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On the Mode of Existence of Mute Law and the Inference of Cryptotypes

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Abstract

A widespread thesis in the analytical theory of law is that norms exist as linguistic entities. Rodolfo Sacco is one of the authors who have most fruitfully insisted, on the contrary, that there is no necessary correlation between norms and language, not even in the specific context of law. He thus extended the conceptualisation of legal normativity well beyond the boundaries of language through the notions of cryptotype and mute law. This paper takes into account two alternative hypotheses to the hypothesis that norms exist as linguistic entities, which are respectively based on the concepts of deontic state-of-affairs and deontic noema. Both hypotheses are tested for their applicability to the phenomena investigated by Sacco under the notion of mute law, notably with reference to cryptotypes. The question is raised then of how the existence of cryptotypes can be inferred from behaviour. The paper emphasizes the role that can be played in this context by nomotrophic behaviour, that is, the behaviour that consists in a reaction to the violation of a norm.

Keywords Mute law · Cryptotypes · Deontic state-of-affairs · Deontic noema · Nomotrophic behaviour · Rodolfo sacco · Amedeo G.Conte

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1 The Untranscendability of Language and the Linguistic Conceptions of Norms

Our everyday world is a world full of norms and rules according to which we regulate much of our behaviour. Some of them seem to us to be based on subjective choices; others, such as the rules of law, impose themselves on us as objective, and are able to shape the reality in which we live in ways of which we are often not fully aware. Norms and rules are thus part of our everyday experience. However, if we are confronted with the question: "What is a norm?", we find it difficult to give a precise and univocal answer. If we recognise that norms and rules condition our behaviour, our choices, and our lives, it is not without sense to assume that norms and rules have some kind of existence, some kind of reality. They are not a nothingness, a *Nichts*. But what kind of reality exactly pertains to norms and rules? What is their mode of existence? What is their ontological status?

There is a long-standing tendency in the theory of law to conceive of legal norms as linguistic entities, or as language-dependent entities—as the correlate of linguistic entities. This tendency was strengthened in the twentieth century, when many positivist theorists of law were influenced by the anti-metaphysical positions of logical empiricism and by the "linguistic turn" that marked the method of investigation of a conspicuous part of twentieth century philosophy, particularly in the context of so-called analytical philosophy. Many among them, such as Felix E. Oppenheim [20, 21], Norberto Bobbio [3], Uberto Scarpelli [31–33], Amedeo G. Conte [5, 7] and, more generally, the Italian Analytical School of legal philosophy, were in fact able to draw fruitful insights for the analysis of normative phenomena thanks to the adoption of conceptual tools elaborated in the field of semiotics and the philosophy of language.[1]

In this long-lasting cultural climate, many authors were led to conceive law as language, and to think that the object of the science of law is language, *and only language*. As Conte remarks in a book [5] originally published in 1962, many legal analytical theorists explicitly or implicitly share the thesis of the "untranscendability of language", which he illustrates as follows:

> Even when the jurist speaks of something other than the language-object of the legislator (when, for example, in historical interpretation he speaks of something other than the codes), he nevertheless does not transcend language, but transcends from language to language—from the language of the codes, and that of the preparatory works, to that of historiography. He no longer speaks of *a* language but continues to speak of language. To speak of law is to speak of language (pp. 266-7, my translation, emphasis added).[2]

[1] For a general survey on the Italian Analytical School of legal philosophy see [26]. For further remarks on this point, see also, among others, Di Lucia [13] and Di Lucia and Passerini Glazel [14].

[2] As I will show below (§§ 3. and 4.), Conte has later become critic of the linguistic conception of norms and law; he eventually introduced two non-linguistic concepts of norm, namely the concept of *deontic state-of-affairs* and the concept of *deontic noema*.

According to this conception, the norms of which law is composed are always entities of language, linguistic entities.

In fact, the thesis of the linguistic nature of norms admits at least three variants:

(i) In the *first* variant, norms are to be identified with deontic *sentences*, i.e. sentences having the form 'Behaviour *B* is *D*'—where *D* designates one of the deontic modes (obligatory, forbidden, permitted, optional)—or with sentences synonymous with them.
(ii) In the *second* variant, norms are to be identified not with deontic sentences, but with deontic *propositions*, i.e. with the meanings of deontic sentences.[3]
(iii) In the *third* variant, norms are to be identified neither with sentences, nor with propositions, but with deontic *utterances*, i.e. deontic or normative linguistic acts, such as the linguistic act of prohibiting to do something or enacting a law.[4]

The linguistic conception of norms presents a not insignificant advantage: if norms are linguistic entities, they are, in a sense, "empirically perceptible". Where there is, respectively, a (valid) deontic sentence, or a (valid) deontic proposition, or the (valid) deontic utterance of a deontic sentence, there is a (valid) norm.

