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## Living with Ghosts

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# Living With Ghosts

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### I. INTRODUCTION

I want to do some jurisprudence. By that, I mean to talk about law while *not* doing law. One talks while doing many things. There are, of course, many ways to talk or write while doing law. For example, an opinion letter, memo notes, opening or closing arguments, a brief, a question at trial, a ruling on evidence, a statute, and a court opinion are all commonly recognized manifestations of talk doing law. I will not be doing law, but rather, I hope, jurisprudence. Thus, the truth of the old adage, “Those who can do; those who can’t teach.”<sup>1</sup>

Jurisprudence talks and teaches about law. “What is law?” Now, that is an old question with many answers from many quarters. Here I will look to an old jurist, Leon Petrazycki, who was as late as 1976 described as, “almost unknown to the Anglo-Saxon and English-speaking world, . . .”<sup>2</sup> Of course, I never met this man. I found reference to his ideas in several articles by a colleague who was examining law from a psychological view and suggesting that a psychological theory of jurisprudence would do well to focus on the experience of law in everyday life.<sup>3</sup>

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1. And, someone added, “And those who can’t teach, teach teachers; and those who can’t teach teachers, teach law; and all the rest are lawyers.”

2. Rudzinski, *Petrazycki’s Significance for Contemporary Legal and Moral Theory*, 21 AM. J. OF JURIS. 107 (1976).

3. Melton, *The Significance of Law in the Everyday Lives of Children and Families*,

I want to talk about Petrazycki's notion of law so that all of us, doers, teachers, and lawyers, might consider our relationship to law. "What makes it go?" "How do I drive it?" I will tell you what Petrazycki thinks law is. Then, I will attempt to take these ideas into contemporary areas of jurisprudential thought by discussing a few curious puzzles that they raise. All of this is to offer—not prove—a way of seeing law. It is, of course, only a way; an insight that may be accepted or rejected, though not erased. Perhaps it may stimulate thought on where we have been and which way we might go.

## II. LAW AND MORALITY

Leon Petrazycki was one of the early proponents of a psychological jurisprudence. He was born in Poland in 1867 to a family that belonged to the Polish nobility.<sup>4</sup> He studied medicine for several years in Kiev and then turned to law. He developed an extensive body of scholarship in Polish and Russian and two of his major works have been put in an English translation, *Law and Morality*.<sup>5</sup>

Petrazycki was recognized as a brilliant law student at the University of Kiev and he was awarded a grant to study in Germany. He studied for two years in Berlin at the time of the drafting of the German Civil Code and published two works in German which drew wide attention. When he returned to Russia he published a work under the title "Introduction to the Science of Legal Policy" and on the strength

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22 GA. L. REV. 851 (1988); Melton & Saks, *The Law as an Instrument of Socialization and Social Structure* in NEBRASKA SYMPOSIUM ON MOTIVATION, THE LAW AS A BEHAVIORAL INSTRUMENT 235 (G. Melton ed. 1985).

4. G. Langrod & M. Vaughan, *The Polish Psychological Theory of Law* in POLISH LAW THROUGHOUT THE AGES 299, 306 (W. Wagner ed. 1970). In this Article I use the Polish spelling, "Petrazycki." The name is sometimes found as "Petrazhitzky" which is said to indicate the pronunciation. N. Timascheff, "Introduction" LAW AND MORALITY: L. PETRAZYCKI AT xvii (H.W. Babb trans. 1955). It is also found as "Petrazhitzkii." Babb, *Petrazhitzkii: Theory of Law*, 18 B. U. L. REV. 511 (1938). Timascheff and Babb refer to Petrazycki as a Russian legal philosopher while Langrod and Vaughan denote him as Polish.
5. L. PETRAZYCKI, LAW AND MORALITY: (H. Babb trans. Harv. Univ. Press ed. 1955) [hereinafter LAW AND MORALITY]. The translation is abridged from two works, THE INTRODUCTION TO THE STUDY OF LAW AND MORALITY: THE FOUNDATIONS OF EMOTIONAL PSYCHOLOGY (1905)(311 pages) and THE THEORY OF LAW AND STATE, IN CONNECTION WITH A THEORY OF MORALITY (1907)(758 pages). The translation itself runs to only 330 pages.

