accipere), of obeying the commands of officials (authoritativeness), etc.

The example of the believer who thinks it is god's will that he got sick but nevertheless goes to the physician can be contrasted with the example of the standard convicted innocent person. In the first case we have the experience of *the obligatoriness of suffering without the experience of the obligatoriness of non-interfering*, while in the second one we have the case of an *obligatoriness of non-interference without the experience of the obligatoriness of tolerance*. These two examples can be completed with three more examples: the *fatalistic believer*, the *convicted guilty person who actually feels guilty for what he did*, and the *rebellious convicted innocent person* (see table 4.12).

I hope that in this way it is clear why the obligations of pati cannot be psychologically reduced to sets of obligations of non-interference and vice versa.

Table 4.12. – Example of pairings/non-pairings of obligatoriness of *pati* and obligatorinesses of non-interference.

	OBLIGATORINESS OF PATI	OBLIGATORINESS OF NON-INTERFERENCE
fatalistic believer	yes	yes
convicted guilty person	YES	NO
<i>standard believer</i>	NO	YES
<i>standard convicted innocent</i>	no	no

The obligatedness of the *convicted guilty person* (i.e. his appulsion towards the punishment) can sometimes be psychologically reduced to his need of *ethical relief* from the guilt of wrongdoing. Ethical relief is thus closely connected to guilt. This is, in my opinion, the psychological core of the phenomenon of *atonement* or *expiation*.

According to Sigmund Freud, the guilt causing the desire for punishment can also be unconscious (and thus be unrelated to the deed the person is punished for). I am referring to the famous theory of the “criminals from a sense of guilt” (*Verbrecher aus Schuldbewusstsein*). Freud’s conjecture is that certain people commit crimes, not because they are interested in the possible gains from the crimes themselves, but rather because they seek the punishment in order to get a relief from a pre-existing unconscious sense of guilt (see Freud 1916* and 1918*).

Some more light about the psychic phenomenon of the desire for atonement/expiation can be cast if we take into account Piaget’s conjectures regarding the development of the ideas of expiation and retribution in the child:

[A]dult constraint explains the formation of the idea of expiation ... It cannot be denied that the idea of punishment has psycho-biological roots. Blow calls for blow and gentleness moves us to gentleness. The instinctive reactions of defense and sympathy thus bring about a sort of elementary reciprocity which is the soil that retribution demands for its growth. But this soil is not enough in itself, and the individual factors cannot of themselves transcend the stage of impulsive vengeance – a stage that does not itself bring about the system of regulated and codified sanctions codified in retributive justice.

Things change with the intervention of the adult. Very early in life, even before the infant can speak, its conduct is constantly being subjected to approval or censure. According to circumstances people are pleased with the baby and smile at it, or else frown and leave it to cry, and the very inflections in the voices of those that surround it are alone sufficient to constitute an incessant retribution. During the years that follow, the child is watched over continuously, everything he does and says is controlled,

gives rise to encouragement or reproof, and the vast majority of adults still look upon punishment, corporeal or otherwise, as perfectly legitimate. It is obviously these reactions on the part of the adult, due generally to fatigue or impatience, but often, too, coldly thought out on his part, it is obviously these adult reactions, we repeat, that are the psychological starting-point of the idea of expiatory punishment. If the child felt nothing but fear or mistrust, as may happen in extreme cases, this would simply lead to open war. *But as the child loves his parents and feels for their actions that respect which Bovet has so ably analyzed* [see above sec. 3.2], punishment appears to him as morally obligatory and necessarily connected with the act that provoked it. Disobedience – the principle of all “sin” – is the breach of the normal relations between parent and child; some reparation is therefore necessary, and since parents display their “righteous anger” [*juste collere*] by the various reactions that take the form of punishments, to accept these punishments constitutes the *most natural form of reparation*. The pain inflicted thus seems to re-establish the relations that had momentarily been interrupted, and in this way the idea of expiation becomes incorporated in the values of the *morality of authority*. In our view, therefore, this “primitive” and materialistic conception of expiatory punishment is not imposed as such by the adult upon the child, and it was perhaps never invented by a psychologically adult mind; but it is the inevitable product of punishment as refracted in the *mystically realistic mentality* of the child. [Piaget 1932: 257, f., 1932*: 321 f., translation modified, emphases added. About the concepts of *moral of authority* and *mystically realistic mentality of the child* see above sec. 3.2]

The experience of the obligation to tolerate a certain penalty, hence, may be rooted in the way children experience the first (real or quasi-real) penalties “enacted and enforced” by the caretakers, namely by the people they at once fear and love most.

One more argument against the reduction of the experiences of obligatoriness of pati to sets of obligatorinesses of nonfacere can be made by taking into account Petrażycki’s distinction between

1. *basic object* of an ethical experience and
2. *auxiliary object* of an ethical experience.

First of all, let us read a passage where Petrażycki explains this distinction.

The fulfillment of various legal and moral obligations – the actualization of the corresponding objects – *ordinarily* presupposes the accomplishment by the obligor of various other positive or negative actions or tolerances [*terpenija*] on his part, or both, as the means or the necessary condition for realizing the required effect. Thus fulfillment of the legal obligation to pay another a sum of money owing to him, or of the moral obligation to render financial assistance to another, presupposes acquisition by the obligor of the corresponding amount, abstention by him from spending it on his own needs or pleasures, tolerance by him of the corresponding deprivations, and the like. Fulfillment of the obligation of a railroad switchman by the time the train passes presupposes his refraining from sleep and intoxication, his

presence at the place where his obligation is to be performed, his endurance of bad weather and cold, and so forth.

Originating in the consciousness of a given condition of duty [*soznanie dan-nogo dolženstvovanija*], representations [*predstavlenija*] of actions, abstentions, or tolerances – essential to the performance of that duty – appear (through the association of ideas [*idei*] or by inference) and to them ethical impulses are extended, so that they in turn become objects of obligations. Such objects – as well as the corresponding moral and legal experiences – may be termed “auxiliary” [*vspomogatel'noe*] or “subsequent” [*posledovatel'noe*], to distinguish them from those which are primary [*glavnoe*] or basic [*osnovnoe*]. [Petrażycki 1909-10: 429 f., 1909-10*: 194 f., translation modified, emphasis added]

Above, we have seen

- that an obligatoriness of tolerance can psychologically exist even without the psychological existence of any obligatoriness of non-interference, as well as
- that the psychological existence of a set of obligatorinesses of non-interference does not amount to the psychological existence of a simple obligatoriness of *pati*.

Now, the fact that an obligatoriness of *pati* can psychologically exist even independently of certain obligatorinesses of non-interference is perfectly compatible with the fact that *most* obligatorinesses of *pati* do imply sets of auxiliary obligatorinesses of non-interference. *From a basic obligatoriness of pati any sort of obligatoriness of non-interference is usually*⁴⁴ psychologically derived, unless some sort of interference is permitted for some other cause⁴⁵. Where no factor disturbs the natural “flourishing” of the auxiliary obligatorinesses of non-interference “originating in the consciousness of the obligatoriness of a given *pati*”, *it is just impossible to know what belongs to the set of nonfacere implied by the obligatoriness of some pati without conceptualizing the pati itself*.

For a reduction to be successful, the *reductor* should not contain the *reducendum*, otherwise what we have is a *reductio per idem*. The three dots in table 4.13 express the idea of this gap that cannot be filled without directly taking into account the obligatoriness of *pati*.

We can now turn to what the *third spectator* has to experience for a *pati-facere* legal relationship to exist. In my opinion, for such a legal relationship to exist a third spectator (if any) must experience:

- *peace of mind* in the case of attributive side's *facere* and imperative side's *pati*⁴⁶,

⁴⁴ Petrażycki himself uses the adverb *často* (e.g. Petrażycki 1909-10: 431).

⁴⁵ In the case of the quote misattributed to Voltaire this cause is that the freedom of speech belongs to both arguers.

⁴⁶ In the case the legal relationship does not exist in the psyche of the third spectator we should expect some sort of *surprise* for the “imperative side's” *pati*. Of course,

- *indignation* in the case the imperative side does not carry out his *pati* (including the auxiliary imperativesidednesses stemming therefrom) as well as indignation at any index of nonpati,
- *peace of mind* if the attributive side, despite the opposition of the imperative side, attempts to perform his *facere* and in doing so makes use of some degree of aggressiveness.

Table 4.13. – Irreducibility of obligatorinesses of pati to sets of obligatorinesses of nonfacere.

		SET OF OBLIGATORINESSES OF NONFACERE
		obligatoriness of <i>nonfacere</i> ₁
		obligatoriness of <i>nonfacere</i> ₂
		...
obligatoriness of <i>pati</i>	→	obligatoriness of <i>nonfacere</i> _n

The third point is very important since it is connected with the issue of self-defense. Even though self-defense may arise also in the contexts of nonfacere-nonpati or facere-accipere legal relationships, it is in the context of pati-facere legal relationships that the probability is the highest that the attributive side tries to do his self-justice. That is why I am going to shortly discuss this issue here.

The reason why it is more probable that a person is tempted to do his self-justice when he experiences himself as the attributive side in a pati-facere legal relationship than in a nonfacere-nonpati or a facere-accipere legal relationship is easy to conjecture. In the case the attributivesidedness consists of a nonpati the attributive side should use violence in order to stop the attributive side’s facere. In the case the attributivesidedness consists of an accipere the attributive side should use violence in order to try to obtain the other side’s facere. Instead, in the case the attributivesidedness consists of the very attributive side’s facere, the attributive side’s self-defense seems to be nothing more than directly performing his own facere.

In the case of pati-facere legal relationships the attributive side focuses on his own behavior, rather than on the imperative side’s: thus self-defense is experienced less like an act of violence towards others and more like just simply behaving in one’s own “lawful” way.

I write *imperative side* in inverted commas because for the third spectator that person would not be an imperative side at all.

Third spectators play a crucial role to the functioning of self-defense. If the third spectator shares⁴⁷ the attributive side's legal experience, he will not try to prevent the attributive side from exercising self-defense. The non-reaction of the third spectators to the attempt of the attributive side to do his self-justice makes his self-defense easier and therefore more probable⁴⁸.

4.4.4. *pati-nonfacere* (omissibility)

Petrażycki did not discuss a fourth kind of legal relationship: *pati-nonfacere*.

In my opinion Petrażycki's classification must be completed by adding this fourth kind of legal relationship.

To my knowledge the first author who mentioned the possibility of a fourth kind of legal relationship was Alexander Witold Rudziński in his *Z logiki norm* (1947). Since I could find this book neither in Poland nor elsewhere, I have to rely on the accounts given by Lande (1953-54: 992), Nowacki (1963), Motyka 1993 (53 f.) and Opalek (1957: 419 ff).

According to Lande, Rudziński's line of reasoning is the following. The negation of the *pati-facere* legal relationship leads logically to a *nonfacere-nonpati* legal relationship. Therefore there must also be a legal relationship originating from the negation of *facere-accipere*. This legal relationship should be a sort of *nonaccipere-nonfacere*. Since it seems strange (*cos dziwnego*) to talk of the obligatoriness of a *nonaccipere*, Lande reports that Rudziński transforms this *non accipere* into a *pati*. In this way, according to Lande, Rudziński's negation is just partial (*połowiczna*) (see table 4.14).

Tabella 4.14. – How Rudziński reportedly devised the pati-nonfacere legal relationships.

<i>pati</i>	-	<i>facere</i>		<i>facere</i>	-	<i>accipere</i>
<i>nonfacere</i>	-	<i>nonpati</i>		?	-	<i>nonfacere</i>

⁴⁷ Of course, by *share* I mean that the third spectator makes a legal experience *compatible* with the legal experience of the attributive side (cf. sec. 3.6).

⁴⁸ Cf. Sacco 2007 (298 f.). This subject should be further investigated in order to take due account of the findings coming from ethological research.

The objection made by Lande does not hold if we adopt the proposal I made in sec. 4.4⁴⁹. The different kinds of legal relationship should be distinguished exclusively depending on whether the focus is: (1) on the *facere* of the imperative side, (2) on the *nonfacere* of the imperative side, (3) on the *facere* of the attributive side or (4) on the *nonfacere* of the attributive side. Therefore, the negation of the *facere* is the uniquely relevant one. This is the way through which I psychologically obtained the four kinds of legal relationship somewhat corresponding to the four traditional deontic modalities⁵⁰.

Lande and Nowacki report that Rudziński gave, among others, the following examples of a *pati-nonfacere* legal relationship:

1. the “right” of a wounded soldier not to perform his service,
2. the “right” of a sick worker not to work, and
3. the “right” of the taxpayer not to pay a certain tax after it has been repealed.

Lande objects that in these cases there is but a *lack of legal regulation* (*stan pozbawiony regulacji prawnej*).

This objection is wrong because of several reasons.

To begin with, the term *lack of legal regulation*, in the context of a psychological theory of law, is quite unfortunate. What matters are exclusively the emotions possibly experienced by the imperative side, the attributive side or the third spectator. Therefore, it is better to use the terms *absence-of-ethical-phenomena*, *absence-of-legal-relationships*, etc. See next subsection.

The difference between the *absence-of-legal-relationships* and a *pati-nonfacere* legal relationship lies on the possible emotional reactions of the participants in the case the imperative side’s behavior does not meet the (factual or legal) expectations of some participant⁵¹.

Let us examine the point of view of the individual-A who wants to refrain from an action of his.

⁴⁹ In particular, if we understand the *pati* as the acknowledgment by the imperative side of the attributive side’s attributivesidedness there is not even the partial negation Lande objects to Rudziński as no transformation is at all necessary (cf. above, fn. 26).

⁵⁰ Opalek (1957), instead, distinguished the following kinds of legal relationship: (1) *facere - facere*, (2) *facere - non facere*, (3) *non facere - facere* and (4) *non facere - non facere*. Nowacki (1963) – who expanded and corrected Opalek’s distinction – pointed out that his own distinction (and therefore also Opalek’s) refers to the «behaviors of the imperative side [*strona zobowiązona*] and of the attributive side [*strona uprawniona*] ... from the point of view of their correlativeness [*korelatywność*]» (130). As I said, the distinction proposed in the text is based exclusively on whose is the *facere* or *nonfacere* focused on. I am not denying that Opalek’s attempt may be fruitful to some goal. In my opinion, it just plays no role as to the goals pursued in this book.

⁵¹ If the “not-met” expectation is of the imperative side himself he is a *deviant* in Pattaro’s sense (sec. 3.4).

If A experiences himself as the attributive side in a *pati-nonfacere* legal relationship, he will get angry at any violation on the part of B of any auxiliary obligation stemming from this legal relationship. Furthermore, A will also get angry at any *index* of B's *nonpati* of A's *nonfacere*.

This is typically the case of a wounded soldier and of a sick worker.

In the case of *absence-of-legal-relationships*, instead, by definition, there cannot be any violation of any auxiliary obligation. A will experience peace of mind in the case B carries out actions that, had a *pati-nonfacere* legal relationship existed, A would have, instead, experienced as violations of B's auxiliary obligations. This holds true also in the case of mere indexes of non-tolerance of A's inaction.

The same reasoning could be repeated as for the imperative side and the third spectators.

Generally speaking, the legal relationships of the kind *pati-nonfacere* can exist only if a *background (factual or ethical) expectation* exists according to which the imperative side should act. The same can be argued *mutatis mutandis* as regards *pati-facere* legal relationships. In a country where virtually nobody worships any religion it is conceivable that somebody experiences himself as the attributive side in a *pati-facere* legal relationship concerning the worshipping of some religion. Conversely, in a country where virtually everybody worships some religion it is conceivable that somebody conceives himself as the attributive side in a *pati-nonfacere* legal relationship concerning the refraining from worshipping any religion.

In this context Kazimierz Opalek (1957: 418) gave as an example the art. 70 of the Polish Constitution of 1952:

Nie wolno też nikogo zmuszać do udziału w czynnościach lub obrzędach religijnych.

It is not allowed to compel anybody to participate in religious activities or rites.

This normative fact may well cause in some people the experience of a *pati-nonfacere* legal relationship.

Finally, a country can be imagined in which neither religion has ever been forbidden nor it has ever been somewhat obligatory. In such a country there might be a mere *absence-of-ethical-phenomena* whatsoever, and any attempt to either prevent somebody from worshipping some religion or to force him to worship some would be experienced in the terms of the violation of some other independent ethical expectation (think of the general expectation of being free of threat or compulsion).

This last point is of paramount importance. *The absence of a pati-nonfacere legal relationship regarding a certain inaction is fully compatible with the existence of other ethical phenomena regarding possible encroachings upon that very inaction.*

Let us now discuss the third example that seems to have been given by Rudziński: the *pati-nonfacere* legal relationship resulting from the repeal of some tax.

Repeal is a jurisprudential phenomenon. It does not pertain to naïve legal ontology. But a few words are in order here (more can be found in Fittipaldi 2012).

To understand why Lande's objection to Rudziński is wrong it is first necessary to get acquainted with Petrażycki's concept of a repealing statute.

[A]brogative [*otmenitel'nye*] statutes ... are normative facts. As normative facts, however, negative – and in particular abrogative – legislative utterances [*zakonodatel'nye izrečeniya*] are acts possessing independent significance ... productive of radical revolutions in the law (revolution in the psyche of the people as to matters of principle) and putting an end to whole systems of legal convictions which defined the earlier social order.

Normative facts that do not create but annihilate [*uničtožajut*] “norms” (eliminating earlier legal convictions, opinions, and the corresponding projections from law) may be termed norm-abrogating or “negative” normative facts. Having done their work and purified [*očistiv*] the legal psyche from the corresponding legal convictions, many norm-abrogating facts lose all legal significance thereupon ... so that *when the laws in force are collected there is no reason to mention them*. [Petrażycki 1909-10: 328, 1909-10*: 157, translation modified, emphasis added]

Repeal is pursued through normative facts. Repeal, as a psychological phenomenon, is accomplished when one's psyche does not react any more with ethical emotions to the actions/inactions the repealing statute was about. A repealing statute is effective, in a sociological sense⁵², if a certain percentage of people's psyches in a certain community is “purified” from those ethical convictions. When virtually everybody's psyches “experience” absence-of-legal-relationship⁵³ as regards that set of actions/inactions there is no reason to keep re-publishing the corresponding repealing statutes.

In the *theory of legal dogmatics* repealing statutes, conceived as *thetic-constitutive* normative facts⁵⁴, illusorily produce their effect immediately. If, say, a repealing statute is enacted in order to repeal a previous statute, the previous statute is believed to cease to exist in the very moment the repealing statute comes into effect. Of course, this is not the case in the *psy-*

⁵² As regards the sociological concept of effectiveness see for instance Friedman 1975 (45).

⁵³ Of course, such an experience should perhaps be called a *non-experience*.

⁵⁴ The concept of a *thetic-constitutive* rule, along with the concepts of an *anankastic-* and *eidetic-constitutive* rule have been devised by Amedeo G. Conte (e.g. 1989 and 1997). These phenomena belong to jurisprudential ontology and are discussed in Fittipaldi — a and 2012. Suffice here to say that in the context of Petrażyckianism Conte's *thetic-constitutive rules* should be understood as normative facts.

*chological theory of law*⁵⁵. Here a repealing statute may or may not be effective. Moreover, its effectiveness may be affected by the running of time.

Here is an example taken from Petrażycki.

[T]he repeal [*otmena*] of serfdom law [*krepostnoe pravo*] in Russia by ... Alexander II ... without any doubt produced the development of a corresponding intuitive law in the overwhelming majority of the population. But the intuitive law of this part of the population, in particular the intuitive law of the majority of landowners and of the huge majority of farmers, at the time of the publication of the Emancipation Manifesto was the typical lord-serf legal mentality ... Certain farmers, chiefly the old ones, retained for decades their previous legal psyche [*psibika*] of serfdom law and were unwilling to know [*znat'*] or acknowledge [*priznavat'*] the reform. They declared to their former lords that they considered as their sacred duty to keep faithfully serving them also in the future and even felt hurt at the offer to leave to freedom, to get paid for their services, etc. ... But the huge majority, especially the young ... were freed very quickly from the previous serf intuitive legal psyche ... [Petrażycki 1909-10: 503, 1909-10^{*}: 289, translation modified]

It is an obvious corollary of ethical solipsism that the very same normative fact can produce different ethical experiences in different individuals (see sec. 1.1. fn. 9). Thus, the emancipation manifesto:

1. may have produced no effect whatsoever (or even produced indignation) in the psyches of some,
2. may have produced omissibilities in the psyches of others and
3. may have immediately produced absence-of-legal-relationships in still others.

The difference between case 2 and case 3 is purely psychological. If a former lord were to require a service from a former serf, the serf would be experiencing an omissibility if he were to react with anger, while he would be experiencing absence-of-legal-relationship, if he just were to calmly refuse or to laugh at the former lord's request, or even to call an ambulance to take him to the next psychiatric hospital (if such a request were to be made today).

The example of the omissibility of paying a certain repealed tax is deceiving because usually statutes that repeal taxes become effective in a very fast way. Once a tax has been repealed it seems impossible even to think to pay that tax⁵⁶. But this is typical of modern civilized world⁵⁷. Just

⁵⁵ This is not the case according to historical realism either. Normative facts, once enacted, keep having existed for ever. I deal with this issue in detail elsewhere (— a), but see a short discussion below, sec. 4.11.

⁵⁶ This phenomenon, in the context of general theory of legal dogmatics, has been called *absence-impossibility* (Conte & Di Lucia —). Conte and Di Lucia oppose *absence-impossibility*, such as castling in checkers, to *presence-impossibility*, such as the impossibility of castling in chess when the king is under check. These issues pertain to jurisprudential ontology. They are discussed in Fittipaldi — a.

⁵⁷ The issue of the relationship between the “law in books” and “law in action”, or more precisely the relationships between the theory of legal dogmatics and the (socio-) psychological theory of law is discussed in detail in Fittipaldi — a.

think of publicans. As public contractors, they served as tax collectors for the Roman Republic and later for the Roman Empire. In such a context, it is much easier to imagine some individual that, after some tax has been repealed, gets angry at the undue request on the part of the publican to keep paying a certain tax, even though it has been “formally” repealed.

Generally speaking, a normative fact that pursues the psycho-sociological repeal of some obligatedness/obligatoriness may cause in the short run omissibilities and in the long run absence-of-legal-relationships. What really occurs is a purely socio-psychological question that cannot be solved in a theoretical way.

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After the due discussion of the Polish theorists who already devised this fourth kind of Petrażyckian legal relationship we can now turn to a systematic discussion of this phenomenon.

As I said, an example of such a legal relationship can be the omissibility of worshipping some religion. Another example could be omissibility of feeding oneself. This legal relationship somewhat corresponds to the deontic modality usually referred to by deontic logicians with the English adjective *omissible*. In French and Italian the adjectives *facultatif* and *facoltativo* are used⁵⁸.

In the case of *pati-nonfacere* legal relationships *the imperative side has to tolerate a certain inaction (or a certain kind of inaction) on the part of the attributive side*. Here the focus is on the *nonfacere* of the attributive side.

We have the following qualities:

1. the *actional omissibility* of the course of action,
2. the *personal omissibility* of the attributive side.

In English, these qualities can be expressed through *can refrain from* and perhaps through *not to have to* or *need not*. (See table 4.15).

It should be remarked that strictly logically *not to have to* and *need not* mean mere *absence-of-obligatedness/obligatoriness*. The fact that a person *does not to have to perform a certain action* does not necessarily imply that this person is the attributive side in a *pati-nonfacere* legal relationship.

Table 4.15. – English ways to express omissibilities.

PERSON	QUALITY	ACTION
You	can refrain from [don't have] [need not]	entering the field [to enter the field] [enter the field]

⁵⁸ See Ray 1926 (55) and Bobbio 1956. The French and Italian terms are very unfortunate as they derive from the Latin verb *facere*. Therefore, unlike the English term *omissible*, they are very unsuitable to convey the idea of the permittedness of a *nonfacere*.

Now, *mere absences-of-obligatedness/obligatoriness* and *omissibilities* are both cognitively devoid of salience. They are cognitively very close. In either case, refraining from acting does not cause any trouble – at least usually. *This may be why in many languages a construction that strictly logically means absence-of-obligatedness/obligatoriness can be also used to mean omissibility*⁵⁹. It is worth reading what Frank Palmer wrote at this regard in his *Modality and the English Modals*:

It is not so certain ... whether there is a clear distinction between permission[⁶⁰] not to act and no obligation ... It is no accident, therefore, that English has no normal unambiguous form for expressing permission not to act ... and there is no overriding argument for saying that *needn't* expresses no obligation rather than permission not to act. [Palmer 1979: 65]

Palmer does not mention here the construction *can refrain from* that, in English, is a cumbersome way to unambiguously express an omissibility.

The fact that *pati-nonfacere* legal relationships are the kind of legal relationship most devoid of *cognitive salience*⁶¹ has two *falsifiable* linguistic implications:

1. If, from a strictly logical point of view, a construction can mean both an omissibility/absence-of-legal-relationship and a prohibitedness, it can never be understood as meaning exclusively an omissibility/absence-of-legal-relationship (unless it is formed through the negation of a verb meaning a *strict* obligatedness/obligatoriness).
2. A construction that strictly logically means an omissibility may be understood as meaning a prohibitedness, while a construction that strictly logically means a prohibitedness can never be understood as meaning an omissibility.

The starting point of both these hypotheses is that omissibilities/absences-of-legal-relationship, on one hand, and prohibitednesses, on the other, are cognitively close to each other. *Both are about omissions*.

⁵⁹ A parallel question is whether a phrase that strictly logically means absence-of-prohibitedness can be also used to mean permittedness and the other way round. About this issue see also above, sec. 3.5.

⁶⁰ Palmer understands *permission* in a performative sense. This is so because he, in general, understands deontic modality as a performative phenomenon. Palmer discusses *sollsätze* in the context of what he calls *dynamic possibility* and *dynamic necessity* (1979: 106 f.). Nonetheless what he holds here as regards permissions does for *sollsätze* as well.

⁶¹ In linguistic literature the term *cognitive salience* is used to refer to experiential properties such as being perceptually striking, interesting or noteworthy (Zhuo Jing-Schmidt 2005: 117). See also the definition and the cognitive salience index proposed by Urmas Sutrop (2001: 275, 266), as well as Schlicht's references to related concepts (1998: 72, fn. 1).

If it may not be surprising that omissibilities and absences-of-legal relationship are cognitively close to each other, it can be more surprising that also omissibilities and prohibitednesses are.

As I said, both are about some nonfacere. In the case of omissibilities the focus is on the attributive side's nonfacere, while in the case of prohibitednesses the nonfacere focused on is the imperative side's. From a mere perceptive or representational point of view they are quite similar, as they both involve omissions⁶². Furthermore, and perhaps even more important, *in either case, usually, if the action is omitted no trouble should result.*

Let us now give some examples regarding hypothesis 1, namely the hypothesis that if an expression may be understood as meaning a prohibitedness or an omissibility/absence-of-legal-relationship it will be standardly understood as meaning solely a prohibitedness.

Andrea cannot come (English) (1)

Andrea darf nicht kommen (German) (2)

From a strictly logical point of view, because of the syntax of Germanic languages, the negative particle (*not/nicht*) can be ambiguously referred to the governed verb (*come/kommen*) or to the modal verb (*can/dürfen*)⁶³.

To refer to these phenomena Palmer distinguishes the *negation of the modality* from the *negation of the event*. If *not* is referred to the modal verb, the modality is being negated. If *not* is referred to the governed verb, what is negated is the event. In my terminology, this corresponds to the negation of the ethical quality as opposed to the negation of the action of which that quality is predicated. In this second case, the ethical quality is predicated, not of the action, but of the *inaction*.

In the context of sollnormen Palmer points to strange asymmetries in the English language, such as the phenomenon that in the case of *can* and *may* the particle *not* is referred to the modal verb while in the case of *must not* the particle *not* is referred to the action (1979: 64).

This asymmetry is predicted by my hypothesis.

Let us examine *can*.

If the negation is referred to the modal verb, the sentence should be understood as meaning the mere negation of Andrea's permittedness (**not can*) as regards his action (*come*). Such a sentence should be understood as

⁶² By the same token, also *facere-accipere* and *pati-facere* are cognitively close, as both involve some *facere*. That is why in certain languages certain expressions can refer to both kinds of *facere* (see below sec. 4.9.1).

⁶³ In English the negative particle *not* can never precede the modal verb *can*. In German this is possible exclusively in dependent clauses (*Ich glaube, dass er nicht darf*) and in special contexts (*Nicht kann ich zurück*).

meaning that there is mere *absence-of-permittedness* – nothing being said about other possible legal relationships.

Another meaning, though, is possible, namely that, since Andrea's coming is not permitted, his coming is therefore prohibited. Such a sentence is standardly understood in this second meaning. In my opinion, the cause of this phenomenon could be that only very rarely is the mere absence-of-permittedness communicated. What much more often is communicated is the prohibitedness of some behavior. *This is so, because the background of permittednesses is often an opposite normative expectation.* This holds true, not only in the context of *rechtsnormen*, but also in the context of *rechtssätze*. Also in the context of *rechtssätze* people do communicate the "objective" permittedness of a certain course of action in order to remove the hearer's expectation that that course of action is prohibited. Of course, this is a hypothesis that should be empirically tested.

We can conclude that the examples (1) and (2) show that a construction that strictly logically means:

1. either *omissibility*,
 2. or absence-of-permittedness and, by implicature, *prohibitedness*,
- may be eventually understood as meaning exclusively a prohibitedness.

There are two exceptions that I think can be explained through non-ad-hoc hypotheses: *emphatic 'not'* (3) and *insertion* of an adverb between *can* and *not* (4):

You can come or can not come, as you wish. [Palmer 1979: 64] (3)

We can always not go, can't we? [Palmer 1979: 29] (4)

Examples of the hypothesis that, if a construction can mean both an omissibility/absence-of-legal-relationship and a prohibitedness, it can never be understood as meaning exclusively an omissibility/absence-of-legal-relationship (unless it is formed through the negation of a verb meaning a *strict* obligatedness/obligatoriness) can be given also in the context of verbs meaning an obligatedness/obligatoriness. Even if no omissibilities are here involved, I think it expedient to discuss this phenomenon in this subsection.

Consider the following examples:

Andrea should not come (English) (5)

Andrea soll nicht kommen (German) (6)

Also here the negative particle can be referred to *come/kommen* and to *should/soll*. In the first case the sentence should be understood as meaning an *absence-of-obligatoriness/obligatedness* – nothing being said about other possible legal relationships. In the second case the sentence should

be understood as meaning the obligatedness of Andrea as regards his not coming⁶⁴. The second interpretation prevails, as speakers of both languages understand these sentences as meaning prohibitednesses.

My hypothesis contains the qualification that the sentence is *not* formed through the negation of a verb meaning a *strict* obligatedness.

Consider the following two examples:

Andrea must not come (English) (7)

Andrea muss nicht kommen (German) (8)

[“Andrea does not have to come”]

From a strictly logical point of view, (7) and (8) could ambiguously mean both Andrea’s strict obligatedness as regards his not coming and an absence-of-obligatedness/obligatoriness at this regard. In English (7) is commonly understood as meaning a *strict prohibitedness*⁶⁵. Instead, Germans commonly understand (8) as meaning omissibility/absence-of-obligatedness/obligatoriness.

