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Recommended Citation

Hendrix, Burke (2006) "Defending Non-Combatants: A Reply to Richard Arneson," *Cornell International Law Journal*: Vol. 39: Iss. 3, Article 12.

Available at: <http://scholarship.law.cornell.edu/cilj/vol39/iss3/12>

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Defending Non-Combatants: A Reply to Richard Arneson

Burke Hendrix†

Comment on Richard Arneson's *Just Warfare Theory and Noncombatant Immunity*

Richard Arneson has raised a challenge to the basic division in traditional just war theory between combatants and non-combatants, arguing that in many cases culpable *non-combatants* should be preferred as targets to morally innocent combatants. He calls the basic principle at work *Fault Forfeits First*—when someone has to be killed in warfare, it is appropriate that persons who are morally culpable for the conflict be killed before those who are not. Thus, civilians can often be legitimate targets, either because they are relatively more morally culpable than the soldiers fighting on their side or simply because they are an easier and more effective target in a particular case. In making this kind of argument, Professor Arneson joins Jeff McMahan and some others who have been challenging the traditional distinction between combatants and non-combatants and many of the conclusions of just war theory derived therefrom.

I want to argue that these kinds of revisions of traditional just war theory are generally misguided because they fail to take sufficient account of the difficulties of using the theory in practical terms, and the real-world limitations that face all of us in deciding how to act in complex circumstances. Professor Arneson concedes, of course, that it may be reasonable to uphold the traditional division between combatants and non-combatants as a matter of international law or publicly-promulgated moral standards, since doing so may produce the best social consequences over the long term. But he argues that these expectations about social consequences should not blind us to the fundamental difficulties the distinction faces when investigated on its own terms and within its own logic.

I believe Professor Arneson underestimates the degree to which all moral principles take their value from the kinds of purposes for which they must be used. In practical terms, morality is supposed to guide judgment, and it can only do that if we know what general classes of decisions we are likely to face. While Professor Arneson cannot escape this sort of limit, he believes that we must at least begin from a more abstracted position than

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just war theorists usually do and work toward more legalistic or publicly-usable principles in stages because doing so may sometimes expose surprising exceptions to principles that seem fixed to us. I will argue that pushing matters into *higher* levels of abstraction than Professor Arneson prefers to do actually undermines his argument in fundamental ways and shows the degree to which all moral theories must be structured at appropriate levels for their social purposes. In doing this, I will try to uncover the dangers of the particular kinds of hypothetical cases that Professor Arneson seeks to use in eroding the boundary between combatants and non-combatants.

In traditional just war theory, combatants can be killed because they are materially and causally involved in attempts to kill others, and not because of their purported moral culpability. On traditional just war standards, the opposing party's involvement in the war effort—not his evil character—makes him a legitimate target. On Professor Arneson's revised standard, relative moral culpability is what matters instead. Professor Arneson's central principle is that Fault Forfeits First—whenever someone must be killed, it is always better that it be the morally culpable person rather than the morally non-culpable one, whether that person is actively involved in war-making or not.

Professor Arneson gives us a number of cases in trying to persuade us of the plausibility of his position. I want to consider in particular the cases he outlines involving bystanders—people who would generally not be legitimate targets in traditional just war theory. Professor Arneson asks us to imagine ourselves in three hypothetical cases in which we are driving up a narrow mountain road, while a person called Evil Aggressor is bearing down upon us in a heavily armored vehicle with the intention of killing us. Because of our circumstances, we are incapable of harming Evil Aggressor, who is causally responsible for the danger to us—we can only choose either to engage him in car-to-armored-vehicle combat knowing that we will die, or to swerve off the road in the only spot available for doing so, and thereby kill a bystander who is in no way causally related to the harm we face. In ordinary just war theory, self-defense does not justify the killing of a causally uninvolved person even to save one's own life—soldiers can only target soldiers and not civilians, even if they know that they will die as a result of this limitation. Professor Arneson wants to convince us that it would be right to kill the bystander in saving ourselves if the bystander is morally culpable in some way. I agree with his judgments as the cases are framed, but I believe that this framing is radically incomplete.

