LEVINAS, ETHICS AND LAW

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The truest violence of law is not attributable to its errors, but to its essence. As a structure of meaning and a source of norms, framed through general and abstract standards, law has an especial, inevitable capacity to misrecognise ‘the other’ at the precise moment that the other is in most need of its justice. The significance of the other, upon which Levinas speaks with unparalleled philosophical authority, is instead personal, unique, singular, and fundamental in informing our understanding of ourselves, our desires and our duties. This book addresses law’s difficult task of responding meaningfully to the type of ethical provocation that Levinas argues the other delivers. It is also about how his theory of ethics can allow us to challenge our own conceptions of law and, more importantly, how the complex relation between law and the other helps us understand what makes us human.

First, it is worth asking why we would want to think about this connection between law and human subjectivity. For many, law might well appear merely as a system of rules and punishment. Such a definition, exemplified by the early English legal positivists, allows us to limit our relationship with law to the injunction not to disobey. Command theory, associated indelibly with Jeremy Bentham and John Austin, famously held that law ought to be defined as a code of behavioural imperatives issued by a legitimated authority and backed by the threat of punishment. It is little coincidence that the jurisprudence of nineteenth-century Britain, which was emerging as a global economic powerhouse, would pander to the idea that law only really addresses wrongdoers, and that the compliant, industrious majority can freely get along fine without worrying too much about what it has to say. A central premise – perhaps even a presumption – of this book is that the law does not simply regulate our behaviour, but also plays a fundamental role in determining our senses of ourselves. This book adopts a much wider notion of the ‘legal subject’
than the common one, described exemplarily by another totemic figure of orthodox jurisprudence, Hans Kelsen, as simply ‘he who is the subject of a legal obligation or of a right’. Beyond abstract entitlements and duties, beyond statute books and law reports, beyond the grandiose architecture of courts and Parliament, beyond prisons and parole officers, the law plays a fundamental role in building us as subjects, from bottom-up. The way we interpret the world and think of ourselves and others is always processed through thick legal filters. It is true to say that we are ‘legal subjects’, but not merely in the sense that we are ‘subjected’ to the laws of the state as Kelsen would have it, not merely in the way that we have an abstract existence as legal entities, but also in the way that our basic mode of being, living and thinking is conditioned by a legal matrix of norms and knowledge. In other words, we are not simply subjects that must abide by legal rules; we are subjectified, produced as subjects, by law. Such a claim of course relies upon a number of theoretical premises, which can be initially summed up neatly with reference to Drucilla Cornell, who wrote that, ‘law is embedded in ontology, in a shared social reality’. By referring, quite rightly, to ‘ontology’ Cornell evokes the way in which law does not simply teach codes of behaviour, to which we can take a critical and interpretive distance. As ontology, law authors our understanding of being itself, both our being as subjects, and the being of the world around us. Of course, law cannot subsume all aspects of subjectivity. There must be elements of our experience that exceed – even rupture – the understanding of existence that law grants to us. But what Levinas helps expose in this regard is not a plurality of ways of understanding being, but instead, that which eludes ontology altogether. That which is truly other. It is in this gap that we have the opportunity to inquire into our relation with the law more critically, thinking about the limits and failures of law in its governance of life, and how our subjectivity may be constructed in critique of or even resistance to the law. The extent to which our subjectivity reaches out beyond a legalised understanding of the world, or a ‘legal ontology’, and specifically in the way that this gesture operates in a response to radical otherness, is the structure of ethics that this book traces in the work of Levinas.

