Book Symposium

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Proximity, Levinas and the Soul of Law

Author's Introduction

Legal theory in wonderland

Desmond Manderson

Curioser and curioser

I am honoured to participate in this year's *Australian Journal of Legal Philosophy* book symposium particularly because both the venue and the participants seem to me to reflect the ambition of a dialogue between continental and mainstream perspectives on legal philosophy which lies at the heart of my *Proximity, Levinas and the Soul of Law.*[1] That book arose out of many things. It attempted to articulate my belief in the need to defend a broader, socially conscious and ethical understanding of the relationship between law and justice. It continued a long-standing interest in deconstruction. It was inspired by a genuine fondness for the Anglo-Australian common law's long and complex conversation on the nature of negligence. To read *Chester v Waverley, Donoghue v Stevenson* or *Gala v Preston*[2] is to enter into a most remarkable institutional memory which unites high points of principle and a powerful mirror on society and social change, with intensely human stories of people's lives. There are elements of tragedy here, and farce, and sometimes even redemption. Only the Shakespearean canon, I think,

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2 (1939) 62 C.L.R. 1; [1932] A.C. 562; (1991) 172 C.L.R. 243.

traverses as effectively as does the canon of negligence the high and the low, the general and the particular, to provide us with such powerful insights into our world.

This mix of narratives and ideas illuminates an immensely valuable side of the common law, which we would be the poorer without – its memory, its personality, its humanity. But this mixity likewise accounts for the deep irritation that many people, not least lawyers and law students, feel in the face of what seems like a congeries of instances gussied up in the borrowed garb of principle. The yearning for rules and structure seems utterly dashed here, and leaves many legal scholars frustrated when they try and pin the quicksilver law down and scathing with contempt when they cannot. It seems to me that the need for personality and humanity led the High Court of Australia to elaborate the concept of proximity in the 1980s and 1990s, while the yearning for structure and clarity then led them to beat a hasty retreat. One of the main things I wanted to do was to make sense of this history and to reflect on this paradox.

Above all, *Proximity, Levinas* arose out of two parallel frustrations. I was frustrated that mainstream legal philosophy continued to be driven almost entirely by analytic and/or doctrinal work. Almost no effort has been made to make sense of the enormous body of continental philosophy which has over the past twenty years (and indeed long before) been thinking very deeply about law. The work of Foucault and Derrida, Ricoeur, Agamben and Levinas, not to mention their legal commentators and interpreters including Valverde, Fitzpatrick and Hunt, Critchley, Goodrich and Douzinas, Balkin and Rose, Dyzenhaus, Diamantides and others, quite explicitly tries to come to terms with core issues in the philosophy of law. The nature of rules, the problems of interpretation, the purpose of law, the character of sovereignty, the functions and forces of governance, the relationship between law and politics and justice and law, the limits of regulation, the relationship between responsibility, accountability, and obedience to law: all these issues interest these writers intensely and provide them with some of their most arresting insights. But their work has made little headway within the discourse of mainstream jurisprudence. Why, I wondered, was there no conversation taking place?

But I was equally frustrated that those working with materials from continental philosophy made so little effort to explain insights which to the great majority of legal scholars were counter-intuitive or obscure and were couched in a literary style which bordered on the impenetrable (and in many cases on the wrong side of it). 'The aporia of the undecidable', 'the madness of the decision', 'the state of exception', 'hospitality', 'discipline', 'governmentality', 'the hither side of being', and so forth. These ideas seem to me crucial to thinking about law in the 21st century, but I could detect no urgency in the effort to explain what was meant by them. Where was the

scholarly equivalent of an inter-faith dialogue? Of a multi-cultural jurisprudence? Of an inter-disciplinarity which appeals to – engages – debates with – diverse constituencies rather than simply alienating them?

Perhaps the answer is the fear of failure; in academic circles a rather strong motivator and inhibitor. To learn something new, to appreciate the virtues of another discourse, is always a challenge and a threat. And to attempt to explain to an outsider arcana that one has invested years in mastering might disclose only its poverty. On both sides, these risks are enormous, and I am aware that they compound each other. The effort to explain might–in fact necessarily *does*–quickly expose its weaknesses without doing justice to its strengths: the effort to simplify and to translate makes gaps and inconsistencies rudely apparent, while the persuasive power of the original comes from the nuances and the tradition that one has had to abandon. Not only the risks but the consequences of failure are heavy: one merely exacerbates the divide and the distrust between two very different ways of seeing the legal universe. Even from success, perhaps the best to be hoped for is to have sparked not a conversion but only curiosity.

