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**Highlighting Law  
through the Concept  
of Value**

Paul Amselek

# HIGHLIGHTING LAW THROUGH THE CONCEPT OF VALUE<sup>1</sup>

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## ABSTRACT

The purpose of this study is to consider rules of conduct and the value judgements that they underpin in the light of material standards in common use and the physical measurements made with them. This heuristic parallel makes us fully aware of the very essence of legal rules and the way they work.

## AUTHOR

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As a supposed restatement of a commonplace in his renowned *Dictionary of Accepted Ideas*, Gustave Flaubert wrote under the entry ‘Law’: ‘It is not known what it is’. I shall recall in passing for the sake of anecdote that Flaubert said some fairly savage things about law, writing to a friend in his *Correspondence*, ‘I can think of nothing more foolish than law, except studying law’ (letter to Ernest Chevalier of 15 March 1842). True, this should be seen as the sign of a genuine allergy because, after beginning legal studies in Paris, Flaubert very soon had to give them up as he came down with a nervous complaint, that is, – or at least this is how I construe it – a psychosomatic rejection reaction. The fact remains, though, that more than one hundred and thirty years after it was written, the entry in his Dictionary is still largely relevant; generally speaking, many of us are still today in the dark about law and it is something that calls for enlightenment, much like Goethe on his death bed desperately clamouring, ‘*Mehr Licht! Mehr Licht!*’.

In this respect, I would like to warmly congratulate Jahiel Ruffier-Méray and the CERC team for organising this colloquium entitled ‘*La valeur, les valeurs ... le droit*’. The approximation made in this way between the terms *values* and *law*, with *values* coming first, seems to me like an invitation to study the concept of law by starting from the more general concept of value, and addressing the question from that angle and by that yardstick. This invitation is of very great heuristic interest in my view. This is because the concept of value is precisely more accessible, because it extends beyond the domain of mental things to which law belongs and which is by nature a subtle and difficult domain. This concept itself, in

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1. Report originally entitled ‘Mettre le droit en valeurs’ presented at the colloquium ‘La valeur, les valeurs...le droit’ of 28 November 2014 organised by *Centre d’études et de recherches sur les contentieux* of the department of law of Toulon University. The French title involves word play that cannot readily be rendered in English. ‘Mettre une chose en valeur » (*valeur* in the singular) means to show something in its best light. In writing ‘mettre le droit en valeurs’ (in the plural), the authors means: seeing law as belonging to the world of values, in the guise of values.

practice, is probably not without its shadow zones and haloes of ambiguity in our mind, especially in the human sciences. But we have the opportunity to clarify it, to dispel the shadows and ambiguities, using our common and concrete physical experiences of evaluation. And the light shed in this sector will, it is hoped, spread and bounce back upon the concept of law itself. Approaching law through a theory of value or values, shedding light on the theory of law by setting it upon a theory of values and illuminating it through that medium, or, if you prefer, piercing the ontology of law by directing the spotlights at the idea of value, that is the objective I have set for my contribution. And that is also the meaning of the title I have given to it: ‘Highlighting law through the concept of value’, that is, studying the law, legal rules, in terms of values, from this perspective, under this cover, in this light, so to speak.

In order to achieve this indirect illumination of law and the fundamentals of legal experience, one must begin by properly elucidating what values are exactly and consequently what value judgements are. What I have to say will begin from an idea that some of you will probably be moved to challenge and others on the contrary will view as a truism, but which anyway calls for closer enquiry or clarification. This is namely that values are not properties of things but relations between things, with value judgements being the observations made of those relations, the report of findings on them, as it were. The value that things take on in our view seems to me to result invariably from their relation to other things, *to terms of reference against which we set them*: it is this inescapable relativism of values that reveals in full clarity our ordinary metrological experiences and it is the same relativism that at the same time introduces us directly to the most essential being in law.

It is not usual, it is true, to think of legal rules as being like standard gauges of the physical world: a finer analysis is essential beforehand, which amounts to distinguishing between two types of standards against which things are compared in quite different ways. This distinction is crucial if we are to fully bring the being of law to the light of our awareness.

The inescapable relativism of values and the two types of standards to be distinguished: it is these two points that I am going to examine in turn, as two steps towards unveiling the ontology of law.

## I – THE INESCAPABLE RELATIVISM OF VALUES

### A.

Things in themselves do not have any value that might be a given of their constitution and part of their own identity. Value is always in our minds and even if it remains somewhat obscure, the expression of the relation between one thing and another that is taken as a term of reference. This term of reference serves as a measuring instrument. Its role is to give the measure of the thing set against it, to calibrate that thing, to indicate what that thing is compared with it, set alongside it. It is in this sense that Hegel said that ‘The idea of essence ... is already immanent in measure’.<sup>2</sup> By metonymic transposition, we also use in practice the term ‘value’ to refer to the measuring instrument itself that indicates the value: ‘we don’t have the same values’, we say for example meaning ‘we don’t have the same references’, ‘we don’t use the same standards’.