The Persistence of the Other

The backdrop of this book is a critical review of the current reception of Levinas’s ideas into legal and political theory. To provide some initial context, a few words can be said here by way of a brief biography. At the time of his death in 1995, Levinas had become renowned for his critical
interpretation of the presumptions of Western philosophy, and for his
defence of subjectivity, which, he argued, is constituted by an ‘ethical’,
unconditionally responsible relation to alterity. Having grown up in his
native Lithuania, a formative early episode in the development of these
ideas was his attendance of the University of Freiberg in 1928, where he
would study under Edmund Husserl. It was also here that he was intro-
duced to the work of Martin Heidegger, towards whom he showed great
enthusiasm up until the latter’s joining of the Nazi Party. Much of his
mature work came to resemble a critique of the priority of being reflected
in Heidegger’s philosophy and its legacy. Levinas would later spend
time during the war imprisoned in Fallingbostel labour camp, during
which he wrote what would eventually become published as Existence
and Existent, a stunningly poetic work that meditates, perhaps tellingly,
on themes such as solitude and the desire to transcend the enchain-
ment to oneself. But it was not until 1961 that he published his first
masterwork, Totality and Infinity: An Essay on Exteriority, a complex and
evocative meditation on all aspects of the impression made upon human
life by the encounter with alterity. After this book eventually received
wide attention (notably by that ubiquitous figure of the contemporary
French academy, Jacques Derrida), he published a further major work of
philosophy, the more focused and thematically bleaker Otherwise than
Being or Beyond Essence, in 1974. Since then, his ideas have been gradu-
ally received by many disciplines in addition to philosophy, including of
course law.

Yet Levinas himself wrote relatively little directly on the subject of law,
which might be especially surprising given the breadth of scope of some
of his works. Nevertheless, he has had notable influence in critical and
interdisciplinary legal studies, this sometimes being acknowledged with
a hint of scepticism. Whether an adoption of Levinasian ideas in legal
theory, if it really exists, might form part of a wider phenomenon dubbed
by Fred Alford as the ‘Levinas effect’, is open to debate. This, Alford says,
is ‘the ability of Levinas’s texts to say anything the reader wants to hear, so
that Levinas becomes a deconstructionist, postmodern, or protofeminist,
even the reconciler of postmodern ethics and rabbinic Judaism’. The
philosopher Simon Critchley similarly warned that Levinas’s explosive
influence on ‘religious studies and theology, sociology, aesthetics, literary,
and cultural theory, and even…political theory’ has led to a burgeoning of
‘exegesis, commentary, comparison with other thinkers, and, at its worst,
homage.’ This book therefore hopes to proceed in a way that is mindful
of the evident concerns about instrumentalising Levinas’s work, whilst at
the same time recognising the necessity of putting Levinas into dialogue with other critical apparatuses for understanding law.

Levinas’s work is not always easy to interpret, nor even, on occasion, to fully understand. Even at its most poetic it can be abstruse and intensely difficult to read, and slow to reward even the most tenacious. It often presumes, typically on an unspoken basis, a working knowledge of other continental thinkers. It can sometimes be a gruelling – and ultimately fruitless – effort to trace a linear analytic structure in his arguments (Otherwise than Being, in particular, is written in a dizzying pattern where concepts are frequently utilised before they are explained fully). Yet somehow, as evidenced by the ‘Levinas effect’, there is an enduring and widely felt sense that Levinas explicated something intuitive about our senses of ourselves and of our responsibility to others, our private identities and our relationship with authority.

Much of human endeavour is structured by an attempt to grasp and absorb. The post-Enlightenment dominance of the human as the emancipatory figure of rational enterprise ought to have guaranteed our sanity and our mutual protection. Instead, as we look back over the previous century (a century that Levinas saw almost in its entirety) we are left with abundant images of madness and death. A century whose pivot, at least for the West, was Auschwitz. It may well be the case that the resonance of Levinas’s work lies in the way he traces the very limits of our rationalist conquest, whilst avoiding the nihilist excesses of certain fervent postmodernisms. Whilst the letter of his philosophy is often decidedly abstract, a fair appreciation of Levinas’s intellectual oeuvre should not seek to isolate his ideas from the political context of his own life. It is little coincidence that his work would repeatedly return to the way that our peculiar relations with others offer a horizon of escape, of freedom from both solitude and authority. For all of our knowledge, our capacity to represent, to translate and assimilate, there is always a certain enigma about our emplacement with others that escapes the domain of the sciences. Within this enigma, certain practices that one might judge to be ‘mad’, persecutory obsessions, unconditional duties to strangers, the discontinuity of time, are found to be basic components of how to live.

