Tortologies

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1 The grammar of law

We are friends.
You are threats.
They are our enemies.

It matters how we conjugate the world. The grammar in which one frames an area of law indicates what is seen to be important about it and why. How did law arise and to what end? – these questions have generated a variety of powerful myths surrounding the origin of law.[2] Property law, for example, starts from the first person singular. Its perceived importance derives from the assumed primacy of *I*. Drawing on John Locke and GWF Hegel, the right to the legal protection of property is there constructed as a necessary extension of the ego. There has of course been a counter-tradition of communal rights, of gleaning and commons and usufruct, but since the age of enclosure it has been in retreat. Thus for Locke, the right to property stemmed directly from what it means to be human: to be an individual and to own not only oneself but all that is the product of one's labour.[3] Possession and the individual go hand in hand.[4]

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2 P Fitzpatrick, *The Mythology of Modern Law* (1992) considers in detail several inter-related strands of these myths, focusing in particular on the different aspects of Hobbes which I touch on briefly below. While wholeheartedly subscribing to this argument, I want to mention here the *different* myths which find resonance in the common law legal system, even within Hobbes himself, while acknowledging their complementarity.

3 J Locke, *Two Treatises of Government* (2nd ed, 1970), Chapter V, 'Of Property'.

4 C B Macpherson, *The Political Theory of Possessive Individualism—Hobbes to Locke* (1962).

> ... the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom: For in all the states of created beings capable of Laws, where there is no Law, there is no Freedom. For Liberty is to be free from restraint and violence from others which cannot be, where there is no Law: But Freedom is ... but a Liberty to dispose and order, as he lists, his person, Actions, Possessions and his whole Property, within the Allowance of those laws under which he is; and therein not subject to the arbitrary will of another, but freely to follow his own.[5]

As Hegel argues, my capacity to *will* defines my status as a person and thereby entitles me to the ownership of whatever is constructed by that will. Appropriation—the law of property— is constructed on the basis of a fundamental distinction between legal subjects and legal objects.[6] Conjugated in this way, property appears as the first and necessary law, a perspective strongly supported by writers otherwise as diverse as Ernest Weinrib and Robert Nozick.[7]

Contract law lies clearly within this individualism. It assumes the binding and authoritative nature of our own will. But there is an added dimension. The law of contract gains its legitimacy from the two sovereign selves whose agreement the law protects but does not create. It is law in the second person singular, or perhaps more accurately as taking place between two 'I's, since it is the two of us that join together to make a law. This grammar finds its champion in Thomas Hobbes, wherein the promise that you and I make to each other is the foundation out of which all law emerges. It is a law of nature, he writes,

> *That men perform their Covenants made*: without which, Covenants are in vain, and but Empty words; and the Right of all men to all things remaining, we are still in the condition of War. And in this law of Nature, consisteth the Fountain and Original of JUSTICE. For where no Covenant hath preceded, there hath no Right been transferred, and every man has right to every thing; and consequently, no action can be Unjust. But when a Covenant is made, then to break it is *Unjust*:

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5 Locke, above n 3, para. 57.

6 C Taylor, *Hegel* (1975).

7 R Nozick, *Anarchy, State and Utopia* (1974); E Weinrib, 'Corrective Justice' (1992) 77 *Iowa Law Review* 403; E Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale Law Journal*; E Weinrib, 'The Jurisprudence of Legal Formalism' (1993) 16 *Harvard Journal of Law Public Policy* 583.

> And the definition of INJUSTICE, is no other than *the non Performance of Covenants.*[8]

The force of law comes into being only to ensure the performance by you of your promises, and thus to preserve to me the property, including the life, that is mine.

Yet if contract seems the first law, in Hobbes' grammar, it is a promise made against a background of mutual distrust.

> Therefore before the names of Just, and Unjust can have place, there must be some coercive Power, to compel men equally to the performance of their Covenants, by the terror of some punishment, greater than the benefit they expect by the breach of the Covenant; and to make good that Propriety, which by mutual Contract men acquire, in recompense of the universal Right they abandon... So that the nature of Justice, consisteth in keeping of valid Covenants: but the Validity of Covenants begins not but with the Constitution of a Civil Power, sufficient to compel men to keep them: And then it is also that Propriety begins.[9]

Distrust and fear takes us to Criminal law. For in Hobbes, as in Freud,[10] contract – you and I – lies close to the heart of law, but the violence of other men – 'they' – lies deeper still.

> And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their End, (which is principally their own conservation, and sometimes their delectation only) endeavour to destroy, or subdue one an other... Again, men have no pleasure, (but on the contrary a great deal of grief) in keeping company, where there is no power able to over-awe them all.
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> Hereby it is manifest, that during, the time men live without a common Power to keep them all in awe, they are in that condition which is called War; and such a war, as is of every man, against every man... And the life of man, solitary, poor, nasty, brutish, and short.[11]

Hobbes' powerful and influential vision thus also conjugates the law in, and more precisely against, the third person plural. The need to control *them* is the foundation for the apparatus of the State and the insignia of the

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8 T Hobbes, *Leviathan*, C B Macpherson (ed) (1968 [1651]). Chapter XV. 'Of Other Lawes of Nature', 201-203 (spelling modified).

9 Ibid.

10 S Freud, *Civilization and Its Discontents,* trans. D McLintock (2002 [1930]).

11 Hobbes, above n 8, 183-93.

police. Vulnerability is therefore key to the operation of a myth of origin which, as Fitzpatrick has so convincingly demonstrated, has been accepted as true all the way down to HLA Hart and beyond.[12] The primordial vulnerability of this singular and foundational 'I' in the face of 'they' who threaten me justifies law and the State. It is an old story and articulated no better than by Creon the king in Sophocles' *Antigone,* who insists that the power of law to impose order is a necessary condition to all justice and all other laws.[13]

Against the first person singular here is a counter-tradition here, too, which is not to be ignored – a myth of origin in the register of the first person plural. Law, from Aristotle onwards, comes out of a family, a community: *we*. Indeed, the legitimacy of this *we* is a central step in the reasoning of much mainstream jurisprudence. Ronald Dworkin too, uses the family as his model for the State, arguing that we owe both of them our respect and our obedience for the values we all share. Dworkin's 'law as integrity' and Stanley Fish's 'interpretive community' both insist on a shared (social or legal) community of values in order for law to exist and to function.[14] For both, they are the necessary fountain-head of law.

Constitutional law is constructed on the basis of the grammar of the first person plural. 'We, The People' begins the United States Declaration of Independence, resisting one State and instituting another by begging the very question of grammar—who is this *we* that, already constituted, claims a right to constitute itself?[15] This is and always has been the essence of state-building and self-determination. The Constitution's claim to be the originating and legitimating *grundnorm* of any legal system, given its most comprehensive elucidation in the work of Hans Kelsen,[16] derives from the social identification of 'we' with certain geographic boundaries and 'our' right to make laws for ourselves.

On the one hand, then, the justification of law begins from the first person singular, as variations on a theme of individualism. Both *you* and *they* are conceived as threats to this *I*. Thus contract is conceived as advancing and criminal law as protecting individual self-interest. On the

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12 Fitzpatrick, above n 2, Chapter 6.

13 Sophocles, *Antigone* (1987).

14 R Dworkin, *Law's Empire* (1986) chapters 5 and 6; S Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (1989). For a critique of Dworkin's argument, particularly from the point of view of his analysis of family, see D Réaume, 'Is Integrity a Virtue?: Dworkin's Theory of Legal Obligation' (1989) 39 *University of Toronto Law Journal* 38.

15 See J Derrida, 'Declarations of Independence' (1986) 15 *New Political Science* 7.

16 H Kelsen, *General Theory of Law and State* (1945).

other hand, law begins with the first person plural, as variations on a theme of community. The collectivity is understood as a group of selves who are already broadly assumed to be the same, and who together advance towards certain goals.[17] While *I* am protected against difference, *we* overcome and absorb difference into a greater unity. The former is the cautious rhetoric of isolationism, the latter the triumphal language of assimilation. But we have not really moved away from the first person. *I* and *we* are both grammars that see the world from different ends of the same telescope, which is to say, both grammars which telescope everything into sameness – mine on the one hand (against which the invasion of another person is protected by law) or ours on the other (in relation to which the difference of another person is effaced by politics).

What is called in the common law tradition torts, and more particularly negligence, is in the civil law tradition an aspect of obligations. In each case the law articulates fundamental principles concerning the nature of our responsibilities to each other, and the care we owe each other as we go about our daily business. Yet these responsibilities, which are not based on contract and are not owed to the State, have struggled to find an adequate justification within the confines of the limited grammar of the first person. Are these then our only choices? Either to begin law from an assumption of individualism grounded in mutual fear; or from an assumption of shared values which seems less and less plausible? Where, in short, is *he or she* in all this? – not yet 'you' or 'we' but separate from 'I'?

The third person singular would surely be the grammar proper to these personal obligations, particularly in the common law system of precedent to which I will confine my analysis here. *Singular* since tort law concerns itself with a judgment on each case as a unique set of circumstances, and not rules of universal application. In the *third* person since it is concerned with duties to others and not individual rights, our relationships rather than our agreements. To speak of *you* or *thou* already implies a dialogue and a choice: I choose to address you and in that address is already an agreement, an agreement of language and an agreement to agree -- contract. But torts, and the law of negligence above all, considers my dealings with *him,* to whom my relationship is as a neighbour -- unchosen, contingent, unnamed, and yet unavoidable. To think of *she* or *he* as the origin of law would somehow place our relationship with the other before the self. It would place our unchosen obligations before our

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17 M Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (1997).

agreements and elections.[18] If law grew out of our encounter with the other, before consent, before community, and even before the self—this requires a leap of imagination.

