A JURISPRUDENCE OF THE PROBLEM OF WAR

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ABSTRACT

The thesis focuses upon what might be termed 'war's moral problem.' The problem relates to an *aporetic* relation between a transcendental position of morality and the phenomenon of war. In general terms the problem refers to the situation where, on the one hand, a 'particular conception of morality' condemns war, yet, on the other hand, morality is forced to legitimate particular wars in the attempt to overcome the condition of war. This can be understood as a jurisprudential question that comes to Anglo-European jurisprudence through a long tradition(s) of natural law. The thesis traces the contemporary inheritance of this problem through the philosophy of Immanuel Kant and G.W.F. Hegel. Particular attention is given to how Kant's approach to the problem is taken up in contemporary debates in what might be termed 'neo-Kantian ethics.' This refers to how Kant's approach to war's moral problem is inherited and developed by Jürgen Habermas, Jacques Derrida and John Rawls.

The thesis draws upon a rereading of the philosophy of Hegel to consider the effectiveness and limitations of the approach of 'neo-Kantian ethics' to war's moral problem. By drawing upon a Hegelian conception of law, I argue that war's moral problem and its contemporary emergence, can be understood as a problem of jurisprudence. Hence, by building upon the approaches of Kant and Hegel, I argue that it is appropriate to attempt to come to terms with war's moral problem by the development of what might be called a 'jurisprudence of war.' Within the thesis, I begin to develop an approach to a jurisprudence of war by focussing upon the nexus of law-war-ethics, as

considered through Hegel's critical-metaphysical notions of 'actuality' (*Wirklichkeit*), 'ethical life,' and '(mis)recognition.' The thesis endeavours to develop an account that, in the future, may be expanded into a more comprehensive theory or jurisprudence of war. It might be anticipated that such an account may then be used to inform legal approaches to particular international conflicts.

The thesis is structured as follows: chapters one and two introduce the approach of Kant and 'neo-Kantian ethics' to war's moral problem. Chapters three, four and five develop a rereading of Hegel focussed upon questions of law. Chapter six gives and interpretation of Hegel's approach to war's moral problem. Finally, chapters seven and eight begin to the development of a contemporary jurisprudence of war.

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Statement of Originality

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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Introduction

This thesis examines the question of war as a jurisprudential problem. The focus is upon what can be termed 'war's moral problem' and how this problem is inherited by the philosophical traditions of Kant and Hegel. In this section I will briefly introduce the problem and the method adopted by the thesis.

Introducing War's Moral Problem

I suggest that what might be considered as 'war's moral problem' is the difficulty, or barrier, that occurs when attempting to reconcile a particular 'Western' conception of morality and war. When referring to a 'conception of morality,' I am loosely drawing upon a moral sensibility that has been passed on to contemporary jurisprudence through a number of religious, ethical and legal traditions, and which holds an aversion to the phenomenon of war. This sensibility seeks to overcome the condition of war through the institution of legal and ethical inter-state ordering. One source of this moral sensibility can, perhaps, be located in the commandment of the *Decalogue*, "Thou shalt not kill." This Judaeo-Christian (and Islamic) injunction finds its way, along with others, into contemporary Anglo-European ethics and jurisprudence through the development of the tradition(s) of natural law.[1]

One interpretation of the natural law tradition understands the injunction of morality (or in other terms, the position of 'ethics' or 'justice') to occupy a 'transcendental' position. The moral transcendental assumes the structure of an 'ought,' or of an

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[1] When speaking about the tradition of natural law, I am drawing upon an interpretation of this tradition given by Ernst Bloch. See: Bloch, E. *Natural Law and Human Dignity* Schmidt, D.J. tr. (Cambridge, Mass.: M.I.T. Press, 1996).

'imperative.' Its position is always situated in the 'beyond.' The transcendental moral moment occupies a position that stands apart from what is present, and thus, as an absence, or longing, or hope, it represents the structure of an ethical reality that is always fully 'not yet' (*noch nicht*).[2] In this conception, law or ethical conduct is placed under the judgement, or criticism, of a transcendental morality that deems human acts to be inadequate and, at times, immoral. Law or human ethical action is urged to transform, or reorder, itself in accordance with its higher transcendental principle. Or, in a less radical and more prudential manner, law and human ethical action take the moral transcendental moment as a guide that seeks to inform the always imperfect legal and ethical ordering of human conduct.

This conception does, perhaps, involve a certain 'messianic connotation' whereby 'morality,' the 'good,' or 'justice,' resides as a beyond, a forward-looking hope or expectation, which, the present strains towards; a possibility which is open to, and dependent upon, the impossible. However, this conception also refers to an openness or incompleteness of any present ethical reality. Hence, ethical notions function as radical openings onto human possibility, and in this sense, the demand or injunction stems in part, from an ontological and conceptual incompleteness of the present. Further, this natural law conception also inherits a Stoic concentration upon the centrality of 'human dignity,' the importance of 'upright carriage.'[3] In this respect, the conception relates to a question of human ethical responsibility. It involves the issue

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[2] On Bloch's notion of the 'not yet' see: Bloch, *The Principle of Hope* Plaice, N. and Plaice, S. tr. (Cambridge, Mass.: M.I.T. Press, 1995). For accounts of Bloch's philosophy generally see: Hudson, W. *The Marxist Philosophy of Ernst Bloch* (London: Macmillan, 1982); Moylan, T. and Daniel, J.O. (eds.) *Not Yet: Reconsidering Ernst Bloch* (London: Verso, 1997); Geoghegan, V. *Ernst Bloch* (London: Routledge, 1996); Jones, J.M. *Assembling (Post)Modernism: The Utopian Philosophy of Ernst Bloch* (New York: P. Lang, 1995).
[3] Bloch, E. *Natural Law and Human Dignity* Schmidt, D.J. tr. (Cambridge, Mass.: M.I.T. Press, 1996), pp. 10-24.

of how law and ethics is to respond to the world, and how, that, which is not yet, can be enacted and, thus, brought into being. Further, this transcendental moral moment is always within a position of risk. It sits in a precarious relation in the world of human action as legal and ethical orders are built upon, and justified through, the power of its name.

I am not implying that this particular conception of morality is an adequate description of the whole of a long and diverse tradition(s) of natural law. Rather, I merely suggest that this conception is 'one' conception that has relevance within contemporary jurisprudence.[4] It is, thus, one conception that has carried through to some spheres of Anglo-European jurisprudence and is present within contemporary jurisprudential problems. I suggest that this moral conception is present within, or relevant to, contemporary jurisprudential approaches to the question of war.

The term 'war's moral problem' refers to something of an *aporia* that is present when a particular conception of morality approaches the phenomenon of war. On the one hand, a transcendental moral moment condemns war, this moment calls for the situation of war to be overcome. However, on the other hand, the enacting of the injunction places at risk the transcendental moral moment's status. The overcoming of war involves the risk of morality giving the whole of itself over to war, of being the justification of a war against war. In the confrontation with war, morality risks itself, it risks becoming no longer the judge of human action, but merely, a 'comfort.'

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[4] For an account of the relation between a tradition of natural law and the modern juridical notion of human rights, see: Douzinas, C. *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart, 2000).

War's moral problem is, thus, an old problem. It is present within Medieval Christian theological debates over the notion of 'just war,' of the justness of war (*ius ad bello*) and the nature of justice within war (*ius in bellum*).[5] However, within 'modernity,'[6] in the sense of the era that refers to the beginning of the transformation in Western Europe from a feudal and religious ordering of society, towards the emergence of the 'state' and then the 'nation-state,' the tradition of natural law begins to take on a more juridical and less religious character.[7] Following the carnage of the Thirty Years War (1618-48), and the violent claims of transcendental supremacy fought over by differing Christian confessions, the consideration of war's moral problem begins to be arranged around a number of juridical themes. The advent of the 'Westphalian world,' the Treaty of Westphalia (1648) and the codification and development of its principles by natural law jurists such as Christian Thomassius, Samuel Pufendorf, Hugo Grotius, and Emer Vattel, began the positioning of war's moral problem as a juridical problem, a question of law. With regard to the emergence of the Westphalian world, Ian Hunter states:

> First, at the interstate level, the Westphalian order was dedicated not to the elimination of war – which it treats as a permanent feature of interstate relations – but to its regulation. On the one hand, by tying the European states

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[5] There are numerous accounts of the 'just war' tradition, see generally: Walzer, M. *Just and Unjust Wars* (New York: Basic Books, 1977); Coates, A.J. *The Ethics of War* (Manchester: Manchester University Press, 1997); Christopher, P. *The Ethics of War and Peace: An Introduction to Moral and Legal Issues* (Upper Saddle River, N.J: Pearson, 2004).

[6] I use the term 'modernity' throughout the thesis and do so in a very general sense. I use the term to denote an era in history that can be distinguished from 'antiquity.' Further, I use the term to refer to the development of conceptions of law, ethics and freedom, that, have arisen following the Westphalian ordering of legal and political sovereignty, and, conceptions of right and liberty that, have emerged following the 'French' and 'Industrial' Revolutions. Generally, I do not make use of the term 'post-modernity.' Further, I acknowledge the particular Euro-centric nature of the terms 'antiquity' and 'modernity.' As a point of reference, see: Habermas, J. *The Philosophical Discourse of Modernity: Twelve Lectures* (Cambridge: Polity Press, 1987).

[7] On the importance of this demoralisation of the spheres of law and politics, particularly as carried out by German natural law jurists see: Hunter, I. *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (New York: Cambridge University Press, 2001). On how this occurs with respect to the issue of war see generally: Tuck, R. *The Rights of War and Peace: Political Thought and the International Order From Grotius to Kant* (Oxford: Oxford University Press, 1999); Knutsen, T.J. *A History of International Relations Theory* (Manchester: Manchester University Press, 1992); Clark I., and Neumann, I.B. (eds.) *Classical Theories of International Relations* (Macmillan: London, 1996).

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into a system of reciprocally guaranteed security, and by treating territorial states as sovereign in relation to all other temporal or spiritual powers, Westphalia was designed to banish ideological wars of annihilation from the European heartlands. The system of pacts backed by great-power guarantors was not intended to preclude territorial infringements or conflicts, but to ensure that these would take the form of contests between 'just enemies' – rather than wars of extermination against heretics – thereby avoiding the cycle of outrage and revenge that had made the religious wars so savage and so difficult to end. On the other hand, this entirely concrete respatialisation and detheologisation of the European order was dependent on the existence of an extra-European colonial world....

Second, the restriction of war to a domain of regulated conflicts between states depended on the desacrilisation of politics inside them. Here we have observed that Westphalia marked the tentative emergence of the first forms of religious toleration that would lead to the separation of state and church. It was only when a secularised political jurisprudence permitted social peace to displace religious truth and moral right from the political arena the Catholics and Protestants could reach a compromise in the distribution of religious rights and possessions. This substitution of worldly security for theological truth, which entailed a major curtailment of the sovereign's rights in religious matters, was the first step towards the norm of the state's neutrality in religious affairs.[8]

The institution of the Westphalian order as a historical event and its codification and re-narration by the natural law jurists can be understood as an attempt to come to terms with war's moral problem. This attempt dealt with the violence that arose from wars fought in the name of religious or moral truth by de-sacrilising and de-moralising the international order. In recognising the potential violence that lay within the transcendental moral moment's injunction to overcome war, the natural lawyers recognised the importance of carrying out morality's injunction by prudential, rather than, radical means. Hence, because the transcendental moral, or sacred, 'truth' was itself the site of contestation, the only way to salvage morality's transcendental position was to attempt to sever its ties from the process of international legal ordering. Under this conception, war is not outlawed entirely, but through its regulation by a notion of international law, war is separated from morality.

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[8] Hunter, I. "Westphalia Calling" 'unpublished research paper,' p. 11.

In this respect, transcendental morality is preserved: by being removed from questions of international law, the transcendental moral moment is not sullied by particular wars carried out in its name. Rather, it remains in its position as judge. However, transcendental morality is also sacrificed. It is banished from international law and questions of war. Hence, for the natural lawyers, war and the sense that a particular war may be 'right' or 'just' (the *ius ad bellum* and the *ius in bello*) becomes a question of the legal regulation of sovereign right and the question of, 'who is sovereign?' In this sense, the radical command of natural law is ignored. The command, 'Thou shalt not kill,' becomes a question of private moral conscience as states emerge into a world of legally-regulated killing.

However, the Westphalian order was not able to completely overcome war's moral problem. The problem still resided, although hidden within a legal discourse, within the attempt by the natural lawyers to legally regulate the 'rightness' of war (within both Europe and the colonial world). Further, the violent power of war's moral problem resurfaced again in the wars of 'liberation' and 'counter liberation' following the American War of Independence and French Revolution. Thus, the fires of war's moral problem, while having cooled for a time by the post-Westphalian natural lawyers, were re-ignited by the French Revolution's impact upon natural law. War's moral problem came again to the fore through the triad of natural right, *liberté*, *fraternité* and *égalité*; it rose again in Europe with the *Marseillaise*, and the march of Napoleon as the dual figure of 'liberator' and 'Emperor.'

Within contemporary jurisprudence, war's moral problem is inherited in this agitated state. Within international law, following Hiroshima, Nagasaki and the Nazi Holocaust, law's language is again one of moral condemnation.[9] In the 'post-Cold War world,' the language of transcendental morality comes again to the fore, situated within the notions of 'humanitarian war,'[10] 'Arab-Islamic terrorism,' and the so-called 'War on Terror.' What appears, before contemporary jurisprudence, is a question inherited from the tradition of natural law. By focussing upon war's moral problem, this thesis examines one line of inheritance of this question. It focuses upon how this question is inherited by Immanuel Kant, and then, following Kant, by G.W.F. Hegel. The thesis examines the contemporary relevance of this inheritance by focussing upon three thinkers of the second half of the twentieth century who have taken up and developed Kant's approach to war's moral problem. These are, Jürgen Habermas, Jacques Derrida and the late John Rawls.

By drawing attention to the limitations and inadequacies within the 'Kantian' line of inheritance I attempt to build upon the Hegelian approach to war's moral problem. I refer to this attempt as the development of a 'jurisprudence of war.' Through this, I seek to offer a small contribution to a long-running jurisprudential question that comes to Anglo-European jurisprudence through the tradition(s) of natural law. The thesis, thus, has a limited aim, that of reminding Anglophone legal scholarship that what confronts us today as war's moral problem should not necessarily be considered as primarily a question of morality, or, of international relations, but, rather, that it

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[9] For example see: Charter of the United Nations, Preamble. (1945).
[10] On this re-emergence, I draw upon Douzinas. See: Douzinas, C. "Postmodern Just Wars: Kosovo, Afghanistan and the New World Order" in Strawson J. (ed.) *Law After Ground Zero* (London: Glasshouse Press, 2002).

should be considered as a question of jurisprudence. Hence, the *aporia* that arises in war's moral problem might be considered as a *jurisprudential question.*

Before discussing my approach to Kant and Hegel, it is necessary to make a comment with regard to terminology. Within the thesis, I draw a distinction between the terms 'morality' and 'ethics.' For example, I use the terms 'war's moral problem,' 'transcendental morality' and 'the ethical life of the state.' Within these terms, I am drawing upon a sense of Hegel's distinction between '*Moralität*' and '*Sittlichkeit*'[11] as set out in the *Elements of the Philosophy of Right* (1821).[12] We might consider that the two terms are related, in that they belong to what can be referred to as the notion of 'ethics in general.' Hence, each refers to a conception situated within a long tradition(s) of natural law thinking that focuses upon questions of what is 'right,' what is 'good,' and what is 'just.' Each relates to a conception of law, social life, and politics, which involves the position of a transcendental. Within this, the present is 'not yet right,' it is 'not yet just,' whereby the notion of the 'not yet' represents the ontological incompleteness of the world and one's hope or expectation of something better,[13] and, further, it refers to the *aporetic* nature of the notions of ethics and justice.[14]

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[11] This distinction will be discussed in greater detail in chapter four.

[12] Hegel, G.W.F. *Elements of the Philosophy of Right*, Wood, A.W. (ed.) Nisbet, H.B. tr. (Cambridge: Cambridge University Press, 1991), (Hereafter cited as *Ph.R.*).

[13] This suggestion is taken from Bloch. See: E. *Natural Law and Human Dignity* Schmidt, D.J. tr. (Cambridge, Mass.: M.I.T. Press, 1996), pp. xxvii-xxx.

[14] This suggestion is taken from Derrida, see: Derrida, J. "The Force of Law: The 'Mystical Foundation of Authority'" Quaintance, M. tr. in Cornell, D., Rosenfeld, M., and Carlson, D.G. *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992), pp. 16-27.

Following Bloch, both Kant and Hegel can be situated within the natural law tradition.[15] Within this tradition, Kant represents a moment of conceptual revolution, whereby, the question of 'ethics in general' is to be decided no longer by reference to nature (*physis*), personal inclinations, or social customs. Rather, human action should be governed by the ultimate obligation towards others and towards one's self.[16] This obligation is to be determined by reference to 'reason,' and thus, through self-reflection and critique it is to be realised by an act of 'self-legislation.' When using the term 'morality' (as *Moralität*) and 'war's moral problem,' I am making use of this Kantian sense of the term. Hence, with Kant, 'war's moral problem' begins to take on a more specific meaning as it is influenced by Kant's conception of 'morality.'

In contrast to Kant's notion of morality, when using the term 'ethics' or 'ethical life,' I am drawing upon Hegel's sense of the term '*Sittlichkeit.*' This term incorporates *Moralität*, it incorporates the moment of critical self-reflection and self-legislation. However, *Sittlichkeit* is also distinct from this, in the sense that self-reflection upon one's obligations, is tied by Hegel, to the acknowledgement of particular content. This is not to say that *Moralität* does not have a content, it does, and it engages with this content at the level of 'practical judgement.'[17] Rather, *Sittlichkeit* refers to Hegel's conception that 'obligation' is grounded in, and arises through, the 'recognition'[18] of 'custom.' The individual's obligations to its others arise out of familial, social, legal and political relations. This sense of obligation involves a relation between critical

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[15] Bloch, E. *Natural Law and Human Dignity* Schmidt, D.J. tr. (Cambridge, Mass.: M.I.T. Press, 1996), pp. 66-130.
[16] Höffe, O. *Immanuel Kant* Farrier, M. tr. (Albany: State University of New York Press, 1994), p.136.
[17] O'Neil, O. "Instituting Principles: Between Duty and Action" in Timmons, M. (ed.) *Kant's Metaphysics of Morals: Interpretive Essays* (Oxford: Oxford University Press, 2002), p. 338.
[18] Note that, Hegel's theory of 'recognition' will be discussed in chapter five.

self-reflection and one's 'social' or 'ethical being.'[19] While this discussion is only a rough and incomplete outline of the distinction it is perhaps enough to give something of an indication of how Kant and Hegel each take up war's moral problem.

Kant and the Kantian Inheritance

The thesis begins the engagement with war's moral problem by focussing upon the Kantian inheritance of this problem and then, the inheritance and development of Kant's approach within contemporary thought. Kant's inheritance of war's moral problem occurs predominantly through his text *Towards Perpetual Peace: A Philosophical Sketch* (1795).[20] Kant's comments upon war, international law, and 'cosmopolitan right' have had a great deal of influence upon the thinking of these issues, particularly in the latter half of the twentieth century. Kant's comments have been interpreted by numerous scholars in differing ways, and have been used as a theoretical foundation to develop a number of approaches within the fields of international relations, international law and conceptions of international ethics. I will briefly discuss a number of scholars, who, interpret and develop the ideas expressed in Kant's *Perpetual Peace*. For the sake of simplicity, I will speak in terms of 'groupings.' However, any such classification is only for ease of presenting a general overview, it is not conclusive, and there is, of course, a great cross-over between these interpretations.

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[19] Note that, Hegel's notion of 'social being' will be discussed in chapter four.
[20] Kant, I. "Toward Perpetual Peace: A Philosophical Sketch" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991).

One line of inheritance takes up Kant's[21] approach, sometimes referred to as a form of 'cosmopolitanism,'[22] as a means of thinking through the possibilities of re-ordering or transforming the sphere of international relations and thus, going beyond the dominant 'Westphalian order.' Such thinkers include David Held,[23] Derek Heater,[24] Daniele Archibugi,[25] and Pheng Cheah.[26] Generally, these thinkers trace a historical movement away from the Westphalian order and argue for new 'democratic' and 'cosmopolitan' forms of institutional ordering. These thinkers can be contrasted to a general interpretation that treats Kantian cosmopolitanism as being consistent with liberalism and, thus, not inconsistent with a form of Westpahalian order built upon 'liberal-democratic' principles. On this view, Kant's notions are interpreted as a complement and a guide to the relations between liberal states, rather than a radical

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[21] For general interpretations and commentaries on Kant see: Höffe, O. *Immanuel Kant* Farrier, M. tr. (Albany: S.U.N.Y. Press, 1994); Anderson-Gould, S. *History and Moral Progress in the Philosophy of Immanuel Kant* (New York: S.U.N.Y. Press, 2001); Guyer, P. *Kant and the Experience of Freedom* (Cambridge: Cambridge University Press, 1996); Guyer, P. *Kant on Freedom, Law and Happiness* (Cambridge; Cambridge University Press, 2000); Fenves, P. *The Late Kant: Towards Another Law of the Earth* (New York: Routledge, 2003); Timmons, M. (ed). *Kant's Metaphysics of Morals: Interpretive Essays* (Oxford: Oxford University Press, 2002); Wood, A.W. *Kant's Ethical Thought* (Cambridge: Cambridge University Press, 1999); O'Neil, O. *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge: Cambridge University Press, 1989).

[22] For accounts of Kant's 'cosmopolitanism' generally see: Brown, C. *International Relations Theory: New Normative Approaches* (Hemel Hempstead: Harvester Wheatsheaf, 1992); Boucher, D. *Political Theories of International Relations: From Thucydides to the Present* (Oxford: Oxford University Press, 1998); Wright, M. *International Theory: Three Traditions* Wright, G. and Porter, B. (eds.) (Leicester: Leicester University Press, 1991); Bull, H. *The Anarchical Society* (London: Macmillan, 1977); Hurrell, A. "Kant and the Kantian Paradigm in International Relations" *Review of International Studies* 16 1990, 183-205; Bohman, J. and Lutz-Bachman, M. (eds.) *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge, Mass.: M.I.T. Press, 1997); Anderson-Gould, S. *Cosmopolitanism and Human Rights* (Cardiff: University of Wales Press, 2001); Hutchings, K. and Dannreuther, R. (eds.) *Cosmopolitan Citizenship* (Basingstoke: Macmillan, 1999).

[23] Held, D. *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1995); Held, D. *Models of Democracy* (Cambridge: Polity Press, 1996).

[24] Heater, D. *World Citizenship and Government: Cosmopolitan Ideas in the History of Western Political Thought* (Basingstoke: Macmillan, 1995).

[25] Archibugi, D. "Models of International Organisation in Perpetual Peace Projects" *Review of International Studies* 18 (5) 1992, 295-317; Archibugi, D. "From the United Nations to Cosmopolitan Democracy" in Archibugi, D. and Held, D. (eds.) *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge: Polity Press, 1995); Archibugi, D. "Immanuel Kant, Cosmopolitan Law and Peace" *European Journal of International Relations* 1 (4) 1995, 429-456; Archibugi, D. and Held, D. (eds.) *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge: Polity Press, 1995); Archibugi, D., Held, D. and Köhler, M. (eds.) *Re-Imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge: Polity Press, 1998).

[26] Cheah, P. and Robbins, B. (eds.) *Cosmopolitics: Thinking and Feeling Beyond the Nation* (Minneapolis: University of Minnesota Press, 1998).

call to transform the international sovereign order. Theorists taking up this line of interpretation include Michael Doyle,[27] Bruce Russet,[28] and John Oneal.[29]

While the above two 'groups' take up Kant's comments predominantly in an approach to the political dimensions of international relations there are also a number of thinkers who interpret and inherit a conception of Kantian international law. Again, these thinkers differ to the extent that they interpret Kant's comments on international law, either as a radical re-ordering of international law, or, more narrowly, as a form of law that merely regulates and guides inter-state relations and the relations between states and individuals. Some of these thinkers include Richard Falk,[30] Noberto Bobbio,[31] Fernado Tesón,[32] Charles Covell,[33] George Cavellar.[34]

In addition to these groupings are a number of thinkers who through a Kantian tradition attempt to develop an ethical or normative approach to international relations. Such thinkers draw upon Kant and, to a limited extent, Hegel, in their attempts to theorise the 'ethicality' of the relations between states. Further, these thinkers draw upon Kant to critique both the practice of interstate relations and the

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[27] Doyle, M.W. "Liberalism and International Relations" in Beiner, R. and Booth, W.J. (eds.) *Kant and Political Philosophy* (New Haven: Yale University Press, 1993); Doyle, M.W. *Ways of War and Peace: Realism, Liberalism and Socialism* (New York: Norton, 1997).

[28] Russet, B.M. *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton, N.J.: Princeton University Press, 1993); Russet, B. and Oneal, J. *Triangulating Peace: Democracy, Interdependence, and International Organisations* (New York: Norton, 2001).

[29] Oneal, J.R. and Russet, B.M. "The Classical Liberals Were Right: Democracy, Interdependence and Conflict" *International Studies Quarterly* 41 1997, 267-94.

[30] Falk, R. *Human Rights Horizons: The Pursuit of Justice in a Globalising World* (New York: Routeldge, 2000).

[31] Bobbio, N. "Democracy and the International System" in Archibugi, D. and Held, D. (eds.) *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge: Polity Press, 1995); Bobbio, N. *Liberalism and Democracy* Ryle, M. and Soper, K. tr. (London: Verso, 1990).

[32] Tesón, F.R. *A Philosophy of International Law* (Boulder, C.O.: Westview Press, 1998).

[33] Covell, C. *Kant and the Law of Peace: A Study in the Philosophy of International Law* (London: Macmillan, 1998).

[34] Cavellar, G. *Kant and the Theory and Practice of International Right* (Cardiff: University of Wales Press, 1999).

'realist'[35] perspective upon international relations which otherwise views certain moral questions as irrelevant to the thinking and operation of state action. Scholars attempting to develop a 'normative approach' to international relations include Andrew Linklater,[36] Terry Nardin,[37] and Thomas Pogge.[38]

By picking up the question of war's moral problem at the point of Kant's inheritance the thesis cuts across these differing lines of interpretation. However, the focus of the thesis is not upon the Kantian re-conceptualisation of international relations, international law or international ethics in general; rather, the thesis has a specific focus upon how Kant inherits war's moral problem, and then how this Kantian inheritance is taken up and re-interpreted in the contemporary approach to war's moral problem. While a number of the aforementioned interpreters do focus upon the question of war, they do not necessarily concentrate upon the question of war's moral problem. [39] In this respect, my interpretation of Kant differs from the approaches listed above, in that I read Kant's comments in *Perpetual Peace* as an engagement

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[35] The term 'realist' is used quite broadly within international relations literature. Generally it refers to scholars who focus upon the role of power within international relations and the 'necessary' role of war, it also refers to scholars who are sceptical of the role of 'morality' when speaking of international relations, and scholars who oppose a cosmopolitan position and argue from the position of 'reason of state.' See broadly: Machiavelli, N. *The Prince and the Discourses* Lerner, M. (ed) Ricci, L. tr. (New York; Random House, 1950); Hobbes, T. *Leviathan* (Harmondsworth: Penguin Books, 1975); Treitschke, H. *Politics*, Kohn, H. tr. (New York: Hardcourt, Brace and World Inc., 1963); Morgenthau, H.J. *In Defense of the National Interest* (New York: Alfred A. Knopf, 1952); Waltz, K. *Man, the State and War* (New York: Columbia University Press, 1959); Kissinger, H. *Does America Need a Foreign Policy: Toward a Diplomacy for the 21ˢᵗ Century* (New York: Simon and Schuster, 2002);

[36] Linklater, A. *Men and Citizens in the Theory of International Relations* (London, Macmillan, 1982); Linklater, A. *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Cambridge: Polity Press, 1998).

[37] Nardin, T. *Law, Morality and the Relations of States* (Princeton, N.J.: Princeton University Press, 1983); Nardin, T.and Mapel, D.R. *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992).

[38] Pogge, T.W. "Cosmopolitanism and Sovereignty" in Brown, C. (ed.) *Political Restructuring in Europe: Ethical Perspectives* (London: Routledge, 1994); Pogge, T.W. *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity, 2002).

[39] See: Doyle, M.W. *Ways of War and Peace: Realism, Liberalism and Socialism* (New York: Norton, 1997) and Falk, R. *Law, Morality and War in the Contemporary World* (New York: Praeger, 1963); Falk, R. *The Great Terror War* (New York: Olive Branch Press, 2003). See also: Ohrend, B. *War and International Justice: A Kantian Perspective* (Waterloo, Ontario: Wilfrid Laurier University Press, 2000).

with the jurisprudential question of war's moral problem. I suggest that Kant can be read as attempting to come to terms with war's moral problem by offering three principle gestures: the moral condemnation of war, the enunciation of cosmopolitan right and the establishment of an international juridical order. My approach is, thus, not a radical reinterpretation of Kant; rather, it is merely a reading guided by the question of how Kant responds to a particular jurisprudential problem via three key ethical-juridical notions.

In this respect, rather than engage with a wide number of scholars who take up generally Kant's approach to the state, law, ethics and even war, the thesis follows the Kantian inheritance of war's moral problem through three scholars who, in the twentieth century, have adopted Kant's three principle gestures in response to the phenomenon of war. The thesis focuses upon the approaches of Jürgen Habermas,[40] Jacques Derrida[41] and the late John Rawls[42] and examines how each thinker, by taking up Kant's three principle gestures, attempts to come to terms with war's moral problem.

When speaking of the approach of these three thinkers to war's moral problem, for ease of reference, I use the term 'neo-Kantian ethics.' I acknowledge that this term is somewhat inaccurate or inadequate, and I do not imply that the thinking of these scholars, in all of their novelty and difference, is reducible to, or merely representative

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[40] Habermas, J. "Kant's Idea of Perpetual Peace, With the Benefit of Two Hundred Years Hindsight" in Bohman, J. and Lutz-Bachman, M. (eds.) Bohman, J. tr. *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge Mass.: MIT Press, 1997); Habermas, J. "The Postnational Constellation and the Future of Democracy" in Habermas, J. *The Postnational Constellation: Political Essays* Pensky, M. tr. (Cambridge: Polity Press, 2001).

[41] Derrida, J. *Specters of Marx: The State of Debt, the Work of Mourning and the New International*, Kamuf, P. tr. (New York: Routledge, 1994); Derrida, J. *On Cosmopolitanism and Forgiveness*, Dooley, M. and Hughes, M. tr. (London: Routledge, 2001).

[42] Rawls, J. *The Law of Peoples* (Cambridge Mass.: Harvard University Press, 1999).

of, a re-interpretation of Kant. Further, the term 'neo-Kantian ethics' should be distinguished from, and bears no reference to, the schools of thought sometimes described as 'Neo-Kantianism.'[43] By using the term 'neo-Kantian ethics' I merely refer to the suggestion that, when Habermas, Derrida and Rawls confront the issue of war, each takes up an ethical approach that openly draws upon and attempts to reinvigorate an approach taken by Kant, and, in particular, each adopts or takes up Kant's three principle gestures. The thesis, therefore, looks at this inheritance, its problems and limitations, as a means of coming to terms with war's moral problem in contemporary times and does so with the aim of developing a jurisprudence of war. The examination of this inheritance, and attempt to develop a jurisprudence of war, takes place by drawing upon the philosophy of Hegel.

Inheriting Hegel

The thesis examines Hegel's inheritance of war's moral problem, and does so by drawing upon and giving a rereading of various elements of the philosophy of Hegel. The thesis interprets the philosophy of Hegel by concentrating upon juridical questions. I read Hegel's philosophy as presenting a jurisprudence and I draw attention to the possibility of considering Hegel, not simply as a major philosophical figure of modernity, but, also, as a *jurisprudential thinker*, who can be drawn upon to investigate juridical questions in the present.

At the outset, it should be noted that I am not a Hegel scholar, nor do I attempt to present this thesis as a work of Hegel scholarship. While the thesis does offer a small

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[43] My use of the term 'neo Kantian ethics' should be distinguished from the schools of thought often referred to as 'Neo-Kantianism.' These include the 'Marburg School' and the 'Southwest German School,' stemming from the scholarship of Herman Cohen and Wilhelm Windelband, respectively.

contribution to Hegel scholarship, my primary aim is to contribute to Anglophone jurisprudence by examining the contemporary issue of war's moral problem and, through this, to begin to develop a jurisprudence of war. In this respect, the thesis involves a regimented rereading of the philosophy of Hegel with questions of law in mind. Further, I do not attempt to offer a conclusive account of the philosophy of Hegel and acknowledge that the attempt to interpret a thinker such as Hegel, without possessing the ability to read his work in German, leaves one open to the possibility of misinterpretation and error. Given these comments, I will now set out briefly where my reading of Hegel is situated within Hegel scholarship.

When drawing upon Hegel, I predominantly make use of his text, *The Elements of the Philosophy of Right*. This text and Hegel's theory of law and the state in general is often charged with being 'closed,' 'totalising,' and apologetic to the status quo. Against this, Hegel's theory of law can be read as being open to moments of difference and paradox within the law and, further, his account can be read as being both critical of the present, and expectant of the future.[44] Throughout the thesis I endeavour to read Hegel's account of law and his *Philosophy of Right* in this latter sense. Thus, the Hegelian engagement with questions of law is read in the manner of presenting an 'opening' to questions of law and, further, Hegel's 'system' is read in terms of the notion of 'open system.'[45]

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[44] With regard to approaching the 'Western tradition' of philosophy '*aporetically*' and not 'deterministically,' see: Rose, G. *Mourning Becomes the Law* (Cambridge: Cambridge University Press, 1996), pp. 9-10.

[45] I am drawing upon something of the sense of the term given by Ernst Bloch and the denial of the assumption that the onotological structure of the world is settled. While my interpretation of Hegel is not 'Blochian,' I do draw upon a number of Bloch's notions, such as the notion of 'not yet' (*noch nicht*).

My reading of Hegel's philosophy of law as an opening, attempts to pay attention to the fact that the *Philosophy of Right* presupposes an account of 'metaphysics' within Hegel's *Science of Logic* (1812)[46] and a theory of 'recognition' (*Anerkennung*) within Hegel's *Phenomenology of Spirit* (1807).[47] I will briefly discuss my interpretation of each, in turn. My reading understands Hegel's *Logic* as presenting a 'critical metaphysics.' This follows on from the inter-subjective interpretation of the *Logic* taken by Michael Theunissen[48] and, following him, Peter Dews.[49] To a more limited extent, I also draw upon the discussions of the *Logic* given by Gillian Rose,[50] and Robert Pippin.[51]

As a 'critical metaphysics,' the *Logic* presents an ongoing engagement with metaphysical inquiry. It possesses a 'critical' function that is opposed to all forms of 'positive' or pre-critical metaphysics and is concerned with an ongoing inquiry into being and thinking. Further, the *Logic* is premised upon a notion of inter-subjective and communicative freedom. This view can be distinguished from interpretations of

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[46] Hegel, G.W.F. *Hegel's Science of Logic* Miller, A.V. tr. (London: Allen and Unwin, 1969), (Hereafter cited as *S.L.*); and Hegel, G.W.F. *The Encyclopaedia Logic, With the Zusätze : Part I of the Encyclopaedia of Philosophical Sciences with the Zusätze* Geraets, T.F., Suchting, W.A. and Harris, H.S. tr. (Indianapolis: Hackett, 1991), (Hereafter cited as *E.L.*). Note, while Hegel's *S.L.* is the more comprehensive philosophical work, and the *E.L.* comprises only a part of Hegel's *Encyclopaedia*, I will throughout the thesis draw my references predominantly from the *E.L.*, due to the translation by Geraets et. al. being the more recent translation.

[47] Hegel, G.W.F. *Phenomenology of Spirit* Miller, A.V. tr. (Oxford: Oxford University Press, 1977), (Hereafter cited as *Ph.S.*).

[48] Theunissen, M. *Sein and Schein. Die kritische Funktion der Hegelschen Logik* (Frankfurt: Suhrkamp, 1978).

[49] Dews, P. *The Limits of Disenchantment: Essays on Contemporary European Philosophy* (London: Verso, 1995).

[50] Rose, G. *Hegel Contra Sociology* (London: Athlone, 1981).

[51] Pippin, R.B. *Hegel's Idealism: The Satisfactions of Self-Consciousness* (Cambridge: Cambridge University Press, 1989).

the *Logic* that understand it as presenting a pre-critical cosmic substance,[52] or as a non-metaphysical category theory.[53]

My reading understands Hegel's theory of recognition as presenting an account of law and ethics premised upon the production of self-consciousness through the inter-subjective relation. The theory is understood as demonstrating the mediation of subject and object via the notion of 'Spirit' (*Geist*). Further, the theory, by pointing to both the possibilities and limitations of knowledge and hermeneutical experience, develops an account of law, ethics and freedom. Hegel's theory of recognition attempts to explain the dual moments of openness towards the other, and the mis-recognition of the other, resulting in the situation of domination and mastery. My reading of the theory of recognition can be distinguished from the anthropological interpretation given by Alexandre Kojève[54] and the psychoanalytical interpretation given by Slavoj i ek,[55] each of whom, in their respective interpretations, heavily emphasise the notion of 'desire.'

Further, my reading does not follow the arguments given by Jürgen Habermas[56] and Axel Honneth[57] that the theory of recognition was 'suppressed' in Hegel's mature

[52] Taylor, C. *Hegel* (Cambridge: Cambridge University Press, 1975). See also: Houlgate, S. *Freedom Truth and History: An Introduction to Hegel's Philosophy* (London: Routledge, 1991); Plant, R. *Hegel* (London: Allen and Unwin, 1973); Inwood, M. *Hegel* (London: Routledge, 1983).

[53] Hartmann, K. "Hegel: A Non-Metaphysical View" in MacIntyre, A. (ed.) *Hegel: A Collection of Critical Essays* (New York: Anchor Books, 1972); Findlay, J.N. *Hegel: A Re-Examination* (London; George Allen and Unwin, 1958).

[54] Kojève, A. *Introduction to the Reading of Hegel* Nichols, J.H. tr. (Ithaca, N.Y: Cornell University Press, 1980).

[55] i ek, S. *The Sublime Object of Ideology*, (London: Verso, 1989); i ek, S. *Tarrying With the Negative: Kant, Hegel and the Critique of Ideology* (Durham: Duke University Press, 1993). See also: Schroeder, J.L. *The Vestal and the Fasces: Hegel, Lacan, Property and the Feminine* (Berkeley: University of California Press, 1998); Butler, J.P. *Subjects of Desire: Hegelian Reflections in Twentieth-Century France* (New York: Columbia University Press, 1987).

[56] Habermas, J. *Theory and Practice* Viertel, J. tr. (Cambridge: Polity Press, 1988).

[57] Honneth, A. *The Struggle for Recognition: The Moral Grammar of Social Conflicts* Anderson, J. tr. (Cambridge: Polity Press, 1995).

work, or that given by Michael Theunissen,[58] that recognition was 'suppressed' in Hegel's account of the state. Rather, I agree with the views taken by Robert Pippin[59] and Robert Williams[60] that Hegel's notion of recognition, as fundamental to his conception of freedom, continued through his mature work and is present within Hegel's account of the state.[61]

Within the thesis, I do attempt to develop something of an original reading of the theory of recognition, expanding upon Gillian Rose's conception of the theory as '(mis)recognition.' In my rereading, I endeavour to show that the moment of limit, failure and closure, the *mis* of (mis)recognition, occurs not only within each ethical act, but also that it may be worth considering the 'necessity' of this moment when jurisprudence approaches the notion of ethics more generally.

My reading of Hegel's account of law and ethics focuses upon Hegel's central critical-metaphysical category of *Wirklichkeit*, a notion that describes a conception of reality that is both 'worked up' and a reality which is 'working.' Following the common English translation this term is rendered as 'actuality.'[62] I recognise that this term is inadequate as it implies the sense of something final, and hence, does not adequately capture the German verb '*wirken*,' which is important to Hegel's use of

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[58] Theunissen, M. "The Repressed Inter-Subjectivity in Hegel's Philosophy of Right," Watkins, W. tr. in Cornell, D., Rosenfeld, M. and Carlson, D.G. (eds.) Watkins, E. tr. *Hegel and Legal Theory*, (New York: Routledge, 1991).

[59] Pippin, R.B. "What is the Question for which Hegel's Theory of Recognition is the Answer?" *European Journal of Philosophy*, 8 (2) 2000, 155-172.

[60] Williams, R.R. *Hegel's Ethics of Recognition* (Berkeley: University of California Press, 1997).

[61] This of course does not mean that the theory did not undergo change through Hegel's maturation, and it is in this sense the comments of Habermas and Honneth need to be taken into account.

[62] The use of the term 'actual' follows the use of the two translators Knox and Nisbet. For their respective discussions of the translation of this term see: Hegel, G.W.F. *Hegel's Philosophy of* Right Knox, T.M. tr. (London: Oxford University Press, 1967), p. 10; Hegel, G.W.F. *Elements of the Philosophy of Right*, Wood, A.W. (ed.) Nisbet, H.B. tr. (Cambridge: Cambridge University Press, 1991), p. xxxix.

the term *Wirklichkeit*. However, given the constraints upon my own present level of knowledge of German and the fact that I am a legal theorist and not a philosopher, I use the terms most commonly in use within Anglophone Hegel scholarship. Hence, throughout the thesis, when referring to Hegel's terms '*Wirklichkeit*' and '*wirklich*,' I use the terms 'actuality' and 'actual.' I utilise these terms, however, stressing the importance that, when used, these terms signify a specific philosophical meaning. Hence, when I use these terms I do not employ their common English meaning.[63]

Through the critical-metaphysical category of 'actuality' (*Wirklichkeit*), Hegel's theory of Right is understood as presenting a conception of law and ethics that describes the forms or shapes of Right that have come to be dominant within modernity. These shapes are reflected within legal rights and duties and, are reflected within the individual's ethical life as a form of 'social being.' For Hegel, the predominant shapes of Right within modernity are the spheres of the family, civil society and the state. These spheres describe both an ethical state of being, and a method of ethical reflection occurring within the law. However, when understood as *Wirklichkeit*, Hegel's notion of Right refers to not only what has become present, but also, to what is not yet. Hence, in the tradition of natural law, Hegel's notion of Right encompasses an ontological unsettlement or restlessness within law and ethics that manifests as a drive, hope or expectation, which critiques the present and pushes towards the realisation of a more adequate future.

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[63] Note that, the discussion of the meaning of Hegel's notion of '*Wirklichkeit*,' takes place in greater detail in chapter three.

In this respect, my reading needs to be distinguished from two interpretations of Hegel. One view interprets Hegel's account of law[64] and the state as representing an apology for the status quo, or, as presenting an account that justifies a particular kind of state (Prussian or contemporary liberal-capitalist) against change, innovation, or transformation. Such an interpretation is given by one of Hegel's early interpreters, Rudolph Haym,[65] and the subsequent 'conservative' or 'Right' Hegelians.[66] This view is also present in the contemporary, popular work of Francis Fukuyama.[67] Such interpretations fundamentally mis-understand the critical-metaphysical basis and potential radicality of Hegel's philosophy of law. Thus, they have been, and continue to be, inadequate.

A second line of interpretation continues or shares a strained relationship with Hegel in the style of the 'Young Hegelians.'[68] This line of interpretation, while inheriting and invigorating many aspects of Hegel's philosophy, sometimes considers Hegel's account of law and the state to be conservative, authoritarian and even totalising. Thinkers taking this line of interpretation include, among many others, Theodor W. Adorno,[69] Herbert Marcuse,[70] Slavoj i ek[71] and Jean-Luc Nancy.[72] While such

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[64] For general collections on Hegel's account of law see: Cornell, D., Rosenfeld, M. and Carlson, D.G. (eds.) *Hegel and Legal Theory*, (New York: Routledge, 1991); Salter, M. (ed.) *Hegel and Law* (Aldershot: Ashgate 2003). For general collections dealing with Hegel's political and legal philosophy see: Pelczynnski, Z.A. (ed.) *Hegel's Poltical Philosophy: Problems and Perspectives: A Collection of New Essays* (Cambridge: Cambridge University Press, 1971); Lamb D. (ed.) *Hegel* (Aldershot: Ashgate, 1998); Steinkraus, W.E. (ed.) *New Studies in Hegel's Philosophy* (New York: Holt, Reinhart and Winston, 1971); Stepelevich, L. and Lamb, D. (eds.) *Hegel's Philosophy of Action* (Atlantic Highlands, N.J.: Humanities Press, 1983); Williams, R.R. (ed.) *Beyond Liberalism and Communitarianism: Studies in Hegel's Philosophy of Right* (Albany: S.U.N.Y. Press, 2001).
[65] Haym, R. *Hegel unde seine Zeit*, (Berlin, 1857).
[66] Erdman, J.E. *Philosophische Vorlesungen über den Staat*, (Halle, 1951); Lasson, A. *System der Rechtsphilosophie*, (Berlin, 1882).
[67] Fukuyama, F. *The End of History and the Last Man* (New York: Avon Books, 1992).
[68] See generally: Stepelevich, L.S. (ed.) *The Young Hegelians: An Anthology* (Atlantic Highlands, N.J.: Humanities Press, 1997); McLellan, D. *The Young Hegelians and Karl Marx* (London: Macmillan, 1969).
[69] Adorno, T.W. *Negative Dialectics*, Ashton, E.B. tr. (London: Routledge and Keegan Paul, 1973).

thinkers take up and explore Hegel's notions of 'dialectic,' inter-subjective recognition, Hegel's theory of alienation, and the critique of the Kantian 'logic of essence,' each, to differing extents, dismisses or ignores the worth of Hegel's philosophy of law and, thus, each ignores Hegel's contemporary importance as a juridical thinker. While these thinkers give a great deal to contemporary philosophy, each of their accounts of freedom and ethics might be considered as somewhat limited. This is perhaps due to each not fully appreciating the significant worth and vitality of Hegel's conceptions of law, freedom and ethics.

What might be preferred to these readings of Hegel are interpretations that recognise the worth of Hegel's conceptions of ethics and law. Such interpretations do not reduce Hegel to a form of communitarianism,[73] but rather, interpret Hegel's *Philosophy of Right* as presenting a valid and highly important theory of freedom. In Anglophone scholarship, with regard to Hegel's philosophy of ethics and law, I consider the most comprehensive of these interpreters to include Shlomo Avineri,[74] Gillian Rose, Paul Franco,[75] Allan Wood[76] and Michael Hardimon.[77] Of these, my interpretation is

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[70] Marcuse, H. *Reason and Revolution: Hegel and the Rise of Social Theory* 2nd ed. (London: Routledge & Kegan Paul, 1955).

[71] i ek, S. *The Sublime Object of Ideology*, (London: Verso, 1989); and i ek, S. *Tarrying With the Negative: Kant, Hegel and the Critique of Ideology* (Durham: Duke University Press, 1993).

[72] Nancy, J. *The Speculative Remark: One of Hegel's Bon Mots* Suprenant, C. tr. (Stanford: Stanford University Press, 2001); Nancy, J. *Hegel: The Restlessness of the Negative* Smith, J. and Miller, S. tr. (Minneapolis: University of Minnesota Press, 2002).

[73] Taylor, C. *Hegel and Modern Society* (Cambridge: Cambridge University Press, 1979).

[74] Avineri, S. *Hegel's Theory of the Modern State* (Cambridge: Cambridge University Press, 1972).

[75] Franco, P. *Hegel's Philosophy of Freedom* (New Haven, Conn.: Yale University Press, 1999).

[76] Wood, A.W. *Hegel's Ethical Thought* (Cambridge: Cambridge University Press, 1990).

[77] Hardimon, M.O. *Hegel's Social Philosophy: The Process of* Reconciliation (Cambridge: Cambridge University Press, 1994). Note, my interpretation also draws upon two German scholars, Manfried Riedel and Joachim Ritter. While I make use of many of their insightful comments, I do not subscribe to either of their Hegelian interpretations as a whole. See: Riedel, M. *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy* Wright, W. tr. (Cambridge: Cambridge University Press, 1984); Ritter, J. *Hegel and the French Revolution: Essays on the Philosophy of Right*, Winfield, R.D. tr. (Cambridge Mass.: MIT Press, 1982).

closest to that given by Rose and Avineri, however, my interpretation should be distinguished from each.

Rose's original reading of Hegel perhaps, at times, over-emphasises the moment of negativity, the moment of fracture or break, due to the influence of Adorno on her thought. Like Rose, my reading attempts to hold onto the importance of the negativity of the 'dialectical moment' and the *mis* of (mis)recognition. However, I also seek to emphasise the 'speculative moment' and thus, the ethical significance of modern legal notions of subjectivity and the state. Avineri's interpretation has proved invaluable in the correction of many fundamental misconceptions of the philosophy of Hegel in the Anglophone world. His account is, however, somewhat limited to operating as a 'defence' of Hegel, and further, by not incorporating fully the implications of Hegel's theory of (mis)recognition, Avineri's account does not fully explore the possibilities of Hegel's theory of the juridical.

Within Anglophone scholarship my interpretation involves a degree of originality through an emphasis upon treating (or perhaps re-claiming) Hegel as a juridical thinker. I interpret Hegel's theory of law and ethics through a stress upon the importance of the critical-metaphysical category of actuality (*Wirklichkeit*) and the theory of (mis)recognition. Drawing upon these notions the thesis attempts to develop a Hegelian theory of law that endeavours to hold onto the ethical significance of modern legal forms of subjectivity and the state, and yet, remains both critical of law's limitations and thus, open to future possibility. While this is only a very minor contribution to the long philosophical tradition of Hegel studies, the emphasis upon the notion that Hegel is a juridical thinker is important. Treating Hegel as a juridical

thinker provides a theoretical basis upon which jurisprudence can attempt to comprehend war's moral problem, as, *a juridical problem.*

The attempt to come to terms with war's moral problem, via the development of a jurisprudence of war, involves interpreting and building upon Hegel's account of war. In Anglophone scholarship Hegel's account of the state and his account of the relation between the state and war have been subject to a number of erroneous accusations. Amongst these, are the claims by John Dewey[78] that Hegel 'glorified war' and was a philosopher of 'Prussian militarism,' and the claim by Karl Popper[79] that Hegel helped to lay the theoretical foundations of German Fascism. A good deal of Hegel scholarship has been devoted to exposing these claims as myths, misunderstandings and even as fabrications. Hence, among others,[80] scholars such as Walter Kaufman,[81] Shlomo Avineri,[82] Erol E. Harris[83] and T.M. Knox[84] have defended Hegel against his accusers. These interpreters have generally treated Hegel as presenting something of a 'realist' account of war and international relations, and further, they have situated Hegel's comments on war in terms of the relation in Hegel's thought between war and ethical learning and, Hegel's account of 'Providence.' These scholars have generally engaged in the process of correcting the various Hegel 'myths' and have not sought to

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[78] Dewey, J. *German Philosophy and Politics* (New York: Books for Libraries Press, 1915). See also: Hobhouse, L.T. *The Metaphysical Theory of the State* (London: George Allen and Unwin, 1918).

[79] Popper, K. R. *Open Society and Its Enemies,* (London: Routledge and Kegan Paul, 1945).

[80] See: Bosanquet, B. *Philosophical Theory of the State* (London: Macmillan,1910); Muirhead, T.H. *German Philosophy in Relation to the War* (London: Murray, 1915); Bruggencate, H.G. "Hegel's Views on War" *Journal of the History of Ideas,* 22 1961, 58-60; Smith, C.I. "Hegel on War" *Journal of the History of Ideas,* 26 1965, 282-285; Verene, D.P. "Hegel's Account of War," in Pelczynski Z.A. (ed.) *Hegel's Political Philosophy: Problems and Perspectives* (Cambridge: Cambridge University Press, 1971).

[81] Kaufman, W.A. "The Hegel Myth and its Method" *Philosophical Review* 60 1951, 459-86.

[82] Avineri, S. "Hegel and Nationalism" *Review of Politics* 24 1962, 461-84; Avineri, S. "The Problem of War in Hegel's Thought" *Journal of the History of Ideas,* 22 1961, 463-474.

[83] Harris, E.E. "Hegel's Theory of Sovereignty, International Relations, and War," in Verene, D.P. (ed.) *Hegel's Social and Political Thought: The Philosophy of Objective Spirit* (New Jersey: Humanities Press, 1980).

[84] Knox, T.M. "Hegel and Prussianism" *Philosophy* 15 1940, 51-63.

develop Hegel's account of war into an account adequate for the contemporary question of war's moral problem.

More recently, a number of scholars have re-engaged with Hegel's comments on war and international law. These include Steven Walt,[85] Steven B. Smith,[86] Adriaan Peperzak,[87] Thomas Mertens[88] and Michael Mitias.[89] This re-engagement with Hegel's conception of war has focussed predominantly upon interpreting Hegel's conception of war so that it might be not inconsistent with more recent developments within international law. Further, these thinkers criticise a number of Hegel's metaphysical assumptions that hamper the application of his conception of war today. Generally, these interpretations are limited to single journal articles and, thus, present only a restricted engagement with Hegel's conception of war. Further, these articles, only to a partial extent, manage to situate Hegel's comments on war within his wider philosophical 'system.' The only book-length engagement with Hegel's conception of war is given by Hayo Krombach.[90] Krombach's interpretation, while novel, is however limited. His interpretation uses categories from Hegel's *Logic* to investigate Hegel's conception of war and its contemporary relevance. However, his

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[85] Walt, S. "Hegel on War: Another Look" in *History of Political Thought*, 10 (1) Spring 1989, 112-123.
[86] Smith, S.B. "Hegel's Views on War, the State, and International Relations" in *American Political Science Review*, 77 (3) 1983, 624-632.
[87] Peperzak, A. "Hegel Contra Hegel in His Philosophy of Right: The Contradictions of International Politics" in *Journal of the History of Philosophy* 32 (2) 1994, 241-263.
[88] Mertens, T. "Hegel's Homage to Kant's Perpetual Peace: An Analysis of Hegel's Philosophy of Right" in *The Review of Politics* 57 (4) 1995, 665-691.
[89] Mitias, M.H. "Hegel on International Law" *Clio*, 9:2 1980, 269-281. See also: Bohman, J. "Hegel's Political Anti-Cosmopolitanism: On the Limits of Modern Political Communities" *Southern Journal of Philosophy* 39 2001, 65-92; Nederman, C.J. "Sovereignty, War and the Corporation: Hegel and the Medieval Foundations of the Modern State" *Journal of Politics* 49 1987, 500-519; Black, E. "Hegel on War" *The Monist* 57 (4) 1973, 570-583; Gordon, R.H. "Modernity, Freedom and the State: Hegel's Concept of Patriotism" *The Review of Politics* 2000, 295-325; Shelton, M. "The Morality of Peace: Kant and Hegel on the Grounds of Ethical Ideals" *The Review of Metaphysics* 2000, 379-408; Hutchings, K. "Perpetual War/Perpetual Peace: Kant, Hegel and the End of History" *Bulletin of the Hegel Society of Great Britain* 23-24 1991; Hicks, S.V. *International Law and the Possibility of a Just World Order: An Essay on Hegel's Universalism* (Rodopi: Amsterdam, 1999).
[90] Krombach, H. *Hegelian Reflections on the Idea of Nuclear War* (Hampshire: Macmillan, 1991).

interpretation does not adequately relate Hegel's account of war to a Hegelian theory of ethical life or law, and thus, his interpretation is somewhat abstracted from legal, political and ethical reality.

With regard to the use of Hegel within international relations literature, two branches of international relations theory that take up Hegel's philosophy. Scholars such as Kimberly Hutchings[91] and Andrew Linklater[92] draw upon the tradition of 'critical theory' and use an interpretation of Hegel to point to a number of themes. These include the importance of 'ethical life' within international relations, the consideration of the relativity of the thinker's position within their own sphere of ethical life, and the importance of ethical institutions when considering the transformation of international relations. Scholars such as Chris Brown[93] and Mervyn Frost,[94] take up somewhat similar positions. However, they draw upon a more 'communitarian' interpretation of Hegel in their attempt to develop a 'constitutive theory' of international relations.

Generally, these international relations scholars do engage, at times, with Hegel's conception of war, however, this does not occur at a sustained level. These scholars interpret Hegel at the level of political philosophy and thus, do not present a strong juridical interpretation of Hegel. Further, these scholars, only to a limited extent, draw upon other aspects of Hegel's philosophical system. In this respect, while these interpretations offer much to the sphere of international relations, they do not take up

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[91] Hutchings, K. *International Political Theory* (London: Sage, 1999).

[92] Linklater, A. *Men and Citizens in the Theory of International Relations* (London, Macmillan, 1982); Linklater, A. *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Cambridge: Polity Press, 1998).

[93] Brown, C. *Political Restructuring in Europe: Ethical Perspectives* (London: Routledge, 1994).

[94] Frost, M. *Ethics in International Relations: A Constitutive Theory* (Cambridge: Cambridge University Press, 1996).

the question of war as a juridical problem nor do they view it necessary to use an interpretation of Hegel to do so.

In contrast to the use of Hegel within the field of international relations theory, I draw upon Hegel's critical-metaphysical category of actuality (*Wirklichkeit*) and the theory of (mis)recognition, so as to begin to develop a juridical account that attempts to come to terms with the contemporary question of war's moral problem. In this respect, I am writing from the position of an inheritance of a tradition. I am using Kant and Hegel to show that the contemporary challenge of war's moral problem can be considered in light of its position within a tradition of jurisprudence and, thus, that war's moral problem can be approached as a jurisprudential question. In this respect, the thesis offers an original contribution to Anglophone legal and jurisprudential scholarship.

Chapter 1

Kant's Inheritance of War's Moral Problem

Introduction

This chapter will introduce Kant's inheritance of war's moral problem. This will occur by giving a reading of Kant's *Towards a Perpetual Peace: A Philosophical Sketch*.[1] I will draw attention to how Kant attempts to come to terms with war's moral problem via offering three principle contentions. These are: the moral condemnation of war, the enunciation of cosmopolitan right and the establishment of an international juridical order. By tracing these gestures, I will attempt to highlight a number of barriers confronted by Kant in his approach to war's moral problem.

Kant and War's Moral Problem

Kant inherits war's moral problem from the tradition of post-Westphalian natural law that sought to separate transcendental morality from questions of war and international law. Kant, thus, inherits an approach to war's moral problem which is ordered around a set of juridical themes. War is regulated by the notion of sovereignty and the right of the sovereign to go to war in defence of its territory or interests. The extent and limit of these rights, and perhaps the question of sovereignty itself, take up much of the discourse of natural law. Kant's text, *Perpetual Peace* can be read as a radical challenge to the ordering of war's moral problem by post-Westphalian natural

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[1] Kant, I. "Toward Perpetual Peace: A Philosophical Sketch" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991).

law. Indeed, Kant refers to Grotius, Pufendorf and Vattel as 'sorry comforters.'[2] Kant can be read as taking up the radicality of the natural law tradition and turning this against an approach that understood natural law prudentially.[3] Kant, by drawing upon the strength of the moral imperative contained within his own philosophy, and upon the tradition of Stoic-Christian 'cosmopolitanism'[4] and 'peace projects' of Abbé St. Pierre and Jean-Jacques Rousseau, approaches war's moral problem with fresh vigour. Kant approaches the problem by dismissing the legal legitimation of war, and, in drawing upon the injunction of transcendental morality, he declares: "There shall be no war."[5]

For Kant, the call of morality asks us to transcend the ongoing relation of war between states and institute an international legal order that can guarantee peace. Morality demands the overcoming of war by the juridical order. The burden of establishing this juridical order falls upon the shoulders of moral agents, these being states, or more specifically, republics and moral statesmen, who, through their actions, are required to bring about an inter-state federation of peace.

I suggest that we can read Kant's approach to the issue of war and international relations as a struggle with war's moral problem. Hence, in attempting to carry out the moral imperative of overcoming war, the question arises of, how can a moral transcendental moment be held onto, without collapsing law, war and ethics into the

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[2] *Ibid.*, at p. 103.
[3] On this separation within the natural law tradition and the difference between the 'prudential' and 'radical' approaches I am drawing loosely on Ian Hunter's treatment of early German natural law. See: Hunter, I. *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (New York: Cambridge University Press, 2001).
[4] Kant's 'cosmopolitan' gesture will be discussed shortly. For Kant's inheritance of the 'Enlightenment' cosmopolitan tradition see: Archibugi, D. "Immanuel Kant, Cosmopolitan Law and Peace" *European Journal of International Relations* 1 (4) 1995, 429-456.
[5] Kant, I. "The Metaphysics of Morals" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 171.

activity of moralisation? In thinking about war, Kant was struggling with the difficult problem situated within the relation between law and ethics, between the juridical and morality. This relation can be referred to as the *nexus of law-war-ethics*.

The question of how the transcendental moral moment is held onto, but is not reduced to the rabid moralisation of inter-state violence, remains something of an unresolved problem in the approach of Kant. In a sense, Kant's thought is caught by war's moral problem. His positioning of morality in relation to the phenomenon of war sits precariously, and its status is tipped to fall into the opposite of what Kant intended, that of giving 'sorry comfort' to the waging of war. I suggest that Kant's effort to maintain a degree of control over war's moral problem occurs through three principle gestures: the moral condemnation of war, the enunciation of cosmopolitan right, and the establishment of an international juridical order. The following sections will look at how Kant attempted to keep a hold upon war's problem through these gestures, all of which are guided by the over-arching ideal of 'peace.'

The Moral Condemnation of War

Rather than putting forth a uniform conception of the morality of war, Kant can be read as presenting three somewhat differing, though integrated, conceptions. The first involves a teleological conception of the position of war within history. The second pays regard to a degree of political realism and acknowledges the Westphalian tradition, while the third, stemming from a Stoic-Christian morality and guided by the 'categorical imperative,' considers war as morally wrong or evil. It is suggested that this latter conception is the dominant one and is most prominent within the *Perpetual*

Peace text. In examining the question of what 'type' of morality Kant invoked in his attempt to come to terms with the phenomenon of war, it will be necessary to discuss all three moral conceptions.

In *Perpetual Peace*, Kant takes up a theme on war introduced in an earlier essay, the *Idea of a Universal History with a Cosmopolitan Purpose* (1784).[6] In this, Kant argues that the history of the human race as a whole can be regarded as the realisation of a 'hidden plan of nature' to bring about a perfect civil constitution of mankind.[7] Kant situates war within an over-arching conception of history guided by 'providence,' or, one underlaid by teleology, where 'reason' operates through nature in the eventual fulfilment of a higher purpose. In *Perpetual Peace*, Kant argues that peace is guaranteed by the authority of nature which exhibits a purposive plan of producing concord amongst humans and does so against their wills and, indeed, by the very means of their discord.[8] In focussing upon the ideal of peace and the historical phenomenon of war, Kant asks the question, 'How does nature help to promote man's moral purpose?'[9] His answer is that nature uses war to drive humanity towards the accomplishment of political right in its three forms - civil, international and cosmopolitan.[10] Kant argues:

> The means by which nature employs to bring about the development of innate capacities is that of antagonism within society, in so far as this antagonism becomes in the long run the cause of a law-governed social order.[11]

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[6] Kant, I. "Idea for a Universal History With a Cosmopolitan Purpose" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991).
[7] *Ibid.*, at p. 50.
[8] Kant, "Toward Perpetual Peace: A Philosophical Sketch" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 108.
[9] *Ibid.*, at p. 112.
[10] *Ibid.*, at p. 114.
[11] Kant, I. "Idea for a Universal History With a Cosmopolitan Purpose" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 44.

For Kant, this antagonism, or the 'unsociability of men,' is 'rooted in human nature.'[12] There exists a dual nature of man to want to 'live in society,' to develop one's capacities within society, and, in contrast, the desire to 'live as an individual.' This desire is the unsocial characteristic of wanting to direct one's self in accordance with one's own ideas.[13] Kant argues:

> Without these asocial qualities (far from admirable in themselves) which cause the resistance inevitably encountered by each individual as he furthers his self-seeking pretensions, man would live an Arcadian, pastoral existence of perfect concord, self-sufficiency and mutual love. But all human talents would remain hidden forever in a dormant state, and men, as good-natured as the sheep they tended, would scarcely render their existence more valuable than that of their animals. The end for which they were created, their rational nature, would be unfulfilled and void. Nature should thus be thanked for fostering social incompatibility, enviously competitive vanity, and the insatiable desires for possession or even power. Without these desires, all men's excellent natural capacities would never be roused to develop.[14]

War performs a moral function. While war may be evil, this evil is redeemed through its necessary role in the development of human reason and in the production, through conflict, of man's becoming a higher moral being. As will be discussed later, Hegel takes up a similar view in relation to history, extending this theoretical motif into the 'cunning' of reason in history.[15] To an extent, both Kant and Hegel draw upon something of a morally 'dark' conception of the position of war. Both, in treating history as 'progress,' share some resonance with a Zoroastrian cosmology of the necessary struggle between good and evil,[16] the idea of 'evolution' underpinning history,[17] and (to a lesser extent) certain Calvinist notions of the necessity of

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[12] *Ibid.*

[13] *Ibid.*, at p. 44.

[14] *Ibid.*, at p. 45.

[15] This point will be addressed in Chapters 3 and 6.

[16] On Zoroastrianism see: Zaehner, R.C. *The Dawn and Twilight of Zoroastrianism* (New York: Putnam, 1961).

[17] See: Ferguson, A. *An Essay on the History of Civil Society* (Edinburgh: Edinburgh University Press, 1966).

unsociability underpinning man's civil and economic development as expressed in the ideas of, among others, Adam Smith[18] and Bernard Mandeville.[19]

Within *Perpetual Peace*, Kant argues that nature employs war in the progression towards peace. This occurs in three ways. First, he argues that if people were not compelled by internal dissent to form a civil constitution and submit to public laws, war would produce the same effect from outside. Hence, the threat of a neighbouring armed power forces a people to limit their wills and form a state.[20] Second, nature wills that a particular state does not become a 'universal despotism' ruling over the entire world. This occurs through linguistic and religious differences that cause mutual hatred and the pretext for wars. Thusly, peace is brought, not by the power of one state, but only through the development of culture, the sharing of principles and through mutual understanding.[21] Third, nature unites nations through the means of their mutual self-interest, whereby, as the 'spirit of commerce' takes hold over peoples, "States find themselves compelled to promote the noble cause of peace, though not exactly from the motives of morality."[22]

Kant's account of history should be approached with caution.[23] The criticism of reason's role in the 'redemption' of evil as a theodicy, is spoken strongly by

[18] Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations* Cannan, E. (ed.) (New York: Modern Library, 1994).

[19] Mandeville, B. *The Fable of the Bees* Harth, P. (ed.) (Harmondsworth: Penguin, 1970).

[20] Kant, "Toward Perpetual Peace: A Philosophical Sketch" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 112.

[21] *Ibid.*, at p. 114.

[22] Ibid. Kant's comments on the benefits of the 'spirit of commerce' need to be contrasted with his critique of European colonialism, driven by the desire for power and wealth. This critique is contained within Kant's comments on 'hospitality,' which will be discussed shortly.

[23] It should be noted that there is a degree of contention amongst Kant scholars over how to interpret Kant's account of history. See: Yovel, Y. *Kant and the Philosophy of History* (Princeton: Princeton University Press, 1980); Guyer, P. *Kant on Freedom, Law and Happiness* (Cambridge: Cambridge University Press, 2000); Galston, W. *Kant and the Problem of History* (Chicago: University of Chicago

Nietzsche.[24] It is spoken louder still by his many inheritors, in response to Nazi Germany and the Holocaust.[25] This issue opens onto a number of philosophical questions about the reading of history, the relation between 'reason' and 'time' and the question of how one's acts are co-ordinated in relation to events of the past and the expectation of the future. These issues, however, extend beyond the scope of the thesis.

On the relation between Kant's account of history and war's moral problem, one small point can be made. Of interest, is the need for 'thinking,' in general, to hold onto something morally transcendental in war, and the subsequent difficulty that this incurs. This involves the necessity within war's problem to conceive in war something more than just violence, bloodshed and destruction. It is the desire for thought (philosophical, ethical, jurisprudential), to see or generate something positive out of pure negativity. This involves the conception that there is something more to war, an attribution to, and a search for, a higher significance dwelling within humanity's most horrible of acts.

Press, 1975); Höffe, O. *Immanuel Kant* Farrier, M. tr. (Albany: S.U.N.Y. Press, 1994). Note also Höffe's comment at p. 196 that:

> According to Kant, the beginning and the aim of history are neither objectively known nor merely imagined. The beginning can only be constructively presumed, and the goal can only be conceived as a practical idea.

[24] See generally: Nietzsche, F.W. *The Birth of Tragedy and Other Writings* Geuss, R. (ed.), Speirs, R. tr. (Cambridge: Cambridge University Press, 1999); Nietzsche, F.W. *Thus Spoke Zatharustra: A Book for All and None* Kaufman, W. tr. (Harmondsworth: Penguin Books, 1978); Nietzsche, F.W. *Twilight of the Idols* Hollingdale, R.J. tr. (Harmondsworth: Penguin, 1968).

[25] See generally: Benjamin, W. "On The Concept of History" in Benjamin, W. *Illuminations* Arendt, H. (ed.), Zohn, H. tr. (New York: Harcourt, Brace & World, 1968); Adorno, T.W. and Horkheimer, M. *Dialectic of Enlightenment* Cumming, J. tr. (London: Verso, 1986); Arendt, H. *Eichmann in Jerusalem* (Harmondsworth: Penguin, 1965). For a brief intellectual history on the idea of 'Providence' and theodicy see: Neiman, S. *Evil in Modern Thought*, (Melbourne: Scribe Publications, 2002).

In *Perpetual Peace*, Kant approaches war's problem (from one direction) through the idea of history. In this, the transcendental moment of morality is futural. Morality is not reduced to the petty and arbitrary violence of humanity; war does not totalise morality, nor is morality captured by barbarism. Rather, morality always stands apart from war, morality is always a beyond, it is a not yet. This is the idea of a peaceful federation of the future in which humanity can fully develop morally and which, is always being partly realised through various imperfect attempts.

In this conception, morality is both now and not yet. It is now, through the working of nature in history; it is both the moral acts towards peace and the immoral acts of self-interest and power. However, morality is always also not yet. Morality involves a transcendental horizon. In one sense, it operates as a beacon or a guide to those actors who work towards civil union and peace. In another sense, it is the futural peacefulness which cannot be fully known, and, instead, only anticipated. This aspect is both irreducible and corruptible. On the one hand, it can never be fully known or touched; it is always a fully transcendental beyond. On the other, it grants value to all actions good and bad. It gives part of itself to war, it gives war 'some form' of itself, it gives-over validity through the coordination of action in the present by a transcendental meaning.

From this perspective, it might be argued that Kant's assessment does not fully overcome war's moral problem. In granting nature the 'guarantee' of perpetual peace,[26] it gives too much of itself over to the activity of the now. Morality falls into the danger of losing the shine of its transcendence, as it is reduced to the various

[26] Kant, "Toward Perpetual Peace: A Philosophical Sketch" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 114. Note, Kant states: "(N)ature guarantees perpetual peace by the actual mechanism of human inclinations."

unsociable moments of the process that make up the bulk of what is historical progress. In this respect, Kant's play of nature grants all action some degree of moral legitimacy based upon its small role in the extravagant production of history. Hence, it could be argued that Kant moves to avoid this difficulty, so as to ensure that morality does not become 'sorry comfort.' This can be seen in the second differential of the morality of war, Kant's acknowledgement of the Westphalian tradition.[27]

Kant keenly observed the moral problem of war, that when morality is used to conceptualise war, there occurs the danger of subsuming morality under the yoke of particular wars and morality's reduction to the relativistic language of 'just' and 'unjust' wars. Hence, in something of a gesture towards the Westphalian tradition, Kant attempts to remove any moral legitimacy to the wars between sovereign states. For Kant, what makes the war of a state 'right' is not a higher moral justification, but rather, the right of sovereignty, the right of a constituted civil polity to resolve its disputes and express its claims against its others, in the situation where there exists no higher power above states to determine the legitimacy of their claims. War is thus stripped of its transcendental moral legitimacy, and is the claim of one sovereign state against another. Kant states:

> After all, war is only a regrettable expedient for asserting one's rights by force within a state of nature, where no court of justice is available to judge with legal authority. In such cases, neither party can be declared an unjust enemy, for this would already presuppose a judge's decision; only the *outcome* of the

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[27] On this Höffe's point, note: Höffe, O. *Immanuel Kant* Farrier, M. tr. (Albany: S.U.N.Y. Press, 1994). Höffe argues that Kant's optimism for a greater degree of peace occurring in history is not necessarily grounded in the 'unsociability' of humanity's 'nature,' but, in humanity's pursuit of justice. He notes at p. 200 that:

> Even before de Tocqueville (1805-59), Kant thus claims that at least since the French revolution, we live in an era in which peoples strive for just forms of government despite various impediments and thus give history meaning. But it does not appear to be the antagonism within human nature but rather the liberating events which are responsible for legal progress.

conflict, as in the case of a so called 'judgement of God,' can decide who is in the right. A war of punishment (*bellum punitivum*) between states is inconceivable, since there can be no relationship of superior to inferior among them.[28]

Note, Kant is not here stating that 'might makes right.' Rather, he is making a comment to the effect that the language of 'right' is misplaced if one were to consider that one particular state has a higher right over another. In effect, Kant attempts to rescue and re-frame the language of international right, so as to institute 'Right' itself as something higher still, as something that transcends the petty bickering of states and which sits effectively beyond the lawless and warlike condition of inter-state relations. This is the idea of a true international law, one which is not yet, one which exists as the unrealised idea of peace.

In focussing upon war's moral problem, Kant is at pains to not allow morality (the higher law as international law or Right, which is not yet), to lose its transcendental position, to become simply the right of states, as they are, and thus, the right of the powerful over the weak. Kant does not want the notion of Right to be reduced to a justification of "the depravity of human nature" which is displayed in the unrestricted relations between various states.[29] Further, he questions why the word 'right' has not been banished from military politics, as it is a "superfluous pedantry."[30] Kant argues:

> For Hugo Grotius, Pufendorf, Vattel and the rest (sorry comforters as they are) are still dutifully quoted in *justification* of military aggression, although their philosophically or diplomatically formulated codes do not and cannot have the slightest *legal* force, since states as such are not subject to a common external constraint. Yet there is no instance of a state ever having been moved to desist from its purpose by arguments supported by the testimonies of such notable men.[31]

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[28] Kant, "Toward Perpetual Peace: A Philosophical Sketch" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 96.
[29] *Ibid.*, at p. 103.
[30] *Ibid.*
[31] *Ibid.*

Following this comment, Kant notes an idea that goes directly to the heart of war's moral problem. This is the need for war to be coupled with some authority beyond itself. The need manifests in the recurrence of warring parties to attempt to bind their violent actions to a morality that is not reducible to the immediacy and mundaneness of the present. Rather, morality is instead separate from, and critiques and passes judgement upon human actions from its status as transcendental. For Kant, this is the rationale for the fact that the term 'right' has not been banished from the warring relations of states, as each party, dutifully and pitifully, feels required to have their violence justified by a higher authority.

In this respect, it seems that it is not so much the fact that states are simply not 'bold enough' to banish the language of Right from their conflicts, but rather, that there is something in war, in the violent actions between states, that makes the effort of the participants to attempt to hold onto the notion of morality, a necessity. One interpretation might suggest that this is the condition that one's violence needs to be constantly redeemed, given more value than simply state killing, and, hence, that war itself requires a transcendental moral locus. For Kant, this necessity is described in a slightly different sense. A logically transcendental morality, for Kant, is a given. Humanity, at times, attempts to reach towards a transcendental morality and, by it, co-ordinate its actions. He argues:

> This homage which every state pays (in words, at least) to the concept of right proves that man possesses a greater moral capacity, still dormant at present, to overcome eventually the evil principle within him (for he cannot deny that it exists), and hope that others will do likewise.[32]

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[32] *Ibid.*

This suggestion leads into the third differential of Kant's consideration of the morality of war, the overarching conception that considers war morally wrong or evil. This needs to be explained through Kant's wider moral theory and the idea of the 'categorical imperative.' It is via this third position upon the morality of war, framed by the requirements of 'reason' and the idea of peace, that the other two moral positions must be viewed. It is primarily through this conception that Kant attempts to come to grips with war's moral problem.

In this third and dominant conception, Kant argues that "(R)eason, as the highest legislative moral power, absolutely condemns war as a test of rights and sets up peace as an immediate duty."[33] Further that:

> The concept of international right becomes meaningless if interpreted as a right to go to war. For this would make it a right to determine what is lawful not by means of universally valid external laws, but by means of one-sided maxims backed up by physical force. It could be taken to mean that it is perfectly just for men who adopt this attitude to destroy one another, and thus to find perpetual peace in the vast grave where all the horrors of violence and those responsible for them would be buried.[34]

Where does this moral condemnation of war stem from? In one sense, Kant's moral condemnation of war stems from his inheritance of a natural law tradition and the tradition of Christian morality. Both, to differing degrees, share a 'common morality' that prohibits killing, as strongly voiced in the *Decalogue's* injunction: 'Thou shalt not kill.'[35] In this light, Kant frames war and its associated phenomena of terror and violence, as something of a moral problem. War is not to be considered as simply the machination of politics, but rather, it is to be viewed as a problem of morality,

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[33] *Ibid.*, at p. 104.
[34] *Ibid.*, p. 105.
[35] Boyle, J. "Natural Law and International Ethics" in Nardin, T. and Mapel, D.R. (eds.) *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992), pp. 120-123.

whereby morality must intervene to put an end to the ongoing evil occurring in the political world.

