

THE ORIGIN OF OBLIGATIONS

Towards a Fundamental Phenomenology of Legal and Moral Obligation

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INTRODUCTION

This essay explores the possibility of conceiving obligations independently of rights. In doing so, it engages with one of the key themes of the workshop held in Glasgow in May 2016 on the nature of obligations, as announced in the initial invitation to the workshop. Scott Veitch wrote in the invitation that the workshop would explore, among other questions, the possibility of contemplating the "priority of obligation ahead of right." This "priority of obligation ahead of right" was the theme of my contribution to the workshop and is also the central concern of this essay.

The Hohfeldian perspective on the relation between rights and obligations – which one can consider paradigmatic for modern legal theory and thought – insists on the correlativity of rights and duties. This perspective evidently prompts one to doubt the possibility of any "priority of obligation ahead of rights," considering its evident implication that obligations cannot be contemplated in the absence of rights. This means that any theoretical endeavour to promote or facilitate a "duty-oriented" conception of communal responsibility, without falling back into a rights-based conception, would have to break out of the Hohfeldian paradigm of thinking about rights and duties.

The exploration of the possibility of duties that exist independently of rights that I present in what follows, therefore scrutinises the possibility of such a break with the Hohfeldian paradigm. Key to this scrutiny is an analysis of the concept of obligation that one might extract from Marcel Mauss' *Essai sur le don*. Mauss' essay expressly invokes the notion of obligations that derive from the *nature of things*, as is evident from the following key description of the *kula* ring (a Melanesian practice of gift-exchange):

"[A]u fond, ce sont de mécanismes d'obligation et même d'obligation par les choses, qui jouent [dans le kula]." (Mauss 2007 [1925]: 109)

The English translation by Ian Cunnison changes the meaning of these two lines slightly by suggesting the obligation is "resident in the gifts" themselves, and not in the things (*les choses*), as the French text suggests (see Mauss/Cunnison 2011 [1954]: 21). This change of meaning is fortunate, for it alerts one to the specificity of the meaning of this line in the French text and invites one to scrutinise its specific invocation of "obligation by the things" further by comparing it to the Roman law concept of *res* (English: thing; French: *chose*) from which the Romans inferred all obligations, and by considering it as an *ontic* and/or *ontological* conception of the nature of obligations that allows one to relate one's understanding of obligations to key aspects of philosophical conceptions of responsibility that one finds in the work of thinkers such as Jacques Derrida, Martin Heidegger, Emanuel Levinas and Jean-Francois Lyotard.

It nevertheless remains a question whether Mauss' *Essai sur le don* really offers the possibility of contemplating a duty without having to invoke a discourse of rights. Jacques

Derrida insisted that Mauss' discussion of the economy of the gift is not at all a discussion about the gift in the strict sense of the word. The so-called "gifts" circulated in the gift-economy are really just counter-performances, he insisted (see Derrida: 1991, 39-94). In other words, they concern instances of compliance with pre-existing obligations in a scheme of reciprocal obligations. The asymmetrical relation between the giver and receiver of the gift that conditions the possibility of a true gift – which requires that the giver just gives and that the receiver just receives – is evidently absent from the gift economies (the institutions of the *kula* and *potlatch*) that Mauss describes with reference to an array of traditional cultures. During the Glasgow workshop, Lyndsay Farmer reiterated Derrida's response to Mauss by pointing out a pertinent passage in Mauss' text where Mauss quotes a Maori proverb according to which the gift involves "no risk" (Mauss 2007 [1925]: 229; Mauss/Cunnison 2011 [1954]: 69). According to this proverb, the expectation that the gift will be returned in due course is so established that the one who gives at any particular moment in time, need not worry about this giving, for he will be receiving in due course.

Now, if Derrida's and Farmer's contentions are indisputably and unequivocally correct, they would effectively deprive one of any recourse to Mauss' text for purposes of finding a conception of an obligation that is not *ab initio* tied to a right. This is so, because the possibility of contemplating gift exchanges in terms of asymmetrical duties – that are in no way linked to a dynamics or mechanics of reciprocal rights and duties – would necessarily depend on the possibility of asymmetrical gifts that do not respond to one another. This observation therefore informs a key hypothesis of this essay: If there is no such thing as an asymmetrical gift – the only gift in the strict sense of the word, according to Derrida – there is most likely also no such thing as an asymmetrical duty, or a duty that precedes the existence of a right, as Veitch put it in his workshop announcement.

The essay engages with the thoughts introduced here as follows:

It expounds Hohfeld's analyses of legal correlatives in Section I for purposes of clarifying the way in which duties relate to rights in standard Hohfeldian rights discourses. It then also puts forward a constitutional law argument to show how the scope of rights discourses might be expanded in order to expand the spectrum of recognised legal duties in any given society. Section I ultimately concludes with the sober observation that this expansion of rights discourses is the only way in which standard legal argument can pursue an expansion of duty discourses. This juridical expansion of rights discourses for the sake of expanding duty discourses is not insignificant, but it ultimately only underlines the reality that standard *legal* arguments and discourses will by definition or default always fall short of Veitch's call for a conception of the "priority of an obligation ahead of a right."

Section II then turns to a reading of Mauss' essay of the gift to determine whether one might at least plausibly contemplate the "priority of obligation ahead of right" from the vantage point of a broader normative or philosophical discourse about duties. The challenge here is to determine whether Mauss' text offers one a plausible conception of an asymmetrical gift; that is, a gift that is not burdened by the exigencies of reciprocity. At stake, here, is the possibility of a truly *free* gift or a truly *free act* of giving that is not in any way conditioned by the *right* of another to receive a gift in view of obligations or debts created by earlier gift exchanges. To rephrase once more: At stake, here, is the possibility of

a duty to give that is categorically and qualitatively different from the duty to pay back. The link between gifts and obligations that is put forward here is of course far from self-evident and may even strike one as rather counter-intuitive. This link would therefore have to be scrutinised incisively and Section V below will turn to do so. For now, let us first just note again Derrida's and Farmer's suggestion that Mauss' contemplation of the gift only concerns a duty to pay back, and not a duty to give. This suggestion cannot be dismissed easily and Section II indeed highlights several key elements of Mauss text that indeed seem to confirm Derrida's and Farmer's assessment of it.

Section III nevertheless proceeds to qualify Derrida's and Farmer's assessment of Mauss' essay by pointing out another side of the essay. In other words, it highlights a certain ambiguity in Mauss' text which shows that his text does create a narrow yet significant opening for contemplating a gift that is not just a matter of repayment. The text does allow one to contemplate a duty that derives, independently, from the very nature of things, as the passage cited above suggests. Section III notes further that Derrida's critique of Mauss relies substantially on Heidegger's ontological difference or divide between *Being* and *beings*, and especially the notion of *es gibt* (it gives) on which this difference or divide pivots according to Heidegger. It therefore also notes a certain resonance between Mauss' conception of a duty that derives from the nature of things and Heidegger's notion of *Being* that gives *beings*. Section IV nevertheless moves on to wrest Mauss' essay away from this very plausible Heideggerian interpretation of his text. It does so for purposes of realigning Mauss' text with a Kantian conception of moral responsibility. The aim of this shift from a Heideggerian to a Kantian reading of Mauss is to show that a duty to give that derives from the "nature of things" can be understood better today – in secular urban environments – in terms of a Kantian regard for the moral imperative that conditions human liberty.

Section V turns to the rather conspicuous further question – already noted above – that comes to the fore when one assumes the possibility of a duty to give that is not just a duty to pay. Suppose one accepts on the basis of the arguments expounded in Section III that Mauss' text indeed contemplates a duty to give that is not just a duty to pay. Why would one still want or need to consider this "duty" to give an obligation? Is it necessary to consider the duty to give a duty at all, and if so, why? A well-grounded positive answer to these questions is crucial for concluding the overarching argument regarding the possibility of a "priority of obligation ahead of right" that this essay offers. Section V endeavours to offer such an answer with reference to thoughts of Jean-Francois Lyotard and Emmanuel Levinas.

Section VI concludes the essay by returning to the Hohfeldian legal discourse with which it begins. It returns to this discourse for purposes of exploring the question whether the philosophical or Maussian perspectives developed in Sections II to V may contribute to an expansion or a mutation of the Hohfeldian paradigm of reciprocal rights and duties, so as to allow for a post-Hohfeldian regard for a "priority of obligation ahead of right" in legal discourse.

I. EXPANDING THE SCOPE OF HOHFELDIAN RIGHTS-DUTIES CORRELATIVES THROUGH CONSTITUTIONAL LAW

One day, in a quite different – post-Hohfeldian – age, humanity might return to a sensibility akin to the one to which the poet gives voice in Psalm 121: “I will raise my eyes up to the hills, where will my help come from?” A future humanity may want to return to the sensibility of these words for purpose of recovering a sense of duty. It may come to raise its eyes to the hills again and ask: Where do our duties come from? Where does my duty come from? This substitution of *help* with *duty* may strike one as curious and even unfounded. Perhaps so, but it is motivated by the sense that Veitch’s request that we contemplate an expanded concept of duty, in this volume, turns on the conviction that a stronger or greater sense of duty – a sense not linked to any expectation of entitlement – may well be very helpful.¹

Psalm 121 would seem to express an *ontological* and even *onto-theological* understanding of help or sustenance. Help comes from elsewhere. One looks to the hills for help. And as the second verse of the Psalm then asserts: Help comes from God. This onto-theological understanding of sustenance will be a key concern of this essay. It will rely on Marcel Mauss’ essay on the gift – where one finds a comparable association of God and the hills, a similar sensibility regarding the god or gods that dwells or dwell in the hills – to put forward the idea that any help that may come to us from the hills, will come to us, *if* it comes, in the form of a profound sense of duty. However, we will ultimately move on from Mauss – passing briefly through Heidegger – to Kant, Levinas, and Lyotard to explore the possibility of a truly *deontological* – instead of *ontological* or onto-theological – understanding of the “priority of obligation ahead of right.” We will accordingly endeavour to also read Psalm 121 as a purely deontological poem, a poem that ultimately recognises that the arrival of sustenance – of everything that sustains us – finds its primordial form in the advent of a sense of obligation.

A future humanity may or may not return to this deontological sense of obligation that this essay explores. It may or may not return to a sense of duty that will arrive from elsewhere – from the hills, as the poet suggests in the book of Psalms – before anything else arrives. It may or may not return to a sense of duty that arrives like a stranger who descends from the hills and brings the hills with her, so to speak. If such a future humanity were indeed to return to this primordial sense of the arrival of obligation, it would have to take leave of current understandings of obligation that are largely reduced to restrictive legal conceptions of duty. Those whose sense of duty is exhausted by these restrictive legal conceptions of obligation do not and need not raise their eyes to the hills for the sake of understanding the advent of duty or obligation. They know where duty comes from. They know, at least as far as the law and legal duties are concerned, that duties emanate from rights-duty relationships. They know this because Wesley Hohfeld tells them so in a way that appears self-evident: One has a duty because some public authority – a legislator, judge or administrative official – has endowed someone else with a right. A duty is the legal correlative of someone else’s right. From a Hohfeldian perspective, any idea that a legal duty may exist in absence of a right, is simply and fundamentally misconceived. This legal understanding of duty would indeed appear to have displaced, today, any other sense of duty that may precede or exceed, and eventually question, the boundaries of legal obligation.

