

Equating Innocent Threats and Bystanders

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ABSTRACT *Michael Otsuka claims that it is impermissible to kill innocent threats because doing so is morally equivalent to killing bystanders. I show that Otsuka's argument conflates killing as a means with treating a person herself as a means. The killing of a person can be a means only if that person is instrumental in the threat to Victim's life. A permission to kill a person as a means will not permit killing bystanders. I also defend a permission to kill innocent threats against Otsuka's Trolley Cases. Otsuka depicts a person tied to an oncoming trolley as a bystander. I argue that such characters are threats whom Victim can permissibly kill.*

Introduction

Michael Otsuka argues for the impermissibility of killing innocent threats by defending what he calls the Moral Equivalence Thesis.¹ This thesis holds that innocent, agency-lacking threats are morally indistinguishable from innocent bystanders. Otsuka then appeals to the widespread intuition that killing bystanders is morally impermissible. If this intuition is correct, it must be similarly impermissible to kill innocent threats. Indeed, the killing of innocent threats is said to be analogous to the most reprehensible sort of bystander killing: human-shield-type cases where Victim intentionally makes use of a bystander to save his own life.

I argue that Otsuka is mistaken to claim that killing an innocent threat in self-defence is akin to the worst sort of bystander killing. We can distinguish between *killing* a person as a means to self-preservation, and treating a person *themselves* as a means to self-preservation. Killing an innocent threat constitutes killing as a means, and is less obviously impermissible than treating a person as a means.

Otsuka's argument remains the most influential and compelling defence of the claim that it is impermissible to kill innocent threats. Various recent advocates of this position endorse Otsuka's strategy.² I consider Jeff McMahan's attempt to strengthen Otsuka's account, and show that McMahan is ultimately unsuccessful. Drawing on recent work by Gerald Lang, I suggest that Otsuka's and McMahan's arguments compel us to accept that a permission to kill innocent threats extends to permit the killing of *some* characters usually conceived of as bystanders. However, I reject the suggestion that this extension gives us reason to think it impermissible to kill innocent threats. Rather, it suggests that these characters are not bystanders after all.

I. The Moral Equivalence Thesis

Otsuka defines a bystander as 'someone who does not herself endanger your life and who is not responsible for whatever it is that does endanger your life.'³ By 'not responsible',

Otsuka means that what endangers your life is beyond the bystander's control. The bystander has no agency regarding that which threatens you. Similarly, an innocent threat has no agency over the fact that she is a threat. A paradigmatic innocent threat is depicted in *Ray Gun*:

Ray Gun: Victim is trapped at the bottom of a well. Falling Person has been blown over the edge of the well. Falling Person will land on Victim and crush him to death against the ground unless Victim vaporises Falling Person.⁴

Falling Person is 'someone who is not in control of . . . her body qua endangering object'.⁵

Even though a threat is not, strictly speaking, a Bystander in the technical sense that I have introduced, nor is she literally a bystander to her body, she is a bystander in the morally relevant sense because she is a bystander, qua agent (and hence qua responsible agent) to the endangering movements or presence of that body.⁶

Otsuka sets out his argument as follows.

- (1) It is impermissible to kill a bystander to prevent oneself from being killed.
- (2) The killing of an innocent threat and the killing of an innocent bystander are, other things being equal, on a par as far as permissibility is concerned.
- (3) Therefore, it is impermissible to kill an innocent threat to prevent oneself from being killed.⁷

Before we consider the plausibility of equating threats and bystanders, we need to look at what Otsuka has to say about killing bystanders.

II. Different Types of Killing

(i) *Side-effects and Means*

It is generally accepted that there are limits to what one can permissibly do to protect oneself. Certain ways of killing innocent bystanders are commonly regarded as going beyond what is morally permissible in self-defence.⁸

There are different ways in which one might kill a bystander. A bystander might be killed as a *side-effect* of Victim's saving of his own life. Here, in the course of Victim's protecting himself from a threat, an innocent bystander is killed, but not in a way that is instrumental to Victim's defence. Such a killing is illustrated by *Lethal Gas*.