Professor Arneson gives us three possibilities for what the bystander alongside the road might be doing as Evil Aggressor bears down upon us. In each case, the bystander is not an Innocent Bystander but rather a Guilty Bystander who is to some degree or another culpable. In the first example, Guilty Bystander is excited to see Evil Aggressor kill us and is trying to contribute materially to our demise by throwing snowballs at our car. Since his attempts are so pathetically ineffectual, however, he is not really any sort of causal threat, and not someone who we could legitimately kill

to preserve our own lives under traditional just war theory. In the second case, he does not attempt to causally contribute, but he really wishes that he could do so—perhaps his arm is broken, which prevents even what would be his ineffectual attempts at throwing snowballs. The third case is the most striking, and indeed the most revealing of Professor Arneson's revised theory—in this case, Guilty Bystander is not actually *doing* anything, or even *wishing* he could do something—instead, he is simply excited to see our death, either because he is a fan of Evil Aggressor or because he thinks it will be entertaining to watch. In this case, Professor Arneson argues that the evil desires of the Guilty Bystander are sufficient to render him liable to harm under the principle he has described as Fault Forfeits First—the bystander is culpable in his attitudes, and culpable people should always be killed before non-culpable people. For that reason, we can run him over to preserve our own lives without compunction—perhaps he did not “have it coming,” but he at least had it coming more than we did.

But here we need to ask some more questions about who Guilty Bystander really is. Under Professor Arneson's hypothetical, we can see that Guilty Bystander is culpable *in this case, at this moment*, and that the person who would otherwise have to die has done nothing wrong, *at this particular moment*. Professor Arneson also acknowledges, however, that it matters what people might have done in the past to create a contemporary danger—culpability is more than simply a matter of the present moment. But if the past matters in important ways, suddenly we need to ask another set of questions. What should we say if Guilty Bystander, although exulting in our impending death today, has actually been an exemplary person for most of his life? Let us assume, for example, that he has been extremely generous towards others, works exceptionally hard to fulfill his duties as a husband and father, and works for a very low wage in trying to prevent animal cruelty. His approval of our impending death in this instance is admittedly out of character, but all of us have our occasional failings and hypocrisies, many of them severe. Is it still so obvious that he is a legitimate target to be killed? At least to me, it no longer is.

But let us thicken our hypothetical case a bit further, and ask another set of questions about who the *driver* might really be. Let us assume that yesterday, in totally different circumstances, our present driver was an Evil Aggressor. Professor Arneson, in holding that culpability matters only in regard to the *particular situation, narrowly construed*, seems committed to the position that this fact about our driver's recent past cannot make a difference in the present case. But surely this is wrong, as becomes especially clear when we make our driver far more culpable—suppose, for example, that yesterday he killed an entire family in cold blood, simply for the entertainment value of doing so. If we consider culpability only for the particular circumstances of Evil Aggressor, Guilty Bystander, and the driver, we will have to say that Guilty Bystander should be killed rather than the driver, because the driver's culpability is unrelated to present circumstances. On any compelling understanding of Fault Forfeits First, however, this simply will not do—what matters when we are judging rela-

tive culpability is not simply the present moment narrowly construed, but the overall degree of aggregated culpability by those involved on each side.

Notice that this aggregation of culpability is not a form of consequentialism, since it does not ask which person is of more value to society—it asks instead what kind of intentions an individual has had over the course of his or her lifetime. Moreover, Professor Arneson seems right in holding that we cannot simply consider directly harmful acts committed by each party. Culpability as such is a function of our will towards others and not of our actual ability to harm them. But if this is true, it seems to pose some daunting difficulties for *Fault Forfeits First*—how will we ever have the necessary knowledge to evaluate the lives of each person involved?

Moreover, it would not be easy to make these comparisons in any satisfying way even if we had full information about each person's acts and intentions over the course of his or her life. Even with such information, we would still need to know how to go about weighing and balancing all of the disparate acts and intentions involved. Can, for example, virtuous and selfless acts offset evil intentions? Is a one-time desire for murder inherently worse than a long, drawn-out set of lesser offenses? Are bad intentions fully negated by subsequent contrition, or not at all? Does a victim's forgiveness dissolve culpability or leave it fully intact? I am not sure how to give definitive answers to these questions, but in practical terms, we have to find midrange solutions for dealing with the uncertain culpability and character of others.

Some readers will probably want to object that I have simply changed Professor Arneson's hypothetical cases in illegitimate ways by adding in information about the previous lives of our Guilty Bystander and driver, so that we are now arguing about something entirely different than what he had in mind. Clearly, I have added a great deal to his original case, but is any of it an illegitimate alteration? We should be extremely wary of drawing lessons from hypotheticals that cannot bear additional information without fracturing. If *Fault Forfeits First* is to be a principle with real use, it will have to be viable outside of an extremely sheltered environment in which our horizons of culpability are artificially confined to one small moment in time, with all other information defined away as irrelevant. Once we remove the artificial framework of culpability for a particular circumstance narrowly construed, it is no longer obvious that civilians who supported an unjust war must be more culpable on balance than those who opposed the war, or those who are resisting the unjust war from the other side.