However, even assuming that this is true (which is far from obvious),[5] can we say that the reverse is also true, i.e. that wherever there is a norm there is necessarily a (valid) deontic sentence, or a (valid) deontic proposition, or a (valid) deontic utterance? If norms, indeed, are to be *identified* with certain linguistic entities, then, by virtue of the identity relation, we must assume not only that where there is one of these entities there is a norm, but also that where there is a norm there must be one of these linguistic entities.

In his insightful and thought-provoking research, Rodolfo Sacco offers a wealth of counterexamples, where norms exist even when no normative *linguistic* entity is present: he thus refutes the relationship of identity between norms and normative linguistic entities and suggests that norms are not necessarily correlated with language.

[3] This is the case, for instance, of what Carlos E. Alchourrón and Eugenio Bulygin [1, 2] call "*hyletic* conceptions of norms", according to which norms are to be identified with *norm-lektá*, that is, the deontic *análoga* of propositions.

[4] This is the case, for instance, of what Carlos E. Alchourrón and Eugenio Bulygin [1, 2] call the "expressive conceptions of the norm", that is, those conceptions in which the deontic utterance plays an essential role.

[5] Suffice it here to recall Theodor Geiger's remark [15, 16] according to which "not every sentence [*Satz*] in the form of a verbal norm [*Wortnorm*] really contains a norm": for instance, "an act of legislation [*Gesetzesbestimmung*] which the public for any reason ignores and which the authorities make no effort to enforce is a normative sentence [*Normsatz*], but it lacks the binding character of a norm […]"; as a consequence, "[i]t is only valid on paper. Neither the public nor the state regard it, any longer, as obligatory" ([16, p. 48, translation modified]; German original [15, pp. 25–6]).

2 Norms Beyond Language

Rodolfo Sacco is one of the authors who have most fruitfully insisted that there is no necessary correlation between norms and language, not even in the specific context of law. In his research he extended the conceptualisation of legal normativity well beyond the boundaries of language through the introduction into the field of legal anthropology and comparative law of two concepts that are particularly fruitful for the investigation of non-linguistic normative phenomena: the concept of 'mute law' and the concept (originally proposed by the American linguist Benjamin Lee Whorf) of 'cryptotype' [27–30, 37].

The notion of mute law encompasses all those legal phenomena, be they rules or acts, that operate in a society without being verbalized, in some cases without even being thought of by the person who applies or performs them. Among the phenomena of mute law, Sacco [27] calls 'cryptotypes' those "rules that man practices without being fully aware of them", "rules that exist and are relevant, but which the operator does not formulate (and which, even if he wanted to, he would not know how to formulate)" (p. 40).

Sacco's research on mute law illuminates (at least) two distinct types of mute legal phenomena, which partly overlap:

(i) The *non-verbal* elements operating in a legal system (whether or not that legal system knows verbality and operates in the presence or absence of language). Two examples: the mute act of *occupation*, which is the mute material act by which one captures an un-owned thing, thus acquiring the ownership of it; the mute act of *dereliction*, which is the mute material act by which one abandons or throws away a property of his in such way as to indicate that he intends no further claim to it.
(ii) The *non-verbalized* elements operating in a legal system (whether or not that system knows verbalization, and whether or not it is operating in the presence or absence of language). Two examples: non-verbalized customary norms and cryptotypes.

To these two types of legal phenomena correspond two different meanings of the adjective 'mute': (i) 'mute' as a synonym for '*non-verbal*'; (ii) 'mute' as a synonym of '*non-verbalized*'.

These two meanings of the adjective 'mute' are not equivalent to one another:

(i) If something is *non-verbal*, then it is a *quid* that exists, by essence, in a form other than words: it has a non-verbal mode of existence, it is a non-verbal, or non-linguistic, entity. Three examples: a tree, a sunset, and, in the domain of mute law, an unspoken legal act such as the mute act of *occupation*, which cannot be performed by words.
(ii) If something is *non-verbalized*, this only means that it has not been expressed in words. Whether or not something is verbalized is not an essential but rather an accidental matter. Three examples: the psycho-motor rules for riding a bicycle may be non-verbalized by the ordinary biker (but they can, in principle, be

verbalized by an expert in psychomotricity); the linguistic rule according to which, in Italian language, one cannot say '*Tre scuri abiti*' (while one can say '*Tre grossi libri*') may be non-verbalized by the ordinary speaker (but it can, in principle, be verbalized by a linguist); the legal rule, unconsciously followed and operating in French law, according to which delivery is an abstract mode of conveying ownership of a movable property may be non-verbalized by the legal operator (but it can, in principle, be verbalized by the comparatist of law).