If value is always the relation of something to a benchmark, it is important, for proper understanding, to tell apart quantitative and qualitative values. For quantifiable things or properties [*grandeurs* in French], such as weights, lengths, temperatures, or durations, we use as a benchmark a certain agreed

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2. *La théorie de la mesure*, French transl. André Doz (Paris, PUF, 1970) p. 23. Hegel, *The Science of Logic*, para. 707.

quantity of the property in question and the evaluation will consist in establishing to how much of this unit of measurement, the property, for example, the weight of such or such a thing is *equivalent*. As one expert in metrology puts it, ‘the measure of a quantity of some property is the quotient of that quantity by an arbitrary quantity of the same property taken as a reference’.<sup>3</sup> The measuring tool here adjusts to the thing to be measured, value is an ‘equivalence’. We are dealing as it were, if I may be allowed the pun, with a ‘made to measure’ value, established by attuning the benchmark with the thing to be evaluated. For unquantifiable things, belonging to the category not of the *quantum*, but the *quale*, of quality, of the indivisible way of being, the term of reference used serves by definition as an integral, non dismemberable, ‘all of a piece’ control specimen of the thing that is compared to it. We are dealing in this instance with templates or archetypes. Their function is to tell their users how the things that are to be compared with them ‘ought to be’, ‘what they ought to correspond to’. In this case, the benchmark does not adjust to the thing to show to what the thing is ‘equivalent’; the principle is for the thing in question to adjust to the benchmark. If it matches it, it is recognised to have a positive value; if not, it will be said to have a negative value. For example the template or pattern a tailor uses shows how the garment to be cut for the customer ‘ought to be’. The template acts as a guide in his tailoring work, enabling him to check and evaluate what he is doing. His cutting will seem ‘good’ or ‘poor’ depending on whether or not it matches the template.

The rules that constitute law and more generally all rules of conduct, all ethical rules are akin to these templates, even if they are not material, physical standards in the sensory world but standards of a purely mental texture, entities of the world of the intellect, implemented in our minds only. Law belongs in this regard to the domain of metrology or the theory of measurement, alongside all of the other measuring instruments we use, despite our commonly over-narrow conceptions of the discipline and even if it is not usual practice for jurists to contemplate law from this angle; indeed jurists put me in mind in this instance of Monsieur Jourdain.<sup>4</sup>

It is precisely in my view probably Kelsen’s greatest merit to have placed at the centre of his normativist theory this fundamental nature of ‘measures’ of legal and more generally ethical rules, measures of a particular type, for sure, but working on exactly the same principle, in the same way as material measuring instruments. His analyses probably contain shortcomings, sometimes whopping errors, that needed closer investigation. But the fact remains that it was Kelsen who first brought to light the relation between these rules, value judgements made on the basis of them and the positive or negative value of the conduct stemming from them. He writes in the opening pages of his *Pure Theory*:

The behavior conforms to the norm, if it is such as it ought to be according to an objectively valid norm; it does not conform, if it is not such as it ought to be according to an objectively valid norm because it is the opposite of the behavior that conforms to the norm. The judgment that an actual behavior is such as it ought to be according to an objectively valid norms is a value judgment – a positive value judgment. It means that the actual behavior is “good”. The judgment that an actual behaviour is the opposite of the behavior that conforms to the norm, is a negative value judgment. It means that the actual conduct is “bad” or “evil”. ... The norm that is regarded as objectively valid, functions as a standard of value applied to actual behavior.<sup>5</sup>

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3. Jean-Claude Engrand, *De la métrologie fondamentale à son application industrielle*, (Paris, Librairie scientifique et technique Albert Blanchard, 1976) p. 7.

4. Molière’s *Bourgeois Gentilhomme*, who discovers he has been speaking prose all his life but did not know it.

5. Hans Kelsen, *Pure Theory of Law*, translated by Max Knight (New Jersey, The Lawbook Exchange, Ltd., 2005) p. 17.

The main point has been made, even if it is inaccurate to claim that ‘only real facts’ or ‘actual behaviour’ can be set against norms and give rise to value judgements. The same can apply to supposed or purely imaginary facts, as attested in legal practice in cases of ‘judicial errors’; besides, the behaviour-guiding function of ethical rules would be impossible if we were unable beforehand to compare our simple plans of action against rules to be observed.