Not ignorant of the risks and difficulties before me, not even reckless of them though perhaps negligent, I set out to write a book that would try to create that dialogue and bridge that gap. I chose the work of renowned philosopher of ethics Emmanuel Levinas, on the one hand, and the law of negligence on the other, because they seemed to me to speak to each others' concerns remarkably closely, despite the radical difference between their intellectual pedigrees. My goal was to explain as clearly as I could the relevance of Levinas' insights to lawyers and legal academics who might never before have come across him; and to explain the sophistication of the legal concerns and insights to continental theorists who might never before have given them a thought. I wanted to do this without betraying the language of either, and thus to bring Levinas' poetry and compassion to law and law's specificity and pragmatism to Levinas. I am sure, as the generous critics who are published in this collection amply demonstrate, that my arguments were not entirely convincing. Yet this symposium, its sponsorship by the Australian Society of Legal Philosophy and its publication in the august pages of the *AJLP,* suggests to me that they did not fail utterly. The three commentators gathered for this forum exemplify for me exactly the kind of cross-fertilization I despaired of ever witnessing: Helen Stacey, a mainstream legal theorist discusses whether my work adequately comes to grips with Levinas, Catherine Mills, a continental philosopher wonders whether my work adequately comes to grips with the law, and Jonathan Crowe, whose own work stands for exactly the dialogue between jurisprudential traditions that I am urging, nevertheless questions whether Levinas and law could ever communicate with each other at all. I don't suppose I have convinced anyone that my vision of law could ever be genuinely ethical, or my vision of ethics genuinely legal, but I am cheery

that a certain curiosity amongst such strange bedfellows has been sparked. Out of curiosity and only out of curiosity is any understanding born.

Law Through the Looking-Glass

Over the past hundred years, the law of negligence has transformed itself, and in the process transformed our sense of the obligations we owe to all those around us – local governments for the services they provide, banks and professionals for the advice they give, drivers on the road, doctors in the surgery, homeowners for their guests or visitors, and even for the trespassers who might drop in unannounced. Yet what is now compendiously described as 'the duty of care' is in some ways an unusual obligation. It is not the outcome of an agreement founded on self-interest, like a contract. It is not a duty owed to the community as a whole and acted on by the State, like criminal law. It describes a *personal* responsibility we owe to others which has been placed upon us without our consent. It is a kind of debt that each of us owes to others although we never consciously accrued it. Thus it raises in a distinctly personal way one of the oldest questions of law itself: 'Am I my brother's keeper?' What does it mean to be responsible? This is not a question that is easier to answer for us than for Cain. In *Proximity, Levinas and the Soul of Law* I defend a vision of responsibility in negligence which derives from what might be termed our literal response-ability: it implies a duty to respond to others stemming not from our abstract sameness to others, but rather from our particular difference from them. Responsibility is not a *quid pro quo* — it is asymmetrical, a duty to pay attention to others just in so far as their interests diverge from our own. The duty of care emerges not because we have a will (which the law of contract respects) or a body (which the criminal law protects) but because we have a soul.

My starting point for this argument was a sense that the common law and its legal theorists have always struggled to articulate and justify the notion of a duty of care. It received, of course, its paradigmatic expression in *Donoghue v. Stevenson.*[3] Yet the extent of Lord Atkin's 'neighbour principle' has never been entirely resolved. The law imposes a distinction between the moral and the legal. 'The law casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him', Justice Windeyer reminded us. 'A man who, while travelling along a highway, sees a fire starting on the adjacent land is not, as far as I am aware, under any common law duty to stop and try to put it out or to warn those whom it may harm'.[4] The common law of course emerged from the industrial revolution bearing the

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3 [1932] A.C. 562.

4 Hargrave v Goldman (1963) 110 CLR 40, 66-67 per Windeyer J.

imprint of individual rights, freedom, and contract.[5] The law of torts, imposing on individuals unchosen obligations to think of others, sits uneasily on this edifice. And there is another conceptual difficulty with the law of negligence. Integral to the common law's methodology is its case by case and backwards-looking methodology. Judge-made law responds to events and casts judgments on people's actions *post,* if not entirely *ad hoc.* So we may not even know our obligations before the law deems us to have failed to perform them.

