

# Levinas and Law: Siding with the Angels

Helen Stacy<sup>+</sup>

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## 1. Introduction

In his detailed and nuanced study, Desmond Manderson's *Proximity, Levinas and the Soul of Law* offers a reading of a shining decade of Australian High Court jurisprudence that came close to putting Levinasian ethics into tortious liability. Like other academic scholars who have urged Continental social theory upon the Anglo-American legal academy, Manderson questions whether Kantian rules and principles are up to the task of taking account of human suffering. Instead, Manderson urges that judges see Levinasian empathy and Kantian rationality as equal partners in declaring legal standards of liability. And while Manderson's vehicle is a relatively small sample of Australian decisions about the duty of care, this book makes a much larger point. Manderson's argument at heart is that the common law should aspire to its more generous moments. It is the idea that courts and judges ought to routinely step in on the side of the angels when there is struggle or hurt or difficulty between people. As the book's title "... the soul of law" suggests, Manderson's thesis is that the common law is much more than the application of anodyne rules. Rather:

Each case within the common law is but a glimmering or reflection of a meaning that can never be entirely found or pinned down. ... The strength of the law is that this restless quest, in case after case, offers us an adaptive capacity well-suited to the protean world.<sup>1</sup>

Emmanuel Levinas is Manderson's North Star in this vision, and his critique of particular Australian High Court decisions of tortious liability and his description of Levinas is wide-ranging. Influenced by Levinas' writings,

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<sup>+</sup> Senior Research Scholar, Freeman Spogli Institute for International Studies at Stanford University and Senior Lecturer, Stanford Law School.

<sup>1</sup> Desmond Manderson, *Proximity, Levinas and the Soul of the Law* (McGill University Press 2006), 143

particularly *Totality and Infinity* and *Otherwise than Being or Beyond Essence*, Manderson urges us, and by extension, our courts, to transcend the cruelty of indifference to the plight of others.<sup>2</sup> Manderson refutes those critics of Levinas who have charged him with impracticability – not, of course, by coming up with a template of how Levinasian ethics might be applied, as that would defeat the quicksilver nature of a Levinas-inflected response to new suffering. Rather, in place of rules, Manderson offers his belief in the common law’s own structural propensity for adaptation.

## 2. Emmanuel Levinas

Emmanuel Levinas was an icon of modern Jewish thought. Born in Lithuania before World War I and living much of his life in France including a period in German captivity during WW II, he died in 1995, the same year that his intellectual sparing partner, British philosopher Gillian Rose also died. Like many trained in Germany before World War II, he studied under Edmund Husserl and Martin Heidegger at the University of Freiburg. *Totality and Infinity* (1961), His first monumental work, addressed ontology – the nature of “Being” – through investigating the ‘face-to-face’ relation with strangers, or ‘the Other’.

From Husserl he took phenomenology, the idea that we constitute other people cognitively as an *alter ego*. Seeing that another human being is like me- acts like me, appears to be the master of her conscious life within a shared social universe- was Edmund Husserl's basic phenomenological approach of people. But for Levinas, Husserl's analysis lacked the core element of intersubjective life. Our social world affects us as individuals because the other person addresses *me*, calls to *me*. The *other* need not utter words in order for me to *feel* her summons. Her simple presence in my world uniquely affects me.

From Heidegger he took another core element of intersubjective life: that the other’s presence constitutes each of us because they make demands upon us. Yet for Levinas, Heidegger also missed a crucial point. Heidegger’s Being operates in the world of tangible matter and through the social and economic transactions of daily life. Levinas went beyond Heidegger’s Being to the felt experience of Being. We are summoned by others and we feel ourselves because we *feel* the implicit demands of others. The ‘I’ first experiences itself as called and liable to account for herself. ‘I’ respond to others as if they had commanded. There may be no words and no explicit

<sup>2</sup> Emmanuel Levinas, *Totality and Infinity* (Alphonso Lingis trans., The Hague: Martinus Nijhoff 1981); Emmanuel Levinas, *Otherwise Than Being, or Beyond Essence* (Alphonso Lingis tras., The Hague: Martinus Nijhoff 1981).

action towards me, yet the intrinsic relationality of human coexistence means I feel others' presence as a demand and a command.

