What laws are experienced as
A comment on Celano’s pre-conventions

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The aim of this comment is to discuss tentatively one way of understanding, for the study of legal phenomena, some of the implications of recognising the existence of peculiar entities which Celano calls pre-conventions. This comment speculates that, if Celano is right, then so-called paradigm cases of law lose some of their philosophical centrality. To study pre-conventions, one needs to collect accounts of situations in which relevant agents use criteria for identifying legal phenomena that only approximate valid sources of law. To provide such accounts, the traditional informational focus of a philosophical analysis of law also needs, this comment further speculates, substantial broadening: if pre-conventions are in the body, then that is where we need to look if we want to study them.

Keywords: Dewey’s empiricism, paradigm cases, experience in law, law and mental health

1 INTRODUCTION

At the very beginning of Conrad’s Heart of Darkness, Marlowe tells the story of his youthful fascination for, what he calls, blank spaces on the earth.

Now when I was a little chap I had a passion for maps. I would look for hours at South America, or Africa, or Australia, and lose myself in all the glories of exploration. At that time there were many blank spaces on the earth, and when I saw one that looked particularly inviting on a map (but they all look that) I would put my finger on it and say, ‘When I grow up I will go there.’ /…/ I have been in some of the[se places] /…/. But there was one yet – the biggest, the most blank, so to speak – that I had a hankering after. (Conrad 1899: 197)

Reading Celano’s work on pre-conventions, it is difficult not to feel a similar kind of excitement and wonder for the yet unexplored spaces of our conceptual maps which he is pointing at.

Here is one of Celano’s basic moves in a nutshell. ‘Conventions’, in the generic sense of ‘agreements’ (in Celano’s terminology, convergent or shared ways of doing, or seeing, or thinking), can easily be organised along a double distinction: first, the distinction between tacit and explicit agreements; and, second,

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the distinction between agreements that can be explained (or accounted for) as strategic solutions to recurring coordination problems in social conduct on the one hand, and agreements that cannot on the other.

The combined application of this double distinction gives us four alternatives: 1) explicit agreements that can be traced back to strategic solutions to coordination problems (such as contracts, treaties, and so on); 2) explicit agreements that cannot; 3) tacit agreements that can be explained as strategic solutions to recurring coordination problems in social conduct (these are, in Celano’s terminology, conventions à la Hume or David Lewis); 4) tacit agreements that cannot.¹

Pre-conventions, in Celano’s terminology, occupy the fourth slot. Pre-conventions can be seen in convergent behaviour which is not a mere biological regularity. They are learnt, and yet are effortless, automatic, unreflective, fluid – they are “Conventions /…/ that are in the body /…/ and have become as natural as breathing, a ‘second nature’” (Celano 2016: 12). Pre-conventions are “tacit bodily schemes” or “embodied diagrams that establish what to do, what is the correct, the right or proper way to proceed” (Celano 2016: 14–15). They are neither mere de facto regularities nor norms. To use Celano’s phrasing, they are normative facts.

The aim of this paper is to discuss tentatively one way of understanding, for the study of legal phenomena, some of the implications of recognising the existence of peculiar entities which Celano calls pre-conventions. In order to do so, I need to first take a brief detour into a classic theme from John Dewey’s pragmatist philosophy.

2 A BRIEF DETOUR: THE FIRST POSTULATE OF DEWEY’S EMPIRICISM

John Dewey once wrote that the first postulate of that “vital but still unformed movement variously termed radical empiricism, pragmatism, humanism, functionalism” lies in a “presupposition as to what experience is and means”: “things – anything, everything, in the ordinary or non-technical use of the term ‘thing’ – are what they are experienced as” (Dewey 1905: 115). Thus, Dewey adds:

If one wishes to describe anything truly, his task is to tell what it is experienced as being. If it is a horse that is to be described /…/, then the horse-trader, or the jockey, or

¹ See Brigaglia’s comment on Celano’s paper (Brigaglia 2016) for a somewhat different characterisation based on a distinction between two kinds of normative behaviour – rule-following and norm-conforming behaviour. The great merit of Brigaglia’s characterisation is that it highlights the relevance of Celano’s pre-conventions for the study of legal phenomena in a clear and straightforward way.
the timid family man who wants a ‘safe driver’, or the zoologist or the palaeontologist must tell us what the horse is which is experienced. If these accounts turn out to be different in some respects, as well as congruous in others, this is no reason for assuming the content of one to be exclusively ‘real’, and that of others to be ‘phenomenal’; for each account of what is experienced will manifest that it is the account of the horse-dealer, or of the zoologist, and hence will give the conditions requisite for understanding the differences as well as the agreements of the various accounts.

