Introduction

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Introduction

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The need to replace force with law is central to a Kantian theory of war. In such a theory the only ground for using force is the prevention of wrongful force. War is barbaric and wrongful. A key theme in Kantian political and legal philosophy is every individual's right to independence, which can only be secured through a legitimate state, which in turn is obliged to repudiate war and pursue peace. Yet the Kantian project of achieving perpetual peace among states seems (at best) an unfulfilled hope. The wider category of global justice does not fare much better, at least according to most theorists. The modern state is often portrayed as a major obstacle to both peace and global justice. Kantian theories are distinctive insofar as they try to carve out a relatively hopeful role for the state in international affairs, though one that is grounded in an analysis of the state's nature rather than being driven by completely abstract moral considerations. Modern states' authority claims and their exercise of power and sovereignty span a spectrum from the most stringently and explicitly codified—the constitutional level—to the most fluid and turbulent—acts of war. Inter alia, that suggests a specific connection between constitutionalism and just war theory, as both concern the justifiability of state action vis-à-vis individuals as well as states. This book aims to explore that connection through the lens of the relationship between law and (just) war theory from a Kantian perspective.

The various contributions in this book investigate both extremes of the spectrum: national and transnational constitutionalism and acts of war, and their relationship. The key questions considered—directly or indirectly—by all the contributors are the following: what, if any, are the normatively salient differences between states' internal coercion and the external use of force? Is it possible to isolate the constitutional level from other aspects of the state's coercive reach? How could that be done while at the same time guaranteeing a robust conception of human rights and adherence to the rule of law? Likewise, is war an extension of political practice or an alternative to it? New forms and technologies of warfare raise further fundamental questions about due process, individual responsibility, fairness, and broader questions pertaining to justice and the responsibility to protect. From a constitutional perspective, questions concern the justification for state action, the human rights framework, and the question of judicial review and proportionality reasoning in "emergency" contexts. The purpose of the book is to combine political theory on war, philosophy of law, criminal law theory, and constitutionalism

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scholarship in order to provide a new platform for understanding the contemporary law of war through a Kantian prism.

1. War, Peace, and Politics

The main dividing line in current debates on the morality and legality of war is not the one Kant faced. In the eighteenth century, the main debate was between just war and regular war theories.[1] Just war theories were centered on an account of the acceptable reasons for war, and saw war as a mechanism for punishing wrongdoers, that is, those who go to war for the wrong reasons (Ripstein 2021; Frowe and Lazar 2018, 99–145).[2] Regular war theorists saw armed conflict as a dispute resolution mechanism for sovereigns. As Ripstein helps us see, Kant found a third way between those positions. His approach is centered on a novel understanding of the status of states, and puts the achievement of peace at the center of the picture: war is only permissible to enforce a prohibition against resolving disputes by force, and the conduct of war must be compatible with the possibility of a future peace. So Kant's view is that there are no just causes for war per se, since war is only admissible when it is the only way to secure peace, through hindrance of force in self-defense.

This view is of continuing relevance in the twenty-first century, even though the main dividing line is now between two wings of the just war tradition: traditionalists and revisionists (Ripstein manuscript; Benbaji and Statman 2019).[3] The former view is associated with Michael Walzer and others, the latter with Jeff McMahan and his followers (McMahan 2009; Frowe 2014). The basic assumption of traditionalist just war theory is that combatants should only be held responsible for whether they fight justly, that is, in accordance with the requirements of jus in bello, irrespectively of whether the war itself is just. According to Walzer, war has no equivalent in peacetime. It is an extreme situation, and needs to be understood in that context (Walzer 1977; Benbaji and Statman 2019; Noorda 2016; Bazargan and Rickless 2017). For Walzer the moral norms governing the initiation and conduct of war should be responsive to states' sovereignty, which inter alia gives special status to all state-fielded combatants (Walzer 1977). Revisionists like McMahan question the privileged moral standing of states, with wide-ranging consequences for the permissibility even of defensive war, a blurring of the line between combatants and noncombatants, and a number of other radical consequences, such as a privatization of the ethics of war, where the relevant decisions on whether to use force must be taken by each soldier (McMahan 2009).