Both *must* and *müssen* mean a *strict* obligatoriness⁶⁶.

Why is there this German “exception” with *strict* obligatedness/obligatoriness?

My tentative answer is that the situations where some *strict obligatedness/obligatoriness* is negated are cognitively and pragmatically much more salient than the situations where a *simple obligatedness/obligatoriness* is negated. Further research is required to clarify this issue.

Let us now give an example of hypothesis 2, namely the hypothesis that a construction strictly logically meaning an omissibility may be “misunderstood” as meaning a prohibitedness, but not the other way round.

⁶⁴ Note that because of the mandatory use of the auxiliary *to do* with the honorary modal verb *to have to* no logical ambiguity occurs in the following cases: (1) *You don’t have to come* [absence-of-obligatedness/obligatoriness], (2) *You have not to come* [prohibitedness].

The same holds true, though because of different syntactical reasons, in Italian with the verb *potere* (“can”): (3) *Andrea non può venire* [lit. Andrea does not have a permittedness as regards his coming (Usually understood as meaning a prohibitedness)], (4) *Andrea può non venire* [lit. Andrea has a permittedness as regards his not coming: omissibility].

In case of (4) the sentence cannot mean absence-of-permittedness. It can solely mean omissibility. This position of *non*, though, is emphatic.

⁶⁵ Palmer points to the phenomenon that *must* can sometimes be used to mean what I call a mere absence-of-obligatoriness/obligatedness and gives the following examples: (1) *No one must go*, (2) *You never must do it*.

This is possible only with the appropriate stress (94)

⁶⁶ DUDEN dictionary (2003, entry *müssen*) defines the deontic use of *müssen* in the following way: «... aufgrund gesellschaftlicher Normen, einer inneren Verpflichtung nicht umhinzukönnen ... on the basis of societal rules not being able to resist an internal obligation».

Consider the Italian sentence

Andrea non deve venire (Italian) (9)
[subject + negation + verb meaning *obligatedness/obligatoriness* + verb]

This sentence strictly logically means that Andrea does not have to come⁶⁷, since in order to express a prohibitedness the negative particle (*non*) should be before the governed verb (*venire*) and not before the modal verb (*deve*)⁶⁸.

Instead, this sentence is standardly understood as meaning the *prohibitedness* of Andrea's coming.

We can now turn to the psychological analysis of *pati-nonfacere* legal relationships.

If I were to accept Petrażycki's idea that ethical appulsions and repulsions are elementary, I think I should describe the ethical experiences at least one of the three participants has to experience for a *pati-nonfacere* legal relationship to exist as follows. At least one of the three participants (either directly or through identification with the imperative side) must experience

- a *repulsion* towards any index of *nonpati* on the part of the imperative side,
- a *repulsion* towards the imperative side himself, in the case indexes of *nonpati* occur, or
- an *appulsion* towards any attempt of the attributive side to react to any kind of coercion to *facere*.

Let us now reduce these appulsions and repulsions to the five ethical emotions.

For a *pati-nonfacere* legal relationship to exist the *attributive side* must experience *anger* towards any index of *nonpati* on the part of the imperative side and/or towards the imperative side himself who shows these indexes.

As regards the imperative side, for a *pati-nonfacere* legal relationship to exist the imperative side must experience at least:

- *peace of mind* in case of attributive side's *nonfacere*,
- *pride*, for his tolerating the attributive side's *nonfacere*,
- *guilt* in case he does not tolerate the attributive side's *nonfacere*,
- *shame* in case he does not tolerate the attributive side's *nonfacere*, or

⁶⁷ This phenomenon has been already been pointed to by Conte 2000 (889).

⁶⁸ In certain contexts, especially in order to stress a strict prohibitedness, Italians can also say: *Andrea deve non venire* [Andrea + verb meaning *obligatedness* + negation + verb meaning "coming"].

It should also be noticed that if the obligatedness/obligatoriness is qualified, its negation is understood as meaning mere absence-of-obligatedness/obligatoriness or omissibility. *Andrea non deve venire per forza oggi, può anche venire domani* ("Andrea does not necessarily have to come today, he can also come tomorrow").

- *ethical relief* for his tolerating the attributive side's *nonfacere*.
Finally for a *pati-nonfacere* legal relationship to exist in some third spectator he must experience:
- *peace of mind* in the case of attributive side's *nonfacere* and imperative side's *pati*⁶⁹,
- *indignation* in the case the imperative side does not carry out his *pati* (including the auxiliary imperativesidednesses stemming therefrom) as well as indignation at any index of nonpati,
- *peace of mind* if the attributive side discharges some of his usually restrained aggressiveness in order to prevent the imperative side from forcing him to act.

4.4.5. Absence-of-ethical-phenomena and ethical indifference

In this subsection I will shortly discuss two questions:

1. Is a coupling of permittedness and omissibility possible?
2. Does absence-of-ethical-phenomena ever play a role as distinguished from omissibility, or are they always confused?

My starting point is Amedeo G. Conte's *Saggio sulla completezza degli ordinamenti giuridici* (1962). This work is much a work in deontic logic. Nonetheless, to the small extent standard deontic logic is compatible with a yet-to-come Petrażyckian deontic logic, this work can be our starting point.

Conte used the term *deontic indifference* (*indifferenza deontica*) to refer to the following quality: *being at once permitted and omissible*. He used, instead, the term *deontic non-qualification* (*inqualificazione deontica*) to refer to the following quality: *being devoid of any deontic qualification whatsoever*. (Of course, being devoid of a quality is a quite odd quality).

Now, in that book, Conte convincingly shows that *deontic non-qualification cannot be reduced to deontic indifference*.

Even though Conte's deontic logic is quite different from the Petrażyckian deontic logic presupposed in this book, Conte's conclusion holds also for a Petrażyckian deontic logic.

In order to stress that I am here within the frame of Petrażyckianism, I will keep using my terminology. Instead of the term *deontic indifference*, I will use *permittedness-omissibility* (or *pati-facere/nonfacere legal relationship*). Instead of the term *deontic non-qualification*, I will keep using the terms *absence-of-ethical-phenomena*, *absence-of-legal-relationships*, etc.

⁶⁹ In the case the legal relationship does not exist in the psyche of the third spectator we should expect some sort of *surprise* for the "imperative side's" *pati*. Of course, I write *imperative side* in inverted commas because for the third spectator that person would not be an imperative side at all.

Now, the questions to be answered here are the following:

- a. Does it make sense to talk of ethical indifference within the Petrażyckian approach adopted in this book?
- b. Is absence-of-ethical-phenomena, as distinguished from omissibility, involved in linguistic phenomena?

To answer question-a we have to ask whether it is psychologically possible that an individual experiences at once his *facere* as permitted and omissible.

I think that a good candidate for such a phenomenon is the *freedom of worship*, if experienced as including also an omissibility⁷⁰. For a permittedness/omissibility to exist it is necessary that:

1. the attributive side experiences anger *both* in the case others do not tolerate his *facere* and in the case they do not tolerate his *nonfacere*, as well as at any index of either, or
2. an imperative side experiences shame or guilt in case of his own non-tolerance of *both* somebody's *facere* and somebody's *nonfacere*⁷¹, or
3. a third spectator indignates (or experiences contagious shame) in case of non-tolerance of *both* somebody's *facere* and somebody's *nonfacere*.

A further question to be raised in this context is whether such an experience is purely the result of the combination of experiences of permittedness and omissibility or it blends into a self-contained cluster. I leave this question for further research.

As to question-b the answer is to some extent *yes*.

Absence-of-ethical-phenomena, as distinguishable from omissibility, can be involved in linguistic phenomena.

As we know, a construction strictly logically meaning *absence-of-obligatedness/obligatoriness* can be understood as meaning *omissibility* (sec. 4.4.4).

Now, *the confusion between absence-of-obligatedness/obligatoriness and omissibility can be conducive to linguistic change*.

An example could be the change of meaning of the German verb *dürfen*. The original meaning of this verb was "to need"⁷². The original meaning of this term is witnessed in Modern German terms such as the adjective *dürftig* ("poor", "scanty") or the verb *bedürfen* ("to need to").

The verb *dürfen* acquired the modern meaning "to be allowed" starting from 16th century. This is the result of its use in negative sentences (HW 1997: *dürfen*). I think that the steps of this process can be highlighted through the terminology developed in this book (see table 4.16).

⁷⁰ At this regard Conte mentions the term *protected freedom (libertà protetta)* (27).

⁷¹ Further research is required as regards *pride* and *ethical relief*.

⁷² See HW 1997 (entry *dürfen*), ETWS 1999 (entry *dürfen*) as well as Conte 2007.

In (1) *dürfen* means necessity. I have not been able to ascertain whether it could also mean *obligatedness/obligatoriness*. The negation of *dürfen* (2) was used to mean the absence of some necessity resulting from some ethical expectation, much as to the same effect in contemporary German *müssen nicht* is used (above sec. 4.4.4). In my terminology, *dürfen nicht* was used to mean absence-of-obligatedness/obligatoriness.

The fact that both absence-of-ethical-relationships and omissibility are devoid of cognitive salience, as well as the fact that, from a practical point of view, whether a *facere* is devoid of ethical projective qualities or it is omissible quite rarely matters at all, caused that (2) would be interpreted as meaning an omissibility (3).

Table 4.16 – Development of the modern meaning of the German verb ‘*dürfen*’.

ORIGINAL MEANING			
<i>er darf kommen</i>	necessity, (obligatedness/obligatoriness?)	“He need come”	(1)
<i>er {darf nicht} kommen</i>	absence-of- obligatedness/obligatoriness	“He needn’t come” / “He doesn’t have to come” / “He doesn’t have the necessity to come”	(2)
1 ST REINTERPRETATION OF THE NEGATIVE SENTENCE			
<i>er darf {nicht kommen}</i>	omissibility	“He can refrain from coming” “He has the permission not to come”	(3)
<i>er darf kommen</i>	permittedness	“He has the permission to come” “He can come”	(4)
2 ND REINTERPRETATION OF THE NEGATIVE SENTENCE			
<i>er {darf nicht} kommen</i>	prohibitedness	“He shouldn’t come”	(5)

Now, omissibilities are usually expressed in the following way:

modal verb meaning “to be permitted” + negation + verb

This has caused that the removal of the negation from (3) was interpreted in the sense that the speaker means permittedness (4), and not a necessity any more. The final step, in Modern German, was that the negation of the course of action was eventually interpreted in the sense of prohibitedness (5) ⁷³.

⁷³ In Modern German, strictly logically, *dürfen nicht* + inf. can mean either absence-of-permittedness or omissibility. As regards why this construction is re-interpreted as meaning a prohibitedness see above, sec. 4.4.4.

Another case where absence-of-ethical-phenomena plays a role independently of omissibility is the Italian construction *non potere* + inf.:

Non puoi venire (“You cannot come”)

Unlike the English construction *cannot* + inf., that strictly logically can mean both absence-of-permittedness and omissibility, the Italian construction *non potere* + inf., strictly logically, should mean exclusively absence-of-permittedness. Nonetheless, because of the lack of cognitive salience of absence-of-permittedness as well as because of the implicature discussed in sec. 4.4.4, the Italian construction is standardly understood as meaning a prohibitedness.

One final remark is in order here.

The verb *can* can be used to mean both a permittedness and a mere absence-of-prohibitedness. But we can recall that Mark Johnson held that “although *can* tends to assume an absence of restricting barriers, its primary focus is on *potentiality* or *capacity* to act” (above, sec. 1.4). This is consistent with the interpretation of *can* that I have given in sec. 4.4.3.

The cause of this ambiguity of *can* is probably that both in the case of a permittedness and in the case of a mere absence-of-prohibitedness there will probably be no trouble if the individual decides to act, even though the emotions involved in case of non-tolerance are predicted to be quite different.

4.5. PURE ATTRIBUTIVE PHENOMENA

The reduction of Petrażyckian ethical emotions to superegoic emotions allows also for *pure* attributive phenomena, namely ethical experiences on the part of some attributive side that do not involve the representation of any imperative side. The ethical phenomena here involved may be:

- the discharge of one’s usually restrained aggressiveness,
- pride.

To my knowledge the first author who argued for this correction of Petrażycki’s theory of ethics is Jacek Kurczewski⁷⁴. Let us start with a quotation from this author:

We know very well ... the psychological type of the perpetual claimant [*wieczny pieniacz*, see Jakubowska 1986: 199] who acts according to the principle that Ego has the right to a certain action toward Alter although Alter does not have any duty to fulfill the claim. Rightful claims need not be correlated with duties. Thus a soldier has the right to kill the enemy but

⁷⁴ At this regard Motyka (1993: 160) mentions exclusively Kurczewski and Jakubowska.

any duty of the killed to submit to the killer would negate the essence of war, and slaughter would take place instead. Mankind was not always of the opinion that the victims of slaughter ought to subdue themselves, although this was presumably the opinion held by the guardian monsters at work in Nazi concentration camps. The emotions of claim do not necessarily manifest themselves only in such situations and they may be observed in a much more peaceful and “normal” case, such as when we give each citizen the right to certain services of an institution without thinking it necessary that the institution should have the duty to fulfill all individual claims. [Kurczewski 1976: 7; see also: 1977b (29), 1993 (376) and Jakubowska 1986]

Here Kurczewski adopts the “projective” terminology that I decided not to adopt in this book. He talks in the terms of rights and duties. For reasons explained above (sec. 1.2), I prefer instead such cumbersome terms as *attributivesidedness* and *imperativesidedness*. Therefore, I will discuss Kurczewski’s ideas with my terminology.

I think it heuristically fruitful to examine each kind of legal relationship I discussed in the previous subsections and ask whether to each of them a pure attributive experience may correspond.

Pure attributive permittednesses. This is the case of Kurczewski’s soldier example. Stating the existence of a pure permittedness means that at least:

1. the (*pure*) *attributive side* does not experience any restraint on the discharge of his aggressiveness in the performing of his *facere* and/or does not experience anger or indignation at any index of non-tolerance of his *facere* on the part of others, or
2. *third spectators* do not experience any anger/indignation at the *facere* of the (*pure*) *attributive side* and at the *nonpati*.

Just as in the case of the imperative-attributive permittednesses, the attributive side’s otherwise restrained aggressiveness may boost his *facere*. The difference lies in the *obligatoriness of the imperative side’s pati*. In the case of purely attributive permittednesses this obligatoriness is experienced by neither the attributive side nor the third spectator.

The discharge of aggressiveness on the part of the attributive side is an ethical phenomenon if the attributive side’s aggressiveness is usually restrained. The aggressiveness of soldiers usually is unrestrained exclusively *qua* soldiers in a direct interaction with an enemy. Instead – just to give an example – with a superior their aggressiveness is usually quite restrained. Hopefully this holds true also when they come back to civil life.

I think that other examples of pure permittednesses can be found in the field of games. According to Petrzycki games are made up of imperative-attributive emotions ⁷⁵:

⁷⁵ The question how Amedeo G. Conte’s concept of an eidetic-constitutive rule (along with the other kinds of constitutive rules he has devised) can be accommodated

The rules of games (such as games of cards, checkers, chess, dominoes, lotto, forfeits, bowls, billiards, cricket etc.), which define [*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 1909-10: 88f., 1909-10*: 64 f.]

Unlike Petrażycki, my opinion is that games are made up *also* of purely attributive emotions. This is a plain consequence of Kurczewski's statement about war.

In soccer, for example, the player experiences himself as purely-attributively entitled to make a goal. *Usually*, a soccer player does not get angry or indignant if the players of the opposite team try to prevent him from making a goal, provided that they comply with the general rules of the game (just think of the rules concerning fouls).

I introduced the qualification 'usually' because, of course, we cannot exclude that a soccer player may occasionally get angry or indignant at a successful attempt to prevent him from making a goal.

More in general, I think that many examples of pure attributive permittednesses can be found in the field of competitive sport activities, as well as in the field of economic competition.

I think that by hypothesizing purely attributive phenomena we can cast some light on a phenomenon pointed to by Karen Horney:

The difficulties many people have ... in observing traffic regulations – as pedestrian or as driver – often result from an unconscious protest against them. *They* should not be subject to such rules. [Horney 1950: 44]

Sure, I am convinced that this is very often a quite plausible explanation: very often people's non-compliance with other people's normative expectations is nothing but an unconscious protest against them.

But I conjecture that there may be *also* some cases that should be explained in the terms of purely attributive phenomena. In these cases the driver, for example, focuses exclusively on his action and his aggressiveness boosts his action in such a way that he experiences himself as beyond and above the norms usually experienced in his community in the context of driving. If the driver's aggressiveness is usually restrained, this sort of *psychological Ausnahmestand* ("state of exception") is nothing but the experience of a purely attributive permittedness. A hypothesis that should be tested is whether this *Ausnahmestand* is experienced more often by drivers than by pedestrians. I guess so – and not only because the probability of being hurt in an accident is lower for a driver than for a pedes-

in the framework of Petrażyckianism is addressed in Fittipaldi — a. Conte's theory of constitutive rules is by far the richest theory of constitutive rules hitherto produced. It is exposed in several of the writings collected in Conte 1995. See also Conte 1997.

trian. It might be that being inside a vehicle that is separated from without somewhat reduces the driver's proneness to experience empathy.

Pure attributive omissibility. For such a pure attributive experience to exist the pure attributive side must discharge his usually restrained aggressiveness in order to perform a nonfacere.

It is difficult to find examples of such a situation.

An example could perhaps be certain cases of *hunger strike*. Some hunger striker might discharge his usually restrained aggressiveness in order to prevent others from feeding him against his will, but he might at the same time *not* get angry at those attempts to save his life.

As for third spectators, it could be argued that such a pure attributive omissibility exists in their psyches if they:

- neither experience some obligativeness of tolerance of the hunger strike (including the auxiliary imperativesidednesses stemming therefrom),
- nor indignant at the discharges of aggressiveness by the hunger striker in order to prevent them from feeding him against his will.

Pure attributive prohibitednesses. Here the focus of the attributive side is not on his action/inaction, but rather on a state of the world that according to the attributive side *should not occur*, and this without the representation of anybody who has to refrain from some action of his. It is difficult to imagine a way the individual's usually restrained aggressiveness could be discharged without reference to any imperative side.

An example of such a phenomenon can be perhaps found if we take into account a different ethical phenomenon: *pride*. We can recall here the claim of invulnerability discussed at length by Horney. This claim of invulnerability could be called a sort of *neurotic right to health*. Horney points out that in certain cases what is called here a *pure attributive claim of invulnerability* may turn into some sort of delusion of never being hurt⁷⁶.

Self-righteousness ... can prohibit the feeling of shame. Moreover, a pride in invulnerability may forbid him to admit to himself that he feels hurt. A god may show wrath at the imperfection of mortals, but he *just is not hurt* by a boss or a taxi driver; he should be big enough to overlook it and strong enough to take everything in his stride. [Horney 1950: 98]

The conjecture is that in the case of the delusion on never being hurt the normative expectation of the pure attributive side produces the delusional fulfillment of his purely attributive normative expectation.

Pure attributive obligatorinesses. In this case the focus of the attributive side is on a state of the world that according to him *should occur*, and this

⁷⁶ The invulnerability can be physical or psychological.

without the representation of anybody who has to produce that state of the world.

A case of such of a phenomenon could be the second example given by Kurczewski: the attributivesidedness as to a certain service from a certain institution without thinking of the obligatedness of the institution as to the fulfillment of all individual claims. But I cannot understand how such a phenomenon could be psychologically possible. Perhaps the example regards the case where the institution is to provide that service only to a certain percentage of the people who make a request to this effect. But not even in this case can I understand why the experience of a citizen *who has been selected* should not be understood in the terms of a typical imperative-attributive experience. By the same token, a citizen *who has not been selected* should “experience” mere absence-of-ethical-phenomena.

A different example can be perhaps found again in Horney’s work. I am thinking of her analysis of people who feel entitled to success, popularity, etc. (1950: 163). Also in this case the individual’s normative expectation may lead him to delusions of success, popularity, etc. Just as in the case of pure attributive prohibitedness it is *pride* that plays a crucial role here.

Now, with the only exception of pure permittednesses, I think that it can be argued that pure attributive phenomena are very rare and/or nearly pathological phenomena. The conjectures I have made in this section are summed up in table 4.17.

I will spend some more words on pure attributive phenomena when discussing pure attributive ownership (sec. 4.12).

4.17. – Tentative psychological reductions of purely attributive phenomena.

PURELY ATTRIBUTIVE:	PSYCHOLOGICAL REDUCTION
PERMITTEDNESS	discharge of one’s usually restrained aggressiveness focused exclusively on the action without anger in case of attempts to stop it
OMISSIBILITY	discharge of one’s usually restrained aggressiveness against others’ attempts to force to act without anger at those attempts
PROHIBITEDNESS	narcissistic delusion that the prohibited state of affairs does not come true
OBLIGATORINESS	narcissistic delusion that the obligatory state of affairs comes true

4.6. THE DEGREE OF COGNITIVE SALIENCE OF THE DIFFERENT KINDS OF LEGAL RELATIONSHIP AND THE FACTORS CONDUCTIVE TO THE DETACHMENT OF DEBTS

In this paragraph I will first show that certain legal relationships are more cognitively salient than others and thus more conducive to illusions of legal entities. Then I will explain why my analysis of the illusions of debts, duties, powers and rights will start from debts, that I consider as the thickest illusory legal entity.

With the term *cognitive salience* I understand *the property of being perceptually striking, interesting of noteworthy*⁷⁷.

Generally speaking, actions are more cognitively salient than inactions. This is mirrored in language, as the terms referring to negative realities are usually marked.

The negative always receives overt expression while the positive usually has zero expression. [Greenberg 1966: 50]

This implies that, historically, the first nouns referring to legal entities should emerge in the context of legal relationships involving actions, rather than inactions: (i.e. *facere-accipere* and *pati-facere*). Hence, no wonder that the most unmarked naïve legal terms refer to these two kinds of legal relationships.

The terms *debt* and *duty* prototypically refer to a *facere* on the part of the imperative side. The term *right* seems to prototypically refer to a *facere* on the part of the attributive side. We shall see that only to some extent can *power* be referred to a *facere* on the part of the attributive side, as a complete explanation of *powers* requires a discussion of Petrażycki's concept of *vlast'* (sec. 4.8).

Of course, in the case of *facere-accipere* legal relationships, the *facere* is much more cognitively salient than the *accipere* (that sometimes may even not exist). Therefore, we are to expect that, historically, nouns meaning "debt" or "duty" stem from the imperative side's *facere*, rather than from the attributive side's *accipere*.

By the same token, in the case of *pati-facere* legal relationships, since *pati* is quite devoid of cognitive salience, we are to expect that the nouns referring to the entities stemming from this legal relationship stem from the *facere* rather than from the *pati*.

The very idea that actions have a stronger cognitive salience than inactions implies that the nouns referring to entities stemming from *pati-non-facere* and *nonfacere-nonpati* legal relationships should emerge much later (if at all) than nouns referring to entities stemming from legal relationships involving an action on the part of either the attributive or the imperative side.

⁷⁷ Cf. above, sec. 4.4.4, fn. 61.

As regards *pati-nonfacere*, in no language known to me there exists a noun referring to an entity related to this kind of legal relationship. Actually, as we know (sec. 4.4.4), this kind of legal relationship is so cognitively devoid of salience that in certain languages, such as English, there is not even a simple and unambiguous way to refer to this kind of legal relationship. The construction *can refrain from* + gerund is unambiguous but cumbersome. The constructions *not to have* + inf. and *need not* + inf. are simpler but ambiguous (strictly logically, they should mean exclusively absence-of-obligatoriness/obligatedness).

In the case of *nonfacere-nonpati*, instead, nouns do seem to exist. I am not thinking of terms such as *prohibition* that actually refers to a linguistic utterance, but rather to nouns such as *wrong*⁷⁸ and *tort*. The existence of these terms is completely compatible with what I just stated about the higher salience of actions over inactions. These terms refer to the case a *facere* takes place when the superergoes of the participants expect a *non-facere*. The very existence of a *nonfacere-nonpati* legal relationship gives a high degree of salience to the possible *facere* of the imperative side.

Even though it could be argued that *wrongs* belong to naïve legal ontology, they will not be discussed here, as the explanation of these illusions involves *historical realism* (see above sec. 1.3). Such a term as *wrong* does not designate some entity belonging the attributive side. It rather refers the action of the imperative side, once it has already taken place. Moreover, there are languages in which the nouns for “wrong” are marked. Just think of the German noun *Unrecht*.

Since children seem to learn first what they should *not* do rather than what they should do⁷⁹, it is surprising,

1. that in most languages I know there are no unmarked constructions to express the ethical quality of prohibitedness⁸⁰ and
2. that I have not been able to find any language in which there is an unmarked noun meaning the prohibitedness actually owned by the attributive side, rather than the already performed misdeed of the imperative side.

⁷⁸ It is worth noting that *wrong*, if originally an adjective, is now a full-fledged noun, as it can have the plural form *wrongs*. It underwent unmarkedization.

⁷⁹ This is what Bucciarelli calls *principle of immorality acculturation*: «Culture moralizes more about immorality than morality» (—).

⁸⁰ An example is the unmarked Russian particle *nel'zja* that in the construction *nel'zja* + impf.-inf. means actional prohibitedness: *Нельзя так поступать* (“One should not behave this way”).

The term *nel'zja* does include the particle *ne*, but since there is no such term as *l'zja* in contemporary Russian, it can be argued that *nel'zja* underwent unmarkedization. The term *l'zja* is etymologically related with two modern Russian terms: the adjective *lëgkij*, (“easy”) and *pol'za* (“use”, “advantage”). See Černyh 1993 (entry *нельзя*).

Another (though *quasi*-unmarked) verb meaning prohibitedness is the Latin verb *nequire*.

Further research is required to explain the first phenomenon. As regards the second phenomenon, I think that an explanation will result from my discussion of the factors causing the illusions of debts, duties, powers and rights. I conjecture that these factors are less at work in the case of prohibitednesses. A further tentative explanation for both phenomena will be given in sec. 4.12.

As I said, I will start with the discussion of debts. I will first discuss debts because I conjecture that debts are experienced – in naïve legal ontology – as the *thickest* legal entities. In other words, I think that, among legal entities, debts are the legal illusions that are experienced as resembling material things the most. They can even be somewhat experienced as being subject to the law of gravity (sec. 4.1).

My starting point is that the illusions of debts stem from *facere-accipere* legal relationships. Since it can be argued that an *accipere* is much less cognitively salient than a *facere*, I will argue that the illusions of debts stem from the imperative side's *facere*.

By the term *debt* I shall understand the illusion of a legal entity involving

1. *the obligatedness of the imperative side as to the handing over of a certain amount of money or other fungibles to the attributive side, or*
2. *the obligatoriness of the handing over of a certain amount of money or other fungibles on the part of the imperative side to the attributive side.*

These two definitions are equivalent. They differ only in that (1) relates to the case the illusory legal quality is projected onto the imperative side, while (2) relates to the case the quality is projected onto the action. (As regards the concept of *naïve money* adopted in this book the reader can see the Appendix).

My goal will be to explain *how the obligatoriness of the facere and the obligatedness of the imperative side get detached from the facere and the imperative side, and thus start being experienced as a free-standing entity.*

My hypothesis that the illusions of debts psychologically originate from the detachment of obligatednesses/obligatorinesses into illusions of free-standing things does not imply anything as regards the specific path of development of an unmarked noun for “debt”. As we will see, nouns for “debt” may stem from terms originally meaning

1. a certain *facere*,
2. the *advantage* the attributive side expects from that *facere*,
3. the *fungible things* the handing-over of which that *facere* consists of,
4. the *obligatoriness* of the *facere* – understood as *its* quality,
5. the *obligatedness*⁸¹ of the imperative side – understood as *his* quality.

⁸¹ Even though we are concerned with debts rather than with obligations, it is worth recalling here that in certain languages the terms now meaning “obligation” first used to mean the “obligatedness”, i.e. the *condition of being obligated*. This is the case of the

We shall see that actually the opposite is often true.

A free-standing illusion of debts in terms of entities comes into existence when the obligatoriness of a certain *facere* and the obligatedness of a certain person get detached from either. Once this detachment has taken place, naïve people start “feigning” that there is a sort of thing – a *chose*, a common lawyer could perhaps say – independent of other entities, such as owing people or owed things. As has already been discussed (sec. 1.4), *the not being inherently relational to anything else* is a prototypical feature of entities, as opposed to qualities. The very low degree of markedness of the nouns for debts shows that they are experienced as free-standing entities (sec. 1.4).

I will discuss the factors conducive to the detachment of the obligatoriness from the *facere* and to the detachment of the obligatedness from the imperative side, *separately*. Since some – but not all – these factors operate also in the case of duties, powers and rights, I find it more convenient to first discuss all of them in the case of debts, and then to check how many of these factors are at work, *mutatis mutandis*, in the case of the other three kinds of legal entities.

I found five factors that can cause the detachment of the obligatedness from the imperative side and the detachment of the obligatoriness from the *facere*.

A first factor is the bilaterality itself of legal relationships. The other factors cause the illusion of a detachment of the legal quality by virtue of some sort of transfer in a broad sense. In table 4.18 I sum up the factors that I will discuss in the next sections.

I think that all these factors are more or less caused by the attributiveness that Petrażycki stipulatively proposed to treat as the distinctive feature of legal phenomena. The following can be also regarded as a contribution to showing how suitable is the distinction proposed by Petrażycki to the creation of adequate theories in legal studies.

The fact that I discuss these factors, but not others, does not imply that I exclude that further factors may be at work here. Since – to the extent of my knowledge – this book is the first attempt ever made to explain the illusions of debts and some other naïve legal entities in the framework of

Russian word *objazanmost'*. This noun stems from the passive past participle of *objazyvat'* (“to obligate”).

To some extent, this holds true also for the Latin term *obligatio*. This term stems from the verb *obligare* (“to obligate”). The suffix *-io*, among others, means the state of having undergone the process meant by the verb. This is so even in the case of such deponent verbs as *obliviscor* (“to forget”). Just think of the term *oblivio* that can also mean *forgottenness* as is witnessed by such an idiom as *oblivione iacere* (“to lay in oblivion”). (About the connection between *obligatedness* and *obligation* see also sec. 4.6.3).

As regards *obligatoriness* we can recall the German term *Verbindlichkeit*. This noun first meant *obligatoriness*.

Petrażycki’s legal solipsism, I am pretty sure there will be many mistakes and omissions⁸².

Table 4.18. – Factors conducive to the detachment of obligatednesses/obligatorinesses into illusions of free-standing debts.