Levinas’s work springs out of a critique of ontology, that is, the idea that to philosophise is to understand our relation with being. For Levinas, being expresses, or tends towards the expression of, totality. It deems to articulate everything. For Levinas, the encounter with the other person expresses something that escapes totality, something that is otherwise than being. This radical form of signification, which for Levinas is
pre-ontological, has the capacity to level a direct and singular provocation, an ethical challenge, to the subject that experiences it, one that calls into question the most basic elements of the subject’s ontological grasp on reality: its autonomy, its freedom. His work elucidates a schism between ontology and ethics, and as one can immediately anticipate, the challenge posed to law by Levinas’s work is as necessary as it is difficult. Laws are general and universal; legal judgment has a capacity to assert a factual knowledge of events and a juridical determination of their culpability. Yet law is always called upon to try to comprehend real, unique events: human encounters whose otherness has the power to slip through the law’s ontology. Whether the law assimilates otherness, or whether it responds ethically (indeed, whether it is even possible to respond ethically) is Levinas’s ultimate question for law, and is a question rooted in a wider concern for justice. The remainder of this chapter, whilst reserving substantial engagement with Levinas’s philosophy for the next, will explore a few thematic threads which allow us to frame the importance and difficulty of the question of the other for law.

**Ethics, Morality and Orthodox Jurisprudence**

It is fair, although simplistic, to say that Levinasian ethics are concerned with how we respond to those who are different to us. It is hopefully useful, therefore, to first indicate the way in which Levinas understood the nature of difference, and moreover how it is distinct from the sort of conceptual framework used in more familiar sources of legal and political philosophy. In order to do so, Levinas’s idiosyncratic approach to ethics will be contrasted briefly with the ways that Anglo-American theory tends to frame difference through plural moral outlooks.

Given that anyone who has already studied jurisprudence will be familiar, perhaps painfully so, with the debate between the legal positivist H. L. A. Hart and Lord Patrick Devlin in the late 1950s and 1960s, this is perhaps an appropriately recognisable place to start. In these theorists’ writings, morality is understood as a set of substantive values, typically those held by a social majority. The key question is what legitimacy the law has in enforcing such morals. The wider picture that is painted by this debate is between a positivist outlook that regards law as a formal system of legitimated rules, represented by Hart, and an attempted revival of the position that law must contain an intrinsic set of natural moral values, championed by Devlin. Taking a step back further still, one is presented with an overtly political debate. On the one hand, we find arguments in favour of the liberal state allowing for a plurality of changeable values to
be articulated and protected, and on the other, a much more conservative model of substantive morals being sustained via the machinery of governance.

As Devlin’s moral essentialism was accompanied by an indefensible objection to the legalisation of sex between men, it is of little surprise that the liberal side of this debate won. The central positions of Anglo-American jurisprudence are largely tied to the political philosophy of liberalism, positing law as a structure of common agreement which can regulate people’s own pursuits of their differing desires and values. But whilst for Hart the validity of law is not dependent upon its articulation of any particular moral outlook, there are two important ways in which values emerge in his theory. The first is that in order for law to function it must protect some fundamental values, such as the value of human life. The second is much more crucial however, and is revealed in the centrality of a natural right to equal freedom that Hart attributes to his conception of legality. Once this is accepted, Hart’s argument can proceed in broad adherence to the liberalism of John Stuart Mill: interference with this freedom must be justified to be legitimate, and the principle means of justification is to show that the interference is necessary to prevent harm. When the law encounters the other, it ought to allow the other sufficient freedom to realise itself within a pluralistic society, except where it poses some form of threat.

When posed alongside Devlin’s caricature of social conservatism, Hart’s position seems eminently reasonable. However, it fails to negotiate the problem that dogs any liberal theory of law, which is how one can posit a framework for the pluralism of values that is not itself predicated on a value at its origin. In order to facilitate a pluralistic diversity of interests, jurisprudence must inevitably give expression to a wider and determinate set of moral ideas. For example, the moral priority of the individual, the centrality of rights, and the function of the market as a means of structuring society are all implicit values reflected in the very foundation of liberal governance. The extent to which radically divergent alternative ideas about political community can be accommodated within such a framework is therefore inescapably limited. Furthermore, as will be covered towards the end of the book, by promoting a formalistic protection of plurality the substantive content of such principles has the effect of appearing apolitically normal and natural. Alternative conceptions of social life thereby risk contortion in the way they are interpreted.

