

PROXIMITY: THE LAW OF ETHICS AND THE ETHICS OF LAW

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I INTRODUCTION

The ‘duty of care’ is an unusual obligation. It is not the outcome of an agreement founded on self-interest, like a contract. It is not a duty owed to the community as a whole and acted on by the State, like criminal law. It describes a *personal* responsibility we owe to others which has been placed upon us without our consent. It is a kind of debt that each of us owes to others although we never consciously accrued it. Thus it raises, in a distinctly personal way, one of the oldest questions of law itself: ‘Am I my brother’s keeper?’ What does it mean to be responsible? This is not a question that is easier to answer for us than for Cain. In recent work, of which this essay presents an aspect, I have argued that the idea of responsibility articulated in the law of negligence comes from what might be termed our literal response – ability: it implies a duty to respond to others stemming not from our abstract sameness to others, but rather from our particular difference from them.¹ Responsibility is not a *quid pro quo* – it is asymmetrical, a duty to listen to the breath of others just in so far as their interests diverge from our own.

In order to develop this argument, I have become increasingly drawn to the work of the philosopher of ethics Emmanuel Levinas who was until recently mainly of interest to a small but influential circle of French thinkers including Maurice Blanchot, Jean-Paul Sartre, and Jacques Derrida. Now he is becoming rapidly better known. His two main works, *Totality and Infinity* and *Otherwise Than Being, or Beyond Essence*,² offer a reconstruction of human selfhood away from questions of identity and ego and towards an ‘ethics of the other’. I cannot promise the reader an easy ride, but as recompense Levinas offers a sustained meditation on the relationship of ethics, responsibility and law, and – remarkably – he does so using precisely the language of the duty of care. Here then is a

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1 Desmond Manderson, *Proximity, Levinas and the Soul of Law* (2006).

2 Emmanuel Levinas, *Totality and Infinity* (Alphonso Lingis trans, 1969 ed) [trans of: *Totalité et infini: essai sur l'extériorité*]; Emmanuel Levinas, *Otherwise Than Being, or Beyond Essence* (Alphonso Lingis trans, 1981 ed) [trans of: *Autrement qu'être ou au-delà de l'essence*].

philosopher, largely unknown to legal theory, who at last speaks the language of torts.

Although we shall see that Levinas has very much to say that is pertinent to our thinking about responsibility, neighbourhood and duty, he is by no means without his problems, and it is with these problems that the current essay is particularly concerned. The first difficulty lies in his insistence on treating the ethical realm, in which responsibility is unique, unbidden and infinite, as entirely *incommensurable* with the political realm, in which responsibility is made subject to definite, finite rules, and moreover subordinated to the pragmatic demands of the State and social policy. Questioners like Derrida, Rose and Habermas have wondered how it could ever be possible for Levinas' notion of an ethics of absolute and infinite responsibility towards others to communicate with a political world inevitably governed by regulation on the one hand and imperfection on the other.³ To compound the problem, Levinas' own limited forays into the application of his ethics to political questions have not been entirely convincing.⁴

The second difficulty lies in Levinas' own relative silence on the question of law. In his major works, he says very little about the relationship of law to the ethics of alterity, and what he does say suggests that he thinks of law as an entirely positivistic, codified, and rule-bound structure. In other words, law seems for Levinas to be synonymous with politics and justice synonymous with rules.⁵ Yet this conception fails to capture the way in which law serves as a separate modality of thinking about social relations, and is not merely politics by other means.⁶ As Sarah Roberts writes, 'if one takes seriously Levinas' claim that asymmetrical ethical responsibility is the origin of justice then one must also reject Levinas' suggestion that justice [merely] involves viewing persons and responsibility as comparable and symmetrical'.⁷ Furthermore, as the common law of negligence makes abundantly clear, neither can we simply characterise law as the application of 'rules'. Drawing on Derrida and on other recent work on Levinas,⁸ I offer, in this essay, a brief account of law – *particularly* in reference to the fluidity and ambiguity that marks the common law discourse on the 'duty of care' in the law of negligence – that both captures and justifies its distinct form, and does so in a way that in fact makes a more convincing case for the possible relevance of Levinas' ethics to legal doctrine, than his own much

3 Jurgen Habermas, *The Philosophical Discourse of Modernity* (Frederick Lawrence trans, 1991 ed) [trans of: *Der philosophische Diskurs der Moderne*]; Gillian Rose, *The Broken Middle: Out of Our Ancient Society* (1992); Jacques Derrida, 'Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas' in *Writing and Difference*, (Alan Bass trans, 1978 ed) 97–192 [trans of: *L'Écriture et la Différence*].

4 Emmanuel Levinas, *Difficult Freedom: Essays on Judaism* (Séan Hand trans, 1990 ed) [trans of: *Difficile Liberté: Essais sur le judaïsme*]; Howard Caygill, *Levinas and the Political* (2001).

5 For example, the discussion of justice in Levinas, *Otherwise Than Being*, above n 2; see also William Simmons, 'The Third: Levinas's Theoretical Move from An-archival Ethics to the Realm of Justice and Politics' (1999) 25 *Philosophy and Social Criticism* 83, 93–7.

6 Ronald Dworkin, *Law's Empire* (1986).

7 Sarah Roberts, 'Rethinking Justice: Levinas and Asymmetrical Responsibility' (2000) 7 *Philosophy in the Contemporary World* 5.

8 Ibid; Simmons, above n 5.

narrower conception of law can alone provide. Where in particular do we see in action those structural resources of the common law that allow it to acknowledge on the one hand the fluid and responsive nature of responsibility, and on the other give voice to an ethical component to the law? My argument is that one example is to be found in that much-maligned creature of the Australian High Court, ‘proximity’.

Once again, we find that Levinas was there before us. For Levinas, ‘proximity’ is the key word that implies our ethical relationship to others.

The relationship of proximity cannot be reduced to any modality of distance or geometrical contiguity, or to the simple ‘representation’ of a neighbour; it is already an assignation, an extremely urgent assignation – an obligation, anachronously prior to any commitment.⁹

Levinas means by proximity something fundamental to who we are and why we have a responsibility to others; something which furthermore cannot be reduced to logic, knowledge or rules. Proximity is an *experience*, emotional and bodily, and not an idea.¹⁰ Incarnate in us all, its implications ‘exceed the limits of ontology, of the human essence, and of the world’.¹¹

Astonishingly, in the period from 1984 to about 1998, the Australian High Court was on the same track. Particularly in the influential judgments of Justice William Deane, the Court sought to give content to the duty by reference to the concept of proximity:

I have, in *Jaensch v Coffey* and *Heyman*, endeavoured to explain what I see as the essential content of the requirement of neighbourhood or proximity which Lord Atkin formulated as an overriding control of the test of reasonable foreseeability. So understood, the requirement can, as Lord Atkin pointed out, be traced to the judgments of Lord Esher M.R. and A.L. Smith L.J. in *Le Lievre v Gould*. In my view, that requirement remains the general conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another.¹²

The notion of proximity was a controversial jurisprudential development that led to innovation after innovation in the Court’s judgments. When I first read these judgments it seemed to me that the court was groping towards a new idea of the nature and the legitimacy of our ideas of responsibility. Then when I read Levinas some years later, I came to appreciate much more clearly what they might have wanted to say and why it mattered. The conjunction of these two discourses, in their own ways so uniquely positioned to reflect deeply on the essence of our responsibility to others, and the connections between the language they each used, seemed to me so remarkable as to demand a sustained analysis.

Proximity in law, seen as a way of describing those to whom we owe a duty such that ‘I ought reasonably have them in contemplation as being so affected

9 Levinas, *Otherwise Than Being*, above n 2, 100–1.

10 Ibid 63–97.

11 Emmanuel Levinas, ‘Beyond Intentionality’ in Alan Montefiore (ed), *Philosophy in France Today* (1983) 100, 112.

12 *Stevens v Brodribb Sawmilling Company*; *Gray v Brodribb Sawmilling Company* (1986) 160 CLR 16, 52–3.

when I am directing my mind to the acts or omissions which are called in question',¹³ came in for trenchant criticism. Its vagueness and its irrelevance were attacked alike.¹⁴ Indeed, following the departure of Deane J from the bench, the concept rapidly declined in significance. In 1998, Kirby J concluded 'it is tolerably clear that proximity's reign in this Court, at least as a universal identifier of the existence of a duty of care at common law, has come to an end'.¹⁵ Since this Thermidor, and consequent upon several changes in personnel, the Court has sought to limit and even undermine its previous jurisprudence. It has done so in two ways: on the level of substance, by returning to a more limited and voluntaristic conception of responsibility; and on the level of method, by attempting to explicitly limit what is sometimes decried as 'judicial activism'. Proximity was seen as central to both these apparent problems.

