

Kutz, Christopher. *On War and Democracy*. Princeton: Princeton University Press, 2016. Pp.344. \$39.95 (cloth).

According to a common taxonomy, approaches to political philosophy can be placed on a spectrum. One extreme treats political philosophy as simply a branch of applied ethics, in which political principles follow directly from applying norms of interpersonal morality. The other views political philosophy as morally autonomous, its principles justified directly by the special circumstances of political activity.

While the overwhelming majority of contemporary work on the ethics of war sits firmly in the former camp, Christopher Kutz's *On War and Democracy* offers a rich and deeply interesting treatment of war that takes the opposing perspective very seriously. Though each of the twelve essays collected (three previously unpublished) focuses on a particular practical issue, Kutz's overarching project is to evaluate the use of force from the distinctive point of view of democratic political values; how should conscientious individuals, *qua* democrats, think and argue about war?

Kutz's approach not only sets him apart from mainstream war ethicists, but also democratic theorists, in two respects. Firstly, he takes a deliberately broad view of democracy, which treats majoritarian voting and formalized institutions as neither necessary nor sufficient for genuinely democratic activity. Instead, Kutz locates the underlying value of these practice in the exercise of collective agency guided by a shared democratic ethos or self-understanding. As he puts it, "The crucial component of democracy, on my view, is a matter of our mutual orientation in collective action: how individuals conceive of their actions in relation to each other, and in relation to a broader set of goal involving building or defending open political institutions." (4) This broad conception – which Kutz terms *agentic* democracy – brings a range questions into the remit of democratic theory that are usually rather peripheral, including the ethics of harming and killing. On Kutz's view, the soldier or revolutionary is no less evaluable under democratic ideals than the voter or statesmen, since "popular will can manifest itself in violence as well as in its polls." (7)

Secondly, Kutz is keen to resist the temptation to treat democracy as an unalloyed good or a panacea for all societal maladies. While democratic governance may embody great value, Kutz emphasizes its susceptibility to pathology. These are particularly acute in the domains of national security and war, in which a mix of populism, fear and righteousness can lead to moral catastrophe. A central idea running throughout the book is that these disasters are not simply bad or regrettable, but inconsistent with democratic ideals. For Kutz, responding to democracy's value requires recognizing the *limits* it imposes on action. Properly understood, "democratic values should be seen as constraints on both the forms and the ends of collective violence, not as a new source of war's legitimacy." (8)

The majority of the essays focus on uncovering the shape of these limits in specific contexts. Following a substantive introduction, 'Democratic Security' challenges the common tendency to tightly link human security with democratic institutions, pointing out that "democratic processes are consistent with a great deal of mischief" (26). In particular, Kutz argues that putting too much emphasis on popular sovereignty, at the expense of other values, undermines the ability of international law to constrain state behavior in desirable ways. This theme is also explored in 'Democracy and the Death of Norms', in which Kutz charts the recent erosion of the legal and moral norms against torture and targeted killing, and argues that certain values need to be institutionally insulated from the influence of panicked electorates and opportunistic politicians. The vices of political leaders are explored in more detail in 'Leaders and the Gambles of War'. Kutz provides an extremely helpful discussion of Nagel's and Williams's notoriously tricky accounts of moral luck, and argues that the notion of *ex post* moral evaluation is particularly seductive and dangerous in the political realm.

Two essays focus directly on the ethics of targeted killing and torture. In ‘Drones, Democracy, and the Future of War’ Kutz argues that the use of drones “itself targets democratic life” (198), both in states deploying drones and in communities subject to drone strikes. ‘Must a Democracy Be Ruthless’ presents a devastating critique of the legal and political reasoning underpinning the infamous ‘Torture Memo’ issued by the US Department of Justice Office of Legal Counsel in 2002.

My personal highlight of the collection – ‘War, Democracy and Publicity’ – considers a more abstract objection to these practices, which focuses on how they became part of US foreign policy via concealed *de facto* legislation, such as the Torture Memo. To draw out the distinctive moral problem posed by secret law, Kutz provides a rich and highly plausible account of the value of publicity. On Kutz’s view, the purpose of law is not simply to guide and coordinate action, but to enable an otherwise-diverse population to articulate the shared norms and values that constitute their identities as co-citizens. Concealed law is incompatible with this aim. When secret law is unmasked, we discover, quite literally, that we are not the people we thought ourselves to be.