FACTORS CONDUCTIVE TO THE DETACHMENT OF OBLIGATEDNESS		
	bilaterality	
IMP’s <i>facere</i>	→ <i>facere</i>	ATTR

	transferability, transitoriness	
IMP ₁		
↓		
obligatedness	<i>facere</i>	ATTR
↓		
IMP ₂		
FACTORS CONDUCTIVE TO THE DETACHMENT OF OBLIGATORINESS		
	transitoriness, fungibility, transformability	
	<i>facere</i> ₁	
	↓	
IMP	obligatoriness	ATTR
	↓	
	<i>facere</i> ₂	

⁸² My conjecture that debts are illusions of free-standing obligatednesses/obligatorinesses is incompatible with Petrażycki’s contention that subjectless and objectless debts and rights are psychologically unconceivable: «[A]ssuming subjectless [*bessyb’ektmye*] and objectless [*bessob’ektmye*] rights and obligations is something ... impossible. This is so because it contradicts the nature of law itself (i.e. our legal psyche) to such an extent that for this psyche it is something unthinkable, something psychologically unperformable. An obligation according to which “nobody” is obligated, is not an obligation, it is just the absence of an obligation. An entitlement [*pravomočie*], according to which nobody is entitled, is not a right. The representation [*predstavliat’ sebe*] of obligations without anybody who is obligated, etc. is something possible with words alone, i.e. it is possible to pronounce and write the corresponding words, just as, e.g. the words “everything that is white is black” [*vse beloe černo*] etc., but without the corresponding real and serious thought». [Petrażycki 1909-10: 401]

My contention, instead, is that the fact that the terms for “debt”, “duty”, “right” and “power” are unmarked in several different languages is an index that they are conceived as *inherently non-relational*, namely that they are experienced as free-standing entities (sec. 1.4 and 4.1).

My criticism on Petrażycki might recall Barry Smith’s (2003) criticism on Searle (1995). Actually the term *free-standing y-term* has been invented by Barry Smith. Be as it may, as I have explained in sec. 1.3, the goals pursued in this book are incommensurably different from the goals pursued by Searle and other analytical ontologists.

4.6.1. Bilaterality

The first cause of the illusion of debts that I will discuss is their legal (i.e. their bilateral) nature in general.

In order to understand the causal role that this feature may play it is necessary to understand why the very concept of a *moral debt* is nothing but a metonymy.

We could define a *moral debt* in this way: *we have a moral debt when the imperative side experiences the obligatoriness of a certain behavior of his to the advantage of a beneficiary, without experiencing the beneficiary as an attributive side. Rather, the imperative side expects some sort of gratitude on the part of the beneficiary in case the debt is "paid"*.

My basic hypothesis is that in no language can a term for "moral debt" emerge before a term for "legal debt".⁸³ This is a falsifiable hypothesis.

A good way to understand the difference between the hard illusion of a legal debt and the weaker illusion of a "moral debt" is discussing Pierre Bourdieu's distinction between *economic capital* and *social capital*⁸⁴.

While economic capital is made up, among others, of legal debts, social capital is made up of "moral debts".

By using Bourdieu's words we can say that a "moral debt" exists when there is the «recognition of [that] *nonspecific indebtedness which is called gratitude*» (Bourdieu 1983^{*a}: 252, emphasis added).

Bourdieu defines *social capital* in the following way:

Social capital is the aggregate of the actual and potential resources which are linked to the possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition – or in other words, to membership in a group^[85] – which provides each of its members with ... a "credential" which entitles them to credit, in the various sense of the word. [Bourdieu 1983^{*a}: 248 f.]

⁸³ My hypothesis does not exclude that they arise at the same time.

⁸⁴ My discussion of *social capital* should be able to show that Ossowska's (1960) contention that Petrażycki's definition of legal phenomena leaves no room for morality is wrong.

⁸⁵ I consider the word *group* inappropriate in this context. It evokes the idea of a discrete border between the group and the outside, while – as is clear even from Bourdieu's text – the idea of a network better stresses that there are multidimensional degrees of interconnection among different persons. It is possible that A, B, C, D, E, F all know each other. In this case we may say they are "a group". This is not the case, instead, if E knows only A, B and C, but not D, and F knows E, C and D, but not A and B, etc. In this case we have only people with dimensionally different degrees of *reciprocal* interconnection.

A second reason why the term *group* is inappropriate in this context is that – as Bourdieu (1983^{*a}: 251) explicitly states – there are people who «are known to more people than they know». In such a case A, B and C would know Y, but the reciprocal would not hold true. These are *non-reciprocal* connections.

We could say that social capital is made up of the *set of favors* a person can ask for from other people.

Bourdieu likes to describe *social* capital with the *legal* terms usually used to describe *economic* capital. He does so in order to “uncover” how social capital (as well as cultural capital) is a means to perpetuate social inequality, i.e. a means for the dominant class to retain its power.

I am not concerned here with political issues. My goal is quite different from Bourdieu’s. While he tried to show how social capital – unlike, to some extent, economic capital – produces the reproduction of the social structure *in a disguised way*, my goal is showing how his analysis contains also conjectures regarding the causes of this “disguisement”.

From his Marxist perspective, the starting point of the analysis is overt economic capital. This is why he uses metonymically the economic terminology in order to describe social capital. From my perspective, the starting point of the analysis is social capital, and economic capital is but an illusion created by a complicated set of intertwined causes.

This is why I write *disguisement* in inverted commas. What Bourdieu calls *non-disguisement* is for me the coming into existence of legal illusions (e.g. the ownership of debts), while what Bourdieu calls *disguisement* is for me simply the not-coming-into-existence of a certain legal illusion (e.g. just expecting the reciprocation of favors done).

According to me, *economic capital is made up of sets illusory entities*. One sort of these entities are debts (understood as credits). This approach, of course, implies that Marx’s idea that law is but a superstructure of economy is untenable. Economy is constituted by legal illusions. Without legal illusions there can be no economic capital⁸⁶.

Bourdieu’s Marxist approach does not deprive his analysis of exceptional sociological insight, though. That is why I am using it. Where he sees *concealed capital*, I just see a kind of power that is not psychologically experienced as a set of thick debts (understood as credits) because of the lack of appropriate causes for this illusion to arise. *The illusions of legal debts make power more visible*. In a way, we could say that – paradoxically – legal illusions do give a real contribution to understanding how power is distributed in a certain society, while the absence of such illusions makes the distribution of power less visible. Bourdieu prefers to use the

⁸⁶ As regards the theoretical compatibility of Petrażycki’s psychological theory of law with Marxism see Lande 1952 (879 f.). Petrażycki himself contended that: «one can ... follow darwinism, historical materialism and the theory of law as imperative-attributive experiences at the same time». [1909-10: 753, 1909-10*: 327]

This is not to say that Petrażycki was a Marxist or that his theories were accepted in communist countries. They were rejected in Soviet Union, but tolerated in Poland (see Motyka 1993).

Marxist metonymy of *capital*, while I think it is more appropriate just to talk in terms of *power*⁸⁷.

Let us now show how Bourdieu's analysis is full of insight as to the question we are to answer: namely *why, if social capital is made up of moral debts, moral debts are not experienced in the same way as legal debts.*

As we have seen, according to Bourdieu «social capital is made up of social obligations» (1983^{*a}: 243). What the “owner” of a certain social capital actually owns is not a set of credits. What he “owns” is the condition of *non-specific indebtedness* of certain individuals.

Now, it should be noticed that economic (i.e. legal) indebtedness is *non-gradable*. Legal obligatedness either (illusorily) exists or not. A legal debt may be bigger or smaller than another, but this does not have anything to do with any sort of *degree of existence*. This regards exclusively how big they are⁸⁸. *Prototypical existence is non-gradable*. The mode of existence of legal debts is that of prototypical entities.

Instead, two “social obligations” with seemingly the *same content* can be experienced as having different degrees of intensity. John may owe more hospitality to Mark than to Robert depending on the history of each relationship. Moral obligatednesses/obligatorinesses are gradable depending on the strength of the human relationship between the obligated person and the beneficiary.

⁸⁷ A different analysis of these very same phenomena has been offered by Max Weber when he discussed the distribution of power in a given society. Of course, he did not use any Marxist metonymy. It is worth quoting some relevant passages here: «The structure of every legal order [*Rechtsordnung*] directly influences the *distribution of power* [*Machtverteilung*], economic or otherwise, within its respective community. This is true of all legal orders and not only that of state. In general, we understand by ‘power’ [*Macht*] the chance of a man or a number of men to realize their own will in a social action even against the resistance of others who are participating in the action. “Economically conditioned” power is not, of course, identical with power as such. On the contrary, the emergence of economic power may be the consequence of power existing on other grounds». [Weber 1956†: 678, 1956†*: 926]

The role played by the concept of legal order in Weber's sociology is not unlike the role played by institutionalization in Bourdieu's sociology (as regards this concept cf. below sec. 4.6.2, fn. 114). In a given community, Weber distinguishes a social order (*Soziale Ordnung*) from an economic one [*Wirtschaftsordnung*]. An economic order, for Weber, is «the way in which economic goods and services are distributed and used». A social order is «[t]he way in which social honor [*soziale Ehre*] is distributed in a community between typical groups participating in this distribution» (Weber 1956†: 679, 1956†*: 927). To refer to “social honor” Weber makes use also of the term ‘prestige’. There is no room to discuss here the concept of social honor. It belongs, at least to some extent, to non-ethical social ontology. Cultural prestige is one sort of social honor. Trendiness is another. *Not all kinds of social honor involve a deontology in John Searle's sense* (2010: 91). This is why, instead of the term *social ontology*, I prefer to use the terms *legal* or *ethical ontology*.

⁸⁸ Cf. at this regards Locke's statements about primary qualities (above sec 2.6, cf. also sec. 1.4, fn. 54).

Two points can be taken from Bourdieu's analysis:

1. The existence of a moral debt depends on the (pure) imperative side's *gratitude*.
2. A moral credit cannot be acquired directly, but only *indirectly*.

Moral debts do not come into existence punctually, but emerge gradually and indirectly. They stem from the pleasure of the relationship with a certain person and therefore *can hardly be experienced as something detachable from him*.

Let us read a quotation of Bourdieu that may shed some light on this point:

[T]here are some goods and services to which economic capital gives immediate access, without secondary costs; others can be obtained only by virtue of a social capital of relationships (or social obligations) which cannot act instantaneously, at the appropriate moment, unless they have been established and maintained for a long time, as if *for their own sake*, and therefore outside their period of use, i.e. at the cost of an *investment* in sociability which is necessarily long-term because the time lag is one of the factors of the *transmutation* of a pure and simple debt into that recognition of nonspecific indebtedness which is called gratitude [emphasis added]. [Bourdieu 1983^{*a}: 252, emphases added]

It can be noticed that also the term *investment*, in this context, is a sort of economic metonymy⁸⁹.

Actually, Bourdieu is well aware of this metonymy.

It should be made clear, to dispel a likely misunderstanding, that the investment in question here is not necessarily conceived as a calculated pursuit of gain, but that it has every likelihood of being experienced in terms of the logic of emotional investment, i.e. as an involvement which is both necessary and disinterested. [Bourdieu 1983^{*a}: 257, fn. 18]

That the investment is or, at least, is supposed to be disinterested has as an implication the *refusal of calculations as to moral debts* as well as the *risk of ingratitude this refusal necessarily involves*. Sure, also legal debts do involve certain kinds of risks, but they neither imply the refusal of calculation, nor the risk of ingratitude.

[T]he declared refusal of calculation and of guarantees which characterizes exchanges tending to produce a social capital in the form of a *capital of*

⁸⁹ The term *transmutation* deserves a remark too. Here it is clear that according to Bourdieu's Marxist approach legal debts transmute into moral debts, while according to the approach adopted in this book, the opposite is true. Moral debts transmute into legal debts if certain causes operate – one of them being attributiveness. While according to Bourdieu legal debts are the natural starting point (he talks of *pure and simple debts!*), according to me the (psychologically) natural starting point must be “moral debts”, namely moral obligatorinesses/obligatorinesses.

obligations that are usable in the more or less long term (exchange of gifts, services, visits) necessarily entails the risk of ingratitude, the refusal of that recognition of nonguaranteed debts which such exchanges aim to produce. [Bourdieu 1983^{*a}: 254]

Thus, a first reason why legal debts are experienced as thicker entities than “moral debts” is that “*moral debts*” depend on the gratitude of the obligor, while legal debts do not. The existence of “moral debts” amounts to the existence of gratitude. Legal debts, instead, are experienced as existing independently of gratitude. “It is *not* from the *gratitude* of the debtor that the creditor can expect his payment” – to rephrase a well-known quote.

Sure, the moral debtor may feel guilty if he does not pay his “moral debt”, just as a legal debtor may feel guilty if he does not pay his own legal debt. But the “moral debtor” feels guilty because he feels that he has been ungrateful to a person he has a connection with. The legal debtor, instead, just feels guilty for what he did or failed to do. A physiological debtor feels guilty (or experiences shame) for not having paid the room in the hotel where he slept⁹⁰. He may feel regret for the owner’s loss. But this is not to say that he feels ungrateful to the owner of the hotel. It is not from the benevolence of the owner of the hotel that he got the room. There is no room for gratitude here. (As regards gratitude see also above sec. 4.3).

The creditor expects his payment from the debtor’s wish to avert his own shame/guilt, rather than from his wish to avert his ingratitude-induced shame/guilt⁹¹.

“*Moral debts*” are closely attached to the human relationship that engenders them, while legal debts are not. Actually a “moral debt” cannot exist independently of a human relationship. In the case of legal debts, instead, as we already know, neither are debts paid out of gratitude, nor is gratitude experienced by the person who receives the payment of the debt.

This is why legal debts are experienced as more detached from the person of the imperative side than “moral debts”.

Before turning to the second reason why bilaterality may play a major role as regards the detachment of the obligatedness from the imperative side an important remark is in order here. We have seen that “moral debts” are closely attached to the person of the imperative side while legal debts mostly are not. In particular, “moral debts” are closely related to the *gratitude* of the obligated person.

⁹⁰ Where most people would not have paid a debtor will experience pride.

⁹¹ In many cases, of course, the creditor expects his payment because the debtor fears his potential anger (see above 4.4.1). In this case, of course, only the creditor’s anger is an ethical phenomenon. The debtor’s payment is not (see above 3.4, fn. 26).

Now, this statement of mine should not be understood in the sense that there are no legal obligatednesses completely undetachable from the imperative side.

Jacek Kurczewski, along with Małgorzata Fuszara and Iwona Jakubowska, have made and successfully tested the hypothesis that the closer the relationship between two persons, the more probable it is that the obligatedness to provide help – I would add, even financial help – is experienced as a legal one (see Kurczewski 2010: 131, drawing on Kurczewski *et al.* 1983). In other words, the probability that a person in need experiences another person as *legally* obligated to lend him some money is the highest if that other person is his mother, lower if that person is a sibling, still lower if he is a friend and the lowest if he is a perfect stranger. This hypothesis was tested in Poland when general Jaruzelski introduced food rationing, but I think it holds true in more general contexts⁹².

Even if in this case we are dealing with a genuine *legal* obligatedness, the detachment is hardly possible because this obligatedness, rather than depend on the gratitude of the obligated person, does depend on the degree of relativeness of the two individuals. The closer two relatives are, the smaller the “investment in sociability” that must be made. We all know that love and gratitude are often not related.

The degree of closeness between two persons plays also a crucial role as regards the key distinction between experiencing oneself as an attributive side as regards *obtaining something* from somebody else and experiencing oneself as an attributive side as regards the *mere asking for* something. (About this topic see also below sec. 4.6.3, fn. 116 and sec. 4.6.2, fn. 112).

My conclusion is that only rarely are “moral debts” experienced as independent of the involved subjects⁹³, while there may be legal debts that are experienced as independent of any personal connection. This is why the bilaterality of legal debts may be conducive to the phenomenon that they are experienced as somewhat *in between* the attributive and the imperative side.

An open question is why the ethical phenomena between strangers take on more often a legal rather than a moral structure. My conjecture is that this is so because ethical phenomena are often shaped by the requirements of economic coordination. Resources are probably more efficiently allocated if their allocation does not depend of the benevolence or love of the imperative side, but rather on the demands of an attributive side. Moreover, the enforcement of such allocations may be more effective if ethical anger rather than guilt/shame/pride operate.

⁹² Of course, this hypothesis may hold at different degrees depending on the kind of society the involved subjects belong to and their respective ages.

⁹³ An example that comes to my mind of a “moral debt” towards a stranger is the almsgiver’s debt towards the beggar.

There is a second reason – unrelated to Bourdieu’s analysis – why bilaterality may produce a thicker illusory entity than unilateral obligatednesses/obligatorinesses.

Bilaterality may cause that a legal debt, rather than being experienced as attached to the person of the debtor, is experienced as being somewhere between the debtor and the creditor.

This phenomenon has been somewhat described by Petrażycki:

Suppose we are concerned with this judgment: “Squire A has a right to obtain from lessee B, 5.000 rubles rent”; or “lessee B is bound to pay to Squire A the 5.000 rubles stipulated in the lease”. According to the legal terminology, there is – as between A and B – the legal relationship of lessor-lessee. Here a legal phenomenon [*pravovoe javlenie*] confronts us: Where is it? ... It would be a mistake to suppose that it is to be found *somewhere in space between A and B*, or that – if A and B are in a certain province – the legal phenomenon is somewhere in that province, or to suppose that the legal obligation ascribed to lessee B in the judgment aforesaid is something found in him, and the right to obtain 5.000 rubles is something present – and found in Squire A, in his hands, or in his spirit, or anywhere at all around him. [Petrażycki 1908: 24, 1908* 24]

Petrażycki mentions here three possible mistakes (I will use the term *illusion*). The illusion

1. that the debt is believed to exist *between* the attributive side and the imperative side;
2. that the debt is believed to exist somewhere *in the province* where A and B are;
3. that the debt is split into two entities: namely a debt and a credit, one near the debtor, the other near the creditor.

He does not mention a fourth possibility:

4. that the debt is believed to exist in a specific reality-that-ought-to-be⁹⁴.

The second and fourth illusion are devoid of interest for us here. The fourth illusion can be found only among the speculations of the 20th-century legal philosophers, while we are here concerned with naïve legal conceptions. The second illusion can be considered a kind of the first one. If the debt is not believed to be a quality of the imperative side, it is therefore believed to be somewhere outside the attributive side and the imperative side: either between them or in the town, the province, the state, etc. where they live, but such questions involve some sort of jurisprudential thinking⁹⁵.

In the case of the first (as well as of the second) illusion what matters is that the debt is believed to be *outside* both the attributive side and the

⁹⁴ I use Pattaro’s (2005) term.

⁹⁵ The seemingly absurd question *where an illusory entity is* plays a crucial role in that branch of legal dogmatics called *conflicts of laws* or *international private law*.

imperative side. My conjecture is that a crucial causal role as to the emergence of this illusion is played by the simple fact that, besides the imperative side, there is also an attributive side. This is precisely bilaterality.

As regards the third kind of illusion it could be asked: *why I assume that a single entity (i.e. a debt) is imagined to exist between (or outside) the debtor and the creditor, rather than two qualities or entities: one near the debtor (his indebtedness) and the other near creditor (his “accreditedness”)*⁹⁶.

The answer was given in sec. 4.6. Debts stem from *facere-accipere* legal relationships. In these relationships the *facere* of the imperative side is much more salient than the *accipere* of the attributive side.

Thus, the question we are confronted with is: what causes this *facere* to get detached from the person of the debtor? The issue of the detachment of the *accipere* from the person of the creditor can hardly play a role in the context of *naïve* legal ontology because the *accipere* has a much lower degree of salience than the *facere*.

In most languages I am going to analyze the terms meaning “debt” are much more connected with the imperative side’s *facere* than with the attributive side’s *accipere*⁹⁷.

Because of this reason, I think that the third kind of illusion is but a historically late one, while the first one is the most deeply entrenched in *naïve* legal ontology.

A clue that supports my conjecture is that *across many different languages first there seems to emerge a term ambiguously meaning both “debt” and “credit”, and only later on does a specific term for “credit” get developed. The concept of credit belongs to jurisprudential ontologies.*

Actually the adverb ‘ambiguously’ is not completely accurate in this context because my conjecture is that *in early naïve ontology credit and debt are but the very same illusory entity just seen from two different points of view. Legal obligatednesses/obligatorinesses – once detached from the person of the debtor – are first experienced as being one single entity between the creditor and the debtor. Only later on do debts and credits get distinguished.*

That in many languages the same term is used for both “debt” and “credit” has been discussed by Petrażycki himself – though for a purpose different from mine. By describing this phenomenon Petrażycki was trying to show that rights are nothing else but obligations belonging to some person⁹⁸.

⁹⁶ For instance, Adolf Reinach argues that «through the act of promising something new enters the world. A claim arises in [*auf*] the one party and an obligation in [*auf*] the other» (1913^{*}: 8 f.).

⁹⁷ We will see that a partial exception is Ancient Greek where the noun for “debt” stems from the idea of the *usefulness* of the imperative side’s *facere* to the attributive side.

⁹⁸ In the following quotation Petrażycki maintains that the common way of talking shows the true nature of rights (as obligations belonging to someone): «The fact that

Petrażycki gave many examples also from exotical languages that I do not master at all. I will not discuss these examples. I will discuss only languages I am to some extent acquainted with.

For more information the reader can see Petrażycki's text (1909-10: 52-55).

Let us start with *Ancient Greek*.

Petrażycki says that in Ancient Greek the word *χρέος* could be used to refer to both debts and credits (as well as the word *χρήστης* could be used to refer to both the debtor and the creditor)⁹⁹. Petrażycki did not insert any specific Ancient Greek quotation, but I think that inserting one may be useful in order to better understand this usage. Here is one I found in Demosthenes:

Φασι γὰρ οὐκ ἀποδόσθαι τὰ πατρῶ' ὧν ἐκομίζοντο χρημάτων, οὐδ' ἀποστήναι τῶν ὄντων, ἀλλ' ὅσ' αὐτοῖς κατελείφθη *χρέα* καὶ σκευὴ καὶ ὄλως χρήματα, ταῦθ' ἑαυτῶν γίνεσθαι. Ἐγὼ δ' οἶδ' ἀκούων ὅτι τὴν οὐσίαν Ξενοπείθης καὶ Ναισικράτης ἅπασαν *χρέα* κατέλιπον, καὶ φανερὰν ἐκέκτηντο μικράν τινα: [Demosthenes, *Against Nausimachus*, 38,7, emphases added]

They declare that they did not sell their father's estate for the money which they received, nor did they give up the property, but that all that was left to them – *credits* [*χρέα*], furniture, and even money – still belongs to them. I, for my part, know by hearsay that Xenopeithes and Nausikrates left their entire property in *outstanding debts* [*χρέα*], and possessed very little tangible [lit. φανερός = visible] property. [Demosthenes 1958†*: IV, 425, emphases added].

Two remarks are in order here.

First. The term *χρέος* is etymologically connected with the noun *χρεία* and the verb *χράομαι* meaning, respectively, “advantage” and “to use”. Therefore, the term seems to be conceptually connected with the idea of the usefulness of the imperative side's *facere* to the attributive side¹⁰⁰.

rights from the point of view of popular psyche represent nothing else but obligations that are ascribed to us, that pertain to us, obligations of some others, is confirmed by the phenomenon, widespread among different peoples, that popular language, besides words corresponding to our contemporary expressions ‘right’, ‘legal claim’, etc., or instead of these expressions, makes use ... of the reference to the active belonging to a certain person of a debt or of an obligation of a certain person». [Petrażycki 1909-10: 52]

⁹⁹ Petrażycki 1909-10 (53) refers to the entries *χρέος* and *χρήστης* in TLG 1831-1865 and in Passow 1841-1857.

¹⁰⁰ Also the Ancient Greek verb *ὀφείλω* (“to owe”) seems to be connected with the idea of advantage. This verb is connected with the Ancient Greek noun *ὄφελος* and with the Sanskrit noun *phalam*, both meaning “advantage” (see Rocci 1943, *entry* ὄφελος). Here is a quotation where a construction with *ὀφείλω* is used: «πολέσιν γὰρ Ἐπειοὶ χρεῖος ὀφείλον (the Epeans owed a debt to many people)». [*Iliad*, 11,688]

Second. This example is interesting also because of the translation. The second *χρέα* is here translated by A.T. Murray with *outstanding debts* ¹⁰¹, that is an English expression meaning “credit” when it is the object of the verb to own.

Latin. The standard Latin term for “debt” is *aes alienum* ¹⁰².

A preliminary question could be raised as to this term: why is it marked?

Answering this question amounts to showing that in Latin the same term can be used to refer to both debt and credit.

The Latin term *aes* originally meant “copper”, but subsequently started meaning “money”. Since *giving money* is the *facere* owed by the imperative side, *aes* started to *synecdochically* mean “debt”. *Aes alium* is a debt somebody else owns against me (and that I owe), while *aes meum* is a debt (i.e. a credit) I own (and somebody else owes me). To better understand how this Latin term works just think of the English expressions:

Give me my money (i.e. “Pay my credit” / “Pay your debt with me”)

Give him his money (i.e. “Pay his credit” / “Pay your debt with him”)

Since the term *aes* can mean “debt” or “credit” depending on the possessive adjective attached to it, the term itself is quite short and does not contradict my theory.

Here is a definition of *aes* available in the *Lexicon totius latinitatis*:

Aes significat ... totum id, quod simul sumptum constituit alicujus facultates seu redditus: unde active *aes suum*, passive *aes alienum* dicitur. [LTL 1965: entry *aes*]

Aes means whatever at once makes up somebody’s expenses, possessions or incomes: thus we say actively *aes suum*, passively *aes alienum*.

Here are three of the many examples that can be found in the *Lexicon*.

The first one is taken from the *Digest*.

Aes alienum est quod nos aliis debemus; aes suum est quod alii nobis debent. [D. 50.16.113. § 1]

Others’ *aes* is what we owe to other people. His *aes* is what other people owe us.

¹⁰¹ Louis Gernet, in his French translation (*Demosthenes 1954†**: I, 254), translates *chréa*, in both cases, with *créances* (“credits”).

¹⁰² Actually, Romans used also the term *debitum*, from which among others the English, French and Italian terms meaning “debt” stem. I will discuss only *aes alienum* because it was the most used term for “debt”, as well as because at first glance it is the most troublesome for my hypothesis.

It should not be thought that this use of *aes* is typical of technical language, as this example taken from Plautus' comedy *Curculio* clearly shows:

subduxi ratiunculam, quantum aeris mihi sit quantumque alieni siet [Plautus, *Curculio*, 371 f.]

I've struck my balance, how much debt I own and how much debt I owe.¹⁰³

The third one is taken from Cicero's *In Verrem*:

At hominem video ... non modo in aere alieno nullo, sed in suis nummis multis esse et semper fuisse. [Cicero, *In Verrem*, 2.4.11]

I see that the man ... not only has no debts, but that he always has abundance of ready money.

Hence, it can be argued that Latin speakers experienced debts and credits as two facets of the very same entity.

It is worth remarking that the Latin expression *aes alienum suum* means "his debt" (i.e. "the debt he owes" – see LTL 1965: entry *aes*). Now, the fact that a legal debt is experienced as something *external* to both the creditor and the debtor is not incompatible with the phenomenon that the debt is experienced as *somewhat related more to the debtor than to the creditor*. Thus the term meaning "legal debt", once joined to a possessive article or adjective, starts meaning "legal debt owed by the debtor", rather than "legal debt owned by the creditor". Below in this subsection we will see that in certain languages in order to state the *creditor's ownership over "his" legal debt* expressions such as "lord of the debt" have been used.

Two more remarks are in order here.

First. Petrzycki did not discuss the Latin terms *aes alienum* and *suum*, but he did discuss the Latin term *obligatio*. I am not interested here in the discussion of the ontology of this term because it does not pertain to *naïve* legal ontology. It is worth recalling, though, that Petrzycki noticed that the Latin term *obligatio* can be used both in an active and in a passive sense¹⁰⁴.

Second. From a *synchronic* point of view, I argued that *aes* is "two-faced" because of the bilaterality of *legal* ethical phenomena. In this sense, it can be argued that the noun *aes* – though experienced as slightly more related to the imperative side – is first of all experienced as an *obligat- edness/obligatoriness detached* from both the imperative and attributive side. But from a *diachronic* point of view *aes* is first of all related to the

¹⁰³ Compare the translation proposed by Nadjo 1989 (108, fn. 6): «Je fait le compte des mes petits affaires, de ce que j'ai d'avoir et de ce que j'ai de dettes».

¹⁰⁴ See Petrzycki 1909-10: 53. As regards this issue see also Pugliese 1939 (241). Completely different explanations for this phenomenon can be found in Betti 1955 (126) and Maine 1861 (324). It is worth noticing that both the English and the German translators of Bourdieu's text *The Forms of Capital* were using the terms *obligation* and *Verpflichtung* in an active sense when using the expressions *capital of obligations* (1983^a: 254) or *Kapital von Verpflichtungen* (1983^b: 197).

facere of the imperative side – more precisely: *to what is to be given* by the imperative side. Therefore, from both an etymological and a psychological point of view we still are to explain how the *obligatoriness of the facere* gets detached from the *facere*, or, more precisely, from what the imperative side has to give. This is why we shall encounter *aes meum* and *alienum* again below (sec. 4.6.4).

Slavic languages. As regards *Polish* – Petrażycki’s mother tongue –, he gave the following examples (1909-10: 52).

wymagać zapłaty swego długu (lit. “to require the payment of one’s debt”)

swego długu dochodzić (lit. “to demand one’s debt”).

In this case it seems that the possessive adjective (*swego* is the genitive of the possessive-reflexive adjective *swój*) can be used to express the idea that the *dług* (“debt”) belongs to the creditor, rather than the idea that it is owed by the debtor.

Petrażycki says that at certain stages of development of many Slavic languages “creditor” was expressed by nouns derived from nouns meaning “debt”. These terms were often amphibological. They could mean, depending on the context, either “creditor” or “debtor”. This phenomenon is an interesting index of the fact that debts are experienced as *entities capable of belonging to both the imperative side and the attributive side*, though of course in completely different ways. This in turn is an *index of the detachment of the debt from the imperative side*. Eventually, in all the Slavic languages mentioned by Petrażycki, the closer connection of the imperative side with the debt has solved the amphibology and now “debtor” is the unique meaning of these words. But these phenomena are well worth being mentioned here.

Petrażycki gave the following Polish, Czech and Serbian examples: *dłużnik*, *dlužník* and *dužnik*. They all derive from nouns meaning “debt”.

The dictionary of *Ancient Czech* by Jan Gebauer (1903) says that the word *dlužník* often means “creditor” and, among others, gives the following example from a translation of the bible (Deut. 15,2):

napomínati nebude moci dluznyk

the creditor [*dluznyk*] shall not [lit. will not be able to] exact it

As for *Serbian*, the Serbian dictionary by Vuk Karadžić says that *дужник* (*dužnik*) may mean also “creditor” and gives the following example:

не смије од дужника да дође кући [Karadžić 1818: entry *дужник*]

he cannot go home because of his creditor^[105]

¹⁰⁵ I thank Emanuele Marini for his help in this translation.

Even though the *Russian* term *dolžnik* (должник) means today uniquely “debtor”, this amphibology existed in *Russian* as well.