Furthermore, Hart encounters difficulties when claiming that the authority of legal principles derives from a structure of legal reason-
ing, unfettered by the brutish power of the state. Hart famously posits the existence of a ‘rule of recognition’ capable of identifying valid law, which is necessary for the coherence of any modern legal system. As Peter Fitzpatrick has noted adeptly, by having to identify the apex of English law’s legitimacy as simply ‘whatever the Queen in parliament enacts as law’ Hart can resort to little more than legal faith when the conceptual integrity of parliamentary supremacy is interrogated. Whilst Hart’s jurisprudence attempts to disarm law by claiming that it is authorised by a coherent and acceptable internal logic, he is never able to fully depart from the nexus between legitimacy and sheer power. Once our understanding of the apparatus of sovereign power is renewed as the ultimate source of law’s authority, the problematic of how law recognises and responds to its other is redoubled in intensity and complexity.

Continuing with the theme of liberal theory’s approach to accommodating difference, Rawls’s A Theory of Justice, another iconic text of legal theory syllabi, encounters the same problem in a more pronounced manner. Rawls is interested in identifying the basic principles of a just legal system. The principles he identifies are a commitment to constitutional rights and distributive justice, which are arrived at by working through what mutually disinterested parties would choose if detached from their lived reality and forced to devise the social structure they would then enter. The power of Rawls’s theoretical position is in its neo-Kantian methodology, arguing that the specific rights of people and redistributive powers of the state result from an impartial position of rational consensus. Again, the task of liberal jurisprudence is to claim that its structures transcend matters of personal value, and provide a platform upon which we can all agreeably co-exist. Of course, the idea that a group of people who are not already committed to liberal principles would prioritise individualistic rights is problematic, and this criticism of Rawls is well documented. In his later work Political Liberalism, Rawls shifted the terms of his theory away from a moral position based on abstracted rationality, and towards an overtly political theory. The book opens by taking as granted the ‘fact of reasonable pluralism’, and poses the idea of society as ‘a system of fair cooperation and that its fair terms be reasonable to all to accept is part of its idea of reciprocity’. By relying on themes such as society’s overlapping consensus and practices of public reason, Rawls is interested in the ways his idea of justice can manifest in a fairly narrow, yet entirely conventional, political culture that presumes from the outset a foundation of social agreement. In a similar way, Ronald Dworkin’s jurisprudence pursues a liberalism rooted in a general entitlement to equal
concern and respect. He argues that there is a privileged mode of legal reasoning that extends beyond the technical application of discrete rules and into broader matters of principle, and which allows for the community to express itself in the assertion of law as a coherent, seamless whole. When Dworkin writes that a ‘community of principle accepts integrity’,¹⁴ he means that where a society orients itself around a mutually agreeable set of principles, it is necessary for them to be able to reason with that matrix of principles as an unbroken totality. By interpreting and reinterpreting that web of principles in real, lived scenarios, law achieves its legitimacy. Again, we encounter the problem of how the law can respond, meaningfully and ethically, to those others who lie outside the consensus of a social majority, and beyond the totality of principles upon which legal reasoning is predicated. In differing ways, each of these totemic figures of legal theory negotiates a tension within liberal theory, between the need for a platform upon which people can pursue differing moral convictions on the one hand, and the need for such a platform to be generally acceptable across society on the other. What each of them arrives at is a form of moderate moral pluralism, in which disparate conceptions of how we live our lives can be accommodated only so long as we all subscribe to roughly the same ideas about rights and justice. Not only do such outlooks manifestly fail to provide a framework in which deep difference, radical otherness, can be apprehended, they also relegate political differences to the level of mere personal preference.