Why, then, do Professor Arneson's hypothetical cases seem enticing in the first place? It is because we have learned from criminal law to believe that culpability should be judged in regard to particular acts narrowly construed. In criminal law, we only make judgments about what people have done in specific instances because these are the kinds of acts that we can recognize, that others can recognize, and that we can hope to deter through punishment. But we should also remember that where the criminal law is concerned, we have special procedures for attempting to discover the facts

of the matter—we do not simply act on our impressions about a particular person but rather spend a great deal of time and energy in determining guilt or innocence. And despite these procedures, the criminal law remains an imperfect midrange solution for the problem of human wrongdoing—it does not ensure that only evil people will be punished, or that all culpable people will receive what they deserve.

Given these acknowledged limits, it seems both implausible and dangerous to convert a legal idea of culpability for specific, narrowly-defined acts into a theoretical tool intended to evaluate the principles for combatants in a just war, as Professor Arneson's hypothetical cases encourage us to do. Once we escape these implausibly narrowed horizons, we cannot immediately conclude that someone who is culpable for supporting a particular unjust war is in fact a more legitimate target. Those who support an unjust war are without doubt culpable in this *particular* regard, but this does not necessarily make them on balance responsible for more evil in the world than someone who opposed this particular war, or a civilian within the country being attacked.

This should be particularly clear when we consider the centrally important question of how groups of people in the real world fall into wars. Even if most wars are unjust, most believe that their individual cause is legitimate. Sometimes we can write such beliefs off as egregious forms of self-delusion or ignorance, but it seems both uncharitable to the burdens of judgment faced by others and factually incorrect to believe that most persons do not generally have more worthy motivations. People who support a war will often be scared for themselves, their loved ones, and their way of life; they will believe that they are rescuing people in need; they will believe that the other party is motivated only by evil; they may even believe that God desires their involvement. In other words, they will be flawed human beings with complex motivations, whose culpability in this particular case will often be embedded in a much larger web of non-culpable or even morally desirable social practices that have helped to produce this particular war. To decide who is culpable for more wrongdoing on the whole, we must look beyond particular instances in time and evaluate the whole of an individual's existence, which is by no means a straightforward task.

Once we have somehow carried out these full evaluations, it may turn out that those who are supporting the unjust war still remain relatively more culpable, or we may find that there are a larger number of culpable people on the side resisting the unjust war. What we are more likely to discover, however, is that both populations are more or less the same - a few people who have been severely malign in their actions and intentions, alongside many who have more inconsistent motivations, and with a few true saints thrown in for good measure. Seen in this light, it seems to make more sense to try to find some more plausible and useful standard than culpability for deciding who is a legitimate target in warfare—something more obvious and easily recognized, something that can be used by real moral actors in dangerous and difficult circumstances, when they will have to be able to choose among a number of eligible human targets, and where

they will be too often tempted to attribute evil to those no better or worse than themselves. The division in traditional just war theory between combatants and non-combatants, between those who are contributing materially to the war and those who are not, seems extremely appropriate as it takes seriously the kinds of limitations of knowledge and judgment under which all of us must operate. In other words, the traditional distinction between combatants and non-combatants deserves to be upheld because it is a valuable theory of the middle range, adapted to the purposes to which it must be put.

Before closing, however, I should say that there likely does remain an important role for culpability within the larger contours of just war theory. As I noted above, our familiar view of culpability for particular kinds of limited acts is a legal concept that is fully appropriate for the purposes to which it is put. For the same reason, judgments about culpability for specific acts could have an important role to play in structuring the character of just war theory insofar as it can reasonably aspire to mimic a legal order in offering inducements for the avoidance of particular kinds of behaviors. It thus may be reasonable, *as a matter of social practice*, to portray entire democratic populations as relevantly culpable if they fail to prevent an unjust war. More obviously, it seems to make sense to have a social practice in which we punish people who lead countries into such wars or who commit criminal acts during the war itself. But we should recognize these standards for what they are—imperfect, future-oriented social practices that can only imprecisely distribute rewards and punishments. Indeed, there is a certain irony here—it is not impossible that Professor Arneson's arguments could be given a derivative justification within such a practice, as the set of rules judged to lead to the best outcomes for most people over the long term. But to argue that they are justified at some more foundational level of moral analysis would ultimately be a mistake—judgments about culpability and punishment for particular acts are themselves part of a mid-level moral theory, and not something more fundamental to such a theory. Midlevel theories, in short, are the things we know how to create and, therefore, they deserve our continued respect where they are already working tolerably well. Thus, the traditional distinction between combatants and non-combatants seems to me worth upholding, however enticing the hypothetical cases that would try to persuade us otherwise.