What Levinas brings to this discussion is a very detailed understanding of proximity as a kind of relationship that gives rise to responsibility, that cannot be codified, and yet must inevitably find expression in words (legal or otherwise) whose function is to define and to conceptualise. In the period under review, the High Court of Australia struggled with and eventually failed to come to terms with the very same paradox, rejecting proximity just because it was 'a legal rule without specific content, resistant to precise definition and therefore inadequate as a tool ...'¹⁶ Levinas points to the way in which the Court has missed the point. The challenge of this essay is to *insist* on the role of this paradox in the law – the value of an idea which is not reducible to a rule – and to demonstrate that proximity's incapacity of definition is the very source of its ethical power. In other words, with the help of Levinas we can begin to see, on the level of substance, the outline of a different idea of responsibility; and on the level of method, that the charge of activism misunderstands the very nature and role of ethical judgment in law. Furthermore, these two ideas – what it is to be responsible and what it is to judge – are in fact integrally connected.

II RESPONSIBILITY, 'THE THIRD PARTY' AND THE PROBLEM OF LAW IN LEVINAS

Levinas argues that our responsibility is not a question of choice or contract – it is an obligation that chooses *us* because of our capacity to make a difference. It is our power, and another person's vulnerability to it, that makes us responsible. About this idea of responsibility we might summarise the following central points:

13 *Donoghue v Stevenson* (1932) AC 562, 580 (Lord Atkin).

14 See for example Michael McHugh, 'Neighbourhood, Proximity and Reliance' in Paul Finn (ed), *Essays on Torts* (1989) 5; Kumaralingam Amirthalingam and Thomas Faunce, 'Patching Up "Proximity": Problems with the Judicial Creation of a New Medical Duty to Rescue' (1997) 5 *Torts Law Journal* 27.

15 *Pyrenees Shire Council v Day; Eskimo Amber Pty Ltd v Pyrenees Shire Council* (1998) 192 CLR 330, 414.

16 *Ibid.*

First, responsibility is inherent in the initial encounter between persons – before language or philosophy or law. The obligation to respond is intrinsically prior to any specific response we might make and therefore, any pre-existing rules of limitation. That is the ‘irreducible paradox of intelligibility’. Contrary to some rather severe criticism that is at times directed at him, Levinas is not simply condemning the ‘realm of the said’, or logic, or rules.¹⁷ Rather he attempts to demonstrate the conditions *necessary* for their appearance. Fundamental to those conditions are both an openness to discourse, in which some modicum of trust must precede any dialogue whatsoever, and an awareness that something within us and critical to our existence is not ours and not reducible to our interests.¹⁸ It is not sameness or difference, both of which falsely assume the pre-existence of ‘me’, an autonomous identity ‘fixed like a heart of stone’, but what Levinas sometimes calls ‘non-indifference’¹⁹ that founds the symbolic order.

I am summoned to this assignation without choice or predilection. Responsibility is the *opposite* of contract or commitment; its purpose is not mine: I do not agree to it, but I *find* myself responsible.

Strictly speaking, the other is the end; I am a hostage, a responsibility and a substitution supporting the world in the passivity of assignation, even in an accusing persecution, which is undeclinable. Humanism has to be denounced only because it is not sufficiently human.²⁰

This is the fundamental aspect of responsibility towards which all Levinas’ demonstrations about the irreducibility of subjectivity to choice are directed. It is, I think, obvious by now but nevertheless of central importance to the business of legal justification: responsibility is not a choice. This ‘unexceptionable responsibility, preceding every free consent, every pact, every contract’²¹ is not a tragedy or an unpleasant necessity. On the contrary it lies at the very core of those experiences that constitute us. It is not as if we were free, and then a responsibility was imposed upon us. Responsibility emerges *with* our selfhood, *with* relationship, *with* desire.²²

Secondly, responsibility is not reciprocal.²³ It has nothing to do with social contracts or legal policies. It arises foremost from the vulnerability with which the other approaches us, and which places a demand on us and in us. He may be responsible for me too, but as Levinas curtly remarks, “‘that’s *his* business.”²⁴ In some sense, then, this responsibility always remains incalculable and hence cannot be measured against any responsibilities that the other might owe to me or that I might owe to others. Now Levinas is forced to admit that this creates a

17 See especially Gillian Rose ‘New Political Theology’ in Gillian Rose (ed), *The Broken Middle: Out of Our Ancient Society* (1992) 1.

18 See especially Levinas, *Otherwise Than Being*, above n 2, 45–8.

19 See, eg, Levinas, *Otherwise Than Being*, above n 2, 138–9. See Joseph Libertson, *Proximity – Levinas, Blanchot, Bataille and Communication* (1982) 90.

20 See, eg, *ibid* 85.

21 *Ibid*.

22 *Ibid* 86.

23 See, eg, *ibid* 85.

24 Emmanuel Levinas, *Éthique et Infini: Dialogues avec Philippe Nemo* (1982) 94.

problem in any society in which many different and over-lapping relationships are implicated.

It is troubled and becomes a problem when a third party enters. The third party is other than the neighbour, but also another neighbour, and also a neighbour of the other, and not simply his fellow. What are the other and the third party for one another? What have they done to one another? Which passes before the other?²⁵

The fact that we are all responsible for *each other* renders law and justice necessary as a practical matter: 'comparison, coexistence ... order' – some measurement or limitation must be placed on the infinite demands of infinite others.²⁶ So the application of the absoluteness of Levinasian ethics to the world of law is by no means a straightforward matter. Levinas insists on the distinctness, and indeed the utter incommensurability of the political and legal realms; and yet at the same time he seems to want to say that the personal ethics of responsibility *can* contribute to the kind of political or legal processes we instantiate.

Thirdly, therefore, it follows that in the challenge with which responsibility thus confronts us, we are singled out. This means to be made individual 'the very subjectivity of the subject.' The other chooses *us* because, in the face of their vulnerability, we are singled out as the one or ones who can most make a difference. There is no deferral. No one else will do, and we cannot simply hide behind some pre-existing rule to shirk our responsibility. It is all up to us and up to now. I think the experience of charity brings home the point. When I meet a beggar on the street, there is nothing I can say to escape the moment. There is no point saying 'I gave at the office' or 'I don't believe you.' No rule of my own devising can protect me from the demand of an immediate decision that is mine and mine alone. I can give, or I can not give. But no one can do this for me. The rule cannot tell me whether I ought to obey it on this occasion. This is what Levinas means when he says that the relationship with another 'is not a species of consciousness whose ray emanates from the I; it puts the I in question. This putting in question emanates from the other'.²⁷ The demand from the other that puts me on the spot likewise constitutes me as a unique subject, a self.

Uniqueness signifies through the non-coinciding with oneself, the non-repose in oneself, restlessness ... For it is a sign given of this giving of signs, the exposure of oneself to another ...²⁸

So in stark opposition to the standard view, responsibility is not the outcome of a decision taken by our individual autonomous selves. It is the cause of that individuality. The demand of the other individualises *me*. It is achieved for me, not by me. Responsibility is therefore not only the foundation of any and all relationships. It is the constitution of subjectivity.

Finally, the content of that exercise of responsibility – because it precedes and cannot be constrained by rules – is always changing. As with desire, which draws us forth towards others, responsibility deepens with practice and awareness (and

25 See, eg, *ibid* 85.

26 *Ibid*.