It is said that the L. Petrazycki Association in Warsaw contains 35 volumes of his work on 58 subjects. A short bibliography of his work in Russian and Polish by English titles (although LAW AND MORALITY is the only English translation) may be found in Sadurska, *The Jurisprudence of Leon Petrazycki*, 32 AM. J. JURIS. 63 n.2 (1987). Other references to his works in Polish and/or Russian may be found in the articles about his work which are cited in this Article. A bibliography may be found in Babb, *supra* note 4, at 576-78 which refers to commentary (in German and Russian) about Petrazycki's work.

of that piece he was awarded a Master's Degree. In 1897 he received a doctor's degree and was admitted to the professorship. In 1898 he published two volumes in Russian, *The Joint-Stock Company*, and was given the chair of philosophy of law at the University of St. Petersburg. He served on the faculty there for twenty years and was the first elected dean.<sup>6</sup>

At St. Petersburg, Petrazycki, caused quite a stir. Some jurists thought he was so radically shaking the legal structure that there would be nothing left. He was soon the most talked about and well known member of the law faculty. His classes were in the largest lecture hall and over a thousand students, and others, overflowed its confines. His annual income, based in part on attendance, reached the unprecedented figure of 40,000 rubles.<sup>7</sup> All this happened despite linguistic difficulties and an "involved style, in German fashion."<sup>8</sup>

Petrazycki sought an empirically based understanding of law and toward that end used an "experimental" methodology of introspection and observation. He is called strongly antimetaphysical because he rejected the independent reality of all imagined verbal abstractions and recognized only physical objects, living organisms, and psychic occurrences as genuine.<sup>9</sup> When Petrazycki observed the external world he concluded that law like Zeus could not be found.<sup>10</sup> But, observation did discover a consciousness of our own mind and there law did appear. Petrazycki then applied an experimental method of self-observation; through introspection he observed the workings of his mind and its relation to the external environment and with "inference by analogy" extended his observations to others.<sup>11</sup> Petrazycki thought this to be empirical psychology without metaphysical or natural law postulates.<sup>12</sup> And, he did not compile empirical data; there are not any numbers.<sup>13</sup>

Introspection and observation convinced Petrazycki that the mind

6. G. Langrod & M. Vaughan, *supra* note 4, at 307-11.

7. Babb, *Petrazhitzkii: Science of Legal Policy and Theory of Law*, 17 B. U. L. REV. 793, 795 (1937).

8. G. Langrod & M. Vaughan, *supra* note 4, at 311. "The saying went in St. Petersburg at the time that Petrazycki thought in Polish, mentally translated his thought into German, and then spoke in Russian." *Id.* at n.52.

9. Rudzinski, *supra* note 2, at 108-09.

10. LAW AND MORALITY, *supra* note 5, at 6-9.

11. *Id.* at 13-17.

12. Laserson, *The Work of Leon Petrazhitzkii: Inquiry into the Psychological Aspects of the Nature of Law*, 51 COLUM. L. REV. 59, 65 (1951).

13. "He relied entirely on historical and legal material in documentary form, which he handled with an extraordinary skill and erudition, and on introspection and external psychological observation." Sadurska, *supra* note 5, at 90. Perhaps it was Petrazycki's numbers aversion which helped Professor Saks to say, "Law students are typically smart people who do not like math." Saks, *Legal Policy Analysis and Evaluation*, 44 AM. PSYCH. 1110, 1115 (1989).

has an active and a passive knowing. The active knowing, will (the will to stay awake despite fatigue), is voluntary and directed toward its object or goal. However, two passive modes of knowing, intelligence and feeling, are not within the control of the person. Cognition forces one to avoid sitting on the hot stove and a feeling of pleasure places without consent a spark in the eyes. When a person knows in one or the other of these modes, Petrazycki called this unilateral—one way or direction at a time.<sup>14</sup>

Furthermore, self-observation revealed that there was a common way of knowing that was bilateral. Bilateral knowing combines active will and passive intelligence and/or feeling. Appetite is a specific bilateral knowing with a passive feeling and an active will to actualize a satisfaction by eating something. Many bilateral knowings are less specific. Your friend suggests that you should go to a concert. Here intelligence and/or feeling combine with will to attain actions which are not of specific detail or even general character or direction. All bilateral knowings are called *impulsions* by Petrazycki.<sup>15</sup> It is important to note that due to the combination of active and passive understanding impulsions are a way of knowing that is partly intended by the actor and partly beyond the actor's control.

