Self and Other in Ethics and Law: A Comment on Manderson

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Emmanuel Levinas has emerged as one of the most influential ethical philosophers of the twentieth century. Much has been written about his theory, but until recently the legal implications of his approach to ethics were relatively neglected. There is an obvious reason for this neglect: Levinas's writings are difficult and obscure and his references to law are, if possible, even more obscure than the rest. Desmond Manderson's book, *Proximity, Levinas and the Soul of Law*,[1] is an important contribution to clarifying and evaluating this contentious dimension of Levinas's project.

The aim of Manderson's book is to bring together two apparently diverse topics: the ethical philosophy of Levinas and the High Court of Australia's jurisprudence on the law of negligence. The central thesis is that, through the shared notion of 'proximity', each of these areas of discourse can illuminate the other. The connections are skilfully drawn and the illuminations genuinely illuminating. In the course of the comparison, Manderson also has some interesting and provocative points to make about the overarching character of both ethics and law. Although Manderson's analysis of judicial conceptions of tort law is valuable, being both sympathetic and critical, I wish to focus here on what he says about Levinas.

I begin with a vexed topic in Levinas scholarship: namely, the very possibility of a Levinasian legal theory. Manderson makes a constructive and, I think, important contribution to this question, insisting that Levinas does not require us to segregate the domains of ethics and law, as some interpreters have suggested. This basic issue provides us with a springboard to explore two other themes in Manderson's reading of Levinas. The first concerns the relationship between self- and other-oriented approaches to ethical and legal discourse; the second, the role of ethical experience in informing and shaping judicial reasoning.

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1 Desmond Manderson, *Proximity, Levinas and the Soul of Law* (McGill-Queen's University Press, 2006).

I. A Levinasian Legal Theory

There is a widespread view among Levinas scholars that Levinas's conception of ethics cannot support a theory of law. The prevalence of this view is partly attributable to Levinas himself and partly due to some of his most influential interpreters, particularly Jacques Derrida. Levinas places strong emphasis on the ineffable nature of ethical experience. Ethics arises from the encounter with the other, which resists thematisation. It is impossible to reduce ethical responsibility to a mere system of rules. For many readers, this aspect of Levinas's work strongly suggests an insurmountable barrier between ethics and law. It is tempting to conclude that no dialogue between the two realms is possible.

This dimension of Levinas's theory has inspired two influential lines of critique. On the one hand, Derrida interprets Levinas as attempting to articulate an ethical philosophy that escapes traditional modes of philosophical reasoning.[2] For Derrida, this project is doomed to failure; Levinas remains trapped within existing frameworks of expression and argument. Another type of critique, which Manderson associates with Gillian Rose, charges that, insofar as Levinas depicts ethics as entirely disconnected from law, politics and the like, his theory ultimately succumbs to quietism and 'institutional inertia'.[3]

Manderson argues, rightly in my view,[4] that these types of critiques rest on a misreading of Levinas. For Manderson, Levinas does not reject the possibility of connecting law and ethics; on the contrary, he wishes to emphasise the necessary interplay of law and ethical experience.[5] What Levinas resists is any attempt to *reduce* ethics to a set of formal rules. For Levinas, law is grounded in and disrupted by ethics.[6] To put it another way, ethics and law are in *proximity*; they remain in a constant state of interrogation and dialogue, but neither may be reduced to or subsumed within the other.[7]

Manderson concludes that, far from giving up on the possibility of legal theory, Levinas seeks to reveal the ethical relationships upon which

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2 Jacques Derrida, 'Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas' in *Writing and Difference* (Alan Bass trans, 1978) 97.

3 Manderson, above n 1, 75.

4 Cf Jonathan Crowe, 'Levinasian Ethics and Legal Obligation' (2006) 19 *Ratio Juris* 421.

5 Manderson, above n 1, 76-7.

6 Ibid 77-8.

7 Ibid 82-3.

law ultimately depends.[8] Ethics presents us with an 'optics', a way of seeing and relating to others;[9] our task is to allow this way of seeing to inform our engagement with legal institutions. Insofar as law takes the form of a system of rules, it involves a betrayal of ethical experience. At the same time, however, law cannot help but reveal a 'trace' of its ethical foundations;[10] by allowing this ethical trace to disrupt and unsettle the existing legal framework, we can maintain a constructive relationship between the two irreducible realms.

