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**Justice and Responsibility: On (not) teaching computer and  
information ethics**

Lucas Introna

The Department of Organisation, Work and Technology  
Lancaster University Management School  
Lancaster LA1 4YX  
UK

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# Justice and Responsibility: On (not) teaching computer and information ethics

*Working Draft: comments welcome*

*Lucas D. Introna*

Centre for the Study of Technology and Organisation  
Department of Behaviour in Organisations  
University of Lancaster Management School, United Kingdom.  
[L.Introna@lancaster.ac.uk](mailto:L.Introna@lancaster.ac.uk)

## **Abstract**

*Can we teach ethics, and if we can how should we do it? Do we want our students to know moral theory or act morally? This paper assumes that the objective of ‘teaching ethics’ is to cultivate the possibility for moral conduct in the everyday world of institutional life. As teachers we know how to teach moral theory but how do we encourage our students to act morally. To attempt an answer I will present some ideas from the work of Levinas and Derrida. With Levinas I will argue that ethics happens in the singularity of the face of the Other before me ‘here and now’. Ethics matter in my everyday contact with the Other that confronts me and claims my response. But what about all other Others simultaneously present? What about justice for all other Others? With Levinas and Derrida I will attempt to articulate the notion of ‘caring justice’. In caring justice I want to show how the demands of ethics (the singular) and the demands of justice (all other Others) can become the impossible possibility for a “justice where there is no distinction between those close and those far off, but in which there also remains the impossibility of passing by the closest.” Furthermore, I want to argue for the need of Aristotle’s notion of ethics as a habit—caring justice as the cultivation of moral character by doing. Finally, to demonstrate what I mean I discuss a singular case of intellectual property right. In this ‘case’ I try to show how caring justice can help us not to teach ethics, but do it--almost.*

## **Introduction**

To act with moral courage is very difficult, almost impossible. To *know* the right thing to do is not the same as *doing* the right thing. When we teach ethics, that is, if it can be taught, we want those taught to act morally rather than know morality. It is with this supposition that this paper will proceed, and quite

possibly fail. Nevertheless, it seems rather evident that teaching codes, principles, categorical imperatives, and the like, does very little to extended the sphere of moral *action*. We can sharpen moral reasoning by reasoning about cases, and this may or may not be beneficial. However, ethics for the ordinary ‘getting through everyday life’ person does not come before her as ‘cases’. Rather ethical claims jump at her ‘as from nowhere’. They leap at her in the most unexpected places and times. When she is rushing for the train, or pressing against some impossible deadline. They appear not as ‘cases’ to be reasoned but as claims to be responded to, or not. Ethics as moral reasoning seems always to arrive to late, like onlookers after an accident. Yet, it is *in* accidents rather than *after* or *before* accidents that ethics really matters.

It is for this reason that I will argue in the first section of this paper, using the work of Levinas, that *ethics* is not a branch of philosophy in the way that epistemology or aesthetics is a branch of philosophy. I will argue that ethics is rather the very source of our sociality. The question “what ought I do” comes up, first and foremostly, as a desperate plea, by the self-certain ego, shaken, immediately and absolutely, by the naked face of the Other before her, ‘here and now.’ Responding to the Other is not a choice borne out by reason, but the resolve to release my rights, to accept my guilt, to be ‘for the Other’ her hostage. Ethical responsibility, the claim of the Other, can not be taught, it can only be accepted, in absolute passivity. Yes, but what about justice, one could hear the other Others ask, even plea? What about those who do not face me ‘here and now’ but who *could* all equally face me, surely they have an equal claim to my responsibility? Surely, I am ‘for them’ as well. In the second section of the paper I will argue with Levinas and Derrida that the face of the Other does not only signify its own Otherness but it also immediately and simultaneously reminds me of every other Other. As such the radical asymmetry of the ethical claim immediately and simultaneously recalls the symmetrical claim for justice—even I am Other for others. The community of Others require justice—justification through calculation, principles and laws to ensure equality in distribution and utilisation of resources. However, the strength of such a justice is not in its disregard for the idiosyncratic in its search for the universal categories and principles of equality, fairness and the like. Rather its strength is in its steadfast willingness to be disrupted by the proximity of the Other. As Levinas (1991(1974)) expresses so eloquently: “Justice remains justice only, in a society where there is no distinction between those close and those far off, but in which there also remains the impossibility of passing by the closest” (p.159). I will use the work of Derrida to articulate a notion of *caring justice* as exactly that justice “where there is no distinction between those close and those far off, but in which there also remains the impossibility of passing by the closest.” In the final section of the paper I will attempt to make sense of this ‘double claim’, this impossible possibility of caring justice, by dealing with a singular case of intellectual

property right. I hope to demonstrate that Levinasian ethics presents us with some fundamental and radical ways (not) to teach information and computing ethics.