The limitations of such approaches are identified quite succinctly when Chantal Mouffe, in her reading of Carl Schmitt, summarises that ‘every consensus is based on acts of exclusion’.¹⁵ Schmitt’s concern with liberalism was that it tends towards depoliticisation, by which differences are sublated into a political machinery incapable of negotiating genuine disparity.¹⁶ If politics concerns collective identity, any assertion of consensus operates to the exclusion of inevitable and irreducible social antagonism. This is readily evident in the tension between Rawls’s attempt to posit a purely rational idea of liberal justice, and his concession that this nevertheless presumes a politically partial set of preferences for freedom, the protection of the individual, and a reciprocal accommodation of ‘reasonable’ differences. Even despite this concession, the terrain of fundamental social disagreement, far from politicising the liberal society, is instead pushed aside by it. Such is the political ‘blind spot’ of liberal theory.¹⁷ Levinas’s insight in this area is, in the same vein, to illuminate the deep-set fragility of any such totalising claim to rational consensus. Whether Levinas must abandon or merely reconfigure the core tenets
of liberalism is a question taken up later. Certainly, he retained a commitment to the idea of the liberal state as a potential site through which the political risks of totality could be overcome. For conventional liberal theory, however, anything that exists outside of the terms of consensus has a tendency to take on a necessarily irrational, politically degenerate appearance, threatening the very terms upon which law and politics operate. As Michel Foucault has commented at length, this is the inevitable consequence of any regime of power that claims to be legitimated by the natural, rational (or indeed, ‘reasonable’) quality of its basic principles. In such instances, genuine otherness can resultantly be dismissed as outside the concern of the central field of politics. One only has to consider the way in which recent US and UK military excursions, as well as those governments’ simultaneous attacks on their populations’ civil rights, were regularly justified either in the archaic language of extreme morality (‘axis of evil’, and so on) or the apolitical terminology of public safety.

It is suggested that the liberal approach to responding to social differences, which tends to be framed within the language of moral pluralism, fails to engage with the ethical challenge of real alterity. Whilst being opposed to an overt moral essentialism that sees the other as an active threat to the ethical life of community, moral pluralism nevertheless only allows for a diversity of values to be accommodated so long as they are expressed within a shared structure of principles. Levinas’s concern with ethics transcends the debate over morality and law. His ethics are not a prescriptive code of moral behaviour, evocative of ‘medical ethics’ for instance. Nor are they a framework in which divergent moral opinions can be negotiated. Instead, his ethics concern the ways we respond and take responsibility for those who exceed our own universal viewpoint, and our own ontological way of comprehending the world around us. Levinas did not favour the idea that philosophy is rooted in a unifying conception of people’s being, which he felt had been a feature of Western philosophy since Parmenides. Instead, he would emphasise the irreducible gap between people’s being. The way in which we respond to this otherness, both in terms of appreciating the limits of cognition and knowledge, and the manner in which we interact with others, therefore becomes crucial. When we encounter someone that is different to us (in other words, any other person), the ethics of our response is not to purport to understand their difference, nor mount a weak pretence at pluralism by assimilating otherness into a shared platform for expressing differing personal preferences. Each inflicts a certain kind of ontological violence, whereby the other person’s otherness is incorporated into one’s own understanding of
the world. The ethical challenge that Levinas describes is to endure a difficult process where one’s own familiar understanding is undone. Ethical agency in Levinas is therefore unlike that of the moral subject in Kant, which is predicated on making the autonomous choice that stands as if it were universal law. Rather, Levinas’s ethics are based on the fracturing of autonomy, and the realisation that our understanding is not in itself enough to explain our ethical drives.

**Law, Otherness and Madness**

The essence of legal reasoning is authorisation and justification. What makes law *law* is that we can distinguish it from other norms by showing how it is grounded in legitimate authority. The poststructuralist movement argued that philosophy holds a comparable approach to its own sense of foundation. Treating philosophy as a literary endeavour, Derrida drew attention to the privileging of the spoken word as the articulation of an essential and present ground, of which all writing is a derivative representation. This can be called ‘logocentrism’. The centrality of law to certain logocentric projects allowed the critical legal scholars Douzinas, Warrington and McVeigh to coin the indulgent but wonderfully tongue-twisting neologism of ‘logonomocentrism’. This, the authors explained, is ‘the claim of the unity of self and others in absolute reason of the law’. It denotes not merely the preoccupation with the presence of reason (*logos*), but also the coincidence of reason with law (*nomos*). The phenomenon of logonomocentrism therefore appears when the search for ground casts its gaze upon a specifically legal terrain.