In ‘Humanitarian Intervention and the New Democratic Holy Wars’, Kutz considers democratic constraints on the *ends* of violence, as opposed to its means, focusing on the justification of intervention in other states. Against the doctrine of ‘liberal intervention’ to promote democracy abroad, Kutz appeals to the importance of respecting collective agency to justify limiting intervention to remedying grave human rights abuses. Related questions are pursued in ‘Democratic States in Victory’, regarding the rights of democratic states to reform other states’ institutions after defeating them in war.

The concluding essay – ‘Looking Backward’ – also raises fascinating *post bellum* questions. Here Kutz tackles the issue of reparations after regime change, focusing on whether victims of property expropriation under communist regimes in Europe have claims to restitution from the democratic states that replaced them. Kutz answers in the negative (with an important exception regarding cultural property), on the ground that political experimentation with systems of property rights falls within the bounds of legitimate state action (even states that are imperfect in many other respects). Losses arising from legitimate experimentation generate no claims for compensation, in (roughly) the same way that losses arising from ‘reasonable’ risk-imposing activities typically generate no claims for compensation in tort law.

A pair of essays stand slightly apart from the others in focusing on *permissions* to use force, rather than constraints. More specifically, they defend the legal orthodoxy that combatants in war enjoy immunity for committing homicide (provided they target only combatants) even if they kill in wars that are unjustified and illegal. As many have pointed out, this seems very odd. We usually treat the permission to use violence as tightly constrained by the permissibility of its ends, yet in war this apparently does not apply. While one common strategy justifies this immunity instrumentally, in terms of the overall harm-reduction it incentivizes, Kutz seeks to provide more principled foundations. In ‘A Modest Case of Symmetry’ he argues that since the *ad bellum* justice of wars is highly uncertain and indeterminate, the conditions for justified sanctioning of ordinary soldiers who fight in unjust wars will almost never be met. ‘Citizens and Soldiers’, on the other hand, contains a more ambitious defense; one grounded in the morally transformative effect of collective political action. On Kutz’s view, the fact that violence in war involves combatants acting *together*, as co-citizens pursuing political (though sometimes unjust) aims, fundamentally alters the way in which each can be held accountable for that violence. This makes it inappropriate to hold combatants individually responsible for unjust killings. As he puts it, “the logic of collective action can make appropriate a limited scope for an essentially *political permission* to do violence, because when I do violence, I do it as a member of one group towards another.” (56)

Kutz then applies this account of combatant immunity to the contemporary problem of ‘irregular’ belligerents, and aims to show how it can be non-arbitrarily restricted to members of certain kinds of armed groups and not others.

Though very much a philosophical work, *On War and Democracy* displays a hugely impressive engagement with law, political science, and history, as well as a heartfelt concern with real-world affairs. I learnt a great deal from thinking about, and engaging with, the ideas and arguments he presents, even if I am not entirely convinced by some of Kutz’s specific proposals

My first disagreement relates to Kutz’s attempt to ground combatant immunity on facts about collective political agency (sketched above). The worry is that if this move succeeds in “rendering impunable what would otherwise be infamous crimes” (43) it risks rendering impunable what surely *are* infamous crimes, such as deliberately targeting non-combatants. For if the privilege enjoyed by unjust combatants to kill their just opponents – who Kutz acknowledges have done nothing to lose their normal right not to be killed (56) – rests on whether the killing manifests a certain kind of collective agency, then why isn’t the targeting of civilians – who have also done nothing to lose their right not to be killed – not also sanitized by the same agentic considerations?

To bring this out, consider the following example: State A is waging an unjust war of acquisition against State B. It can achieve its aims in either of two ways. Firstly, it can target State B’s armed defenders, thereby killing 5,000 combatants. Secondly, it can bomb the factory workers, civil servants, and finance professionals whose activities are necessary for State B’s military defense. If it does so, it will kill 4,000 civilians. Under the orthodox norms of war, State A’s combatants would be immune from sanction for participating in the first strategy, but liable to punishment for the second. It is not clear how Kutz’s view can account for this difference, since there is no reason to think that immunity-grounding collective agency is any less manifest in the second strategy than the first. Moreover, the second involves significantly less unjust killing.

