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**Highlighting Law
through the Concept
of Value**

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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

cation. This is namely that values are not properties of things but relations between things, with value

The value that things take on in our view seems to me to result invariably from their relation to other things, : 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 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'.² 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, ' in French], such as weights, lengths, temperatures, or durations, we use as a benchmark a certain agreed

2. , French transl. André Doz (Paris, PUF, 1970) p. 23. Hegel, , 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 . 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’.³ 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. , but the , of quality, of the

able, ‘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.⁴

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

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 :

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.⁵

3. Jean-Claude Engrand, *La mesure* (Paris: Éditions du Seuil, 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, *General Theory of Law and Logic*, 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 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 (). 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 , to ‘save ethical idealism from the risks of scepticism and relativism’.⁶ The same concern is to be found among Husserl’s

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’.⁷ 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

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

objectively present a set of common characters forming their essence or , by which they suppos-

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

, 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’.⁸ Being unable to bring himself simply to see as identical, against the run of common sense, intuition of value () and intuition of essence (), 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;⁹ confronted with this insuperable aporia, he acknowledged he had run up against ‘the enigmatic function of evaluative acts’.¹⁰

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

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A.

values in things themselves, making abstraction of any use of a standard. When, struck by an emotion any time or in any way to be comparing this landscape to some other that I might have taken as a term of 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, , French translation Paul Ricoeur, (Paris, Gallimard, 1950) p. 90 and 120.
 9. E. Husserl, , p. 330-441.
 10. , 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 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 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

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 , 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.

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

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

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

feeling of ‘fullness’ or ‘satisfaction’. To be ‘content’ or ‘contented’ (from the Latin *contineri*, contain) is literally to have received exactly what one aspired to ‘contain’, as in the expression ‘to one’s heart’s content’. A ‘capacity’ appears even more plainly in the term *capacitas* which in the eighteenth century accommodated 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’.¹²

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

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;¹³ 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

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.

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 monde vivant* (Paris, PUF, 1979) p. 77.

13. *Le monde vivant*, in *Œuvres complètes*, t. I, p. 100. *Le monde vivant*, Ferdinand Alquié (ed.) (Paris, Gallimard, 1985) t. II, p. 920.

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 stan-

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

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tive, 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

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,

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 pro-

they are materialised, of material texture, but a concretisation of the term of reference, a full presence of

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

line reproduction but of an exact *fulfilling*. In this way, when I attribute a positive value, when I call one

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 – as the lock) but that it is , 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

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

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' (. . . , 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

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 indicative 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 , formed from , two times, and , 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

But it is also the case of material rulers and set squares which are likewise used as standard forms to be 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 and 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 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 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

This fundamental nature of rules of conduct, operating in principle in the same way as measuring ' which means both (legal rules) and (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 evoked from the outset: designated, as Georges Dumézil has shown so well, 'the maximum areas of action and claim'¹⁵ – 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 and ('to be in order', 'to deviate or leave the straight and narrow', 'to be in the wrong', etc.) or ideas of or ('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.

is equal to the reference weight.

15. (Paris, Gallimard, 1980) p. 41 ff.

ticularly extravagant concept of ‘modally indifferent substrates’, which he developed in his posthumous

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true’.¹⁷ 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

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 , the other in Ought or), 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: something is, and is, something ought to be and ought to be. is and ought to be, the content of the Is and the content of the Ought, is a

’.¹⁸

For example, Kelsen says, in the norm ‘ ought to pay his gambling debts’, the substrate is ‘paying-gambling-debts’; if I observe that ‘ 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 ‘ 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 of the modally indifferent substrate of an Is with that of an Ought; it is the , and not a relation between

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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. translated by Michael Hartney (Oxford, Clarendon Press, 1991), p. 60 ff.

17. , French translation by Laurent Bury (Paris, PUF, 2014) p. 179.

18. Kelsen, , p. 60.

19. . p. 62.

and I will give you good ethical and legal theory'.