Lethal Gas: Victim is suffering from a fatal illness. Only by manufacturing a particular gas can Victim save his own life. However, the fumes from the gas will kill Bystander, who is in the next room.⁹

Bystander's death is a by-product of Victim's saving his life. It is a foreseen, but unintended consequence of Victim's manufacturing of the gas.¹⁰

A second way that Victim can kill Bystander is as a *means* to saving Victim's own life, as in *Human Shield*.

Human Shield: A javelin is headed towards Victim. Victim can save his life only by grabbing nearby Bystander, and using Bystander as a

human shield, placing her body between himself and the incoming javelin.

Bystander in *Human Shield* is *instrumental* to Victim's purposes. She is killed not as a regrettable side-effect, but as a means intended to save Victim's own life. Otsuka calls such killings, 'paradigm cases of the morally outrageous'.¹¹

Otsuka thinks it impermissible to kill the bystanders in either *Lethal Gas* or *Human Shield*. But, for reasons that I will examine below, Otsuka also thinks that *Human Shield*-type cases, in which Bystander is killed as a means, are worse than cases in which Bystander is killed as a side-effect. And Otsuka takes the killing of an innocent threat to be a case where a person is killed as a means.

In [*Lethal Gas*], the destruction of a human being is of no use to you . . . But when you vaporize the body of the falling Threat, your killing of an innocent person is a *means* to save your life rather than merely a *foreseen consequence*. Here your vaporization is analogous to the worst type of killing of a Bystander, in which you initiate a lethal sequence of events that will result in the useful destruction of a Bystander . . . The vaporization of the Threat is a means to your end of saving your life, even though the falling Threat is, as I have argued, a bystander, qua agent, to her lethally falling body.¹²

I will argue that at least part of the force of Otsuka's argument rests on a conflation of two types of killing as a means. When we separate these two, distinct, sorts of killing, we can see that Otsuka's equation of killing innocent threats with killing human shields is incorrect.

(ii) *Killing as a Means, and Using as a Means*

Otsuka thinks that what makes *Human Shield* so particularly reprehensible is that Victim *uses* Bystander to defend himself.

The condemnation of *using* a Bystander gains even greater support than the condemnation of running roughshod over a Bystander from the strength of the analogous claims that cohere with or imply the condemnation of using. It would, for example, be particularly outrageous for you to push an innocent person onto the path of a trolley in order to prevent it from running over five others. Special support through appeal to analogous cases can be found for condemning the use of a Bystander in cases in which one's use of the Bystander involves *initiating* a lethal sequence of events (as opposed to usefully inserting the Bystander into an already existing lethal sequence of events). Imagine that, instead of using a Bystander's body to shield yourself from an oncoming javelin, you must blow up the bystander's body in order for the exploding body to knock the javelin off course . . . such uses of the innocent are surely thought to be paradigm cases of the morally outrageous.¹³

I'm not sure how robust Otsuka's initiating / inserting distinction is, or what work it is doing here. In grabbing Bystander in *Human Shield*, Victim initiates a new sequence of events, namely the grabbing of Bystander. The aim of this new sequence of events is to insert Bystander into an existing lethal sequence of events, just as blowing

up Bystander is intended to usefully project her into an existing lethal sequence of events.

Perhaps the idea is that in the blowing-up case, Bystander's death is part of the new, Victim-initiated sequence of events, and is not caused by the existing lethal sequence of events, i.e. by the javelin. But if this is true, it's hard to see how we can say that Victim causes Bystander's death in the original javelin case. After all, Bystander's death was not caused by the sequence of events that *Victim* initiated. Bystander was killed by the sequence of events culminating in the projecting of the javelin. But it certainly seems true that Victim kills Bystander by using her as a human shield. This suggests Bystander's death is, in fact, a result of a process that Victim initiates in both cases. So, I'm not sure why Otsuka wants to draw this further distinction, and confer additional moral significance upon it. But since I take both cases to be impermissible, my reluctance to endorse this further wrongness shouldn't matter here.