Symmetrically:

(i) If something is *verbal*, then it is a *quid* that exists, by essence, in form of words: it has a verbal mode of existence, it is a verbal, or linguistic, entity. For example, the name 'Rodolfo Sacco', or the sentence 'Two times two equals four'.
(ii) If something is *verbalized*, this does *not* mean that it is something that exists exclusively in form of words; it only means that it *has been expressed* in form of words. For example, the norm, according to which ownership of movable things without owner is acquired by occupation, is a norm that is verbalized in the Italian Civil Code, Article 923; but this does not necessarily imply that the norm itself is a linguistic entity, as the same norm may well exist as a non-verbalized norm in many other legal systems. On the contrary, if an entity in some way exists without being verbalized, it is necessarily a non-verbal entity: it is an entity that exists in a form other than words, it is an entity that exists as a non-verbal entity. For example, if, in the French legal system, the norm according to which delivery is an abstract mode of conveying the ownership of movable property operates despite being non-verbalized by legal operators, this implies that this norm is a non-verbal entity.

The German sociologist of law Theodor Geiger insisted on the need to distinguish the "subsisting norm" (*subsistente Norm*) from the "normative sentence" (*Normsatz*), and emphasised that "frequently a normative sentence is mistakenly, or at least ambiguously, designated as a norm, whereas the norm itself may even exist without the verbal shell of a sentence [*ohne die sprachliche Hülle des Satzes*]" [15, p. 25] (English translation in [16, p. 47], translation modified).[6]

Analogously, the Czech philosopher of law Ota Weinberger [35, 36] points out that "one should not confuse the existence of a normative expression [*Normausdruck*] with the reality of the norm […], since the norm can be really valid [*real gelten*] even without being expressly formulated" [35, p. 210] (English translation in [36, pp. 47–48]), as in the case of many customary legal norms.

[6] As Conte [11] points out, there is a difference between Sacco's and Geiger's thesis: for Sacco not all norms are *verbalized norms*, because there exist *at least some* norms that are non-verbalized, and thus non-verbal (which does not exclude, in principle, that some other norms may be verbal norms); for Geiger, instead, norms in general are to be distinguished from deontic sentences, because norms and normative sentences are two different kinds of entities. To put it differently, for Sacco the category of norms includes, alongside verbalized norms, also mute norms; for Geiger, on the other hand, the category of norms is a different category from that of normative sentences.

The existence, operativity, and validity, within a legal system, of non-verbalized norms and rules thus implies that norms and rules (or at least *some* norms and rules) are *not* linguistic entities, i.e. their mode of existence is *not* the mode of existence of linguistic entities. But what, then, can be the mode of existence of such norms and rules? Notably, what can be the mode of existence of the mute norms of mute law?

I will consider two possible hypotheses concerning the mode of existence of non-verbalized norms, which are at the same time two alternative hypotheses to the hypothesis that norms exist as linguistic entities: (i) the hypothesis that norms exist as *deontic states-of-affairs* and (ii) the hypothesis that norms exist as *deontic noemata*.

3 Norms as Deontic States-of-affairs

The *first* alternative hypothesis to the hypothesis that norms exist as linguistic entities—which is also the first hypothesis on the mode of existence of non-verbalized norms—is that norms exist (not as linguistic entities but rather) as *deontic states-of-affairs*. This hypothesis has been formulated, for instance, by Amedeo G. Conte.[7] Conte [6] elaborates the concept of "deontic state-of-affairs" on the basis of a parallelism between descriptive and normative language: just like the descriptive *proposition* expressed by the sentence 'It is raining' is not to be confused with the *extralinguistic fact*, or (ontic) *state-of-affairs*, that it is raining, the deontic *proposition* expressed by the sentence 'It is forbidden to smoke in public premises' is not to be confused with the *extralinguistic deontic state-of-affairs* that it is forbidden to smoke in public premises.

According to this first hypothesis, a norm is to be identified neither with a deontic sentence, nor with a deontic proposition, nor with a deontic utterance, but rather with a deontic state-of-affairs that is valid within a given normative system: for instance, the deontic state-of-affairs existing in the Italian legal system that it is forbidden to smoke in public premises.