Manderson does us a great favour by clearly outlining the potential for a constructive exchange between Levinas and law. In a broader sense, his detailed application of Levinasian ethics to the law of negligence constitutes a sustained demonstration of the possibility of a Levinasian legal theory. A central challenge confronting this enterprise, as the tort law example illustrates, is how to expose the trace of ethics within a form of discourse that has traditionally emphasised the autonomy of the self over the ethical demands of the other. It is to this issue, and its position within Manderson's project, that I now turn.

II. Self and Other in Ethics and Law

Manderson draws a distinction early on in his book between self- and other-oriented approaches to legal discourse. He observes that the common law as a whole has traditionally been motivated by a focus on the autonomous legal subject, reflected in the key notions of freedom, contract and individual rights.[11] Tort law, by contrast, sits uneasily within this edifice, insofar as its point of departure is not the rights of the subject, but the duty of care the subject owes to other people, independently of her or his own actions and choices.

For Manderson, the common law's traditional orientation towards the self has manifested itself in two competing conceptual frameworks. The first of these conjugates legal rights and obligations in terms of the first person singular: the self as 'I'. This is the grammar of contract: I have rights and obligations because I have voluntarily agreed to them.[12] The traditional alternative to this framework is to conjugate legal relations in terms of the first person plural: the legal community as 'we'. On this view, I have legal rights and obligations because I am part of a collective of similar

8 Ibid 77.
9 Ibid 52.
10 Ibid 81.
11 Ibid 6.
12 Ibid 22.

individuals; my obligations are to be calculated by taking into account the interests of the group.

Manderson argues persuasively that each of these frameworks systematically obscures the role of the third person singular: what Levinas terms 'the other'. In the former account, the other is placed at a distance from the self, excluded from legal consideration; on the latter view, the other is subsumed within the self, through the notion of the legal community.[13] What Levinas offers us, in Manderson's view, is a third vision of law, which avoids obscuring the encounter with the other by conceiving it in terms of the same. The beginnings of such an alternative framework can be discerned in the law of tort.

The basic distinction, Manderson says, is that tort law is founded on proximity, not privity;[14] the foundation of tortious responsibility is contact, not contract.[15] We are not bound by duties of care because we agree to them, but rather because responsibility to the other is the very foundation of our subjective self-awareness. For Manderson, as for Levinas, the notion of ethical obligation is necessary to explain critical facets of human experience.[16] Responsibility precedes subjectivity; it is for this reason that Manderson ultimately describes negligence as 'the foundational moment of law'.[17] Tort becomes the site of law's pineal gland, the small but central locus where its soul may be found.

It is unclear just how radical a claim this is intended to be. Manderson's conclusion seems to be that tort enjoys a special place within legal discourse; it is the privileged vantage from which we may catch a glimpse of law's foundations in ethical responsibility. In a sense, this is to turn law on its head; if we accept Manderson's argument that the common law traditionally privileges privity over proximity, contract over contact, it is hard to escape the impression that he is proposing an inversion of the traditional model. Tort, it seems, should be elevated to its true place at the centre of legal discourse; for crime, contract and the rest, by contrast, a demotion is in order.

I wonder whether we need to go this far to do justice to Levinas's theory. We have seen that Levinas is not committed to an absolute separation between ethics and law; rather, the two realms are embroiled in an essential yet unresolvable dialogue. We might plausibly take a similar

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13 Ibid 26.
14 Ibid 19.
15 Ibid 94.
16 Ibid 66.
17 Ibid 200.

view of the relationship between self- and other-oriented approaches to legal discourse. Tort law, on this view, serves as a crucial reminder of a foundational aspect of normative discourse that is too often neglected: the unconditional demands that weigh upon me by virtue of my relationship to other people. However, to conceive this relation with the other as the sole basis of social life is to tell too simple a story. Our conception of the self, too, tells us something important about the foundations of the legal community. There is a dialectic here, which cannot be resolved in favour of tort, any more than it can justly be concluded in favour of crime and contract.

For Levinas, the other comes first and last; responsibility, he emphasises, is necessarily prior to freedom.[18] This is the state of the art in ethical phenomenology: we must welcome the other, who too often has been obscured and overlooked in favour of the self. It is the necessary counterpoint, perhaps, to the earlier existentialist phenomenology of Jean-Paul Sartre, who – while no doubt elevating the autonomous self above its proper philosophical status – nonetheless emphasised that responsibility and freedom are irrevocably intertwined as aspects of our self-image.[19] Levinas gives us ethical phenomenology after Sartre (or, perhaps, to echo Theodor Adorno's overworked phrase, 'after Auschwitz');[20] what, then, will be our phenomenology after Levinas?