Otsuka argues that our intuitions about the moral abhorrence of these bystander killings generalise to innocent threats, making killing innocent threats comparable, 'to the worst kind of killing of a Bystander, in which you initiate a lethal sequence of events that will result in the useful destruction of a Bystander.'¹⁴

It is also analogous to those most deplorable cases in which you kill a Bystander in order to eat her body to prevent yourself from starving or in order to replace your failing organs with her healthy ones.¹⁵

But there is a sleight of hand here by Otsuka. In the section I quoted above, Otsuka argues that it is, 'your *killing* of an innocent person' (my italics) that is a means to the end of self-preservation. Similarly, '[t]he *vaporization* of the Threat is a means to your end of saving your life' (my italics). But in *Human Shield*, it is Bystander *herself* who is the means, not Victim's killing of her. When Victim employs Bystander as a human shield, he literally uses *her body* — Victim employs Bystander to defend himself. The same is true in those cases where Victim eats Bystander, or takes her organs, to save his own life.

In *Ray Gun*, however, it is the *vaporization* of Falling Person's body that is instrumental to Victim's end of self-preservation, not Falling Person herself. Otsuka concedes as much in the description quoted. Falling Person *is* the threat, and thus cannot also be an instrument in the process of eliminating the threat.

I suggest, therefore, that the notion of killing as a means can be interpreted in at least two ways. *Human Shield* demonstrates the lethal use of a *person* as a means. *Ray Gun* demonstrates the *killing* of a person as a means. Otsuka's assimilation of cases like *Human Shield* and *Ray Gun* ignores this difference, which I will argue has moral significance. Victim's treatment of Falling Person in *Ray Gun* is not directly analogous to his treatment of Bystander in *Human Shield*. What is particularly reprehensible about using a person as a shield is that they *themselves* are used as a means, and this does not extend to the case of Falling Person.

I have outlined three different ways in which Victim might kill a person:

- (i) Causing their death as a side-effect of some other intended action.
- (ii) Causing their death in order to profit from them, obtaining some benefit that would not have been available in their absence.
- (iii) Causing their death where Victim's lethal actions are a means by which Victim obtains some benefit.

Cases of type (i) and type (ii) are more obviously impermissible than those of type (iii), precisely because (i) and (ii) apply most obviously to bystanders. But type (iii) killings cannot be bystander killings. *Killing* a person can be a means *only* in cases where the target poses a threat. If the *action* of eliminating some character is instrumental in saving Victim's life, it must be because that character is part of the sequence of events that threatens Victim.

Killings of type (i) and type (ii) do not apply to threats.¹⁶ Yet it's (ii) to which Otsuka appeals to try to undermine a permission to kill innocent threats. He equates the vaporising of Falling Person with 'those most deplorable cases' that fall into (ii). But as we have seen, this move is illegitimate. The very feature that makes type (ii) cases so obviously abhorrent is not present in *Ray Gun*. The killing of Falling Person falls into (iii), a category of cases whose wrongness is much less obvious, since the only candidates for type (iii) killings are those people who pose a threat to Victim's life. The wrongness of killing innocent threats cannot be inferred from the wrongness of type (ii) cases as Otsuka suggests.

(iii) Using People as a Means

We can elaborate upon the wrongness of type (ii) cases like *Human Shield* in a way that makes it clear that this wrongness does not extend to killing innocent threats. What makes the using of Bystander in *Human Shield* seem so abhorrent is the fact that Victim *profits* from Bystander in such cases. When Bystander is killed as a side-effect of Victim's saving of his own life, Victim may well find her presence regrettable.¹⁷ Victim would, we can assume, prefer that she were not there.¹⁸ But in *Human Shield*, far from finding it *unfortunate* that there is an innocent bystander in the vicinity, Victim cannot believe his luck, since an innocent bystander is just what Victim needs.

Generally speaking, the main objection to using a person as a means is that it treats them in a particular way that is indicative of a certain attitude towards the object of that treatment. When Victim grabs Bystander in *Human Shield*, Victim demonstrates a lack of respect for Bystander, manifested in his readiness to employ her for his own ends, despite the great cost that this will impose on Bystander. This lack of respect is best captured by the fact that Victim tries to profit from Bystander. Where he should be dismayed that in saving his life he will cause an innocent person's death, Victim is instead grateful for the opportunity of self-preservation that Bystander presents.