Whatever the source and wherever the seeding of impulsions,<sup>16</sup> bilateral understandings, part active will and part passive intelligence and/or feeling are the roots of morality and law. Impulsions might cause an imperative experience of duty, "I must give gifts." This experience for Petrazycki was morality. Impulsions might also cause an experience that is of imperative duty *and* attributive right, "I must give the pipe to Mary." This experience, a psychic phenomenon, which may or may not be acted out in the external world is law.<sup>17</sup>

Petrazycki thus identified morality and law in psychic experiences of bilateral understanding, impulsions formed partly by intent and partly by fate. Morality he distinguished as ungrounded duty to which no person has a claim, while law anchors the imperative impulse to an attributive right of, towards, or in relation to another. The law experience of the subject might be either as holder of right against another or obligor of duty to another. In either case there is a subject which imagines another. Law is the experience of human beings imagining themselves and others to have rights and duties. Such law exper-

14. LAW AND MORALITY, *supra* note 5, at 22-23.

15. *Id.* at 22-31; G. Langrod and M. Vaughan, *supra* note 4, at 354-58. Sadurska, *supra* note 5, at 66-68.

16. Petrazycki does not surmise the origin or source of impulsions. Rudzinski, *supra* note 2, at 118.

17. LAW AND MORALITY, *supra* note 5, at 45-49, 62; Babb, *supra* note 4, at 513-17; Rudzinski, *supra* note 2, at 111-12. *See also* Sorokin, Book Review, 69 HARV. L. REV. 1150, 1152-53 (1956)(reviewing LAW AND MORALITY).

iences direct action and nourish sentiment.<sup>18</sup>

Petrazycki's focus on law as psychic experience greatly broadens the concept of law.<sup>19</sup> Law as impulsion experience sharply contrasts with the view that identifies law as constitution, statute, or common law. These absolute universals were for Petrazycki fantasy or "phantasmata," ghosts.<sup>20</sup> Law is an experience in human beings, similar to dealing with flatulence in a haunted house. It is not the ghosts that do it.

When Petrazycki turned from naming the ghosts (civil law, common law, family law, criminal law) to identifying the phenomena of observation and introspection, law broke the boundaries of ideology. He described four types of law. All share the base of impulsion created experience of duty and right in the human mind. Positive law is a duty-right experience that refers to a normative fact.<sup>21</sup> The normative fact is not necessarily a statute or common law rule. It might be any fact called to mind which evokes a legal experience, *e.g.*, a holy book, a constitution, a ritual dance, or a promise.<sup>22</sup> Put another way, a statute is not the law; a statute is a normative fact that when called to consciousness sometimes triggers a legal impulsion in some people's minds. In the structure of legal experience a constitutional convention stands on the same ground as might a parent's good night kiss, "That good night kiss really has my attention. I should kiss someone good night. I must kiss my child good night."

When the legal experience does not refer to some normative fact, this is intuitive law.<sup>23</sup> When the human being experiencing law is an official of the state acting in such a capacity then that is official law. Unofficial law is experienced by a person not acting as a state official. Official or unofficial law experiences may be either positive or intuitive.<sup>24</sup>

Law suddenly is everywhere. Games of all kinds are arenas for law experience. Family relations of every stripe yield law experiences as hands are washed or not and toys are returned to brother or sister.

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18. For Petrazycki, law had both a distributive and organizational function. Babb, *supra* note 4, at 557-61. These functions were carried out by motivation and education. *Id.* at 562-66. But, it is clear that all of this is in your head. Petrazycki rejected the command and sanctions theory of law. Rudzinski, *supra* note 2, at 113-15.

19. Rudzinski, *supra* note 2, at 109, 117-18.

20. LAW AND MORALITY, *supra* note 5, at 41-42, 62.

21. *Id.* at 57.

22. *Id.* at 157-58, 161-64; Babb, *supra* note 4, at 566-67.

23. LAW AND MORALITY, *supra* note 5, at 57; Babb, *supra* note 4, at 567-570. Given the wide potential for normative (legal impulsion triggering) facts it might be doubted that there are any truly "intuitive" law experiences. Indeed, Babb, in the portion cited above says that intuitive law may be supplemented by "relevant" but not normative facts. The distinction seems illusive.

24. LAW AND MORALITY at 139-40.

Manners and etiquette may take on a right-duty character. The so-called criminal gang is rife with law, and religious notions of imperative-attributive character are legal experiences.<sup>25</sup> "Law is a psychic phenomenon."<sup>26</sup> And, like rain it falls where it will.