This is not to say that Kant is pointing to specific evils in the world; for example, the suggestion that such and such a tyrant is evil and, therefore, we as the 'righteous,' must oppose this tyranny. Rather, war is a problem of immorality, it represents the moral struggle which sits at the heart of each individual's own being, the personal choice of one's actions as being either good or evil. Kant states that the performance of moral duty, or the 'idea of virtue,' involves not so much the standing up to the many evils and sacrifices which must be encountered, but rather, it involves "facing the evil principle within ourselves and overcoming its wiles."[36]

In this respect, the problem of war becomes a problem of individual moral conviction. War occurs, in part, through immorality, through the non-performance of moral duty. War is evil, in that, it involves a transgression of an eternal and universal moral law. Yet, war can be overcome, and for Kant, it can be overcome pragmatically through the carrying out of moral duty. War is overcome by placing politics under the authority of morality. For Kant, "politics must bend the knee before right."[37] In these terms, Kant's approach to war's moral problem can be read as operating in two senses. One sense involves the de-moralising of war and inter-state relations, effacing the legitimacy of a state's claim to carry out war in the name of Right. Another, involves the re-moralising of inter-state relations, the re-framing of the problem of war as a problem of moral duty.

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[36] Kant, "Toward Perpetual Peace: A Philosophical Sketch" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 124.
[37] *Ibid.*, at p. 125.

In this respect, Kant does not see the role of morality in international relations as the assertion of empty or impracticable ideas, but rather, that it is absolutely necessary to couple the notion of Right with politics and to limit political action via moral duty.[38] In the re-moralisation of the inter-state relation, Kant draws attention to two contrasting figures. The first is the 'moral politician' who conceives the principles of political expediency in such a way that they conform with morality and practical reason. The second is the 'political moralist' who fashions morality to suit their own advantage as a statesman.[39] In the consideration of war's moral problem, the difference between these two figures is important. For Kant, if morality is not to become co-opted by reason of state, then the two figures must remain distinct and their outlines not be allowed to merge. As will be discussed later, the distinction between these two figures is somewhat problematic.

From the distinction between the moral politician and the political moralist, Kant attempts to demonstrate the "ultimate principle from which the end of perpetual peace is derived."[40] He argues that all evil that stands in the way of perpetual peace results from the fact that the political moralist starts out from the position where the moral politician rightly stops, that is, the political moralist makes moral principles subordinate to political ends.[41] In contrast, the moral politician follows the formal principle: "Act in such a way that you can wish your maxim to become a universal law (irrespective of what the end in view may be)."[42]

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[38] *Ibid.*, at p. 117.
[39] *Ibid.*, at p. 118.
[40] *Ibid.*, at p. 121.
[41] *Ibid.*
[42] *Ibid.*, at p. 122.

Hence, in contrast to the political moralist, who treats problems of political, international and cosmopolitan right as merely technical or instrumental tasks, the moral politician views these in terms of a moral task. The moral politician sees that the bringing about of peace is not just desirable as a physical good, but that it is a "state of affairs which must arise out of recognising one's duty."[43] Kant, thusly, gives the following advice: "Seek ye first the kingdom of pure practical reason and its *righteousness*, and your object (the blessing of perpetual peace) will be added unto you."[44]

Kant's approach can be understood as somewhat counter to the approach of the post-Westphalian natural lawyers who, in the interest of maintaining peace and order, attempted to remove the question of morality from international relations. Kant reintroduces the question of moral conduct in relation to state action. Kant's understanding is that state action should be moral and that moral action is necessary if there is to be peace. Kant, therefore, approaches war's moral problem, by maintaining that state action ought be governed by a specific form of moral conduct. This conduct is the categorical imperative. He argues:

> (W)hatever the physical consequences may be, the political maxims adopted must not be influenced by the prospect of any benefit or happiness which might accrue to the state if it followed them i.e. by the end which each state takes as the object of its will (as the highest *empirical* principal of political wisdom); they should be influenced only by the pure concept of rightful duty, i.e. by an obligation whose principle is given *a priori* by pure reason.[45]

In Kant's approach to war's moral problem, morality stands in judgement over politics; the state is to act in accordance with moral duty. In this sense, the state takes on the role of a moral person, it is to act in accordance with the standards of a

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[43] *Ibid.*
[44] *Ibid.*, at p. 123.
[45] *Ibid.*, at p. 124.

universal morality that Kant, in the *Groundwork of the Metaphysics of Morals*
(1785),[46] sets forth as the principles under which individuals are to fulfil the moral
law. Hence, state action and, thus, war, is judged by a morality which for Kant, occurs
a priori in human reason.[47]

In the Kantian conception, inter-state relations are set in contrast to a transcendental
morality. This operates as a standard, whereby, on the one hand, the violent actions of
states are judged as 'immoral,' and, on the other, states as moral actors are under a
duty or obligation to fulfil the moral law. States are to conform to the two aspects of
the categorical imperative. First, that: "Act only in accordance with that maxim
through which you can at the same time will that it become a universal law."[48]
Second: "So act that you use humanity, whether in your own person or in the person
of any other, always at the same time as an end, never merely as a means."[49] In this
respect, the overcoming of war and the setting up of an order of peace occurs through
a realisation of inter-state relations, as a 'kingdom of ends.' Kant describes the
kingdom of ends as:

> By *kingdom* I understand a systematic union of various rational beings through
> common laws. Now since laws determine ends in terms of their universal
> validity, if we abstract from the personal differences of rational beings as well
> as from all the content of their private ends we shall be able to think of a
> whole of all ends in systematic connection (a whole both of rational beings as
> ends in themselves and of the ends of his own that each may set himself), that
> is, a kingdom of ends, which is possible in accordance with the above
> principles.
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> For, all rational beings stand under the *law* that each of them is to treat himself
> and all others *never merely as means* but always *at the same time as ends in
> themselves*. But from this there arises a systematic union of rational beings

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[46] Kant, I "The Groundwork of the Metaphysics of Morals" in Kant, I. *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy* Gregor, M.J. (ed.), tr. (Cambridge: Cambridge University Press, 1996), p. 45.
[47] *Ibid.*
[48] *Ibid.*, at p. 73.
[49] *Ibid.*, at p. 80.

through common objective laws, that is, a kingdom, which can be called a kingdom of ends (admittedly only an ideal) because what these laws have as their purpose is just the relation of these beings to one another as ends and means.[50]

By framing the moral relations between states in terms of a morality which is logically transcendental and has an objective reality, a form of Right which is *a priori* in reason, Kant attempts to avoid the co-option of morality by state power, such as the example of the political moralist who uses the language of morality to justify political ends. Kant, in this sense, attempts to hold onto a transcendental moment of morality which can then pass judgement upon states and, more importantly, operate as an injunction, an imperative, to which states are bound and must attempt to realise.

While a discussion of the difficulties of the Kantian approach will occur later in this section, it is necessary to, at least, highlight some questions that arise from Kant's engagement with war's moral problem. First, do the figures of the moral politician and the political moralist remain distinct, or are they straw men, built upon something of a false separation between morality and politics? Second, is a moral framework determined initially as a morality for individuals extendable to govern the more complex roles and activities of states? Third, if a state acts in accordance with its 'moral duty,' is war avoided, or is there the chance, say, in the case of self-defence, that the act of war becomes invested with the legitimacy of transcendental morality? Fourth, does the carrying out of moral duty mean that the state must forego all happiness and even its existence in the name of transcendental morality? Is the state to sacrifice itself in the name of moral duty?

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[50] *Ibid.*, at p. 83.

These questions will be explored more fully throughout the thesis. It is enough to note here the difficulties that might be encountered in Kant's approach to war's moral problem. One means, by which Kant attempts to counter these difficulties, is by re-describing the relations of 'Right' in international relations, so as to pay attention to transcendental morality. Hence, with regard to the second aspect of the categorical imperative, Kant introduces a notion of Right that is beyond the right of states, one that focuses upon a universal humanity. In this respect, the notion of 'cosmopolitan right' can be understood as the second principle gesture in Kant's approach to war's moral problem.

Cosmopolitan Right

In *Perpetual Peace*, Kant approaches war's moral problem by introducing the idea of a cosmopolitan right. Kant argues that the legal constitution of the sphere of the international relations can be understood as being governed by three forms of Right. As such, it could be argued that an individual, anywhere in the world could perhaps understand 'Right' as existing in three forms. The first involves a constitution based upon civil right (*ius civitatis*); this involves the right of individuals within a nation.[51] The second involves a constitution based upon international right (*ius gentium*); this involves the right of states in their relations with one another.[52] The third involves a constitution based upon cosmopolitan right (*ius cosmopoliticum*), which refers to the relation between states and individuals co-existing in an external relationship of mutual influences, who may be regarded as being citizens of a universal state of

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[51] Kant, "Toward Perpetual Peace: A Philosophical Sketch" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 98.
[52] *Ibid.*, at p. 98.

mankind.[53] Kant, thus, sees a notion of Right that is beyond the right of states, a Right which belongs to anyone, anywhere, by virtue of the fact of being 'human.'

The term 'cosmopolitan' has Greek origins. The term *'kosmou politês'* is apparently Cynic in origin and linked to a statement of Diogenes the Cynic, who, in replying to a question asking where he came from, answered: 'I am a citizen of the world.' The subsequent idea of the 'world citizen' becomes more fully developed in Greek and Roman Stoic thought.[54] Kant inherits cosmopolitanism as an 'enlightenment ideal.'[55] It operates as an educative and political ideal, a way of thinking of one's identity beyond that of nationality or patriotism and in terms of the idea of being a citizen of the world.[56]

In *Perpetual Peace*, Kant treats cosmopolitan right in two ways, one involves a limited form that does not override the rights of citizenship and the right of the state. The other, however, involves the position of cosmopolitan right as a critique of international right and, thus, as a notion of Right standing above and beyond the right of the state. These two aspects occur in Kant's treatment of 'hospitality.' Kant argues that cosmopolitan right shall be limited to the conditions of universal hospitality.[57] He notes that hospitality means the right of a stranger not to be treated with hostility when he or she arrives on someone else's territory.[58] The stranger cannot claim the

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[53] *Ibid.*, at p. 99.

[54] Nussbaum, M.C. "Kant and Cosmopolitanism" in Bohman, J. and Lutz-Bachman, M. (eds.) *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge Mass,; MIT Press, 1997).

[55] Archibugi, D. "Immanuel Kant, Cosmopolitan Law and Peace" *European Journal of International Relations* 1 (4) 1995, 429-456, p. 441. See also: Schlereth, T.J. *The Cosmopolitan Ideal in Enlightenment Thought* (Notre Dame: University of Notre Dame Press, 1977).

[56] Nussbaum, M.C. "Patriotism and Cosmopolitanism" in Nussbaum M.C. and Cohen, J. (eds.) *For Love of Country?* (Boston: Beacon Press, 2002), p. 7.

[57] Kant, "Toward Perpetual Peace: A Philosophical Sketch" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 105.

[58] *Ibid.*, at p. 105.

right of a guest to be entertained, but only the right of resort. This right occurs by virtue of the original right to communal possession of the globe.[59] In this sense, cosmopolitan right is limited to the rights and obligations that Kant ascribes to the idea of hospitality. However, Kant, in another sense, gives this notion a highly critical function as he launches into an attack upon the 'inhospitable conduct' of 'civilised' European states.

In his critique, Kant argues that through the practice of colonialism and use of trading companies, European states have, under the pretext of trade, treated the native inhabitants of various conquered lands as 'nothing' and have caused a whole litany of evils and the cruellest and most calculated slavery.[60] These states have violated the right of hospitality by their unjust display when visiting foreign countries. In this manner, cosmopolitan right appears as a notion of Right that is higher than the right of the state and is necessary in governing or regulating the actions of states. Cosmopolitan right occurs as a guiding principle that is grounded upon the notion of a 'universal community.' In a radical sense, Kant's notion of cosmopolitan right can be read as a critique of the practice of European colonialism.

In this respect, the phenomenon of war is to be overcome through the self-identification of states and their citizens in terms of members of a universal community of humanity. Membership of this involves a set of rights and duties that preclude hostile conduct between parties, and unite them as part of a universal moral kingdom. The question of how cosmopolitan right comes into being or force (and

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[59] *Ibid.*, p. 106.
[60] *Ibid.*, at pp. 106-7.

thus, is more than merely a protestation against universal injustice), can be understood through Kant's third gesture, the establishment of an international juridical order.

An International Juridical Order

Kant's third contention in approaching war's moral problem can be read as the call for the establishment of an international juridical order. The goal of such an order is not to regulate or bring about the temporary cessation of war, but rather, to institute a peace that is 'eternal' or 'perpetual.' For Kant, the idea of an international order transcends the warring relations between states, uniting them in a form of political constitution in which their rights and interests can be mediated without the recourse to war. Kant, thus, attempts to overcome the dilemma of morality being drawn upon to justify particular wars and the subsequent position of moral relativism by the setting-up of an international juridical order. Thus, war is to be overcome by the juridical, through the coming into being of a higher law, one that stands above the right of states. In this respect, Kant treats the relations between states, that precede any international order, as a lawless condition. This condition may be described as a 'state of nature,' and this is a 'state of war.'

In terms similar to Hobbes, Kant argues that this state of nature, as a state of war, is characterised by fear, because, even if it does not involve active hostilities, there is the constant threat of war breaking out between states.[61] It is, therefore, necessary that this state of nature be abandoned in favour of the entry into a state of law. Kant argues the relations between nation-states resemble the relation between those individuals

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[61] *Ibid.*, at p. 98.

who, in the state of nature, have not yet come under any external laws. In this relation, these individuals are a standing offence to each other by the very fact of being neighbours, that is, they are a threat towards each other's security.[62] Hence, just as individuals in the state of nature must seek union under a commonwealth and secure their peace and freedom through the institution of law, so individual nations, can and ought to demand of their neighbours that they enter into a constitution, similar to a civil one through which the rights of each member may be secured.[63] War is, thus, to be overcome by the institution of a juridical order, a 'federation of peoples.' For Kant, this would not involve a world state, but a federation between independent nations interested in guaranteeing peace.[64] In proposing a peaceful federation of states Kant sees himself following in the tradition of Abbé St. Pierre and Rousseau.[65]

Kant notes that the establishment of such an order is not an easy task, nor is it foreseeable that such a federation could be established between just any particular type of states. Rather, Kant places special emphasis upon the role of republican civil constitutions, as being the necessary political model of all states, if there is to be the establishment of peace. If peace is to occur, all states must have a civil constitution

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[62] *Ibid.*, at p. 102.

[63] *Ibid.*, at p. 102. On this, note: Anderson-Gould, S. *Unnecessary Evil: History and Moral Progress in the Philosophy of Immanuel Kant* (New York: S.U.N.Y. Press, 2001). Anderson-Gould argues at p. 45 that:

> The idea of a moral life must include not only the unification of all of one's own acts/maxims but also an essential connection of these acts to the acts/maxims of other moral subjects. In other words, given the universality of the ascription of this propensity, the 'moral life' must be represented as a social or collective undertaking.

[64] Kant, "Toward Perpetual Peace: A Philosophical Sketch" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 102.

[65] Kant, I. "Idea for a Universal History With a Cosmopolitan Purpose" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 47.

that is republican, and this involves having governments that are 'representative.'[66] Kant notes that his reasoning relies upon the argument that when the consent of the citizens is required for war to be declared, then it is natural that citizens would be cautious and have great hesitation in embarking upon such a dangerous enterprise before calling down upon themselves all the miseries of war.[67]

It is interesting, here, to note something of a paradox in this relation, one which Kant is certainly not unaware of.[68] It involves the relation between the form of civil constitution and the establishment of an international juridical order. Kant in *Perpetual Peace* appears to be suggesting that a federation of states is only a real possibility when the civil constitution of all states, or at least most of them, are a republican form of constitution. Hence, a peaceful federation and, thus, the end of war can only come about when peoples have achieved a requisite degree of moral, political and cultural maturity that is reflected in their civil constitutions being both republican and representative. However, elsewhere he argues:

> The problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved.[69]

There is a conflict within this idea surrounding war's moral problem. On the one hand, peace is only possible through all states reaching a degree of moral and political maturity and, thus, being constituted in a certain 'republican' form. However, on the

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[66] Kant, "Toward Perpetual Peace: A Philosophical Sketch" in *Kant Political Writings*, in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 100.
[67] Ibid. at p. 100.
[68] On this dilemma and the impact upon the ideal of democracy see: Bobbio, N. "Democracy and the International System" in Archibugi, D. and Held, D. *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge: Polity Press, 1995).
[69] Kant, I. "Idea for a Universal History With a Cosmopolitan Purpose" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 47.

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other hand, such states, and especially 'weaker' states, are constantly put under threat or not allowed to mature, because of the unrestrained interference by other states and the ongoing relation of war and threat.[70] It could be argued that in the thought of Kant, within this conflict, the latter requirement takes some precedence over the former. Hence, what is of greater importance is the ending of the lawless state of savagery between nations and the setting up of peaceful federation. It is only through a viable international juridical order, and the subsequent relation of peace, that humanity's moral and political potential within particular states can fully develop. In this light, the question of the establishment of an international order becomes for Kant an issue of political pragmatics. The question of how the juridification of international relations is to become a firm reality opens onto the *aporia* of war's moral problem. It is, in approaching this barrier, that Kant's account seems to run up against a degree of difficulty.

Kant argues that peace cannot be inaugurated or secured without a general agreement between nations; hence, a particular kind of "league" is required, a "pacific federation" (*foedus pacificum*) which would seek to end all wars for good.[71] This federation would not aim to acquire power like that of any other state, but merely to preserve and secure the freedom of each particular state.[72] Importantly, Kant argues that this idea of a federation is practicable, especially when thought as "extending gradually" to encompass all states. He argues that, if by good fortune one "powerful

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[70] On this, note Bennington, G. "Frontiers: Two Seminar Sessions" in *Frontiers, The Oxford Literary Review* vol. 14 1992, 197-227. Bennington at p. 199 argues that within Kant's conception occurs the idea that the consideration of the 'state' occurs via a concentration upon the relations between states and, hence, the notion that borders, frontiers and differentiation occur not after the state, but, are primary in the notion of the 'state's' constitution. Kant thus draws attention to the idea of the state as a mediated entity, constituted at its borders and frontiers.

[71] Kant, "Toward Perpetual Peace: A Philosophical Sketch" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 104.

[72] *Ibid.*, at p. 104.

and enlightened nation" can form a republic that by its nature will be inclined to pursue a perpetual peace, then, this will provide a point around which other states will join together with the first. Hence, the federation would come into existence through the gradual spreading of alliances of this kind.[73]

Kant expands on these comments in *The Metaphysical Elements of a Theory of Right* (1797),[74] in the section entitled 'International Right.' Kant notes that the idea of a perpetual peace occurring through mutual international agreement, is something of an impossibility, an idea incapable of realisation.[75] However, he argues that the political principles that share the same aim are not impracticable. Hence, the idea of peace can move closer to its realisation through the formation of "international alliances," and that this is practical as it is a project based upon "duty."[76] Such a union of several states brought together to preserve peace may be called a "permanent congress of states."[77] In this manner, Kant frames the practical approach to overcoming of war through the position of certain states, who attempt to bring about peace as a moral duty. Peace is to come about through the alliances of states who are, in effect, moral actors. In their role, they are not caught up in the philosophical question of whether peace is possible or not, but simply act is if such an ideal could really come about. In this, they are guided by moral-practical reason that pronounces the irresistible veto: "There shall be no war."[78]

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[73] *Ibid.*, at p. 104.
[74] Kant, I. "The Metaphysics of Morals" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991).
[75] *Ibid.*, p. 171.
[76] *Ibid.*
[77] *Ibid.*
[78] Ibid., at p. 174.

The end of war, the establishment of an international juridical order guaranteeing peace, is premised upon state action. This initially might appear to be an insignificant point. However, within Kant's approach to war's moral problem, the point has a larger significance. It suggests that transcendental morality is framed in terms of action. The idea of peace is tied to state action, to states performing their moral duty, their role as moral actors. However, the constitution of an international order is not immediate; it is a guiding ideal sitting on the horizon. As such, it is to occur only through, as Kant puts it, many "initially imperfect attempts."[79] These attempts involve various alliances and congresses still situated within the state of war.[80] Practical reason, thus, involves the position of states as moral actors who act within a relation characterised by war.

It is not too hard to extend the logic of this argument to foresee the situation where a federation of states is forced, for some reason or other, to go to war. Kant in this light, names one of the 'rights of peace' as the right of states to form alliances for the purpose of communal defence.[81] In this respect, Kant's notion of international law is connected to the authority of the law to use force. Within this, there is something of an implicit relation between force and law,[82] between the establishment of a juridical

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[79] Kant, I. "Idea for a Universal History With a Cosmopolitan Purpose" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 47. On this point see O'Neil, O. "The Public Use of Reason" *Political Theory* 14 (4) 1986, 523-551. O'Neil notes at p. 536 that these efforts are for Kant 'imperfect' because he sees his age as not yet enlightened, one that is engaged historically in the process of emerging from a 'self-incurred immaturity.'

[80] On Kant's account being situated between a state of war and a state of nature, see: Capps, P. "The Kantian Project in Modern International Legal Theory" *Journal of International Law* 12 (5) 2001, 103-125.

[81] Kant, I. "The Metaphysics of Morals" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 170.

[82] On this point note Höffe, O. *Immanuel Kant* Farrier, M. tr. (Albany: S.U.N.Y. Press, 1994). Höffe at p. 174 states:

> According to Kant, the rational concept of law is closely connected with the authority to use force. He does not see this authority as irrational violence or as an immoral usurpation on the

order, and the use of war to maintain this order. Yet, might this not lead Kant into a position of difficulty, into a conception of a 'just war,' and the possibility of morality becoming the 'comfort' of the warrior's action?

Difficulties in the Kantian Approach

It should be noted that the concern of the thesis, in this section, is not to investigate the entirety of the political philosophy of Kant, as it relates to international law and international relations. Rather, what is at issue is how Kant, predominantly through his text *Perpetual Peace*, inherits and attempts to come to terms with war's moral problem. In Kant's engagement, war sits precariously within the nexus of law-war-ethics. Through Kant's three principle gestures, war is condemned by a transcendental morality that demands the overcoming of the state of war through the establishment of an international juridical order. However, the moral command, as it relies upon state actors to realise the end of war, guided by the idea of peace, risks becoming embroiled within the disputes of international right. Within this, the position of morality risks becoming co-opted by the multiple claims of states against their others, as they speak and act in the name of a partially realised cosmopolitan juridical order.

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part of the legal system but instead as an indisputable *a priori* element of all law. As paradoxically as it may seem, without the authority to use force, no legal system, which must nonetheless be committed to the co-existence of free subjects, can be conceived.

Because the law is the very essence of the conditions under which freedom is compatible with the freedom of all others, every action which, in accordance with universal laws, is compatible with the freedom of all others, is legitimate from a legal standpoint. Any interference with this legal authority is illegitimate. Anyone who impedes me in my performance of legal actions does me wrong. Hence, the force preventing illegitimate interference is itself legitimate because it makes freedom of action possible. But with his justification of the forcible nature of law, Kant does not open the door to force of any sort whatsoever. Force is only legal insofar as it prevents injustice. Any other use of force is unjust.

Kant's taking up of war's moral problem runs into a number of difficulties or barriers. A number of comments upon these difficulties will be made here; however, the discussion of these in terms of war's moral problem will occur in greater detail throughout the thesis. Again, what is relevant to the thesis is not a whole-scale critique of the Kantian project, but rather, an attempt to draw attention to the difficulties of Kant's approach to war's moral problem.

One difficulty might go to the problem of determining a truly 'universal law.' The ground of Kant's injunction is his categorical imperative, the maxim that a moral law be capable of being truly universal and the demand that other humans be treated always as an end and never as a means. Kant, thus, in condemning acts of war as a moral wrong and setting up the duty of states to pursue peace through an international juridical order, posits or recognises a universal law that is to extend over the entirety of the globe. The question of how 'reason' is to come to understand the universal law, as one that operates across and between differing peoples and cultures, goes to a question of the relation between 'reason' and 'communication' within the philosophy of Kant and how this might be applied practically.[83] At first instance, this, at least raises the difficulty of the possibility of the universalisation of cultural norms and values. The difficulty of this question can be seen in the ongoing debate between Anglo-European 'human rights' and African or Asian values.[84]

Another difficulty arises, in that, Kant's approach seems to tend towards treating states as if they were human individuals. States are judged by the same standards of

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[83] A more sustained engagement with Kant on this point is beyond the scope of the thesis. It would involve considering Kant's views on the relation between 'reason,' 'toleration,' and 'communication.' On this relation see: O'Neil, O. "The Public Use of Reason" *Political Theory* 14 (4) 1986, 523-551.
[84] See: Donnelly, J. "Twentieth Century Realism" in Nardin, T. and Mapel, D.R. *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992), p. 94.

Right that a transcendental morality judges individual moral actors. In this respect, it can be argued that states are 'personalised.' States are treated as if they were moral persons. This may be somewhat problematic, as it may tend to gloss-over the complexity of ethical relations occurring between the state and its citizens and between citizens within the state.[85] In this respect, Kant's idea of the 'moral politician' perhaps comes into a position of contradiction, or conflict with a number of irreconcilable duties.[86] This conflict raises a question that will be necessary for the thesis to deal with, in the attempt to come to terms with war's moral problem, that of, how do we speak of morality when considering the relations between states?

Further, it could be argued that Kant's approach ignores the role of war in the formation and preservation of law, sovereignty and ethical communities.[87] Kant, to a degree, does pay attention to the co-constituting relation between violence and morality in his consideration of a theory of nature, as a means of describing the relation between human unsociableness and moral development. However, Kant's rejection of the moral legitimation of state violence generally overrides the consideration of the redemption of violence in history, by classifying war as a moral wrong. Hence, in attempting to ensure that morality remains transcendental and that it does not become the handmaiden of state violence, Kant is perhaps forced to ignore, or suppress, law's origin in, and its continual re-inscription through, violence. Kant, is of course, not oblivious to the violent origins and practices of states. His framing of international law in terms of a moral obligation is an attempt to encourage states to

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[85] Note, this point anticipates Hegel's critique of Kantian morality, which will be addressed in chapter four.
[86] Note, this point anticipates Kant's notion of 'practical judgement' which can be read as a counter to the critique that Kantian morality is 'empty' or merely 'formal,' again this will be addressed in chapter four.
[87] Note, this point anticipates Hegel's critique of Kant's *Perpetual Peace*, this point will be addressed in greater detail in chapter 6.

leave this violence behind, to transcend their blinkered view and govern their actions by moral duty. In this regard, it might be said that Kant considers war as an 'accidental,' rather than as a 'necessary' property of states and state action.

This view runs across difficulties when considering how a state is to act 'morally.' Kant's position, perhaps, does not pay enough attention to the status of the legal institution of the state mediating its claims and becoming itself historically, through war. In a sense, this view ignores the position of war in the mediation between law and ethics. This mediation involves the notion that ethical relations within the state involve ongoing sites of conflict and violence, and that this logic extends to the outside of the state in its relations with its others. For Kant, law, the civil constitution or the international juridical order, operates to regulate this violence; however, his consideration is somewhat one-sided, in that it does not pay enough attention to the position of violence in the becoming of law.

The ramifications of Kant's approach become apparent with the question of how the international juridical order is to come into realisation. If, the history of law's origin is overwhelmingly violent and law maintains itself through the legitimation of this violence, then should one expect the realisation of an international juridical order to be different? What can be anticipated, here, is an ongoing process of moral action where war is carried out to institute law, where war is fought for the ideal of peace, and, thus, where war becomes a war against war.[88] With this in mind, when

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[88] On this 'nightmarish ' situation note: Fenves, P. *Late Kant: Towards Another Law of the Earth* (New York: Routledge, 2003). Fenves at p. 112 notes:

> (F)or Kant, the thought of the eternal return of the same generates both a dream and a nightmare: the dream of a duty constituted federation of independent states, all of which have bid adieu to their former condition of "savage (lawless) freedom;" and the nightmare of

approaching war's moral problem, the violence of law becomes something of a conceptual and pragmatic sticking point.

Another difficulty arises through Kant's re-introduction of the position of morality and moral action, when considering war and the actions of states. Such a 're-moralisation' of the language of international law and war re-instates the position that the post-Westphalian natural lawyers attempted to avoid, that of, war being fought in the name of moral or sacred claims to 'truth.' Further, the re-introduction of the language of morality and moral action has a tendency, when not approached via the true Kantian rigour of the categorical imperative, to descend into a language of 'subjective-moralisation.' That is, where the notion of morality becomes nothing more than a disguise, used to legitimate one's own aims and aspirations. In this respect, transcendental morality is co-opted; it is treated not as the moment of criticism or judgement, but rather as comfort.

Kant was definitely aware of this problem. His approach to the problem of war is directed at rescuing morality from giving sorry comfort to warmongers and the political moralists. It is in the interest of escaping the instrumental use of morality by political actors, that Kant reminds international law of the transcendental position of the moral law, its status as always being not yet, being an imperative. However, Kant's approach comes across difficulties when one considers the position of the moral actor, the state guided by the so-called 'moral politician.' The question arises, to what extent does the state or federation of states, derive moral legitimacy for their

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massive mutual-annihilation. The dream has of course, generated the greatest interest among Kant's readers, then and now, doubtless because it can be transformed into a program for international politics. The nightmare, by contrast, has gone largely unnoticed. But the dream may only be a screen for the nightmare, which as Kant dares to say, alone justifies providence.

actions? Does a particular war derive moral legitimacy or, at least, allow an actor to claim moral legitimacy, through the argument that war is necessary in the preservation or defence of peace? In this case, it is not too difficult to conceive the problem of war becoming re-invested with a certain legitimacy in the wider process of moral conceptualisation. This is an *aporia* within war's moral problem that Kant approaches and is, perhaps, unable to overcome.

Conclusion

In this chapter, I have introduced how Kant inherits war's moral problem from the natural law tradition. By giving a reading of Kant's *Perpetual Peace*, I have endeavoured to show how Kant attempts to come to terms with war's moral problem by offering three principle contentions: the moral condemnation of war, the enunciation of cosmopolitan right and the institution of a juridical order. Through these gestures, Kant re-institutes the primary position of morality in the consideration of war and state action. Kant's radicalisation of the natural law tradition finds the de-moralisation of international law and the legal regulation of war (and colonial wars of acquisition) as unacceptable. Against this, Kant introduces an approach to war and international law based upon an ultimate moral obligation, and thus, for Kant, the endeavour to overcome war ought to occur by state action guided by the categorical imperative.

In this chapter, I have drawn attention to how Kant's approach to war's moral problem centres upon the two figures, the 'moral politician' and the 'political moralist.' Further, I have pointed to a number of barriers that Kant's account comes

across, which inhibit Kant's ability to fully overcome war's moral problem. In the following chapter, I will discuss how Kant's approach is inherited by three contemporary scholars, Habermas, Derrida and Rawls. In introducing how these thinkers take up Kant's inheritance of war's moral problem, I will consider how each attempts to come to terms with the barriers encountered by Kant, and the extent to which each might add to a jurisprudence of war.

Inheriting Kant's Approach to War's Moral Problem

Introduction

This chapter will introduce the inheritance of the Kantian approach to war by three contemporary thinkers, Jürgen Habermas, Jacques Derrida and the late John Rawls. Attention will be drawn to how these thinkers take-up Kant's three principle contentions, and how each, in differing ways, understands and comes to terms with war's moral problem. The chapter does not aim at presenting a thorough critique of each, rather, its purpose is necessarily limited to merely highlighting how each, struggle with the difficulties of war's moral problem.[1] Once again a point of note, that when referring to the approaches of Habermas, Derrida and Rawls, the descriptive term 'neo-Kantian ethics' will be used. This term does not attempt to encapsulate the entirety of each scholar's thought, but merely refers to the way each scholar approaches war's moral problem by actively inheriting and developing Kant's three principle contentions. However, before introducing the approach of neo-Kantian ethics it is necessary to briefly discuss the relation between Kant's *Perpetual Peace* and some of the developments within international law that have come to reflect aspects of Kant's vision.

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[1] A more extensive critique of the approach of 'neo-Kantian ethics' will occur in chapters seven and eight, when I will consider the extent to which 'neo-Kantian ethics' has added to a jurisprudence of war.

The appeal of the ideals of peace and cosmopolitan right as outlined by Kant over two hundred years ago in *Perpetual Peace*, have not lost their resonance in contemporary times. Kant's three principle contentions have achieved a degree of authority over modern jurisprudential and ethical thought. In the sphere of international law and international relations, the popularity and influence of Kantian ideas owes also to the changes in the relations between states since Kant's time. It can be said that the latter half of the twentieth century witnessed at least the partial embodiment of some of Kant's ideals. Kant's three contentions: the moral condemnation of war, the enunciation of cosmopolitan right and the establishment of an international juridical order; have found something of a manifestation in the paradigm of international law that grew out of the failed attempt of the League of Nations, and, its more enduring successor, the United Nations.

This is not to say that the coming into being of a federation of states around the idea of peace, in the form of the United Nations, is a direct result of the ideas of Kant. Rather, the current structure of international law and the relations between states, of which today the United Nations holds an important structural, political, legal and ethical presence, represents, to a degree, an embodiment, or a partial historical realisation, of the three principle contentions expressed in the essay *Perpetual Peace*. In this sense, Kant's attempt to come to terms with war's moral problem is not of interest merely from the viewpoint of intellectual history. Rather, Kant's essay can be

understood as a 'living document.' For many, the elements expressed in Kant's three contentions have been understood to represent the 'spirit of the age.'[2]

International law, now mediated through the supra-national body of the United Nations, sets up 'peace' as not simply an intellectual ideal, but as a practical possibility. The extent to which this 'spirit' of contemporary international law shares with Kant an approach to war via a cosmopolitan ideal is reflected somewhat in the preamble to the Charter of the United Nations:

> WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and the worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and the respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.
> AND FOR THESE ENDS to practise tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples.
> HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS.[3]

International law under the organ of the United Nations, can be understood as taking partial shape in accordance with Kant's three principle contentions. The body represents the establishment of an international juridical order, a 'pacific federation,' the purpose of which is to maintain international peace and security. This is to occur via the taking of collective measures for the prevention and removal of threats to

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[2] For liberal accounts on the similarities and differences between Kant's ideal and the United Nations see: Laberge, P. "Kant on Justice and the Law of Nations" in Mapel, D.R and Nardin, T. (eds.) *International Society: Diverse Ethical Perspectives* (Princeton, N.J.: Princeton University Press, 1998); Tesòn, F.R "The Kantian Theory of International Relations," *Columbia Law Review* 92 1992, 100-135.
[3] Charter of the United Nations, Preamble. (1945).

peace, and the settlement of international disputes via peaceful means.[4] Further, this conception of international law involves the attempt to set up something of a 'higher power,' to act as an arbiter of inter-state disputes. This 'higher power' occurs in the international institutional forms of the 'International Court of Justice'[5] and the 'Security Council.' The latter has authority under the Charter to call for the maintenance of international peace by state members, and to secure this peace through military force, if necessary.[6]

In addition, the idea of the United Nations can be understood to represent, to an extent, the Kantian ideal of cosmopolitan right. It recognises not only the rights of states, but also that of universal human rights and the importance and validity of these in the relations between states.[7] The notion of human rights within international law, expressed in the Universal Declaration of Human Rights,[8] invoke cosmopolitan right at a level where, while not displacing the rights of state sovereignty, at least limits and challenges the right of the state, rendering it no longer absolute. The notion of universal human rights have a cosmopolitan flavour, their claim lies beyond state boundaries and extend to all citizens of the world.

Further, and perhaps most importantly, international law through the establishment of the United Nations, mirrors, or is in accordance with, Kant's third contention, that of the moral condemnation of war. War is no longer conceived as the valid exercise of a state's right or interest. The Charter views the 'scourge of war' as a wrong and deems

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[4] *Ibid.*, Article 1.1.
[5] *Ibid.*, Article 92.
[6] *Ibid.*, Articles 41 and 42.
[7] *Ibid.*, Article 1.3.
[8] Universal Declaration of Human Rights (1948).

that states are to settle international disputes by peaceful means.[9] However, war is not

completely outlawed. Rather, it is retained as a limited right of a state to individual

and collective 'self-defence.'[10] In this respect, war is given legitimacy or justification,

when deemed "necessary to maintain or restore international peace and security."[11] It

is in light of these developments in international law that neo-Kantian ethics takes up

Kant's approach to war's moral problem. I will now discuss how Habermas, Derrida

and Rawls, each in turn, takes up and develops Kant's approach to war's moral

problem.

Habermas and Kant's Perpetual Peace

For Habermas, in contemporary times, Kant's three contentions represent not simply

intellectual ideas, but rather, they constitute a conceptual frame that has taken a hold

over international law and international relations. As an institutional form, this

cosmopolitan law has only been partially realised and needs to be reassessed and

implemented through a cosmopolitan juridical order. Habermas notes:

> (K)ant's idea of a cosmopolitan order must be reformulated if it is not to lose
> touch with a world situation that has fundamentally changed. The long-
> overdue revision of Kant's basic conceptual framework is made easier by the
> fact that the cosmopolitan idea itself has not remained fixed. Ever since
> Woodrow Wilson's initiative and the founding of the League of Nations in
> Geneva, the idea of a cosmopolitan order has been repeatedly taken up and
> implemented in politics. After the end of World War II, the idea of perpetual
> peace was given more tangible form in the institutions, declarations, and
> policies of the United Nations (as well as other transnational organisations).
> The challenge of the incomparable catastrophes of the twentieth century has

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[9] Charter of the United Nations, Preamble. (1945), Article 2.3.
[10] *Ibid.*, Article 51.
[11] *Ibid.*, Article 42.

also given new impetus to Kant's idea. Against this sombre background, the World Spirit, as Hegel would have put it, has jerked unsteadily forward.[12]

Habermas's taking up of Kant's three principle contentions involves a revision of a number of arguments put by Kant, a criticism of the limitations of a number of Kant's presuppositions and an extension of the Kantian ideal of peace. Habermas extends the scope of Kant's moral condemnation of war by revising Kant's conceptions of war and peace. He argues that, when Kant in *Perpetual Peace* condemned war, he was thinking of the "panorama of spatially and technically limited war" between individual states or alliances.[13] Kant had not yet witnessed the occurrence of a 'world war,' and forms of war that no longer permit the distinction between fighting troops and the civilian population.[14]

Habermas argues that, today, given the expansion of war into multiple civil and guerrilla wars, war is now unlimited. Subsequently, Kant's concept of peace has to be extended to include the claim that war itself, in the form of a war of aggression, is a 'crime' that deserves to be despised and punished.[15] It is in this sense that Habermas takes up Kant's moral condemnation of war and extends it through the notion of the 'criminalisation of war.'[16]

Habermas notes that Kant's cosmopolitan order runs into a conceptual difficulty. This relates to the level of obligation each state holds to the pacific federation and the

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[12] Habermas, J. "Kant's Idea of Perpetual Peace, With the Benefit of Two Hundred Years Hindsight" in Bohman, J. and Lutz-Bachman, M. (eds.) Bohman, J. tr. *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge Mass.: MIT Press, 1997), p. 126.
[13] *Ibid.*, at p. 115.
[14] *Ibid.*, at p. 115.
[15] *Ibid.*, at p. 115.
[16] Note that Habermas considers the 'criminalisation' of war to be 'legal' rather than 'moral.' His distinction will be discussed shortly via his engagement with Carl Schmitt.

extent to which the federation of states maintains its permanence. Habermas argues that, on the one hand, Kant wanted to preserve the sovereignty of the members of the federation and, hence, their ability to dissolve the compact. On the other hand, if the federation of states is to create the conditions of peace, then it must differ from merely provisional alliances, to the extent that the members feel substantially obligated to subordinate their reason of state to the goal of peace and, thus, give up on war.[17]

Habermas argues that Kant did not have any legal obligation in mind as the federation was not organised around the organs of a common government and a coercive authority. He notes that Kant was forced to rely exclusively upon each government's moral self-binding.[18] For Kant, the limitations of this position were overcome by the proposing of a gradual agreement between morality and politics through a philosophy of history and a 'hidden intention' of nature.[19]

Further, in his revision of Kant's cosmopolitan idea, Habermas notes that Kant saw three factors emerging in history that could lead to a federation based upon the enlightened self-interest of states. These were, the peaceful nature of republics, the power of world trade to create communal ties, and the function of a political public sphere.[20] On the first assumption, Habermas argues that Kant was in no position to perceive the role of nationalism, which, in transforming subordinate subjects into actively identifying citizens, did not make the nation-state more peaceful than its 'absolutist' predecessor. He argues that Kant certainly did not foresee that the mass

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[17] Habermas, J. "Kant's Idea of Perpetual Peace, With the Benefit of Two Hundred Years Hindsight" in Bohman, J. and Lutz-Bachman, M. (eds.) Bohman, J. tr. *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge Mass.: MIT Press, 1997), p. 117.
[18] *Ibid.*, at p. 118.
[19] *Ibid.*, at p. 119.
[20] *Ibid.*

mobilisation of young men obligated to military service would stir nationalist passions and produce an age of devastating, ideologically unlimited, wars of liberation.[21]

He notes Kant's second assumption involved the role of world trade bringing nations into an interdependent world community, where war would fade away under the weight of mutual economic interests. Habermas argues that Kant had not yet learned, as Hegel would from the British economists, that capitalist development would lead to an opposition among classes, threatening peace within political liberal societies. Further, the accelerating progress of capitalistic industrialisation would strain domestic politics with civil wars and lead foreign policy down the path to imperialist wars.[22] In addition, Habermas notes that the latter half of the twentieth century has witnessed, through economic forces referred to today as 'globalisation,' the blurring of the boundaries between domestic and foreign policy that are constitutive of state sovereignty.[23] He argues:

> Non-governmental actors such as multinational corporations and internationally influential private banks render the formal sovereignty of nation states increasingly hollow. Even the governments of the economically most powerful countries today are keenly aware that they are caught on the horns of a dilemma: on the one hand, their scope for action is limited by the structures of the nation state; on the other hand, they must respond to the imperatives based not entirely on world trade but also on increasingly global networks of productive relations. Sovereign states could profit from their economies so long as they were "national economies" that could be influenced by political means. With the denationalisation of the economy, in particular, with the interdependencies in the world financial markets and in industrial production itself, national politics loses its control over the general conditions of production - and with it any leverage for maintaining its standard of living.[24]

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[21] *Ibid.*, at p. 120.
[22] *Ibid.*, at p. 121.
[23] *Ibid.*, at p. 122.
[24] *Ibid.*

In this respect, Habermas argues that the interdependency of economic forces robs the political subjects that Kant relied upon of the very basis for their independence.[25]

Habermas notes Kant's third assumption, that of an emergent public sphere within republican democracies which will be critical of government and put a halt to the government action, otherwise justified by a 'clever slight of hand.' Habermas notes that Kant counted on the existence and development of a transparent public sphere, formed by literary means, borne by a small class of educated citizens.[26] He argues that Kant could not have foreseen the transformation of the bourgeois public sphere of the future, one dominated by an electronic mass media, semantically degenerated and taken over by images and virtual realities.[27]

In contrast to this, Habermas argues that what Kant dared to anticipate, is actually, through global communication, coming about in the form of a 'global public sphere.' He argues that the emergence of a global public sphere, a cosmopolitan awareness, can be seen in the polarised public opinion over the events of the Vietnam War and the First Gulf War. Further, the emergence of this global public sphere can be seen in the 'world summits' on ecology and global warming.[28] For Habermas, this global public sphere is still not yet fully emergent. Yet, within it resides a degree of hope, if

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[25] *Ibid.*, at p. 123. For Habermas's account of democracy and its impact on the nation-state see: Habermas, J. "The Postnational Constellation and the Future of Democracy" in Habermas, J. *The Postnational Constellation: Political Essays* Pensky, M. tr. (Cambridge: Polity Press, 2001).

[26] Habermas, J. "Kant's Idea of Perpetual Peace, With the Benefit of Two Hundred Years Hindsight" in Bohman, J. and Lutz-Bachman, M. (eds.) Bohman, J. tr. *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge Mass.: MIT Press, 1997), p.124.

[27] *Ibid.*

[28] *Ibid.*

not realisable immediately on the global stage, it is at least developing through the 'postnational' institutions of Europe.[29]

With these criticisms in mind, Habermas argues that the Kantian ideal of perpetual peace needs to be revised in three key areas. Firstly, the inconsistency between the idea of peace and state sovereignty in Kant's federation needs to be overcome. The rights of the world citizen must be institutionalised in such a way that they actually bind individual governments.[30] He argues that the community of peoples must at least be able to hold its members to standards of reasonably appropriate behaviour through the threat of sanctions. Hence, only by this can the situation of states, asserting their rights through mutual threat, be transformed into a federation whose common institutions take over state functions. This involves legally regulating the relations among members and monitoring their compliance with the federation's rules.[31]

In this sense, Habermas argues for the extension of Kant's idea of an international order built on moral obligation, to the establishment of an international order built upon legal obligation. International law is to operate as more than just a mere moral 'ought.' Instead, it is to have its basis in a set of workable international legal institutions whose judgments are legally binding and enforceable against both individuals and states. Habermas can be understood as arguing for the formation of a cosmopolitan sovereignty. A legal order whose legitimacy is not premised upon the

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[29] Habermas, J. "The Postnational Constellation and the Future of Democracy" in Habermas, J. *The Postnational Constellation: Political Essays* Pensky, M. tr. (Cambridge: Polity Press, 2001), pp. 99-111.
[30] Habermas, J. "Kant's Idea of Perpetual Peace, With the Benefit of Two Hundred Years Hindsight" in Bohman, J. and Lutz-Bachman, M. (eds.) Bohman, J. tr. *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge Mass.: MIT Press, 1997), p. 127.
[31] *Ibid.*, at p. 127.

sovereignty of states, but which, in effect, trumps state sovereignty. For Habermas, international law today hamstrings the possibility of peace and an effective cosmopolitan legal order, by guaranteeing state sovereignty. Hence, he notes that while the Charter of the United Nations prohibits offensive wars, at the same time, the Charter expressly forbids the intervention in the internal affairs of a state.[32] For Habermas, this conflict must be overcome.

Secondly, Habermas argues that because Kant saw the barriers of national sovereignty as insurmountable, he conceived the cosmopolitan community as a federation of states, not of world citizens. Habermas notes that this assumption proved inconsistent, in that Kant derived every legal order, including the state, from a more original law that gives rights to every person by virtue of being a member of humanity.[33] If the Kantian ideal is to stay true to the idea of cosmopolitan right, Habermas argues that the autonomy of citizens should not be mediated through the sovereignty of states.[34] He notes that developments in cosmopolitan law have so far outstripped Kant, in that the United Nations Charter places a general obligation upon its members to observe and attempt to realise human rights. Further, he argues that the United Nations has its own institutions for determining that human rights abuses have occurred. Although the United Nations lacks an effective executive power that could secure human rights through necessary interventions into nation states, he argues that international law is, at least since 1991, involved in taking the first tentative steps towards this end.[35]

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[32] *Ibid.*, at p. 127.
[33] *Ibid.*, at p. 128.
[34] *Ibid.*, at p. 128.
[35] *Ibid.*, at p. 129-30. Habermas gives the example of the first humanitarian intervention in the sovereignty of a state by the U.N., when in 1991 the U.N. instituted 'no-fly zones' in Iraq to protect the Kurdish minority.

Thirdly, Habermas argues that if a cosmopolitan law is to be fully instituted, then, the political unity of the world under the United Nations must move beyond its present formal equality and deal with the problems associated with the economic stratification of society. The institution of a cosmopolitan law involves, thusly, the overcoming of social divisions and economic imbalance. For Habermas, this can occur only if consensus is reached in three key areas. The first refers to a historical consciousness shared by all members concerning the non-simultaneity of societies simultaneously related by peaceful coexistence.[36] The second refers to a normative agreement concerning human rights across Europeans, Africans and Asians.[37] The third refers to the development of a shared understanding of the meaning of peace. This must go beyond Kant's merely limited conception of peace and be formulated through an understanding of the link between the emergence of wars and specifically societal causes.[38]

Habermas and War's Moral Problem

In taking up Kant's contentions, Habermas shows an awareness of war's moral problem. This involves the difficulty of when attempting to conceptualise war, holding onto a transcendental morality without moralising war, and, in so doing, putting morality at the service of war. Kant's struggle with one element of this problem in the situation where a peaceful federation of states, an alliance formed through the moral imperative to institute peace, is forced to defend itself and the ideal of peace against aggressive states. For Habermas, this dilemma becomes more urgent

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[36] *Ibid.*, at p. 132.
[37] *Ibid.*, at p. 133.
[38] *Ibid.*

with the current structure of international law under the framework of the United Nations. What is likely to occur in the transition away from nationalism and 'reason of state,' and towards the establishment of a cosmopolitan law, is the occasioning of wars being fought so as to maintain 'peace' and 'security' and protect human rights. In such a situation, transcendental morality, which draws nations out of the state of nature and into an international juridical order, and which, as 'reason,' originally condemns war, is positioned upon a precipice. The transcendental moment of morality is put a risk in the situation where morality is called upon to justify war.

Habermas approaches war's moral problem by drawing a distinction between 'law' and 'morality.' In this distinction, a war in the name of peace or waged to prevent a crime against 'humanity,' is given legal, rather than moral sanction. In drawing this distinction, Habermas engages with Carl Schmitt. Schmitt was keenly aware of how transcendental morality, expressed as the idea of peace or as 'humanity,' could easily be drawn into the legitimation of war, and further, the awful power such a morally legitimate war could display. In the context of his attempt to draw attention to the concept of the 'political,' and its categories of 'friend' and 'enemy,' Schmitt notes that:

> If pacifist hostility toward war were so strong as to drive pacifists into a war against non-pacifists, in a war against war, that would prove that pacifism truly possesses political energy because it is sufficiently strong to group men according to friend and enemy. If, in fact, the will to abolish war is so strong that it no longer shuns war, then it has become a political motive, i.e., it affirms, even if only as an extreme possibility, war and even the reason for war. Presently this appears as a particular way of justifying wars. The war is then considered to constitute the absolute last war of humanity. Such a war is necessarily unusually intense and inhuman, because by transcending the limits of the political framework, it simultaneously degrades the enemy into moral and other categories and is forced to make of him a monster that must not only

be defeated but also utterly destroyed. In other words, he is an enemy who no longer must be compelled to retreat into his borders only.[39]

Schmitt was particularly critical of the use of moral concepts to justify war. His argument suggests that morality itself seems to drive itself to this end. Whereby, carrying out the moral imperative to abolish war and establish a federation of peace, necessarily leads towards a 'war against war.' In this case, the classical borders of state sovereignty, or the 'political,' seem no longer relevant, as a universal morality is not confined to any particular borders. Thusly, war transcends all politics, all territory and renders the world and its conflict only understandable through the moralised categories of good and evil, moral and immoral, human and inhuman.

In this sense, it could be argued that Schmitt merges the Kantian figures of the moral politician and the political moralist into one. The latter assumes the dominant position within this split, or multiple, political personality. Hence, for Schmitt the concept of a 'war for the sake of humanity' has only a political meaning. Since humanity cannot wage war, as, at least on this planet, it has no enemy (Schmitt excludes the possibility of nature, or the environment as an enemy), what is actually occurring is that a state is fighting a particular political enemy in the name of humanity.[40]

Schmitt argues that when a state invokes the name of 'humanity,' that particular state seeks to usurp a universal concept against a political opponent. At the expense of its opponent, the state tries to identify itself with 'humanity' in the same way as one can use the concepts of peace, justice and civilisation, in order to claim these as one's own

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[39] Schmitt, C. *The Concept of the Political* Schwab, G. tr. (Chicago: University of Chicago Press, 1996), p. 36.
[40] *Ibid.* at p. 54.

and deny the legitimacy of the enemy.[41] He notes that the notion of 'humanity' is especially useful as an ideological instrument of imperialist expansion.[42]

It is in this respect that Schmitt criticised the League of Nations, arguing that the League of Nations did not eliminate the possibility of wars, just as it did not abolish states. Rather, it introduced new possibilities for wars and swept away many obstacles to war by legitimising and sanctioning certain wars.[43] For Schmitt, the League of Nations, as not being truly universal, was instead, merely an alliance. As such, the legitimacy of war, the justness of war, the *jus belli*, was not abolished, but rather, was instead totally or partially transferred to the alliance.[44] On this issue, Schmitt makes a point of crucial significance, whereby through the institution of a form of juridical international order, such as the League of Nations, international violence becomes controlled, regulated and legitimised under a moral-legal framework (which, for Schmitt, is an order of political-economic imperialism).[45] Under such an order, Schmitt argues that a new vocabulary is born. In this, 'war' is condemned, but executions, sanctions, punitive expeditions and international policing remain as measures to assure peace.[46] In this case, particular wars become a 'police action,' violence legitimated by law, while, on the other hand, other acts of war become 'crimes,' illegitimate forms of violence.[47]

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[41] *Ibid.*, at p. 54.

[42] *Ibid.*, at p. 54.

[43] *Ibid.*, at p. 55.

[44] *Ibid.*, at p. 57.

[45] *Ibid* at p. 79. Schmitt argues "A war waged to protect or expand economic power must, with the aid of propaganda, turn into a crusade and into the last war of humanity."

[46] *Ibid.*

[47] See: Douzinas, C. "Postmodern Just Wars: Kosovo, Afghanistan and the New World Order" in Strawson J. (ed.) *Law After Ground Zero* (London: Glasshouse Press, 2002); Brown, C. "Selective Humanitarianism: In Defence of Inconsistency" in Chatterjee, D.K. and Scheid, D.E. (eds.) *Ethics and Foreign Intervention* (Cambridge: Cambridge University Press, 2003). For more general legal accounts of 'humanitarian' war see: Chesterman, S. *Just War or Just Peace? Humanitarian Intervention and*

Habermas responds to Schmitt's assessment by taking issue with the suggestion that wars in the name of human rights, disguised as police actions, lend certain wars a moral legitimacy and that this moralisation stamps the enemy as an inhuman criminal.[48] He argues that Schmitt's conception rests upon the false assumption that human rights in modernity are moral rather than legal. For Habermas, the conception of human rights does not have its origin in morality, but that human rights bear the imprint of the modern conception of individual liberties and are, therefore, juridical in character.[49] He argues that while, for Kant, human rights have a moral content, they still structurally belong within an order of positive and coercive law in which claims to individual rights may be enforceable.[50] Hence, it is constitutive of the meaning of human rights that they belong within an existing legal order in which they can be protected, be it national, international or global.

In this sense, for Habermas, human rights await a full institutionalisation within the framework of a cosmopolitan legal order, and this is only now emerging.[51] On this basis, Habermas argues that a war for humanity, or a war to protect human rights, is a war which is legal rather than moral. Under a cosmopolitan juridical order, the violence that is drawn upon to protect human rights is given legal, not moral legitimacy. Habermas argues:

International Law (Oxford: Oxford University Press, 2001); Gray, C. *International Law and the Use of Force* (Oxford: Oxford University Press, 2000); Tsagourias, N.K. *The Jurisprudence of International Law: The Humanitarian Dimension* (Manchester: Manchester University Press, 2000); Wheeler, N.J. *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000).

[48] Habermas, J. "Kant's Idea of Perpetual Peace, With the Benefit of Two Hundred Years Hindsight" in Bohman, J. and Lutz-Bachman, M. (eds.) Bohman, J. tr. *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge Mass.: MIT Press, 1997), p. 136.

[49] *Ibid.*, at p. 137.

[50] *Ibid.*, at, p. 140.

[51] *Ibid.*

Establishing a cosmopolitan order means that violations of human rights are no longer condemned and fought from a moral point of view in an unmediated way, but are rather prosecuted as criminal actions within a framework of a state-organised legal order according to institutionalised legal procedures. Precisely such a juridification of the state of nature among states would protect us from a moral de-differentiation of law and would guarantee to the accused full legal protection, even in cases of war crimes and crimes against humanity.[52]

For Habermas, Schmitt's argument against an unmediated moralisation of international politics leading to the moralisation and criminalisation of state violence, ignores one decisive criteria. This criteria is: the "legal presupposition of an authority that judges impartially and fulfils the conditions of neutral criminal punishment."[53] Habermas, thus, reinstates the distinction between the two Kantian figures, the political moralist and the moral politician. However, in contrast to Kant, for Habermas, the latter figure carries out their actions no longer merely through moral obligation, but through legal authority granted by the juridical order. Habermas, thus, seems to claim that Schmitt's critique is only valid when the political moralist uses legal authority as a 'cover' to legitimise a political end. Hence:

The politics of human rights undertaken by a world organisation turns into a fundamentalism of human rights only when it undertakes an intervention that is really nothing more than the struggle of one party against the other and thus uses a moral legitimation as a cover for a false juridical justification.[54]

The issue, thus, becomes not one of moral obligation, but one of appropriate cosmopolitan legal authority. Habermas argues that the correct solution to the problem of the moralisation of power politics is not the demoralisation of

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[52] *Ibid.* Note, Habermas at pp. 141-6, runs a critique of Schmitt that is not of direct relevance to the discussion of war's moral problem. Habermas argues that Schmitt wanted the de-criminalisation of war, and looked towards a preservation of an international order where war could still be used to solve conflicts. He argues that Schmitt saw something of an ethical relation between the 'political' and killing.

[53] *Ibid.*, at p. 147.

[54] *Ibid.*

international politics. Rather, the solution lies in the democratic transformation of morality into a positive system of law, with appropriate legal procedures of application and implementation. This involves, "the cosmopolitan transformation of the state of nature among states into a legal order."[55]

Habermas can be understood as attempting to overcome war's moral problem by keeping war and morality separate. Ultimately, morality judges war. The transcendental moral moment urges humanity to move towards peace and to institute an international juridical order. In this frame, war is viewed as a question of legality not morality, whereby the protection of peace and human rights occur as the protection of legal rights under a cosmopolitan legal order. Under this conception, particular wars are not given moral legitimacy, but are deemed legal or illegal under a global juridical authority. The moral content of war is thus limited to the extent that all law and all rights contain a moral element. However, the ultimate legitimacy of violence resides not in the moral opinion of the parties involved, but instead, it is grounded in the authority of a cosmopolitan, juridical, institutional framework.

Habermas's argument does not fully overcome war's moral problem. His distinction between the moral and legal legitimation of war is premised upon an appeal to the possibility of an impartial, neutral juridical authority. For Habermas, war has a legal rather than a moral legitimacy when there exists a cosmopolitan juridical institution that can determine the legality or illegality of certain actions and, thus, intervene as 'police action' to secure peace and protect human rights. However, Habermas admits that such an authority is not yet in existence, and that, while partly realised, in the

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[55] *Ibid.*, at p. 149.

form of the United Nations and other institutions, there still exists a gap between the letter of cosmopolitan right and the actuality of this ideal. He states:

> The contemporary world situation can be understood in the best-case scenario as a period of transition from international to cosmopolitan law, but many other indicators seem to support a regression to nationalism.[56]

In this, Habermas runs up against the same problem of transition that confronts Kant's approach to war's moral problem. As a cosmopolitan juridical institution is not yet truly in existence, then the idea of peace and cosmopolitan law sits as an ideal or a moral 'ought,' that reason demands be brought into existence. The structure of this moral obligation renders war, in this case, both immoral and as a moral necessity. The problem of going to war, as a war for peace, a war for humanity, a war against war, binds a particular war, by a particular alliance, to a transcendental moral authority. This perhaps leads into the situation where morality begins to collapse upon itself through its unresolvable internal contradiction. Morality unconditionally condemns war and then legitimises a particular war through its own imperative.

Habermas confronts this problem with respect to a particular war, the bombing of Kosovo and Serbia by N.A.T.O. in 1999. In this situation, the actions by N.A.T.O. were not given legal authority by the executive arm of the United Nations, the Security Council. In an open letter to the German people, Habermas argued that the bombing of Kosovo was legitimised by the need to protect human rights abuses against the Kosovo-Albanian population. In his argument, Habermas struggled with the lack of institutionalisation of cosmopolitan law, and, hence, the distinction between morality and legality. He stated:

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[56] *Ibid.*, at p. 130.

Because as long as human rights are comparatively weakly institutionalised on a global scale, the border between law and morality can become essentially blurred, as in the current case. Because the Security Council is blocked, N.A.T.O. can only rely upon the moral validity of international law - on norms for which there are no effective executives for the application and implementation of law that are recognised by the community of nations.[57]

Given this dilemma, Habermas invoked again the Kantian figures of the moral politician and the political moralist. In this, he contrasted the actions of the U.S.A. to that of Europe, arguing that, on the one hand, the U.S.A. are enforcing the implementation of human rights as part of the mission of a super-power who "pursues this aim under the premise of power politics." While, on the other hand, most European nations regard the enforcement of human rights as necessary in order to establish the rule of law in international relations.[58] In drawing this distinction, Habermas noted the problematic nature of an action guided by morality and not by institutional legality. Such action offers up the problem of multiple and differing interpretations of international law and the United Nations Charter.[59]

Habermas argued in favour of the N.A.T.O. action, "despite the dilemma of having to act as if there were already a fully institutionalised cosmopolitan condition."[60] Habermas claimed that in the absence of an "institutionalised cosmopolitan condition" and, in order to prevent "mass murder," then, "if there is no other way out, democratic neighbour states have to intervene in an emergency based on a legitimisation by international law."[61] In this sense, he stated that the actors are engaged in an

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[57] Habermas, J. "Bestiality and Humanity: A War on the Border Between Law and Morality" in *Die Zeit* 29 April 1999, Solms-Laubach, F. tr. w.w.w.global site.ac.uk. p. 4.
[58] *Ibid.*, at p. 5.
[59] *Ibid.*
[60] *Ibid.*
[61] *Ibid.*

"unavoidable temporary paternalism."[62] While arguing in favour of a particular war, Habermas gave a note of caution to the action, stressing that such self-empowerment should be considered as an exception and not ever be the rule.[63]

In this example, while Habermas only argues in favour of the moral legitimacy of a particular war, and not war in general, what is visible is the manner in which Habermas's approach runs up against the difficulties of war's moral problem. As international law is only partially realised, state action is still guided by the moral imperative to bring the law of peace into full realisation. In the situation confronted by Habermas, war does not possess legal authority, but only a moral authority. As Habermas is aware, this moral authority is subject to contestation, and this leaves open the possibility that morality itself becomes the site of contestation. This is the possibility of war becoming the contestation, not simply of who interprets, but perhaps, the battle over who is in possession of a higher moral authority. When this contestation occurs, the parties involved may not all be 'moral politicians.' Rather, some may be 'political moralists' who use the language of morality, or an appeal to the not yet international law, as a disguise to hide and legitimate their own self-interest. Here, it seems that Habermas's approach to war's moral problem runs up against a significant difficulty. In the situation where there is no neutral and powerful legal authority, Habermas is forced to rely upon each state's moral self-binding. This places jurisprudence upon a difficult ground, it is asked to consider which actor is the most 'moral.'

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[62] *Ibid.*
[63] *Ibid.*

Jacques Derrida takes up the three Kantian contentions carefully and is cautious of war's moral problem. Derrida attempts to hold onto the transcendental moral moment absolutely, so as to avoid the problem of morally legitimating war. This stems from an emphasis upon the inherent violence of the law, and an insistence upon the duty to always go beyond duty, the obligation to a morality or to an ethics that is always 'yet to come,' always beyond and structuring our critical awareness and engagement with war and law in the present.

Derrida distinguishes his account of law from the Kantian imperative. In contrast to the position of the categorical imperative to which he refers as a 'regulative idea,' Derrida stresses the *aporia* of the rule, and the *aporia* of the moment of decision. This suggests that for a decision to be 'just,' it must be regulated and without regulation, and that each decision requires an absolutely unique interpretation.[64] For Derrida, the 'idea of justice' involves the 'undecidable,' the notion that justice can never be instituted and yet, the constant demand of justice is that there must be a decision. For Derrida, this is the Kierkegaardian 'madness' of the decision.[65] For Derrida, law or justice needs to be understood as '*aporia*,' justice is *aporetic*. He argues:

> But for this very reason, it *may* have *avenir*, a "to-come," which I rigorously distinguish from the future that can always reproduce the present. Justice remains, is yet, to come, *à venir*, it has an, it is *à-venir*, the very dimension of events irreducibly to come. It will always have it, this *à-venir*, and always has. Perhaps it is for this reason that justice, insofar as it is not only a juridical or political concept, opens up for *l'avenir* the transformation, the recasting of refounding of law and politics. "Perhaps," one must always say perhaps for

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[64] Derrida, J. "The Force of Law: The 'Mystical Foundation of Authority'" Quaintance, M. tr. in Cornell, D., Rosenfeld, M., and Carlson, D.G. *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992), p. 23-24.
[65] *Ibid.*, at p. 25-26.

justice. There is an *avenir* for justice and there is no justice except to the degree that some event is possible which, as event, exceeds calculation, rules, programs, anticipations and so forth. Justice as the experience of absolute alterity is unpresentable, but it is the chance of the event and the condition of history.[66]

It can be argued that Derrida's account of law and justice in terms of the 'to-come' (*avenir*) can be considered as being not too distant from Kant's categorical imperative. This becomes possible when both Kant and Derrida are situated within a tradition(s) of natural law, or, that each inherit aspects of a tradition(s) of natural law in which 'right' or 'justice' is understood as being 'not yet.' In this sense, Derrida's meditation upon the notion of the justice that is 'to come,' can be interpreted as a development within and a contribution to, a long natural law tradition(s). This tradition, as portrayed by Ernst Bloch, pays attention to the 'messianic' demand of 'right' or 'justice,' the impossibility of this demand, the *aporetic* nature of ethics,[67] and the moment of ontological incompleteness, instability and restlessness.[68] If Derrida's account of justice is read as being within this broad tradition,[69] then Derrida's engagement with Kant's ideal of international law and peace can be understood as a refinement of Kant's project rather than a radical departure from it.

Derrida follows the Kantian contention of the moral condemnation of war, or at least in a weaker sense, an awareness of and an aversion to, the violence in both history and

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[66] *Ibid.*, at p. 27.
[67] This point is also taken up strongly by Gillian Rose. See: Rose, G. *Mourning Becomes the Law* (Cambridge: Cambridge University Press, 1996).
[68] Bloch, E. *Natural Law and Human Dignity* Schmidt, D.J. tr. (Cambridge, Mass.: M.I.T. Press, 1996); Bloch, *The Principle of Hope* Plaice, N. and Plaice, S. tr. (Cambridge, Mass.: M.I.T. Press, 1995).
[69] On positioning Derrida within a tradition of natural law as understood by Bloch, see: Kochi, T. "Anticipation, Critique and the Problem of Intervention: Understanding the Messianic: Derrida Through Ernst Bloch" *Law and Critique* 13 2002, 29-50.

the present, of which ethics sets up the imperative or responsibility for us to

overcome.[70] In defiance of the apologists of progress, he states:

> For it must be cried out, at a time when some have the audacity to neo-evangelise in the name of the ideal of a liberal democracy that has finally realised itself as the ideal of human history: never have violence, inequality, exclusion, famine and thus economic oppression affected as many human beings in the history of the earth and of humanity. Instead of singing the advent of the ideal of liberal democracy and of the capitalist market in the euphoria of the end of history, instead of celebrating the "end of ideologies" and the end of great emancipator discourses, let us never neglect this obvious macroscopic fact, made up of innumerable singular sites of suffering: no degree of progress allows one to ignore that never before, in absolute figures, never have so many men, women and children been subjugated, starved, or exterminated on earth.[71]

Derrida draws attention to this as a 'crisis of international law,' a crisis which needs to

be overcome. In the tradition of Kantian cosmopolitanism, Derrida refers to the idea

of the 'New International.'[72] This refers to a profound, long-term, transformation of

international law, of both its concepts and its field of intervention.[73] He argues that

just as the concept of human rights has developed over a number of centuries through

numerous socio-political upheavals, so should the idea of international law be

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[70] Note, Cornell's point that Derrida takes very seriously the ethical command 'thou shalt not kill.' See: Cornell, D. *The Philosophy of the Limit*, (New York: Routledge, 1992), p. 168.

[71] Derrida, J. *Specters of Marx: The State of Debt, the Work of Mourning and the New International*, Kamuf, P. tr. (New York: Routledge, 1994), p. 85.

[72] *Ibid.* Derrida refers to the 'New International' as:

> It is a link of affinity, suffering, and hope, a still discreet, almost secret link, as it was around 1848, but more and more visible, we have more than one sign of it. It is an untimely link, without status, without title, and without name, barely public even if it is not clandestine, without contract, without national community (International before, across, and beyond any national determination), without-co-citizenship, without common belonging to a class. The name of the New International is given here to what calls to the friendship of an alliance without institution among those who, even if they no longer believe or never believed in the socialist-Marxist International, in the dictatorship of the proletariat, in the messiano-eschato-logical role of the universal union of the proletarians of all lands, continue to be inspired by at least one of the spirits of Marx or of Marxism (they now know that there is *more than one*) and in order to ally themselves, in a new, concrete, and real way, even if this alliance no longer takes the form of a party or a worker's international, but rather of a kind of counter-conjuration, in the (theoretical and practical) critique of the state of international law, the concepts of State and nation, and so forth: in order to renew this critique, and especially to radicalise it.

[73] *Ibid.*, at p. 84.

extended and developed so as to be consistent with the ideal of democracy and human rights that it proclaims. This means going beyond the limitations of the idea of state sovereignty and the situation where international law is controlled by a small number of powerful states.[74]

For Derrida, we should hold today a dual engagement with international law. On the one hand, this involves a criticism of the limits of international law. He argues that a critical approach involves noting that international law and institutions depend upon a certain historical culture. Hence, they cannot be disassociated from certain European philosophical categories, particularly the concept of the state or national sovereignty.[75] Further, supposedly universal international law, remains in its application, largely dominated by a small number of nation states. Predominantly, it is these states who, through their technological, economic and military power, both determine and enforce the moment of decision within international law.[76]

On the other hand, Derrida argues that these facts do not operate to disqualify all international institutions. Rather, justice demands that we pay tribute to those within international institutions who are working towards the perfectibility of these institutions, and the emancipation of international law from its present limits.[77] Hence, we must salute the developments of international law, however partial and confused these might be. Particularly, credit must be given to the development of the notion of

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[74] *Ibid.*
[75] *Ibid.*, at p. 83.
[76] *Ibid.*
[77] *Ibid.* p. 84.

the right of 'humanitarian intervention,' which, in certain circumstances, operates to limit the sovereignty of the state.[78]

Derrida thus takes up the three Kantian contentions in a hyper-critical manner. This is displayed in his discussion of the development of international law through the criminalisation of war and violence in terms of the notion of the 'crime against humanity.'[79] He argues that the concept of a 'crime against humanity,' which now circulates in everyday language, is a product of, and given authority by, the international community at a particular date in its history. This notion overlaps with, but is not confounded with, the history of the re-affirmation of human rights.[80] In terms of its place within a wider cosmopolitan purpose, and the notion of 'forgiveness,' the notion of a crime against humanity, thus, belongs to a 'good movement.'[81] However, Derrida notes, with a Schmittian resonance, the ambiguous nature of humanity accusing itself. He states:

> (H)ere is a human race which would claim to accuse itself all at once, publicly and spectacularly, of all the crimes committed in effect by itself against itself, 'against humanity.'[82]

In this sense, Derrida argues that 'we' are all heirs in some fashion to crimes against humanity. Further, that 'we' even revere and celebrate these events. Sometimes, these events, as massive, organised and cruel murders, are those that are retrospectively deemed 'legitimate revolutions.' Hence, these acts themselves have permitted the

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[78] *Ibid.*
[79] Derrida, J. *On Cosmopolitanism and Forgiveness*, Dooley, M. and Hughes, M. tr. (London: Routledge, 2001), p. 29.
[80] *Ibid.*
[81] *Ibid.*
[82] *Ibid.*

emergence of, and are at the foundations of, notions like those of crimes against humanity and human rights.[83]

Derrida, in holding onto the importance of international law and cosmopolitan right, maintains something of a critical distance. This, it seems, is in part fostered by an awareness of law's violence. This is an awareness that the cosmopolitan concepts underlying international law, institutions of the United Nations and human rights, are not morally 'pure' notions, but rather, they have developed historically through the often bloody passage of the European nation-state system and its colonial-imperial legacy. These notions are themselves forms of law and Right that have come into existence through the course of, and in response to, the wars and violence of history. He argues:

> *All* Nation-States are born and found themselves in violence. I believe that truth to be irrecusable. Without even exhibiting atrocious spectacles on this subject, it suffices to underline a law of structure: the moment of foundation, the instituting moment, is anterior to the law or legitimacy which it founds. It is thus *outside the law*, and violent by that very fact. But you know that this abstract truth could be illustrated (what a word, here!) by terrifying documents, and from the history of all States, the oldest and the youngest.... This foundational violence is not only forgotten. The foundation is made in *order* to hide it; by its essence it tends to organise amnesia, sometimes under the celebration and sublimation of the grand beginnings.[84]

In this sense, the idea of a crime against humanity, and thus the crime of war, involves both a conceptual shift in the history of thinking about nation-states, and also a re-inscription of law's violence, this time as the violence of international law. Hence, Derrida argues that what appears singular and new here, today, is the project of making states, or at least the heads of state responsible for their violence and forcing

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[83] *Ibid.*
[84] *Ibid.*, at p. 57.

them to appear before universal authorities.[85] However, such a prosecution or intervention in the name of 'humanity' is always limited, in that it still relies upon the action and power of sovereign states. Further, when action is taken in the name of universal human rights, this occurs in a politically interested fashion, in which sovereignty and power relations inform the decision and action. Derrida notes, for example, N.A.T.O.'s intervention in Kosovo, rather than in Chechnya.[86] Law, as international law, thus reinscribes itself and its authority through force, through war as legitimate violence, which as a 'police action' is subject to politics and is, thus, arbitrary.

Derrida, in the tradition of a radical natural law, and, as such, not too removed from Kant's categorical imperative, argues that we must go beyond the international law. That the inheritance of the cosmopolitan tradition involves the duty to think of an international law that is to come. In following Kant's cosmopolitanism and intending to extend this principle and go beyond it, Derrida argues that we are not defined through and through by the political, and, above all, not by citizenship within the nation state. Rather, something 'arrives' that exceeds all institution, all power, all juridical-political authority. This is the idea of a 'democracy to come.'[87]

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[85] *Ibid.*

[86] *Ibid.*, at p. 58.

[87] *Ibid.*, at p. 55. See also, Derrida, J. *Specters of Marx: The State of Debt, the Work of Mourning and the New International,* Kamuf, P. tr. (New York: Routledge, 1994). Derrida, when investigating what is 'living' in the Marxist inheritance speaks of this concept, the 'democracy to come' in terms of its 'messianic' element. He states at p. 59:

> Well, what remains irreducible to any deconstruction, what remains as undeconstructable as the possibility itself of deconstruction is, perhaps, a certain experience of the emancipatory promise; it is perhaps even the formality of a structural messianism, a messianism without religion, even a messianic without messianism, an idea of justice - which we distinguish from law or right and even from human rights - and an idea of democracy - which we distinguish from its current concept and from its determined predicates today.

Derrida argues that we should go beyond the old Greco-Christian cosmopolitan ideal, that put forward by the Stoics, Saint Paul and Kant, and envision the coming of a universal alliance or solidarity, that extends beyond the internationality of nation-states and, thus, beyond citizenship.[88] For Derrida, what this might involve is the idea of an institution such as the United Nations, though modified in its democratic structure and Charter. This institution would have at its disposal an "effective intervening force" and, hence, would no longer have to rely upon rich and powerful nation states to carry out its decisions.[89] International law would no longer be hamstrung by states who, acting cynically and hypocritically, otherwise operate to bend international law to suit their own interests.[90] Derrida notes that he is not unaware of the utopic character of this ideal of an international institution of law and an international court of justice with their own autonomous force. He draws attention to the fact that such an ideal is also *aporetic*, in the sense that the idea of something 'beyond' the sovereignty of a nation state involves the constitution of a new figure. A universal sovereignty, an absolute law with force at its disposal.[91]

Derrida thus comes to recognise war's moral problem. He senses that the moral imperative to establish a cosmopolitan law necessary involves the possibility that this new law, this juridical order, will itself be violent. Derrida makes this point as he draws out and extends Kant's right of hospitality as a form of cosmopolitan ethics that commands us to go beyond the state. For Derrida, this ethics of hospitality is necessary if we are to come to terms with and overcome the violence that rages upon

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[88] Derrida, J. 'A Dialogue with Jacques Derrida' in Borradori, G. *Philosophy in a Time of Terror* (Chicago: University of Chicago Press, 2003), p. 124.
[89] *Ibid.*, at p. 114.
[90] *Ibid.*, at p. 114-5.
[91] *Ibid.*, at p. 115.

a world-wide scale and is implemented by both state and non-state organisations.[92] He

argues that the idea of hospitality is not simply of one ethic amongst others, rather,

that, insofar as it has to do with the *ethos*, with one's home, one's place of dwelling

and manner of being there, the manner in which we relate ourselves to others, then,

"ethics is hospitality."[93] However, any law of hospitality always involves a limit, it is

always dependent on and controlled by the state police. Hence, there remains the

problematic relation between the transcendental ethical command, and the force of

law through which it is always instituted. Of this, Derrida argues:

> It is a question of knowing how to transform and improve the law, and of knowing if this improvement is possible within an historical space which takes place *between* the Law of an unconditional hospitality, offered *a priori* to every other, to all newcomers, *whoever they may be*, and *the* conditional laws of a right to hospitality, without which *The* unconditional Law of hospitality would be in danger of remaining a pious and irresponsible desire, without form and without potency, and of even being perverted at any moment.[94]

Derrida's manner of attempting to deal with war's moral problem is to affirm the

transcendental ethical or moral moment, the moment of promise, of expectation, of

the democracy of international law and democracy that is to come. He affirms the

notion of responsibility to duty, whereby one can never be responsible enough.