Levinas' own philosophy began to emerge after World War II. Like Husserl and Heidegger, Levinas rejected philosophy's traditional singular preoccupation with metaphysical questions about Being and epistemological questions about how we know. Like them, he rejected attempts at grand abstract systems of explanation: his philosophical stance was both anti-universalist and anti-foundationalist. His war experience, though, (he did forced labour as a prisoner of war in Germany while his wife and daughter hid in a French monastery and his entire family in Lithuania died in the Holocaust) coupled with Heidegger's affiliation to National Socialism during the war, led Levinas to reject Heidegger, as well as the centrality of Being to philosophical enquiry.<sup>3</sup> Rather, Levinas's approach made personal ethical responsibility to others the starting point and primary focus for philosophy rather than merely a secondary reflection following explorations of the nature of existence and the validity of knowledge. Levinas positioned his concerns with ethics. For Levinas, ethics is beyond Being — *otherwise* than Being.

Both *Totality and Infinity* and *Otherwise than Being or Beyond Essence* (1974) are descriptions of our encounter with another person; that encounter impacts in a specific way. The viewer sees a stranger while also cognitively constituting the other person as an *alter ego*. Human existence, as sensibility, is full and creative, before it is either instrumentalist or utilitarian. We are always, already, living within social relations. More importantly, we are always being impacted by the expression of others before we became aware of them. Beyond anything else, the fundamental intuition of Levinas's philosophy is the relation of responsibility that arises from feeling the command of another's proximity; a relationship that is non-reciprocal and ethical to its very core.

For Levinas, the face-to-face encounter with another is an epiphany when both proximity and distance are strongly felt. At the same time as the face of the stranger is revealed, their face also makes a demand. It is pure expression; expression that affects me before I can begin to reflect on it. And the expression of the face is dual: it is *both* command *and* summons. The

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<sup>3</sup> He later came to regret his enthusiasm for Heidegger, after the German philosopher's accommodation to Nazism. In commenting on a discussion of forgiveness in the Talmud, he wrote: 'One can forgive many Germans, but there are some Germans it is difficult to forgive. It is difficult to forgive Heidegger'. Levinas described history as violence, punctuated by extremes of war and annihilation. The encounter with the other person, so far as it is an event, merely inflects history or leaves a *trace* in it. But this is not the history found in the textbooks. It is more like a history of isolated acts or human ideals (justice, equity, critique, self-sacrifice).

other's face is not an object, but in its defenselessness it is passive resistance to my own freedom. This demand comes before I can express, or even know, my own freedom. In other words, ethics precedes ontology.

All knowledge, for Levinas, must be produced out of an ethical relationship. His emphasis is on a relationship of respect and responsibility for the other person rather than a relationship of mutuality and dialogue. 'I' epitomized in 'I think, therefore I am' - the phrase with which Rene Descartes launched much of modern philosophy - Levinas began with an ethical 'I'. For him, the self is only possible with its recognition of 'the Other', a recognition that carries responsibility toward what is irreducibly different:

The Other precisely reveals himself in his alterity not in a shock negating the I, but as the primordial phenomenon of gentleness.<sup>4</sup>

Quite simply, ethics for Levinas begins with the encounter with the Other. Because we cannot ever really know or comprehend strangers on their own terms, the way that we react to strangers reflects our own ethics.<sup>5</sup>

### 3. The soul of law

Manderson takes Levinas – a writer he describes as 'passionate, mystical, and rational, at times bewitchingly erudite and elsewhere bewildering abstruse'<sup>6</sup> and delves into the underbelly of law's soul. Manderson tells us that Levinas' anti-rational, anti-universalist, anti-foundationalist and non-prescriptive ethics have a lesson for law. This is a challenging injunction to lawyers, it must be said, and one that has led many legal scholars in the common law world to skirt Continental abstractions in favour of the comfort of Anglo-American linearity.

But setting his face against law's preference for the clear countours of rationality, Manderson puts law on the side of philosophy and poetry and art – precisely, it must be remembered, where law began. Law came initially from the Church, and then philosophy, even while landlords were administering written law over tenants and husbands were administering unwritten laws over

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<sup>4</sup> Levinas, *Totality and Infinity*, above n 2, 150

<sup>5</sup> Levinas would propose that ethics is a calling into question of the 'Same'. Here, the encounter with the 'Other' has no empirical basis as an event or non-event in linear time, nor is there a 'self' that exists *a priori* to the encounter which may choose to avoid the traumatic experience of alterity. The encounter, a discovery of alterity in itself, is an originary and essential moment through which the self comes into being — it precedes freedom and determinism, action and passivity.

<sup>6</sup> Manderson, above n 1, 7.

their wives. Manderson's method builds upon Levinas' ethic of care, pointing to the lineage of Australian High Court tort cases that have haltingly expanded the law of negligence. And because Levinas, like his Continental social theory brethren, is too opaque to do the work of legal reasoning on his own, Manderson urges a supplement, that of the common law tradition, a tradition of ever-present instability. Manderson prescribes Levinasian ethics of the Other with a common law codicil.

