Responding Responsibly: Manderson, Levinas and the Duty of Care in Law

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Desmond Manderson's book, *Levinas, Proximity and the Soul of the Law* provides an insightful investigation of proximity as the condition of ethics in the philosophy of Emmanuel Levinas and its value for understanding the ethical component of the duty of care in tort law. Of particular interest for Manderson is the way in which the notion of proximity that Levinas develops – which he sees as the basis for a responsibility that precedes and exceeds individual choice – allows for a mutual contamination or corruption of ethics and law. Substantively, Manderson analyses the trend toward the concept of proximity in the Australian High Court in the 80s and 90s as well as the subsequent move away from it. He suggests that the Levinasian conception of proximity can help articulate and clarify what was at issue in the High Court's grappling with that term, and in doing so, it can help articulate just what is at stake in the legal notion of a duty of care. I am going to leave aside the analysis of the High Court's use of proximity, with the attendant risk that I leave aside what it most important about this book. Instead, I want to raise some theoretical questions about the notion of proximity and the conception of responsibility that it yields for Manderson. In doing so, I will register concerns about the limits of this understanding of responsibility, particularly in terms of the mutual disruption of law and ethics that he understands the notion of 'proximity' to effect. My comments are very much in the vein of a sympathetic critique: while I agree with his identification of the importance of a Levinasian understanding of proximity in responsibility, I hesitate to say with him that proximity is all that is required for establishing and delimiting responsibility. Instead, I will suggest that the notion of a breach of duty of care that is correlative with the duty of care in tort law requires more internal differentiation in the concept of responsibility than is allowed by the approach that he develops from Levinas.

Manderson begins his analysis of the intersection of ethical responsibility and tort law by positing that a duty of care arises 'because we have a soul'. He defines the soul as 'the place we hold open, deep within ourselves, for others to enter', or as a hospitality that we don't impose upon

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others but is instead 'redeemed and reformed by difference'.[1] Moreover, Manderson posits that if a soul is to be found in law, then it will be in tort law and in particular, in the law of negligence. Negligence law entails a 'personal responsibility we owe to others that has been placed upon us without our consent... a kind of debt that each of us owes to others'[2] that is incommensurable with either mutually self-interested contracts or the duty to community and state entailed in criminal law. The specifically philosophical argument that Manderson wants to develop is that the responsibility of negligence law is best described and understood in terms of the framework of an ineluctable responsibility to the other articulated by Levinas, in which it is by virtue of our openness to others that something like a 'duty of care' can arise at all. In this sense then, the 'idea of responsibility articulated in the law of negligence comes from what might be termed our literal response-ability',[3] where the duty to respond does not emerge from sameness or commensurability but from difference and non-substitutability. Taking account of this generates a critical perspective on two dominant approaches to understanding legal responsibility.

First, this conception of responsibility generates a critique of totalistic notions of duty that emphasise the distribution of convertible interests compared and exchanged through the fiction of 'abstract equivalence'.[4] Manderson takes the concern with distributive justice to be exemplary of this logic, since it presupposes the commensurability and fungibility of individual interests, and *ipso facto*, the substitutability of individuals. Identifying this logic as 'sociopathic' in its concern with the balance of interests, losses and gains across communities, he argues that it ultimately privileges sameness by requiring that individual interests be subsumed to the equitable distribution of social resources. But, second, a conception of responsibility centred on difference and non-substitutability also generates a critique of individualistic approaches that emphasise individual choice, intentionality and causality, which Manderson calls 'psychopathic' thinking.[5] He notes that an individualistic approach 'proceeds from a principle of autonomy according to which human beings are first and foremost independent and 'fully accountable choosing agents'[6] and the law of 'I' upon which this approach is based aims to preserve this independence. In this view, responsibility is primarily a matter of the will, something which individuals take upon themselves as a matter of choice: it is by virtue of choice that one 'comes into relationship with others'

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1 Desmond Manderson, *Proximity, Levinas and the Soul of Law*, Montreal: McGill-Queens University Press, 2006, p4-5.