Does Kant put forward a distinctive version of (traditionalist) just war theory or a new kind of theory altogether? It is hard to envision an answer to that question that

[1] Arthur Ripstein, *Kant and the Law of War*, forthcoming (Oxford University Press 2021). Referred to as Ripstein 2021.

[2] On the history of just war theory and regular war theory.

[3] Though there is, arguably, a third strand too, namely contractual just war theory, advocated by Yitzhak Benbaji and Daniel Statman. For them the society of states should organize itself in light of a basic aim that its members ought to pursue together, namely the preservation of peace. The legal rules regulating resort to and conduct of war express, in their view, an agreement between the parties on the international level to achieve this largely Kantian aim. See also Benbaji, "A Semi-Kantian Just War Theory," ch. 2 in this volume.

does not descend into a verbal dispute. Nonetheless one of the most striking and insightful aspects of Ripstein's interpretation of Kant on the law of war is indeed that the resulting view may still be seen as a third way between today's prevailing positions, just as it was a third way between just war and traditional war theories in the eighteenth century. That is because, unlike Kant, both traditionalist and revisionist just war theorists focus primarily on morally evaluating harms and wrongs whose nature is determined independently of a full theory of the proper aims of legitimate states. Whereas the Kantian view (as reconstructed by Ripstein) is centered not on pre-political moral commitments, but on preserving states' rightful condition, which in turn is a precondition of the right to independence (Ripstein 2009; Rostbøll 2017).[4] The upshot, as we will see below and as some of the contributions in this book as well as Ripstein's replies make clear, is a view that can countenance the distinctively political standing of states while avoiding the Scylla of giving in to a status quo bias in favor of sovereign prerogative, and the Charybdis of treating conflict among states as analogous to interpersonal disputes.

2. The Centrality of Law

Kant regards peace as the constituent through which everything about war—the grounds for going to war, the conduct of war, and what happens after a war—must be judged (Ripstein 2021: chap. 1). And it is the legal system that governs this. Kant's writings on peace are largely concerned with how the right of nations could be realized through a federation of nations and through a legal framework. For Kant, states have to enter a lawful condition through a universal association of states. As Ripstein explained already in *Force and Freedom*, each state's right against other states is purely defensive: to continue being the rightful condition it is, on its own territory (Ripstein 2009). Kant's solution to the just war theory problem of uniting just cause with the prospects of war has two parts: an account of the distinctively public nature of a state, and an account of peace as an essentially public condition under which disputes can be resolved on their merits (Ripstein 2021). Law is the key to Kant also in a global context, in terms of global institutions and cosmopolitan right, because on the Kantian view, legal institutions are not merely helpful tools in the service of achieving and maintaining peace; they are fundamentally constitutive of what it is to live in peace between nations (cf Kleingeld 2004; Maliks 2014). The same point about law generates Kant's claim in *Perpetual Peace* that no state can rightfully acquire another (Ripstein 2009). Defensive force for Kant is therefore about the political right to independence. In a state of nature each nation can only do what seems good and right to it. For Kant this is a problem as there may be good causes on both sides, which confirms the need for an international non-coercive legal order that secures the prospects of peace (Ripstein 2009).

As law is central to Kant and as war theory is seeking to achieve peace, Kant's war theory is also a constitutional law theory. For example, proportionality is important in

[4] On Kant's deviation from the centrality of pre-political moral commitments.

a Kantian war theory, yet as war is only permissible in self-defense there is no wrong that needs correcting by proportionality in this context. So for Kant the defender does not wrong the aggressor by using necessary but disproportionate force to prevent that wrong (Ripstein 2021: chap. 3). Proportionality is however still relevant to secure a broader condition of peace; as such, it must be committed to de-escalating conflict. Proportionality for Kant is then more of a global mechanism as it concerns questions about stability and the possibility to secure peace by insisting on proportionate action (Ripstein 2021, chap 3 and chap 5). Accordingly, while traditional just war theory is centered on the need for war to have be fought in a just way (jus in bello), it adds proportionality in the jus ad bellum test requiring weighing costs and benefits (Ripstein 2021, ibid). For Kant instead the proportionality assessment is a standard for securing peace. And as Ripstein reminds us, "War is the condition in which might makes right; peace is a condition in which, through the establishment of procedures, right guides might" (Ripstein 2016). So the right procedure is very important—a point taken up by several of the contributors in this book.[5]