Petrazycki's notion of what is may be found in *Law and Morality*. And, the scholars who have been able to have access to his works in Russian and Polish leave a clear consensus as to what he thought the point of it all was—"the complete dominance of active love."<sup>27</sup> In his work on the German Civil Code Petrazycki criticized the drafters for overlooking love.<sup>28</sup> "The great, bright ideal of the future," said Petrazycki, was love.<sup>29</sup> For Petrazycki this was an axiom of practical reason not derived from experience or a generalization of observable data.<sup>30</sup>

In Russia at the beginnings of the Twentieth Century Petrazycki's ideas caused considerable discussion.<sup>31</sup> Late Twentieth Century American jurisprudence is also in considerable ferment.<sup>32</sup> Today, legal scholars have called attention to many problem areas once thought beyond a narrow view of law. I want to take Petrazycki's expanded notion of law and ask how it might inform or be informed by several puzzles that are raised today. The puzzles will not be solved. Yet, their mystery and their gifts might be better understood.

### III. A PSYCHOLOGICAL JURISPRUDENCE OF EVERYDAY EXPERIENCE: SOME PUZZLES<sup>33</sup>

#### A. Reflection and Existence

The problem of reflection and existence is tied to method and sub-

25. Rudzinski, *supra* note 2, at 117-18.

26. Babb, *supra* note 4, at 518.

27. Babb, *supra* note 7, at 810. When the "psyche of love" kicks in law will be "psychologically inappropriate." *Id.*

28. G. Langrod & M. Vaughan, *supra* note 4, at 317.

29. Rudzinski, *supra* note 2, at 123.

30. Sadurska, *supra* note 5, at 74.

31. Timascheff tells of the exchange of articles and pamphlets that provoked Petrazycki to write a small book, *THE NEW DOCTRINE OF LAW AND ITS CRITICISM BY SERGUEYEVICH* (1910) in response to "vicious attacks." N. Timascheff, *supra* note 4, at xxix.

Some 20 years later Jerome Frank's psychological approach in *LAW AND THE MODERN MIND* (1930) set off a similar storm.

32. See Minda, *The Jurisprudential Movements of the 1980's*, 50 OHIO ST. L.J. 599 (1989).

33. The relationship of reflection and existence runs throughout the work of Professor Roberto Mangabeira Unger. See R. UNGER, *KNOWLEDGE AND POLITICS* (1975); R. UNGER, *LAW IN MODERN SOCIETY* (1976); R. UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1984). The particular notion of contexts of routine and contexts of transformation is articulated in R. UNGER, *FALSE NECESSITY* 4 (1987).

Discussion of the fundamental contradiction is usually attributed in

ject as subject and method are themselves entwined. We act from two distinct and seemingly irreconcilable knowings. On the one hand, we act as if we are the passive receptors of the world; the context of our existence, the institutions, thoughts, materials, and images simply given. Logic and causality open the window only to what is. On the other hand, we act as if the world may be made as we desire. The dreams of what might be call us to create a fresh context that appears foolishly to insult reason and fact. The context of knowing may not be shed, but whether it is an existence to be endured or a reflection to be turned is answered in the taste of the action that knowledge yields.

The relation of reflection and existence is of much interest in current jurisprudence. A strong voice in that concern, Professor Roberto Unger, has continually focused his thought on the problem of the contextual frameworks in which law occurs. He has discussed the apparently passive frameworks of routinization and the frameworks which

contemporary works to Professor Duncan Kennedy. See Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-12 (1979). The contradiction of rules and standards has been a focus of Professor Mark Kelman. See M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987). An extensive bibliography of stories, narrative, and its connection to law may be found in Elkins, *A Bibliography of Narrative*, 40 J. LEGAL ED. 203 (1990). Powerful examples of narrative jurisprudence have been produced by Marie Ashe, a Nebraska law graduate who now teaches at the University of West Virginia College of Law and Emily Hartigan who currently teaches at the University of Nebraska College of Law. See Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. J. 355 (1989); Hartigan, *The Power of Language Beyond Words: Law as Invitation*, 26 HARV. C.R.-C.L.L. REV. 67 (1991).

Professor Peter Gabel has written the classic piece on dreams or illusions as factors that block authentic human confrontation by a dialogue of "rights." See Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984). The dream of living by what we would do and feel in each other's circumstances has been offered by Professor Leonard Jaffee. See Jaffee, *Empathetic Adjustment—An Alternative to Rules, Policies, and Politics*, 58 U. CINCINNATI L. REV. 1161 (1990). Much of feminist thought views "law" as a patriarchal myth. See generally Scales, *The Emergence of Feminist Jurisprudence* "An Essay", 95 YALE L.J. 1373, 1378 (1986).

Judge Richard Posner discusses every traditional and current demand for an autonomous and objectively correct "law" in his recent book, *The Problems of Jurisprudence*. He concludes that effort by rejecting every such claim and issuing a "pragmatist manifesto." R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 454-69 (1990).