## **On *not* teaching ethics: asymmetry and responsibility**

For Levinas(1991(1974), 1996a, 1996d) and Caputo(1993) ethics is not a cognitive content, the outcome of some practical or moral reasoning process as proposed, for example, by Kant. Caputo (1993, 2000) argues that moral reasoning comes to late—like a crowd after an accident that now argues about what went wrong, who is to blame, what ought we have done—so to with ethical theorists/theory. Rather, in the facticity of everyday life moral claims jump at us from nowhere. They make claims on our resources without leaving us time and space to reason and discover what we ought to do. The temporality and ‘location’ of the ethical claim is of a different kind to the temporality and ‘location’ of moral reasoning—it has an urgency that closes down all room for manoeuvre. The temporality and location of the ethical claim is in my *Befindlichkeit*—in my ‘finding myself already busy in the world of everyday going about’. Ethics happens, and when I look up, take notice, I am already ‘in’ it—its captive, its hostage. How will I respond, now here, to the face before me?

For Levinas, ethics is happens—or not—when the self-certain ego becomes disturbed (shaken, questioned) by the proximity, before me, of the absolute Other, the absolute singular (the Infinite). The wholly Other that takes me by surprise, overturns and overflows my categories, themes and concepts; it shatters their walls, makes their evident sense explode into non-sense. For Levinas the claim of conventional ethics (Ethics with a big ‘E’ as Caputo calls it) that we can *know*, the right thing to do, is to claim that the absolute singular can become absorbed into, domesticated by, the categories of my consciousness. Once the Other, this singular face before me, has become an instance in my categories or themes it (the face) can no longer disturb the self-evidentness of those categories. Nothing is more self-evident than my categories, and likewise with the singular now absorbed as an instance of them. As Jew, nigger, rich, poor, homeless, rapist, criminal, capitalist, idealist, realist, (and every other category we care to name) the singular disturbing face disappears in the economy of the category. In the category, we can reason about rights, obligations, laws and principles, and yet ethics may never happen—actual faces starve, die, are humiliated, scorned as they circulate in the economy of our categories. They fall through the cracks of our debates, arguments and counter-arguments, and yet we feel justified—we have our reasons; it was the right thing to do after all.

This desire to call forth, to render present what ‘is’, has always been at the heart of western thought—the project of being as defined by Heidegger. Truth as unconcealment (*aletheia*) of what ‘is’.

In the gaze of consciousness the concealed (*lethia*) is made present (*alethia*). The task of western consciousness, of Philosophy with a big ‘P’, is to draw the Other, the strange, always at the edges, into the light of the present—to expand the horizon of consciousness is its calling. In the expanding horizon of consciousness, the strange, the Other, is a ‘not-yet’, waiting to be domesticated by the revealing gaze of intentionality. Yet, the singular has always disturbed the systems of philosophy. As Caputo (1993, p.73) argues:

The individual, according to the most classical axiomatic, is ineffable (*individuum ineffabile est*). That is to announce with admirable rigor a breach in the surface of philosophy. It formulates a principle for what falls outside principles, a covering law for what law can not cover, for a kind of out-law. It announces with all desirable clarity that the individual is both necessary and impossible.... For to understand metaphysics, which takes itself to be the science of what is real, one must understand that the only thing that is real, the individual—*sola individua existunt*—is the one thing of which it cannot speak.

However, by saying the singular is ‘ineffable’ we have already said too much. We have already brought it into our system of thought. We now have a location for it. It now no longer disturbs us, or surprises us. In some small but significant way we have already domesticated it. This is the impossibility we face, this very face, here now, before me. It is wholly Other, in a way that never allows me to settle down into my system of thought.

If this is so how can the Other disturb me without becoming content of consciousness? Levinas uses the familiar event of a doorbell ringing to disturb my work, my thoughts, but when I open the door, there is nobody there. Was there nobody there? Did I imagine it? I have no memory, I can not recall. The absolutely other—the infinity—does not move in the temporal horizon of being. Its presence “does not simply lead to the past but is the very passing toward a past more remote than any past and any future which still are set in my [ego] time...” (Levinas, 1996b, p.63). Just when I settle back into my thoughts the doorbell rings again, and again, and again—but there is never some body *there*. The subject is affected without the source of the affection becoming a theme of re-presentation. The term *obsession* designates this relation which is irreducible to consciousness. “Obsession traverses consciousness contrariwise, inscribing itself there as something foreign, as disequilibrium, as delirium, undoing thematization, eluding *principle*, origin, and will, all of which are affirmed in every gleam of consciousness.” (Levinas, 1996d, p.80-81). It is this relationship of incessantly *there* but never present that Levinas calls proximity, the relationship with the absolute stranger.