2 Ibid 5.

3 Ibid.

4 Ibid 37.

5 Ibid 27.

6 Ibid 38.

and choice can similarly limit those relationships and the responsibilities that inhere in them. Responsibility is the outcome of choice, and is thus contingent on that choice. Noting that the dominant philosophical consistency of this view contrasts with its explanatory value in terms of legal responsibility, Manderson argues that this 'agent-centred' approach to responsibility fails to recognise that responsibility is necessarily relational, since responsibility is always responsibility to someone else.

The approach to responsibility that Manderson develops in this book moves between these frameworks, rejecting fundamental tenets of both. He argues that responsibility is necessarily relational, and it involves a relation not only to another individual but to the totality of all others. At the same time, this is a totality without sameness insofar as what is at issue is the sheer singularity of each other, that is, their inherent non-substitutability. Additionally, responsibility is intrinsically related to human subjectivity, but not in the sense that it is the outcome or consequence of the realisation of individual will. Instead, the necessary relationality of responsibility entails that responsibility precedes and in fact gives rise to subjectivity. As Manderson writes, 'Responsibility is relational because personhood itself is relational: responsibility is therefore not a consequence of our agency or will or choice but is prior to it... responsibility does not derive from our personhood; it produces it'.[7] The nature of this relationality is one of proximity: proximity describes the condition of 'being-with-others' that characterises human sociality and gives rise to responsibility in the first place. As Manderson writes, 'Proximity does not limit responsibility: it augurs and inaugurates it. It inspires it'.[8] Further, proximity does not simply describe an epistemological relation – it is not a problem of 'other minds', but instead, 'describes the corporeal experience of relatedness that inspires and provokes responsibility at all'.[9] One important consequence of this understanding of proximity, then, is that it ensures that responsibility is not the outcome of an individual choice to assume responsibility. Instead, proximal responsibility 'chooses us' by virtue of our being-with others. Responsibility or 'the obligation to respond... is not our choice but our condition'.[10] On this view, we are called to and by responsibility as part of being with others, such that responsibility is simply about contact, not contract.[11]

More specifically, the concept of proximity highlights the ethical importance of the neighbour, one who is part of our world, who exists in relation to us and to whom we are bound by virtue of our closeness to them.

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7 Ibid 42

8 Ibid 103.

9 Ibid 121.

10 Ibid 62.

11 Ibid 94; passim.

For Levinas, neighbourliness is not limited to the prosaic meaning of those who live near us; he writes:

> proximity is a relationship with a singularity, without the mediation of any principle or ideality... it describes my relationship with the neighbour'... [However], 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.[12]

For reasons that will be become clearer in a moment, for Manderson the figure of the neighbour not only entails the deep sense of proximity articulated by Levinas. It also evokes a more prosaic sense of being in a relationship with particular others. I will return to why this is important in a moment, but for now the general point to be taken is that neighbourliness picks out the way in which we necessarily share a world with others and *ipso facto* are held or 'taken hostage' by a responsibility for them.

This sense of neighbourliness, Manderson contends, also lies deep in the law of negligence, initially – though somewhat erroneously – expressed in the 'neighbour principle' of Lord Atkin. This principle exhorts that one has a duty of care to not cause injury to one's neighbour. The error of the standard formulation of the neighbour principle in negligence, though, is the link it introduces between duty of care and reasonable foreseeability and the subsequent adjudicative priority given to the latter of these: this error leads to the obfuscation of proximity. Instead of reasonable foreseeability, Manderson argues that the appropriate correlative to proximity is vulnerability, since proximity generates 'a situation of distinct vulnerability: it singles out plaintiffs'.[13] Thus, he writes:

> We are proximate to those who are distinctly vulnerable to us, regardless of what we know. And those who are hostages to our fortune return the favour, making us hostage to our responsibility for them in turn. We do not choose to be responsible; on the contrary, their vulnerability identifies us.[14]

This point about proximity and vulnerability demonstrates the way in which Levinasian ethics both coincides with but also corrupts tort law – that is, at the

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12 Emmanuel Levinas, 'Substitution' in Adrian T Peperzak, Simon Critchley, and Robert Bernasconi, Eds. *Emmanuel Levinas: Basic Philosophical Writings*, Bloomington; Indiana University Press, 1996, pp.79-96 at 81.