Legal obligations or duties, it would appear then, can be determined and delimited exhaustively by determining and delimiting the rights of others. Would anyone be burdened by a sense that contemporary societies suffer from a dearth of duties, he or she would have to consider this dearth a result of a dearth of rights. Veitch is burdened by this sense of a dearth of duty, and he has good reasons to be burdened thus. However, he may well not be content with the idea that this dearth of duty can only be remedied by remedying a dearth of rights. He understands this “dearth of duty” to be a result of a misconception of the way in which human beings live together. He wishes to alert us to the pervasive social reality of waves of duties (an idea he gets from Waldron) that conditions the very possibility of rights. Proper awareness of these waves of rights, he suggests, would relativize and rectify contemporary social and legal consciousness’ excessive focus on rights. A due regard for these waves of duties – for the way in which waves of people do their daily duty diligently to make things work – may well wash away this excessive concern with rights, might one say. And it may also cast new light on the way in which the law allows some individuals to *legally* opt out of these waves of rights in order to withdraw to islands of duty free existence. This essay is an endeavour to pay due attention to Veitch’s pertinent concerns in this regard. It will engage squarely with these concerns in its concluding section (Section VI). Let us nevertheless begin more modestly by first just posing the question of how standard legal argument may remedy a dearth of duties through remedying a dearth of rights. For this purpose, we must look closely at the essential process through which rights enter the legal world, and for that matter also enter the rest of the world in which we live.

This invocation in passing of an entry of rights “into the legal world,” that is “for that matter also [an entry into] the rest of the world in which we live,” demands more attention than one might think at first, for something very specific is at stake in the Hohfeldian paradigm of legal correlatives from which we are taking our cue here. The first thing that Hohfeld teaches us is indeed that there is no significant distinction to be drawn between the “legal world” and “the rest of the world in which we live.” His analysis of legal correlatives does not entertain the conception of a dualism between law and society, or between the “legal world” and the “rest of the world” that humans inhabit. According to Hohfeld, human beings live in one world in which different legal correlatives organise different kinds of human relationships, and the common or lay (or formalist!) distinction between a world of law, and the rest of social reality, actually concerns nothing more than a distinction between two different sets of legal correlatives, namely, the distinction between rights and duties, on the one hand, and non-rights and liberties (or privileges), on the other (see Hohfeld 1913: 16-59; Singer 1982: 975-1059).

The sphere of human existence that is generally – that is, in lay terms – considered the *sphere of law*, concerns the sum total of rights-duties relations in any particular society at any particular time. The sphere of existence that is generally considered the *non-legal social sphere*, comprises the sum total of non-rights and corresponding liberties that exist in a particular society at any particular time. It is important to stress again, however, that Hohfeld did not consider this law-society distinction of any importance for legal reasoning. The lay conception of a significant difference between the sphere of law, on the one hand, and a non-legal social sphere, on the other, becomes a formalist conception (from which follows a whole spectrum of notions regarding a sacrosanct private sphere that cannot be restructured politically) when it is adamantly sustained in legal reasoning. Hohfeld,

however, was not a legal formalist. He was a legal realist that discerned no intrinsic formal division between law and society. He insisted that this distinction simply emanates from political or policy decisions that turn some social relations into right/duty relations and others into non-right/liberty relations.

Let us take a closer look now at the difference between rights/duties and non-rights/liberties correlatives. How do these different correlatives come into existence? As already observed above, they are the outcome of different kinds of governmental and/or judicial decisions, but one can add to this that one is basically never sure whether one is dealing with the one set of correlatives, and not with the other, until such time as a court has decided the matter. Legislation and administrative acts can and should largely determine the nature of relations between individuals and/or groups of individuals, but legislation and governmental action often still invite significant disputes regarding the nature of the relations they establish, and then the disputing parties regularly turn to some court to settle the matter. How, then, do courts establish right/duty relations, on the one hand, and non-right/liberty relations, on the other?

A court establishes a right/duty relation between disputing parties every time that it upholds a rights-claim in a dispute. It establishes a non-right/liberty relation every time it dismisses a rights-claim. In the former case, the court tells the claimant that he has a right, and the defendant that he has a duty. In the latter case, the court tells the claimant that he does not have the right that he is claiming, while signalling to the defendant that he is free to ignore the claim of the claimant. Put in Hohfeldian terms, one can say that the latter case is one in which the court tells the claimant that the right he claims does not exist. It is not a *right*, on which his claim is based, but a *non-right*. In the same breath, the court is telling the defendant that he is free or at liberty to ignore this *non-right* of the claimant. In other words, the defendant has *the liberty* to ignore the claimant's claim.

Let us return now to Veitch's concern with the dearth of duty in the time we live. We have already indicated that Veitch's hope to remedy the dearth of duty without taking recourse to rights are doomed to be disappointed as far as legal reasoning is concerned. Legal reasoning, as we know it, cannot contemplate duties that are not correlative to rights. Let us nevertheless put Veitch's concern on the backburner for a moment for purposes of taking a closer look at how legal reasoning might remedy a dearth of duty, by remedying a dearth of rights. How can legal reasoning accomplish this expansion of duty through and expansion of rights? A typical positivist line of legal reasoning would insist: Don't ask the courts to increase the number and scope of rights that society must honour. Go to parliament for this purpose. Another line of legal reasoning that is pervasive today is to invoke a constitutional or convention right that demands that an existing array of ordinary legal rights be enhanced so as to give due effect to the constitutional or convention rights at issue in the dispute at hand. At stake, here, is the so-called horizontal effect of fundamental rights from which resulted one of the most significant transformations of judicial reasoning in the course of the twentieth century (see Van der Walt, 2014). It should be noted that both lines of legal reasoning invoked here will probably be informed by a constitutional argument. In the case of the horizontal effect argument, the claimant will ask the court to enhance his existing legal rights in view of the demands of some constitutional right. In the case of the positivist line, the court will basically leave or urge the claimant to engage in political action that will

move parliament to bring legislation more in line with the constitution. The positivist court may even send a signal to parliament that such legislation is needed. It will just not proceed to legislate itself to improve the situation.

The constitutional argument will most likely not satisfy Veitch, for it evidently does not envisage any "priority of obligation ahead of right." Let us nevertheless take a look at how these constitutional arguments – cast in Hohfeldian terms – can be invoked in the case of *the disappearing assets* that Veitch targets in his essay in this volume: A beneficiary (B) receives invisible and therefore untaxable benefits from a Trust Company (TC) based in the British Virgin Islands (BVI). Two different scenarios – both typical – can be imagined or predicted here:

1) B is resorting to legal tax minimization practices by using applicable law of the UK (which also applies in the BVI, but somewhat differently, it seems).

2) B is resorting to illegal tax evasion practices that transgress UK law.

Considered in Hohfeldian terms, B is exploiting the *liberty* or *privilege* (synonyms as far as Hohfeld is concerned) not to be taxed in case 1. The UK seems not to have a right to demand tax in this case. It has a *non-right*. At issue, here, is a typical case of what tax lawyers would call "legal tax minimization" that is made possible by some loophole or ambiguity in the law, or by some express "tax ruling." UK tax legislation has not imposed a clear enough duty to pay tax in this case and the UK therefore has no right to demand tax. It thus leaves tax payers free to pay or not to pay. Some pay, others don't (the smart ones don't).

In the case of 2), B has a clear *duty to pay* tax but fraudulently does not do so, thus violating the state's *right to receive* tax.

We can assume that Veitch is deeply vexed by both these scenarios and feels action should be taken. In case 2, he can become a whistle blower and help to put the UK's prosecuting machinery in motion. This is simple. Case 1 is more complex, but he can resort to activating one of the two lines of constitutional legal reasoning invoked above. Assuming for the sake of argument that he can meet *locus standi* requirements through recourse to public interest or class action litigation procedures, he can try to get a court to send a strong *obiter* signal to government that the constitutional (or just patriotic) duty of UK citizens and residents to pay tax demands more effective legislation. The remedy that this positivist line of argument offers may seem weak, but it is not insignificant. It may well aid any political action that Veitch, like-minded political activists, and other responsible citizens may want to take to move the legislator to pass better tax laws.

In the UK, Veitch's legal action will probably be restricted to this positivist line of reasoning, unless he can somehow manage to translate his grievance into a human rights argument that can become actionable under the Human Rights Act. Should he be able to do so, he can try to move a more interventionist court to demand legislative reforms on the grounds that existing UK tax legislation falls foul of the demands of the Human Rights Act.² The UK seems bent on removing this option from the table very soon, but it is worthwhile mentioning it while it still exists. This Human Rights Act option is interesting because the UK does not have

a written constitution with a list of justiciable constitutional rights that may be invoked in an argument for legal reform. In countries with written constitutions containing a list of justiciable constitutional rights, Veitch would have been able to turn to the domestic constitution to put forward constitutional arguments demanding legal reform.

One can assume that neither of these options are likely to satisfy Veitch. The remedies they offer may well seem slight to him, and unlikely to materialise, at that. And they are light years away from any conception of the "priority of an obligation ahead of a right." Against this background, Veitch may well feel inclined to raise his eyes towards the hills and ask: Where may our duties come from? And when will they come? If he would be so inclined, would he just be too ahead of his time and dreaming of distant age, still to come? Or is he sensing something that is closer to us than we may think, something like a wave of duty coming our way, *always* coming our way, if we would just care to open our eyes to it? Let us turn now to Mauss' *Essai sur le don* to take a closer look at whether Veitch could be getting at something here, and at what it is that he may be getting at.

II. THE POSSIBILITY OF THE "PRIORITY OF OBLIGATION AHEAD OF RIGHT" CONSIDERED THROUGH A READING OF MAUSS

Can an obligation come to us, without coming to us as an obligation that is already tied to someone else's right? This is the key question that we need to address if we hope to find some way out of the Hohfeldian constellation of correlative rights and duties that underpins our current understanding of legal relationships. A duty that might be assumed without being exacted by the right of someone else, would seem to be a duty assumed freely. In this section of this essay we will engage with a careful reading of Mauss' *Essai sur le don* for purposes of scrutinising the possibility of such a free assumption of an obligation or duty.

We have already noted above how Mauss' text invokes a duty that emanates from the nature of *things* – [*une*] *obligation par les choses*. We have also shown, however, that the English translation of Mauss text already retreats somewhat from the far-reaching meaning of this invocation of a duty that emerges from the nature of things. The English text suggests the obligation derives from the gift itself. It reads:

Pains are taken to show one's freedom and autonomy as well as one's magnanimity, yet all the time one is actuated by the mechanisms of obligation which are resident in the gifts themselves. (Mauss/Cunnison, 2011 [1954]: 21)

The difference that comes to the fore here between the original French text and the English translation may seem small, but it is significant. If the obligation simply derives from gifts received, and only from them, the suggestion that the duty is assumed voluntarily and freely, becomes difficult to sustain. The duty that appears to be of concern in the English translation, seems to be one that emanates from a gift previously received. At stake seems to be a duty that is demanded by the gift received, and not a duty that is freely assumed. The English text would indeed seem to deny the possibility of a duty freely assumed. The first part of the sentence states clearly that the pretension of freedom and autonomy is ultimately nothing but a show. In reality, the return of the gift is mandatory. This is true, however, not only of the English translation, but also the original French. The latter also states clearly:

On recherche en tout ceci à montrer de la liberté, de la liberté et de l'autonomie, en même temps que de la grandeur. Et pourtant, au fond, ce sont de mécanismes d'obligation, et même d'obligation par les choses, qui jouent. (Mauss, 2007 [1925]: 109)

To be sure, the thought that we are pursuing here through close scrutiny of Mauss' text is not linked to any suggestion that the gift exchanges of the *kula* that Mauss is discussing implies no obligation to give. Such a thought would take leave of Mauss' text all too conspicuously. Already in the first lines of his essay on the gift, Mauss invokes both the mandatory nature of the gift exchange, and the tension between this mandatory nature of the gift exchange and its "theoretical" conception. The English translations reads:

In Scandinavian and many other civilizations contracts are fulfilled and exchanges of goods are made by means of gifts. In theory such gifts are voluntary, but in fact they are given and repaid under the obligation. (Mauss/Cunnison, 2011 [1954]: 1)

These opening lines of the English translation of the essay also differs slightly from the original French text. The French text seems to underline the realisation that the gift is not real. Instead of contending that contracts are fulfilled and goods exchanged "by means of gifts," it contends that the fulfilment of contracts and exchange of goods are made in "the form of gifts" – *sous la forme de cadeaux* (Mauss, 2007 [1925]: 65). In other words, these lines of the French text would seem to state even more clearly than the English translation that "the gift" concerns nothing but a contractual and mandatory exchange of goods that is dressed up as an exchange of gifts.