Lord Atkin put his finger on the problem of our personal responsibilities to others when, in the most celebrated case in the common law, he asked simply, 'Who is my neighbour?' The question, around which the whole law describing, expanding, limiting, and parsing the 'duty of care' has since circled obsessively, is as straightforward as it is profound.[19] In an incisive footnote, the great philosopher of ethics Emmanuel Levinas explains that 'a neighbour concerns me outside of any a priori.'[20] It is prior to contract. *He* or *she* is an other, not because of us or one of us, but simply next to us. Levinas continues, 'perhaps because of current moral maxims in which the word *neighbour* occurs, we have ceased to be surprised by all that is involved in proximity and approach.'[21]

Emmanuel Levinas,[22] philosopher and Jewish theologian, was until recently of interest mainly to a small but influential circle of French thinkers including Maurice Blanchot, Jean-Paul Sartre, and Jacques Derrida. Now he is rapidly becoming better known, as the vast number of new books being published this year to celebrate the centennial of his birth, attests. His two main works, *Totality and Infinity* and *Otherwise Than Being or Beyond Essence,*[23] offer a reconstruction of human selfhood away from questions of identity and ego and towards an 'ethics of the other' – an ethics starting from the point of view of the third person, not the first. Levinas' writing is passionate, mystical, and rational, at times bewitchingly erudite and elsewhere bewilderingly obtuse. Nevertheless, he 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 philosopher, unknown to and entirely ignorant of legal theory, who nevertheless speaks in the language of the common law of torts.

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18 S Benso, *The Face of Things: A Different Side of Ethics* (2000) points out that it is not the other that is placed before the self, but our relationship with the other: at 25.

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

20 E Levinas, *Otherwise than Being, or Beyond Essence* (trans) A Lingis (1981) 192, note 20. Originally published as E Levinas, *Autrement qu'être ou au-delà de l'essence* (1974).

21 Ibid 5.

22 It is orthodox to spell Lévinas without an accent when writing in English, and that custom I follow here.

23 Levinas, *Otherwise than Being,* above n 20; E Levinas, *Totality and Infinity* (trans) A Lingis (1969) 215. Originally published as E Levinas, *Totalité et Infini* (1961).

Over the past several years, I have been working on a project which has attempted to articulate the insights of Levinas to a legal audience, with particular reference to the distinct idea of responsibility in tort law.[24] Above all, as I hope this essay will go on to illustrate, Levinas offers a point of departure in trying to understand why we ought to be responsible for others that is radically unlike the standard grammars and philosophical reference points which have to date governed our understanding of this responsibility. Levinas suggests that we can understand responsibility in quite a different way, and in a manner that both captures something central to the legal discourse, and – just as relevantly - central to our own experience. Law is, after all, not just a structure of arbitrary rules of co-ordination. It is a story as to the way in which our society re-attaches commitments to their proper authors. Responsibility is not a judicial *auto-da-fe* but an influential narrative about who we are.

My claim is that this narrative – particularly as it emerged in the High Court of Australia during the heady days of the debate over the meaning of the word 'proximity' – is surprisingly illuminated by the perspectives and language of Levinas. I propose to introduce Levinas to a vast area of legal scholarship that is unlikely to be familiar with him, or he with it. And I wish to explore the relevance of his arguments at the concrete level of legal doctrine in a particular area of substantive law.[25] My question is a simple

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24 D Manderson, *Proximity, Levinas and the Soul of Law* (2006). Other aspects of this research are also in press: 'Emmanuel Levinas and the Philosophy of Negligence' (2006) 14 *Tort Law Review* 1; 'The Ethics of Proximity: An Essay for William Deane' (2005) 14 *Griffith Law Review;* 'Proximity – the Law of Ethics and the Ethics of Law' (2005) 28 *University of NSW Law Journal* 697.

25 Accordingly, this essay and the book of which it represents a part, embarks on a project quite different from that of previous scholars of Levinas. Of recent work drawing on Levinas and legal theory, see P Fitzpatrick, *Modernism and the Grounds of Law* (2001); S Motha and T Zartaloudis, 'Law, Ethics and the Utopian End of Human Rights' (2003) 12 *Social and Legal Studies* 243; S Motha, 'Mabo: Encountering the Epistemic Limit of the Recognition of 'Difference' (1998) 7 *Griffith Law Review* 79; C Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000); C Douzinas, 'Human Rights at the "End of History": Justice between the Symbolic and the Ethical' (1999) 4 *Angelaki: Journal of the Theoretical Humanities* 99; C Douzinas, 'Justice, Judgment and the Ethics of Alterity,' in K Economides (ed), *The Deontology of Law* (1997). The work of Diamantides is particularly detailed and has been the most careful attempt to relate Levinas and law to date: M Diamantides, *The Ethics of Suffering* (2000); 'Ethics in Law: Death Marks on a still life' (1995) 6 *Law and Critique* 209; 'The Ethical Obligation to Show Allegiance to the Un-knowable' in D Manderson (ed), *Courting Death: The Law of Mortality* (1999) 181; 'In the Company of Priests: Meaninglessness, Suffering and

one: how might Levinas change how we understand the law we have – here and now? Simple though it is to define, this task of translation or application is, of course, fraught with difficulty. The present essay attempts to explain issues in contemporary European philosophy to a jurisprudential audience which is by and large entirely unfamiliar with its style or ideas. Perhaps I am leading with my chin. But it seems to me that the ideas that Levinas raises are worthy of serious attention amongst jurisprudes. Levinas does not by any means fit the stereotype of the playful, ironic, ambiguous cultural tease that more traditional legal theorists might have in mind when the words 'French' and 'theorist' are brought together in a sentence. He is, indeed, a writer of exceptional rigor and exceptional ethical sincerity. For how long must the analytic and the continental traditions continue to act as if the other does not exist? For how much longer will the idea of dialogue between the two, in which each are capable of recognizing the concerns, understanding the commitments, and learning from each other be written off as either impossible or pointless? Here is Levinas, who for fifty years wrote about the nature of responsibility and the relationship of ethics to law, with particular reference to terms such as 'duty of care', 'neighbourhood', and 'proximity.' Is the time for a discourse around these questions and across these two traditions not yet nigh?

2 Psychopaths and sociopaths

For Levinas, the construction of the world according to the grammar of the first person presents us, like *zugswang* in chess,[26] with a duality—singular or plural, 'I' or 'we'—but no real choice. Either way, it is a logic which is posited on the primacy of being, the self's immediate presence to itself, a concept embedded in the very word in-dividual, a fundamental particle incapable of further division.

> For our logic rests on the indissoluble bond between the One and Being... Being qua being is for us monadic. Pluralism appears in Western philosophy only as a plurality of subjects that exist. ...The Plural, exterior to the existence of beings, is given as a number... Unity alone is ontologically privileged.[27]

Compassion in the Thoughts of Nietzsche and Levinas' (2003) 24 *Cardozo Law Review* 1275; 'The Subject May Have Disappeared But Its Suffering Remains' (2000) 11 *Law and Critique* 137.

26 *Zugswang* is a position in chess in which a player is obliged to make a move, but no such move can be made without disadvantage: it is game theory *aporia.*

27 Levinas, *Totality and Infinity*, above n 23, 274.

The self is philosophy's *grundnorm.* Being and thinking originate with the self, of which alone we have unmediated access, and from which all our knowledge must be derived. This closed circle in which everything is related to the unitary self or to the collective unity of those selves, Levinas characterizes as 'totality'. There are different ways to experience this totality, but the purport of the argument is that far from being polar opposites, *I* and *we* are two sides of the same coin, two expressions of the totalizing essentialism of the self as the necessary origin and bottom line to all commitment.[28] Our oscillation between these two poles has blinded us to other possibilities: possibilities without which our understanding of the law of negligence, the unbidden responsibility for the other, must be seriously incomplete.

If philosophy is an 'egology'[29]—just a way of talking about the self—what then does one do about our relationship with other people? The two answers would appear to be either 'to totalize the Other at an adequate distance,' and thus to institute a discourse of separation and difference (law as a firewall between selves) or 'to engulf the Other in a communion' and thus to introduce a discourse of union and sameness (law as the unification of selves).[30] Either others' difference condemns them to remain forever outside my comprehension, or their sameness reduces them to a factor in some collective equation. The former, for example, can be recognized in deontological liberalism, or the philosophy of rights, since it preserves the integrity of others just because their interests cannot be measured against mine. The latter may be recognized in teleological liberalism, or the philosophy of utilitarianism, since it preserves the equality of others just because their interests *can* be weighed up and summed across society as a whole.[31]

In either discourse, our ability to comprehend another person *as* other is, and must be, fatally compromised: since the totality of difference (conjugated in the first person singular) rejects the possibility of any comprehension *by* me and the totality of sameness (conjugated in the first person plural) rejects the possibility of their otherness *from* me. Once the self is taken as the natural starting point from which we build all our understanding of the world, it is inevitable that one will succumb to one or other of these 'psychoses'.

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28 J Libertson, *Proximity - Levinas, Blanchot, Bataille and Communication* (1982) 10-11.

29 S Hand, 'Introduction,' in E Levinas, *The Levinas Reader,* ed. S Hand (1989) 4.

30 Libertson, above n 28, 313.

31 See Sandel, above n 17; J Rawls, *A Theory of Justice* (1999); W Kymlicka, *Liberalism, Community, and Culture* (1991).