дѣльщикъ – “тот, кто должен” ... а также “заимодавец” [Černyh 1993: Долг: 261]

d’lž’nik: “he who owes”, but also “lender” .[¹⁰⁶]

Petrażycki shows that in the *Graždanskie Zakony* (civil laws) of the *Svod Zakonov Rossiskoj Imperii* *debts* are dealt with as if they were movables capable to actively belong to a certain person:

Ст. 418. Имущества долговья суть все имущества, въ долгахъ на другихъ лицахъ состоящая

Art. 418. Debitorial goods [*imuščestva dolgovyja*] are all goods that consist of debts [*dolgy*] on other persons.

As regards *German* I have not been able to find any context where *Schuld* (or *Schulden*) is used in the sense of “credit”.

The examples Petrażycki gives, though, are convincing enough to our goals.

As I said, even though a debt is experienced as a thing (rather than as somebody’s obligatedness and thus as his quality), it is still more probable that a desubstantival noun derived from a term meaning “debt” evokes the representation of a debtor than the representation of a creditor.

In this case, the speaker has to find a way to express the idea of a creditor. This problem has been solved by the ancient speakers of *Germanic languages* by making use of an expression meaning by and large “lord of the debt”¹⁰⁷. This shows again that the debt is somewhat experienced as something between the creditor and the debtor, capable to pertain – though in different ways – to the creditor and to the debtor.

For instance, in *German*, prior to the introduction of the word *Gläubiger* – that is a calque from Latin *creditor* – the creditor was called *Schuldherr*, namely the *Herr* (“lord”) of the *Schuld* (“debt”).

Here are two examples taken from Luther’s translation of the Ancient Testament:

Nu kömpt der Schuldherr vnd wil meine beide kinder nemen zu eigen Knechten. [2 Kings, 4,1]

Now the creditor is coming to take my two boys as his slaves.

Gehe hin, verkeuffe das öle vnd bezale deinen Schuldherrn. [2 Kings, 4,7]

Go, sell the oil and pay your creditors.

¹⁰⁶ See also Sreznevskij 1893-1912: entry *дѣльщикъ*: 758.

¹⁰⁷ According to Émile Benveniste (1969: 147), a similarly compounded noun is the Armenian term *partatēr* that literally means “master of the debt” (*tēr* is the Armenian term for “master”).

Romance languages.

As regards *French*, Petrażycki quotes the expression *dette active*, as opposed to the expression *dette passive*. Petrażycki mentions similar expressions in Spanish and Italian: *deuda activa* as opposed to *deuda pasiva* as well as *debito attivo* as opposed to *debito passivo*¹⁰⁸. As a native speaker of Italian I can witness that these expressions are no longer in use in Italian.

Finally, as regards *English*, that is something between a Germanic and a Romance language, Petrażycki mentions the expressions *debt active and passive*. One more expression that can be mentioned here is *owner of a debt*.

4.6.2. Transferability

A second factor that may cause the detachment of the obligatedness from the imperative side is *transferability without duplication*. In other words transferability may cause the transformation of the illusion of some quality into the illusion of some entity.

By *transferability without duplication* of something I mean that *something, that in t_0 has a certain set of spatial coordinates, in t_1 gets a new set of spatial coordinates, without having had more than one single set of spatial coordinates in the meanwhile*: in other words, without any *bi- or multilocation*.

Few people – if at all – seem to experience the illusions of debts, as if they existed with a *precise set* of spatial coordinates. Nonetheless legal debts seem to share this feature in their own way.

Since I am here concerned with a possible cause of the detachment of the obligatedness from the person of the debtor I will not discuss what a civil lawyer would call the *active transmissibility* of the debt (i.e. a change of the attributive side), but only its passive transmissibility (i.e. a change of the imperative side). Only the fact that the obligatoriness of a certain *facere* stops “burdening” a certain person and starts “burdening” another can cause the detachment of the obligatedness from the imperative side. The fact that the obligatedness can change its “owner” does not touch on the issue of the detachment of the obligatedness from the imperative side.

An obligatedness gets transferred without duplication if

- prior to t_i the imperative side A is obligated,
- in t_i the imperative side B starts *suddenly* being obligated, and
- starting from t_i , the former imperative side A is not obligated any more.

¹⁰⁸ See for instance art. 463 of the Codice per lo Regno delle due Sicilie (1819).

Usually debtors cannot transfer their debts at their whim. Creditors would not accept it. But there is a case in which creditors must accept a transfer and may even claim it: *it is the case of the debtor's death*.

The bilaterality of legal debts implies that, if the debtor dies, there is still a creditor who wants what he experiences as owed to him. This creditor might try to claim “his” debt (i.e. his credit) from a relative of the debtor – especially if that relative has taken possession of the deceased person’s material wealth ¹⁰⁹.

Hence, my conjecture is that transferability is caused by the existence of an attributive side that experiences a certain obligatoriness as owed to him.

Nothing like this can happen in the field of morality, where nobody by definition makes the experience of being an attributive side.

To make this point clear it must be stressed that in external reality *no transfer of debts really takes place*. The only phenomenon really taking place is that *the legal emotions experienced by the attributive side towards the first imperative side, when that imperative side dies, suddenly stop being experienced, and new ones, similar in every respect to the former ones, start being experienced by the attributive side towards the new imperative side*. The fact that these emotions are similar creates the illusion of a transfer by virtue of the Humean mechanism discussed above in sec. 2.6.

The conjecture that transferability plays a major role as regards the coming into existence of thick illusions of debts was inspired to me by Pierre Bourdieu. It bears repeating, though, that while Bourdieu thought that the moral obligatednesses that make up social capitals are just concealments of the true economic reality, I think that the “true” economic reality is made up of legal illusions.

With this in mind, let us read Bourdieu’s text.

¹⁰⁹ This is what I call non-institutional inheritance. My use of the term *non-institutional* corresponds by and large to the way David Hume used the term *natural*: «The right of succession is a very natural one, from the presumed consent of the parent or near relation, and from the general interest of mankind, which requires, that men’s possessions should pass to those, who are dearest to them, in order to render them more industrious and frugal. Perhaps these causes are seconded by the influence of relation, or the association of ideas, by which we are naturally directed to consider the son after the parent’s decease, and ascribe to him a title to his father’s possessions. Those goods must become the property of some body. But of whom is the question. Here it is evident the person’s children naturally present themselves to the mind; and being already connected to those possessions by means of their deceased parent, we are apt to connect them still farther by the relation of property. Of this there are many parallel instances». [Hume 1739-40: § 3.2.3, 510 ff.]

A factor David Hume does not mention and that I think plays a crucial role here is simply that the children of the deceased person are just the people for which it is usually *the easiest* to take the material possession of his wealth.

The different types of capital can be distinguished according to ... how easily they are transmitted. What matters here is, on one hand, how big the rate of loss is when the capital is transferred, on the other, to what extent the transmission of the capital can be concealed; the risk of loss and the cost of the concealment tend to vary in inverse ratio. Everything which helps to disguise the economic aspect also tends to increase the risk of loss (particularly when it comes to intergenerational transfers). [Bourdieu 1983^{*a}: 253 f., translation modified on the basis of Bourdieu 1983^{*b}: 197¹¹⁰]

According to Bourdieu, the price of “concealing” a transfer of capital¹¹¹ is a high risk of loss.

This typically happens with social capital, since its existence depends on gratitude. The transfer of “moral debts” from the parents “owning” them to their children is well “concealed” but it involves a high risk of loss. The child – especially when his parents have already died – cannot rely on the “moral debts” “owned” by his parents in the same way he can rely on the legal credits he may have inherited from them¹¹².

As I have already stated, *what Bourdieu calls concealment, in my approach, is simply the non-emergence of the illusion that something gets actually transferred. The “non-concealment” is nothing else but the emergence of the illusion that something gets transferred.* Of course, when I say that this is an illusion, I am not arguing at all that these illusions do not matter¹¹³.

¹¹⁰ The German and the English translation are different. I could not find the French original. While the English translation reads «the rate of loss and the *degree* of concealment tend to vary in inverse ratio», the German one reads as follows: «das Schwundrisiko und die Verschleierungskosten haben die Tendenz, mit entgegengesetztem Vorzeichen zu variieren». Or course, I think that the German translation is the correct one.

¹¹¹ As is evident from the use of the term *capital*, Bourdieu’s ontology implies that there is such a thing as a non-specified form of capital.

¹¹² It could be asked whether it makes sense at all to talk of the ownership over a moral debt. Since “moral debts” are purely imperative, nobody *owns* anything. But this is not completely accurate. Sure, who owns a social capital does not own other people’s obligatednesses/obligatorinesses but does own the permittedness to *ask for* favors with corresponding contents. (See also below fn. 116).

¹¹³ A topic that does not pertain to naïve legal ontology is the second-degree illusion of having or owning a certain debt where “actually” no such a debt “really” exists (i.e. is experienced by other individuals), as well as the second-degree illusory conviction not to have any debt where, instead, one is “actually” indebted. I call these phenomena *illusory illusions* and *illusory non-illusions*, respectively. Adolf Reinach considered these phenomena as conclusive refutations of any psychological theory of law (1913^{*}: 11). I discuss these issues elsewhere, as they pertain to jurisprudential ontologies (— a). The very core of the answer to Reinach’s objection, though, is simple. Debts do not really exist. What may or may not have really existed are the historical normative facts that usually bring into being the emotions that make up the illusions of debts. Reinach simply takes the historical existence of normative facts for some sort of current existence of legal entities.

On this topic cf. also above sec. 3.4, fn. 41.

Two final remarks inspired by Bourdieu are in order here.

First. That, *in general*, transferability is a major factor as to the emergence of illusions of free-standing entities has been implicitly noticed by Bourdieu when he discussed the concept of *embodied capital*:

The embodied capital, external wealth *converted into an integral part of the person* ... cannot be *transmitted* instantaneously (unlike money, property rights, or even titles of nobility) by gift or bequest, purchase or exchange. [Bourdieu 1983^{*a}: 245 f., emphases added]

Here Bourdieu was referring mainly to cultural capital, but what is worth stressing here is the opposition between *embodiment*, on one hand, and *transmissibility*, on the other.

As I said, Bourdieu talks of *embodiment of wealth*, since his Marxist approach leads him to think that wealth has an objective existence even when it is concealed, and that one way wealth is concealed is through embodiment.

The approach adopted in this book would lead to adopt a different terminology. For instance, I would have used, instead of the term *embodiment*, the term *undetachability*.

Nevertheless Bourdieu's statement suggested to me the conjecture that transferability, because of its connection with detachability, may be a major factor as to the coming into existence of illusions of free-standing entities.

Second. Bourdieu distinguished non-institutionalized social capital from institutionalized social capital. According to him, forms of institutionalized social capital are *titles of nobility* – the non-institutionalized form thereof being the simple set of connections and “moral debts” a certain person owns¹¹⁴.

Let us read a quotation where the continuum from non-institutionalized social capital to the title of nobility is described by Bourdieu:

The reproduction of social capital presupposes an unceasing effort of sociability, a continuous series of exchanges in which recognition is endlessly

¹¹⁴ Here is a quotation where the concept of *institutionalized capital* is explained by Bourdieu: «[C]apital can present itself in three fundamental guises: as *economic capital*, which is immediately and directly convertible into money and may be institutionalized in the forms of property rights; as *cultural capital*, which is convertible, on certain conditions, into economic capital and may be institutionalized in the forms of educational qualifications; and as *social capital*, made up of social obligations (“connections”), which is convertible, in certain conditions, into economic capital and may be institutionalized in the forms of a title of nobility». [Bourdieu 1983^{*a}: 243]

Actually, Bourdieu does not explain what he exactly means when he refers to *non-institutionalized economic capital*. The difference between *non-institutionalized economic capital* (as opposed to *institutionalized economic capital*) is in discussed detail in Fittipaldi (— a).

affirmed and reaffirmed. This work, which implies expenditure of time and energy and so, directly or indirectly, of economic capital, is not profitable or even conceivable unless one invests in it a specific competence (knowledge of genealogical relationships and of real connections and skill at using them, etc.) and an acquired disposition to acquire and maintain this competence, which are themselves integral parts of this capital ... [T]he possessors of an inherited social capital, symbolized by a great name, are able to transform all circumstantial relationships into lasting connections. They are sought after for their social capital and, because they are well known, are worthy of being known ("I know him well"); they do not need to "make the acquaintance" of all their "acquaintances"; they are known to more people than they know, and their work of sociability, when it is exerted, is highly productive ... The title of nobility is the form *par excellence* of the institutionalized social capital which guarantees a particular form of social relationship in a lasting way. [Bourdieu 1983^{3a}: 250 f.]

My conjecture is that also in the case of titles of nobility a major factor for their detachment into illusions of free-standing entities is their transferability in the form of inheritance.

Of course, this factor operates best when the child of a nobleman does not have the title before the very moment of the death of his father (non-duplication). I will say something more on this topic in the next paragraph when explaining transitoriness in the terms of half-transferability. (About this issue see also sec. 4.9.2).

4.6.3. Transitoriness

I call a certain reality '*transitory*' if its representation necessarily involves the thought that at a certain moment it will cease to exist, while I call it '*persistent*' if its representation does not involve this thought. While prototypical qualities are persistent, states are transitory (above, sec. 1.4 and 2.5).

The obligatedness involved in legal debts is transitory in that debts are conceived as susceptible to termination, first of all (though not exclusively) through the payment on the part of the imperative side. Debts are a kind of obligatedness that is expected to cease to exist prior to the death of the obligated person.

A comparison with slaveness can shed some light on this point. Slaveness is conceived as a state or a quality depending on the fact that it may or may not terminate before the person's death (as well as on the fact that it may or may not begin after his birth). Now, while *slaveness* may be conceived as a quality or a state, depending on given legal conceptions, the *obligatedness of the slave* is a quality of the slave as it persists until slaveness does.

As we know, according to William Croft the *transitory possession of a state may be expressed by a possessive construction (with the state being a*

root noun) more easily than the more permanent possession of some quality (sec. 2.5).

The obligatedness of debts functions in a way similar to other states, such as hungriness or thirstiness. As we know, there are languages in which the state of being hungry is expressed through possessive constructions:

Tengo hambre (Spanish)

Ho fame (Italian)

(lit. "I have hungriness")

Likewise, terms such as *obligatio* or *objazannost'*, that originally meant "obligatedness" (above sec. 4.6, fn. 81), have started being used in possessive constructions.

Habeo obligationem ... (Latin)

У меня обязанность ... (Russian)

(lit. "I have the obligatedness...")

Even though no term for "debt" I am discussing in this book has this origin, we cannot exclude that in some language the term for "debt" stems from some term meaning obligatedness and that, over time, it undergoes unmarkedization.

It could be objected that transitoriness cannot be a factor conducive to the detachment of the obligatedness from the imperative side, because it just *causes obligatedness to be conceived as a state*. In other words, showing that states may be expressed through root nouns does not amount to showing that states are experienced as entities.

But there is still the question left open by Croft (sec. 2.5): *Why is the relation between a state and the possessor of the state more amenable to metaphoric expression as a possession relation than the relations between a quality and the possessor of the quality?* Is there something that states share more with entities than with qualities?

I will make a conjecture regarding debts that I cannot exclude could be further generalized to accommodate such phenomena as the "possession" of hunger, thirst, sleepiness, etc.¹¹⁵.

The transitoriness of the obligatedness, in the case of debts, has a feature that leads to conceive it as a sort of *half-transferability*. We have *half-transferability when a phenomenon occurs in a way resembling a transfer, though in an imperfect way*. The transfer can be imperfect

¹¹⁵ I am thinking of Italian expressions such as: *Ho voglia di mangiare* ("I feel like eating something", lit. "I have wish to eat"), *Ho sonno* ("I am sleepy", lit. "I have sleepiness").

Any generalization should reckon with the fact that here there is no suddenness (see just below in text).

1. if there is sudden *transfer with duplication*,
2. if there is sudden *creation ex nihilo*,
3. if there is sudden *destruction into nihil* (i.e. without a transformation into something else).

Let me first spend a few words about 1 and 2, and then focus on 3.

In general naïve ontology – with the exception of miracles that are called ‘miracles’ because of the very fact that they do not belong to general naïve ontology – no transfer with duplication usually takes place. Hence, a transfer with duplication is experienced as a sort of imperfect transfer. This is the case of titles of nobility and computer files.

Sudden creations *ex nihilo* do not belong to general naïve ontology either. God creates *ex nihilo*, people do not. My conjecture is that, *if something suddenly appears somewhere, it is subconsciously assumed to have been somewhere else up to the moment of its appearance*. Hence, in this case a transfer, rather than a creation, is assumed to have taken place. The reason for this is that *suddenness* is alien to most everyday natural processes (“*Ἡ φύσις οὐδὲν ποιεῖ ἄλματα*”, “*natura non facit saltus*”), while it is a prototypical feature of transfers. When A gives *x* to B there is prototypically a moment in which *x* ceases to be in A’s control and starts being in B’s. This prototype may cause the sudden appearance of something to be experienced as the result of a transfer from a hidden place.

By the same token, my conjecture is that sudden destruction into nihil does not belong to naïve ontology (“*οὐδὲν γὰρ χρήμα γίνεται οὐδὲ ἀπόλλυται*”, “*Rien ne se perd, rien ne se crée ...*”). If something suddenly disappears without leaving any traces it might be subconsciously assumed that it is now in a hidden place.

If the transitoriness of an obligatedness involves the representation of its sudden destruction (through the performance of the imperative side or else, such as a release on the part of the attributive side), we have to do with a transitoriness involving a half-transferability.

It is worth remarking that while the payment of a debt causes immediately the termination of the legal emotions in all three possible participants, this is not the case of “moral debts”. *Moral obligatednesses do not get extinguished in a sudden*. The fact that you were my guest one year ago may imply that you owe me hospitality in your place. Nonetheless, the fact that I have not yet been able to take advantage of your hospitality does not exclude that you may feel *entitled to ask*¹¹⁶ to be my guest again this year.

¹¹⁶ As I have already remarked (sec. 4.6.1 and 4.6.2, fn. 112), it is of paramount heuristic importance to stress the distinction between one’s attributivesidedness as regards a certain *facere* of the imperative side and one’s attributivesidedness as regards *asking for a certain facere*. In the first case the attributive side owns an obligatedness/obligatoriness. In the second case the attributive side owns his own permittedness.

If social capital is definitionally made up of moral obligatednesses/obligatorinesses, it nonetheless involves also *legal* attributivesidednesses as the “owner” of a certain social

All this is implied by the *refusal of calculation* and the *unceasing effort of sociability* Bourdieu talks about (sec. 4.6.2). Moreover Bourdieu's concept of unceasing effort of sociability excludes that there can be such a thing as an attributive side releasing the imperative side from his moral obligatedness.

Transitoriness (and half-transformability) can play a role not only as to the detachment of the obligatedness from the person of the imperative side, but also as to the *detachment of the obligatoriness from the facere*. Not only people, but also things can have states. The concept of *state of matter* does not belong to naïve ontology, but the concepts of cold and heat do. That is why there are languages in which the fact that something is hot or cold can be expressed through unmarked verbs. Think of the Latin verbs *caleo* and *frigeo*.

Hence the transitoriness (understood as half-transformability) of an obligatoriness can cause the illusion of the detachment of the obligatoriness from the *facere* owed by the imperative side.

4.6.4. Fungibility

We can now come to factors conducive exclusively to the detachment of the *obligatoriness* from the *facere*. In this section, I will deal with fungibility. Transformability will be dealt with in the next one.

We have to explain the detachment of *obligatoriness*:

- from the imperative side's *facere* or
- from the *things* that the imperative side has *to give* (as his *facere*).

It is worth noting that in many languages the word for “debt” derives from:

1. an adjective or a noun referring to the obligatoriness of the imperative side's *facere* (e.g. the English, Italian and German terms *debt*, *debito* and *Schuld[en]*),
2. a noun referring to the thing that is to be given by the imperative side (e.g. the Latin terms *aes alienum* and *meum*),
3. a noun referring to the advantage to the attributive side of the imperative side's *facere* (e.g. the Ancient Greek term χρέος).

There is connection between the cause of the *conceptual detachment* of the obligatoriness and the possible cause of the *emergence or specialization in a certain language of a term* referring exclusively to “debts”. If something

capital owns the permittedness of asking for favors – though in a way that allows the other side to refuse them. This point stands out clearly if we just think of the fact there is plenty of just-ask-for-something-permittednesses we do not ascribe to simple acquaintances or strangers (“How dare he ask for that?”). Think of asking for money.

is conceptualized as different from something else, there is some chance that two terms get developed for either entity. If they are not conceptually distinguished, of course, there is not even a chance for that.

My (trivial) conjecture is therefore that *in a certain culture the conceptualization of a certain reality probabilistically causes the emergence or the specialization of some term for that reality in that culture* (while its non-conceptualization definitely prevents such a term from emerging or getting specialized).

My hypothesis is that *the major factor affecting the detachment of obligatoriness is fungibility* (i.e. the capability of mutual substitution of the individual units of a certain kind of good or commodity). Instead, if a person has to give a certain (i.e. *individuated*) thing the obligatoriness can hardly be experienced as distinguished from the thing itself. Below (sec. 4.12), we will see that it is very difficult that an illusion of a free-standing *right of ownership* – as detached from the thing *owned* – comes into existence in naïve legal ontology, since ownership is so closely attached to the things over which it is. This is so because ownership is over *individuated* things (even in the case of *fungibles*).

In the case of fungible things there is a chance that a vague idea of some sort of obligatoriness detached from what has to be given emerges before the things owed get individuated through the actual handing-over. Before what has to be given has been actually given the attributive side does not know “*which*” money he will get. He knows only that he will get a certain amount of money.

Compare these two sentences:

Give me my bag (1)

Give me my money (2)

In case (1) we can expect that the attributive side already experiences himself as the owner of the bag, while in case (2) we have a sort of *conceptual hysteron proteron*, as what temporally happens later is anticipated to what temporally happens earlier. *The myness* comes after *the handing-over* of the money, but the creditor calls that money *his* money before it has been given to him. Hence there is a *myness* (or *hisness* – depending on the point of view) before the money and independently of it. The money (or, more broadly speaking, the fungibles) is not individuated until it has been given to the attributive side. Prior to the individuation there is nothing over which the attributive side can properly assert his ownership by using the possessive adjective *my*. The attributive side already calls *his* money what actually still is but the imperative side’s money¹¹⁷.

¹¹⁷ I give a few hints as regards the issue of the role of the civil law concepts of *traditio* and *real contract* in naïve legal ontology below, sec. 4.12.

Such a conceptual hysteron proteron – along with the availability of other terms for “money” – may be the cause of the specialization of the Latin term *aes* for “debt” and “credit” (see also sec. 4.6.1). In the case of fungibles that have not been yet handed over the *myiness* and the *hisiness* are easily perceived as detached from what is to be given.

Mine is a falsifiable hypothesis in Karl Popper’s sense. It excludes that there exists a language in which a noun meaning “debt of a non-fungible thing” has a lower degree of markedness than a noun meaning “debt of fungible things”. (It does not exclude, though, that there can be a language with only one term meaning both, or with two terms having the same degree of markedness).

A detachment of the obligatoriness can also take place in the context of alternative obligatednesses (also termed “disjunctive obligations”), or obligatorinesses of giving not-yet-existing things, but I think that such cases play virtually no role in naïve legal ontology. Hence there is no reason to discuss them.

4.6.5. Transformability

A second factor – if less important than fungibility – that may contribute to the detachment of obligatoriness is transformability. If the *facere* owed by the imperative side to the attributive side can be transformed into a different *facere*, the illusion can emerge that there exists some sort of obligatoriness that gets transferred from the previous *facere* to the new one. Thus transformability might cause the illusion of a free-standing – detached – obligatoriness.

Transformability belongs to naïve legal ontology. A transformation takes place if an imperative side, who has *to give* a certain amount of money to the attributive side, runs out of money and the attributive side accepts to “transform” the *obligatoriness of that giving* into the obligatoriness of the building of a fence in his field or into the obligatoriness of the giving of some cheese the imperative side produces, *vel cetera*.

In naïve legal ontology the transformation of an obligatory *facere* into another obligatory *facere* is experienced much as the transformation of some milk into a piece of cheese, or of some wood into a chair, etc. In naïve non-legal Western ontology transformability is explained through the naïve idea that there is some sort of *matter* that can lose a shape (form) and get a new one. The matter is thought to persist throughout the change¹¹⁸.

¹¹⁸ This idea was first made explicit by Aristotle. About the role of matter (ὕλη) in changes (μεταβολαί) see *Met.* 1042a 32-33. Of course, this is just a naïve rationalization of common sense, full of shortcomings. See at this regard the account given by Michael J. Loux: «In later writings like the *Physics*, Aristotle confronts the fact that the primary

It is worth recalling that the very idea of matter is probably based on the prototype of *wood*. Both the Greek term ὕλη and the Latin term *materia* originally used to mean “wood”, “trunk”.

The fact that an obligatoriness can be transformed into another may involve the idea that the obligatoriness exists independently of the *facere* it actually takes on. Of course, the fact that both matter and obligatoriness are conceived of as existing independently of a certain form does not imply that they are conceived of as capable of existence independently of any form.

Though in this book I am concerned with *naïve* legal ontology, it is worth spending a few words about the way the transformability of obligatoriness has been dealt with by jurisprudence, especially in the civil law tradition. This tradition has come to a conception of the transformation of obligatoriness quite far from that of naïve legal ontology. Yet some traces of naïve legal conceptions can still be found. I think that a short discussion of the way jurisprudence has treated the transformability of obligatoriness can shed some more light on both the way naïve legal ontology differs from jurisprudential ontology and how transformability affects the detachment of the obligatoriness from the *facere*.

In the civil-law tradition the transformation of an obligatoriness is called *objective novation*: objective novation «involv[es] *the substitution of a new obligation for an old one*», while subjective novation «involv[es] the substitution of a new obligor for a previous obligor that has been discharged by the obligee» (BLD 2004: entry *Novation*, emphasis added). Since subjective novation involves obligatedness, rather than obligatoriness, we shall discuss only objective novation.

It worth noting that civil lawyers do not conceive objective novation in the terms of the transformation of an old obligatoriness into a new one. They rather prefer to say that an old obligatoriness gets extinguished and that at the very moment the old one gets extinguished a new one comes into existence. We can read the art. 1271 of the French Code Civil (1804) at this regard:

substances of the *Categories* have temporally bounded careers, that they are things that come to be and pass away. To accommodate this fact, he construes ordinary objects as composites of matter and form, but he interprets the relationship between the matter and form constituting a familiar particular as that of predication. He tells us that the form is predicated of its matter; and in the *Metaphysics* this account leads Aristotle to question the idea that the primary realities are basic subjects of predication. In the light of the hylomorphic analysis, this idea entails that matter is primary substance: and as Aristotle sees it, matter lacks the determinateness required of what is to play the explanatory role of a primary reality. Although the Aristotle of the *Metaphysics* does not want to deny that the familiar particulars of the *Categories* are genuinely real, the insight that they are composites of prior entities entails that they cannot be primary substances». [Loux 1991: 870 f.]

Art. 1271. La novation s'opere ... [l]orsque le débiteur contract envers son créancier une nouvelle dette qui est substitué a l'ancienne, laquelle est éteinte ...

Art. 1271. Novation is brought about ... [w]here a debtor contracts towards his creditor a new debt which is substituted for the old one, which is extinguished ...

Surprisingly, this conception, if obviously naïve in that it assumes that debts are things that can be created and extinguished, somewhat parallels the psychological conception of law. But there is a crucial difference.

The psychological theory of law does *not* predict that in case of transformation the previous *facere* suddenly ceases to be experienced as obligatory. It predicts that, *if* it suddenly stops being experienced as obligatory, and at the very same moment a different *facere* starts being experienced with that very same quality, the illusion of a transformation may emerge. This illusion, in turn, may cause the illusion of a free-standing obligatoriness. There is no reason to exclude that some attributive side, after having agreed on a “transformation”, claims that both the previous *facere* and the new one are performed.

One of the causes of the fact that in civil law jurisprudential ontology novation has been conceived in a way so different from that of naïve legal ontology might be the rule stating that prior charges and mortgages of a former claim do not pass to the one which is substituted to it, unless the creditor has expressly reserved them (art. 1278 code civil, see also § 1378 of the ABGB). But it is also possible that the opposite is true, namely that this rule has caused the emergence of a jurisprudential conception that somewhat parallels the psychological one. Further research is required at this regard.

It is worth remarking that in the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB) of 1811 both the jurisprudential and the naïve conception are mirrored.

§ 1376. Die Umänderung ohne Hinzukunft einer dritten Person findet statt, wenn ... der Hauptgegenstand einer Forderung verwechselt wird, folglich die alte Verbindlichkeit in eine neue übergeht.

§ 1376. The transformation [*Umänderung*] without the participation of a third person takes place when ... the principal object of a claim gets changed [*verwechselt*], and therefore the former obligation changes [*übergeht*] into a new one.

§ 1377. Eine solche Umänderung heißt Neunungsvertrag (Novation). Vermöge dieses Vertrages hört die vorige Hauptverbindlichkeit auf, und die neue nimmt zugleich ihren Anfang.

§ 1377. Such a transformation is called contract of novation. By virtue of this contract the former principal obligation ceases to exist and a new one has at once its commencement.

The jurisprudential conception is mirrored in § 1377. A *Verbindlichkeit* (lit. “obligatoriness”¹¹⁹) ceases to exist (*hört auf*) and new one has its commencement (*ibr Anfang*). The naïve legal approach, instead, is mirrored in the noun *Umänderung* (“transformation”), as well as in the verbs [*in etwas*] *übergeben* (“to change [into something]”) and *verwechseln* (“to change”).

4.7. DUTIES

We can now check how many of the factors affecting the detachment of obligatednesses/obligatorinesses into debts operate in the case of duties.

First of all, we need a definition of *duty*, *dovere*, *Pflicht*.

By the term *duty* I understand an illusion involving:

1. *the obligatedness of the imperative side as to a certain facere as a consequence of a command issued by some superior,*
2. *the obligatoriness of a certain facere on the part of the imperative side as a consequence of a command issued by some superior.*

The concepts of *command* and *superior* (i.e. a person holding a certain *vlast'* in Petražycki's sense) will be discussed in sec. 4.8 ff. To understand this paragraph an intuitive grasp of these concepts will suffice.

The English term *duty* means “duty-resulting-from-a-command” starting from the 13th century. Its meaning “function”, “office” dates back to the 14th century”. Only in the 15th century did *duty* acquire the meaning of “payment enforced or levied” (EE 1986: entry *duty*). This last meaning and the legal illusion it refers to are of no concern for us here, as they can be explained much in the same way as the illusions of debts. At the end of this section, instead, I will spend a few words about *duty* in the sense of “function”, “office”.

Also the German term *Pflicht*, the Italian term *dovere* and the Russian term *dolg* have among their core meanings that of “duty-resulting-from-a-command”.

Let us now examine the factors that may affect the detachment of the obligatedness and obligatoriness from the imperative side and his *facere*.

Bilaterality.

As I have already argued in the case of debts, the fact that an obligatedness is between two persons, rather than inherent to exclusively one, may cause the detachment of the obligatedness from the person of the imperative side¹²⁰.