Typically, then, the duty of care has been justified as either a kind of restriction on our individual freedom imposed by the State in order to protect our collective well-being, or as the articulation of a complex web of implicit agreements amongst us all: either as a multitude of social contracts or as an emanation of social power. Instead, I propose in this book to defend a completely different perspective in which the autonomy of individuals is questioned, and according to which responsibility is *by its very nature* unpredictable, unchosen, and asymmetrical. The law of negligence, particularly as articulated fitfully in the common law, would stand on this view not as an oddity but as a paradigm of the responsibility. My beacon in this endeavour has been Emmanuel Levinas (1906-1995), French philosopher and Jewish theologian, an immensely influential writer on ethics, to whose work my book is something of an introduction. His two main works, *Totality and Infinity* (1961) and *Otherwise Than Being, or Beyond Essence* (1971)[6] offer a reconstruction of human selfhood away from questions of identity and self-hood and towards an 'ethics of the other' (a phrase which has resonated throughout a huge range of later writers in philosophy, politics, and law). And while his writing is in equal parts poetic and obtuse, it repays the effort through a sustained meditation on the relationship of ethics, responsibility and law. Even more remarkably for my purposes Levinas' language uncannily echoes that of the duty of care. 'Perhaps because of current moral maxims in which the word *neighbour* occurs', he writes, 'we have ceased to be surprised by all that is involved in proximity and approach'.[7] Here then is a philosopher unknown to legal theory who nevertheless speaks the lingo of torts.

Ethics is central to Levinas' thought. By this he means a personal responsibility to another that is both involuntary and singular.[8] At least as

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5 Morton Horwitz, *The Transformation of American Law* (Cambridge: Harvard University Press, 1977).

6 Emmanuel Levinas, *Totality and Infinity,* trans. Alphonso Lingis (Pittsburgh: Duquesne University Press, 1969) [hereinafter TI]; Emmanuel Levinas, *Otherwise Than Being, or Beyond Essence,* trans. Alphonso Lingis Lingis (Pittsburgh: Duquesne University Press, 1968) [hereinafter OBBE].

7 Levinas, TI, ibid, 5.

8 Zygmunt Bauman, *Postmodern Ethics* (Oxford: Blackwell, 1993); Marinos Diamantides, *The Ethics of Suffering: Modern law, Philosophy and Medicine* (Dartmouth: Ashgate, 2000), 2 et seq.

opposed to the Kantian paradigm of morality as 'a system of rules',[9] ethics therefore speaks about inter-personal relationships and not about abstract principles.[10] At least as opposed to most understandings of rules and law, ethics insists on the necessity of our response to others, and the unique circumstance of each such response, rather than attempting to reduce such responses to standard instances and rules of general application applicable to all and capable of being entirely known in advance. Indeed, the point is that ethics constantly destabilizes and ruptures those rules and that knowledge.[11] Furthermore, ethics implies an unavoidable responsibility to another which, in one of his most famous phrases, Levinas exhorts as 'first philosophy':[12] by this he means that without some such initial 'hospitality'[13] or openness to another human being, neither language nor society nor philosophy could ever have got going. At least as opposed to many understandings of justice,[14] there is nothing logical or inevitable about such an openness; except that without it, we would not be here to talk to one another. We cannot *derive* ethics from universal first principles. Ethics *is* that first principle.

One of the key questions of *Proximity, Levinas and the Soul of Law* was therefore whether, and if so, how such an ethics – spontaneous, uncodifiable, and singular – could have any impact on the *law,* which seems to be just the opposite of these things. Throughout the book, I tried to defend the idea of responsibility offered by Levinas and show how it made sense of the central insights of the duty of care. First, 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. Secondly, responsibility is not reciprocal. It has nothing to do with the logic of social contracts or legal policies. It arises simply from the vulnerability with which the other approaches us, and which places a demand on us and in us,

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9 It is this understanding of ethics that governs John Caputo, *Against Ethics: Contributions to a Poetics of Obligation with Constant Reference to Deconstruction* (Bloomington: Indiana University Press, 1993). See Diane Moira Duncan, *The Pre-Text of Ethics: On Derrida and Levinas* (Peter Lang, 2001), 141.

