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Petrazycki: Law and Morality

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LAW AND MORALITY. By *Leon Petrazycki*. Cambridge: Harvard University Press. 1955. Pp. xlvii, 335. \$7.50.

"The content of traditional legal science is tantamount to an optical illusion: it does not see legal phenomena where they actually occur. . . ."¹ Professor Petrazycki in this initial English translation of two of his works first published in 1905 and 1907 offers a profound and modern analysis of the nature of law designed to eliminate this illusion. Petrazycki rejects traditional definitions which seek to find law in objective rules of reason, the commands of the state, the general will, etc.—that is, in a world external to the individual. He directs his analysis to the subject experiencing

¹ PETRAZYCKI, LAW AND MORALITY 8 (1955).

the legal phenomena, finding the sphere of law in the mind of the individual. As defined by Petrazycki, law is a psychological experience of an individual who, reacting to a given set of facts, senses an obligation owed another which is to be performed in a prescribed manner and a corresponding right attributed to that person to receive the called-for performance.² These "ideas" of right and duty establish legal norms for the given individual. Petrazycki recognizes that these norms may be influenced, for example, by a statute governing the situation. But the statute is only a "normative fact," part of the external data to which the mind of the individual actually experiencing the legal relationship may consciously or unconsciously refer.

In order to establish the psychological foundation for his theory of law Petrazycki introduces the concept of an "impulsion," i.e., a bilateral passive-active experience, such as hunger, which consists of an awareness of a given situation and an incitement to action in accordance with that cognition. Petrazycki is primarily concerned with the more abstract and general impulsion, duty. An impulsion is a moral one if this duty (or "imperative") is the only factor present in the psychological experience. It is legal if there is an attributive aspect allied with the imperative; if there is not only an obligation felt (to give Smith ten dollars) but a right to have the obligation performed which is ascribed to the subject of the legal relationship (Smith should receive ten dollars, having rendered valuable services). Two important points deserve notice with respect to such an analysis. First, the distinction between law and morality is founded solely upon the content of the impulsion and an experience may be either one or both, depending upon whether an attributive aspect is or is not present in the psychologic experience. Second, the scope of law is extremely broad under Petrazycki's definition since the psychic experience at its foundation does not postulate social or political constraint and does not require a human being as the subject of an attributed legal right.

Petrazycki's theory must be distinguished from such "psychological approaches" to the law as those of Jerome Frank and Ranyard West, which are in reality concerned only with normative facts. Both Frank, in his psychological interpretations of judicial reasoning,³ and West, in his use of law as ancillary to the individual's psychological control of anti-social tendencies,⁴ conceive of law as something external to, and determinative of, the individual's psychic experience. More closely akin to Petrazycki's theory are the views represented by Gurvitch and Olivecrona. Gurvitch adopts the imperative-attributive concept but holds that it "implies that

² For excellent analyses of Petrazycki's legal theory see Babb, "Petrazhitskii: Theory of Law," 18 BOST. UNIV. L. REV. 511 at 513-518 (1938) and SOROKIN, CONTEMPORARY SOCIOLOGICAL THEORIES 700-706 (1928).

³ FRANK, LAW AND THE MODERN MIND 100-117 (1930).

⁴ West, "A Psychological Theory of Law," INTERPRETATIONS OF MODERN LEGAL PHILOSOPHY 784 (1947).

all law rests on *collective* experience and presupposes an authority not identical with the rules themselves. Only by a collective recognition of social facts which realize values, is it possible to establish a close interconnection between claims and duties."⁵ Olivecrona recognizes that legal relationships are merely "conceptions in human minds"⁶ but, unlike Petrazycki and Gurvitch, views them as shaped by the "regular use of force."⁷ The deficiency of both analyses is that in attempting to formulate primarily a theory of the determinants of the legal experience they unnecessarily restrict the scope of the experience itself. Petrazycki, on the other hand, is concerned with an empirical analysis of the legal mentality. A legal relationship conceived between Indian and idol is as revealing of the psychic experience of law as one between Mrs. Palsgraf and the Long Island Railroad.

One of the most important aspects of Petrazycki's psychological theory is its interpretation of law's inter-relationship with the individual and society. Petrazycki makes an extensive analysis of: (a) law's functions in distributing social benefits and organizing an authoritative system for securing the enjoyment of those benefits, and (b) law's motivational and educative effect on individual and group behavior. But unfortunately he devotes only a few pages to the influence of group and individual behavior on law. Petrazycki never definitively analyzes the determinants of law since he leaves the question of what is the nature of the "impulsions" unanswered. These impulsions cannot be equated with instincts—"definite stimulus-response processes or actions which are inherited"⁸—since Bernard has established that habits rather than instincts are the major determinants of the individual's psychologic pattern. Purposive or hedonistic foundations should also be rejected.⁹ Petrazycki seems to realize that the legal mentality must be a function of the educative effects of society, environment, etc., but he leaves the subject to a future analysis. As a concomitant of Petrazycki's failure to analyze the determinants of law, his pervading interest in the form of the legal experience and neglect of its content subjects his theory to another important criticism. Petrazycki supplies merely a mental structure adaptable to a wide range of substantive norms and he formulates no objective standards for evaluating the content of the legal experience.¹⁰

This review has attempted to offer only a hint of the scope of Petrazycki's legal theory. As a concluding evaluation of this most recent addi-

⁵ GURVITCH, *SOCIOLOGY OF LAW* 57 (1942) (*italics added*).

⁶ OLIVECRONA, *LAW AS FACT* 77 (1939).

⁷ *Id.* at 169.

⁸ BERNARD, *INSTINCT: A STUDY IN SOCIAL PSYCHOLOGY* 509 (1924). See pp. 509-534 for Bernard's analysis of instincts and habits.

⁹ PETRAZYCKI, *LAW AND MORALITY* 31 (1955).

¹⁰ For a similar criticism of the legal theories of Neo-Kantism and Neo-Hegelianism, see HALLOWELL, *MAIN CURRENTS IN MODERN POLITICAL THEORY* 358 (1950).

tion to The 20th Century Legal Philosophy Series, Pound's more general appraisal seems appropriate: "His chief contributions, for the purposes of jurisprudence, seem to be: his reference of both law and morals to psychology, distinguishing intuitive morals and law from positive morals and law; his study of the process of human motivation; his theory of the creation of positive morality and positive law through unification of habits of conduct; and his psychological theory of alternating change and stability."¹¹

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¹¹ Pound, "Fifty Years of Jurisprudence," 51 HARV. L. REV. 777 at 809 (1938).