There can therefore be little doubt that Mauss is expressly and intentionally writing about a mandatory exchange in his essay on the gift. And in some sections of his text he is not only talking about a mandatory exchange, but also about a mandatory *contractual* exchange. This is especially clear where he discusses the Maori notion of the spiritual force (*hau*) of the gift that results from the fact that the giver of the material gift also gives something of himself with the material gift that will become poisonous if not returned to the giver soon enough (Mauss, 2007 [1925]: 82-87). In this regard, Jacques Derrida's observation that Mauss' essay on the gift talks about everything except the gift – *l'Essai sur le don, de Marcel Mauss, parle de tout sauf du don* (Derrida, 1991: 39) – is asserting something that is evidently already obvious to Mauss himself.

Derrida is undoubtedly right and risks just restating what is already abundantly clear: Mauss cannot be and is not writing about gifts that are not directly linked to contractual obligations. Any suggestion that he is, must be misguided. Seen from this perspective, Mauss is offering us no escape from Hohfeld's correlative conception of rights and duties. And yet, the thought that we are pursuing here is indeed that Mauss' text does provide us an opportunity to contemplate a gift, or at least an element of the gift, that exceeds whatever contractual obligation to which it is tied. One may present this thought in terms of a shift from contradiction to paradox. One can assert that the contractual obligations to which the gift is irreducibly tied, simply *contradicts* the notion that there is a gift at stake here. Or, one can suggest that something of the gift remains real despite being irreducibly tied to contractual obligation, thus giving rise to a *paradoxical* constellation of gift and contract that sustains the tension between them and does not culminate in mere

contradiction (which would necessitate the cancellation of the one or the other). The reading of Mauss' text that follows suggests that Mauss is doing, or aims to do, the latter. Mauss' text suggests that he recognises in gift exchanges a surplus or excess of giving that cannot be reduced to contract. I shall expound this claim, in what follows, notwithstanding the passages in Mauss' text that suggest he considers the gift as nothing but a form of contract, a form of contract that takes the form of a gift.

The first undeniable suggestion that the gift precedes and exceeds contractual payment and repayment can be found in Mauss' explication of the three obligations that underpin the gift economy. The duty to give back what has been received is not the only obligation. The duty to give back gifts received earlier is accompanied by two other duties, the duty to give and the duty to receive – *l'obligation de rendre les cadeaux reçus ... en suppose deux autres aussi importantes: obligation d'en faire, d'une part, obligation d'en recevoir, de l'autre*. Only a theory that attributes due importance to all three these duties – *[une] théorie complète de ces trois obligations* – can explain all the complexities of the gift exchange properly (Mauss, 2007[1925]: 87). Why does Mauss stress the existence of three duties here, the duty to give, the duty to receive, and the duty to give back? And why does he distinguish so clearly between the duty to give and the duty to gift back? The only plausible answer to these questions must be that Mauss wishes to emphasise a separate existence of the *duty to give* that cannot be reduced to *the duty to give (or pay) back*. It is important to pay specific and separate attention to this, he contends, for it could give us insight into how humans first became traders – *[l'obligation de donner est non moins importante; son étude pourrait faire comprendre comment les hommes sont devenus échangistes* (Mauss, 2007[1925]: 88).

So Mauss does seem to be contemplating an asymmetrical duty to give, after all, a duty that precedes and conditions the institutionalisation of the *kula* ring, that is, a general practice of symmetrical and reciprocal gift exchanges. He is evidently considering something like a "first gift" – *premier don* – to which he returns later in the essay, a first gift that makes the ensuing practice of reciprocal giving possible. Remarkably, this first gift, the *vaga*, is not quite the first gift, it has to be solicited by a prior series of gifts called the *wawoyla*. The *wawoyla* gifts solicit or court the *kula* (Maus, 2007[1925]: 120). The *kula* ring turns on prosaic exchanges – called the *gimwali* – between partners (*entre partenaires*) that ensues after the giving of the first gift, the *vaga*. Once the *vaga* is given, the *kula* ring is established and functions as an uninterrupted chain of supplementary giving and giving back that includes mandatory markets (*une chaîne ininterrompu de cadeaux supplémentaires, donnés et rendus, et aussi de marches obligatoires*) The *wawoyla*, however, concerns the soliciting of a future partner (*le partenaire future*) that is not yet bound by the mandatory circle of gifts known as the *kula*. The presentation of the *wawoyla* through which a future *kula* is courted thus constitutes a veritable drama of solicitation, persuasion, seduction and dazzling (*il faut donc séduire, éblouir*), and it evidently takes place under conditions in which the acceptance of the courting and the subsequent giving of the first *kula* gift, the *vaga*, are not yet certain (Mauss, 2007[1925]: 121).

One would seem to be well on one's way towards presenting a case that Mauss is contemplating, alongside established practices of reciprocal and symmetrical gift-exchanges, also an asymmetrical first gift that precedes and exceeds the duty to give back. If this is so, one could also seem well on the way towards a conception of a duty that precedes

and exceeds the symmetry of Hohfeld's correlative constellation of rights and duties. The *wawoyla*, the preliminary gifts that solicit the first *kula* gift, the *vaga*, surely comes to the fore in Mauss' text as a first gift that is not yet classifiable in terms of *giving back*, that is, classifiable in terms of giving back gifts already received earlier from a partner under the auspices of an already established circle of reciprocal obligations. One indeed seems to be edging here towards a contemplation of a possibility of an asymmetrical duty to give that exceeds the Hohfeldian conception of correlative rights and duties. One must nevertheless not move too fast. At least two questions beckon one to slow down: Why is the giving of the *wawoyla*, the soliciting gift that precedes and courts the first gift, the *vaga*, a duty? And if it is a duty, where does this duty come from, considering that it does not derive from an earlier gift that must be returned?

The answer to these questions requires that we turn back to the earlier pages of the essay where Mauss distinguishes between the three duties that underpin the *kula* ring, the duty to give, to give back, and to receive. Why is this first duty to give a duty and where does it come from? Mauss puts forward a remarkable explanation in this regard: The duty to give the first gift derives from the notion that the receiver of the first gift already has a right to everything that belongs to the giver – *on donne parce qu'on y est forcé, parce que le donataire a une sorte de droit de propriété sur tout ce qui appartient au donateur* (Mauss, 2007[1925]: 89). Mauss is invoking a notion of "right" here that Western legal thinking generally associates with Thomist natural law, namely, the right of all God's creatures to share in the fruits of the earth, a right in terms of which St. Thomas expressly invokes the right of the poor to the wealth of the rich (Aquinas, 1975 [1265-1273], 2a 2ae 66 7). It is a good question however, whether contemporary legal thinking can reverse the whole history of modern legal thought and consciousness that by and large stripped the Western legal imagination of its ability to entertain notions of natural rights that emanate from the gift of the earth that God made to all mankind.

The story is well known. Aristotelian and Thomist natural law thinking gave way to the prototype positivism of early modern social contract theories under the paradigm of which earthly sovereigns, and not God, distributed the fruits of the earth.³ Since then, earthly sovereigns almost invariably tended to manage their distributions of the earth in terms of positive property and contractual relations until the social havoc caused by the industrial revolution moved them to reintroduce redistribution policies that were at least vaguely reminiscent of the Thomist notion of the rights of the poor to the wealth of the rich. It is also well-known that the introduction of these redistribution policies – associated in the Western world with the rise of the social welfare state towards the end of the 19th and early 20th century – has ever since been under pressure to cede once more to strict regimes of property and contract that allow for little or no non-contractual redistribution of property. It is the dominance of these strict regimes of property and contract in contemporary legal consciousness that explains the pervasive tax evasion practices that Veitch's contribution to this volume of essays has in its sight. These practices are informed by the deep conviction that legal duties can only stem from the property and contractual rights of others. The idea that duties can stem from anything but property and contract is foreign to this consciousness.

Mauss' essay on the gift is evidently offered as an argument against this reduction of legal duty to correlatives of contractual and property rights. This is also how Mauss understood it himself.⁴ It is nevertheless obvious that the elements of the essay that we have considered so far, do not yet give us any reason to suggest that Mauss is effectively showing us a way out of the Hohfeldian constellation of correlative rights and duties. We have stressed above that Hohfeld understood his constellations of legal correlatives as outcomes of sovereign legislative or judicial decisions. Were a return to pre-modern natural law possible, it would not significantly alter the construction of law in terms of correlative rights and duties that we associate with Hohfeld and modern law. It would only replace the modern sovereign with the premodern sovereign – God, represented by his King – and thereby reintroduce legal correlatives that modern sovereigns no longer or rarely recognise, namely, the correlative right and duties that emanate from the conviction that humans are destined to share the surface and fruits of the earth.

Mauss' essay on the gift does not contemplate a revival of Thomist or Aristotelian versions of natural law, but, as we saw above, it evidently explores premodern notion of rights and duties that emanate from the human being's common ownership of the earth, the common ownership that already gives the receiver of the first gift a property or shared-property right to everything that the giver owns - *le donataire a une sorte de droit de propriété sur tout ce qui appartient au donateur*. What Mauss is contemplating here is evidently what one might call a pagan version of St. Thomas' Christian natural law. He offers us a marvellously pagan view of the world in which the first primordial correlativity of rights and duties stems from the way human beings take part in the natural order of things by giving and receiving gifts. Giving and receiving is not just a matter of exchanging material goods between the giver and receiver, it is also, and perhaps firstly, a matter of soliciting the favour and benevolence of the whole natural and spiritual environment – nature, gods and ancestors – that sustain the giver and receiver – *[les] échanges de cadeaux entre les hommes ... incident les esprits des morts, les dieux, les choses, les animaux, la nature, à être généreux envers eux* (Mauss, 2007[1925]:92). It all literally amounts to sustaining the most profound unity and oneness of things, a veritable mixing of souls with things and things with souls – *[on] mêle les âmes dans les choses; on mêle les choses dans les âmes* (Mauss, 2007[1925]: 103).

It is important to note that Mauss also recognises this sense of the oneness and relatedness of things in Roman law, and specifically in the Roman law notions of the *nexum* and *res*. The *nexum* – the legal bond – derives from things as much as it derives from humans – *[le] nexum, le 'lien' de droit vient des choses autant que des hommes* (Mauss, 2007[1925]: 184). Likewise, the word *res* – literally translatable as *the thing* – did not just denote "inert beings" or objects, but things as they related to family relations – *plus on remonte dans l'antiquité, plus le sens du mot familia dénote les res qui en font partie* (Mauss, 2007[1925]: 185). It is this sense of the word *res* that Michel Villey invokes in his contentions regarding the ancient meaning of the word *ius*. It did not signify a subjective right – the legal powers of an individual – as we know it today, insists Villey, but a *res* – *a thing* that determined the relations between people (see Villey, 1946, 217). It is worthwhile noting here that Martin Heidegger would also point out this meaning of the word *res* in his essay *Das Ding – The Thing* – to which we return below. *Res* denoted for the Romans, he observed, that which citizens talk about to one another, that which concerns them publically – *das in Rede stehende, das was jeden offenkundig angeht* (Heidegger (1985) [1984] 167).