27 Levinas, *Totality and Infinity*, above n 2, 195 (translation corrected).

28 Levinas, *Otherwise Than Being*, above n 2, 56.

this is as true of communities as it is of people). This, too, it seems to me, describes very well the actual experience of responsibility. The relationship of responsibility 'is not a return to oneself' but on the contrary 'disengages the one as a term, which nothing could rejoin'.²⁹ This is what Levinas means when he speaks of 'the undoing of the substantial nucleus of the ego'.³⁰ Responsibility is a rent in the fabric of being, an interruption to the monologue of the self. Once undone, the knot that rejoins us to ourselves must nevertheless preserve the discontinuity as part of us.³¹ Furthermore, since we are *continually* being re-constituted through responsibility, since relationship and consciousness derive from an understanding that 'cannot be accounted for in the first person singular',³² no formula of words, system or rules could close off the possibility of its future exercise. We always remain open to future and unknowable obligations of responsibility. There is no surprise in the fact that responsibility always surprises us.

The necessarily *responsive* and developing nature of responsibility provides a justification which other models do not address for the flexibility and change that imbues the common law of negligence. Indeed, most articulations of the law do not even recognise that responsiveness and responsibility are connected. If the principles of responsibility are simply rules laid down in order to stabilise expectations and put our social interactions on a more predictable footing, then the constant reassessment and transformation that marks the cases on jurisprudence of the common law duty of care can only be seen as a failure. But, as Levinas suggests, such fluidity and ambiguity are necessary elements to the very idea of responsibility.

The specific implications of such a view of responsibility, and in particular the way in which the High Court's analysis of proximity in the period 1984-1998 leaned towards such an expansive role for it, are difficult and detailed matters which I have explored at considerable length elsewhere.³³ There is nevertheless an over-riding and conceptual problem that relates not to the doctrinal specifics of asymmetric responsibility, but to Levinas' general idea of law. For Levinas seems to fantasise a world built of two people alone, each infinitely indebted to the other for their survival, their consciousness, their self. No doubt if you were Robinson Crusoe after the discovery of Friday, you would probably feel like that, too.³⁴ But in law and otherwise, it is very often the case that our responsibilities do not concern one other person alone. We must *balance* our obligations, weigh up the help a stranger calls from us against our duty to our families and the loved ones who are waiting for us at home. We live in a society in which needs invariably clash, in which budgets and resources are limited for each of us and all

29 Ibid 114.

30 Ibid 141.

31 Ibid 70.

32 Alphonso Lingis, 'Preface' in Levinas, *Otherwise Than Being*, above n 2, xvi.

33 Manderson, above n 1. See also additional articles forthcoming in *Tort Law Review* (2005) and *Griffith Law Review* (2006).

34 Nicholas Kasirer, 'Le Droit Robinsonien' in Nicholas Kasirer (ed), *La Solitude en Droit Privé* (2002) 1.

of us, and where more help is sought than can ever possibly be given. This, for Derrida, is the real question. What then?

I cannot respond to the call, the request, the obligation, or even the love of another without sacrificing the other other, the other others ... I am responsible to any one (that is to say to any other) only by failing in my responsibility to all the others, to the ethical or political generality. And I can never justify this sacrifice.³⁵

For Derrida, there can be no solution to this problem, for in the process we would reduce the ethical demand to a legal formula, a matter of equations and a hierarchy of norms and rules. And as we have seen, this defeats both the urgency and the pre-cognitive nature of proximity altogether. Proximity cannot ever be reduced to a rule, for that would destroy its capacity to surprise and change us. Moreover, if 'every other is absolutely other' – '*tout autre est tout autre*'³⁶ – how could such a comparison even take place? How could incommensurable obligations ever be subject to measurement?³⁷ 'Adhering absolutely to any one duty inevitably leads to my sacrificing another absolute duty, and this I do without any means of justifying my choice. And yet I choose. I choose to follow one and neglect another, to align myself with one and fight against another.'³⁸

Levinas is entirely mindful of the problem, and both in *Otherwise Than Being* and elsewhere, tries to address it.³⁹ Indeed, he concedes the unsustainability of his romantic dualism.

If proximity only ordered me to the one other, there wouldn't have been any problem ... it is troubled and becomes a problem when a third party enters. The third party is other than the neighbour, but also another neighbour, and also a neighbour of the other, and not simply his fellow. What then are the other and the third party for one another? ... Which passes before the other?⁴⁰

The recognition that the third party is *also* my neighbour brings with it the need for balance and equality.⁴¹ For Levinas, this is why we need 'justice', which he would appear to use here to encompass the rule of law. But the entry of law into Levinas' world seems a lot like the demise of ethics. Justice, he concludes, is all about 'comparison, co-existence, contemporaneousness, assembling, order, thematization ... the intelligibility of a system'.⁴²

In proximity the other obsesses me according to the absolute asymmetry of signification ... The relationship with the third party is an incessant correction of the asymmetry of proximity in the face that is looked at. There is weighing, thought, objectification ... Justice requires contemporaneousness of representation. It is thus that the neighbour becomes visible and, looked at, presents himself, and

35 Jacques Derrida, *The Gift of Death* (David Wills trans, 1995 ed) 68–70 [trans of: *Donner la mort*].

36 Ibid ch 4.

37 Derrida, above n 3; see especially Simon Critchley, *The Ethics of Deconstruction* (1999) 96–8.

38 Derrida, above n 3, 79.

39 See Emmanuel Levinas, 'Wholly Otherwise' (Simon Critchley trans), in Robert Bernasconi and Simon Critchley (eds), *Re-Reading Levinas* (1982) 3.

40 Levinas, *Otherwise Than Being*, above n 2, 157. I have retranslated the first sentence which again seems to me needlessly difficult: see Emmanuel Levinas, *Autrement qu'être* (1978) 245.

41 See also Levinas, above n 4, 18.

42 Levinas, *Otherwise Than Being*, above n 2, 157.

there is also justice for me. The saying is fixed in a said, is written, becomes a book, law and science.⁴³

Levinas therefore seems to conclude that the entry of 'the third' marks the moment at which 'I am no longer infinitely responsible for the other, and consequently no longer in an asymmetrical, unequal relation'.⁴⁴ Law takes over.⁴⁵

This is not, perhaps, quite the post-metaphysical Gallic shrug it appears to be at first. The idea of inspiration provides a suggestive metaphor for the ways in which things that are not ours, and are beyond our control, can nevertheless touch us. An inspiration is a breath from outside that fills us with something strange and new as we go about our lives. This breath does not arise in us, and we do not *choose* to receive it: it comes to us and makes its transformative demands whether we will have it or not. The question is not, how does law operationalise this unusual idea of ethics, but how does ethics inspire law?

III ETHICS INSPIRES LAW

A Ethics/politics

The first way in which ethics inspires law, despite law's constant efforts to reduce it to what Levinas calls 'the said' – 'a book, a law, code' – and thus to destroy it, is this: in establishing the primacy of ethics over politics, Levinas offers an important foundation from which our understanding of justice might begin. 'Justice remains justice only, in a society where there is no distinction between those close and those far off, *but* in which there also remains the impossibility of passing by the closest.'⁴⁶ Let us notice in passing that in connecting ethics to the *closest*, he assumes that it is possible and necessary to distinguish between the two. He continues: 'The forgetting of self moves justice'.⁴⁷ He does not mean that the abstraction or impartiality of the self leads to just judgment. He means that the sacrifice of self-interest drives us to just action. Under the former model, indifference is a way of *applying* justice. Under the latter model, non-indifference to those who are proximate to us is a way of *moving* or transforming justice, and indeed of desiring it.

