Author's Response to the Commentators

'and it really *was* a kitten, after all.'

Desmond Manderson

'The proper function of a critic is to save the tale from the artist who created it... If it be really a work of art, it must contain the essential criticism of the morality to which it adheres.'
—D.H. Lawrence, *Studies in Classic American Literature* (1923)

I am grateful for the opportunity to contribute to this symposium and provide here a critical response to the book under review this year. I approached *Proximity, Levinas and the Soul of Law* with some enthusiasm, but I find on reflection that the author's tiger, when shaken vigorously, turns out to be a kitten, after all. Although we are promised a new way of thinking about tort theory, and a new development of Levinas' own understanding of the relationship between ethics and law, the book is always teetering on the precipice of its many stools. Manderson's discussion of contemporary approaches to tort theory is charmingly suggestive – distributive justice theories are sociopathic, he suggests, smothering all differences under an oppressive collective 'we', while corrective justice theories are psychopathic, treating the parthenogenic and individualistic 'I' as in need of constant protection against all the others who seek to invade and destroy it. The first assumes that 'us' is what matters, and the second that it is 'me'. A nice image, to be sure, but the analysis is too reductive to convince those who have made their life within these categories. So too, there are dense discussions of the unbridgeable opposition Levinas posits between 'ethics' and 'law', and of critics such as Derrida, Habermas, and Rose[1] who have taken him to task for a

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[1] Jurgen Habermas, *The Philosophical Discourse of Modernity*, trans. Frederick Lawrence (Cambridge, Massachusetts: MIT Press, 1991); Gillian Rose, *The Broken Middle: Out of Our Ancient Society* (London: Blackwells, 1992), Jacques Derrida, 'Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas', in *Writing and Difference,* trans. Alan Bass (London: Routledge, 1978), 97-192.

mystical utopianism which seems hopelessly unconnected to the day to day problems our institutions face. Yet here too Manderson's effort to show how the so-called 'trace' of ethics, 'of infinite responsibility' can nevertheless continue to contaminate the work of law will seem far too airy-fairy for the lawyers and far too down-n-dirty to the philosophers. No doubt to be attacked from both sides in this way is the peril that awaits all inter-disciplinary research but it seems in this case unusually acute. The previous commentaries collected in this symposium reflect, in different ways, this peril, though with the added novelty of suggesting that he is not philosophical enough for the lawyers – witness Stacey – and not legal enough for the philosophers either – witness Mills. Manderson might, perhaps, retort that to meet contrary criticisms on all sides like this is surely evidence that he has done something right. What he has achieved is a dialogue between legal and philosophical perspectives, not 'applying' the agent Levinas to the object law, but rather allowing each to modify our appreciation of the other.[2] But in the process I suspect he has created Frankenstein's monster, neither one thing nor the other.

In the end, the novelty of Manderson's vision of law lies in his insistence, a little naïvely, on the necessity, indeed the value of indeterminacy, the 'trace' or 'fresh judgment' that each new case must confront and must contribute to an on-going dialogue. But who amongst us, not just lawyers but citizens too, will be comforted by that? I wonder whether in legal terms this is really a viable position to take. And at the same time the novelty of his vision of ethics lies in his insistence with 'disarming moral sincerity'—a back-handed compliment if ever there was one[3]—on its pragmatic relevance to concrete legal problems. But in the process, the wildness of Levinas' ethical position and the difficulty of living by its lights, becomes domesticated.[4] Perhaps it is the very impossibility of applying Levinas to law that is its value, at least to the philosophers and critics amongst us. *Traduttore, traditore,* they say. Indeed, Manderson goes so far as to defend betrayal as a genre, arguing that without the inevitable failures of translation new knowledge and new understanding would never emerge. That is what traitors always say and in this case I suspect the author is a traitor not to one country but two. Whether that balances the injustice or merely doubles it will depend on your view of the loyalty owed to the genres he has mixed and matched here.

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2 See also Desmond Manderson, ed., *Essays on Levinas and Law: A Mosaic* (London & New York: Macmillan, 2008).

3 Simon Critchley, 'Anarchic Law: A review of *Proximity, Levinas, and the soul of law'* (2007) 1 *Law & Humanities* 248-55, 248.

4 See Stacey on the question of Levinas and Mills on the question of law, above; Jacques de Ville, 'Levinas on Law: A Derridean Reading of Manderson's *Proximity, Levinas, and the Soul of Law'* (2007) 16 *Griffith Law Review* 225-47 is particularly critical of Manderson's *taming* of the radicalism of Levinasian ethics.