*“Anarchically, proximity is a relationship with a singularity, without the mediation of any principle or ideality. It is the summoning of myself by the other (autrui), it is a responsibility toward those*

whom we do not even know. The relation of proximity does not amount to any modality of distance or geometrical contiguity, nor to the simple 'representation' of the neighbour. It is *already* a summons of extreme exigency, an obligation which is *anachronistically* prior to every engagement. An anteriority that is older than the a priori." (Levinas, 1996d, p.81)

This proximity, this very nearness that is never *there* and which escapes my themes yet always disturbs me, prevents me from settling down in my thoughts, is signified in the face of the other. The face of the other is not merely the empirical face, yet the empirical face does serve as a signifier that signifies the always already ineffable of the singular confronting me. It is the placeholder that never settles down in any 'place' yet ceaselessly reminds me that 'I' have already taken its 'place'. "The proximity of the other is the face's meaning", writes Levinas (1996d, p.82). As a face the other becomes my neighbour—the one closes to me that demands my attention. Her face calls me, solicits me, and in so doing recalls my responsibility. The moment I catch a glimpse of her face 'I' become questioned—am I not occupying her place in the sun? Her face keeps me hostage in its total uncoveredness and nakedness, in the defencelessness of her eyes, the straightforwardness and absolute frankness of her gaze. Her face resists me. Not as a power that confronts me, but as a measure that puts me into question, immediately and absolutely. The indictment of the ego is "produced when I incline myself not before the facts, but before the other. In her face the other appears to me not as an obstacle, nor as a menace I evaluate, but as what measures me. For me to feel myself unjust I must measure myself against infinity." (Levinas, 1996c, p.58).

I stand accused, always already accused—without having done anything I have always been accused. I must respond. Not out of my choosing but prior to my freedom, prior to my choosing. All I can say is "I"—'I' as in "I am guilty", "I am the murderer", and "I am responsible". I am for the other. This taking up of my responsibility Levinas calls substitution. However, this 'taking up' is not an act it is rather an absolute passivity. In resolving not to be, 'subjectivity undoes essence by substituting itself for the other'. I become a subject in the fullest sense of the word. My uniqueness, my autonomy, is the fact that no one can answer for me. Morality is not a moral choice by a free self-certain ego. It is rather in the encounter with the infinitely other that I can become questioned, I recall my guilt, and accept (by absolute passivity) my responsibility, be subject for the other—not an I-am but an I-am-for-the-other. My subjectivity always already refer to the Other as its source, its moral force. As Cohen (1986, p.5) argues:

Moral force can not be reduced to cognitive cogency, to acts of consciousness or will. One can always refuse its claim... and the capacity to rationalise such refusal is certainly without limit.

Ethical necessity lies in a different sort of refusal, a refusal of concepts. It lies in the prethematic demands that are necessarily lost in the elaboration of themes. Ethical necessity lies in the social obligation prior to thematic thought, in the disturbance suffered by thematic thought... This is not because ethics makes some truths better and others worse, but because it disrupts the entire project of knowing with a higher call, a more severe “condition”: responsibility”

If this is true, if the force of morality is in proximity of the face of the other, what about all other Others already implied in the very face before me? Surely, I am also an Other for others? Is there not a limit to my being for the Other? These questions need to be addressed. This is the purpose of the next section.

### **On teaching ethics: symmetry and caring justice**

Levinas (1991(1974), p.158) argues that we can not speak of the Other without immediately and simultaneously speaking of *all* Others. The face of the Other obsesses me *both* in its refusal to be contained (rendered equal) *and* its recalling of the always already equal claim of all Others weighing down on me in this particular face before me. In the face of the Other is signified always and already the face of all other Others—the ‘third’ in Levinas’ terminology. In the words of Critchly (1999, p.226-7): “Thus my ethical relation to the Other is an unequal, asymmetrical relation to a height that cannot be comprehended, but which, *at the same time*, opens onto a relation to the third and to humanity as a whole – that is, to a symmetrical communities of equals. This simultaneity of ethics and politics gives a doubling quality to all discourse...the community has a double structure; it is a community of equals which is at the same time based on the inegalitarian moment of the ethical relation.” It is exactly this simultaneous presence of the Other and *all* other Others that gives birth to the question of justice. The urgency of justice is an urgency born out of the radical asymmetry of every ethical relation. Without such a radical asymmetry the claim of the other can always in principle become determined and codified into a calculation, justice as a calculation and distribution. Thus, justice has its standard, its force, in proximity of the face of the Other. Levinas (1991(1974), p.159) asserts: “justice remains justice only, in a society *where there is no distinction between those close and those far off*, but in which there also remains the *impossibility of passing by the closest*. The equality of all is born by my inequality, the surplus of my duties over my rights. The forgetting of self moves justice” (my emphasis). This formulation of justice by Levinas highlights the tension; one could almost say a paradox in Levinas’ justice. There ought to be ‘no distinction between those close and those far