Let me re-explain these two kinds of totalities, these two blind spots to which egotism might lead, using the metaphor of psychopaths and sociopaths.[32] The psychopath knows of no interests beyond his own. He requires, erected between himself and others, an impermeable shield to protect him from intrusion and them from annihilation. This is the self as nothing but boundaries and edges; everyone outside the self is a stranger. Psychopathic thought is a philosophy of *I*, its law the delimitation of boundaries and rights. The essence of rights, after all, is to protect each of us from the others. It is also the law of contracts, since the undertaking of a responsibility involves the dissolution of boundaries between selves which *only* a freely given consent can justify. The self must *get* something in order to justify any sacrifice of its interests. Consideration must be received if consideration is to be shown. Altruism is inconceivable. Indeed, this is precisely Levinas' point as to the alienation to which autonomy leads. 'To be good is a deficit, waste and foolishness in a being... Ethics is not a moment of being; it is otherwise than being, the very possibility of the beyond.'[33]

Conversely, the sociopath imagines we are all just the same as him, and conceives therefore of no boundaries between his interests and those of others. He assumes, he presumes, he imposes, he indulges: since everybody outside the self is just like him, he naturally universalizes his preferences. Sociopathic thought is a philosophy of *we,* its law the law of the community and politics and of the unproblematic balancing of different interests across society as a whole. Note that on neither construction is there any room for the *neighbour:* he who is neither the sociopath's presumed friend nor the psychopath's presumed foe.

Yet our very experience of relationship is betrayed by this assumption that other people are defined merely in relation to us, as if every relationship would have to derive from and be justified by this self as a point of reference. 'You are so like me' and 'you are so unlike me' are both just ways of talking about me. The totality—or comprehensible whole—about which the psychopath and the sociopath reveal different aspects implies in different ways the same omission of the other, and therefore embodies at its core an impossibility. Levinas explains this paradox through the idea of desire. On the one hand, desire 'tends to bring the object 'close enough' to be engulfed' by the self, and by assimilation (or sameness) therefore destroys the sensation of incompletion which generated

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32 American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV*, (1994, 4th ed); C Bartol, *Criminal Behavior: A Psychosocial Approach* (1995, 4th ed); R F Hare, *Psychopathy: Theory and Research* (1970).

33 Levinas, 'God and Philosophy,' (1975) in E Levinas, *Collected Philosophical Papers* (trans) A Lingis (1987) 165.

the attraction in the first place. We cannot communicate with ourselves but only with something outside of us. This desire is like a parasite; it consumes the host that makes it possible. On the other hand, desire 'is the tendency to place the object at a distance adequate to phenomenality.' In other words, it places the desired on a pedestal so that we can study and observe and know and perhaps even adore but in any case objectify it. By this movement of segregation (or difference) we actually destroy the possibility of any connection between exterior and interior which might consummate the attraction. As Joseph Libertson concludes, 'thus totalization in *either* sense would be the destruction of communication (either too close or too far) and therefore the destruction of separation.'[34] Either way, then, there is 'a reduction of difference to negation and dispersion, and a reduction of proximity to communion.'[35]

The failure that I am trying to get at here stems from binomial thinking. Any explanation of the other person *y* is expressed as a function of *x*. But *y* is not a function of *x*, nor yet of not-*x*. Here is the problem of responsibility for Levinas: if you are a kind of me, what is to stop me (or society, or the state) from using you or sacrificing your interests in a grand plan which is *objectively* to our greater co-prosperity? But if you are utterly different from me, why should I be obliged to take your interests into account at all? Either way, I express you in my terms, in the coinage of an economy with which I am already familiar, and as a limit on the free expression of my self which must be justified in terms amenable to that self. In neither discourse can responsibility to another person be posited except if it is consented to by the self, the reference point for all freedom and the justification for all constraint. Consent may be treated as being fundamentally individual and explicit, as in the case of contract law, or social and implicit, as in the case of criminal or constitutional law, but in either case the priority of the self reduces responsibility to one species of *quid pro quo* or another.

It is of course quite circular to suggest that the reason I owe you a duty of care is because, if the positions were reversed, you would owe me a duty of care. An absence of duty would suffice to satisfy the conditions of perfect equality just as well. So what must be explained is why I would owe you a duty of care *prior* to conditions of equality; what needs to be explained is why I ought to owe you a duty of care quite apart from whether you would owe such a duty to me. There is an assymetry here that cannot be fully accounted for from within the logic of a system.[36] We can only explain it if we stand back from the assumption of the priority of the self which already taints our conclusions. 'Why does the other concern me? ...

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34 Libertson, above n 28, 180-81.

35 Ibid 313.

36 Levinas, *Totality and Infinity,* above n 23, 215.

Am I my brother's keeper? These questions have meaning only if one has already supposed that the ego is concerned only with itself, is only a concern for itself...'[37]

Totality is incapable of addressing our relations with others; its impoverished language can speak only by comparison with the sameness or difference of the already-known. Within the discourse of the self, the other is only capable of being 'its property, its booty, its prey or its victim';[38] no 'non-allergenic' encounter is possible and neither, argues Levinas, is justice.

> The totality of Being is flawless and all-encompassing; because it *incorporates* alterity within the empire of sameness, the Other is only other in a restricted sense. Totality has no outside; the subject receives nothing, learns nothing, that it does not or cannot possess or know.[39]

Levinas tries to move beyond this framework under the rubric 'infinity.'[40]

> In thinking infinity the I from the first *thinks more than it thinks.* Infinity does not enter into the *idea* of infinity, is not grasped; this idea is not a concept. The infinite is the radically, absolutely, other... It is experience in the sole radical sense of the term: a relationship with the exterior, with the other, without this exteriority being able to be integrated into the same...[41]

Clearly there are problems here. Even the word in-finite, though presented by Levinas as a positive experience of incommensurability or 'otherness' (and therefore the model for a non-appropriative relationship with specific others), in fact seems to be understood negatively. It means that which is *not* finite, that which surpasses understanding. Infinity, not yet a positive term, continues to be defined by its relationship of absolute difference from the knowable.[42]

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37 Levinas, *Otherwise than Being,* above n 20, 117.

38 H Caygill, *Levinas and the Political* (2001), 77.

39 C Davis, *Levinas: An Introduction* (1996), 40.

40 Ibid 27.

41 Levinas, 'Philosophy and the Idea of Infinity,' (1957) in Levinas, *Collected Philosophical Papers,* above n 33, 54.

42 R Bernasconi, 'The Trace of Levinas in Derrida,' in D Wood and R Bernasconi, *Derrida and Différance* (1988) 15.

In his well-known discussion – seen by some as a critique and by others as an elaboration[43] – Jacques Derrida makes a similar point with respect to Levinas' whole project. Wasn't Levinas a writer? -- if language is the reduction of meaning to the terms of a pre-existing system, the epitome of circularity and the failure of any genuine encounter with 'the other', how can he hope to 'explain' his meaning? Wasn't Levinas a philosopher? -- if philosophy is and always has been nothing but the analysis of this circular and egotistical system of thought (squealing *me me me* all the way home), how can he hope to explain these ideas from within its stranglehold? One might wonder in short if it is ever possible to stand outside a totality which on Levinas' own analysis is 'flawless and all-encompassing.' If 'totality has no outside; the subject receives nothing, learns nothing, that it does not or cannot possess or know,'[44] then exactly where does Levinas propose to stand?[45] Derrida at his harshest accuses Levinas of enacting a dream of 'pure thought of pure difference. We say the *dream* because it must vanish *at daybreak*, as soon as language awakens.'[46] According to Davis, 'the contortions through which [Levinas'] text passes, and much of the difficulty of *Totality and Infinity*, derive from the endeavour to avoid describing the encounter with the Other in terms that would implicitly restore primacy to the Same.'[47] Levinas' undoubted obscurity is part of his attempt to avoid the awkward trap he has set for himself.

Concerned as we might be with the circularity of Levinas at this point, it is absolutely imperative to insist that he on no account aimed to dismiss human subjectivity as a mere social construction, *à la* Foucault or (as is often thought) the postmodernists with their all-pervasive irony.[48]

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43 Ibid 15; compare P Atterton, 'Levinas and the Language of Peace: A Response to Derrida' (1992) 36 *Philosophy Today* 59.

44 Davis, above n 39, 40.

45 Bernasconi, 'The Trace of Levinas in Derrida,' in Wood and Bernasconi, above n 42, 15-16; J Derrida, 'Violence and Metaphysics,' in *Writing and Difference* (trans) A Bass (1978) 79-153.

46 Ibid 189.

47 Davis, above n 39, 45.

48 M Foucault, *The Order of Things: an Archaeology of the Human Sciences* (1970) 215. The lack of an Archimedean point is a problem which has beset many critics. Indeed, the comparison with skepticism formed a central part of Levinas' own response to this criticism in *Otherwise Than Being.* Levinas notes that the logical refutation of skeptical arguments does not herald their defeat but only shadow their return. The continual return of skepticism 'despite the refutation that put its thesis into contradiction with the conditions for any thesis would be pure nonsense if everything in time were recallable, that is, able to form a structure with the present': Levinas, *Otherwise than Being,* above n 20, 171; see generally 165-71. On the

Instead, Levinas aims to defend the human subject, the self, but without starting from a premise of selfishness.[49] He proposes a self which has been formed from the outside in, as it were, a 'denucleated' ego.[50] Such a trajectory is announced at the very beginning of *Totality and Infinity.*

> This book then does present itself as a defense of subjectivity, but it will apprehend the subjectivity not at the level of its purely egoist protestation against totality... but as founded in the idea of infinity.[51]

For Levinas, in short, our subjectivity and our unique individuality – which he takes very seriously - *derive* from our responsibility to others, and not the other way around.[52] The duty of care, in law and philosophy alike, would be the outcome of this attempt not to undermine but to reframe, in terms of an initial indebtedness to others, what it means to be human.