The fruitfulness of the concept of deontic state-of-affairs becomes particularly evident in relation to the phenomenon of customary law: while the linguistic conceptions of norms can hardly account for customary norms, which exist independently of their verbalization, the notion of deontic state-of-affairs accounts for both statutory and customary norms.

A deontic state-of-affairs may indeed be the product of a linguistic norm-creating act of the lawmaker: through a linguistic norm-creating act the Italian law-maker made it the case, for instance, that it is forbidden to smoke in public premises. In this case the deontic state-of-affairs is a *thetic* deontic state-of-affairs, in Conte's terminology. However, a deontic state-of-affairs may as well be an *athetic* deontic state-of-affairs, that is, a deontic state-of-affairs that is established in a given legal system independently of any norm-creating act, as in the case of customary norms,

[7] As I mentioned above, Conte initially [5, 7] shared the view that norms are linguistic entities—more precisely: prescriptive deontic sentences; in his later works [10, 12], though, he recognizes that by the term 'norm' we may alternately refer to one of at least five different deontic entities: a deontic sentence, a deontic proposition, a deontic utterance, a deontic state-of-affairs, or a deontic noema.

such as, for instance, the customary norms of the Saxons, that were existing before their verbalization in Eike von Repgow's *Sachsenspiegel* [10, 12].

Conte's notion of deontic state-of-affairs can be hermeneutically fruitful to interpret at least part of the phenomena that Sacco includes in mute law, notably non-verbalized customary norms. However, in Conte's conceptualization, the specific mode of existence that pertains to deontic states-of-affairs is the same mode of existence that, according to Hans Kelsen, pertains to norms, that is, validity. This implies that only *valid* deontic states-of-affairs do exist; an invalid deontic state-of-affairs, on the contrary, would be an inexistent deontic state-of-affairs, and thus it is no deontic state-of-affairs at all.

Sacco's category of mute law, on the contrary, seems to be more focused on the *facticity* of legal phenomena rather than their *validity*, and it includes phenomena for which it can be doubtful that one can properly speak of validity. An example is that of the norm that a court may adopt to rule on a matter that is previously unknown to written law, to other courts and to legal doctrine: if the court in its decision adopts "a solution that is wise and agreeable, so convincing that it will be imitated in the future without conflict", then, according to Sacco [30, p. 63], we are in front of a mute rule of law, a mute "non-legal rule of law" (*un diritto non legale*), that will get verbalized with the filing of the court's ruling. With reference to this example, Sacco raises the question: "[W]hen did that rule of law come into being that with the filing of the judgment was verbalized?". To answer this question Sacco first asks another question: "What was the state-of-affairs before the ruling was filed, […] when the judge reported in chambers, presenting his solution as certain to the president and his colleague, who in turn find the rule obvious, or at least agree with it?" (p. 63). Sacco recognizes that some authors would reply that before the filing of the ruling the norm does not exist; however, he remarks that the same matter would have been decided in the same way if it were presented to another court, which suggests that that norm was not an inexistent but rather a latent norm. Sacco explains:

> There is no verbalized norm; but there is, and has been for some time, a situation in which the average judge, the normal judge, if confronted with the matter, would dispose, or would have disposed, in that foreseeable manner, that is to say, would abide, or would have abided, by that criterion of decision. That is, there is a predictability of the hypothetical judicial decision (p. 63).

Sacco then rhetorically asks: "Is the predictability of the community's conduct and the conforming judicial decision a nothingness? Or is it instead an indication of the existence of a norm?". His conclusion is (i) that a norm already exists, (ii) that that norm is mute law, and (iii) that "that mute law precedes in time any hypothetical implementation of the norm" (p. 64).

Sacco's example looks quite problematic for the hypothesis that the norms of mute law exist as deontic state-of-affairs, if the specific existence of deontic states-of-affairs is equated to their validity: notably, can the predictability described by Sacco be considered an indication of the existence of a *valid* deontic state-of-affairs? To put it differently: is the *disposition* of a legal community to abide by a criterion

of decision—a criterion that was never formulated nor thought of before—already a valid deontic state-of-affairs?

While a positive answer is not in principle impossible,[8] a negative answer seems to be implied by the equation of validity and existence of deontic states-of-affairs. A hint in the direction of a negative answer to these questions is offered by Conte's conceptualization of draft norms not as deontic states-of-affairs but rather as deontic noemata. In fact, the norm proposed by a member of the court to his colleagues is similar to a draft law proposed by a member of a legislative assembly to his colleagues; and it looks very doubtful that a draft law can be considered a *valid* deontic state-of-affairs already existent in the legal system. Of course, people may orient their action to the foreseeable promulgation of the proposed law; but the promulgation may never take place, and the draft norm would then remain what it is from the beginning, that is, the mere *idea of a norm*—in Conte's terminology, a mere *deontic noema*.