It should now be clear why we commenced this reading of Mauss' text by insisting on the way the original French text states clearly that the duty to give does not simply stem from the gift received. The obligation is not only "resident in the gift," as the English translation suggests, but emanates from the things themselves - *ce sont de mécanismes d'obligation, et même d'obligation par les choses, qui jouent* (Mauss, 2007[1925]: 109). However, it should also be clear that our reading of Mauss has thus far not brought us a single step closer to contemplating a duty that is independent of a right. It still does not seem to offer us any ground for contemplating the "priority of obligation ahead of right," that Veitch invites us to contemplate. Mauss' text still seems to offer no respite from the correlativity of rights and duties that Hohfeld considered an essential element of modern legal consciousness. All that the text seems to offer us, is a premodern conception of right/duty correlatives. It offers an extra set of correlatives in terms of which the initial gifts of the earth – the endowments of that all humans receive in the first place from the gods and from nature – demand a gift in return. In this regard, the doubts that Derrida and Farmer express regarding the notion of "gift" in Mauss' *Essai sur le don*, pointed out above, still seem to hold completely true. There is no gift contemplated in the essay, it seems, that is not already a repayment.

The premodern conception of the correlativity of rights and duties that comes to the fore in Mauss' essay invites one to consider a certain "natural law" expansion of modern positivist constellations or rights and duties. Whereas these modern positivist constellations of rights and duties restrict the correlativity of rights and duties to property and contractual rights, the premodern and pagan "natural law" expansion of rights/duties correlativity contemplated by Mauss extends this correlativity to reciprocal gift exchanges. It surely offers *a vision* of a primordial sharing of the resources of the earth that disallows the reduction of rights and duties to established property and contractual rights that culminate in the tax evasion practices that vex Veitch. There is, however, no reason to believe that *this vision*, this premodern conception of expanded right/duty relations, offers a more effective expansion of right/duty relations than the constitutional law expansion considered above (in Section I). There is, in fact, much reason to believe that the language of obligations that Mauss explores and expounds in his essay on the gift is exhausted and spent today. One can hardly expect it to have more of a chance to have an impact on the way in which contemporary law conceives of right/duty correlativity than Aristotelian or Thomist natural law has, and the impact of Aristotelian and Thomist natural law thinking on contemporary legal consciousness can already be considered negligible. Seen from this perspective, the constitutional law expansion of right/duty relations discussed above would indeed seem to offer a far more effective and credible source of resistance to the reduction of legal duties to the contractual and property rights of others.

However, we are far from done with our reading of Mauss text, for there is an aspect of his text that does seem to bring us closer to a regard for a duty that might come to us unaccompanied by any right. The elements of the text that we have covered thus far give one no reason to raise one's eyes to the hills to ask where such a duty unaccompanied by a right might come from, for they assert an all too clear knowledge regarding the origin of duties. Duties derive from the rights with which every human being is endowed in view of the common possession of the earth that God or the gods granted to all humans. But it is the language of exactly this knowledge that is by and large exhausted and spent today, and

it is only when one realises this and begins to look away from it, that Mauss' text begins to point one to a duty that comes to one as if from nowhere, and unaccompanied by a right, at that. For purposes of uncovering this element of Mauss' text, we need to return once more to Derrida's and Farmer's observation regarding the absence of any real gift in Mauss' text, as we do now in the next section of this essay.

III. THE GIFT OF TIME

Jacques Derrida discerns neither contradiction, nor paradox, in the tension between gift and obligation that comes to the fore in Mauss' essay on the gift. He discerns in it a veritable *double bind* that renders the gift *logically* impossible. On the one hand, the gift only becomes a gift when it creates an obligation – *d'une part il n'y a pas de don sans lien, sans bind ... sans obligation ... nous rappelle Mauss*. On the other hand, the gift must be freely given and must bear no relation to any obligation to be a gift in the strict sense of the word – *mais d'autre part il n'y a pas de don qui ne doive se délier de l'obligation, de la dette, du contrat, de l'échange, donc du bind* (Derrida, 1991: 42).

This, however, does not seem to constitute an accurate reading of Mauss' text. The *Essai sur le don* surely suggests – in view of all the gift economies that it describes – that the gift *invariably* creates obligations. But there is nothing in the essay that suggests that the gift *must* create an obligation to be or become a gift. Again, Mauss' text certainly considers the gift a response to and a source of obligation, but throughout the text, Mauss only engages with empirical or historical observations of how gift exchanges function or functioned in practice. He never makes conceptual contestations that invoke a logic according to which they must function. As suggested above, Mauss' text surely confronts one with paradox, that is, with seemingly paradoxical phenomena, but not with the conceptual double bind that Derrida invokes here. The double bind that Derrida reads into Mauss' text derives from another concern that his own text – *Donner le temps* – puts forward on the pages where he imputes a double bind to Mauss' conception of the gift. It is certainly not warranted by Mauss' text.

Why is Derrida concerned with a double bind here? The double bind that he discerns in the act of giving concerns the demand of complete anonymity with which the act of giving must comply for the gift to be a true gift, and not just a source of obligation. The giving of the gift must absolutely not reveal the identity of the giver or donor. The moment that the giver of the gift becomes recognisable, the receiver of the gift will not only be burdened by this recognition of the giver. The receiver of the gift will through this recognition also attain a reductive grasp or hold on the donor that reduces him or her to a specific or specifiable act of giving. The same applies to the valuable of the gift given. The gift must remain *invaluable*. The gift will of course always come across as "valuable" in the sense of having "some" or "considerable" value. In another sense, however, it is also *invaluable* (as one often says with regard with very precious gifts). The value of the gift must remain completely unrecognisable and unknown. The moment that X is recognised as the donor of a gift with the value Y, both the giver and the act of giving become associated with a gift-transaction with a specified or specifiable exchange value. This association is inevitably reductive. The giver and the act of giving get reduced to the transaction, and to the value given, transferred or exchanged. If all of this is to be avoided, the donor and the value donated

must never become known, and this means that the gift can never be known as a gift without destroying it (see Derrida, 1991: 26-27).

Elements of Derrida's concern with the anonymity and unfathomability of the gift are also evident in Mauss' essay on the gift. As we saw above, Mauss' text certainly makes it clear enough that the significance of the gift is not in the first place related to its material value, but to the unmeasurable and invaluable sentiments of friendship and sociality that it solicits. The sentiments of generosity and benevolence precipitated by the gift surely also blur the specific identity of the donor in Mauss' text. We saw above how Mauss describes the act of giving in terms of a holistic event of general generosity that involves gods, nature, animals and deceased ancestors. However, it is not from Mauss that Derrida takes his adamant concern with an anonymous and unfathomable event of giving that cannot be reflected in the value of the gifts exchanged between humans. He takes it from Martin Heidegger's notion of an *ontological difference* or *differentiation* through which *Being* (*das Sein*) allows for the emergence of *beings* (*Seienden*), not by showing itself in *beings*, but, on the contrary, through withdrawing from them. Heidegger conceived of this ontological differentiation through which *Being* allows for the existence of *beings*, by withdrawing from them, as an event of giving; an event of anonymous or impersonal giving – *es gibt* – through which *Being* gives *beings*. The insistence that *Being* does not show itself in, but withdraws from, the beings that it gives, was crucial for Heidegger's endeavour to resist the metaphysical inclination to think of *Being* as another *being*, notably, *a supreme being* such as God, the essential characteristic of which was its enduring and infallible *presence* (see Derrida, 1991, 32-38).

It is important to note that Heidegger himself at times describes the ontological event through which *Being* gives *beings* in terms of a holistic exchange between the four elements of the *fourfold* (*das Geviert*) – heaven and earth and mortal humans and immortal gods (Heidegger, 1954: 157-175). He does so in a way that is quite reminiscent of the way Mauss describes the coming together of gods, humans, nature, animals and ancestors in the exchange of gifts between humans. The poetic quality of this rehabilitation of the discernibility of *Being* in *beings* in notions such the *fourfold* may well be debatable, but it could at least be said to be largely inoffensive as far as modern liberal democratic political and moral sensibilities are concerned. One may want to add that it is as inoffensive as it is irrelevant to these sensibilities. The offence in Heidegger's thought to modern liberal democratic sensibilities commences where his rehabilitation of the discernibility of *Being* in *beings* – through which he evidently retreated from or betrayed his own concern with an ontological withdrawal of *Being* from *beings* – begins to equate the history of *Being* with the historical destiny of the German people. It is well known today into what depths of deranged despair and personal dishonour (notably with regard to Husserl) this equation ultimately lured him, and one need not go into this history again here.⁵ Suffice it to restrict our attention to Heidegger to the very thought that he betrayed, the thought of an act or event of giving that does not enter, but withdraws from, the identifiable gifts that emerge from this act or event.

Derrida's invocation of a double bind that renders the gift impossible very clearly derives from Heidegger's contemplation of *Being that gives beings by withdrawing from them*. The gift cannot become present in the gift, argues Derrida. It cannot become a *present* or

presence without forfeiting that what is absolutely crucial to it, namely, the irreducible and inexhaustible freedom to give; a freedom to give that necessarily includes the freedom *not to give*, the freedom to withhold the gift. And this is where Mauss' essay on the gift runs into difficulty, according to Derrida, for it turns all too evidently on the assumption that gifts previously given – concrete, material and materialised gifts – not only oblige future giving, but also seem to guarantee it. It is with regard to exactly this observation that Lyndsay Farmer pointed out the following telling passage in Mauss' essay during the Glasgow conference:

We should come out of ourselves and regard the duty of giving as a liberty, for in it lies no risk. A fine Maori proverb runs:

Ko maru kai atu
Ko maru kai mai
Ka ngohe ngohe

"Give as much as you receive and all is for the best." (Mauss/Cunnison 2011: 69).

There is vast scope for slippages of meaning between the different languages – Maori, English, French – in play here. Derrida observes in his text on Mauss how the latter's rather flagrant disregard for the singularity of idiom creates the impression that the different cultural practices of gift exchanges that the essay describes point to a single referent, a universal "truth" of giving and receiving to which all cultures and societies subscribe (see Derrida 1901: 41). We cannot investigate the possible slippage of meaning between the Maori text that Mauss cites, and the translation of it that he provides. But it is important to at least note here another slippage of meaning that occurs between the English translation and the original French text of Mauss' essay. The French text does not simply assert the absence of risk in the act of giving, as the English translation does. It invokes the absence of the *risk to err* – *on ne risque pas de se tromper* (Mauss, 2007[1925]: 229).

The slippage of meaning at issue here may seem small, but it raises a number of key concerns that are highly relevant for the search for a duty that is independent of a right on which we have embarked. It is therefore important to tease out the key difference between the meaning of the French text and English translation here. The first difference that comes to mind is this: One does not risk *erring* in the face of risk, just like one cannot endeavour to be "right" or take the "right decision" in the face of risk. The essence of *risk* is the absence of information on the basis of which a decision can be "correct" or "incorrect." This is why it does not make sense to suggest someone took the "right" or "wrong" decision in the face of risk. One can at best invoke here a fortunate or unfortunate decision. Whether a decision in the face of risk turns out felicitous, or not, is a matter of chance or luck. To invoke the "rightness" of the decision under these circumstances is to make a mockery of the meaning of "right" and "rightness."