Hence, ethical responsibility is always structurally within, but also beyond, any

international law, any human rights, any intervention. For Derrida, the transcendental

moment of the injunction always retains its status as an injunction, thus, it is not

completely caught, confined, or captured by the law. In this sense, the violence of

international law, of the humanitarian law, is never fully moralised, never given moral

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[92] Derrida, J. *On Cosmopolitanism and Forgiveness*, Dooley, M. and Hughes, M. tr. (London: Routledge, 2001), p. 5.
[93] *Ibid.*, at p. 17.
[94] *Ibid.*, at p. 23.

legitimacy, because the transcendental moral moment always sits beyond, always retains its status as an impossibility.

Derrida might be criticised for giving-up on the pragmatics of responsibility. It could be argued that Derrida, in attempting to be responsible to the responsibility, is, in effect, not responsible enough. This 'irresponsibility' might be the result of giving too much emphasis to the chaos or madness, of the decision. Such an emphasis operates to de-emphasise the 'mundaneness' of the decision. This mundaneness, perhaps, refers to the process of simply trying to get on with the pragmatics of ethical decision and action, in a world where any decision and action will necessarily be inadequate. However, Derrida's hyper-critical notion of responsibility, can be seen to occupy an important position, in that, it endeavours to keep a strict separation between morality and war. He argues:

> For justice does not end with the law. Nor even with duties (*devoirs*), which, in a still wholly paradoxical way, "must," "should" go beyond obligation and debt. I tried to show elsewhere that any pure ethics must begin beyond, law, duty and debt. Beyond law, that's easy to understand. Beyond duty, that's almost unthinkable. Recall what Kant says: a moral action must be accomplished not only "according to duty (*pflichtmässig*)" but "from duty (*eigentllich aus Pflicht*)," "out of pure duty (*aus reiner Pflicht*)." Once we have followed Kant this far, as we no doubt ought to do, a leap is still required. If I act out of pure duty, *because I must do so, because I owe it*, because there is a debt I must repay, then two limits come to taint any pure ethicity or pure morality. On the one hand, I subordinate my action to a knowledge (I am supposed to know what this pure duty is in the name of which I must act). Yet an action that simply obeys knowledge is but a calculable consequence, a deployment of a norm or program. It does not engage any decision or any responsibility worthy of these names. On the other hand, by acting out of pure duty, I acquit myself of a debt and thus complete the economic cycle of exchange; I do not exceed in any way the totalisation or reappropriation that something like a gift, hospitality, or the event itself should exceed. We must thus be dutiful beyond duty, we must go beyond the law, tolerance, conditional hospitality, economy and so on.[95]

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[95] Derrida, J. 'A Dialogue with Jacques Derrida' in Borradori, G. *Philosophy in a Time of Terror* (Chicago: University of Chicago Press, 2003), p. 133.

In this sense, any affirmation of international law is always only as a promise, an expectation. Derrida attempts to resolve the problem of the moralisation of war and the legitimation of a particular war by morality, through a radicalisation of the Kantian moral imperative that situates the injunction of transcendental morality always beyond any law. This, though, runs across the question of, how exactly might one be responsible to a never-ending responsibility? Further, how can state action be reconciled with this radical moral responsibility?

It can be argued that Derrida does not overcome war's moral problem. The structure of the 'promise,' while critiquing the immorality of war, through sleight of hand does violence to itself, by promising to human action more than it is willing. In a sense, it gives the act of war a degree of moral legitimacy via the warring actor's belief in the promise. The necessary belief that by one's own action, and by only such an action, can humanity even come close to fulfilling the promise of an international law that is yet to come. While this action is the undecidable and represents an *aporia*, it also involves the demand that a decision must be made, that someone must act.

Within Derrida's approach to war, how this action is coordinated remains something of a problem. By being forced to act, to act with force, the international actor, the state, must engage in some form of conduct to bring international law and peace into realisation. Yet, by emptying international law of its content, by speaking of the to come only at the level of *aporetic* structure and quasi-messianic promise, then the actor is perhaps left to provide the promise, the international law to come, with their own content. This, then, opens onto a possibility of a contestation between differing

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'contents,' between differing versions of what is, to come. Further, if the actors do not hold onto a rigorous deconstruction of their own content, then the notion of the promise adds further fuel to the possibility of war and violence. In this respect, it can be said that, while Derrida recognises war's moral problem and treats it with a great deal of caution, his approach is perhaps not fully able to come to terms with or overcome war's moral problem.

Rawls and the Moralisation of the International Order

The late John Rawls, in *The Law of Peoples*, openly inherits Kant's three principle contentions. Rawls morally condemns war and sets up the idea of peace as a goal to be attained. He draws upon an idea of the cosmopolitan right of 'peoples' that is beyond the right of sovereign states, and he sees the necessity of the establishment of a viable international juridical order in the form of a grand social contract. Of the three thinkers discussed in this chapter, Rawls attempts to stay closest to the ideals of Kant as set forth in *Perpetual Peace*. Rawls takes a less critical approach to Kant's framework and, instead, merely tries to think through the pragmatics of how the Kantian cosmopolitan project might be achieved in contemporary times as a 'realistic utopia.'

However, Rawls also strays the farthest from Kant, in that, of the three inheritors, he is least aware of the difficulties of war's moral problem. Unlike Kant, Rawls does not worry about the problematic use of morality to think about war and the possibility that the morality which is used to condemn, is turned instead into a legitimation of particular wars. Rawls comes across this difficulty whereby his neo-Kantian ethical

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approach to war results in a thesis that perhaps not only moralises war, but tends towards moralising the international order.

Rawls's project takes Kant's idea of a peaceful federation as its starting point and attempts to think through how this might be achieved in contemporary times.[96] This involves the formation of an international social contract between liberal democratic states, and, then, the thinking through the problems involved in the extension of this to non-liberal states and, further, the inclusion of authoritarian and aggressive states. The *Law of Peoples* thus follows Kant's concern with the problem of war whereby the freedom of any particular state and its citizens is bound to the successful formation of a peaceful federation amongst states.[97] Rawls states:

> The basic idea is to follow Kant's lead as sketched by him in *Perpetual Peace* (1795) and his idea of a *foedus pacificum*. I interpret this idea to mean that we are to begin with a social contract idea of the liberal political conception of a constitutionally democratic regime and extend it by introducing a second original position at the second level, so to speak, in which the representatives of liberal peoples make an agreement with other liberal peoples.... and again with non-liberal though decent peoples.... All this also accords with Kant's idea that a constitutional regime must establish an effective Law of Peoples in order to realise fully the freedom of its citizens.[98]

Rawls states that some might think the idea of a 'realistic utopia' of a law of peoples is merely a fantasy, particularly given the shock to western consciousness inflicted by Auschwitz. He argues that following the Holocaust and our knowledge, now, that human society admits its own "demonic possibility," this should not, however, affect our hopes for achieving something similar to Kant's *foedus pacificum*.[99] He notes that we must not allow the great evils of the past and present to undermine our hope for

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[96] Rawls, J. *The Law of Peoples* (Cambridge Mass.: Harvard University Press, 1999), p.10.
[97] *Ibid.*
[98] *Ibid.*
[99] *Ibid.*, at p. 21.

the future of our society to belong to a society of liberal and decent peoples across the world. If our hope is undermined, then the "evil" and "demonic" conduct of others destroys us and seals us within their victory.[100]

Rawls argues that we must strengthen our resolve by developing a reasonable and workable conception of political right and justice to govern the relations between peoples. In accomplishing this, we may follow Kant's lead and begin from a political conception of a "reasonably just constitutional democracy" and then proceed to extend this conception outward to the society of other liberal and decent peoples.[101] In this respect, Rawls takes up very strongly the Kantian moral condemnation of war. Whereby, for Rawls, war is not simply a wrong, but rather an 'evil,' which must be overcome through a higher conception of Right and the institution of some form of 'reasonably just' juridical order.

In attempting to overcome war, Rawls follows the Kantian idea that a cosmopolitan right exists beyond the right of sovereign states, and hence that sovereignty is to be limited by a higher notion of Right. He argues that we must reformulate the powers of state sovereignty in light of a reasonable law of peoples and deny to states the traditional rights to war and to unrestricted internal autonomy.[102] He claims that this accords with the historical shift since World War II, through which international law now limits the state's right to wage war to instances of self-defence and further, that the development of human rights restricts the state's right to internal sovereignty.[103] In following this cosmopolitan ideal, Rawls draws attention to reasoning behind his

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[100] *Ibid.*, at p. 22.
[101] *Ibid.*, at p. 23.
[102] *Ibid.*, p. 27.
[103] *Ibid.*

use of the term 'peoples' rather than 'states.' He argues that people's are to derive their rights and duties, that is their so-called sovereignty, from the law of peoples itself, of which they would agree, along with other peoples in suitable circumstances.[104]

In considering what the content of such an agreement or social contract between 'peoples' might be, Rawls draws upon his thought-exercise known as the 'veil of ignorance.'[105] This asks a person to construct a set of rules which would be reasonable and just, under the condition whereby they are unaware of their own 'comprehensive doctrines.' Further, this would involve being unaware of the particulars of their own person, their race, their gender, their wealth and so on. The idea, to an extent, can be understood as something of a reworking of Kant's categorical imperative, the maxim that the moral law must be capable of being a universal law for everyone. Rawls uses this thought experiment to consider the principles appropriate to a liberal constitutional democracy, and then extends this to consider what would be the appropriate principles that would govern the relations between liberal peoples.

In this thought experiment, 'peoples' are modelled as being 'rational' and, further, subject to a thick veil of ignorance. They do not know the size of the territory, or the population or the relative strength of the people whose fundamental interests they

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[104] *Ibid*. A common liberal critique of Rawls' *Law of Peoples* is that it betrays the principles of liberalism by according legitimacy to inegalitarian regimes, or that he is too forgiving of serious forms of oppression in the name of liberal tolerance. See: Buchanan, A. "Rawls's Law of Peoples: Rules for a Vanished Westphalian World," *Ethics* 110 (4) 2000, 697-721; Tesón, F.R. "The Rawlsian Theory of International Law," *Ethics and International Affairs* 9 1995, 79-99; Tan, K. "Liberal Toleration in Rawls's Law of Peoples," *Ethics* 108 (2) 1998, 276-295.

[105] On Rawls's notion of the 'veil of ignorance' see: Rawls, J. *A Theory of Justice* (Belknap Press, 1971) and Rawls, J. *Political Liberalism* (New York: Columbia University Press, 1993).

represent.[106] By this method, which is not completely 'ignorant,' as it draws upon the "familiar and traditional principles of justice among free and democratic peoples,"[107] Rawls draws up a list of principles that constitute the basic charter of the law of peoples.[108] Of these, Rawls states that this list of principles is "admittedly incomplete," and involves the adding of other principles and a degree of ongoing explanation and interpretation.[109] However, he later claims: "I contend that the eight principles of the law of peoples are superior to any others."[110]

In terms of the idea of an international juridical order, Rawls argues that his conception of the law of peoples differs to the 'cosmopolitan view,' in that such a view focuses upon the wellbeing of individuals and not the justice of societies.[111] He notes that, according to the cosmopolitan view, there is still a requirement after each domestic society has reached a level of internally just institutions, to consider a method of global distribution that reduces the material inequalities among societies.[112] In contrast, the law of peoples stops short of this goal. It is indifferent to the global distribution of wealth, short of a responsibility of wealthy nations to give some

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[106] Rawls, J. *The Law of Peoples* (Cambridge Mass.: Harvard University Press, 1999), p. 32.
[107] *Ibid.* at p. 37.
[108] *Ibid.* These principles are:

(i)   Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
(ii)   Peoples are to observe treaties and undertakings.
(iii)   Peoples are equal and are parties to agreements that bind them.
(iv)   Peoples have to observe a duty of non-intervention.
(v)   Peoples have a right of self-defence but no right to instigate war for reasons other than self-defence.
(vi)   Peoples are to honour human rights.
(vii)   Peoples are to observe certain restrictions in the conduct of war.
(viii) Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime.

[109] Rawls, J. *The Law of Peoples* (Cambridge Mass.: Harvard University Press, 1999), p. 37.
[110] *Ibid.*, at p. 41.
[111] *Ibid.*, at p. 119.
[112] *Ibid.*

assistance to poorer ones. Hence, the law of peoples proscribes no target further than

"justice and stability for the right reasons."[113] On this basis, the law of peoples sets up

the idea of co-operative organisations that would involve three types. One framed to

ensure free trade between peoples, a second to allow peoples to borrow from a

cooperative banking system and a third, similar to the United Nations, that would be

referred to as a Confederation of Peoples.[114]

In working out the possible realisation of this aim, Rawls's account involves a form of

categorisation of states into five types: liberal peoples, decent peoples, outlaw states,

societies burdened by unfavourable conditions, and benevolent absolutisms.[115] Rawls

refers to liberal and decent peoples together, as "well ordered peoples."[116] In this

process of characterisation, certain moral, legal and political factors become important

in distinguishing one type of state from another. He argues that liberal peoples have

three basic features. First, a reasonably just constitutional democratic government that

serves the fundamental interests of the citizens. Second, citizens are united by

common sympathies, a kind of nationality, a sense of unity as a community and a

nation. Third, an attachment to a political-moral conception of right and justice.[117]

With respect to this moral nature, Rawls states:

> Like citizens in domestic society, liberal peoples are both reasonable and
> rational, and their rational conduct, as organised and expressed in their
> elections and votes and the laws and policies of their government, is similarly
> constrained by their sense of what is reasonable.[118]

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[113] *Ibid.*, at p. 120. Some 'cosmopolitans' have criticised Rawls's argument for limiting the notion of distributive justice to an application only within the state. Hence Rawls is considered to be not cosmopolitan enough or even at all. See: Caney, S. "Cosmopolitanism and the Law of Peoples" in *Journal of Political Philosophy* 9 (3) 2001, 1-29.

[114] Rawls, J. *The Law of Peoples* (Cambridge Mass.: Harvard University Press, 1999), p. 42.

[115] *Ibid.*, at p. 63.

[116] *Ibid.*

[117] *Ibid.*, at p. 23.

[118] *Ibid.*, at p. 25.

While Rawls argues that liberal peoples have a moral character and are guided by a sense of what is reasonable, he argues that a liberal society does not posses a "comprehensive conception of the good" and, rather, only citizens and associations within liberal society have such conceptions.[119] Rawls argues that liberal peoples, because of their 'reasonableness,' wish to see a reasonably just and peaceful set of relations between societies. As such, liberal peoples are willing to limit the traditional conception of state sovereignty and the state's right to war, to the lesser right of the right to self-defence and, further, they are willing to limit a state's internal sovereignty through human rights.[120] Rawls goes on to state that, since 1800, though liberal democratic societies have often engaged in war against non-democratic states, they have not fought one another.[121] He claims:

> The absence of war between major established democracies is as close to anything we know to a simple empirical regularity in relations among societies.[122]

It is this empirical regularity, that, in a sense, seems to underwrite for Rawls the law of peoples as a 'realistic utopia.'[123] Rawls presents the argument that, as war has been avoided between liberal societies, then it can be assumed that, if the ideas and principles that structure liberal societies internally can come to hold sway over the relations between all societies, then peace will be more likely to occur. He states that the law of peoples is an extension of the liberal conception of justice for a domestic

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[119] *Ibid.*, at p. 34.
[120] *Ibid.*, at p. 42.
[121] *Ibid.*, at p. 52. On this point Rawls follows the liberal theorist Doyle, M.W. "Liberalism and World Politics," *American Political Science Review*, 80 1986, 11-51. See also: Tesòn, F.R "Kantian International Liberalism" in Mapel, D.R and Nardin, T. (eds.) *International Society: Diverse Ethical Perspectives* (Princeton: Princeton University Press, 1998).
[122] Rawls, J. *The Law of Peoples* (Cambridge Mass.: Harvard University Press, 1999), p. 52.
[123] *Ibid.*

regime to a society of peoples.[124] As such, while his conception is not a forcing of non-liberal societies to become liberal, the law of peoples involves a process of 'moral learning,' a psychological process in which these liberal principles become honoured and adopted over time.[125] He argues:

> (I)f a liberal constitutional democracy is, in fact, superior to other forms of society, as I believe it to be, a liberal people should have the confidence in their convictions and suppose that a decent society, when offered due respect by liberal peoples, may be more likely, over time, to recognise the advantages of liberal institutions and take steps towards becoming more liberal on its own.[126]

In characterising 'decent societies,' Rawls suggests that such societies are "associationist" in form, where members are viewed in public life as part of groups and each group is represented in a "decent constitutional hierarchy."[127] Like liberal societies, decent societies do not have aggressive aims. However, unlike liberal societies, decent societies do have an underlying religious or philosophical doctrine that is 'comprehensive' and has influence over the structure of government and social policy.[128] Further, decent societies observe human rights in accordance with a conception of the common good and idea of justice. These rights necessarily involve corresponding social duties and obligations.[129] In giving an example of a decent society, Rawls offers an imagined idealised Islamic state named 'Kazanistan.' In this state, there is no separation between church and state, and, while religious minorities are respected, they cannot obtain higher positions in government.[130]

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[124] *Ibid.*, at p. 55.
[125] *Ibid.*, at p.44.
[126] *Ibid.*, at p. 62.
[127] *Ibid.*, at p. 64.
[128] *Ibid.*
[129] *Ibid.*, at p. 66.
[130] *Ibid.*, at p. 75-76.

Such a decent state is in contrast to what Rawls refers to as an 'outlaw state.' Rawls argues that what constitutes an outlaw state is its 'aggressive nature.' He argues that such 'regimes' think it a sufficient reason to engage in war as a means of advancing a state's rational as opposed to reasonable interests.[131] I suggest that, at this point, Rawls demonstrates something of an unawareness of war's moral problem, and comes across a difficulty which Kant attempted to avoid.

For Rawls, the idea of a law of peoples developing between liberal peoples is relatively straightforward. The extension of this to decent peoples is possible, if liberal peoples tolerate a degree of difference and do not force their principles upon others. However, this ideal falls into difficulty when 'well-ordered peoples' come into confrontation with peoples who are not 'well-ordered' and who, are either aggressive, or, unwilling to give up their sovereignty to the law of peoples. In this, Rawls's argument strikes the problem which hit Kant, namely, how is the moral law of peace to be brought into existence against those who may oppose it?

Rawls's response to this difficulty is to invoke the doctrine of 'just war.' He states:

> The aim of a just war waged by a just well-ordered people is a just and lasting peace among peoples, and especially with the people's present enemy.[132]

For Rawls the moral legitimacy of war is limited to a particular people in the struggle against a particular enemy. Further, it may be extended to a war waged in the protection of human rights. He states:

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[131] *Ibid.*, at p. 90.
[132] *Ibid.*, at p. 94.

> Well-ordered peoples do not wage war against each other, but only against non-well-ordered states whose expansionist aims threaten the security and free institutions of well-ordered regimes and bring about the war.[133]

Further that:

> Is there ever a time where forceful intervention might be called for? If the offences against human rights are egarious and the society does not respond to the imposition of sanctions, such intervention in the defence of human rights would be acceptable and would be called for.[134]

Rawls's approach, which begins by following the Kantian condemnation of war and setting up the goal of peace, ends by drawing upon morality to justify war, to justify wars against outlaw states. However, Rawls, in drawing upon morality to justify war, also leaves behind the Kantian rigour of the categorical imperative. Rawls's argument can be understood as moving away from Kant's ultimate principle of morality, and moving towards a form of 'subjective-moralisation.' In this respect, war is not justified by the transcendental moment of morality, rather, war is justified by private inclinations and the use of a moralised language. In a sense, Rawls uses the law of peoples to give 'comfort' to particular wars and particular acts. By doing so, Rawls falls into war's moral problem, that is, Rawls reduces the transcendental moment of morality to the subjective-moralisation of war. State actors are thus redescribed actors as having moral legitimacy or illegitimacy. This has the effect of granting certain actors a degree of moral legitimacy, perhaps regardless of their actions. This can be seen to be occurring through Rawls's approach to the 'outlaw state.'

At first instance, Rawls's characterisations appear to be based upon distinctions between forms of states, distinctions based upon different forms of political, legal and

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[133] *Ibid.*
[134] *Ibid.*, at p. 94, no. 6.

ethical organisation. This would seem to be the case in the distinction between liberal and decent societies, the first having its organisation in the tradition of Anglo-European liberal democratic individualism, and the latter describing non-Anglo-European states where while adopting standards of human rights, their specific cultural and religious traditions remain dominant. However, Rawls's third category of 'outlaw state' suggests that the distinctions that underlie Rawls's characterisation of states may not be necessarily grounded in institutional and political differences. Rather, they are perhaps influenced by an abstract moral categorisation.

For Rawls, what constitutes an outlaw state is the fact that it is 'aggressive.' Yet, the term 'aggression' seems to involve something of a loaded meaning, based upon the certain moral legitimacy of the actor. Rawls argues that any society that launches into war in the interests of gaining wealth, natural resources, to win power and empire, and, therefore, no longer honours the law of peoples becomes an 'outlaw state.'[135] However, Rawls also suggests the contrary. Where for some states, 'aggression' may not necessarily deem it to be classified as an outlaw state. He argues that with regard to the act of aggressive war: "Of course, so-called liberal societies sometimes do this, but that only goes to show that they may act wrongly."[136] In this respect, Rawls seems to consider that a liberal society should not be properly considered as 'outlaw state.' Rather, that the justness of its domestic institutions and the moral learning of its people, renders any acts of aggression an exception and not the rule.

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[135] *Ibid.*, at p. 91.
[136] *Ibid.*

Another point that suggests that Rawls's classification of states does not rest on very firm ground, is his notion of 'decency.' Rawls notes that "there is no definition of decency."[137] Further, that:

> I think of decency as a normative idea of the same kind as reasonableness, though weaker (that is, it covers less than what reasonableness does). We give it meaning by how we use it.[138]

Rawls's account gives the sense that his system of categorisation between liberal, decent and outlaw, rests upon something similar to Schmitt's notion of the use of moral terms to usurp the moral legitimacy of the enemy.[139] This is not to say that Rawls's categorisation is removed entirely from empirical reality. Rather, his comprehension of the actions of differing states seems to be framed through a conceptual schema where some groups are considered morally good and others bad or evil. In this sense, the actions of differing states are interpreted and judged through a subjective, moralised lens. Under this conception, wars that are fought by states that are 'good' or 'mostly good' are considered wars of 'self-defence' and, thus, 'just.' Whereas those wars fought by 'bad' states, are 'aggressive,' and sometimes, represent the embodiment of 'evil.' In such an outlook, certain historical facts are emphasised, while others are ignored or explained away as exceptions to the normal standard of moral behaviour.

This is perhaps best demonstrated when Rawls claims that the absence of war between major democracies, since 1800, is "as close to anything we know to a simple

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[137] *Ibid.*, at p. 67.
[138] *Ibid.*
[139] Schmitt, C. *The Concept of the Political* Schwab, G. tr. (Chicago: University of Chicago Press, 1996).

empirical regularity in relations among societies."[140] Following this statement Rawls

seems to gloss over the history of Anglo-European colonialism. Rawls refers to this

history merely as "the great shortcomings of actual, allegedly constitutional

democratic regimes."[141] Further, Rawls says he cannot offer an explanation of this

colonial and imperial history, because the history of European colonialism involves

examining complex issues such as class structures, the role of mercantilism and the

desire for colonies, which are issues too wide for his analysis.[142] Against Rawls's

'empirical regularity,' a retort in the style of Schmitt could be put. One might suggest

that, just because 'friends' do not go war against 'friends,' this does not mean that

'friends' do not go to war against their 'enemies.'

A further example of Rawls's subjective moralisation, or attempt to morally

legitimate particular acts of state violence, involves his treatment of the colonial past

of the U.S.A. Rawls describes the overturning of, or interference in, the governments

in Chile, Guatemala, Iran and Nicaragua, by the U.S.A., as covert operations carried

out by a "government prompted by monopolistic and oligarchic interests without the

knowledge and criticism of the public."[143] This description may be juxtaposed with

Rawls's discussion of the details of history, when considering the justification of the

Allied bombing of German cities and civilians in World War II He states:

> Britain's bombing of Germany until the end of 1941 or 1942 could be justified
> because Germany could not be allowed to win the war, and this is for two
> basic reasons. First, Nazism portended incalculable moral and political evil for
> civilised life everywhere. Second, the nature and history of constitutional
> democracy and its place in European history were at stake.[144]

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[140] Rawls, J. *The Law of Peoples* (Cambridge Mass.: Harvard University Press, 1999), p. 52.
[141] *Ibid.*, at p. 53.
[142] *Ibid.*, at p. 54.
[143] *Ibid.*, at p. 53.
[144] *Ibid.*, at p. 99.

In Rawls's engagement with history, he seems to broadly brush a number of acts with an abstract or subjective, moral categorisation. In this, Rawls displays a degree of moral ambiguity. Some acts are considered intrinsically 'evil,' for example, those of the Nazi's who 'threatened democracy in Europe.' Whereas, the actions of other states, for example the U.S.A., are not considered as 'evil' or a 'threat to democracy.' Rather, such acts are described as merely 'shortcomings.' In Rawls's conception, in the strict divide between good and evil, he does not attempt to describe-away, gloss over or downplay the acts of Nazi Germany as 'shortcomings' carried out by 'monopolistic and oligarchic interests.'

Rawls's encounter with war in the *Law of Peoples* demonstrates something of an inability to grasp war's moral problem. His approach of combating the problem of war through the notion of 'just war' renders his account liable to the Kantian critique of offering 'sorry comfort' to the makers of war. Further, Rawls seems unaware of the contradictions inherent in his approach, he draws upon a Kantian morality to condemn the evils of war, but then descends into a moral legitimation of certain wars to this end. Rawls's account helps to show the dangers that may arise through an inheritance of Kant's approach to war, when this inheritance does not hold onto Kant's cautious approach to war's moral problem. In contrast to Habermas and Derrida, Rawls does not pay enough regard to the position of war's moral problem. This lack of attention leads to an attempt to use morality to justify some acts of war and condemn others, the result being the sacrifice of transcendental morality and an opening onto the subjective-moralisation of war.

This chapter has shown how Kant's inheritance of war's moral problem and his approach as outlined in *Perpetual Peace* has exerted an influence over contemporary philosophical and jurisprudential thought. In particular, Kant's approach to war's moral problem has been taken up by three contemporary thinkers, Jürgen Habermas, Jacques Derrida and the late John Rawls. This chapter has shown how each of these thinkers took up Kant's three symptomatic contentions: the moral condemnation of war, the enunciation of cosmopolitan right and the establishment of an international juridical order. Further, attention was drawn to the extent to which each of these thinkers, in taking up Kant's contentions, displayed an awareness (or perhaps a lack of awareness) of war's moral problem. It has been shown how each thinker has added to Kant's approach, and each, in a sense, can be considered as developing within a natural law tradition, an approach to war's moral problem. In this respect, each thinker has added to the development of a jurisprudence of war.

Habermas's approach has followed Kant's moral imperative but has recognised the inadequacy within international law of states being bound by only moral duty and not legal force and regulation. In this, Habermas has stayed close to Kant's awareness of the important relation between law and force and has expanded upon Kant's comments on the need for the development of valid and working 'positive,' international, or postnational legal institutions to realise the moral command. However, Habermas's approach has also drawn attention to a difficulty or inadequacy inherent within this revised Kantian approach. This involves the situation where a valid and objectively neutral international law is not yet in existence. In this case,

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Habermas's approach has a tendency to fall back into the Kantian figures of the 'moral politician' and the 'political moralist,' and relies once again upon states to act 'morally,' and perhaps, at times, engage in war as a form of moral action.

Derrida's contribution to the development of the thinking of war's moral problem through the contentions of Kant, has been to draw the attention of jurisprudence towards the *aporetic* nature of international law. Derrida's stress upon the inherent violence of law leads to something of a hyper-critical assessment of moral action within international law and an emphasis upon a cautious approach to the relation between the establishment of an international law to come, and the violence that any attempt to realise this might involve. However, Derrida's approach suffers somewhat due to its concentration upon the *aporia* of law. Derrida perhaps approaches war's moral problem by developing a natural law that is without content, that is reduced to the bare structure of an emancipatory promise. If Derrida's approach is to remain simply at the level of critique, then, this is perhaps not a problem. However, if Derrida's account is to be read as a program, or a contention towards international political action (as is implied 'to an extent' by the notion of the 'New International'), then Derrida's account does not assist in overcoming war's moral problem. Rather, his account leads jurisprudence back into it.

Of the three approaches described generally by the term 'neo-Kantian ethics,' Rawls perhaps offers the least to a jurisprudence of war. His approach, which might be described as a pragmatisation of Kantian natural law, leads directly into war's moral problem. Through his effort to work out how to bring into realisation an international law that guarantees peace, Rawls proceeds to give an account of a 'just war,' a war

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which attempts to argue its legitimacy based upon its claim to a transcendental morality.

On the flip side, it could be argued that Rawls's account is of the greatest importance to the development of a jurisprudence of war. This occurs in the sense that Rawls's account presents the darker side, or the nightmare, inherent within the Kantian approach to war's moral problem. Rawls's account leads the thinking of war back into a pre-Westphalian situation, where morality (as a replacement or renewal of the sacred) is the dominant form of conceptualising international relations and the acts of war. Yet, in the Kantian sense, Rawls's use of 'morality' is the most immoral. Rawls's use represents a descent into a world of private inclination and private interest. In this account, state actors carry out the polemic or masquerade of acting morally, and each, while not following the injunction of the moral imperative, still claim to be the 'most moral.'

What Rawls, and the difficulties or limitations inherent within the approaches of Habermas and Derrida help to illustrate, is that the approach of 'neo-Kantian ethics' to war's moral problem, is somewhat limited. However, given Kant's revolutionary re-conceptualisation of the natural law tradition, it would perhaps not be appropriate, in the contemporary world, to approach war's moral problem by reverting to the approaches taken by the post-Westphalian natural lawyers. In this respect, the development of a jurisprudence of war, which would need to take into account the important comments made by Habermas and Derrida, (and the lessons learnt from Rawls) might perhaps be better placed if it were to look to the philosophy of Hegel. In

the following chapters I will look towards a reading of Hegel that might enable

jurisprudence, to more adequately, come to terms with war's moral problem.

Chapter 3

The Speculative Thinking of Law

Introduction

So far, the thesis has traced the inheritance of war's moral problem through the approach of Kant, and then, the approaches of neo-Kantian ethics. While each have added to a jurisprudence of war, each have come across a number of barriers and have not been able to fully come to terms with war's moral problem. In following the inheritance of war's moral problem through something of a natural law tradition, it is necessary for jurisprudence to examine Hegel's inheritance of this problem from Kant. Hegel's approach to war's moral problem overcomes some of the barriers encountered by Kant. However, Hegel's approach also comes across a number of difficulties. It is hoped that, by drawing upon Hegel's approach to war's moral problem, the thesis might begin to develop a jurisprudence of war that may come to terms with war's moral problem in contemporary times. Yet, there is a degree of contention over the interpretation of Hegel's philosophy in general. Hence, before turning to Hegel's approach to war's moral problem, it will be necessary over the next three chapters to develop a rereading of Hegel that can be used in the development of a jurisprudence of war.

In this chapter, I will reread Hegel's theory of law focussing upon the category of 'actuality' (*Wirklichkeit*). I will attempt to develop actuality (*Wirklichkeit*) as a contemporary legal category. In the philosophy of Hegel, this category has a

particular meaning with respect to Hegel's *Logic*. Hence, this chapter will begin by giving a brief discussion of Hegel's *Logic*. I will then suggest a meaning of 'actuality' (*Wirklichkeit*) as a legal category and introduce its relevance to the consideration of questions of law.

Hegel's Logic as a Critical Metaphysics

Within the thesis's approach to war's moral problem, it is necessary to reread Hegel's category of actuality (*Wirklichkeit*) and draw out its sense of meaning as a legal category suitable for contemporary questions of law. Preparing this category, and, indeed, the philosophy of Hegel, for an account of law that has contemporary relevance, involves understanding Hegel's *Logic* as presenting a 'critical metaphysics.' This will involve paying attention to recent 'inter-subjective' interpretations of the *Logic*.

It should be noted that the discussion of Hegel's *Logic* can only take place as an outline and cannot attempt to be comprehensive. While the interpretation of Hegel's *Logic* is contentious, it is not the central focus of the thesis and is relevant only to the positioning of Hegel's philosophy for the purpose of engaging with a jurisprudential problem. Second, the point must noted that I am a legal theorist and not a Hegel scholar. Hence, the interpretation taken operates as a rereading of certain aspects of the philosophy of Hegel, with questions of law in mind. Further, it should be noted that the difficulty of coming to terms with Hegel's *Logic* is compounded by the fact that contemporary debates and interpretations by German scholars over the past thirty

years, remain mostly untranslated and are only creeping slowly into Anglophone Hegel scholarship.

Regarding my contribution to the interpretation of Hegel, within the thesis, I offer a 'rereading' of Hegel's category of 'actuality' (*Wirklichkeit*) and Hegel's theory of 'recognition.' With regard to the former, I draw upon contemporary inter-subjective interpretations of the *Logic*, and, with regard to the latter, I draw upon a number of contemporary interpretations of Hegel. My rereading attempts to develop these interpretations by understanding their operation jurisprudentially, that is, as focussed upon and working through questions of law. By treating Hegel as a jurisprudential thinker, I use these notions together with aspects of Hegel's philosophy that are less contested within Hegel scholarship, such as Hegel's critique of Kantian morality, Hegel's theory of ethical life, and Hegel's accounts of civil society and the state. In this sense, I do not attempt a radical interpretation of Hegel, rather, I seek to develop an interpretation of two Hegelian notions by focussing upon questions of law. I will now discuss briefly the interpretation of Hegel's *Logic*.

With regard to the *Logic*, there are a number of differing interpretations. One standard 'metaphysical' view, as given by Charles Taylor, interprets Hegel's *Logic* as a metaphysical doctrine of spiritual substance, as a ground plan in which we can see the essence of *Geist* or God unfolding.[1] Other metaphysical views take somewhat similar interpretations, but vary with regard to the position of 'subjectivity' and where this emerges.[2] Another line of interpretation is the 'non-metaphysical' view. This

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[1] Taylor, C. *Hegel* (Cambridge: Cambridge University Press, 1975), pp. 225-231.
[2] For differing views that take up or examine the 'metaphysical' interpretation see: Houlgate, S. *Freedom Truth and History: An Introduction to Hegel's Philosophy* (London: Routledge, 1991); Plant, R. *Hegel* (London: Allen and Unwin, 1973); Inwood, M. *Hegel* (London: Routledge, 1983).

interpretation sees the *Logic* as representing a form of category analysis without any existential commitments and operating as the description of certain relations between basic concepts. Such a 'non-metaphysical' interpretation of the *Logic* has been taken by J.N. Findlay[3] and Klaus Hartmann.[4] Also, of note, are interpretations of the *Logic* in terms of hermeneutics,[5] and a variety of what are sometimes referred to as 'social-Kantian' interpretations. For these, the *Logic* represents categories of thought produced through social interaction. These readings concentrate upon what it means to be a 'thinking' subject and vary to the extent that the *Logic* is realist or anti-realist, the latter treating the *Logic* as a form of social theory. [6] The former interpretation shares 'some' characteristics with an understanding of Hegel's *Logic* as a 'critical metaphysics.'

Hegel's *Logic* can be understood as attempting to present, what might be called, a 'critical metaphysics.' This is in accordance with the suggestion that Hegel's *Logic* can be interpreted as presenting, in its three parts, not a return to a pre-critical classical metaphysics, but a critique of both classical metaphysics and the Kantian metaphysics of reflection. It can be seen as the attempt to critically engage with a project of ongoing metaphysical enquiry. A respected interpretation along these lines is given by Michael Theunissen.[7] With regard to this interpretation, Robert B. Pippin

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[3] Findlay, J.N. *Hegel: A Re-Examination* (London; George Allen and Unwin, 1958).

[4] Hartmann, K. "Hegel: A Non-Metaphysical View" in MacIntyre, A. (ed.) *Hegel: A Collection of Critical Essays* (New York: Anchor Books, 1972). On this view see also: Pinkard, T. "The Logic of Hegel's Logic" in Inwood, M. (ed.). *Hegel* (Oxford: Oxford University Press, 1985).

[5] Gadamer, H.G. *Hegel's Dialectic: Five Hermeneutical Studies* Smith, C. tr. (New Haven: Yale University Press, 1976); Redding, P. *Hegel's Hermeneutics* (Ithica: Cornell University Press, 1996).

[6] For 'realist' interpretations of the *Logic* see: Pippin, R.B. *Hegel's Idealism: The Satisfactions of Self-Consciousness* (Cambridge: Cambridge University Press, 1989); Rose, G. *Hegel Contra Sociology* (London: Athlone, 1981). For an interpretation in terms of 'social theory' see: Adorno, T.W. *Negative Dialectics*, Ashton, E.B. tr. (London: Routledge and Keegan Paul, 1973); Habermas, J. *Knowledge and Human Interests* Shapiro, J.J. tr. (London: Heinemann Educational, 1978).

[7] Theunissen, M. *Sein and Schein. Die kritische Funktion der Hegelschen Logik* (Frankfurt: Suhrkamp, 1978). Note, I can only agree 'in principle' with Theunissen's interpretation, as it has not yet been

notes that Theunissen assigns to the *Logic* a 'critical function,' one that is opposed to all forms of 'positive' metaphysics and that this begins to free thought and rationality from their traditional positivity, and suggests a view of thinking and reasoning as 'communicative freedom.'[8] In this interpretation, the central metaphysical notions involved in conceptions of social relationality are, through a complex process of 'critique' and 'presentation,' revealed to be *Schein*, illusory being, and thus, not yet the truth of the *Begriff*, the Concept.[9] He notes that, for Theunissen, 'truth,' is the claim that any form of 'being a self' or an individual, is inextricable from 'being in an other,' and that this is the truth contained in the Hegelian *Satz*, the speculative proposition.[10]

In taking-up this suggestion, Peter Dews notes:

> Just as the end of myth can itself only be recounted as myth, perhaps the story of the end of metaphysics will itself always open on to a metaphysical dimension. A style of philosophy which acknowledges this - in opposition to both the contextualism and formal universalism which today command wide allegiance - would view a commitment to metaphysical inquiry as an important aspect of the cognitive and imaginative transcendence of the given, and not one-sidedly as its ontological endorsement.
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> Far from being the discovery of recent - let alone postmodernist - thinking, the idea that metaphysics can no longer function foundationally, as 'first

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translated into English. My knowledge of the basic premises of his argument are due to accounts given by Peter Dews and Robert B. Pippin and a general reconstruction of the thinking of Hegel's *Logic* through the an emphasis upon the categories of 'Recognition' (*Anerkennung*) and 'Actuality' (*Wirklichkeit*).

[8] Pippin, R.B. *Hegel's Idealism: The Satisfaction of Self-Consciousness* (Cambridge: Cambridge University Press, 1989), p. 295-6, no. 8. Pippin does not wholly agree with Theunissen's account of part three of the *Logic* and Theunissen's claim that Hegel is trying to restore a critical-metaphysical version of Christian theology. Pippin attempts to stick to an account of the *Logic* that attempts something of a 'realist' metaphysics without a theological content. In contrast, jurisprudence should not necessarily flee from the theological content in Hegel's philosophy. Hegel can be described as a 'theological thinker,' but, this does not imply he reduces philosophy to a pre-critical theology, rather, his approach operates as an attempt to radicalise Christian theology through speculative philosophy. For an account of Hegel's 'theology' in this sense, see: Küng, H. *The Incarnation of God: An Introduction to Hegel's Theological Thought as a Prolegomena to a Future Christianity* Stephenson, J.R. tr. (New York: Crossword, 1987).

[9] Pippin, R.B. *Hegel's Idealism: The Satisfaction of Self-Consciousness* (Cambridge: Cambridge University Press, 1989), pp. 295-6, no. 8.

[10] *Ibid.*

philosophy,' has been central to the European tradition ever since the turmoil of post-Kantian idealism and its aftermath. By contrast, it is an unfortunate distinguishing feature of much contemporary theory to believe that metaphysics should also be suppressed in its role as 'last philosophy,' to employ Michael Theunissen's attractive term. In its residual yet irreducible guise as last philosophy, metaphysical exploration does not search for bedrock, but rather helps to hold open those fragile horizons of significance which lie *beyond* the dispersed and compartmentalised forms of modern inquiry.[11]

We can see how this style of thinking operates through Hegel's *Logic* as a critical metaphysics.[12] Again, this can only occur here as an outline that will guide the overall interpretation of Hegel. What will follow is an attempt to explain a number of crucial moves within Hegel's *Logic* as the operation of a critical metaphysics, and how this might open the thinking of law and legal questions.

What is perhaps most problematic in the reading of the *Logic*, is part three, the doctrine of the *Begriff* (the Concept).[13] In contrast, parts one and two, the doctrine of

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[11] Dews, P. *The Limits of Disenchantment: Essays on Contemporary European Philosophy* (London: Verso, 1995).

[12] On this point, something of a similar position is put by the Aristotelian interpretation of Hegel taken by Ritter. See: Ritter, J. *Hegel and the French Revolution: Essays on the Philosophy of Right*, Winfield, R.D. tr. (Cambridge Mass.: MIT Press, 1982). Ritter at pp. 42-3 notes:

> The political upheaval of the age has called into question the meaning of the metaphysical tradition and its truth; it sets out to annihilate it. In Hegel's view, however, that also means that philosophy is faced with the question of how it is to react to this. Does the old world of spirit and its historical tradition come to its demise in the present with the emergence of modern society? Has the time arrived to undo its religious, ethical, spiritual substance and dismiss it as something past and over with historically? Philosophy can no longer evade these questions..... Evasion of the posed problem is already its abandonment. Therefore the only path that remains open is taking up the problem of emancipation in its full radicality; Hegel sets out on this course by summoning the aid of One Philosophy and making its theory the theory of the age and of the upheaval coming to pass with it.

[13] The term '*Begriff*' has been translated alternatively as 'concept' or as 'notion.' In German the term has a wider meaning than either of these English terms, in that in addition to its meaning in the sense of a concept or notion, it can be understood in terms of its active element, paying attention to the verb '*begreifen*,' to comprehend, stemming from '*greifen*,' to grasp or sieze. Hegel's philosophical meaning involves both of these senses, that of a conception which is stable and formed, and, the activity of the formation of conceptions. Further, the philosophical meaning as per the *Logic* has something of a transcendental aspect to it. Hence, there is a sense of separation between the *Begriff*, as 'the Concept' and our 'notions.' In this sense, our 'notions' can be understood as being not yet adequate to the *Begriff*. In this respect, I will try to use the German term and maintain this philosophical distinction between, 'the *Begriff*' and 'notions.'

Being (*Sein*) and the Doctrine of Essence (*Wesen*), are relatively less problematic. The doctrine of Being can be interpreted as presenting a critique of classical realist metaphysics, demonstrating the logical incompleteness of classical metaphysical categories such as 'Being,' 'Becoming' and so on. As such, it operates as a critique of the classical conceptions of ontology. Further, it can be seen as a critique of the non-critical use of this metaphysics by 'common sense' and by empirical science, as it demonstrates the logical instability of categories such as 'Quality,' 'Quantity,' 'Degree' and so on. An awareness of this critical function of the first part of the *Logic* is shared by a number of readers of Hegel, regardless of their differing interpretations of the work as a whole.[14]

The doctrine of Essence can be understood as Hegel's extension of the Kantian critique of metaphysics turned against the metaphysics of Kant himself and thus, as a critique of the logic of 'reflection,' and the idea of the unknowable 'thing in itself.' Hegel disagrees with the Kantian separation between phenomena and noumena, between thoughts of things and the un-revealed 'things in themselves.' Hegel attempts to show the limitations that are inherent within 'reflective cognition,' via demonstrating the logical inadequacy of the categories involved. He critiques the relation between the categories of Essence, Existence and Appearance, showing the

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[14] See the views of: Pippin, R.B. *Hegel's Idealism: The Satisfaction of Self-Consciousness* (Cambridge: Cambridge University Press, 1989), p. 181; Taylor, C. *Hegel* (Cambridge: Cambridge University Press, 1975), 125-7; Gadamer, H.G. *Hegel's Dialectic: Five Hermeneutical Studies* Smith, C. tr. (New Haven: Yale University Press, 1976), pp. 12-13; Marcuse, H. *Reason and Revolution: Hegel and the Rise of Social Theory* 2nd ed. (London : Routledge & Kegan Paul, 1955), p. 122. Note, I do not subscribe to Marcuse's argument that Hegel betrayed his own 'critical spirit' in the *Philosophy of Right*. However, Marcuse at p. 122 does make the important point that:

> Sufficient notice has not been given to the fact that Hegel himself introduces his *Logic* as primarily a critical instrument. It is, first of all, critical of the view that 'the material of knowledge exists in and for itself in the shape of a finished world apart from thinking,' that it exists as 'something in itself finished and complete, something which, as far as reality is concerned, could entirely disperse with thought.'

groundlessness of reflective cognition as it reveals itself to itself as its own *Schein*, or illusory being.

Hegel argues that the Kantian distinction between an unknowable world and the world that can be known is unstable. Hegel argues that:

> The usual error of reflection is to take *essence* as what is merely *inner*. If it is taken only in this way, then this view of it is also quite an *external* one, and that 'essence' is the empty external abstraction.[15]

In this sense, Essence is not behind or beyond Appearance, rather, as this empty external abstraction, "essence is what exists, existence is appearance."[16] In this respect Hegel notes:

> Essence is initially a totality of inward shining, but it does not remain in this inwardness; instead, as ground; it emerges into existence; and existence, since it does not have its ground within itself but in an other, is quite simply appearance. When we speak of "appearance" we associate with it the representation of an indeterminate manifold of existing things, whose being is mediation pure and simple; so that they do not rest-upon themselves, but are only valid as moments.... When posited in this way appearance does not stand on its own two feet, and does not have its being within itself, but within another.[17]

This critique by Hegel on the Kantian logic of reflection has been used most emphatically in recent times by Slavoj i ek. It, in many ways forms the corner stone of his analysis of cultural forms and ideology.[18] Yet the understanding of the *Logic* does not stop at this point but continues into part three, the doctrine of the *Begriff*.[19] In moving into the doctrine of the *Begriff*, Hegel's *Logic* progresses, from the position of

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[15] Hegel, *E.L.*, § 140, Remark.
[16] *Ibid.*
[17] *Ibid.*, at § 131, Addition.
[18] See: i ek, S. *The Sublime Object of Ideology*, (London: Verso, 1989); and i ek, S. *Tarrying With the Negative: Kant, Hegel and the Critique of Ideology* (Durham: Duke University Press, 1993).
[19] For a critique of the limitations of i ek's interpretation of Hegel see: Dews, P. "The Tremor of Reflection: Slavoj i ek's Lacanian Dialectics" in Dews, P. *The Limits of Disenchantment: Essays on Contemporary European Philosophy* (London: Verso, 1995).

a critique of metaphysics, into a 'critical metaphysics;' as such it needs to be understood as presenting a critical engagement with 'ontology.'

The progression in part three of the *Logic* involves Hegel's attempt to go beyond the Kantian separation between thought and being. This does not amount to a return to a pre-critical metaphysics but, rather, a re-exploration of metaphysics via modernity's awareness (through Hegel's reading of Fichte) of the subject's activity in shaping both its own thought and the world. Hegel attempts to progress beyond the self-limiting logic of reflection via the radicalisation of Fichte's notion of inter-subjective recognition (*Anerkennung*). In this respect, the move from the doctrine of Essence to the *Begriff* is underlaid by Hegel's conception of the mediation between subject and object, the co-constituting relation between thought and being through the process of inter-subjective recognition. This builds upon an account prepared by Hegel in the *Phenomenology of Spirit*, which points to the position of the third, or Spirit (*Geist*), in the mediation between subject and object. In understanding the mediation between subject and object as always occurring through the third, Hegel can argue that the logic of reflection "does not have its being within itself, but within another."[20]

In referring to Hegel's overcoming of the inherent limitation of the logic of reflection, by the move to the doctrine of the *Begriff*, Peter Dews, following the arguments of Hinrich Fink-Eitel,[21] notes:

> Hegel's theory of the concept can be understood in this perspective as characterising a reciprocal relation of recognition, which overcomes the abstracting and subsuming *modus operandi* of reflective cognition. The vicious circularity of the structure of essence cannot be broken open by a further act of knowing, but only when the reflecting subject no longer seeks to

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[20] Hegel, *E.L.*, § 131 Addition.
[21] Fink-Eitel, H. *Dialektik und Sozialethik: Kommentierende Untersuchungen zu Hegels 'Logik,'* (Meisenheim: Anton Hain, 1978).

ground its own identity by abstracting from its relation to the other. Only by acknowledging this relation as constitutive of its identity, just as this identity enters into the relation, can it finally resolve the conflict between necessity and contingency, the ground and that which is grounded.[22]

Dews, following Fink-Eitel, notes that at first it may appear far-fetched to interpret the structure of the Hegelian *Begriff* along the lines of inter-subjective recognition. However, the proposal seems more plausible if we consider that the conceptuality of language, which is fundamental to human sociality, establishes the permanent possibility of reconciling conflicting subjective perspectives.[23] He argues that clashes between viewpoints give rise to hermeneutically reflective conflicts where the continuing discrepancy between interpretive schema can eventually push back to the basic shared question of what it means to grasp something conceptually at all. Hence, it can be argued that, for Hegel, the 'life of the *Begriff*' consists in nothing other than this constant process of rupture and negotiation.[24]

Dews notes that it is important to remember that current 'inter-subjective' readings of the *Logic* inspired by the work of Theunissen, do not claim that Hegel delivers a speculative deduction of inter-subjectivity.[25] He notes that, according to Theunissen, Hegel's account of the *Begriff* has a tendency to reinstate precisely the dominating metaphysics of reflection that it was intended to overcome. This occurs in particular passages where Hegel claims that the *Begriff* has proved itself to be the unconditioned ground of what previously appeared as its antecedent conditions.[26] However, in contrast, he also notes that Theunissen's indication that other passages in the *Logic*

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[22] Dews, P. *The Limits of Disenchantment: Essays on Contemporary European Philosophy* (London: Verso, 1995), p. 244.
[23] *Ibid.*, at p. 145.
[24] *Ibid.*, at p. 245.
[25] *Ibid.*, at p. 250.
[26] *Ibid.*, at p. 250.

portray the experiential content of the *Begriff* in terms of Hegel's youthful terminology of 'love.' This implies that, in a sense, the *Begriff* lies beyond the limits of theory and reflection.[27]

In this respect, it can be understood that the ground or theoretical foundation, of part three of the *Logic*, the doctrine of the *Begriff*, is the logic of inter-subjective recognition. This is not simply the production of thought through activity, but, as shown in the *Phenomenology of Spirit*, the mediation of the subject and object by each other. This occurs inter-subjectively, and, historically, as the process of *Spirit* (*Geist*). In this sense, the *Begriff* involves its two sides coming to terms with itself. As the 'subjective' *Begriff*, it is the activity of self-conscious, inter-subjectivity attempting to comprehend or grasp itself. It attempts to grasp itself residing within its own object, or the 'objective' *Begriff*. The unity and tension of these two sides can be understood as the Absolute Idea. For Hegel, this refers to the 'thinking' (that can be understood as the mediation between being and thinking) 'that thinks itself.' This is the suggestion of a critical metaphysics that attempts to re-invigorate the Aristotelian idea of *noêsis noêseôs*.[28] On this, Hegel states:

> This unity, therefore, is the *absolute truth* and *all truth*, it is the Idea that thinks itself, and at this stage, moreover, it is [present] *as* thinking, i.e., as logical idea.[29]

One further addition can be made to this interpretation of the *Logic*. This involves thinking of the doctrine of the *Begriff* in terms of the Hegelian notion of *Aufhebung*. Here, the *Begriff* should not be considered in the sense of some form of cosmic teleology marching itself through the world and history. Rather, it can be understood

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[27] *Ibid.*, at p. 250.
[28] Hegel, *E.L.*, § 236 Addition.
[29] *Ibid.*, at § 236.

as a sense of 'development,' when the notion of 'development' is re-considered, as through the Idea. The Idea (grounded upon the inter-subjective constellation of co-constituting being and thought's critical self-reflection, *Sein* and *Wesen*) is engaged in the ongoing process of attempting to come to terms with itself, by 'grasping' or comprehending itself. Hence, the Idea involves the constant task of comprehending *what is*, (*was ist*). Yet, what is, is precisely this inter-subjective constellation of co-constituting being and thought. What is, is the *Begriff.* Hence, the Idea's process of comprehending itself involves the ongoing struggle to make the notions of itself adequate to what it itself, actually is. That is, the attempt to make the notion adequate to the *Begriff.*

In this conception, the Idea's notions of itself become a more adequate reflection of what it is. This sense of Hegelian optimism is not the result of a divine wind, but rather, is sourced in an idea at the heart of the *Phenomenology of Spirit*, the category of *Bildung*. This refers to cultural growth, formation, and education.[30] In the *Logic*, *Bildung* can be understood in a more methodological frame, occurring as 'the three moments' of speculative thinking. These occur as the ongoing process of thinking as a form of self-education. This involves thinking's coming to terms with its own failures and limitations and, through this, gaining a 'deeper,' 'thicker,' or 'more adequate' comprehension of the world. Hegel refers to this process of thinking as the 'Logical.'[31]

The 'Logical' has three sides: the first is the side of abstraction or the 'understanding,' the second is the 'dialectical' or 'negatively rational' moment, the third is the

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[30] On the importance of the notion of '*Bildung*' see: Kelly, G.A. *Idealism, Politics and History: Sources of Hegelian Thought* (London: Cambridge University Press, 1969).
[31] Hegel, *E.L.*, § 79.

'speculative' or 'positively rational' moment.[32] When considering that these three moments underlie the inter-subjective constellation of thought and being, then Hegel can claim that these elements are "moments of everything Logically real," that is, "of every concept or of everything true in general."[33]

With regard to the first, the 'understanding,' this involves the activity of bestowing universality upon a particular content. Hence, the universal posited by the understanding is an abstraction held in opposition to a particular. However, what is determined as a result of the understanding also becomes a particular itself.[34] Thought, in its attempt to comprehend by bestowing universality upon the content, separates the objects, makes parts from the whole and by drawing boundaries and limits, abstracts them from their interconnectedness and original mediation. Thought, thus, makes the mediated object 'immediate.' For Hegel, this is not to discredit the understanding. The understanding must be conceded its right and merit, whereby without the understanding there would be no fixity or determinacy in the domains of theory or practice. Hence, with regard to cognition, it involves apprehending given objects in their determinate distinctions.[35]

Hegel describes the second moment as the 'negatively rational' or 'dialectical' moment. This involves more than scepticism, or the subjective seesaw of arguments. Instead, the dialectic is the genuine nature of the thought determinations made by the understanding, it is the genuine nature of the finite in general.[36] Hence, the dialectical moment is an "immanent transcending" in which the very nature of the finite

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[32] *Ibid.*
[33] *Ibid.*, at § 79, Remark.
[34] *Ibid.*, at § 80, Addition.
[35] *Ibid.*
[36] *Ibid.*, at § 81, Remark.

determinations of the understanding, display their limit.[37] For Hegel, the dialectic

constitutes the "moving soul of all scientific progression," and the principle through

which immanent coherence and necessity enter into the content of science.[38] Further,

it is the general principle of all activation in the actual world, the "general principle of

all motion and life."[39]

An example Hegel gives is the statement, "man is mortal." Death is generally

regarded as having its ground in external circumstances; however, the proper

interpretation is that life bears within itself the germ of death and that the finite

negates and transcends itself because it contradicts itself inwardly.[40] Hegel claims that

everything around us offers an example of dialectic because we know that, instead of

being fixed and ultimate, everything finite is alterable and perishable, and thus,

everything holds its own negation within itself.[41] Hegel gives an example of this

overturning in a legal proverb, "*Summmum ius summa uniuria*," meaning that if abstract

justice is driven to its extreme it turns over into injustice.[42]

With regard to the third moment, the 'speculative' or 'positively rational' moment,

Hegel asserts that the negative of the dialectic has within it a positive moment, a

positive result. Hegel notes that the speculative moment apprehends the unity of the

determinations in their opposition, and it holds onto the affirmative that is contained

in their dissolution and transition.[43] Hence, the dialectic has a positive result, its act of

negation does not render the understanding into a nothing, a void; rather, it shows that

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[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*, at § 81, Addition, no. 1.
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*, at § 82.

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the determination of the understanding is not self-sufficient, that it contains within it a contradiction, its opposite, and when pushed to its limit it turns over into its opposite. The speculative moment of thinking is precisely the grasping of this result. Hence, the speculative moment sees thought as a result, as a unity. This is not a formal unity, but rather a unity of distinct determinations that are grasped in the concrete.[44]

Speculative thought, thus, has at its foundation the category of 'unity.' This is the unity of identity and non-identity, the unity of 'A' with 'not A.' Speculative thought comprehends the 'A' as presupposing or having its ground in what is not, the 'not A' (- A). The suggestion that the 'A' already contains within itself the 'not A' (- A), is not simply a thought experiment, rather, this for Hegel is grounded within the constellation of inter-subjective recognition. It is in grasping this that the speculative moment is a moment of education or of development. The speculative moment preserves the previous moments by building itself upon them, by holding them within itself while transcending them. The speculative moment, in this sense, is lifted up and over the abstract position of the understanding and the contradiction of the dialectical moment. It is the 'thicker' position of thought which knows itself in these previous manifestations, and through knowing itself, as such, it becomes something much more, something elevated.

It is in this manner that there is a sense of process, or educative building or development, within the doctrine of the *Begriff*. The process of speculative thinking pushes beyond its own limitations, and attempts to come to terms with its own tensions, contradictions and presuppositions, so as to become more adequate to itself.

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[44] *Ibid.*, at § 82 Remark.

As the *Begriff*, this is not just the activity of academic thinking, but is the activity and progression of ontology as well. This sense of process can be understood as occurring within Hegel's term, *Aufhebung* (*aufheben*, *aufgehoben*).

With regard to the term *Aufhebung*, Hegel notes:

> At this point we should remember the double meaning of the German expression '*aufheben*.' On the one hand, we understand it to mean 'clear away' or 'cancel' and in that sense we say that a law or regulation is cancelled (*aufgehoben*). But the word also means 'to preserve' and we say in this sense that some thing is well taken care of (*wohl aufgehoben*). This ambiguity in linguistic usage, through which the same word has a negative and positive meaning, cannot be regarded as an accident nor yet as a reason to reproach language as if it were the source of confusion. We ought rather to recognise here the speculative spirit of our language, which transcends the 'either-or' of the understanding.[45]

The German term *Aufhebung*, has been rendered by some translators into the terms 'sublate' and 'sublation.' Such a term is inadequate to give proper meaning to Hegel's use of the term in the full speculative sense.[46] As noted by Hegel, what ought to be recognised is the 'speculative spirit' of the term, that 'transcends' the either-or of the understanding and dialectic. *Aufhebung* should be understood in this speculative sense. As the form or attitude of thought that attempts to transcend ordinary thinking, it attempts to overcome the abstract conception of the understanding, and not be caught up by the negativity of the dialectic. Speculative thought attempts to preserve the initial determinations of thought and comprehend them in their negative relation to each other.

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[45] *Ibid.*, at § 96, Addition.

[46] There is contention over the meaning and translation of the term '*Aufhebung*.' In terms of determining the meaning, I have drawn upon the various instances where Hegel himself addresses the term and, thus, I apply terms in English that attempt to come closest to his meaning. For a variety of views on this point see: The 'translators notes' in Hegel, *E.L.*, pp. xxiii-xlvii. For a sustained engagement with this notion see also: Nancy, J. *The Speculative Remark: One of Hegel's Bon Mots* Suprenant, C. tr. (Stanford: Stanford University Press, 2001).

In paying regard to the speculative meaning of *Aufhebung*, its meaning as a verb should be emphasised. The verb *aufheben*, can be thought of as '*heben auf*,' this involves action and activity. In thinking of this in English, the terms to 'heave-up,' 'lift-up,' 'overcome' and 'transcend,' may be more appropriate. The meaning in the speculative comprehension has been heaved-up and over itself, lifted out of a limited comprehension, transcending thought's prior immediacy and inadequacy.

A similar speculative meaning occurs in the English phrase 'to lift the shutters,' thus, lifting the mind out of the finite perspective, and in the sense of the phrase, 'to raise one's awareness,' to come to a greater awareness by comprehending and not forgetting the limitations of one's initial perspectives. To pay regard to the speculative sense is to not overly stress the negative but see its work, the 'labour of the negative,' in the production of a positive result. In this lifting-up, the speculative moment is the attempt of the Idea as finite, to grasp itself within the infinite and transform itself accordingly.[47]

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[47] On the etymology of the term 'speculative' see: Inwood, M. *A Hegel Dictionary* (Oxford: Blackwell, 1992). At p. 271 Inwood notes:

> *Spekulation, spekulativ* and *spekulieren* ('to speculate') come from the Latin *speculatio* ('spying out, reconnoitering; contemplation') and *speculari* ('to spy, observe; to look around'), which in turn descend from *specere* ('to look'). (The Latin for 'mirror' is *speculum*, which gave rise to the German *Spiegel*, 'mirror').

With regard to the notion of 'speculative thought' generally, the idea of mirrors, while limited, does give something of an insight into the Hegelian notion of the finite within the infinite. What comes to mind is an art instillation, the "Infinity Room." (Artist Unknown, Asia-Pacific Bi-Annual Art Exhibition, Queensland Art Gallery, Brisbane, 2002.) This instillation consists of a small room in which a person would enter and the door would open and close behind them. Inside the spectator would stand on a small platform that is also a mirror and which, sits flush with the water that covers the surface of the floor. Both the walls and ceiling of the room are mirrors and everything remains dark except for small glowing spheres that hang from the ceiling. This visual effect involves the light from the spheres reflecting infinitely from all surfaces of the room. What appears to the spectator's eye is the perspective of the infinite which is relational, it comes about through the multiplicity of relations and inter-relations, as light passes between the surfaces of the spheres and mirrors.

The example of the 'infinity room' is limited to 'picture thinking' and is at the level of the visual comprehension of light rather than comprehension of thought. Further, such thinking is perhaps characteristic of the relation in the *Logic* described as 'existence' within the logic of reflection. Hence

It is through this sense of *Aufhebung* that there is a development, an education, as self-transcendence, present within the *Begriff*. It occurs as both an activity and as a process. It involves a progression only in the sense that there can occur a building upon that which was before. This speculative sense can be understood, as open, incomplete and hence, always attempting to come to terms with itself, with its own incompleteness. In this respect, a critical metaphysics does not represent the end of all knowledge, or the attainment of the 'absolute' in terms of finality. Rather, a critical metaphysics is the sense of an opening onto its own self, and onto that which resides beyond itself, a moment that cannot be fully captured.

In this respect, Hegel's *Logic*, as a critical metaphysics, can be read *aporetically*. It can be understood as an engagement with the contradictions arising through the mediation between thought and being which occur as barriers, or paradoxes, negating the successful speculative comprehension of the whole. Such barriers are not simply generated internally, but arise from what is not yet, what is unable to be captured by the notion of 'system.' Yet, these barriers occur also as openings, as the opening of lines of metaphysical inquiry to which the speculative moment of thought (building upon the problematic nature of thought that has gone before it) attempts to comprehend and come to terms with. It is perhaps by thinking of Hegel's speculative thought in this manner, as a critical metaphysics, that jurisprudence should attempt to interpret Hegel's conception of law.

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it is less adequate than the *Begriff*. However, as an example for Anglophone juridical thinking, the example does make the important point of how for Hegel, nothing can be known directly or immediately, but only through the activity of mediation. In this process the *spectator* is actively involved. The moment of the 'understanding' does not grasp this, it thinks it can comprehend the object directly and know what it is. The understanding does not realise that the object is an infinite churning of inter-relations and further that the thinker, is part of this process of inter-relation and mediation.

In Hegel's treatment of law, what lies buried in his writing is a double-object, a simultaneous thinking about the categories of law and *the thinking of this thinking*. It involves the grasping of the modes of law's thought and its critique. Any engagement with Hegel's philosophy of law and the notion of 'Right' should proceed from this basis, thus paying attention to the 'worrying' that is working through the text. That is, the immanent critique of the thinking of the categories of law, and the attempt to transcend the finitude of particular modes of legal comprehension by speculatively grasping the whole and its process of movement and development. In this respect, Hegel's speculative thinking of the law involves the attempt lift up both the thinker and the legal categories employed to a higher level of comprehension; it is the *aufheben* of both the thinker and the law. This worrying turns upon the question of *what is (was ist)* Right? Hegel states:

> The laws of right are something laid down [*Gesetztes*], something *derived from* human beings. It necessarily follows that our inner voice may either come into collision with them or concur with them. The human being does not stop short at the existent [*dem Daseienden*], but claims to have within himself the measure of what is right; he may be subjected to the necessity and power of external authority, but never in the same way as to natural necessity, for his inner self always tells him how things ought to be, and he finds within himself the confirmation or repudiation of what is accepted as valid.... But these very discrepancies [*Gegensätze*] between that right which has being in and for itself and what arbitrariness proclaims as right make it imperative for us to learn to recognise precisely what right is. In right, the human being must encounter his own reason; he must therefore consider the rationality of right, and this is the business of our science, in contrast with positive jurisprudence, which is concerned only with contradictions. Besides, the present-day world has a more urgent need of such an investigation, for in olden times there was still a respect and veneration for the existing [*bestehenden*] law, whereas the culture [*Bildung*] of the present age has taken a new direction, and thought has adopted a leading role in the formation of values. Theories are put forward in opposition to what already exists [*dem Daseienden*], theories which seek to appear correct and necessary in and for themselves. From now on, there is a more special need to recognise and comprehend the thoughts of right. Since thought has set itself up as the essential form, we must attempt to grasp right,

too, in terms of thought. If thought is to take precedence over right, this would seem to throw open the door to contingent opinions; but genuine thought is not an opinion about something [*die Sache*], but the concept of the thing [*Sache*] itself. The concept of the thing does not come to us by nature. Everyone has fingers and can take a brush and paint, but that does not make him a painter. It is precisely the same with thinking. The thought of right is not, for example, what everybody knows at first hand; on the contrary, correct thinking is knowing [*das Kennen*] and recognising the thing, and our cognition should therefore be scientific.[48]

When Hegel's speculative thought turns to the question of law, and hence, to the question of 'Right,' of central importance is the *Logical* category of *Wirklichkeit*. The rereading of Hegel's theory of law thus emphasises the category of *Wirklichkeit*. The thesis understands Hegel's theory of law as being concerned with demonstrating how the Idea of Right, as both freedom and the good, comes into actuality (*Wirklichkeit*). This involves seeing freedom and the good as embodied in the law and being both now and not yet. Hence, law contains a certain ethical content and degree of freedom that emerges through law in certain forms and which shape the political and social reality. However, law also contains its own negation within itself. As such, the content of the good and freedom, remain unsatisfied in their present forms and contain within them the yearning to negate the present and leap into the future by transforming reality into a higher form.

The interpretation taken by the thesis regards Hegel as putting forth a complex account of law that is not static or apologetic but instead is interested in following the movement, change and development of the idea of Right. In terms of Hegel's position upon law and the state, much has been made from his (in)famous stanza[49] within the preface to the *Philosophy of Right*, in which Hegel states:

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[48] Hegel, *Ph.R*, Preface, Addition, p. 13.
[49] With regard to the *Doppelsatz*, Jackson states: "No political theorist has suffered more distortion because of a single sentence than Hegel." See: Jackson, M.W. "Hegel: The Real and the Rational" in

> *Was vernünftig ist, das ist wirklich;*
> *Und was wirklich ist, das ist vernünftig.*[50]

This is generally translated as:

> What is rational is actual;
> And what is actual is rational.[51]

In the interpretation of Hegel taken by the thesis, emphasis is given to *Wirklichkeit* as a category central to understanding Hegel's philosophy of law and as such, war's moral problem. *Wirklichkeit* can be understood as the working of reality, it is the work of reality, it is reality's work, the nature of reality as work and working. The German verb *wirken* is important to Hegel's specific philosophical meaning of *Wirklichkeit*. The category of *Wirklichkeit* refers to a conception of reality that is at work, that is working itself up and that has been worked up.

In the English translations of Hegel, *Wirklichkeit* is rendered as 'actuality' and *wirklich* is rendered as 'actual.'[52] These terms to do not express the sense of meaning that Hegel is trying to get across. In this respect, these terms are inadequate. However, given linguistic restraints, and the difficulty of finding a word in English that expresses the notion of 'the working of reality' and 'a reality that has been worked

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Stewart, J. (ed.) *Hegel's Myth and Its Method* (Evanston Ill: Northwestern University Press, 1996). For a number of commentators who discuss differing interpretations of this sentence see: Wood, A.W. *Hegel's Ethical Thought* (Cambridge: Cambridge University Press, 1990), p. 11; Franco, P. *Hegel's Philosophy of Freedom* (New Haven, Conn.: Yale University Press, 1999), pp. 123-130; Riedel, M. *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy* Wright, W. tr. (Cambridge: Cambridge University Press, 1984), p. 31-40; Hardimon, M.O. *Hegel's Social Philosophy: The Project of Reconciliation* (Cambridge: Cambridge University Press, 1994), pp. 52-77; Avineri, S. *Hegel's Theory of the Modern* State (London: Cambridge University Press, 1972), pp. 214-217. Note, Avineri at p. 216, offers an important reminder. He argues that Hegel starts not by postulating the rationality of the actual, but rather the actuality of the rational. Hence the statement should be read in the sense that what is rational has within itself the power to come into actuality.

[50] Hegel, G.W.F. *Grundlinien der Philosophie des Rechts* (Frankfurt: Suhrkamp, 1970), p. 24.

[51] Hegel, *Ph.R.*, p. 20.

[52] The use of the term 'actual' follows the use of the two translators Knox and Nisbet. For their respective discussions of the translation of this term see: Hegel, G.W.F. *Hegel's Philosophy of* Right Knox, T.M. tr. (London: Oxford University Press, 1967), p. 10; Hegel, G.W.F. *Elements of the Philosophy of Right,* Wood, A.W. (ed.) Nisbet, H.B. tr. (Cambridge: Cambridge University Press, 1991), p. xxxix.

up,' the thesis is confined to using the terms 'actuality,' 'actual,' and at times, 'actualisation.' I ask the reader's patience with these terms and, further, ask that, when reading, these terms are understood to signify a specific, Hegelian philosophical meaning, and not the meaning ascribed to their common English usage. [53]

I will now discuss Hegel's philosophical meaning of the term *Wirklichkeit*, a term which provided not only difficulty in translation, but also caused difficulty in German, as Hegel's specific philosophic meaning is different to the common German usage of the term. Hegel situates the term *Wirklichkeit* within the preface to his *Philosophy of Right*. In the preface, he argues that the task of philosophy is not to imagine law and the state, as it 'ought to be.' Rather, "To comprehend *what is*, is the task of philosophy, for *what is*, is reason."[54] For Hegel, '*what is*,' is the relation between *Vernuft* and *Wirklichkeit*, between reason (or 'rationality') and actuality.[55] In this

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[53] Note that when quotations are taken from a translation of Hegel's texts where the word 'actual' or 'actuality' is used, this will not be amended. What will be required is the reading of these terms of the philosophical meaning of *wirklich* and *Wirklichkeit*, that is presented in this portion of the thesis.

[54] Hegel, *Ph.R.* Preface p. 21.

[55] While I do not subscribe to the Aristotelian interpretation of Hegel taken by Ritter, he does make a number of very important points. See: Ritter, J. *Hegel and the French Revolution: Essays on the Philosophy of Right*, Winfield, R.D. tr. (Cambridge Mass.: MIT Press, 1982). Ritter at pp. 36-7, disagreeing with the charges by Rudolf Haym, that Hegel founds the state on the basis of an outdated metaphysics, argues that:

> In the same sense Aristotle and St. Thomas called 'philosophical life' and its theory 'divine' in order to differentiate it from practical knowledge. Philosophy grounds its arguments in the divine and not necessarily in the practical life; it is therefore itself godly, because it gathers itself around the divine. In the context of this tradition - Hegel presupposes and always did understand his philosophy as a realisation of the one, eternally self-same philosophy - the statements of the *Philosophy of Right* that are politically objectionable to Haym mean for Hegel himself that the state has for its content man in his relation to the divine and not only in his needful nature, as is the case in natural theories of society. Therefore the task is one of making possible the innerwordly realisation of the spiritual, religious, and ethical orders borne by human existence.

Cf. Wood's claim that the *Philosophy of Right* must be looked at simultaneously in two ways, as a 'practical philosophy' and as an 'exercise in speculative theodicy.' Wood, A.W. *Hegel's Ethical Thought* (Cambridge: Cambridge University Press, 1990), p. 11. Note any discussion of the religious aspects of Hegel's philosophy must take into account Hans Küng's magisterial study on Hegel's speculative Christianity, see: Küng, H. *The Incarnation of God: An Introduction to Hegel's Theological Thought as a Prolegomena to a Future Christianity* Stephenson, J.R. tr. (New York: Crossword, 1987).

sense, what is rational, or what is reason, is not simply an idea or opinion in a book or one's thought, occurring as an 'ought' to be. It is instead fully immanent within the concrete existence of the world.[56] In Hegel's conception, reason is engaged in the process of transcending itself by becoming more accordant with itself. Through law, this occurs as the coming into actuality (*Wirklichkeit*) as stable and existent forms that are in the *ongoing process of self-over-leaping, self-working*.[57]

Hence, what *is* (*was ist*) the law, or the state, that has come into existence, is not flat and static, but, rather, *is in process*. The process of working and working itself up into higher, full and stable levels of actuality. The task of the philosophy of law is to comprehend law, legal right, morality, the state, ethics, and even war within this process, to understand the *wirklich* nature of *Vernuft*, and through *Vernuft*, as philosophical reason, understand reality as *Wirklichkeit*. Hegel states:

> (W)hat matters is to recognise in the semblance of the temporal and the transient the substance which is immanent and the eternal which is present. For since the rational, which is synonymous with the Idea, becomes actual by entering into external existence [*Existenz*], it emerges in an infinite wealth of forms, appearances, and shapes and surrounds its core with a brightly coloured covering in which consciousness at first resides, but which only the concept can penetrate in order to find the inner pulse, and detect its continued beat even within external shapes.[58]

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[56] On this, note Franco, P. *Hegel's Philosophy of Freedom* (New Haven, Conn.: Yale University Press, 1999). Franco at p. 132 comments:

> The rational is not something that is simply in our heads or merely inwards; it is what is what is effective and actual. In Aristotelian terms, the rational is not mere *dynamis* but is also *energeia*. It is, thus, a doctrine about the nature of rationality that stands first in Hegel's understanding of the identification of the rational and the actual. And it is only after he has made this fundamental point about actuality's being an essential component of rationality that he makes the further claim, in the second half of the *Doppelsatz*, that the actual is rational.

[57] Note Avineri, S. *Hegel's Theory of the Modern* State (London: Cambridge University Press, 1972). Avineri at p. 65, argues that for Hegel 'reason' has to be contrasted to the classical Greek idea of '*logos*' which exists as a given. In contrast, for Hegel, reason as Spirit, occurs in the unfolding procession of human manifestations in history.

[58] Hegel, *Ph.R.*, p 20.