As the proper authority for waging war is crucial in a Kantian war theory, there is also a clear constitutional dimension. Constitutional legal questions that are highlighted by a Kantian war theory are, inter alia: How and why can a decision regarding the authority to enter war be challenged? When is self-defense under Article 51 UN allowed? Is preventive force allowed? What is proportionate to secure peace? How does the law of war reconcile with human rights protection and its complicated relationship with international humanitarian law, and what is the impact of criminal law and international criminal law vis-à-vis the discussion of war? Other intriguing questions are multidisciplinary, for example, concerning the links between global justice and the right of war. These questions and other related matters are discussed throughout this book.

3. Structure of the Book

Arthur Ripstein's new book, *Kant and the Law of War*, published with the Tanner Lectures (Oxford University Press 2021), provides a focal point for the emphasis of the present volume. The contributions in this edited volume respond to the manuscript of *Kant and the Law of War* as of June 2018. The book is divided in three parts. The chapters in Part One engage most closely with *Kant and the Law of War*. The chapters in Part Two discuss Kantian theories of war and related questions more broadly. In the third part of the book Arthur Ripstein replies to all contributions.

3.A. Part One

In the first chapter, "A Semi-Kantian Just War Theory," **Yitzhak Benbaji** explores how the Kantian philosophy of the law of war and how it is based on two normative claims.

[5] See, e.g., the chapters by Alon Harel and Malcolm Thorburn.

First, states are independent of each other in virtue of their duty to provide a legal order in a territory which they rule. Second, any use of non-defensive force by a state in a territory which it does not actually rule is illegal. Benbaji shows that there is a deep tension between these claims, and he sets out to offer a contractarian theory of the crime of aggression, which he characterizes as semi-Kantian: states are fully legitimate only if their right to rule over their territory is recognized by all other states. Semi-Kantians argue that Ripstein's Kant misconstrues the standing of states vis-à-vis the territories over which they rule. Taking seriously the disanalogy between a state's (disputable) territorial right and the (indisputable) bodily rights of a natural person, semi-Kantians structure territorial rights as based on two factors. Benbaji argues that a state is entitled to rule over a territory if and only if (first) it secures the private freedom and the political participation of its inhabitants *and* (second) a treaty to which other states voluntarily entered obligates all actors not to use force in resolving future disputes over this territory.

Rainer Forst's chapter, "Might and Right: Ripstein, Kant and the Paradox of Peace," sets out to critically discuss the methodological approach that Ripstein chooses when reconstructing Kant's position and in particular how he defines and relates "constitutive" and "regulative" principles with respect to peace and public right. Forst focuses on what he calls a *paradox of peace*: peace is supposed to avoid, end or overcome war as the practice of might making right; but the principle of peace itself at crucial points seems to require us to accept that might makes right, at least as far as the past is concerned. But can this be reconciled with the principle of right that ought to guide our normative thinking about these matters? If we follow Kant, do we have to accept that the paradox of peace is unavoidable, as Ripstein implies? Specifically, Forst offers a different interpretation of the relevant constitutive principle in the realm of the practical, namely that of freedom, and he invites Ripstein to move beyond Kant in questioning rather than affirming the paradox of peace.

Next, in "Reading Kant's *Rechtslehre*: Some Observations on Ripstein's *Kant and the Law of War*," **Thomas Mertens** puts forward a semantic observation which he claims reflects not only Ripstein's Kantminterpretation, but also his own perspective as a long-term reader of Kant. Mertens observes that Kantian scholarship has become to a large extent an Anglo-Saxon affair, and Kant is read and interpreted against the background of political and legal problems of that world. History has shown that several readings of Kant are possible and Ripstein provides us with a new, powerful reading of Kant which is indebted to that Anglo-Saxon background. Mertens discusses several intriguing questions, inter alia, Ripstein's interpretation of Kant's view on the law of war is the distinction between the just war tradition and the regular war tradition and Kant's departure from both traditions. This enables Ripstein to carve out what he considers Kant's specific position, which consists in strictly limiting the grounds for a just war to defending the rightful condition of one's state (i.e., national defense as the only legitimate ground for going to war) and in emphasizing and broadly interpreting Kant's view on the law during war (the *ius in bello*). Mertens, however, is unsure that this solves the problem of whether or not Kant subscribes to a right to war.

