

Law and Morality at War

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Abstract Through a critical engagement with Jeremy Waldron's work, as well as the work of other writers, I offer an account of the relative scope of the morality of war, the laws of war, and war crimes. I propose an instrumentalist account of the laws of war, according to which the laws of war should help soldiers conform to the morality of war. The instrumentalist account supports Waldron's conclusion that the laws of war justifiably prohibit attacks on civilians even if it turns out that some civilians lack a moral right not to be killed. Importantly, the instrumentalist account also offers what Waldron thinks impossible: a non-consequentialist defense of the failure of the laws of war to prohibit the killing of nonthreatening combatants. Finally, I argue that new war crimes can be broader than the morality of war as well as established laws of war and that many of the arguments for defining war crimes more narrowly than either the morality of war or the laws of war are unconvincing. In all of these ways, I hope to carry forward Waldron's project of exploring the relationship between law and morality in war.

Keywords Law of war · Morality of war · War crime · Killing · Letting die · Jeremy Waldron

Jeremy Waldron's essay 'Civilians, Terrorism, and Deadly Serious Conventions' begins with a simple question: to what extent does the moral force of the legal rule against intentionally attacking civilians in war derive from the rule's status as a (legal) convention? Waldron's essay appears to end with a simple answer: hardly at all. It is wrong to intentionally attack civilians in war because it is wrong (indeed, it is murder) to intentionally kill other human beings. Murder, in turn, is *malum in se*, morally wrong prior to and independently of any legal rule or convention. Interestingly, Waldron also writes that if there is any moral force in the legal rule against intentionally attacking civilians then it lies not in what the rule prohibits but in what the rule does not prohibit: intentionally attacking combatants. If the law defines combatant status such that some combatants retain their

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