The speculative comprehension of law is charged with the task of seeing past the many forms and shapes of law and comprehending how within these forms, resides reason, as the Idea of Right, developing, manifesting and over-coming itself. In this regard, *Wirklichkeit* is a development. Hegel is clear that this is distinct from what merely appears and from what has an existence before us. In commenting upon the misunderstanding of the relation between *Vernuft* and *Wirklichkeit* contained in his own stanza, he notes that actuality (*Wirklichkeit*) is to be distinguished from 'appearance.' From what is 'contingent' and from other determinations outlined in the *Logic*, such as 'being-there' and 'existence.'[59]

In Hegel's meaning, referring to something as *wirklich* suggests that it contains a degree of stability and permanency; that is, something, a form of life or law, has come into existence and has realised itself (even if only partially) in accordance with reason. Hence, not everything can be described as *wirklich*. Something, which is temporal, transient, or only partially emerged, may in terms of Hegel's *Logic*, be described as 'appearance,' but not necessarily as *Wirklichkeit*. Hegel notes in a comment upon his (in)famous stanza:

> But as far as their philosophical meaning is concerned, we have to presuppose that the reader has enough education to know.... that quite generally, what is there is partly *appearance* and only partly actuality. In common life people may happen to call every brain wave, error, evil, and suchlike "actual," as well as every existence, however wilted and transient it may be. But even for our ordinary feeling, a contingent existence does not deserve to be called something-actual in the emphatic sense of the word; what contingently exits has no greater value than that which something-*possible* has; it is an existence which (although it is) can just as well *not be*.[60]

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[59] Hegel, *E.L.* § 6.
[60] *Ibid.*

For Hegel, the meaning of *Wirklichkeit* transcends the separation between thought and the world, between 'ideas' and 'reality'. He notes that, in this separation, it is generally assumed that 'thought' is synonymous with subjective representation, intention and planning, whereas 'actuality' (*Wirklichkeit*) is assumed to be synonymous with an external sensible existence.[61] He notes that this form of thinking is involved when one speaks of a plan or 'idea' of, for example, a certain kind of taxation which seems quite good in theory, but which, however nothing of the sort can be found in 'reality.'[62] For Hegel, this form of thinking misunderstands both the nature of thought and reality and, hence, such a separation must be rejected outright. He argues that:

> For, on the one hand, ideas are not just to be found in our heads, and the Idea is not at all something so impotent that whether it is realised or not depends upon our own sweet will; on the contrary, it is at once what is quite simply effective and actual as well. On the other hand, actuality is not so bad or so irrational as it is imagined to be by "practical men" who are devoid of thoughts or at odds with thinking and intellectually derelict. As distinct from mere appearance, actuality, being initially the unity of inward and outward, is so far from confronting reason as something other than it, that it is, on the contrary, what is rational through and through; and what is not rational must, for that very reason, be considered not to be actual. This agrees, for that matter, with the usage of educated speech, in that, for example, we would object to recognising someone who does not know how to bring about something valid and rational as being "actually" a poet or a statesman.[63]

Following this Hegel further clarifies the relation between reason and actuality (*Wirklichkeit*) stating that:

> The ground of a widespread prejudice about the relationship between the philosophies of Aristotle and Plato must also be looked for in the common interpretation of actuality that we are here discussing and in the confusion of actuality with what is tangible and immediately perceptible. According to this prejudice, the difference between Plato and Aristotle is supposed to be that, whereas the former recognises the Idea and only the Idea of what is true, the latter, in contrast, rejects the Idea, and clings to what is actual; for that reason he should be considered the founder and leader of empiricism. On this head it

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[61] *Ibid.*, at § 142, Addition.
[62] *Ibid.*
[63] *Ibid.*, at § 6, Addition.

must be remarked that actuality certainly does form the principle of Aristotle's philosophy, but his actuality is that of the Idea itself, and not the ordinary actuality of what is immediately present. More precisely, therefore, Aristotle's polemic against Plato consists in his designation of the Platonic Idea as mere *dynamis*, and in urging, on the contrary, that the Idea, which is recognised by both of them equally to be what is alone true, should be regarded essentially as *energeia*, i.e., as the inwardness that is totally to the fore, so that it is the unity of inward and outward. In other words, the Idea should be regarded as Actuality in the emphatic sense that we have given to it here.[64]

Hegel's relating of *Wirklichkeit* to Aristotle's *energeia*[65] is not an arbitrary determination. The German term *wirklich* is linked through its stem verb '*wirken*' (to work) to the Greek *energeia*. Heidegger notes that *wirken* belongs to the Indo-Germanic stem *uerg* from which both the German *Werk* and the Greek *ergon* derive.[66] He states that the fundamental characteristic of working and work does not lie in something effected (*effectus*), but, rather, that something comes to stand and lie in 'unconcealment.' He notes that *wirklich* is the working or the worked, it is that which brings forth into presencing and that which has been brought here and has brought-

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[64] *Ibid.*, at § 142, Addition.

[65] See: Ferrarin, A. *Hegel and Aristotle* (Cambridge: Cambridge University Press, 2001). Ferarin argues that Aristotle's *engergia* is the center point of understanding the philosophy of Hegel, he states at p. 7:

> *Energeia*, usually rendered in English as "actuality" after the Latin translation "*actus*," is by and large translated by Hegel as *Tätigkeit* (activity) or as *Wirklichkeit* (actuality), even though in the context of single works he will prefer different words (e.g. in the *Philosophy of Spirit* and *Logic, Aktuosität*, actuosisty, while in the *Phenomenology* a closely related notion is that of *Entwicklung*, development). However he translates it, though, he invariably means the same, an actualisation of a potency originally immanent in the subject of the process of movement. Hegel interprets *energeia* as the self-referential activity that he finds at work in its several manifestations: from the self-grounding of essence to the Concept, from the teleological process to natural life, from the essence of man to the forms of knowing and acting down to its most obviously free and self-determining dimension, absolute thinking that has itself as an object. This latter notion is for Hegel to be found in Aristotle's *noêsis noêseôs*, which is the prefiguration of absolute spirit....

[66] Heidegger, M. "Science and Reflection" in Heidegger, M. *The Question Concerning Technology and Other Essays*, Lovitt, W. tr. (New York: Harper and Row, 1977), p. 160. Heidegger is used here only to draw attention to the etymology of *Wirklichkeit*. This does not mean that the general interpretation of Hegel is a Heideggarian one, nor is Hegel here being reduced to Heidegger. For a similar account of the position of *energeia* see: Gadamer, H.G. *Hegel's Dialectic: Five Hermeneutical Studies* Smith, C.P. tr. (New Haven: Yale University Press, 1976), pp. 14-15.

forth.[67] He states that when considered sufficiently broadly, it means: "that which, brought hither forth into presencing, lies before; it means the presencing, consummated in itself, of self-bringing-forth."[68] Heidegger argues that even when the Greeks, namely Aristotle, speak of what the Romans call *'causa efficiens,'* they never mean the bringing about of an effect.[69] Rather, what consummates itself in the Greek *ergon* is a self-bringing-forth into full presencing. Thus, he notes that Aristotle's fundamental word for presencing, *energeia*, is properly translated by the German word *Wirklichkeit*, only if the verb *wirken* is thought as the Greeks thought it, in the sense of bringing hither-into-unconcealment and bringing-forth-into-presencing.[70]

One should be careful, here, when stressing the relation between *Wirklichkeit* and *energeia* to not simply reduce Hegel's use of *Wirklichkeit* to a description of reality that is akin to the movement, flux and flow of energy. *Wirklichkeit* does involve process and movement however; it also involves a change in the nature of reality, whereby it involves a sense of a worked up reality, a reality that has transformed itself and resides in a new and stable form. This refers to a reality that may have existed partially or potentially but now has come to be a fully existing reality, one that contains within it possibilities that are still not yet realised. This meaning is given by Hegel's treatment of *Wirklichkeit* as a category of the *Logic*. In the *Logic* Hegel distinguishes *Wirklichkeit* from both the categories of 'Being' (*Sein*) and 'Existence' (*Existenz*). He notes that actuality (*Wirklichkeit*) stands higher than Being, that "Being is not yet actual: it is the first immediacy; its reflection is therefore a becoming and

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[67] Heidegger, M. "Science and Reflection" in Heidegger, M. *The Question Concerning Technology and Other Essays*, Lovitt, W. tr. (New York: Harper and Row, 1977), p. 160.
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*, at p. 160-1.

transition into an other.[71] For Hegel, the category of Being, as abstract, relies upon its passing over into its other, into not-being, into Nothing. As such, Being does not have stability but is instead Becoming. Hegel states:

> As the first concrete determination of thought, becoming is also the first genuine one. In the history of philosophy it is the system of Heraclitus that corresponds to this stage of the Logical Idea. When Heraclitus says, "Everything flows" (*panta hrei*), then it is *becoming* that is thereby pronounced to be the basic determination of everything that is there; whereas on the contrary, as we said earlier, the Eleatics took being, rigid without process, to be what is uniquely true. In connection with the principle of the eleatics Heraclitus says further, "Being is no more than not-being" (*ouden mallon to on tou ontos esti*); what this expresses is precisely the negativity of abstract being, and the identity, posited in becoming, between it and nothing, which, in its abstraction, is equally unstable.[72]

While actuality (*Wirklichkeit*) does contain within it both Being and Becoming and, as such, involves movement and process, it is also distinct and different from the constant movement of Becoming. Further, Hegel argues that actuality (*Wirklichkeit*) stands higher than Existence. He states that Existence is the immediacy that has proceeded from ground and conditions, or from Essence (*Wesen*) and its reflection.[73] He notes, "Existence therefore passes over into Appearance in that it develops the reflection which it contains."[74] Hegel describes Existence as:

> Existence is the immediate unity of inward reflection and reflection into another. Therefore, it is the indeterminate multitude of existents as inwardly reflected, which are at the same time, and just as much, shining into another, or *relational*; and they form a *world* of interdependence and of infinite connectedness of grounds with what is grounded. The grounds are themselves existences, and the existents are also in many ways grounds as well as grounded.[75]

Hegel explains this in different terms:

> What we have here is therefore also to be found in the ordinary consciousness: when we consider the ground of something, this ground is not something

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[71] Hegel, *S.L.* p. 541.
[72] Hegel, *E.L.* § 88, Addition.
[73] Hegel, *S.L.* p. 541.
[74] *Ibid.*
[75] Hegel, *E.L.* §. 123.

abstractly inward, but is instead itself an existent again. So, for instance, we consider the ground of a conflagration to be a lightning flash that set a building on fire, and, similarly, the ground of the constitution of a people is their customs and circumstances of life. This is the general shape in which the existing worlds is presented initially to reflection, namely, as an indeterminate multitude of existents which, being reflected simultaneously into themselves and into something else, are in the mutual relationship of ground and grounded with respect to each other. In this motley play of the world, taken as the sum total of all existents, a stable footing cannot be found anywhere at first, and everything appears at this stage to be merely relative, to be conditioned by something else, and similarly as constituting something else. The reflective understanding makes it its business to discover and pursue these all-sided relations; but this leaves the question of a final purpose unanswered, and, with the further development of the Logical Idea, the reason that is in need of comprehension therefore strikes out beyond this standpoint of mere relativity.[76]

For Hegel, actuality (*Wirklichkeit*) is not the infinite reflection of itself in an other. Rather, it begins to strike out beyond the standpoint of mere relativity and manifests itself. It occurs as 'self-distinguishing' and 'self-determining' movement.[77] Hegel argues that actuality (*Wirklichkeit*) is the unity of Essence and Existence, of what is inner with what is outer.[78] This places it higher than the infinite relativity of Existence, as it is the product or mediation of the meeting of Essence and Existence.

For Hegel, Essence is the shining or reflection of thought upon itself, critically attempting to separate the 'essential' from the 'inessential.'[79] Once critically determined, thought attempts to re-fashion reality upon the basis of this distinction; hence, for Hegel, "Essence must appear."[80] That is, Essence does not stay hidden but, as something determinate, is brought through the relativity of Existence, as Appearance. Hegel notes:

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[76] *Ibid.*, at § 123, Addition.
[77] Hegel, *S.L.* p. 542.
[78] Hegel, *E.L.* § 142.
[79] *Ibid.*, at §114.
[80] *Ibid.*, at § 131.

> Essence is initially a totality of inward shining, but it does not remain in this inwardness; instead, as ground, it emerges into existence; and existence, since it does not have its ground within itself but in an other, is quite simply appearance. When we speak of "appearance" we associate it with the representation of an indeterminate manifold of existing things, whose being is mediation pure and simple, so that they do not rest upon themselves, but are valid only as moments.[81]

Hegel notes that when we say that something is 'only appearance,' then, this points to a certain defect which consists in the fact that Appearance is still an inwardly broken moment and does not yet, have any stability of its own. This stability, however, begins to emerge in actuality (*Wirklichkeit*).[82] In actuality (*Wirklichkeit*), form and content begin to emerge into something of a stable relationship. Under certain conditions, an 'essence' that has 'emerged' through 'existence' and thus has 'appeared,' but only in a transient, temporary or partial existence or only as possibility or potentiality, now instead, emerges beyond this level and into a worked up, but, stable existence. That is, it comes to have 'actuality' (*Wirklichkeit*). Hence, it has come into or been brought into a condition that has occurred through the working up of existence, through manifestation and into something which can now be described as having a reality, an actual reality, and a reality that constitutes the emergence of something higher than what was before.

This condition refers to something that does not merely pass away as a moment, but, involves a degree of stability and permanence. Further, through this action of re-breaking reality, there is generated new conditions and new potentialities. Hegel states: "What is actual *can act*; something manifests its actuality through that which it

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[81] *Ibid.*, at § 131, Addition.
[82] *Ibid.*

produces. Its relationship to another something is the manifestation of itself."[83]

Further that:

> When all the conditions of something are completely present, it enters into actuality; the completeness of the conditions is the totality as in the content, and *the something itself* is this content determined as being equally as actual as possible.[84]

Actuality (*Wirklichkeit*) contains the metaphysical categories of possibility, contingency and necessity.[85] That is, actuality (*Wirklichkeit*) refers to something which is not just a manifestation of a potentiality (the relation between *potentia* and *actus*) or something which occurs solely through chance and the intervention of some other. Rather, it occurs in the relation between possibility and contingency, brought together through 'necessity.' In terms of the question of what is necessity? Then, the category of *Wirklichkeit* should be considered again in the terms of Hegel's positioning of the (in)famous stanza at the beginning of the *Philosophy of Right*, that of:

> *Was vernünftig ist, das ist wirklich;*
> *Und was wirklich ist, das ist vernünftig.*[86]

Wirklichkeit is the working of reality, it is the work of reality, reality's work, the nature of reality as work and working. It is the working of the Idea through reality, as actualisation into higher levels of reality. In the speculative thought of Hegel, this involves the necessity that reason should come to be actual and occur in the world. As such, Hegel's philosophy of law centres upon the comprehension of law, the state, and ethical life as *Wirklichkeit*, as the Idea of Right working through reality, as working itself up.

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[83] Hegel, *S.L.* p. 546.
[84] *Ibid.*, at p. 548.
[85] Hegel, *E.L.* § 143-147.
[86] Hegel, G.W.F. *Grundlinien der Philosophie des Rechts* (Frankfurt: Suhrkamp, 1970), p. 24.

Hegel's philosophy of law, thusly, sees the necessity of reason manifesting itself through reality as the Idea of Right, which becomes realised through taking the shape of differing forms which, at particular moments, when certain conditions have been satisfied, develop into a form of Right that exists at a higher level of reality than that which went before it. Further, this form of Right that has become actual (*wirklich*), contains a degree of stability, endurance and permanency. It works upon or changes the nature of reality, it works up reality and creates a whole set of new conditions, openings and possibilities for Right to over-leap itself in the future.

Such a reading does not mean that 'reason' necessarily works itself through reality and that, inevitably, a bright, happy future awaits the human race. Rather, the process of Right coming into actuality is dependent upon human action. Hence, freedom is not guaranteed. Rather, it is dependent upon human and institutional action to bring it forth, to bring it into actuality (*Wirklichkeit*). Right is dependent upon human acts, upon the action and activity of human subjects, who are driven by the sense that what is, does not yet, correspond to Right. Thus, reality must be transformed so as to bring Right into full and stable actuality (*Wirklichkeit*).

This points to the revolutionary impetus within Hegel's account of law. It is the drive of Right as not yet, the urging of self-transcendence. It is the centrality of Right as 'deed,' as subjective action, work, and transformation, which resides at the heart of the conception of Right as *Wirklichkeit*. Such a suggestion stems from a stress upon the sense of the verb '*wirken*' within the category of *Wirklichkeit*. This, as a critical-metaphysical legal category, locates a revolutionary principle within the law itself,

within Right. Hence, through action, Right effects its own negation and overcoming. Right posits, negates and transcends and, thus, *transforms itself through its own deed.*

This interpretation takes into account the 'left Hegelian' radicalisation of Hegel's legal and ethical theory that, in part, seeks to reinstitute the Fichtean emphasis upon human activity and deed.[87] However, the rereading simultaneously attempts to hold onto and preserve the positive ethical content embodied within the law as a form of freedom, and, hence, the role of the state in freedom's coming into actuality (*Wirklichkeit*). In this sense, the content of positive law is not simply negated, treated as mere appearance and critiqued as merely *bourgeois* law. Rather, conceiving Right as *Wirklichkeit* holds onto both law's ethical content and the need to negate and transcend 'what is rotten' in the law. In this account, both the act of the (human) subject, and the ethicality of the object (as law, as legal institution), is held onto when attempting to conceptualise 'freedom.' In this sense, the rereading shares some similarity with the interpretation given by Ernst Bloch.[88]

Bloch situates both Hegel and Marx within a tradition of natural law characterised by the inherent tension between right and not-right, freedom and unfreedom, justice and injustice, now and not yet. Bloch sees both Marx and Hegel holding onto this tension

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[87] On the relation between knowledge and action and the influential position Fichte's notion of '*Handlung*' on the radicalisation of Hegel and how this extends through to Critical Theory' see: Kortian, G. *Metacritique: The Philosophical Arguments of Jürgen Habermas* Raffan, J. tr. (Cambridge: Cambridge University Press 1980). For a survey of the political readings of Hegel, the 'conservative Hegelians,' and, the 'young Hegelian' concentration upon the 'philosophy of deed' see: Ottman, H. *Hegel and Political Trends: A Criticism of the Political Hegel Legends* in Stewart, J. (ed.) *The Hegel Myths and Legends* (Evanston, Illinois: North Western University Press, 1996). See also: Löwirth, K. *From Hegel to Nietzsche: The Restoration of Nineteenth Century Thought* Green, D. E. tr. (London: Constable, 1964), pp. 53-136.
[88] Bloch, E. *Natural Law and Human Dignity*, Schmidt, D.J. tr. (Cambridge, Massachusetts: M.I.T. Press, 1987).

with law, freedom and justice.[89] He notes further that, the school of the 'young Hegelians' attempted to cleanse the tradition of natural law of any conservatism the older Hegel may have fallen into, doing so by re-emphasising the radical moment of reason within reality, the pregnancy of right within the social world, the inherent demand of law itself to become fully rational.[90]

Reading Hegel in this manner has a number of benefits. First, it attempts to hold onto the normative force of law, its embodiment as a form of good and freedom, but without reducing Right into an apology for the present state of the law. Thus, the approach sees the grounding of ethics and freedom within the legal, political and social institutions of the state and recognises the possibility of conceptualising the state as an 'ethical actor.' However, because the approach also attempts to hold onto the inherent transcendental moment of law and ethics, the reading does not fall into the position of reducing the Idea of Right to solely what simply exists in present reality. Hence, this reading may be contrasted to the 'conservative Hegelian'[91] reading or the claim that Hegel's philosophy suggests a notion of the 'end of history.'[92]

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[89] *Ibid.*, at pp. 120-209.

[90] *Ibid.*, at p. 129. My account while invoking the centrality of Bloch's notion of the 'not yet' is however, not an account of 'process' in a Blochian sense. Further, my focus upon war's moral problem steers a different direction from Bloch's quasi-mystical investigation of reality and the seeking-out of its emancipatory and messianic moments.

[91] Early German interpreters who took a 'conservative' or 'conservative-liberal' interpretation of Hegel's *Philosophy of Right*, include: Erdman, J.E. *Philosophische Vorlesungen über den Staat*, (Halle, 1951); Haym, R. *Hegel unde seine Zeit*, (Berlin, 1857); Rössler, C. *System der Staatlehre*, (Halle, 1857); Lasson, A. *System der Rechtsphilosophie*, (Berlin, 1882). For a good account of these early interpretations see: Ottman, H. *Hegel and Political Trends: A Criticism of the Political Hegel Legends* in Stewart, J. (ed.) *The Hegel Myths and Legends* (Evanston, Illinois: North Western University Press, 1996).

[92] With regard to the 'end of history' interpretation see: Kojève, A. *Introduction to the Reading of Hegel* Nichols, J.H. tr. (Ithaca, N.Y: Cornell University Press, 1980); Fukuyama, F. *The End of History and the Last Man* (New York: Avon Books, 1992). For a refutation of the 'end of history' argument see: Harris, H.S. "The End of History in Hegel" *Bulletin of the Hegel Society of Great Britain* 23-24 1991, 1-14; Grier, P.T. "The End of History and the Return of History," *The Owl of Minerva* 21 1990, 131-44; Maurer, R.K. "Hegel and the End of History" in Stewart, J. (ed.) *The Hegel Myths and Legends* (Evanston, Illinois: North Western University Press, 1996).

Further, the reading of Hegel taken by the thesis is to be contrasted with the popular Anglophone portrayal of Hegel, that suggests that Hegel either glorified, or was an apologist for an authoritarian Prussian state[93] and, further, that he was a philosophical precursor to Bismarck and National Socialism.[94] This interpretation is still prevalent today, outside of Hegel scholarship. The reading of Hegel taken by the thesis proceeds from the premise that these Hegel 'myths' have already been thoroughly refuted by Anglophone Hegel scholarship.[95]

Comprehending Law

A reading of Hegel's speculative thought, while paying attention to the position of human subjectivity and its activity in the bringing of freedom into actuality, does not mean that the law is interpreted simply from the standpoint of the subject. Rather, part of the benefit of a Hegelian theory of law is the attempt to comprehend freedom through its objective embodiment. This involves a focus upon how freedom is located within and through law and legal-political institutions, and upon how this comes about.

On this point, Manfred Riedel notes that in understanding Hegel's *Philosophy of Right*, it is crucial to recognise Hegel's historical attitude.[96] He notes that Hegel's starting point is the modern French revolution, which attempted to incorporate the

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[93] See: Dewey, J. *German Philosophy and Politics* (New York: Books for Libraries Press, 1915); Hobhouse, L.T. *The Metaphysical Theory of the State* (London: George Allen and Unwin, 1918).

[94] Popper, K. R. *Open Society and Its Enemies*, (London: Routledge and Kegan Paul, 1945).

[95] See: Bosanquet, B. *Philosophical Theory of the State* (London: Macmillan,1910); Muirhead, T.H. *German Philosophy in Relation to the War* (London: Murray, 1915); Knox, T.M. "Hegel and Prussianism" *Philosophy* 15 1940, 51-63; Kaufman, W.A. "The Hegel Myth and its Method" *Philosophical Review* 60 1951, 459-86; Avineri, S. "Hegel and Nationalism" *Review of Politics* 24 1962, 461-84.

[96] Riedel, M. *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy*, Wright, W. tr. (Cambridge: Cambridge University Press, 1984), p. 38.

ideal of freedom within natural law into legal codes and civil constitutions. In this sense, the 'rationality' of the state refers to the actuality of recent history that is given proper recognition in 'philosophical right.'[97] He argues that it is in this manner that Hegel takes up the traditional task of philosophy, to 'comprehend what is' as the speculative knowledge of Being. Hence, "To think *Being* in the framework of the events of Time."[98]

Joachim Ritter also draws attention to the centrality of the revolution in Hegel's thought. He notes that the problem for Hegel was one posed, and at the same time, left unresolved by the revolution, that of the political realisation of freedom.[99] He notes that, for Hegel, the problem that has been raised through the revolution by the demand for political freedom, consists in finding the appropriate legal form of freedom. This consists in developing a legal order that accords with the freedom of self-hood, and does it justice by enabling the individual to fully be itself and achieve individual self-determination.[100] For Hegel, philosophy becomes the key to unlocking the new era coming to pass with the revolution.[101]

In this sense, jurisprudence can read the 'ontology' of the Idea of Right, as being both historical and futural. It is historical in that its existence constitutes the procession of unfolding in time through subjective acts and legal and political institutions, whereby it comes to know itself only through the comprehension of this passage. It is futural, in that the Idea of Right is never fully constituted and is irresistibly orientated towards

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[97] *Ibid.*
[98] *Ibid.*
[99] Ritter, J. *Hegel and the French Revolution: Essays on the Philosophy of Right*, Winfield, R.D. tr. (Cambridge Mass.: MIT Press, 1982), p. 47.
[100] *Ibid.*, at p. 48.
[101] *Ibid.*

its not yet, residing within its own structural beyond, its own inadequacy or incompleteness. Right, is thus, constantly burdened with the promise of its own better self.

The Idea of Right as being both historical and futural, is encompassed within the conception of Right as *Wirklichkeit*. As *Wirklichkeit*, the Idea of Right is in passage towards higher stages of reality. This occurs as forms emerge that transcend the old, and through their stability and endurance, their existence begins to reflect Right's image. Further, the Idea of Right lasts as something that has become actual, until, unsatisfied with its existing imperfection, it leaps over itself and manifests into a new form, more true to itself, and thus becomes a new worked up reality. This new actuality (*Wirklichkeit*), while negating the old form of itself, transcends the old through its preservation of it, and, in a sense, holds it within itself. As such, the process of *Wirklichkeit* as the working up of reality can be understood via Hegel's notion of *Aufhebung*.

This suggestion comes up against the claim that Hegel justifies the status quo in some form through the march of progress, understood as 'world history.' This involves the argument that Hegel, through the category of actuality (*Wirklichkeit*), retrospectively gives any form of law a positive content by positioning it within the wider passage of evolution or progress. Such an interpretation needs to be rejected. It is worth here noting Ritter's comments in response to such claims. He states:

> Ever since the concept of world history lost all substantial meaning and became a mere collection for all known cultures and histories of peoples, there has hardly been any area in Hegel's philosophy so misunderstood and dismissed as mere speculation as the theory of world history. For Hegel himself, however, it is bound up with the theory of his own time and of the Revolution in a very immediate and fundamental sense. The world-historical

dimension of European history is the freedom of being human; that signifies, however, that *the Revolution itself must positively qualify as an epoch of European world history and its freedom of being human* in so far as its makes freedom the foundation upon which all legality is based.[102]

In Ritter's argument, what follows from the sense of world historical meaning is that there is politically, no longer, any possibility of turning back from the revolution and what it has achieved. This is in the sense that every present and future legal and political order must presuppose and proceed from the revolution's universal principle of freedom.[103] The point for jurisprudence is that law is to be judged via the category of freedom, that is, the extent to which law has brought freedom into actuality (*Wirklichkeit*). However, as to the question of what freedom is, this category itself is not static but is also in a process of becoming more than itself. This is the sense that our notions of freedom are becoming and are driven, by necessity, to become more adequate to freedom as the *Begriff*. This does not, however, occur merely in the process of thought, but occurs as being emptied out into time. The category of freedom only becomes more adequate through the objective manifestation of legal institutions that have become actual (*wirklich*), through a reality that has worked itself up. In this sense, reality corresponds to 'reason,' only to the extent that freedom, through reality's (or law's) work, has come to be actual (*wirklich*). In this conception, freedom can be understood as the working of law, as the work of law, law's work, and as the nature of law as work and working.

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[102] *Ibid.*, at p. 51. He notes further at p. 50 that:

> In Hegel's view, the unity of freedom and man's being is also the principle of world history; this has the very precise meaning, that history only becomes world history when it comes to have its subject as man in the sense of his being a man. Where man does not exist as man, there is also history, whatever else it may signify, does not belong to world history. Its subject is man as man and therewith humanity. Since, however, man's being necessarily includes freedom, Hegel understands world history also as the history whose principle is freedom and whose course has freedom's development and unfolding for its content.

[103] *Ibid.*, at p. 52.

Under the category of actuality (*Wirklichkeit*), there is no going back to a previous notion of freedom. Further, the shape that has come to be actual holds sway until law's own inadequacies and contradictions become too much to bear. There arises then, the necessity of freedom to call for the transcendence of Right again. This demand is not one of any cosmic teleology, but is the demand of speculative thinking, which, in a Hegelian conception, is inherent in the manner of thinking about the law. Just as the process of speculative thinking can be problematic, involving the dominance of the understanding, the rampart self-perpetuating, hyper-sceptical, moment of the dialectic, and the arrival of the speculative moment that is never speculative enough. So, then, is law's passage to freedom through actuality (*Wirklichkeit*) problematic, as well. Law's process of coming to higher levels of actuality, as involving the sense of *Aufhebung*, is not reducible to a predictable mechanics or full conceptual ordering of reality.[104] Rather, Right's own restlessness produces its own unpredictability, its own irredeemable chaos, and a dangerousness. Freedom, occurring through the work of Right, is thus not guaranteed; it involves a struggle with itself occurring as an ongoing, tenuous, mediation between thought and being.

Conclusion

In this chapter, I have given a rereading Hegel's theory of law. I have drawn upon the suggestion, by contemporary inter-subjective interpretations of Hegel's *Logic*, that the

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[104] For an account which emphasises the position of chance, contingency, restlessness, and hence an argument against the reduction of Hegel's notion of *Aufhebung* into an account of 'order,' 'closure,' or 'mechanics,' see: Nancy, J. *The Speculative Remark: One of Hegel's Bon Mots* Suprenant, C. tr. (Stanford: Stanford University Press, 2001).

Logic expresses a 'critical metaphysics.' From this, I have attempted to develop a rereading of Hegel's theory of law as presenting a critical metaphysics. I have argued that Hegel's category of actuality (*Wirklichkeit*), when understood in terms of a critical metaphysics, provides the basis of Hegel's conception of law. This account begins to form the theoretical basis upon which the thesis will consider war's moral problem and Hegel's inheritance of this problem through a natural law tradition. As indicated previously, the attempt to develop a jurisprudence of war that might be adequate for contemporary circumstances focuses upon the nexus of law-war-ethics. Before moving on to consider Hegel's reception of war's moral problem, it will be necessary to examine Hegel's account of ethics and ethical life, and Hegel's inheritance of, and attempt to philosophically develop, Kant's conception of morality.

Chapter 4

Ethical Life and the State

Introduction

The previous chapter began a rereading of Hegel's conception of law by giving an interpretation of the category of actuality (*Wirklichkeit*) as a critical-metaphysical juridical, category. This drew upon inter-subjective interpretations of Hegel's *Logic* that viewed the *Logic* as presenting a critical metaphysics. This chapter continues the rereading of Hegel as a jurisprudential thinker by focussing upon his conception of ethical life (*Sittlichkeit*). In this chapter, I draw upon the interpretation of Hegel's conception of ethical life as a critique of Kantian morality and the interpretation that Hegel's account of the family, civil society and the state can be understood as 'social being.' To this, I will seek to add the suggestion that Hegel's account of the shapes of ethical life, particularly, the spheres of civil society and the state, can be understood juridically. I suggest that this is possible by considering each, in terms of the critical-metaphysical, juridical, category of actuality (*Wirklichkeit*).

What is Ethical Life? - Hegel's Critique of Kantian Morality

Hegel's theory of ethical life is widely understood as a critique of Kantian morality. Hegel's theory of ethical life takes up the Kantian and Fichtean theories of freedom and attempts to go beyond their limitations. For Hegel, this means locating the freedom of the 'will' within ethical life. For the purpose of introducing the position of

the will and its relation to the question of freedom in Hegel, I will draw briefly on the account given by Allan Wood.[1] Wood states:

> The Introduction of the *Philosophy of Right* begins by developing the concept of a free will whose vocation is to achieve *absolute* freedom, whose absoluteness consists in the fact that it "refers to nothing other than its own self, so that every relation of *dependence* on something other falls away."[2]

Wood notes that Hegel's identification of freedom with rational choice is motivated by the idea that freedom is a good, but also, Hegel's view stems from his inheritance of the philosophical traditions of Spinoza, Kant, and Fichte.[3] He argues that this starts with Spinoza's idea that you are free when the source of your actions is in you and unfree when the source is outside of you. Perfect freedom is the condition in which one's actions are caused only internally, not externally.[4] Further, this idea is present in Kant's conception of the autonomous will. This acts solely from respect of a self-given law, rather than from any natural inclinations, which Kant takes to lie outside the rational agent's real self.[5]

This line of thought is developed in the philosophy of Fichte, in the attempt to work out completely the idea of a self that strives to be entirely its own work. For Fichte, the essence of selfhood is the drive towards freedom, a tendency that he calls the "tendency to absolute self-activity," or to "self-sufficiency," or the "absolute tendency

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[1] Wood, A.W. *Hegel's Ethical Thought* (Cambridge: Cambridge University Press, 1990). Note, the use of Wood here to introduce Hegel's place within a particular philosophical tradition does not mean that the interpretation of Hegel taken in the thesis subscribes to Wood's interpretation of Hegel in terms of a "Self Actualisation Theory." The interpretation of Hegel taken in the thesis relies upon a specific philosophical interpretation of Hegel's work through the critical-metaphysical juridical category of *Wirklichkeit*, which, while somewhat similar, has a meaning that is distinct and different from the English term 'actualisation.'

[2] Wood, A.W. *Hegel's Ethical Thought* (Cambridge: Cambridge University Press, 1990), p. 43.

[3] *Ibid.*, at p. 42.

[4] *Ibid.*, at pp. 42-3.

[5] *Ibid.*, at p. 43.

to the absolute."[6] Wood argues that, just as Fichte's "tendency to absolute self-activity" belongs to a will that wills "freedom solely for the sake of freedom," Hegel's absolutely free will is "the free will that wills the free will."[7]

In the *Philosophy of Right*, Hegel attempts to demonstrate how the will comes to be free through the development of the Idea of Right. Freedom of the will is tied to the process of the coming into actuality (*Wirklichkeit*) of Right. In this, the highest stage of freedom of the will, is the will that knows itself through ethical life (*Sittlichkeit*) and acts upon this self-knowledge. In the *Philosophy of Right*, particularly within the introduction, Hegel sets out how the will obtains its freedom as a critique of the positions of Kant and Fichte. He argues that the will does not become free simply through its moral self-legislation, but through action, the translating of itself into existence. This action, where the will, wills itself to be free, does not occur through the solitary act of self-positing, but through the will's actions within concrete ethical life. For Hegel, the question of freedom is resolved when the will finds itself in, and knows itself as, ethical life.

Hegel notes that the basis of Right is the 'realm of Spirit' in general.[8] Right acquires its particular character, its content, through the national character of a people, the particular stage of historical development and the relations between peoples playing-

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[6] *Ibid.*
[7] *Ibid.* Note the claim by Riedel, *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy*, Wright, W. tr. (Cambridge: Cambridge University Press, 1984). Riedel at pp. 61-67, argues that Hegel, in taking up the idea of freedom as the 'will that wills itself' as the fundamental presupposition of his theory of Right, follows in the tradition of Hobbes and Rousseau. Each break with the assumption of a teleological law of nature (*lex naturalis*) which stands above the human will and rules over the nature of things. He notes that the impulse permeating form the notion of individual will flows through the whole of the Hegelian system and conception of the state.
[8] Hegel, *Ph.R.* § 4.

out through history.[9] Further, he argues that the will is not wholly separate from thinking and that the two are not separate faculties. Rather, the will is a particular way of thinking, that of thinking translating itself into existence, thinking as the drive to give itself existence.[10] For Hegel, a 'free will' is one that comprehends its ground, the basis of its existence and, from there, determines its acts in accordance with its own terms. In modernity, the 'free will' is that which finds itself in and knows itself as 'ethical life.'

Hegel's account of ethical life has two objects of critique. The first is Kant's conception of morality, of which Hegel attempts to go beyond. The second is what might be termed 'subjective-moralisation.' This does not involve the rigour of attempting to carry out the categorical imperative, rather it involves the situation where private inclination, or 'mere caprice,' is passed off as moral judgement. This second sense is not 'moral' in the Kantian sense of the term, but it does, for Hegel, represent the result of subjectivity run wild. It represents a situation in modernity where the individual considers its appeal to its own conscience to be the ultimate moral arbiter, and where this 'unrigorous' and 'uncritical' appeal to private conscience becomes the dominant form of 'moral' reflection. From both the Kantian and Hegelian perspectives, this conception is nothing moral; it is merely the decision of selfish or private interest. However, Hegel seems to consider that there is something of a link between Kantian morality and subjective-moralisation, where the latter represents the deformed cousin of the former. The link for Hegel is perhaps the conception that Kantian morality can slide or degenerate into subjective-moralisation when it moves from the level of theoretical reflection to a practical morality operating

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[9] *Ibid.*, at §. 3.
[10] *Ibid.*, at § 4, Addition.

within society. In this respect, when considering Hegel's critique of Kantian morality, it is important to keep in mind Hegel's suggestion that there is a link between the two forms, without, however, reducing Kantian morality to the caricature of subjective-moralisation.[11]

Generally, Hegel favours concrete mediated norms, grounded in social and cultural institutions, over abstract universals. Duty arises not by pure self-legislation through the determination of the moral law via reason. Rather, duty arises through one's membership in social institutions, the immersion in living law and custom. Hence, duty is determined through reflecting upon one's 'being,' one's mediated existence through institutional norms, through what Hegel refers to as *Sittlichkeit*, or ethical life. Hegel considers Kant's conception of morality to be somewhat 'abstract.' One aspect of Hegel's critique of Kant is sometimes called the 'emptiness' charge; that is, that Kantian morality represents an 'empty formalism.' Hegel states:

> However essential it may be to emphasise the pure and unconditioned self-determination of the will as the root of duty - for knowledge [*Erkenntnis*] of the will first gained a firm foundation in the philosophy of Kant, through the thought of its infinite autonomy - to cling onto a merely moral point of view without making the transition to the concept of ethics reduces this gain to an *empty formalism*, and moral science to an empty rhetoric of *duty for duty's sake*.[12]

On this, Wood notes that Hegel's critique of the Kantian standpoint on morality involves the argument that the test of the categorical imperative provides no real

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[11] Note: Theunissen, M. "The Repressed Inter-Subjectivity in Hegel's Philosophy of Right," Watkins, W. tr. in Cornell, D., Rosenfeld, M. and Carlson, D.G. (eds.) Watkins, E. tr. *Hegel and Legal Theory*, (New York: Routledge, 1991). Theunissen at p. 36, notes that Hegel's critique of 'morality' is two-fold. The firstly it involves a critique of theoretical reflection occurring in Kant's philosophy. Secondly, it involves a critique of the 'practical morality' or subjective-moralisation of civil society. This second aspect can be seen in Hegel's ongoing polemic against Jacob Fries. Note Avineri, S. *Hegel's Theory of the Modern* State (London: Cambridge University Press, 1972). Avineri at p. 120 argues, that in attacking Fries, Hegel pointed to the fact that in Fries, the rigor of Kantian philosophy degenerated into an ethic of mere subjective intentions. For Avineri, this was a danger that Hegel had always discerned in Kantianism.

[12] Hegel, *Ph.R.* § 135, Remark.

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distinction between maxims. Hence, no 'doctrine' of duties can be formulated from the moral standpoint, as it provides nothing but an empty principle.[13] Further, he notes that Hegel argues that such 'moral' acts occur, not from duty alone, but arise out of particular motives.[14] He notes that Hegel's argument is that there can be no action from 'pure duty,' as action under empirical circumstances involves the importation of empirical motives. Hence, to act from a moral principle involves giving duty some manner of empirical content. This means that one is always acting from empirical motives and not just out of a supposedly pure duty. To avoid this means, either not acting at all, or abstracting completely from the empirical content of one's actions.[15] In the latter case, a 'pure duty' could almost justify any action at all. In this sense, Hegel's critique of Kant suggests that the moral standpoint provides no determinate criteria, short of the criteria of 'humanity,' for moral action.

In reciting Hegel's critique of Kant, jurisprudence must be careful not to overplay the difference between Hegel and Kant arising out of the 'emptiness charge.' It should be remembered that Hegel inherits from Kant, a conception of freedom in terms of a law that is self-legislated. Part of Hegel's differentiation from Kant is his redrawing of the boundaries of the 'self' within this self-legislation. Hence, part of Hegel's argument against Kant is that, while centering moral self-legislation upon the thinking 'individual,' Kant imputes, in a sense, through the back door, a social-ethical content upon which this self-legislation implicitly draws upon. In this respect, the determination of a universal law via 'reason' actually involves a determination of a 'universal' morality derived from particular social customs and conventions. The Kantian response is that Kant's theory of morality is not unaware of this and, rather,

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[13] Wood, A.W. *Hegel's Ethical Thought* (Cambridge: Cambridge University Press, 1990), p. 154.
[14] *Ibid.*, at p. 169.
[15] *Ibid.*, at p. 169.

that the attempt to determine a universal law is not 'abstracted' from social and cultural conceptions. Guyer argues:

> Kant's idea seems to be that we assign the origin of the moral law to a figure other than ourselves in order to express the distinction between mere inclination and reason within ourselves, and we characterize this other figure as divine in order to represent the authority of the fundamental law or reason over our inclinations; but on reflection, we are well aware that the source of the moral law is actually our own reason and that the authority of reason over mere inclination is self-created.[16]

Another aspect of Hegel's disagreement with Kant involves the position of the *a priori*. Pippin argues that Hegel's disagreement with Kant arises from the concern for what a 'free, self-determining life' requires. Hegel denies that a life determined by 'what any rational person ought to will' is sufficient.[17] Pippin notes further, that Hegel disagrees with or gives up on the Kantian hope that there is a single formal rule of practical rationality in itself, a simply definitive *a priori* which tells us how to govern our actions and to be 'one among many.' He notes that Hegel gives up on the Kantian attempt to show how one could come to experience one's own concrete, individual freedom, in acting as a 'rational agent,' defined so formally.[18] For Hegel, the question of 'duty' is one that is far more complex and requires a more valid theoretical base than anything that can be circumscribed in a formal rule or simply by the consultation of one's conscience.[19]

It might be argued that, for Hegel, the question of what a free, rational, self-determining life requires, falls upon the content or the circumstances that such a

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[16] Guyer, P. *Kant on Freedom, Law and Happiness* (Cambridge: Cambridge University Press, 2000), p. 403.

[17] Pippin, R.B. *Idealism as Modernism: Hegelian Variations.* (Cambridge: Cambridge University Press, 1997), p. 92.

[18] Pippin, R.B. "What is the Question for which Hegel's Theory of Recognition is the Answer?" *European Journal of Philosophy*, 8 (2) 2000, 155-172, p. 162.

[19] Petry, M.J. "Hegel's Criticism of the Ethics of Kant and Fichte," in Stepelevich, L.S. and Lamb, D. (eds.) *Hegel's Philosphy of Action* (Atlantic Highlands N.J.: Humanities Press, 1983).

'rational' determination of conscience is grounded upon. It depends upon how the content, the customs, that one is immersed in, is to be deemed moral or immoral, and of how one is to choose between moralities and the bulk of their inherent contradictions. Hegel touches upon these points when he discusses the position of the 'beautiful soul.'

For Hegel, the beautiful soul involves the notion of the moral self-consciousness who wants to maintain its moral purity. For Hegel, the beautiful soul has a conception of 'pure moral duty' but this exists only in the "empty abstraction of pure thought."[20] The moral self-consciousness wants to act so as to fulfil its duty, to realise itself fully as a moral being by acting upon its moral command. However, duty cannot be translated from thought into existence and retain its 'purity,' as this purity exists only in the abstraction of duty from living social-mediated relations. In the concrete, this duty contains multiple duties that may be contradictory. Hence, acting upon one duty raises a contradiction with others. Because the self-consciousness conceptualises duty in abstract moral terms and does not grasp the contradiction and multiplicity inherent within all concrete ethical duty, self-consciousness refuses to act so as to preserve the purity of its duty. In doing so, it forsakes what it endeavoured to preserve. For Hegel this self-consciousness:

> (L)ives in dread of besmirching the splendour of its inner being by action and existence; and, in order to preserve the purity of its heart, it flees from contact with the actual world, and persists in its self-willed impotence to renounce its self which is reduced to the extreme of ultimate abstraction, and to give itself a substantial existence, or to transform its thought into being and put its trust in the abstract difference [between thought and being]. The hollow object which it has produced for itself now fulfils it, therefore with a sense of emptiness. Its activity is a yearning which merely loses itself as consciousness becomes and object devoid of substance, and, rising above this loss, and falling back on itself, finds itself only as a lost soul. In this transparent purity of its moments,

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[20] Hegel, *Ph.S.*, § 637.

an unhappy, so called 'beautiful soul,' its light dies away within it, and it vanishes like a shapeless vapour that dissolves into thin air.[21]

The beautiful soul, in being unwilling to let go of the purity of its moral duty, renders itself unable to act. Of course, it cannot act, as no 'pure' duty can be acted upon within the world and still maintain its purity. In one sense Hegel's notion of the beautiful soul can be read as a critique of Kantian morality. However, it can also be read as an attempt by Hegel to open up the lines of Kant's moral inquiry, in that it asks, how am I to 'be' a moral agent? Hegel asks, what is the relation between morality (or rather ethics in general) and an individual's 'being?'

With regard to the conception that the notion of the beautiful soul is a critique of Kantian morality, a Kantian response should be noted. In response to the charge that Kant's conception of morality is merely an 'ethics of conviction or private conscience,' Ottfried Höffe notes:

> The will is by no means indifferent towards its expression in social and political reality. It is not above and beyond reality but rather the ultimate determining cause – insofar as the cause lies in the subject. To be sure, the expression of the will may, due to bodily, mental, economic and other imperfections, fall short of what is willed. For example, help may be too little or too late despite supreme efforts. But man can never escape this danger. His action and inaction occur in a social context dependent upon natural and social conditions.[22]

It should be noted that Hegel's critique goes also to a distinction within Kant between 'theoretical' and 'practical' judgement. With regard to 'practical judgement' Onora O'Neil notes:

> Practical judgement is *always* a matter of finding a way of achieving a range of aims and objectives while conforming to a plurality of principles of duty,

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[21] Hegel, *Ph.S.* § 658.

[22] Höffe, O. *Immanuel Kant* Farrier, M. tr. (Albany: State University of New York Press, 1994), p. 144.

and of doing so while taking account of the varied realities and vulnerabilities of human life.[23]

In this respect, part of the distinction between Kant and Hegel rests in whether there resides a contradiction within 'duty itself,' or whether conflict does not reside in 'duty itself' but rather, within the contingencies of life involved in acting upon duty. Kant agrees with the latter.[24] For Hegel, duty necessarily involves contradiction, and this arises due to a relation between ethics and 'being.' By concentrating upon this relation, Hegel attempts to clarify and go beyond the Kantian conception of morality, suggesting that morality (*Moralität*) needs to be understood as having its ground within ethical life (*Sittlichkeit*).

Ethical Life as Social Being

Hegel's notion of ethical life (*Sittlichkeit*) can be understood as 'social being.'[25] This implies that the essence of individuality is its recognition of itself within its wider social existence.[26] The term ethical life has meaning in two simultaneous senses. The first refers to the status of human life as having an existence as inter-related and

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[23] O'Neil, O. "Instituting Principles: Between Duty and Action" in Timmons, M. (ed). *Kant's Metaphysics of Morals: Interpretive Essays* (Oxford: Oxford University Press, 2002), 338.
[24] *Ibid.*
[25] There are a number of differing interpretations of Hegel's theory of ethical life, each emphasise to differing degrees the 'Greek' or 'communitarian' aspects of ethical life, and each consider to differing degrees the role of ethical life as a form of 'social theory,' or draw attention to Hegel's position within the development of the natural law tradition. My rereading of ethical life as 'social being' shares some similarities with the interpretation taken by Avineri, see: Avineri, S. *Hegel's Theory of the Modern State* (London: Cambridge University Press, 1972). However, my interpretation differs to the extent that its focus is upon how the notion of ethical life applies to and can be used to open questions of law. Further, in the next chapter, I will offer a rereading of Hegel's notion of ethical life through a theory of (mis)recognition.
[26] Note Honneth, A. *The Struggle for Recognition: The Moral Grammar of Social Conflicts* Anderson, J. tr. (Cambridge: Cambridge University Press, 1995). Honneth at p. 14, argues that Hegel's early writings display an attempt to replace atomistic basic concepts with categories that are geared towards the social nexus between subjects. Honneth argues that that Hegel asserts that every philosophical theory of society must proceed, not from the acts of isolated subjects, but rather, from the framework of ethical bodies within which the subjects already move.

mediated, where individuality and human will is not separated and atomistic, but rather, is a thoroughly integrated and a presupposing moment of this wider sociality. This existence is not fixed in history, but instead develops, or is worked up, to higher levels of reality, higher levels of the good and freedom, in accordance with the category of *Wirklichkeit*. A second sense, refers to an individual having an awareness of this mediated and inter-related existence as their essence. It is where an individual, rather than having a self-comprehension that is isolated and abstract, has instead something of a speculative sense of their self, a sense of their self as a moment within a wider whole. In this occurs a normative or moral aspect, where the individual's knowledge of their self influences their actions. It is a relation between self-knowledge and action where the knowledge of one's self, as ethical life, produces ethical acts.

The German term *'Sittlichkeit,'* translated as 'ethical life,' is derived from *Sitte*, the German for 'custom' and infers a mode of conduct habitually practised by a social group and regarded as a norm of behaviour.[27] Hegel's conception of ethical life was somewhat influenced by what he perceived as the beauty of life in Greek antiquity, where a person's self-knowledge was immersed within the customs of the community. In this conception, the ethical life of the community was an individual's 'immediate truth.'[28] In Hegel's somewhat idealised conception of Greek life, the notion of subjectivity as it exists in modernity, the knowing of one's self as possessing an independent will, opinion, and moral conscience, separate from the group, had not yet emerged. Instead, there existed a harmony between the individual and the community, where each knew itself only as moments of the other.

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[27] Inwood, M. *A Hegel Dictionary* (Oxford: Blackwell, 1992). p. 91.
[28] Hegel, *Ph.S.* § 440.

It is important to note that when Hegel speaks of ethical life he is not arguing for a return to the immediacy of Greek ethical life. The notion of ethical life does not remain fixed within this idealised and utopian conception; instead, it went through a series of historical changes and continues to develop through modernity. In its development, the harmony of Greek ethical life broke apart, driven by an internal contradiction described by Hegel in the play, Antigone.[29] Further, for Hegel, the rise of a private conscience and the subjective perspective of Right, exemplified in the philosophy of Socrates, and religious reflection through the spread of Christianity, further broke apart the beauty of the Greek unified self-conception. This harmony was increasingly transfigured through the advent of the Roman conception of a legal personality.[30] In Hegel's time, this self-alienation had developed through the Enlightenment to the position of the (philosophical) dominance of subjective morality and the subjective-moralisation of all spheres of life. In this, private opinion held itself in opposition to what it conceived as the dead and lifeless body of the law.[31] Against this, Hegel sought to properly philosophically ground (or reconceptualise) the moral conception in the concrete, or fully mediated nature of ethical reality. This reality was ethical life, as it had come to exist within modernity.

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[29] Sophocles, *The Thebian Plays* Watling, E.F. tr. (Harmondsworth: Penguin, 1965).

[30] Note Avineri, S. *Hegel's Theory of the Modern* State (London: Cambridge University Press, 1972). Avineri at p. 25 argues that for Hegel, the rise of Imperial Rome put an end to the free republican spirit of classical antiquity. Under empire, the readiness to work and die for the whole disappeared and the citizen's militia was replaced by a standing army. See also the account by Franco, P. *Hegel's Philosophy of Freedom* (New Haven, Conn.: Yale University Press, 1999), pp. 104-5.

[31] Note Riedel, M. *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy*, Wright, W. tr. (Cambridge: Cambridge University Press, 1984). Riedel at p. 115, argues that the young Hegel's assumptions, influenced by Gibbon's *Decline and Fall*, involved the notion that a vibrant Greek ethical life fell and congealed into the lifeless formality of Roman law and the relations of abstract 'private persons.' Riedel argues that this account involved a degree of historical falsity and inaccuracy. He notes that Hegel's assessment of the modern condition of 'alienation' developed from this original naivety, through reading of the British political economists.

Important within Hegel's account of ethical life, is the play, Antigone. Hegel's account of Antigone highlights the understanding of law in modernity that Hegel's *Philosophy of Right* attempts to reconceptualise. Antigone represents the idea of social being; her life represents ethical life, in that law is not the imposition of duties upon her. Rather, in the carrying out of her ethical duty, she is giving effect to her own wider self, to her social being embodied in the divine law and in the *polis*. The play, Antigone, is central to the conception of Hegel's ethical life, as it signals what he views as the breakdown of the harmony of Greek ethical life, and the resulting tensions between multiple duties that becomes characteristic of modernity. In pointing to this tension, Hegel draws our attention to the question of what is ethical action and how, by one's ethical actions, does one become free?

In his reading of the Antigone, Hegel emphasises the violence of the contradiction at the heart of ethical life and, thus, the violence residing within an individual's ethical being. He describes the self-destruction of the beauty of Greek ethical life, whereby in being unable to manage its own internally generated contradiction, it is tragically destroyed and its harmony and unity undone. In the account, the figure of Antigone is shown as the middle term of the spheres of ethical life, her ethical being is the mediation between human law and divine law. Antigone's ethical duty is composite; it involves on the one hand, knowledge of human law, a duty to the city, and to its ruler, Creon. On the other, it involves knowledge of a duty to the divine law, known and expressed through the natural relation of the family and the rights and rituals associated with the passage from life into death.[32] In the conception of the harmony of Greek ethical life, these two spheres are not in conflict but re-enforce and complement

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[32]Hegel, *Ph.S.* § 448-450.

one-another. The individual has their ethical being as the middle term, the point of mediation between these two spheres, and has something of a beautiful and harmonic ethical existence in knowing themself in and through their relation. Hegel notes:

> The ethical world is in this way in its enduring existence an immaculate world, a world unsullied by any internal dissension. Similarly, its process is a tranquil transition of one of its powers into the other, in such a way that each preserves and brings forth the other. We do indeed see it divide itself into two essences and their reality; but their antithesis is rather the authentication of one through the other, and where they come into direct contact with each other as real opposites, their middle term and common element is their immediate interpenetration.[33]

Often the play is interpreted as the clash between natural and positive law, with Antigone upholding the side of natural law, disobeying the command of the positive law of Creon. She does so, by attempting to perform the necessary funeral rites for her dead brother who had fought against the city. Hegel's interpretation is somewhat different. For Hegel, the conflict arises out of a contradiction inherent in ethical duty itself, where duty opposes itself. This contradiction, which lay potentially within the harmony of ethical life, is brought about when Antigone attempts to perform the ethical act, when she makes the decision to act upon the duty inherent in one aspect of her ethical being, and in doing so, negates the other.

Antigone does not withdraw like the beautiful soul into the realm of 'pure duty' and, as such, into inaction. Rather, she realises that her ethical duty has an existence only through her deeds, through her action giving life to the law. In carrying out her duties under divine law to bury her brother, she knowingly commits a crime, negates and does violence to her duty under human law. The seemingly tragic nature of Antigone is that she knew that her action to carry out one duty would negate the other and, as

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[33] *Ibid.*, at. § 463.

such, she suffered guilt. Guilt arises, not only because her actions were both ethical and a crime, but because, in negating one aspect of her ethical duty, she had negated an aspect of her own self. Unable to live on with this now manifest contradiction, as a now divided and violently torn ethical being, she suffers and commits suicide.

Hegel notes that the collision between duties is, in a sense, 'comic' because it expresses a contradiction at the heart of all duty, at the heart of all ethical life.[34] This comedy belongs to, or, is characteristic of modern law where the spheres of one's ethical life necessarily come into collision and are recognised as such. In one sense, Antigone is the initiation of modern law as the tenuous nature of modern ethical life. In the modern state, one's social being is stretched across numerous spheres and hence, Right and freedom is characterised by these competing duties. Further, Antigone represents the comedy of ethical action, which is never truly tragic. Thus, in a second sense, it is suggested that the notion of tragedy is something of a 'fiction' used to mark the ever-present tension within ethics itself. By this, the 'truth' of the 'harmony' of Greek ethical life is a fiction just as the idea of a 'pure' moral duty is also a fiction.

In this case, I suggest that it is not completely correct to say that ethical life and the law was historically broken and that this tragedy initiated the mundane law of modernity in which this break can never be resolved. Rather, the comedy of law is that this tension, this contradiction, has always resided within ethical life and the point of responsibility within law and ethics is to recognise and come to terms with this.[35]

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[34] *Ibid.*, at § 465.

[35] In emphasising the notion of 'comedy,' I share with, and depart from, an interpretation of Hegel's Antigone as given by Gillian Rose. See: Rose, G. *Mourning Becomes the Law* (Cambridge: Cambridge University Press, 1996). With regard to the comedy of law in modernity, Rose at p. 72 states:

In the logic of Hegel's thought, ethics is always working itself through this contradiction. Ethical action is always some form of suffering through error, otherwise the action is not ethical at all. Understanding Hegel's ethical life in this manner means paying attention to this mediated content within ethics and law. As social being, ethics involves some break or breaking, it involves some form of negation and self-negation. This follows on from the Hegelian idea that Pure Being contains within itself its own contradiction, its Non-Being, its Nothing. Only through this troubled passage, does Being become Determinate Being, a conception that is

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> (T)he law is no longer that of Greek ethical life; it is no longer tragic. Antigone stakes her life as the individuated pathos of substantial life in collision with itself: she presents part of its truth and she acknowledges the part of that truth *which exceeds* her. By contrast, modern law is that of *legal status*, where those with subjective rights and subjective ends deceive themselves and others that they act for the universal when they care only for their own interests. This is the *spiritual-animal kingdom*: it is comic, not in the sense of frank joviality or careless gaiety and self-mockery, but in the sense of bitter and repugnant intrigue by individuals who deceive others by seeming to share their real interests and whose real interest is without substance.

In departing from Rose, I attempt to reread Hegel so as to point to the argument that all ethical life, either in modernity, or in classical antiquity, involves a sense of the 'comic.' Hence, Antigone represents both the institution of the comedy and contradiction of modern law, and the comedy of (mis)recognition at the basis of law and ethics. In this respect the tragedy and comedy of law and ethics cannot be seen as shift that has been historically instituted, a harmony or middle term that is now 'broken.' Rather, we should understand the play as pointing to the violence and tension that is present within all ethics regardless, and a contradiction that is not particular to 'modernity.'

Also note, that my interpretation of Hegel's Antigone does not focus upon the question of gender and femininity within the text and within Hegel's system as a whole. One critique is that Hegel's suppression of 'feminity' as simply 'other,' is symptomatic of the repression of 'otherness' in his system as whole. Such an account is given by Derrida, see: Derrida, J. *Glas* Leavey, J.P. and Rand, R. tr. (Lincoln: University of Nebraska Press, 1986). While the point Derrida makes with regard to the position of the feminine in Hegel is important, it would be an overemphasis, to argue that 'otherness' is repressed within the Hegelian philosophical project as a whole. The taking of this position tends to render Hegel as something of a 'straw man,' against which, 'post-modernism' may claim to go beyond in its attempt to develop an 'ethics of openness to the other.' Such an attempt perhaps does not pay significant attention to the position of 'alterity' within Hegel's system. This notion will be canvassed briefly in the discussion of Hegel's theory of recognition, in chapter four.

For a number of feminist criticisms of Hegel's construction of gender see: Irigray, L. "The Eternal Irony of the Community," Gill, G.C. tr. in Mills, P.J. (ed.) *Feminist Interpretations of G.W.F. Hegel* (University Park, Pennsylvania: Pennsylvania State University Press, 1996); Mills, P.J. "Hegel's Antigone," in Mills, P.J. (ed.) *Feminist Interpretations of G.W.F. Hegel* (University Park, Pennsylvania: Pennsylvania State University Press, 1996); Butler, J. *Antigone's Claim* (New York: Columbia University Press, 2000). On the relation between Hegel and Feminist philosophy see: Hutchings, K. *Hegel and Feminist Philosophy* (Cambridge: Polity Press, 2003) and Gauthier, J.A. *Hegel and Feminist Social Criticism: Justice, Recognition and the Feminine* (Albany: S.U.N.Y. Press, 1997).

thicker and understood as having undergone mediation.[36] Hegel's conception of ethics can be understood as an attempt to pay attention to this mediated character, this thickening. This can be seen in the three moments of ethical life, the family, civil society and the state.

Three Spheres of Ethical Life

In the *Philosophy of Right*, when Hegel speaks of ethical life, he refers to three spheres of life within modernity, the family, civil society, and the state. It is in and across these three institutional forms that the individual may have some comprehension of their essence as a mediated existence, as social being. Further, it is only through a comprehension of these three spheres as providing the ground of ethics, as ethical life, that, for Hegel, 'freedom' can be understood.

When Hegel refers to ethical life, he refers to these three spheres that have come into a degree of actuality (*Wirklichkeit*) within modernity. That is, these forms have come to hold a degree of stability and presence as the dominant forms of ethical relation. They are the dominant shapes in which Right has developed. As a critical metaphysics, these three shapes represent the Being of Right, that also reflects upon itself and determines itself as its own Essence. This involves a notion of freedom that relies upon self-critique and self-positing. Under Hegel's assessment, the Idea of Right sits in a degree of tension with itself, a tension between its own three spheres, and each sphere presupposes, and is only itself through its others. Further, the tension

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[36] Hegel, *E.L.* § 81-96.

is characterised by attempting to realise itself as fully actual via the negation of the other. This tension is Right's working against itself.

Hegel's legal and political philosophy should be understood as offering more than a communitarian response to Kantian morality. The theory of ethical life is more than an attempt to balance modernity's emphasis upon subjective morality with a classical or Aristotelian conception of humanity as a 'social animal.'[37] The theory of ethical life points to a jurisprudential conception that attempts to give an account of how the Idea of Right has come to be actual within what Hegel saw as modernity. The theory of ethical life gives jurisprudence an account of how to think about Right, its forms, its being, its inherent tensions, and its activity, not simply as it is grounded in 'reality,' but rather, as the ground of jurisprudential reality, which, itself, is self-grounded and self-grounding. Hence, the theory of ethical life, when understood through the category of actuality (*Wirklichkeit*), points to how law and ethics can be understood as the ground of freedom.

Hegel's account of ethical life can be understood, not as the jettisoning of Kant's conception of morality, but as a building upon it. Hegel positions Kantian morality within the process of the Idea of Right coming into actuality (*Wirklichkeit*). In the Hegelian conception, the notion of an independent, subjective moral consciousness

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[37] Cf. Taylor, C. *Hegel and Modern Society* (Cambridge: Cambridge University Press, 1979). Against a Taylor-style 'communitarian' interpretation of Hegel, note Franco, P. *Hegel's Philosophy of Freedom* (New Haven, Conn.: Yale University Press, 1999). Franco, at p. 224 notes:

> Such communitarian interpretations tend to reduce Hegel's doctrine of ethical life to a doctrine about the importance of community in general in constituting our identities.... While this may be true, it is not what Hegel's doctrine of ethical life is primarily about. For Hegel, ethical life is important because it is the realisation of our rational essence, freedom. It is not a sociological idea about the constitution of identities but, rather, a philosophical idea about human self-realisation. Nor does ethical life refer to just any community but specifically to that community which objectively realises the rational freedom of human beings.

which attempts to guide itself via a universal moral obligation, does not constitute the whole of Right. However, this conception does represent one important shape that has come into actuality (*Wirklichkeit*) in modernity. This shape has come into actuality in tandem with political and economic conditions, forging the 'independence of the subject' as the principle of modern revolution. The independent moral conscience of Kantian morality is, thus, an integral part of one sphere of ethical life that emphasises the independence of the subject as a legal and political actor. In his assessment of the sphere of civil society, as being one sphere of Right, Hegel, thusly, holds onto the revolutionary, or radical aspect of Kantian natural law.

In this respect, Hegel recognises civil society as an ethical sphere. Pelczynski notes, that what Hegel calls 'civil society' is the positive creation of individualism, as the achievement of the modern world becoming a dominant social force since the French Revolution.[38] The notion of civil society represents the growing recognition by the community that its members have legitimate rights and interests as particular private individuals and are no longer merely defined by their position within traditional societal groups.[39] The notion of civil society refers to the emergence of a form of ethical life within modernity where the individual is released from having its moral, economic and legal being defined and controlled, purely in terms of the individual's position within the feudal, religious or monarchical-imperial order. Civil society refers to the emergence or emancipation of individual, as individual, and refers to this idea as the principle of the revolution of legal, moral and economic relations in modernity.

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[38] Pelczynski, Z.A. "The Hegelian Conception of the State" in Pelczynski, Z.A. (ed.) *Hegel's Political Philosophy: Problems and Perspectives* (Cambridge: Cambridge University Press, 1971), p. 7-8.
[39] *Ibid.*

Riedel argues that what Hegel made the times aware of, with the phrase 'civil society,' was nothing less than the result of modern revolution. He claims that the term refers to the emergence of a depoliticised society through the centralisation of politics in the princely or revolutionary state, and the shift of society's focal point towards economics as a result of the changes occurring through the emergence of the Industrial Revolution.[40] Further, he argues that Hegel, following the study of the British political economists, had grasped 'labour' as the form of emancipation for modern society in which the individual is 'formed' through the freedom of legal personality.[41] He notes that Hegel had realised that it was not only the relation of wills and rights of individuals that is constitutive of the composition of society, but also, their relation to things, grounded in need and labour, and that this was fundamental to the emergence of independence and freedom.[42] Hence, labour and exchange are the forms that constitute 'society' as a relation of will and right. In the same way that labour mediates the individual with himself and with nature, exchange mediates the individual's labour with the labour of all.[43]

For Hegel, this unleashes a double result, on the one hand, there is a fostering of the general awareness of the freedom of the individual in society. Yet, this universalisation alienates individuals from one another and from themselves. Civil society thus refers to the emergence of the revolutionary notion of subjective independence, but also to the result, the continued process of the alienation of the individual from itself and from its others through labour and exchange. Hegel's perspective on labour is given greatest emphasis in his unpublished manuscripts,

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[40] Riedel, M. *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy*, Wright, W. tr. (Cambridge: Cambridge University Press, 1984). p. 148.
[41] *Ibid.*, at p.122.
[42] *Ibid.*, at p. 119.
[43] *Ibid.*, at p. 121.

referred to as the *Jena Realphilosophie I and II* (1803-4 and 1805-6). Avineri, drawing upon these manuscripts, notes that, for Hegel, on the one hand, the condition of labour involved the externalisation and objectification of all of humanity's capacities and potentials. However, on the other hand, labour also brings forth the conditions that frustrate this new individuality's attempts to integrate itself into the world.[44]

To this, we should note the comments by Ritter, that Hegel, while seeing the burdens of labour upon society, nevertheless sees the positive character of labour in its constitutive connection with freedom, thusly, lifting it beyond all former historical forms of social practice.[45] For Ritter, Hegel's view of the essence of modern revolution, which differentiates it from all other rebellion and upheaval, lies not so much in the particular political form the violence takes, but rather, in the process of social emancipation underlying it. This revolution of emancipation, ultimately, has its source for Hegel in civil society.[46]

In the Hegelian conception, Kantian morality emerges out of this legal, ethical and economic revolution of civil society. The emerging political and economic independence of the individual gives content and a degree of power, through which the Stoic-Christian natural law ideas of an independent moral consciousness and the universality of humanity can be realised. This power of subjective independence that emerges in civil society thus becomes a dominant shape of Right, a newly prevailing conception of freedom. This occurs in ethics as the ideal of the individual's moral

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[44] Avineri, S. *Hegel's Theory of the Modern* State (London: Cambridge University Press, 1972), p. 90.
[45] Ritter, J. *Hegel and the French Revolution: Essays on the Philosophy of Right*, Winfield, R.D. tr. (Cambridge Mass.: MIT Press, 1982), p. 73.
[46] *Ibid.*, at p. 76.

conscience of one who is not guided by another, but who is guided by an appreciation of oneself as universal, as a member of humanity. Hegel expresses the embodiment of this natural law and cosmopolitan ideal in the terms of:

> *A human being counts as such because he is a human being*, not because he is a Jew, Catholic, Protestant, German, Italian, etc.[47]

In civil society, the principle of subjective independence becomes codified in law through the notion of formal equality. Law's form is shaped by the content behind the emergence of subjective independence mediating labour and exchange through property rights and the formal equality of contract. Law and legal rights operate as the mediating ground or, middle term, by which the particular needs of individuals are brought together at the level of universality. Hegel notes that rights become externally necessary in the protection of particular interests.[48]

Law in civil society, for Hegel, is that which comes into existence by being posited, by being applied to the relationships of property and contract.[49] Through law, the needs of persons are mediated and this occurs via the application of a universal law to a particular case.[50] He notes that this mediation occurs via the particular adopting the required form, whereby only through the particular need adopting the posited legal form (becoming itself through its merging with the form), does such a need come to have an acknowledged existence within civil society. Hegel notes:

> Acquisitions of property and transactions relating to it must therefore be undertaken and expressed in the *form* which that existence gives to them. Property is accordingly based on *contract* and on those *formalities* which make it capable of proof and valid before the law.[51]

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[47] Hegel, *Ph.R.* § 209, Remark.
[48] *Ibid.*, at § 209 Addition.
[49] *Ibid.*, at § 213.
[50] *Ibid.*, at § 214.
[51] *Ibid.*, at § 217.

In this sense, the form in which law in civil society occupies as a shape of Right that has come into actuality, expresses, through the centrality of property, both the freedom that emerges from subjective independence, and the resultant alienation that flows from this. For Hegel, this points to the suggestion that the shape of ethical life as civil society, is not the whole of Right, and that any such conception is one-sided and false. Rather, the sphere of civil society presupposes and relies upon other shapes of Right that have come into actuality (*Wirklichkeit*) in modernity. Therefore, it is inadequate to consider the conceptions of law as formal equality and subjective morality (both the Kantian moral conception and subjective-moralisation) as the whole of Right. Consideration must also be given to the other spheres of ethical life, the family and the state.

For Hegel, the primary institution of ethical life is the family. In the family occurs the disposition where one is conscious of one's own individuality within a unity, and where one is present not merely as an independent person, but as a member.[52] The comprehension of having one's being as part of a unity occurs for Hegel in the idea of 'love.'[53] Hegel states:

> Love means in general the consciousness of my unity with another, so that I am not isolated on my own [*für mich*], but gain my self-consciousness only through the renunciation of my independent existence [*meines Fürsichseins*] and through knowing myself as the unity of myself and with another and of the other with me.[54]

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[52] *Ibid.*, at § 158.
[53] Note Benhabib, S. "On Hegel, Women and Irony," in Mills, P.J. (ed.) *Feminist Interpretations of G.W.F. Hegel*, (University Park, Pennsylvania: Pennsylvania State University Press, 1996). Benhabib at p. 34 argues that Hegel's conception of love and sexuality when placed in the context of changes taking place in his time and around him personally, show him to be a 'counter-enlightenment thinker'. She argues that Hegel denigrates early attempts of woman's emancipation and seeks to imprison women once more in the confines of the monogamous nuclear family that they had threatened to leave.
[54] Hegel, *Ph.R.* § 158, Addition.

In Hegel's conception, love as a feeling, is an awareness of one's social, inter-related existence; it is the thinking of one's self as a co-constituted part of a greater whole. In the family, there exists a relation between self-knowledge and human action, where the individual's comprehension of their self as part of the whole, orientates their behaviour. For example, the parent makes sacrifices for the child, and one acts in a different way to the partner one loves, than to a stranger or acquaintance. In love, one lets go the importance of one's immediate being in the affirmation of the other and, in this letting-go, one has a sense of being free.[55]

For Hegel, in the family one acts ethically, one limits one's self so as to benefit the other, one makes self-sacrifices on behalf of another or on behalf of the whole. Yet, such an act is not a limit upon the self, because in acting on behalf of the other or the whole, one is acting on behalf of one's shared existence. Thus, one acts, so as to affirm one's wider self. What should be noted is the important relation, here, between a form of speculative comprehension, occurring at the level of 'feeling' in love, and human ethical action. Yet, Hegel sees the sphere of ethical life in the family as limited, stating:

> But love is a feeling [*Empfindung*], that is, ethical life in its natural form. In the state, it is no longer present. There one is conscious of unity as law; there the content must be rational, and I must know it.[56]

Love and the family is, thus, an important form of ethical relation, for Hegel, it is set in something of a contrast to sense of self within civil society. Civil society's focus upon the independence of the individual leads to a conception of freedom opposed to the conception of freedom within the family. This turns upon the conception of what

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[55] On this see also Franco, P. *Hegel's Philosophy of Freedom* (New Haven, Conn.: Yale University Press, 1999). pp. 236-248.
[56] Hegel, *Ph.R.* § 158, Addition.

it means to have freedom, to have freedom as a state of being. In civil society, the having of freedom occurs in the emergence of a conception of independence. The having of freedom is the 'I' that is no longer reliant upon a social group or order, a tribe or, a class. It is the idea of a state of being where the 'I' exists for itself, dependent only upon its own work and moral conscience. In contrast, in the relation of the family, to have freedom means a degree of renunciation of this independence, it means a conception of being which is shared. However, through the notion of 'love,' each ethical relation, that of the family and that of civil society, involves a conception of the particular, in and through the universal. In civil society, this is through the Christian idea of a love of 'humanity,' and love of the 'neighbour;' in the family this ethic is perhaps stronger, more concentrated, it is closer to home.

For Hegel, each sphere of ethical life does not cancel the other out, rather, each have come to a level of actuality (*Wirklichkeit*) in modernity. Hence, each individual has within themselves, within their own being this inherent tension. For Hegel, this 'strong' form of knowledge of one's being as a unity that occurs in the family, as opposed to the 'weak' conception that occurs in civil society, does not provide the whole basis of ethical relations within the wider community. Love, as a 'feeling,' is somewhat inadequate for this task, for Hegel, love's ethical obligation needs to be developed into law. This is the third sphere of ethical life, that of the state.

For Hegel, the state and civil society are the two dominant shapes of Right that have come into actuality (*Wirklichkeit*) in modernity. It is important to note that, when Hegel speaks of the state as something that is actual, what he is referring to is not any particular state, but rather, the state as the Idea of Right that has come into being as

the dominant form of legal, political and ethical ordering in the modern world and which, perhaps, for us, still has not yet emerged into full actuality (*Wirklichkeit*). Hegel notes:

> In considering the Idea of the state, we must not have any particular states or particular institutions in mind; instead, we should consider the Idea, this actual God [*diesen wiklichen Gott*], in its own right [*für sich*]. Any state, even if we pronounce it bad in the light of our own principles, and even if we discover this or that defect in it, invariably has the essential moments of its existence [*Existenz*] within itself (provided it is one of the more advanced states of our time). But since it is easier to discover deficiencies than to comprehend the affirmative, one may easily fall into the mistake of overlooking the inner organism of the state in favour of individual [*einzelne*] aspects. The state is not a work of art; it exists in the world, and hence in the sphere of arbitrariness, contingency and error, and bad behaviour may disfigure it in many respects. But the ugliest man, the criminal, the invalid, or the cripple, is still a living human being; the affirmative aspect – life – survives [*besteht*] in spite of such deficiencies, and it is with this affirmative aspect that we are here concerned.[57]

For Hegel, the notion of the state is distinct from that of civil society. In this respect, the state is to be considered as more than just the collection of particular interests.[58] This does not mean that the spheres of civil society and the state are entirely separate. Rather, each contains within itself the other. On the one hand, civil society presupposes the state, it develops through the state and is maintained by the state.[59] On the other hand, the idea of the modern state is distinguished from the states of antiquity through the recognition of the position of subjective freedom within it.[60] The idea of the state is, thus, a product of revolution. Its form revolves around how it is to accommodate and not negate the form of freedom that has emerged in civil society and, yet, maintain itself as an independent sphere of ethical life, as something more than the collection of just particular interests.

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[57] *Ibid.*, at § 258 Addition.
[58] *Ibid.*, at § 182, Addition.
[59] *Ibid.*
[60] *Ibid.*, § 260.

Hegel's conception of the state involves comprehending the state as something more than simply a form of 'power,' or a dominant form of 'community.' In the Hegelian conception, the state is the ground of ethics and a locus of freedom. Avineri notes that the idea of the state embodies man's highest ethical relationship to other human beings. However, this function of the state is not absolute, in order to qualify for such a role, the state has to reflect the self-consciousness of individuals.[61] Within the idea of the state, the freedom of the individual lies not simply in their subjective moral position and their actions, but in their self-comprehension as social being occurring in and through the state.[62] Hence, within the idea of the state resides a relation between self-knowledge and action, between the speculative awareness of one's self in terms of concrete and ethical actions. In this, there is a relation between the comprehension of social being and freedom, whereby, the human actor who does not understand their self as social being and understand this as the ground of their will, is not fully free.

Hegel's idea of the state puts forward the implicit critique of the conception of freedom held within civil society.[63] In civil society, freedom is conceived as an act of independent individual self-positing, either through work, or via the moral conscience. However, the individual's independence within civil society implicitly presupposes and relies upon some other. In this respect, work and property are

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[61] Avineri, S. *Hegel's Theory of the Modern* State (London: Cambridge University Press, 1972), p. 181.
[62] Note Pelczynski, Z.A. "The Hegelian Conception of the State" in Pelczynski, Z.A. (ed.) *Hegel's Political Philosophy: Problems and Perspectives* (Cambridge: Cambridge University Press, 1971). Pelczynski at p. 27 argues that, Hegel's account of the state does not involve unconditional duty to obey its commands. He argues that Hegel frequently stresses that the rationality of positive laws should never be taken for granted and may indeed be lacking.
[63] Note Franco, P. *Hegel's Philosophy of Freedom* (New Haven, Conn.: Yale University Press, 1999). Franco at p. 284 notes:

> That it is not just the idea of the social contract which Hegel is rejecting, but the whole classical liberal understanding of the state for which the social contract serves as the chief theoretical construct.

mediated relations, so are legal rights. In the notion of the state, a 'thicker' conception

of freedom arises. This occurs through the acknowledgment by the individual that it is

not simply dependent upon the state. Further, this conception arises when the

individual comes to recognise the state as the expression and instrument of freedom.