The story of Leon Petrazycki is retold from the works already cited. That part of the story which tells of the dinner party and the delicious homemade cakes may be found in Meyendorff, *The Tragedy of Modern Jurisprudence*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES, ESSAYS IN HONOR OF ROSCOE POUND 521 (P. Sayre ed. 1947). The closing words from Leon Petrazycki are found in LAW AND MORALITY at 70-71.

All references to the Montgomery Bus Boycott come from the scholarship of Professor Randall Kennedy. See Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989).

seem to be actively revised in transgression. He has sought to illumine the question of how and why we pass from one framework, logic, or consciousness to another.

By dividing the world into matters of law and matters of fact through the forms of legal rights and the procedures of courts, the commonly understood legal process plays a significant role in the maintenance of routine or the quest of transformation. For example, consider the Montgomery Bus Boycott in 1955. Dr. Martin Luther King was prosecuted for breach of a statute prohibiting conspiring "without a just cause or legal excuse" to hinder, delay, or prevent another from carrying on any lawful business.

The situation called a myriad of legal ghosts, legal rights, to mind. And, it was these ghosts that were thought to provide an authoritative answer to questions of the proper order and marshalling of the facts. Would the law of evidence allow testimony of persons who were riding busses that were struck by rocks or bullets to be heard when those persons had not seen the source of the attacks? Would the racist behavior of the Montgomery City Lines be relevant to the law's question regarding the "just cause" of the boycott? Was the boycott's commitment to non-violence relevant to the law as a "legal excuse"? Was King denied the law's promise of due process by being selectively prosecuted? What about the law's promise of free speech?

Although Dr. King was convicted by the logic of routinization, somehow a logic of transformation became a conviction. In a few years there were "Freedom Riders." But, before those facts took place the law had asked other questions. Could the bus company ignore state segregation rules? Could the informal transportation system developed by the boycotters be ordered to stop by a court? Was segregation on busses unconstitutional?

I do not know how a framework of routine oppression became a framework for "Freedom Riders" and transformation. When is it time to kill the King? Perhaps the only answer to the riddle is in the doing; kiss the ring or strike the blow. Petrazycki's insight is that the doing is common in the everyday experiences of morality and law. The bilateral experience of impulsion is the mysterious source of legal experience. Impulsion is the coming together of active reflection and passive existence. Thus, the particular knowing of a duty and right experience is partly made-up and partly unavoidable. But, the legal experience, the impulsion experience of reception and creation, is inexorable.

All human beings have law experiences. "Give me my comic book back." All of these experiences are from Petrazycki's perspective identical and unique, like fire. Persons in all parts of the world are becoming aware of their bondage to context and their simultaneous ability to revolutionize it. Often, this awareness is due to, or enhanced

by, a law experience where one realizes that what was once thought necessary is to some extent open to transformation. This is the nature of the law experience and like the wind it is everywhere.

*The Law Is A Hollow Vessel;  
Inexhaustible In Its Uses, Fathomless.*

Lao Tzu

Leon Petrazycki was born in Poland, Vitebsk province. The people of the province were predominately White Russian. Leon was born to Polish nobility, the local gentry. But, four years before his birth, his father, Jozef Petrazycki, had participated in an insurrection against Russian rule. Jozef's estates were confiscated and he died while Leon was very young. Although Leon lectured in Russian at St. Petersburg, he spoke with a noticeable Polish accent. His early works published in German were signed "von" Petrazycki.

In 1906 while holding the office of dean with the law faculty at St. Petersburg, Leon was urged to participate directly in political life. He was elected to the Duma. Within the year the Duma was dissolved. Former deputies and others joined together to produce the Viborg Manifesto as a protest against the destruction of the Duma. The manifesto urged that the people not pay taxes which had not been adopted by the Duma. The manifesto called upon the people to refuse military service. And, finally, it asked that all other public obligations be denied until the creation of a new parliamentary assembly.

Leon was not persuaded of the correctness of the manifesto. And, he was aware of the consequences which would visit its signers. Yet, he signed in a spirit of solidarity. He was sentenced to, and served, three months in jail for this. He also lost his position as dean and was demoted to an associate professor, although he returned to the faculty after being released from prison.

In 1908 the president of the university, at the direction of the minister of education, asked Petrazycki to sign a secret written document stating that Petrazycki was not participating and would not participate in any actions against the state. He was also to promise that he would not breach any penal law, civil service regulations, or oath to the crown. If he refused to sign, he was to be dismissed.

Leon said, "No." He refused to make any promises even in relation to future acts. His written response stated that his views were in his writing and public actions. As a scholar he claimed a right to be free from governmental coercion while being nevertheless bound to remain impartial, objective, and detached from politics in his lectures. Finally, political ethics and personal dignity were said to prevent him from promising not to attempt change in the forms of government.