At first sight, this might look a lot like a rather standard formulation of classic Idealism: ‘things are what they are experienced as’ in the sense that “things (or, ultimately, Reality, Being) are only what they are known to be, or that things are, or Reality is, what it is for a conscious knower” (Dewey 1905: 116). Taking only one step further (say, by substituting ‘experience’ with ‘sense data’, and then seeking a reduction of all experiences of ‘things’ to the latter; or by bracketing the existence of all ‘things’ that fall beyond the world of subjective phenomena), the external world begins to crumble beneath one’s feet.

Well aware of this danger, Dewey had one conceptual distinction up his sleeve – a distinction that, as I shall try to show, might help us in exploring further the relevance of Celano’s pre-conventions for legal philosophy. One should distinguish between what is real and what is true, and, correspondingly, between what is unreal and what is untrue. Here is how he elaborated on the point in the quoted paper (Dewey 1905: 116):

I start and am flustered by a noise heard. Empirically, that noise is fearsome; it really is, not merely phenomenally or subjectively so. That is what it is experienced as being. But, when I experience the noise as a known thing, I find it to be innocent of harm. It is the tapping of a shade against the window, owing to movements of the wind. The experience has changed; that is, the thing experienced has changed – not that an unreality has given place to a reality /.../. Reality has changed, not that truth has changed, but just and only the concrete reality experienced has changed. /.../ The content of the latter experience cognitively regarded is doubtless truer than the content of the earlier; but it is in no sense more real. To call it truer, moreover, must, from the empirical standpoint, mean a concrete difference in actual things experienced. Again, in many cases, only in retrospect is prior experience cognitively regarded at all. In such cases, it is only in regard to contrasted content in a subsequent experience that the determination of ‘truer’ has force.

According to the postulate of what Dewey calls ‘immediate empiricism’,

[T]hings are what they are experienced to be; and, unless knowing is the sole and only genuine mode of experiencing, it is fallacious to say that Reality is just and exclusively what it is or would be to an all-competent all knower. /.../ Or, to put it more positively, knowing is one mode of experiencing, and the primary philosophic demand (from the standpoint of immediatism) is to find out what sort of an experience knowing is – or, concretely how things are experienced when they are experienced as known things.
3 PRE-CONVENTIONS AND THE PARTIALITY OF PARADIGM CASES OF LAW

So, what is the upshot of all of this for the legal philosopher who is interested in Celano’s pre-conventions?

Let us consider this one version of an otherwise very common posture towards seeking explanations, or elucidations, or analysis, of terms like ‘law’, ‘legal authority’, or ‘legal duty’ (Finnis 2010: 245):

Laws – the rules or norms and principles of the political communities governed by systems of law – are facts only if they are first ideas in the minds of those who make them (posit them) /…/. These ideas become efficacious social facts only by being adopted – thought of as relevant reasons for action – in the deliberations and consequent choices and actions of those to whom they are addressed, the laws’ subjects. /…/ All the facts about laws are primarily facts in the realm of spirit – of that dimension of human reality in which ideas, meanings, propositions, valid argumentation, and properties such as truth and falsity, not to mention aspirations, aversions and intentions, can all leap (not without material support) from mind to mind and thereby, both immediately and mediately, change the world.