In *Ray Gun*, Victim would prefer Falling Person to be absent. It also seems plausible to think that he would prefer Bystander to be absent in *Lethal Gas*. Certainly, Victim derives no benefit from the presence of either character. But in *Human Shield*, Victim's attitude towards Bystander is to view her primarily as tool that he can use for his own ends, obtaining from her a benefit that he could not have had in her absence.

That Victim profits from Bystander's presence, then, explains more precisely what it is that makes *Human Shield* seem like 'the worst type of bystander killing'. But this notion of profiting does not generalise to the killing of an innocent threat. Victim does not profit from Falling Person's presence. Falling Person's presence is a mortal threat to Victim.

Of course, this argument alone cannot show the *permissibility* of killing Falling Person. That killing Falling Person is less reprehensible than some other *impermissible* form of killing does not show that killing Falling Person is permissible. But it does

show that Otsuka's argument for the impermissibility of killing threats — namely that such killings are akin to bystanders killings — is incorrect. And while showing this error cannot prove a permission to kill innocent threats, the onus is now on Otsuka to show that to kill Falling Person as a means is wrong.

In a standard case of self-defence against a culpable threat, one kills the threat as a means to self-preservation. That killing culpable threats is a means does not make killing them impermissible. The question is where we place the killing of Falling Person on this spectrum of permissibility. And Otsuka cannot cite Falling Person's innocence without begging the question against advocates of the permission. To show that we should place innocent threats alongside bystanders, Otsuka must show that killing innocent Falling Person is impermissible in a way that killing a culpable threat is not. To do this, he must offer an alternative argument for the moral equality of threats and bystanders, since his argument from 'killing as a means' cannot do the work he needs.

III. Some More Trolleys

Luckily, Otsuka offers just such an argument. Otsuka claims that, 'the moral property that explains why we may not kill a bystander is her lack of responsible lethal agency, and not the absence of her body from the sequence of events that results in death.'¹⁹ So, Victim cannot permissibly kill Bystander because Bystander has no control over, nor agency regarding, that which threatens Victim.

This lack of agency or control is also true of an innocent threat. Otsuka's contention, then, is that innocent threats should be treated as bystanders because they cannot exercise control over the fact that Victim is threatened. Just as killing an innocent bystander is morally prohibited, so too is killing an innocent threat.

Otsuka makes this point persuasively with the following *Trolley Cases*.

- (1) An innocent person is lying alongside the path of a runaway trolley. Unless you hurl at the trolley a bomb that will destroy the trolley but will also kill the innocent person, the trolley will kill you.
- (2) An innocent person is trapped *inside* the trolley. Unless you throw the bomb, destroying both the trolley and the innocent person, you will be killed.
- (3) There is no trolley, but merely a falling person. Unless you vaporise the person, she will fall on you and kill you.²⁰

If killing the innocent person alongside the track in (1) is impermissible, it seems that killing the innocent person inside the trolley in (2) must be also impermissible. Otsuka claims that, '[c]hanging the location of the person should not make any moral difference.'²¹ But if (1) and (2) are impermissible, it is a difficult task to show that killing the falling person in (3) is not.

Jeff McMahan argues in support of Otsuka's claim that it is impermissible to kill Falling Person, who is what McMahan terms a Non-Responsible Projectile.²² But McMahan revises Otsuka's example because he thinks that in its original version, many people would argue for the permissibility of killing the innocent person by the side of the tracks in (1) and inside the trolley in (2). (1) and (2) both illustrate the killing of innocent people as side-effects, and might seem less wrong than other sorts of bystander killing.

McMahan suggests that by making the killing of the person in (2) an example of killing as a means, the wrongness of such killing will be much more apparent. He thus devises the following *Exploding Trolley* case to replace Otsuka's case (2) above.