Taking a risk is the most concrete experience of what one may want to call, with Derrida, an encounter with *the undecidable*. Derrida's reasoning in this regard is well-known. It is the undecidable and only the undecidable that requires a decision, and a real decision is only possible in the face of the undecidable. A decision that is informed with regard to all crucial elements of what stands to be deliberated, is not a decision but the technical application of knowledge and "know how" (see for instance Derrida 1994: 52-57). The decision is the

critical and cutting moment in a response to the unknown. Seen from the perspective of this strict conception of the words “risk” and “decision,” one must conclude that the “risk of making a mistake” (*risque de se tromper*) is the one thing that cannot be at issue in the face of real risk. Conversely, one can only “risk” making a mistake when one faces no real risk. The risk invoked in the phrase “risk making a mistake” should therefore also be seen for what it is. It cannot concern a real risk. The word “risk” is employed incorrectly or inaccurately in this phrase to simply denote a mere “possibility of making a mistake.”

One must conclude in view of these reflections that a significant instability of meaning becomes conspicuous when one compares the French text and English translation of Mauss’ essay on the gift. When there is no risk (as the English text suggests), there is a real possibility of error (contrary to what the French text suggests). When there is no possibility of error (as the French text suggests), it must be because there is a real risk that cancels out the possibility of error (contrary to what the English text suggests).

Now, there are two ways out of this conundrum. The first is to simply attribute this instability of meaning to a mere instance of inaccurate translation that can easily be avoided by simply dismissing the translation and sticking to the French text. But this does not really help, for a closer look shows that the instability pointed out here, haunts the French text without comparing it to the translation. On the one hand, Mauss invokes the absence of the risk of error: *on ne risque pas de se tromper*. On the other hand, however, his translation of the Maori text that he cites, also commits him to an assertion of the absence of risk *as such*, to which the English translation of his text seems to commit him. He translates the Maori text as saying: *tout sera très bien* – everything will be very well. This “*tout sera très bien*” certainly amounts to an unequivocal assertion of the absence of risk; hence the need to conclude that the same instability of meaning that emerges from a comparison of the French and English texts, also emerges from a close reading of the French text on its own.

The second way out of the conundrum is to dismiss the artful textualism deployed here for the sake of a common sense and straight forward hermeneutic assessment of what Mauss evidently wants to say. If we do this, we may well want to conclude that Mauss is obviously asserting the absence of risk that the English translation puts forward and which comes to the fore in his own translation of the Maori citation. Should we indeed decide to follow this common sense hermeneutic route, however, we ultimately run into bigger trouble, for Mauss expressly attributes the eventual shift in Semitic, Greek and Roman societies, away from economies of the gift to economies of contract, to the wish or need to avoid and terminate the uncertainty that haunted the gift economies. Two passages are especially significant in this regard. In the first Mauss refers to the Semitic, Greek and Roman distinctions between legal obligation (*l’obligation et la prestation non gratuit*), on the one hand, and the gift (*le don*), on the other, and then asks: But is this distinction not a rather recent development in the legal systems of the great civilisations (*[mais] ces distinctions ne sont-elles pas assez récentes dans les droits des grandes civilisations*)? Did they not pass through an earlier phase during which they did not have this cold calculating mentality (*[n’ont-elles] pas passé par une phase antérieure, où elles n’avaient pas cette mentalité froide et calculatrice*)? (Mauss, 2007[1925]:180)

By posing these questions, Mauss suggests clearly that Semitic, Greek and Roman civilisations only eventually attained a cold calculating mentality that demanded a clear distinction between enforceable legal obligations, on the one hand, and gift exchanges, on the other. Before developing this calculating mentality, these civilisations tolerated a degree of incalculability in their social exchanges that rendered a clear distinction between strictly legal relations and broader social or moral relations redundant. In other words, Mauss is clearly suggesting that the earlier economies of these societies tolerated levels of incalculability and chance that their later economies were no longer prepared to tolerate.

A second passage, a few pages further on in the essay, confirms this suggestion beyond any doubt. Here Mauss again writes how the Greeks and the Romans, perhaps following the Northern and Western Semites, separated the contract of sale from that of the gift, thus bringing about a veritable and venerable revolution (*une véritable, grande et vénérable révolution*) that broke with an outdated morality and an economy of the gift that was too exposed to chance, too wasteful and too sumptuous – *trop chanceuse, trop dispendieuse et trop somptuaire* (Mauss, 2007[1925]: 195). It would surely not have been surprising if the English translation had resorted to the words “too risky” to convey the French “*trop chanceuse*,” but it simply refers, instead, to a “dangerous gift economy” (Mauss/Cunnison 2011: 52). We need not delve deeper into these specificities of the French text and its English translation. Suffice it to just observe, for now, that a conclusion that Mauss understood the gift economy as a risk-free contractual economy no longer seems as warranted as it may seem when Mauss’ later citation of the Maori proverb, discussed above, is considered in isolation from the rest of the text. The text is far from unambiguous, but there is clearly enough evidence that it may well be less at odds with Derrida’s conception of the gift than Derrida appears willing to concede.

The moment of a risk-taking decision in the midst of unfathomable circumstances is the defining element of the ethics of the gift and of hospitality that Derrida develops in his late texts. Hospitality, he contends, is nothing but an exposure to risk – *l’hospitalité ...ne peut ni ne doit être autre chose que l’exposition au risqué* (Derrida 1999: 137). This is of course an overstatement and therefore misstatement of the point at issue. An instance of risk taking is not as such a gift or an instance of hospitality. An act of giving and/or hospitality concerns more than just taking a risk. But taking a risk is certainly an irreducible part of giving and giving hospitality according to Derrida. Why is this so important to him, and why is this important for our pursuit of Veitch’s concern with “priority of obligation ahead of right”?

Risk is the pointed effect of the incalculability that conditions or preconditions the ethics of giving. It is the very sting of the incalculable. And it is the very ordeal of any duty that may come one’s way *before* the security networks of rights/duties correlatives restore the comforts and consolations of calculability. It seems fair to suggest that it is this coming of duty, this arrival of duty ahead of any correlative rights claims, *this very event of duty*, that Veitch beckons us to consider with his call to contemplate the “priority of obligation ahead of right.” And perhaps this arrival of duty ahead of rights does come to us like a wave, to use Waldron’s phrase; a veritable ocean wave that puts our footholds and grips on everything that sustains us, fundamentally at risk. In the face of this arrival, this approaching wave of duty, recourse to the exact scope and limits of a corresponding right for purposes of assessing and limiting one’s obligation is still an option, but no longer a dutiful option. Even

less so, of course, is the recourse to an absence of right – a non-right – that warrants a privileged escape from duty. The Hohfeldian discourse does not apply here, for the advent of duty that we are contemplating, precedes the very terms of this discourse. The Hohfeldian discourse, complete with measurability and calculability as it is, always settles in the wake of an initial arrival of an incalculable obligation, but in none of its settlements does it ever comprise a term or concept that can address the initial arrival of obligation that the ethics of the gift and hospitality has in mind. The arrival of duty contemplated in this radical ethics of hospitality always *suspends* whatever term or terms that settled legal discourses have to offer. The suspension at stake here is indeed a veritable phenomenological reduction or *epokhē*; a veritable suspension of the paradigms of understanding and knowledge that render the world measurable and manageable; a veritable suspension of natural consciousness, as Edmund Husserl might have put it (see for instance Husserl, 1992: 6, 16).

What is it that is given when something is given through such a voluntary assumption of risk? Not the material value that might be given or transferred, for that element of the gift is exactly that which forthwith attains the status of a reciprocal contractual performance. What is essentially given by voluntarily taking the risk whether one's act of giving will be reciprocated or not, is *time*, time that releases and leaves the other free to reciprocate or not reciprocate. In the final analysis, the only thing that can be given, says Derrida, is *time* – [*ce*] *qu'il y a à donner, uniquement, s'appellerait le temps* (Derrida, 1991: 45).

The gift of time, considered in terms of an existential suspension of the secure terms of trade and transaction on which natural consciousness depends and relies for the sake of sustaining an optimally risk-free existence, opens up a *categorical divide*. It opens up a categorical difference between the secured world in which natural consciousness makes itself at home, on the one hand, and the intimation of a completely different existence that is *no longer* and *not yet* classifiable as a "world." This different reality dawns upon consciousness whenever it is called to respond to an ethical demand that does not fit into the secured world that has become its home, the secured world on which it routinely relies as a matter of "natural" course. The gift of time that allows the other to take his or her time, suspends the regular expectations of any consciousness that has made itself at home somewhere. It exposes consciousness to a completely different reality that it cannot anticipate and measure in advance, a different reality that suspends or renders inapplicable all its available categories of anticipation, classification and measurement. Hence the invocation here of a *categorical divide*, and of "*an opening up*" of a categorical divide. It is but a short step from this *categorical divide* that opens up with the gift of time, that Derrida contemplates, and Kant's *categorical imperative*. This steps must nevertheless be thought through carefully, and this is what the next section of this essay will endeavour to do.

IV. THE CATEGORICAL DIVIDE AND THE CATEGORICAL IMPERATIVE

The gift of time that releases and leaves the other free to reciprocate or not. This is how one might, today, articulate the arrival of a duty that is not accompanied by a sense of entitlement. Of concern, here, is the suggestion that one comes to sense what is necessary to do to let things continue as well as they might in the face of uncertainty, *before* responding to a sense of anyone's entitlement. This is also how one might rearticulate,

today, the third maxim through which Kant explained the categorical imperative: Always treat every person also as an end, never as a mere means to an end – *zugleich als Zweck, niemals bloss als Mittel* (Kant, 1956a [1785]:61). We shall turn to Kant's categorical imperative presently. Before we do so, however, let us first take a closer look at the *categorical divide* that opens up in the gift of time that Derrida contemplates. An incisive regard for the *categorical divide* that Derrida contemplates is indeed crucial for an adequate understanding of the radical ethics that Kant envisaged with his *categorical imperative*. One of the achievements of Derrida's ethics of the gift may well be argued to concern the unique way in which it invites one to reread Kant.

There simply are no terms for the ethical "transaction" that is at stake for Derrida. One cannot come to terms with it. The only thing that is demanded here is to give, and to give unconditionally and without reserve. It is crucially important to understand the *categorical divide* between this demand to give, and any obligation-limiting legal or moral discourse with which one may endeavour to meet it. The categorical divide is such that one may venture to call it, for a moment, an *ontological divide*. It indeed shares key features with the ontological differentiation between *Being* and *beings*, that Heidegger contemplated. The wave of duty that we are contemplating can therefore, provisionally, be considered a wave of *Being* in response to which no reference to specific *beings* – or any specific circumscription of relations between them – offer adequate terms of settlement. The ontological divide that marks the withdrawal of *Being* from *beings*, is the scene of an inexhaustible unsettlement. However, the categorical divide that is at stake in the arrival of duty that we are contemplating, is ultimately *not* an ontological divide. The scene of unsettlement that we are endeavouring to witness does *not* concern *Being's* release of *beings*. At stake, here, is *not* the first gift, *Being's* gift to *beings*. Heidegger's "*es gibt*" is *not* what we are contemplating. From the perspective of the arrival of duty that concerns us here, all these ontological terms are drawn from the vocabulary of an old metaphysics that Heidegger sought to renew, but in which he ultimately remained squarely stuck. This language is exhausted today. Its terms are spent. They no longer speak, in any case not to a secular, urban, liberal democratic sensibility. And it is this sensibility that we must take as the inevitable point of departure for thinking the unsettling arrival of duty "ahead of a right" that Veitch has requested us to contemplate. Secular, urban and in principle (if not in reality) liberal democratic environments have become the home from the front porch of which the unsettling gift of time must be contemplated today. Heidegger's "village-life" or "pastoral" renewal of the old metaphysics of *Being* stands no chance of disrupting this world, no chance of uprooting its categories of measurement and orientation.