For Manderson, law's soul is best revealed in the doctrines of negligence of tort law because it cobbles together the many-faceted dimensions of the duty of care that we owe to others – a responsibility that defines what it is to be a person. This is the neighbour principle – proximity, duty, responsibility, vulnerability, articulated by some Justices of the High Court of Australia. For Manderson, the problem with most interpretations of tortious duty is their focus on principles of reasonable foreseeability, principles that are rooted in assumptions about agency and autonomy. Manderson is very clear that this is simply mistaken. Tortious duty ought instead be based upon feelings of connectedness and vulnerability. We don't owe a duty of care to others simply because we want to exist in a world of reliable and predictable behaviour – that would be arid and mechanical, a duty that reduces life to a quid-pro-quo with no connection to human feeling. No, says Manderson: following Levinas, our duty of care to strangers arises because we have a soul that connects to other souls. This is the vulnerability that is the very essence of our Being.

Levinas saw our vulnerability to others as the central feature of human existence. At any moment, vulnerability might place us in need of care or rescue, or it might place us where we can uniquely respond to the needs of another. Caring is what people are *able* to do and that is why they *ought* do it. Proximity is our reality. Proximity dictates the nature of our relationships with others and a duty of care emerges from it simply because one is able, or ought to be able, to extend oneself toward another. When law describes a duty of care, it describes performance that emerges out of love rather than calculation. For Manderson:

The best understanding of the law itself has an ethical component and proximity is that component.<sup>7</sup>

Manderson's legal proximity is at heart a theory of vulnerability and responsibility between people; it does not require any prior relationship such as a doctor with her patient or an employer with her employee; it does not require any sort of implied contract of care such as between a local government agency and its ratepayer. Manderson cites the South Australian

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Ibid 16.

case of *Hahn v Conley* involving a 3-year old child who steps into the path of a speeding car when searching for her grandfather.<sup>8</sup> A grandfather's proximity to his grandchild is the same as saying 'Here I am' to a toddler, as if he were encouraging her to come to him when she calls out in fear after wandering away from adults. The legal form of this relationship is tortious duty of care. Put into the law of negligence, to be able to prevent harm befalling the child as she walks towards safe adult arms is to be proximate to her. Proximity is situational, unplanable, and serendipitous.

And proximity goes even further than already existing relationships between people. The quintessential Levinasian example in Manderson's analysis is the duty to rescue a stranger- a duty arising not from any prior relationship or understanding between two people, but simply because someone needs rescuing and another is able to rescue. A duty to rescue, in other words, arises when someone needs us and we have the capacity to help. The simple fact that one is present- in fact or figuratively- in a moment of danger to another, creates an ethical obligation. The situation itself frames the ethical obligation. As Manderson puts it:

The duty to rescue *is* the duty of care ... The closer we are, conceptually speaking, to the paradigm case of [the] drowning baby or [the] house on fire, the stronger the call on the duty of care.<sup>9</sup>

This is an ethical responsibility that is an imperative. Manderson again:

Perhaps I can do no more than lend someone a mobile phone or call an ambulance. Perhaps if someone is drowning, I can do no more than raise the alarm. But if I can do more, I must.<sup>10</sup>

And even more strongly:

The more influence or power I have, the more irreplaceable my position and the more responsibility will make demands on me.<sup>11</sup>

This, it strikes Manderson, is how law itself ought to function. Manderson celebrates the slice of legal history when Australia's High Court Justices were able to see this ethical way. The role of law is to affirm our response to need, to give legal sanction to an *a priori* ethical obligation rather than through utilitarian calculus or Kantian principle.

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<sup>8</sup> Ibid 149.

<sup>9</sup> Ibid 93.

<sup>10</sup> Ibid 96.

<sup>11</sup> Ibid 160.

## 4. Applying Levinas

In philosophy, Levinas has, of course, been critiqued. The inestimable Gillian Rose, who energized the field with her ascetic hedonism and irreverence, thought Levinas was simply too misty-eyed about ethics and insufficiently gritty about the public institutions that mediate ethics.<sup>12</sup> Utopia is no place to put our trust in justice, Rose argued; justice needs law, and law has to roll around in the mess of politics.

