DESMOND MANDERSON, *PROXIMITY, LEVINAS AND THE SOUL OF THE LAW* (MONTREAL: MCGILL-QUEEN'S UNIVERSITY PRESS, 2006)

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A JURISPRUDENCE OF THE INDIRECT

The genius and authenticity of Des Manderson's book announces itself in the closing sentence of the acknowledgements:

[T]he law stated is correct as of midnight on 10 March 2005. This has always struck me as bizarre both for its arrogance and its uselessness, since it is a date on which by definition the book has no readers. Between accuracy and readership there is a null set. So I will confine myself to the following: the law stated is incorrect on any day you happen to be reading it and, if I may briefly foreshadow the long argument to come, a good thing too.¹

Manderson's engagement with Levinas' philosophy and the law, and indeed the wit and style of this book are summed up in these words. This playful subversion of a set piece of legal writing characterises a scholarship in pursuit of what always exceeds the law. Thus, whenever you consult a case, whenever you think that a judge has articulated a principle; 'something' is absent, leaving its traces in doctrine and indicating a 'beyond': and this "is a good thing too". With this lightness of touch, Manderson indicates a new and intriguing form of jurisprudence; a jurisprudence of the indirect that this short review will attempt to describe. Manderson's work to date has evoked this beyond that remains within in different terms: it might be the aesthetic, or it might be a figure of justice bound up with death; indeed, it might even be what travels under the name of Emmanuel Levinas as an ethics of alterity. Ethics, then, figures a kind of non - relation to the law; a non relation or an indirectness that Manderson claims can teach us a great deal.

Already, "the ethics of alterity" is a little too used up; trotted out in doctrinaire Levinasian scholarship, in post - Derridean musings on the avenir of justice: these terms risk losing their strangeness, their resistance to good sense and their potential to upset, provoke and refigure. In posing the (non) relation between tort law (primarily in its Australian manifestation) and Levinas' thought, Manderson reclaims the spark of this thinking - briefly illuminating an incongruity and disturbing established forms of scholarship. This represents a new departure for work on tort, at least for those who think that the social world can be reduced to an algebra. In place of cost benefit analysis, then, Manderson's thought offers its mercurial flashes; a thinking no more completed by Levinas' philosophy than it has been by his other adventures in jurisprudence. Indeed, as much as this is a book inspired by Levinas, it is also an engagement with Melville, Borges, Antony Gormley and Henry Moore- artists whose work illuminates law and philosophy in the

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1 Desmond Manderson, *Proximity, Levinas and the Soul of the Law* (Montreal: McGill-Queen's University Press, 2006) 10.

figuring of a responsibility that brings us to ourselves; in the name of keeping ourselves open to the world; in the cause of an essential modesty that realises the flawed nature of all grand designs and the fundamental mistake that lie behind all nice achievements of balance.

According to Manderson, tort has been touched with a strange spirit of neighbourly love since Lord Atkins' judgment in *Donoghue v Stevenson*. This is not about the exchanges of contract law, or the retribution and punishment of criminal doctrine. However, Manderson is not claiming that love for one's neighbour is somehow the hidden code of tort law; if anything, the subject "has never been entirely comfortable"² with this idea. Tort communicates with a spirit outside of itself - an outside that may influence its development, but which is not essentially reducible to legal terms at all. We need to look to "the constant surprise of intersubjectivity"³ - and the broader problematic of "how our society reattaches commitments to their proper authors" before we can feel this animus as our responsibility for the other person: "Responsibility is not a judicial auto-da-fe but an influential story as to who we are."⁴

One of the fundamental points of this argument, at least from the rather limited perspective of the lawyer, is that behind the rules of tort is a notion whose "value" is that it cannot be reduced to a rule. 'This' 'is' a 'surprise' that is rooted in our being together in a social world; in our relations of proximity with others.

What sense do we make of this? For those brought up on conventional jurisprudence, such an approach might be incomprehensible. Indeed, one of the structural problems that Manderson faces in this book is the need to explain to a legal audience a body of thought that requires an engagement with 'difficult' continental philosophical traditions. Partly through the clarity of the exposition, and partly through the skilful interface of philosophical and legal themes, Manderson achieves this difficult objective. The task of explaining the intricacies of Levinas' thought is the work of the middle chapters of this book. It may be useful to outline the contours of the notion of proximity.

If we allow ourselves a brief gloss of Levinas, we could start by suggesting that the other is the other person: the one whom I come across in my daily life. However, the other cannot be counted alongside the self to produce a sum that is the social. This is not "sameness theory."⁵ There is no "collectivity"⁶ which brings together the other and the self in an "us" of common inclusion. The figure of the other is the stranger whose arrival confronts a self that is comfortably at home:

Responsibility... comes from our exposure to others and is not due to the unfettered exercise of our agency. It does not come from our intentions but prevails upon them. It is not an active,

2 *Ibid.* at 5.

3 *Ibid.* at 11.

4 *Ibid.*

5 *Ibid.* at 31.