3 Sameness theory

The totality trap and its twin psychotic registers can be found throughout the literature of tort theory. The language of the self falls far short of explaining the very notion of responsibility to others that must lie at the heart of any satisfactory theory. Let us begin with the totalization proper to sameness, the sociopathic law of the *we* – distributive justice. It is described in Aristotle's *Nichomachean Ethics* as the proportional entitlement of persons to 'any distributions of honour or money or the other things that fall to be divided' according to some allocative criteria.[53] Justice consists in the logic of the criteria, whether it be 'to each according to his...' need, or merit, or birth, or rank, or effort;[54] and its proper application across society. Distributive justice implies therefore the evaluation of the claims of many people in terms of a norm against which they can all be adequately measured. It focuses on the best social outcomes in general, even at the cost of some sacrifice to individual entitlements. Thus income tax, a classic regime of distributive justice, may take more from the rich than the poor precisely in order to 'pattern' the allocation of social

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contrary, though, for Levinas the resilience of skepticism points to the possibility of truths existing at different levels and in different ways.

49 See R Cohen, *Ethics, Exegesis and Philosophy* (2001) 218; Caygill, above n 38, 109-24.

50 Levinas, *Otherwise Than Being,* above n 20, 64.

51 Levinas, *Totality and Infinity,* above n 23, 26.

52 This is of course a theme throughout the literature of and on Levinas. For one recent discussion, see P Maloney, 'Levinas, Substitution, and Transcendental Subjectivity' (1997) 30 *Man and World* 49.

53 Aristotle, *Nichomachean Ethics V* (1955) 111-12.

54 C Perelman, 'Equity and the Rule of Justice' in C Perelman, *Justice, Law and Argument: Essays on Moral and Legal Reasoning* (1980).

resources in a fashion that is deemed equitable.[55] Of necessity, therefore, any concept of distributive justice must be built upon the idea of an economy, in which it becomes possible to treat your interests and mine, and everyone's, as comparable in terms of the criteria that have been set up.

The law of torts invariably involves a loss, some damage which we attempt to measure in monetary terms. The question is—to whom should this loss be allocated? Should the loss stay where it falls? Should those who caused it be made to pay? Should the community as a whole bear the burden, through no-fault liability or insurance? In short, when will a loss which an injured party suffers be shifted and to whom? In one sense, the whole of tort law is of necessity a system of distributive justice. But only those interpretations qualify which treat the interests of the person who has suffered the loss as commensurable to and measurable against those of the rest of society (including the person or persons who occasioned the loss). On such a view, at least according to the more severe versions of utilitarianism, an injury to one person which made two people happy would (everything else being equal) make society better off and would be presumptively just. The equality of persons—indeed their intrinsic arithmetical *sameness*—arises, in the words of Jeremy Bentham, not from any absolute inviolability of persons but rather from a society in which 'each count for one, and none for more than one.'[56]

One rarely finds such extremism countenanced nowadays, but a similar calculus animates much of the economic analysis of law.[57] Given that utilitarianism is built upon the idea of an economy of persons, this is not surprising. For Ronald Coase, whose work has been of unparalleled importance to the law and economics movement, there is no such thing as a harm inflicted by one person on another. The problem is by its very nature 'reciprocal'.

> The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the

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55 For a virulent critique of the idea of 'patterned systems of justice', see Nozick, above n 7.

56 J Bentham, *An Introduction to the Principles of Morals and* (1982 [1832]) Chapter XVII Section 1; see also J S Mill, and J Bentham, *Utilitarianism and Other Sssays,* Alan Ryan (ed) (1987).

57 See G Postema, 'Introduction,' in G Postema (ed), *Philosophy and the Law of Torts* (2001) 4.

> more serious harm. I instanced in my previous article the case of a confectioner the noise and vibrations from whose machinery disturbed a doctor in his work. To avoid harming the doctor would inflict harm on the confectioner.[58]

Coase looks at the best *outcome* for society of a conflict. Our goal ought to be to minimize the costs of accidents and to increase the overall efficiency of society. If my invasion of your space is more efficient than avoiding it, so be it. As Coase argues,

> The reasoning employed by the courts in determining legal rights will often seem strange to an economist because many of the factors on which the decision turns are, to an economist, irrelevant. Because of this, situations which are, from an economic point of view, identical will be treated quite differently by the courts. The economic problem in all cases of harmful effects is how to maximise the value of production.[59]

The effect of this approach is to treat the doer and the sufferer of harm as essentially the same, and to evaluate the overall social costs on both parties. Richard Posner describes this as 'the social function of negligence' and argues that the moral indignation we experience when A carelessly injures B is merely an expression of an underlying social and economic judgment. It is not that A has caused harm to B that upsets us (since Coase would say that in economic terms, each must harm the other) but merely the fact that the harm could have been avoided at less cost—a fact we lay at the foot of the 'cheapest cost avoider,' whose behaviour we label careless. Thus, 'because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident... Indignation has its roots in efficiency...'[60] Crucially therefore, the economic point of view is about social welfare and, since we are all the same, the benefits of one person's behaviour can be weighed against the costs it imposes upon others. Such an approach necessarily appropriates the other as a mere factor in a calculus of overall utility. This commitment to the equation and balancing of interests is an essential ingredient of distributive justice and law and economics alike.

Neither is it only in the nether reaches of law and economics that one finds the assimilation of others into a collective – *we* – whose interests can be measured because of their essential arithmetic sameness (the other, says

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58 R Coase, 'The Problem of Social Cost' (1960) 1 *Journal of Law and Economics* 1, 2.

59 Ibid.

60 R Posner, 'A Theory of Negligence' (1972) 1 *Journal of Legal Studies* 29.

Levinas, is thus treated as 'close enough to be engulfed'). In *US v. Carroll Towing Co*,[61] which contains the classic formulation of negligence law in the US, Justice Learned Hand articulated the issues in just this way.

> The owner's duty, as in other similar situations, to provide against resulting injuries, is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. 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: i.e., whether B<PL.[62]

The implications of this are unequivocal. The inconvenience of my avoiding injury is placed on the same scales as your risk of harm; whether the risk is worth running will be calculated *as if we were the same person.*[63] The self and the other have thus been assimilated into elements of the same structure; our needs and interests are not identical but nevertheless they are to be treated as if they were commensurable. Justice weighs the scales blindfold, using the social language of reasonableness, and determines where the loss most efficaciously lies. As Jules Coleman puts it, 'if precaution costs are foregone opportunities to engage in an activity the injurer values, then the measure of those costs is given by the value of the activity to him. The degree of security the victim is entitled to is fixed by the evaluations of the injurer in violation of the criterion of fairness.'[64]

For Levinas this distributive approach, whether market or social, derived across individuals or collectives, omits an intrinsic truth of human relations. I am not merely an object in your calculations, a creature for your appropriation. In *Totality and Infinity* he treats this as merely the first phase of a coming to awareness. In this first phase, we experience ourselves through the infantile desire to consume something, make it part of ourselves, and convert it to our use. We enjoy our food, our playthings, our very breath, and in the process enjoy our mastery of the environment and our capacity to take something and subject it to our will. The sociopath even enjoys people in this way, as a mere object to be commodified.[65] The external world becomes absorbed by us and therefore ours. 'Thus in the satisfaction of need the alien-ness of the world *loses* its alterity; in satiety

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61 (1947) 159 F 2d 169 (2d Cir.)

62 Ibid 173 (Learned Hand J).

63 See also the discussion of *Vincent v Lake Erie* in R Epstein, 'A Theory of Strict Liability' (1974) 3 *Journal of Legal Studies* 151.

64 J Coleman, 'Tort Law and Tort Theory: Preliminary Reflections on Method' 183 in Postema, above n 57, 206.

65 Levinas, *Totality and Infinity*, above n 23, 111.

the real I sank my teeth into is assimilated, the forces that were in the other become *my* forces, become me.'[66] Representation adds a further dimension to the process of enjoyment, since language gives us a conceptual as well as an physical ownership of the things around us, and gives them a stability, an identity, a name: power.[67]

But there is necessarily a remainder to this process, an aspect of our relations which escapes capture or commodification. The return of things to their elements—of bodies to food, of beings to objects—fails in its work of appropriation. Thus, as Levinas reminds us most vividly in French, we say *du vent, de la terre, de la mer, du ciel, de l'air.*[68] We partake *of* the world and its bounty, but we cannot ever fully take it over. Representation, too, whether through language or images, offers me only 'a side of being while its whole depth remains undetermined.'[69] The imperfection of the process is inevitable. According to Levinas, the abyss between 'interiority'—our sense of an inner life—'and economy' – this relentless commodification – cannot be resolved from within the language of hunger, of enjoyment, of consumption or of distribution. Totality cannot explain what it means to *relate* to others in a society because, by reducing everything to a great calculation and a false unity, we find ourselves ever more alone: the work of consumption or absorption, by reducing everything to *I* or *we*, takes other people, who precisely cannot be consumed, distributed, calculated, or assimilated, away from me.[70]

What is left over from our relentless attempts to systematize the world, to treat it as one great differential equation, is alterity: the otherness of others.[71] This essential remainder Levinas epitomises through the experience of the human face, which 'differs from every represented content' of it.[72] The face cannot, in fact, be possessed or consumed.[73]

> The other person pushes back, as it were, does not allow himself to be consumed in the egoism of my enjoyment. The other resists consumption. The other

66 Ibid 129.
67 Ibid 139.
68 Ibid 132.
69 Ibid.
70 E Levinas, *Ethique et Infini: Dialogues avec Philippe Nemo* (1982) 53.
71 Compare Heidegger, whose philosophy is relentless in its pursuit of 'the thing in its thingness' and the being in its *Dasein* [or being-ness]: M Heidegger, 'The Origin of the Work of Art' in *Poetry, Language, Thought* (trans) A. Hofstadter (1971) 17-87, 19.
72 Levinas, *Totality and Infinity,* above n 23, 177.
73 Ibid 197.