¹¹⁹ As regards this German term see above, fn. 81.

¹²⁰ To be sure, commands do *usually* create obligatednesses/obligatorinesses between the superior and the imperative side, but it is not necessarily so. The superior

My hypothesis excludes that an unmarked term for “obligatedness in a moral sense” can come into existence before an unmarked term for “duty-resulting-from-a-command”. This hypothesis implies that, if a term such as *Pflicht* has started meaning “moral obligatedness/obligatoriness”, this is probably a consequence of the trickling down of philosophical thinking onto naïve language. Of course, this corollary is a hypothesis that should be historically tested.

As regards the Italian term *dovere*, all the occurrences (but one: *Pg* 17,86) of this term in Dante’s *Divina commedia* (1321) refer to bilateral (i.e. legal) phenomena (see *Pg* 10,92, *Pg* 13,126, *Pg* 23,15 *Pg* 30,5, *Pd* 9,18 and *Pd* 18,53). In some cases it can be argued that *dovere* was used in the meaning of “debt” (owed to God)¹²¹.

Transferability.

Commands are usually issued because certain *tasks* have to be performed.

If there is more than one task to be performed and the superior has more than one subordinate at his disposal, A_1 and A_2 , the superior may decide that it is better that a certain task that he had previously assigned to A_1 is performed by A_2 . This may happen because of the most diverse reasons. For instance, A_1 may have got sick.

In this way the illusion may emerge that the *obligatedness* of A_1 has been transferred to A_2 through a command of the superior. The superior may pretend that he *just* “transferred” a *duty* (instead of “creating” a new one) in order to stress that he is coping with a pre-existing problem, rather burdening A_2 with his capricious commands. Think of the case the task could be performed by the superior himself. If the situation is construed as if there were a *pre-existing* duty – a “pending” duty – that must be assigned to someone, it might be less probable that it is asked why the superior does not perform that task himself.

In order to avoid misunderstandings it should be pointed out that a superior cannot “cancel” a previously issued command by issuing a new one that in some way negates¹²² the former.

When the superior assigns to A_2 the duty he had previously assigned to A_1 he is trying to undo the command₁ with which he had previously brought about A_1 ’s obligatednesses. But command₁, once issued, cannot be cancelled. As a historical fact, it keeps having existed for ever. The

may also wish to bring about in the imperative side an imperativesidedness vis-à-vis some third who by the operation of the superior’s command starts experiencing himself as an attributive side. In this case we have a trilateral phenomenon.

¹²¹ For example: «ombre che vanno / forse di lor dover solvendo il nodo» (Perhaps they are shades who go loosening the knot of their debt). [*Pg*, 23,15]

¹²² Petrażycki talks of *otricatel’nye izrečeniya*, “negative pronouncements” (Petrażycki 1909-10: 328, 1909-10*: 157).

superior, with a new command, can but try to eradicate A_1 's intention to comply with command_1 and try to create in A_2 a new intention similar in content to the former A_1 's intention. (I will say something more at this regard in sec. 4.11.)

Of course, the fact that these commands have the same content as regards *what* is obligatory does not exclude that they are contradictory as regards *who*, A_1 or A_2 , should carry out the duty. Actually, they are contradictory. This is why we say that the superior changed his mind¹²³.

The superior can only hope that A_1 will stop experiencing his obligatedness and A_2 will start experiencing his. But it cannot be excluded that A_1 , say, though sick, still wants to carry out his duty and feels guilty for not being able so to do. This amounts to the fact that the previous duty still exists in A_1 's psyche.

Transitoriness.

As I said, the superior through his commands can most of the times *bring about* and *erase* certain legal obligatednesses/obligatorinesses in his subordinates. In the first case we have a "creation" *ex nihilo*, in the second we have a "destruction" into nihil.

Even if it is impossible for the superior to cancel some command that he issued, since a command, once issued, keeps having existed for ever (cf. below sec. 4.11), the superior is usually successful in erasing a legal norm in his subordinates' psyche. This is especially the case if by the new com-

¹²³ To my knowledge, Petrażycki addressed the problem of the contradiction between commands only in the case two or more superiors issued commands in the same field of conduct: «Endowing more than one subject with the right to exert authority over identical subordinates would, in accordance with the attributive and adversary nature of the law, lead to more or less sharp (and possibly sanguinary) conflicts if the various persons possessing that authority could issue different (perhaps diametrically opposed) commands [*velenija*] with a like claim to require the execution thereof. Characteristically, the legal consciousness tends so to adapt the relevant convictions and the actual experiences (the consciousness of a duty of subordination and of a right to obedience) that in individual cases – in particular when the commands [*rasporjażenija*] are contradictory [*protiworečaiščie*] – the actual duty of obedience is acknowledged with regard to one, and not to two or more, of those who issue the commands. In precisely the same manner, the legal consciousness of those who issue the commands ordinarily eliminates the idea that substantially diverse commands of others be obeyed at the same time. Thereby conflicts are prevented». [Petrażycki 1909-10: 208, 1909-10*: 132 f.]

There is no reason not to extend this contention to contradictory commands issued by the same superior as well as not to connect this issue with the issue of repeal discussed above (sec. 4.4.4).

Petrażycki's psychological conceptions as regards ethical contradictions could be compared with Łukasiewicz's psychological principle of contradiction (1910).

Quite surprisingly the psychological theory of ethics comes to results that are somewhat compatible with certain conclusions arrived at by Hans Kelsen in such late writings as *Recht und Logic* (1965) or *Derogation* (1962).

mand the subordinate is released from a certain obligatedness. Therefore, duties are experienced as both createable and destructible.

Moreover, once a duty has been performed, the corresponding obligatedness/obligatoriness usually *suddenly* ceases to be experienced.

These *usual* phenomena might cause the detachment of both the obligatedness and the obligatoriness.

As we have seen as regards *transferability* and we will see just below as regards *transformability*, though, the superior may often find it more psychologically expedient to pretend that some transfer or transformation has taken place, rather than a creation *ex nihilo*.

Fungibility.

This factor seems to play no role here.

Transformability.

My sociological hypothesis is that duties get transformed more often than debts. Usually, debts can be transformed only if there is the agreement of both the attributive and the imperative side. As I said, in the case of duties, instead, the superior can usually successfully destroy previous duties and bring about new ones at his whim.

The attributive side, though, may find it expedient to pretend that he has just *changed* a previous duty into a new one, especially when the new duty is more burdensome than the other (or it is just an obligatedness the imperative side is not used to).

I think that the theory of *endowment effect* can be applied here, though with an extension. The *endowment effect* (or *divestiture aversion*) is the hypothesis that people value a good more if it has already been assigned to them¹²⁴.

I think that a similar hypothesis can be made as for duties-resulting-from-commands. In particular, my hypothesis is that, *unless the subordinate has a pre-existing preference or aversion for a given task, once a task has been assigned to him, he will experience the new task (along with the very act of assignment) as more burdensome than the previous one, even if third spectators would consider the burden of either task to be by and large the same*. Testing empirically this hypothesis does not lie within the scope of this book.

A cause for this phenomenon may be that *receiving a command that assigns a task is painful in itself*, independently of how burdensome the task is.

The intuitive knowledge of this phenomenon may explain why some superior may try to *conceal* the fact that a new duty has been “created” *ex nihilo*.

¹²⁴ There is a huge amount of literature on the *endowment effect*. See the essays collected in Kahneman & Tversky 2000.

Moreover, if the new task is *more burdensome*, talking in the terms of transformation can be an effective way to conceal that the new task is more burdensome than the previous one. If it is *just* a transformation, the amount of required effort (as well as the amount of involved obligatoriness) cannot be higher, much as the amount of matter involved in naïve ontological transformations remains constant throughout the process.

With perhaps the only exception of transformability, the amount and intensity of the factors operating towards the detachment of obligatedness/obligatoriness in the case of duties are smaller than in the case of debts. Hence, no wonder that in ancient languages it is hard to find *naïve* words for “duty”. In ancient Greek the term whose meaning is the closest to that of *duty* is ἔργον (lit. “work”, “task”). The noun ἔργον is undetached from the *facere*, though. Therefore in Ancient Greek we have a not-yet-accomplished legal illusion. The same holds true as for the Latin term *officium* that stems from *opus* (“work”) and *facere* (“to do”).

A falsifiable implication of the *comparison of the factors* affecting the detachment of the obligatedness/obligatoriness in the case of debts and in the case of duties is that, on average, the terms for “duty-resulting-from-a-command” should not be less marked than the terms for “debt”. Of course, there can be languages with just one term for both, as is the case of the Russian term *dolg* or the Italian term *dovere* at Dante’s time.

In the case of duties there is a third kind of detachment calling for an explanation: *the detachment from the utterance causing the obligatedness/obligatoriness*.

First of all it is worth remarking that in some languages, like Italian, the term for “command” can be the object of a possessive construction:

Ho l'ordine di non fare entrare nessuno (1)
(lit. “I have the command/order not to let anybody in”)

In this case, *ordine* means by and large “duty”. Of course, if the word *dovere* – instead of the word *ordine* – is used, no *explicit* reference is being made to the fact that the obligatedness stems from a command:

Ho il dovere di non fare entrare nessuno (2)

It is worth remarking that in Italian a possessive construction such as (1) is possible also with terms referring to *negative commands* (3), but it is not possible with terms meaning “suggestion” (4):

Ho il divieto di farti entrare (3)
(lit. “I have the prohibition to let you in”)

[?]*Ho il consiglio di farti entrare* (4)
(lit. “I have the suggestion to let you in”)

My hypothesis is that (1) and (3) are acceptable but (4) is not because while a command or a linguistic prohibition create the illusory states of obligatedness or prohibitednesses, suggestions do not create an analogous illusory state of “suggestedness”¹²⁵. Why is “suggestedness” different from obligatedness/obligatoriness? The reason might be that a suggestion constrains the recipient’s freedom much less than a command or a prohibition. This hypothesis excludes that there exists a language in which there is a possessive construction for a noun meaning “suggestion”, while there is not for a noun meaning “command” or “prohibition”.

As regards the issue of the detachment itself from the utterance, my conjecture is that duties are experienced as entities independent of commands because superiors may pretend to change or transfer duties *through* their commands, rather than destroying them into nihil and creating new ones *ex nihilo*. *If superiors change or transfer duties through their commands, duties must be something different from the commands themselves.* Commands are experienced as tools whereby the superior manipulates obligatednesses/obligatorinesses. This causes both the detachment of obligatednesses/obligatorinesses from the commands and the detachment of these illusory obligatednesses/obligatorinesses into illusory legal entities. In table 4.19 some superior first creates OB with a command. Then he pretends to be changing OB into *OB* by issuing a second command. Finally, with a third command, he changes again his mind and wants his subordinate to carry out his first issued command.

Table 4.19. – Double “change” of some obligatedness/obligatoriness.

COMMAND ₁		COMMAND ₂		COMMAND ₃	
↓		↓		↓	
OB	→	OB	→	OB	→

In English – as well as in several other languages – *duty* can mean also a legal illusion involving:

1. *the obligatedness of the imperative side as to a certain facere as a consequence of an office, a function or a status he holds,*
2. *the obligatoriness of a certain facere on the part of the imperative side as a consequence of an office, a function or a status he holds.*

This kind of obligatedness/obligatoriness is hardly *transferable* independently of the office itself – especially in the realm of *naïve* legal life (I am thinking of offices such as *father, boss, head of the tribe*, etc.).

¹²⁵ To be sure, in Italian there is also the construction *Ho il permesso di ...* (“I have the permission to ...”). In this case the amount of the recipient’s freedom is increased as a constraint has been removed.

By the same token, in naïve legal life, they are not *transitory*, since they exist until the office does.

As regards *fungibility* – it plays no role here.

Finally, these duties may be *transformed*, but this domain pertains to jurisprudential legal ontology.

Duties-resulting-from-offices seem to be too closely attached to the offices they stem from. Therefore, my falsifiable hypothesis is that in no language can an unmarked noun referring to *duties-resulting-from-offices* emerge before an unmarked noun referring to *duties-resulting-from-commands*¹²⁶. (Of course, I am referring to unmarked terms different from terms meaning “office” or “order”).

4.8. RIGHTS VS. POWERS?

We can now turn to powers and rights.

My starting point is the conjecture that *in naïve legal ontology powers and rights are not sharply differentiated*.

I will proceed in the following way. I will first try to distinguish two different – though overlapping – legal-psychological phenomena. Then, I will inquire to what extent there exist two different nouns roughly corresponding to them. Finally (in sec. 4.9), I will make some conjectures about the possible causes of the emergence of the illusions to which these nouns refer.

A first psychological phenomenon that can give rise to illusions of legal entities are the legal relationships of the kind *pati-facere*. The *facere* involved in this kind of legal relationship is cognitively quite salient. Hence we can expect that some term referring to this *facere* emerges and that this term has a low degree of markedness. Petrażycki refers to the legal entity

¹²⁶ In Ancient Greek the term for “duty-resulting-from-an-office” (καθήκον) has a higher degree of markedness than the term meaning “duty-resulting-from-a-command” (ἔργον). The term καθήκον is the neutral present participle of καθήκω that in the third person means “to be expedient”. As we know, though, the term ἔργον is undetached from the *facere*. As regards the term δεόν (present participle of the verb δεῖ, “it is necessary, obligatory”), it does not specifically refer to duties-resulting-from-offices.

In Latin, *duty-resulting-from-an-office* can somewhat be translated with the terms *munus*, *munia* and *officium*. We know that *officium* stems from a term meaning “work”, “task”. The term *munus* means first of all “office”. Only synecdochically does it mean “duty-resulting-from-an-office”. The same can be argued in the case of *munia*.

It is worth recalling here that, according to Benveniste, the *munus* was originally connected with the idea of an exchange because «[in] fact, among the duties of a magistrate *mūnus* denotes spectacles and games. The notion of “exchange” is implied by this. In nominating somebody as a magistrate one confers on him honour and certain advantages. This obliges him in return to counter-service in the form of expenditure, especially for games and spectacles» (Benveniste 1969*: 79).

belonging to the attributive side in this kind of legal relationship with the term *pravomoćie* (lit. “power of right”). Instead, I will keep using the term *permittedness* in order to avoid using a terminology based on a yet-to-be-explained illusion and to stress that we are dealing with the problem of the transformation of some illusory quality into some illusory entity.

A different psychological phenomenon, already discussed by Petrażycki, that may give rise to illusions of legal entities is *vlasti* (“powers”) or *prava vlasti* (lit. “rights of power”). To refer to this phenomenon I will avoid such nouns as *power*, *authority*, etc.; I will instead make use of the term *authoritativeness*. I shall do this because of the very same reason I use the intentionally cumbersome term *permittedness*.

To get acquainted with the concept of *authoritativeness* the best thing to do is to start from Petrażycki’s clear definitions. He distinguishes between *general powers* and *special powers*. I will adapt Petrażycki’s text to my terminology. Therefore, I will translate *vlast’* with *authoritativeness*.

1. The term *general authoritativeness* [*obščaja vlast’*] ... must be understood as meaning legal relationships [*provootnošenija*] consisting of: a) a general legal obligation of obedience (to obey commands of every sort issued by the other party – whatever their content – or to obey commands of every sort with specified exceptions); and b) general obligations to tolerate actions (to tolerate actions of every kind – including corporal punishments which involve maiming or death – by the personal entity endowed with the authoritativeness^[127] [*vlastitel’*], or to tolerate actions of every kind with specified exceptions – such as capital punishment). General authoritativenesses are, therefore, either unlimited or limited by particular exceptions.
2. The term *special authoritativeness* [*special’naja vlast’*] must be understood as meaning the special obligations of some and the rights of others in that they are limited to a definite scope of conduct [*ograničennye opredelennoju oblast’ju povedenija*]. Thus the authoritativeness of the president of a learned society, legislative assembly, meeting and the like is a special authoritativeness, the right [*pravo*] that only certain actions of his are tolerated, as well as the right that certain arrangements are observed by the members of the assembly, namely only actions and arrangements related to the proper order of considering the relevant issues (and not for example, such as relate to the private domestic life of the members of the assembly). [Petrażycki 1909-10: 199, 1909-10* 129, translation modified]

We can sum up Petrażycki’s conception of authoritativeness in the following way¹²⁸. The person endowed with such an authoritativeness can do two different kinds of things:

¹²⁷ The phrase “personal entity endowed with attributiveness” corresponds to the Russian term *vlastitel’*: “power-holder”.

¹²⁸ Petrażycki discusses also the *vlasti* consisting of participating «in the management of general affairs by making certain declarations which must be taken into account

1. He can issue commands (or prohibitions) to his imperative sides (law-“creating” *facere*).
2. He can directly act as the attributive side in *pati-facere* legal relationships against his imperative sides.

Special authoritativenesses are distinguished from general authoritativenesses in that the former are psychologically experienced exclusively within a positively defined field of conduct, while the latter are experienced in virtually whatever field of conduct with exceptions ¹²⁹.

by others (the legal capacity to make declarations plus claims that they be taken into account), such as the right of voting in the matter of forming collective decisions (in national assemblies, parliaments, legislative commissions, courts, administrative departmental institutions), rights of legislative or other initiative election rights relative to national representation or local self-government, in universities and the like» (Petrażycki 1909-10: 732, 1909-10* 315). These phenomena do not belong to naïve legal ontology and are discussed in Fittipaldi (— a).

Also very important is Petrażycki’s distinction between *social’nye vlasti* and *gospodskie* (from *gospod’* “Lord”) *vlasti* (see Petrażycki 1909-10: 200 and 728 ff., 1909-10*: 130 and 312 ff.), since it is crucial as to his distinction between private and public law. This topic along with his distinction between *ius disponendi* and *ius consentiendi* (1985†: 458 f.) is discussed in Fittipaldi (— a). As regards the *ius consentiendi* see also the next footnote as well as below, sec. 4.9.4-5.

¹²⁹ A question that, to my knowledge, was not addressed by Petrażycki is what happens: (1) if a personal entity endowed with a *general authoritativeness* issues commands regarding behaviors that *belong* to the set of behaviors to which *it should be excluded* (intruding authoritativeness); (2) if a personal entity endowed with a *special authoritativeness* issues commands regarding behaviors that *do not belong* to the set of behaviors to which *it should be limited* (extruding authoritativeness).

Probably Petrażycki would have answered that such commands are *non-binding*. This can be argued on the basis of what Petrażycki writes as regards the case some “power-holder”, whose authoritativeness is subjected to somebody else’s *ius consentiendi*, does not respect it. «In several social organizations ... there is and plays a big role the right [*pravo*] of certain persons ... that the subject of a certain power [*władza*] performs [*wykonywał*] certain power-acts only if he has obtained the consent of th[at] perso[n]. Such a right is usually sanctioned by the non-bindingness [*nieważność*] of the acts performed [*uczynione*] without the consent of the holder of that right (*ius perfectum, lex perfecta*)». [Petrażycki 1985†: 457]

To my knowledge, Petrażycki has not proposed a psychological definition of *bindingness*. Therefore, we can use the definition I have proposed above (sec. 2.5, fn. 16): *a fact is binding if it plays the role of a normative fact in at least one individual*.

Now, my contention is that in case 1 and in case 2 the command issued by the “power-holder” is not experienced as binding (this means, among others, that the modal verb *should* is to be understood as an anankastic one).

In order to avoid misunderstandings it must be stressed that this is but an empirical hypothesis. The findings of the Milgram experiment imply that we are to expect that commands issued in such circumstances as 1 and 2 have some chance to be experienced as binding. This psychological finding has its legal dogmatic counterpart in Hans Kelsen’s principle of self-legitimation of authoritative acts (1929: 1828). In these cases the *should* is not anankastic, but rather a pretty standard one that means a prohibitedness of the superior (i.e. the prohibitedness of a certain abuse of his authoritativeness).

More at this regard can be found in Fittipaldi 2012 where I discuss the possible distinction between *ważność* and *obowiązywanie* and I argue that Petrażycki’s theory

I will refer to these different kinds of activities on the part of the animate entity endowed with an authoritativeness with the following terms:

- law-“creating” *facere*,
- mere *facere*.

Moreover, I will refer to the person endowed with an authoritativeness and to the person subjected to it with the terms *superior* and *subordinate*, respectively.

Now – as is apparent from Petrażycki’s definition – *authoritativenesses* do include *permittednesses*. This is but a consequence of the fact that the superiors through their commands (or prohibitions) can create dispositions to experience legal emotions in their subordinates¹³⁰. Among these legal emotions there can obviously be legal emotions constituting a legal relationship of the kind *pati-facere*.

I will now focus on the *law-“creating” facere* the superior can carry out. (Of course, by the verb *to create* I just mean that the superior is able to cause in the subordinate the relatively stable psychic disposition to experience certain legal emotions).

To my recollection, nowhere does Petrażycki explicitly state that the commands issued by some superior are *normative facts* for the subordinate. But this is a necessary corollary of his theoretical frame along with the corollary that commands are a phenomenon akin to what Petrażycki technically calls a *statute* (*zakon*).

Support for this contention can be found in Komarnicki’s *Ogólna teoria prawa*, based on Petrażycki’s Warsaw lectures. Here is what he writes about *prawo stanowione* (lit. “decided law”) – as a subset of positive law:

[I]t could be asked whether we have a phenomenon analogous [*analogiczne*] to statutes [*ustawa* (singular)] ... in the case of ... kinds of prescriptions

implies the distinction between *validity* (i.e. *Verfassungsmässigkeit*), *psychological bindingness* and *legal-dogmatic bindingness*.

¹³⁰ It should be also remarked that an attributive side may also linguistically “claim” the *facere* (or *nonfacere*) of a recalcitrant imperative side. *Such a claim has nothing to do with a command*. The phenomenon of linguistically claiming, though, may be the cause that attributivesidednesses are conceived in the terms of some sort of linguistic activity. Think of terms such as the German *Anspruch* or the English *claim*. They stem, respectively, from *ansprechen* (“to speak to”) and from the Latin verb *clamare* (“to cry”, “to call”).

The frequency with which a certain claim is made may correlate with the degree of cognitive salience of each kind of legal relationship. This frequency, though, may also be correlated with the structure of each legal relationship. My conjecture is that claims are made more often where the legal relationship is about the action/inaction of the *imperative side*. In the case of legal relationships that are about the *attributive side*’s behavior, the attributive side has less often to make claims. He can just directly act or refrain from acting without having to make any claim prior to his action/inaction. This topic is also related to that of self-defense (sec. 4.4.3). (As regards the frequency with which claims are made see also below sec. 4.9.1, fn. 139.)

As regards these issues see also Hägerström 1917* (86 f.) and Pattaro 1974 (212 f.).

[*przepisy*] in which we refer [*powołujemy się*] to some authority, [like] ... for instance the internal charts [*regulaminy*] of associations. To go even more down, it is possible to find an analogous phenomenon in family life: the command of the father [*rozkaz ojca*]. In all these norms [*normy*] we find certain common features, namely that they are in force [*obowiązują*] in reference to a certain authority [*autorytet*] that issued them. [Komarnicki —: 259 f.]

Komarnicki's terminology sometimes diverges from mine. Sure, the way he uses the verb *obowiązywać* ("to be in force", "vigere", "gelten") is fully compatible with my psychological definition of *bindingness* of a normative fact as its playing the role of a normative fact in at least one individual's psyche. On the other hand, though, he seems to use the term *norm* as synonymous with *normative fact*.

Be as it may, he points to an interesting *analogy*. The difference between me and Komarnicki is that in my opinion these phenomena are not analogous. *They are on a continuum*¹³¹. Komarnicki refers to all these phenomena with the term *prawo stanowione*, a term that I prefer to translate in English with the expression *buletic law* since these psychic legal experiences refer to the will (*βουλή*) of some animate entity/entities (real or fictional).

[W]ith the term *buletic law* [*prawo stanowione*] we cover all norms in which the normative fact is the will [*wola*] of a certain authority [*autorytet*], like god, the church, the authority [*władza*] of some association, etc. [Komarnicki —: 260]

If we turn to Petrażycki's definitions of a *statute* and of *statute law*, we can notice that nothing in his definitions prevents us from treating *statutes* and *commands* as similar phenomena.

[We can define]:

1. statute law [*zakonnoe pravo*] as imperative-attributive experiences containing reference to unilateral legal commands [*rasporjaženija*] of someone as normative facts;
2. statutes [*zakony*] as unilateral legal commands [*rasporjaženija*] of someone insofar as they play the role of [*javljajuť'sja*] normative facts ... [Petrażycki 1909-10: 543, 1909-10*: 258 f.]

As I said, I think that commands and statutes are on a continuum¹³². As regards this issue, see also below sec. 4.10.

¹³¹ In Fittipaldi 2012 I contended that commands are not normative facts, while commandments are. There is no reason to discuss this issue here. Here I will treat commands as if they were normative facts (rather than elements of the hypothesis of a hypothetical legal conviction, that is what I think they actually are).

¹³² Petrażycki seems to have used the terms *rasporjaženie* and *velenie* as synonymous. See for instance the citation reported above in sec. 4.7, fn. 123.

From the modern psychological point of view here adopted the functioning of authoritativenesses should be described in the following way.

For an authoritativeness to exist at least one of the following phenomena is a necessary and sufficient condition:

1. The superior gets *angry* if the subordinate does not comply with his commands.
2. The subordinate feels *guilty* or *ashamed* in case he does not comply with the commands issued by the superior (or experiences *pride* in case of difficult compliance).
3. A third spectator *indignates* in the case the subordinate does not comply with the commands issued by the superior.

These authoritativenesses should not be confused with *institutional authoritativenesses* (“institutional powers”), namely authoritativenesses which do not involve superegoic emotions. The differences between psychic and institutional authoritativenesses are discussed in Fittipaldi (— a), as institutions do not belong to naïve legal ontology.

As examples of authoritativenesses Petrażycki mentions, among others, the *vlasti* of the parents: *otečeskaja vlast'* (“paternal power”) and *materinskaja vlast'* (“maternal power”) (Petrażycki 1909-10: 201). He did not discuss, though, the issue where authoritativenesses, in general, originate. Also in this case Petrażycki *hypotheses non finxit*.

The approach adopted in this book (sec. 3.2) implies a simple conjecture: *the legal phenomenon of both general and special authoritativenesses originates from the experiences each of us had with his first caretakers*. The first caretakers are experienced by the child as gods endowed with a general authoritativeness in Petrażycki’s sense.

Now we can inquire whether in naïve legal languages there exist two different *nouns* roughly corresponding to the two above discussed psychological phenomena: *authoritativenesses* and *permittednesses*.

My hypothesis is that *in naïve legal language one noun may often cover both meanings*. Testing this hypothesis does not lie within the scope of this book. I will just give three examples taken from the New Testament. For each example I give the Ancient Greek version, Jerome’s Latin translation (late 4th-century) and Luther’s German translation (1545).

- (1) ὡς ἄνθρωπος ἀπόδημος ἀφείς τὴν οἰκίαν αὐτοῦ καὶ δοὺς τοῖς δούλοις αὐτοῦ τὴν ἐξουσίαν ... [Mark 13,34, emphasis added]

Sicut homo, qui peregre profectus reliquit domum suam et dedit servis suis *potestatem* ...

Gleich als ein Mensch der vber Land zog und lies sein Haus und gab seinen Knechten *Macht* ...

(“It is like a man going on a journey, when he leaves home and puts his slaves *in charge*”)

- (2) οὐκ οἶδας ὅτι ἐξουσίαν ἔχω σταυρῶσαί σε καὶ ἐξουσίαν ἔχω ἀπολῦσαί σε; [John 19,10, emphasis added]
nescis quia *potestatem* habeo crucifigere te, et *potestatem* habeo dimittere te?
Weisst du nicht das ich *macht* habe dich zu creutzingen und *macht* habe dich los zu geben?
("Do you not know that I have power to release you, and power to crucify you?")
- (3) Μὴ οὐκ ἔχομεν ἐξουσίαν φαγεῖν καὶ πιεῖν; [1 Corinthians 9,4, emphasis added]
Numquid non habemus *potestatem* manducandi et bibendi?
Haben wir nicht *macht* zu essen vnd zu trincken
("Don't we have the right to eat and to drink?")

In (1) the terms ἐξουσία, *potestas* and *Macht* refer to an authoritativeness. The man goes on a journey and "gives" his authoritativeness to his slaves.

In (2) Pilatus is referring to his authoritativeness enabling him to command to his subordinates to release or to crucify Jesus. But it could be argued that Pilatus could have even crucified Jesus personally – if he had so wished. This means that in this case these terms meant a permittedness/authoritativeness. Think of some dictator who personally executes some political opponents of his regime that have been formally condemned of treason.

In (3), finally, Paul is referring exclusively to a permittedness.

Hence, my conjecture is that the psychological distinction between authoritativenesses and permittednesses is not clearly mirrored in naïve legal nouns, and thus it is not clearly conceptualized in naïve legal mentality.

In order to avoid misunderstandings it should be stressed that the fact that in naïve legal ontology there is an overlap between authoritativenesses and permittednesses does not imply that some naïve noun covering both authoritativenesses and permittednesses also covers all four kinds of attributivesidednesses that may belong to the attributive side. Quite the contrary. The discussion of this point will allow us also to start discussing the unmarked Latin term *ius*.

My hypothesis is the following: *If in a certain naïve legal language there is an unmarked noun meaning "authoritativeness/permittedness", there must have been a stage in the development of that noun when it could not be used to refer to the illusory attributive entity belonging to the attributive side in facere-accipere, nonfacere-nonpati and pati-nonfacere legal relationships.*

In other words, my hypothesis is that naïve legal ontologists do not conceptualize a general illusory entity for whatever accipere, facere, nonfacere, nonpati that may belong to an attributive side. The illusion of such a *general attributive entity* is the achievement of non-naïve jurisprudential thought.

We already know the possible cause of this phenomenon. Among the four kinds of legal relationship only *facere-accipere* and *pati-facere* are salient enough as to produce legal illusions. As for *nonfacere-nonpati* legal relationships, they gain saliency in the case of a *facere* on the part of the imperative side (see sec. 4.6).

The fact that jurisprudence has stretched the naïve concept of permittedness up to the concept of a general attributive entity (“right”) as to include also the other three kinds of legal relationship is of no concern for us here.

My hypothesis is that *in no naïve legal language can an unmarked noun referring to a general attributive entity come into existence prior to the emergence of*

1. *an unmarked noun referring to some obligatedness/obligatoriness belonging to the attributive side* (debt, duty),
2. *an unmarked noun referring to some permittedness/authoritativeness belonging to the attributive side* (right, power),
3. *an unmarked noun referring to an action (or, better, a mis-deed) on the part of the imperative side that violates some prohibitedness the attributive side feels entitled to* (wrong).

This approach implies that the Latin term *ius* could first refer to permittednesses/authoritativenesses only. Only through civil law jurisprudence did this term undergo generalization. I made this prediction without knowing in advance whether it would be proven wrong or not (actually this is the method I pursued throughout all this book).

My prediction seems to have been correct.

Let us read Giovanni Pugliese about this issue.