Several weeks later, the ministry of education, through the president, replied to Petrazycki, that a civil servant was not free to criticize his minister and that the government's distrust was justified by his

criminal convictions. Finally, the language used by Leon was said to be inappropriate.

Nothing happened. In 1913 Leon Petrazycki was restored to his full professorship and re-elected dean by a vote of ten to one.

## B. Contradiction

If the method of knowing is puzzling because of the tension of reflection and existence, it is also the case that the subject to be known is contradictory. Law is the personal experience of duty and simultaneous right. This experience is marked by contradiction. Look by introspection and observation at this psychic experience in which you imagine another to be in a relation of right holder or duty obligor to you. This other may, of course, be sitting in the room with you or be itself a creature of imagination sitting nowhere, yet acting upon you through human agents who don its skins.

This other is the source of contradiction. I need others to be fully alive and an authentic self; but while I yearn for them I fear that they may smother me. Professor Duncan Kennedy has called this "the fundamental contradiction." This root paradox (a paradoxical world seems less frightening than a world of contradiction) is manifested in every law experience.

Mark Kelman gave expression to this contradiction's presence in the very linguistic form of legal ghosts, rules and standards. Rules (Do not use guns to take things from others) direct that we live with others so that good fences make good neighbors. But, a clear fence will invariably be over or under inclusive in some instances. And, by reliance on rule one surrenders to the cunning who will turn the rule's edges to swords. Thus, one turns to a form that articulates a standard (Do not take things from others in ways that are not reasonable.) Yet, to live with others by the standards of honor one will encounter caprice and must suffer the tyranny of shameful surrender or guilty rebellion.

The contradictions of need and threat in relation to others and of rule or standard in the shape of the ghosts is magnified by the possibility that every ghost, or at least many, have a twin. A statute prohibiting free expression is not allowed. Yet, a statute may prohibit free expression if there is a beautiful enough (compelling re political speech, substantial re commercial speech, and legitimate re pornographic speech) state interest and its clothes are properly fit (narrowly tailored in the case of political and commercial speech, and rationally related for pornographic speech). The problem of the twins might be seen in Petrazycki's notion of the normative fact.

Remember that the active-passive knowing (impulsion) of an imperative-attributive experience, law; may be positive or intuitive. Positive law is a law experience triggered by or moored to a normative

fact. Intuitive law is not tightly woven to such a fact. Yet, how could one experience a right-duty knowing without some context, facts. If, as Petrazycki says, a story of the origin of the Sacred Bear is as entitled to normative fact status as a story of legislative process, then how does one know an intuitive law experience and its context of relevant fact from a positive law experience within a context with normative fact.

This problem may seem trivial, law is law, and its type of little import. However, the answer to the problem seems to occur in every contradictory or paradoxical law experience. In that case it may inform all of law. Introspection and observation suggest that we deal with contradiction by a narrative method of remembering and telling stories. It is the story; perhaps a movie, a song, an account of a friend, one's life foretold, or *Ex parte Crow Dog*, that one turns to as answering the navigational problems of a paradoxical experience. First, in the beginning, is the story. The story brings the normative facts of positive law to the surface. It is the story that leaps into the void of intuitive law. In story everything is up for grabs.

Law experiences surrounding the Montgomery Bus Boycott and the trial of Dr. Martin Luther King for conspiring to harm the bus company were of course full of contradiction. I believed that the conspirators had a just cause. The ghosts said guilty while I said honorable. And, I thought I heard some ghosts that agreed with my law experience. They continue to speak.

Within the criminal trial itself Dr. King may have lied. He claimed he had not conspired to urge others not to ride the buses. Perhaps this was done to protect others. Perhaps the truth was not something that could be demanded by oppressors. But, perhaps the true narrative of resistance if told at the trial would have caused the story of struggle to become a more powerful normative fact.

Perhaps the shift from routine to transformation would have been more visible; its vibrations heard more clearly.

*Half The Story Has  
Never Been Told.*

Robert Nesta Marley, O.M.

Leon Petrazycki was the son of a noble and the son of a rebel. In his mature life he signed a manifesto of resistance with which he substantively disagreed as an expression of solidarity. And, to protect his freedom, he refused to sign a promise of intellectual indenture. He was a prisoner of the state and a dean of the law school.

In 1917, Leon was again dean at St. Petersburg. The provisional government that was formed after the revolution of 1917 appointed him to the Senate, Russia's Supreme Court. He was apparently thought of as a person of progressive opinion. It was believed that he favored equal rights for women and he was well known as a humanist.