Recent work on what Levinas calls 'the third' has insisted that our need to take into account 'the other others' should not lead us to give up on the relationship of ethics and politics. Roberts, for example, argues that the institutions of the third (institutions such as courts of law and public services and even what is, to my mind, suggestively called 'third party insurance') *enable* us to fulfill our responsibilities to these others. These institutions bridge our relationships with others: they do not necessarily abandon the ethical insight of asymmetric responsibility, but witness and testify to it.⁴⁸ Finally it is surely true that the

43 Ibid 158–9.

44 Levinas, above n 39, 231.

45 Derrida, above n 3, 185.

46 Levinas, *Otherwise Than Being*, above n 2, 159.

47 Ibid.

48 Roberts, above n 7, 7–8. See also Simmons, above n 5, 84–5.

reality of my relationship with others in society is given meaning and depth by my feelings of ethical proximity, without which experience ‘citizenship’ or ‘social obligation’ would remain a purely abstract and probably unimaginable concept. ‘My relationship with the other in proximity [Roberts writes] gives meaning to my relationship to all others as ‘citizens’ or abstract members of a moral community. It is the face-to-face encounter with the other which is the moving force, demanding political justice.’⁴⁹ What is it that motivates the McCartney sisters – Donna, Catherine, Gemma, Paula, and Claire – to take on the IRA within their own community, after the murder of their brother? In a striking echo of Antigone, Gemma says: ‘Love. Basic love for my brother. Only now I’m in this situation do I realize how essential justice is ... Otherwise he would have died in vain’.⁵⁰

Thus, ‘justice doesn’t eliminate my personal, asymmetrical responsibility but is motivated by it, and draws its authority from it’.⁵¹ The primacy of the ethical over the political is not just an abstract ontological point: it tells us something about how we find meaning and legitimacy in our everyday lives. Ethical proximity is not replaced by social justice, but motivates and critiques it. While Levinas concedes that on some level ‘there is a direct contradiction between ethics and politics’ so he insists that ‘there is also an ethical limit to this ethically necessary political existence’.⁵² In other words, justice must proceed from certain assumptions about the ineradicable nature of our duties to others, and these starting points make a considerable difference to the contours, and of course the justifications, of the law.

B Infinity/totality

The second way in which ethics inspires law is this: in establishing the primacy of the uniqueness of the other, which Levinas calls ‘infinity’, over considerations that treat us all as comparable units of a conceptual whole, which Levinas calls ‘totality’, Levinas seeks to emphasize the importance of the preservation of distance in the fulfilment of responsibility. To be proximate is to be juxtaposed but not together. The gravitational field of another draws us close but never absorbs us entirely: in short, neighbourhood.

The *standard of care* in the law of negligence provides the opportunity to balance the contradictory demands that responsibility lays upon us. It is the venue wherein the law – as a means of ‘comparison, coexistence ... order’ – moves from an absolute language of yes/no by which we determine those to whom we are responsible, to a language of reasonableness, by which we determine whether we have fulfilled our responsibility. However, reasonableness imports a social judgment, which means that it attempts to balance what we might have done against our other obligations, expectations and demands. In other words, reasonableness is a question of balancing the needs of the one who

49 Roberts, above n 7, 9.

50 In Angelique Chrisafis, ‘The Women Who Took On the IRA’, *Guardian Weekly* (March 18–24 2005) 20.

51 Roberts, above n 7, 9.

52 Emmanuel Levinas, ‘Ethics and Politics’ in Séan Hand (ed), *The Levinas Reader* (1989) 293.

was injured, against our own desires and those of the ‘third party’: society, the other others.

Can Levinasian proximity tell us something about that most totalising of institutions, the standard of care? One answer can be readily seen by reference to the classic US case, *United States v Carroll Towing Co*⁵³ (‘*Carroll Towing*’). There, Justice Learned Hand attempted to convert the balancing act of the law into an algorithm. The standard of reasonable care requires us, he argued, to take into account the probability of an action causing harm and the gravity of the injury that might result, and to weigh against that ‘the burden of adequate precautions’.⁵⁴

Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P ; the injury, L ; and the burden, B ; liability depends upon whether B is less than L multiplied by P : ie, $B < PL$.⁵⁵

The text has become a staple of both the law of obligations and of the economic analysis of law.⁵⁶ Let us put aside its obvious insufficiency as a formula, which is a rather cheap point, and focus instead on its undoubted power as a metaphor. The standard of care is to be determined *as if* we were all mathematical commensurates: as if risk and inconvenience were able to be placed on the same scale against one another. Of course, in the real world, such a balance is complex and thoroughly imperfect, but the algebraic metaphor suggests to us the perspective towards which we ought to strive. Accordingly, the interests of each side are to be measured up in the light of some third party or neutral term, ‘reunited under a single gaze’.⁵⁷ *My* B (the difficulty and cost of avoiding an accident) and *your* L (the injury you thereby suffer) both become quantities of x in the same juridical equation. This is the fundamental tenet of all forms of utilitarianism, and it is precisely the kind of totality-thinking that Levinas contrasts so forcefully with infinity. The effect is that, as a society, we can decide that my burden (the inconvenience of driving slowly, for example) is greater than your injury. Your injury becomes a cost that society will deem ‘reasonable’ in proportion to the advantages that accrue to the rest of us from it. This is of course the mainstay of politics: the judgment of effects in terms of comparative statistics generalised across masses, in pursuit of collective goals such as efficiency or progress. There are prices to be paid to achieve our social ends – houses must be torn down so that airports may sprout up – but it is precisely its comparative reasonableness that justifies the imposition of that price on particular individuals. In deeming that your injury (and others like it) was *reasonable*, you are made to sacrifice something against a greater good that has been measured, and weighed, and judged.

Not only does this absorb the two parties into the midst of a social evaluation that consumes their personal relationship. It ultimately allows the unwanted imposition of a risk on another person if the inconvenience not just to society but

53 (1947) 159 F 2d 169.

54 See *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–8 (Mason J).

55 (1947) 159 F 2d 169, 173 (Learned Hand J).

56 See Richard Posner, *Economic Analysis of Law* (6th ed, 2003).

57 Levinas, *Totality and Infinity*, above n 2, 36.

to the defendant would prove too great an intrusion on their freedom. That too would be 'reasonable'. If the burden on me of avoiding a certain course of conduct is unreasonably great, Learned Hand's 'calculus' allows the harm to reasonably befall you. So here too, the two sides of the equation are treated just as if they both shared the same interests and values, as if the relationship was symmetrical and commensurable. There is no proximity at this stage of the analysis since there is no recognition of the incompatibility of their interests. Instead, the two are treated as if they were two halves of the same whole. That is the essence of Learned Hand's 'calculus'.

Being both social and comparative, the judgment of the standard of care appears to move us out of the realm of the ethics of responsibility entirely. Reasonableness might be thought of as the domain of politics. When Levinas acknowledges the necessity of comparison and order,⁵⁸ the necessity in other words of the delimitation of 'reasonable care', and the balancing of the other against the other other, does he thus abandon us to totality? Certainly there are moments in which he seems to. Levinas' own brief discussion in *Otherwise Than Being* suffers from his own carelessness in running together, with little thought for their distinctiveness, 'justice, society, the State and its institutions'.⁵⁹ For him, this is all the same: not-ethics. But law is not politics, although there are elements of politics in it. It is true that reasonableness will always involve calculations of social and personal utility but at the same time the common law of negligence insists on taking the romantic duality of the world of responsibility – just the other and I – seriously. In this, the law of torts is already a little closer to ethics than perhaps Levinas imagines. The question for the law of negligence is always particular, always shorn of some of its elements of expedience. We are to forget the framework of insurance or of social welfare, and focus just on this singular moment and this singular relationship. It is no longer about me, or about we, but about you. For many, that gives to the legal argument an air of unreality. However it also properly recognises the foundational quality of that relationship and provides it with a distinct voice.

There are alternatives to the totalising calculus of *Carroll Towing*. It is possible to preserve a trace of Levinas' defence of proximity even within the socialised judgments embedded in the standard of care. I have been particularly influenced by Stephen Perry's remarks on the calculus of negligence. He writes, 'the conception of fault which emerges here involv[es] not a balancing of interests, but rather a consideration of whether the creator of the condition in question ... imposed a certain *level* of risk upon others'.⁶⁰ Perry is here drawing on the famous case of *Bolton v Stone*.⁶¹ The orthodox view was expressed by Lord Oaksey: 'The standard of care in the law of negligence is the standard of an ordinarily careful man, but in my opinion, an ordinarily careful man does not

58 Alphonso Lingis, 'Introduction' to Levinas, *Totality and Infinity*, above n 2, 14.

59 Levinas, *Otherwise Than Being*, above n 2, 159.

60 Stephen Perry, 'The Impossibility of General Strict Liability' (1988) 1 *Canadian Journal of Law and Jurisprudence* 147, 164–9.