13 Ibid 124.

14 Ibid.

point at which they might be closest (most proximate), they are also distant, estranged from each other in the differing vocabularies of foreseeability and vulnerability.

Rather than pursue this point of conjunction and the critique of foreseeability that Manderson develops, I want instead to keep focus on the notion of proximity and the particular conception of responsibility it generates. For Levinas, the account of responsibility that the notions such as proximity, the neighbour and vulnerability undergird entails a critique of Martin Heidegger's turning of philosophy toward the question of Being. Instead, Levinas urges that the ethical is beyond ontology – a position captured in his dictum that ethics is 'first philosophy', prior even to ontology. This indicates that it is inadequate to simply equate ethics with ontology. The ethical is the 'beyond' of Being, not simply another way of articulating or disclosing the Being of beings. But having said that, and without going into the detail of what this means, this points to what I take as a central ambiguity in Manderson's analysis. For the central torsion of a revised understanding of subjectivity as given over to others from the start and the way of thinking about ethics that this necessitates leaves unaddressed the question of the interaction between what might be called – roughly speaking – the descriptive and normative elements of the notion of proximity. Or rather, these elements are at times too easily run together. For instance, Manderson writes at one point that proximity:

> identifies a certain kind [of closeness] that matters for the purpose of thinking about responsibility. It specifies that kind [of closeness] in terms of a vulnerability that singles a person out without their choice and that therefore singles out the one who has a special response ability [sic] with respect to them. [Proximity] determines that relationship not in terms of intention, foresight, or choice ... of the one encumbered by a duty but, rather, in terms of the inescapably shocking experience of relationship they share. Proximity therefore binds together the why, who and how of the duty of care: it points to a normative foundation, a language of analysis, and a mode of proof.[15]

But in its demand that proximity is simultaneously normative, descriptive and veridical, this characterisation ultimately appears to risk a logical circularity, such that one is responsible simply because one is responsible.

To avoid this circularity, it may be necessary to distinguish between the factual condition of being capable of response and subsequently taking on the

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15 Ibid 127.

responsibility that attaches more or less strongly to responding. In other words, it may be important to distinguish between responsiveness, understood as the condition of being inescapably in relation with others, and responsibility, understood as a duty to respond in a particular way and for which one can be held to account. Manderson's approach to questions of responsibility deliberately collapses this distinction, and frequently uses the homonymy of responsibility and responsiveness understood as the ability to response, that is, '*response – ability*' – to suggest this lack of distinction. But to my mind, this risks obfuscating the specific conditions under which one might reasonably be held to account for a lack of or failure to live up to one's responsibility. For one, being capable of responding does not ensure that one responds responsibly. Recognition of the condition of being with others can just as easily lead to violence and a disregard for one's duty of care as it might lead to respect for the vulnerability of others. This suggests that the issue might be reframed, to say that one must be held in responsiveness to be able to be held responsible at all. But the holding responsible does not immediately spring from relationality or responsiveness per se. In other words, though it may be a necessary condition for it, responsiveness is not equivalent to responsibility.

Related to this, the question arises of whether, and if so how, the account of responsibility as a responsiveness that is prior to and gives rise to subjectivity can generate a sense of the limitations of and differentiation between right and wrong conduct. Certainly, such a distinction and differentiation of conduct is not endogenous to Levinas's approach: he argues instead that one can never fulfil or discharge one's responsibility, and further, that one is responsible for what others do as much, if not more than the actions of oneself. At its most stringent, responsibility involves a fundamental accusative that the ethical subject can never escape; he writes:

> Obsessed with responsibilities which do not result from decisions taken by a "freely contemplating" subject, consequently accused of what it never willed or decreed, accused of what it did not do, subjectivity is thrown back on itself – in itself – by a persecuting accusation. Concretely, this means to be accused of what others do and to be responsible for what others do. It is to be pushed to the limit, responsible for the very persecution undergone.... Responsibility for the other does not wait for the freedom of commitment to the other. Without having done anything, I have always been under accusation: I am persecuted.[16]