From a strictly legal point of view, and what could be more appropriate to the pages of the Australian Journal of Legal Philosophy, Manderson shies away from the 'infinite' aspect of Levinasian responsibility, arguing that this infinity is 'infinitely deep, not infinitely wide'; that it does not mean that we are all responsible to everybody, but rather that to those with whom we are 'proximate', our responsibility can never be defined or cauterised in advance. Crowe is rightly sceptical of this interpretation which it seems to me is a bit of a sleight of hand on Manderson's part; and it must be said that it is not always easy to see where Levinas ends and Manderson's development and correction of him begins. Certainly by the last chapter, Manderson's triangulation of responsibility, judgment, and law owes more to the Derrida of 'Force of Law'[5] than to Levinas himself.

Even within the carefully constrained understanding of infinite responsibility he sets himself, I remain unsure whether Manderson has not finessed the problem. Chapter 5 is, from the legal scholar's point of view, central to the argument. To paraphrase Dr Johnson, while not every reader has wanted it shorter, no reader has ever wanted it longer. Here and in the chapters that follow, Manderson reconstructs the legal history of negligence in the High Court of Australia in the process defending, rather quixotically, its flirtation with proximity during the 1980s and 1990s. Yet in the end, as Mills observes, the exercise of establishing the duty of care is only a preliminary step. Once a responsibility has been established, the court must still determine if that responsibility has been breached by the defendant. On this point, Manderson makes a few brief remarks in the final chapter, but is otherwise silent. I cannot help wondering if, for all its symbolic value, by which the author appears to be immensely taken, the 'duty of care', broad or narrow, with or without proximity, is really only of minor importance as we go about the daily grind of acting responsibly. Manderson might even be accused – and this is for other researchers to examine and explore – of reinstating the same dichotomy between responsible 'ethics' and the calculus of law, that he wished to tear down. The duty issue is the realm of responsibility, our infinite relationship with the suffering other. But the breach issue seems here to remain the province of law, rule-bound and finite as ever.

What is most characteristic about Manderson's approach in all this, I think, is that he is less interested in the results that legal tribunals deliver to parties before them than in the language – the 'discourse', he would say – in which they are couched. For him, the legal discourse which has developed around the idea of responsibility to others has a force and a cultural significance quite apart from the actual decisions and consequences of individual cases. The attraction of Levinas, then, is that his work offers the

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

analysis of tort law a register that captures something of its distinct blend of uncertainty, judgment, and compassion. Law is emotional and not just logical; its stuttering uncertainty is a failure if what you want from law is efficiency, but a success if what you want from it is honesty. Above all, the common law offers us an ethical ideal of teaching in which law's instability, its constant reassessment and transformation of its own principles, allows us all, judges and citizens alike, to keep learning from a process that is never entirely settled or rigid.[6] I have some sympathy for this position which seems to me to bring together the very heart of both the common law and ethics. Both are exegetical practices and therefore dialogic and responsive, rather than monologic and declaratory.[7] And I say this despite law's increasingly anxious and, particularly in the case of the jurisprudence of negligence, hopelessly untenable self-image to the contrary.[8]

Nonetheless, I wonder whether the focus on discourse at the expense of results is, at best, only part of the story. Again, this is a question for future research. How important is the discourse of law in our culture? Do people really care very much what the High Court of Australia says about their duty to their fellow man? And what price do we pay for this sentimental commitment to law as a record of history and culture? Many scholars, of course, find the whole structure of negligence law, which almost arbitrarily chooses to compensate the victims of some accidents while ignoring others, illogical and unjust.[9] The more we understand the law of negligence as a means of providing necessary compensation to those who have been injured, and the more we think of insurance as a necessary means of financing that compensation, the less appropriate or even honest seems a tort system which focuses, in rhetoric though not in reality, on fault and individual responsibility. So we find the proliferation of no-fault schemes that provide us with the outcomes we want without disguising it in an out-moded rhetoric. Manderson tells the story of negligence as if these realities did not exist, or did not matter. Admittedly, he does attempt to incorporate even the fact of insurance into his picture of our responsibility to others. 'From a self-centred perspective, it might seem to be a way of protecting myself from the perils of a legal action...It is my insurance against the liability I may incur. But from this alternative perspective, insurance is instead a way of protecting others from

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6 Robert Gibbs, 'The Other Comes to Teach Me: A review of recent Levinas publications' (1991) 24 Man and World 219, 219-20.