61 [1951] AC 850.

take precautions against every foreseeable risk'.⁶² Lord Reid has more to say on the subject of how to determine the behaviour of a reasonable man in fulfilment of his responsibility: 'I do not think it would be right to take account of the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all'.⁶³ Lord Reid therefore rejects the relevance of the size of the burden in determining whether one's responsibility to others requires one to modify one's conduct.

A familiar example will demonstrate the distinction. The notorious Ford Pinto was introduced in 1970 with very poor protection for its fuel tank.⁶⁴ The consequence of this design flaw was a large number of preventable deaths and burns: estimates range from 180 deaths up to 900. Taking a figure of \$200,000 as the value of a human life (a rather arbitrary number which had been adopted by the US National Highway Traffic Safety Administration⁶⁵), Ford determined that the cost of vehicle adjustment would be \$137 million, and the benefit in injuries foregone and lives saved only \$50 million.⁶⁶ B > PL: QED. But the point does not depend on exactly how many people died, nor how much a human life is worth, actually or actuarially. The point is rather that, according to the logic of Learned Hand's formula, it was entirely *responsible* for the company to have carried out some such reasoning.

Clearly, for most people, something has gone wrong in simply undertaking such a calculation. It is not merely undignified. It is not merely impossible. It has missed the point. The burden *to you* of fixing a problem is not to be weighed against the injury *to me* of leaving it, for that treats us as if we somehow shared these burdens and benefits. It is not that these things cannot be weighed, but that they should not. Responsibility for another asks us to respect the concept of proximity, by which is meant a requirement to preserve the distance of another, from appropriation in the interest of some imagined joint project.

As Levinas himself concedes, responsibility entails striking a balance between the social and the individual: we do not demand that our vehicles are as safe as they could possibly be, because of certain established expectations concerning everything from price to speed. In law, responsibility entails striking a balance between the individual and the other – since, as Levinas says, we are ourselves an 'other to the others'. In the interests of preserving our individual freedom, therefore, we are prepared to run certain risks that are neither large enough nor grave enough to warrant our attention at all. That, after all, was the logic of *Bolton v Stone*.

Furthermore, responsibility entails striking a balance between our obligations to one other and to all the others.⁶⁷ Particularly in dealing with government agencies, their need to balance a whole range of responsibilities may limit the

62 Ibid 863 (Lord Oaksey).

63 Ibid 867 (Lord Reid).

64 Mark Dowie, 'Pinto Madness', *Mother Jones* (San Francisco), September/October 1977.

65 Ibid.

66 See also Douglas Birsch and John Fielder (eds), *The Ford Pinto case: A Study in Applied Ethics, Business, and Technology* (1994).

67 Levinas, *Otherwise Than Being*, above n 2, 157.

kind of intervention that it will be reasonable to undertake.⁶⁸ That has clearly been the animating concern of the courts in their attempts over recent years to control the expanding liability of local councils. In *Romeo v Conservation Commission of the Northern Territory*⁶⁹ ('Romeo') the Australian High Court was asked to reconsider the broad liability imposed on such authorities in *Nagle v Rottnest Island Authority*.⁷⁰ It might be said that this was another case in which, post-proximity, the Court has begun to view the question of responsibility more narrowly than before. While the majority affirmed the duty of care owed by the Conservation Commission to the users of a scenic car park overlooking a cliff-top near Darwin, the court divided on whether its failure to provide some kind of fence breached that duty. A young woman, drunk, had stumbled off the edge late one night. The Commission was held not liable, not simply because it would have cost too much to put up the fence but rather because of the range of other responsibilities and associated costs the Commission faced. In the competition for resources, such organisations must constantly balance one 'other' against all the others. Justice Kirby articulates a question of balance that also appears to have concerned Toohey and Gummow JJ:

Demanding the expenditure of resources in one area (such as the fencing of promontories in natural reserves) necessarily diverts resources from other areas of equal or possibly greater priority. Whilst this consideration does not expel the courts from the evaluation of what reasonableness requires in a particular case, it is undoubtedly a factor to be taken into account in making judgments which affect the operational priorities of a public authority ...⁷¹

The question of how to act responsibly will admit of different alternatives – more or less expensive, more or less extensive.⁷² In many cases, a warning sign erected by a council may well prove reasonable enough.⁷³ Indeed, the difference between the majority judgments in *Romeo* and the dissents of McHugh and Gaudron JJ rest precisely on the future resource implications, across the range of the Commission's responsibilities, of holding in favour of Nadia Romeo.⁷⁴ The existence of alternative responsibilities and claims upon a council's resources lies at the heart of the so-called distinction between 'policy' and 'operational' factors.⁷⁵ The council worker who comes to inspect your home finds herself in no conflict in determining the exercise of her responsibility, for it is specific, limited, and singular; the question as to whether the council ought to institute a system of inspection in the first place is, on the other hand, just such a matter of balancing finite resources amongst multiple responsibilities. All this reflects the ways in which the question of breach changes with the entrance of the third

68 *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431.

69 (1998) 192 CLR 431.

70 (1993) 177 CLR 423.

71 *Romeo* (1998) 192 CLR 431, 480 (Kirby J).

72 See *Geyer v Downs* (1977) 138 CLR 91 (Murphy and Aickin JJ).

73 See *Wyong Shire Council v Shirt* (1980) 146 CLR 40; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423. In *Romeo*, of course, a warning sign would hardly have helped a girl, drunk, at night.

74 *Romeo* (1998) 192 CLR 431, 456–60 (Gaudron J), 460–3 (McHugh J).

75 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 469 (Mason J).

party. While ‘the Other’s hunger – be it of the flesh, or of bread – is sacred ... the hunger of the third party limits its rights’.⁷⁶

But – and this is the point that Levinas forces us to confront – responsibility does *not* entitle us to think of ourselves at the very moment when we should be thinking of the other. Levinas goes on: ‘the only bad materialism is our own’.⁷⁷ Responsibility will not permit us to do nothing when we ought to be doing something, simply because doing nothing relieves us of a burden. It is not *up* to us to ‘trade off’ the other against ourselves. That would remove the distance between us altogether and destroy the experience of proximity that it must preserve. That burden, which Learned Hand suggests can be reasoned away, is the very fact of responsibility. Responsibility, like hospitality, means the welcoming of inconvenience. This is what Lord Reid means when he states that if a certain activity cannot be undertaken without creating a substantial risk, it ought not to be undertaken at all.⁷⁸ We are not at liberty to decide that our cricket is more important than Miss Stone’s security in circumstances in which that security is the very essence of our responsibility. That is what Learned Hand suggests and what *Bolton v Stone* rejects. Our courts have not surrendered reasonableness to the internal calculus of cost and benefit.⁷⁹ As in the Pinto case, it would be fundamentally wrong to attempt to balance out costs and benefits when there is a ‘substantial risk’ to which the plaintiff has been exposed. In such a case, the inconvenience or cost of protecting the safety of another *is* your responsibility, not just an element to be considered in deciding how far it extends.⁸⁰

Responsibility is not a question of contract, in which one uses another person in ways that advance some common project.⁸¹ There is a distance between us that at exactly the moment that it recognises my power, demands of me a sacrifice in order to preserve that distance.⁸² All responsibility requires a sacrifice in order to preserve something unshared and unique. Perhaps that was what Ford’s rational system did not allow for. Instead, they traded off those who burned, in the interests of efficiency.

76 Levinas, above n 4, xiv, ‘Foreword’.

77 Ibid.

78 *Bolton v Stone* [1951] AC 850 (Lord Reid).

79 *Mercer v Commissioner of Road Transport & Tramways (NSW)* (1936) 56 CLR 580 (Rich, Evatt and McTiernan JJ).

80 Interestingly, the jury itself appears to have come to a middle position. In an odd ‘rider’ affixed to their verdict, they concluded that ‘the defendant was not careless in the ordinary meaning of the word in not fitting the device but on the contrary, he was justified in taking the remote risk of claims for damages that might arise for accidents’. No doubt the jury is reflecting a general view that financial responsibility is more easily acknowledged than moral responsibility. But clearly the rider is no support for Learned Hand’s position, for on that reasoning, the Tramways Authority had done nothing wrong and there would be no need to speak of ‘claims for damages’ at all. The remark is not just ‘quite consistent’ with a finding of negligence, as the majority note, but in fact dependent on it; dependent, therefore, on negligence amounting to something other than a cost-benefit analysis: see *ibid* (Rich, Evatt and McTiernan JJ).