off’ yet ‘at the same time’ it ought to remain ‘impossible of passing by the closest’. This tension is what Critchley termed above the ‘double structure’ of community. Living with ‘the law’ and ‘the face of the Other’ *at the same time*. It is exactly this tension which Derrida (1992) addresses in his paper “Force of Law: The “Mythical Foundation of Authority”, which I will now turn to.

In his essay Derrida (1992) distinguishes between the law (*droit*)—we could also add policy or any other explicit rules for directing conduct and for settling disputes—and justice (*juste*). Law, for Derrida, is the positive structures that make up the judicial systems of one sort or another, that by virtue of which actions are said to be legal, legitimate, or properly authorised (Caputo, 1997, p.130). Derrida argues that the law—to be law—must be enforceable; it must have some force. This connection between law and force is easily recognisable in our everyday speech when we use the phrase “the force of the law” or “can we enforce this law?” But where does this force come from? What authority or foundation provides this basis for law to have force? To this Derrida responds that the origin of the authority of the law, which gives it its force, is unfounded. No matter how detailed we do our analysis, whether we analyse the reasons, the debates, the arguments, the institutions, the decision processes, the power structures, the regimes of truth (in Foucault’s language), and so forth, we will not discover the *ultimate* source or foundation that guarantees this authority, gives it its force. Derrida (1992, p.13) concludes: “Its very moment of foundation or institution...the operation that amounts to founding, inaugurating, justifying law (*droit*), making law, would consist of a *coup de force*, of a performative and therefore interpretative violence that in itself is neither just nor unjust and that no previous law with its founding anterior moment could guarantee or contradict or invalidate.” Thus, law is constructed through a performative act that is always in some form or another self-authorising. One could respond with disappointment, “what now?” Are we now in an endless see of nihilism? No, not so, rather its unfoundedness is simultaneously the opening up of the possibility for ‘salvation’—as constructed it is always deconstructible. This deconstructible nature of the law creates the space, the possibility for justice. If law had an ultimate foundation then the ‘face of the Other’, the singular, would always be consumable by this force. The face would loose its authority. Note however, that the authority of the face is not to suggest or demand but rather to question, to disturb, to obsess, the auto-authority of the law.

Caring justice—as I will call it<sup>1</sup>—is this possibility of a space opening up between the authority of the law—which it has even if we can not ‘find’ it as such—and the incessant questioning and

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<sup>1</sup> I follow Edgoose (1997) in using the term ‘caring justice’ to try and retain some elements of Levinas’ notion of justice—which could be said to be more like Derrida’s concept of law (*droit*), but not quite—and Derrida’s notion of justice which

disturbing of this authority by the singular nude face of the Other before me ‘her and now’. It is rather appropriately like the infinite sign “∞”, as it is infinite. Whenever we follow its ‘trajectory’ we always tend to end up on the other side of where we thought we were or where we wanted to be. We need the law (*droit*) to give our judgement ‘force’, yet when we face the other, in its singularity, it shatters the law, making the law seem perverse, like a caricature devoid of reality and relevance. However, when we then ‘suspend’ the law to deal with this singular, before me ‘here and now’, we become aware, rather in an acute way, that every other Other—*simultaneously* present in the face of this Other before me—is also an Other singular whose claim is equally legitimate. Thus, we are thrown back onto the law, the equality of every possible other ‘before the law’—its very necessity and possibly its force.