Hopefully, not a return to the totality of the self – but neither, I would suggest, should we seek a radical inversion of normative discourse in favour of the other. Ultimately, as Levinas hints at various points,[21] such a pure philosophy of the other is neither possible nor even desirable. Rather, what we should seek is a genuine interplay between self- and other-oriented understandings of purposive human action. The call is not to inversion, but to openness: far from being trapped in the pineal gland of negligence, the soul of law confronts and eludes us everywhere.

III. Ethics and Judicial Reasoning

Finally, Manderson offers us something that, to my knowledge, has never been offered so clearly before: the outlines of a Levinasian theory of

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18 Ibid 70.

19 For further discussion, see Jonathan Crowe, 'Existentialism and Natural Law' (2005) 26 *Adelaide Law Review* 55.

20 Theodor Adorno, *Negative Dialectics* (E B Ashton trans, 1973) 361-5; Theodor Adorno, *Prisms* (Samuel Weber and Shierry Weber trans, 1981) 34.

21 See, eg, Emmanuel Levinas, *Otherwise than Being or Beyond Essence* (Alphonso Lingis trans, 1998) 43-7, 157-9.

judicial reasoning. It is a theory that embraces the value in legal decision-making of 'an idea that is not reducible to a rule'.[22] The central point is that legal judgment must remain open to the ethical context that lies behind the framework of legal rules. In this respect, Manderson gives us an ethically-motivated account of the merits of judicial law-making and the common law method.[23]

A central idea in Manderson's conception of judicial reasoning – and one which seems to swim against the tide of contemporary Australian legal theory – is that certainty in legal decision-making is overrated. The merit of the common law method, on this view, is that it allows a growing, organic form of justice, which is not reducible to static rules.[24] The question underlying Manderson's approach is not: 'how does law implement ethics?'; but rather: 'how does ethics inspire law?'.[25] The notion of proximity figures in this account as an overriding principle, incapable of more definite formulation, yet capable of being understood by reference to various factors elucidated over time.[26]

Insofar as it is desirable, certainty arises from the accumulation of precedent in response to concrete cases, rather than any attempt to formulate a precise and all-encompassing set of rules. This, Manderson tells us, is a 'jurisprudence for adults', rather than the narrow 'rule-fetishism' found in certain strands of legal positivism.[27] It is a vision of law in movement, a developing and organic entity that remains open to the traces of ethical experience within the settled rules. Manderson offers us a vision of law that embraces its imperfections, rather than attempting to obscure them through a fiction of completeness.[28]

The underlying point here is that one can have an imperfect law that nonetheless maintains its ethical hold on its subjects. Indeed, Manderson's view suggests that only a law that remains open to ethical experience can truly claim authority over its citizens.[29] It follows that settled law is not the overarching ideal many take it to be.[30] In *Totality and Infinity*, Levinas describes how the subject, initially 'at home with' her or himself [*chez soi*],

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22 Manderson, above n 1, 15.
23 Ibid 10-11.
24 Ibid 144.
25 Ibid 182.
26 Ibid 119-20.
27 Ibid 200.
28 Ibid 198.
29 For further discussion, see Crowe, above n 4.
30 Manderson, above n 1, 202.

is obliged to assume responsibility for the other.[31] Manderson reminds us that law cannot remain *chez loi*, cocooned in the interiority of its own settled rules; rather, true law is always in exile, constantly reaching beyond itself in an effort to find its way home.

That is what proximity signifies: a gesture without an end. In this respect, Manderson echoes a point made in a different context by Michael Detmold: law is continually in movement – and this movement is the hardest thing for law to grasp.[32] There is a necessary connection between the true nature of law and the true nature of responsibility.[33] Embracing this view of law as necessarily incomplete allows us to avoid segregating law from ethical experience; equally importantly, we can accomplish this without entirely rejecting the self as a site of moral self-discovery. What is necessary is that both law and the self remain constantly open to the demands of that which they cannot contain.

Manderson reminds us at a central moment in his book how responsibility enjoys the element of surprise. As Levinas puts it with characteristic poetry, 'consciousness is always late for the rendezvous with the neighbour'.[34] In a similar way, it seems, law is destined always to be late for the rendezvous with the ethical. But, as folk wisdom tells us, better late than never.

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[31] Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority* (Alphonso Lingis trans, 1969) 33.

[32] M J Detmold, 'Australian Law: Federal Movement' (1991) 13 *Sydney Law Review* 31, 31.

[33] Manderson, above n 1, 204.

[34] Ibid 115.