However, Sacco suggests that both the norm that informs the ruling of the court and the norm that is proposed as a draft law may already *exist* in the *mentality* of the corresponding legal community as a shared sentiment, or as a derivation of shared logical premises [30, p. 65]. But this mode of existence as a shared sentiment or as a derivation from shared logical premises cannot be equated to the legal validity of a norm, because a normative sentiment may be shared without being a valid norm in a given legal system, and a valid norm may exist in a legal system to which no shared normative sentiment corresponds. This leads us to the second alternative hypothesis to the hypothesis that norms exist as linguistic entities.

4 Norms as Deontic Noemata

The *second* alternative hypothesis to the hypothesis that norms exist as linguistic entities—and the second hypothesis concerning the mode of existence of the norms of mute law—is that norms exist as mental objects, or objects of consciousness. This second hypothesis admits of at least two different interpretations: one in strictly *psychological* terms, one in *phenomenological* terms. For the purpose of this paper, I will consider the latter. Notably, I will elaborate on the concept of deontic noema, which has been introduced by Amedeo G. Conte in his investigation into the possible referents of the word 'norm' [10, 12].

According to Conte, when we speak of a norm, we may refer to (at least) *five* possible referents (five possible *designata* of the word 'norm').[9] The first three possible referents of the word 'norm' are those that I enumerated in § 1. in relation to the three possible variants of a linguistic conception of norms: the word 'norm' may indeed refer, in different contexts, to a *deontic sentence*, to a *deontic proposition*, or

[8] A positive answer would imply, though, that the equation of the specific existence of deontic states-of-affairs to validity is abandoned. The hypothesis that the existence of deontic state-of-affairs can also be understood in terms of *facticity* has been advanced, for instance, in Paolo Di Lucia and Lorenzo Passerini Glazel [14, pp. 99–101].

[9] To the five possible referents of the word 'norm' identified by Conte at least two more may be added: a deontic conduct (for instance, an exemplary conduct to be taken as the norm) and a deontic object, that is, an object, or artifact, that is taken as a norm for other objects or artifacts (see Passerini Glazel [25]).

to a *deontic utterance*. A fourth possible referent of the word 'norm' is the *deontic state-of-affairs*, which I have illustrated above in § 3. The fifth possible referent of the word 'norm' is a *deontic noema*, that is, a norm understood as an intentional object of consciousness.[10]

Conte offers two examples of deontic noemata.

The *first* example (the one I mentioned above in § 3.) is that of a draft norm that is proposed to a legislative assembly. The draft norm is not (yet) a valid norm (a valid deontic state-of-affairs) existing in a legal system; it is merely the *idea*, the mental *representation* (*Vorstellung*) of a norm elaborated in the mind of the proponent member of the assembly, to be discussed with the other members.

The *second* example is drawn by Conte from the Swiss Civil Code, art. 1:

> "In the absence of a statutory provision, a court is to decide in accordance with customary law and, in its absence, in accordance with the *rule* it would adopt as legislator" (emphasis added).

The rule that the court would adopt as legislator, like the draft norm proposed to a legislative assembly, is *not* (yet) a valid deontic state-of-affairs existing in the legal system; it is a mere *idea*, a mere *representation* of a norm, which would eventually become a verbalized and valid norm (at least in its individual and concrete application to the case) only with the filing of the ruling of the court.

This example recalls the example by Sacco that I discussed in § 3., and it seems to imply that Conte would *not* have agreed that the norm adopted by the court in absence of a statutory provision and a customary norm can be understood as an already existing, valid *deontic state-of-affairs*: this norm of mute law can rather be understood as a *deontic noema*.

Conte [12], indeed, points out the difference between the deontic noema and the deontic state-of-affairs in the following terms: "(i) a deontic *noema* is a deontic state-of-affairs *in intellectu*; (ii) a deontic *state-of-affairs* is a deontic noema *in actu*" (§ 5.3.2.).

In this formulation of the difference between a deontic noema and a deontic state-of-affairs, the notion of deontic noema seems in fact to be a merely residual notion in Conte: it seems to refer not to norms understood as real norms (deontic states-of-affairs), but only to norms as *merely represented*, or *merely imagined*, in one's mind. However, the concept of deontic noema may turn out to be more relevant than Conte thought, as well as more fruitful for the interpretation of the phenomena of mute law.