10 Adriaan Peperzak, 'Emmanuel Levinas: Jewish Experience and Philosophy' (1983) 27 *Philosophy Today* 297, 302.

11 Robert Bernasconi, 'Deconstruction and the Possibility of Ethics', in J. Sallis, ed., *Deconstruction and Philosophy: The Texts of Jacques Derrida* (Chicago, University of Chicago Press, 1987), 131; Marinos Diamantides, 'Ethics in Law: Death Marks on a still life', (1995) 6 *Law and Critique* 209, 224-5.

12 Emmanuel Levinas, *Éthique comme philosophie première* (Paris: Rivages Poches, 1998).

13 Jacque Derrida and Anne Dufourmantelle, *Of Hospitality*, trans. Rachel Bowlby (Stanford, CA: Stanford University Press, 2000).

14 John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1999).

like a baby left on our door-step. In some sense then, this responsibility always remains incalculable and cannot be measured against any responsibilities that the other might owe to me or that I might owe to others. Thirdly, in the challenge with which responsibility confronts us, we are singled out. So in stark opposition to the standard view, responsibility is not the *outcome* of individuality. It is the cause of it. The demand of the other constitutes me as an individual. Finally, the exercise of responsibility is not finite. Like desire, which draws us towards others, responsibility deepens with practice and awareness. Since we are *constituted* through responsibility, 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 hangs over us.

One consequence of such a view is to reclaim tort law as the expression of a distinct philosophical world-view, and to emphasize its importance as foundational to our understanding of law itself. A more pragmatic consequence is to transform our responsibility for omissions and in particular in regards to a 'duty to rescue', from an anomaly into a core exemplification of the duty of care. But I wanted to go further than that. In order to push the limits of Levinas, and in order to push the limits of the law, the central chapters of the book offer a case study in the history of the discourse of the duty of care in the High Court of Australia between 1984 and 2000, during which time a mighty struggle took place between distinct conceptions of the nature of responsibility in the law. For Levinas was writing about duty and responsibility just as the law, too, was grappling with them anew.[15] His work, and its reception into English (*Otherwise Than Being* was first translated as late as 1981)suggests the inter-disciplinary importance of these questions. Meanwhile, the Australian jurisprudence on the duty of care offers a resource unparalleled in both the depth of its discourse and the scope of its reflections on the meaning of responsibility in law. These cases are richly imagined and powerfully argued. They offer an instructive and vigorous debate on the nature of law, responsibility and society which obsessed the Court for almost twenty years. What better body of work could there possibly be against which to explore Levinas' ideas and to test their actual relevance to the world of law?

Proximity is the key word that unites Levinas' explanation of the experience of ethics with the High Court's explanation of the duty of care. For Levinas, proximity is a closeness to others who can be approached but never reached. We are never exactly the same as another person, and it is this

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15 Hedley, Byrne & Co. Ltd v. Heller & Partners Ltd [1964] A.C. 465; Dorset Yacht Co. Ltd v. Home Office [1970] A.C. 1004; Anns v. London Borough of Merton [1978] A.C. 728; Jaensch v. Coffey (1984) 155 C.L.R 549; Sutherland Shire Council v. Heyman (1985) 157 C.L.R. 424; Caltex Oil (Australia) Pty Ltd v. The Dredge 'Willemstad' (1976) 136 C.L.R. 529.

difference and distance from others rather than any sameness to them which gives rise to our responsibility.

The relationship of proximity cannot be reduced to any modality of distance or geometrical contiguity, or to the simple 'representation' of a neighbour; it is already an assignation, an extremely urgent assignation—an obligation, anachronously prior to any commitment.[16]

Levinas means by proximity something fundamental to who we are and *why* we have a responsibility to others; something which furthermore cannot be reduced to logic or knowledge or rules. Proximity is an experience, emotional and bodily, and not a concept.[17] Incarnate in us all, its implications 'exceed the limits of ontology, of the human essence, and of the world'.[18]

In and after 1984, the Australian High Court was on the same track. Particularly in the influential judgments of Justice William Deane, the Court sought to give determinate content to the duty by reference to the concept of proximity.[19] The notion of proximity was a radical and controversial jurisprudential development that led to innovation after innovation in the Court's judgments. When I first read these judgments it seemed to me that the court was groping towards a new idea of the nature and the legitimacy of our ideas of responsibility. Then when I read Levinas many years later, I came to appreciate much more clearly what they might have wanted to say and why it mattered. The conjunction of these two discourses, in their own ways so uniquely positioned to reflect deeply on the essence of our responsibility to others, and the connections between the language they each used, seemed to me so remarkable as to demand a sustained analysis.