Let me give an example to make it a bit clearer. Let us imagine that we are in the room of our local doctor with our partner to hear the outcome of some tests done on tissue taken from a suspicious growth. The doctor informs us that the tests were unfortunately positive. It is a cancerous growth that is potentially life threatening. Furthermore, although it is operable, he can not perform the operation because the rules [law - *droit*] for allocating resources makes it a lower priority than other conditions (such as AIDS treatment, and neo-natal care) and these have already drained the available resources. At this moment, here and now, sitting before this doctor, these rules seem like a caricature devoid of reality and relevance. “Doctor, are you saying that my partner might die because the ‘rules’ for resource allocation does not favour her condition? This is certainly perverse, absolutely irrelevant. It is *my partner*, “this person sitting before you, that we are talking about; not some general instance in the logic of the rules.” Yet, as the initial rage subsides, we realise that every other Other, simultaneously present in this moment of disappointment, is also a singular—a ‘wife’, ‘baby’, ‘brother’, a face—with an equally legitimate claim—“what about *my son, my daughter, my partner?*” We are thrown back onto the law. It is impossible!

Derrida argues that this is the impossible possibility of [caring] justice. It is ‘possible’ as we do find ourselves in it all the time, yet it is ‘impossible’ because it always already escapes our ability to resolve it, to solve it, ‘once and for all’. In the midst of this impossible possibility we experience the *aporia* (profound, even mystical, puzzle) of [caring] justice. When Derrida uses the term ‘impossible’ he uses it as a term of art. It is not the logical opposite of ‘possible’. The ‘possible’ is for Derrida the “future present”—a possibility that can become possible with hard work and maybe a bit of luck. On the other hand, the ‘impossible’ is that which overflows all future possibilities, always already reaching

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could be said to be more like Levinas’ notion of ethics, but not quite. Derrida comments on this relation of terms but also warns against taking it too far, so I wont. (see Derrida, 1992, p.22)

to a 'beyond' that will never be a present, a 'not yet' that will never come—yet calls us with the utmost of urgency. To “desire the impossible is to strain against the constraints of the foreseeable and possible, to open the horizon of possibility to what it cannot [and never will] foresee or foretell.” (Caputo, 1997, p.133). According to Derrida we simultaneously experience three *aporias* as we find ourselves in the impossible possibility of caring justice (Derrida, 1992, p.22).

*First aporia: the suspension of the law.* Conformity to the law does not ensure justice it only ensures legality. Caring justice requires that the law be reinvented for every case. Derrida (1992, p.23) argues: “to be just, the decision of a judge, for example, must not only follow a rule of law or a general law but must also assume it, approve it, confirm its value, by a reinstating act of interpretation, as if ultimately nothing previously existed of the law, as if the judge himself invented the law in every case. No exercise of justice as law can be just [caring justice] unless there is a ‘fresh judgement.’” The requirements of the law must somehow be stretched to cover the singular without turning the singular into a case or an instance (which would be legal but not caring) and without ignoring the law (which would be caring but not just). Caring justice is found, if it is found at all, caught up between the “blind and universal law and the singularity of the situation before us”.

*Second aporia: the ghost of undecidability.* Undecidability is not the opposite of decidability but rather the opposite of ‘calculably, programmability, formalisability’ and the like. It is not merely being trapped in the tension between two equally relevant rules, thereby being paralysed ‘like a deer caught in a headlight’. A decision that did not go through the “ordeal of the undecidable” is not a decision—it is a calculation. It may be legal but it would not be just. But more than this undecidability is never resolved, never passed over. It is there before during and after the decision has been made. Undecidability “remains caught, lodged, at least as a ghost—but an essential ghost—in every decision, in every event of decision. It ghostliness deconstructs from within any assurance of presence, ant certitude or any supposed criteriology that would assure us of the justice of a decision, in truth of the very event of a decision.” (Derrida, 1992, p.25). Caring justice happens, if it happens, only in the singular moment of the decision. The “warm glow of [caring] justice never settles over the law, the rule, the universal, [as] the ‘maxim’ that can be drawn from this singular ‘event’, or still less over the person deciding, who can never say ”I am just.” (Caputo, 1997, p.138). Caring justice has to be invented and reinvented from decision to decision. Decisions that sit uneasy, unable to settled down into the certainty of a ‘precedent’, a potential rule, or even a heuristic. Rather continually disturbed by the radical singularity of the moment of decision—that is the ghost of undecidability that always remains to haunt any pretence to certainty of the law.

*Third aporia: urgency.* Caring justice is always required here and now, in this singular situation. It cannot wait for more information, ‘for all the facts to come in’. A “just decision is always required immediately” (Derrida, 1992, p.26). I may have time to reflect, gather information and deliberate alternatives, yet the moment of decision always “marks the interruption of the juridico- or ethico-or politico-cognitive deliberation that precedes it, that *must* precede it.” The instant of decision, as Kierkegaard reminded us, is madness. However “much time is expended in deliberation, a [caring] just decision would always demand action in a ‘finite moment of urgency and precipitation’, and would always be ‘structurally finite’...” (Caputo, 1997, p.138). Our deliberations seem not to prepare us for the moment, the immediacy, of having to leap, here and now. The singular ‘here and now’ makes all our deliberation suddenly seem irrelevant and unrelated, yet we must decide ‘here and now’.