Whether quantitative evaluations or qualitative evaluations, value, it can be seen, invariably remains the expression of the relationship of a thing to a term to which it is referred. It is not inherent in that thing, but is attributed to it from outside by a subject at the end of a specific measuring operation the subject has undertaken.

## **B.**

There is, it is true, in this particular province of metrology formed by legal theory and more generally ethics, a recurrent tendency to deny this relativism of values and to think that things, and in particular human conduct, give themselves objectively, independently of us, as ‘good’ or ‘bad’. As if their value were not relative but absolute, that is literally ‘flowing from themselves alone’ (*ab-solus*). It is strange that any credit could have been accorded to such a conception, particularly because, being limited to moral values alone, it introduces an unsustainable dichotomy in the domain of metrology: the value of a thing is quite the opposite of an absolute, precisely because, once again, it is the relation of that thing to another that serves as a reference. In fact, behind these strands of thought, it is not hard to see a hopeless attempt to free ethics from the – what is felt to be so terribly worrying – arbitrary character of human will. It is this concern, for example, that manifestly comes through behind the ‘phenomenology of values’ developed under the guidance of Edmund Husserl. He made no bones about the fact that his phenomenological theory of ethics, far from being ideologically neutral, was designed, as Dominique Pradelle so finely put it in his Preface to *Leçons sur l'éthique et la théorie de la valeur*, to ‘save ethical idealism from the risks of scepticism and relativism’.<sup>6</sup> The same concern is to be found among Husserl’s disciples, as illustrated by this reflection by Max Scheler: ‘Neither the idea of duty nor that of norm can form the starting point of ethics, nor pass for the standard that alone would make it possible to tell apart good and evil ... The proponents of this theory are unable to show, even most approximately, where this “standard”, this “idea” or this “goal” would come from and why it would not be purely arbitrary to adopt them, as is the case for other conventional measures such as the metre’.<sup>7</sup> In legal theory, we find similar motivations at work behind the various jusnaturalist strands, of course.

But all these attempts to ‘absolutise’ values turn out to be entirely vain; the relativism of values is inescapable. When it ceases to be conceived of as the relationship to a term of reference, value is no longer meaningful, and indeed care is taken to provide no clarifications on this point. What does it mean for a thing to be good in and of itself independently of us? When it is expelled from its own identity, value becomes incomprehensible. And it cannot be made to usurp or ‘squat’ some other identity without creating devastating disorder in our categories. This can readily be seen in Husserl who has the greatest difficulty in shutting out the fact that his realist conception of values leads to the introduction of an improbable ontological dichotomy: things of a certain type, classified under a certain concept, supposedly objectively present a set of common characters forming their essence or *eidos*, by which they suppos-

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6. French translation Patrick Lang and Carlos Lobo (Paris, PUF, 2009) p. 14.

7. Max Scheler, *Le formalisme en éthique et l'éthique matérielle des valeurs*, French translation Maurice de Gandillac (Paris, Gallimard, 1955) p. 208-213.

edly stand apart from other types of things; but they purportedly in addition present another common character, ‘good’ or ‘bad’, which is not exactly part of their essence while likewise giving rise, through an affective experience, to an ‘objectivising act’ in Husserl’s terminology, that is an act of empirical observation of an objective given. As if the same type of things played on a dual register of identity, a two-faced identity. Husserl speaks, in this sense, of a ‘world of things’ and a ‘world of values’, of the ‘simple thing’ and the ‘evaluated thing’, or again of the ‘simple awareness of thing’ and, on that basis, of a ‘new awareness that takes position with respect to things’.<sup>8</sup> Being unable to bring himself simply to see as identical, against the run of common sense, intuition of value (*Wertschau*) and intuition of essence (*Wesensschau*), we see the founder of phenomenology engaged in laborious and quite obscure contortions to try to mark them apart beyond the fundamental nature he ascribes to them as acts of observation and description;<sup>9</sup> confronted with this insuperable aporia, he acknowledged he had run up against ‘the enigmatic function of evaluative acts’.<sup>10</sup>

It is no chance matter that the phenomenology of values claims, quite abusively, to relate all evaluative acts in the domain of ethics to an affective experience and affective judgements. It is precisely because these judgements are currently conceived of as being made without the intermediary of standards and terms of comparison. This is seen therefore as the most sterling proof of absolute values, independent of us, that we supposedly merely observe in things. In point of fact, affective judgements are no exception to the relative character of values. We shall discover this through a distinction I now wish to mention between two types of standards and subsequently the types of relations of conformance or non-conformance that they imply. This distinction is at the same time particularly important for legal theory because it lifts the veil completely on the nature of standards of legal rules.