In this way, the authors lead us to consider the textual and ontological violence of the law, which arises in the way that the fallacious appeal to unity between subjects, objects and laws inevitably produces an exclusionary effect upon others. In fact, there is a double violence here. On the one hand, one finds a familiar violence of a text whose inscription and interpretation is monopolised by an elite minority, and which has the material effect of legitimating physical force (imprisonment, fines, compulsion or prohibition to perform certain acts and, in some parts of the world, killing). But it is the second form of violence that is more of interest, and which arises out of the law’s logonomocentric pretence. It is the violence of repudiating alterity; this being not merely a denial of the presence of the other within the law, but also a denial of its absence.

In the same way that the logocentric philosopher expresses a determined, fully present economy of meaning, the law, in its totality, appears always capable of giving an answer. Its rationality is always able to fully
cognise a set of events and declare what is right and wrong, legal and unlawful. The rationality of law thus purports to be total; there is no ‘other’ that falls outside of its understanding. What is more, the solution purports to already be there, therefore avoiding the risks of retroactivity. If this proposition seems naive, it is worth remembering that it has enjoyed explicit support in the field of Anglo-American jurisprudence. To return to a figure mentioned earlier in this chapter, Ronald Dworkin (in)famously argued that legal argument is not so much a search for the best or most persuasive answer to a problem, but finding the right answer. This position is predicated on a theory that holds legal reasoning to be a process of assembling and re-assembling principles into a coherent totality. If one accepts that such a seamless whole is logically possible (even if not actually existent), it follows that there must be a right way in which to solve any problem that arises. It may take time, it may be undermined by human error and it may be expensive, but if we pose an imaginary, incomparably perfect legal interpreter – named Hercules by Dworkin – then the law will always provide him with the applicable solution.

It is easy to attack Dworkin for this relentlessly idealistic vision, but in an important sense he is right. Law is a fabric of meaning that purports to incorporate all phenomena into its understanding of the society it governs. Of course, it would be naïve to claim that law can operate as a true metaphysical totality; it can only be violently asserted as a totality (here we might lament Dworkin’s obtuse and undeveloped dismissal of the critical insights of what he calls ‘French linguistics’). Where difficult and unusual facts and problems look as though they may slip through its interstices, the law will always claim to weave them back in. The job of the critical Dworkinian, if such a figure exists, is to reveal that this Herculean process is profoundly violent and exclusionary, and the seamless web of meaning can be no more than a false claim to totality, meaning that every incorporation of life into law produces an excluded trace, or other. It is the process of assimilation, the ability to break up, categorise and interpret phenomena in accordance with a pre-existing bank of legal knowledge that allows the law to always offer an answer.

Curiously, Dworkin’s choice of Hercules as the figurative ideal judge is quite apt. According to the famous Greek legend, this ancient mythical hero was commanded to perform twelve heroic labours by King Eurystheus. The story of the labours of Hercules is one of tenacity, commitment and courage, and the antithesis of apathy and indecision. Therefore he might persuasively resemble the perfect judge, unswayed by external pressures, determined to fulfil his duty to the Crown. Some might object that the
figure of the judge Hercules can tell us little about the reality of law, given real-life judges’ inconvenient proclivity for imperfection. Yet the myth may tell us more about the actual work of the judiciary than we might at first assume. Prior to his heroic adventures, Hercules was a capricious madman. Driven insane by Hera, the goddess of women and marriage, he slaughtered all six of his sons. His twelve labours, commissioned by Eurystheus only once he regained his sanity, were rites of atonement for this murder. There are two versions of Hercules therefore, one mad and one sane, but what remains consistent is his predilection for violence, whether in the senseless and unjust murder of his offspring, or in the sanctioned killing of fantastical beasts upon the authority of the sovereign. Surely it would be the latter version, the determined and repentant Hercules, who is needed in the work of law, and the science of deciding of hard cases? Yet we might be prompted to think otherwise by Derrida, who – in works informed pervasively by Levinasian ethics – has written repeatedly on the way that madness is at the heart of all genuine decisions. A decision that follows a predetermined rationality or formula is no decision, in that it is calculable, akin to solving an arithmetic problem. A decision only becomes possible when something is undecidable, in that the alternatives are of some kind of heterogenous species and so something foreign to the domain of rule and calculation must be introduced in order to arrive at one option to the dismissal of the other. If we take Derrida’s reflection seriously we find that, somewhat ironically, it is the insane Hercules who makes the true decision, the mad jump to one of several undecidable poles.