> person is not capable of being known, but 'is encountered as a felt weight against me'.[74]

The face of the other. Murder attempts to negate the face; but even murder cannot obliterate resistance. Indeed, the whole rage to murder wells up from the realization that another being will in some sense *never* be entirely subject to my appropriation. This fury expresses itself as a final desperate effort to eliminate that resistance but even when it physically succeeds, it fails psychologically. Death, far from being the apotheosis of consumption and appropriation, only manifests its final impossibility.

> To kill is not to dominate but to annihilate; it is to renounce comprehension absolutely... This infinity, stronger than murder, already resists us in his face, is his face, is the primordial *expression*, is the first word: 'you shall not commit murder.' The infinite paralyses power by its infinite resistance to murder, which, firm and insurmountable, gleams in the face of the Other, in the total nudity of his defenceless eyes... There is here a relation not with a very great resistance but with something absolutely *other:* the resistance of what has no resistance—the ethical resistance.[75]

Murder, this futile effort at obliteration and the haunting that inevitably succeeds it, was not an abstract concept for Levinas. *Totality and Infinity* (1961) and *Otherwise Than Being* (1974) are haunted by the ashen memory of holocaust, which he fortuitously survived. They were written for the express purpose of undermining as powerfully as he could the ego-driven and pragmatic system-building which he believed helped to bring it about. Indeed, the one fragment of writing that dates from his years in a Nazi prisoner of war camp, addresses precisely this question: it is an elaboration on the theme of ghosts, of the mythical power that cannot be contained or captured even after the death of the body.[76] We can kill the other but at that very moment they escape their subjection once and for all and haunt our dreams forever.

A face, for Levinas, demonstrates for us the impossibility of totalization: no balancing of interests, no accountant's ledger of pros and cons, no policeman's identikit of objective features, could ever succeed in summing it up. It marks the insufficiency of accountability. Most importantly for law, it also marks the emergence of responsibility. The concept of responsibility is incoherent without some distance between me and you. We are not the same as each other, and we are *not* absorbed into

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74 A Lingis, 'Translator's Introduction' in Levinas, *Otherwise than Being,* above n 20, (i).

75 Levinas, *Totality and Infinity,* above n 23, 198-9.

76 Caygill, above n 38, 56-61.

some collective utility. And this is just what makes responsibility possible, since otherwise I would be responsible only for me or for us. But responsibility implies a *response* to you, at the very point at which and only insofar as our needs actually differ. There is no responsibility without 'a distance more precious than contact, a non-possession more precious than possession, a hunger that nourishes itself not with bread but with hunger itself.'[77] Our respect for this distance, not its elimination, allows us to be responsible 'for the other.'[78] There can be no responsibility without such a divergence between us, without a conflict of interests which demands from me some small or large sacrifice.

If that divergence is merely expressed as two differing but mutually measurable interests within a greater unity that declares itself entitled to arbitrate between them, as theories of distributive justice postulate, then the distinction between us has been eviscerated with a mere sleight of hand. Distributive justice is a theory of the totality because it purports to *solve* the problem of difference, and thus to *dissolve* it. Any theory which reduces you and I to like terms in an algebra, building on the abstract equivalence and convertibility of our interests, cannot recognise the prime ethical movement of negligence: towards responsibility, that is, towards and in recognition of the material and embodied otherness of the other.

4 Difference theory

The intuition expressed in the previous section is intrinsic to the law of negligence. Negligence has always looked to the actions of individuals and sought thereby not just to provide compensation or to maximize welfare but to attribute responsibility.

Nevertheless, under the influence of orthodox legal theory, common law courts in recent years have striven to emphasize that the terms and expectations of that relationship will be determined by the parties' own choices and understandings. Responsibility is, to adopt a frequent turn of phrase, 'assumed' – meaning willingly accepted – by the parties themselves.[79] If anything, therefore, the courts have turned away from a notion of responsibility imposed by society to one grounded in free will and personal choice. So we have only moved from sociopaths to psychopaths. It is not *we* the community who determine what will constitute the ambit of my obligations, but *I* myself who decides.

Let us turn then to the totalization proper to difference, the law of the *I* -- corrective justice. It typically proceeds from a principle of autonomy

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77 Levinas, *Totality and Infinity,* above n 23, 183.

78 Levinas, *The Levinas Reader,* above n 29, 90.

79 *Geyer v Downs* (1977) 138 CLR 91.

according to which human beings are first and foremost independent and 'fully accountable choosing agents.'[80] The preservation of this abstract independence is said to be the goal of corrective justice. As Aristotle explains it in the *Nichomachean Ethics,* it requires the rectification or annulment of any wrongful gains I have secured at the expense of your independence, and of any wrongful losses I have imposed upon that independence.[81]

Corrective justice therefore resists the subjection of the individual to any communal good or social interests. If I damage your property in an accident, it makes no difference whether you or I can best afford to absorb the cost. My intrusion on your autonomy demands rectification regardless of our substantive positions, and regardless of its impact on general welfare. In this sense then, it respects and preserves a space for the unique face of the other person: there is no calculus here, no weighing up of interests. This commitment to the value of autonomy has attracted an impressive range of thinkers to it. But the argument for corrective justice stems from the right to independence of the self, and not the needs or vulnerability of the other person. It is fundamentally *my* autonomy which is protected by the principles of corrective justice: yours is what I give up in exchange for it.

The key question, however, remains: for what are we responsible? If we were responsible for something, then we would be wrong not to do it. But answering this question, the scholars of corrective justice, Epstein and Coleman, Weinrib and Benson, despite their differences, all share certain assumptions which constrain the answers they are prepared to offer. The themes of autonomy and self-hood, the totality proper to *I,* dominate their register. If the self is defined in terms of its utter individuation from all other selves, and in terms of its 'free will' to act entirely in accordance with its wishes, one might wonder how we came to owe any responsibility – a burden on our freedom – to any other person at all.

The answer, according to this approach, is twofold. In the first place, an egoism and a symmetry governs this understanding. Responsibility flows from the self to the other only to the extent that I have acted upon that other person. There is no inevitability of interaction or relationship; responsibility emerges only when I have by word or deed *brought* myself into contact with another. Silence or inaction cannot, without more, generate responsibility.

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80 P Benson, 'The Basis of Corrective Justice and its Relation to Distributive Justice' (1992) 77 *Iowa Law Review* 515, 549.

81 Aristotle, above n 53, 111; and see also the helpful elucidation of the principle in J Coleman, 'Moral Theories of Torts: Their Scope and Limits: Part II' (1983) 2 *Law and Philosophy* 5, 6-7.

Secondly, we may expand this natural 'force field' of responsibility beyond the mere limits of bodily integrity, if and only if we choose to do so. The great common law cases which expanded the concept of the duty of care from the 1960s on were dominated by just this understanding. Responsibility might, in the language of the time, be 'assumed.' An agreement by a bank to give specialist advice[82]; a school which opens its gates early to permit children to play in the grounds[83]; a government department which undertakes the management of delinquents or orphans[84]; a public authority which builds change rooms next to a swimming hole.[85] All these have by their consent or by their behaviour assumed a new and 'affirmative responsibility'—a duty to act. Fundamentally it is their free will which has placed these duties of care upon them. Choice brings one into relationship with others, and choice can likewise curtail it.

In fact, on this model, the so-called 'assumption' of responsibility assumes nothing: it is born of an act of individual will. Responsibility is undertaken by us, not imposed upon us. It is for that reason that 'rescue cases' have been so often considered outside the ambit of corrective justice.[86] I have no duty of care to save a drowning child, even if the rescue throws no burden or risk on me, because this would impose a responsibility in relation to an other which violates *my* autonomy when I have not violated theirs. Neither my actions nor my consent have brought about this relationship: accordingly, no principle of corrective justice could justify the violation of autonomy which responsibility imposes. What have *I* done that needs correcting? In what way has this demand, this relationship, become *mine?* In short, because all responsibility is understood to be a problem, a transgression on our autonomy rights, it must be positively justified.

Corrective justice, then, becomes in effect a species of implied contract: an agreement to take care constructed in order to preserve our agency and extended by the exercise of that agency. So much is explicit in a writer like Richard Posner; tort law is necessary 'to overcome the adverse effects of transaction costs on the operation of free markets.'[87] So too Charles Fried, in an oft-cited passage, insists that the promise is the 'moral

82 *Hedley Byrne v Heller* [1964] AC 465.

83 *Geyer v Downs* (1977) 138 CLR 91.

84 *Dorset Yacht Co v The Home Office* [1970] AC 1004.

85 *Nagle v Rottnest Island Authority* (1993) 177 CLR 423.

86 M Menlowe and A Smith (eds), *The Duty to Rescue: The Jurisprudence of Aid* (1993).

87 R Posner, 'Epstein's Tort Theory: A Critique' (1979) 8 *Journal of Legal Studies* 457, 463.

basis... by which persons may impose upon themselves obligations *where none existed before.*'[88] Autonomy precedes responsibility.