However, due to a pessimistic view of the revolution and current events, he never participated as a jurist with the court.

In 1921 persons of Polish ancestry were given the opportunity to emigrate to Poland. Leon left. He took a chair of sociology in the Law Faculty of Warsaw University. In Poland, he worked also with the Polish Committee for Codification in spite of illness during this period, and the reactionary government of Marshal Pilsudski. In his last year on the faculty he fought in defense (the offense is not mentioned) of an eminent Jewish historian.

He professed an empirical method of introspection and observation that sought to reject all metaphysical ghosts. Yet, he saw the dominance of active love as the goal of law experiences. Law experience, like a psychic infection of reason and desire was to make itself inappropriate in the presence of love. Yet, love was postulated as "practical," beyond introspection and observation.

On May 15, 1931, experiencing the law of library participation, Leon, sent his wife to the library to exchange a book for him. When she returned he was dead. The revolver was by his side.

### C. Dreams

The law is overlooked when sought only in phantoms such as constitutions and statutes. Such phantoms neither direct nor nourish the people, for the energy is in the person not the ghost. The person is filled with the tension of reflection and existence. It is that pressure which sings the melodies of self and other. The ghosts are flat, they have no life in them and they mask the lives that they haunt by soothing the fear of confrontation with real and imagined others.

Discourse in ghost language binds the people in chains which are not less strong because they are fantasy projections. The ghost of "conspiracy" holds a human being in subordination while the specter of "just cause" holds the key. The most powerful idol "belief in authority" tricks all human beings into alienation. "Authority," as seen by Professor Peter Gabel, is a ghost which one turns to when one no longer believes that others ALSO desire to relate in a way that is life-affirming and empowering. Thus, one becomes alienated; he or she acts toward the other as if some ghost lieutenant of "Authority" will mediate a confrontation.

All the rules and standards, the ghosts of law, attempt to give a ghost appearance to the human beings they fear. A person is seen as a "landlord" or "tenant." And, the ghost of "lease" flattens the context of the obligation to pay money to another for living in a particular place and the right to demand money for having shared with another. The ghost of "Authority" known to the necromancers of law as "rights," hides from us the place, the understanding, and the doing of

law. Good people may at least hope to share sovereignty and perhaps to take dominion.

Professor Leonard Jaffee has argued that all systems of law are pathological, that they mirror and breed warped characters. Warped character reflects chronic repression, denial, and harm that has occurred in the person's history of pursuing simple biological and spiritual pleasure and attempting to avoid pain and suffering. Warpage results from the creation of patterns of perception, desire, and action that limit the internal freedom of persons to a role and/or type. The types are myriad and vary greatly in scope and intensity; *e.g.*, respectability, attention to detail, sophistication, craftsmanship, godliness, emotionless action, steely nerve, and phallic narcissism. The roles are also many; parent, student, lawyer, and poet are just a few. But, a pathological character is not necessarily doomed to evil or hopelessness. There is always some potential for free unblocked sensibility.

Because few, no matter how warped, are completely without empathy, Professor Jaffee suggests that we dismantle every system; not draw a line somewhere, but erase one. Try empathic adjustment to deal with others; rely on empathy. Everyone has some empathy, at least enough for a hope that we could do law by what we would feel and do in each other's situation. Empathy does not have a ghost system to protect us, nor a demon to tell us our shame is justice. As a first step, tell the people that they may let the guilty go free. After all, there is no Nuremberg Defense and the empathy which saves the criminal may also save the judge.

At the trial of Dr. Martin Luther King those who dared to judge another would not sort the good and the bad by rules, but do the things that are right. The law experience would be a way for the people to confront their character. They would define themselves by governing as they would do and feel in each other's circumstances and imagination. What ghost can threaten a strong heart or heal the weak?

*Love Is The Only  
Law To Obey.*

David "Ziggy" Marley

One night Leon Petrazycki gave an excellent dinner party in his small dining-room. Prince Eugen Trubetskoy, a Professor of Philosophy of Law at Kiev University was in attendance. Senator Foynitsky, an eminent criminologist at St. Petersburg was there. The woman who prepared and served the chickens (*Backhuhm*), the *piece de resistance* and special choice of Leon, who was an expert host, was the mother of several of Leon's children. She (unnamed in the story) and the children lived in the flat with Leon. They were not married. The guests may not have suspected that the lady was not Leon's landlady.

But, no one seemed to care. The evening was a delight for thought and taste. Trubetskoy was brilliant in his quiet way.