On this Hegel states:

> The state is the actuality of the ethical Idea - the ethical spirit as substantial
> will, *manifest* to itself, which thinks and knows itself and implements what it
> knows in so far as it knows it. It has its immediate existence [*Existenz*] in
> *custom* and its mediate existence in the *self-consciousness* of the individual
> [*das Einzelnen*], in the individual's knowledge and activity, just as self-
> consciousness, by virtue of its disposition, has its *substantial freedom* in the
> state as its essence, its end, and the product of its activity.[64]

In this conception, Hegel's notion of the state can be understood in terms of critical

metaphysics. It involves an emphasis upon law and ethics expressed through the state

as a form of Being. Yet, the state represents freedom only when the critical reflective

capacity of self-consciousness observes itself reflected in this Being, as its own

Essence, and further, when it conceives that it can posit itself as such. In the notion of

the modern state, Hegel recognised the possibility of this occurring, however, when

this ideal is not met, when the self-consciousness of individualities is not reflected in

the state, this does not render a particular state as 'unethical.' Rather, particular states,

and those existing today, still need to be regarded as spheres of ethical life with a

certain ethical value. This suggestion is perhaps more apparent today than in Hegel's

time.

Regardless of how one may judge a particular state, what the notion of the state

represents is a shape of Right that has come into actuality (*Wirklichkeit*) in modernity

as the highest form of political and legal ordering. The notion of the state has actuality

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[64] Hegel, *Ph.R.* § 257.

(*Wirklichkeit*), in one sense, in that it is invested with power. In this sense, the notion of the state, developing through the Westphalian tradition and tradition of European monarchical and revolutionary sovereignty has carved for itself a monopoly upon the legitimacy of violence. In another sense, the notions of citizenship, representative democracy, and the administration of justice, are fundamentally tied to, and have developed through, the notion of the state. Further, the notion of the state has operated as the means through which formal legal rights and human rights have come to into actuality. While in the present there is seemingly exists a tension between the respective powers of state sovereignty and the logic of capital, the state still remains the fundamental legal and political instrument in the control over labour, exchange, the movement of commodities and the redistribution of income.

In this sense, freedom can be understood as occurring through the work and working of the state. This suggests the working up of reality through a shape of Right, a juridical conception, that is more than just an idea in one's head, but is a manner or shape of being. This being is not static and lifeless, it involves its own working and the effort to work itself up to higher levels of reality. It is, in this respect, that the state needs to be understood as a form of ethical life, the ground and locus of freedom and as a critical-metaphysical idea of the 'living good.'

It is in this regard, that Hegel's positive comments upon the position of the state as a shape of ethical life, can to be understood. I am in a sense reading backwardly here, ascribing to the state characteristics that it did not really posses, or had not yet developed fully in Hegel's time. Yet, it is perhaps not too erroneous to suggest that the sense of meaning I am pushing towards here, when describing the state as a shape

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of Right and working of freedom, gives a sense of meaning that Hegel's conception of

the state as *Wirklichkeit*, attempts to convey. For Hegel, the state provides the sphere

of life through which freedom comes to be manifest and through which individuals, to

the extent that they come to comprehend themselves in and through the state, gain an

ethical education or development. In this regard Hegel recounts the saying:

> When a father asked him for advice about the best way to educate his son in
> ethical matters, a Pythagorean replied: "Make him a citizen of a state with
> good laws."[65]

Such a conception of the state as ethical life is not totalising. This reading suggests

that Hegel's notions of the spheres of ethical life, in particular that of civil society and

the state, should be read as two shapes of the Idea of Right that have come into

actuality (*Wirklichkeit*) in modernity. Without the other, each is one-sided and false.

Yet, each are engaged in a constant tension of attempting to overcome the other and to

become fully actual; to become the highest and undisputed form of Right. In this

respect, Hegel's notion of the state involves difference, tension, negation,

contradiction, conflict, paradox and *aporia*. Without these characteristics, Hegel's

conception of the state cannot be understood a providing an adequate account of

freedom. Hence, for jurisprudence, it is through an emphasis upon the manifest

tension and restlessness within the notion of Right itself, that Hegel's notion of ethical

life can be better understood.

Conclusion

This chapter has continued the reading of Hegel as a jurisprudential thinker by

focussing upon his conception of ethical life (*Sittlichkeit*). This chapter has drawn

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[65] *Ibid.*, at § 153, Remark.

upon the general understanding that Hegel's notion of ethical life, represents a critique of Kant's conception of morality and presents an account of law and ethics that initiates a conceptual distinction between the spheres of civil society and the state. To this, I have drawn attention to how Hegel's account of ethics can be understood as operating within something of a natural law tradition, in that, Hegel inherits and attempts to refine and further develop, the Kantian conception of morality. For Hegel, this development involves the three spheres of ethical life, the family, civil society and the state.

In this chapter, I have attempted to build upon the general conception of Hegel's notion of ethical life by drawing attention to its juridical character. Hence, the notion of ethical life can be framed, or understood juridically, through the critical-metaphysical category of actuality (*Wirklichkeit*). In this sense, the ideas embodied within the spheres of ethical life, civil society and the state, can be understood as representing the two dominant conceptions of ethics that, in modernity, have come to be actual (*wirklich*). In terms of a tradition of natural law, Hegel can be understood as re-positioning Kant's conception of morality within a theory of law. I suggest, that approaching Hegel's notion of ethical life in this manner, involves understanding the relation between law and ethics as one of work and working, the working against its own contradictions, and the working up of reality through law. In the focus upon war's moral problem, this conception of the relation between law and ethics will be important when considering Hegel's inheritance of war's moral problem and, the attempt to build upon Hegel's conception, in the development of the jurisprudence of war. However, before moving on to this, it is necessary to look at the relation between

law and ethics through Hegel's theory of recognition. This will be the focus of the next chapter.

Chapter 5

The Process of (Mis)Recognition

Introduction

The previous two chapters have developed an account where Hegel's philosophy can be understood as situated within, what might be termed, a tradition of natural law. Attention has been drawn to Hegel's inheritance and critique of Kant's conception of morality and Hegel's attempt to develop this through a theory of law. So far, the thesis has offered a rereading of the philosophy of Hegel, by interpreting Hegel's theory of law in terms of the critical-metaphysical category of actuality (*Wirklichkeit*). Further, it has been shown how Hegel's notion of ethical life and, thus, the relation between ethics and law, can be understood through the critical-metaphysical category of actuality (*Wirklichkeit*).

In this chapter, I attempt to extend the rereading of Hegel through a focus upon Hegel's theory of recognition (*Anerkennung*). By drawing upon a number of contemporary interpretations of the theory of recognition, I will show how Hegel's theory of law can be understood as containing a number of important philosophical dimensions. These point to a broader understanding of Hegel's theory, which will be referred to as, the theory of '(mis)recognition.' In this chapter, I draw upon this broader conception of Hegel's theory of (mis)recognition so as to add to the rereading of Hegel's theory of law. When reread through the notion of (mis)recognition, Hegel's conception of law opens up to present an

account which pays attention to law's inadequacies and what might be termed, a certain 'violence' of the law. I will suggest that a Hegelian conception of law, understood through the operation of (mis)recognition, allows a conception that pays attention to the limitations and inherent violence of the law, but which does not necessarily condemn the law as unethical. Rather, (mis)recognition allows jurisprudence to hold onto the ethicality or the ethical content of law, by drawing attention to the necessary limits of ethical action.

General Comments on Recognition

Before drawing upon Hegel's theory of recognition to continue the rereading of Hegel, it is necessary to discuss some points of contention within the interpretation of Hegel's theory of recognition. One issue of contention in Hegel scholarship regards the position of recognition in Hegel's thought, and whether his account of inter-subjective recognition continues or significantly changes within his mature writings. One view, sometimes referred to as the 'abandonment' thesis, holds that Hegel had developed in his unpublished manuscripts, referred to as the *System of Ethical Life* (1802-3) and the two versions of the *Jena Realphilosophie*, an account of the nature of modern individuality and social institutions that focused upon the formation of freedom and ethical norms through a struggle for recognition. This account examined the nature of inter-subjectivity, through the mediation of the family, language and labour. The view suggests that Hegel abandoned this focus upon strong inter-subjectivity, either in the *Phenomenology of Spirit* or in the *Philosophy of Right*, and did so in favour of a focus upon the self-reflection of

Absolute Spirit, or a metaphysical notion of 'substance.' Jürgen Habermas and Axel Honneth hold a strong version of this argument, that inter-subjectivity was abandoned quite early. Michael Theunissen, holds a weaker version, that the mature Hegel maintained the position of inter-subjectivity within his accounts of the family and civil society, but that this was eventually 'suppressed' in his account of the state.

For Habermas, Hegel, in the Jena lectures, had developed a distinctive, systematic basis for the formative process of Spirit. The categories of language, tools and family, designated three patterns of dialectical relation, that of symbolic representation, the labour process, and interaction on the basis of reciprocity, whereby each mediates the subject and the object in their own way.[1] He argues, however, that Hegel soon abandoned the systematics of these lectures and replaced them with the subdivisions of the *Encyclopaedia of the Philosophical Sciences in Outline* (1817), into subjective, objective and absolute Spirit and to which the original analysis became subordinate.[2]

Similarly, but in greater detail, Honneth argues that the younger Hegel had conceived that struggle amongst subjects for mutual recognition of their identity generated inter-societal pressure toward the establishment of political institutions that would guarantee freedom.[3] He argues that Hegel, even in the *Realphilosophie*, under the greater influence of the philosophy of Fichte, came to view the process of recognition in terms of the project of the philosophy of consciousness and the idea of Spirit. Honneth claims that the increased

[1] Habermas, J. *Theory and Practice* Viertel, J. tr. (Cambridge: Polity Press, 1988), p.142.
[2] *Ibid.*, at p. 161.
[3] Honneth, A. *The Struggle for Recognition: The Moral Grammar of Social Conflicts* Anderson, J. tr. (Cambridge: Polity Press, 1995), p.5.

concentration upon Spirit's self-reflection within Hegel's system, resulted in the theory of recognition as a development of ethical-social relations, losing its central position. Instead, social and political forms of human interaction became represented as mere transitional stages in the process of consciousness's formation that produced Spirit's self-knowledge and its development as *Bildung*, or education.[4]

While these views hold some weight in relation to the change in philosophical emphasis given by Hegel to the theory of recognition over his lifetime, they are somewhat incorrect, if understood as arguing that Hegel abandoned the theory of inter-subjective recognition entirely. Hegel's theory of inter-subjective recognition continues throughout both the *Phenomenology of Spirit* and the *Philosophy of Right*. Theunissen, in contrast to Habermas and Honneth, sees the operation of inter-subjective recognition continuing into Hegel's *Philosophy of Right*. He argues that within the *Philosophy of Right*, Hegel's account of inter-subjective recognition is present within the accounts of the family and civil society. However, it is 'suppressed' in Hegel's account of the ethical life of the state.[5] Theunissen argues that Hegel's theory of the state "erases every trace of inter-subjectivity in it."[6] He argues that this is, in part, due to Hegel's affirmation within the theory of ethical life of a metaphysical order to which classical politics commits the citizen to the role of 'substance.'[7] He notes that the transfer from civil society to the state,

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[4] *Ibid.,* at pp. 31-32.
[5] Theunissen, M. "The Repressed Inter-Subjectivity in Hegel's Philosophy of Right," Watkins, W. tr. in Cornell, D., Rosenfeld, M. and Carlson, D.G. (eds.) Watkins, E. tr. *Hegel and Legal Theory,* (New York: Routledge, 1991).
[6] *Ibid.,* at p. 57.
[7] *Ibid.,* at p. 3.

removes inter-subjectivity from all reality, for it destroys the communal construction of Spirit through which individuals come together in the constitution of their world.[8]

While Theunissen's account has merits, his suggestion that inter-subjectivity is suppressed in Hegel's account of the state, is not supported by detailed argument. Rather, it seems to be presented as merely a 'claim.' In contrast to the strong 'abandonment' argument, and Theunissen's 'suppression' claim, my interpretation agrees with the argument that inter-subjective recognition continues throughout Hegel's mature work and forms the basis of his conception of freedom. Such a point has been argued by Robert B. Pippin and Robert R. Williams.

For Pippin, the logic of inter-subjective recognition is central to Hegel's *Phenomenology of Spirit*. Inter-subjective recognition provides the basis of Hegel's attempt to move beyond Kant and Fichte in the explanation of how self-consciousness is produced.[9] Further, Pippin argues that the structure of inter-subjective recognition forms the basis of Hegel's conception of freedom. He argues that Hegel's account of ethical life, in the *Philosophy of Right*, is not an abandonment, but rather, is a somewhat successful account of recognition, or a mutuality based on a kind of rational acknowledgment. Pippin argues that the theory of recognition is central to Hegel's approach to the question of freedom.[10] The most detailed Anglophone study of Hegel's theory of recognition has been made by Williams.[11] He argues that Hegel's theory of recognition holds a central place, not only

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[8] *Ibid.*, at p. 12.
[9] Pippin, R.B. *Hegel's Idealism: The Satisfaction of Self-Consciousness* (Cambridge: Cambridge University Press, 1989), pp. 143-63.
[10] Pippin, R.B. "What is the Question for which Hegel's Theory of Recognition is the Answer?" *European Journal of Philosophy*, 8 (2) 2000, 155-172, p. 155.
[11] Williams, R.R. *Hegel's Ethics of Recognition* (Berkeley: University of California Press, 1997).

within Hegel's conception of self-consciousness, but also, that it forms the basis of Hegel's conception of freedom and ethics. He argues that Hegel's inter-subjective recognition is neither abandoned nor suppressed in the thought of the mature Hegel, but, that recognition plays an essential role in Hegel's conception of freedom and ethics within the *Philosophy of Right*.[12]

With regard to this point of contention, the rereading taken by the thesis subscribes to the general argument that Hegel's theory of recognition is present within the *Phenomenology of Spirit* and the *Philosophy of Right*. The theory is fundamental to Hegel's conception of both freedom and ethics and while the theory may have undergone changes and developments, the theory has not been fully abandoned or suppressed. In this respect, I agree with the arguments made on this point by Pippin, and Williams.[13] This, however, does not mean that I subscribe in full to the entirety of their interpretations and their particular use of the theory of recognition. Rather, I draw upon their accounts to develop a rereading of Hegel's theory of recognition that points to a position of violence within ethics and law.

In making a further point with regard to the interpretation of Hegel's theory of recognition, it is important to distinguish the interpretation taken, here, from interpretations taken from either anthropological or psychoanalytic viewpoints. Hence, I

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[12] *Ibid.*, at pp. 1-28.
[13] For an account of this debate with regard to inter-subjective recognition within the *Ph.S.* see: Sembou, E. "Hegel's Idea of a Struggle for Recognition: The *Phenomenology of Spirit*" *History of Political Thought* 24 (2) 2003, 262-281.

do not follow the 'anthropological' interpretation taken by Kojève,[14] or, the Lacanian-psychoanalytic interpretation by i ek.[15] Kojève's interpretation has merit, in that it draws attention to the position of subjective and institutional relations as ongoing sites of conflict and struggle. However, as an interpretation of the process of recognition as a whole, his interpretation is somewhat unbalanced, in that the successful moment of recognition is underemphasised in opposition to an emphasis upon the notions of 'struggle' and 'mastery.' Further, Kojève tends to overemphasise the social aspect of recognition, thus abstracting the process out of its context within the *Phenomenology of Spirit* and its position within the formation of self-consciousness. In this sense, it has been suggested that it is from Kojève's reading of the process of recognition, that there arises the popular charge that, within Hegel's theory of recognition, the difference of the 'other' is reduced to the 'same.'[16] In Hegel's theory of recognition, as I understand it, this charge is somewhat misplaced.

Further, i ek's reading, while being interesting and novel, must be distanced from the interpretation of recognition taken by the thesis. This is for the reason that i ek's interpretation has a tendency to structure Hegel's theory of recognition in terms of the Lacanian 'void,' the position of trauma or lack, from which desire emanates. In i ek's account, the theory of recognition is underlaid by Lacan's theory of the 'Real.' While this

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[14] See: Kojève, A. *Introduction to the Reading of Hegel* Nichols, J.H. tr. (Ithaca, N.Y: Cornell University Press, 1980).
[15] i ek, S. *The Sublime Object of Ideology*, (London: Verso, 1989); and i ek, S. *Tarrying With the Negative: Kant, Hegel and the Critique of Ideology* (Durham: Duke University Press, 1993). See also: Schroeder, J.L. *The Vestal and the Fasces: Hegel, Lacan, Property and the Feminine* (Berkeley: University of California Press, 1998); Butler, J.P. *Subjects of Desire: Hegelian Reflections in Twentieth-Century France* (New York: Columbia University Press, 1987); Carlson, D.G. "Hegel's Theory of Quality" *Cardozo Law Review* 22 (2) January 2001, 425-593.
[16] On this point see Williams, R.R. *Hegel's Ethics of Recognition* (Berkeley: University of California Press, 1997), pp. 10-13.

is relevant to a Lacanian understanding of jurisprudence, the engagement with the philosophy of Lacan and what this might mean to a consideration of Hegelian approaches to questions of law, is beyond the scope of this thesis. Hence, i ek's specific reading of Hegel, through Lacan, is not taken up here.

My interpretation of Hegel's theory of recognition builds upon a number of interpretations given by a number of Hegel scholars. These scholars draw attention to a number of philosophical dimensions inherent within the theory of recognition. In using Hegel's theory of recognition to develop a rereading of Hegel's account of law, it is important to pay attention to a number of these philosophical dimensions. These dimensions include, the operation of the theory of recognition as a theory of the production of knowledge, a theory of recognition as a hermeneutical theory and as the theory of recognition, as expressing Hegel's conception of the relation between man and the divine. When viewed in this manner, Hegel's theory of recognition can be understood as expressing more than an account of power relations, or an account of social relations built upon desire. I suggest that a focus upon these philosophical dimensions is necessary, if, jurisprudence is to understand Hegel's theory of recognition and use it in the development of a rereading of Hegel's theory of law.

However, before discussing a number of philosophical dimensions that underlie Hegel's theory of recognition, it is perhaps necessary to give a brief account of the operation of Hegel's theory of recognition within one portion of the *Phenomenology of Spirit*. Giving a short account will help to put some the important comments made by Hegel scholarship

within a textual context. Hegel's account of self-consciousness and the master-slave relation within chapter four of the *Phenomenology of Spirit*, is perhaps his most well known discussion of recognition. My attempt to reread Hegel's theory of law through the theory of recognition pays attention to the dual moments set out in these passages. I will give a brief account of the process of recognition within this section.

The Satisfaction of Self-Consciousness

Hegel's account in chapter four of the *Phenomenology of Spirit* focuses upon the formation of what he refers to as, 'self-consciousness.' Hegel considers self-consciousness to be a *'negative essence'*[17] or as a negative unity. This refers to the 'I' conceiving itself and maintaining its identity with itself, the I=I, only by differentiating itself from and superseding what it conceives itself not to be, that is, what is 'other' than the 'I', the 'not I' (-I). Hence, self-consciousness is a negative unity, or negative relation and this can be stated in terms of the unity of 'I=I and I≠-I'. Hegel states that self-consciousness is only certain of itself by superseding this other that presents itself to self-consciousness as an independent life, and, in this sense, Hegel states that 'self-consciousness is desire *(Begierde)* in general.'[18] Self-consciousness is both subject to this intrinsic desire to negate the other, and aware of it. This coming into awareness, and thus,

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[17] Hegel, *Ph.S.* § 174.
[18] *Ibid.*

the ability to produce, manifest and transform its own desire, is an important stage in the

awakening, or perhaps, the 'enlightenment' of 'self-consciousness in general.'[19]

Within the transformation of desire, Hegel suggests that self-consciousness may move

beyond the situation where it merely relates to its external objects negatively. For Hegel,

the move beyond simple desire involves self-consciousness coming to understand itself

and the world in a 'speculative relation.' This involves self-consciousness as 'subject,'

and its world, or others, as 'object,' as being mutually constituted, hence as each being a

product of an ongoing process of mediation. It is in this speculative comprehension of

the relation between subject and object that Hegel attempts to express the speculative

'truth' of self-consciousness, that: "*Self-consciousness achieves its satisfaction only in*

another self-consciousness."[20]

For Hegel, this involves the process of self-consciousness comprehending itself in terms

of a 'spiritual unity.'[21] This, for Hegel, is the idea of Spirit (*Geist*), where 'what is,' or

what is self-consciousness's existence in general, is the mediating middle that constitutes

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[19] On this point note Kelly, G.A. "Notes on Hegel's Lordship and Bondage" in MacIntyre, A. (ed.) *Hegel: A Collection of Critical Essays* (New York: Anchor Books, 1972). Kelly at pp. 196-7, argues with regard to desire:

> Hegel posits a society at the dawn of self-consciousness for a still more profound purpose: the analysis of the broken ego striving to restore itself. But if the Self and the Other are, to speak bluntly, men, they also dwell within each man. They are original principles of the ego, awakened to combat by the appearance of another ego in which they are reduplicated, and thenceforward transformed by history. Without this shock, there would be no history, only desire (*Begierde*), man's link with the animal world, and the unproductive and repetitive cycles of biological nature.

[20] Hegel, *Ph.S.* § 175.
[21] *Ibid.*, at § 178. On this point note Pippin, R.B. "What is the Question for which Hegel's Theory of Recognition is the Answer?" *European Journal of Philosophy*, 8 (2) 2000, 155-172. Pippin at p. 161 argues that 'being free' is not being treated as an essential or as any sort of substantial causal capacity, but rather, for Hegel 'being free' is an 'achievement.' It is a collective achievement where subjects have come to constrain their conduct and engage with each other on the basis of their developed norms.

the relation between two self-consciousnesses. As mediating middle, each have their existence only through their relation with each other. Each comprehends itself in the identification with, and the negative differentiation from, the other. Hegel notes:

> With this we already have before us the concept of *Spirit*. What still lies ahead for consciousness is the experience of what Spirit is - this absolute substance which is the unity of the different independent self-consciousnesses which, in their opposition, enjoy perfect freedom and independence: 'I' that is 'We' and 'We' that is 'I.' It is in self-consciousness in the concept of Spirit, that consciousness first finds its turning-point, where it leaves behind it the colourful show of the sensuous here-and-now and the night-like void of the super-sensible beyond, and steps out into the spiritual daylight of the present.[22]

This process of seeing-into the other, as part of a 'spiritual unity,' and re-comprehending one's self, is not without its complications, errors, and mishaps. Hence, Hegel's account of recognition puts forward initially the example of what might occur within a somewhat successful act of recognition. However, Hegel juxtaposes this to the position where self-consciousness remains within a limited sphere of comprehension. What will follow are the two opposing scenarios.

Hegel notes that, in the process of recognition, what we observe is the idea of 'self-consciousness in general' which splits into two extremes and where each extreme is in transition to its opposite. He argues that each is, for the other, the 'middle term,' through which each mediates itself with the other and, through this, unites with itself. When two self-consciousnesses become aware of this, Hegel notes: "They *recognise* themselves as *mutually recognising* one another."[23]

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[22] Hegel, *Ph.S.* § 177. Note, I have changed term translated by Miller as 'Notion,' to 'Concept.'
[23] *Ibid.*, at § 185.

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This process does not necessarily result in an equal mutual recognition between two self-consciousnesses. It can result in the situation where one is being recognised and acknowledged, and the other is performing the recognising.[24] Hegel notes that each is certain of its own self, but not certain of the other, and, as such, its own self-certainty still has no 'truth' for it. This truth would only be affirmed by the recognition of each by the other. Hegel notes that, in this, one self-consciousness attempts to show itself in its full self-certainty, as the pure 'I,' not attached to a common existence. This results in the negation of the other. For Hegel, this occurs on the part of both self-consciousnesses, resulting in each seeking the 'death' of the other. Thus, the relation between the two individuals is such that they prove themselves and each other through the process of 'life and death struggle.'[25]

Hegel proposes that this trial by death does away with the truth of self-certainty that was supposed to issue from it. Death shows that each staked their life, but the one who survived the struggle gets no acknowledgement or recognition from the dead other, and further, the dead other gets nothing in death but death itself. Through the experience, self-consciousness learns that life is essential to it. Thusly, there occurs the situation where one is the independent self-consciousness, whose essential nature is to live for itself, and the other is the dependent self-consciousness, whose essential nature is to live for another. The former is the master or lord, the latter is the slave or bondsman.[26]

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[24] *Ibid.*
[25] *Ibid.* at § 187.
[26] *Ibid.*, at § 189.

In the relation of mastery and slavery, lordship and bondage (*Herrschaft und Knechtschaft*), the self-consciousness of the master is mediated through the relation with the slave, and is further mediated with the world of objects or things, through the slave. The master takes enjoyment from the world of objects via the slave's work upon the world.[27] In these moments, the master gains its recognition through the other self-consciousness, the slave. However, in this relation the full mutual moment of recognition is missing, the outcome of the process is one-sided and unequal, as it is derived through force and fear and is not freely given by either party.[28]

Hegel argues that in such recognition, what was for the master the 'unessential consciousness' is now the object that constitutes the truth of the master's self-certainty. Hence, the recognition of the master's self-certainty comes not from an independent self-consciousness, but instead, from a dependent one. Thus, in reality, the master's 'truth' is the 'unessential consciousness.'[29] In this case, the 'truth' of each player turns out to be the opposite of what they might expect from their relation. The truth of the independent consciousness of the master is really the servile consciousness of the slave. Further, it is the slave who, through its experience is transformed into an independent consciousness. For Hegel, this is to occur through the slave's discovery of its own power and independence through the relation of work.[30]

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[27] *Ibid.*, at § 190.
[28] *Ibid.*, at § 191.
[29] *Ibid.*, at § 192.
[30] *Ibid.*, at § 193.

From this account, we get two perspectives of recognition as presented by Hegel. The first is perhaps what could be called the 'somewhat successful' perspective, where full mutual recognition occurs between self-consciousnesses. Each recognises their speculative, spiritual unity with the other and gives their acknowledgement to the other freely. Here, the two obtain their perfect freedom and independence and comprehend the 'I' that is 'We' and the 'We' that is 'I.' Juxtaposed to this is the situation where acknowledgment is forced and both self-consciousnesses remain in a relation of negativity towards each other. In this, each mis-recognises the other and their co-constituting relation with the other. In this case, each tries to negate the other and what results is a struggle for recognition and the relation of master and slave.

It is important to note that in the interpretation taken here, these two positions are not mutually exclusive and, rather, every act of recognition is always an act of mis-recognition. Hence, the broader notion of recognition encompasses the speculative unity of these two divergent positions; each is contained in the other and each contains the potential for the other to occur. The process of recognition as a whole, is the playing-out of each of these moments and the movements between the two, where the individual's ethical being is the tension and play between the two.

This duality occurs throughout the process of recognition within Hegel's *Philosophy of Right*. It goes to the heart of the relation between speculative knowledge and the freedom that occurs in ethical life. Through this, jurisprudence can reread a Hegelian theory of law as involving the constant operation of this tension, the recognition and mis-recognition of

'I' as 'We' and 'We' as 'I.' In this rereading, the ethical basis of law is the attempt to overcome the situation of mastery, *Herrschaft*, and move to spiritual unity where freedom comes about through full mutual recognition. As a dialectical process, this can never be completely successful, whereby full mutual recognition at one level turns over into its opposite at another.

Such a theory of law sees the process of Right coming into higher levels of actuality (*Wirklichkeit*) where the process of Right is the overcoming of *Herrschaft*,[31] by the establishment of stable ethical relations occurring at higher levels. These, then, operate to foster the conditions of full speculative awareness by individuals existing within these relations. However, before discussing how this duality occurs within a Hegelian conception of law and ethics, it is necessary to discuss a number of differing philosophical dimensions occurring within the process of recognition, within both the *Phenomenology of Spirit* and the *Philosophy of Right*.

Philosophical Dimensions of Recognition

The account given by Hegel in chapter four of the *Phenomenology of Spirit* draws attention to two moments of recognition. These are the successful moment, where the 'I' understands itself as part of the mediated 'We,' and the unsuccessful moment, where the 'I' fails to recognise, or refuses to recognise the other and from this develops struggle and a relation of domination. It is important not to reduce Hegel's account of recognition to

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[31] See: Höffe, *Political Justice: Foundations For a Critical Philosophy of Law and the State* Cohen, J.C. tr. (Cambridge: Polity Press, 1995). Höffe places Hegel in a tradition of philosophy that attempts to come to terms with and overcome *Herrschaft*.

merely the struggle for power between two fully formed subjectivities. Doing so misses a number of philosophical dimensions that are at work in Hegel's theory of recognition. If jurisprudence is to draw upon Hegel's theory of recognition to reread Hegel's conception of law, then, it is necessary to pay attention to a number of dimensions that are at work within the process of recognition. To begin with, it is worth considering the etymology of Hegel's term '*Anerkennung*' which, in English, is translated as 'recognition.' For this purpose, I will draw upon the comments of Paul Redding and Gillian Rose.

Paul Redding notes that like the English words, 'recognise' and 'acknowledge,' '*Anerkennung*' has a *performative* dimension. Hence, to acknowledge another in a particular way is to acknowledge the validity of some implicit claim or status, and thereby bind one's actions to the other.[32] However, the word *Anerkennung* is closely connected with its cognates, *kennen* (to have direct knowledge, or to be familiar or acquainted with) and *erkennen* (to know or recognise something), each having predominantly 'epistemic' senses.[33] Importantly, the performative and epistemic senses of the term are interwoven. Thus, when one acknowledges another, one acknowledges the other as a certain kind of subject and, thus, one interprets the other based upon certain apparent qualities, their role, or their status. Further, the process of knowing is bound up with complex ways or acts of acknowledging claims as valid, through the recognition of them as possessing a certain truth.[34]

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[32] Redding, P. *Hegel's Hermeneutics* (Ithaca: Cornell University Press, 1996), p. 103. Note, I draw on Redding here just for the purposes of making this etymological distinction, this does not mean I follow more generally his hermeneutical account of Hegel.
[33] *Ibid.*
[34] *Ibid* at p. 104. Redding notes that Hegel argued that Fichtes' account of recognition contained only the perfomative aspect, that is, the affirmation of human rights and not an epistemic moment or aspect. Hence, Fichte failed to produce an 'objective' account of the Subject-Object. On the relation between Fichte's and

Keeping these dual senses in mind, it is important to note that within the act of acknowledging and coming to know, it is not one of complete success, but involves a sense of incompleteness and failure. This is due to the finitude of human knowledge and the role of contingency. On this point, I agree with Gillian Rose's emphasis upon the position of epistemic failure and error as being inherent within any act of recognition. It is important, however, not to overemphasise this point, that is, the negative moment of the dialectic within the process of recognition. Rose's original reading of Hegel perhaps, at times, over-emphasises this point due to the influence of Adorno on her thought. In my interpretation of recognition, this negative moment is highly important as it offers critical potential and purchase to both the theory as a whole and to the interpretation of Hegel's conceptions of law, ethics and freedom. However, an interpretation of the theory of recognition must also give an emphasis to the positive, successful moment, as this is equally as important to Hegel's conception of freedom as ethical life. Nevertheless, Rose's comments on the moment of epistemic failure in the theory of recognition are highly instructive.

Rose notes that Hegel's concept of recognition is developed from the concept of 'intuition,' namely Fichte's 'intellectual intuition' and Schelling's 'productive intuition,' each of which attempts to explain Kant's transcendental unity of apperception.[35] Rose

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Hegel's accounts of recognition, see: Williams, R.R. *Hegel's Ethics of Recognition* (Berkeley: University of California Press, 1997) and Williams, R.R. *Recognition: Fichte and Hegel on the Other* (Albany: S.U.N.Y. Press, 1992).

[35] Rose, G. *Hegel Contra Sociology* (London: Athlone, 1981), p. 70. Note the intellectual history from Kant, Fichte, Schelling, and then Hegel is complicated and dense and there is no room within the thesis to adequately account for its development.

argues that for Hegel, 'recognition' assumes a relation where the '*relata*' are able to see each other without suppressing each other, and thus, each see each other speculatively. This means seeing the other not as simple identity or non-identity, but as each seeing themselves precisely in their mediating relation. For Rose, 'absolute intuition' or 'absolute reflection' means that in 'a' in seeing 'b,' 'b' also sees 'b' looking back at 'a,' and, hence, 'a' sees itself fully as both 'a' and 'b.' Further, 'a' sees that 'b' is not 'a,' and that 'b' can also see 'a' either one-sidedly or reciprocally.[36] Rose notes that it was the impossibility of stating this adequately in terms of images or 'mirrors,' implied by the terminology of 'reflection,' that led Hegel to abandon the term 'intuition,' and to distinguish sharply between thought as philosophy, and the media of images or representation, as art and religion.[37]

Further, Rose argues that Hegel gradually changed 'intuition,' *Anschauung*, into recognition, *Anerkennung*. 'Recognition' emphasises the lack of identity or difference which is seen. '*Anschauung*' has the semantic disadvantage of sounding too immediate, too pre-critical, too successful, whereas in recognition, the 'an,' 'into,' becomes 're,' again in *Anerkennung*. *Anerkennung* thus implies an initial experience which is misunderstood, and which has to be re-experienced. Hence, it does not imply an immediate, successful vision, but that the immediate vision or experience is incomplete.[38]

Rose argues that the familiar or known, the immediate experience, (*das Bekannte*) is a partial experience that has to be re-experienced or known again (*annerkannt*), in order to

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[36] *Ibid.*, at p. 70-71.
[37] *Ibid.*, at p.71.
[38] *Ibid.*

be fully known (*erkannt*). Hence, 're-cognition' implies an initial mis-cognition, not an immediate 'seeing-into.'[39] With this meaning in mind, throughout the thesis, 'recognition' will be referred to as the process '(mis)recognition,' whereby any act of recognition always involves the *mis* of (mis)recognition, an incomplete act, an incomplete cognition or cognising, that always needs to be re-experienced and re-performed again and again. This is not to say that the act of (mis)recognition is always one of complete failure, rather it can only ever be partially successful. Hence, the inadequacy of the seeing-into renders impossible any absolute finality or closure. In this respect, there is always a remainder of the other that cannot be fully cognised or represented, there is always something else, some dimension of the other, that needs to be seen and known.

With these points in mind, I will now proceed to a discussion of a number of philosophical dimensions within Hegel's theory of (mis)recognition. Beginning with the suggestion that Hegel's theory of (mis)recognition presents a theory of the formation or production of knowledge. In this sense, the process of (mis)recognition is within the tradition of the injunction of the Oracle of Delphi to 'know thyself.' In this respect, Hegel sees the goal of philosophy to lay aside the title of the "love of knowing" and become "actual knowing."[40] For Hegel, the theory of (mis)recognition explains the process through which self-consciousness comes into knowledge of itself and gains knowledge of the world and other self-consciousnesses around it.

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[39] *Ibid.*
[40] Hegel, *Ph.S.* § 5.

The theory of (mis)recognition attempts to demonstrate that self-conscious knowledge occurs through inter-subjectivity, thus, all knowledge develops through an ongoing process of inter-relation. Human knowledge is constantly mediated through the inter-subjective relation, a process where self-knowledge is mediated through the other and numerous others. This involves failures, short-sightedness, errors and contestations over claims to particular versions of certainty and 'truth.'

In Hegel's theory of (mis)recognition, the structure of self-consciousness as a 'negative unity' means that it is not a given that self-consciousness will obtain a speculative comprehension of itself with its others. Rather, freely given mutual recognition is dependent upon each self-consciousness letting the other go free and not negating the freedom of the other. As such, the process of (mis)recognition describes a situation where contests over knowledge and naïve claims to 'truth' occur. The struggle to the death is, in one sense, a struggle over the validity of claims to 'truth' and the struggle to have one's claim and self-certainty legitimised by the acknowledgement of the other. In this sense, this structure of (mis)recognition can be understood as mirroring the three moments of speculative thought as described in chapter three, the understanding, the dialectical or negatively rational moment, and the speculative or positively rational moment.

In its immediacy, self-consciousness is akin to the moment of the understanding, whereby its self-conception is not mediated, or is abstract. It is the pure 'I,' divorced from the world of objects with no concrete content of its own, except for its pure self. In seeing its other, itself in the other and, thus, its 'othered' self, self-consciousness attempts to negate

the other so as to affirm its certainty of itself. As such, it attempts to force the other to abandon its claim upon itself and acknowledge and affirm the position of the first. This moment is akin to the dialectical or negatively rational moment, whereby self-consciousness seeks to affirm what it is, by negating what it is not. When the two self-consciousnesses are viewed in terms of parts of a related whole, 'self-consciousness in general' contains within itself an internal contradiction, one pole opposed to the other.

In the process of (mis)recognition, playing out into struggle and the relation of master and slave, thought does not transcend the position of negativity and the abstract conception of itself. Self-consciousness critiques and attempts to negate the abstract other and, as such, perpetuates a cycle of negativity. The third, 'speculative' moment of thought, occurs in the 'spiritual' moment of (mis)recognition. Here, self-consciousness allows the other to go free and accepts the 'otherness' of itself.

Hence, the speculative or positively rational moment of the process of (mis)recognition is that moment where self-consciousness comprehends the 'I' as 'We' and the 'We' as 'I.' It is, thus, lifted-up beyond the limitations of mere negativity (if only to be caught again at a different level) towards a greater truth of self-certainty. How the move is made between the negative to the speculative, is the central question of self-consciousness gaining the truth of its self-certainty.

This point is emphasised by Pippin who emphasises Hegel's move beyond Kant and Fichte. Pippin notes that it is within Hegel's location of self-consciousness within the

inter-subjective relation, that Hegel moves beyond Kant's transcendental subjectivity and formal categorality and toward the consideration of the achievement of some fundamental 'like-mindedness.' This like-mindedness is the condition of knowledge and Hegel develops the conception that such a condition must be seen as a 'result' of a certain kind of conceptual change.[41]

Further, knowledge, or 'reason,' occurs through the process of (mis)recognition as the inter-relation between human subjects in and across societies, in and through family, culture, politics, religion, art, philosophy and so on. In this sense, knowledge can be seen as the ongoing process of sociality. This point is stressed by Terry Pinkard who reads the process of recognition in the sense of the production of social knowledge. This occurs in the process of shapes or 'formations of consciousness' as reasons for belief, or as the process of dominant or 'authoritative' reasons coming into appearance in history.[42] Pinkard argues:

> Out of the dialectic of recognition between master and slave, Hegel will develop his conception of the *social* nature of knowledge - that is, his idea that the standards for what counts as authoritative reasons should be seen as the outcome of a process of a community's collectivity coming to take certain types of claims as counting *for them* as authoritative, a process best understood in historical and institutional terms.[43]

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[41] Pippin, R.B. *Hegel's Idealism: The Satisfaction of Self-Consciousness* (Cambridge: Cambridge University Press, 1989), p. 146-7.

[42] Pinkard, T. *Hegel's Phenomenology: The Sociality of Reason* (Cambridge: Cambridge University Press, 1994), p. 8. Pinkard at p. 8 argues:

> Any form of life will have certain reasons that it takes as authoritative; to the extent that it becomes *self-conscious* about these standards and norms, it will develop accounts of why what it *takes* as authoritative for itself *really is* authoritative. Becoming self-conscious about such norms is to become aware of the apparent paradoxes, incoherence's, and conflicts within them.

[43] *Ibid.*, at p. 53.

When understood via the process of (mis)recognition, the sociality of knowledge is not

without error. Knowledge as Spirit, becomes the infinite churning of inter-subjective and

inter-social productions of (mis)recognition taking place through finite minds, operating

as the activity of its own upsetting. Knowledge as Spirit, is driven by a ceaseless

negativity, a restlessness, an undermining, an undoing, and a propelling of itself into the

future. Rose characterises this process as both a drama and a comedy:

> Let me then shoot from a pistol: first, *spirit* in the *Phenomenology* means the
> *drama of misrecognition* which ensures at every stage and transition of the work –
> ceaseless comedy, according to which our aims and outcomes constantly
> mismatch each other, and provoke yet another revised aim, action and discordant
> outcome. Secondly, *reason*, therefore is comic, full of surprises, of unanticipated
> happenings, so that comprehension is always provisional and preliminary. This is
> the meaning of *Bildung*, of formation or education, which is intrinsic to the
> phenomenological process.[44]

It is in the sense of the theory of (mis)recognition presenting a theory of knowledge that

the two moments of the process of (mis)recognition, the successful and the unsuccessful,

can be better understood. The notion of 'desire' can be situated within a wider process of

the production of knowledge, whereby the negative relation between the human subject

and its object, is situated within a broader context of the socially produced wants and

needs. Further, the refusal or the inability to fully recognise the other, occurs not simply

as the effort of one individual attempting to exercise a degree of power over the other.

Rather, the engagement is situated within the context of an ongoing process of inter-

subjectively and socially mediated 'beliefs,' or forms of consciousness. This becomes

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[44] Rose, G. *Mourning Becomes the Law* (Cambridge: Cambridge University Press, 1996), p. 72.

important when examining the formation, through law, of the legal person, and the conflicts inherent between legal persons, and institutional legal entities.[45]

Further, the conception of the theory of (mis)recognition also helps to explain the development of normative claims and values, re-introducing into a tradition of natural law an awareness of the importance of custom and sociality in the development of ethical norms. However, Hegel's conception does not operate to erase the position of the subject, or reduce subjectivity to the passive recipient of a larger social structure. Rather, the position of the subject is vital in the production and development of ethics. The development of ethicality is dependent upon the act of the subject, and the ability to acknowledge, appreciate, or see-into the other. This ability is perhaps underscored by the 'hermeneutical' or interpretative dimension inherent in Hegel's theory of (mis)recognition.

Hegel's theory of recognition is underlaid by an interpretive or 'hermeneutical aspect.' It is worth noting the interpretations taken by Hans-Georg Gadamer and, following him, Paul Redding, who place Hegel's theory of recognition within a hermeneutical tradition. In this respect, Hegel follows a tradition that includes Nicholas of Cusa, Spinoza, Herder[46] and the young Schelling. Redding notes that Hegel carries on the tradition of

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[45] In approaching this point it is important to not to reduce Hegel's theory of recognition to simply a 'social theory.' This means remembering the position of inter-subjective recognition within the understanding of Hegel's philosophy as a 'critical metaphysics.' Hence recognition involves the ongoing process of overcoming the limits of human knowledge in the attempt to grasp the infinite in a sense of development. This occurs in the sense of the *Begriff* reflecting upon itself as the Idea.

[46] On this see also Habermas, J. *Theory and Practice* Viertel, J. tr. (Cambridge: Polity Press, 1988). Habermas, at p. 153 argues that, Hegel following Herder, sees within the process of recognition the importance of 'symbols' within language. He sees the achievement of symbols to be 'representation.'

Nicholas of Cusa and Copernicus in a critique of geocentrism, where, if the cosmos is infinite, then its centre is everywhere and no-where. This suggests that the correct understanding of our place in the infinite is from no privileged location, and that all views are partial and perspectival.[47] Redding's views are instructive in helping to place Hegel's theory in a number of traditions and not simply as a response to or as the extension of, the thought of Kant. My rereading of recognition appreciates this perspective, however, it should be distinguished from something of the pragmatic focus sense of Redding's interpretation.

With this said, an understanding of the legal and ethical dimensions of recognition can be deepened by drawing attention to the position of the finite within the infinite. Hegel's account of (mis)recognition can be understood in terms of explaining the means by which the finite mind can come to terms with, interpret, understand and 'see-into' an object that itself is an aspect of the infinite. Gadamer notes that Hegel grasped that the simple dichotomisation of reality into universal and particular, idea and appearance, the law and its instances, is inadequate. Hence, this simple dichotomisation needs to be eliminated just as much as the division of consciousness into consciousness, on one side, and its object, on the other. By attempting to overcome this dichotomisation, what is then thought in a new way is termed by Hegel as 'inner difference' or 'infinitude.' Hence, self-consciousness, in its identity with, and difference from, its object, is infinity itself.[48]

Hence the 'synthesis' of the 'manifold' is bound to the representational function of features that permit the identification of objects, and their subsequent interpretation.

[47] Redding, P. *Hegel's Hermeneutics* (Ithaca: Cornell University Press, 1996), p 25-27.

[48] Gadamer, H.G. *Hegel's Dialectic: Five Hermeneutical Studies* Smith, C. tr. (New Haven: Yale University Press, 1976), p. 57.

In this respect, the process of (mis)recognition explains that the act of 'seeing-into' the other is not merely the task of the 'see-er,' looking into and comprehending a finite object before it.[49] What makes the task difficult is that the finite object contains the infinite within it, the infinite that is immanent within the finite. The object of recognition is itself mediated, the object is itself a *through-ness*; it is the product of an infinite series of relations with its others. This infinite relation stretches forward and backward across time and space. In this sense, the *mis* of (mis)recognition, the moment of error or inadequacy, occurs via the finite mind or human subject, being unable in a mere instant to grasp the infinite, the enormity, and complexity of the process of inter-relations, constellations, constitutions, stretching across peoples and across time.

When understood in this sense, what might otherwise be termed the 'violence' of (mis)recognition, is, in part, a result of the infinite subject being unable to grasp the infinite nature of its object. The inability to ever fully recognise the other is a result of human finitude. In this respect, the operation of law can only ever mis-recognise its object. Law could not ever fully establish a relation of 'openness towards the other,' as some aspect or critical dimension of the other (or of law's many others) remains out of sight, unable to be grasped, conceptualised, acknowledged, or recognised. Any attempt to be 'open' will always involve a point of failure, the resurgence of limit and finitude. It is, in this respect, that we might be able to understand the ethical boundaries, limits, and, to an extent, the violence of the law. When understood via the process of (mis)recognition,

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[49] *Ibid.*, Gadamer, at pp. 58-9, argues that, in the position of self-consciousness as Spirit, Hegel is seeking a kind of reconciliation between 'anciens' and 'moderns.' He argues that for Hegel, there is no opposition between existing reason, existing spirit, *logos, nomos, pneuma*, on the one hand, and the *cogito*, the truth of self-consciousness on the other. By tracing the course of the appearing Spirit, Hegel attempts to teach us to recognise the standpoint of the 'anciens' in the standpoint of the 'moderns.'

law's inadequacy or violence relates in part to a tradition of hermeneutics and Hegel's assessment of the limitations inherent in the attempt to see-into the other.

It should be noted, further, that Hegel's conception of the attempt to see-into the other within the theory of (mis)recognition, involves the attempt to see-into and know God. In this respect, there is generally a theological, and more specifically, a Christian religious dimension underlying Hegel's theory of recognition. Hence, when considering Hegel's theory of recognition and the extent of its operation throughout Hegel's system, the observation that Hegel was a 'theological thinker' should not be ignored or forgotten. This theological element makes the reception of Hegel's thinking today somewhat problematic. Hegel' philosophical questions remain interesting and relevant; however, sometimes, Hegel's answers, due to the influence of the religious upon the philosophical, are more difficult to accept or entertain, unless one is willing to take up an openly religious approach to problems in the world.

While the particular rereading of Hegel's theory of recognition taken by this thesis does not follow a theological interpretation of Hegel, the religious undercurrent of Hegel's philosophy and philosophical thinking, as drawn attention to by Hans Küng[50] and Rowan Williams,[51] cannot be ignored. Hence, even in a non-religious interpretation of Hegel's theory of recognition, one must acknowledge that religious categories are still immanent

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[50] Küng, H. *The Incarnation of God: An Introduction to Hegel's Theological Thought as a Prolegomena to a Future Christianity* Stephenson, J.R. tr. (New York: Crossword, 1987).
[51] Williams, R. "Hegel and the Gods of Postmodernity" in Berry, P. and Wernick, A. (eds.) *Shadow of Spirit: Postmodernism and Religion* (London: Routledge, 1992); Williams, R. "Logic and Spirit in Hegel" in Blond, P. (ed.) *Post-Secular Philosophy: Between Philosophy and Theology* (London: Routledge, 1998). See also: Hyppolite, J. *Genesis and Structure of Hegel's Phenomenology of Spirit* Cherniak, S. and Heckman, J. tr. (Evanston: Northwestern University Press, 1974).

within a strictly philosophical or jurisprudential utilisation of Hegel. This can be seen in something of the similarity between the structure of (mis)recognition and a Christian conception of God.

It can be argued that, underlying Hegel's theory of (mis)recognition, is an account based upon the Christian knowledge of God, one which overcomes the Jewish unknown or alienated God, perhaps represented by the unknowable Kantian 'thing in itself.' In the Semitic tradition, this separation between God and man is represented in the creation and in the fall. God is thus alienated from man, and man from God. Man is left yearning for redemption, and for unification once again with the divine. In Hegel's conception, the reflection of the Jewish religion remains at this level of alienation and anguish. He notes that the God of the Jews is an 'alien God,' an 'object on high,' an 'invisible object,' a powerful lord who confronts the people as servants of God, and who is remote and overbearing.[52] In this reflection, there is an absolute separation between subject and object, between the conception of man and the conception of the divine. In a sense, the relation between God and man is represented in the terms of the relation between master and slave.

However, for Hegel, Christian religious reflection leaves behind the "sensuous here-and-now and the night like void of the super sensible beyond, and steps out into the spiritual daylight of the present."[53] Here, self-consciousness no longer stands in opposition to the alienated, unknown other but, sees in the other itself, and does not negate, but, affirms

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[52] Küng, H. *The Incarnation of God: An Introduction to Hegel's Theological Thought as a Prolegomena to a Future Christianity* Stephenson, J.R. tr. (New York: Crossword, 1987), p. 112-113.
[53] Hegel, *Ph.S.* § 177.

this otherness of itself. It sees itself as Spirit (*Geist*), as the 'I' that is 'We' and the 'We' that is 'I.'[54] This unity between subject and object, between God and man, is represented in Christian religious reflection in the personage of Jesus and the doctrine of the Trinity. In this, man and God are united historically in the figure of the 'God-man' and persist in this ongoing triune relation through Spirit, or the ongoing religious community as the third. Hence, in Christian religious reflection, self-consciousness coming to know the 'absolute,' is represented in the identity between man and God. This is not in terms of a formal identity, but in terms of an active speculative unity, of both, identity and difference, each making sense only through the position of the third.

For Hegel, advent of the 'God-man' represents the divine's over-coming of its own self-alienation. God as Being, cannot be static but effects its own negation, its non-Being, and thus is a Becoming. The divine only becomes itself by becoming other than itself and then coming back to itself through this otherness. The divine, the infinite, only truly becomes itself through becoming other than itself, becoming man, becoming finite and through this, it then effects a unity between the infinite and the finite. Hegel notes:

> (T)he first is the *Absolute Being*, Spirit that is in and for itself in so far as it is the simple eternal *substance*. But in the actualisation of its Concept, in being Spirit, it passes over into *being-for-another*, its self-identity becomes an *actual*, self-*sacrificing* absolute Being; it becomes a *self*, but a mortal, perishable self. Consequently, the third moment is the return of this alienated self and of the humiliated substance into their original simplicity; only in this way is substance represented as Spirit.[55]

Through this form of reflection, the relation between man and the divine is no longer one of master and slave, but of a self-conscious speculative unity. However, as Küng notes

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[54] *Ibid.*
[55] Ibid., at § 532.

the incarnation of God in the event of Jesus as the 'God-man' is only a beginning and can only be a beginning.[56] The idea of a speculative unity between the divine and man is only ushered in by the event, it is not completed. Hence, the ongoing task of self-consciousness attempting to comprehend itself is to be carried forth, not through the 'picture thinking' of religious reflection, but for Hegel, through the comprehension of speculative philosophy. The task of self-conscious reflection, and the task of speculative philosophy, is to comprehend the divine, to know God through the process of knowing, knowing itself. In this sense, for Hegel, critical metaphysics is not only the death of God, but also God's rebirth as something more than it was, as the becoming of the divine through human self-conscious reflection.

It is in this sense that the successful moment of recognition, might be understood. It could be said that the moment within the process of recognition, where the 'I' sees itself as 'We' and the 'We' as 'I,' represents for Hegel, two conceptions. On the one hand, this represents an ethical relation to the other, where individuality is open to the other, in both its difference and its similarity, and attempts to comprehend itself as mediated with the other. On the other hand, this same relation represents for Hegel a Christian conception of the relation between humanity and the divine, where each can only be known through the position of the third. One response to this could be that Hegel's ethics merely takes up a religious conception. However, perhaps another more important point resides here. This is that Hegel's ethics, understood through the process of (mis)recognition, attempts to draw into the thinking of ethics and ethical life in modernity an important development

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[56] Küng, H. *The Incarnation of God: An Introduction to Hegel's Theological Thought as a Prolegomena to a Future Christianity* Stephenson, J.R. tr. (New York: Crossword, 1987), p. 212.

made by Christian religious reflection. This, is, that true worship, or the attempt to approach the sacred, or to express one's love for God, can occur only through the mediation with the third.

With Jesus, the expression of love for God occurs through the expression of love for one's neighbours, for one's others and for the most 'other' of others, the socially excluded: the poor, the old, the sick, the leper and the prostitute. In this sense, the way to God is through the third, through establishing an ethical relation, through establishing ethical communities. Hence, when understanding Hegel's theory of law and ethics through the theory of (mis)recognition, it can be argued that underlying Hegel's account of law is thus, a radical ethicality in which the divine is only approached through the development of ethical relations between members of humanity. In this sense, underlying Hegel's account of ethics, involves the 'work of love.' This work stands both within and apart from the law. The ethical injunction, the love of God, must be brought about through the development of law. However, the full re-unification with God, is always not yet, and in this sense, Hegel's theory of law is always subject to the injunction of its own radical ethics, that law should be uplifted, that it should be put to work.

By paying attention to this dimension within Hegel's theory of (mis)recognition, and the operation of the theory of (mis)recognition as a theory of knowledge and as encompassing a hermeneutical dimension, a greater sense of meaning opens up for the theory as a whole. By taking these interpretations into account, Hegel's theory of law and his conception of ethical life can be reread. While such a rereading is not in any sense

radical, it may operate to open up a number of themes within Hegel's conception of law and ethics. By focussing upon the dual moments within the process of (mis)recognition, I will now give a brief rereading of Hegel's theories of law and ethical life.

(Mis)Recognition and the Law

Hegel's theory of (mis)recognition extends through the *Philosophy of Right*; its operation can be reread so as to emphasise the working of the two moments of (mis)recognition through a number of legal notions. Understood in this sense, (mis)recognition operating through law is both fundamental to the subject becoming free through the law and the position of the subject as excluded from the law. Both freedom and the occurrence of domination and exclusion proceed through the human subject assuming particular legal 'forms.' This provides the basis for acknowledgement of status, or the refusal, or inability of the law to recognise. One important legal form is that of 'personality,' the notion of the legal 'person.'

Within the *Philosophy of Right*, Hegel focuses upon the notion of personality within the section entitled 'abstract right.' In this section, legal personality develops through the process of (mis)recognition via the individual acquiring property and, then, confronting others with property, in the relation of contract. The account in the section on abstract right, in many ways, mirrors the movements in the account of self-consciousness in the *Phenomenology of Spirit*, but includes the idea of the 'will.' As such, Hegel's account of legal personality involves the will coming to realise itself through the appropriation of property and via the acknowledgement by others. Hegel notes that the will has reference

to itself as individuality and that this pure self-reference to itself, constitutes the initial

moment of personality.[57] Hegel defines personality as:

> Personality begins only at that point where the subject has not merely a
> consciousness of itself in general as concrete and in some way determined, but a
> consciousness of itself as a completely abstract 'I' in which all concrete limitation
> and validity are negated and invalidated. In personality, therefore, there is a
> knowledge of the *self* as an *object* [*Gegenstand*], but as an object raised by
> thought to a simple infinity and hence purely identical with itself. In so far as they
> have not yet arrived at this pure thought and knowledge of themselves,
> individuals and peoples do not yet have personality.[58]

Just as self-consciousness in the *Phenomenology of Spirit*, when facing the world of

objects, acts to overcome what seems to oppose it, personality operates in a similar

manner. For Hegel, personality acts to overcome what seems to limit it and attempts to

give itself an unlimited reality. It attempts to posit existence as completely its own.[59] The

means by which this manifests is property. The person posits itself, externalises its will

through the appropriation of property. This amounts to taking away or negating the

independence of property and affirming the person through it. Hegel notes that to

appropriate something means to manifest the supremacy of the person's will in relation to

that thing.[60] Gillian Rose notes that:

> (P)ersonality is the first, still wholly abstract definition of the will. The 'person'
> considers the sphere distinct from him to be immediately different from him, not
> free, not personal, without rights. It may therefore be appropriated or possessed
> on an arbitrary and capricious basis. I become master of what I possess, and it is
> the embodiment of my 'personality.' I treat the thing as a mere natural object,
> whether it is an inanimate object or another human being. In the later case I have
> enslaved the other.[61]

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[57] Hegel, Ph.R. § 35.
[58] *Ibid.*, at § 35, Remark.
[59] *Ibid.*, at § 39.
[60] *Ibid.*, at § 44, Addition.
[61] Rose, G. *Hegel Contra Sociology* (London: Athlone, 1981), p. 85.

The manifestation of personality in property is itself inter-subjective. Just as self-consciousness confronts another self-consciousness, personality confronts another and becomes itself only through its relation with its others. Hegel notes that simply the act of willing that something should be mine, is not enough to constitute appropriation and the ownership of property. On the contrary, it requires that property be taken possession of and held, which, most importantly, depends upon this action being recognised by others.[62] Thusly, personality is a form of (mis)recognition. Property is not owned merely by a subjective will, but by mediation with another will through the relation of contract.[63]

Hegel notes that the relation of contract presupposes that the contracting parties recognise each other as persons and owners of property.[64] There is an important circularity here, as the possession of property is the initial outward manifestation of personality. Yet, only those with property are recognised as persons and, in turn, only persons may be recognised as property holders. Here (mis)recognition occurs through the acknowledgement of a certain form,[65] one gains legal status, and greater freedom,

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[62] Hegel, Ph.R. § 51. Note Avineri, S. *Hegel's Theory of the Modern* State (London: Cambridge University Press, 1972). Avineri at p. 89 claims that, Hegel's view of the basic nature of property differs from classical political economy in that property remains premised on social consensus and not on the mere fact of possession.

[63] Hegel, Ph.R. § 71. Note Honneth, A. *The Struggle for Recognition: The Moral Grammar of Social Conflicts* Anderson, J. tr. (Cambridge: Polity Press, 1995). Honneth at p. 51 claims that, Hegel sees in exchange the prototype for reciprocal action among legal persons. Exchange value for Hegel represents the spiritual embodiment of the agreement between participating subjects. Hence, the introduction of contractual relations is accompanied by broadening the concrete meaning of institutionalised form of recognition. For it is in terms of the specific capacity to bind itself to the moral content of its performative expressions that the legal subject finds confirmation as a contractual partner.

[64] Hegel, Ph.R. § 71, Remark.

[65] Hegel makes an important point on legal forms: Hegel, at, *Ph.R.* § 218, Addition, states:

> When right is posited as what it is in itself, it is law. I possess something or own property which I took over as ownerless; this property must now also be recognised and posited as mine. This is why there are *formalities* in society with reference to property: boundary stones are erected as symbols for others to recognise, and mortgage books and property registers are compiled. Most property in civil society is based on contract, whose formalities are fixed and determinate. One

through the acknowledgement of a certain form by one's others. However, the form presupposes certain social and economic conditions. The recognition of one form is dependent upon the recognition of another set of forms that are instituted through the law and through the dominance of certain conditions in social reality, themselves created by legal forms, and so on.

One form of (mis)recognition between property holders is contract. Contract is the confrontation between property holders and, in a manner, resembles the situation of mutual recognition, where the owner is not negated by self-consciousness, but, is allowed to go free. Hegel notes that the will of the person comes into being through contract, this is a process of mediation, containing contradiction. He states:

> I *am* and *remain* an owner of property, having being for myself and excluding the will of another, only in so far as, in identifying my will with that of another, I *cease* to be an owner of property.[66]

The process of (mis)recognition as occurring in the relation between 'persons,' property owners and in contract, involves full mutual recognition where the parties acknowledge each other as equals and treat each other as such. However, the process also involves the *mis* of (mis)recognition where some individuals are not acknowledged or are acknowledged only as inferior. Hence, the sphere of legal recognition also involves the process of struggle for (mis)recognition and the position of master and slave. For Hegel,

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may well view such formalities with antipathy and believe that they exist only in order to bring money for the authorities [*Obrigkeit*]; they may even be regarded as offensive and as a sign of mistrust, on the grounds that they invalidate the saying that a man's word is his bond; but the essential aspect of such forms is that what is right in itself should also be posited as right. My will is a rational will; it has validity, and this validity should be recognised by others. Here is the point at which my subjectivity and that of others must be put aside, and the will must attain a security, stability, and objectivity which form alone can give it.

[66] Hegel, *Ph.R.* § 72.

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legal (mis)recognition does not operate within a vacuum but within the political, economic and social realities of civil society and the state, under which, in modernity, different peoples as groups and as individuals are (mis)recognised through law as holding differing degrees and levels of rights.

Legal (mis)recognition through the operation of the acknowledgment of formal rights can be seen to contain two opposing aspects. On the one hand, the (mis)recognition of rights and the proliferation of rights operates to lift peoples up, to realise their capacity for freedom in society and affirm them as free beings. Hence, for example, the *Declaration of the Rights of Man* operated to lift peoples up through the law, not only in their acknowledgement as a universally recognised being, but in the raising of the (re)cognition, or education of individuals who then begin to know their selves and their others as a 'universal person.' Hegel notes:

> It is part of education, of *thinking* as consciousness of the individual [*das Einzelnn*] in the form of universality, that I am apprehended as a *universal* person, in which [respect] *all* are identical. A *human being counts as such because he is a human being*, not because he is a Jew, Catholic, Protestant, German, Italian etc.[67]

On the other hand, the operation of (mis)recognition through civil society and the law of the state also has a limiting and oppressive function. This occurs in the sense that some individuals are not given the same degree of universal recognition as others and, as such, are not lifted up to a higher level of freedom. The prime example being that the universal recognition of the rights of 'man' involved the lack of recognition of the rights of women. Further, the degree of freedom derived from the universal (mis)recognition of formal rights was limited, in that, as being universal and formal, it ignored the concrete social

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[67] Hegel, *Ph.R.* § 209 Remark.

and economic conditions under which rights-bearers lived. For example, while possessing similar degrees of formal rights, the factory worker did not posses the same degree of freedom as the merchant or land holder. In this manner, legal recognition remains limited in civil society, in that it remains a 'formal' recognition, thus, and does not recognise the full concrete social being of the individual. This double-function of the (mis)recognition of legal rights is noted by Douzinas, who argues:

> Right as the relation between persons who recognise each other in some attribute or characteristic is created in the process of recognition. Private rights, in particular, lead to the recognition of the other as another person, someone carrying weight in his or her abstract capacity for freedom. But from another perspective, legal rights form a repertory of acceptable and available forms of recognition in a particular society and age, a collection of ways in which institutions are prepared to acknowledge publicly some and not other aspects of identity. Legal rights therefore have a dual role. As elements of our patrimony, as partial recognitions and expressions of our identity, they become key components in our negotiations and struggle with others, crucial aspects of interpersonal relations and public expressions of inter-subjectivity. But rights also form a key component of social recognition: they express the social and political balance of power which often promotes distorted versions of self and misrecognitions of identity.[68]

The process of legal (mis)recognition also extends to the boundaries of the state, to the recognition of the citizen and non-citizen. In this, the citizen, the individual as a member of the state, is lifted up through the law to having a certain degree of freedom within the state, and the right to reside within the state and its protection under the law. For the non-citizen, the full *mis* of (mis)recognition comes into force to exclude the other as barbarian, as alien, as outsider. This individual who is refused recognition as a citizen, and is recognised as non-citizen, as foreigner, as illegal, and is granted none of the rights under the law of the state. Instead, this individual is positively excluded from the law of

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[68] Douzinas, C. "Identity, Recognition, Rights or What Hegel Can Teach Us About Human Rights?" *Journal of Law and Society*, 29 3 2002, 379-405, at p. 391.

the state and its freedom, and this exclusion, in the example of the refugee, occurs through the use of law's force. The *mis* of legal (mis)recognition, thus, involves both conceptual and physical violence.

Further, the state itself is a product of the mutually co-constituting relation of (mis)recognition, whereby the state achieves its legal 'personality' and, thus, its freedom through the notion of sovereignty and the (mis)recognition of it by others as sovereign and free. This idea will be expanded upon later, yet, enough has been said here to anticipate the similar logic operating in the formation and acknowledgment of state sovereignty and how inter-state conflict might be thought in terms of the *mis* of (mis)recognition. I will now turn briefly to how Hegel's theory of ethical life can be understood through the theory of (mis)recognition.

(Mis)Recognition and Ethical Life

The theory of (mis)recognition can be seen to underlie Hegel's notion of ethical life. It is the form by which self-conscious subjects conceive themselves and act as ethical beings, and it is only in doing so that self-conscious subjects may attain freedom. For Hegel, self-conscious subjects achieve their highest level of freedom and independence in the realisation of the 'I' that is a 'We' and the 'We' that is an 'I.'[69] This is the situation where a self-consciousness does not oppress or negate the other, but, in seeing itself in the other and the other in itself, lets the other go free and affirms the otherness of itself.

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[69] Hegel, *Ph.S.* § 177.

In the situation of full mutual recognition, the self-conscious subject comprehends itself in its relation to the other and, in doing so, develops a broader comprehension of itself. Self-comprehension is no longer 'immediate' and 'thin,' but instead, is mediated and 'thick.'[70] Such a thickness necessarily involves the position that for self-consciousness to affirm itself, it does so, not by negating the other, but by affirming itself with and through the other. Hence, this particular self-comprehension affects the actions of the subject, it encourages the subject to act ethically. Its self-interest is no longer opposed to or in competition with the other, but is intimately tied to it. The 'I' conceives itself as a 'We,' the self conceives itself as a mediated self and as one which is now 'de-centred.' Further, freedom comes through the relation of mutual recognition; it involves the changed conception that the other is no longer opposed to, or a limit to one's self. Instead, one's freedom involves the affirmation of the new inter-subjective or social being.

For Hegel, the process of (mis)recognition is central to the question of freedom. In emphasising the ethical moment of (mis)recognition carrying through the *Philosophy of Right* and its centrality to the question of freedom within the state, my rereading shares some similarity with the interpretation taken by Williams. However, my reading differs in emphasis from Williams in that it, perhaps, attempts to take a more 'critical' stance to the process of (mis)recognition as an ethics. This occurs via attempting to not treat the two positions of full mutual recognition and the failed, or refused *mis* of (mis)recognition, as distinct opposites, as an either-or. Rather, the interpretation taken here emphasises the

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[70] The term 'thick' is used often in North-American communitarian accounts of ethics. I do not use this term in a 'communitarian' sense, but use it when drawing upon a specific interpretation of Hegel's theory of (mis)recognition. Cf. Walzer, M. *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, Ind.: University of Notre Dame Press, 1994).

point that the *mis* of (mis)recognition resurfaces in every moment of full mutual (mis)recognition.[71] Hence, full freely-given ethical recognition always contains within it a degree of limitation and negativity that characterises a failed recognition, refusal of acknowledgement, or struggle between self-consciousnesses. As such, even a moment of full mutual recognition involves a moment of *Herrschaft* in some respect, to somebody. This need not occur through the refusal to recognise, but merely through human finitude, through epistemic limit and the necessary inability to fully see-into the other. Further, this duality works, also, in the reverse, that there is an ethical aspect also occurring, however limited it might be, within the master-slave relation; that is, within relations commonly understood as oppression or un-freedom.

Keeping in mind the inherent incompleteness and failure embedded within any moment of the process of (mis)recognition is important to thinking about ethical life (*Sittlichkeit*) and ethics in general. In this regard, the three spheres of ethical life within Hegel's *Philosophy of Right* can be reread by paying attention to the dual moments of (mis)recognition. The operation of this duality of (mis)recognition can be seen in 'love.' For Hegel, the disposition within the family, of love, involves being self-conscious of one's individuality within this unity, so that one is present within it, not as an independent person, but as a member.[72]

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[71] This is not to say that Williams treats these moments as mutually exclusive. I am merely suggesting that my approach perhaps emphasises, to a greater extent than that of Williams, the interaction of the two moments of (mis)recognition, and the importance that these two moments present to jurisprudence in the comprehension of law and ethics.

[72] Hegel, *Ph.R.* § 58.

In the initial moment of recognition, the confrontation with the other is experienced as a loss of self before the other, which is the initial undermining of one's self-certainty, immediacy and independence, by the negative contradiction of the other.[73] If the parties do not give up their absolute independence, they can never get past this initial confrontation and the result is an unequal relation of domination.[74] However, in love, both the initial moment of loss of self, and pursuit of exclusive individuality undergo a reversal. In love, the initial independence is no longer self-satisfying but instead is insufficient and subsequently negated. Yet, this negation is not a loss of individuality, rather it transforms and enlarges the self-hood of the lovers.[75] It can be seen that, through this comprehension, the subject takes on an ethical character, it limits itself and co-ordinates its needs and desires in relation to its relation with the other. This does not mean that the subject is less free, but that it expresses its freedom through this relation, as *the freedom of the relation.*

While Hegel speaks of the family as an ethical institution, it is generally known through feminist critiques, that the institution, while undergoing numerous changes across culture and time, still, is typified in many respects as a sphere of patriarchal dominance. The sphere is often typified by domestic abuse and the bounding of women to the home, a situation that, in general, is not simply overcome by the conception of full mutual recognition occurring in love.[76] Rather, love itself can be the act of domination or

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[73] Williams, R.R. *Hegel's Ethics of Recognition* (Berkeley: University of California Press, 1997), p. 210.
[74] *Ibid.,* at p. 210.
[75] *Ibid.*
[76] See again the feminist critiques of Hegel and also: Nicolacopoulos, T. and Vassilacopoulos, G. *Hegel and the Logical Structure of Love: An Essay on Sexualities, Family and the Law* (Aldershot, U.K.: Ashgate, 1999).

oppression. With this in mind, we should note that love contains within it both the moments of successful and failed speculative comprehension of otherness.[77] Love as a form of (mis)recognition contains within it the speculative conception of the 'I,' genuinely considering itself as a familial 'We' and acting accordingly. It also contains the failed incomplete *mis* of (mis)recognition, where the other is not allowed to go free but is, instead, oppressed and dominated and where, within both love and the family, there can exist the oppressive relation of master and slave.

For Hegel, the process of ethical (mis)recognition also exists in civil society. While abstract right and contract have been discussed in terms of their legal aspect, these as moments within the process of (mis)recognition have also an ethical nature. The idea of personality has an ethical aspect. The mutual acknowledgement and (mis)recognition of a self-consciousness as a 'person,' by another, entails a change in behaviour by each in the comprehension of each, as persons. Hegel notes:

> Personality contains in general the capacity for right and constitutes the concept and the (itself abstract) basis of abstract and hence *formal* right. The commandment of right is therefore: *be a person and respect others as persons.*[78]

[77] Pippin, R.B. "What is the Question for which Hegel's Theory of Recognition is the Answer?" *European Journal of Philosophy*, 8 (2) 2000, 155-178. Pippin, at p. 166 notes that, the family is an 'ethical' and not primarily a 'natural' institution. He argues that this not because of anything 'substantial' or intrinsic about the family. Rather the family is ethical due to the sort of active recognition that mutual dependency requires and, the necessary role of this, in the achievement of independence.
Note further, Honneth, A. *The Struggle for Recognition: The Moral Grammar of Social Conflicts* Anderson, J. tr. (Cambridge: Polity Press, 1995). Honneth at p. 37 argues that, Hegel's line of thought on love and the family presents a significant step beyond the mere claim found in theories of socialisation, that the formation of the subject's identity is tied to inter-subjective recognition. Hegel's ideas lead to a further conclusion, that, if the individual does not recognise its partner to interaction, to be a certain type of person, then the individual is also unable to experience itself completely or without restriction as that type of person.
[78] Hegel, *Ph.R.* § 36.

The form of (mis)recognition here is itself limited where, just as love is a limited form of (mis)recognition due to being grounded in feeling, the recognition occurring between 'persons' remains at a formal and abstract level, where the full concrete reality of the otherness is not recognised, and, instead, only a partial form of the other is acknowledged. Similarly, in the operation of (mis)recognition in contract and between property holders, what is recognised is not the fullness of the inter-related subjectivity, but the 'thing,' the property that stands behind each individual or that each individual is standing upon. It is only through this 'thing,' that the individual gains their acknowledgement from the other.

The third form of ethical (mis)recognition is that which takes place within the state. For Hegel, the state is a shape of Right that occurs higher than the shapes of the family and civil society. However, this does not mean that the state subsumes both the family and civil society. Rather, it can be understood that the state is engaged within the multiple, ongoing, processes of (mis)recognition, occurring at different levels of ethical reality. The idea of full mutual (mis)recognition occurring in the state represents the situation where self-consciousness comes to acknowledge the other as part of itself, and, itself as part of the other. In doing so, it affirms its speculative identity. In this case, the 'other' stands for not just abstract self-conscious subjects, but involves concrete subjectivities having their existence across multiple and different inter-relations throughout society and its institutions. The 'other' also represents the institutions of the ethical state and the laws of the political body of the state itself.

This is not to say that institutions are directly comparable to the self-consciousness, that is, characteristic of the human individual. Rather, this suggest that that individuals within legal and political institutions may come to develop a speculative awareness of their inter-subjective being and, influenced by this awareness, these individuals may seek to develop institutions whose actions reflect such an awareness. In this respect, the law and the state in process of (mis)recognition can be considered as not merely opposed to the subject. Rather, law and the state can be understood as part of its wider inter-subjective social being. This is in terms of the 'We,' that is, the 'I.'

Extending the operation of the notion of (mis)recognition through the law also points to the position within the state, where the 'I' understands itself as a 'We.' This suggests that the state (its laws, institutions, the legislature, the executive and the monarch), recognises itself as a moment within a social, organic, relational existence. This involves the recognition of multiple and different subjectivities and, in the state doing so, it does not negate, dominate or oppress, but affirms these differing and contradictory moments as part of itself. Full mutual (mis)recognition also suggests that these others re-cognise, or come to know themselves through each other, such that the state's self-conception is an active product of inter-relation and continues as an ongoing process.

In this respect, for ethical life to come into full and stable actuality (*Wirklichkeit*), citizens must fully recognise themselves in and through the state. Further, the state must fully recognise itself in and through its citizens. This involves the action of each human subject, as 'citizen,' being orientated towards a wider social being. Within this, the

individual comprehends, or recognises itself within and as the state, its freedom and the state's freedom being fundamentally bound to each other. Such a conception does not necessarily mean that the individual 'I' is swallowed by the 'We.' As much as the subject recognises itself as a mediated being, through the wider social and legal constitution, it also recognises its ethical life within civil society and in the family. Certainly, for the process of (mis)recognition to be successful, each of these spheres must recognise themselves in the other and affirm themselves as such. Put another way, the self-conscious subject operates as the locus of mediation between these three spheres and recognises itself and other subjectivities as such. In this respect, ethical (mis)recognition is the acknowledgement and comprehension of this three in one, this three through one, and the mediation of multiple and different ones through these three.

Under this conception, the ethical life of the state involves the process of self-conscious subjectivity beginning to comprehend itself in terms of an infinite mediation of divergent spheres and levels of ethical reality. The high point of full mutual freely-given (mis)recognition would occur (if it is ever to occur) when political, legal and social institutions of the state begin to reflect this infinite ethical reality. The full coming into actuality (*Wirklichkeit*) of ethical life would be seen to occur in the process where the institutions of the state begin to act ethically. This is also one way of conceptualising the Hegelian monarch.[79] The person of the monarch acts as a reflection of the organic whole, of the 'We' that is reflected in the 'I.' The monarch (we could think here the position of the 'head of state'), reflects outwardly the level of comprehension of recognition within

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[79] Cf. Nancy, J. "The Jurisdiction of the Hegelian Monarch" in Nancy, J. *The Birth to Presence* Holmes, B. et. at. tr. (Stanford: Stanford University Press, 1993).

the ethical life of the state. The monarch operates like a beacon, a set of mirrors surrounding a flame: what it reflects and projects is the level of full mutual recognition reached within the state.

Of course, it is perhaps more likely that the reflection from the monarch demonstrates the lack of full mutual recognition within the state and, thus, the limitations and failures of the state. The *mis* of (mis)recognition exerts a strong pull in the sphere of the legal and political, where the other and its difference is not acknowledged and embraced but is instead, misunderstood, oppressed and negated. Hence, the state can as much be characterised as the flux and process of struggles for recognition between groups, between subjectivities, between conceptions, beliefs and the multiple spheres themselves. This process involves the domination or negation of one sphere (family, civil society, state) by another.

It can be expected that, in the state, acknowledgement is not freely given mutually, but is forced by one over the other. Power is brought to bear and, through force, one is recognised and the other becomes the recognisor. In this respect, the state replicates in and across its spheres, the relation of master and slave and the divorcement of the self-conscious subject from its others. This occurs in the failure to grasp each other in their speculative relation and, instead, the affirmation of one abstract and limited self-perspective over another. This *mis* of (mis)recognition can occur for all sorts of other reasons; among these might include the inability to see-into or interpret the many others, or, the development of 'forms of consciousness,' of authoritative reasons for belief and

knowledge, which become the site of contestation and struggle. These reasons impede the individual's or the institution's ability to recognise the many others, to recognise their difference, or to understand each 'other' as mediated by the third. In this respect, the state and society can be seen as caught in a relation of sheer negativity. A relation in which the *mis* of (mis)recognition, when backed by the power of law and political institutions, manifests forms of conceptual and physical violence.