The aporias of suspension, undecidability and urgency is the ‘stuff’ of caring justice. It is the stuff of ethical action of moral conduct. Caring justice is hard, so hard that we would tend to fail more often than not. Yet, it is all we have. Ethics is not easy, and it is getting more difficult as more and more faces ‘face’ us in our shrinking world. Ethical theory is not going to ‘solve’ it. We must argue, we must debate, we must calculate, but not to ‘solve’ but to disturb—to push what seems to be certain back to the disturbing urgency of the radically singular and what seems to be radically singular back to ‘all the other Others’, the third always already there. Caring justice is hard but is all we have. Can we teach it? This is what I want address in the next, and final section.

## **The vocation of caring justice: ‘teaching’ the wisdom of love**

We, and our students, do not need to be taught Moral Philosophy (the love of wisdom) but rather caring justice as the wisdom of love. As Levinas (1991(1974)) expresses it:

Philosophy is called upon to conceive ambivalence, to conceive it in several times. Even if it is called to thought by justice it still synchronises in the said the diachrony of the difference between the one and the other, and remains the servant of the saying [of caring justice] *that signifies the difference between the one and the other as non-indifference to the other*. Philosophy is the wisdom of love at the service of love. (p.162, my emphasis)

Caring justice is not something to ‘know’ it is rather a calling, a vocation. This calling calls us, summons us, with utmost urgency to ‘suspend’ prior judgement, to stare undecidability in the face, and to reinvent justice in every ‘here and now’ in “fear and trembling”—while acknowledging that we are all perpetual beginners in the vocation of love. Caring justice is a perpetual journey in which we can never arrive. We must cultivate a propensity, a habit, of caring justice in the way Aristotle proposes

ethics as the development of [moral] character (*ēthos*)<sup>2</sup>. The virtue of moral character, of caring justice, is acquired “just as we acquire crafts, by having previously activated them...we become just by doing just actions...” (Aristotle, 1985, p.34)—we cultivate caring justice by plunging ourselves into its impossible possibility. If we simply apply the prior judgement then we have not ‘done’ caring justice. If we simply ‘throw’ ourselves into the singular ‘here and now’ we have not ‘done’ caring justice. However, it is when we face, and respond to every ‘here and now’ face—the closest—while simultaneously and equally facing all other Others, that we do caring justice. The ‘habit’ to be cultivated is never to allow the law—the rule, the policy—to settle down into self-certainty or self-evidence and simultaneously never to allow the singular face before me ‘here and now’ to drown out the incessant calling of all other Others equally present in this ‘here and now’. This is the habit of love. A craft in which we may always be failing and yet in which we are always called afresh by the urgency of its calling—our moral vocation. This much we can ‘tell’ our students and ourselves but it is something they can only learn by doing, by taking up the vocation. Equally, for the calling to become an existentially real calling they must also see the ‘traces’ of it in our own lives, in our community, this is our collective calling. Even if this is so, is there somehow we can help them to ‘see’ it? Yes, I believe we can. I will try to illustrate what I mean with an example from the intellectual property right debate.

The purpose of intellectual property law is to balance the property rights of the creators—to derive fair benefit from their creations—and access rights of society—to have reasonable access to such goods. In recent years, however, this ‘balancing’ has gone steadfastly in the direction of disproportionately securing the rights of the creators as argued by Lipinsky and Britz (2000). A trend they termed “proprietaryism.” The aggressiveness of this trend is reflected in the Global Piracy report (SIIA, 2000) of the Software and Information Industry Association (SIIA). In this report they claim that:

An effective intellectual property system is one that adequately protects its nation’s software creations and inventions. First and foremost, each nation must enact appropriate laws. “Appropriate,” in this context, means the laws should acknowledge the rights of creators and owners of computer software, be comprehensive and leave no doubt as to what rights and remedies are granted in the law. ... Finally, the public should be educated and understand the protections afforded to computer programs under copyright and other intellectual property laws. (p.3-4).

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<sup>2</sup> I want to thank Deborah Johnson for pointing me to Aristotle in this regard.