6 *Ibid.* at 39.

but a passive experience. It has nothing to do with the symmetry of a promise or the free will of an autonomous agent.⁷

This takes us some way to the idea of our proximity with others. It cannot be made into a theme- we need to talk, rather, of being “caught up” by it. It may require the ego, but the ego does not represent proximity to itself, it signifies proximity in “signifying itself”- in its exposure to the other.⁸ Proximity cannot be found in handshakes, the exchange of money and promises; it would not even be “suffering in common”.⁹ If “non reciprocity” is nevertheless the experience of proximity, then obsession may be one of the ways in which it signifies itself. Thus, “the neighbour concerns me with his exclusive singularity without appearing...”¹⁰ The neighbour appears as a “singularity”¹¹- a singularity is linked to a sociality that “cannot be abrogated”.¹² Singularity cannot be found in the social bond, in contract or community: but nevertheless the other in her singularity confronts me.

Manderson’s gloss on these ideas is exemplified in the following paragraph:

Proximity, unlike Christian love or Marxist brotherhood, is a relative closeness, not a universal kinship. Levinas does not imagine that we are all neighbours all the time. Isn’t that what lies behind the word ‘neighbour’ itself, a word at once distinctively Levinasian and decisively legal? It marks the boundary within which we find ourselves responsible. Or...proximity is in fact the origin of responsibility: it is the experience that leads us to catch sight of it. That is its role in ethics and law. Proximity does not limit responsibility: it augurs and inaugurates it. It inspires it.¹³

In this passage the anarchic philosophical language modulates into the language of legal analysis. This opens the second major theme in this book- the close analysis of the Australian common law. Proximity can be used to understand a “radical new language” that the Australian High Court tried to develop in the 80s and the 90s; a way of rethinking that most fundamental of concepts: the question of duty. Manderson argues that in so doing the court came close to, touched upon, an ‘institutional’ development of proximity, but failed to understand that the concept provides not so much a ground as a “limit” to responsibility. The court could not deploy this limit, but had to reduce it to rules and principles- effectively limiting responsibility to cases of “consent and choice”.¹⁴

The language of proximity, dimly perceived and poorly explained, has forced enormous change upon the High Court over the past

7 *Ibid.* at 49.

8 Emmanuel Levinas, *Otherwise than Being* (Pittsburgh: Duquesne University Press, 1998) 83.

9 *Ibid.* at 84.

10 *Ibid.* at, 86.

11 *Ibid.*

12 *Ibid.* at 87.

13 *Supra* note 1 at 103.

14 *Ibid.* at 104.

twenty years. Reasonable foreseeability has become of trivial significance. Assumptions of responsibility and reliance have been tried and found wanting. Policy arguments have been increasingly limited and defined. I venture to suggest that it is far too late for the High Court to 'reject' proximity. They have already been contaminated. For there has been another language of responsibility that has gradually intruded on the deliberations of the Court, imposing itself with growing insistence. This language has centred on the experience of vulnerability and the capacity to control: precisely the features, that I have argued give real and recognizable content to Levinas' description of responsibility.¹⁵

This logic allows us to 'find' proximity in its very withdrawal from the law - for proximity and the "law of duty" communicate with each other to the extent that they cannot be "defined" only "approached".¹⁶ This paradox should not and cannot be explained- it can only be made more profound. This is essentially the work of chapter 6. Drawing on the celebrated analysis of the saying and the said, Manderson moves towards a major claim about the failure of the Australian courts to respond to the spirit that was haunting the law. This is because proximity is not, ultimately, an experience of logic or of rules, but a foundation of responsibility on experience:

It offers not one rule amongst others, as indeterminate as the rest, but, instead, a necessary moment to understand our relationship to others as coming from a phenomenal connection between persons that binds together the vulnerability of one to the response ability that singles out another. Without reference to proximity, it is not our law's reasoning that will suffer, but its empathy – and that, says Levinas, is what makes reasoning possible.¹⁷

Part of the beauty of this book is that it opens onto matters much broader than the law of tort. Thus, this assessment of the courts' failure requires a thinking through of empathy, and, as Manderson pursues this theme through Levinas' rather messy politics, an account of the social and political world and law's role within it. This is where Manderson's optimism shows through. The soul of the law is its failure to close in on itself. It is befitting of this jurisprudence of the indirect that the word that appears so central to the title is hinted at in the text rather than specifically developed. That the law is a failure is only an element of a problematic that suggests that we always learn from failure—and that we must remain in pursuit of what makes us capable of ethics, and capable of moulding our institutions to respond to our being alongside others.

Manderson's book provokes legal scholarship to reach beyond itself. In realising one of the legacies of Levinas' thought for legal philosophy, Manderson shows the originality of a thinking that, whilst it cannot be

15 *Ibid.* at 104.

16 *Ibid.* at 143.

17 *Ibid.* at 166.

identified with any of the traditions of jurisprudence, cannot be dismissed as post structuralist obscurantism or some form of relativism. So—(to take only two obvious reference points) unlike natural law theory and its Dworkinian variants, Manderson/Levinas does not discover the principles that lie within the law and allow right answers to be produced. Unlike positivism, in its strong and weak forms, jurisprudence is not limited to identifying the marker that defines the law. Both positions would lose the sense in which a term like proximity inspires and leaves its traces through legal concepts. In the end, this book, and the voice that speaks within is that of a humanist. Not in the Kantian sense; Manderson's humanism is a much looser intellectual optimism, a cosmopolitan eclecticism that celebrates the malleability of the law. Even if attempts to produce ethical laws result in failure, the judge, the lawyer and the jurisprude must respond to their own being as that which is summoned by others, even if the spirit of this summoning remains ultimately resistant to the letters that shackle it to form.