Rereading Hegel's account of law and the state through the process of a broader conception of the theory of (mis)recognition perhaps helps to open up Hegel's theory of law. It does not offer a radical reinterpretation, but it helps to draw attention to the themes of contestation, conflict, struggle and even violence occurring within Hegel's theory of law. The focus upon the dual moments of (mis)recognition which are not mutually exclusive, but are, in a sense contemporaneous, suggests a conception of law that involves both ethicality and failure, limit, inadequacy and violence. On the one hand, law contains an ethical content, where across the spheres of civil society and the state, ethical action is dependent upon a speculative awareness of the mediating position of the third. This involves the attempt to recognise the other, to see the other in one's self and one's self within and through the relation with the other. On the other hand, this attempt always involves the *mis* of (mis)recognition, the inability to fully comprehend the other, the problem of limit, of finitude, and the refusal to recognise the other, to refuse to engage in the risk of re-comprehension of self through the other and, instead, the forcing of one's limited perspective upon the other.

The *mis* of (mis)recognition does not necessarily erase law's ethical content, it does not reduce law to being 'unethical.' Rather, a broader theory of (mis)recognition suggests that ethics and ethical action can be understood to contain both moments of (mis)recognition. Hence, the theory of (mis)recognition suggests a conception of ethics in which the violence of (mis)recognition occurs inherently within every ethical act. While this can never fully be overcome, the impetus of ethics is, nevertheless, the effort to overcome the *mis* of (mis)recognition; hence, to overcome the inadequacies of ethics itself.

In this respect, the dual moments of (mis)recognition represent something of an *aporia* within ethics. Hegel's two moments, when understood as being intimately tied together, point to the insufficiency of any ethical act, a logical structure within ethics that inscribes both the impossibility of ethical action, and the ethical demand to approach the impossible. That is, the demand to, at once, both embrace the other and let the other go free. Rereading Hegel's theory of law in this manner can be helpful to jurisprudence. It draws attention to a point that is somewhat similar to one made by Derrida in his conception of 'justice as aporia,' and what Derrida sometimes terms, the 'undecidable.'[80] In this sense, a conception of the dual moments of (mis)recognition shares an awareness, with Derrida, of the 'impossibility of the decision,' the violence of law, or the inevitable moment of ethical sacrifice when confronted by the third.[81] However, a rereading of Hegel's conception of law through the theory of (mis)recognition might point

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[80] See: Derrida, J. "The Force of Law: The 'Mystical Foundation of Authority'" Quaintance, M. tr. in Cornell, D., Rosenfeld, M., and Carlson, D.G. *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992).
[81] See also: Derrida, J *The Gift of Death* Wills, D. tr. (Chicago: Chicago University Press, 1995).

jurisprudence in a different direction to that taken by Derrida, and, as such, a direction that might assist jurisprudence in attempting to come to terms with war's moral problem.

What might be considered through the notion of (mis)recognition is the suggestion that the moment of violence within ethics is not simply inherent, but is, perhaps, 'necessary.' This sense of necessity arises through the dependency of the ethical act on the negation of some other. In this respect, the *mis* of (mis)recognition, which is, to an extent, a result of human finitude, might also be considered as necessary for there to be an ethical relation at all. What is being suggested, here, is not a radical departure from Derrida's insistence upon the relation between force and law, but rather, an attempt to approach this issue from something of a Hegelian perspective. What is suggested, is that the theory of (mis)recognition might provide one means of approaching the relation between law and ethics. This approach involves attempting to hold onto the ethical content of law, while recognising the act of violence and, further, by paying attention to the importance of this violence to ethics itself. This small point is put forward only as a suggestion. It might be explained by drawing upon Hegel's notion of *Aufhebung*.

(Mis)recognition within ethics can be considered in terms of Hegel's notion of *Aufhebung*. That is, the process of (mis)recognition can be understood as the attempt by self-conscious subjectivity, or, indeed, the institutions of the state and the state itself, to lift itself up, to heave itself up and overcome or transcend itself and its others. (Mis)recognition turns on the problem of the finite encountering itself in the infinite. The act of lifting up, involves the leaving behind of something, or the transcendence of

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something. This conception helps to explain the relation between the transcending and the transcended, that which is stepped upon as the firm ground of the lifter, or, that which is simply left behind, because only a finite amount can be lifted up at a certain point in time.

This point is perhaps clearer in the struggle for (mis)recognition between self-consciousnesses. In this, each remains in a limited self-conception and negative relation, and conceives their self-advancement and certainty in opposition to another. Here self-consciousness seeks to transcend itself by transcending the otherness within and before itself. Hence, the self attempts to heave itself up and over the other, towards what it conceives naively as truth, or freedom, or independence. In the position of the master, the self has transcended the other and has both negated it and preserved it. The other is negated, in that it has lost its independence, its freedom, but has been preserved, in that the master's position is maintained by the slave; the master has the slave as its foundation and as such, the master contains the negated other within it.

This position is not excluded in the idea of mutual speculative recognition where the 'I' is a 'We' and the 'We' is an 'I,' as in the moments of ethical (mis)recognition occurring within love, in civil society, or the state. In this, the abstract self-conception is transcended. The parties, in comprehending themselves together, as having a shared existence or a relational constitution, lift each other up towards a higher conception of social being and a higher level of freedom. The previous self-conceptions that are negated or left behind, are also preserved within the now thicker self-conception. However, this

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ethical lifting up also runs across the problem of the finite, of limit and epistemic failure. When the ethical act is carried out, something or someone must be transcended, negated, or left behind.

Take, for example, the family. This ethical lifting up occurs only in the confines of a small group, where those 'outside' are not conceived in terms of this relation. Rather, the family constructs itself in opposition to other groups, to non-family, to the world at large. This occurs also in civil society, the legal person or property holder who, in (mis)recognition, is lifted up to a higher level of freedom and ethical treatment. Again, this runs up against the problem of limit, where transcendence occurs at the expense of the other who possesses less or no rights, or who has no property or is considered not a 'person.' Or again, in the ethical state, where in the flux of (mis)recognition, each is lifted up through their comprehension of themselves in speculative unity with their others and political institutions. Again, as a concrete entity is limited, it has a physical boundary, a population definable against individuals within the rest of the world, who, as barbarians or aliens, are not recognised as citizens and, therefore, not lifted up to a higher level of freedom through the state. Hence, even in forms of mutual recognition, occurring via feeling, or through law, someone, or something, is left behind. Somebody is negated and is not actively embraced within this speculative unity.

This can be understood as operating also within the ethical life of the state as a whole. In the state, the lifting up of one sphere, the family, civil society or the state, involves the leaving behind or, to an extent, a negation of the others. Within the individual, this

creates an internal contradiction and tension where one's rights and duties to each sphere come into conflict with the others. In the condition of the finite body, the individual can only do so much. This means one aspect must be focussed upon, given attention, given energy and raised at the expense of the others. A similar conception was encountered in Hegel's account of Antigone. In the play, the internal conflict between the ethical spheres of the family and the state tragically tore apart Antigone's being. Within modernity, this conflict and tension is not necessarily tragic; it is the condition of every individual's concrete social being. This is the *mis* of (mis)recognition, which maintains itself as an ongoing process, a moment of contradiction within the law. (Mis)Recognition points to the *impossibility of being able to lift up the whole, as whole.*

Understanding ethical life via (mis)recognition might tell jurisprudence something about the nature of ethics and ethical relations. It suggests that the notion of 'limit' has not merely a negative, but also a positive function. If we turn back to the notion of the beautiful soul, the moral imperative comes up against the problem of limit. Ethical duty cannot be extended to every other and, although duty demands it, ethical action can extend only to some and not all. Viewed from the perspective of (mis)recognition, this may be turned around to suggest that it is upon this limit, this negative relation, that ethical relations are built. Ethical relations are just as much determined by the negation of some other, as they are determined by the attempted openness to another. Ethical relations derive their power from the negation of some other and, thus, are built and have

meaning as an ethics of closure. This may not be a radical point, but it is a point that contemporary jurisprudence should take into account. [82]

This conception might be seen in the operation of familial love. Love has meaning in the family not simply due to the ethical norms created by the openness towards and recognition of the self in the other, as lover to lover, or, as parent to child. Love, also, derives its ethical value through the exclusion of some other. Love, as an ethical relation, derives its meaning through the rejection of the romantic advances of the unattractive other or, in the exclusion of the non-family member, through the recognition of the family member against the neighbour. This occurs also in civil society and the state. The ethical relation to the property owner occurs via the refusal to recognise the non-property owner. The ethical relation of the citizen to citizen, or, the state to the citizen, is built not solely on the recognition of each as social being, but the refusal to recognise the alien, the barbarian, or the refugee, as citizen.

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[82] My focus upon the notion of 'limit' and 'finitude' in my rereading of Hegel's ethics of (mis)recognition should be distinguished from the account of law and ethics given by Drucilla Cornell. See: Cornell, D. *The Philosophy of the Limit*, (New York: Routledge, 1992). Cornell draws upon Derrida and Adorno to reread a Hegelian tradition of the philosophy of law, pointing to the violence of law. She examines the possibility of developing a 'non-violent ethical relation with the other.' Cornell at p. 62 states:

> Indeed, I will suggest that the entire project of the philosophy of the limit is driven by an ethical desire to enact the ethical relation. Again, by the ethical relation I mean to indicate an aspiration to a nonviolent relationship to the Other, and to otherness more generally, that assumes responsibility to guard the other against the appropriation that would deny her difference and singularity.

I would argue that Cornell's aspiration to a non-violent relation with the other results in her losing a degree of control over the question of ethical responsibility. In a sense, her account may, be represented by the images given by Gillian Rose. That is, of a nonviolent and open 'new Jerusalem,' held in opposition to, a violent and totalizing, 'old Athens.' See Gillian Rose. See: Rose, G. *Mourning Becomes the Law* (Cambridge: Cambridge University Press, 1996), p. 21. Against Cornell, I suggest that a more comprehensive account of law might be developed through a rereading of Hegel's theory of (mis)recognition. Such an account would attempt to pay attention to the violence of law, while at the same time, attempting to hold onto law's ethical content. Such an account would involve a conception of ethics that involves both the injunction to establish a non-violent relation with the other, and the conception that violence is not only inherent within any ethical act, but that this violence is somewhat necessary for ethics.

What such a notion of ethical life points to, is not that one side of (mis)recognition, the 'successful' moment is good, and the 'unsuccessful' moment is bad, but, that ethical life is constituted through both of these aspects. Thus, ethics does not simply amount to an 'openness' or a duty to 'humanity,' but, ethics and ethical life as (mis)recognition, are always the inter-subjective constitution of these two dual moments. Ethicality relies upon both moments of (mis)recognition, upon both openness and closure towards the other.

This is not to say that jurisprudence should embrace an ethics of closure, but that it should, via the theory of (mis)recognition, pay attention to how ethical relations are inter-subjectively constituted. It involves paying attention to the notion that ethical relations are built upon a degree of closure and negation. In this respect, closure towards, negation of an other, and perhaps a degree of violence towards the other becomes necessary to the building of ethical relations. This suggestion is expressed with caution, as the argument that 'ethicality needs violence,' if interpreted as an affirmative command, leads to quite horrible results. Yet, it is perhaps at this moment, of peering into the horrible point of contradiction, of the *aporia* within ethics, that a certain importance, or slice of meaning, emerges for jurisprudence. This meaning cannot be fully explained or developed here, as it is the subject of a larger theoretical project. However, part of this meaning proves important to the attempt by jurisprudence to come to terms with war's moral problem. The appreciation that ethics (and ethical action) involves a degree of violence, and, to an extent, can be understood as depending upon a degree of violence (or, at least, negation),

may prove helpful when considering the nexus of law-war-ethics and the development of a jurisprudence of war.

Conclusion

This chapter has continued the rereading of Hegel's conception of law. In this chapter, I have drawn upon a number of interpretations of Hegel's theory of recognition in which the theory can be understood as encompassing a number of philosophical dimensions. By drawing upon these dimensions and by emphasising the dual moments of recognition, I have argued that Hegel's theory can be understood as a broader theory of '(mis)recognition.' Using this conception of (mis)recognition, I have attempted to reread Hegel's theory of law. I have argued that Hegel's conception of law and ethics can be reread by focussing upon the dual moments of (mis)recognition, the moment of successful mutual recognition, and the moment of failure, limit or error, the *mis* of (mis)recognition. Within law and ethics, these moments are not mutually exclusive, but occur simultaneously within every legal right and ethical encounter with the other. I have argued that this opens for jurisprudence a conception that may help to approach the necessary moment of contradiction, or *aporia*, within law and ethics. Whereby, a theory of (mis)recognition may allow a conception that pays attention to the violence of law and also manages to hold onto law's ethical content. This involves the understanding that the moment of limit, error, negation or even violence, is not only inherent to ethics and ethical action, but is, perhaps, 'necessary' to it.

While this rereading of Hegel's theory of law has not been in any sense radical, it has added to the understanding of Hegel's conceptions of law and ethics, and has presented an interpretation, through which, the philosophy of Hegel can be more readily drawn upon by jurisprudence in the approach to contemporary problems of law. At this point, it is now worth considering Hegel's inheritance from Kant, of war's moral problem, and the extent to which the approach of Hegel contributes to the jurisprudence of war.

Chapter 6

Rereading Hegel's Account of War

Introduction

So far, the thesis has followed the inheritance of war's moral problem by Kant and how, in contemporary thought, Kant's approach to war's moral problem has been taken up and developed by 'neo-Kantian ethics.' In attempting to come to terms with war's moral problem, both the approaches of Kant and neo-Kantian ethics have been seen to have added to a jurisprudence of war and have done so within a broad and long-running tradition(s) of natural law. Attention has also been drawn to how both the approach of Kant and that of neo-Kantian ethics have come across a number of difficulties or barriers and, as such, these approaches have not been able to overcome, or fully come to terms with, war's moral problem. It has been suggested that it may be worthwhile for jurisprudence to investigate a second line of inheritance of war's moral problem, that of the approach taken by Hegel.

For the purpose of examining Hegel's approach to war's moral problem, and the possibilities Hegel's approach offers to the development of a jurisprudence of war, it has been necessary to reread Hegel's conception of law. This rereading has involved understanding Hegel's notion of Right via the critical-metaphysical category of actuality (*Wirklichkeit*). Emphasis has been given to Hegel's development of Kant's conception of morality through the notion of ethical life, and how this can be understood juridically, as a development within a tradition of natural law. Further,

Hegel's conception of law has been reread through a broad theory of (mis)recognition. In this, Hegel's theory of law can be seen to present a conception where law's violence does not necessarily render the law as 'unethical.' Instead, Hegel's conception argues towards the important position of violence within ethics. With this in mind, the thesis will now turn to examine Hegel's approach to war's moral problem and consider what Hegel adds to a jurisprudence of war.

In this chapter, I will reread Hegel's account of war, concentrating upon the Hegelian response to Kant's engagement with war's moral problem. I will show how Hegel's account can be reread as a response to Kant's three principle contentions: the moral condemnation of war, the invocation of cosmopolitan right and the establishment of an international juridical order. This chapter will not present a wholesale defence of the Hegelian account of war, rather, it will concentrate upon the effectiveness of Hegel's critique of Kant's approach to war, taking into consideration Hegel's presupposition of the 'realist' positions of Machiavelli and Hobbes, and a number of Hegel's philosophical assumptions that may be untenable today.

Preliminary Comments

A rereading of Hegel's conception of war must take into account a number of philosophical assumptions and presuppositions that, otherwise, limit the usefulness of a Hegelian conception, today. I will briefly discuss some of these presuppositions.

Hegel's account of war, as expressed in the *Philosophy of Right*, at times, draws upon three metaphysical assumptions: a notion of progress, a notion of providence, and the

relation of cause and effect. With regard to the first, Hegel's account of 'world history' may, at times, fall back into a teleology of 'progress.'[1] In this respect, his account can sometimes be understood to put forward an argument that takes on a form similar to the notions that have come to be known as 'evolution' and 'social-Darwinism.'[2] In this sense, war can sometimes be tied to the right of progress, of the 'civilised' against the 'uncivilised' and so on.[3] Further, this conception may at times, display a certain European bias. A rereading of Hegel's account of law should approach carefully the notion of progress and the danger that may arise in combining a notion of progress with a conceptualisation of particular acts of war. Such caution should not preclude the discussion of war through a critical-metaphysical category of actuality (*Wirklichkeit*). While this does involve a notion of struggle that is related to the development of freedom, the category also pays attention to how thought might approach particular conflicts through juridical conceptions that have come to hold a degree of sway over reality.

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[1] Cf. this to Ritter's comments on Hegel's account of world history as discussed in chapter three. See: Ritter, J. *Hegel and the French Revolution: Essays on the Philosophy of Right*, Winfield, R.D. tr. (Cambridge Mass.: MIT Press, 1982).

[2] For differing readings on Hegel's account of history see: Perkins, R.L. (ed.) *History and System: Hegel's Philosophy of History* (Albany: S.U.N.Y. Press, 1984); Wilkins, B.T. *Hegel's Philosophy of History* (Ithica, N.Y.: Cornell University Press, 1974); O'Brien, G.D. *Hegel on Reason and History* (University of Chicago Press, 1975); O'Brien, G.D. "Does Hegel Have a Philosophy of History?" in Inwood, M. (ed.) *Hegel* (Oxford: Oxford University Press, 1985); Houlgate, S. *Freedom, Truth and History: An Introduction to Hegel's Philosophy* (London: Routledge, 1991); Hyppolite, J. *Studies on Marx and Hegel* O'Neil tr. (London: Heinemann, 1969).

[3] See for example Hegel, *Ph.R.* § 351:

> The same determination entitles civilized nations [*Nationen*] to regard and treat as barbarians other nations which are less advanced than they are in the substantial moments of the state (as with pastoralists in relation to hunters, and agriculturalists in relation to both of these), in the consciousness that the rights of these other nations are not equal to theirs and that their independence is merely formal.

Second, Hegel's account of world history can be understood to presuppose a notion of 'providence.' Hegel states in his *Lectures on the Philosophy of World History*[4] that his investigation of world history can be seen as a 'theodicy,' as a justification of the ways of God in the world, and further, that this theodicy should enable us to comprehend all the ills of the world, including the existence of evil.[5] For Hegel, 'providence' is the religious truth that the world is not prey to chance and external contingent causes, but is governed or ruled by 'reason.'[6] For Hegel, the serious engagement with a philosophical idea of providence is a theological imperative, as it approaches the question of whether it is possible or not to know God?

What can be seen in Hegel's account of world history are the theological undertones that lie within the process of (mis)recognition. Hegel can be understood as viewing the world as the alienation of the divine from itself, whereby the trauma and suffering of the world, and thus, the condition of war, occur in the separation of humanity from God, and God from humanity. World history for Hegel is the activity of this alienated and divided Spirit coming to know itself in terms of its speculative unity, and needing to do so to become free.

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[4] Hegel, G.W.F. *Lectures on the Philosophy of World History: Introduction, Reason in History* Hoffmeister, J. (ed.) Forbes, B. intro. Nisbet, H.B. tr. (Cambridge: Cambridge University Press, 1975).
[5] *Ibid.*, at p. 42. Note also the argument by Kaufman, W. "The Hegel Myth and its Method" in Walter Kaufman (ed.), *Hegel's Political Philosophy*, (New York: Atherton Press, 1970). Kaufman at p. 166, argues that, Hegel attempted to solve the problem of evil by demonstrating that evil serves a positive function. On this point see also: Kierans, K. "The Concept of Ethical Life in Hegel's Philosophy of Right" *History of Political Thought*, 23 (3)1992, 417-435. For a discussion of Hegel in terms of the philosophical tradition of coming to terms with 'contingency' see: Kolakowski, L. *Main Currents of Marxism*, vol. 1. Falla, P.S. tr. (Oxford: Oxford University Press, 1981), pp. 9-80.
[6] Hegel, G.W.F. *Lectures on the Philosophy of World History: Introduction, Reason in History* Hoffmeister, J. (ed.) Forbes, B. intro. Nisbet, H.B. tr. (Cambridge: Cambridge University Press, 1975), p. 35.

Hans Küng notes that, for Hegel, while the world is not identical with God in any simple sense, it is nonetheless, "God in his development."[7] This God who is in development, externalises itself in history and, in doing so, leads the world on an upwards course, firstly as nature and ultimately as Spirit, towards itself, and towards its infinity and divinity.[8] He notes that the fact that God is perceived in terms of a dialectical development has momentous consequences for the concept of God. It means that the concept of God includes the negative moment within itself, and that God becomes itself through all the seriousness, all the pain and suffering of the world. That God comes to be itself through the work of the negative.[9]

Hegel's account of the speculative unity between God and humanity, when read as a critical-metaphysics, is interesting, and, further, his notion of the dialectical development of God is an attractive theological position. However, for the purpose of this rereading, focussing upon questions of law, this account needs to be put to the side. It is best, then, that a rereading of Hegel's approach to war's moral problem should not take up Hegel's notion of providence, otherwise a jurisprudential conception of war will move towards an openly theological form of reflection. As Hegel may be considered to be, at heart, a 'theological thinker,' the separation of his thought into religious and non-religious elements, is a problem and a somewhat artificial exercise. However, with regard to approaching the issue of 'providence,' the attempt to separate and not take up the religious aspects of Hegel's thought is

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[7] Küng, H. *The Incarnation of God: An Introduction to Hegel's Theological Thought as a Prolegomena to a Future Christianity* Stephenson, J.R. tr. (New York: Crossword, 1987), p. 220.
[8] *Ibid.*
[9] *Ibid.*, at p. 221.

necessary here. The separation endeavours to avoid the charge that a Hegelian theory might retrospectively justify acts of violence through the 'cunning of reason.'[10]

Thirdly, Hegel's account of war within the *Philosophy of Right*, at times, assumes a relation between cause and effect. In particular, this arises in Hegel's contention that war holds a normative status in the ethical education of the populace. It resides in the argument that the threat of death via war, might bring peoples to discover that their self-identification through their property is inadequate, and that their true 'essence' lies in the ethical community and the necessary self-sacrifice for its defence. On this claim, Hegel seemingly draws upon images of a classical Greek conception of war and the honour of the citizen sacrificing their life for the *polis*.[11] Further, Hegel might also be understood as drawing upon the figure of Napoleon, and the image of the Napoleonic wars as an educative or cleansing process. For Hegel, such wars may have resembled a strong wind sweeping away the stale and oppressive feudal orders of old Europe, or, at least, the institutions of the Holy Roman Empire.[12]

Again, Hegel's claim that war has an effect in educating or raising the ethical awareness of the state's citizens should be approached with a degree of caution. This role of war cannot really be tested and as such, it does not pass the burden of proof.

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[10] The quintessential critique of any so-called 'dialectic of historical progress' perhaps resides in Walter Benjamin's "On the Concept of History" in particular, the images of the 'angel of history' and the 'puppet and the dwarf.' Any rereading of Hegel's theory of war and Hegel's philosophy in general must pay attention to Benjamin's critical insights. See: Benjamin, W. *Illuminations* Arendt, H. (ed.), Zohn, H. tr. (New York: Harcourt, Brace & World, 1968).

[11] While I do not agree with his reading of Hegel as a whole, see Lukács's comments on the young Hegel's conception of Greek war. See: Lukács, G. *The Young Hegel: Studies in the Relations Between Dialectics and Economics* Livingstone, R. tr. (London: Merlin Press, 1975).

[12] Note the comment by Avineri, S. "Hook's Hegel" in Walter Kaufman (ed.) *Hegel's Political Philosophy*, (New York: Atherton Press, 1970). Avineri notes at p. 74, that in 1806 the young Hegel explicitly welcomed the Prussian defeat by Napoleon at Jena. Hegel welcomed ending of medieval anarchy in Germany, the introduction of rational legislation, and the codification of law based upon universal norms and principles. On this see further: Pinkard, T. *Hegel: A Biography*, (Cambridge: Cambridge University Press, 2000).

Further, the granting of normative value to a particular war has a tendency to fall back into a theory of 'just' and 'unjust' wars and this is, on the whole, inconsistent with a Hegelian reading of war in light of the process of (mis)recognition. With these three presuppositions addressed, I will now proceed to give a rereading of Hegel's account of war as a response to Kant's approach to war's moral problem.

Against the Moral Condemnation of War

Hegel's account of war has received quite a troubled reception within Anglophone philosophy. In the first half of the twentieth century, it was subject to the various claims that Hegel had glorified war, that he was the official philosopher of Prussian militarism, and that he provided a theoretical precursor to German Fascism.[13] These views are incorrect. They have arisen, in part, from the failure to understand Hegel's comments within the *Philosophy of Right* and Hegel's comments upon 'world history,' within the broader context of Hegel's philosophical system as a whole. Further, it has been suggested that such 'myths' arose in England and America during the two 'World Wars,' where the rejection of Hegel's philosophy was part of a wider anti-German sentiment.[14]

In light of the substantial literature on Hegel in the later part of the twentieth century, which has comprehensively responded to and refuted these Hegel myths, any suggestion that Hegel glorified war, or, was an apologist for Prussian militancy should

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[13] See: Dewey, J. *German Philosophy and Politics* (New York: Books for Libraries Press, 1915); Hobhouse L.T. *The Metaphysical Theory of the State* (London, George Allen and Unwin Press, 1918); and Popper, K. R. *Open Society and its Enemies* (New Jersey: Princeton University Press, 1945).

[14] Stewart, J. (ed.) *The Hegel Myths and Legends* (Evanston, Ill.: Northwestern University Press, 1996), p.6.

immediately be dismissed.[15] In this respect, it is not the aim of this chapter to present

a defence of Hegel's account of war against these erroneous, yet somewhat popular

claims. Rather, this chapter represents a rereading of Hegel's comments on war with

questions of law, and, primarily, the issue of war's moral problem in mind.

Hegel's account of war can be read as an inheritance of, and response to, Kant's

engagement with the problem of war in the essay *Perpetual Peace*. Hegel's account of

war offers a critique of Kant's three contentions, through which Kant attempts to

come to terms with war's moral problem. With regard to Kant's first contention,

Hegel's account of war can be read as a critique of Kant's moral condemnation of

war. In similarity to Kant, Hegel takes up war's moral problem by initially rejecting

outright the tradition of 'just war.' In a passage that echoes Kant's rejection of the use

of the term 'Right' with respect to war, and the labelling of those who do, as 'sorry

comforters,'[16] a younger Hegel states:

> Right is the advantage of a particular state, specified and acknowledged by
> treaties; and since, in treaties in general, the different interests of states are
> specified, despite the fact that these interests, as rights, are infinitely complex,
> these interests - and hence also the rights themselves - must come into
> contradiction with each other. It depends entirely on the circumstances, on the
> combinations of power - i.e. on the *judgment* of politics - whether an
> endangered interest or right will be defended with all the force a power can
> muster, in which case the other party can also, of course, adduce a right of its
> own since it has itself exactly the opposite interest which collides with the

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[15] For early defenders of Hegel, refuting the linking of him to Prussian militarism and Nazism, see:
Watson, J. "German Philosophy and Politics" *Queen's Quarterly*, 22 (4) 1915, 366-379; Muirhead,
J.H. *German Philosophy in Relation to the War* (London: John Murray, 1917).
For theorists who in the latter half of the twentieth century began to turn around the Anglophone
misconceptions of Hegel and his position on war and the state see: Kaufman, W. "Hegel's Myth and Its
Method" *The Philosophical* Review, 60 1951, 495-486; Avineri, S. "The Problem of War in Hegel's
Thought" *Journal of the History of Ideas*, 22 1961, 463-474; Bruggencate, H.G. "Hegel's Views on
War" *Journal of the History of Ideas*, 22 1961, 58-60; Smith, C.I. "Hegel on War" *Journal of the
History of Ideas*, 16 1965, 282-285; Verene, D.P. "Hegel's Account of War," in Pelczynski Z.A. (ed.)
Hegel's Political Philosophy: Problems and Perspectives (Cambridge: Cambridge University Press,
1971); Harris, E.E. "Hegel's Theory of Sovereignty, International Relations, and War," in Verene, D.P.
(ed.) *Hegel's Social and Political Thought: The Philosophy of Objective Spirit* (New Jersey:
Humanities Press, 1980.).
[16] Kant, I. "Toward Perpetual Peace: A Philosophical Sketch" in Kant, I. *Kant Political Writings* Reiss,
H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 103.

first, and hence also a right. Thus, war or some other means must now decide - not which of these rights asserted by the two parties is the genuine right (for both parties have a genuine right), but which right should give way to the other. War or some other means must decide the issue, precisely because both contradictory rights are equally true and hence a third factor - i.e. war - must make them unequal so that they can be reconciled, and this occurs when one gives way to the other. [17]

On the claim that war involves the conflict between 'right and right,' Hegel inherits a conception of war, at least stemming from the Westphalian tradition. In a sense, this conception recognises that sovereignty involves the right to war and that this precludes the idea of a higher moral or religious condemnation or justification. In this respect, Hegel's position on war is distanced somewhat from the Kantian position. Hegel rejects the Kantian contention that war should be condemned outright by reason and that war is judged by a transcendental morality. In the Hegelian conception, the question of the relation between war and morality goes to the issue of what is the 'ground' of 'Right?' That is, if we are to speak about war in terms of a moral language, then, it is necessary to question where this moral moment is grounded. This involves the question of where the moment of judgement is situated, and of where Right resides?

As demonstrated earlier, Hegel in the *Philosophy of Right*, had criticised Kantian morality and its less rigorous cousin, popular, subjective-moralism. This critique continues in Hegel's reception of Kant's approach to the issue of war. For Hegel, when asking the question of 'what is Right,' the act of turning to one's private conscience and the attempt to act according to a universal law that endeavours to take into account the position of humanity, is a necessary form of reflection. Indeed, it is a

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[17] Hegel, G.W.F. "The German Constitution" (1798-1802) in Hegel, G.W.F. *Political Writings* Dickey, L. (ed.) Nisbet, H.B. tr. (Cambridge: Cambridge University Press, 1999), p. 70.

form that separates the thinking of modernity from classical antiquity. However, for Hegel, this form of moral reflection is not the whole of Right. Rather, what Right is, also involves an investigation into what Hegel calls ethical life, *Sittlichkeit*. In part, this describes the form of lived morality or custom, which exists in and, through objective, legal and political institutions and through which, the individual guides its actions via a 'second nature.' For Hegel, as an account of freedom, both philosophically and pragmatically, Kantian morality, on its own, is inadequate. For Hegel, if we are to comprehend freedom in modernity, then thought needs to understand the role of subjective reflection within the objective sphere of social being. Right, has its ground in ethical life that, in modernity, is located in the idea of the state.

It is from this position that Hegel contests Kant's argument that war is not right, that it is an inherent wrong. For Hegel, such a claim does not pay tribute to the fact that the notion of 'Right,' itself, is located within the state and in the state's acts of war. In this sense, the Hegelian argument involves the suggestion that we cannot simply judge the actions of states as we would the actions of a private person. States may have a form of personality in the sense of sovereignty, and they may act as individuals. However, states are also large complex institutional entities containing layers of internal mediation and tension. States represent a form of living ethical life, which, as an objective form, exist as a form of the living good. Hence, the state, as a 'living good' (even if we may think it to be inadequate or corrupt) cannot be considered in the same terms as moral judgement considers an action of a single individual to be right or wrong.

This argument by Hegel is not confined to history, rather it is alive today, and to an extent, it resides within the neo-Kantian approach to war's moral problem. This issue of what states 'ought' to do, exists in the philosophical rigour of the Kantian approach, and in Kant's most un-rigorous double-figure, the position of subjective-moralisation. This second position exists today; it might be considered as arising, at times, in the contemporary popular figure of the 'public intellectual' or 'expert,' or even in the figure of the 'international lawyer.'

For Hegel, approach to war's moral problem via Kant's conception of moral judgement, or by the private inclination of subjective-moralisation, is not fully adequate.[18] In part, this inadequacy lies in there being no higher power over states to pass and enforce judgement. Further, for Hegel, the inadequacy arises, due to Kant's conception not paying adequate attention to the position of the state and its relation to freedom, as ethical life. For Hegel, the state represents the highest form of Right. Hegel states:

> States are not private persons but completely independent totalities in themselves, so that the relations between them are not the same as purely moral relations or relations of private right. Attempts have often been made to apply private right and morality to states, but the position of private persons is that they are subject to the authority of a court which implements what is right in itself. Now a relationship between states ought also to be inherently governed by right, but in worldly affairs, that which has being in itself ought

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[18] Note Hutchings, K. *International Political Theory: Rethinking Ethics in a Global Era* (London: Sage, 1999.) Hutchings takes up the Hegelian point on the critique of the 'critic' having privileged access to a moral universal. She points to the importance of understanding the critic's place within ethical life. She states at p. 183:

> (T)he normative theorist does not have privileged access to the ground of normative truth, which can somehow operate self-evidently as a short cut to universal normative agreement. The ground on which any person may argue for a particular normative prescription is the ground of their 'relative identity' with their ethical life and their principles, values, practices and institutions which it encompasses - in all their complexity and tension. It is therefore the exposition of international politics as ethical life which must be the primary purpose of the normative international theorist, most particularly if that theorist is concerned to defend and articulate particular prescriptive positions.

also to posses power. But since no power is present to decide what is right in itself in relation to the state and to actualise such decisions, this relation [*Beziehung*] must always remain one of obligation. The relationship between states is a relationship of independent units which make mutual stipulations but at the same time stand above these stipulations.[19]

With regard to the first element, Hegel inherits or shares a conception with Hobbes, that in the condition where parties exist without a common power over them, then conceptions of right and wrong, justice and injustice, are out of place. This is the Hobbesian conception of 'civil war' as the 'state of nature,' which is a relation of a war of all against all. Such a condition is defined by the absence of law, where, for law to be in a sense, actual, then it must have some form of power behind it. Further, law requires a degree of legitimacy, in that it is not simply the judgement of one party backed by its own force, who claims the mandate of 'Right.'[20]

Kant takes up this Hobbesian conception more thoroughly, in that he accepts the rightlessness of the international relation as a 'state of nature.' However, this needs to be overcome via the institution of law through the contract of states. Kant, thus, replicates the Hobbesian condemnation of the brute relations of unrestrained power and the need to contract out of this relation through the formation of a higher power, and extends this theorisation from the sphere of civil, to international relations. Hegel,

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[19] Hegel, *Ph.R.* § 330, Addition.

[20] Hobbes, T. *Leviathan* (Harmondsworth: Penguin Books, 1975), pp. 184-188. Noting the well-quoted passages, at p. 185:

> Hereby it is manifest, that that during the time men live without a common Power to keep them in awe, they are in that condition which is called Warre; and such warre is of everyman against everyman.

And at p. 188:

> To this warre of everyman against everyman, this is also consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law.

however, tends to turn this 'realism' back upon itself, following Hobbes's own assessment of the relation between sovereigns.[21] In describing the relations between states as a 'state of nature,' one that cannot be overcome, moral and legal claims of Right remain only at the level of obligation, at the level of an ought.[22] More on the Hegelian conception of an international juridical order will be said shortly. However, Hegel's assessment needs to be understood with respect to the second aspect of his argument.

In making the argument that the relations between states should not be thought of in the terms of a private morality, Hegel is not arguing that international relations should be devoid of the notion of Right and, as such, reduced to simply the operation of brute power and the acceptance of this fact. Rather, Hegel is making the point that, when we are to think about the relation between war and ethics in general, Right is grounded in the ethical life of the state. Therefore, any conception of war and international relations must proceed from this fact. Hence, the notion of Right, in relation to war, must be thought of as the right of one state against another. In this respect, Hegel favours concrete or mediated notions of ethics over moral judgements that might otherwise tend towards abstract conceptions. For Hegel, the state might be considered as 'ethical entity,' or 'ethical actor,' whereby its actions, even in war, embody a living ethical life. In this respect, the state's position as ethical life grants its acts a degree of legitimacy.

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[21] *Ibid.*, at p. 266. Hobbes states:

> So in States, and Common-wealths not dependent upon one another, every Common-wealth, (not every man) has an absolute Libertie, to doe what shall be judge (that is to say, what that Man, or Assemblie that representeth it, shall judge) most conducing to their benefit. But withall, they live in the condition of a perpetual war, and upon the confines of battle, with their frontiers armed, and canons planted against their neighbours round about.

[22] Hegel, *Ph.R.* § 333.

Hegel refers to this 'right' of state as its 'welfare.' The guiding principle of international relations is not that of a 'universal philanthropic thought,' but of the welfare of the state which is threatened by others.[23] Hence, from the Hegelian position, when thinking about morality in the sphere of war, the question of Right, is not simply one of individual moral judgment that seeks to determine 'universal law.' Rather, the focus needs to be upon the position of the state as the embodiment of ethical life, and its acts as the safeguarding of its own welfare. Welfare represents the shape of Right as a 'concrete universal.' As ethical life, the state is a shape of Right that is mediated. The state represents a moment of ethical 'universality' that has come to be, through the process of mediation, of inter-subjective (mis)recognition occurring between the state's members.

The argument, by Hegel, is not that politics is superior to morality, but rather, when the notion of Right is understood fully, that is, as ethical life, then politics and morality are no longer in such a fervent opposition. In such a case, war is not to be morally condemned as an evil, but, is instead to be understood as a conflict between differing spheres of ethical life. War is to be situated within the notion of *Sittlichkeit*. Hence, for Hegel, the Kantian moral condemnation of war is perhaps a symptom of an inadequate conception of the notion of Right, one that does not yet understand Right as ethical life. Hegel states:

> There was at one time a great deal of talk about the opposition between morality and politics and the demand that the latter should conform to the former. In the present context, we need only remark in general that the welfare of a state has quite a different justification from the welfare of the individual [*des Einzelnen*]. The immediate existence [*Dasein*] of the state as the ethical substance, i.e. its right, is directly embodied not in abstract but in concrete existence [*Existenz*], and only this concrete existence, rather than any of those many universal thoughts which are held to be moral commandments, can be

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[23] *Ibid.*, at § 337.

the principle of its action and behaviour. The allegation that, within this alleged opposition, politics is always wrong is in fact based on superficial notions [*Vorstellungen*] of morality, the nature of the state, and the state's relation to the moral point of view.[24]

In this sense, it can be said that Hegel takes up, to a degree, the 'realism' of the classical republicanism of Machiavelli in the location of the state as embodying the highest good. In this respect, the legitimation of war occurs as the expression, or, defence of, this higher form of Right. War, while an unenviable situation and something not to be brought on without caution, has a degree of 'necessity' in the preservation and survival of the ethical community. Where the ethical life of the state is constantly exposed to contingency and threat, then the question of what the state 'ought' to do is not necessarily a question to be answered by an individual's moral judgement. The state may be judged, but by going to war, the state is not necessarily wrong or unethical. Rather, as a form of the 'living good,' which in the course of its life, must preserve and safeguard itself. In this respect, as the state is the embodiment of Right, its actions, even in war, are necessary to the preservation of itself and, to an extent, the preservation and manifestation of Right.[25]

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[24] *Ibid.*, at § 337, Remark.

[25] See: Machiavelli, N. *The Prince and the Discourses* Lerner, M. (ed) Ricci, L. tr. (New York; Random House, 1950). Note, Machiavelli's discussion on the relation between 'necessity' and the 'ought' at p. 56:

> A man who wishes to make a profession of goodness in everything must necessarily come to grief among so many who are not good. Therefore it is necessary for a prince, who wishes to maintain himself, to learn how not to be good, and to use this knowledge and not use it, according to the necessity of the case.

I am interpreting Machiavelli here as a republican and as one who, is interested in what acts are necessary in fulfilling the common good of the republic, this is in distinction to an interpretation which sees Machiavelli as being interested in the crude workings of gaining and maintaining power. Hegel seems to have interpreted Machiavelli in the former sense and relies heavily upon Machiavelli in his early work. See: Hegel, G.W.F. "The German Constitution" (1798-1802) in Hegel, G.W.F. *Political Writings* Dickey, L. (ed.) Nisbet, H.B. tr. (Cambridge: Cambridge University Press, 1999). Note Hegel's comment at p. 80:

> Even Machiavelli's basic aim of raising Italy to statehood is mis-construed by those who are short-sighted enough to regard his work as no more than a foundation for tyranny or a golden mirror for an ambitious oppressor. But even if his aim is acknowledged, it is alleged that his means are abhorrent, and this gives morality ample scope to trot out its platitudes that the end

Hegel, in this sense, is drawing our attention back to the conception of war in classical antiquity where war held something of an 'ethical character.' This should not be interpreted as a regression to a classical ideal of war, but rather, as an attempt to counter Kant's moral condemnation of war. Hegel's drawing upon elements of a classical ideal can be considered as the suggestion that the outright condemnation of war is a logical error and falls quickly into a degree of hypocrisy. This is because modern conceptions of morality that focus upon the reflection on one's conscience, generally presuppose the idea of the state as a form of ethical life. Hence, if the individual condemns war outright, then he or she, in condemning the acts of the state, condemns their own ethical being.

Hegel attempts to counter this position by accepting the premise that war is something of a historical constant. Hence, at points in history, war can be regulated, yet due to chance, contingency and the limits and failures of humanity, war will probably never be fully eliminated. Given that war occurs and, further, that states rely and found themselves upon war, Hegel makes the point that war has an 'ethical character.' War is a moment within the ethical life of the state and, thus, a moment within the notion of ethics itself. However, it seems that Hegel attempts to extend this point too far, and at this moment of extension, his account falls into some difficulty. This can be seen in the statement that:

> (W)ar should not be regarded as an absolute evil [*Übel*] and as a purely external contingency whose cause [*Grund*] is therefore itself contingent, whether this cause lies in the passions of rulers or nations [*Völker*], in injustices etc., or in anything else which is not as it should be. Whatever is by nature contingent is subject to contingencies, and this fate is therefore itself a

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does not justify the means, etc. But there can be no question here of any choice of means: gangrenous limbs cannot be cured by lavender-water, and a situation in which poison and assassination have become common weapons permits no-half measures. Life which is close to decay can be reorganised only by the most drastic measures.

necessity - just as, in all such cases, philosophy and the concept overcome the point of view of mere contingency and recognise it as a *semblance* whose essence is necessity. It is *necessary* that the finite - such as property and life - should be *posited* as contingent, because contingency is the concept of the finite. On the other hand, this necessity assumes the shape of a natural power, and everything finite is mortal and transient. But in the ethical essence, i.e. the state, nature is deprived of this power, and necessity is elevated to the work of freedom, to something ethical in character. The transience of the finite now becomes a *willed* evanescence, and the negativity which underlies it becomes the substantial individuality proper to ethical essence. - War is that condition in which the vanity of temporal things [*Dinge*] and temporal goods - which tends at other times to be merely a pious phrase - takes on a serious significance, and it is accordingly the moment in which the ideality of the *particular attains its right* and becomes actuality. The higher significance of war is that, through its agency (as I have put it on another occasion), the 'ethical health of nations [*Völker*] is preserved in their indifference towards the permanence of finite determinacies, just as the movement of the winds preserves the sea from that stagnation which lasting calm would produce - a stagnation which a lasting, not to say perpetual, peace would also produce among nations.'[26]

This argument can be seen to involve two major claims. The first is the conception that war is a part of the ethical life of the state. This is, in the sense that ethics, as ethical life, cannot be held apart from war and violence. Rather, war is 'necessary' to ethical life, in the sense that, historically, all states either found themselves in, or maintain themselves through, some form of violence. A broader notion of ethics might, then, take account of the position of war and violence within ethics itself. This leads to the suggestion that ethics itself is inherently violent. In this respect, as the ethical life of the state has some form of significant relation to war, an individual cannot, without a degree of hypocrisy, condemn war outright. Such condemnation cannot occur without considering the individual's ethical being and its wider existence through the state, founded and maintained through war and violence. For Hegel, ethical life and one's social being permits no such moral high ground.

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[26] Hegel, *Ph.R.* § 324, Remark.

In the second claim, Hegel stresses the 'necessary' aspect of war for ethical life. He does so by arguing that war performs a function that, at first, is not immediately apparent.[27] This is the sense, as described by Avineri, that war operates as a 'test' of the 'health' of the ethical life of the state.[28] The possibility of a state having its boundaries breached, its political constitution destroyed, its form of life undone and even, perhaps, re-made by another who is alien to it, may shape the populace's self-conception and, in doing so, affect its internal constitution. Hence, the possibility of having one's existence destroyed by another group may encourage an individual to identify with a group whose members share a common fate. The threat from outside strengthens the conception of individuals as part of a unity, a togetherness that knows themselves as dependent upon each other. Thus, the negative relation between states occurring in war may act to lift individuals from their conception of themselves as a particular within civil society. War acts to elevate individuals towards a self-conception in terms of the universal, as members of the state, as part of the state and as knowing themselves through the state as social being.

In this argument, particularly in the use of the idea of 'health,' Hegel draws again upon Machiavelli in his contention that, in the process of time, a republic's 'goodness' becomes corrupted unless something intervenes, either as an extrinsic accident or internal prudence, to bring the state back to its original principles.[29]

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[27] Stephen Walt notes that 'necessary' in this sense relates to a moral justification, and not by virtue of the nature of events. See: Walt, S. "Hegel on War: Another Look" in *History of Political Thought*, 10 (1) 1989, 112-123, at p. 121. Steven B. Smith notes that war becomes the means of educating modern bourgeois-Christian citizens in the civic virtues that would otherwise be lost in the modern world. See: Smith, S.B. "Hegel's Views on War, the State, and International Relations" in *American Political Science Review*, 77 (3) 1983, 624-632 at p. 630.

[28] Avineri, S. *Hegel's Theory of the Modern State* (London: Cambridge University Press, 1972), p. 199.

[29] See: Machiavelli, N. *The Prince and the Discourses* Lerner, M. (ed) Ricci, L. tr. (New York; Random House, 1950), p. 397-402. Note that Hegel in the *Phenomenology of Spirit* took perhaps a more 'Machiavellian' view of war and its position as a form of ethical renewal. Hegel seems to have either abandoned this view, or at least ceded it to the forces of history. Note Hegel, *Ph.S.* § 455:

In this aspect of the argument, Hegel overdraws himself. While the point that an outside threat may bring the citizens to identify with the state may have some relevance, the contention cannot be given any level of proof. Further, this assumption relies upon relation of cause and effect, which, if held as a firm matter of principle, would render Hegel's account something of a mechanics. Such a rendering is not consistent with Hegel's overall philosophical approach. In addition, to claim that war, in this sense, is 'necessary' infers that war contributes something to the health of ethical life that cannot be given by some other condition; for example good government. On this basis, the second aspect of Hegel's argument, apart from it being perhaps read as an insight into the workings of early 'nationalism,' should be treated with a degree of caution. This does not condemn the entirety of Hegel's approach; his critique of the Kantian moral condemnation of war and the conception that war needs to be considered from the viewpoint of the ethical life of the state, still holds a great deal of weight.

In this respect, Hegel's use of the term 'necessary' when speaking of the relation between war and ethics should be treated cautiously. 'Necessity' should be understood, here, in the sense that was suggested in chapter five, where the process of (mis)recognition pointed to ethics always involving some degree of violence. It involves the suggestion that a degree of violence is inherent within the notion of ethicality itself and that, in a sense, ethical action is dependent, or reliant upon a

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In order not to let them become rooted and set in this isolation, thereby breaking up the whole and letting the [communal] spirit evaporate, government has from time to time to shake them to their core by war. By this means the government upsets their established order, and violates their right to independence, while the individuals who, absorbed in their own way of life, break loose from the whole and strive after the inevitable independence and security of the person, are made to feel in the task laid on them their lord and master death.

degree of violence towards some other. When considered in this light, 'war's ethical necessity' approaches an *aporia* within Right itself. Hegel's approach to war's moral problem is to recognise the violence within ethical life and attempt to recognise its 'necessity.' This claim is, however, balanced by Hegel's approach to Kant's other two principle contentions.

Cosmopolitan Right

Hegel's view on war does not render his account 'anti-cosmopolitan.' With respect to war, there is a strain of the cosmopolitan ideal within his thought, albeit a tempered one. Remembering the importance of the form of freedom presented in Hegel's account of civil society, and the centrality of the French revolution in Hegel's thinking, Hegel's position is certainly not averse to a degree of cosmopolitan thinking, at least to the extent that it represents a European ideal.[30] An element of the cosmopolitan ideal is evident in Hegel's statement that:

> *A human being counts as such because he is a human being*, not because he is a Jew, Catholic, Protestant, German, Italian, etc.[31]

In contrast to Kant, this cosmopolitan ideal is not higher than the right of the state; further, any such conception needs to be comprehended in the context of inter-state recognition. Hence, in rereading the Hegelian position, one can say that the preference given to ethical life of the state is not a simple case of favouring the state over the individual, as may occur a cultural rights argument against the 'universalism' of European human rights. Rather, it is the suggestion that the sphere of international

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[30] On the point that Hegel puts forward a 'weak cosmopolitanism' see: Bohman, J. "Hegel's Political Anti-Cosmopolitanism: The Limits of Modern Political Communities" in *Southern Journal of Philosophy*, 39 2001, 65-91, at p. 66.
[31] Hegel, *Ph.R.* § 209, Remark.

relations needs to pay account to the question of 'how' might ethical relations develop within the international. Hence, the idea of cosmopolitan right needs to be placed in the context of the relation of inter-state (mis)recognition.

For Hegel, the relation between states can be characterised by the theory of (mis)recognition. Hegel notes that the state has 'individuality' and this is present, essentially, in the state acting as an individual, and, also, in the immediate individuality of the sovereign.[32] Further, Hegel notes that individuality appears as the relation of the state to other states, each of which is independent in relation to others. It is in this sense of independence that there rests the primary freedom and dignity of the nation.[33] For Hegel, within the mediated interstate relation, the state's existence as sovereign and independent exists as a negative relation of "another to another."[34]

The state is both independent of, and dependent upon, its others. The state is the highest form of political organisation, the most powerful entity on earth, yet, its existence is also dependent upon those around it, its acknowledgement by its others, and the non-interference of one by the other. The state is simultaneously independent and dependent; the balance of this turns on the extent of its power, strength and constitution. Hegel states:

> The nation state [*das Volk als Staat*] is the spirit in its substantial rationality and immediate actuality, and is therefore the absolute power on *earth*; each state is consequently a sovereign and independent entity in relation to others. The state has a primary and absolute entitlement to be a sovereign and independent power *in the eyes of others*, i.e. *to be recognised* by them. At the same time, however, this entitlement is purely formal, and the requirement that the state should be recognised simply because it is a state is abstract. Whether the state does in fact have being in and for itself depends upon its content - on its constitution and [present] condition; and recognition, which implies that the

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[32] *Ibid.*, at § 321.
[33] *Ibid.*, at § 323.
[34] *Ibid.*

two [i.e. form and content] are identical, also depends on the perception and will of the other state.[35]

In the inter-state relation, the state comes to be constituted, in part, through the formal acknowledgment of it by other states. The form of this (mis)recognition takes the shape of international law, whereby the state gains its sovereignty through the international (mis)recognition of its 'personality.' In this respect, the legal dimension of the process of (mis)recognition is quite strong, and, when invested with power, it can determine the fate of a particular ethical life. The state gains its sovereignty as a form of personhood, or personality, through the acknowledgement and recognition by its others. The notion of 'sovereignty' represents an inter-state form of acknowledged status. This involves an acknowledgment of independence of one state by its others and, with this, an entitlement to have its boundaries respected and its internal matters not interfered with. The state's existence and its rights are dependent upon it having, or acquiring, a certain legal form that is accepted by its others in communion. To not have this form is perhaps similar to not being acknowledged as a legal person. It would mean not even being treated at a level of formal equality with other states and, thus, the prospect of being 'acquired' by another state as their property or dominion.

Hegel's account opens up, perhaps, a 'realist' perspective on the operation of the notion of sovereignty and sovereign independence, placing it firmly within the "perception and will of the other state."[36] The status of sovereignty and the rights accorded to such an acknowledgement, are dependent upon the structure of (mis)recognition. This involves struggles for self-certainty, naïve self-conceptions, disputes over claims to truth (political, religious, geographical), the relative positions

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[35] *Ibid.*, at § 331.
[36] *Ibid.*

of power, ethical orientations, abstract and limited conceptions of the world, inabilities to comprehend, understand, and tolerate difference and so on, and so forth. On this Hegel states:

> Without relations [*Verhältnis*] with other states, the state can no more be an actual individual [*Individuum*] than can an individual [*der Einzelne*] can be an actual person without a relationship [*Relation*] with other persons. On the other hand, the legitimacy of a state, and more precisely - in so far as it has external relations - of the power of its sovereign, is a purely *internal* matter (one state should not interfere with the internal affairs of another). On the other hand, it is equally essential that this legitimacy should be *supplemented* by recognition on the part of other states. But this recognition requires a guarantee that the state will likewise recognise those other states which are supposed to recognise it, i.e. that it will respect their independence; accordingly these other states cannot be indifferent to its internal affairs. In the case of a nomadic people, for example, or any people at a low level of culture, the question even arises of how far this people can be regarded as a state. The religious viewpoint (as in former times with the Jewish and Muhammedan nations [*Volkern*] may further entail a higher opposition which precludes that universal identity that recognition requires.[37]

Hegel's statement alludes to the operation of (mis)recognition and the refusal of some states to recognise the sovereignty and independence of others. For some states, this lack of acknowledgement of their independence and sovereignty has proved historically costly; their ethical being has been wiped out, enslaved or destroyed by warring nations who were more powerful and possessed greater technology. For others, their relative power meant that they were not dependent upon the acknowledgment of others and could stand and shine brightly, at least for a brilliant, terrible moment, until the inter-state relation brought their brief independence to an end. In this vein, Hegel notes a statement by Napoleon, that: "The French Republic is in no more need of recognition than the sun is."[38]

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[37] *Ibid.*, at § 331, Remark.
[38] *Ibid.*, at § 331, Addition.

For Hegel, the ethical relations between states are considered in similar terms to the development of ethics within the state. Abstract determinations of Right are inadequate, as they do not pay sufficient attention to the social-constitutive formation of norms and obligations developed through acknowledgement, identification and struggle. Through the process of (mis)recognition, Right occurs only as recognised. Hence, the extent to which the idea of cosmopolitan right comes to hold sway over the relations between states is governed by the extent this right is recognised by sovereign states. As such, this idea can only come to hold sway through the passage of struggle, that is, states being forced by others to acknowledge cosmopolitan right through the process of war. This suggests a war in the name of cosmopolitan right, or a 'humanitarian war.' This may also suggest a process of states re-cognising themselves beyond the level of state sovereignty and, thus, voluntarily limiting their sovereignty in the name of cosmopolitan right. As will be seen in Hegel's account of international law this is somewhat of a problem.

Against an International Juridical Order

Hegel is highly critical of the Kantian conception of an international juridical order, particularly the idea of a federation of states formed in the name of peace. As to Kant's suggestion, Hegel comments:

> Perpetual peace is often demanded as an ideal to which mankind should approximate. Thus, Kant proposed a league of sovereigns to settle disputes between states, and the Holy Alliance was meant to be an institution more or less of this kind. But the state is an individual, and negation is an essential component of individuality. Thus, even if a number of states join together as a family, this league, in its individuality, must generate opposition and create an enemy.[39]

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[39] *Ibid.*, at § 324, Addition.

Further that:

> Kant's idea [*Vorstellung*] of *perpetual peace* guaranteed by a federation of states which would settle all disputes and which, as a power recognised by each individual state, would resolve all disagreements so as to make it impossible for these to be settled by war presupposes an *agreement* between states. But this agreement, whether based on moral, religious, or other grounds and considerations, would always be dependent on particular sovereign wills, and would therefore continue to be tainted with contingency.[40]

Hegel places the idea of an international juridical order firmly within the structure of the process of inter-state (mis)recognition. In this conception, the idea of an international juridical order, or for that matter the idea of international law in general, remains an 'ought.' The process of (mis)recognition helps to explain the structure of international law and the relations between states, a structure that has definitely a dark underbelly. As in the legal dimension of (mis)recognition, the form in which a body appears to another is essential for the other to see the first, to comprehend it and either see itself in the other, or, to reject this otherness entirely and, as such, refuse to acknowledge it. In other respects, pure pragmatics are at play. The state has another state as it neighbour; it resides beside it and they are joined and separated and, thus, at the border, the other state is acknowledged. However, there still remains the question of, to what extent is this other state fully recognised? That is, with respect to sovereignty, do states see themselves in terms of a relational unity, an ethical 'We,' or, is it the case that the level of acknowledgement between states is generally thin, formal, and limited?

Under Hegel's conception, the relation between states and international law occurs as a form of mutual (mis)recognition that is formal and limited. Hegel notes that the manner in which states exist involves their various inter-relations, that are determined

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[40] *Ibid.*, at § 333, Remark.

by the independent and arbitrary wills of each state. These relations between states possess the formal nature of 'contracts' in general.[41] He notes that the subject matter of these contracts is infinitely less varied than those that exist between persons in civil society, where individuals are mutually independent in multiple respects. In contrast, independent states are concrete wholes that have the ability to satisfy many of their needs internally.[42]

For states, this self-comprehension of independence is 'strong,' because states are concrete political and legal entities that embody, to differing degrees, ethical life. Hence, states encompass infinite ethical relations internally between their members and, depending upon the level of its development and the self-comprehension of its citizens, the state has a knowledge of itself, as social and ethical being. In this respect, the state's self-interest is different from the self-interest of the individual in civil society. The state's conception of its 'right' is already mediated through the relations of ethical life.

It is for this reason that Hegel sees, as intangible, the Kantian idea of extending the idea of a social contract between citizens to a grand social contract between states.[43] The relations between states resemble that of 'contracts' in general, yet, in contrast to those within civil society, there is no higher power to enforce them. As such, the relations between states remain, and will remain, only at the level of obligation. In this conception, the state is able to opt out of its obligations at any point when its welfare comes under threat. Under Hegel's reasoning, there is a crucial point of

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[41] *Ibid.*, at §332.
[42] *Ibid.*
[43] Cf. to Mitias's incorrect 'contractarian' reading of Hegel's theory of international law. See: Mitias, M.H. "Hegel on International Law" *Clio*, 9 (2) 1980, 269-281.

difference that renders untenable the Kantian project of treating the relations between states as if they were individuals within a civil social contract. Unlike the person in civil society who is highly dependent upon its others (for example in the relations of need and labour), the state, to an extent, has a degree of independence (which we have seen decrease over time in the 'globalisation' of economic markets), in that, as ethical life, it is the locus of its own freedom. Specifically, the state's freedom rests in its independence from its others. In the Kantian conception, this independence is somewhat immoral, to the extent that it leads to and is maintained through war and conflict. However, in the Hegelian conception, the state, as a concrete sphere of ethical life, is ethical; it acts ethically in the maintenance of itself as independent from its others.

Under this conception, the state is already an ethical actor, it is the site and location of ethics. The state represents a form of ethics that, through gaining legal and political institutionalisation, has come into a level of actuality (*Wirklichkeit*). It is, in this sense, that the state has the right to stand apart from its others and to not come under the sway of their moralisation. Hence, in Hegelian terms, the state has the right to oppose a group of nations who are acting in the name of 'peace' or 'humanity,' and to go to war, if necessary. Under this conception, such a group of states for all their noble intentions, or dishonest polemics, have no higher right than the state that stands alone and in opposition to them. Each represent spheres of ethical life, each can be understood as *ethical actors*.

This Hegelian point needs to be held onto; there is a danger of investing a higher moral legitimacy to a group, or federation of nations, especially when these come to

hold greater power over time. From a Hegelian position, the argument is not that sovereignty is inviolable, as if it were something holy. Sovereignty is only ever a product of the operation of (mis)recognition between states and, thus, a consequence of war, violence and power. The Hegelian position involves a certain degree of scepticism of a group, or federation of states, who claim to represent a universal contract in the name of 'humanity' and 'peace.' This scepticism arises from the position of the state as ethical life, the pull of which remains strong, as it represents the highest form of freedom that has come into actuality (*Wirklichkeit*). Because, for Hegel, freedom is fully located in the state, any claim of legal authority beyond this remains logically weak.[44] This claim may have 'appeared' but is not yet, in any Hegelian juridical sense, fully 'actual' (*wirklich*). Hence, Hegel's account suggests that one must, at least, think to look behind the 'universal' moral, or 'juridical' claim, and towards the spheres of ethical life, towards the particular states who make such claims, and the relation of these claims to their own welfare.

With this in mind, it should be noted that the Hegelian position is not totally opposed to the formation of some form of international law that may seek to codify the relations between states and reduce the incidence of war. Hegel in the *Philosophy of Right* speaks quite often that international law is an 'ought,' or that states 'ought' to observe their obligations under treaties.[45] Hegel disagrees with the conception that a working international law can come into existence in the manner of an inter-state contract. Rather, given the logic of the process of (mis)recognition, legal and ethical standards only come into actuality (*Wirklichkeit*) through the process of struggle for acknowledgement between parties. Further, the development of common standards

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[44] This point will be considered further in the next two chapters.
[45] Hegel, *Ph.R.* § 330 Addition, and at § 333.

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rely upon the ability of disparate parties to 'let go' of their immediate conception of freedom and re-comprehend their identity and freedom via a speculative awareness of each other. Such a process takes time, a shared education or learning and the stabilisation of norms, in the sense of a fostering of certain customs. Hegel notes this in the statement that:

> The European nations [*Nationen*] form a family with respect to the universal principle of their legislation, customs, and culture [*Bildung*], so that their conduct in terms of international law is modified accordingly a situation which is otherwise dominated by the mutual infliction of evils [*Übeln*].[46]

The Hegelian position, perhaps more attuned to the violence inherent in the formation of law and ethics than the Kantian approach, recognises that the process of the formation of any higher international law will necessarily be a violent one. This formation will involve ongoing wars in the struggle for recognition and the (mis)recognition of international law. The establishment of any higher law will necessarily occur through the dual process of state's coming to a higher speculative awareness and the fall into violent struggles of recognition.

This duality represents something of a split in the reading of Hegel's view of history. One view follows the logic of ethical recognition, seeing the possibility of the taming of war via eventual mutual acknowledgement between nations and the higher cultivation of human education to this end.[47] The other, sees Hegel as presenting a tragic view of history, where the inevitability of war and conflict leads to the rise and

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[46] *Ibid.*, at § 339. Addition.
[47] On this 'cosmopolitan' or 'optimistic' view see Avineri, S. *Hegel's Theory of the Modern State* (London: Cambridge University Press, 1972); Bohman, J. "Hegel's Political Anti-Cosmopolitanism: The Limits of Modern Political Communities" in *Southern Journal of Philosophy*, 29 2001 65-91; Hicks, S.V. *International Law and the Possibility of a Just World Order: An Essay on Hegel's Universalism* (Amsterdam: Rudolpi, 1999); Mertens, T. "Hegel's Homage to Kant's Perpetual Peace: An Analysis of Hegel's Philosophy of Right" in *The Review of Politics* 57 (4) 1995, 665-691; Peperzak, A. "Hegel Contra Hegel in His Philosophy of Right: The Contradictions of International Politics" in *Journal of the History of Philosophy* 32 (2) 1994, 241-263.

decline of states, a turbulent process redeemed only through the self-reflection of Spirit via aesthetics, religion and philosophy.[48] While this debate is interesting, what is most relevant is the Hegelian contention that within the relation of international law, as conceived through the process of (mis)recognition, war does not necessarily fade away. Rather a reading of Hegel shows us that war takes up a central place and maintains something of a 'necessary' ethical significance.

The Usefulness of a Hegelian Conception of War

At this point, it is perhaps important to ask what a Hegelian theory of war adds to the 'realist' conception typified by the approaches of Machiavelli and Hobbes? As noted, Hegel's conception of war presupposes and develops a number of arguments given by these two thinkers. From Machiavelli and Hobbes, Hegel draws attention to the fundamental position of war in the founding of law and ethics. Hence, the contention that we cannot think of law, ethics and the state in a vacuum, but must consider these notions in the concrete. Hence, that the state comes to be itself through its others via war, and that the 'being' of law and ethics is fundamentally violent. Secondly, Hegel takes a 'realist' position in rejection of any claim of a 'just war' in the sense that war involves the struggle of 'right against right.' Further, Hegel following Machiavelli, locates the 'ethicality' of war in the necessary defence and survival of the 'common good,' or ethical life of the state. Here, the state as an ethical actor has an inherent right to war because it is only through the state and the state's actions, that peoples have their freedom.

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[48] On the tragic view of history see: Williams, R.R. *Hegel's Ethics of Recognition* (Berkeley: University of California Press, 1997), pp. 357-363; Peperzak, A. "Hegel Contra Hegel in His Philosophy of Right: The Contradictions of International Politics" in *Journal of the History of Philosophy* 32 (2) 1994, 241-263.

In this element of political 'realism' that is sceptical of the moral condemnation of war, Hegel starts to, at least, bear some similarity to the caricatures made of him in the accusations that he 'glorified war,' or was a supporter of 'Prussian militarism.' Indeed the German political realist, Heinrich von Treitschke, a passionate supporter of German nationalism, militarism and an admirer of Bismarck, draws very heavily upon this element of political realism in Hegel's thought. Although he attempts to distinguish himself from Hegel, he presents something of an authoritarian and 'reason of state' reading of Hegel. Treitschke argues:

> The state, therefore, is not only a high moral good in itself, but is also the assurance for the people's endurance. Only through it can their moral development be perfected, for the living sense of citizenship inspires the community in the same way as a sense of duty inspires the individual.[49]

And that:

> Without war no state could be. All those we know of arose through war, and the protection of their members by armed force remains their primary and essential task. War, therefore, will endure to the end of history, as long as there is a multiplicity of states. The laws of human thought and of human nature forbid any alternative....[50]

While there is a strong sense of realism in Hegel's conception of war, the rereading of Hegel's theory of war as presented in this chapter has given an interpretation of Hegel which has added more to the thinking of the problem of war than simply an updating of the realist theories of Machiavelli and Hobbes. The interpretation given is quite far from that taken by someone like Treitschke. Rereading Hegel's comments on war as a response to Kant's three principle contentions points to Hegel's development of a jurisprudence of war in the approach to war's moral problem.

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[49] Treitschke, H. *Politics*, Kohn, H. tr. (New York: Hardcourt, Brace and World Inc., 1963), p. 31.
[50] *Ibid.*, at p. 38 Note also Treitschke's statement p. 295: "By what authority do individual men arrogate to themselves to utter such a 'Thou shalt!' to the state?"

As a response to Kant, Hegel's approach to war adds to a jurisprudence of war and its attempt to come to terms with war's moral problem. When Hegel's conception of Right is understood as a development within the natural law tradition, then Hegel's comments upon war can be seen as an opening onto the jurisprudential question of, what is Right? Hegel's approach points to the conception that jurisprudence can only adequately come to terms with war's moral problem, if jurisprudence approaches war through a more developed, or more comprehensive conception of Right. It is in this respect that Hegel criticises Kant's approach as, for Hegel, Kant's conception of morality is somewhat limited; it does not account for the whole of what Right is. Hegel introduces, then, the suggestion that jurisprudence needs to approach war's moral problem by understanding Right in terms of ethical life. When thought of in this manner, the act of war should not be condemned outright, but rather, it should be understood as being situated within the ethical life of the state and in relation to this ethical life, as being something of a 'necessity.'

Hegel's focus upon war's necessary relation to the ethical life of the state, can be interpreted as presenting something of a 'realist' position, somewhat akin to the positions presented by Machiavelli, or Hobbes, or even Treitschke. I suggest that Hegel's comments can also be read in another way; as the opening of a jurisprudential question situated within the nexus of law-war-ethics. Hegel's comments, when understood within a natural law tradition, attempt to further open the question surrounding the relation between war and Right, and in this sense, Hegel's comments enunciate the question of, what is the ground of ethics in relation to war? Hence, when approaching war's moral problem, Hegel can be seen to be engaging in war's

moral problem by asking, how are we to consider the question of Right when situated within the interstate relation?

Hegel's attempt to answer this question, and thus attempt to come to terms with war's moral problem, is to suggest that Right can be understood as constituted in the process of mediation between states. Hence, the notion of ethical life of the state, and the suggestion that the state is the 'highest right,' is, itself, subject to mediation. For Hegel, Right is located in the relation of inter-state (mis)recognition. The theory of (mis)recognition draws our attention to the fundamental position of war within the development of international law as the ongoing process of struggle for recognition between states. In this sense, via the necessary position of state action, war is not displaced, hidden, or ignored. Rather, war is comprehended as central to the relation between law and ethics. Hegel's positioning of war through the relation of (mis)recognition draws attention to *the position of war as a moment of mediation between law and ethics.*

However, Hegel's approach does not fully overcome war's moral problem. Hegel's approach, perhaps, ties too firmly the transcendental ethical moment to the notion of the state and to the conception of Right that resides (or is caught) within it. In this respect, 'hope' is tied to state action and state survival, or else, for Hegel, hope resides in the development of culture, and the notion of providence. In this respect, while Hegel has added to, or helped to develop, the jurisprudence of war, his approach to war's moral problem remains somewhat limited. Hegel has avoided the position of moralising war; he has drawn upon the Westphalian sense of war being a 'right' of the sovereign. Further, Hegel has not de-moralised the sphere of international relations

entirely. Rather, war is shown to be necessary to the ethical life of the state and, further, through the notion of (mis)recognition, war is integral in the formation of law and ethical life. Yet, Hegel's account appears to overemphasise one side of Right, that of the state, and, underemphasises, or does not fully consider, the shape of Right represented by civil society.

In this respect, Hegel's approach to war's moral problem does not fully integrate the radicality of the natural law tradition that is otherwise expressed so forcefully in Kant's condemnation of war. Hegel's under-emphasis of this shape of Right means that an important dimension of war's moral problem escapes Hegel's analysis. The stress Hegel lays upon the ethical life of the state does not suppress this transcendental ethical moment, but perhaps shifts it from the juridical into the domain of religious reflection. This limits Hegel's approach to war's moral problem and means that, considered today, Hegel's approach, on its own, could not adequately come to terms with war's moral problem. In attempting to build upon Hegel's approach to war's moral problem, jurisprudence should perhaps focus upon this tension within Right itself and the extent to which it might be of importance to the contemporary consideration of war's moral problem.

Conclusion

In this chapter, I reread Hegel's account of war concentrating on Hegel's response to Kant's engagement with war's moral problem. It was shown how Hegel's account responds to and highlights the limitations within Kant's three principle contentions. Hegel adds to a jurisprudence of war and its consideration of war's moral problem.

He does so by suggesting that approaching war from the position of Kantian morality is somewhat limited. Contra Kant, Hegel points to the position of war in relation to the ethical life of the state, and the process of interstate (mis)recognition. For Hegel, war needs to be considered through an expanded notion of Right in which the state and its actions are understood as ethical. While Hegel adds to a jurisprudence of war, Hegel can also be seen to be drawing upon a certain 'realism' inherent within the approaches of Machiavelli and Hobbes. Further, Hegel's account of war draws upon a number of philosophical presuppositions that may be somewhat untenable, today. These presuppositions and Hegel's underemphasis of the shape of Right represented by civil society, renders Hegel's approach to war's moral problem somewhat limited. In the final two chapters, through building upon Hegel's account, I will attempt to develop a jurisprudence of war that overcomes these limitations and might more adequately come to terms with war's moral problem.

Chapter 7

(Mis)Recognising War's Moral Problem

Introduction

The previous chapter considered how Hegel inherited war's moral problem from Kant. The chapter showed that Hegel attempted to overcome the limitations of Kant's approach to war's moral problem through the development of a conception of Right that included a notion of the state as ethical life, and a conception of inter-state (mis)recognition. Hegel's reframing of the question of Right in relation to war, through the notion of ethical life, can be seen to have added to a jurisprudence of war. However, given a number of his philosophical presuppositions and, perhaps, an overemphasis upon the shape of Right represented by the state, Hegel's account does not completely overcome war's moral problem. Yet, Hegel's approach does open up the possibility of developing a jurisprudence of war that might more adequately come to terms with war's moral problem. In this, and the following chapter, I will build upon Hegel's approach to war's moral problem. This will involve drawing upon and extending my rereading of Hegel's conception of law, in the attempt to develop a jurisprudence of war that may come to terms with war's moral problem in contemporary times.

In this chapter, I will draw upon the notion of inter-state (mis)recognition as a method that allows jurisprudence to examine the 'ethicality' of war, without moralising the

problem of war altogether. Through the notion of (mis)recognition, I will examine again the approaches of neo-Kantian ethics to war's moral problem. This will involve pointing to how the notion of (mis)recognition is, to an extent, taken up by neo-Kantian ethics in their respective approaches to war's moral problem. Further, I will use the notion of (mis)recognition to show that, while the approaches of neo-Kantian ethics add to a jurisprudence of war, their approaches do not fully overcome the difficulties of war's moral problem. Following this, I will attempt to show how the notion of (mis)recognition might help a jurisprudence of war come to terms with war's moral problem. This will involve the attempt to recognise the 'ethicality' of war.

(Mis)Recognition and Theories of International Relations

In this chapter, by drawing upon the notion of (mis)recognition, I consider the approach of neo-Kantian ethics to war's moral problem In this examination, attention should be paid to the fact that the three theorists discussed in chapter two, Habermas, Derrida and Rawls have each, to differing extents, been influenced by differing Hegelian philosophical traditions and have engaged with and taken up various aspects of Hegel's philosophy. For example, Habermas's 'discourse ethics' and 'logic of communicative action' are built upon Hegel's earlier theory of recognition and turned back through the categorical imperative.[1] Rawls's account of law and the political incorporates something of a Hegelian idea of ethical life, at least via an American

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[1] Generally see: Habermas, J. *Theory and Practice* Viertel, J. tr. (London: Heinemann, 1974.); Habermas, J. *Knowledge and Human Interests* Shapiro, J.J. tr. (Boston, Mass.: Beacon Press, 1971); Habermas, J. *The Philosophical Discourse of Modernity: Twelve Lectures* Lawrence, F.G. tr. (Cambridge: Polity Press, 1987).

'communitarian' interpretation of what this might mean.[2] Further, Derrida, while positioning himself perhaps the farthest from Hegel, inherits, as a philosophical tradition, at least, the 'critical,' negative, or sceptical element of Hegel's thought of which Derrida, in a sense, draws upon to read Hegel against Hegel (though un-dialectically) in the tradition of Kierkegaard and Nietzsche.[3]

While Habermas, Derrida and Rawls have been, in some way, influenced by the Hegelian philosophical tradition, each incorporating elements of Hegel's thought or, actively positioning their thought against Hegel, none of these thinkers has taken up, in any substantial manner, Hegel's approach to war's moral problem. While each thinker is aware of Hegelian arguments pertaining to ethical life and the process of (mis)recognition generally. The approach of neo-Kantian ethics to war's moral problem can be seen to be limited, in that each has not fully appreciated Hegel's contribution to the jurisprudential consideration of the problem. Thus, while each thinker openly inherits and attempts to develop Kant's approach to war's moral problem, Hegel's approach and, thus, his important contribution to a jurisprudence of war, is not in any significant manner taken up, or developed, by neo-Kantian ethics. In this respect, jurisprudence can draw upon Hegel's contribution to the consideration of war's moral problem, to assist in judging the approaches taken by Habermas, Derrida and Rawls.

In drawing upon Hegel 's contribution to the jurisprudence of war, it should be noted that Hegel's philosophy has been taken up by a small number of theorists within international relations theory. In the 1980's and 90's a number of branches of

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[2] See: Rawls, J. *Lectures on the History of Moral Philosophy*, Herman, B (ed.) (Cambridge, Mass.: Harvard University Press, 2000.)

[3] See: Derrida, J. *Glas* Leavey, J.P. and Rand, R. tr. (Lincoln: University of Nebraska Press, 1986).

international relations theory arose, sometimes referred to as 'critical international theory'[4] and 'constitutive theory.'[5] The latter taking up Hegel's theory of ethical life as a form of social theory or communitarianism, and the former taking up various forms of Hegelian philosophy, as filtered through members of Frankfurt School. These two branches generally approach the thinking of international relations through the notions of 'immanent critique,' the limits of sovereignty and sovereignty's foundation in violence, the social constitutive formation of ethical norms, and the role of boundaries and identity in the recognition of the 'other.' In this respect, these approaches share some similarity with some post-structuralist and Focauldian interpretations of international relations in their critique of the notion of sovereignty and the focus upon the relation between knowledge and power.[6]

These various theorisations are interesting and refreshing to the generally under-theorised area of international relations. However, the approaches of critical international theory and constitutive theory, generally, have not turned their attention to the jurisprudential question of war's moral problem. Hence, while their use of Hegel to approach questions of international relations may assist the approach of the thesis in some areas, these approaches do not generally assist in the consideration of war's moral problem and the development of a jurisprudence of war. With this in

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[4] See: Linklater, A. *Men and Citizens in the Theory of International Relations* (London, Macmillan, 1982); Linklater, A. *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Cambridge: Polity Press, 1998); Hutchings, K. *International Political Theory* (London: Sage, 1999).
[5] See: Frost, M. *Ethics in International Relations: A Constitutive Theory* (Cambridge: Cambridge University Press, 1996); Brown, C. *Political Restructuring in Europe: Ethical Perspectives* (London: Routledge, 1994).
[6] See for example: Cambell, D. *National Deconstruction: Violence, Identity and Justice in Bosnia,* (Minneapolis: University of Minnesota Press, 1998); Klein, B. *Strategic Studies and World Order* (Cambridge: Cambridge University Press, 1994); Der Derian, J. and Shapiro, M. (eds.) *International/Intertextual Relations: Postmodernist Readings of World Politics,* (Lexington, Mass.: Lexington Books, 1993).

mind, I will now draw upon the notion of (mis)recognition to consider the approach of neo-Kantian ethics to war's moral problem.