[I]t is essential to the Roman concept of *ius* the possibility for the entitled person to perform some action [i.e. *pati-facere*] or at least the fact that he owns a power [*signoria*] over a person or a thing. The fact that another person has to behave in a certain way [i.e. *facere-accipere*] or has to refrain from certain actions towards another person [i.e. *nonfacere-nonpati*], for Romans is not the content of a *ius*, while it is the essence of a right according to the modern development of this concept. [Pugliese 1939: 240]

Here is how Pugliese shows that *ius* could not be used in the context of *prohibitednesses*.

[T]he content of a servitude – i.e. something Romans undeniably conceived as rights –, when it consists solely of an omission on the part of the owner of the servient tenement (negative servitudes) is not expressed by Romans as a “*ius*”, but rather as the negation of a “*ius*” ... of the owner of the servient tenement. The case of the *servitus altius non tollendi*[¹³³] and of

¹³³ [i.e. the servitude of not building higher”]

the *servitus ne luminibus officiatur*¹³⁴, that are generally comprised in the “*iura luminum*”, is typical. About the *servitus ne luminibus officiatur* Paulus (D. 8.2.4) says that by its operation «*hoc maxime adepti videmur, ne ius sit vicino invitis nobis altius aedificare atque ita minuere lumina nostrorum edificiorum*»¹³⁵; both these servitudes are asserted in court by denying in the *intentio* the *ius* of the neighbor to build or to raise his building, as is very clearly shown by Ulp. D. 8.5.4.8 («*si cui omnino altius tollere non liceat, adversus eum recte agetur ius ei non esse tollere*»¹³⁶) and by Afr. D. 39.1.1.5 («*si prius quam aedificatum esset, ageretur ius vicino non esse aedes altius tollere...*»¹³⁷). [Pugliese 1939: 241, emphases in the original]

Servitudes such as *ne luminibus officiatur* or *altius non tollendi* typically involve nonfacere-nonpati legal relationships. Until the imperative side has not performed his prohibited *facere*, the attributive side’s nonpati is completely devoid of cognitive salience. Hence, no illusion of a *free-standing attributive prohibitedness* belonging to the attributive side can emerge when this kind of legal relationship is involved. No wonder that Romans did not think that this sort of attributive side owned a *ius*.

Obviously, the way Romans tried to accommodate the fact that the attributive side could bring suit against the imperative side even before the imperative side had performed any work was wrong from a psychological point of view. Since they could not devise the concept of a *ius* that includes the idea of an attributive side who owns the imperative side’s prohibitedness, the attributive side was forced to assert the mere absence-of-permittedness of the imperative side.

Now, a legal relationship exists if at least one of the three participants has the disposition to experience a superegoic emotion. For a nonfacere-nonpati legal relationship to exist, for example, it is necessary that the attributive side has a stable disposition to experience anger towards any index on the part of the imperative side of some intention to build higher. The mere absence of any *ius* of the imperative side would mean that in such a case the attributive side would not experience any anger. This is obviously not the case. The attributive side does experience anger and, since self-defense is not permitted, he is forced to go to court.

(As regards the concept of absence-of-permittedness as a sort of absence-of-ethical-phenomena see sec. 4.4.5).

¹³⁴ [i.e. “the servitude according to which someone’s light should not be obstructed by a neighbor’s building”]

¹³⁵ [“we seem to have especially obtained that our neighbor does not have the right to raise his building any higher against our will, so as to lessen the amount of light in our house.”]

¹³⁶ [“where a man is not permitted to raise his house any higher, an action can properly be brought against him, asserting that he has no right to raise it.”]

¹³⁷ [“if, before any work has been performed, suit is brought in order to assert that the neighbor does not have the right to raise a house to a greater height ...”]

Let us now see how Pugliese shows that *ius* could not be used to refer to the ownership of some legal obligatedness/obligatoriness.

He discusses the following formula quoted in the Digest:

ut possit quis defendere ius sibi esse cogere adversarium reficere parietem ad onera sua sustinenda [D. 8.5.6.2]

so that somebody be entitled to defend his right to compel the defendant to repair the wall necessary for the sustain of the weight of his building.

The plaintiff is the owner of the servient tenement. The defendant is the owner of the dominant one. The owner of the servient tenement experiences himself as the attributive side in a *facere-accipere* legal relationship concerning the reparation of some wall of his that performs the function of sustaining the building (i.e. the dominant tenement) of the imperative side.

Let us now read how Pugliese shows that the noun *ius* could *not* be used to refer to the belonging to the attributive side of this *facere* of the imperative side.

We can note that, since in this case it could not be denied that the owner of the servient tenement had some sort of right [*facoltà*], a “*cogere*” is inserted into the sentence, so that “*ius*” still refers to an activity on the part of the owner of the servient tenement, rather than to the “having to obtain” [*dovere ottenere*] an action or an omission on the part of others. Also here it can be noticed that “*ius*” is formally incapable of expressing the genuine content of a right, the claim on somebody else’s behavior. [Pugliese 1939: 240, fn. 1]

In other words, since *ius* could not be used to refer to an action of the imperative side, it is artificially referred to an action of the attributive side, namely his compelling (*cogere*) the imperative side to fix the wall.

In this way, what psychologically is the ownership of a legal obligatedness/permittedness is construed as if it were a permittedness.

Before turning to the explanation of why in naïve legal ontology permittednesses and authoritativenesses produce illusions of free-standing entities, a few words should be spent to answer the question of whether the Latin term *ius* could be used to refer, not only to permittednesses, but also to *authoritativenesses*.

The answer is yes.

Two examples are the *ius edicendi* and, perhaps, the *ius respondendi ex auctoritate principis*

(1) *Ius autem edicendi habent magistratus populi romani* [Gaius, *Inst.* 1.1.6]

(“The magistrates of the Roman people have the *ius* of promulgating edicts”)

(2) Nam antiquitus institutum erat, ut essent qui iura publice interpretarentur, quibus a Caesare ius respondendi datum est ... [Inst. 1, 2, 8]

(“For it was decided in ancient times that the laws should be publicly interpreted by those to whom the right to answer had been granted by the Emperor”)

Another example might be the quotation of Sallust I give below (sec. 4.10, fn. 140), if only in that context *ius* were not to be rather understood as a noun meaning “legal correctness” (see below). Nonetheless, it is worth remarking that in that quotation the term *potestas* is clearly used as meaning “permittedness/authoritativeness”.

4.9. THE FACTORS CONDUCTIVE TO THE DETACHMENT OF PERMITTEDNESSES/AUTHORITATIVENESSES INTO ILLUSIONS OF FREE-STANDING ENTITIES

Since in naïve legal ontology permittednesses and authoritativenesses confront us with significant overlaps I will discuss the factors that may cause the detachment of permittednesses and authoritativenesses into the illusions of free-standing entities together.

Before doing this, it bears repeating that the issue of the detachment of the authoritativenesses into free-standing entities is slightly different from the parallel issue of the detachment of permittednesses. As we know, in the case of permittednesses we are dealing with a simple *facere* while in the case of authoritativenesses we are dealing with law-“creating” *facere* only possibly involving a direct *facere* on the part of the attributive side.

Notwithstanding this difference, I will try to explain both detachments together.

I will adopt the following terminology:

- By the term *attributive side* I shall refer to both the attributive side in a *pati-facere* legal relationship and the *superior* in an authoritativeness. This will not prevent me from sometimes using the term *authoritative-attributive side* in order to stress that I am referring exclusively to the superior in an authoritativeness.
- By the term *imperative side* I shall refer to both the imperative side in a *pati-facere* relationship and the subordinate in an authoritativeness.
- By the term *permittedness/authoritativeness* I shall refer to both the quality of permittedness and the quality of authoritativeness.
- By the term *right-authority-power* I shall refer to the naïve legal undifferentiated entity that is the result of the detachment of permittednesses/authoritativenesses.

Since the psychological phenomena the illusions of rights and powers stem from present us with significant overlaps, I make the conjecture that

the factors conducive to the detachment of permittednesses into illusions of free-standing entities also further the detachment of authoritativenesses, as well as the other way round. The cause for this might be precisely that in naïve legal ontology, as I hypothesized in the previous section, permittednesses and authoritativeness are not clearly differentiated. This has a falsifiable implication: *without some jurisprudential trickling down, in no naïve legal language can two distinct unmarked and specialized nouns emerge referring, one to permittednesses, the other to authoritativenesses.* This hypothesis explains ex post – but not ad hoc! – why only later on did the Latin term *ius* start to mean “right” in a modern sense by giving up the meaning “authoritativeness”.

Before discussing in some detail to what extent the factors affecting the detachment of debts are at work in the case of right-authority-powers, it should be also stressed that while in the case of debts we are confronted with a *clear-cut social phenomenon*, in the case of right-authority-powers this is not the case at all. Unlike debts, permittednesses and authoritativenesses confront us with a *huge variety*. Hence, my conjectures will hardly be much more than vague hints, as a detailed analysis would require the discussion of the specific kinds of permittednesses and authoritativenesses experienced in a given society.

My discussion of the five factors possibly affecting the detachment of *permittednesses/authoritativenesses* into illusions of *right-authority-powers* will show that these factors are less at work here than in the case of debts.

This has a falsifiable implication: *in a naïve legal language an unmarked noun for “permittedness/authoritativeness” is much less probable than an unmarked noun for “debt”.* This hypothesis explains ex post – but not ad hoc! – why in Ancient Greek the term ἐξουσία is marked as compared with χρῆος.

Let us now discuss these factors in some detail.

4.9.1. Bilaterality

Bilaterality can affect the detachment of the *authoritativeness* from the attributive side into the illusion of a free-standing entity. Through his authoritativeness the attributive side can control the imperative side. Hence this *authoritativeness* might be experienced by both sides as a *tool* at disposal of the attributive side. Through this tool the attributive side has control over the behavior of the imperative side. A symbol for the detachment of this capability into a *tool* in the hands of the attributive side may be the *scepter*, especially in the case of general authoritativenesses¹³⁸. By following a hypothesis made by Jacek Kurczewski (see above, sec. 4.6.1) to its

¹³⁸ As regards the scepter as a symbol of supreme power see Chevalier & Gheerbrant 1969.

logical consequences my hypothesis is that this factor plays a smaller role in the relationship of the child with his caretakers than in relationships between strangers. An intermediate case might be the *manus mariti*, where the hand of the husband can be interpreted much as a tool used by the husband to control his wife. Of course, the characteristics of each society should be taken into account.

The case of *permittednesses* is different. Bilaterality can hardly play any role as to the detachment of this quality from the attributive side into the illusion of a free-standing entity.

This is so because, while in the case of debts the attributive side owns the obligatedness of another individual (i.e. the obligatedness of the imperative side), in the case of permittednesses what the attributive side owns is not the quality of some other individual, but rather *his own free choice as regards a certain possible course of action of his*. Hence, there is no reason to expect that this legal quality starts being experienced as if between the attributive side and the imperative side (who often seems to have nothing more than a hardly cognitively salient imperativesidedness as regards his own *pati*).

That is why there is no reason to expect that a noun for “permittedness” starts being used in both an active and a passive sense, as is instead the case of the terms for “debt” or “obligation” (sec. 4.6.1 and fn. 104). While a debt can at once *be of the imperative side* and *belong to the attributive side* (think of the Latin term *aes alienum suum!*), a permittedness is always *the permittedness of some facere of the attributive side belonging to that very same attributive side*.

Because of this reason, while obligatedness can be experienced as if being *in between* the attributive side and the imperative side, this is not possible in the case of permittedness.

There is a different path through which bilaterality can play a role as to the coming into existence of illusions of free-standing entities in the context of permittednesses/authoritativenesses. This path does not originate from the idea of the permittedness of the attributive side’s *facere*, but rather from the broader idea of its *ethical correctness*.

We have first to give a definition of *ethical correctness*.

A certain action (or inaction, respectively) is experienced as ethically correct by some individual X if (conjunctively):

- *it does not elicit in X any ethical repulsion;*
- *any attempt aimed at forcing to inaction (or to action, respectively) would elicit some ethical repulsion in X;*
- *any index of repulsion (be this repulsion ethical or not) towards that action (or inaction, respectively) would elicit ethical repulsion in X.*

Of course, this experience may regard even X’s own behavior. Less obvious is that *ethical correctness* can be experienced by both an attribu-

tive side and an imperative side. An *almsgiver*, a *debtor* and a *holder of a right of way* all experience their actions as ethically correct, despite their typical experiences being different:

1. a typical almsgiver is a *pure imperative side*,
2. a typical debtor is the *imperative side* in a *facere-accipere* legal relationship,
3. a typical holder of a right of way is the *attributive side* in a *pati-facere* legal relationship.

A more accurate analysis of this concept should require a discussion in the terms of superegoic emotions. As we know, while the typical repulsion on an imperative side should be explained in the terms of anticipated shame or guilt, the typical repulsion of the attributive sides and of third spectators should be explained in the terms discharges of aggressiveness. For the present purposes I think that this reduction is not necessary and I make use of Petrażycki's terminology.

My definition excludes that, in the case of some *pure attributivesidedness* (above sec. 4.5), the action can be experienced as ethically correct. Sure, the attributive side's action does not elicit any ethical repulsion. But possible attempts aimed at *preventing* that action do not elicit ethical repulsions either, while according to the proposed definition, instead, they should. The very definition of a *pure attributive phenomenon* excludes that attempts aimed at preventing the action or indexes of non-tolerance thereof should elicit ethical repulsion.

To use Kurczewski's example, hardly will soldier John, who is trying to kill the enemy soldier Bill, be indignant at (i.e. will experience ethical repulsion towards) the fact that Bill does not tolerate (*pati*) John's attempt to kill him and even tries to avoid his own death. My definition of ethical correctness excludes that the action of a soldier who tries to kill an enemy soldier can be called *ethically correct*. (Of course, other definitions I have proposed in this book imply that such an action should be called an ethical phenomenon, as it involves a discharge of otherwise restrained aggressiveness).

The reason why I define ethical correctness in this way is that I think this is an *adequate definition* in Petrażycki's sense (above sec. 4.2). If it were proven to be limping, in that it unduly excludes pure attributive phenomena, it should be changed in order to cover them as well.

Now, my hypothesis is that naïve legal mentality does not clearly distinguish between:

- the legal permittedness of a certain action, and
- its ethical obligatoriness.

Both situations have in common that any attempt to prevent the *facere* would cause repulsive emotions. This is the case of any attempt to prevent *both* the *attributive side* in a *pati-facere* legal relationship from performing his own *facere* *and* to prevent the *imperative side* from performing his *facere*.

We can expect that, if in a given society there is such a broad concept of ethical correctness, *bilaterality may cause some attributive side in a pati-facere legal relationship to experience the ethical correctness of his action in the terms of his own ethical correctness.*

It can be argued that it is *more probable* that the ethical correctness of some *facere* is claimed by an attributive side against his imperative side than by an imperative side against some third who tries to prevent him from performing his *facere* ¹³⁹. Just think how often it occurs that somebody tries to prevent a policeman or the holder of a right of way from exercising his permittedness relative to the frequency somebody tries to prevent somebody else from giving alms or paying his own creditor. The example of Antigone who experiences herself as an imperative side and claims her obligatedness as regards burying Polyneices' body in defiance of Creon's prohibition comes to mind. But this is mythology. I think that in real naïve legal life attributive sides claim the ethical correctness of their actions more often than imperative sides.

Therefore my conjecture is that, if in a certain culture there is a concept for *ethical correctness*, that ethical correctness will be claimed more often by attributive sides that participate in *pati-facere* legal relationships. This conjecture implies the further *hypothesis that the noun for "ethical correctness" will be used in possessive constructions more often by attributive sides than by imperative sides.*

Testing this hypothesis does not lie within the scope of this book, but it is worthwhile to check whether such a path of development can be found in the history of the Latin term *ius* ¹⁴⁰.

¹³⁹ This conjecture is compatible with the conjecture I made above in sec. 4.8, fn. 130. There, I have contended that it may be more probable that an attributive side makes a claim in the context of an *accipere-facere* legal relationship than in the context of a *facere-pati* legal relationship. Here, in text, I am contending that attributive sides are more likely than imperative sides to claim their own *facere*.

¹⁴⁰ As an example of the use of the noun *ius* as meaning "legal correctness" in a context where the legal correctness of the belonging of certain *permittednesses/authoritativenesses* is being denied it is worth recalling the following text: «Itaque, quod plerumque in atroci negotio solet, senatus decrevit, darent operam consules, ne quid res publica detrimenti caperet. Ea *potestas* per senatum more Romano magistratui maxima *permittitur*: exercitum parare, bellum gerere, coercere omnibus modis socios atque civis, domi militiaeque imperium atque iudicium summum habere; aliter, sine populi iussu nullius earum rerum consuli *ius est*» (Thereupon, as is often done in a dangerous emergency, the senate voted that the consuls would take heed, that the commonwealth suffer no harm. The *permittedness/authoritativeness* [*potestas*] which according to Roman usage is thus conferred [*permittitur*] to a magistrate by the senate is supreme, allowing him to raise an army, wage war, exert any kind of compulsion upon allies and citizens, and exercise unlimited command and jurisdiction at home and in the field; otherwise, without the order of the people, none of these activities is *ius* to the consul). [Sallust, *Bellum Catilinae*, 29, emphases added]

The construction *ius est* + inf. and *ius est ut* + subj. seem to be quite old and can be compared with the Ancient Greek construction δίκαιόν ἐστι + inf.

nam si istuc ius est ut tu istuc excusare possies,
luci claro deripiamus aurum matronis palam
[Plautus, *Aulularia*, 4.10]

if it's legal to clear yourself that way,
we should be stripping ladies of their jewelry on the public highways in
broad daylight [Plautus 1916†*-38†*: 4.10]

In this case Euclio denies the ethical correctness of Lyconides' *facere*.

As regards a possible use of *ius* to refer to an *obligatedness/obligatoriness* just think of a plain sentence like *ius est ut sic datum reddatur*.

I think that this historical development could be summed up in the following way:

1. The ethical correctness of a certain *facere* is stated by an attributive side A or a third spectator C.
2. The attributive side A claims the ethical correctness (experienced as a quality) of a certain *facere* of his against an individual B that A experiences as his imperative side.
3. The attributive side A claims that a certain ethical correctness *belongs to him*.

It is worth noting that the linguistic phenomenon consisting of using abstract nouns in possessive constructions occurs also with abstract nouns that do not have anything to do with “law”/“ethical correctness”.

Ha una cucina molto sana (Italian)
 (“He cooks in a healthy way”)
 lit. He has a healthy cuisine

Now, as I said, the bilaterality of *pati-facere* phenomena should cause the specialization of a noun meaning “ethical correctness” into the sense of permittedness more often than into any other specialized meaning.

We cannot expect that such a noun gets specialized in order to express some relativistic conception of ethics. An expression such as *my morality* is understandable only in the context of ethical relativism. It refers to the possibility of several moral systems all acceptable within the same spatio-temporal coordinates, much in the same way as an expression such as *my law* or – better – *Italian law* refers to a certain spatio-temporally individuated law. Both these concepts do not have anything to do with *naïve* ethical ontology.

Now, *in a context where legal pluralism is unconceivable an expression such as ‘my law’ may be more easily understood as referring to some vantage position the attributive side thinks to have, rather than to some system of*

law a certain person claims to own (or to create – in the case of an absolute monarch).

A similar phenomenon seems to have occurred in the case of a word like *freedom*. This word, in many languages, first meant the objective freedom of a certain person or of a certain action. Only later on did it start being used to refer to a *discrete entity* capable of belonging to someone. Because *law* and *freedom* may be referred to certain specific actions (unlike *cuisine* that is rather a know-how about several complex sets of *facere* that only sometimes get summed up in recipes), we can make the hypothesis that a term meaning “ethical correctness” has a higher probability than a term meaning “cuisine” to be used in a subjectivized way.

In classical Latin we can observe the phenomenon of the subjectivization in its very happening. By *subjectivization* I understand the process of appropriation of the ethical correctness on the part of the attributive side.

Here is what Álvaro D’Ors wrote in his *Aspectos objetivos y subjetivos del concepto de “ius”*:

It is apparent ... that even if we can often translate the word *ius* with *right* [*derecho subjetivo*], Romans did not come to understand this word precisely in this sense, because they did not create this category. This word, that is crucial ... to understanding the whole Roman legal life, is so ambiguous that sometimes it shows up with an objective meaning, of legal order, and sometimes with a subjective one, of right [*facultad*], and we cannot maintain that Romans clearly distinguished between these two aspects. [D’Ors 1953: 280]

After discussing the ambiguous degree of subjectivization of the word *ius* in idioms such as *iure uti*, D’Ors remarks that in Latin this word occurs with a stronger subjectivizing nuance when associated with possessive adjectives:

We find a more reliable stage of subjectivization when the *ius* not only gets used by an individual [as in the case of the idiom *iure uti*], but is also owned [*apropiado*] by him, as is the case when is being talked of *ius meum* or *ius suum*. Expressions such as *ius meum persequi, postulare, optinere, adipisci*, etc. produce in us the idea of a *right*. Nonetheless doubt and perplexity come back when it is being talked of a *ius*, not of a person, but of a thing: *fundus cum iure suo* [lit. “tenement with its law”]. Can a tenement have a right?

As these expressions confront us with contradictions, some authors think that *ius* means something like “legal situation”. This is the case of Gioffredi, Villey and Kaser – each one independently of the other. The last one quotes ... texts taken from Plautus and Terence that are quite compelling. A character of *Captivi* (v. 244) says *antehac pro iure imperitabam meo*; namely, that he did not know he was a slave. Hence, the *ius suum* is his legal situation of being a slave. Apparently, here we do not have to do with a *right*. Kaser, in this case, does not talk of a *Rechtsslage*, but rather of “meine Rechtsstellung”. In my opinion, this is the key concept. *Ius* means

precisely, not only in certain cases – as Kaser says – but always (of course, for Romans’ legal mentality) “just position”, “legal position”. This is the intermediate point that allows for the fact that the word *ius* can have both an objective and a subjective meaning, without any shift in its meaning. [D’Ors 1953: 283 f.]

It seems that at the stage of development discussed by D’Ors *ius* meant something more than the “ethical correctness of some action”. If this term could be used to refer to the legal situation of a slave, it must have covered also prohibitednesses. This extension can be easily explained if we just think that ethical correctness can be experienced also of *inactions*. The *ius* of the slave is what the slave can, should and should not do.

As for such a phrase as *fundus cum iure suo*, I think that the “ethical correctness” of an inanimate thing is to be understood as the set of what-ever can be done, should be done and should not be done with that thing.

From the theoretical point of view adopted in this book it is quite interesting that D’Ors mentions *transferability* as a factor playing a role in the process of subjectivization of *ius*, namely, in our terms, in the process of the emergence of the illusion of an entity.

A conception of *ius* as a right [*derecho subjetivo*] appears when *ius* is the object of a transfer. *Adquirere* [“to acquire”] or *amittere* [“to loose”] *ius* can be said of the “legal position”, but it is not meant that this “position” gets transferred”. *Alienare* [“to alienate”] *ius* seems to me to be always post-classical.

Dig. 1, 3, 41, *Totum autem ius consistit aut in adquirendo aut in conservando aut in minuendo: aut enim hoc agitur quemadmodum quid cuiusque fiat, aut quemadmodum quis rem vel ius suum conservet, aut quomodo alienet aut amittat.*¹⁴¹ [D’Ors 1953: 298 f.]

It is worth contrasting the history of the Latin noun *ius* with the possible but unhappened history of the Ancient Greek *adjective* δίκαιος.

The adjective δίκαιος was used to express the *ethical correctness* of either the imperative/attributive side or his action/inaction:

- δίκαιός εἰμι + inf. (lit. “I am lawful to do ...”)
- δίκαιόν ἐστι ἐμὲ + inf. (lit. “It is lawful for me to ...”)

Both sentences, depending on the circumstances, could refer to the imperative side or to the attributive side. While in the first case they are to be understood as referring to an *obligatedness*, in the second case they are to be understood as referring to a *permittedness*.

¹⁴¹ [“All *ius* is either about acquisition, or about retainment, or about reduction; actually it comes either to the way something becomes somebody’s, or to the way somebody retains it or his *ius*, or to the way somebody alienates or loses something.”]

If Ancient Greek had followed a path similar to Latin, the neuter form δίκαιον would have been used more often by *attributive sides* with a possessive adjective in such constructions as ἐμὸν δίκαιον or as the object of a verb meaning “to have”, such as the Greek verb ἔχειν.

Indeed, such constructions seem to have existed in Medieval Greek. See for example the following sentence taken from Geórgios Sphrantzēs’s *Chrónikon* (1401-1478), as edited by Immanuel Bekker:

τὸ ἐμὸν δίκαιον, ὃ ἔχω ἐν τῇ Βουλγαρίᾳ [Bekker 1838, §1.14, 58 f.]
(lit. “my *dikaion*, that I have in Bulgaria”)

The cause of the fact that this was not the path eventually followed by the development of Greek might be that δίκαιον, unlike *ius*, is an adjective and hence is slightly less suitable to be itself adjectivized or to be used as an object of a verb meaning “to have”¹⁴².

The term δίκαιον got eventually specialized to refer to “law” (compare Modern Greek δίκαιο), another term – δικαίωμα – specialized itself to refer to “right”.

4.9.2. Transferability

After the hints given by D’Ors, it is in order here to go into some more details as regards transferability.

My hypothesis is that in naïve legal life transfers of *permittednesses* are quite rare. They mostly attach to statuses or stem directly from commands issued by some attributive-authoritative side. In this latter case, though, the reasons why a superior might think it more convenient to pretend to be transferring some obligatedness from one subordinate to another (sec. 4.7) seem not to operate. Unlike obligatednesses/obligatorinesses, permittednesses are usually not at all painful for the recipient.

Also *authoritativenesses* seem to be experienced as qualities closely attaching to the attributive side. This is so to such a degree that in many languages the unmarked or low-marked nouns for “authoritativeness” often stem from terms meaning “force”, namely terms referring to a physical *quality* of the person. Besides ἐξουσία – that seems to stem from the

¹⁴² I wrote ‘slightly less suitable’ because, of course, the phenomenon of adjectives being transformed into unmarked nouns is well attested, not only in Greek (think of the English term *right*). As regards Modern Greek, just think of the term νερό (“water”) that stems from the Ancient Greek adjective νερός (“fresh”) in the expression νερόν ὕδωρ (“fresh water”) (see Andriōtēs 1995†: νερό).

As regards the English, German and Italian terms *right*, *Recht*, *diritto*, they all stem from some adjective or past participle turned over time into an unmarked noun. I have not been able to ascertain whether these terms have ever been used also to express some obligatednesses/obligatorinesses of the imperative side.

idea that a certain prohibitedness is lifted to the effect that a certain action can now be performed –, another Modern Greek noun for “authoritativeness” is δύναμη – a term meaning “force”, “strength”. The Latin term *authoritas* (from the verb *augere*) seems to be related to ancient roots meaning “force” (see Benveniste 1969*: 421). The Russian noun *vlast’* stems from the verb *vladet’* (“to hold sway”) – a verb that is etymologically connected to the German term *Gewalt*, “power”, “violence” (see HW 1997 and ETWS 1999). The Russian verb *vladet’* – that is of course related to *vlast’* – originally meant “to be strong” and is etymologically connected to the Latin verb *valere* that means “to be strong”, “to be healthy” (see Černyh 1993).

The degree to which authoritativenesses are experienced as qualities attaching to the attributive side is witnessed also by the fact that in many languages there are terms referring at once to both the attributive side’s *office* and to the attributive side’s *authoritativeness*. Think of the following two examples:

That authority has decided that they shall pay by March. (1)

He has the authority to decide that they shall pay by March. (2)

It could be argued that inheritability hardly plays a role here, as the son of a king might be experienced as inheriting his father’s authoritativeness just as he inherits his tallness or strength.

Nonetheless it can be objected that in the case of death of the person “holding” the authoritativeness the transfer is sudden and without duplication (“The king is dead. Long life to the king”). The resemblance with the giving of things is more striking if the king can abdicate prior to his death.

Another phenomenon potentially affecting the detachment of the authoritativeness into the illusion of a free-standing entity is *delegation*.

Delegation belongs to naïve legal life. Recall the quotation of Mark 13,34 (sec. 4.8) involving the verb δίδοναι “to give”. (The term δούς is the aorist active participle of δίδοναι).

A delegation can create the illusion of a free-standing entity more easily if the delegator cannot exercise the authoritativeness during the term of the delegation. In this way the analogy with things is fully operating. This analogy is even more perfect if there is no principle such as *delegatus non potest delegare*.

Therefore, we can argue that the probability that in a given culture there is an unmarked term for “authoritativeness” correlates positively with the following phenomena:

1. Transfers different from the mere inheritability at the death of the authoritative-attributive side (e.g. abdication).
- 2.1. Delegation.

- 2.2. Delegation without the possibility for the delegator to exercise the delegated authoritativeness (i.e. non-duplication).
- 2.3. Delegation without the possibility for the delegator to exercise the delegated authoritativeness as well as with the possibility for the delegatee to delegate in his own turn that authoritativeness to a further delegatee.

4.9.3. Transitoriness

By *transitoriness* I understand chiefly the fact that a certain permittedness or authoritativeness can expire independently of the death of the attributive side.

My conjecture is that in naïve legal life *permittednesses* are often transitory. This is especially the case if they stem from permissions – understood as *utterances* – issued by some authoritative-attributive side. An implication is that this kind of (positive) permittednesses should be coded in the terms of *states*, rather than in the terms of qualities, and that therefore the nouns referring to them should be more amenable to possessive constructions (sec. 2.5 and 4.6.3).

Just think of the following examples:

I have the permission to + inf. (English) (1)

Ho il permesso di + inf. (Italian) (2)

As regards *authoritativenesses*, instead, it seems to me that their transitoriness is a rare phenomenon in naïve legal life.

4.9.4-5. Fungibility and transformability

In the case of debts – besides transitoriness – I have made the conjecture that also *fungibility* and *transformability* play a crucial role as to the detachment of the obligatoriness from the *facere* into the illusion of a free-standing entity.

It does not make much sense to talk of fungibility in the case of *permittednesses*.

As regards *authoritativenesses*, instead, my conjecture is that they comprise such a wide array of activities that they can hardly be pseudo-synecdochically reduced to one of them. This holds first of all for their prototype, namely parental authoritativeness.

Therefore it could be contended that authoritativenesses – especially *general* authoritativenesses – are structurally arranged in such a way as to produce outcomes akin to the outcomes produced by fungibility. With

general authoritativenesses a “pseudo-synecdoche” that reduces them to a specific law-“creating” *facere* is not possible.

Such a “synecdoche” would, instead, be possible in the case of some very special authoritativenesses consisting for example of “rights of veto”¹⁴³. It would be no surprise if such an authoritativeness were referred to by a mere synecdoche.

Transformability does not seem to belong to the naïve life of authoritativenesses.

Just a very few words now about the role of fungibility and transformability in the case of permittednesses.

It seems to me that in naïve legal life permittednesses are not fungible.

As regards transformability, I think that there is no difference with what I said above about transferability. My hypothesis is that in naïve legal life permittednesses mostly attach to statuses or stem directly from commands issued by some attributive-authoritative side. In this second case the superior will hardly have any reason to pretend to be changing some permittedness that he granted.