In a passage from the book *Grundriß einer allgemeinen Theorie des Staates* [17] (1926), Hans Kelsen—possibly drawing inspiration from an analogous thesis advanced by Max Weber [34]—writes:

[10] Conte [12] stresses that the deontic noema, which is an *intentional* phenomenon, must be distinguished from the deontic proposition, which is an *intensional* phenomenon. '*Intentional*' is an adjective that belongs to the lexicon of phenomenology, whereas '*intensional*' is an adjective that belongs to the lexicon of semantics. On the notion of deontic noema, see also Passerini Glazel [23–25].

> "It is not the norm or the normative order, in their validity-existence [*Geltungsexistenz*] that become effective [*wirksam*]. It is the fact that men represent to themselves [*sich vorstellen*] the norm or the normative order, and it is this *representation* [*Vorstellung*] what becomes effective [*wirksam*], since it drives men to adopt the behaviour corresponding to the *representation of the norm* (p. 8, emphasis added).

If we interpret Kelsen's concept of the representation of a norm in terms of a deontic noema, and the norm "in its validity-existence" in terms of deontic state-of-affairs, then the concept of deontic noema takes on a far more significant role in the understanding of the reality of law than Conte seems to have originally assigned to it. In Kelsen's view, indeed, the effectiveness, or operancy (*Wirksamkeit*), of a norm is always the effectiveness of a deontic noema: only indirectly and by metonymy can one say that a norm understood as a deontic state-of-affairs is effective. Therefore, for a norm to be effective or operant on an agent's behaviour, it *has* to be represented in the agent's mind as a deontic noema.

Kelsen's view thus suggests that a deontic noema may not only be the imaginary representation of a non-existing norm—as in the case of a norm proposed in a legislative assembly; it can also be the representation of an actual deontic state-of-affairs that is valid within a given legal system. And this norm representation, or deontic noema, is moreover necessary for the effectiveness of the norm.

5 Mute Law and Normative Experience

In order to better evaluate the possible relevance of the concept of deontic noema for the understanding of the norms of mute law, I will now compare Conte's notion of deontic noema to the conception of norms "as thoughts", proposed by Ota Weinberger [35, 36].

For Weinberger, the norm is a thought (*Gedanke*), and thus belongs to the sphere of "ideal entities", of *ideelle Entitäten* [36, p. 37; 35, pp. 208-209].[11]

Since norms are not material but ideal entities, Weinberger [36, p. 33; 35, pp. 204-5] remarks that they cannot be directly or indirectly perceived with the senses. The fact, however, that norms and rules are not directly perceptible with the senses does not imply, according to Weinberger, that they are devoid of reality. Notably, according to Weinberger, a distinction must be drawn between the case in which the "thought of the norm" is considered as a mere structure of meaning on a purely logical level, abstracting it from any concrete mental process, and the case in which, instead, the ideal being (*ideelles Sein*) of the norm has points of contact with material reality. According to Weinberger, the points of contact between the ideal being of the norm and material reality consist:

[11] The German language has two distinct adjectives that correspond to the English adjective 'ideal'. The first adjective, '*ideell*', means "belonging to the sphere of thought", and thus has an *ontological* sense; the second adjective, '*ideal*', means "corresponding to a model of perfection", and thus has an *evaluative*, or *axiological* sense. The term used by Weinberger is here '*ideell*'. On the distinction between the two German adjectives '*ideell*' and '*ideal*', see also Hans Kelsen [18] (chapter VIII, footnote 1).

(i) in acts (*Akte*), i.e. "materially concrete events of ideal content", such as psychic acts, acts of knowledge, acts of will;
(ii) in the fact that even ideal entities can sensibly be given temporal coordinates, i.e. a temporal determination of their existence [36, p. 38; 35, p. 209].

The norm posited by the legislator is not a mere abstract structure of thought; it is rather considered as posited or willed by a particular subject and as valid within certain time coordinates. In this case, the norm is then, for Weinberger, a reality. However, he points out that "the reality of a norm", a "norm's real existence" cannot be equated to the act through which the norm is posited, nor with the existence of a sentence or an utterance expressing the norm. For Weinberger, indeed, a norm can be really valid (*real gelten*) even without being expressly formulated (as I mentioned above in § 2.). Nor can a norm be equated to the conduct of its addressees. The reality of a norm rather manifests itself in at least four moments, according to Weinberger:

(i) The reality of the norm is manifested, firstly, in the fact that the norm "exist[s] in the realm of human consciousness" as an "*experience* of obligatoriness" (*Soll-Erlebnis*) or as "*knowledge* of obligatoriness" (*Soll-Wissen*);
(ii) the reality of the norm manifests itself, secondly, in the fact that it "operates [*wirkt*] on human behaviour as a motivating element";
(iii) the reality of the norm is manifested, thirdly, in the fact that it "stands in close relation to the existence of social institutions such as administrative authorities, courts, legislative bodies";
(iv) the reality of the norm is manifested, fourthly, in the fact that "conduct that conforms to or deviates from the norm produces positive or negative social consequences", and in particular in the fact that society "reacts to transgressions of the norm" [36, pp. 40–1; 35, pp. 210-1].