81 See Emmanuel Levinas, ‘Martin Buber and the Theory of Knowledge’ in Emmanuel Levinas, *Proper Names* (Michael Smith trans, 1996 ed) [trans of: *Noms Propres*].

82 Levinas, *Totality and Infinity*, above n 2, 294.

Much writing on legal responsibility attempts to define what it is *for* – efficiency or progress or whatever. But this is to get it upside down. Responsibility is the birth of purpose; it is what makes possible the society in which we can have purposes and the persons who can have them. It is not *for* something; it is what something is *for*.⁸³ Responsibility is only truly responsible when it is against my interests, against ‘our’ interests, *beyond* calculations. If one is responsible for something – for the safety of others on the roads, or the welfare of the child in your care – one is not responsible ‘up to a point’. One does not cease to be responsible when it is no longer ‘worth it’ *to you*. To think of responsibility in those terms is already to be irresponsible: that is where Learned Hand went wrong. That is what Levinas means by contrasting ‘the hunger of the third party’ which limits responsibility, with ‘our own bad materialism’ which does not.⁸⁴ It is also what Lord Reid meant, and it strongly contrasts with what is commonly and revealingly called ‘the calculus of negligence’. Even when it is reduced to a legal system through the operation of the standard of care, Levinas’ ideal of responsibility thus preserves something of its essential character, interrupting our general rules with specific instances, and providing depth, meaning, and desire to our search for justice.⁸⁵

C Saying/said

The third way in which ethics inspires law is this: in establishing the primacy of the saying over the said, Levinas means to suggest that the moment of ‘fixing’ ethics in a theme or a system, of turning it into a book of law or a code of rules, does not inevitably signal the complete loss of ethics. Levinas associates ‘saying’, as an event of language, with ‘infinity’, as an event of existence. Both indicate the outside – uncodifiable, incomprehensible, as unpredictable as our responsibility to others – that nevertheless affects us. The whole message of Levinas is that this outside is the *necessary* remainder or supplement to any system of meaning whatsoever.

We cannot reduce language to the things-that-language-says any more than we can reduce another person to the things-the-person-is. In each case, there is something left over: the field or relationship that makes these *things* possible. This relationship affects us, and, most importantly, continually demands something more of us. Responsibility is not a contract: we always get more than we bargained for.

There is nothing particularly mystical about this. Levinas could be describing the operation of the common law of torts over the past century or so. The growth of a complex sense of responsibility has emerged, gradually but inexorably, precisely in response to the exposure to ‘others’, irreducible to the prior ‘said’ of the law. Each time the law’s response is to create a new book, a new law – some

83 ‘My responsibility for the other is the *for* of the relationship’: Levinas, above n 52, 90.

84 Levinas, above n 4, xiv.

85 The failure to understand the difference, and thus the failure to appreciate what Levinas means by infinity, lies at the heart of some of the most careless criticism of his work, as I trust I have elsewhere shown.

new and definitive ‘rule’ – but never adequately or permanently. There is always some new remainder or loose end waiting for a further event to challenge and to press it. The common law embodies the recognition that no code can ever capture the true experience of responsibility. The phenomenon of our relationship to others is destined to catch us out. Concerning each of us and in relation to the system of the common law as a whole, the duty of care is not some thing we choose. It just *happens* to us.

To some this will come as a disappointment. Time after time the critics of proximity have attacked its indeterminacy, and have appealed to the common sense view that law is a system of rules:⁸⁶

If negligence law is to serve its principal purpose as an instrument of corrective justice, the principles and rules which govern claims in negligence must be as clear and as easy of application as is possible. Ideally, arguments about duty should take little time with need to refer to one or two cases only instead of the elaborate arguments now often heard, where many cases are cited and the argument takes days.⁸⁷

So too the English courts have frequently insisted that the ‘criterion of liability’ must present an ‘ascertainable meaning’ if it is to have ‘utility’.⁸⁸ The many dissents of Brennan CJ surely address precisely this point, conceiving of law as a system of rules and proximity as a surplus or a waste – so much unnecessary verbiage. Perhaps proximity is not entirely predictable. Clients – again the perspective is most strongly associated with McHugh J – deserve to know in advance exactly what their obligations to their fellow man are.

But proximity *is* ethics. This is not to say that the requirements of law, and even of justice, ought to go un-remarked or unrecognized: no one would suggest that we ought to get rid of rules and limits altogether. But Levinas insists that there is a necessary ethical register to law too, which neither cannot nor should not be entirely eliminated in the interests of personal comfort and social stability. In the law of negligence, proximity is that register. If, to recall a familiar objection, proximity is the ‘fifth wheel’ of the duty of care, then it is a flywheel, storing and releasing the energy that permits forward movement. There is a certain productive antagonism between ethics and law. This is precisely the discomfiting, nagging role of proximity in negligence. If it fails as a rule, always forcing us to rethink, question, and reassess our relationship with others, then it has succeeded as ethics. It is the infinite which haunts the totality, the saying behind the said.

Levinas makes this argument with regrettable vagueness. His understanding of law is, in this respect, simplistic (just as Justice Deane’s understanding of ethics was too simplistic to properly articulate the unsettling role that proximity fills). Not only does Levinas confuse law with politics, as we have already seen, so too he appears to equate law with justice, with a written code. Levinas does at times describe justice as ‘unethical and violent’, saying ‘[w]e must ... un-face human

86 See, eg, *Perre v Apand* (1999) 198 CLR 180.

87 Ibid 216 (McHugh J).

88 *Leigh & Sullivan v Aliakmon Shipping* [1985] QB 350, 397 (Robert Goff LJ); *Caparo v Dickman* [1990] 2 AC 605, 618 (Lord Bridge).

beings, sternly reducing each one's uniqueness ... and let universality rule'.⁸⁹ This might lead us to read him as separating the legal from the ethical in a rather crude way. At stake, then, are two points: the narrow way Levinas understands law, and the narrow way he understands justice.⁹⁰

The criticism of Levinas' conception of the meaning of justice and its relationship to law was first made by Derrida in 'Violence and Metaphysics', who suggested there that one of the reasons that one cannot stay with 'an ethics without law' is because alterity is 'already *in* the same', which is to say that ethics has already contaminated the allegedly rigid purity of the law.⁹¹ He then offered an extensive exploration of the legal question 25 years later in 'The Force of Law'. For Derrida, there is a tension between law, in the traditional sense of a stable body of rules, and justice: 'law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable'.⁹²

But the tension is not just between law on the one hand and justice on the other. On the contrary, it dwells within the idea of justice, itself internally riven between the operation of two mutually incommensurable impulses: equal treatment and singular respect.⁹³ Justice embodies both an aspiration towards 'law or right, legitimacy or legality, stabilisable and statutory, calculable, a system of regulated and coded prescriptions'⁹⁴ and at the same time the desire for a unique and singular response to a particular situation and person before us. Justice is both general and unique; it involves treating everybody the same *and* treating everybody differently.⁹⁵

This tension dwells within the idea of law too. Every legal decision requires us to make a judgment as to the applicability of prior general norms to the necessarily different and singular situation before us. A judge trying to decide whether the current dispute fits within the established category must always confront the fact that they have a *choice*, and this choice can never be ignored. Although 'hard cases' dramatise this choice, every case requires us to make the same kind of decision. We must still decide if this unique case is 'the same as' or 'different from' the past, and this is of course the very choice that the past *cannot ever help us with*. The point seems to me obvious, but it is ignored by every theory of positivism I have ever read. Be it ever so slight, the burden of judgment is an ineluctable part of the choice which the specificity of a case – of any case – imposes on us. Indeed, a judge who acted as if there was no choice in the matter (as some claim they do), as if their role was purely mechanical, would be

89 Discussed in Simmons, above n 5, 97.

90 Roberts, above n 7, 5.

91 Derrida, above n 3, 157–9, 181–5.

92 Derrida, 'Force of Law: The Mystical Foundation of Authority' (1990) 11 *Cardozo Law Review* 919, 947.

93 See also Judith Sklar, *Legalism* (1964).

94 Derrida, above n 92, 959.

95 See also Roberts, above n 7, 8–10.

obedient, but not responsible.⁹⁶ The two are in fact opposites. Such a judge would be as *incapable* of making a 'just' decision as a machine, or the weather.