Tony Honoré, in a series of articles recently republished, is relentless in his insistence that the purpose of responsibility is to give recognition to our sense of autonomy, choice, action, freedom, identity, promise and control. It is necessary for us to be responsible, he argues, because it is necessary for us to have a sense of 'people as the authors of their actions.'[89] Responsibility, he argues, comes with agency and with the ownership of actions. It is in fact an assertion of our freedom, our control, and our consent—an act of will. 'Consider the ways in which we take on responsibility [he writes]. Most of them involve assuming control of some situation or purporting to control it... our responsibility for what we do is connected with the control we have over our conduct... Responsibility [therefore] involves a combination of actual or assumed control and risk.'[90] Responsibility for our actions is a condition of being a self with independent control over events in the world. We 'take on' responsibility by an exercise in free will. 'It is outcomes'—the things we choose to do and, by our actions, for which we accept responsibility—'that in the long run make us what we are.'[91]

This argument is at one with the consistent approach taken to responsibility within much of analytic philosophy. Mackie dogmatically asserts the 'straight rule of responsibility: an agent is responsible for all and only his intentional actions.'[92] Michael Smith characterizes responsibility as deriving from 'rational self control.' Our control over our *selves* allows us to make choices to which the idea of responsibility holds us. Philip Pettit, too, provides an 'agent-centred' analysis. We hold persons responsible 'for a given action' because 'they could have done otherwise.' Again, then, the notion of choice by and agency of the self governs his approach. Stephen Perry likewise constructs the idea of responsibility as deriving from our ability to control our behaviour, and this in turn derives

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88 C Fried, 'The Artificial Reason of the Law or: What Lawyers Know' (1981) quoted in P Cane, *Responsibility in Law and Morality* (2002) 195. See also G Keating, 'Social Contract Concept of the Tort Law of Accidents' in Postema, above n 57, 30-33.

89 T Honoré, *Responsibility and Fault* (1999) 137.

90 Ibid 128-30.

91 Ibid 31.

92 J L Mackie, *Ethics: Inventing Right and Wrong* (1977) 208.

from 'our status as moral agents.' [93] Responsibility is imputed to and only to those acts we do and those states of affairs we bring about.[94]

This consistency is extraordinary since it makes so little sense of the legal approach to responsibility, at least. As Peter Cane points out, with considerable force, 'responsibility in civil law is always responsibility *to* someone... In civil law, the nature and quality of relevant outcomes and their impact on the victim are at least as important as, and often more important than, the nature and quality of the conduct that produced the outcome.'[95] Cane's latest work develops this point at greater length. As he points out, the idea of vicarious liability—of the responsibility, for example, of an employer for the negligent acts of his or her employees in circumstances in which it we cannot easily describe the employer as having intended in any sense to bring about the action *at all*—would make little sense were 'the rule of responsibility' really so straight.[96] More fundamentally, the very notion of a duty of care is personal and relational. Even before we are responsible *for* our actions, we are responsible *to* certain people because of their relationship with us. In negligence law, this is the first and foundational step of the analysis of responsibility. One asks the question 'to whom am I responsible?' before one asks 'what have I done?' Duty, as Justice Benjamin Cardozo reminded us so eloquently in the celebrated case of *Palsgraf v. Long Island,* is a term of *relation* not a function of intention.[97]

Faced by an orthodox tradition that makes two assertions -- that responsibility is inherent in what it means to be human, and that what it means to be human is defined by agency – Cane rejects both. Responsibility, he concludes, is not a 'natural fact' but a 'heterogeneous context-specific practice'.[98] 'All moral and legal personality and

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93 M Smith, 'Responsibility and Self Control' in P Cane and J Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (2001) 1.

94 S Perry, 'Responsibility for Outcomes, Risk, and the Law of Torts' in Postema, above n 57, 72-4.

95 P Cane, 'Responsibility and Fault: A Relational and Functional Approach to Responsibility' in Postema, above n 57, 104.

96 According to at least some theories, vicarious *liability* is not a theory of responsibility at all. On such an analysis, there is a compensatory and structural reason for such rules, but no normative principle is at stake. This line of thinking strikes me as failing to capture our thinking on this question. A failure to acknowledge vicarious liability displays surely an ethical shallowness and not really a legal misunderstanding.

97 [1928] 248 NY 339.

98 Cane, above n 88, 23, 25.

responsibility is human artefact,' he says, and law is simply evidence for one contingent form of that artefact.[99]

At this point it becomes possible to sever the two propositions at the heart of the 'agent-oriented' paradigm we have been considering. One—as against Cane, I maintain that our understanding of responsibility *does* derive from what it means to be a human subject. In this sense, responsibility is by no means a contingent 'artefact'. Legal structures give expression to more than themselves: they are sketches of an essential ethical principle. But—two—it is a mistake to assume that the essence of the human subject inheres in its agency and will. That is precisely the self-centred construction of the person outlined and critiqued in the first part of this essay. It is possible to believe that responsibility is intrinsically linked to human subjectivity without taking the second step, and linking it to the idea of choice and of free will. That is just what the idea of a responsibility *to* someone rather than for something highlights. *Responsibility is relational because personhood itself is relational:* responsibility is therefore not a consequence of our agency or will or choice, but prior to it. Levinas goes further. Responsibility does not derive from our personhood; on the contrary, it produces it.

5 The ontology of the wolf

One striking aspect of the debates over tort theory is the constant presentation of justice as if these were the only two choices possible. Corrective justice *or* distributive justice: the two Aristotelian options, which correspond to two psychoses, are presented as if that was all there could possibly be. The assumed and therefore invisible insistence on this dualism is quite remarkable.[100] The question is whether the completeness of this philosophy, its solidity, is really just its rigidity.[101] In their *a prioris* concerning the individual integrity and agency of the human being, and in their reduction of responsibility to the term by which this self is protected from interference, these are distinctions without a difference. *Zugzwang*

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99 Ibid 41.

100 For example, I Englard, *The Philosophy of Tort Law* (1993) 88; Postema, 'Introduction' in Postema, above n 57, 8; M Stone, 'The Significance of Doing and Suffering' in ibid, 131, 152-4; J Coleman, 'Tort Law and Tort Theory' in ibid, 208; P Vines, 'Fault, Responsibility and Negligence in the High Court' (2000) *Tort Law Review* 130, 136; J Coleman, 'The Practice of Corrective Justice' in D G Owen (ed), *Philosophical Foundations of Tort Law* (1995) 56.

101 Derrida makes the same point in juxtaposing the Heideggerian *'mit'* (which we might think of as cognate to distributive justice) and the Cartesian *'cogito'* (which we might think of as cognate to corrective justice): Derrida, 'Violence and Metaphysics', above n 45, 112.

again. The construction of human beings as radically different and separate from each other fails to capture something intrinsic to the person and to the very idea of personality. Just as we saw the totality proper to sameness fail to respect incommensurability in humans, the totality proper to difference fails to account for our capacity for connection.

If one *is* only 'in and for oneself' then responsibility must be explained in those terms.

> Am I my brother's keeper? These questions have meaning only if one has already supposed that the ego is concerned only with itself, is only a concern for itself. In this hypothesis it indeed remains incomprehensible that the absolute outside of me, the other, would concern me.[102]

In the next few paragraphs, I want to begin to show how Levinas points to the priority of the other before the self, not in a normative but in a conceptual or philosophical sense. Once we can accept that the self is not the bedrock and given term from which we must derive all our reasoning, then a notion of responsibility as founded on our duty to others becomes far less problematic to initiate. On the other hand, if the self exists prior to the limitations incurred by its responsibilities, and *as* autonomy and freedom, then responsibility itself—even the responsibility not to violate the freedom or integrity of others—becomes the consequence of a social contract which, whether out of convenience or necessity, acts to restrict our natural grasp.[103]

One response to this might be empirical. Actually existing human beings necessarily depend on others and in all cases need relationships. On a sociological and psychological level, this is undoubtedly true. Moreover, from the day of our birth (and even before), our personalities are constructed out of our relationships with others rather than emerging fully formed, parthenogenetically as it were. The self does not in fact exist before it has relationships but comes to fruition with and through them. Yet this is altogether too easy a response. The question remains as to the origin of those relationships. Do we acquire them out of the depths of our autonomy, or are they somehow intrinsic to what it means to be a self? This is a question of ontology, which is to say the nature or essence of things, and accordingly requires a more abstract answer. It matters because, as we have seen, the autarchy of the self at the moment determines the justification and limits the extent of the duty of care. What is the state of nature?—'the war of all against all' or 'the irreducible responsibility of the one for all'?[104]

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102 Levinas, *Otherwise than Being,* above n 20, 117.

103 Hobbes, above n 8; Rawls, above n 31.

104 Levinas, *Otherwise than Being,* above n 20, 159.

> It is extremely important to know if society, as currently constituted, is the result of a limitation of the principle that man is a wolf for man, or if on the contrary it results from a limitation of the principle that man is *for* man.[105]

Let us consider the logic of the wolf a little more closely. In the section that follows, I propose to work in layers through the unspoken assumptions about selfhood which the orthodox model of responsibility in tort theory takes for granted, and thus to show what might lie behind these assumptions. I want to argue that this model of an independent and autonomous self cannot be the 'original position.' So there must be something – some relationships – that stand before this supposedly primordial and autonomous existence. In doing this, my aim is to critique the ontological claims of the autarchic conception of self and responsibility from the inside, as it were. Instead, I will argue that 'selves' are relational through and through: not just as an empirical fact, but as a necessary theory; not just derivatively and contingently, but inherently. Such an insight into our relational interdependence independent of either social policy or autonomous choice, would, if it could be established, go a considerable way to offering us a new starting point as to how we think about those non-autonomous, non-social responsibilities that the duty of care articulates, and why it might be central to our humanity.