Weinberger shifts the focus from the intentional *object*—the deontic *noema*, in Conte's perspective—to the intentional *act*—the deontic *noesis*—of which the noema is the object.[12] The real existence of the norm consists, from this point of view, in its being the intentional object of a normative experience (a *Soll-Erlebnis*) or a normative knowledge (*Soll-Wissen*). From this perspective, a deontic noema can be not only an *imagined*, or merely *represented*, norm, but also an *experienced* norm: the intentional object of an actual *normative experience*.

This perspective seems to fit with Sacco's claim that "many rules actually exist, mute and unactuated, but somehow thought, in the sense that they are conformed by a feeling […] or contained in logical premises capable of conditioning them" [30, p. 65]. It also seems to fit with Sacco's thesis that the *opinio iuris ac necessitatis*—which can be viewed as a normative experience of a deontic noema—is sufficient to put into effect the mute norm of customary law [pp. 20–4]; or with the above mentioned case of a court that, confronted with a matter that is previously unknown to written law, to other courts and to legal doctrine, adopts the rule it would adopt as legislator because that rule is experienced as the obvious normative solution to the

[12] A noema in Edmund Husserl's phenomenology is the objective counterpart of a noesis.

matter; or again with the *extra ordinem* customary norm, corresponding to a widespread normative experience, that allows mushroom picking on other people's land.

The idea of the existence of a norm—a deontic noema—in terms of the intentional object of a *Soll-Erlebnis* or a *Soll-Wissen* can notably explain Sacco's claim that, as soon as at the first moment in which a practice appears, the customary norm is already in force ([30, p. 23]), and that the customary norm may exist before and independently of the compliance with the norm (p. 61); in short, "where there is so-called *opinio* there is mute law" (*ibidem*).

A question arises, though, when one considers those forms of mute law that Sacco calls cryptotypes. As I mentioned above (§. 2), cryptotypes are "rules that man practices without being fully aware of them", "rules that exist and are relevant, but which the operator does not formulate (and which, even if he wanted to, he would not know how to formulate)". Cryptotypes are not only non-verbalized norms but also *unconscious*, *unthought* norms, according to Sacco [30, p. 16]. Then the question is: Can a deontic noema, i.e. the intentional object of a normative experience, be unconscious? To put it in Weinberger's terms: Can a norm-thought (*Normgedanke*), be unthought? This seems to be, in fact, a *contradictio in adiecto*. However, the notions of deontic noema and normative experience (or deontic noesis) can be conceived of as broader than that of norm-thought: the intentional object of a normative experience need not be a noema that is *consciously* thought out in general and abstract terms; it can also be the rather undefined object of an unreflected feeling of obligatoriness that directly affects the concrete behaviour one feels is due, without knowing for what general and abstract reason it is due. In this acceptation, the concepts of deontic noema and normative experience seem to be compatible also with Sacco's notion of cryptotype.

6 Nomotrophic Behaviour and the Inference of Cryptotypes

In § 5. I have suggested that the hypothesis that (at least part of) the norms of mute law exist as deontic noemata—that is, as intentional objects of normative experiences—can be hermeneutically fruitful to better understand many phenomena of mute law, including cryptotypes. If, however, the norms of mute law are mute norms, and cryptotypes in particular are rules that are followed without the agent himself being aware of them, how is it possible to ascertain the existence of such norms?

This is a specification of the more general question concerning the possibility of inferring rules from behaviour. In a paper devoted to Sacco's notion of mute law [11], Conte concisely maintains that a norm can be inferred from the behaviour that is oriented to that norm—which he calls "nomotropic behaviour" [see 9]—through the method of abduction.