Anna Stilz, in her chapter on "The Moral Basis of State Independence," takes as her starting point the central claim in Arthur Ripstein's defense of a Kantian approach to war, namely that each state has a right to be independent from the determining choice

of other states. As she explains, Ripstein declares that the state is "sovereign—*sui iuris*" (16). The state's right to independence is the basis for its permission to use force in national defense, and also for *in bello* restrictions that limit the permissible means of waging war to those necessary to stop aggression. But what morally justifies the state's right to independence? And can this right be accounted for on Kantian grounds? Moreover, Stilz argues that according to her Kantian reductivist view, then, independence has two dimensions: a legitimate state must not only "rule on behalf" of its inhabitants (by protecting their *private independence*), it must also reflect the shared will of most cooperators on its territory to establish justice through a particular institutional configuration (thus protecting their *political independence*). Specifically, Stilz focuses on whether the Kantian view, as Ripstein reconstructs it, provides a philosophically satisfying basis for attributing a right to political independence to the state. In the final section, she outlines an alternative reading of Kant that may provide a more compelling moral foundation for this right.

Thereafter, **Peter Niesen**'s "Vulnerability, Space, Communication: Three Conditions of Adequacy for Cosmopolitan Right" argues that according to the Kantian completeness assumption, not only do we face a major unresolved systematic issue—all exercise of cosmopolitan right takes place in a state of nature between states and foreigners: a highly structured state of nature, to be sure, but a state of nature nonetheless—but we have too few options for fulfilling the conditions of explanatory adequacy. Niesen points out that in *Kant and the Law of War* no space is reserved for leaving normative issues undecided, to be resolved through politics and through additional, positive global institutions. This is why Niesen pleads for a fuller, less parsimonious account where Kant's provisional cosmopolitan right is to be completed via a process of institutionalization and lawmaking. He stresses that cosmopolitan lawmaking would have to chime with Kant's overall strategy of contractual, non-coercive international lawmaking, and cosmopolitan institutions would have to reflect international law's binding, yet nonviolent character.

Relatedly, in "Three Models of Territory: Arthur Ripstein on the Territorial Rights of States," **Alice Pinheiro Walla** argues that regardless of whether a legal order has been established over a territory, possession of land *itself* already imposes obligations on persons outside the territory to respect it. She points out that possession of land also imposes on the holders of territory duties that are global in scope. It is therefore not possible to reduce territorial rights to claims of juridical independence in virtue of a state's internal civil condition. The reason is a fundamental asymmetry between forms of private right that involve external objects, including land (*Sachenrecht*), and forms of private right involving only the wills of the parties. Pinheiro Walla argues that Kant recognized this asymmetry in his legal theory. As a result, rights to external objects require a form of consent that can only be achieved under a global rule of law. Therefore, the problem of territory (the fact that possession of land must impose an obligation on all others to respect that territory) is not yet solved in a world of "monadic" public legal orders coexisting in an international state of nature. A state that enforces a public legal order over a specific area solves the problem of consent only in regard to its own citizens. It does not yet solve the problem of possession of land and the obligations it gives rise to in regard to other states and foreign individuals.

Pinheiro Walla states that recognizing this problem does not commit us to adopting a conception of territory as the property of states, as Ripstein seems to conclude.