## II – THE TWO TYPES OF STANDARDS

Rather than broaching this distinction directly and head on, I shall come to it gradually via an introductory stage beforehand looking more closely at the case of affective judgements. I shall take up here, in particular, and refine them, views I developed in my latest book *Cheminements philosophiques dans le monde du droit et des règles en général*.<sup>11</sup>

### A.

At first sight, evaluations or affective judgements seem to illustrate a pure and simple immanence of values in things themselves, making abstraction of any use of a standard. When, struck by an emotion when confronted with some natural or urban landscape, I find it ‘beautiful’ or ‘ugly’, I do not seem at any time or in any way to be comparing this landscape to some other that I might have taken as a term of comparison. The very idea is even at first blush quite preposterous and would not occur to anyone. And yet, things look quite different if one takes the trouble to fully dismantle the specific experience that led me to make this judgement. The affective experience comes down essentially to the idea of sensibility or receptiveness. It is an experience whereby the subject feels, as the case may be, attraction and openness or on the contrary repulsion and closure with respect to certain things. How can this feeling lead to the

8. E. Husserl, *Idées directrices pour une phénoménologie*, French translation Paul Ricoeur, (Paris, Gallimard, 1950) p. 90 and 120.

9. E. Husserl, *Leçons sur l’éthique et la théorie de la valeur*, p. 330-441.

10. *Ibid.*, p. 369.

11. Paris, Armand Colin, 2012.

formulation of an evaluative judgement, that is to the attribution of a positive or negative value to the things in question? When confronted with a landscape that fills us with admiration or contentment, we should, in expressing the affective conditions so felt, merely say 'I like this landscape'. Why and above all how are we induced to recognise the landscape has a positive value in saying that 'it is beautiful'?

There comes into play here, in point of fact, an extremely subtle entire mental process that is both complex and non-apparent, unexplained, that develops spontaneously unbeknown to us in the remotest depths of our minds. Which is also why it has remained inadequately elucidated. The affective reactions of attraction or repulsion depend on the subject's predispositions, the *tendencies* that are within him – let's say his potential receptiveness which means he is in a position to take in certain things and not others, rather in the way a radio receiver is capable of picking up some wavelengths and not others.

By hypothesis, this structure of receptiveness or sensibility, these tendencies or predispositions inhabit us purely latently and silently. They are only revealed to us by being activated, that is, through our experiences of affection, through attraction or repulsion felt in practice with regard to some thing or another. In feeling attraction, allure or pleasure for some thing, at once the existence within me of a structure of sensibility, of underlying tendencies, reveals itself to my awareness and at the same time I have the feeling that these tendencies are satisfied, fulfilled, that is, I am in the presence of a thing that matches those I was predisposed to entertain. This is precisely what leads me naturally to make a value judgement, to move from 'I like this thing', 'this thing is pleasurable' to 'this thing is good or beautiful'. Through a sort of trigger that goes off automatically in my mind and which is peculiar to intuitive reasoning, I deduce from my attraction (or on the contrary my repulsion) that I am (or am not) in contact with a type of thing that I am virtually open to receive. It is this intimate and lighting-like logical deduction that I express by saying that this thing is 'beautiful' or 'good' (or 'ugly' or 'bad'). There is indeed therefore, in this context, a term of reference that acts in my mind and that serves at least formally as a support for my value judgement. This term of reference is immanent in my tendencies. It is the *that-towards-which-I-tend*, the potential type of things I am predisposed to entertain, to which I am predisposed to open up. In other words, affective judgement operates under very particular circumstances. There is not simply one thing set against another that is taken as a template. There is an inference from one given – a certain affective condition felt with respect to a thing – whether that thing matches or not a virtual archetype or potential control specimen that remains hidden in the shadows, etched out by the aspirations of my sensibility. The value judgement made derives, in other words, from a process of indirect evaluation or by knock-on effect.