The presupposition here is that, at least in paradigm cases, we experience laws, or laws have an effect on us, as known things – that is, as things that have been accepted, or whose meaning has been interpreted, or that enter our conscious choices and deliberations, or that are thought of as relevant reasons for action.2

This is very reasonable and sound. For one thing, it would certainly be difficult to deny that the existence of a legal system depends crucially on its creation, acceptance and recognition by at least some of its subjects: positive law certainly does not fall from the sky. Furthermore, cases in which we experience laws as known things, and think of them as relevant reasons for choosing or deliberating one way or another, are typically cases of central importance for us: the judge deciding the case before her, the accused party waiting for the decision of his case, the elected official crafting a new statute, and so on. All these cases are standardly and effortlessly identified as legal. Furthermore, regardless of what influence legal rules are taken to have, in these cases, as far as the behaviour of the people they are addressed to (via threat of sanctions, or acceptance of the obligations they impose, or the expected effects of a legal reform, etc.) is

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2 These are, it seems to me, all cases of what Brigaglia calls (in his comment on Celano’s paper) rule-following behaviour (that is, a process of compliance with rules which 1) develops in more than one step, 2) is explicit, and 3) is slow and effortful). Brigaglia usefully contrasts rule-following with norm-conforming (that is, a process which 1) develops in more than one step, 2) is tacit triply (opaque, dumb, automatic), and 3) is fast and effortless). In Brigaglia’s reconstruction, pre-conventions are centrally involved in norm-conforming behaviour.
concerned, it is certainly the influence of known objects on one's conscious and deliberate choices.\(^3\)

But if Celano is right and the conceptual space that he is pointing at is not empty, but is instead populated by entities he calls ‘pre-conventions’, then these accounts – accounts of laws experienced as known things – important and central as they are, are only partial accounts of what laws are experienced as. ‘Pre-conventions’, if Celano is right, are automatic, unreflective, spontaneous ways of doing (or being, or perceiving, or thinking) that have become a second nature. We cognitively experience their bite, how they move us one way or another, only retrospectively, or identify their effects in subsequent experiences, if at all. And yet, if Celano is right, they do seem to actually move us one way or another and, thus, have normative authority over our conduct.

This is where Dewey’s suggestion might be directly relevant. Let us recall:

(1) If one wishes to describe anything truly, his task is to [provide accounts of] what it is experienced as being by relevantly situated individuals;

(2) If these accounts turn out to be different in some respects, as well as congruous in others, this is no reason for assuming the content of one to be exclusively ‘real’, and that of others to be ‘phenomenal’;

(3) The primary philosophic demand /…/ is to find out /…/ how things are experienced when they are experienced as known things. But knowing is only one mode of experience, and understanding what the knowledge standpoint is itself experienced as means pointing to a concrete difference in the actual things experienced.

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3 The appeal to and invocation of paradigmatic cases of law is a rather common feature of otherwise very different methodologies pursued by contemporary legal theories – such as, for example, theories that hold that explanations and descriptions of what law is should be done from the point of view of the person who possesses practical reasonableness, or from the point of view of the ordinary person, or from the point of view of someone who uses laws to guide his conduct and to criticise the conduct of others, or from the point of view of herculean judges. One common feature of all of these cases is that laws (that is, at the very least, legal texts) are considered to be known objects – that is, the man who possesses practical reasonableness, or the ordinary man, or Hercules, are thought of, at the very least, as being able to mentally formulate the rule that they are about to follow (or violate), have conscious access to it and, thus, its meaning can function as a reason for action. As such, paradigmatic cases of law (e.g., a legal decision as it is seen from the point of view of the person who possesses practical reasonableness) should be distinguished from typical or frequent cases of law – that is, the most typical or frequent cases in which people have contact with laws or legal rules (e.g., assuming wide-spread legal illiteracy, a legal decision as it is seen by someone who has little knowledge and understanding of relevant legal texts and propositions governing the case in hand). I thank an anonymous reviewer for pressing me to clarify this point.
4 LAW, TRAINS AND MENTAL HEALTH

To illustrate the concrete relevance of these points for further philosophical exploration of Celano’s pre-conventions, let me go back home – to the train station in my hometown, Pavia, in the 1960s. Back then, as Mario Jori told the story, there was a person who would ‘make trains leave the station’ (Jori 2010). He would stand next to the tracks, wait for the ‘official’ whistle signalling the train’s departure, and then wave as the train started moving. Most people (say everyone but little children and confused or lost foreigners) understood, or quickly realised, that the fellow was not the ‘true’ station manager – or anyone ‘officially’ employed by the Ferrovie dello Stato, the state railway company. Indeed, most people understood, or quickly realised, that the fellow was mentally ill and possibly under some form of illusion or delusion as to what his actual qualifications and powers were.