4.10. STATUTES, COMMANDS AND THE WISHES OF AN AUTOCRAT

In the previous paragraphs I did not make any clear distinction between the concept of a *statute* and that of a *command*. By following Komarnicki – and presumably Petrażycki himself – I contended that they both are sorts of *buletic positive law* (above, sec. 4.8).

My conjecture is that commands and statutes are on a *continuum*. In table 4.20, I sum up what I think may be *some* of the features of prototypical commands as opposed to prototypical statutes. Further research is required on this topic¹⁴⁴.

It could be asked whether the psychic experience of a person that receives a command is the same as that of a person who experiences a certain text as a statute. *More in general*, it could be asked whether the experience of a person who experiences an ethical appulsion/repulsion is the same as that of the recipient of a command.

We can recall that Petrażycki stressed that “ethical impulses are similar to the imperative impulses aroused by commands or prohibitions addressed to us” (above sec. 1.2). Of course, according to Petrażycki ethi-

¹⁴³ Petrażycki considered such authoritativenesses to be kinds of *iura consentiendi* – as opposed to *iura disponendi* (1985†: 459: fn. 15).

¹⁴⁴ Many of these features seem to be explainable with the conjecture I advanced in Fittipaldi 2012, namely that commands are *not* normative facts, but merely elements of normative hypothesis of certain kinds of legal convictions.

cal phenomena do not have anything to do with commands. As the reader knows, I think, instead, that they are genetically – though not functionally – related phenomena, as the super-ego stems at least partially from commands and prohibitions really issued by the first caretakers.

Table 4.20. – Prototypical commands vs. prototypical statutes.

PROTOTYPICAL COMMAND	PROTOTYPICAL STATUTE
oral	written
issued by one person	issued by more than one person
issued with no special procedure	issued with some special procedure
constructed according to the current will of its issuer	not constructed according to the current will of its issuer
addressed to concretely identified addressees	addressed to abstractly identified addressees
not binding the issuer	binding the issuer

Now, Petrażycki did not discuss in what – if at all – the imperative impulses aroused in us by commands are different from ethical emotions.

A first answer is that ethical impulses stem from the internalization of the caretakers' commands, while in the case of commands no such internalization takes place.

I wish to go into some more detail as I think that answering this question will help us to cast some light on the different kinds of buletic legal phenomena. Moreover, if the psychic experience of the recipient of a command is different from that of some person who experiences a certain text as a statute, we might expect that this difference affects the way either person linguistically expresses his obligatedness/obligatoriness.

This issue has been discussed in a very insightful way by Axel Hägerström. He precisely distinguished the state of consciousness of the recipient of a command from the psychic experience of some sort of sense of duty (*pliktkänsla*). Just as Petrażycki, Hägerström held that these two kinds of experiences are quite similar to each other (1917*: 127 ff., see also Pattaro 1974: 135 ff.).

The differences between Petrażycki and Hägerström are mostly terminological. Petrażycki would not have used such a term as *sense of duty*. He would have preferred his technical term *etičeskaja appul'sija*. Moreover, Petrażycki would have never used such a term as *viljeimpuls* ("conative impulse") as it involves the representation of some sort of *vilja* ("will"), while according to Petrażycki (and me) ethical phenomena have nothing in common with will (above sec. 2.6).

Despite these differences the similarities between Hägerström's conceptions and Petrażycki's are striking. That is why it is noteworthy that

Hägerström maintained that between these two kinds of experience – if similar – there is a difference (1917*: 135).

On one hand, Hägerström shows that neither the judgments that express the state of consciousness of the recipient of a command nor the judgments that express the state of consciousness of the person who experiences sense of duty state anything about external reality. From this point of view, according to Hägerström, there is no difference between them. On the other hand, Hägerström stresses that *linguistically* they seem to correlate with different phenomena. This puzzled him, and rightly so.

Since Hägerström is not always clear in his writings, I prefer to discuss Hägerström's point in the interpretation given by Enrico Pattaro (1974).

Here is how Pattaro sums up the way Hägerström states the difference between these two kinds of experience:

Hägerström's criticism ... implies that, if somebody tries to base the difference between the utterances that express the state of consciousness of the recipient of a command and the utterances that express the state of consciousness of a person who experiences sense of duty, between the former and the latter there is no difference. There is no difference because ... not even duty-judgments actually are true judgments, as well as because ... the ought-utterances in the form of a judgment are a special way to express a conative impulse associated to the representation of a certain behavior.

If, from a logical point of view, there is no difference, from a practical one, this difference is still there as in fact people usually express their sense of duty through ought-utterances in the form of judgments as if they were real judgments, whereas it is not common to express the state of consciousness of the recipient of a command with ought-utterances in the form of judgments. This problem cannot be considered as solved and thus forgotten just because these judgments have been shown not to be true judgments. On the contrary. *There is a problem precisely because, despite its illogicalness, this is an overwhelming linguistic use.* [Pattaro 1974: 154, emphasis added]

To understand this passage it should be borne in mind that what is here called *ought-judgment* is pretty much a projective process in Petrzycki's sense:

[W]hen we make an ought-utterance in the form of a judgment [*enunciato di dovere in forma di giudizio*], we do not want to express that we are experiencing some sense of duty, but rather that an obligation exists or that obligatoriness [*doverosità*] is a feature of a certain behavior, regardless of whether we are experiencing some sense of duty. [Pattaro 1974: 144 f.]

The question raised by Hägerström-Pattaro makes a lot of sense within the approach adopted in this book. If two phenomena are shown to be “logically” the same, but still some other (linguistic) phenomena correlate with just one of them, while not with the other, there is still a problem to be solved.

In the framework of this book, I would rephrase the Hägerström-Pattaro's question in the following way: *The legal emotions produced by that special kind of normative facts called 'commands', unlike other kinds of positive and intuitive ethical emotions, result less often in projective legal qualities. Why is this so?*

Now, that commands should be less conducive to projective legal qualities than other kinds of positive law (or intuitive law) might be considered as a corollary of the analysis I made of the degree of stability of projective qualities (sec. 2.5). At one end, we find intuitive ethics. It produces the most stable projective qualities. At the other, we find that particular kind of positive law that is the positive law made up of the legal experiences caused by commands.

In my opinion, though, the linguistic phenomenon produced by these psychological phenomena is not that intuitive ethical emotions result more often in judgments than commands. I think *it is not true that the legal emotions caused by commands cause less often projective qualities (or states) than other kinds of ethical experiences*. As we know, the most typical way to express projective judgments is modal verbs. I think there is no evidence that modal verbs are used less often in the context of obligatednesses/obligatorinesses resulting from commands. Of course, both mine and Hägerström's statement are hypotheses that should be empirically tested.

That there is not the difference hypothesized by Hägerström does not mean that he was wrong when he maintained that certain linguistic phenomena may correlate mostly or always with certain kinds normative facts – to use Petrażycki's terminology.

To keep things simple let us examine only five phenomena:

1. *Intuitive* legal experiences (sec. 2.5)
2. Legal experiences resulting from *horizontal customs* (sec. 2.5)
3. Legal experiences resulting from *vertical customs* (sec. 2.5)
4. Legal experiences resulting from *statutes*
5. Legal experiences resulting from *commands*

The last two kinds of experiences are what I call *buletic* positive legal experiences.

My hypothesis is *that the closer is an experience to the legal experience resulting from a command the higher is the probability that that legal experience is expressed through a possessive construction involving a noun*.

As regards positive ethical experiences, we already know (sec. 2.5) that they seem to positively correlate with possessive constructions involving a noun such as *obligation*:

He has the obligation to + [inf.] (1)

By the same token, in certain languages such as Italian, *even nouns meaning "command" can be the object of possessive constructions* (sec. 4.7).

Ho l'ordine di non fare entrare nessuno. (2)
(lit. "I have the command not to let anybody in")

As we know, in both cases, the cause of this phenomenon seems to be the *transitoriness* of the illusory ethical reality predicated of the behavior. Transitoriness involves a construal in which a property may be owned and lost, or – more precisely – a construal in which a property is experienced as capable of being owned just because it can be lost.

A sort of correlation on which I, instead, completely disagree with Hägerström-Pattaro is the following:

[U]sing duty-utterances in the form of judgment brings about the conception of a world-that-ought-to-be [*mondo del dovere*] as real as the world-that-is [*mondo dell'essere*], that is distinct from it and somewhat parallel to it. [Pattaro 1974: 157]

In my opinion, instead, this usage brings about first of all illusions of realities in the very *world-that-is*. These are the typical illusions of naïve legal ontology. The illusion of a distinct world-that-ought-to-be is typical of jurisprudential ontologies. I discuss it elsewhere (— a).

It is now in order to shortly discuss the *autocrat's wishes*.

It could be objected that prototypical statutes should be contrasted, not with prototypical commands, but rather with the mere wishes of an autocrat. It is worth reading Hägerström, at this regard:

[Where] an autocrat is held to have the right to legislate for the people *according to his will and pleasure* ... [i]t may be that laws [i.e., in my terminology, *statutes*] in fact acquire an impersonal force, based on the legal mechanism, and that they even bind the legislator himself so long as they endure, just as in a constitutional *régime*. But, in so far as the idea of the autocrat's personal right is theoretically maintained, obedience to the laws is in theory determined by the belief that he personally desires this obedience. On that view the autocrat is personally *a legibus solutus*. But in that case the laws, as imperatives, have a different nature from that which they have in the other case. They may be as directly influential as you please, like any other commands with authority behind the words. But, since the autocrat is held to have the right to legislate for the people at *his own will and pleasure* personally, it is *his* wishes which stand out as the *determining* factor. Thus, when the imperatives are reflected upon, they come to stand out as *one* source of information about his wishes. Suppose that one can get to know these in some other way or suppose that they should appear to have altered after he issued the order although that order has not itself been revoked. Then the wish which he has indicated in any of these ways is the only one that is important. [Hägerström 1917* 312 f., emphases in the original, see also Pattaro 1974: 228, fn. 15]

In this case, as Hägerström states, commands are nothing more than a *source of information* about the autocrat's *current* wishes. They are but indexes of what he currently wants. I think this is a special kind of buletic law, as in this case the representation of the current mental state of the autocrat plays a much more important role than in the case of commands. In the case of commands, what often matters is exclusively whether they were issued. (It goes without saying that in the case of prototypical statutes what matters is always exclusively whether they have been – historically – passed.)

Further research is required in order to include psychological research about the consequences an autocratic attitude in child-rearing may result in and to contrast them with the consequences of a mere authoritarian parenting style. The conjecture could be made that the development of the child may be affected depending on whether to avoid conflict he can just strictly stick to the commands and prohibitions historically issued by his caretaker, or whether he has to care about his sudden and unpredictable changes of mind, even if they do not get explicitly manifested.

4.11. THE ILLUSIONS OF THE AMENDMENT OF A COMMAND/STATUTE

Some words are in order here as regards the *illusion of modifying commands/statutes*.

I argued above that there is a number of reasons why a superior may pretend to be changing a duty rather than to be “creating” a new one (sec. 4.7). Now, because of the very same reasons a superior may pretend to be just changing a previously issued command.

While in the case of commands that change obligatednesses/obligatorinesses it is pretended that two different commands transform the same matter (i.e. the obligatedness/obligatoriness), *in the case it is the command that is transformed, the focus is rather on the superior's wish*.

It is worth stressing here that, unlike in the case of statutes/commands, there is no reason for a prototypical autocrat to pretend that he just “transformed” a certain historical wish of his into another one. What matters are uniquely his *current wishes*.

My hypothesis is that the *illusion of amendment* is most likely to emerge in the case of statutes. It is less likely in the case of commands, and it is even less likely in the case (mostly theoretical) of the autocrat's wishes.

Let us start with the first author, to my knowledge, who contended that the idea that statutes can be transformed is a naïve illusion: Hans Kelsen ¹⁴⁵.

¹⁴⁵ To be sure, also Petrażycki argued that norm-modifying normative facts should be reduced to norm-creating and norm-abrogating facts. But, unlike Kelsen, Petrażycki

In this context he made use of the term *Rechtsnorm*. It is not necessary to discuss here what exactly Kelsen means by 'Rechtsnorm'. From the next quotations it is apparent that this term can be understood as roughly referring to an odd subset of Petrażycki's set of legal normative facts¹⁴⁶.

Let us read two quotations where Kelsen argues that *rechtsnormen* cannot be amended¹⁴⁷:

The term 'partial repeal' of a [rechts]norm can be understood to mean the *partial change* [*teilweise Änderung*] of its content ... But the way in which the content of a [rechts]norm is changed is not that the [rechts]-norm continues to be binding as a partially repealed [rechts]norm, but that the bindingness of one [rechts]norm is repealed – by a [rechts]norm whose only function is repealing ... – and replaced by another [rechts]norm whose content is partly different from that of the first [rechts]norm. When people [*man*] speak of the 'partial repeal of a [rechts]norm', they mean a *partial change in the content of a legal rechtsnorm which continues to be binding*. For example, if there is a binding legal [rechts]norm 'theft is to be punished by one to three years imprisonment', and if the duration of the imprisonment is changed to 'six months to five years imprisonment', then according to this view the [rechts]norm continues to be binding but with an altered [*geändert*] content. The event [*Vorgang*] taking place in the realm of norms [*Bereich der Normen*] is represented analogous to the partial alteration of a physical object which does not affect [*bei Aufrechterhaltung*] its identity, *as when a house with six windows is changed by adding two new windows or by walling up two existing windows, without thereby making it into a different house*. [Kelsen 1979: 90, 1979*: 112, emphasis added, translation modified]

Kelsen considers this theory wrong.

This analogy is wrong. A *rechtsnorm* cannot be changed as a physical object can. When the content of a [rechts]norm is changed (i.e. when the content of a [rechts]norm whose content represents a partial alteration of the content of another *rechtsnorm* begins to be binding), there are two *rechtsnormen* which are in conflict with each other [*die miteinander in Konflikt stehen*]. Either the earlier *rechtsnorm* continues to be binding without any change and there are now two *rechtsnormen* which conflict, or the bindingness of the earlier [rechts]norm is repealed in virtue of the positive law principle *Lex posterior derogat anteriori* (i.e. it loses its bindingness when the second [rechts]norm becomes binding) and the only binding [rechts]norm is the

did not contend that the very idea of a statute that *modifies* another is a naïve illusion. Rather Petrażycki used the general metaphysic argument that «change is to add or create, to eliminate, or to unite» (1909-10: 329, 1909-10*: 157). It goes without saying that Petrażycki's argument, unlike Kelsen's, is meant to hold for any kind of phenomenon, including non-ethical ones.

¹⁴⁶ It is odd because it could be argued that it includes both *buletic* normative facts and such normative facts as horizontal custom.

¹⁴⁷ I will not translate *Rechtsnorm* and, as the reader knows, I do not capitalize it (sec. 1.4).

second one whose content is *partially* different from that of the first [rechts]-norm. In neither case does the first [rechts]norm continue to be binding with an altered content, as the theory of the *partial* repeal of a rechtsnorm assumes. Even if we assume along with the traditional theory that the change in content of the earlier [rechts]norm is brought about by an amendment of the earlier [rechts]norm by the later [rechts]norm, the earlier [rechts]-norm does not continue to be binding with an altered content, but it is only the second [rechts]norm which is binding. And this is so even when the second [rechts]norm is formulated as ‘The minimum age specified in the first [rechts]norm to enter into a contract is reduced to 20 years.’ For this is simply an abbreviated form for the whole [rechts]norm with a partially different content. That is clear from the fact that – even according to the traditional theory – when the later [rechts]norm is identical in content with the earlier [rechts]norm, the earlier [rechts]norm ceases to be binding. For if the bindingness of the later [rechts]norm is repealed, the earlier [rechts]-norm does not revive [*die alte Norm gilt nicht*]. [Kelsen 1979: 90 f., 1979*: 112 f., translation modified and completed]

In other words, Kelsen holds that the reason why the phenomenon that “really” takes place is not the transformation of rechtsnorm₁ into rechtsnorm₂ through an act of transformation is that, if that act of transformation is undone, rechtsnorm₁ does not revive. He adds that a revival would not obtain even if rechtsnorm₂ had the same content as rechtsnorm₁.

His contention is correct, but the way he supports it is completely wrong. That a statute that repeals another repealing statute should not bring about the revival of the statute that was first repealed is just Kelsen’s personal political preference¹⁴⁸. Therefore it is just a non-argument.

Moreover, it should be borne in mind that, even if rechtsnormen – understood as *Petrażyckian normative facts* – can be even the product of the wild fantasy of some imperative side, attributive side or third participant, *normative facts can definitely also be really existing external physical realities*.

In this case there is no reason to exclude that they can be physically changed just as a house can. Think of a community where the official texts of statutes, once passed, are collected in some building¹⁴⁹. Nothing prevents us from imagining that in such a community for the amendment of a statute to take effect (i.e. to become “binding”) the originals must be physically changed¹⁵⁰. In such a community, the originals of the statutes

¹⁴⁸ William Blackstone, for instance, had a different opinion: «If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal word to that purpose» (1765-1769: intr., 3.8: 90).

¹⁴⁹ The role played by such originals could be compared with the role played by the prototype meter of Sèvres between 1889 and 1960.

¹⁵⁰ I am making here use of the psychological concept of bindingness (above, sec. 2.5, fn. 16). In accordance with my definition of bindingness, in the case discussed in text *for a text slightly different from another one (previously experienced as a normative fact) to be experienced as a normative fact and to substitute the previous one it is necessary that the original text gets physically modified*.

could and should¹⁵¹ be modified just as a house can. Nonetheless it is true that *most* normative facts *cannot* be modified. *Most of them* cannot be modified because they do not pertain to current reality, but rather to *historical reality*. As I said above, according to historical realism, what has happened keeps having happened for ever (sec. 1.1). This contention is fully compatible with Petrażycki's psychological theory of repeal (sec. 4.4.4). Through new normative facts lawmakers can just try to change the psyches of people, bureaucrats and judges. In modern countries they are successful most of the times, but this is just an empirical fact (cf. also sec. 4.7).

Once a certain *historical normative fact*¹⁵² has come into existence it cannot be undone¹⁵³. What a person endowed with an authoritativeness can do is but to produce further normative facts in order to try to change the psyches of his subordinates¹⁵⁴.

A different and perhaps more effective way to achieve the same result may be just pretending to be "transforming" the previous historical nor-

This is a (probabilistic) causal law. This is why I refer to the rules about the bindingness of normative facts with the term *anankastic-constitutive rules*, rather than with the term *anankastic-constitutive norm*. I think that the term *norm* should be used only in the context of Amedeo Conte's eidetic-constitutive rules (1997). The term *rule* is compatible with the idea of a causal law, while the term *norm* is not. (As for Conte's *thetic-constitutive* rules, such as repealing statutes, they are instead normative facts). See Fittipaldi — a and 2012.

My psychological conception of the rules about validity is identical with Hägerström-Pattaro's proposal (1974: 101 f.).

The psychological conception of bindingness should not be confused with the legal dogmatic conception thereof. At this regard see again Fittipaldi — a and 2012.

¹⁵¹ This is an *anankastic* 'should'. See above sec. 1.4, fn. 69, as well as the previous footnote.

¹⁵² Elsewhere (— a) I contrast historical (i.e. institutional) normative facts with current (i.e. non-institutional) normative facts.

¹⁵³ That historical reality lasts is the cause of the illusion that «[i]f a command is given or a request is made, something is thereby *changed in the world*. A certain action *now* stands there as commanded or requested» (Reinach 1913*: 22, emphases added). Nothing stands *now* as commanded or requested. What only stands is the past, that cannot be changed or extinguished. This is why such a contention as that «a claim to have something done dissolves as soon as the thing is done» (9) is but a confusion between the point of view of legal dogmatics and the point of view of the theory of law (Lande 1925: 375). I deal with Reinach in Fittipaldi — a, as his work discusses a mixture of everyday legal ontology and jurisprudential legal ontology. That normative facts can be historical facts also explains why «claims and obligations can exist without being the object of knowledge» (Reinach 1913*: 10). This holds true for whatever historical fact. Historical facts can *have* existed without being known by anyone. Again, as regards this topic see Fittipaldi — a.

¹⁵⁴ As regards the principle *lex posterior derogat anteriori*, in the psychological theory of law this is a psychological phenomenon akin to the phenomena discussed above in sec. 4.7, fn. 123. The psychological origin of this principle is probably the assumption that if some superior issues a command that is empirically incompatible with a previous one, he must have changed his mind.

mative fact into a different one. I discussed above why some superior may find it expedient to pretend to be transforming some duty-resulting-from-a-command (sec. 4.7). In the case of statutes further factors may be at work. For instance, an amended statute may be easier to retrieve than a new one. Moreover, in this way the previous one may be more easily forgotten, that is precisely what the lawmaker who “amends” a statute wishes.

This is the way the illusion of the transformation of a command/statute may emerge.

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Finally, it is worth spending a few words to contrast the *illusion of the transformation of some command into another* with *illusion of the transformation of some duty by issuing new commands* (above, sec. 4.7). In both cases normative facts are experienced as tools whereby the superior changes some reality. In the case of the illusion of the transformation of some duty into a new one, the superior pretends to be changing some reality that, as we know, does not really exist. He pretends to be changing some external reality, while he is attempting to destroy some internal reality in his imperative side’s psyche and to create a different one in it.

In the case of the illusion of the transformation of some command/statute into another, the superior is not pretending to be changing some imperativesidedness. He is rather pretending to be changing some other command/statute. In this case the tool is made of the same matter of what is being illusorily manipulated, much as some person might try to transform an iron hammer into something else by making use of some other iron hammer. But as we know, already issued commands/statutes cannot be undone. Once issued, they keep having existed for ever.

The difference between the illusion of the transformation of an obligatedness/obligatoriness and the illusion of the transformation of a command is therefore that in the first case the superior is trying to change some not-really-existing reality, while in the second one he is trying to change some historical reality. Only the illusion of the transformation of an obligatedness/obligatoriness is conducive to the illusion of a free-standing legal entity (above, sec. 4.7).

I sum up the different structures of these two kinds of illusory transformations in table 4.21. I use italics to symbolize the idea that something keeps being somehow the same throughout the change.

Table 4.21. – Two illusions of transformation.

TRANSFORMATION OF COMMANDS		TRANSFORMATION OF DUTIES			
	command ₂		command ₁		command ₂
	↓		↓		↓
command ₁	→	<i>command₁</i>	OB	→	<i>OB</i> →

4.12. A CASE OF UNDETACHMENT: OWNERSHIP

As a conclusion for this chapter let us address a case of undetachment in naïve legal ontology: *ownership*. I hope that this discussion will be useful to stress a contrario the role of the five factors of detachment I discussed. This discussion will also help us to cast some more light as regards the very phenomenon of attributiveness.

Ownership, understood as an entity, does not belong to naïve legal ontology. The nouns referring to it in the four languages I am taking into account in this book are all marked or the result of some jurisprudential trickling down: *ownership*¹⁵⁵, *property*¹⁵⁶, *Eigentum*, *proprietà*, *sobstvennost'*. The same holds true for the Latin term *dominium*, that is marked as compared with the term *dominus*. In Ancient Greek, instead, there not even seems to have existed a noun precisely meaning “ownership” (Biscardi 1982: 188).

Ownership is first of all a naïve projective *quality*. The English term *ownership* refers to the quality of an animate entity: his quality of being owner. When I say that ownership is a projective quality, though, I refer first of all to the quality of an inanimate entity. I refer to its quality of belonging to some animate entity. That is why I shall often use the term *ownness* as well. The model for the neologism *ownness* are the Latin term *proprietas*, the German term *Eigentum* and the Russian term *sobstvennost'*.

The reason why I did not discuss *ownness* as a naïve projective quality in ch. 2 is that *ownness* is a specifically *legal* projective quality. Understanding this quality requires being already acquainted with Petrażycki's distinction between legal and moral phenomena.

Before discussing *ownness* as an unaccomplished naïve legal illusion of a free-standing entity, it is necessary to start with Petrażycki's conception of ownership.

Ownership is neither a bond [*svias'*] between a person and a thing nor the sum total of the prohibitions issued by anyone in respect of anyone. It is a psychic impulsive-intellectual phenomenon. It exists solely in the psyche of one who attributes to himself or to another a right of property. The person who ascribes [*prpisyvaet*] to *another* a right of ownership considers [*sčitaet*] himself (and others) bound to tolerate any relationship [*otnošenie*] toward the thing (any influence brought upon it, any use or abuse of it, *uti et abuti*) on the part of that other, and on his part to refrain from every sort of action

¹⁵⁵ According to Holdsworth (1936: 78), the first attestations of the terms *owner* and *ownership* date back, respectively, to 1340 and to 1583.

¹⁵⁶ I shall refer mostly to the term *ownership*. The meanings of the term *property* are far more complex than those of *ownership*. About the complexity of the term *property* in Common Law see Gambaro et al. 1992. It is worth pointing out that *property* can be used more often than *ownership* to refer to the thing that is the object of the right of ownership.

with regard to the thing (without the permission of that other: the owner). Consciousness [*soznanie*] of these obligations is experienced in an attributive manner: the use and the freedom from interference by others is experienced as something which is due and owing to the owner.

One who ascribes to *himself* a right of ownership in a given estate or other object considers others bound to tolerate any economic dealing therewith that he fancies and to refrain from interference (bound not to “step in”). He experiences these psychic acts with attributive force [*sila*]: any dealing with the property which he pleases – and he alone – free from the interference of others – is due and owing to him, and others are bound to submit thereto. [Petrażycki 1909-10: 190, 1909-10*: 124]

Jerzy Lande sums up Petrażycki’s conception by saying that according to Petrażycki the right of ownership consists of «two legal relationships bound to each other: the first one of the kind *pati - facere*, the second one of the kind *non facere - non pati*» (1952: 877).

We saw above that Petrażycki’s three kinds of legal relationship should be completed with a fourth one: *pati-nonfacere*. In my opinion, the right of ownership should be understood as the result of *three* legal relationships, as the attributive side typically also experiences that others have to tolerate that he refrains from taking care of his thing or piece of land. Think of a piece of land that lies uncultivated – not just fallow – for an unreasonable amount of time just because his owner is an idle rich man. As we already know, though, my general hypothesis is that omissibilities hardly play any role in naïve legal life. An exception to this hypothesis may be ownership – especially the ownership of land. Under certain circumstances omissibilities involving land may become quite salient. Think of the situation where there is shortage of some agricultural product.

Before discussing how the sum of these three legal experiences may cause the illusion of a special bond between the attributive side and his thing, it should be stressed that Petrażycki’s conception of ownership is too narrow.

First. It does not cover the phenomenon of *relative ownership*. «A may be the owner vis-à-vis B, but he may not be the owner vis-à-vis X» (Kurczewski 1977a: 366).

Second. Ownership may not include all the three mentioned legal relationships. Moreover the range of actions permitted to the attributive side may be restricted. That is why Kurczewski has proposed the following more general concept of ownership:

Between two persons the owner of the good as for actions [czynności] of the kind C is the person who has the freedom [swoboda] to carry out those actions – a freedom that others must respect [respectować]. [Kurczewski 1975: 162, emphasis in the original]

This definition has two problems.

First. It covers exclusively the attributive side's permittednesses and omissibilities. It does not to cover the imperative sides' prohibitednesses.

Second. It does not allow for some sort of *pure attributive ownership* – a phenomenon that is theoretically predicted by Kurczewski's theorizing of pure attributive phenomena. I think that *ball possession* in games may be an example of such a pure attributive ownership. A person who experiences himself as the pure attributive owner of some good discharges his aggressiveness in order to keep it, but does not discharge aggressiveness in the case of *mere indexes* of some interior non-acknowledgment of his possession.

I think that Kurczewski's definition can be improved and generalized in the following way. *A experiences himself as the imperative-attributive owner of a certain inanimate entity*¹⁵⁷ *vis-à-vis the imperative side B if A experiences himself as the attributive side in some pati-facere, pati-nonfacere or nonfacere-nonpati legal relationship involving that inanimate entity.* By the same token, *person-B experiences himself as the purely attributive owner of a certain inanimate entity if he experiences his purely attributive permittedness or omissibility as regards some facere or nonfacere involving that inanimate entity.*

Kurczewski refers to Petrażycki's narrow definition of ownership as to a *monistic conception* (*monistyczna koncepcja*). I shall, instead, use the couple of adjectives *absolute* and *complete*. We can now turn to the question of the undetachment of absolute and complete ownership¹⁵⁸.

The sum of the bundle of legal experiences that make up absolute and complete ownership may cause the illusion of a special bond between the attributive side and his thing. In English, this illusion is expressed through the English possessive articles (i) *my/our*, (ii) *your*, (iii) *his/her*, etc. depending on whether the experiencer is (i) the attributive side, (ii) the imperative side or (iii) a third spectator / imperative side. Some languages have also reflexive possessive adjectives. Think of the Russian *svoj* or the Latin *suus*¹⁵⁹.

¹⁵⁷ This term was inspired to me by Kurczewski's (1973: 46) distinction between the activities regarding people (*czynności wobec ludzi*) that are involved in authoritativenesses (*władzy*) and the activities regarding things (*czynności wobec rzeczy*) that are involved in ownership (*własność*). Further research is needed in order to better distinguish – if at all – ownership of animate entities (such as slaves or animals) from authoritativeness.

¹⁵⁸ Of course, a sociologist cannot assume that an individual's experience of ownership is necessarily the same throughout the whole life of the individual. The hypothesis can be made, for example, that in certain dire times the attributive side's experience of his omissibility as to cultivating his own land decreases. This hypothesis was inspired to me by the research to which Kurczewski refers in his *Living sociology of law* (2010: 129 ff.).

¹⁵⁹ Unlike *svoj*, the reflexive possessive adjective *suus* could be used only for the third person singular and plural.

Let us now read how Petrażycki explains the illusion of this bond.

The idea that a special bond [*osobaja svjas'*] exists between the person and the thing ... is due not alone to the association of ideas ... but also to other psychic processes directly evoked by the attributive experiences.

The attributive nature of legal motorial impulsions leads to a projection with the following content. Various (represented) objects are experienced as endowed with the quality ... of appertainingness [*pričitaemost'*], of attributedness [*predostavlennost'*], belongingness [*prinadležnost'*]. They are experienced as appertaining, being attributed, belonging to certain (represented) subjects. Because of these emotions the projection arises [*polučaetsja*] that certain obligations are owed by someone to someone else and that these obligations, at once, belong to the latter as his rights [*prava*] – hence the projection of the appertainingness [*prinadležnost'*] of obligations as well as of the belongingness [*prinadležnost'*] of rights. What is required of the obligor appears as authoritatively attributed as belonging – to another. If it is a matter of paying a certain sum, or of furnishing other objects, the projection of belongingness [*proekcija prinadležnosti*] is (on the basis of attributive impulsions) then extended to this sum or to these objects also. Obligees receive “their own” [*svoë*]. In the discharge of mutual debts, they retain what is “theirs” – that is that which is due from the other side. The tendency to project the belongingness [*prinadležnost'*] naturally operates with special force, and particular continuity and persistence, in those fields where the legal attributedness [*pravovaja predostavlennost'*] is not limited in operation to another definite person (relative attributedness [*otnositel'naja predostavlennost'*]) but are unlimited in operation, extending to all other persons whatsoever (*absoljutnaja predostavlennost'*) ... This explains the ascription of the belongingness to the attributive side [*sub'ject attributiva*¹⁶⁰] is stubbornly and constantly experienced, and why the term “property” (*proprietas*, *Eigentum*) is used likewise. The “belongingness” of something to its “owner” is an impulsive projection ..., just as the “appetizingness”, “attractiveness”, “repulsiveness”, “prettiness”, “ugliness”, and so on, which are ascribed under the influence of impulsions to objects and phenomena of the external world. [Petrażycki 1909-10: 191 f., 1909-10*: 125 f., translation modified]

Before discussing how the projective mechanism operates in this case, two remarks are in order here.