This sense of irredeemable accusation, of responsibility as persecution and of responsibility for persecution, can cause much consternation upon first

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16 Levinas, above n 12, 88, 89

reading. But one of the important points that Levinas takes from this formulation is the basic substitutability of the ethical subject, wherein one is responsible for the other and for what the other does, even before one is responsible for one's own actions. For his part, Manderson largely avoids the question of responsibility and persecution posed in this passage, and resists the radical substitutability that Levinas seems to suggest. However, he does adopt the idea that responsibility cannot be fulfilled or discharged, articulated in the idea that responsibility is not a result of choice as well in the claim that responsibility is infinite.

Of the infinitude of responsibility, Manderson argues that this should not be understood to mean that we are responsible for all others all the time. Rather, the infinitude of responsibility indicates the depth of our responsibility to those particular others that come into our sphere of being and thus within the boundaries of care. Thus he writes that the infinitude of responsibility does not mean that it 'extends equally over everything it encounters'. Rather, it means that responsibility 'continues to demand from us in ways that fuel our aspirations and our striving while giving us no grounds for complacency. It is infinitely deep not infinitely wide'. This ultimately means that 'we are never done with responsibility, we are never responsible enough'.[17] Because we are never done with responsibility, there will necessarily be occasions where a balance between responsibilities to one or another other, if not to all others, is required. This balance is found in the fact that 'we are ourselves an other to others'.[18] Further, in terms of public responsibility, the availability of resources and competing priorities may determine the 'different alternatives' that 'the question of how to act responsibly' admits.[19] But to what extent can the characterisation of responsibility as infinite care for the other by virtue of a proximity that is prior to any individual choice admit of such alternatives for action?

Negligence law is fundamentally concerned with identifying and appropriately redressing wrongs or injuries through compensatory means. Given this, the characterisation of responsibility as infinite necessarily raises the question of how negligence law can identify the limits of responsibility, in terms of who and how much one can be held to account for injuries done to others. It should be clear that proximity in the Levinasian sense of a fundamental 'being-with-others' that is itself constitutive of personhood or subjectivity shows *why* we might have something like a duty of care to others at all. That is, we have such a responsibility by virtue of our being with others. Further, if the notion of the neighbour is given a more prosaic or everyday inflection than Levinas suggests at times, to mean something more like

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17 Manderson, above n 1, 159.

18 Ibid 188.

19 Ibid 189.

neighbourliness as a relationship with particular others, then it can also tell us something about the limits of a duty of care in terms of identifying the individuals *to whom* we owe a duty of care. That is, it can identify those beings for whom we are responsible because we are spatially and/or relationally proximate or near to them. What is less clear though is what it can tell us about the *extent* of our duty of care to those who fall within the range of neighbourliness.

In addressing the question of the limits of responsibility, Manderson claims at one point that 'proximity does not limit responsibility: it augurs and inaugurates it. It inspires it'.[20] Posed against more legalistic understandings of proximity, Manderson goes on to soften this claim by suggesting that while an understanding of proximity provides the ethical impulse of law, it can also help direct the Court in responding to 'the duty question' and determining the boundaries of responsibility. In this mode, he argues that 'responsibility is infinite in the sense that it is insatiable, so to speak, but not in the sense that it is indiscriminate'.[21] This characterization of infinitude certainly helps to establish the second sense of limitation I mentioned above, in terms of to whom we might be responsible. Proximity is thus not an infinite responsibility to all others, but to the particular others with whom we are in relation, who are peculiarly vulnerable to us and to whom we must respond in terms of a duty of care. But it merely highlights the problem regarding the third sense of the limits of responsibility, that is, in terms of the extent or 'depth' of our responsibility. For on this account, there is no limit to the depth of our responsibility. And while Manderson may well be right to argue against the reductive calculus of damages versus interests institutionalised in negligence law and right to claim that responsibility does not stop 'when it is no longer "worth it" *to you*',[22] this only establishes the necessity of a different way of adjudicating what the limits of responsibility might be. That is, while the calculation of damages and interests may not be the right way to determine the limits of responsibility, it does not follow that there are no limits.