Now, the story is fairly simple and straightforward – it is certainly not difficult to imagine or see its plausibility. We all have witnessed or participated in very similar scenes. Its simplicity (and the ubiquity of its traits) helps to illuminate a number of important points, which are, in turn, centrally connected with Celano’s pre-conventions. Let me list, somewhat dogmatically and with little argument, at least six of them.

Notice, first, that the fact that many understand or quickly learn that, in a suitably similar situation, such a person is probably mentally ill and not a true ‘officer’ can easily be explained by the fact that many share similar or convergent criteria for the identification of valid legal phenomena.

Second, these are, most probably, neither strictly legal criteria (that is, relevant laws may very well not identify them as relevant criteria for determining, say, a person’s qualifications for ‘making trains leave the station’) nor is their concrete application most probably the result of any conscious interpretation of relevant legal material on the part of passengers or onlookers at the station. They are, rather, an example of Celano’s pre-conventions, which, in this case, determine the style of officials working for Ferrovie dello Stato, or how they are supposed to wave at passengers or conductors, or, even more generally, they might draw the line between sane and insane behaviour (people might notice, and consider as relevant, the odd and inappropriate twinkle in the eye, the unruly beard or hair of the mentally ill, or the stains on his clothes).

Third, even though these criteria might not be legal, they are most definitely connected with how people concretely experience a large portion of legal phenomena, how they discriminate between legitimate and illegitimate legal orders and commands, and how they concretely experience their authority. However, legal rules and regulations are experienced, in such and similar cases, as unknown things – their authority is known or cognitively thematised only retro-
respectively, if at all. One certainly does not need to ponder whether the fellow is mentally ill or not – the realisation of the fellow’s mental health is effortless, spontaneous and automatic: one simply dismisses his movements and gestures as a clear sign of his mental challenges.

Fourth, and consequently so, sometimes such criteria might misfire identifying as legal something which is not truly so; or vice versa, dismissing as not legal something which is actually legal and authoritative. But the fact that the content, when cognitively considered, of these experiences is untrue (since they do not track the identification of valid laws) does not make them unreal, nor does it exclude their relevance for an account of what laws are experienced as being. On the contrary, it is by contrasting such content with the truer content of other experiences (experiences, that is, which track the identification of valid laws) that one may acquire an account of what sort of experience knowing the law is.

Fifth, if one wants to provide an account of how legal authority works in these or relevantly similar cases – say, if one wants to provide an account of the kinds of reasons that legal authority offers to its subjects in these cases, or an account of how and in which sense, in these cases, legal authority is different from moral or epistemic authority – then an account of how pre-conventions work, as well as an account of when and why they misfire (if they ever do), is both useful and relevant: in these cases, pre-conventions provide an occasion, a context and a point for the normativity of legal authority.

Sixth and last, in order to provide such an account, one cannot simply rely on an analysis of the formal sources of law applicable to the case, or on an analysis of the ways in which these are explicitly and consciously used by relevant subjects. Instead, what one needs is to be there and observe the ‘inappropriate and odd twinkle in the eye’, or the ‘unruly beard’, or the ‘unruly hair’, the passengers’ reactions to these things, as well as to collect the latter’s accounts (partial or confused as they may well turn out to be) of their reactions.

5 CONCLUSION

Marco Brigaglia usefully distinguishes, in his comment on Celano’s paper (Brigaglia 2016), between rule-following and norm-conforming behaviour. Pre-conventions, in his account, are centrally involved in norm-conforming behaviour. Brigaglia also suggests that much classic debate in the philosophy of law, such as the debate on the concept of law or on the concept of legal authority, is typically centred on rule-following rather than on norm-conforming behaviour. He concludes that study of Celano’s pre-conventions (that is, study of norm-conforming behaviour) promises to provide much insight and perspicuity in such debate. I agree.
This comment further speculates that, if we are right, then so-called paradigm cases of law (that is, situations in which law is experienced as a known thing) lose much of their centrality. To study pre-conventions or norm-conforming behaviour, we also need accounts of situations in which relevant agents use criteria for identifying relevant legal phenomena that only approximate valid sources of law – that is, we need accounts of situations in which laws are not experienced as known things. To provide such accounts, the traditional informational focus of a philosophical analysis of law also needs, I suspect, substantial broadening: if pre-conventions are in the body, then that is where we need to look if we want to study them.

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