In contrast to the metaphysical language that pivots on the way specified *beings* emanate from unspecifiable *Being* (a language that can easily be traced to the Neo-Platonists), Kant's language of moral obligation offers a much more promising framework for thinking the arrival of duty "ahead of right" that Veitch is asking us to consider. It was Kant's ground-breaking insight that moral responsibility is fundamentally conditioned by freedom, the freedom to assume responsibility. His practical philosophy was an epochal post-Aristotelian statement of the insight that moral obligation does not derive from nature, *Being* or any kind of ontological insight, but from the fundamental freedom to assume responsibility. It reiterated Hume's famous protest against the *naturalistic fallacy*, the idea that you one can derive "ought" from "is" (Hume, 1888 [1739] 469-470). The assumption of responsibility is

the sign of freedom from nature, from physical reality, from any conception of “is,” argued Kant (see Kant 1956a [1785]: 81-102, 1956b [1785]:140). However, Kant’s language has in many respects also fallen into the staleness of an unforgiving and unimaginative moralism. It can be argued to have done so for reasons that are traceable to a fundamental incoherence in his own conception of moral obligation and practical reason (*praktische Vernunft*). On the one hand, Kant is adamant that the moral law concerns an experience of a universal imperative – you ought/*du sollst* – that cannot be fulfilled in any specified way. Any endeavour to give concrete effect to the imperative, asserted Kant, must end up contaminating the strict universality demanded by the moral law with the inevitable particularity of action. Any concrete attempt to comply with and *realise* the moral law must end up contaminating the universality of the response it demands with the particularity of specific concerns. In this respect, Kant’s practical philosophy also contemplates an absolute or *categorical divide* – a divide that we shall begin to call an *ethical divide* below – between the demand of the moral imperative, on the one hand, and any concrete response to it, on the other. Hence also Kant’s completely consistent insistence on a strict distinction between and separation of legality (*Legalität*) and morality (*Moralität*) (Kant, 1956[1795]: 318).

The law, claimed Kant, is not concerned with the enforcement or promotion of moral perfection, but with the reconciliation of the external liberty of one legal subject with that of another under a general system of rules (Kant, 1956[1795]:337). With this notion of the reconciliation of the external liberty of individuals, Kant evidently already contemplated the correlativity of legal relations that Hohfeld later analysed more exhaustively. For Kant, this correlativity of legal relations bore no comprehensible or knowable link to the strict and absolute demand of the moral imperative. However, Kant remained burdened by the sense that the impossibility of giving any concrete effect to the moral imperative ultimately renders the imperative meaningless; hence his postulation of the transcendental ideas of practical reason, the *summum bonum* and the *eternal life of the soul*, with recourse to which moral effort could be considered meaningful, notwithstanding its apparent futility in finite time and space. The *summum bonum* concerned the idea of an ultimate harmony between morality and nature. The idea of the *summum bonum*, contended Kant, renders thinkable the possibility of a perfectly moral existence that would also be a perfectly happy and fulfilled existence, considering that moral duty (*Pflicht*) would no longer be at odds with natural inclination (*Neigung*), but completely reconciled with it. According to him, the idea of the eternal life of the soul rendered thinkable a process of infinite moral progress that would culminate in the moral perfection and holiness (*Heiligkeit*) required to render the *summum bonum*, the reconciliation of duty and inclination, or nature and morality, possible (see Kant 1956b [1785]: 238-266).

Hegel performed an acute analysis of these principles of Kant’s moral philosophy in ten pages of the *Phänomenologie des Geistes* which he introduced under the heading *Verstellung* (dissemblance). In this analysis, he showed that Kant’s notion of the *summum bonum* cannot constitute the perfection or fulfilment of the moral imperative that he contemplates, considering that the very possibility of this moral imperative turns on the impossibility of any compliance with it. The moral imperative can only be experienced as a moral *imperative* – a *demand* or *command* – as long as it remains in tension or at odds with a reality that does not comply with it. Kant’s ideas of the perfection of the soul and of the *summum bonum* do not render morality possible, argued Hegel, they do exactly the

opposite. They render morality impossible, given that he – Kant – himself defined morality in terms of an irreducible tension between moral duty and natural inclination (Hegel, 1970 [1807]:453-464). Had Kant remained consistently true to this understanding of moral obligation, he may well have been less inclined to allow his own particular moral sentiments to lead him to facile assessments of the “universal” moral obligations of others, as he did in the well documented case of his advice to Maria von Herbert. Von Herbert had written to Kant about how her friend lost his feelings for her after she had disclosed to him a previous friendship that she had been concealing from him for too long. She had known all along that she should tell her friend about the previous friend, but struggled to do so for fear of the painful consequences to which the disclosure could lead. In his response, Kant boldly advised Von Herbert that all dishonesty constitutes a moral failure and justified the waning of her friend’s affection for her because of her “too late” disclosure of her previous friendship.⁶

Rigorous consistency with his own insight into the unbridgeable gap between moral duty and any finite attempt to comply with it would have exacted the insight that compliance with the categorical imperative was simply not possible under the finite circumstances that Von Herbert had described to Kant. It is noteworthy that Von Herbert’s second letter to Kant (1993) already grasped well the critique of Kant’s moral theory that Hegel articulated in the *Phänomenologie* (1807). She already realised well that moral duty only has significance when it competes with “the attractiveness of sin.”⁷ What she failed to realise, or realised much too late, however, is the way in which this significance of moral obligation arrives *in* and *as* moral consciousness long before the materialisation of any right of anyone else to some or other specified moral response.⁸ It is this arrival of the significance of moral obligation that concerns us here, and the time has come to ask why this arrival of moral significance, prior to any identification of a right, can still be called an obligation or duty. We turn to this question in the next section of this essay. Before we do so, however, it is important that we conclude this section with a careful reflection on the significance of the third maxim through which Kant explained the categorical imperative. As already stated above, the third maxim concerns the imperative to always treat every person and yourself also as an end, never as a mere means to an end – *zugleich als Zweck, niemals bloss als Mittel* (Kant, 1956a [1785]:61). Had Kant contemplated the full complexity of this maxim in his advice to Von Herbert, he may well have responded differently to her moral predicament.

Of the three explanatory maxims of the categorical imperative that Kant offered, the third one is the least likely to fall back into Hume’s naturalistic fallacy, which is ultimately the fallacy that the conduct demanded by the categorical imperative can be identified in finite and specific terms. The other two maxims through which Kant explained the categorical imperative – act in such a way that you can make the maxim of your act a universal law (*ein allgemeines Gesetz*) or a universal law of nature (*ein allgemeines Naturgesetz*) (Kant 1956b [1785]: 51) – both create or risk creating the impression that moral conflict can be resolved with recourse to a universal and unambiguous rule of conduct that will respect every individual’s autonomy and dignity in the same way. It may well have been this fallacious conception of the moral law that prompted Kant’s confident identification of moral failure in the case of Maria von Herbert. He evidently failed to realise that her dilemma could not be resolved with recourse to a single “correct” and universal rule of conduct without either

reducing her to an instrument of her friend's finite moral projections, or him to hers. Hegel grasped this well in his critique of Kant's moral philosophy. When it comes to the difficult situation that calls for a moral decision, moral consciousness always faces several moral demands, not one, and can therefore not give effect to *the* moral law – *[der] Begriff des Handelns [schliesst] eine manigfaltige Wirklichkeit und daher eine mannigfaltige moralische Beziehung in sich* (Hegel 1970 [1807] 448).

Kant's third maxim already begins to reflect this insight to some extent. It makes clear that the categorical imperative requires that *neither* the self *nor* the other be reduced to the one's or the other's moral projections. The humanity (*Menschheit*) of both one's own, and of any other person (*sowohl in deiner Person, als in der Person eines jeden andern*), should be considered an end and not just a means to an end (Kant, 1956a [1785]:61). When this "double kingdom of ends" appears impossible to realise under finite circumstances – as it always does in the case of deep moral conflict – the categorical imperative had best be articulated in terms of the freely assumed obligation to give one another time to reciprocate or not to reciprocate, and to do what is required to let things continue as well as they might *for everyone* involved. What comes out of this assumption of duty, and what one might gain or lose from it, are secondary questions. The relation between the moral act and whatever it achieves must simply be severed, *categorically* severed. But let us ask now, why this *freely assumed* obligation can still be called an obligation.

V. WHY IS THE DUTY TO GIVE A DUTY?

It is Emmanuel Levinas who first recognised that Heidegger's ontological language is still full of the language of fullness; full of the language of plenitude that characterised Western metaphysics from its beginning. Heidegger may have gone further than any metaphysician before him to de-substantialise the presupposition of full presence on which Western metaphysics turns. However, his retention of the notion of "*es gibt*" (*it gives*) as the definitional feature of his de-substantialised conception of *Being* is for Levinas the tell-tale sign of a thinking that is at best rearticulating the metaphysics of plenitude. Heidegger may have stepped back from the conception of fullness as full presence, but not from the conception of fullness itself, contends Levinas. The replacement of the conception of Being in terms of presence with a conception of Being in terms of an inexhaustible capacity to give, remains, according to Levinas, a metaphysics of generosity that is not warranted by our experience of existence. The historical record of what happened in Europe between 1933 and 1945, he writes, attests to no such generosity – *[aucune] générosité, que contiendrait, paraît-il, le terme allemand de es gibt correspondant à l'il y a ne s'y manifestait entre 1933 et 1945*. It attests, to the contrary, to a horrible neutrality of existence that only attains to meaning with the surge of *beings* – *[la] lumière et le sens ne naissent qu'avec le surgissement et la position d'existants dans cette horrible neutralité de l'il y a* (Levinas 1976[1963]: 435).

It is in response to this false metaphysics of generosity – false in the sense of not corresponding to one's most fundamental experience of reality – that Levinas commenced to articulate a thinking that turned the *ontological divide* into an *ethical divide*. For this thinking, the first encounter with existence does not entail the arrival of a gift that requires acceptance. It concerns the arrival of an obligation to respond to a void or lack, an obligation to respond that is an obligation to give – to give in whatever way that may

alleviate the burden of the void or lack that determines the first experience of existence. *Being* is a dead empty lack of specification or neutrality, contends Levinas. It only attains to fullness or positivity with the arrival of an obligation in an encounter with another person; an encounter that Levinas famously describes in terms of the ethical demand that the face of the other makes upon the self (Levinas (2006) [1949]: 239-241). In other words, according to Levinas, the surge of *beings* from the horrible neutrality of *Being* – *le surgissement d'existants dans cette horrible neutralité de l'il y a* – takes place in the encounter with the other, and more specifically, the encounter with the face of the other.

It is important to note, however, that the arrival of obligation in an encounter with another human being remains a primordial divide. It is no less primordial than Heidegger's ontological divide. On the contrary, it may well be said to be more primordial. The ethical divide may well be said – perhaps moving somewhat away from Levinas – to come first. It may be considered “older” than the ontological divide. From this arrival of obligation results the fundamental parameters of the world or worlds we live in, the parameters of all *Being* and *beings*. With the obligation that arrives with the descent of a stranger from the hills, one might say, the hills themselves arrive. Considered in this way, existence comes to us, not as wealth that commands the capacity to accept and receive. It comes to us as a need that demands a response. It does not offer, but demands a gift. And if it is a gift that is demanded here, and not some calculable contractual repayment, it is because the ethical divide tolerates no currency converter. The need that comes, the need that arrives like a wave from nowhere, tolerates none of the familiar modes of quantification that are employed on this side of the divide. That is why it demands a blank check, so to speak. Since no price or value is fixable here, the performance demanded inevitably takes the “form” of a limitless gift. This is also why it is not contradictory to talk about an *obligation* or a *duty* to give freely – *a free obligation* or *free duty* – when the ethical divide is at stake. The ethical divide opens up the obligation to give, but it neither compels the response, nor fixes its terms. The relation between the obligation to give and the freedom to give certainly remains irreducibly non-adequate and invariably inadequate, but it is not in the least incoherent, not in the least contradictory.