A more thorough and detailed analysis of the way in which the method of abduction can be employed to infer a norm from behaviour is conducted by the Italian legal philosopher Gaetano Carcaterra [4]. For Carcaterra, the observation of a regularity of behaviour can be, indeed, a first indication that a norm may be underlying that behaviour; but such a hypothesis needs to be corroborated through the investigation of seven kinds of possible concurrent circumstances (pp. 123–129), which are:

(i) the fact that the hypothesis that the regularity is deontic, i.e. determined by a norm, is more or less plausible at the outset;
(ii) the fact that it is to be presumed that the presence of a given norm leads to that regularity of behaviour in the majority of those concerned;
(iii) the fact that it is hardly credible that that regularity of behaviour would occur in the absence of that norm;
(iv) the fact that the majority of involved agents hold that behaviour;
(v) the fact that those who deviate from that regularity of behaviour avoid being noticed;
(vi) the fact that in the absence of that norm it would make no sense for those who deviate from it to avoid being noticed;
(vii) the fact that most deviants avoid being noticed.

All these circumstances provide further clues supporting the hypothesis that the observed regularity of behaviour is determined by a norm. In other words, if some, or all, of these concurrent circumstances occur, then the initial hypothesis concerning the presence of a certain norm will become more and more plausible. However, alongside the circumstances listed by Carcaterra, at least two others can be added that are particularly relevant for the investigation of cryptotypes and customary norms.

The *first* of the two additional circumstances, which has been pointed out by Sacco, can be ascertained by comparison of different legal systems. Comparison with a legal system in which a rule has been made explicit and verbalized makes it possible, according to Sacco [30], to discern (either in transparency, or by opposition) the cryptotypes that, in another legal system, are operating in a non-explicit and non-verbalized form. Sacco gives the example of the legal rule according to which delivery is an abstract mode of conveying ownership of a movable property: this rule is present in a verbalized form in German law, whereas it is present only as a cryptotype in French law. Sacco explains:

> An examination of the French solutions on the subject of manual gift, recovery of undue payment and fulfilment of the obligation allows the conclusion to be drawn that the rule—verbalized in Germany—according to which delivery is an abstract mode of transfer of movable property operates [also] in France (p. 39).

The *second* of the two circumstances consists in the possible presence of what I proposed to call "nomotrophic behaviour" occurring in the event of a breach of the norm (see 22, 25). Nomotrophic behaviour is the behaviour of a person who reacts to the violation of a norm in order to prevent the repeated violation of the norm from undermining the norm. The prototypical form of nomotrophic behaviour is the imposition of a sanction on the person responsible of the behaviour contrary to the norm; but nomotrophic behaviour can take almost any form, like demanding an apology, raising scandal, highlighting or exacerbating the harm caused by the violation of the norm, and so on.[13]

[13] My notion of nomotrophic behaviour is inspired by Niklas Luhmann [19] analysis of the many possible forms of reactions to the violation of a normative expectation.

Nomotrophic behaviour is a clear clue that a norm is experienced as obligatory, and since it presupposes the existence of the norm that has been infringed, nomotrophic behaviour indirectly *gives an expression* to it. For this reason, it can provide a strong indication that a mute norm or a cryptotype exists.

However, Sacco seems to suggest that the inference of existing norms can be pushed well beyond the limits of an inference from *actual* behaviour, and this makes the question of the inference of the norms of mute law even more complicated. Sacco, indeed, extends the notion of mute law beyond the boundaries of actuated norms, to those "very important areas where the rule is not yet actuated" [30, p. 68]. In a reply to Conte's thesis that a norm can be inferred from the behaviour that is oriented to that norm (and nomotrophic behaviour is a peculiar kind of such behaviour oriented to a norm),[14] Sacco reiterates that the concept of "mute law" comprises norms that not only are *latent* and *non-verbalized* but may also be *unactuated* (p. 61). The inference of such latent and unactuated norms is a much more difficult and problematic task, since there is no actual and observable behaviour from which the norm can be inferred: a keen jurist must then rely only on the individuation of a merely *potential* nomotrophic behaviour, according to Sacco. This seems to be suggested also by Geiger [15, 16], who writes: "The *latent* norm [*latente Norm*] corresponds to the *potential* reactivity [*potentielle Reaktion*] […] in the case of violation of the norm" ([15, pp. 58–63]).

To sum up, Sacco tries to expand the domain of legal normativity well beyond the boundaries of language, in an uncertain and uncharted territory in which a perceptive and insightful jurist should be able to infer unactuated norms through the awareness that silence can be eloquent, and that the dimness and ineffability of a latent norm does not preclude the palpable predictability of a merely potential but eloquent nomotrophic reaction to its violation.

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[14] Conte [9] calls "nomotropic" (with *p*) behaviour every form of behaviour that is generally oriented to a norm, which includes, for instance, abiding by, but also eluding that norm. "Nomotrophic" behaviour (with *ph*) is a particular form of nomotropic behaviour.

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