First, Petrażycki seems to suggest that also in the case of *facere-accipere* legal relationships the attributive side experiences as his own what is due to him on the part of the imperative side. This can be related to what I said above about the Latin terms *aes meum* and *aes alienum* (sec. 4.6.1 and 4.6.4).

Second, it is not clear what Petrażycki means when he says that in the case of the discharge of mutual debts, the two sides *retain* (*uderživajut*) “what is ‘theirs’ – that is that which is due to them from the other side”¹⁶¹.

¹⁶⁰ The noun *attributiva* is the genitive singular of Petrażycki’s neologism *attributiv*.

¹⁶¹ In Russian: «управомоченные получают “свое”, при расплате по взаимным долгам удерживают “свое” (т.е. то, что причитается от другой стороны)».

Sure, both sides retain what is theirs, but *theirs* does not mean “that which is due to them from the other side”. This would make sense in the context of the payment of a standard debt. As we know (sec. 4.6.4), here a conceptual hysteron proteron takes place. The attributive side *already* calls *his money* the money that is *still* the money of the imperative side, whereas in naïve legal mentality the ownness¹⁶² of fungibles does not get transferred until these fungibles are individuated and handed over. But in the case of the mutual discharge of debts I think that no conceptual hysteron proteron takes place. Either side just retains that which is already his. The reason why the expression “his own” is used is that simply no handover takes place, rather than the fact that this money is due from the other side. In the case of the mutual discharge of debts we just have the standard emotion of ownership of each side over his own amount of money. Nobody gives anything to anybody, and thus no ownership over the money gets transferred.

We can now come to the explanation Petražycski gives of the illusion of *myness*, *yourness*, *hisness*, etc. in the case of ownership.

Petražycski mentions *continuity* and *persistence*.

Following what I suggested in sec. 2.5, I think it better to draw on the concepts of *stability* and *intersubjectivity*.

*Prototypical absolute and complete ownness involves a stable and intersubjective relationship between an animate and an inanimate entity*¹⁶³.

Think of the relationship between a human being and his arm or leg:

1. People have their legs *vis-à-vis all other people*.
2. Most people retain their legs *until they die*.

Now, the complete and absolute ownership over movables¹⁶⁴ is experienced as much more stable and intersubjective as compared with the ownership of debts. This is precisely what Petražycski suggests.

As regards stability, suffice it to say that the ownership of debts is necessarily transitory, as their payment usually extinguishes them. Ownership, instead, can last even a man’s whole life if he does not decide to transfer it. Usually the future of debts is that they will be extinguished. The future of ownership, other things being equal, is instead that it will last until the thing itself¹⁶⁵. We can say that ownership is less transitory than debts.

¹⁶² By the term *ownness*, of course, I stress that I am not talking of an entity.

¹⁶³ That is why in many languages terms meaning the belongingness of some entity (be it animate or inanimate) to some *inanimate* entity: (1) either do not exist (think of the German *sein* or of the Russian *ego*, that can both refer to an animate and an inanimate entity), (2) or, if they exist, are marked (think of the Italian *di esso* as compared with *suo*).

¹⁶⁴ We focus here on movables. Cf. below fn. 167.

¹⁶⁵ Whether people experience ownership as imprescriptible is an empirical issue that cannot be addressed here. Negative prescription would make ownership more transitory.

As regards *intersubjectivity*, we can notice that, while in the case of debts the attributive side owns the imperative side's *facere*¹⁶⁶, in the case of absolute ownership the attributive side experiences himself as owning the thing *vis-à-vis* the entire world¹⁶⁷.

This means that among the different kinds ownership, complete and absolute ownership is the ownership that most resembles the prototypical ownness of one's bodily parts.

In this way we have come to an explanation of the *illusion of a special bond between a person and a thing*. We can now come to the question of why in naïve legal ontology this ownness does not get detached from the thing into the illusion of a free-standing right of ownership.

Since nowadays – because of the trickling down of jurisprudential ontology onto naïve legal conceptions – we are quite accustomed to the idea of a right of ownership distinct from the thing owned, I think it useful to go back in the past in order to shortly show how the naïve conception looks like.

A good example of the naïve conception is the following passage taken from Gaius.

Quaedam praeterea res corporales sunt, quaedam incorporales. Corporales hae sunt, quae tangi possunt, velut fundus, homo, vestis, aurum, argentum et denique aliae res innumerabiles.

Incorporales sunt, quae tangi non possunt, qualia sunt ea, quae in iure consistunt, sicut hereditas, ususfructus, obligationes quoquo modo contractae. Nec ad rem pertinet, quod in hereditate res corporales continentur, et fructus, qui ex fundo percipiuntur, corporales sunt, et id, quod ex aliqua obligatione nobis debetur, plerumque corporale est, veluti fundus, homo, pecunia: nam ipsum ius successionis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. Eodem numero sunt iura praediorum urbanorum et rusticorum. [Gaius, *Inst.*, 2.12-14]

Further, things are divided into corporeal and incorporeal. Corporeal things are tangible things, such as land, a slave, a garment, gold, silver, and countless other things. Incorporeal are things that are intangible, such as exist merely in law, for example, an inheritance, a usufruct, obligations however contracted. It matters not that corporeal things are comprised in inheritance, or that the fruits gathered from land (subject to usufruct) are

Positive prescription (*usucapio*), instead, cannot cause the detachment of ownership as it is closely related to adverse possession.

¹⁶⁶ Sure, in the case of the debts of fungibles, because of the already mentioned *hysteron proteron*, the attributive side may experience his imperative side's fungibles as already his, but this is so *exclusively vis-à-vis his imperative side*.

¹⁶⁷ It does not concern us in this context the fact that still in many common law countries there is a system based on the relative ownership of land, as I consider the ownership of movables the prototype of naïve legal ownership. Ownership over land is a jurisprudential phenomenon.

corporeal, or that what is due under an obligation is commonly corporeal, for instance land, a slave, money; for the rights themselves, of inheritance, usufruct, and obligation, are incorporeal. Incorporeal also are the rights attached to urban and rural lands. [Gaius 1946[†]: 68 f.]

The reason why Gaius did not mention *dominium* among the *res incorporales* is that the owner does not have a right, but the thing itself. In this way Gaius's words mirror naïve legal ontology¹⁶⁸.

That Romans did not conceive ownership as a *ius* is clearly shown by Álvaro D'Ors:

The owner has the land itself, the *res*; the owner of a servitude has a *ius*, that, as a consequence of a somewhat metaphorical process, is treated like a *res* and is referred to as a *res incorporalis*. [D'Ors 1953: 288]

Only in the context of *incomplete* (i.e. fragmented) ownership can the illusion come into existence that there exists some sort of ownership over something that is independent of the thing itself.

We can now turn to the question of why in naïve legal ontology there is not such an entity as a right of ownership.

We saw above that three factors may cause the detachment of a legal quality from the action/inaction of the attributive/imperative side into the illusion of a free-standing entity:

1. transitoriness,
2. fungibility and
3. transformability.

Only *transitoriness* can play a role here.

Sure, it could be objected that the ownership over a certain thing can be *transitory* for its owner, but as soon as it ceases to belong to him it starts being somebody else's. In this way there is always somebody the thing belongs to.

Nevertheless it can be replied by pointing to such phenomena as *occupatio* or *derelictio*. In the case of *occupatio* some un-owned thing (*res nullius*) is turned into an owned thing. In the case of *derelictio* some owned thing is turned into an un-owned thing. This may cause ownness to be experienced as an entity.

¹⁶⁸ Recall that Hohfeld criticized «the tendency to confuse or blend non-legal and legal conceptions». Here is what he wrote about the term *property*: «The word 'property' furnishes a striking example. Both with lawyers and with laymen this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various rights, privileges, etc., relate; then again – with far greater discrimination and accuracy – the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object». [Hohfeld 1913: 6]

In the case of the word *property*, because the legal quality of belongingness is hardly detachable from the thing, the word, when used in a concrete sense, starts meaning the thing itself.

The second and the third factor, instead, can play no role.

Obviously, *fungibility* can play no role as ownership is over a strictly individuated thing.

As for *transformability*, it plays no role in *naïve* legal ontology as sudden – and therefore perceptible – transformations of the right of ownership require kinds of positive law that have nothing to do with naïve legal ontology.

As I said above, transformation can cause the illusion of a free-standing entity because it conveys the idea that a certain obligatoriness exists independently of the shapes it takes.

Now, a phenomenon somewhat comparable with transformability could be the *transfer of ownership independent of the material possession of the thing*. In this case ownership is dealt with independently of the thing itself. These phenomena, though, do not belong to naïve legal ontology. In naïve legal ontology only *real contracts* exist, namely contracts that require the delivery of the thing. In naïve legal ontology the transfer of the thing (*traditio*) is tantamount to the transfer of the ownership over that very same thing. These two phenomena are undistinguishable in naïve legal mentality¹⁶⁹.

We can conclude that of the three factors that may cause the detachment of the belonging-to-somebody into the illusion of a free-standing entity only transitoriness may operate here. As we already know, transitoriness can also lead to experience a reality as a state. This could explain why in English ownness can be expressed also with the unmarked verb *to own*. We can expect this phenomenon also in other languages.

A falsifiable hypothesis following from these considerations is that it is much more probable that in a naïve legal language an unmarked noun for “debt” gets developed than for “absolute and complete right of ownership”.

Further research is needed as regards the possible correlations between the various kinds of relative and/or incomplete ownership and the legal illusions possibly stemming therefrom.

A final remark is in order here about the relationship between *ownness* and *attributiveness*. It could be argued that Petrażycki’s concept of *attributiveness* is unclear¹⁷⁰.

My conjecture is that the *prototype of ownness is the ownness of one’s bodily organs or activity*. This prototype may cast light on the very concept of attributiveness.

¹⁶⁹ As for solemn contracts, hardly do they belong to naïve legal ontology. A discussion of real and solemn contracts from an anthropological point of view can be found in Sacco 2007 (293). See also Musselli 1989.

¹⁷⁰ Such a criticism seems to have been made by Ziemiński. See Motyka 1992 (150).

It is easy to argue that in the case of permittednesses the attributive side experiences himself as the owner of his action (sec. 4.9.1). The action is very often carried out by using one's body. This reasoning can be extended to omissibilities.

In the case of *facere-accipere* this idea is stretched to cover the owning of the imperative side's *facere*.

As for prohibitednesses, it is more difficult to argue that the attributive side is the owner of the imperative side's *nonfacere*. In this context illusions of some attributive entity belonging to the attributive side seem not to emerge. Not even unmarked adjectives or modal verbs to refer to the imperative side's prohibitedness seem to emerge (see sec. 4.6). The cause of these phenomena is not that *nonfacere-nonpati* legal relationships are less related to ownness than the other three. Quite the opposite. The most typical prohibitednesses regard the very body of the attributive side. Just think of the prohibitedness of assaulting people. In this case the focus of the attributive side is not on some imperative side's inaction but rather on his own body that he expects to be free of any aggression. This may explain why unmarked terms can be hardly found for the imperative side's quality or for the attributive side's entity. The focus is simply on the attributive side himself. It is the attributive side that is inviolable, not the imperative side that is prohibited¹⁷¹.

This hypothesis, if correct, may explain the difference between the attributive side's *anger* and the third spectator's *indignation*.

Both are discharges of one's usually restrained aggressiveness¹⁷², but only the attributive side may be experiencing a *loss*. Only the attributive side does experience himself as *endowed* with something and the behavior of the imperative side as a damage caused to him.

To be sure a person may experience a loss without discharging aggressiveness. A loss does not necessarily elicit a discharge of aggressiveness, but if this is the case, then such a discharge of aggressiveness deserves the name of *anger*. The concept of loss is not necessary to the concept of norm, but it is for the concept of anger.

If this is correct, it should be contended that *the prototype of the infringement of an attributivesidedness is an aggression to the body*¹⁷³.

¹⁷¹ As for phenomena such as the servitude *ne luminibus officiat* it can be argued that the attributive side experiences the light as his own light.

¹⁷² Recall that in certain cases the third spectator may experience shame. I think that such an experience in an attributive side is quite rare and pathological.

¹⁷³ Further research is required in order to cast some light about possible connections with the endowment effect.

APPENDIX

MONEYNESS AS A NAÏVE NON-LEGAL PHENOMENON

In my definition of *debt* I made use of the concept of money. It might be objected that money is an institutional phenomenon that does not pertain to naïve legal ontology. If such an objection were deemed correct, it would be completely wrong to consider debts as a typical naïve-ontological phenomenon because debts presuppose a non-naïve-ontological phenomenon as money.

Whatever the way we understand the term *institutional* (as well as its connections with legal phenomena understood as imperative-attributive phenomena), as we know, institutional phenomena do not pertain to the scope of this book ¹.

But *money is not an institutional phenomenon*. Of course, I am referring here to naïve money. I am thinking neither of fiat money nor of M1, M2, etc. ². With this qualification, money is a naïve phenomenon.

That money is a naïve phenomenon does not imply that it is a naïve *legal* (or ethical) phenomenon. Naïve money does not have anything to do with superegoic emotions. To rephrase an all-too famous quote: it is not from the superego of the butcher, the brewer or the baker, that we expect that they accept our money, but from their regard to their own interest.

That is why I am dealing with money in an appendix.

My conjecture is that in naïve ontology *money is not an entity, it is a quality*. I am not the first to make this conjecture. Let us read the masterly written passage where Friedrich August von Hayek defines *money*:

[A]lthough we usually assume there is a sharp line between what is money and what is not – and the law usually tries to make such a distinction – so far as the causal effects of monetary events are concerned, there is no such clear

¹ A discussion of the multiple connections between institutionality and legal phenomena (though understood in a different way from that adopted in this book) can be found in Lorini 2000. I deal elsewhere (— a) with the connection between institutionality, imperative-attributive phenomena and historical realism.

² I deal with them elsewhere (— a).

difference. What we find is rather a continuum in which *objects of various degree of liquidity*, or with values that can fluctuate independently of each other, shade into each other in the degree to which they function as money. I have always found it useful to explain to students that it has been rather a misfortune that we describe money by a *noun*, and that it would be more helpful for the explanation of the monetary phenomenon if ‘money’ were an *adjective* describing a *property which different things could possess to varying degrees*. ‘Currency’ is, for this reason, more appropriate, since objects can ‘have currency’ to varying degrees and through different regions or sectors of the population. [Hayek 1990: 56, emphases added]

At this regard Hayek recalls that Fritz Machlup (1970) occasionally speaks of *moneyness* and *near-moneyness*. I shall also make use of the term *moneyness* in order to stress that moneyness is a quality.

The fact that Hayek talks of “a property that can be possessed” recalls Croft’s statement about the connection between states and possessive constructions (sec. 2.5). I will not discuss moneyness as a state because I think that transitory money is a non-naïve phenomenon.

Now, according to Hayek’s definition, the degree of moneyness of an entity is its degree of liquidity. *The higher is the probability to find somebody who accepts a certain object in exchange for something else, the higher the degree of moneyness of that object*. In a certain community, several different entities can be endowed with a high degree of moneyness at the same time. Moneyness does not depend on convention – whatever this term means. It depends on the really-existing (secondary or primary) qualities of some entity.

In line with the subject-matter of this book, the question to be asked here is the following: *if, from a scientific point of view money, is a quality, why does naïve language refer to this reality with nouns, and not with adjectives?* Hayek complains that money is a noun, but does not explain the cause of this “mistake”.

To give a tentative answer to this question two situations must be distinguished.

1. *Single-money societies*, namely societies with *only one* kind of objects with a degree of liquidity much higher than that of any other object.
2. *Multiple-money societies*, namely societies with *several* kinds of objects with a degree of liquidity much higher than that that any other object.

In the first case we can expect that moneyness is synecdochically identified with that object. The prediction can be made that in such societies the noun for “money” very often stems from the noun for this object. This phenomenon is similar to the undetachment of absolute and complete ownness that I discussed above (sec. 4.12).

In the second case we can expect that moneyness gets somewhat detached from the objects endowed with it. This is so because in a society with multiple goods with a high degree of liquidity it could be argued that

money is a quality these goods *share*. Therefore money cannot be identified with just one of them. If you can pay with gold, silver, or bronze, money may be experienced as somewhat different from them. In this case, money is not the thing itself, but rather one of its qualities.

Now, the question is why in such a society money is not experienced as a quality. An answer could be that money is an odd quality, as it is not a quality of the object itself, like its color. Rather money is made up of the attitudes of other people. Money does not lie in the object, it lies in other people. It could be argued that this quality lacks somewhat of saliency. By the same token, it could be also argued that perhaps three kinds only of money are not enough as to avoid synecdoche. Think instead of the concept of liquidity as experienced in modern economies.

The distinction between single-money and multiple-money societies implies the hypothesis that, since in multiple-money societies it is harder to identify money with just one kind of object, in such societies there is a higher probability that the term for “money” is taken from somewhere else. This could explain why in Latin the terms *aurum* (“gold”), *argentum* (“silver”) and *aes* (“copper”) could all be used to mean “money”, but, on the other hand, an independent noun for “money” also emerged. According to Benveniste (1969, 1969*), *pecunia* (“money”) first meant “mobile wealth” (*richesse mobilière personnelle*). (As for *aes*, we know that it eventually got the specialized meaning “debt”/“credit”)³.

Of course, I am talking here merely of a *higher* chance that no synecdoche occurs. Recall that in Ancient Greek the term for “money” was ἀργύριον (“piece of silver”)⁴.

Hayek’s definition of money centers on the medium-of-exchange function of money. Economists, traditionally, assign to money three other functions:

- being a measure of value,
- being a store of value and
- being a standard for deferred payments.

Naïve money does not necessarily perform all these functions at once. *For some physical entity to perform the measure-of-value function it is necessary that the set of these entities can be treated as isomorphic with the set of rational numbers* (or at least integers). This is not at all obvious. Think of a society where the entities with the highest degree of liquidity are shells – their purchasing power depending on the most diverse factors: color, size, shape, state of conservation, etc.

³ It could be perhaps argued that *pecunia* somewhat stems from the store-of-value-function of money that I will shortly discuss just below.

⁴ A special challenge posed by money is that in most languages the terms meaning “money” – much as the terms referring to the “sex organs” – seem to proliferate at a pace that makes it difficult even to gather all the relevant materials.

The kind of money presupposed in my definition of debts performs also the measure-of-value function. This function can be performed exclusively by fungible entities.

As for the *store-of-value function*, for an entity to perform this function it is necessary that that entity is non-perishable. Think of a society where fresh fish is the medium of exchange. In such a society fresh fish could perform the medium-of-exchange function, but it could hardly perform the store-of-value function. The store-of-value function is closely related to wealth. In such a fish-addicted society the store-of-value function could be better performed by cured fish such as stockfish, smoked eels, etc.⁵

The *standard-of-deferred-payments function* may also be detached from the others. It is easy to imagine situations where the *standard-of-immediate-payments function* (i.e. the medium-of-exchange function) is performed by some good, while the *standard-of-deferred-payments function* is performed by another. If we are in July, we may decide to use eggplants as a standard for the immediate payments and oranges a standard for the payments due next winter.

From each of these three functions an independent definition of money can be obtained. My conjecture, though, is that the core of the naïve concept of money is the medium-of-exchange function. This function (and its connection with the concept of liquidity) defines naïve money. The other three functions just correlate with the core medium-of-exchange function.

The question is whether these three other functions play a causal role as to the phenomenon that money is not experienced as a quality.

As for the *measure-of-value function*, this function involves the concept of value. What value is, is one of the thorniest issues of the history of economic thought. I cannot venture to address this topic here. The only point I wish to make is that the role of the measure-of-value function as to the incapability of conceiving money as a quality is perhaps related to the question of whether cardinal numbers are experienced as qualities of sets or as free-standing entities. The hypothesis could be made that the higher a number, the likelier it is that it is conceived as an entity⁶. Instead, the lower a number, the likelier it is that it is conceived as a quality. An index that a certain number is experienced as a quality may be that its term, like

⁵ Cf. Amato & Fantacci 2012 as regards Keynes' proposal to create an international money incapable to perform the store-of-value function.

⁶ On the number-are-things-in-the-world metaphor see also Lakoff & Núñez 2000 (80 f.).

An open question is why, if the higher the number, the higher the chance that it is experienced as an entity, in languages with declensions high numbers are not usually declined. The language I am acquainted with with the highest declinable number is Russian. The number is *five*: N. *piat'*, G. *piati*, D. *piati*, A. *piat'*, I. *piatju*, P. *piati*. As is apparent this declension is partially syncretized.

an adjective, agrees with the gender of the noun it modifies⁷. In Ancient Greek the highest number with this property is *four*. The form τέτταρες is used with masculine and feminine terms. The form τέτταρα is used with neutrals. In Russian and Latin the highest number with this property is *two*. The forms *dva* and *duo* are used for masculine and neutral terms. The forms *dve* and *duae* are used for feminine terms⁸.

I think that the *store-of-value function* can play a role as to the conception of money as an entity, rather than as a quality. My conjecture is that naïve minds cannot conceive value but in the terms of *entities* that have a use value⁹. Further research is required.

Finally, as for the *standard-of-deferred-payments function*, it seems to me that it cannot play a different role from that played by the *medium-of-exchange function*.

As I said, my definition of debts requires some sort of entity performing at least two functions: the medium-of-exchange function and the measure-of-value function. That some entity can perform these functions does not depend on anybody's superego. It rather depends on the really-existing (primary or secondary) qualities of these entities as well as on the possible *practical usefulness* of these qualities to the person who decides to accept these entities in exchange for something else.

⁷ Of course, this criterion cannot be used in languages where adjectives do not agree with nouns such as English.

⁸ In the case of number two it should be also taken into account that its declension stems of the declension of the dual that is more marked than both the singular and the plural, and thus may be syncretized.

⁹ In classical economics use value is opposed to exchange value. Moreover, especially in Marx's economics, exchange value is distinguished from price. Of course, these concepts are quite different from the concept of value in marginalist economics.

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INDEX OF NAMES*

- Albert, Hans 10, 28, 61, 74, 76-77, 79, 130-132
Amato, Massimo 284
Andriōtēs, Nikoláos P. 259
Antigone 175, 255
Apresjan, Jurij D. 28
Aristotle 37, 43, 232-233
- Barnett, Bernard 26
Baum, Karl Berthold 12, 138
Bekker, August I. 259
Benveniste, Émile 222, 241, 260, 283
Benzon, William L. 29
Berkeley, George 29, 74-75, 77-79, 81
Berlin, Brent 61
Berlin, Isaiah 171
Betti, Emilio 220
Biscardi, Arnaldo 272
Blackstone, William 269
Bobbio, Norberto 191
Bourdieu, Pierre 151, 210-214, 216, 220, 224-227, 230
Bovet, Pierre 16, 94-96, 124, 183
Bozzi, Paolo 81
Bretone, Mario 28
Bucciarelli, Monica 206
Bybee, Joan L. 36, 141
- Çarlson, Greg 40
Černyh, P.Ja. 143, 206, 222, 260
Chevalier, Jean 252
- Cicero 220
Clark, Edwin C. 138
Conte, Amedeo G. 50, 67, 189-190, 196-198, 201-202, 270
Creon 255
Croft, William 33-45, 48, 67, 69-70, 80, 141, 227-228, 282
Cruse, D. Alan 48
- Darwin, Charles 109
Dearing, Ronda L. 89, 121-122, 150
Demosthenes 218-219
de Waal, Frans 118, 126
Di Lucia, Paolo 190
Dirven, René 46
Dixon, Robert M.W. 37
Dodds, Eric R. 124
D'Ors, Álvaro 257-259, 278
- Ferenczi, Sándor 89-90
Fantacci, Luca 284
Feyerabend, Paul K. 16, 118
Fittipaldi, Edoardo 10-11, 14, 17, 20-21, 50, 64-65, 67, 71, 82, 86, 94, 110-114, 133, 145, 152, 162, 190, 202, 226, 243, 245-246, 262, 270
Freud, Anna 116, 128, 168
Freud, Sigmund 12-13, 26, 49, 62-63, 66, 76-77, 83, 87-90, 92-94, 96, 103, 105-107, 110, 115-117, 121, 125, 130, 132-135, 160-161, 182

* Here can be found the names of the people mentioned in the text and the appendix. The English alphabetical order is followed (e.g. Łukasiewicz comes before Luke).

- Friedman, Lawrence 189
Fuszara, Małgorzata 215
- Gaius 10, 250, 277-278
Gambaro, Antonio, 272
Gawkowska, Aneta 37
Gebauer, Jan 221
Geiger, Theodor 100-103, 108, 110
Gernet, Louis 219
Gerth, Hans Heinrich 107
Gheerbrant, Alain 252
Giaro, Thomas 152
Gioffredi, Carlo 257
Granlinski, J. Heidi 90, 92
Gray, J. Patrick 135
Greenberg, Joseph H. 33-36, 44, 205
Grünbaum, Adolf 94, 132-133
- Hägerström, Axel 24, 27, 82, 92, 96,
107, 124, 244, 263-267
Hayek, Friedrich August von 281-283
Hernández Marín, Rafael 31
Hogden, Margaret T. 31
Hohfeld, Wesley N. 147, 278
Holdsworth, William 272
Horney, Karen 168-169, 179-180, 202-
204.
Hume, David 22, 26, 29, 56, 74-75, 78,
224
- Jakubowska, Iwona 200-201
Jaruzelski, Wojciech 215
Jerome (Latin translator of the Bible)
246
Jesus 16, 147, 162, 247
John (the Evangelist) 247
Johnson, Mark 23, 48-49, 72, 200
- Kahneman Daniel 29, 238
Kant, Immanuel 62, 93, 118-119, 158
Karadžić, Vuk S. 221
Kaser, Max 257
Kay, Paul 61
Keats, Jonathon 46
Kelsen, Hans 45-46, 72, 100, 237, 243,
267-269
Keynes, John Maynard 284
Kohlberg, Lawrence 26
Kolbinger, Florian 152
Komarnicki, Waclaw 130, 244-245, 262
- Kopp, Claire B. 90, 92
Kowalski, Tadeusz 12
Külpe, Oswald 28
Kurczewski, Jacek 112, 169, 200-202,
204, 215, 252, 254, 273-274.
- Lakoff, George 23, 72, 284
Lande, Jerzy 186-187, 189, 211, 270,
273
Langacker, Ronald W. 141
Laserson, Max 138, 139
Leoni, Bruno 147
Lévy-Bruhl, Lucien 119
Lewis, Helen B. 121, 123
Lewis, Michael 92, 120, 122-128
Locke, John 80, 212
Lorenz, Konrad 117-118, 120-121
Lorini, Giuseppe 50, 281
Loux, Michael J. 232-233
Łukasiewicz, Jan 237
Luke (the Evangelist) 147
- Machlup, Fritz 282
Maine, Henry S. 220
Mancia, Mauro 124
Mark (the Evangelist) 246, 260
Marini, Emanuele 221
Marx, Karl 211-212, 226, 285
Matthew (the Evangelist) 147
Milgram, Stanley 243
Motyka, Krzysztof 11, 14, 17, 19, 21,
130, 145, 147, 152, 154, 186, 200,
211, 279
Müller-Braunschweig, Carl 90, 92
Murray, Augustus T. 219
Musselli, Luciano 279
- Nadjo, Leon 220
Nowacki, Józef 186-187
Nowakowa, Izabella 145
Nowak, Leszek 145
Núñez, Rafael E. 284
Nussbaum, Martha C. 56, 120-121
- Olivecrona, Karl 12-13, 21, 31, 82, 176
Opalek, Kasimierz 27, 147, 186-188
Ossowska, Maria 210
- Palmer, Frank R. 46, 50, 69, 166, 172,
192-195

- Passow, Franz 218
Pattaro, Enrico 11-13, 16, 27, 82, 92,
96, 104-107, 111, 117, 128-129, 187,
216, 244, 263-266, 270
Peczenik, Aleksander 114
Petrażycki, Leon 10-28, 32, 47-48, 53-
57, 64-67, 69, 71, 73, 75, 82, 85-89,
96-100, 102-103, 106-114, 124-130,
137-138, 142-149, 152-179, 181, 183-
184, 186, 189-191, 196-198, 200-202,
205, 208-211, 216-218, 220-223, 235-
237, 241-246, 254, 262-265, 267-270,
272-276, 279
Piaget, Jean 24, 26, 55-56, 75, 78, 88,
95-98, 117, 119, 126, 135, 173, 182-183
Piers, Gerhart 121
Plautus 220, 256-257
Plutchnik, Robert 128
Polyneices 255
Popper, Karl R. 89, 130-133, 135, 232
Priest, George L. 17
Pugliese, Giovanni 220, 248-250

Ray, Jean 191
Reinach, Adolf 217, 225, 270
Retzinger, Suzanne 126
Rocci, Lorenzo 218
Rosch, Eleanor 144
Roversi, Corrado 28
Rozin, Paul 120
Rozmaryn, Stefan 12
Rudziński, Alexander W. 11, 25, 32,
96, 186-187, 189

Sacco, Rodolfo 64, 186, 279
Sandler, Joseph 90

Sapir, Edward 22, 45
Schlicht, Ekkehart 127, 135, 167-169,
192
Searle, John, R. 30-31, 74, 209, 212
Seidler, Grzegorz L. 12
Silverberg, James 135
Singer, Milton B. 121
Smith, Adam 87-88, 135, 169, 180-181
Smith, Barry 29, 209
Sphrantzēs, Geōrgios 259
Sreznevskij, Izmail I. 222
Sutrop, Urmas 192
Sweetser, Eve 48, 50

Talmy, Leonard 45, 48-49
Tangney, June P. 89, 121-122, 150
Taylor, John R. 29, 37, 46, 60-61, 144
Terence (Terentius) 257
Trubeckoj, Nikolaj S. 33
Tversky, Amos 238
Tylor, Edward B. 31

Villey, Michel 257
Voltaire (François-Marie Arouet) 179,
184

Weber, Max 212
Whorf, Benjamin L. 22
Wierzbicka, Anna 60
Wood, Ledger 9
Wright Mills, Charles 107

Zhuo Jing-Schmidt 192
Ziemiński, Zygmunt 154, 279,
Znamierowski, Czesław 10, 12, 17, 19-
23, 26, 114, 146

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