In his book *Le différend*, Jean-Francois Lyotard resorts to the expression “*différend*” (dispute) to name the ethical divide. The book *Le différend* is, on the one hand, a meticulous Wittgensteinian/Levinasian/Kantian study of language as an ethical response to an event. Lyotard understands the “event” in terms of an arrival of the sense that existing language – the totality of existing phrases, sentences or idioms – is in need of an additional phrase or idiom for purposes of responding to “*what*” is happening: *dans le différend, quelque chose “demande” à être mis en phrase* (Lyotard 1983: 30). The “*what*” of the “*what is happening*” cannot be named in the sense of stating “*what* is the case.” The conventions of language certainly limit sayability, as Wittgenstein instructs us. One cannot just say anything in response to the event. But language never restricts sayability sufficiently to exclude disputation – *le différend* – regarding the appropriate response to *what is happening* (Lyotard 1983: 56-92). Under these circumstances – under circumstances of the sense of need that something must be said that has not been said before – the proposal of a new phrase or idiom that might ensue, can never claim to name the “*what*” of “*what is happening*.” It cannot provide the “*what*” with a referent. It can only testify to the sense “*that something is happening*.” The new phrase can testify to *the case* that something

(*quod*) is happening, but it cannot refer to that which (*quid*) is happening, explains Lyotard: *Le cas ...serait qu'il arrive quelque chose, quod, plutôt que ce qui arrive, quid...le cas n'est pas ce qui est le cas. Le cas est: Il y a, Il arrive* (Lyotard 1983: 120-121).

The ethical divide concerns the impossibility of a phrase that would allow for a passage from the *quod* to the *quid* of the event. The event demands a response. It demands that a response be *given* and that a new phrase be found. The new phrase will need to be selected, however, from a range of possibilities offered by the conventions of language, none among which can transcend the conventionality that determines it. No new phrase can therefore come to address the *quod* of the event on its own terms, so as to determine its *quid*. No phrase can claim the capacity to *refer* to the event. No phrase can specify its *quid* or *quiddity*. A certain testimony is possible here, but not one that *names* the event in the sense of saying what it is. The relation between the event and the phrase that testifies to it, remains irreducibly *non-adequate*. The phrase is doomed to search for appropriateness under irreducible conditions of *non-adequacy*. Phrasing is thus never a matter of equation, but always a matter of *non-equation* and *non-adequation*.

This irreducible *non-adequation* between the event and any response to it, also marks the crucial divide between the event of suffering a wrong (*tort*), on the one hand, and the damage (*dommage*) that might be claimed or awarded to compensate for the wrong suffered, on the other (Lyotard, 1983: 18-19). This is why the duty to respond to a *wrong* – in contrast to the Hohfeldian duty to *pay* compensation to someone with a correlative right to be paid compensation – remains irreducibly linked to a duty to *give*. The duty to respond to a wrong – beyond compensation of damages – is a duty *to give* and not *to pay*. This is so because no terms of payment – and no conditions of equation or adequation that might warrant such terms – exist. The *sense of a duty* to respond to a *wrong* explodes the conventional correlativity of rights and duties that warrants specified payments and repayments.

In other words, the arrival of a sense of the duty to respond to a wrong is conditioned and accompanied by a sense of irreducible non-adequacy that renders invocations of payment and repayment fundamentally inappropriate. On the other hand, the possibility of any conscious act of giving – be it to a friend, a loved one, or a stranger – that is not occasioned by a sense of a wrong committed, also remains conditioned by a sense of irreducible non-adequacy (that may or may also not be a sense of inadequacy). One does not pay or repay a loved one for his or her love or a friend for friendship. One does not pay a stranger whom one perceives to be in need. No one ever comes close to a sense of what must be “paid” under these circumstances. One simply gives, and invariably remains caught up in an inner disputation – *différend* – regarding the “appropriateness” of a palpably non-adequate gift.

Can one still talk about a *duty* to give in these cases, a *duty* to give to a loved one or friend, or to the stranger in need? Must one talk this way? Perhaps the sense that a stranger is in need is no different from the duty that arrives from a sense that a wrong has been done. Perhaps here, too, one rather responds to a wrong, that is, to the sense that that the stranger should not have been in need in the way he or she is. But in all three these cases of giving – to the loved one, the friend, the stranger – the urge to give can hardly be imagined as unaccompanied by any sense of a *demand of appropriateness* in the face of an absolute

absence of criteria of appropriateness. Perhaps people do sometimes bestow gifts unthinkingly and frivolously, without considering themselves faced with the demand of an immeasurable “appropriateness.” Perhaps this kind of gift expresses a certain sovereignty of giving that demands further reflection, as Bataille and Derrida suggest. The focused magnanimity of the serious gift, however, invariably responds to a sense of a demand that comes to one; a demand that reaches the shore of one’s consciousness like a wave of existence; a demand that brings with it an undefined sense of obligation, a sense of an ungrounded need or desire to respond appropriately.

Standard idioms and conventions of phrasing may well militate against endowing the mere sense of a need to respond appropriately – in absence of any demand to pay, repay or compensate – with the significance of an obligation. Levinas nevertheless insists that every encounter with the face of another person signals the unfathomable obligation to respond to an immeasurable “appropriateness” that has nothing to do with any right that that person may or may not have (see Levinas, 1971: 203-235). Perhaps we have finally arrived here at a thought that appears to answer to Veitch’s call to contemplate an obligation that precedes all considerations of rights and entitlements. The question is, however, whether the pursuit of this thought has not taken us much too far away from the concrete context of political and legal responsibility that Veitch may well consider an essential ingredient of his call. Does Levinas’ insistence on the obligation that stems from the encounter with the face of the other bear any significance for any practical philosophy, or must it always remain something foreign to all notions of the practical and the doable? Can one imagine it to have any meaningful bearing on concrete legal reasoning? Or does the categorical or ethical divide that conditions this unconditional obligation prevent one from doing so? These are the questions that the next and last section of this essay will address.

VI. POST-HOHFELDIAN *LEGAL* DUTIES TO GIVE FREELY?

The work of Levinas – and of Lyotard – alerts one to the sign of an infinite obligation that has always and will always have preceded and exceeded all past and future “correct” settlements of correlative rights and duties. This sign – the sign that signals infinite obligation before signalling existence, or signals existence as infinite obligation – is the signal that occasions all instances of standard juridical recourse to the correlativity of rights and duties. Once occasioned, however, this juridical discourse invariably, and forthwith, begins to ignore any intimation of “the priority of duty ahead of right.” The signal of obligation precipitates the very need for juridical discourse. It is the very occasion for the juridical discourse that will forthwith begin to ignore it. The sign or signal of obligation is, in other words, the very occasion of something that is *designed* to silence or erase the sign or signal of obligation. The shelf-life of any design is indeed the period of time that it fends off and silences all signs that call for a new design. The better the design – the better the *de-sign* – the more effective the silencing of the sign. The better the law, the more unlikely the chances of escaping from its correlative constellations. It is the task of contemplating this unlikely escape from exceptionally well-designed law that Veitch has requested us to consider in this volume of essays. He has done so because of an evident awareness that the high-tech “tax minimisation” laws that he has in his sights, are not only silencing a call of duty that may come from beyond the boundaries of law, but is increasingly also hollowing out the last echoes of such a duty *within* the law. The awareness is perfectly coherent: The

more rights/duties correlatives are no longer sensitive to the way in which a primordial sense of obligation allows one to make sense of existence as such, the more will all rights/duties correlatives that don't serve one's own direct interests come across as senseless burdens that had better be translated, as far as legal high-tech would allow, into non-rights/liberties correlatives. *Voilà* the massive tax "minimisation" practices with which Veitch's contribution to this volume engages. One cannot even invoke the pejorative term "tax evasion" here, for the practices at issue would appear to enjoy the full blessing of exceptionally good law.

Hence, then, Veitch's call to look away from existing law and existing conceptions of rights and duties, at least for a moment; hence his call to *suspend* existing law and legal relations, as phenomenologists might instruct one to do, and to "raise our eyes to the hills" in search of a primordial sense of duty that may come to us in advance of all existing legal rights. For the legal duties that sustain legal rights themselves ultimately evaporate when they are no longer oriented by sense of duty that we cannot measure; oriented by a sense of duty with regard to which due performance cannot be specified, a sense of duty to which one can only, and must, give oneself freely. This, then, seems to be the arduous path of thinking onto which Veitch beckons us: Away from a perfectly legal existence under which we increasingly consider ourselves *duty free*; and towards the rediscovery of the free assumption of duty – the *free duty* – that *orients* our existence in the most fundamental sense of the word conceivable.

Twentieth century legal reasoning endeavoured to unshackle duty – to *free* it from the trappings of existing law – on a number of significant occasions, one of which was the 1932 House of Lords decision in the case of *Donoghue v Stevenson* ([1932] UKHL 100). The essence of the *Donoghue* decision was the unshackling of a general duty of care – an *independent* duty to care – from contractual duties, on the one hand, and from the range of specific duties of care recognised in the writs of old English law, on the other.⁹ This is how English law came to recognise the general legal duty for which several civil codes of Europe already provided at the time. The German civil code already invoked at the time, and still invokes today, notions of good morals – *guten Sitten* (BGB, 2002 § 817). The French *Code Civil* invokes damage that results from unspecified negligence or unreasonable conduct – *dommage ... causé non seulement par son fait, mais encore par sa négligence ou par son imprudence* (CC, 2017, art 1241). French jurisprudence infers from this clause a common standard of social conduct – *une norme générale de conduit sociale* – that is not based on contractual obligations or any other written legal disposition – *les devoirs extra-contractuels qui ne sont explicités par aucune disposition écrite* (see Viney and Jourdain, 2006: 380). The Dutch Civil Code refers to *ongeschreven recht* (unwritten law) in this regard (NBW, 1992, 6:162(2)). In the case of all three these codes, the clauses invoking good morals, common standards of conduct or unwritten law serve as a basis of which any damage causing event that can be classified as contrary to the good morals of society can be sanctioned as a source of a legal duty to pay compensation.

The same principle was invoked in South Africa in 1975 in the case of *Minister van Polisie v Ewels* (1975 (3) SA 590 (A)) for purposes of introducing into South African law a general legal duty, not only *not to cause*, but also *to prevent* damage. The case was generally hailed by South African scholars of the law of civil delict as a significant breakthrough in South African

judicial reasoning. *Ewels* was considered a milestone because it recognised an independent, free-standing, general legal duty to prevent harm. However, pre-*Ewels* conceptions of narrowly circumscribed duties of care – drawn from old English law – persisted in the reasoning of the South African High Courts and Supreme Court of Appeal until the Constitutional Court took recourse to the horizontal effect of the South African Constitution of 1996 to put a stop to them in the case of *Carmichele v Minister of Safety and Security* (2001 (4) SA 938 (CC)). Since then, the general legal duty to prevent harm appears to have been consistently recognised by South African courts (see for instance *Minister of Safety and Security v Dirk van Duivenboden*, 2002 (6) SA 431 SCA).