Peter Benson is, in the clearly expressed and categorical nature of his assumptions, a good example of the lupine logic that I wish to problematize. For Benson, we exist first and foremost as separate selves; our relationships come *after* our original 'self-relatedness,' and are experienced as conflict or choice. Responsibility derives from, imposes upon, and is limited by our essential 'moral independence.'[106] 'At this point in the analysis, subjects are represented as persons who are both identical to and separate from one another...'[107] So morality and independence are connected in Benson's reasoning, and the starting point of his conception of tort law.

This is the central claim of orthodox theories of our responsibility to others: that selfhood must be understood in terms of 'identical' and 'separate' persons. The nature of our responsibility to 'one another' stems from this initial assumption. But how do we know this? Benson's first assumption is that selves already exist. Not only do they exist, but they can be identified and distinguished from things which are not selves. Objects, for example, are forms of property. 'Being without the form of self-

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105 Levinas, above n 70, *Ethique et Infini*, 74-5.

106 Benson, above n 80, 557.

107 Ibid 564.

relatedness, [he writes] they can therefore, consistent with this standpoint, be used merely as means to something else.'[108]

How could this distinction ever have emanated from within the depths of a purely self-related being? How exactly can a self tell another self from a thing (indeed, the psychopath cannot)? Some *relationship* with others, then, is already implied even at the moment when Benson wants to demonstrate the primordial independence and purely self-relatedness of individuals. Some knowledge of the other, some insight into *their* being, must be found, and cannot be located from solely within the self.

Portraiture in Western art has long striven to capture the fact that a self is not an object like any other. A person has a depth to them, a secrecy, which is untrue of any still life. The successful portrait conveys something of the personality of the sitter, their internal makeup, which cannot be explained simply in terms of the sum of their objective features. Certainly we can reduce a person to a collection of likenesses – the shape of the face, the colour of the eyes or of the hair – but who would argue but that objectification misses the person altogether?[109] Leonardo Da Vinci's *Mona Lisa,* so clichéd now as to be virtually beyond redemption, is nevertheless the most famous portrait in the history of painting for a reason. Its greatness subsists in precisely this: that we see there depicted a woman with a secret, an inner world which Da Vinci has managed to convey to us without disclosure. Da Vinci has shown us *consciousness as such.* And the essence of consciousness is the mystery of the inner worlds of others which we sense but to which we can never gain access. The gaze of the Mona Lisa is an annoying little smile that tells us that there is something going on behind those eyes which we will never entirely fathom. In fact, Da Vinci's use of *sfumato* gives the painting itself a blurred and misty surface which further intensifies this sense of mystery. Even the five or six layers of plexiglass behind which the painting is now shrouded only serves to add to this sense of distance and opacity. In conveying consciousness, the face of *La Gioconda* dramatizes the separateness of other's being which no proximity, however close and transparent we get, can ever efface. In this, it is the very epitome of portraiture.

When Benson assumes that we just know that other selves are our *alter egos,* he assumes that we have already been touched by them in a way that cannot be defined by any inventory of objects or external features. Nothing on the surface would permit us to distinguish a subject from an object. The distinction requires already the recognition of a secret world. Relationship, then, is not something that is created between pre-existing

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108 Ibid.

109 Levinas, above n 69, *Ethique et Infini*, 79.

selves: it is the way in which the self first comes to *recognize* selfhood - in others and in itself.

Benson's second assumption is this: not only can other selves be identified and distinguished, but they can be *represented.* Representation requires language of some kind—a system of signs. And signification implies not just difference but sameness, or strictly speaking, relatedness. Language works by the sharing of a currency between people, a sharing which never identically reproduces its content.[110] Language without any sameness or precedent could not be communicated but would die, ephemerally, in an eternal present—it could not be *re*-presented. But language without an awareness of difference, which the self by itself cannot provide, could not express any content, concept or thing. So if the self already has, on this analysis, a representational capacity, it must already exist in relationship with others. In this primordial moment, it is far from alone.

The self represents, we might ask, but to whom? At the very least, to itself. That is what 'self-relatedness,' in Benson's terms, or to put it another way, consciousness, the very core of the self, means. But consciousness is always consciousness *of* something.[111] It involves an ability to think of oneself as apart, in a fashion that treats oneself as an object of contemplation, even if it is only one's future self or past memories that are distanced in this way. Even if one is only thinking 'here I am, thinking' – the worst kind of Cartesian bore – one has opened up a 'knot' in the fabric of being, a 'diremption' or breakage in which we must experience ourselves *discontinuously* if we are to experience ourselves at all. So it would be wrong to say that the 'other' appears as an object or a problem that intrudes upon our pre-established and autonomous consciousness. Some relationship with 'an other' is necessary for consciousness itself to have come into existence in the first place. An experience of the other gives birth to the self.

> The same has to do with the other before the other appears in any way *to* a consciousness. Consciousness is always correlative with a theme, a presented represented, a theme put before me, a being which is a phenomenon... [But] subjectivity is the other in the same... The other in the same determinative of subjectivity is the restlessness of the same disturbed by

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110 J Derrida, *Of Grammatology,* trans. Gayatri Spivak (1976); J Derrida, 'Différance' in *Margins of Philosophy* (trans) Alan Bass (1972); Derrida, 'Violence and Metaphysics', above n 45.

111 Levinas, above n 69, *Ethique et Infini*, 21

> the other [and] ...signifies an allegiance of the same to the other.[112]

We must have experienced some difference, some outside within us, or ourselves as part of that outside, in order to have any experience of ourselves at all. As Adriaan Peperzak, one of Levinas' most devoted interpreters, puts it, 'self-consciousness discovers itself as an original and irreducible relation to some 'other' it can neither absorb nor posit on its own.'[113]

Now a relationship which is not ethical would instantly either assimilate or exclude the other and therefore reduce it once more to sameness or irrelevance. We would all be either black holes from which not even light could escape; or balls of matter and anti-matter, destined to disintegrate on impact. Either way, such a self would be unable ever to move outside itself. That is why Levinas famously speaks of 'ethics as first philosophy.'[114] There can be no philosophy or knowledge – indeed no self-consciousness at all – without this recognition of and commitment to maintain a *relationship* with the *difference* of another. And another word for a relationship that respects difference is a responsibility.

Let us take one more step into the ontology of the wolf. The third assumption is that the self is capable of representation not only to itself but also, it would appear, to other selves. I speak to you and, for the theorists we have been looking at, our communicative agreement is the very foundation of any acceptance of responsibility. Such a theory, therefore, requires a discourse. Again, exactly how this could emerge from amongst a collection of autarchic selves, 'a sheer unity of self-consciousness... not yet the more complex 'we',' is not explained.[115] For this step requires not just language and self-hood in the abstract; it also requires a capacity to talk *to* each other. Language is not just the description of the world as object. Before I can speak to another person of anything at all, there must be an initial trust, a promise to offer something of myself and to listen to you in good faith. There is nothing straightforward in this, if one starts from the proposition that a self first exists for itself alone.

Indeed, Thomas Hobbes saw the problem very clearly. His social contract is founded on a law of nature:

> that men perform their covenants made; without which covenants are in vain, and but empty words; and the

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112 Levinas, above n 20, 25.

113 A Peperzak, 'The One for the Other: The Philosophy of Emmanuel Levinas' (1991) 24 *Man and the World* 427, 436.

114 A Peperzak, *Ethics as First Philosophy: The Significance of Emmanuel Levinas for Philosophy, Literature and Religion* (1995).

115 Benson, above n 80, 561.

> right of all men to all things remaining, we are still in the condition of war. And in this law of nature consisteth the fountain and original of justice.[116]

If we could not at least start from the supposition of the truth of what people say to us (and the default position is that every conversation is backed by sincerity), then no discourse would be possible.[117] This 'offering of the world... first opens the perspective of the meaningful.'[118]

Thus, before words can depict things or opinions of any kind, they must present a relationship of trust between people. And here we get to the point at which Levinas can be seen to diverge from these philosophies of autonomy or indeed, of community. For Levinas argues that this trust alone makes communication possible and hence I start off, even before my conscious self exists, with a responsibility to another person. This initial, unfounded, and unauthorized obligation makes discourse possible, prior to the world of meaning and communication, idea and agreement. Language is *ethical* before it is epistemological.[119] It is a gift before it is a commodity.[120]

In *Otherwise than Being,* the second of Levinas' two great books, Levinas develops this idea further through the contrast of *dire* and *dit,* 'saying' and 'said'. Prior to any propositional content, language as a collection of nouns, there is language as a verb, a 'saying' which cannot (by definition) be justified by reference to anything said. The saying stands promisor to the said, and has nothing but the person to back it up. Above all, there is nothing *equal* or *contractual* about the saying. I do not open myself up through speech in return for your promise to do likewise. That would already be in the realm of the 'said' and already presuppose the existence of a credible discourse. I must begin unilaterally, offering myself nakedly through language. What I say does not matter. The fact of saying is already a relationship. Communication and self-consciousness begin from a pledge *to* and not a contract *with* another. Language begins, like all trust, with inequality and asymmetry. It is not an agreement to be secured but a fine risk to be run, with no promise of a return.

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116 Hobbes, above n 8, Chapter XV.