Proximity in law, seen as a way of describing those to whom we owe a duty has come in for trenchant criticism. Its vagueness and its irrelevance have alike been attacked.[20] Indeed, following the departure of Justice Deane from

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16 Levinas, OBBE, above n 6, 100-01.

17 See in particular ibid 63-97.

18 Emmanuel Levinas, 'Beyond Intentionality' in Alan Montefiore, ed., *Philosophy in France Today* (Cambridge: University Press, 1983), 112.

19 Jaensch v Coffey (1984) 155 C.L.R. 549; Sutherland Shire Council v Heyman (1985) 157 C.L.R. 424; Burnie Port Authority v General Jones Pty Ltd (1994) 179 C.L.R. 520.

20 See for example Michael McHugh, 'Neighbourhood, Proximity and Reliance', in Paul Finn, ed., *Essays on Torts* (Sydney: Law Book, 1989) 5-42; Kumaralingam Amirthalingam and Thomas Faunce, 'Patching up 'proximity': problems with the judicial creation of a new medical duty to rescue' (1997) 5 *Torts Law Journal* 27.

the bench, the concept rapidly declined in significance.[21] Since this Thermidor, and consequent upon several changes in personnel, the Court has sought to limit and even undermine its previous jurisprudence. It has done so in two ways: on the level of substance, by returning to a more limited and voluntaristic conception of responsibility; and on the level of method, by attempting to explicitly limit what is sometimes decried as 'judicial activism'. Proximity was seen as central to both these apparent problems *Proximity, Levinas and the Soul of Law* is in part a rearguard action which seeks to understand and defend the idea of proximity against these criticisms, and to explain why it might still matter despite the High Court's own dramatic disavowals.

Levinas sees proximity as describing ethic's *responsiveness* to the unique and changing circumstances in which responsibility comes to us rather than us choosing it. There is always an element of surprise to it; one might even say, a nervous shock. *Proximity, Levinas and the Soul of Law* tries to argue that far from being alien to the methodology of law (and the common law of negligence above all) this vision of ethics and responsibility is a fine articulation of it. What some would see as the problem of proximity's imprecision, its specificity, its openness to the future, and more broadly the problem of 'judicial law-making', I see on the contrary as law's greatest ethical strength. Ultimately, Levinas was interested in the very human paradox of a relationship that gives rise to responsibility that cannot be codified and yet must inevitably find expression in words (legal or otherwise) whose function it is to define and to conceptualise. In the period under review, the High Court of Australia struggled with and eventually failed to come to terms with the very same paradox, rejecting proximity just because it was 'a legal rule without specific content, resistant to precise definition and therefore inadequate as a tool…'.[22] Yet here Levinas points to the way in which the Court missed the point. With the help of Levinas we can begin to see, on the level of substance, the outline of a more expansive idea of responsibility; and on the level of method, that the charge of so-called activism misunderstands the very nature and role of ethical judgment in law. Furthermore, these two ideas are in fact integrally connected – what it is to be responsible and what it is to judge are really the same thing, and both require of us surprise, reflection, the questioning of established norms, an openness to change and revision.

Contrary to arguments which have been used both to attack the expansionist leanings of the Court and to defend them, it is *not* the case that judges are simply in the business of choosing between different policies – some more individualist and narrow in outlook, some more collectivist and

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21 Pyrenees Shire Council v Day; Eskimo Amber Pty Ltd v. Pyrenees Shire Council (1998) 192 C.L.R. 330 at 414 [238] per Kirby J.

22 Ibid per Kirby J.

broad – with nothing to go on but their own sense of social justice.[23] Courts do not or should not just choose policies because they lead to outcomes they like or because they reflect a social ideology they happen to like. In *Proximity, Levinas and the Soul of Law* I argue that an expansive, organic, and self-questioning approach to the process of judgment is simply a better understanding of how law really works. I argue that the court's focus on vulnerability, asymmetry, and unpredictability is simply a better understanding of what responsibility really means. And finally I argue that there is a necessary connection between the true nature of law and the true nature of responsibility. Proximity embodies a kind of openness because law is inevitably open-textured; because responsibility is itself necessarily open; and because law must itself be responsible if it is to instruct the community in what responsibility means.