Subsequently, **Alon Harel** in his contribution, "A Kantian Defense of Remedial Wars," discusses how Ripstein differentiates among three types of wars: self-defense, remedial, and punitive. Harel then argues that Ripstein's reasons for rejecting a right to remedial wars fail. The underlying Kantian principles guiding Ripstein's own account dictate that remedial wars are permissible. There are very powerful consequentialist, intuitionist, and conventionalist arguments against recognizing a right to remedial wars. But the logic provided by Ripstein's account of Kant cannot justify the prohibition on such wars. Precisely as the right to conduct defensive wars follows inevitably from our understanding of states as independent of each other, the right to conduct remedial wars follows from this very same principle. Harel argues that punitive and remedial wars are fundamentally different and that while Ripstein's counterargument addresses successfully the case of punitive wars, it fails to address the case of remedial wars. Key to Harel's claim is that those two cases should be discussed separately and that the case for a right to remedial wars is much stronger than the case for a right to punitive wars.

Relatedly, **Massimo Renzo**, in his chapter on "National Defense and the Value of Independence" focuses on Ripstein's treatment of wars of national defense. Renzo points out that attempts by some of the most prominent philosophers working within this paradigm have either concluded that wars of national defense are impermissible,[4] or that they are permissible only in a restricted number of circumstances. If they are right, and if Ripstein's account does a better job in dealing with these cases, that would be a reason to favor the Kantian approach over the traditional just war model (assuming that we are reluctant to abandon the verdict of common-sense morality and international law on this issue). However, Renzo argues that neither of these claims is correct. He argues that Ripstein's view ultimately lacks the resources to justify a right to wage wars of national defense, and contemporary just war theorists are wrong in believing that their approach can at best ground a weak version of such right. According to Renzo this gives us some reason to prefer the just war approach over the Kantian one championed by Ripstein, as the former provides a suitably robust account of the right to wage wars of national defense, in the sense that the right is not conditional on further vital interests being threatened.

3.B. Part Two

In her contribution "Exactitude and Indemonstrability in Kant's *Doctrine of Right*," **Katrin Flikschuh** states that while the *Doctrine of Right* is often seen as Kant's contribution to legal theory, it is primarily a work in political philosophy. Flikschuh argues for a reading of the *Doctrine of Right* as a work that includes a concern with law but is not confined to that concern alone. She claims, however, that the state is a less comprehensive idea for Kant than it is for some of his immediate predecessors and successors on the one hand, and for most contemporary political philosophers on the other hand. Flikschuh emphasizes that the *Doctrine of Right* thus has a remit that is

both wider than the philosophy of law and narrower than more comprehensive conceptions of political philosophy: it is concerned with the idea of the state and, correspondingly, with right as a distinctly associative political morality, but it is also the companion piece to the *Doctrine of Virtue*, which means that not everything of moral significance falls within the domain of law or that of political morality more generally. In her chapter she sets out to explain why this is the case.

In his "The Right to Wage Private Wars of Subsistence: Its Nature, Gounds, and Place in Revisionist Just War Theories," **Johan Olsthoorn** explores the controversial question of wars undertaken in defense of human rights to subsistence. Olsthoorn critically contrasts two ways to ground rights to wage so-called "subsistence wars": via "modern" duties of global justice and via "old" rights of necessity. He explains that Cécile Fabre and other revisionists have argued that subjection to extreme deprivation can in principle give the severely deprived a just cause for waging defensive subsistence wars against those flouting their duties of global justice. Therefore this traditional right of necessity makes for a rival ground for legitimate subsistence wars. Olsthoorn then proposes to conceptualize "rights to wage private wars in defence of basic rights" in terms of "remedial rights." His main contention is that which remedial rights persons acquire will depend on the nature and content of the first-order deontic notion whose violation or nonfulfillment generates the remedial right.

Next, in his chapter on "Between Wormholes and Blackholes: A Kantian (Ripsteinian) Account of Human Rights in War," **Aravind Ganesh** sets out to explore the question of how human rights can be safeguarded in war, against the background of a conception of law as an instrument for attaining moral ends. On this basis, Ganesh shows how the moral approach in line of a of cases finds human rights obligations to obtain despite the obligor state having little to no capacity to enforce its writ, due either to the territory being embroiled in an active civil war or under the control of another state. Subsequently, Ganesh introduces Kant's conception of rights and war, the hallmark of which lies in law being logically prior to morality. This results in a conception of "human rights" as possible only where there are political institutions capable of enforcing law, and a conception of war as a condition where there are no rights at all. Ganesh then argues that individuals may nevertheless make claims of human rights in time of war. Where an applicant can make out even a risible claim that a defendant state has held itself out as an authority over it, that state may not be heard to deny the concomitant obligations of human rights. Ganesh argues that the limit is reached, however, when the facts alleged by the applicant are *utterly* barbaric, disclosing not even a scintilla of the possibility of a rightful condition. In such situations, the applicant becomes a bare life: her inability to state a cause of action means that she can, in effect, never have any causes of action.