It is interesting and informative that the report does not make any mention whatsoever that “appropriate” laws should also ensure reasonable access to society to these goods or that the public should be ‘educated’ to know their rights of access. Unfortunately the emerging legal framework in the US—that is supposed to ensure equal protection of the rights of property and access—is being constructed in a context where there are massive power asymmetries between the parties trying to secure these rights. In such a context the SIIA’s view and the current disproportionate protection of property rights in the US is not surprising. It is also not surprising that the SIIA is actively working “with officials from the Office of the U.S. Trade Representatives and other executive branch and congressional officials to correct *deficiencies* in legal regimes and enforcement [of other countries] and directly lobbies foreign governments and international organisations for improvement in the intellectual property protections afforded computer software... [to] at least as high as that required by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) or, if applicable, at higher levels set by multilateral and bilateral agreements” (SIIA, 2000, pp.11-12, *my emphasis*). At the end of the SIIA piracy report they claim that “as long as software piracy remains, there will be fewer jobs, less research and development, increased costs and lower standards of living.” Given that the vast majority of software is produced in the US by about 1000 companies<sup>3</sup>, and the huge profits made by these companies, it is unlikely that this statement could be true. In fact it is more likely that the aggressive push for property rights, and the associated attempts to expand this property centred legal framework to other countries with “deficient” legal frameworks, would result in access being denied for those who need it most. It is such a singular case<sup>4</sup> that I now want to turn to.

Peter Mutzi is a maths teacher in a rural secondary school about 50 miles from Karonga. Karonga is one of the major towns in the sparsely populated north of Malawi. Peter succeeded to negotiate with a development agency for access to a standalone PC, printer and some computer stationary. He intends to start an after school workshop where children can learn computer skills. He believes such skills will enable them to gain access to better jobs when they inevitably move to the capital Lilongwe or the commercial centre Blantyre. Unfortunately, when the computer arrived it was only loaded with a Windows 95 operating system. No application software was included. Peter was keen to teach the students word-processing, spreadsheets, graphics and databases. While at Bunda College of Agriculture, which is part of the University of Malawi, he had an opportunity to use Microsoft Office.

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<sup>3</sup> The SIIA represents 1000 companies that represent 85% of US revenue for packaged and online software.

<sup>4</sup> Although the personal details of this case is fictional, the quantitative data it is based on is actual.

The limited availability of computers at the university prevented him from gaining a high level of proficiency. Nevertheless, these skills, although limited, was considered to be very valuable by his employer and is also highly sought after in the commercial centres. He was determined to get a copy of MS Office for the school computer. This will also allow him to increase his knowledge of the MS Office applications. With these increased skills he could contribute to the management of the school and be a more effective tutor for the children. He did some research and discovered the following:

- A full version of Microsoft office would cost 383 US\$ with p&p it will go up to 405 US\$ as it will have to be imported.
- There is a person, John Bisengo, in Lilongwe who sells CD-ROMS with the full version of MS Office for 5 US\$. These copies can only be bought in person and does not include any documentation or support. The trip to Lilongwe will cost him about 3 US\$.

He will have to pay for the software himself, as the school does not have any budget available for such expenditure. He also does not want to go back to the development agency for help as he feels the school should contribute its own share in getting the system up and running. His gross annual salary is 300 US\$. After considering the options it is evident that there is no alternative for him he will have to travel to Lilongwe to by the 'pirate' CD-ROM for 5 US\$.

Was Peter wrong in opting to by the pirate copy? In the view of the SIIA John and Peter are pirates that should be prosecuted for their actions. However, should we not consider the particular situation in developing countries and the singular situation of Peter? They respond:

Unfortunately, in many countries with developing economies, demand for software is being met by piracy – not by publishers. American software publishers are unable to compete with counterfeit operations that duplicate their programs and distribute them directly to consumers on street corners and shops throughout the world at prices often as low as \$2. ... Although some argue that lower levels of personal income justify software piracy, this is misleading. In most developing countries, computer software is only used by a relatively small group of individuals and organisations affluent enough to purchase computers, not by the average citizen. More significantly, if individuals and organisations can afford to buy computer hardware, why shouldn't they be expected to purchase legitimate copies of software to run on that hardware? Arguments citing the industry's infancy, fragility or strategic importance are secondary, at best, because governmental initiatives in support of a local software industry so often lead to protectionism, lack of competition and technological stagnation. Software piracy prevents natural allocation of resources in an efficient manner and calls for targeted governmental intervention. (SIIA, 2000, p.15)