Proximity, like ethics, is no doubt always 'asking for trouble': it is a question mark and never a full stop. That's the point. In keeping the jurisprudence of negligence off balance, proximity ensures that our law keeps moving. Proximity was, within the law of negligence, a structural place-holder for a kind of permanent revolution in the law, and a refusal to be satisfied with the present order. It institutionalizes a constant doubt and questioning that makes justice possible and judgment sincere.[24] The High Court's endless struggle with the doctrinal uncertainties of the duty of care exposed it not only to a different way of thinking about responsibility, but a new way of thinking about its own practice too. Perhaps, just like academics, they shrank away from the implications of this because they too suffer from a fear of failure.

In the broadest sense, my aim in *Proximity, Levinas and the Soul of Law* was to invite lawyers, judges, ethicists and writers *all* to 'ask for trouble' and start talking, as Levinas would put it, 'otherwise'. Too much scholarship operates in well-worn runnels. Do not believe anyone who tells you that law is law and philosophy is philosophy (or, for that matter, that art is art, or literature is literature, or rhetoric is rhetoric) and never the twain shall meet. All law embodies, reflects, constitutes, inaugurates, and participates in philosophy (just as it does art, literature, rhetoric, and so on) – the question is which, and why, and what do we do about it. Finally, then, *Proximity, Levinas,*

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23 Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart 2002); Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in P. Cane & J. Stapleton, eds., *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford: Oxford University Press 1998); Prue Vines, 'Fault, Responsibility and Negligence in the High Court' (2000) *Tort Law Review* 130.

24 William Paul Simmons, 'The Third' (1999) 25 *Philosophy and Social Criticism* 83, 99.

and the Soul of Law stands as an exercise in and a plea for the importance of inter-disciplinary scholarship.

In order to advance this inter-disciplinary conversation I offer a new theory to the common law and a new case study to ethics, and to critique each by the application of the other. Ultimately I wish to defend proximity, not privity, as the ethical principle of the law: a relationship built on a pledge *to* and not a contract *with* the other.[25] Ethics, of course, is not simply law, either in theory or practice. But justice and law surely *proceed* from the ethical relation found in proximity.[26]

It is not without importance to know if the egalitarian and just State in which man is fulfilled... proceeds from a war of all against all, or from the irreducible responsibility of the one for all, and if it can do without friendship and faces.[27]

This is not (as one of the commentators collected in this symposium I think reads it) Levinas being ambivalent. On the contrary, Levinas is telling us that our myths of origin really matter. And from that of Hobbes, whose story of the origin of law has enormously influenced our understanding of the State and our social relationships with each other, Levinas demurs. Without the sense of responsibility which awoke us to being, as if from a breathless unconscious, how could we ever have begun to communicate at all? Responsibility establishes both a sense of self and a sense of relationship, and it is these in turn which create the very *possibility* of agreement, and law, and justice. Thus the personal pledge on which negligence insists is not some afterthought, some invention of the State. Rather, as Sarah Roberts writes, 'my relationship with the other in proximity gives meaning to my relationship to all others as 'citizens'... It is the face-to-face encounter with the other which is the moving force, demanding political justice'.[28] If that is the case, then the law of negligence is not only the soul of law, but its foundation.

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25 See Richard Cohen, *Ethics, Exegesis and Philosophy: Interpretation After Levinas* (Cambridge: Cambridge University Press, 2001), 224.

26 'Justice must be informed by proximity; that is to say, the equality and symmetry of the relations between citizens must be interrupted by the inequality and asymmetry of the ethical relation. There must be a certain creative antagonism between ethics and politics': Simon Critchley, *The Ethics of Deconstruction, 2nd ed.* (Edinburgh: Edinburgh University Press, 1999), 233.

27 Levinas, OBBE, above n 6, 159-60.

28 Sarah Roberts, 'Rethinking Justice: Levinas and Asymmetrical Responsibility,' (2000) 7 *Philosophy in the Contemporary World* 5, 9.