7 Richard Cohen, *Ethics, Exegesis and Philosophy: Interpretation After Levinas* (Cambridge: Cambridge University Press, 2001), 225-245.

8 Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Oxford and Cambridge, MA: Basil Blackwell, 1986).

9 Patrick Atiyah, *Accidents, Compensation and the Law, 7th ed.*, ed. Peter Cane (Cambridge: Cambridge University Press, 2006) is rightly the classic in the field.

the perils of my carelessness...and it is my responsibility to provide it for them'. [10] Insurance, then, is not a way that defendants abrogate their responsibility but, dare I say it, how they ensure it. Overall, however, his approach is to focus on the duty of care as a social vision, without unduly heeding its actual operation. Yet surely we should not ignore a focus on law's outcomes merely to preserve a certain 'conversation' in which few participate. I think it not entirely unfair to note that despite Manderson's sincere attachment to the particularity and suffering of individual lives, the discourse about discourse that he privileges operates at quite a high level of abstraction.

I suppose that is the value of this odd book. It is not entirely a work of philosophy, and it is hardly a piece of law reform. It is instead, I think, an inter-disciplinary history of a moment – within ethics and within law. It is where Manderson envisages a connection between disparate histories, and disparate disciplines, and labours to bring them together, that I think he is at his most convincing. In the particular case of the duty of care, I do not think that the parallels in language and approach between Levinas and the jurisprudence of the High Court were coincidental. In that watershed year 1984, the Court was searching for resources to reconfigure an ethical coherence in law at a unique moment in its jurisprudential history. 1984 was the heyday of 'critical legal studies',[11] a brash outpouring by (mainly) US academics which insisted on the absolute impossibility of the coherence of rules or meaning within the law. Law: was power. In philosophy, aspects of the emerging field of post-structural theory (on which CLS drew clumsily) were also casting doubt on the legitimacy and interpretative stability of institutions of authority.[12] Power: was law. In society as a whole, the myth that judges do not 'make' law, the bread-and-butter of judicial mythology since the time of Coke and Blackstone, had been comprehensively debunked. This had gradually exposed courts around the world to an increasingly virulent criticism, in light of which judges were undoubtedly facing growing pressure

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10 Desmond Manderson, *Proximity, Levinas and the soul of law (*Montreal & Kingston: McGill University Press, 2006), chapter 4.

11 Robert Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57; Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass.: Harvard University Press, 1987); Allan Hutchinson, *Critical Legal Studies*; 'A Bibliography of Critical Legal Studies' (1984) 94 *Yale Law Journal* 461; Mark Tushnet, 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363; Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1978) 28 *Buffalo Law Review* 205.

12 Jacques Derrida, 'Before the Law' and 'The Law of Genre,' in *Acts of Literature,* ed. Derek Attridge (Routledge: New York, 1992), 181-220 and 221-252; Michel Foucault, *Power/Knowledge*: *selected interviews and other writings, 1972-1997,* ed. Colin Gordon (New York: Pantheon, 1980); *Discipline and Punish: The Birth of the Prison,* trans. Alan Sheridan (New York: Vintage Books, 1979).

from social critics to find new ways to justify and explain their craft. In Australia, the appointment of Lionel Murphy to the High Court was like a red rag to the bull of orthodox theories of judicial legitimacy. He had, more than any judge before him, espoused a critical approach to law. Yet he had personal reason to come to regret the demystification of the judiciary. 1984 was the very year the 'Murphy affair' broke, and there followed the shameless excoriation of a High Court judge, in the media, parliament, and through judicial proceedings.[13] Where now was the line between law and politics?

Assailed from without and derided from within, the Australian High Court in those days seems to have been on a quest to reclaim law's goodness – trying to explain to an increasingly sceptical world why law as an institution was worth caring about despite the fact that it could no longer be defended as simply the robotic 'application' of objective 'rules'. This was perhaps more than a little naïve, but faced with the cynicism and hostility that encircled it, understandable and even inspiring. Manderson's own quest to seek life and meaning in the law—not by stripping it back to its essentials but on the contrary, by ramifying its social, cultural, and historical resonances—though it is just as naïve and probably less inspiring, is equally understandable.

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13 See Tony Blackshield, Michael Coper, and Geroge Williams, eds., *The Oxford Companion to the High Court* (Melbourne: Oxford University Press, 2001), 486-89; Garry Sturgess, 'Murphy and the Media' and Tony Blackshield, 'The 'Murphy Affair'' in Jocelynne A. Scutt, ed., *Lionel Murphy: A Radical Judge* (1987), chs. 11 and 12.