The (Mis)Recognition of Moral Identity

If jurisprudence begins from the premise that the relations between states and the position of war can be understood through the process of inter-state (mis)recognition, how, then, might this affect the consideration of the neo-Kantian approach to war's moral problem? One way of thinking this through is via the two Kantian figures of the 'moral politician' and the 'political moralist.' This idea involved the suggestion that state action needed to be guided by a transcendental morality. Hence, if the immoral condition of war is to be avoided and a federation of peace formed, then it is necessary that states govern their actions in accordance with, or at least in consultation with, the categorical imperative.

For war to be overcome, 'politics must bend the knee before right.'[7] Such a conception involves a question of moral genuineness, the contrast between the 'moral politician' and the 'political moralist.' On the one hand, the moral politician shapes politics so as to conform with morality and practical reason; on the other hand, the political moralist makes overtures to the principle of morality, but in reality, fashions his or her morality to suit the state's advantage. These two figures should not be considered in terms of a separation between 'morality' and 'politics,' as this would constitute something of a false separation. Rather, the juxtaposition of the two figures

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[7] Kant, I. "Toward Perpetual Peace: A Philosophical Sketch" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p. 125.

opens onto a question of moral action of, how 'moral' or 'immoral' is the state actor?[8]

The dichotomy involves a question of moral judgement, and this can be understood, or framed through the notion of (mis)recognition.

From a Hegelian position, the relation of 'morality' between states needs to be understood as ethical life. The state is conceived as an ethical being and its welfare as its highest form of Right. Hence, the moral action of the statesman is not, as Hegel would put it, a 'universal philanthropy' governed by a moral principle, but instead, right and duty are derived from the state's own content, its ethical life, which is understood as being universal and concrete. This is the recognition that the institution of the state and its citizens share an ethical bond of reciprocal rights and duties towards each other, and that these are mediated through numerous legal and political institutions.

Yet, within a Hegelian conception, there exists a further source of ethical obligation, this involves an idea that runs through natural law involving an ethical obligation to 'humanity' as a whole. In Hegel, this cosmopolitan ethics is rather 'weak.' However, a rereading of Hegel's conception of law must take into account the growing importance of this principle in the second half of the twentieth century and the fact that this conception has come to gain some level of actuality (*Wirklichkeit*). Hence,

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[8] On this false separation between politics and morality and how it creeps back into international relations discourse see: Hutchings, K. "The Possibility of Judgment: Moralising and Theorising in International Relations," *Review of International Studies*, 18 1992, pp. 51-62. She notes at p. 57 that:

> The Kantian realist is the judge raising the contingent to the status of an absolute; the Kantian moralist (revolutionist), is the judge applying an absolute standard to contingency, but there is agreement that the realms of is and ought, theory and practice, politics and morality, do not meet outside the theorist's judgment. The Kantian combination of realism and moralism is a wholly consistent consequence of Kant's premises; once this is recognised, the seeming opposition of realist and revolutionist perspectives in international relations is brought into question.

reality has been worked up to the extent that cosmopolitan ethic holds a degree of sway or influence in the world, in and through the development of international institutions and the inclusion of human rights as positive legal rights, within state constitutions. This sphere of obligation should be recognised by jurisprudence as a form or shape of right that has a degree of actuality (*Wirklichkeit*). The institutional emergence of the cosmopolitan ethic codifies, under international law, a long running tension between state sovereignty and the universal sovereignty of humanity. Linklater describes this as the tension between 'men' and 'citizens.' He notes:

> These two concepts of obligation create an important problem or tension within the state which we may characterise as the problem of reconciling our existence as men with the acquired status of citizenship; we may characterise it also as a division within the lives of modern citizens, a sense of being pulled in competing directions by antagonistic ethical demands....[9]

This account should be tempered by the suggestion that this ethical tension is not simply dualistic; rather, it involves three sources of ethical obligation. For the statesman, ethical obligation is triadic: it involves the obligation to the ethical life of the state, the obligation to 'humanity,' and the obligation of states to each other. This third obligation occurs through the relation between states as one of (mis)recognition. This is the relation of customs, treaties, pacts, bonds and even 'friendships,' formed through reciprocal acts of mutual recognition between sovereign states. This relation describes the result of struggles for recognition and the forcing of weaker states to accept the will of the stronger, and, hence, the formation of reciprocal rights and duties through the operation of differing degrees of power.

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[9] Andrew Linklater, *Men and Citizens in the Theory of International Relations*, 2nd ed., (London: Macmillan, 1990), p. 15.

An inter-state ethical obligation can be seen in the idea of an alliance, that is, the obligation one state holds itself to owe to another and the agreement to aid each other in the event of war. Such a relation also includes an economic obligation between states, and what might have been in the past described as the obligation of 'ideology.'

In this respect, the Schmittian idea of 'friends' and 'enemies' becomes again relevant. Hence, the ethical obligation of one state to another, the relation of 'friends' is shaped through the opposition to an 'enemy.' This is, in a sense, the extension of a Hegelian argument against Kant's pacific federation. Hegel argues that:

> (E)ven if a number of states join together as a family, this league, in its individuality, must generate opposition and create an enemy.[10]

When thinking about ethical obligation within the sphere of the international, then the two Kantian figures can be understood in terms of this triadic relation. Further, it should be noted that each of these spheres of obligation is underlaid by the process of (mis)recognition. (Mis)recognition occurs between the state and its peoples, between states and states, and between states and all peoples generally. Amongst these competing obligations, the Kantian 'moral politician' guided by 'morality' and 'practical reason,' would perhaps act in the interest of ending war through an emphasis upon the cosmopolitan sphere of ethical obligation. In effect, the two other spheres of ethical obligation would be framed in accordance with this 'higher' form of Right, the duty to 'humanity.' Hence, each would be negated or subsumed by the cosmopolitan form of Right. Yet, the question arises of, how is this moral actor recognised, and, how might this actor itself recognise what is the 'moral' course of action? Further, how might neo-Kantian ethics recognise the moral politician as

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[10] Hegel, *Ph.R.* § 324, Addition.

opposed to the 'immoral politician,' the political moralist? Thus, if the position of the moral actor is problematic and involves the error of mis-recognising, then a reliance upon the figure of the moral actor may cause difficulty to the approach of neo-Kantian ethics.

(Mis)Recognising Moral Identity in Rawls

In chapter two, I discussed how Rawls inherited Kant's approach to war's moral problem by taking up Kant's three principle contentions: the moral condemnation of war, the enunciation of cosmopolitan right and the establishment of an international juridical order. Attention was drawn to how Rawls's 'law of peoples' seemed to not pay significant attention to war's moral problem. This lack of attention led to a subjective-moralisation of both war and the sphere of international law. In this section, I will consider again Rawls's inheritance of Kant's approach to war's moral problem drawing upon the notion of (mis)recognition.

The figures of the moral politician and the political moralist figure heavily in Rawls's account of the inter-state relation and the approach to war. The figures occur in the general distinction between what Rawls terms 'reasonable,' as opposed to, 'rational' conduct. Rawls draws a conceptual distinction between 'liberal peoples' and 'states.' For Rawls, liberal peoples limit their basic interests as required by what is 'reasonable.'[11] Liberal peoples are characterised by their willingness to offer fair terms of social cooperation to others.[12] Hence, they are not constrained by purely 'rational' conduct, which places as a higher principle the importance of state military

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[11] Rawls, J. *The Law of Peoples* (Cambridge Mass.: Harvard University Press, 1999), p. 29.
[12] *Ibid.*, at p. 25.

and economic power, and the expansion of state power and influence.[13] Liberal peoples are those, who guided by their moral learning, have gained from their liberal political institutions. They have something of a broadly cosmopolitan outlook upon the world, one that is averse to war and looks toward a friendly or neighbourly cooperation with others.

As noted earlier, the method of classifying types of 'peoples' and states figures quite heavily in Rawls's account. Rawls separates the world into 'liberal,' 'decent,' 'outlaw states,' 'beneficent absolutisms,' and 'burdened societies.' This method of classification can be conceptualised through the notion of (mis)recognition. Rawls's system of classification is somewhat reductionist. It has a tendency to not recognise elements of internal difference, distinction and dissent within states. Further, his categories operate as a system of moral ordering where, through their types, states are accorded a certain moral value. The best example is Rawls's use of the term 'outlaw' state and its resemblance to the term in popular use today, the 'rogue' state. Each term gives a sense of being outside of the law, of being unstable, violent, and each perhaps conjures Hollywood images of a 'frontier' or 'wild west,' that needs to be tamed or civilised. The terms point to a state without any ethics, without any authority and which must be brought under order and the rule of law.

One difficulty with Rawls's approach is that, once jurisprudence begins to classify states in such a manner, it becomes difficult to recognise within the state anything other than the characteristics that have been ascribed to it. One's cognition of the state becomes framed through the identity that the state is given. This important point on

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[13] *Ibid.*, at p.28.

(mis)recognition was made strongly by the late Edward Said in his classic text *Orientalism*.[14] Said showed how an Arabic and Islamic identity was produced by an 'orientalist' discourse, whereby, the portrayal of the Arab as irrational, inferior, uncivilised and so on, went hand in hand with a justification of European colonisation and imperial domination of the Middle East.

Rawls's account is susceptible to this form of critique. However, attention also needs to be paid to how the notion of (mis)recognition operates 'ethically' within Rawls's account and how it might explain Rawls's attempt to bring the Kantian ideal into reality. An ethical moment of (mis)recognition is fundamental to Rawls's law of peoples and it occurs in the form of a liberal notion of 'toleration.' He notes:

> A main task in extending the Law of Peoples to nonliberal peoples is to specify how far liberal peoples are to tolerate nonliberal peoples. Here, to tolerate means not only to refrain from exercising political sanctions - military, economic, or diplomatic - to make a people change its ways. To tolerate also means to recognise these nonliberal societies as equal participating members of good standing in the Society of Peoples, with certain rights and obligations, including the duty of civility requiring that they offer other peoples public reasons appropriate to the Society of Peoples for their actions.[15]

Under the principle of toleration, Rawls recognises states who, while not liberal, exhibit a degree of what might loosely be described (from the perspective of Rawls) as a form 'ethical life,' by their closeness to what Rawls considers a 'reasonably just constitutional regime.'[16] Hence, it could be said that the ethical bonds between peoples underlying Rawls's cosmopolitan ideal, operates via the structure of mutual ethical (mis)recognition. However, Rawls's recognition of the other has limits. It is dependent upon the extent to which so-called decent peoples exhibit enough social,

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[14] Said, E.W., *Orientalism* (London: Routledge and Keegan Paul, 1978).

[15] Rawls, J. *The Law of Peoples* (Cambridge Mass.: Harvard University Press, 1999), p. 59.

[16] *Ibid.*, at p. 72-3. Rawls argues further that one might conceive a similarity between 'decent hierarchical societies' and Hegel's idea of the ordering of peoples via groups – estates, corporations, and associations.

political, and ethical characteristics, so that they may be recognised as 'decent' and, thus, possessing a degree of ethical worth in the eyes of their liberal observers and judges. In this sense, Rawls's ethics of (mis)recognition between peoples is one-sided and limited. It assumes the position of epistemic and moral superiority of one side, who acknowledges the other, only to the extent that the other conforms with the first's moral standards.

On this basis, Rawls's international ethic can only ever be limited, in that it begins from the position of liberal mastery over the moral domain. His account is not open to the possibility of liberal epistemic and moral deficiency, in relation to the other. Nor is it open to the possibility of the moral improvement of liberal peoples occurring through their encounter with numerous others. For full mutual recognition to occur, one must be open to having one's own epistemic and moral coordinates redefined through the encounter with another, that is, to become oneself by becoming more than oneself through the other. It involves a degree of 'letting go' of one's epistemic and moral ordering.[17] Such a possibility is not present in Rawls's account, where the 'liberal' society is presented in a privileged or superior position, within the encounter with its others.

From a different angle, it could be said that Rawls's ethics of international obligation are grounded in the 'pragmatics' of inter-state (mis)recognition. This argument works from the presupposition that an 'idealised' ethics of successful recognition is not possible in an unstable world, where priority must be given to the pragmatics of securing peace. Thus, getting on with the business of securing and keeping the peace

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[17] For an interesting perspective on the idea of 'letting go' as a basis of an ethical relation, see: Wolcher, L. "The Third Mountain: A Meditation on Chaos and Oder" *International Journal for the Semiotics of Law* 15 2002, 25-52.

involves a lesser ethical principle. As such, the ethical relation between states is necessarily limited to the lesser principle of respect or toleration, so as to avoid, as best as possible, the occurrence of war. To a limited degree, Rawls is perhaps closer to reflecting the Westphalian notion of recognition of sovereignty than he might otherwise like to think. Hence, his use of the term 'peoples' is inaccurate, Rawls is really talking about the formal (mis)recognition of sovereign right and independence between states. His account re-describes the status quo of international law in the present, where the (mis)recognition of the sovereignty of states is the basic principle. Further, his account shares similarity to the position of war under contemporary international law, where the right to self and collective defence sits in a tenuous and undefined relation to the 'criminality' of war and the legitimation of (sometimes aggressive) war in the defence of 'peace' and 'humanity.'

In this sense, Rawls's account gives up on the radical element of natural law that was embodied in Kant's vision of morally re-ordering the relations between states. However, Rawls's account is not a return to the notions underlying the Westphalian order. Rawls's account places the respect for sovereignty below what he sees as moral principles and moral ordering. However, his moral principle does not follow the strictness of the categorical imperative and rather, as subjective-moralisation, tends towards displaying a moral mastery over legal and political ordering.

Rawls seems to be unaware of the position of his authorship taking on a form of moral mastery. Not to be unfair to Rawls, he does state openly that his account is one built upon liberal principles and upon how liberal societies might conduct themselves in

relation to others, based upon their own political conceptions.[18] Further, Rawls's account is premised upon his earlier works as an author within a 'liberal,' if not decidedly 'North American liberal,' conception of law and politics.[19] Still, one may discern the significance of the *mis* of (mis)recognition within Rawls's account and the difficulties this leads in his reworking of Kant's attempt to overcome war.

I have already mentioned that it seems that Rawls, unlike Kant, does not appear to be aware of war's moral problem. However, Rawls's account still holds a degree of significance in the development of a jurisprudence of war, due the particular emphasis Rawls gives to the importance of war in attempting to ensure peace. When Rawls's account turns to the issue of war, there occurs an implicit recognition of the importance of war to ethics and, thus, to international law. This is expressed through the reliance upon a doctrine of 'just war' where Rawls draws heavily upon the work of Michael Walzer.[20] The reliance upon the importance of war sets the approach of Rawls apart from the approaches of Derrida and Habermas. Of the three, Rawls is the least aware of war's moral problem and the particular danger of giving war a moral justification. However, of the three, Rawls is the most eager to justify war in the name of peace. While Rawls may not approach this issue with caution, what his account does draw attention to is a certain ethicality of war, the suggestion that war is necessary in the attainment of peace.

Rawls's account of the relation between ethics and war is limited. It is situated within his subjective-moralisation of the sphere of international relations. Yet, Rawls does

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[18] Rawls, J. *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), p. 121.
[19] See also: Rawls, J. *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971).
[20] See: Walzer, M. *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977).

pay attention to the fundamental position of war in the 'defence' of an international juridical order against aggressive 'outlaw states.'[21] In this emphasis, Rawls points to the pragmatics of moral action, the importance of the moral law or imperative being backed by force, whereby, if actors do not engage in war, then the moral law is put under threat. For Rawls, war is given a certain moral validity; war appears in the central position between law and ethics and, through this, Rawls points to a degree of necessity of war or violence in the creation and preservation of any legal order.

With this said though, Rawls's account does not properly grasp the nexus of law-war-ethics. Rawls does not grasp the position of war in the relation of inter-state (mis)recognition and, thus, the role of war in the various struggles between states influenced by ethical, epistemic, religious and economic factors, and so on. His account of war is somewhat one-sided. As a theory of 'just war,' he legitimises some wars and others upon his conception of the ethical worth of the actors involved. Rawls does not recognise the struggle between ethical wholes, rather, only certain state actors are recognised as holding ethical legitimacy. This is exemplified in the position of the outlaw state, of which, Rawls refuses to recognise as representing a legitimate form of ethical life.

By not understanding the ethical and legal role of war in the relation of inter-state (mis)recognition, Rawls falls into the trap laid by war's moral problem, whereby, the transcendental moral moment is subsumed by the justification of particular wars. This can be seen most clearly when he takes up the image of 'statesman.' Rawls argues:

> The statesman sees deeper and further than most others and grasps what needs to be done. The statesman must get it right, or nearly so, and then hold fast

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[21] Rawls, J. *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), p. 91.

from this vantage. Washington and Lincoln were statesmen, but Bismarck was not.... the ideal of the statesman includes moral elements. Merely acting in world-historical ways does not make someone a statesman. Napoleon and Hitler incalculably altered history and human life; but statesmen they decidedly were not.[22]

Here the two Kantian figures of the moral politician and the political moralist are raised again. Within Rawls's account, these two figures become figures at war, one is (mis)recognised as going into a moral battle against the other. These two figures come to resemble, somewhat, Hegel's two figures in the initial moment of (mis)recognition. However, in Rawls's account there is no possibility of successful, mutual recognition; ethicality is not a process or a result. Rather, one figure assumes the position of moral mastery and it appears willing to defend its position by force. In this respect, Rawls's account does not help to overcome war's moral problem, but rather, by setting up the conditions for a violent confrontation over moral truth, Rawls's account leads back into, and perhaps even magnifies, war's moral problem.

Derrida and (Mis)Recognition

In contrast to Rawls, Derrida is highly aware of the difficulties of war's moral problem and approaches the problem with a great deal of caution and sensitivity. As was shown in chapter two, Derrida inherits Kant's three principle contentions in a hyper-critical manner and, in approaching war's moral problem, Derrida draws the attention of jurisprudence to an *aporia* that resides within international law. This *aporia* stems in part from the inherent violence that resides within the law. In this section, I will engage again with Derrida's approach to war's moral problem, concentrating upon how something similar to the notion of (mis)recognition operates

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[22] *Ibid.*, at pp. 97-8.

within his approach, and further, upon how the notion of (mis)recognition might point to a number of limitations within Derrida's account.

Derrida's awareness of war's moral problem leads to a degree of scepticism and caution with regard to speaking about the 'actors' within global conflict. His approach, thus, shares something with the Hegelian grasp of the inter-state relation underlaid by the process of inter-state (mis)recognition. In this relation, law is founded and maintained through violence and, further, law hides this violence and legitimates itself through its own language. Derrida is aware of this self-positing relation between law, ethics and war, where war is re-invested with legitimacy and this legitimacy helps to strengthen and uphold the position of the law. Derrida seems at pains not to fall into a situation of legitimating an actor upon the basis of subjective-moralism. Instead, he is highly critical of the discursive forces that shape or, in Hegelian terms, 'master,' via moral, legal and technical categories, the linguistic and epistemic conditions through which differing actors in the situation of war are recognised and granted legitimacy.

Derrida's deconstruction of the terminology used to represent the actors in war and the terminology of 'war' itself, shares much with the critical element inherent within the notion of (mis)recognition. For Derrida, the question of how we recognise the actors in the relation of war, must pay attention to a discourse that is itself 'hegemonic.' This 'system,' which is a combination of public opinion, media, political rhetoric and the authority of so-called experts, inscribes norms into every

meaningful phrase surrounding international violence and this operates to legitimate some acts and actors, and render illegitimate others.[23]

Defined in terms of the process of (mis)recognition, this hegemony can be described as the position of *Herrschaft*, of mastery, occurring in every act of (mis)recognition. It is the process of acknowledging some person or act through investing within them a certain status that re-affirms the recognisor's conception of the world. Through this, parties are only then ever viewed through the form that they have been accorded, and further, they come to know themselves through this form, this status. Thus, investigating war's moral problem must pay attention to the forms, status, language and categories that shape our perspective of the conflict. In particular, attention needs to be paid to the prevailing sense of moral legitimacy, which seems inherent in some actors and absent in others.

In this sense, the Rawlsian 'outlaw' cannot be taken at face value, but, through critique, must be pulled apart. Derrida shows how this critique may occur, focussing upon the contemporary 'immoral' figure of the 'terrorist.' He states:

> If one is not to trust blindly in the prevailing language, which remains most often subservient to the rhetoric of the media and to the banter of the political powers, we must be very careful using the term "terrorism" and especially "international terrorism." In the first place, what is terror? What distinguishes it from fear, anxiety, and panic?... How does terror that is organised, provoked, and instrumentalised differ from that *fear* that an entire tradition, from Hobbes to Schmitt and even to Benjamin, holds to be the very condition of the authority of law and of the sovereign exercise of power, the very condition of the political and of the state? In *Leviathan* Hobbes speaks not only of "fear" but of "terror." Benjamin speaks of how the state tends to appropriate for itself, and precisely through threat, a monopoly on violence ("Critique of Violence").[24]

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[23] Derrida, J. 'A Dialogue with Jacques Derrida' in Borradori, G. *Philosophy in a Time of Terror* (Chicago: University of Chicago Press, 2003), p. 93.
[24] *Ibid.*, at p. 102.

For Derrida, the use of differing categories to speak about war does not occur by chance. The border lines of the categories are fragile, they are indistinguishable to the extent that one cannot draw the line between 'national' and 'international,' the 'police' and the 'army,' 'peacekeeping' and 'war,' 'terrorism' and 'war,' 'aggression' and 'defence.'[25] However, there is an ordering to how we cognise and recognise the actors in war, and their moral and legal legitimacy. For Derrida, how these categories come to be used is an issue of power. He states:

> Semantic instability, irreducible trouble spots on the borders between concepts, indecision in the very concept of the border: all this must not only be analysed as a speculative disorder, a conceptual chaos or zone of passing turbulence in public or political language. We must also recognise here the strategies and relations of force. The dominant power is the one that manages to impose and, thus, to legitimate, indeed to legalise (for it is always a question of law) on a national or world stage, the terminology and thus the interpretation that best suits it in a given situation.[26]

The problem of how jurisprudence is to (mis)recognise the actors in war can be turned back against Derrida and posed as the question of, how is jurisprudence to (mis)recognise the international law that is 'to come?' Derrida, in the tradition of Kant's moral imperative, argues that we must go beyond the current state of international law, and that this involves the duty to think of an international law which is yet to come. Yet, the question of (mis)recognition goes not only to the content of this international law, but, also, extends to the question of, how do we (mis)recognise those who claim to bring this international law into reality, those who claim to act in its name? In this respect, does the figure of the moral politician arise again in Derrida's idea of the 'New International?' Probably not; Derrida is perhaps too cautious to cede to any particular body a moral legitimacy in the way that Rawls might do.

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[25] *Ibid.*, at p. 105.
[26] *Ibid.*

Hence, when Derrida speaks of an institution he always speaks of it in a double sense. In Derrida's terms, the idea of an international law to come, attempts to hold onto what is 'good,' that is, the charters and principles of international law, such as the United Nations, or human rights. However, this inherent 'goodness' must be subjected to ongoing rigorous critique, a re-working, so as to bring into accordance with its transcendent ideal.[27] Further, Derrida's dualistic reading of law is always an attempt to pay attention to the relation between force and law. This involves a tension or *aporia* within the structure of law, where law's ethicality is bound to an inescapable relation with violence. Derrida notes:

> I'm not unaware of the apparently utopic character of the horizon I am sketching out here, that of an international institution of law and an international court of justice with their own autonomous force. Though I do not hold law to be the last word in ethics, politics, or anything else, though this unity of force and law (which is required by the very concept of law, as Kant explains so well) is not only *utopic* but *aporetic* (since it implies that beyond the sovereignty of the nation-state, indeed beyond democratic sovereignty - whose ontotheological foundations must be deconstructed - we would nonetheless be reconstituting a new figure, though not necessarily state - related, of universal sovereignty, of absolute law with an effective autonomous force at its disposal), I continue to believe that it is faith in the possibility of this impossible and, in truth, undecidable thing form the point of knowledge, science, and conscience that must govern all our decisions.[28]

One way of looking at this tension, inherent in Derrida's thought, is in terms of the process of (mis)recognition. In particular, through the dual moments of (mis)recognition represented by the successful relation of the 'I' that is 'We' and 'We' that is 'I,' and the failed moment, represented by the violent struggle for recognition, which founds the relation of mastery and slavery. When law is read through this account of (mis)recognition, then it involves this dual moment. It does not necessarily have to be thought dialectically, that is, as the process of moving from

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[27] *Ibid.*, at p. 110. See also: Derrida, J. *Specters of Marx: The State of Debt, the Work of Mourning and the New International*, Kamuf, P. tr. (New York: Routledge, 1994), pp. 83-84.

[28] Derrida, J. 'A Dialogue with Jacques Derrida' in Borradori, G. *Philosophy in a Time of Terror* (Chicago: University of Chicago Press, 2003), p. 115.

the unsuccessful to the successful relation (and visa versa), but rather, these moments can be thought of as occurring simultaneously.

Understood via the notion of (mis)recognition, law contains a dual relation. On the one hand, law involves the building of ethical relations via mutual acknowledgement of identity and status, and the production of shared social norms and values through an epistemic openness to the coordination of one through another. On the other hand, this ethical relation is simultaneously constituted through the violence of struggle and the imposition of some form of mastery, some form of violent act that brings law and ethics into manifestation and maintains it. For Derrida, this dual aspect of law occurs with regard to the state. This is an *aporia*, Derrida argues:

> We are always lead back to the same *aporia*: how to decide between, on the one hand, the positive salutary role played by the "state" form (the sovereignty of the nation-state) and, thus, by democratic citizenship in providing protection against certain kinds of international violence (the market, the concentration of world capital, as well as "terrorist" violence and the proliferation of weapons) and, on the other hand, the negative or limiting effects of a state whose sovereignty remains a theological legacy, a state that closes its borders, excludes or represses non-citizens, and so forth? Once again the state is both self-protecting and self-destroying, as at once remedy and poison.[29]

When faced with the problem of war, Derrida seemingly recognises both sides. He recognises the ethical nature of law that is fundamental to attempting to carry out the duty to a transcendental morality, or justice that is to come. He recognises also that law and, thus, the ethics that guides law, is fundamentally violent, that law requires violence. However, Derrida's approach does not extend this relation to encompass the contention that war or violence is 'necessary' to law and ethics. Hence, Derrida does not put forward the suggestion that war or violence contains an ethical legitimacy.

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[29] *Ibid.*, at p. 124.

It might be considered that Derrida's reluctance to affirm a notion of the ethicality of war or violence is perhaps due to not wanting to fall into war's moral problem. Hence, Derrida is keen to avoid the position where he justifies a particular war which might result in the sacrifice of the transcendental aspect of morality. In this respect, when thinking about Derrida's approach to war's moral problem via the notion of (mis)recognition, Derrida seems to emphasise the critical, or negative, side, over the positive, or speculative, side. Derrida, thus, emphasises the moment of failure, rupture or lack of identity occurring within law and ethics, over the moment of ethical unity or success.[30] One result of this emphasis might be the difficulty, then, for Derrida to affirm any legal or political institutions that might posses an ethical content. Hence, Derrida's approach might find it difficult to affirm any actor who might carry out the moral duty. Such an actor will necessarily carry out a degree of violence, and this poses the problem that the affirmation of such an actor becomes a legitimation of that actor's violence.

Derrida's conceptualisation of law, and the state as an *aporia*, as both remedy and poison, corresponds to war's moral problem. It reflects Kant's difficulty, where morality is dependent upon the actions of law and an international juridical order to move beyond the ongoing relations of war. This dependency results in the moral law being realised via war and thus, the possibility of investing war with the legitimacy of a transcendental morality. Derrida does not overcome this problem, and attempts to come to terms with it by drawing attention to this violence, so that jurisprudence does not fall into the position of granting it legitimacy. Yet, it could be argued that Derrida's approach might render his position somewhat comparable to that of the

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[30] In this respect, one might argue that Derrida's 'Hegelianism' if one could say such a thing, resembles somewhat Adorno's Hegelianism, in the sense of that presented by Adorno's 'negative dialectics.' One link would perhaps be the influence of Benjamin upon each thinker.

Hegelian 'beautiful soul.' This, is, with respect to the argument that Derrida seems to be unwilling to endorse the ethical content of law without criticising it, undermining it, and drawing back from its acts, so as to not legitimise law's violence. From this view, Derrida's approach to war's moral problem is caught by the problem of moral action; the 'undecidable' becomes the question of, how does one act without doing violence to morality itself?

Derrida's approach to war's moral problem avoids the difficulty that confronts Rawls, whereby particular actors, or moral politicians, and thus, particular wars, are given moral legitimacy. However, Derrida's approach to this issue places the position of the moral actor in a double bind. One must act, morality, and the injunction of the to come, demands action; however, one cannot act, as one's actions will be violent and, further, one's violence will be re-narrated in the colours of law's legitimacy. I suggest that Derrida's difficulty in coming to terms with this problem stems from his overemphasis of one side of (mis)recognition and from a reluctance to recognise a degree of 'ethicality' within war and violence. In this respect, while Derrida's contribution to a jurisprudence of war has been important, his account, on its own, is limited and cannot fully come to terms with war's moral problem.

Habermas and the (Mis)Recognition of the Moral Actor

In chapter two, I introduced Habermas's attempt to develop Kant's approach to war's moral problem. Attention was drawn to how Habermas endeavoured to avoid the position of moralising war, by drawing a distinction between a war that is given a moral justification and, one that is given legal legitimacy and authority. It was shown

how Habermas's account ran into a degree of difficulty when confronted by the question of granting legitimacy to a particular war, in the absence of a working international law. In this section, I will continue the consideration of Habermas's inheritance of Kant's approach to war's moral problem. This will involve looking at the position of the notion (mis)recognition within Habermas's approach, and, further, how the notion of (mis)recognition draws attention to the limitations of Habermas's approach to war's moral problem.

Hegel's notion of (mis)recognition forms a central part of Habermas's thinking; particularly, it forms the core of his notion of 'discourse ethics.' It has already been discussed how, for Habermas, the importance of Hegel's notion of inter-subjective recognition lies in the work of the early Hegel, and the idea of the inter-subjective constitution of subjects through the figures of language, labour and the family. Habermas takes these figures and rereads the Kantian moral imperative through them, thus, giving Kant's universal moral law an explicitly inter-subjective or social content. Habermas uses a reading of the process of inter-subjective recognition as a solution to moral and political problems and as an attempt to redeem Kant and Hegel through each other. In his approach, Habermas separates the notion of inter-subjectivity from Hegel's metaphysical claims. Habermas takes up the logic of inter-subjectivity as an insight or method that can be held onto, while letting go of the rest of the Hegelian 'system.'[31] Referring to Hegel, Habermas states:

> His concept of ethical life (*Sittlichkeit*) is an implicit criticism of two kinds of one-sidedness, one the mirror image of the other. Hegel opposes the abstract universality of justice manifesting itself in the individualist approaches of the modern age, in rational natural right theory, and in Kantian moral philosophy. No less vigorous is his opposition to the concrete particularism of the common

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[31] For an explanation of how Habermas does this see: Kortian, G. *Metacritique: The Philosophical Arguments of Jürgen Habermas* Raffan, J. tr. (Cambridge: Cambridge University Press 1980).

good that pervades Aristotle and Thomas Aquinas. The ethics of discourse picks up this basic Hegelian aspiration to redeem it with Kantian means.

This idea is not so stunning if one keeps in mind that discourses, treating as they do problem validity claims as hypotheses, represent a reflective form of communicative action. To put it another way, the normative content of the pragmatic presuppositions of argumentation is borrowed from that of communicative action, onto which discourses are superimposed. This is why all moralities coincide in one respect: The same medium, linguistically mediated interaction, is both the reason for the vulnerability of socialised individuals and the key resource they possess to compensate for that vulnerability.[32]

For Habermas, the working towards the cosmopolitan ideal of an international juridical order proceeds on the basis of inter-subjective recognition. The Kantian imperative, the judging of principles in accordance with their ability to be universalised and take into account 'humanity' as an end, is given content through the inter-subjective reflection of communicative action that works as the negotiated production of social norms and laws. This 'discourse ethics,' as an ethics of recognition, works towards producing a universal law that is mediated. It attempts to produce ethics as an outcome of the process of recognition, as communicative action, between parties.

Habermas also takes up the idea of recognition as a critical principle. Remembering that, for Hegel, the state is placed in a relation of (mis)recognition with its others. It has a degree of independence; however, this only occurs through its interdependence within its others. Thus, the Hegelian conception of the state is one of a mediated entity and needs to be thought in terms of its position within an inter-state relation. This relation is characterised by formal acknowledgement and struggle. Habermas extends this logic into a critique of the notion of the state itself. He argues that the

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[32] Habermas, J. "Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?" Lenhardt, C. and Nicholson, S.W. tr. in Beiner, R. and Booth, J.W. (eds.) *Kant and Political Philosophy: The Contemporary Legacy*, (New Haven: Yale University Press, 1993), pp. 324-5.

traditional notion of the state has been eroded by the economic process referred to as 'globalisation.'[33] He argues that, in the present, the conventional Westphalian idea of the nation-state as an independent actor, being able to make rational decisions with regard to the pursuit and preservation of its own power, is becoming less accurate. He claims:

> While the state's sovereignty and monopoly on violence remain formally intact, the growing interdependencies of a world society challenge the basic premise that national politics, circumscribed within a determinate national territory, is still adequate to address the actual fates of individual national-states.[34]

Hence, the logic of capital, the operation of financial markets and the power of multinational corporations, combined with widespread immigration changing national ethnic identities, have resulted in what Habermas refers to as the 'postnational constellation.'[35] For Habermas, the traditional notion of the 'state' is no longer adequate to answering the demands of democracy and the Kantian duty to have morality upheld through the law. Habermas rejects the return to ethnic identity or the nation, as an attempt towards political closure against the onslaught of the process of modernisation. As such, he rejects the 'closure' of a Hegelian ideal of 'ethical life,'

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[33] Habermas, J. *The Postnational Constellation: Political Essays*, Pesnky, M. tr. (Cambridge: Polity Press, 2001), p. 60.
[34] *Ibid.*, at p. 70.
[35] *Ibid.*, at p. 65:

> The democratic constitutional state, by its own definition, is a political order created by the people themselves and legitimated by their opinion and will-formation, which allows the addressees of law to regard themselves at the same time as the authors of the law. But because capitalism follows a logic of its own, it is unable to conform to these demanding premises by itself.

And at 78:

> Increasing globalised markets have clearly worked to the disadvantage of the state's autonomy and its capacity for economic interventions. At the same time, multinational corporations have emerged as powerful competitors to nation-states.

passing it off as a fantasy that mis-recognises the concrete constellation of the world.

Habermas argues:

> To be sure, a renewed closure cannot be envisioned defensively, as a resistance to a supposedly "overwhelming" process of modernisation. This would merely reintroduce the nostalgic attitudes of the losers of modernisation, clinging to the utopian image of a "redeemed" form of life as a way of warding off despair. What turns these romantic, often peculiarly touching, fantasies into "utopian" images in the worst sense are the regressive features of an "ethical life" projected into the distance, which do justice neither to the emancipatory potential that accompanies the forced opening of a dissolving social formation, nor the complexity of new circumstances. Not even intellectuals as dedicated to modernity as Hegel and Marx were entirely free of fantasies of this kind.[36]

If not the state and the idea of ethical life, jurisprudence might ask, who or what is to be recognised as the actor or actors charged with the task of bringing the cosmopolitan law into reality? Who is to bring the problems of 'globalisation,' mass poverty, and inequality, inter-ethnic war, and neo-imperialist war under the rule of a universal law? Who, then, might Habermas recognise as this moral actor? As shown earlier, Habermas struggles with this problem of moral agency when confronting war. Following the Kantian line of argument that war must be overcome through the establishment of an international juridical order, Habermas comes up against the problem that such an order of law is not yet in existence and, therefore, needs to be brought about by 'someone.' However, he is aware that the coming about of international law, requires, in some circumstances, the going to war so as to bring it about. This runs into the difficulty of legitimating a war in the name of 'humanity' or a 'war against war,' and the possibility that transcendental morality is given over to the subjective-moralisation of war.

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[36] Habermas, J. *The Postnational Constellation: Political Essays*, Pesnky, M. tr. (Cambridge: Polity Press, 2001), p. 86.

With regard to a particular war, that of N.A.T.O.'s bombing of Serbia-Kosovo, Habermas attempted to guide his way through war's moral problem by drawing upon the Kantian figures of the moral politician and the political moralist. Habermas hinted at one actor, Europe, who was acting in accordance with correct intentions, going to war as a last resort, but doing so out of duty to the ideal of international law and the cosmopolitan ideal. On the other hand, the U.S.A. was painted as the political moralist, acting in the pursuance of its own self and strategic interest and doing so 'in the name' of humanity and international law. By attempting to draw this moral distinction, Habermas made the effort to draw his argument back, somewhat, giving the caution that such a moral self-empowerment should only be an exception and not the rule.

With the invasion of Iraq by the U.S.A. and Great Britain in 2003, Habermas's use of the two Kantian figures has taken on a greater degree of importance, and with this, Habermas has, perhaps, put a degree of caution to the side. This is not to say that Habermas is advocating or legitimating war by any figure. Rather, Habermas has strengthened the operation of the two Kantian figures and has recognised the moral actor upon whose shoulders the burden of establishing a cosmopolitan international law and ideal of peace now rests. In the postnational constellation, this actor is not a state, but a federation of states, one, who has sufficient moral learning and self-reflection to carry the torch of international law. This actor, who is charged with the challenge of developing and defending a cosmopolitan order on the basis of international law, is a postnational new Europe, the European Union. In an open letter (co-signed by Derrida), Habermas argues:

> Europe today is characterised by the experience of the totalitarian regimes of the 20th century and by the experience of the Holocaust - the persecution and

annihilation of the European Jews, in which the National Socialist regime also involved countries that it had conquered. The self-critical confrontation with this past reminded us of the moral foundations of politics.[37]

And that:

> Each of the large European nations experienced the flowering of imperial power, and - more importantly for our context - they also had to work through the experience of losing empires. This experience of decline was combined in many cases with the loss of colonies. As imperial power and colonial history recede into the past, the European powers have been able to adopt a stance of reflective distance to themselves. Thus they could learn to perceive themselves, through the eyes of the conquered, in the doubtful role of conquerors who are being called to account for the violence of a forced, deracinating modernisation. This (knowledge) could promote the rejection of Eurocentricism, and perhaps it has given wings to a Kantian hope for a world domestic policy.[38]

Habermas, is of course, not arguing that the European Union should take up arms against the U.S.A. in a struggle for the establishment of a cosmopolitan, international law. However, his letter is a call to Europeans to take on a new role in history. This role is that of being an example to the world by demonstrating how a postnational order may operate successfully. Further, this role involves the task of establishing

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[37] Habermas, J. "After the War: The Rebirth of Europe" *Frankfurter Allgemeine Zeitung*, 31 May 2003, (Translations taken from the internet). The relevant quotes in German are as follows:

> Das heutige Europa ist durch die Erfahrungen der totalitären Regime des zwanzigsten Jahrhunderts und durch Holocaust – die Verfolgung und Vernuchtung der europäischen Juden, in die das NS-Regime auch die Gessellshaften der eroberten Länder verstrickt hat – gezeichnet. Die selbskritischen Auseinandersetzungen über diese Vergangenheit haben die moralischen Grundlagen der Politik in Erinnerung gerufen.

And,

> Jede grossen europäischen Nationen hat eine Blüte imperialer Machenfaltung erlebt und, was in unserem Kontext wichtiger ist, Erfahrung des Verlusts eines Imperiums verarbeiten müssen. Diese Abstiegserfahrung verbindet sich in vielen Fällen mit dem Verlust von Kolonialreichen. Mit dem wachsenden Abstand von imperialer Herrshaft und Kolonialgeschichte haben die europäischen Mächt auch die Chance erhalten, eine reflexive Distanz zu sich einzunehmen. So konnten sie lernen, aus der Perspektive der Besiegten sich selbst in der zweifelhaften Rolle von Seigern wahrzunehmen, die für die Gewalt einer oktroyierten und entwurzelnded Modernisierung zur Rechenschaft gezogen werden. Das könnte die Abkehr vom Eurozetrismus befördert und kantische Hoffnung auf eine Weltinnenpolitik beflügelt haben.

[38] *Ibid.*

supranational forms of cooperation that are necessary to the overcoming of war and the establishment of a viable international law.

Yet, the figure Habermas draws is not unclear; it is the idea of a moral actor who is to stand in opposition to what Habermas sees as the present or possible hegemony of the U.S.A. and its pursuance of aggressive war. Habermas's response to war is to call for the establishment of a figure who has had the benefit of reflecting upon its bloody past and, thus, has gone through a process of moral development. This invokes a sense of Hegel's argument upon 'Absolute Spirit's' self-reflection in history, an argument that Habermas might otherwise reject. Habermas's call invokes the argument that there is a positive content arising from the negativity of history, a moral development that arises from a collective reflection upon the experience of inter-state war, Fascism and the Holocaust. For Habermas, this reflection and 'moral development' seems to give a degree of credibility to an actor whose role must be to lead the way, or, at least, voice the concern of the Kantian duty towards the moral law.

In this respect, Habermas's response to war is to affirm the two Kantian positions of moral politician and political moralist. In doing so, he re-moralises the sphere of international relations. This is not to say that one cannot take sides, or that one cannot name the perpetrator of injustice or hegemony. Yet, generally Habermas's naming of the moral actor does not voice the scepticism or caution that is expressed by Derrida, who is aware of the *aporia* hidden within the figure of the moral actor. Instead, Habermas's approach, perhaps, begins to bear more of a resemblance to that taken by Rawls. Each affirm the moral calling of a particular actor who takes on a moral-

historical role, the distinction between the two approaches being that Habermas, unlike Rawls does not grant the moral actor the general licence to carry out a morally legitimate war.

In this respect, when Habermas's discourse ethics come up against the phenomenon of war, his ethics of communicative action tends to strike the *mis* of (mis)recognition. By tying himself to the figure of Europe, as the figure of the moral politician (or at least the potential to be), Habermas situates himself within a global struggle for (mis)recognition between states, groups of states, international institutions, demonstrators and N.G.O.'s who, along with a chorus of 'experts,' each claims to be speaking from the position of practical reason in consultation with morality. In the absence of a working set of international legal institutions, this struggle for (mis)recognition becomes a struggle between claims of moral 'truth' and the contestation over who is acting morally. Habermas's gesture towards the moral position of a new Europe opens up onto this problem of (mis)recognition, and this limits his ability to overcome war's moral problem. Habermas, thus, like Derrida and Rawls, is unable to offer a solution to war's moral problem.

The difficulties encountered by Habermas draw attention to two general limitations, within the approach of neo-Kantian ethics, to war's moral problem. On the one hand, the stress upon the moral injunction against killing and the sensitivity to the possibility of morally legitimating war, leads to a position where the question of moral action is, in a sense, given up, and all that can be affirmed is the transcendental call of the not yet. On the other hand, the lack of emphasis upon the issue of mis-recognising the moral actor, leads to the possibility of legitimating particular wars

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and, thus, reducing the moment of transcendental morality to the operation of subjective-moralisation. To differing degrees, these two sides can be understood to be present across the approaches of neo-Kantian ethics to war's moral problem. Hence, while the approaches of Rawls, Derrida and Habermas have added to a jurisprudence of war, each due to these limitations, has not been able to fully come to terms with, or overcome war's moral problem.

Further, while in a tradition of natural law, each has been seen to have taken up and developed Kant's approach to war's moral problem, each thinker, while incorporating some elements of Hegel's wider philosophy into their thought, has not drawn upon Hegel's contribution to a jurisprudence of war to assist in the approach to war's moral problem. Their accounts have, thus, not radically extended beyond Kant's approach to war's moral problem and, perhaps, remain limited through not building upon the insights that flow from Hegel's engagement with the problem. With this in mind, for the remainder of this chapter and throughout the next, by drawing upon a number of insights given by neo-Kantian ethics and upon my rereading of Hegel's conception of law and his approach to war, I will attempt to develop a jurisprudence of war that might begin to come to terms with war's moral problem in contemporary times. This will involve the attempt to go beyond the approaches of neo-Kantian ethics and endeavour to recognise the 'ethicality' of war.

(Mis)Recognition and Transcendental Ethics

The notion of (mis)recognition may assist jurisprudence in developing an account of the 'ethicality' of war. Such an account, when focussing upon a relation between war

and ethics, would need to pay attention to both the operation of the *mis* of (mis)recognition, and the moment of a successful recognition or acknowledgement of the other. By holding onto each of these moments, a jurisprudence of war may be able to overcome some difficulties surrounding the issue of war as a form of ethical action. Hence, the notion of (mis)recognition might help to overcome some of the difficulties encountered by neo-Kantian ethics.

The notion of (mis)recognition suggests the position of a transcendental ethical moment within war. This may be seen by a focus upon the actors involved. What is of interest is the relation between knowledge and action, whereby action, such as the act of war, is guided by a set of ethical coordinates that give action meaning and purpose. The relation can be seen in the struggle for (mis)recognition, where each party's actions, their struggle to the death, is driven by their own sense of meaning, their own truth claim, in which they seek to have upheld and acknowledged by the other. In this relation, action is always self-reflective; the parties act so as to give their self-conception a firmer existence through their others. Further, the actor's self-knowledge is the product of their action, as inter-action, and this re-coordinates their self-conception in some way.

In this sense, it could be said that, in war, action involves some form of cognition, a self-reflection where action is grounded in, or is guided by, some form of ethical framework. The declaration of war is always made with some purpose, some legitimation which gives a sense of meaning to the acts. Whether this occurs through the terms of 'national security,' 'defence of sovereignty,' 'the people,' 'freedom,' 'humanity,' 'human rights,' or 'in the name of God,' the act of war is accompanied by

some sense of meaning that the actor enunciates, and through which, gives the act a sense of legitimacy.

In the relation between action and knowledge, war is always given a reason. Or perhaps, in Fichtean-Hegelian terms, 'reason,' as located in self-consciousness, is always giving itself to itself through the logic of self-positing. Reason gives itself to itself, speaks itself to itself, and to the other, and attempts to posit itself through the other. Douzinas points to the logic of self-positing nicely via a reading of the term 'jurisdiction' as *juris*, the law, that, as *dicta*, as diction, speaks. Hence, jurisdiction is the law that speaks itself to itself.[39]

Hegel's notion of the state as being an individual[40] may be understood in this sense. The logic of the state's self-positing follows the logic of the self-positing of self-consciousness, and, hence, the state, through the positing of law, is conscious of itself and acts so as to affirm its self-conception. In this sense, what might be seen in war, is this relation between knowledge and action, as a self-positing or re-cognition of the self/state. This act of self-positing and self-knowledge is not grounded purely in the self but occurs through the other, as the relation between another 'individual' (self/state), and, as the inter-relation of humanity, cosmology, science, economy, theology, myth and so on. Thus, in the relation between knowledge and action, some part of this knowing is grounded in a beyond, a not yet that cannot be fully grasped. In the declaration of war, this beyond plays an important role in driving action forward

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[39] Douzinas, C. "Jurisdiction or *Diken Didonai* in Relation to the Role of the Critic and the Sovereign" *Symposium on the Jurisprudence of Jurisdiction*, Griffith Law School, 2002. See also: Nancy, J. "The Jurisdiction of the Hegelian Monarch" in Nancy, J. *The Birth to Presence* Holmes, B et. al. tr. (Stanford, Cal.: Stanford University Press, 1993).
[40] Hegel, *Ph.R.* § 321.

and legitimating and coordinating it. This not yet as situated within the law, gives the

act of war a sense of meaning that cannot be fully described, nor fully enunciated.[41]

Importantly, the notion of (mis)recognition tells jurisprudence that the relation

between knowledge and action is always, in some sense, limited, false, misplaced. It

may be completely erroneous, a fable, a construction, propaganda or a lie. In war, this

is the *mis* of (mis)recognition of the triadic structure of ethical bonds, of the state's

(mis)recognition of itself, of the state's (mis)recognition of other states and the state's

(mis)recognition of 'humanity.' In war, this mis-recognition is perhaps most adamant

when the act of violence by the state is given a sense of legitimacy by the speech of

the state to itself and to its others. War, then, involves not only the legitimating claim,

but the struggle between claims, each state claiming the language of 'Right' and each

state investing their actions with a meaning grounded in a beyond. This point has been

put in many ways; for Kant, it is the giving of 'sorry comfort,' for Derrida, the

narration which legitimates and hides the original moment of law's violence, for

Schmidt, it is the attempt to trump the other by capturing and monopolising the

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[41] As a point of note, this 'beyond' should not be reduced simply to the terminology of 'presence' and 'absence' or of the psychoanalytic language of mythical origin of 'totem and taboo' or Jungian 'collective unconscious.' Rather, this coordinating beyond, via the inter-subjective constitution of (mis)recognition, is the relation between the finite and the infinite. It is the multiplicity of inter-relations through which the subject comes to be constituted, the infinite moments of othered-self which as relation, cannot be fully and precisely counted or accounted for. Hence, a beyond is always a within, a position of the infinite relation within the subject. An example would be the question: Where did you obtain your sense of morality? One cannot account for every moment of influence, every relation with some other through which the moral subject is produced. Perhaps defining figures and institutions can be named, but how one's self-construction in the co-constituting relation with these diverse elements cannot be fully accounted for. This 'othered' part of self, is the 'beyond' that is spoken of here, and this sense of a 'beyond' is relevant to the relation between knowledge and action when considering the act of war.

legitimacy of the universal, for Orwell it is 'propaganda,'[42] for Chomsky, it is the 'manufacturing of consent,'[43] for i ek, it is 'fantasy,' the 'big Other.'[44]

However, the relation between knowledge and action in war, the self-reflection and positing that occurs in the process of (mis)recognition, should not be simply dismissed as mere fantasy. Rather, consideration needs to be paid to the fact that this relation is occurring within a sphere of ethical life. Certainly, there is an argument that the notion of ethical life is itself just a moment of fantasy or utopic longing. However, the thesis has argued, so far, that the idea of ethical life is something real, and that it involves an ethical content of law in modernity, occurring as self-relating social being. From this perspective, the relation in war between knowledge and action can be understood as a relation that has a decidedly ethical content.

From this perspective, the act of war is grounded in, and stems from, the ethical life of the state. War becomes, then, an action in accordance with ethical knowledge. This is, in some way, coordinated and orientated by the self-awareness of the state (and its citizens) as social being. Importantly, social being is partly located in the now and partly in the beyond; it is both now and not yet, partly manifest and partly transcendental. It is in this sense that one may point to an ethicality of war. This suggests that war is located within, or in relation to, a transcendental moment within ethics. However, this relation does not reduce all ethics to the act of war, because the not yet of ethics always stands beyond the act of war. It is the notion within ethics that cannot be fully captured by action.

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[42] See generally: Orwell, G. *Nineteen Eighty-Four* (New York: New American Library, 1961); Orwell, G. *Animal Farm* (London: Penguin Books, 1971).
[43] See: Chomsky, N and Herman, E. S. *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Pantheon Books, 1988).
[44] See: i ek, S. *The Sublime Object of Ideology*, (London: Verso, 1989).

If the ethics of war is located in the moment of (mis)recognition of state and citizen, as the relation between knowledge and action, then, it is possible to hold onto an ethical 'moment' in war without reducing ethics to the act of war. This conception may help jurisprudence to work its way around war's moral problem. Holding onto this ethical moment does not mean that all acts of war have an absolute ethical legitimacy. But rather, that the act of war has a degree of 'ethicality.' This 'ethicality' stems from the recognition that the act of war is located (not exclusively) in the self-reflection of ethical life. Hence, war is situated within the action of a self-reflecting (and self-mis-recognising) sphere of ethical or social being.

This suggestion is not a radical claim, but rather, is perhaps an enunciation of the meaning behind Hegel's somewhat obscure claim relating to the 'ethical moment' in war. For Hegel, this ethical moment involves the argument that death and the possibility of sacrifice occurring through war, brings individuals to comprehend themselves as ethical life.[45] The ethical moment in war can be understood as the relation between knowledge and action, whereby, in war, ethical life posits itself through a knowledge of itself. Ethical life is always within and beyond itself. It is within another and not yet itself; further, ethical life is constituted through a relation between the finite and the infinite. In this respect, the ethical moment in war, is the moment of law, the state, and the citizen as social being, (mis)recognising itself within the infinite and acting to affirm itself as such. If war is to be condemned outright, then, jurisprudence not only condemns ethics, but condemns the logic of self-positing that is at the heart of the process of (mis)recognition. In contrast, if jurisprudence attempts to hold onto this ethical 'moment' in war, then, it may place

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[45] Hegel, *Ph.R.* § 324 Remark.

itself in a stronger position to come to terms with war's moral problem. This may occur by considering the relation between war and ethics as operating through the nexus of law-war-ethics.

(Mis)Recognising the Nexus of law-war-ethics

In the previous chapter, I showed via a rereading of Hegel's conception of war, how sovereignty of the state is formed through war and, hence, how law is founded in violence and maintained by violence. In the process of (mis)recognition, sovereignty is something that is acknowledged by other states and is a product of the struggle between states for acknowledgement. This includes the acknowledgement of independence, of control over territory, over resources, of the right to violence, over citizens and contested 'ethnic' groups. The notion of inter-state (mis)recognition, building upon the Westphalian tradition, points also to the fact that not all violence is considered as being rightly called, 'war;' rather, only the violence of the sovereign, the violence carried out by the state, is understood as war. Hence, 'war' is understood as 'sovereign violence.'

The notion of inter-state (mis)recognition demonstrates that violence only attains the status, or the form of war, when recognised as such by other sovereigns. When not recognised, such violence is recognised as an act without legitimacy; it is understood as 'murder,' 'crime' or 'terror'. The notion of (mis)recognition goes to show how, via law, a distinction is drawn between legitimate and illegitimate forms of violence. Further, that sovereignty, which draws and maintains this distinction is itself the product of violence, founded and maintained by 'war,' 'terror,' and 'murder.'

This co-constituting relation between war and law, law and war, is highlighted by deconstruction and critical theory. Such a focus is important; jurisprudence needs to be constantly reminded of the co-constituting relation between law and war. Pointing critically to the relation between war and law can begin to undermine the language of moral righteousness surrounding acts of war. The focus represents a strong 'realist' move that highlights the tenuous and unstable foundations of the state and international law. However, such an approach on its own is limited; it perhaps understands law too negatively and does not pay enough attention to the position of ethics within this relation. A jurisprudence of war needs to understand the position of ethics in the relation between law and war.

In this respect, a jurisprudence of war should perhaps focus upon the nexus of law-war-ethics. This might also be stated as the nexus of law-ethics-war, where ethics occupies the position of the third, the mediating middle. A consideration of this involves the attempt to view the ethical content of war, the position of war in ethics and the act of war as the activity of ethical life. This conception may be approached through looking at the Heideggarian-Hegelian approach of Jean-Luc Nancy and his, somewhat Schmittian, assessment of the relation between war and law. I suggest that Nancy's assessment is somewhat limited, in that he does not, or perhaps refuses, to recognise the relation of law and war as one involving ethics. This may be due to Nancy not fully recognising the position of ethics within law.

Nancy, writing in response to the first 'Gulf war,' recognises the fundamental relation between law and war. He attempts to think through the idea of war and its 're-

assertion' in this conflict, as re-assertion of the figure of sovereignty. He recognises

the position of war as the most sovereign of rights. Echoing some of the elements of

Hegel's notion of (mis)recognition, Nancy argues that the right to wage war "is the

most sovereign of all rights."[46] This is because war allows a sovereign to decide that

another sovereign is an enemy, thus allowing the sovereign to try to subjugate it, or to

destroy it. As such, war is not an effect of sovereignty, but its manifestation.[47] War

also involves the creation of law, the creation of new sovereignties; it is the origin of

our national and state sovereignties, and our legitimacies.[48] He argues:

> The right to wage war excepts itself from law at the very point where it belongs to it both as an origin and as an end; this point is a point of foundation, insofar as we are incapable of thinking of foundation without sovereignty, or of sovereignty itself without thinking in terms of exception and excess. The right to wage war excepts itself from law at a point replete with sovereign brilliance [*un éclat souverain*]. Law does not possess this brilliance, but needs its light, and its founding event. (This is why War is also the Event par excellence; it is not an event in some "history of events" that consists in reciting, one by one, the dates of wars, victories, and treaties, but the Event that suspends and reopens the course of history, the sovereign-event. Our kings, generals, and philosophers have only ever thought of it in this way.)[49]

Nancy argues that war is sovereignty's technology par excellence, as sovereignty's

setting to work, and as its manner of execution.[50] By using the term 'technology'

Nancy notes that he is not referring to the idea of war as a 'means,' rather, war can be

thought as a manifestation, as an execution, as a mode of accomplishment, as man's

accomplishment in the sense of *technç*, for example in 'art.'[51] This is opposed to the

accomplishment or manifestation, which is 'natural,' for example, of that which

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[46] Nancy, J. "War, Right, Sovereignty - Technç" in Nancy, J. *Being Singular Plural*, Richardson, R.D. and O'Byrne, A.E. tr. (Stanford: Stanford University Press, 2000), p. 106.
[47] *Ibid.*
[48] *Ibid.*, at p. 107.
[49] *Ibid.*
[50] *Ibid.*, at p.117.
[51] *Ibid.*

occurs in 'birth' in the sense of *physis*.[52] Here, Nancy is drawing explicitly upon

Heidegger's reading of the Greek term '*technç*.' Heidegger opposes this to purely

'instrumental' understanding of technology as a 'means,' which is dominated by the

Latin notion of 'cause.'[53] Heidegger attempts to re-think or redeem the idea of

technology in modernity, through a classical Greek sense of 'bringing into presence'

and 'unconcealment.'[54] Nancy can be seen to be drawing upon something akin to this

sense. For Nancy, war is not simply a means or an instrument of sovereignty. Rather,

it is the *technç* of sovereignty, the way in which sovereignty manifests, or brings itself

into presence, into unconcealment.[55] He argues:

> Thus, war borders on art. This is not to say that it borders on the art of war, the
> technology of the strategist; it is to say, rather, that it borders on art understood
> absolutely in its modern sense, *technç* as a mode of the execution of Being, as
> its mode of finishing in the explosive brilliance [*éclat*] of the beautiful and
> sublime, that doubled rivalry of sovereignty that occurs within the blossoming
> [*éclosion*] of *physis*.[56]

From this position, Nancy argues that the wars of the second half of the twentieth

century, when carried out in the name of 'humanity,' 'international law,' or in the

name of 'peace,' are always the wars of sovereigns.[57] Contrary to the argument that

these wars represent the emergence of a 'new world order,' Nancy argues that what is

present in war is the affirmation and manifestation of sovereignty and the struggle

between sovereigns.[58] Therefore, we should not see war as merely the means of

execution of some ideal (humanity, international law, peace), rather, war is the

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[52] *Ibid.*
[53] See: Heidegger, M. "The Question Concerning Technology" in Heidegger, M. *The Question Concerning Technology and Other Essays*, Lovitt, W. tr. (New York: Harper and Row, 1969), pp. 5-12.
[54] *Ibid.*
[55] Nancy, J. "War, Right, Sovereignty - Technç" in Nancy, J. *Being Singular Plural*, Richardson, R.D. and O'Byrne, A.E. tr. (Stanford: Stanford University Press, 2000), p. 122.
[56] *Ibid.*
[57] *Ibid.*, at p. 124.
[58] *Ibid.*

execution of sovereignty itself, of the sovereign end.[59] He argues: "Western war denies itself as sovereign end, and its denial, of course, constitutes its admission."[60]

I agree with this portion of Nancy's argument, with the important exception of Nancy's use of the Heideggarian notion of '*technç.*' This however, could be thought, instead, simply in terms of war being the 'manifestation' or 'realisation' of sovereignty. Such an interpretation is not inconsistent with the account given in the thesis, so far, and does not confuse the thesis's Hegelian conception of law with the introduction of complex and differing Heideggerian notions. However, while I agree with Nancy's account of the relation between war and sovereignty, I do not agree with the next move in his argument, where Nancy perhaps mis-recognises the nature of war and its relation to law.

Nancy argues that sovereignty constitutes an emptiness, and that what needs to be understood is the "empty place of sovereignty."[61] This, he argues, is the "empty place of the end," the "empty place of the common good," the "empty place of justice."[62] In this argument, sovereignty has no 'end' but itself, sovereignty's end is not the common good, nor the idea of justice. Rather, after deconstruction, these merely constitute empty signifiers; in a sense, they are the remnants of master narrative and power, and have no content behind them. Nancy seems to argue that there is no 'community' for which sovereignty 'represents' and upon whose basis it acts. In this respect, sovereignty is empty, and its manifestation is the manifestation of an empty symbol. Nancy argues:

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[59] *Ibid.*
[60] *Ibid.*, at p. 125.
[61] *Ibid.*, at p. 137.
[62] *Ibid.*

> (T)he sovereign extremity signifies that there is nothing to "attain;" there is no "accomplishment" or "achievement;" there is no "finishing;" or rather, *for a finite finishing, the execution is without end.*[63]

In this sense, for Nancy, war is *technç*, in the sense that it is not a means to another end, but rather, its end is itself.[64] War is the *technç* of sovereignty, but as sovereignty is 'nothing,' it is the manifestation of nothing but itself, the manifestation of manifestation.[65] I suggest that, on this point, Nancy mis-recognises the figure of war and that this has occurred through Nancy's mis-recognition of the content of law. Contra Nancy, sovereignty is not empty. Rather, following the rereading of Hegel's conception of law, sovereignty has an ethical content; it is the moment where law recognises itself as having both power and 'Right.' As Right, law has, within it, ethical life.

Certainly, sovereignty, as law's recognition of itself, involves the moment of mis-recognition, of failure, of fantasy, of limit, of error and fabrication. However, this does not undermine the fact that law still embodies an ethical content. Nancy's notion of the emptiness of sovereignty is, in a sense, via deconstruction, the attempt to radicalise a critique of the social contract. It is the critique that the notion of 'we the people' is not given authority by any 'people.' Further, this critique involves the suggestion that there is no 'people,' this, itself, being an empty moment of signification. Hence, sovereignty is the bootstrapping of an empty form which gives itself to itself.

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[63] *Ibid.*, at p. 139.
[64] *Ibid.*, at pp. 138-40.
[65] *Ibid.*

In contrast, a Hegelian critique grasps this moment as a moment of fabrication, yet, it does not, then, go on to consider law as empty. Rather, it sees within law the ongoing process of attempting to develop Right through the production of inter-subjective social norms and values, via ongoing struggles for (mis)recognition. In this, shapes of Right come into actuality (*Wirklichkeit*) by occupying a stable form, and this is always in some sense inadequate, unrepresentative, limited. Yet, this does not render law as nothing. Rather, law is merely not yet, it is not yet ethical enough and, hence, needs at some point to be worked up to a higher level. One example of this is the situation occurring in civil society where, via labour, an individual is alienated from itself and in where, the formal equality of the law does not represent, or reflect, humanity's full ethical potential. This moment of alienation does not render the law as nothing, as empty. Rather, law can be understood as being ethical, but inadequate. Law, thus, represents a sphere of ethical life, and a shape of Right, that is only partly realised.

Nancy seems to not be able to hold onto the nexus of law-war-ethics due to his conception of 'community' and perhaps his misreading of Hegel's account of ethical life. I will address these briefly. In the *Inoperative Community*,[66] Nancy addresses Hegel's theory of ethical life. In continuing an argument that the desire for community can be thought of as the belated intention to respond to the harsh reality of modern experience, a response to the withdrawing of divinity, Nancy draws attention to the two figures of death and love.[67] He draws attention to the mythico-literary

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[66] Nancy, J. *The Inoperative Community* Conner, P. et. al. tr. (Minneapolis, Minn.: University of Minnesota Press, 1991).
[67] *Ibid.*, at p.10.

figure of the joint suicide of lovers, where death re-instates the communion based on love or love based on communion.[68] He argues:

> The Hegelian State in its turn bears witness to this, for although it certainly is not established on the basis of love - for it belongs to the sphere of so-called objective spirit - it nonetheless has as its *principle* the reality of love, that is to say the fact "of having in another the moment of one's own subsistence." In this state, each member has his truth in the other, which is the State itself, whose reality is never more present than when its members give their lives in a war that the monarch - the effective presence-to-self of the Subject-State - has alone freely decided to wage.[69]

Contra this, he argues that such a consciousness is 'superficial,' and that death is always 'singular,' that it has no work.[70] Here Nancy follows Bataille who argues that by Hegel putting death to work in his system, he 'reduces the sacred to the profane.'[71]

Nancy argues:

> Millions of deaths, of course, are *justified* by the revolt of those who die: they are justified as a rejoinder to the intolerable, as insurrections against social, political, technical, military, religious oppression. But these deaths are not *sublated*: no dialectic, no salvation leads these deaths to any other immanence than that of .... death (cessation or decomposition) which forms only the parody or reverse of immanence.[72]

In contrast to the notion that death can be put to work, Nancy argues that community instead is 'revealed' by death.[73] He argues that death is not a communion that fuses 'egos' into a higher 'We,' but rather, that the genuine community of mortal beings, or death as community, establishes their "impossible communion."[74] Hence, community is an 'impossible community,' it cannot be reduced to the form of a 'subject.' In

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[68] *Ibid.*, at p. 12.
[69] *Ibid.*
[70] *Ibid.*, at p. 13.
[71] See: Heidt, S.L. "Community in Hegel's Philosophy of Religion: From *Bestimmung* to *Verstimmung*," in Kolb, D. (ed.), *New Perspectives in Hegel's Philosophy of Religion*, (Albany: S.U.N.Y. Press, 1992).
[72] Nancy, J. *The Inoperative Community* Conner, P. et. al. tr. (Minneapolis, Minn.: University of Minnesota Press, 1991), p. 13.
[73] *Ibid.*, at p. 15.
[74] *Ibid.*

death, community inscribes its own impossibility, its 'irredeemable excess' that makes up finite being.[75]

Nancy notes that this limit of community, or the experience of this limit, is not an experience that we 'have' but an "experience that makes us be."[76] For Nancy, "Community is given to us with being and as being, well in advance of all our projects, desires and undertakings."[77] For Nancy, 'community' is what (and can only be understood as) he calls elsewhere, 'Being-Singular-Plural,' which is Nancy's re-working of the Heideggarian 'being-with.'[78] Nancy argues that community consists in 'communication,' and that this is not 'work.' Rather, it is the beating of one singular site against another. Hence, community and communication are not the work of singular beings, but are simply their being, their being suspended upon their own limit.[79] On 'communication' within the being of community, he argues:

> No doubt the Hegelian desire for recognition is already operative here. Nevertheless, before recognition, there is knowing: knowing without knowledge, and without consciousness, that *I* am first of all exposed to the other, and exposed to the exposure of the other.... This is why community cannot arise from *work*. One does not produce it, one experiences one is constituted by it as the experience of finitude.[80]

At this point, Nancy displays something of an unawareness of the full breadth of Hegel's notion of (mis)recognition. Nancy treats (mis)recognition in a Kojèvian sense, as the struggle for power between already formed subjectivities. He perhaps forgets that Hegel's account of (mis)recognition occurs within the *Phenomenology of*

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[75] *Ibid.*

[76] *Ibid.*, at p. 26.

[77] *Ibid.*, at p. 35.

[78] See generally: Nancy, J. *Being Singular Plural*, Richardson, R.D. and O'Byrne, A.E. tr. (Stanford: Stanford University Press, 2000).

[79] Nancy, J. *The Inoperative Community* Conner, P. et. al. tr. (Minneapolis, Minn.: University of Minnesota Press, 1991), p. 31.

[80] *Ibid.*

Spirit, in which the original title reads, '*System of Science: Part One, Science of the Experience of Consciousness.*'[81] In this respect, Nancy does not pay enough attention to the importance of Hegel's notion of (mis)recognition and Hegel's attempt to show how 'consciousness,' as knowing, comes to be, and how consciousness comes to be itself, through its process of comprehending its own being. Further, Nancy does not pay attention to the double-narrative in Hegel's *Phenomenology of Spirit*, the difference between what is occurring for self-consciousness, and what is occurring 'for us,' for the reader. Hence, the comprehension of knowing and being occurs not simply as the idea of the 'We,' as a production, as the work of thought from the perspective of two self-consciousnesses. Rather, from the perspective of the reader, the 'for us,' Hegel's points to self-consciousness already containing the other within itself and hence, 'being' is always containing otherness and, as such, is always a 'being in common.'

Hence, Nancy's point on being in common is already apparent within a close reading of Hegel. In Hegel, the relation between social being and self-conscious reflection provides the basis of ethics and continues via the process of (mis)recognition, into Hegel's *Philosophy of Right*. However, as Nancy thinks of (mis)recognition only in terms of a struggle between formed subjectivities, he argues that the "struggle for recognition" is absent from the *Philosophy of Right*.[82] In this respect, Nancy does not pay enough attention to 'being,' as 'social being,' as self-consciousness's being and reflection occurring via inter-subjective (mis)recognition. Hence, Nancy does not

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[81] For a discussion of the relevance of this original title see: Heidegger, M. *Hegel's Phenomenology of Spirit* Emad, P. and Maly, K. tr. (Bloomington: Inndiana University Press, 1994), pp. 1-32.
[82] Nancy, J. "The Jurisdiction of the Hegelian Monarch" in Nancy, J. *The Birth to Presence* Holmes, B et. al. tr. (Stanford, Cal.: Stanford University Press, 1993), p. 123.

understand the important relation between social being and reflection as an 'ethical relation,' a relation which Hegel expands upon within the *Philosophy of Right*.

It is for this reason that Nancy mis-recognises the position of ethics in war. Nancy follows the line of argument that the idea of the ethicality of war reduces the sacred to the profane, and treats death as production or work. This argument does not appreciate the ethical basis of Hegel's theory of (mis)recognition, whereby the 'We,' is not a myth that is produced to cover the trauma of death, but rather, it is a fundamental relation between knowledge and being. The 'We' as a moment within inter-subjective (mis)recognition, points to how one may know oneself through one's other, and of how one may come to know what (social) being is. This relation between knowledge and being is the work of the Fichtean-Hegelian self-consciousness. When understood in the context of the process of (mis)recognition, the 'deed' is not profane, rather, it is the most sacred. The deed is the becoming that turns abstract being into determinate being. Further, it involves the notion of *Aufhebung*, the infinite's turning out of itself as the finite and the finite's attempt to lift itself up into the infinite. Nancy's account suppresses this moment of creation and emanation at the heart of the notion of 'being.' His suppression of self-conscious reflection within being, as an 'experience of being' that is 'prior to consciousness,' is something of a return to an uncritical-metaphysics, and one which, if understood politically, is far more dangerous than an attempt to appreciate the relation between ethical life and war.

Going beyond Nancy requires that, in recognising the relation between war and law, what needs to be further acknowledged is the position of ethics. Hence, if war is the

manifestation of sovereignty, the manifestation of law, then as law embodies an ethical content, war needs to be thought as the manifestation of this ethical content. This does not reduce war to moralisation, that is, it does not mean that a particular act of one sovereign is good, and a particular act of another sovereign is bad. Rather, the 'ethicality of war,' rests upon the notion that the act of war is not simply the manifestation of law, but is a manifestation of an ethical content that resides (of course, problematically) within law.

A jurisprudence of war needs to take into account this position of ethics, and needs to go beyond accounts that view law negatively or consider law as being empty. This involves the attempt to comprehend the ethicality of war as occurring through the co-constituting relation between law and war. This leads to the suggestion that a jurisprudence of war might consider the state as being an 'ethical actor.' In this respect, the state's actions are not merely the enaction of power, but the enaction of ethical life. This draws upon the Hegelian idea that the state is a shape of Right in actuality (*Wirklichkeit*), a sphere of ethical life. The state's acts are the actions of this life, the living of ethics. Under this conception, war can be recognised as not simply the activity of sovereign, but as the work of ethical life that has an existence through the law.

The notion of the state as an ethical actor points to both law and war having a decidedly ethical content. Such content is not the judgement of moral subjectivity, although this too has its own place. Rather, the acts of the state are seen as 'ethical' in that they represent the actions of an ethical institution, one that exists within an ongoing process of (mis)recognition with its others. Such a suggestion, perhaps. brings to mind the 'reason of state' arguments of, for example, Trietschke. However,

the notion that the state is an ethical actor is distinct from such 'reason of state' arguments, which are one-sided and inadequate. Such accounts generally categorise the 'right of state' as absolute.

The notion of the state as an ethical actor does not entail that the state is absolute. As Right, the state is entirely contingent within the process of inter-state (mis)recognition. Further, within this relation, there exists an ethical obligation owed by states to each other to recognise and acknowledge the ethicality and worth of the other and, thus, comprehend the 'I' of the state as a 'We.' In addition, the notion of the state as an ethical actor recognises that when jurisprudence approaches war's moral problem, it recognises that the state as a shape of Right, is not absolute. Instead, when attempting to comprehend the nexus of law-war-ethics, a jurisprudence of war focuses upon the actuality of Right and the tension and conflict between its two sides, the state and civil society. Hence, while the state as a legal-political-institutional form is the central locus of ethical life in modernity, it is not the absolute locus. Rather, it is challenged, upset and even negated by the radical demand of its other, the sphere of ethical life in modernity which encompasses the radical call of the freedom of the individual and the dignity of 'humanity.'

For neo-Kantian ethics, this radical demand, stemming in part from a natural law tradition, challenges the state via a cosmopolitan ideal. This challenge opens up a question for a jurisprudence of war, of, how to reconcile in the sphere of the international these two ethical-juridical claims. These involve, on the one hand, the ethicality of the state's act of war and, on the other, the radical ethical injunction to negate, upset or overcome, the state's power and its monopoly on violence. This

question, which stems from a tradition of natural law, is not confined to the challenge issued to the international legal order by the cosmopolitan ideal. Rather, it can be seen to be relevant to the consideration of a different, although somewhat related challenge, that issued by the 'terrorist.' In this respect, the question appears most starkly, when jurisprudence is asked to recognise not simply the ethicality of the state's act of war, but, also, the ethicality of non-sovereign war. How might jurisprudence respond to this without falling into the difficulties of war's moral problem?

(Mis)Recognising Non-Sovereign War

When approaching the figure of 'terror,' caution must be taken so as to not open up a whole new thesis problem. Hence, in this section I will consider the issue of recognising non-sovereign war at a relatively abstract level, and I will attempt to do so within the confines of the jurisprudential approach taken so far to war's moral problem. In the previous section, I attempted to outline how jurisprudence, through the notion of (mis)recognition, may come to understand the state's act of war as being 'ethical.' Further, I have argued that, by concentrating upon the nexus of law-war-ethics, jurisprudence can hold onto a conception of the ethicality of war without either subjectively-moralising war, or subsuming the transcendental moment of ethics under particular acts of war.

This argument becomes upset slightly by the figure of non-sovereign war; this is in the sense that I have located the relation between war and ethics through the position of law, the juridical institution of the state. However, my account, by drawing upon a

rereading of Hegel's conception of law, has situated war's moral problem within a dynamic tradition of natural law. In this respect, there is a degree of radicality within the tradition of natural law, which necessarily upsets any claim that the state possesses a monopoly over ethics. What this may suggest is the possibility of recognising, not only an ethicality of sovereign war, but also the ethicality of non-sovereign war. It can be anticipated that this suggestion may lead back into the difficulties of war's moral problem. In this respect, the discussion that will take place in this section will occur only tentatively and under the acknowledgement that the issue cannot be fully dealt with here. Further, the questions that may open up around the issue of non-sovereign war, may provide the ground for further research beyond this thesis. With this said, drawing upon the notion of (mis)recognition, I will now discuss a number of issues that are relevant to the development of a jurisprudence of war. This will involve a consideration of the acts of non-sovereign war carried out against the U.S.A. in 2001.

If jurisprudence pauses to reflect upon the terrorist bombings in New York and Washington D.C. in 2001, then, it may be argued that some members of the 'international community,' perhaps mis-recognised this act of violence. This occurred by the enunciation of the first Kantian principle contention, of morally condemning war, treating it as an evil, and going further, in labelling the act, a 'crime.' This response could be seen in the resolution of the General Assembly of the United Nations on September 12, 2001. In resolution 56, the General Assembly stated that it:

1. Strongly *condemns* the heinous acts of terrorism which have caused enormous loss of human life, destruction and damage in the cities of New York, host city of the United Nations, Washington, D.C., and Pennsylvania;
2. *Expresses* its condolences and solidarity with the people and Government of the United States of America in these sad and tragic circumstances;

3. Urgently *calls* for international cooperation to bring to justice the perpetrators, organisers, and sponsors of the outrages of 11 September 2001.

4. *Urgently calls* for international cooperation to prevent and eradicate acts of terrorism, and stresses that those responsible for aiding, supporting, or harbouring the perpetrators, organisers and sponsors of such acts will be held accountable.[83]

The Security Council went one step further. It morally condemned in similar wording the acts of terror and, then, prepared itself for a 'war against war,' a 'war against terror.' The Security Council, (in addition to the four points listed above), stated that it:

5. *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations;[84]

This response might be considered as inadequate. This is because it falls straight into war's moral problem. On the one hand, a particular act of war is condemned along with its actors. Yet, on the other hand, in response, a war (against war, against terror, a war for peace) is justified and legitimated on the basis of the moral principle that condemned the original act in the first place. In the response, the transcendental moral moment is used as 'comfort' for a particular war and the moral principle falls into contradiction.