Derrida’s own exemplar of such a decision is the story of the sacrifice of Isaac – which holds a conspicuous infanticidal parallel with the legend of Hercules. The narrative has it that God issued Abraham with a command to kill Isaac, his son. Far from claiming this to be exceptional, Derrida asks, ‘isn’t this also the most common thing?’ Isn’t all responsibility based on an incalculable, and therefore unjustifiable, decision? Again, in an overtly Levinasian vein, Derrida posits that such a decision must transcend an immanent economy of knowledge. The question of whether a non-contradictory, seamless web of principles is logically possible is, ultimately, metaphysical, and depends entirely on how we characterise the nature of knowledge and ontology. For Derrida, language is a flux of identity and difference and has no privileged access to underlying presence, despite such access being a recurring presumption of the Western philosophical tradition. Dworkin, reflecting an opposing logocentric outlook, avoids defending his claims to such an analysis of language and
meaning, simply stating that the least sceptical position (his) should be preferred.\textsuperscript{30}

A Levinasian position holds that for as long as there is the other person, there is the irreducible encounter with alterity; for as long as there is alterity, it is impossible to posit a total economy of knowledge without remainder. In turn, this is the condition of the (im)possibility of the decision. But if the condition of possibility of the decision is its impossibility, how do we arrive at a decision that is not arbitrary? In the eulogistic \textit{Adieu to Emmanuel Levinas}, Derrida returns to the enigma of the decision, and whether it demands we conceive of it as always the decision ‘of the other’\textsuperscript{31}. He was right to preface this claim by questioning whether Levinas himself would be comfortable with such a bold formulation. But he is similarly right in identifying Levinas as a thinker who, more than most others, could explain the emptiness and impossibility of a supposed decision that starts and ends with the egotic self. That a decision is undecidable does not entail that no meaningful decision can be made. It signals the manner in which heterogenous assignment, an irrevocable and involuntary affect of the other that forms the basis of Levinas’s ethics, determines the decision on behalf of the subject.

It is in the idea of madness that one finds a link between Levinas’s critique of humanism and the practices of law. To be affected by the other in the deep subjective sense that Levinas means is, for him, evocative of psychosis.\textsuperscript{32} In other words, our singular and shattering relation with others is a form of detachment from the bourgeois familiarity of reality, a tear in the weave of ontology in which the strangeness of alterity ridicules the complacent homeliness of our world. Levinas would be correct in his use of this specifically medical term. In clinical contexts psychosis is associated with hallucinatory or delusional states in which patients lose their grasp on the objective world around them. In the more esoteric Lacanian canon of psychoanalysis, psychosis is thought of as a gap in the symbolic order caused by the absence of the legislative effect of paternal forbiddance.\textsuperscript{33} Similarly for Levinas, psychosis is a moment of removal from the realm of onto-normative everydayness, and into an obsessive, persecutory encounter, the alterity of which opens radically new lines of possibility and of freedom. In this way, Levinas allows us to rethink the couplings of presence and absence, reason and madness, and justice and murder. The logocentric appeal to fill presence was capable of producing the perverted legality of the Nazis, and then the spiralling horrors of the death camps. Meanwhile, the ‘psychosis’ of ethics, a commitment to the other that transcends the fullness of being, is presented
by Levinas as a fragile foundation of ethics and, ultimately, the question of justice.

A Note on ‘Ethics’ and Critical Legal Theory

It is important to understand that Levinas’s ethics are unlike almost every other form of ethics. It is notoriously difficult to generate tangible normative ideas, to the extent that they can inform policy debate, from his work. Indeed, one of the most counterintuitive aspects of his theory is that his ethics are primarily descriptive rather than prescriptive: they do not tell us what to do, nor why one course of action is necessarily preferable to another (the peculiar challenge that this descriptive quality poses to questions of legal norms will be taken up in Chapter 3). Levinas made clear that he regarded it more important to know of the nature of the encounter with the other, rather than its substance. Instead ethics describes an unconditional disposition towards alterity within the structure of the human subject. This disposition originates prior to legal (or moral or political) choices, prior to our conception of personal freedom and autonomy. Such an idea of ethics is therefore hardly intuitive. It could even be argued that the very term ‘ethics’ has received undue prominence in characterisations of Levinas’s oeuvre. His most developed ethical theory, drawn most fully in his two major works, is never presented as a structure of ethics for the sake of ethics alone.