Furthermore, the logic of an infinite responsibility entails that we can never adequately fulfil a duty of care, that we are always negligent, we always breach our duty of care. This means then that no matter what we do, we will never adequately fulfil our duty of care understood as responsibility by virtue of proximity. There is a sense then in which it does not matter, it seems, what our actions are in a given situation; we have always already failed to fulfil our duty of care. To the extent that negligence law aims to identify and rectify in some way injuries in the form of breaches of duty, a Levinasian approach thus seems to overstretch its limits – negligence law is effectively rendered

20 Ibid 103.
21 Ibid 159.
22 Ibid 190.

incapable of redressing our failure to discharge our duty of care for our neighbour by the very extent of the task. Or alternatively, such an approach behoves us to make quantitative distinctions between degrees of negligence: there must be some wrongs that are fundamental but which are not within the capacity of negligence law to redress, there must be others that negligence law can redress in some way (setting aside the question of whether compensation can be wholly commensurate with the injury). But if this is the case, then some mechanism of adjudication will be required to establish whether the wrong or the breach of care done falls within that which can be redressed or that which cannot. And if this is the case, at the least Manderson does not wholly escape the calculative logic that he sees as problematic within the current delimitation of responsibility when he writes for instance that 'responsibility is truly responsible only when it is against my interests, against "our" interests, beyond all such calculations'.[23]

It may be that the problems I am highlighting here pertain most directly if not solely to the interaction of a Levinasian ethics with the calculative demands of negligence law, but I am inclined to think they run deeper. For it seems that the Levinasian approach adopted and adapted by Manderson requires more internal differentiation to admit of the alternative ways of acting responsibly that one might be faced with in a given situation of proximal relationality. More specifically, Manderson's approach risks overdrawing the opposition between relational responsibility and choice; for one consequence of my earlier suggestion that some distinction is required between responsiveness and responsibility is that this reintroduces an element of choice into the assumption of responsibility. This may provide more conceptual leverage in terms of the subsequent attribution and delimitation of responsibility as required in moral and legal reasoning. To be clear, my point here is not to suggest that the individualist framework be restored to a position of theoretical priority. In fact, I think the Levinasian critique is right, in that such approaches fail to appreciate and take account of the fact of our existence in relation – that as moral or ethical agents, we are embedded in a condition of being-with-others in a way that is both unavoidable and constitutive of ourselves. Nevertheless, I also want to suggest that some reference to choice, and the constellation of concepts associated with it such as individual will and autonomy, may still be necessary in clarifying not strictly whether one has a responsibility, but the extent to which one is able to and has fulfilled or lived up to the duty of care that befalls one. That is, choice may not be a sufficient condition for establishing and adjudicating responsibility, but perhaps it is nevertheless a necessary one.

This may look as if I would like some kind of rapprochement between these two frameworks. But that is not quite accurate, since there are important

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[23] Ibid 190.

ways in which these approaches contradict and in fact undermine each other. The point is less to make them cohere than it is to push those points of contradiction, particularly in terms of an understanding of ethical agency or subjectivity and the theoretical consequences of that. In fact, I think it is one of the strengths of Manderson's book that this is also the approach that he takes, allowing both sides of the 'law and ethics' conjunction to be disrupted and to disrupt the other. Even so, I wonder if this cannot be pushed further to generate a more expansive understanding of responsibility that can give account of both the relational proximity that gives rise to responsibility – that is, as one of the conditions of possibility of responsibility – as well as the role of choice and autonomous self-determination within the realisation and fulfilment of our responsibilities to others. Such a conception of responsibility should allow for the possibility of alternative courses of action and provide some means of adjudging between those alternatives and between the necessary and culpable failures to live up to the duty of care that befalls us by virtue of being with others.