A counter argument to this might claim that the condemnation and response is not 'moral' but legal. Hence, that the act of terror is wrong, or without right, because it was carried out by a non-sovereign actor. As such, the act, or any similar act, is not considered to be an act of war, because under international law, and in accordance

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[83] U.N. General Assembly Resolution 56, 2001. www.un.org/documents/ga/docs/56/agresolution.htm
[84] U.N. Security Council Resolution 1368, 2001. www.un.org/documents/sc/docs/1368/scresolution.htm

with principles stemming from the Westphalian order, war is a sovereign right (albeit now morally constrained to the right of self and collective self defence). From this view, the condemnation was not a moral condemnation of an aggressive war, but rather, a condemnation under international law of an act of non-sovereign violence and, hence, a domestic and international 'crime.' Such a refusal to recognise the ethicality of non-sovereign violence seems to be not entirely inconsistent with the account given in the thesis so far, whereby the notion of war's ethicality is tied to the juridical notion of the state. However, ethics is not confined to the state and the notion of (mis)recognition suggests that sovereignty is itself a product of violence. Hence, there may be scope within the development of a jurisprudence of war to move beyond the position of the moral condemnation of terror and attempt to recognise, at least the possibility of, such acts as being 'ethical.'

One means of approaching this issue is by considering the nexus of law-war-ethics through the notion of (mis)recognition. (Mis)Recognition demonstrates that sovereignty, the legal persona of the state, the legal form of international 'person' with accordant rights, is both the most important category and also the least important. With regard to the notion of inter-state (mis)recognition, sovereignty exists only to the extent that the sovereign is recognised by other sovereigns. Hence, the act of violence has formal legitimacy, as the category of 'war,' to the extent that the actor is recognised as sovereign by other sovereigns. When this recognition is refused, or is absent, as a legal category, the act of violence is deemed to be something else. It is recognised as terror, crime, murder, infanticide and so on. In this sense, the legal legitimacy of violence, and predominantly of international violence, is premised upon the process and structure of (mis)recognition between states.

In this respect, I purposely make use of the term 'non-sovereign war.' This is, at first instance, contradictory, whereby conceived under the structure of international legal relations, the category of 'war' is defined by the actor being a 'sovereign.' However, what has also been clearly demonstrated (and quite explicitly by Derrida and Nancy) is that this definition is also constituted in another manner, that is, war defines sovereignty, and sovereignty is founded by and dependent upon the act of war. When viewed via the notion of (mis)recognition, sovereignty is founded, maintained and destroyed by the ongoing process of struggles for recognition between sovereign actors.

In this respect, the legal category of 'war' can only be understood as a category constituted through the process of (mis)recognition between states and between states and non-state entities. The content of this category is mediated, it gains its meaning only through the process of (mis)recognition. Sovereignty is a status that is earned through the eyes of recognisors and it is a status that has been earned through protest, diplomacy and also, by violent struggle. Hence, actors who may once have not been recognised as sovereign may have, through violent struggle, come to be recognised as sovereign by other states. [85]

In this respect, in developing a jurisprudence of war, it would be inadequate to condemn acts of non-sovereign war, or 'terrorism' outright. 'Terror' and 'terrorism' need to be considered within a broader concept of 'war,' one that encompasses both

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[85] On this point see also: Frost, M. *Ethics in International Relations: A Constitutive Theory*, (Cambridge: Cambridge University Press, 1996), pp. 160-212. Examples of the shift in recognition of status between a party being recognised as 'terrorist,' and then subsequently being recognised as 'sovereign,' or at least 'legitimate,' might include: The A.N.C. in South Africa; The I.R.A. in Northern Ireland; the P.L.O. in Palestine.

acts of sovereign and non-sovereign violence. Viewed from this position, the moral

condemnation of 'terror' is inadequate. It ascribes moral value to those actors who

have been recognised as sovereign, and ascribes no moral value to the violence

carried out by actors who are without sovereignty. Rather than morally condemning

acts of terror, a jurisprudence of war would need to examine the acts of non-sovereign

violence through the notion of (mis)recognition. Hence, such acts need to be situated

within what might be termed, a 'global process of struggles for (mis)recognition.'

With regard to this i ek, perhaps, makes a similar point; he argues:

> The WTC attacks confront us with the necessity of resisting the temptation of
> a double blackmail. If we simply, only and unconditionally condemn it, we
> simply appear to endorse the blatantly ideological position of American
> innocence under attack by Third World Evil; if we draw attention to the
> deeper socio-political causes of Arab extremism, we simply appear to blame
> the victim which ultimately got what it deserved.... The only possible solution
> here is to reject this very opposition and to adopt both positions
> simultaneously; this can be done only if we resort to the dialectical category of
> totality: there is no choice between these two positions; each is one sided and
> false. Far from offering a case apropos of which we can adopt a clear ethical
> stance, we encounter here the limit of moral reasoning....[86]

Attempting to understand acts of non-sovereign war, by positioning such acts within

global process of struggles for (mis)recognition, helps to get around the problem of

morally condemning some actors and not others. However, for jurisprudence, such an

approach opens up a whole new set of questions and issues. Such an approach shifts

the sight of recognition beyond a juridical frame and into questions pertaining to the

historical, economic, religious and political context of any claim or struggle for

recognition. How these may be adequately integrated into the development of a

jurisprudence of war is an issue of further study. However, there is perhaps one means

by which jurisprudence may attempt to recognise the ethicality of non-sovereign

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[86] i ek, S. *Welcome to the Desert of the Real! Five Essays on September 11 and Related Dates*, (London: Verso, 2002), p. 50.

violence, while staying within the approach taken so far to war's moral problem. This may occur via framing the act of non-sovereign war within a broad notion of natural law.

As noted earlier, part of Hegel's contribution to a tradition of natural law was the framing of the ethical impetus of natural law through two juridical institutions of modernity, that of civil society and the state. Together with the family, these spheres represent the shapes of ethical life that have come into actuality (*Wirklichkeit*) within modernity. Further, these represent the working of ethics through juridical forms and the working up of reality through the differing conceptions involved in these forms. It was also noted that, when considering Hegel's conception of war, Hegel perhaps gave too much emphasis to the sphere of the state when considering the ethicality of war, and too little emphasis to what the ethicality of war might mean with regard to the sphere of civil society. I suggested that, if a jurisprudence of war is to not be one-sided, then, it may be better to approach war's moral problem through a consideration of the two aspects of ethical life, each of which, while existing in tension with the other, cannot be understood to exist without the other.

In this respect, it might be worth considering the act of non-sovereign war as the 'other' that attempts to upset and negate the state and the ethicality of state war. While this other appears to jurisprudence in the form of 'terrorism' and can be seen to be stemming from modern traditions of 'Islamic reformism'[87] and radical Arab political movements, this other can also be understood in terms of a radical ethical demand that

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[87] On this see generally: Abu-Rabi, I.M. *Intellectual Origins of Islamic Resurgence in the Modern Arab World* (Albany: S.U.N.Y. Press, 1996); Esposito, J.L. *The Islamic Threat: Myth or Reality* (New York: Oxford University Press, 1992); Haddad, Y.Y. et. al. (ed.) *The Contemporary Islamic Revival: A Critical Survey and Bibliography* (New York: Greenwood Press, 1991).

resides within multiple traditions of natural law. In this sense, the state's other might be understood as the radical aspect within the sphere of civil society, which, while situated within the state, is separate from the state and attempts to carry out an ethical injunction to overturn the limitations of legal ordering. This injunction is driven by the demand of freedom, justice or human dignity; it responds to the futural call of the not yet, that demands realisation.

Framing the act of terror in this juridical sense is not aimed at reducing the content, or the claim that is situated behind the act of terror, to being wholly understandable or explainable through a tradition of 'European' natural law. With regard to the example of the attacks carried out in New York and Washington D.C. in 2001, the claims associated with and logic of these attacks, involve complex issues of (mis)recognition with regard to Islamic theological debates, traditions of Islamic political action and a range of global political and economic issues. These issues should not be subsumed or totalised under a discourse of natural law. However, from the position of jurisprudence's attempt to come to terms with the issue of non-sovereign war, such acts might be understood, in part, via the two Hegelian conceptions of ethical life, that of civil society and the state. When framed in this sense, acts of violence, such as those occurring in New York and Washington D.C. in 2001, do not represent a complete aberration, an act that stands outside of the Westphalian style ordering of international law. Rather, such acts, when conceptualised through a framework of natural law, occur as moments within, and a product of, the Westphalian style ordering of international law. When thought of via the framework of the two figures of the state and civil society, acts of non-sovereign violence can be understood as an

integral part of a system of legal ordering that is built upon the institution of the state and the ethical character of state war.

This framework, as a contribution to natural law, situates within the sphere of civil society, the radical moment of natural law which seeks to overturn forms of legal ordering that oppress, or inhibit freedom and contravene human dignity. Situated within the sphere of civil society, is the radical ethical demand that if freedom and human dignity are to be realised, then forms of legal ordering, including at times, the state, need to be negated or overturned. This is the ethical demand residing within and beyond the law; it can be said to occupy something of a 'messianic' character in that it is driven by an indefinable, or perhaps utopic conception of a form of ethical life that is to be instituted 'beyond' the law.

In modernity, this radical ethical injunction is built upon a conception of the power of the 'deed.' The negation of law's depravity and the creation of an ethical life beyond the law, becomes possible through the modern conception of work. Through work, the individual within civil society comes to understand that within their actions reside the potential for radically transforming the world around them. Hence, the individual gains the conception that the demand of the not yet can be realised through the individual's own deeds, the negation of the legal order and the working up of reality to a higher level of ethicality.

I suggest, somewhat cautiously, that the act of non-sovereign violence might be considered by jurisprudence in this manner. Hence the ethicality of non-sovereign violence stems from actors who are driven by a radical ethical injunction to negate

their own state, or another, through the act of war. Such actors can be seen to be situated within both the state and the inter-state process of global (mis)recognition. When understood in this manner, non-sovereign violence represents the radical upsetting of the state. Yet, such acts are not completely divorced from the Westphalian conception of legitimate state violence. Rather, such acts are a fundamental moment within international law and interstate legal ordering. This form of legal ordering attempts to locate the sole legitimacy of violence within the state. In doing so, it suppresses the possibility of non-state actors having recourse to legally legitimate violence. This ordering, through the process of interstate (mis)recognition, attempts to crystallise a form of law. It attempts to render the boundary between legitimate and illegitimate violence as timeless, as a demarcation that sets in stone the forms and status that constitute ethical reality. Yet law is not a statue; it demands more than itself and contains the conditions for its own upsetting.

Understanding the state in terms of the critical-metaphysical juridical category of actuality (*Wirklichkeit*) implies that a degree of restlessness, of tension, of unrealised possibility, resides within any legal order. In this conception, law contains its own transcendental ethical moment that necessarily judges law's failings and inadequacies, and demands that law go beyond itself to realise a potential ethical reality that is not yet. This suggests that any system of legal ordering contains within itself its own moment of rupture. This rupture bursts out of the present and attempts to work up reality into a higher form. Further, this rupture involves the negation of forms of law, particular legal institutions, and systems of legal ordering. A juridical conception of sovereignty and international law stemming from a Westphalian conception of legal ordering cannot be immune to this ethical demand and moment of rupture.

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It is, in this respect, that a jurisprudence of war might consider non-sovereign violence to be 'ethical.' Non-sovereign acts of war can be understood as a moment of ethical rupture within a legal ordering of interstate relations. The ethicality of such acts of terror can be seen to stem from a radical ethical injunction (situated across numerous traditions, religious and less religious) to negate and overcome the inadequacy of law and legal ordering. This ethicality sits both apart from the state, in the notion of civil society, but also within the state, through the state's co-constitution through the sphere of civil society. When considered in this sense, the ethical injunction by which jurisprudence may understand acts of 'terror,' is not too distant from the ethical injunction at the heart of the 'cosmopolitan ideal.' While each cannot be reduced to the other, each may be seen to occupy a radical position within a broad tradition(s) of natural law, in the sense that each seeks to negate and transform the international legal order.

Such a conception opens up onto a number of difficulties. The recognition of acts, such as the attacks upon New York and Washington D.C. in 2001, as 'ethical,' opens onto the question of how might jurisprudence distinguish such acts from other acts of murder, rebellion or infanticide? One response might be to consider acts of non-sovereign war as both 'ethical' and as 'criminal.' However, this does not overcome the problem of classification. Perhaps all that could be said, at this point, is that the attempt by jurisprudence to comprehend or classify any acts always operates through a process of (mis)recognition and, hence, any attempt at classification, the drawing of firm distinctions, is always problematic.

Another problem is that, while the ethicality of the state's act of war derives from the institution of the state as being a ground of ethical life and freedom, the act of terror or non-sovereign war, while stemming from the ethical impetus of civil society, can also be understood as the interest, or judgement of subjective moralism.[88] In this respect, the description of the act of terror as 'ethical' might well be extended to any claim or to any subjective act. It is perhaps, at this point, that a jurisprudence of war would need to draw back and consider that Hegel's argument against the moral condemnation of war can also be applied to the suggestion that acts of non-sovereign war are 'ethical.' In this sense, while the act of non-sovereign war contains a degree of ethicality, the extent to which any particular act can be said to be ethical involves a significant qualification or limit.

The act of non-sovereign war cannot be considered as 'ethical' in the same sense that the act of war by the state is 'ethical.' Each involves a degree of ethicality and neither are absolute; further, each are situated within the other and through the notion of (mis)recognition, the distinction between each is always somewhat arbitrary and problematic. However, a jurisprudence of war needs to draw a distinction between the two forms and recognise that the act of non-sovereign war, while stemming from a sphere of ethical life, occurs as the negation of legal institutions, and not necessarily as their fulfilment. In this respect, while the act of terror should not be morally condemned, the recognition of terror's ethicality, needs to be considered through the differentiation of the levels of freedom and ethicality occurring in the distinction between the two shapes of Right, that of civil society and the state. This distinction is

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[88] Note that Hegel's comments upon the French Revolution might be of some relevance here and provides grounds for further study upon the notion of 'terror.' On this point see the discussions in: Habermas, J. *Theory and Practice* Viertel, J. tr. (Cambridge: Polity Press, 1988); Hyppolite, J. *Studies on Marx and Hegel* O'Neil, J. tr. (New York: Basic Books, 1969).

not conclusive and the questions that arise from this problem open up a number of lines of future inquiry. With this said, it is worth considering in the final section of this chapter the further question of, how might a jurisprudence of war respond to acts of both sovereign and non-sovereign war?

Responding to (Non)Sovereign Acts of War

The attacks upon New York and Washington D.C. in 2001 prompt the question of how should a jurisprudence of war respond to such acts and other similar acts of non-sovereign war? So far, a revised notion of (mis)recognition has been used as a means of attempting to come to terms with the ethicality of war without falling into the moralisation of war so typical of war's moral problem. While there is a level of distinction between the ethicality of war carried out by the state, and that carried out by the non-sovereign, the two may be considered in similar terms when jurisprudence attempts to respond to each. This may occur by considering each act in terms of a wider process of struggle for (mis)recognition between both sovereigns and non-sovereigns.

While the notion of (mis)recognition may prove helpful to thinking about how to respond to the act of war, it should be noted that the notion of (mis)recognition itself is not immune to falling back into the difficulties of war's moral problem. This is shown by the response of i ek to W.T.C. attacks in 2001. While i ek uses a Hegelian notion of (mis)recognition (read through a Lacanian frame), to consider the position of the attacks, and, specifically, to show how one should not fall into a

subjective-moralistic comprehension. There are, nonetheless, problems with i ek's

approach which displays the re-emergence of war's moral problem.

The re-emergence of war's moral problem can be seen in i ek's response to the

violent act through his invocation of the Christian-cosmopolitan image of 'love.' In an

earlier version of *Welcome to the Desert of the Real*, published on-line, i ek closes

with what appears to be a cosmopolitan ethic; he states:

> In the electoral campaign, President Bush named as the most important person
> in his life Jesus Christ. Now he has a unique chance to prove that he meant it
> seriously: for him, as for all Americans today, "Love thy neighbour!" means
> "Love the Muslims!" OR IT MEANS NOTHING AT ALL.[89]

This ethic is repeated with respect to the ethical Israeli-Palestinian conflict, of which

i ek argues, represents "the *symptomal knot* of the Middle Eastern crisis, its Real

which returns again and again to haunt all participants."[90] He states that this conflict

cannot be solved in its own terms, rather, the only way to break out of the vicious

cycle of violence is through an act that would change the co-ordinates of the

conflict.[91] For i ek, an example of such an act, were the actions of the Israeli

'*refuseniks*,' the members of the Israeli Defence Forces who refused to participate in

Israeli aggression against Palestinians. For i ek, this refusal to participate is

contained within the Pauline ethical act, the 'No!' in which the Palestinians, the

'enemy,' were loved as 'neighbours.'[92] i ek states with regard to the acts of the

refuseniks:

> (T)hey treat the Palestinians not as 'equal full citizens' but as *neighbours* in
> the strict Judaeo-Christian sense. And, in fact, that is the difficult ethical test

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[89] i ek, S. "Welcome to the Desert of the Real" *The Symptom*, Issue 2 Spring 2002.
[90] i ek, S. *Welcome to the Desert of the Real! Five Essays on September 11 and Related Dates*, (London: Verso, 2002), p. 126.
[91] *Ibid.*, at p. p. 128.
[92] *Ibid.*, at p. 116.

for Israelis today: 'Love thy neighbour!' means 'Love the Palestinian!' (who is their neighbour *par excellence*), or it means nothing at all.[93]

While i ek is invoking here a cosmopolitan gesture, he is doing so in a specific philosophical sense. For i ek, the Pauline *agape* (love as charity) is the paradigmic ethical act and it operates as an 'uncoupling,' from the symbolic structure. Elsewhere, i ek argues that when the Old Testament enjoins you to love and respect your neighbour, this refers not to your imaginary double, but to the alien traumatic kernel that resides within the other which hystericises and upsets you.[94] The ethical injunction to love one's neighbour is the injunction to embrace what i ek refers to as the 'real' of the other, the other's ontological ugliness which cannot be integrated into one's symbolic universe.[95]

For i ek, approaching the horror of the 'real' of the other's '*jouissance*' is the basis of inter-subjective recognition. It is the recognition of that which protrudes through symbolic beauty, harmony or balance, and is fundamentally upsetting.[96] i ek argues that the Christian ethics of love recognises this; it does not attempt to reintegrate the 'ugly' into an old order or law, or cosmic balance, thus covering or hiding the other's ugliness. Rather, the recognition of ugliness as the embrace of ugliness itself, re-coordinates the law by upsetting it. i ek notes that, in contrast to pagan harmony and balance:

> Christianity (and, in its own way, Buddhism) introduced into this global balanced cosmic Order a principle that is totally foreign to it, a principle which, measured by the standards of pagan cosmology, cannot but appear as a monstrous distortion: the principle according to which each individual has

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[93] *Ibid.*
[94] i ek, S. *The Fragile Absolute: Or, Why is the Christian Legacy Worth Fighting For?* (London: Verso, 2000), p. 109.
[95] i ek, S. "Love Thy Neighbour? No, Thanks!" in Lane, C. (ed.) *The Psychoanalysis of Race* (New York: Columbia University Press, 1998), p. 165-168.
[96] *Ibid.*, at p. 168.

immediate access to universality.... (D)o not Christ's scandalous words from Saint Luke's Gospel point in the same direction: 'If anyone come to me and does not hate his father and his mother, his wife and children, his brothers and sisters - yes, even his own life - he cannot be my disciple' (14: 26)? Here, of course, we are *not* dealing with a simple brutal hatred demanded by a cruel and jealous God: family relations stand here metaphorically for the entire socio-symbolic network, for any particular ethnic 'substance' that determines our place in the global Order of Things. The 'hatred' enjoined by Christ is not, therefore, a kind of pseudo-dialectical opposite to love, but a direct expression of what Saint Paul, in Corinthians I 13, with unsurpassable power, describes as *agape*, the key intermediary term of faith and hope: it is love itself that enjoins us to 'unplug' from the organic community into which we were born - or, as Paul puts it, for a Christian, there are neither men nor women, neither Jews nor Greeks....[97]

For i ek, 'love' is, in this sense of 'uncoupling' the attempt to liberate one's self from the grip of the existing social reality by renouncing the 'fantasmactic supplement' that attaches us to it.[98] Hence, Christ's injunction to 'turn one's cheek' operates in this sense, where as opposed to 'an eye for an eye,' the point is to "interrupt the circular logic of re-establishing balance."[99] This, for i ek, is the 'work of love,' the hard and arduous 'uncoupling' in which, again and again, we have to disengage with the inertia that compels us to identify with the particular order we are born into.[100] It is, in this sense, that for the *refuseniks*, the refusal or the 'No!' was the ethical act; it was an attempt to uncouple from the symbolic order of violence, structured through the religious ordering of the conflict, centred around the position of 'Jerusalem,' as the privileged object. For i ek, a similar authentic ethical act would be the renunciation by Serbia of its nationalistic claims to Kosovo; this would involve the act of sacrificing the substantial attachment to the privileged object.[101]

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[97] i ek, S. *The Fragile Absolute: Or, Why is the Christian Legacy Worth Fighting For?* (London: Verso, 2000), pp. 120-121.
[98] *Ibid.*, at p. 149.
[99] *Ibid.*, at p. 125.
[100] *Ibid.*, at p. 129.
[101] *Ibid.*, at p. 157.

It should be noted that, in taking up this position via the gesture of 'love,' i ek does

not stand very distant from the position of Kant and the cosmopolitans. The act of

love as the act of the refusal, the 'No!' is Kant's cosmopolitan gesture. Kant

announces 'No to war,' and, thus, refuses an international legal order that grants

legitimacy to sovereign war. Kant's injunction represents the attempt to radically and

fundamentally re-coordinate the shape of international relations in which peace and

legal rights occur through the order, and 'balance' of state power. Kant's

cosmopolitan contention is the refusal of this order, the claiming of direct access by

the individual to peace and moral Right. Hence, this 'No!' is the contention taken up

most strongly by Kant for whom: "moral-practical reason within us pronounces the

following irresistible veto: *There shall be no war*."[102]

In this tradition, the act of refusal is spoken with the same resolve within the Preamble

of the United Nations Charter through which, in the determination to avoid the

'scourge of war,' it draws upon the image of 'good neighbours.'[103] Further, this same

'No!' was the voice of millions of protestors in the 'West' who demonstrated against

the invasion of Iraq by the U.S.A. in 2002, whom Habermas invoked as the basis of a

new European consciousness and public identity.[104]

What we should take care to recognise here, as with any cosmopolitan contention, is

the emergence of war's moral problem. i ek's invocation of love as the radical

renunciation of certain ethical and social ordering, mirrors the cosmopolitan

renunciation of the state. However, any such cosmopolitan renunciation does not

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[102] Kant, "The Metaphysics of Morals" in Kant, I. *Kant Political Writings* Reiss, H. (ed.) Nisbet, H.B. tr. 2nd edition, (Cambridge: Cambridge University Press, 1991), p.174.
[103] Charter of the United Nations, Preamble. (1945).
[104] Habermas, J. "After the War: The Rebirth of Europe" *Frankfurter Allgemeine Zeitung*, 31 May 2003.

involve the dissolution of the international order of state sovereignty, but quite the opposite, the re-institution of this order. The prime example of this is the modern notion of humanitarian war, which typifies Kant's confrontation with war's moral problem. Humanitarian war gives the example of the war of love, whereby the social-symbolic order of sovereignty is renounced in the name of 'humanity.' However, 'humanity' cannot sit idly by in the face of threat; instead it is forced to go to war to save itself and, further, it is forced to do so by a reliance upon the power and actions of the state.

Hence, a humanitarian war that refuses the sovereignty of the state, in the name of a universal humanity, not only re-introduces sovereignty, but further, strengthens its power. Humanitarian war is sovereign war in the name of humanity. Such a reassertion of the concrete[105] might be thought of with respect to movements within the Christian church, though in a very general sense. In this manner, Christian love renounced a certain social structure and cosmic order and proclaimed direct access to the divine. What followed, however, through the figure of the Church as 'Holy Spirit,' involved the re-enforcement of a certain cosmic order and social structuring of the relations of the individual to the divine. The individual was, thus, no longer granted access to the divine, but could only (at least until Luther) approach the divine through the cosmic order and ceremony of the priesthood. Hence, what initially sought to overthrow an order in the hope of directly approaching the divine, acted instead to reinstitute an order or structure situated 'between' humanity and divinity.

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[105] Hegel's comments upon the instability of the abstract notion of 'absolute freedom' and the reassertion of the concrete, during the French Revolution and 'Terror,' are somewhat relevant here. See Hegel, *Ph.S.*§ 582-595.

In this respect, what is worth considering when examining the cosmopolitan approach to the act of non-sovereign violence, or terror, is the Hegelian point that there is no direct access to the universal. Rather, the relation between the universal and particular is always mediated by the individual and the individual's actions. This is demonstrated in the cosmopolitan contention, which always reveals itself to be never enough. Certainly one can refuse, one can shout 'No!;' however, after these words, this act, the world still continues to spin and so continues one's ethical responsibility. This responsibility, as 'work,' relies not only upon action but also upon actors who must relate the particular to the universal.

For neo-Kantian ethics, the necessary actor is the figure of the moral actor, the statesman, state, or group of states, who attempt to carry-out the moral law, or ethical responsibility, and, at times, engage in a war against war. When focussing upon this figure, the cosmopolitan contention, the refusal or 'No!' is not an act that radically re-coordinates the symbolic order. Rather, as the refusal rests upon the figure of the moral actor, what becomes reinforced and reinscribed is an order of violence. In this, the act that attempted to initially transcend violence, to radically re-shape the ordering of war, falls back, out of necessity and out of duty, or the duty to go beyond duty, into the legitimation of war by a transcendental morality, as a war against war. Such an act re-opens the possibility of a subjective-moralisation of not only war, but of the actors involved.

It is, in this respect, that žižek's cosmopolitan gesture of love falls back into war's moral problem. While he attempts to refuse the moralised paradigm, he falls back into it via a gesture that brings him very close to that of Habermas. This occurs through

the reliance upon the 'utopic' figure of a new Europe as the moral actor, or perhaps,

as the 'new church.' i ek falls back onto the figure of Kant's moral politician, the

actor who must be relied upon to act in accordance with morality and practical reason

and, if necessary, fight for peace. To be sure, i ek's call for the 'Left' to rally around

the figure of Europe is less moralist and more strategic in focus. However, it still

involves the strong suggestion of the Kantian figure and the contrast of this actor to

the aggressive, war-mongering other. i ek states:

> (I)f the emancipatory legacy of Europe is to survive, we should take the
> September 11 fiasco as the last warning that time is running out, that Europe
> should move quickly to assert itself *as an autonomous ideological, political
> and economic force, with its own priorities*. It is a unified Europe, not Third
> World resistance to American imperialism, that is the only feasible
> counterpoint to the USA and China as the two global superpowers. The Left
> should unashamedly appropriate the slogan of a unified Europe as a
> counterweight to Americanised globalism.[106]

What emerges in i ek's response to the act of non-sovereign war, or terror, is war's

moral problem. Is there a way in which a jurisprudence of war might respond to the

act of terror without falling into this problem? In considering an ethical response to

war, a jurisprudence of war should build upon the Hegelian notion of ethical

recognition between states. For Hegel, however, this occurs only at a formal level,

that is, the recognition of the sovereignty or personhood of states, operates at the

formal level and the limited ethical level of 'contracts in general.' When developing a

jurisprudence of war, such an ethics of (mis)recognition would need to attempt to go

beyond this somewhat limited conception.

One suggestion is that the only adequate response to sovereign or non-sovereign war,

is the recognition of the ethicality of the act of war itself. Anything less is the implicit

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[106] i ek, S. *Welcome to the Desert of the Real! Five Essays on September 11 and Related Dates*,
(London: Verso, 2002), p. 145.

refusal to acknowledge the worth of the other as a form of concrete ethical life. Here, i ek's notion of the 'ugly' is instructive if interpreted in terms of the thesis's rereading of inter-subjective recognition, and not understood via i ek's Lacanian interpretation. If a theory of (mis)recognition is used to attempt to counter war's moral problem, then what a jurisprudence of war must attempt to recognise is that which is the most 'ugly.' It must attempt to recognise that which upsets the Christian-Kantian anti-war sensibility most thoroughly, and, therefore, attempt via the process of recognition, to re-coordinate the moral ordering of the thinking of war itself. What is 'ugly' is not the other, but rather, 'ugliness' resides, perhaps, in the suggestion that the other's violence against us, may in fact, be 'ethical.' A jurisprudence of war should, thus, attempt to re-cognise what is rendered as 'ugly,' it must attempt to recognise the *ethicality of the other's war*.

Hence, for recognition to be a truly ethical response, one is required to acknowledge the ethicality of the other's violence towards you, to recognise the other as ethical life and the other's act of war or terror, as the attempt to bring this into manifestation or fulfilment. This, of course, needs to be mutual. For example, such an ethics of (mis)recognition requires the acknowledgement by, say, Israel or the U.S.A. that the war or violence carried out by the Palestinian, or Muslim 'terrorist,' is ethical. Further, an ethics of (mis)recognition also requires that the Palestinian, the Muslim, or for that matter the 'Left,' recognise that the war or violence carried out by Israel or the U.S.A. even as invasion, is ethical, and that this act involves a manifestation of ethical life. It is, therefore, not enough to say 'No!' Such a refusal may simply reinforce the moral conceptual order that perpetuates war's moral problem. Instead, what must be said is 'Yes!' This may involve the enunciation that: 'I do not implicitly

condemn you and your acts of war by a condemnation of all war and violence. I recognise the ethicality of your act of killing, of your killing of me. I recognise this as the only way in which we can escape a conceptual ordering that moralises both conflict and the actors involved, and thus, precludes the formation of a successful ethical 'We.''

As an ethical response to war, this is difficult; perhaps, it is the most difficult. It is the most difficult, in that it involves a degree of letting go. Such an act of recognition involves letting go of what is most certain and important to one's self, one's life, one's family, one's conception of Right. It involves the open acknowledgement of differing ethical communities, who, even in their violence, in their most aggressive act of war, are not condemned but are acknowledged as bearing ethical worth. Further, such an act of recognition involves the understanding that war itself is a moment or part of the worth of the other's ethical life.

Certainly, such an ethic of (mis)recognition involves some residue of the religious injunction to 'love thy enemy.' Yet, to claim that any 'Western' ethics could be developed that escapes or entirely precludes a Judaeo-Christian-Islamic ethics would be a falsity. What such an ethics of (mis)recognition focuses upon is the effort of avoiding the condemnation of the other, occurring as a result of the condemnation of war. The approach proceeds from the premise that war contains a degree of ethicality, that war is necessary to ethics. Hence, such an ethics accepts the possibility of the injunction that one must recognise the ethicality of the enemy and the ethicality of their act of war against you. This can only occur if one can come to accept that war is not unethical, but is a valid ethical act, a manifestation of ethical life.

Such an ethics of recognition is also built upon the Hegelian lesson that the true moment of recognition is the coming to accept that your own epistemic and moral co-ordinates need to be re-orientated and re-constituted through and by the other. This involves moving beyond the dominant conceptual, moral framework of neo-Kantian ethics that, with its emphasis upon non-violence, perhaps does not pay sufficient emphasis to the important relation between law, war and ethics and the consequences that flow from this nexus. An ethics of (mis)recognition implies the risk of letting go of the dominant moral framework which, while inadequate, holds a degree of mastery over the thinking of war and the nexus of law-war-ethics in modernity.

Hence, in response to acts of non-sovereign war, acts of terror, and, for example acts of 'Arab-Islamic' terror, what a jurisprudence of war suggests is that 'we' must take up an ethics of (mis)recognition. Whether the term 'we' refers to multiple and divergent forms of life that represent the 'West.' Or, whether the term 'we' refers to the multiple and divergent forms of life that represent the 'Islamic world.' What is most important is that each needs to come to terms with the significant conceptual structure of war's moral problem within a global process of (mis)recognition. Further, each needs to attempt to overcome this (or, at least, come to terms with it), by the effort of recognising the ethicality of the other's war. A jurisprudence of war suggests that 'we' need to attempt to recognise the ethicality of the other's war against 'us.'

Conclusion

In this chapter, I have drawn upon the notion of inter-state (mis)recognition as a method that allows jurisprudence to examine the 'ethicality' of war, without moralising the problem of war altogether. Through the notion of (mis)recognition, I examined again the approaches of neo-Kantian ethics to war's moral problem. While the approaches of Rawls, Derrida and Habermas to war's moral problem had each, to differing extents, taken up notions similar to that of (mis)recognition, on the whole, each thinker was unable to present an account that could adequately come to terms with war's moral problem. In attempting to go beyond the limitations contained within the approach of neo-Kantian ethics to war's moral problem, I have argued that a jurisprudence of war might be better placed if it attempts to recognise the ethicality of war. In this respect, in this chapter, I have added to a jurisprudence of war an account through which the 'ethicality' of both sovereign and non-sovereign war may be (mis)recognised. Further, I have suggested how jurisprudence might better respond to both acts of sovereign and non-sovereign war. In the development of this account, I have attempted to situate the position of war within a tradition of natural law and have done so by drawing upon two spheres of what Hegel refers to as ethical life, that of the state and civil society. In this final chapter, I will attempt to develop this account and show how these spheres are relevant to the attempt to come to terms with war's moral problem.

Chapter 8

Developing A Jurisprudence of War

Introduction

So far, the thesis has followed the inheritance of war's moral problem within what has been described, generally, as a natural law tradition. It has been shown how war's moral problem has been taken up by Kant, and then by Hegel, and in contemporary times, by what has been termed, neo-Kantian ethics. Attention has been drawn to how the approach of neo-Kantian ethics has taken up and has attempted to develop Kant's three principle contentions: the moral condemnation of war, the enunciation of cosmopolitan right and the invocation of an international juridical order. It has been argued that both the approaches of Kant, and that of neo-Kantian ethics, have been unable to overcome a number of difficulties contained within war's moral problem. Hence, while each of these approaches have added to a jurisprudence of war, it has been argued that the attempt of jurisprudence to come to terms with war's moral problem might be better served by drawing upon and developing Hegel's approach to war's moral problem.

In this respect, I have endeavoured to develop a rereading of Hegel's conception of law and his approach to war. Upon this, I have attempted to develop a jurisprudence of war that may assist in the coming to terms within war's moral problem. In the previous chapter, I showed how the notion of (mis)recognition might be used to point to the 'ethicality' of war and how such an account is possible without falling into the

subjective-moralisation of war, or, by subsuming the transcendental ethical moment under a legitimation of particular wars. This chapter builds upon the account given, so far, and approaches war's moral problem through the revised Hegelian critical-metaphysical category of actuality (*Wirklichkeit*). I will argue that jurisprudence may better understand war's moral problem by framing war within the tension between the spheres of ethical life represented by the notions of civil society and the state. When approached from this direction, war's moral problem, and its moments of contradiction, or *aporia*, can be understood in terms of the working of Right. This involves conceptualising war in terms of Right's working, Right's working up of reality, and Right's working against itself.

War as a Moral Problem

One limitation of the approach of neo-Kantian ethics resides in the fact that it treats war as a *moral* problem, or rather, war is considered a problem of morality and not a problem of law. As has been shown, for Kant, war was a problem of morality. War was to be overcome by the adherence to moral duty, by turning one's conscience to the demands of the moral imperative and by placing political action under the guidance and demands of moral duty. Hence, for Kant, the overcoming of the problem of war involved politics bending its knee before right. War was not seen as some external evil, but the result of the immorality within all private conscience, that needed to be faced and overcome. The moral imperative of the Kantian approach placed 'peace' as the highest goal, and, through this goal, the act of war, even as that which had become the accepted right of sovereignty, was condemned. Under the

Kantian moral injunction, war lost its status as 'Right;' instead, morality and practical reason declared that: There shall be no war!

The moral condemnation of war and the treating of war as a problem of morality led the Kantian approach into the difficulties of war's moral problem. This involved condemning war by a transcendental moral command. However, for war to be overcome and peace established, the enacting of moral duty relies upon war to defend the idea of peace and to fight in its name. As such, the Kantian approach comes across the problem of relying upon the transcendental moral imperative to both condemn all war, and to legitimate particular wars. This validation of a war against war leads to the possibility of the transcendental moment within morality becoming the 'comfort' of war. Such comfort runs the risk of opening onto the subjective-moralisation of war and, as such, the subsumption of morality under war.

In taking up and attempting to develop Kant's three principle contentions, neo-Kantian ethics adds to a jurisprudence of war, but the approaches, on the whole, are unable to overcome war's moral problem. I would argue that even when attempting to frame war as a problem of law, as a problem of 'international law,' neo-Kantian ethics still treats war as a moral and not a juridical problem. As has been seen in the differing approaches of Habermas, Derrida and Rawls, each take up the Kantian ideal of peace and Kant's three principle contentions of: the moral condemnation of war, the enunciation of cosmopolitan right and the invocation of an international juridical order. For each, the idea of peace structures their conception of international ethical obligations, and war is conceived as a problem that stands in the way of peace. War is condemned from the position that morality demands that there be peace, and that there

should not be war. For each, the inheritance of the moral approach to war is developed in differing ways. For Habermas, this is the categorical imperative at the heart of 'discourse ethics,' for Derrida, this is the duty to go beyond duty in the transcendental demand of the democracy and law that is 'yet to come,' for Rawls, this is the demand of 'reasonableness' defined under a 'veil of ignorance.' Each of these approaches gives a sense of the moral condemnation of war and grounds the overcoming of war within some form of the transcendental moral duty or imperative.

To not be incorrect, Habermas, Derrida and Rawls do not approach war as strictly a problem of morality. Rather, drawing upon the structural developments of international law and international political and legal institutions of the twentieth century, each see war as something of a moral-legal problem. Hence, war is a problem that is to be overcome by international legal institutions, guided by the ideal of peace. As such, each would probably claim that, for them, war is a problem of law, a problem that is to be overcome by the emerging structure of international law.

Habermas puts forward the general claim that war is a problem of the emergence of international law and institutions backed by force, whose purpose is to safeguard peace and human rights. Hence, war is to be overcome by the building of supra-national legal institutions, international courts and the role of police action. For Derrida, generally, war can only be approached by the emergence of an international law and juridical order that is backed by force, of international legal institutions that have the power to prevent or restrict war and enforce human rights. For Rawls, war is to be overcome by the 'law of peoples,' the system of international law and legal institutions built upon alliances. Hence, for Habermas, Derrida and Rawls, the duty to

overcome war involves the duty to establish, in accordance with and beyond Kant, an operational and powerful system of international law.

However, the approach of neo-Kantian ethics does not strictly consider war as a problem of law; each falls back onto the position of morality as the means of approaching war. This occurs, in that any international law is either guided by the moral imperative, or, is held to be inadequate to and, thus, subsumed by morality. At the breakdown of law, or in the comprehension of law's violence, neo-Kantian ethics seems to revert to treating war as a problem of morality. This is seen most vividly in Rawls, in his subjective-moralisation of the international order. Rawls frames both international law and the acts of war in terms of the moral worth, or the 'reasonableness' of the actors involved. In coming up against the problem of how to establish an international juridical order, so as to maintain and establish peace, Rawls falls into the moral legitimation of war in the name of peace. He attempts to resolve the problem of war by drawing upon the notion of 'just war.' His account the 'justness' of war is a determination of subjective-moralisation. Hence, the problem of war becomes a problem of morality and of moral action, the problem of who is the most moral.

Derrida also falls back into treating war as a moral problem. His awareness of the inherent violence of law leads him to realise that the attempt to overcome war by an international legal order will be inherently violent. Hence, the attempt to overcome war will involve war, in the name of law, the perpetration of war so as to end war. Derrida's insistence to go beyond Kant, the duty to go beyond duty, means that he cannot adequately hold onto the content of any international legal order. Instead,

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Derrida places greater emphasis upon the position of transcendental morality, the image of law that is yet to come. In this respect, Derrida's strict adherence to the position of the transcendental means that the moral condemnation of war draws within it the condemnation of international legal institutions. While Derrida terms this moral condemnation or negation, 'critique,' he nonetheless treats war as a moral problem, as the *aporia* at the heart of moral action and moral duty. While Derrida might argue that this is the *aporia* of 'justice,' this notion seems to rest upon a moral aversion to war, perhaps stemming from the injunction, 'thou shalt not kill.'

Further, Habermas falls back into treating war as a moral problem. Habermas insists that war is a problem of law, it is a problem of legal regulation, where acts are judged under an international juridical order, and peace is kept by international police action. For Habermas, this is to occur through the development of international political and legal institutions that, over time, will come to be invested with democratic legitimacy and military power. However, when Habermas confronts the problem of war in the present, his account faces the difficulty that such an international order is not yet. Hence, in the absence of a legitimate and workable legal order with its own power, Habermas is forced to consider war in moral terms. In this respect, war is to be overcome by granting particular wars the legitimacy of morality, the 'name of law,' and further, particular actors must assume the burden of the moral imperative. War becomes the problem of moral war and moral action, the approach to war is underlaid by the moral imperative.

The result for neo-Kantian ethics is that their approaches to war, even if framed as a problem of law, seems to revert to their ground, that of the Kantian conceptualisation

of war as moral problem. This form of conceptualisation limits the ability of neo-Kantian ethics to adequately come to terms with war's moral problem. In a sense, it can be argued that war's moral problem is logically inscribed within the moral approach to war, or, in other words, the approach to war from the perspective of morality operates to generate its own problem.

War as a Problem of Law

Drawing upon Hegel's approach to war, jurisprudence is perhaps placed in a better position, if it considers war as a problem of law. From a Hegelian position, war is a juridical problem. In Hegel's conception, this can be seen by turning to the *Philosophy of Right*, where war is considered as an element of Right along with the notions of abstract right, morality and ethical life. Within the section on ethical life, war is a moment of Right along with the family, civil society and the state. In this conception, war is conceived in terms of the legal relations between states. Hegel's conception of war attempts to re-frame war in accordance with a conception stemming from the Westphalian tradition. In this respect, Hegel reminds jurisprudence that the question of war is one that has concerned a long and diverse tradition of natural law. In this respect, war's moral problem is situated within the question of 'Right' and, as such, from the perspective of Hegel, the consideration of war's moral problem must occur within a more general consideration of the idea of Right.

A rereading of Hegel's conception of law suggests that jurisprudence consider war as being a legal rather than a moral problem. War is not a moral problem, in the sense

that the question of war does not pertain to individual moral subjectivities and their relations with each other, as thought in terms of conscience, intention, happiness and so on. Rather, war is to be thought through a juridical frame, as regarding the relations between states as legal entities, as the problem of who is sovereign, and as the problem of the independence of the state. War is a problem of law in that the position of war is at the centre of the formation of law, the formation and designation of sovereignty. In the relation of (mis)recognition between states and, between states and non-state actors, war is central to the formation and preservation of international legal personality through the violent process of struggles for (mis)recognition and the formal acknowledgement of (mis)recognition between sovereigns.

The Hegelian position points to a degree of inadequacy, or limitation inherent within a formal moral standard, the otherwise 'golden rule,' when such a principle is drawn upon to judge and inform state action and acts of war. For Hegel, as a problem of law, war needs to be understood from the perspective of ethical life, that is, the ethical content of law found within institutions and within the modern state. When the state is comprehended as having an ethical content, then war cannot be simply dismissed or condemned from a moral point of view. Rather, war can be understood as not only a fundamental moment within law, but, a fundamental moment within ethics, in that war is intimately related to the foundation, preservation and maintenance of the state, as ethical life. In this respect, the war of the state is linked, not simply to the individual's welfare, in the sense of survival, but also, to the individual's conception of the good. When approached from this position, war can no longer be condemned outright, because the act of war is fundamentally related to the individual's ethical being. It is by and through war, that the individual has freedom and the good.

The concentration upon the nexus of law-war-ethics shows that the conception of war as moral problem is limited. War is firmly within the juridical, it is a problem of the juridical and needs to be thought of via juridical and not purely by moral or by subjective-moralist categories. As a problem of law, war should not be condemned outright. Such an approach does not argue that there must be war, nor does it glorify war. Rather, a jurisprudence of war may see that it would be preferable that wars are overcome and avoided by more ethical legal relations between states and between states and non-sovereigns. However, such a position is not blind to fact that war has been and will continue to be necessary to law and ethics. This will probably continue to be the case as long as sovereignty, the good and freedom, are constituted within the ongoing process of (mis)recognition.

In this sense, a jurisprudence of war, viewing war as a legal problem, does not either, flee into a transcendental morality or, fall into the subjective-moralisation of war. Rather, a jurisprudence of war attempts to think through the often uncomfortable realities of the nexus of law-war-ethics. This involves the conception that war is the manifestation of law, but further, that war is ethical. By approaching war in this fashion, a jurisprudence of war attempts to avoid war's moral problem. By holding onto the nexus of law-war-ethics, war is not moralised, rather, what is recognised is war's ethical content as the struggle for (mis)recognition, not between right and wrong, but between right and right. Further, the transcendental moment of ethics is not lost or subsumed, and it is not reduced to an ethical relativism between differing communities. This transcendental ethical moment still remains in the conception that war 'ought' to come to an end. By understanding war as the struggle between legal-ethical entities, this conception, or moment of 'hope' is held onto. This ethical

imperative resides in the notion that a conflict 'ought' to be overcome through the speculative ethical recognition of the 'I' as 'We' and 'We' as 'I.' This conception, however, does not fall back into a cosmopolitan image of a peacefully united humanity, the subsumption of the multiple forms of concrete ethical life, the international 'I's,' under a universal kingdom of a 'We.' Rather, a jurisprudence of war pays attention to the ongoing strength of the *mis* of (mis)recognition and, further, the importance of struggle, violence and closure in the production of forms of law and ethics. In this respect, a jurisprudence of war points to the necessary revision of the category of 'peace.'

Under a jurisprudence of war, the notion of 'peace' needs to be adjusted to the realities of the nexus of law-war-ethics. Hegel's discomfort with Kant's idea of 'perpetual peace' did not stem from any inherent preference for the ongoing machinations of war. Rather, it stemmed from a discomfort with the raising of the notion of peace as a privileged category, without considering it as a mediated category. Through the nexus of law-war-ethics, peace, as a juridical category, cannot be held apart from war, peace always involves war, a war to bring it about, a war to sustain it. It is for this reason that an ethics built around the idea of peace and, thus, in condemnation of war, necessarily falls into a 'war for peace.' The notion of peace does not rely on passivity, rather, peace only comes about through activity, through the building of legal-ethical structures that, at times, are brought about, or need to be maintained, via war.

A revised category of peace can no longer turn its nose up at war. Peace and war cannot be thought as unconnected opposites, rather each contain the other, the other is

a mediated moment within each. Within a jurisprudence of war, this does not mean that the 'hope' of peace is discarded. Rather, only a limited, abstract notion of peace is set aside. There is no reason to extinguish a hope for peace, yet, any such hope must pay attention to a revised notion of peace in which the category is re-defined in terms of its relation to war. This involves understanding peace in relation to the nexus of law-war-ethics and the wider process of (mis)recognition. The suggestion that a jurisprudence of war recognises both the ethicality of war and the hope of peace, does not render such a jurisprudence contradictory. Rather, what underlies the tension between the ethicality of war and the hope for peace is a juridical tension that helps to explain the operation of war's moral problem. This tension can be understood as one that resides within the Idea of Right within modernity. This tension can be considered through a revised Hegelian critical-metaphysical category of actuality (*Wirklichkeit*). By drawing upon this category, a jurisprudence of war may be able to begin to come to terms with war's moral problem.

War as the Wirklichkeit of Law

Comprehending war as a question of law helps to overcome the barriers of war's moral problem. A jurisprudence of war suggests that war should not be morally condemned, and instead, war can be understood as occupying a central position in the co-constitution of law and ethics. Further, acts of war can be understood as the operation and production of sovereignty, within struggles for (mis)recognition. In this regard, the appropriate response of jurisprudence to war is not to condemn war outright, but rather, to endeavour to recognise the ethicality of the other's war. This

attempt sits at the heart of the possibility of any successful mutual ethical (mis)recognition between warring parties.

When war is considered as a problem of law, the issue of how this problem may be conceptualised is dependant upon the comprehension of what law *is*. The thesis has understood what law *is* through a rereading of Hegel's conception of law and an emphasis upon the critical-metaphysical category of actuality or, *Wirklichkeit*. This category has been used to describe those shapes of Right that have come to be actual within modernity. The term refers to those shapes that have developed beyond having a partial or transitory existence, and have come to hold a degree of stability within the world. Such shapes influence and mould forms of legal and ethical relations in their image. Further, this category describes the working up of reality, the movement of the Idea of Right in attempting to overcome itself, to transform the limitations of its shape within reality and emerge into a higher form. *Wirklichkeit* is thus the working of reality, the working of law and ethics into higher levels of existent forms.

In this respect, the actuality (*Wirklichkeit*) of Right involves two sides. One side is geared by what is not yet, where Right seeks to overcome itself, to manifest itself as a higher, more adequate form and does so by its own action or work, by the working up of reality. The other side, refers to the level of stability and permanency that a form of Right has come to occupy in the world. A form of Right is actual when it is engrained within the institutions and customs of a society, whereby, in a sense, it has become the 'shape of the world.'

As a critical-metaphysics, the category of actuality (*Wirklichkeit*) is not a return to a notion of teleology or cosmic force. Rather, the category refers to the inter-subjective operation of the *Begriff*, which has both objective and subjective sides. On the one hand, this refers to that which has come to be an object in the world, that which constitutes the world's being. On the other, this refers to the operation of critical reflection upon reality and human action which, informed by this reflection, attempts to transform the world. The actuality (*Wirklichkeit*) of Right then includes this dual aspect within the Idea of Right itself. The Idea of Right incorporates this mediation between the sides of reflection and being.

War's moral problem can be conceptualised through the notion of law understood via the category of actuality (*Wirklichkeit*). In the *Philosophy of Right*, Hegel draws attention to a number of forms of Right that have come to be actual (or have attained a degree of actuality) within modernity. Of particular interest in the approach to war's moral problem, are the two dominant spheres of ethical life (*Sittlichkeit*), represented by the notions of civil society and the state. I suggest that these two shapes of Right hold sway over jurisprudence's thinking of war, and the tension between these two shapes, provides a key to coming to terms with war's moral problem.

Within the sphere of ethical life known as civil society, Hegel has pointed to the revolutionary centre of legal and ethical relations. Civil society points to an emergence of a form of Right within modernity, in which the individual is grasped as having legal and ethical validity, and this is independent from familial or communal relations. The emergence of this form of Right occurs via the revolutionary developments in labour relations and subsequent legal, political, and moral upheaval.

This upheaval results in the economic independence of numbers of individuals within society, who begin to comprehend themselves as morally independent. The Hegelian idea of civil society expresses the coming into actuality of the Stoic-Christian idea of the universal human, who has an identity and accordant rights, distinct from and against society as a whole. The sphere also expresses how a radical ethical injunction within a tradition of natural law, the demand of freedom, human dignity and justice that is not yet, comes to take shape as a legal, social and political mode of being which dominates aspects of legal and ethical thinking in modernity. This shape of Right, thus, works upon reality, it works up or transforms reality, working its way into the individual's self-conception and into the nature of political and legal institutions.

As reality is worked up by the principles within the notion of civil society, history cannot go back. Hence, the modern conception of war cannot go back to understanding war in the way of the ancients. Rather war collides with this form of Right and is, in turn, shaped by it. This might be seen to be occurring in at least two ways. On the one hand, this legal-ethical form, roughly described as civil society, comes into conflict with war. This shape of Right, which embodies, to an extent, a 'cosmopolitan spirit,' condemns war's killing of 'humanity.' This side of ethical life tends towards valuing the human individual wherever that individual may live, regardless of the ethnicity, religion, or nationality. On the other hand, the notion of civil society begins to influence and hold sway over the conceptualisation and occurrence of war itself. War takes shape through this notion of Right, war becomes a war for 'humanity,' and wars come to be fought in the name of human rights.

Such a conception allows war to be thought of, not simply in terms of power, strategy or the common good; rather, war can be understood through its relation to a dominant juridical conception. This juridical conception, encompassed in the notion of civil society, has affected how jurisprudence within modernity has come to comprehend and relate to war. War is understood as a wrong, and considered so, by a juridical conception that emphasises the importance of the individual's moral conscience and the universality of individuality, understood as humanity. Yet, war also becomes invested with a new sense of legitimation. War comes to be understood as the working or realisation of the notion of humanity, when war becomes the mechanism for the preservation and realisation of human rights. When considered in this manner, it is perhaps easier to discern how Kant, and now, the approaches of neo-Kantian ethics comes to think about the phenomenon of war. I suggest that each approaches war from the shape of Right represented by the notion of civil society. This is not to say that each ignores the shape of Right represented by the notion of the state; such a claim would be untrue. Rather, each takes up an approach to war (and war's moral problem) with a greater emphasis upon the side of Right represented by the notion of civil society.

Under a Hegelian conception, this shape of Right is however, not fully actual. Civil society sits in a tension with another sphere of ethical life, the shape of Right represented by the notion of the state. The notion of state as a shape of Right, can be understood to have come to dominate modernity. This shape has emerged in a tandem fashion, as a combination or mediation of revolutionary nationality and princely sovereignty, this shape has become the paradigm juridical relation. This shape has come to hold a monopoly on violence, yet, it also sits as a locus of ethical life and

freedom. The sphere of the state provides the ground of the particular forms of ethics and customs that manifest further into a form of patriotism or nationalism, and, through which, individuals come to know their being and enact their being as freedom. The state can be understood to have come to a greater level of actuality (*Wirklichkeit*) than civil society. Civil society develops through the state, it is fostered and protected by the state. Further, the state as a shape of Right is born from, and maintains itself through, military power and violence. Hence, in terms of power, force and brutality, Hegel's comment remains somewhat true: that the state can be considered to be the highest power on earth.[1]

Yet, as a shape of Right, the state is not simply the idea of sovereignty invested with power, rather, the state is also an ethical actor. Hence, the state's actions, even when violent, represent a manifestation of ethical life. The state is the ground of freedom for the individuals, and, as such, its actions are related to their welfare, to a good which is common. Further, the state is always one among many; as a particular sphere of ethical life and freedom, it is at risk, emerging in the constant and often violent process of (mis)recognition with its others. It is through this notion of the state, that war is given a degree of ethical legitimacy, that war can be understood as being 'ethical.' War is the founding, the maintenance and advancement of the ethical lives within the state. Further, through the state, the freedom of individuality becomes manifest. Yet, the freedom of the individual is also grounded within war and violence, as the freedom of one individual in one state is bound to a history of the state forging a sphere of freedom through war, violence and killing.

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[1] Hegel, *Ph.R.* § 331.

When thinking about war's moral problem as juridical problem, the contradictory position of war within jurisprudence can be explained via the tension between these two shapes of Right that have come into actuality (*Wirklichkeit*), within modernity. I suggest that the understanding within contemporary jurisprudence of 'what is Right,' is, perhaps, caught within a constant tension between these two figures. Hence, the tension between these two sides of Right holds a degree of sway over the manner in which jurisprudence approaches legal problems. This tension is present within the approach of jurisprudence to war's moral problem.

One quite obvious example of how this tension plays out is within the U.N. Charter. Here, the tension between the two shapes of Right can be seen in the contradiction between the rights accorded to states and their sovereignty, and the sovereignty of 'humanity' that places limits upon the acts of the state in the name of human rights. This is further seen in the tension between the right of the state to go to war, and the limitation of this right, and at times, the criminalisation of the act of war.[2]

This conflict between the right of the state to war, and the condemnation of war in the name of 'humanity,' is raised in numerous contemporary discussions of war. The tension arises in a various ways, as the contradictory identity between 'man' and 'citizen,'[3] as the tension in the ethical obligation of 'love of humanity' and 'love of country,'[4] or, as the duelling claims of 'reason of state' and 'right of humanity.' In the debates surrounding war in general, or over a particular war, generally, two camps can

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[2] See generally: Charter of the United Nations, Preamble (1945).
[3] See: Linklater, A. *Men and Citizens in the Theory of International Relations* (London, Macmillan, 1982).
[4] Nussbaum, M.C. "Patriotism and Cosmopolitanism" in Nussbaum M.C. and Cohen, J. (eds.) *For Love of Country?* (Boston: Beacon Press, 2002). See also: Walzer, M. *Thick and Thin: Moral Arguments at Home and Abroad* (Notre Dame, Ind.: University of Notre Dame Press, 1994).

be understood to emerge. On the one hand, styles of thinking, such as neo-Kantian ethics, privilege and elevate the shape of Right emerging out of civil society. This favours the universal human over the state, and condemns war in the name of humanity. However, this approach also leads to the justification of war in the name of humanity and in the name of peace. On the other hand, styles of thought, sometimes referred to as 'realist' and 'classical republican,' privilege and elevate the shape of Right represented by the notion of the state. With respect to war, Hegel can be seen to give emphasis to this side of Right.[5] The difficulty that arises with giving emphasis to the state is that a juridical conception may tend to fall into the position of simply affirming the 'reason of state' and, thus, subsuming the transcendental moment of ethics under the right of the stronger.

With regard to the development of a jurisprudence of war, each of these two sides is one-sided and false. One side gives up on its condemnation of war and ends up legitimising war in the name of humanity; the other loses any transcendental notion of ethics and reduces ethics to the figure of the state, to the relations of power, or to pragmatics and ethical relativism. What has been described as 'war's moral problem' can be understood as a result of this tension. Concentrating upon war as a juridical problem helps to demonstrate that war's moral problem is generated out of a tension that is inherent within law and ethics in modernity. A jurisprudence of war may not be

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[5] Following Hegel, 'constitutive theory' endorses the communitarian side of his thinking, however in the confrontation with war, these theorists generally side with the neo-Kantian condemnation of war See: Frost, M. *Ethics in International Relations: A Constitutive Theory* (Cambridge: Cambridge University Press, 1996); Brown, C. *Political Restructuring in Europe: Ethical Perspectives* (London: Routledge, 1994). The same comment can be made with regard to 'critical international theory,' see: Linklater, A. *Men and Citizens in the Theory of International Relations* (London, Macmillan, 1982); Linklater, A. *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Cambridge: Polity Press, 1998); Hutchings, K. *International Political Theory* (London: Sage, 1999).

able to overcome the problem entirely; however, it least begins to develop an account pointing to why war's moral problem occurs.

War's moral problem can be understood as a necessary consequence of a tension residing within the actuality (*Wirklichkeit*) of the Idea of Right, within modernity. While attention is commonly drawn to this tension within international law, for example, the tension between sovereignty and human rights, what, perhaps, is not recognised or enunciated, is the full jurisprudential significance of this tension. When understood, in terms of the critical-metaphysical category of actuality (*Wirklichkeit*), the tension describes how the Idea of Right has come to be actual, and, within this, Right is divided between itself, it cannot resolve itself and, instead, perpetuates its own internal contradiction. Hence, when one approaches war, to take one side is inadequate; each side of Right only has meaning in relation to the other, each is already 'othered' and has come to be itself through the other.

It is for this reason that the approach of neo-Kantian ethics to war (and also, for that matter, the realist or classical republican approach) is limited. The approach of neo-Kantian ethics grasps only one side of Right, or, if it grasps both sides, it suppresses one side in favour of the other. In developing a jurisprudence of war, it is necessary to attempt to hold onto both sides and the meaning that is generated out of the tension and mediation between the two. In this respect, a jurisprudence of war should recognise that the legal knowledge of war (and conceptions of war, more generally), necessarily view war through these two conflicting sides of Right, which, in the present, cannot be immediately overcome. A jurisprudence of war needs to take account of the fact that war occurs, and is known, within this structure of the juridical.

This not a radical point, however, it is important that jurisprudence is able to grasp this point and hold onto it. Understanding war's moral problem in this manner does not draw an end or conclusion to this issue; particular wars cannot be reduced to simply the tension between these two sides of Right. Rather, what such a comprehension of war's moral problem presents is an opening for jurisprudence to better comprehend the operation of war's moral problem. This opening does not simply assist in the consideration of how legal thinking approaches the issue of war, but, also assists in helping jurisprudence to understand, juridically, what the act of war might involve.

War as the Act of Law

The critical-metaphysical category of actuality (*Wirklichkeit*), as a juridical category, describes not just the shapes of Right that have come to be actual, but it also describes the effort of Right itself, as the Idea, to comprehend itself and overcome its limitations. The actuality of Right also refers to the not yet, of the Idea of Right, and its effort to work up reality to a point, such that a higher and more adequate form of itself may become manifest. This refers to the act of Right, or *Right's deed*, the working or effort of Right's self-positing, which operates so that Right might transcend itself. When turning to war, what can be observed are the two sides of Right, attempting to overcome Right's inherent contradiction. Each side of Right, represented by the spheres of civil society and the state, is in the process of attempting to come fully into actuality (*Wirklichkeit*). Hence, each is driven to become fully manifest, to overcome the condition of contradiction, and to be the shape of Right that rules the world.

This act or deed of Right can be understood through the notion of *Aufhebung*. In this sense, each side of Right is engaged in the act of self-transcendence, in which the other is negated, but is also preserved in this negation. The cosmopolitan ideal and perspective of individual morality attempts to trump, or overcome, the influence of sovereignty and state power, and attempts to place each under the rule of humanity. This suggests the attempt of one-side of Right to overcome the relation of contradiction, and elevate itself to the highest form of Right. Thus, this side negates the idea of the state and state sovereignty, but also preserves this through the idea of a sovereignty of humanity, and the building of the new form of international right. Hence, the conception of international right put forward by neo-Kantian ethics can be seen as an attempt to negate the position of state sovereignty and power and lift above this a new relation, which constitutes a higher form of legal and ethical ordering. This attempt of transcendence and negation, also involves a degree of preservation of what is negated. Hence, whether what is elevated is, the 'Law of Peoples,' the 'New International,' or the 'Post-national Constellation,' each builds upon and preserves the old legal and ethical foundations of the modern state.

The approach of neo-Kantian ethics might, thus, be viewed as the push of one side of Right to overcome the other. In terms of the notion of the *Aufhebung*, this involves the effort to transcend the other, by negating and preserving. This act, or effort, is mirrored by the other side of Right. This might be seen, for example, in the thought of Treitschke and Schmitt, who each elevate the side of the ethical life of the state. While each, in a sense, negates and to an extent, lampoons the cosmopolitan

conception, this is retained, somewhat, by grounding the freedom of civil society in and through the state.

In this respect, the tension, within the juridical thinking of war in modernity, can be explained by the attempt of each side of Right to become fully actual, by overcoming the other, and claiming itself as the highest form of Right. However, for neither side of Right is this transcendence completely possible. Each side of Right is in no position to fully trump the other, and each side, when attempting to do so, merely points to its own inadequacy. The inadequacy of each side of Right stems from each presupposing and containing, within itself, the other. Each cannot overcome the other, as each side sustains the other, each contains the other in itself and, without the other, each side of Right is not itself. As such, there is no immediate speculative overcoming of these two positions sitting on the horizon. The actuality (*Wirklichkeit*) of Right in modernity is characterised by this uncomfortable tension and unity: the Owl of Minerva, perhaps, has a broken wing.

Importantly, this tension does not simply exist in merely the 'thinking' of Right. Rather, this tension is inherent in Right's being. When understood through the critical-metaphysical category of actuality (*Wirklichkeit*), the tension between the spheres of civil society and the state represents not simply shapes of juridical thinking, but also shapes of juridical being. Hence, their tension is a tension within reality, a reality that is working and working against itself. When considered in this sense, the act of war can be understood as the act, or working, of Right. This is the working of Right against itself, the effort of one side to lift itself up and over the other through the negation of the other. However, as each side is dependent upon the other,

this overcoming can never be fully sustained. By understanding war as the act of Right, jurisprudence might explain why, at least, one form of war falls into its opposite and necessarily fails to sustain the claim that it makes for itself.

An example of this can be seen in the modern notion of humanitarian war. Under this notion, war is fought, not under the precepts of state sovereignty, but against it. Such a war involves the claim that a higher form of Right stands above the right of the state to territorial independence, and the monopoly upon violence within its own territory. In this act of war, what can be viewed is the attempt of one side of Right to overcome the other; this is not simply one 'name' of Right being invoked against another, but rather, this act involves the logical conclusion of Right itself. Hence, the tension within the working of Right in modernity drives Right to go to war against itself, to negate by human action what cannot be overcome by thought. It is in this sense that 'war is the war of Right against Right.' War is the attempt of the two sides of Right to become more than their self-separation. *War is the Idea of Right at war against itself.*

In terms of a humanitarian war (or, a war for international law, or, a war for peace), this act cannot be sustained. Instead, the act turns over into its opposite, into the affirmation of the side of Right represented by sovereignty and the state, as ethical life. The act of humanity falls back into the act of the state. This occurs for the reason that the side of Right, represented by the cosmopolitan or humanitarian ideal, is not yet, fully actual on its own. Rather, as emerging out of the sphere of civil society, this side of Right is reliant upon its other, the state. The war of humanity, thus, exposes the tension within Right itself. The war of humanity, driven by the revolutionary legal and ethical potential arising out of civil society, is spurned by this revolutionary

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potential, the not yet of Right, to overcome the inadequacies of the shape of Right, represented by the state. This side of Right can also be understood to be driven by the radical ethical injunction of natural law, to transform, or go beyond the law and realise a notion of dignity, or justice or freedom that is not yet. This side of Right is driven by its revolutionary potential to not just enact itself, but, by its actions, by its war, to attempt to transform the very co-ordinates of Right in modernity. The shape of Right represented by the notion of civil society can be seen to attempt, via the act of war, to work up reality into a higher level of Right's actuality.

However, for such a radical transformation of reality to occur, 'humanity' is reliant upon the armies, the weapons, and the power of the state. Humanity cannot, yet, act upon its own accord; it is reliant upon the actions of its other whom, it is attempting to negate. In this sense, one side of Right, in attempting to negate the other, relies implicitly upon this very other, to effect the act of negation. What might, then, be seen to result is not the negation of the state, nor the radical transformation of reality in accordance with the radical demand of natural law, expressed by civil society, but, in fact, the opposite. What seems to occur through the act of humanitarian war is not the negation of state sovereignty but its assertion, and, further, the reassertion of the state's power and monopoly upon violence.

This points to the suggestion that the state exists as the only viable actor through which Right can be enacted. Humanitarian war relies upon state acts, upon the state's role as an ethical actor. What might be occurring here is the argument that, while civil society attempts to negate its other, civil society necessarily falls back into its reliance upon, and affirmation of, the other that resides within itself. As a consequence, the

side of Right represented by 'humanity' either condemns this action, or condemns itself. On the one hand, what might be seen to occur is the situation where the revolutionary potential of civil society is masked by a hypocritical gesture claiming that 'it' (as 'humanity,' 'international law,' 'freedom,' 'justice'), and not the state, was triumphant. On the other hand, what might be also seen to occur is the situation where the sphere of civil society attempts to stay true to itself, hence, it attempts to stay true to both its emancipatory legacy and to the radical ethical demand of natural law. In this situation, the sphere of civil society launches a critique of the state and a critique of the state's co-option of its name.

This movement does not imply that the state is all-powerful and absolute. Rather, while the shape of Right represented by the state attempts to assert itself, it cannot do so, on the basis of a legal-ethical legitimacy that is entirely its own. In attempting to overcome the other side of Right, its limit, the sphere of civil society and the notion of 'humanity,' the state is forced to claim the legitimacy of this other. It is, in this respect, that the state can be seen as going to war, not in its own name, but in the name of its other. It is, in this sense, that the state might be understood as going to war in the name of 'humanity,' or 'international law,' or 'peace.'

The state, in the attempt to enact itself as the highest shape of Right, is forced to adopt the name, or form, of the other side of Right, that, through its acts, it seeks to negate. Here, the state is caught; as dominant shape of Right, and the side invested with power it can act with a certain disregard of the sphere represented by civil society. However, it cannot disregard this side fully, as the sphere of the state contains this other within it, the state is constantly judged, critiqued, and attacked by a radical

ethical element that resides within itself. In attempting to assert itself against this side of Right, the state is forced to take on the other side's name. Hence, it appears that the strength of the sphere of civil society is such that, in modernity, the state's act of war is carried out, not in its own name but in the name of humanity, or peace, or international law. Yet, by seeming to assume this name or language of civil society, the state is, in fact, caught by the very language it has adopted. By acting in the name of humanity, the state is judged by the radical ideal of humanity, by acting in the name of a cosmopolitan or international law, the state puts itself up to be judged by these ideals. Hence, because the sphere of the state cannot fully overcome the strength of the sphere of civil society, the state's war, as an act of negation, operates to reassert and, to a degree, reaffirm, what the state sought to negate.

It is through this sense of tension within the critical-metaphysical category of actuality (*Wirklichkeit*), that jurisprudence might better come to understand the operation of war's moral problem. This conception does not present a conclusive account of a jurisprudence of war. Rather, what has been presented here suggests a juridical approach to war's moral problem that may, in future, be expanded upon, and used as a means of conceptualising and describing particular international conflicts. While the conception that has been presented here does not, and cannot, fully overcome all the difficulties of war's moral problem, the account presented draws attention towards two important points that may assist jurisprudence in its attempt to come to terms with war's problem.

With regard to the first point, war can be understood as being structured by the actuality (*Wirklichkeit*) of Right within modernity. War, is thus, caught between two

sides of Right that, although existing only through each other, are in constant tension. Understanding the tension between the spheres of civil society and the state, helps to explain war as a juridical problem. By comprehending these two sides in their unity and in their difference, a jurisprudence of war may more adequately comes to terms with war's moral problem. With regard to the second point, war can be seen as the act of these two sides of Right, each attempting to transcend their inherent contradiction. War can be understood as the act of each side of Right attempting to overcome the other. Yet, through such acts, the other is not negated, but rather, is re-affirmed. In this sense, war is the act of Right at war with itself. This suggests not simply a 'war of words,' but rather, what I am attempting to draw attention to, is a juridical structure of violence occurring as the working of reality within the contemporary world. It is in this respect, and this is not said lightly, that, when understood in terms of revised Hegelian critical-metaphysics, war may be conceived as the 'act,' the 'work', or rather, the 'deed' of Right.

Conclusion

This chapter has built upon my rereading of Hegel's conception of law and upon the comprehension of war's moral problem through the notion of (mis)recognition. Drawing upon Hegel's critical-metaphysical category of actuality (*Wirklichkeit*), I have drawn attention to how a jurisprudence of war might better approach war's moral problem by comprehending war as a juridical problem. I have argued that war's moral problem can be framed in terms of the inherent tension within the Idea of Right, between the spheres of civil society and the state. When conceived in this manner, the act of war can be understood as the working of Right and the working of Right against

itself. While my approach may not completely overcome all the difficulties of war's moral problem, it does provide a more adequate approach to war's moral problem than that presented by neo-Kantian ethics. Further, approaching war's moral problem, through the critical-metaphysical category of actuality (*Wirklichkeit*), provides a means by which a jurisprudence of war might be developed in future, as an openly 'juridical' approach to contemporary instances of war, violence and international conflict.

Conclusion

Summary and Openings

This thesis has made a contribution to the consideration of the problem of war within Anglophone jurisprudence. In particular it has argued, that what has been termed 'war's moral problem,' can be understood as a jurisprudential problem: as a problem for, and within, a tradition of jurisprudence. In the thesis, I have shown how war's moral problem came to be inherited by Kant from a natural law tradition(s). In response to war's moral problem, Kant offered three principle contentions: the moral condemnation of war, the enunciation of cosmopolitan right and the establishment of an international juridical order. Yet, these contentions did not fully overcome war's moral problem, rather, they struck a number of barriers or difficulties.

With regard to the contemporary approach to war's moral problem, I drew attention to how three contemporary philosophical and jurisprudential thinkers have inherited Kant's approach to war's moral problem. Focussing upon the approaches of Habermas, Derrida and Rawls, I argued that each took up Kant's three principle contentions and, while each added to a jurisprudence of war, all three were unable to fully come to terms with war's moral problem. One reason why the approaches of neo-Kantian ethics were unable to fully come to terms with war's moral problem, resided in their treatment of war, as predominantly a 'problem of morality,' and not, as a 'problem of law.' In contrast to the approach of neo-Kantian ethics, I have attempted to develop an approach that re-positions war's moral problem within 'the

juridical.' This has involved a consideration of the position of war's moral problem within the nexus of law-war-ethics.

In attempting to come to terms with war's moral problem, I have drawn upon the philosophy of Hegel and have done so, via rereading Hegel's theory of law and his approach to war. My rereading attempted to open up Hegel's theory of law through an interpretation which focussed upon the critical-metaphysical category of actuality (*Wirklichkeit*), and the notion of (mis)recognition. Drawing upon this rereading, and the insights of Hegel's approach to war's moral problem, I have developed an outline of what might be called a contemporary jurisprudence of war.

My notion of a contemporary jurisprudence of war has not attempted to radically alter how jurisprudence conceptualises the phenomenon of war within modernity. Rather, my approach has been confined to the presentation of a number of notions which might allow jurisprudence to more adequately come to terms with war's moral problem. Through the notion of (mis)recognition, I have argued that jurisprudence need not condemn the act of war outright, rather, jurisprudence should take into consideration the 'ethicality' of war and attempt to recognise the ethicality of the other's war, even when the other's war involves the killing of 'us.' This suggestion has developed from a focus upon the position of war within the co-constituting relation between law and ethics. When viewed through the notion of (mis)recognition, war can be seen to be occupying an important position in the constitution of both law and ethics. The notion of (mis)recognition helps to present an account whereby jurisprudence might consider war as 'ethical,' and yet, not subsume ethics under war, nor, legitimate particular wars by way of subjective-moralisation.

Building upon this conception, I have suggested that war's moral problem might be considered through the critical-metaphysical category of actuality (*Wirklichkeit*). Through this, jurisprudence may, more adequately, approach war's moral problem by framing its operation, and moment of *aporia*, through a tension that resides within the working of law, or its actuality (*Wirklichkeit*), within modernity. Hence, jurisprudence may re-consider war's moral problem in terms of the two sides of Right represented by the notions of the 'state' and 'civil society.' I have argued that each side influences how war is understood, condemned and justified within modernity and, further, that the tension within the thinking of war and its operation, plays-out a tension between these two sides of Right. Each side of Right, on its own, is one-sided and false, thusly, to understand war through an emphasis upon only one side of Right, leads to a limited or inadequate jurisprudential understanding of war's moral problem. In this respect, the difficulties encountered by neo-Kantian ethics in its approach to war's moral problem, can be understood to have stemmed from something of a one-sided conception of Right and, hence, a limited understanding of the relation between war and Right.

In contrast to the approach taken by neo-Kantian ethics, my approach to war's moral problem has attempted to hold onto both sides of Right. In this respect, I have attempted to develop an account where war's moral problem is situated within a tension at the heart of the actuality (*Wirklichkeit*) of Right in modernity. Such an approach might not fully overcome war's moral problem, however, it does provide a jurisprudential basis from which the operation of war's moral problem may, at least, be better understood. Further, such an approach operates to remind jurisprudence that

questions, such as war's moral problem, can be understood a 'juridical questions' and that these involve themes which carry-over from a long tradition(s) of natural law.

My approach to war's moral problem has not endeavoured to conclusively resolve this long-running question. It has, however, added to a long tradition of considering the difficult relation between law, ethics and war. In the process of attempting to develop a contemporary jurisprudence of war, the thesis has come across a number of questions, which, may benefit from future inquiry. Out of these questions, I will briefly note three lines of possible inquiry.

A concentration upon the nexus of law-war-ethics, and the notion of (mis)recognition has touched upon a question of ethics and ethical action which could only be briefly discussed within the thesis. The consideration of war's moral problem led to the suggestion of a notion, which, might be referred to as, the 'violence of ethics.' A more comprehensive account of this notion, perhaps, presented as a history of a set of ideas, theories and cosmologies, might be an important inclusion within any future jurisprudential consideration of war's moral problem.

Further, any future development of a jurisprudence of war would benefit from an investigation into the challenge presented to the dominant (Anglo-European) conception of Right in modernity, this challenge, perhaps, arises through the figure of 'Islam' and the question of 'Islamic ethics.' This question was only briefly touched upon by the thesis, and would need to be taken up further if jurisprudence is to attempt to recognise the ethicality of particular wars, situated within a confrontation with various 'Islamic worlds.' Finally, a future development of a jurisprudence of war

might benefit from a concentration upon a wider and more detailed problem. This involves a consideration of the nexus of law-war-ethics in terms of a global question of political economy. While there has been no real scope within the thesis to address this question, war's moral problem and a jurisprudential understanding of notions of Right need to be considered in light of a wider question of the logic and global operation of capital.

Closing Remarks

The act and event of war creates a moral stirring within 'us.' War brings, for those who live in the 'west,' a moment of discomfort, a moment of distress, anxiety, sadness, anger, and outrage. For those who live outside the zone of 'western privilege,' war presents disaster, pain, suffering, hunger, disease, and horror. For both, war also, at times, is accompanied by the assertion of right, the demand of justice, the radical demand to overthrow what is not right and attempt to realise what is not yet. This moral stirring seems to both condemn war and, at times, to demand that war be carried out.

This thesis has taken up this question, and termed it 'war's moral problem.' It has attempted to remind jurisprudence that this question, which confronts 'us' today, needs to be placed within a long legal tradition. Hence, with regard to war, what confronts 'us,' as a question of 'right' and 'not right,' can be considered as a jurisprudential problem. This problem needs to be approached with care and caution, positioned within a consideration of a broader conception of the notion of Right. In my consideration of war's moral problem, I have attempted to draw jurisprudence

towards a conception that pays attention to the importance of the notions of tradition and process, and also, the importance of the act or deed, and its place in the transformation of reality. By drawing attention to the consideration of war's moral problem as a jurisprudential problem, I have hoped to make something of a contribution to the assessment of an old and long-running question, one, which, continues to strike against the hearts and minds of humanity, again and again.

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