Manderson's rejoinder to this critique is two-fold. First, ethics are the catalyst of law, a hair-shirt that scratches and itches, nudging law to respond. In other words, ethics are action-oriented, much more than simply grand sentiments of fellow feeling. And second, any complaint about philosophical uncertainty is just shadow boxing because the common law method is already, has always been, a method of uncertainty. The common law institutionalizes the reality that judges are forever responding to a new itch, forever re-forming the law in response to new and unanticipated requests for justice. Law and justice are quintessentially about constant movement, a constant struggle to respond to felt need – and that was precisely Levinas' point.

How satisfactory are Manderson's assurances that Levinas is right for law? Manderson is urging on us the writings of a scholar who could not be further from concrete prescriptions for behaviour. The difficulty lies not only in the peculiarly dense language of Europe's post-Husserl generation, but much more fundamentally in post-structuralism's squeamishness with declaring its own politics. How much of this applies to Levinas? His writings were filled with terms like the 'face of the Other', or 'moral proximity', terms that have been picked up by today's philosophers, often with more verbal opacity and less potential for practical application than Levinas. How does this impact on Manderson's exhortation of Levinasian 'proximity' as the ethical pillar of tortious duty?

Levinas's remarks on politics were rare and, at times, idiosyncratic. In the 1961 Preface to *Totality and Infinity*, Levinas describes the nation state as the 'organism' of politics: it declares and manages war—whether military or commercial trade wars. *Totality and Infinity* left the question of actual justice somehow suspended between the moral responsiveness that follows from the face-to-face encounter with others, and the conflict of ontological forces that Heidegger described. Later in 1974, *Otherwise than Being* seemed to make politics somehow synonymous with 'humanity'. In fact, Levinas never seemed to decide whether politics meant war, or even a real possibility of peace. In his

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<sup>12</sup> Howard Cargyll, Obituary, Gillian Rose, 1947-1995, *Radical Philosophy*, May/June 1996.

1984 essay 'Peace and Proximity', he seemed to favor the liberal European nation state, but was completely ambivalent about how it came to be formed:

It is not without importance to know—and this is perhaps the European experience of the twentieth century—whether the egalitarian and just State in which the European is fulfilled—and which it is a matter...above all of preserving—proceeds from a war of all against all—or from the irreducible responsibility of the one for the other.<sup>13</sup>

Like Levinas, other Continental theorists have also been reluctant to nail their political colors to the mast. Levinas had a major impact on the young Jacques Derrida, a fellow French Jew who was also known for the density of his writing. Derrida's *Writing and Difference* contains an essay on Levinas called "Violence and Metaphysics" that points out that: 'Levinas does not want to propose laws or moral rules...it is a matter of [writing] an ethics of ethics'.<sup>14</sup> Derrida goes on:

It is true that Ethics in Levinas's sense is an Ethics without law and without concept, which maintains its non-violent purity only before being determined as concepts and laws. This is not an objection: let us not forget that Levinas does not seek to propose...moral rules, does not seek to determine a morality, but rather the essence of the ethical relation in general...in question, then, is an Ethics of Ethics [which]...can occasion neither a determined ethics nor determined laws without negating and forgetting itself.<sup>15</sup>

Others were less satisfied, even infuriated, with Levinas' avoidance of politics. Rose, also Jewish (although she converted to Catholicism on her deathbed) included Levinas in her angry impatience with the refusal of contemporary philosophers to seriously contend with the difficult political heritage of Hegel. Levinas' antifoundational approach to responsibility as the pre-thematic structure of the self and as transcendence seemed to lie between

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<sup>13</sup> *Cahiers de la nuit surveillée*, ed., Jacques Rolland (Paris: Editions Verdier, 1984). In English, see Levinas, 'Peace and Proximity', trans., Peter Atterton and Simon Critchley, in Adrian Peperzak, Simon Critchley, and Robert Bernasconi (eds.), *Emmanuel Levinas: Basic Philosophical Writings* (Bloomington and Indianapolis, in: University of Indiana Press, 1996), 169.

<sup>14</sup> Jacques Derrida, 'Violence and Metaphysics' in *Writing and Difference*, trans. Alan Bass (Chicago, IL: University of Chicago Press, 1980; first published in 1967), 79-153. Derrida also delivered a eulogy at Levinas' funeral, later published as *Adieu à Emmanuel Lévinas*, an appreciation and exploration of Levinas's moral philosophy.

<sup>15</sup> Ibid 111.



phenomenology and religion, yet promised none of the finality of religion and too little reliance on the observable world.