Conventional debates within jurisprudence are largely strangers to Levinas’s work, but as noted near the beginning of the chapter he has received attention within what could broadly be called critical or interdisciplinary strands of legal theory. At least in its early North American incarnation, critical legal studies (CLS) was primarily concerned with exposing the politics and biases of legal processes, which had previously been masked by the ideology of legal neutrality. The formal logic of law was argued to be a mask for rules and judgments that were often arbitrary, contingent or politically instrumental. As such, particular modes of injustice could be revealed: political bias, sexual discrimination and racism were argued to be not so much promoted by individual legal actors, but actually woven into the institutional fabric of law itself. The targets of this sort of critique were typically specific practices and disciplines of the law. With a barely disguised glee, many traditional textbook writers on jurisprudence have since declared ‘CLS’ to be dead. In a very limited sense, thinking specifically of the original North American CLS, they are probably correct. But what such eager diagnoses tend to ignore is the much more amorphous and prevailing influence of critical meth-
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odologies in the legal academy, including outside the United States, since then. In the early 1990s, an apparently ‘postmodern’ or poststructuralist strand of legal theory had emerged, concerned not so much with particular legal processes, but rather with the status of the law as a text, the uses of grammatology and deconstruction, and also with an ethical imperative.36

The turn to such modes of thinking allows for a concern about substantive injustices to be developed into a much more general attack on the structural inadequacies of law. It is not simply the case that the law might act as a shroud for the internal prejudices and biases of those who have monopolised its operations over previous centuries of legal doctrine. Rather than restricting focus merely to the substantive values being projected outwards, critique may turn to think about law’s incapacity to hear the marginal claims coming inwards. The question here is not merely the hidden politics of the law, but also its constitutive inability to comprehend the significance of the other. Levinas has been deployed to help legal scholars understand a striking range of legal issues in this respect, including the plight of migrants, the nature of judicial activism, the origins of liability in private law, and the basis for a radicalised understanding of human rights. This book asks what might unite these disparate applications of Levinasian ethics to law, and considers the challenges that such an ethics faces within today’s legal landscape. Those questions, along with a general discussion of how Levinas’s philosophy can be transposed into ideas about legal reasoning, make up the central two chapters of this book. The latter two chapters take up a particular problematic, asking of the limits of Levinas’s application to law when law is understood as part of a biopolitical model of liberal governance. Insofar as literature on biopolitics suggests a complicity between law and ontology, between legal norms and our totalising understanding of being, the closing chapters suggest that we may need to formulate an alternative means through which Levinas can help us understand the ethical relation against a backdrop of the pervasive efforts to regulate life. But before then, Chapter 2 offers an introductory analysis of Levinas’s philosophical ideas.

Notes

6. For a leading study on the political context of Levinas’s philosophy, see Caygill, Levinas and the Political.
12. Consider, for instance, Fisk, ‘History and Reason in Rawls’ Moral Theory’.
15. Mouffe, On the Political, p. 11.
18. E.g. see Foucault’s analysis of biopolitics in Society Must Be Defended.
20. Derrida, Of Grammatology, p. 43.
22. Dworkin, Law’s Empire; Dworkin, Justice in Robes; Dworkin, ‘A Reply by Ronald Dworkin’.
25. Such a depth of influence was evinced in Derrida’s remark on Levinas, that ‘I am ready to subscribe to everything he says’ (Derrida and Labarriere, Altérités, p. 74).
29. See, e.g., Derrida, Limited Inc.
31. Derrida, Adieu, p. 23. Similarly, in The Politics of Friendship, he refers to the decision of the other, the ‘absolute other in me, the other as the absolute that decides on me in me’ (Derrida, The Politics of Friendship, p. 68).
32. Levinas, Otherwise than Being, p. 142.
33. This form of ‘law’ in Lacan came to be known by the shorthand

34. Levinas, *Totality and Infinity*, p. 18.

35. E.g. McLeod, *Legal Theory*, pp. 155–6; Tamanaha, ‘Conceptual Analysis, Continental Social Theory, and CLS’.