Let us consider this argument. First, they argue that selling the software at \$2 does not allow for fair competition, and obviously they are right. However, if we consider the problem from the other side then a different picture emerges. What is the cost to Peter? In the U.S. an average teachers salary could be taken as approximately \$40,000 per year. If a MS Office costs \$383 at retail price (which would presumably be the fair competitive price for the SIIA) then the cost of the of MS office to teacher in the US as percentage of annual income would be 0.96%. If Peter also pays 0.96% of his annual salary then an equivalent cost for him would be \$2.87. If we take it from the point of view of relative cost to the individual then \$2 does not seem as outrageous as they suggest. We could also do the calculation using per capita GNP. U.S. per capita GNP is \$29240. MS Office as percentage of per capita GNP is 1.31%. If we take 1.31% of Malawian per capita GNP—which is \$551—then a fair cost would be \$7.22. They go on to argue that “if individuals and organisations can afford to buy computer hardware, why shouldn’t they be expected to purchase legitimate copies of software to run on that hardware?” Again it is a very legitimate claim. However, as all information technology equipment and software are imported it must be paid for in US dollar. When you have a currency that is continually devaluing—in 1998 25 Malawi Kwacha (MK) = 1US\$; in 2001 79.5MK = 1US\$—and an inflation rate of 35% any import becomes very expensive indeed. Additionally, Malawi is a country where between 60% and 65% of the population live below the poverty line<sup>5</sup>. This means they do not have the \$49 a year or 14 cents a day to acquire the basic needs to sustain themselves. It is obvious that in such a context the ‘piracy’ of software is a very attractive option indeed—if not the only option. Nevertheless, SIIA is right, it is illegal to pirate software. These rights are accorded them through the Berne Convention<sup>6</sup> and TRIPS<sup>7</sup> agreements. They can legally and legitimately insist that these rights be honoured. Yet, in the face of the singular, Peter in Malawi, wanting to get a better deal for his students, these claims seem perverse. The argument quoted above seems perverse especially the last sentence “Software piracy prevents natural allocation of resources in an efficient manner and calls for targeted governmental intervention.” What shall we say? How can we practice caring justice in Peter’s singular situation?

First, we have to suspend the law. We have to say that the Berne Convention and other associate legal frameworks *are right* and demand to be implemented. It would be legally right to ask Peter to pay more than his annual salary to buy this software, but would it be just? However, maybe,

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<sup>5</sup> <http://www.nso.malawi.net/>

<sup>6</sup> <http://www.law.cornell.edu/treaties/berne/overview.html>

<sup>7</sup> [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)

just maybe it would be *doing* caring justice to ask him to pay \$5 for the software (with manuals). Now the SIIA would object and say that they would not be able to make profit at that price, and they are *right*—but will they be doing caring justice? If so few people use software in developing countries, as they claim, it may not be a problem. However, we are not saying *all* persons in developing countries should be paying \$5. Caring justice has to do with the singular, with the ‘here and now’ before us. It is not about creating precedents. We are not making a policy statement. We are only saying *maybe* it would be just and fair to ask Peter to pay \$5 for the software. He must pay (something) this is the legitimate requirement of the law. Also, maybe, just maybe, Peter’s singular face, the nudity of his plea, will make the law (and the SIIA) less certain of itself—this is the concern of caring justice.

However, what about policy? Does caring justice not concern itself with policy then? It does. Caring justice is the ‘but what about’ *simultaneously present* in every positive and certain statement in the policy—destabilising it, filling it with doubt. It is the host of silenced voices covered over, violently suppressed, by the dominant interpretation—waiting to say, not forcefully, but with a whisper “what about me.” It is this simultaneously present singulars in every positive policy statement that may, just maybe, make it pause... long enough... to see the face of the singular before it ‘here and now’. We must argue, debate and construct policy, regulation and law. Yet, we must equally and simultaneously accept that the policy, regulation, and law will need to be suspended and reinvented every time it faces the singular Other that it is supposed to cover. Caring justice requires that *every* application of the policy be a ‘fresh judgement’—as if every case is an exception not covered by the law. This is the impossible possibility of caring justice.

We can not teach ethics—as the singular disturbing face of the Other. We can teach policy, law, and moral theory. We can, and should allow our students to experience caring justice. This might mean that we must not allow our lectures simply to be moral debates about cases—caring justice is not about right or wrong answers. Rather we must always allow the singulars to speak, to show their faces. We must allow them to explode the evidence of the law, the theory, and *the* answer. When we face the singular without the certainty of the law, the theory, then caring justice might just happen. Practising caring justice is not easy in an educational system where teachers have been ‘set up’ as those who ought to have all *the* answers. Yet, for caring justice to happen at all our students, and we, must find ourselves entangled in its impossible possibility and work it out for ourselves. This is the nature of morality in everyday life—it is impossible and very frail. Yet, it is all we have. Let us nurture in our students and ourselves this care—it is our calling, our moral vocation.

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