117 I say 'default position' because of course there are situations in which we do not presume the integrity of the speaker: a play or a game for example. But this is understood to be exceptional and gains its strength precisely as an exception against a background of presumed honesty.

118 Levinas, *Totality and Infinity,* above n 23, 181.

119 Ibid 73.

120 Levinas, *Otherwise than Being,* above n 20, 96-7.

6 A third way?

This argument suggests a way of thinking about who we are and how we relate to others that is, I think, quite different from the modes of corrective or distributive justice, with their shared premises of autonomy, symmetry, and choice. Levinas insists on the logical and factual inadequacy of such premises. He says: this is just not what it means to be a human subject, and working from those premises human subjectivity – neither selfhood nor consciousness nor language nor philosophy nor law -- *could never have emerged.*

There is nothing perverse in such a view. It is part, I think, of our understanding of many things, including how we make friends, and how we experience responsibility in society and in the law. Responsibility too comes from our exposure to others and is not due to the unfettered exercise of our agency. It does not come from our intentions but prevails upon them. It is not an active but a passive experience. It has nothing to do with the symmetry of a promise, or the free will of an autonomous agent. Such is Levinas' view and it seems to me to capture something pervasive in our lives. Even in those circumstances in which we have agreed to a responsibility, surely it is the case that, by and large, the experience of responsibility always exceeds and surprises those expectations. Is not responsibility always a kind of surplus of experience over our intentions? This is what Levinas means in distinguishing the obligation to a neighbour from a contractual obligation, and emphasizing the closeness that just *happens* to us – which he calls proximity – over the closeness we choose to bring about – which we might term privity. For Levinas, human experience always commences with proximity not privity. Responsibility, he argues

> ... obliges beyond contracts; it comes to me from what is prior to my freedom... The sober coldness of Cain consists in conceiving responsibility as proceeding from freedom or in terms of a contract. But responsibility for another comes from what is prior to my freedom... It does not allow me to constitute myself into an I think, substantial like a stone, or like a heart of stone, existing in and for oneself...[121]

We see here the beginnings of an argument to suggest that the responsibility that comes from sheer proximity – personal, necessary, asymmetrical, and unbidden - is in fact the foundation stone without which the agreements that come from privity will not long stay intact. Alas, the warriors of the world, in the Middle East or Northern Ireland, the Balkans or Somalia, do not understand that law is initiated perilously. They wait for

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121 Levinas, 'God and Philosophy', above n 33, 167.

trust to be guaranteed before embarking on it; they wait for the conditions of discourse to be agreed upon before beginning. They think of speech as an exchange of propositions, a miraculous contract. They wait for 'a *sign* of good faith' – how often have we heard that in recent years? – when good faith is what makes signs possible. They will be waiting for a very long time. For without the risk that comes by first shaking hands, there can be no covenant made at all.

To sum up, Levinas wishes to defend a view of responsibility which provides what Coleman describes as 'agent-specific' reasons for care – and in this he is opposed to models of distributive justice (*we*). But these agent-specific reasons do not necessarily derive from the agent's prior choices and actions – and in this he is opposed to models of corrective justice (I).[122] Levinas suggests a kind of third way. This approach does not take as its base line the socially constructed or practical inequality of circumstances which distributive justice addresses, justifying its demands by virtue of a theory of collective will and the priority of community interests (*we*). Neither does it take as its base line the theoretical or absolute equality of beings which we have seen corrective justice posit, justifying its demands by virtue of a theory of individual will and the priority of autonomy interests (*I*). Where is the third person singular in all this, the grammatology of the other person (*he or she*)? On the contrary, responsibility is best understood as proceeding neither from society nor from our autonomy, but as preceding both of these possibilities.[123] Our responsibility is singular and personal, and not a social or communal construct. But unlike the humanism of rights, the 'humanism of the other man'[124] starts not from our autonomous choices but from the demands which the other, already connected to us from the moment of our consciousness, makes of us.

I think the implications of this starting point are profound and suggest that Levinas offers a radical new way to justify the common law of torts, in particular the duty of care, and a new set of resources by which to explore, elaborate upon and critique it. I cannot begin to elaborate these complexities here, and indeed it will take many writers and many years to do his work justice.[125] But a synopsis of a few of the ways in which

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122 J Coleman, 'The Practice of Corrective Justice' in Owen, above n 100, 55.

123 Again, we see the dichotomy everywhere; for example in Vines in which 'collective responsibility' and 'individual responsibility,' the latter understood as embodying a concept of free will and agency, are again presented as two complete and exhaustive alternatives.

124 Caygill, above n 38, 152.

125 For other aspects, see D Manderson, 'Emmanuel Levinas and the Philosophy of Negligence' (2006) 14 *Tort Law Review* 1; 'The Ethics of Proximity', above n 24; 'Proximity – the law of ethics', above n 24. See also

Levinas' understanding of the nature of responsibility differs from the above models is perhaps in order.

1. Responsibility is inherent in the first encounter between persons. The obligation to respond is intrinsically prior to any specific response and therefore, any pre-existing rules of limitation. 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.[126] Rather he attempts to demonstrate the conditions necessary for their appearance. And fundamental to those conditions are both an openness to discourse and an awareness that something within us and critical to our existence is not ours and not reducible to our interests.[127] It is not sameness or difference, which as we have already seen refer everything to *me,* but what Levinas sometimes calls 'non-indifference'[128] that founds the symbolic order and that finds expression in the duty of care.

2. Responsibility is the opposite of contract or choice: I do not agree to it, but *find* myself responsible. It is not a way of advancing the ego's purposes, but rather disturbs and challenges them.

> 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.[129]

This 'unexceptionable responsibility, preceding every free consent, every pact, every contract'[130] 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 against our will. Responsibility emerges *with* our selfhood, *with* relationship, *with* desire.[131]

3. Responsibility is not reciprocal.[132] It has nothing to do with social contracts or legal policies. It arises simply from the vulnerability with

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the forthcoming *Centennial Conference on Levinas and Law*: www.ccll.mcgill.ca.

126 I am thinking in particular of the work of G Rose: see 'New Political Theology' in G Rose, *The Broken Middle* (1992).

127 On this point, see particularly Levinas, *Otherwise than Being,* above n 20, 45-8.

128 For example, ibid 138-9; Libertson, above n 28, 190.

129 Levinas, *Otherwise than Being,* above n 20, 128.

130 Ibid.

131 Ibid 86.

132 Amongst other places, see ibid 85.

which the other approaches us, and which places a demand on us and in us. 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. He may be responsible for me too, but as Levinas curtly remarks, 'that's *his* business.'[133]

4. It follows that in the challenge with which responsibility confronts us, we are singled out. This means to be made individual—'the very subjectivity of the subject.' We are called to account—to respond—as unique and irreplaceable beings by someone who asks for or needs *our* help. There is no deferral. No one else will do. And the more that we can or could have made a difference to another's suffering – the more that we were singled out in this way – the greater our responsibility. 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.'[134] 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...[135]

If we are to understand responsibility in law as a necessity, even as a welcome and constitutive event, and not as a problem - as the law of torts surely does - then this is why. It is the torch-light held by another which, shining on us, allows us to come to see ourselves. So in stark opposition to the standard view, responsibility is not derived from our individuality. It is the cause of it. The demand of the other individualizes me. It is achieved for me, not by me. Responsibility is therefore not only the foundation of all relationships. It also constitutes our subjectivity.

5. The exercise of responsibility is not finite, not reducible to some codification or rule. By its very nature, it is incapable of being completely predicted in advance. It is always a specific and contextual experience, and this contextuality must also find its place in our law. I think the experience of charity brings home the point. When I meet a beggar on the street, there

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133 Levinas, above n 69, *Ethique et Infini*, 94.

134 Levinas, *Totality and Infinity,* above n 23, 195. The translation says 'the ethical relationship which subtends discourse...'. The use of the word 'subtends' in this context is obscure and is used in English only in specialized scientific contexts. The French *sous-tends* emphasizes this idea of holding under, like a support or a scaffold, but is closer to the root-word *soustenir*, meaning to sustain or provide sustenance, than the English: see ibid 213.

135 Levinas, *Otherwise than Being,* above n 20, 56.

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; no one (no prior rule nor even a government or a social service) can take my place at that very moment. Responsibility is singular and not general, because it comes from a fact and an experience and not as the offshoot of an idea.

Furthermore, since we are *constituted* through responsibility, which is external, challenging, and unpredictable, no formula of words, system or rules, could entirely determine the conditions of its future exercise. We always remain open to future and unknowable obligations of responsibility because this 'question mark' of duty is its nature. The necessarily *responsive* nature of responsibility is a problem for law, which after all seeks to write down or codify the 'full stop' of duty. But at the same time it 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 recognize that responsiveness and responsibility are connected. If the principles of responsibility are simply rules laid down in order to stabilize expectations and put our social interactions on a more predictable footing, then the constant reassessment that marks the common law jurisprudence of the duty of care can only be seen as a failure. But, as Levinas suggests, such fluidity and openness are in fact necessary to the very idea of responsibility.

6. Above all, Levinas' ethics offers a persuasive justification for the duty of care which is uniquely derived from its own structure, and which responds quite closely to the essential features of this duty both in law and in our everyday life: its imposing, unchosen, rewarding, protean, imprecise characteristics. And he gives us a reason to care about it and indeed to think its unique grammar so important to the emergence of our humanity as to be worthy of the title 'first law.' There could be no law – no contract, no constitution, no property, nothing - without our recognition of and commitment to maintain our personal responsibility to others. Perhaps this makes the structure and articulation of the duty of care within our legal structure something of a tautology, but that is surely better than treating it as an oxymoron.