When Petrazycki was about fifty he married another woman. She (unnamed in the story) was the widow of Leon's publisher, Martynou. She was a Polish lady and no longer young, but very practical and full of attention for Leon's incessantly working intellect. Shortly before or after this marriage Leon provided for his children. (The story does not tell us what happened to their mother.) His wife was also a good cook, she made delicious cakes. She exchanged Leon's library book for him. Later, she found his body.

#### D. Morality and Law and Greed

Petrazycki thought that an impulsion (active and passive knowing) experience of obligation or duty without an identifiable right-holder was morality. And he distinguished an impulsion experience of law as having an identifiable holder of right; that is, the experience has both a duty-obligor and a right-obligee. There is, however, another impulsion experience that appears to introspection and observation. An impulsion experience that focuses only on rights, what is owed by the unspecified world at large to isolated majesty, is greed. The exclusive focus on the right to the results of gravity, energy, and matter, without the experience of duty to the earth and stars, destroys the environment with greed. An obsessive desire for the right of wealth maximization and efficiency, without a concern for the poor and inept, fouls the lives of human beings with greed.

In jurisprudential thought, greed manifests itself as the compulsive claim that law is an autonomous discipline and that its self-contained methodology will produce correct answers that persons from the most different political or value perspectives will come to accept as objectively true. Judge Richard Posner has exposed the impossibility of this claim and, taking a line from Yeats, states frankly that for the greedy or the not-so-greedy, "there's more enterprise/In walking naked." To begin that enterprise Judge Posner, issues a "manifesto":

1. There is no such thing as "legal reasoning;"
2. It is usually impossible to demonstrate that a legal decision is correct;
3. Difficult cases can only be decided reasonably;
4. Large changes in law occur as often from conversion or vision as from intellect;
5. Law is an activity that accepts an infinite range of arguments;
6. Law often has a text in the picture, but the meaning of that text is always up for grabs;
7. Law has no overarching concepts of justice, that can direct its actions; and
8. Law is strictly functional, caring not for the soul or the mind, but only behavior.

Eighty years after Petrazycki's ideas shook up St. Petersburg, Judge Posner states that the law has above all an attitude problem.

The pious and reverential must give way to the inquiring and challenging. Thus, although Petrazycki and Posner disagree on whether or not law battles for consciousness; they concur that legal experience should be gauged by its temper and consequences in the material world.

But, Posner still believes that law is an experience of only the few. For Posner, law is the activity of licensed professionals called judges. These judges make law from statutes and decisions and their own preferences. They are limited only by a vague sense of professional propriety and moral consensus.

Petrazycki, on the other hand, saw law experience as common and endemic to all human beings. Perhaps the most important law experience of my lifetime was that of Rosa Parks, who refused to move from her seat on the Montgomery Lines bus. Although three people on either side of Rosa Parks moved as ordered by the bus driver to accommodate several white passengers; Rosa Parks did not. Rosa Parks asked the police officers who boarded the bus and demanded that she move, "Why do you push us around?" One of the officers replied, "I don't know, but the law is the law, and you are under arrest." Rosa Park's law experience did not demand a right answer from an autonomous legal doctrine. Her confrontation with a real other through an impulsion experience of duty and right made law in the real world. Her life experience gave the lie to the ghost language of "all deliberate speed."

*If All Things Were To Become Smoke  
The Nostrils Would Distinguish Them.*

Heraclitus

People will distinguish right and wrong, and the edge of judgment is sharpened by experience. Petrazycki's experiences of introspection and observation led him to see law as a phenomenon of everyday life. A passage from *Law and Morality* pointedly tells us that this experience may not be ignored.

If in the home the attitude to the child is that everything is permitted to the child with regard to others, and the child's demands of every kind are carried out unquestioningly, the result is an anomalous legal mind which may be characterized as a hypertrophy of the active legal mentality: the subject becomes possessed of a propensity to ascribe to himself with reference to others innumerable unreasoning and inordinate legal powers and legal claims, while at the same time acknowledging no rights in behalf of others. The abnormally developed legal mind elevates the child into a sort of being privileged among mortals. If, on the contrary, the child is neglected as regards the law—if no rights of any kind (not even the most modest) are acknowledged in his behalf and no active law sphere of any sort is assigned to him—the reverse psychic anomaly then ensues: underdevelopment of the active law mentality.

#### IV. CONCLUSION

Law may be seen several different ways. What one finds is related

to intention and perspective. Your desire and your standpoint is just that, yours. And each of us must cry for our own vision. In this crying the voices of others, and the voices of ghosts, remind us that we are everywhere.