On the related theme of war crimes, **Malcolm Thorburn** in his chapter on "Kant and the Criminal Law of War," focuses on Ripstein's account of a doctrine that has caused a great deal of trouble to moral philosophers of law over the years: the equal criminal immunity of combatants. This is the doctrine according to which soldiers are held immune from criminal prosecution for their war-making activities irrespective of whether they fought for a just cause (defending their country) or as part of their country's unjustified aggression. This is probably the best example of a doctrine that appears to most moral philosophers to be either totally repugnant or else explicable

only as a sort of depressing concession to reality. Thorburn sets out the contours of the Kantian approach to the morality of law, which begins with the relationship of public authority and only later proceeds to the evaluation of how that authority has been exercised. He then considers Ripstein's application of that approach to the legal equality of combatants in war. Although Ripstein's account suggests a comprehensive justification of the doctrine of equal criminal immunity, Thorburn shows that Ripstein's chapter does not spell this out fully, though he outlines a way in which Ripstein can do so. Thorburn concludes with reflections on the vision of international relations and of individual responsibility reflected in Ripstein's Kantian account and where he draws some lessons for his own field of study, criminal law theory.

Thereafter, **Ester Herlin-Karnell**, in her chapter on "EU Solidarity as Collective Self-Defense?: Constitutionalism and the Public Uses of Force" sets out to explore the notion of self-defense and how it is manifested in contemporary law of war. She links this debate to Ripstein's *Kant and the Law of War* by using the European Union (EU) as a test case. The chapter focuses on the imminence criteria for deciding on self-defense, and to the extent to which Kant completely ruled out any preventive use of force. Moreover, the EU's fight against terrorism and security regulation in general have many parallels with the "war" model and security enforcement practices and preventive justice model, so the chapter discusses the EU security context and its similarities to war. In doing so Herlin-Karnell compares just war theory to the extensive security regulation framework within the EU, and the chapter addresses some pertinent constitutional questions such as the EU solidarity and mutual assistance clauses in the context of collective self-defense and the rule of law.

Also related to the EU is the final chapter by **Bertjan Wolthuis** and **Luigi Corrias**, "Europe's Cosmopolitan Union: A Kantian Reading of the EU Internal Market Law and the Refugee Crisis." Wolthuis and Corrias argue that the EU is a union of cosmopolitan law, in Kant's sense of cosmopolitan law, with EU internal market law as presumably the most extensive system of positive cosmopolitan law in history. They argue that the EU should be viewed as a cosmopolitan union. They ask whether EU law, understood as positive cosmopolitan law, can be qualified as an extension of the legal condition, and whether it can be viewed as consistent with the other two parts of public law, especially with the freedom of EU member states which also depend on the possible connection to global, much less extensive, systems of positive cosmopolitan law such as migration law. Wolthuis and Corrias argue, inter alia, that the crucial question is whether EU migration law is consistent with universal cosmopolitan law, and that the answer is dependent on two major lines of thought, both constitutive of the Kantian framework. The first submits that every individual ought to reside within a state of law: every person is a member of a legal order. The second says that legal orders ought to respect each other's independence, which they explain more fully in their chapter.

3.C. Part Three

In the final part of the book, Arthur Ripstein in his "From Constitutionalism to War—and Back Again: A Reply" offers a response and close commentary of all the chapters. For Kant war is a mechanism that can be used only to securing peace and law

and constitutionalism in this regard are essential in securing that order. Therefore, the public uses of coercion and force arrive with constitutionalism to war and back again.

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