Kutz does consider some limits to his ‘political permission’ to kill, in the context of combatants who are rendered *hors de combat* due to injury or capture (48-49). Killing these combatants falls outside of the scope of the permission, for two reasons. First, the killing does not further the war against the enemy state. Second, by disarming and isolating the combatant from her state, the collective aspect of her identity is destroyed. However, neither of these limiting factors seems to apply in the example of targeting non-combatants I described above. In that case, targeting civilians certainly contributes towards winning the war (and does so at a lesser human cost). Moreover, the civilians have not been isolated from the collective agency of their state. Indeed, they may be performing their functions out of fidelity to their role within a collective political plan (if their industries are nationalized for the sake of the war effort, for example.) I thus remain skeptical that Kutz’s sophisticated defense of combatant immunity has the resources to avoid undermining the most intuitive constraints on conduct in war.

A second source of disagreement concerns Kutz’s objections to interrogational torture. Kutz argues persuasively that criminal law justifications of self-defense and necessity (as appealed to by the authors of the Torture Memo) fail to justify anything approaching a *policy* of torture. But he also aims to show, more strongly, that appeals to necessity and the greater good fail, as a matter of basic morality, to justify torture, even under idealized one-off circumstances such as the notorious ‘Ticking Bomb’ example (in which it is stipulated that the only way to prevent scores of innocents from being killed by a hidden bomb is to torture a terrorist into revealing its location.) For Kutz, this is because it is essential to the nature of a rights claim that it is insensitive to being outweighed by competing welfarist considerations, such as the harms that could be averted by transgressing a right.

One initial worry is that justifications for torture need not require overriding a right. Mainstream accounts of defensive harm typically hold that individuals can *forfeit* their right not to be killed if certain conditions are met (for example, if they are culpably responsible for the existence of threats of serious harm to innocents, and killing them is necessary to prevent those threats from completing.) If, under these conditions, individuals can lose their right not to be killed, and if some forms of torture are no worse than death, then it is *prima facie* plausible that individuals can also lose their right not to be tortured. If so, then the permissibility of torture in Ticking Bomb cases need not be inconsistent with an absolutist conception of rights as non-overridable.

A further problem, which Kutz considers in some detail, is that the extremity of rights absolutism seems to leave it open to counter-examples. Consider Joel Feinberg's famous case of the hiker lost in a storm, who breaks into a cabin and burns furniture in order to avoid freezing to death. Surely the hiker is justified in transgressing the cabin owner's rights? In response, Kutz makes an ingenious proposal. He argues that purported counter-examples rest on a failure to distinguish between 'institutional' and 'pre-institutional' rights. Institutional rights are justified instrumentally, in terms of the goods achieved by a convention recognizing such rights. Property rights are the paradigm example. Kutz accepts that institutional rights *can* on occasion be overridden by considerations of the greater good, given their instrumental status. In fact, we should not think of these as full-blown rights at all, but mere "pseudo rights" (142). By contrast, pre-institutional rights (including the right not to be tortured) are not justified by appeal to some further goal. Rather, they reflect the non-instrumental value, or dignity, of persons as such. Accordingly, argues Kutz, these rights are not susceptible to being overridden.

This restriction of absolutism to pre-institutional rights renders the view more palatable, since it can deal with cases such as the hiker. The problem, however, is that the intuitive permissibility of transgressing rights for sake of the (much) greater good persists across the institutional/pre-institutional divide. Consider a variation on the hiker case, in which the lost hiker can make it to higher ground and safety, but only by pulling an innocent child's hair in order to pull himself up a steep incline. Again, the hiker seems clearly justified in doing so, but the right he transgresses is pre-institutional. Moreover, as Kutz himself points out (145-146), waging war typically involves collaterally killing and maiming innocent persons. If pre-institutional rights cannot justifiably be overridden, pacifism seems the inevitable conclusion. Interestingly, Kutz doesn't think this follows, but his reasons are rather unclear. He appears to rely on the idea that war is a morally autonomous zone, such that the "peacetime right against homicide" (146) does not have the same force. But this seems unsatisfyingly *ad hoc*. Moreover, it not clear how this helps Kutz's cause. For if the special circumstances of war reduce the force of the right against homicide, why not the right against torture too? I am therefore unconvinced by Kutz's case for an absolute moral prohibition on torture (though I agree an exceptionless legal prohibition may well be justified). If there is such a prohibition, it is more plausibly justified by the specific human interests protected by a right against torture, and not by the right's membership in a more general class of pre-institutional rights.

Despite these disagreements, let me close by again emphasizing how much I profited from reading this highly original, wide-ranging, and deeply humane book.

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