The paradoxical choice that judgment always opens up, then, is a necessary element of law as it is of justice. Both demand of us that we respect the rules in their utmost generality *and* the individual in his utter specificity; that we attend to the constructive power of the past as a way of controlling the future, and the re-constructive power of the present as a way of reinterpreting the past. This complicated backwards-and-forwards dynamic is essential to all decision-making and no rules could ever tell us exactly how to accomplish it. A rule is not a self-basting pudding. Simply stated, in law, the judge is bound to choose:

In short, for a decision to be just and responsible it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case ...⁹⁷

The moment of judgment – the answer to the question of whether and how to follow 'the rules', which must be singular and newly-minted – is a crucial moment in which the judge is singled out and rendered irreplaceable, incapable of substitution by some mere procedure. The burden is his and his alone, an inescapable responsibility.⁹⁸

The crucial move that Derrida makes is to situate this inescapable and unpredictable experience of responsibility as part of the inevitable operation of justice (and not as separate), and justice as part of the inevitable operation of interpreting law (and not as separate). Ethics demands an element of incalculability, irreducible to formal rules, an experience that continually unsettles our established categories of thinking, and forces us to *question* the meaning of our rules at the very moment we apply them. If Levinas shows us the necessity of this instability, Derrida shows us how it is already part of something as mundane as legal reasoning. Neither justice *nor* law in Derrida are capable of being reduced to 'juridical-moral rules, norms or representations, with an inevitable totalising horizon',⁹⁹ some one-way track by which the past stops us thinking in the present about what it is for and what it means. For Derrida, in law as in language, this tyranny is simply not possible. The *necessary* passage of time between enactment of a norm and its application, and the *necessary* uniqueness of the present case by comparison to prior norms, inevitably opens up what Julius Stone called a 'lee-way'.

The common law of negligence, for all its faults, is a vehicle that remains deeply committed to an engagement on these terms. From Deane J onwards, the word 'proximity' and all the discussions that have swirled about it, have suggested precisely the operations of a judgment that cannot be entirely settled in

96 For a further discussion and defence of the position, see Desmond Manderson and Naomi Sharp, 'Mandatory Sentences and the Constitution: Discretion, Responsibility, and Judicial Process' (2000) 22 *Sydney Law Review* 585.

97 Derrida, above n 92, 961.

98 See Diane Perpici, 'A Singular Justice: Ethics and Politics between Levinas and Derrida' (1998) 42 (Supp) *Philosophy Today* 59–70.

99 Jacques Derrida, *Specters of Marx: the State of the Debt, the Work of Mourning, and the New International* (Peggy Kamuf trans, 1994 ed) 28 [trans of: *Spectres de Marx*].

advance and that remain sensitive to the particular and the experiential – the place of the ethical *in* law, ‘the other *in* the same’. Certainly, this makes it, as Brennan J oft complained, a ‘category of indeterminate reference’.¹⁰⁰ But Brennan J misses the point: such indeterminacy is inevitable.¹⁰¹ To this Derrida adds that it is more than inevitable: it is a stroke of luck. ‘This moment of suspense ... is always full of anxiety, but who pretends to be just by economising on anxiety?’¹⁰²

This is something we experience every day of our life, in our teaching and our reading and our speaking: justice is not a thing but an attitude, not an answer but a way of approaching questions. Once we decide that we *have* justice, that we know it and only need to put it down on paper and enforce it, we are already well on the way to dogma and injustice. Justice is not to be attained, under any circumstances, by realising a system or implementing a policy. This is not to say, of course, that we can do without policies or systems altogether: like memory and intention, or the conscious and subconscious minds, the calculable and the incalculable exist in different registers.¹⁰³ But we cannot do without either.

IV PROXIMITY – THE RELATIONSHIP OF LAW AND RESPONSIBILITY

In the law of torts, proximity is – or at least was – the *structural* site in which a receptiveness to the experience of others had been purposely kept open, an institutionalised and unstable force for change. It is the part of the ‘third’ or social realm that witnesses our rendezvous with the other, providing a space for a ‘never-ending oscillation’ between ethics and politics.¹⁰⁴ It is the moment in our judicial reasoning wherein the ‘saying’ of responsibility may still surprise the ‘said’ of law. After all, the application of rules or methods is just what our response ability cannot hide behind, and just the kind of *a priori* reasoning that circumstance always exceeds. Despite the sloppy use from which it suffered over the years, the legal instantiation of proximity within negligence does not merely ‘mask ... policy preferences’.¹⁰⁵ On the contrary, it is also an ethics, an anti-policy, in Levinasian terms. Proximity is the legal structure that accommodates the saying while no doubt attempting, always unsuccessfully, to pin it down in the form of the said.

How is such co-existence even possible when the instability that remains so important to ethics and justice is always trying to be erased by law?¹⁰⁶ Levinas

100 *Pyrenees Shire Council v Day; Eskimo Amber Pty Ltd v Pyrenees Shire Council* (1998) 192 CLR 330, 13 (McHugh J); *Perre v Apand*, (1999) 198 CLR 180, 210 (McHugh J); *Hill v Van Erp* (1997) 188 CLR 159 (Gummow J). See Julius Stone, *Legal System and Lawyers' Reasonings* (1964).

101 Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (1962).

102 Derrida, above n 92, 955.

103 Levinas, *Otherwise Than Being*, above n 2, 165–71.

104 Simmons, above n 5, 84. See also Roberts, above n 7, 7–8.

105 *Hill v Van Erp* (1997) 188 CLR 159 (Gummow J), citing Justice Michael McHugh, ‘Neighbourhood, Proximity and Reliance’ in Paul Finn (ed), *Essays on Torts* (1989) 5.

106 Levinas, *Otherwise Than Being*, above n 2, 165–71.

rather helpfully provides us with a metaphor of knots, which ‘interrupt the [seamless or dogmatic] discourse’ of law.¹⁰⁷ ‘The interruptions of the discourse found again and recounted in the immanence of the said are conserved like knots in a thread tied again.’¹⁰⁸ Levinas criticises the State as attempting to cut out these knots of discourse, and thus to repress or suppress the interstices of ethics. Statute law and codification have something of that character, preserving ‘law’ only in an eternal and coherent present. Indeed, in many jurisdictions, amendments to statutes are now placed on-line. In theory, this is said to acknowledge the increasingly changeable nature of modern Acts of Parliament, some of which are amended many times a year.¹⁰⁹ In practice, by concealing the process of amendment in a product which always appears perfectly up-to-date, it becomes ever more difficult to access a history or, ironically, to experience law as a temporal phenomenon. In cyber-space, the visible law belongs to a seamless present which appears to have been formed out of whole cloth.

But judicial decision-making is different. Precedent, like a rosary, remembers and continues to worry over that knotty problem of the past. It builds knots upon knots, imperfections upon imperfections. Certainly the High Court, faced with such interruptions in its supposedly seamless thread of rules, will always attempt to gather up the loose ends and re-tie the thread over and over again. That is how our institutions work. But the knots thus formed conserve the *memory* of that disruption and authorise the possibility of new ones to further unsettle a purely internal and conceptual system of order.¹¹⁰

The great strength of the role of proximity was that it recognized those knots, worried over them remorselessly, and at the same time actively demonstrated why they remain necessary. On one level the law of proximity attempted to describe citizens’ responsibilities for each other and the dimensions that such a response ought to take. And as we have seen, the articulation of such responsibilities is necessarily – ethically – imperfect and subject to amendment. Sometimes, the call of others will put the responsible citizen on the spot without any prior rules to guide him. On another level, the question of proximity was also the forum for law’s recognition of its *own* ‘response ability’. The law, too, finds itself reminded here that a responsible judgment cannot be rendered in advance; it must acknowledge the imperfection of its doctrines and their openness to amendment and reflection. Sometimes the call of others will put the responsible *judge* on the spot and challenge those prior rules. As a legal principle, then, proximity provided a meditation on the ethical engagement that connects persons – while as a legal discourse, proximity provided the moment for an ethical engagement between those who declare the law, and those who supplicate themselves before it. Proximity was both substance and form, enactment and performance of the nature of responsibility.