But there is nothing mysterious or exceptional about this process. Similar value judgements are found outside of the affective domain proper, in many other analogous experiences. One need only think of the case in which, with a large bunch of keys, I attempt by trial and error to insert them in turn into an old lock I want to open. If my first attempts are fruitless, after observing that the keys in question do not fit, I infer that they are 'wrong'. And when at last a key turns in the lock, I will conclude on the contrary that it is 'right'. I wish to express by these value judgements that the keys inserted match or do not match the type of key that this lock, by its constitutional structure, its conformation, is predisposed to accommodate or, if one prefers, that they are in accordance or not with what they ought to be to fit the lock. This is exactly what happens with affective judgements, except that in their case there is no match between things and other things but a match of things and ourselves, the predispositions of our own sensibility. It is the subject himself who plays the part of measuring instrument and who judges

‘good’ or ‘beautiful’ the things that ‘fulfil’ him, ‘stop’ his openings, ‘content’ his leanings and procure a feeling of ‘fullness’ or ‘satisfaction’. To be ‘content’ or ‘contented’ (from the Latin *continere*, contain) is literally to have received exactly what one aspired to ‘contain’, as in the expression ‘to one’s heart’s content’, that is, to receive everything that should fit in, fall to us and that we expect. The idea of filling a ‘capacity’ appears even more plainly in the term *parfait contentement* which in the eighteenth century referred to the large decorative bow that fitted snugly into the neckline of a low cut dress designed to accommodate it.

It is to be observed that the subject plays in the same way this role of measuring instrument when he infers from what he feels about no longer external things but about himself and depending on whether his physical or mental conditions suit him or are uncomfortable, painful, unbearable, whether he is ‘well’, whether his health is ‘good’ or on the contrary he is ‘unwell’ or his health is ‘poor’. Again that does not mean there are states of health that are good or bad in themselves, endowed with some absolute value that one merely observes objectively. It is against our own yardstick, our experience that we are led to make a distinction between ‘normal’ and ‘pathological’. As Georges Canguilhem perceptively observes, ‘medicine exists as the art of life because the living world itself characterises certain states or behaviours as pathological and therefore as having to be avoided or corrected, which states or behaviours are apprehended relative to the dynamic polarity of life, in the form of a negative value’.<sup>12</sup>

Because of this subtlety and the non-apparent character of the process on which they rely, it is understandable that affective judgements might have proved misleading and made believe in a straightforward observation of values inherent in things, absolute values, compelling everyone. Many an illustrious philosopher has fallen prey to this illusion. I have mentioned Husserl, one might also cite Kant with his concept of ‘reflective judgment’ developed on aesthetic judgements or judgements of taste: from the particular feeling of pleasure or displeasure felt at the contact of a thing, one supposedly rises to the assertion of a universal, absolute, axiological truth about the thing by saying that it is ‘good’ or that it is ‘bad’. Kant admits, it is true, that this passage has in his view an ‘enigmatic’ character – he uses the same adjective as Husserl;<sup>13</sup> surely it is not a good sign when a philosopher himself spots what is enigmatic in the theories he proposes (without wanting to sound malicious, Kant seems to me in the habit of this, identifying what is inexplicable in his strange conceptions of human freedom or the categorical imperative and moral action, which he even comes to doubt is achievable in the view he holds of it!). In the case at hand, who would claim, to go back to my earlier example, that in seeing that one of my keys fits my lock and in saying that it is right, I should want to acknowledge it has any absolute, universal value? It is not right in itself, but with respect to the lock in question; and similarly it is only relative to my own sensibility and so to myself, to my subjectivity, that I call ‘right’ or ‘good’ what suits me.

Before I finish with affective judgements, it seems useful to add a few remarks. These judgements, we have just seen, in no way accredit the idea that values are in any way immanent in things themselves independently of any term of reference. But they do show that the relativism of values is not to be purely and simply confused, as it is often thought, with conventionalism and the arbitrary character of human will. A term of reference is always at work, but it is not necessarily the fruit of a conventional or free choice. We do not choose, strictly speaking, the armature of sensibility that inhabits us, even if we can take some deliberate share in shaping it, for example through upbringing or voluntarily becoming

12. *Le normal et le pathologique* (Paris, PUF, 1979) p. 77.

13. *Critique de la faculté de juger*, in *Emmanuel Kant. Œuvres philosophiques*, Ferdinand Alquié (ed.) (Paris, Gallimard, 1985) t. II, p. 920.