Rose's impatience with Levinas and others writing in a similar style exploded in her polemical *Dialectic of Nihilism: Poststructuralism and Law* (1984) in which she attacked leading contemporary European thinkers for simplifying Hegel's thought into a totalizing system.<sup>16</sup> Rose questioned what she saw as a romantic and sentimental construction of Jewish thought about the 'Other' to a modern philosophical experience compromised by its association with totalitarian ideologies. For Rose, in the Jewish philosophical tradition, puts justice at the core of the prophetic message. In that respect it has a distinctive political dimension. It seemed to Rose that law's 'broken middle' – the place where politics mediate ethics and phenomena – ought to raise a challenge for philosophers like Levinas and Derrida.

Yet it can be argued that Levinas's resort to religious language and his many commentaries on passages from the Talmud and from the Bible separate him out from currents of post-modernism that are often viewed as radically skeptical or nihilistic. In fact, given his occasional evocations of a pluralist Being in *Totality and Infinity*, Levinas's argument that justice is marked by the trace of responsibility means he can fit in reasonably well with liberal theories of political justice and sovereignty. After all, Anglo-American liberalism has consistently emphasized that individuals live in multiple social associations that impose a host of responsibilities. Liberal pluralism assumes a cultural existence that co-exists with the singular power of the nation state. In this way, Levinas has deep connections with ideas that are taken for granted in contemporary political thought.

*Proximity, Levinas, and the Soul of Law* is a calm and convincing response to Rose's challenge. With crystalline clarity, Manderson explains how Levinas' responsibility unfolds into dialogic sociality. Intersubjective experience, as it comes to light in the everyday of walking from work to one's car in an unlit car park as in the *Modbury*<sup>17</sup> case he cites, proves 'ethical'. Quite simply, an 'I' discovers its own particularity when singled out by the gaze of the Other.<sup>18</sup> This gaze is both interrogative and imperative. It places a duty upon the car park owners because they are proximate to the harm that may befall someone as they make their lone way to their car on a dark night. Proximity speaks to those who might have prevented the attack that was enabled by the darkness. Proximity says: 'Others may harm me if you do not light my way'. This is politics. When the stranger turns their gaze upon us, we

<sup>16</sup> Gillian Rose, *Dialectic of Nihilism: Post Structuralism and law* (New York, NY : Basil Blackwell, 1984).

<sup>17</sup> *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

<sup>18</sup> Manderson above n 1, 161.

elude it only with ethical difficulty. The politics of affective moments, or what Levinas calls ‘interruptions’, occur because human faces impact us, because we are human. Because we have a soul.

## 5. Where to from here?

Law, too, has a soul. Manderson suggests there is something integral to proximity that makes proximity the heart and soul of law. Like Manderson, I much prefer law with a soul than to law derived purely from calculation. I too want law to apply a deep humanity that responds, really responds, to people. Manderson’s theory of proximity is a good start. But if proximity is not just a concept but is also an actual state, then what work might proximity do beyond, for instance, making a local council liable for a mother’s nervous shock – as when, in *Chester v Waverley Municipal Council*<sup>19</sup> when the Waverly Municipal Council’s failure to fence off a trench that became a fatal trap for a little boy, the Court concluded that ‘it is not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature?’<sup>20</sup> How can Levinas’ ethics be better institutionalised?

If part of the rationale for governments is that they take action on behalf of all of us, then surely Levinas’ ethics ought to apply to the apparatus of governments. But as Manderson notes, applying Levinas’ ethics to the public world of ‘parliaments, the army, the law’ is incredibly difficult.<sup>21</sup> The meaning of Levinasian justice poses a puzzle for the legal system. If the essence of justice is more than the reparation of wrongs in the disinterested name of equity but also encompasses the interests of the stranger, where would Levinas’s logic take the law?

We must, of course, use everyday language to translate Levinas’ ‘affective interruptions’. So, if it is the job of law to work through the finer grained details of proximity, then the face of the other is expressiveness that could be compared to a force. Levinas will not make the additional transcendental move that is needed for comparison, justice, and normativity. But the law can, and should, interpret ‘the Other’ to mean the Third Party. Third Parties are an ‘I’ that should also receive just treatment. Levinas speaks of the face of the other who is ‘widow, orphan, or stranger’. These figures are *more* than allegorical. Each one lacks something essential to its existence: spouse, parents, home. The face-to-face encounter is the possibility of responsibility and hospitality for those who need. Manderson’s point is that the common law system is one that analyses human responsibility, and the

<sup>19</sup> (1939) 62 CLR 1.

<sup>20</sup> Manderson, above n 1, 116.

<sup>21</sup> Ibid 169.

duty of care involves an extensive exploration of the face-to-face relationship. The extent of these responsibilities are questions that lie in the lap of the law.