107 Ibid 170.

108 Ibid.

109 For further on contemporary theories of legislative drafting, see Nicholas Horn, ‘Black letters: Epistolary Rhetoric and Plain English Laws’ (2000) 9 *Griffith Law Review* 7.

110 ‘The discourse that suppresses the interruptions of discourse by relating them maintain the discontinuity under the knots with which the thread is tied again’: Levinas, *Otherwise Than Being*, above n 2, 170.

The danger of the present trend away from proximity is that it represents a narrower view of the nature of legal responsibility, a narrower view of the nature of legal discourse; and no view at all as to the relationship between them. The law of proximity set up a sympathetic resonance between the true meaning of our responsibility for others – unresolved, retrospective, nascent – and the structure through which that meaning ought to be explored. Neither should this parallel surprise us. Responsibility is *always* a kind of judgment in which we are faced with difficult choices but with no choice but to make them; in the face of the other, we are indeed the chosen ones. Judges too are faced with choices but with no choice but to make them; in the face of the parties, they too are the chosen ones.

So proximity offered a structural resource through which to explore the nature and approach each of us ought to take to the experience of responsibility. At the same time it applied this methodology of singularity, predicament, and response not only to our everyday judgments and errors of judgment, but to our institutional judgments about those errors. There is therefore a commensurability between how the law of negligence understands responsibility to others and how it understands its own responsibility to the law. Proximity talked about responsibility *responsibly*.

The responsibility that Levinas thus defends is, for each other of us *and* for the law itself, a ‘difficult freedom’, a ‘jurisprudence for adults’.¹¹¹ It requires us to give up forever a concept of rule-fetishism and absolute obedience which tends to obsess six year olds, according to Piaget (though they grow out of it soon enough).¹¹² Nevertheless, there is therefore something singularly fitting in the location of Levinas within proximity, within the duty of care, within negligence, and within the common law. All *perform*, on different levels, the ideas of responsibility and subjectivity that a commitment to ethics entails. We see here the structural recognition of an ethical principle which our law can ill afford to ignore.

Furthermore the fluidity of proximity reflected something very important about the nature of responsibility. The expansion of the duty of care over the past several years – at least until the High Court’s turn away from proximity in recent years, notably in *Pyrenees Shire Council v Day*; *Eskimo Amber Pty Ltd v Pyrenees Shire Council*¹¹³ and later in cases such as *Modbury Triangle Shopping Centre v Anzil*¹¹⁴ and *Romeo* – should not surprise us. The discourse of law establishes within us not just the obligations of responsibility but a desire for it which constantly takes us out of ourselves and towards the other.¹¹⁵ ‘It is like

111 See ‘A Religion for Adults’ in Emmanuel Levinas, *Difficult Freedom: Essays on Judaism* (Séan Hand trans, 1990 ed) 11, 11–23, 19–21 [trans of: *Difficile Liberté: Essais sur le judaïsme*]. See the critique of positivism as ‘infantile’ in Jerome Frank, *Law and the Modern Mind* (1930).

112 Jean Piaget, *The Moral Judgment of the Child* (first published 1932, 1997 ed); and see a detailed discussion of this question in Desmond Manderson, ‘From Hunger to Love: Myths of the Source, Interpretation, and Constitution of Law in Children’s Literature’ (2003) 15 *Law and Literature* 87.

113 (1998) 192 CLR 330.

114 (2000) 205 CLR 254.

115 See Adriaan Peperzak, ‘The One for the Other: The Philosophy of Emmanuel Levinas’ (1991) 24 *Man and World* 427, 440–444.

goodness – the Desired does not fulfill it, but deepens it.’¹¹⁶ Development and change is the very nature of such a law.

The infinity of responsibility denotes not its actual immensity, but a responsibility increasing in the measure that it is assumed; duties become greater in the measure that they are accomplished ...¹¹⁷

The point is not just that the legal system has responded to a changing social understanding of our duties to others in a mutually implicated lifeworld. More than this, the legal system has and continues to be itself a *force* in that evolution of consciousness. The discourse of responsibility begets its own growth, by and through a language that continually reaches out beyond its established parameters.

We would lose this if we were to give up on the common law either because it is proving too compassionate to defendants (and that is what is typically meant by the phrase ‘tort reform’ in jurisdictions in the United States¹¹⁸) or because it is not proving compassionate enough (and that is what is typically meant by advocates of ‘no fault’ schemes that prevail in jurisdictions such as New Zealand¹¹⁹). Reducing tort law to a static series of principles or, worse, to codified rules or administrative arrangements may, no doubt, solve some problems. It will also deprive us of important opportunities. Such changes make sense if we are sure that by and large we know already what the ‘right outcome’ ought to be; if we are confident that justice is something that can be set down and applied. But if we are not, then we have lost a prime forum through which to *learn* through judgment and reflection. Proximity is that place in which the law is a student of the other and not its master.¹²⁰

On the most general level, should the eclipse of proximity in fact be accompanied by a loss of the ideals of asymmetric response ability with which it has been associated, the law, and those whom the law instructs, will have settled down, closed the books, and ceased to remain open to the singular call of the other. We might return to concepts of choice, action, and assumption of risk to determine our obligations; we might choose once and for all the paradigm of privity over the paradigm of proximity. In such a world, we will have rules, we will have obedience, and we will all, including the law, *know who we are*. One is accustomed to think of ‘settled law’ as an ideal, but Levinas suggests that ethics asks of us never to be entirely settled, never to be at home in our world, always to

116 Levinas, *Totality and Infinity*, above n 2, 34.

117 Ibid 244.

118 See, eg, J T H Johnson, *Our Liability Predicament: the Practical and Psychological Flaws of the American Tort System* (1997).

119 Patrick Atiyah, *Accidents, Compensation and the Law* (1970); *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ); see also Archibald Blair, *Accident Compensation in New Zealand: the Law Relating to Compensation for Personal Injury by Accident in New Zealand* (1978).

120 Robert Gibbs, ‘The Other Comes to Teach Me: A Review of Recent Levinas Publications’ (1991) 24 *Man and World* 219.

be in movement and in question.¹²¹ It is not of course that no laws should ever be settled; it is only that ethics asks also that we find a space from which to recognise and give effect to the *necessary* unsettlement of our obligations, since that unsettlement and openness makes responsibility possible.

Contrary to the arguments which have commonly been used both to attack the expansionist era of proximity and to defend it, it is *not* the case that the court is simply in the business of choosing between different policies – some more individualist and narrow in outlook, some more collectivist and broad – with nothing to go on but their own sense of social justice.¹²² Courts do not or should not just choose policies because they lead to outcomes they like or because they reflect a social ideology they happen to like; if that were the case then there would be no particular reason why they could not as validly choose otherwise in order to achieve a different set of outcomes or a different social ideology. My argument has been that an expansive, organic, and self-questioning approach to proximity and the duty of care is simply a better understanding of how law really works. Furthermore, my argument has been that the court's focus on vulnerability, asymmetry, and unpredictability is simply a better understanding of what responsibility really means.

And finally my argument has been that there is a necessary connection between the true nature of law and the true nature of responsibility. Proximity embodies a kind of openness because law necessarily embodies openness; because responsibility necessarily embodies openness; *and* because law necessarily embodies responsibility.

121 Thus see Levinas, *Otherwise Than Being*, above n 2, 108; Levinas, *Totality and Infinity*, above n 2, 268–70; Simon Critchley, 'Bois – Derrida's Final Word on Levinas', in Robert Bernasconi and Simon Critchley (eds), *Re-Reading Levinas* (1982), 162. See also Caygill, above n 4, 85–6; Robert Bernasconi, 'Deconstruction and the Possibility of Ethics' in John Sallis (ed), *Deconstruction and Philosophy: The Texts of Jacques Derrida* (1987) 131.

122 Peter Cane, *Responsibility in Law and Morality* (2002); Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menu' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998); Prue Vines, 'Fault, Responsibility and Negligence in the High Court' (2000) 7 *Tort Law Review* 130.