accustomed to things. This leads me to a final remark. It should be emphasised, and here I am thinking especially of the phenomenology of values, how superficial and irrelevant it is to liken value judgements in the domain of ethics to affective judgements. The affective judgement of a line of conduct rests on the structure of sensibility naturally at work in the subject and differs radically, in its principle, from the judgement made on the basis of a rule of conduct, a standard crafted by the human mind. This is particularly so because ethical rules are not just the support for value judgements; in that they are standards, they principally form instruments that serve to frame and direct human conduct and that fit into the context of intersubjective relations of authority, as is especially the case for legal rules. This is why, for that matter, ethical theorists and legal theorists often speak interchangeably of value judgements or judgements of ‘validity’; as judgements made on the basis of commands, rules designed to be obeyed by their addressees, ethical judgements are not merely value judgements, indicating whether conduct is objectively consistent or not consistent with terms of reference. They are at the same time judgements about the validity of the conduct at issue, expressing whether or not the conduct is proper, whether the parties conducted themselves well, or their conduct was what was required of them or on the contrary whether they conducted themselves poorly, failed, whether their conduct was inauspicious, did not come up to what was required of them, not just improper conduct but ‘flawed’ in the sense of vitiated, defective, as in the defective shipment of an order one has placed. In these various respects, we are quite outside the scope of affective experience. Whether it seems to me pleasant or unpleasant to do something does not tell me whether others or myself, we ought to, may or may not do it. Affective appreciations may well be involved and often are involved in the practice of ethical and legal rules (in drawing them up, interpreting and applying them; it is not uncommon for a legal value judgement made by a judicial authority to arise from a ‘hunch’, a made-to-measure interpretation of the legal rule by that authority with a view to arriving at the judgement that suits it). But this interplay of affects in ethical experience does not entitle us to lapse into syncretism and to erase what are essential differences.

## **B.**

There is, however, as we shall see, a degree of common ground, a certain analogy, between affective experience and ethical and legal experience. I am now in a position to set out the distinction I announced. The autopsy of the affective value judgement I have performed highlights, equally well for that matter for quantitative as for qualitative evaluations, the existence of two main varieties of standards and consequently two main types of relations of conformance and non-conformance. In some instances, the standard instrument used gives directly itself the measurement of the things compared against it, it embodies the term of reference, the standard with which those things must conform. Conformance, in this case, corresponds to an identical reproduction of the standard. The thing that one can identify with the standard, which comes across as its ‘clone’ we might say nowadays, has a positive value. This category includes measuring instruments of material texture that are in common use such as prototypes of appliances or vehicles used for industrial mass manufacturing, or the colour charts of paint sellers, or show houses and scale models or mock-ups used by architects and property promoters. But this first variety also includes measuring instruments of a purely mental texture such as, in particular, what in ethical theory are called ‘axiological models of conduct’. These are lines of conduct held up as standard models of what ought or ought not to be done such as helping others, being honest, which are good deeds, while lying or harming others are bad deeds. These axiological models, that are not to be confused with rules of conduct, are used in morals as guidelines, catalogues of standard actions by which to evaluate

planned or past conduct by comparison and contrast. We can also evoke the most frequent conduct, by the majority, in a given social group held up as reference models, criteria of what is normal or abnormal or pathological. This very special use of the term ‘norm’ to mean a type of habitual state or behaviour, corresponding to the average case, spread from the nineteenth century through the general influence of the English-speaking world and in France more particularly through Emile Durkheim. The measuring instruments in question, which are also very different in their principle from ethical rules and norms, are currently used nowadays in sociology, linguistics and medicine, especially in psychopathology. I propose to speak, for all these standards of the first type, of ‘concrete standards’, concrete not implying that they are materialised, of material texture, but a concretisation of the term of reference, a full presence of what provides the measure, a presence ‘in person’, ‘in flesh and blood’ as phenomenologists like to say.

Sometimes, on the contrary, the standard instrument used provides only an indirect measure of the things set against it, without itself embodying the term of reference, the how-these-things-should-be. What provides the measure in this case is not itself present ‘in person’; only an imprint of it is hollowed out within the standard. We are no longer dealing with a concrete model that the things to be evaluated must reproduce, but a negative model, in the same way as we speak of a ‘negative painting’, that is, a *mould* in which the things to be evaluated must fit, which must therefore be the subject not of a line for line reproduction but of an exact *fulfilling*. In this way, when I attribute a positive value, when I call one my keys ‘right’ after observing that it fits, that it turns in my lock, that it matches, I do not set this key against a model key with which it is supposedly identical. It is simply that this match with the lock acts in my mind as an index. It logically implies an identity with the type of keys that this lock is potentially capable of accepting, of which it bears the imprint. The model or term of reference remains a purely underlying one here. Under this assumption, the conformance with the standard instrument that is used is understood as a relationship of suitability or adequacy, meaning not that the thing is the same as it (that the key is the same – *pareille* – as the lock) but that it is *appareillée*, that it is matched with it, in agreement or in harmony with it, that it is moulded perfectly to it. It is to this category that belong what in metrology are called measures or standards of ‘capacity’, such as pints, gills, barrels, gallons, bushels, litres, quarts and other thimbles. They are recipients whose content corresponds to a certain quantity of liquid or grain serving indirectly as a reference in trade. To be equivalent to this reference quantity, the fluids or grains poured into the recipients must fill them exactly, with neither shortfall nor surplus.