These case and legislative histories can certainly be considered narratives that tell the story of the *release* of a general legal duty to prevent harm in a number of jurisdictions of the world, and many similar histories very likely relate the development of similar narratives elsewhere. Do these narratives of release or liberation reflect a spreading recognition of a free legal duty *to give*, that is, of a legal duty to simply give oneself freely to the advent of an unfathomable sense of a *free duty*, discussed above, the *free duty* that orients one's existence in the most fundamental sense conceivable? An honest response to this question would certainly have to assess all legal systems and jurisdictions considered on and in their own terms. Both the UK and South African legal systems nevertheless suggest that the release of a general legal duty to prevent harm – as free as it might be from the specific considerations of law that used to shackle it to some or other legitimate expectation or right – does not yet constitute anything comparable to the fundamental *moral duty to give* that one may distil from the thought of Mauss, Kant, Levinas or Lyotard. Both these jurisdictions still shackle the duty to prevent harm to the condition of an acceptable *balance of interests* between the parties involved.¹⁰

Consider in this regard the “text book” case with reference to which South African professors of the law of civil delict explain the general legal duty to prevent harm to their students: the case of someone who fails to save a drowning child from a river (see Neethling et al, 2006: 68).¹¹ There is no legal relationship between the child and the person who fails to save him that determines a duty to act. No existing right of the child imposes a correlative duty on the person who is witnessing the child's imminent drowning. The question is whether a legal duty can be construed or constructed under these circumstances. A prominent opinion among South African theorists of civil delict holds that this can indeed be done, by weighing up the interests of the child and the person who is witnessing the imminent drowning. This, then, is how the law or legal reasoning might construct a duty that precedes a right and indeed gives rise to one. Perhaps also not. Some theorists of the horizontal effect of fundamental rights may well argue quite persuasively that the child's right to be saved, does not derive from such a “constructed” duty. They may argue, to the contrary, that the constructed duty itself derives from the horizontal effect of a constitutional or human right of the child.¹²

One may nevertheless argue in response that constitutional or human rights are not rights in the strict sense of the word. They are open phrases (empty signifiers) that allow for the finding of appropriate full phrases when the exigency to do so arises. Seeing things in this way allows one to recognise a certain proximity between Lyotard and Hohfeld. Hohfeld, we saw above, stresses that an appropriate construction of correlatives is not determined in

advance, but emanates from an authoritative decision in the face of a moral or juridical exigency to find a proper constellation of correlativity. What Hohfeld is asserting here is not in the least at odds with Lyotard's invocation of "something" that demands the finding of a phrase – *quelque chose [qui] "demande" à être mis en phrase*. He too, ultimately exposes the finding of an appropriate constellation of correlatives to the arrival of an abyssal or groundless exigency that Lyotard denotes with the event or advent of the *différend*.¹³ However, this comparison of Lyotard and Hohfeld demands that one distinguishes clearly between *the obligation to find a phrase* or a constellation of correlativity (a constellation is ultimately nothing but a phrase, that is, something said), on the one hand, and the *legal duty* that emerges from the found phrase or found constellation of correlativity, on the other. It demands that one distinguishes clearly between the *absolute and unconditional demand* that arrives with the exigency to find a phrase, on the one hand, and the *relative* and indeed *correlative duty* that emerges from the phrase found. This distinction pivots on the unbridgeable gap between the unmeasurable obligation to give that arrives with an unfathomable event, and the necessary calculability of all conceivable or recognisable legal duties that may follow in its wake.

Sustaining this distinction would be imperative for any Hohfeldian endeavour to remain faithful to Lyotard's thinking of the event as the ultimate resistance to the accountable and countable use of time – *l'ultime résistance que l'événement peut opposer à l'usage comptable du temps* (Lyotard, 1983:15). At stake in this thinking of the event, is, in other words, the resistance against a complete economic reduction of existence. To explain further, let us imagine again the person who sees a child drowning in a river, and let us impute this train of thought to him or her: "That child has everything to lose. I have little to lose. My clothes might get wet. I have a cold and it might get worse if jump in. All things considered, I think it is reasonable that I jump in and save the child." Or even one of these two trains of thought: "I am not a strong swimmer and may also drown in this current, so I should not." "I have a serious heart condition and may very well die myself if I jump in, so I won't." These are evidently considerations on the basis of which judicial reasoning may begin to make juridical sense of what may have come to pass, so as to attribute correlative rights and duties, or non-rights and liberties, to the parties involved in an ensuing law suit. But is it conceivable that this is indeed how someone who stares into the contorted face of mortal agony – someone who looks into *the face of a mortally afraid and panicking child* – would reason, without having first experienced the most simple and immediate demand to give what one has to give and even more than one has to give? Indeed, Levinas avers that the encounter with the face of the other demands that we give more than we have to give – *au-delà de ma capacité: il faut donner ce que l'on n'a pas* (see Derrida, 1999: 141). And this is why the arrival of the sense of a duty to give renders irrelevant, and must render irrelevant, any consideration of that which one has to give.

One might give and find that the situation ultimately did not even demand that one give much – wet clothes, possibly a cold. One may give and end up giving one's life – as some persons with serious heart conditions can be imagined doing and having done under circumstances like these. Or one may fail to give and afterwards offer correlative grounds of justification for one's failure to give. But, one would like to think that it is unthinkable that any of these options, the last one included, would not have been preceded and precipitated by the sense of an arrival of an obligation of which the specific or specifiable terms were

neither relevant, nor available, at the time. If one cannot think this thought, one will have to let go of Lyotard's endeavour to think the event as the ultimate resistance to the complete economisation of time. If one cannot think this thought, one would have to conclude that Veitch's call for a contemplation of the "priority of obligation ahead of right" is utterly pointless. And one would begin to understand why a life that is indeed completely deprived of the sense of a *free duty to give* – a duty that remains fundamentally independent of all calculable rights – may end up as a cynical quest for a *duty-free* existence.

The law's ability to banish the arrival of a sense of obligation and responsibility is not a new concern in critical legal theory. Veitch himself has been engaging with this seemingly intrinsic irresponsibility of law for many years now (see Veitch, 2007). The questions that he has invited us to address in this volume constitute a call to take this engagement further. His own essay in this volume highlights the sheer social indecency of the sophisticated tax minimisation schemes that high-tech law not only makes possible, but also cultivates. It highlights the ways in which high-tech law firms allow the rich to become the worst free riders in our societies; allow them to become and to remain casual observers of a world that is drowning before their feet. For those who have come to recognise this, the search for responsibility and obligation will increasingly prompt them to look away from the law and the legal articulation of duty; it will prompt them to raise their eyes to the hills in the hope that a deeper sense of responsibility may yet dawn upon humanity. This deeper sense of responsibility may well arrive one day, accompanied by a sober awareness that much of what is currently called law, will simply have to be destroyed.

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* Professor of Philosophy of Law, University of Luxembourg; Extraordinary Professor of Legal Theory, University of Pretoria. I am indebted to Frank Michelman and Joe Singer for many instructive discussions of Wesley Hohfeld's analysis of legal correlatives over many years, and to Chris Doude van Troostwijk and Arthur Cools for many inspiring conversations about Husserl, Levinas, Lyotard and the whole phenomenological tradition. I have learned and am still learning a lot from all of them. I thank Scott Veitch and Emiliios Christodoulidis for a sustained working relationship and friendship over many years to which the thoughts developed in this essay also owe immeasurable debt. I thank Pascal Ancel for directing me to the specifics of the *droit de responsabilité* discussed in this essay. I also thank Rachael Walsh for insightful comments on an earlier draft. And I would like to remember here also André van der Walt, who passed away in 2016, but whose influence on the thoughts developed in this essay will always remain with me.

¹ I am grateful to Joe Singer for checking whether this translation matches the Hebrew text well enough and also for telling me a story about how help from the heavens comes to us through people just doing their duty. The story goes like this: Some local council workers go to inform a man that the valley in which his house is standing is going to be flooded, and to help him to pack up and leave in time. No, says the man, you need not help me. If God is sending a flood, he will also send me help. The workers come back later with Jeeps when the house is already flooded knee-deep, but the man still insists: God will help me. They come back with boats when the house is almost halfway under water, but again the man refuses the help and insists that God will help him. They come back again with a helicopter when the house is already fully under water and the man is sitting on the roof. But he just keeps on saying: God will help me. After that the house gets completely submerged, the man drowns and when he gets to heaven he asks God: Why didn't you save me? Then God asks him: I sent people to help you, later I sent them again with Jeeps, boats and even a helicopter, what did you want?

² This may not look like the horizontal effect reasoning that I have invoked above, but I would like to insist that it is on the basis of extensive arguments developed elsewhere. See Van der Walt, 2014.

³ For one of the most salient narratives of this formation of modern law, see Villey, 2009[1975].

⁴ See Florence Weber's introduction to Mauss (2007)[1925]: 50-54.

⁵ The latest revelations regarding this increasingly unpalatable saga came with the publication of Heidegger's *Schwarze Hefte* and the letters to his brother. See Heidegger, 2014; Homolka and (Arnulf) Heidegger, 2016. For an incisive discussion of this publication, see *Heidegger: La boîte noire des Cahiers, Critique*, décembre 2014. For discussions of the letters, see Soboczynski and Cammann, 2016, Schulte 2017.

⁶ For the German texts of these letters, see : Kant, 1791, 1792, 1793. For English translations of these letters, see Ray Langton, 1994. Maria von Herbert's Challenge to Kant, in Peter Singer, *Ethics*, OUP, 1994, 281-294.

⁷ The expression "attractiveness of sin" is taken from the English translation of the letter cited by Langton. It is a somewhat too strong rendition of the German which more literally translated only invokes a "gereizte Sinnlichkeit" (aroused sensuality) – "die Aufgaben der Moralität [erhalten] ihr Ansehen ... nur durch eine gereizte Sinnlichkeit."

⁸ Had she done this she may well have been able to take her friend's particular morality with a pinch of salt. The mistake Kant made here is closely related to the "naturalistic fallacy" against which Hume argues, as I explain further in the text above, towards the end of this section. However, in the last part of his letter, Kant himself appears to recognize the limited morality of Von Herbert's friend.

⁹ For a discussion of the long history of the unshackling of a general duty of care in English law and its peculiar influence on South African law, see Van der Walt, 2003.

¹⁰ In the UK, this balancing of interests at stake here takes place with reference to the "foreseeability" question second that the identification of a duty of care poses. See *Bolton v Stone* [1951]AC 850. In South Africa, the balancing takes place under the question of the wrongfulness of the act that caused the damage. See *Regal v African Super Slate* 1962 (3) SA 18 (A).

¹¹ I refer here to the 5th edition of Neethling et al, *Law of Delict*, 2005, which is the only edition to which I had access at the time of writing and completing this essay. Thanks is due to Johann Knobel for confirming that the 7th edition of 2015 still contains the example of the drowning child and passive onlooker on pages 77-78, and for refreshing my memory of the location of this passage that has become vague after many years of no longer teaching the South African law of delict. It is noteworthy that the *Ewels* case which introduced the general legal duty to prevent harm into South African law also invokes a "duty to save" in the course of discussing the duty to prevent harm. See *Minister van Polisie v Ewels*, 1975 (3) SA 590 (A) at 596-597.

¹² Judge Van Dijkhorst indeed argued this expressly in the South African case of *Jooste v Botha* (2000 (2) BCLR 187 (T)) by contending that absence of a legal duty in private law due to the absence of a corresponding private law right requires the creation of a private law cause of action when a constitutional right demands that.

¹³ This, in any case, is what Singer is arguing when he emphasizes the exercise of responsibility on which the appropriate selection of correlatives turns. See Singer (1982) 1058.