But this second variety of standard instruments is not limited to such measures of capacity. It has far wider scope to my mind.<sup>14</sup> I propose to speak, in contradistinction to *concrete* standards of *formal* stan-

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14. It is worth pointing out in passing the classical distinction in metrology between ‘compoundable’ measurements that are directly ‘measurable’ and ‘non compoundable’ or ‘read-off’ properties. Jean-Claude Engrand writes ‘Properties such as temperature, dates, etc. shall be deemed non compoundable because we cannot obtain a given quantity of them by adding together elementary quantities. They can, though, be arranged in equivalence classes’ (*op. cit.*, p. 7). It would be preferable to emphasize rather two sorts of evaluation procedures, direct and indirect, through indices or ‘reference points’; they correspond to the two major types of standards that I identify. The thermometer is an instrument for reading temperatures from a graduated scale established as a function of the expansion of a liquid (usually mercury) or a gas in a reservoir that is immersed in the medium whose temperature is to be ascertained. Depending on whether the temperature of the medium corresponds to such and such a position of mercury on the graduated scale, depending on whether it fills such and such a margin or level of expansion, it is inferred from it that it is equivalent to a certain quantum of temperature that serves as a reference. It is the same process of indirect or indicatory evaluation with capacity standards in the form of recipients. But it must be underscored that directly measurable properties can also be the subject of indirect evaluation by reading off markings. This is the case, for example, with weights. We can evaluate the weight of an object by using traditional weighing scales (the word balance is derived from the Latin *bilanx*, formed from *bis*, two times, and *lanx*, dish or platter) and by balancing the object to be weighed against standard weights. But we can also use automatic scales, nowadays electronic scales with a single platform and a graduated screen indicating the weight of an object on a moving scale, depending on the pressure exerted by the object being weighed. When the object moves to such and such a reading, when it fulfils such and such a level on the pressure scale, this implies that its weight

dards, consisting of forms that have to be ‘filled’ by the things compared with them if those things are to be found ‘positively valid’, ‘a good fit’. This is the case of patterns used by tailors or hat forms or shoe lasts of milliners or shoemakers, or of plans of houses or flats used by architects or property promoters. But it is also the case of material rulers and set squares which are likewise used as standard forms to be ‘filled’. They confer a value of straightness, rectilinearity or rectangularity on the line or angles that hug their contours, on the markings that strictly follow the margin or outline that their edges make, along their outer boundary, neither within it nor beyond it. By contrast, any line that diverges from this margin has the negative value of an un-straight, ‘twisted’ line.

This enlightens by the same token the metaphorical derivation by which the terms *norma* and *regula* have been employed to refer no longer just to these material measuring instruments but also to tools of mental texture. The norms and rules of conduct are precisely standards of the same family, called upon to be ‘filled’, except that these are not physical forms in the sensory world but logical forms operating only in our minds, in the world of our intellect. Rules of conduct serve to give the measure of what is possible in human action. They set for their addressees the margins of possible action, margins of manoeuvre or leeway, indicating what they cannot do (i.e. a margin of possibility zero), what they cannot not do (i.e. a margin of possibility of 1 or 100%), or what they can or cannot do (i.e. a margin of possibility between 0 and 1, on the boundary between impossibility and necessity). For a line of conduct that is actually followed or merely planned to have a positive value or regularity, straightness or rectitude with respect to an ethical rule, it must ‘fit within’ the margin of possibility defined by the content of the rule; it must be in agreement with it, it must lie within its bounds, which logically implies that it is in conformance with the types of conduct that this margin can potentially accommodate, that it has the capacity to take. Rules of conduct belonging in this way to the category of standards of capacity are a meeting point – and in truth the only meeting point – between ethical and especially legal experience and affective experience in which it is also forms, the forms or configurations of our sensibility, that serve likewise as standards to be fulfilled.

This fundamental nature of rules of conduct, operating in principle in the same way as measuring jugs to be fulfilled, is fully illuminated, when we take the trouble to dwell on it, by the terminology commonly employed in the realm of ethics and more specifically of law. The French term ‘*droit*’ which means both *law* (legal rules) and *rights* (legal powers or abilities) clearly denotes the idea of capacity. The fundamental function of legal rules is to set out ‘rights’, the capacity for action of those to whom they are addressed. This is what the Roman concept of *jus* evoked from the outset: *jura* designated, as Georges Dumézil has shown so well, ‘the maximum areas of action and claim’<sup>15</sup> – by which we are to understand the capacity to act – of everyone in the City. To this must be added all the terms used in the practice of legal and ethical rules and that evoke either ideas of *inside* and *outside* (‘to be in order’, ‘to fulfil one’s duties or obligations’, ‘to be in one’s right’, ‘to be an outlaw’, ‘to transgress the rule’, ‘to deviate or leave the straight and narrow’, ‘to be in the wrong’, etc.) or ideas of *too much* or *not enough* (‘to overstep the mark’, ‘to exceed or go beyond one’s rights’, ‘to fall short of the mark’, ‘to fail to meet one’s obligations’, ‘to be wanting or lacking’, etc.). Through all of these expressions that are familiar to us, it is easy to see that the relationship of conformity that conduct must entertain with ethical rules is not a relationship of identity but of correspondence, adequacy or suitability.

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is equal to the reference weight.

15. *Idées romaines* (Paris, Gallimard, 1980) p. 41 ff.

This is a point that completely escaped Kelsen and that finally led him in his later years to the particularly extravagant concept of ‘modally indifferent substrates’, which he developed in his posthumous *General Theory of Norms*.<sup>16</sup> I would like to cite here a very relevant aphorism by Slovenian philosopher and psychoanalyst, and also comedian, Slavoj Žižek: ‘all lies create the parallel worlds in which they are true’.<sup>17</sup> This aphorism is wonderfully illustrated by the theatrical plays of Georges Feydeau, which rely entirely on this mechanism: a travesty of reality, by a lie or by some error or quid pro quo, leads inexorably one thing after another to this travesty being stretched in an ever less tenable way. But this maxim seems to me to hold also for the errors in which theorists sometimes become stubbornly caught by not hesitating to give them credence, and rather than relinquishing them or correcting them, continuing them by means of amazing fabrications. Kelsen, indeed, was often taken to giving surrealist developments to a mistaken starting idea. One need only think of his strange postulate that a norm should necessarily follow from some other norm, which led him first to his celebrated fundamental norm that was logically assumed to be the basis of the positive legal order, which itself finally led him to seeing at work behind it a ghostlike supreme legislator who supposedly fictitiously laid it down! In the case in point, for want of sufficiently close enquiry, Kelsen made the mistake of likening ethical rules to concrete standards implying, like axiological models of conduct, a relationship of identity of behaviour with those standards. He thereby got himself into a position that was that much more untenable because he had besides constantly underscored a sharp distinction between norms and facts, a distinction that was understood as opposing two sorts of entities, two sorts of radically separate worlds, conjugated on entirely different registers of thought or logical modes (one in *Is* or *Sein*, the other in *Ought* or *Sollen*), two worlds that could not be reduced to the same thing, that could not be brought closer together, between which there was no common measure. To escape from this improbable imbroglio, here are the outrageous and much contorted ‘explanations’ that he imagined:

‘In the statements that something is and that something ought to be, two different components must be distinguished: *that* something is, and *that which* is, *that* something ought to be and *that which* ought to be. *That which* is and *that which* ought to be, the content of the *Is* and the content of the *Ought*, is a *modally indifferent substrate*’.<sup>18</sup>

For example, Kelsen says, in the norm ‘*A* ought to pay his gambling debts’, the substrate is ‘paying-gambling-debts’; if I observe that ‘*A* has paid his gambling debts’, the modally indifferent substrate is also ‘paying-gambling-debts’. It is identical to that of the norm. On the contrary if I observe that ‘*A* has not paid his gambling debts’, the modally indifferent substrate (‘not-paying-gambling-debts’) is not identical to that of the norm. Kelsen concludes that:

‘Value consists in this *identity* of the modally indifferent substrate of an *Is* with that of an *Ought*; it is the *relation of identity between these two modally indifferent substrates*, and not a relation between *reality and norm*, between *Is and Ought*. Something is valuable when it is similar to something else’.<sup>19</sup>

I am tempted to say that there is some Feydeau in all that, in this codswallop conjured up by Kelsen. He could have saved himself the pains by relying on a more elaborate theory of values, which would have enabled him to discover the nature of standards of shape or capacity of rules and the type of relationship of conformity they imply and that is not a relationship of identity.

16. *General Theory of Norms* translated by Michael Hartney (Oxford, Clarendon Press, 1991), p. 60 ff.

17. *Mes blagues, ma philosophie*, French translation by Laurent Bury (Paris, PUF, 2014) p. 179.

18. Kelsen, *General Theory of Norms*, p. 60.

19. *Ibid.* p. 62.

It is classical practice to quote to students of public finance the famous words spoken at an 1830 cabinet meeting by baron Louis, then minister of finance: 'Give me good policy and I will give you good finance'. I would like to paraphrase it by way of conclusion and say 'Give me good metrology theory and I will give you good ethical and legal theory'.