Exploding Trolley: A villain who delights in forcing people to act against their conscience has tied one to the tracks and set a trolley in motion on the track. He has, however, provided a means of escape. He has given one a gun, strapped an innocent bystander to the trolley, and rigged up a device that will cause the trolley to explode if, but only if, it detects that the Bystander's heart has ceased to beat. (Note that this does not make the Innocent Bystander a threat. It is not her beating heart that keeps the trolley going.) One can therefore save oneself from being crushed by the trolley only by shooting and killing the Bystander.²³

McMahan claims that,

... it seems much clearer in this case ... that it would be wrong to kill the Innocent Bystander. For in this case the Bystander must be killed as a means of self-preservation. So, unless there is some critical difference between the Innocent Bystander lashed to the trolley and the Non-Responsible Projectile who is, in effect, lashed to her own body, it seems that it must also be wrong to kill the Non-Responsible Projectile as a means of self-preservation.²⁴

The intuition that McMahan seems to be pushing is that the person who is lashed to the trolley is an innocent shield of a threat, but is, he insists, no threat herself. And since innocent shields are generally thought to be a sort of bystander, the intentional killing of such innocent shields is assumed to be impermissible.

But I think that McMahan's example is unsatisfactory. If the suggestion is that Victim is somehow *better off* for the presence of Attached Bystander, since otherwise he would simply be killed by the trolley, this leads to a particular set of questions. McMahan might be suggesting that this means that Victim profits from Attached Bystander, just like he does from Human Shield. But since this profiting is clearly absent in (3), where Victim is threatened by a falling person, we cannot infer the impermissibility of killing the falling person in (3) from any alleged wrongness of profiting from Attached Bystander in (2).

We ought also to take issue with McMahan's assertion that Attached Bystander does not threaten Victim. If the killing of Attached Bystander is a means to Victim's survival, as McMahan insists, this must be because she is instrumental in the threat facing Victim. How else could the killing of Attached Bystander (and note: not Attached Bystander *herself*) be a means to saving Victim's life? McMahan claims that Attached Bystander cannot be a threat because it is not the beating of her heart that keeps the trolley going, but merely the ceasing of her heart that will stop the trolley. But claiming that this stops Attached Bystander from being a threat just seems false.

If we absent the oxygen from a room, the flame will cease to burn. Surely, then, we would say that the presence of oxygen is instrumental in the flame's continuing to burn. Similarly, there are two things that ensure the trolley's continued movement — say, the fact that it is freewheeling downhill, and the fact that Attached Bystander's

heart continues to beat, since if it ceased to beat, the trolley would explode. There seems to be no reason why we cannot view both facts as relevant, and thus describe Attached Bystander as an innocent threat.

McMahan claims that *Exploding Trolley* is a case in which, ‘the killing of the Innocent Bystander would be intended as a means of self-preservation, as the killing of the Non-Responsible Projectile is in [Otsuka’s] Case 3’.²⁵ This seems to place killing Falling Person and Attached Bystander together on the spectrum of permissibility. But it doesn’t show that either killing is impermissible. It simply suggests that whatever is permitted or prohibited in one is permitted or prohibited in the other.

So, I am not sure that McMahan has really improved upon Otsuka’s original cases. Constructing a case in which killing an innocent person is a means is, it seems to me, simply to construct a different innocent threat case. Otsuka’s original case (2) is harder to answer, since the innocent person in this case doesn’t play an instrumental role in Victim’s death. But she is part of the object that kills Victim, and thus I think that we can permissibly destroy the trolley even with the innocent person inside. It is not the altering of her location that is the morally significant change between (1) and (2). It is that unlike in (1), the innocent person in (2) is part of what is going to kill Victim, and is thus, unlike in (1), a proper object of self-defence.

IV. Shields and Permissible Killing

(i) *Ski Boots and Trolleys*

Gerald Lang argues that shields like that depicted in (2) form part of a ‘composite object’ that is the cause of Victim’s death. Lang suggests that we ought,

... to regard the overall threat in terms of the combined presence of the original threat itself — whether that is, for example, a tank or a trolley — and the Innocent Shield attached to it. Properly analysed, they form a *composite* object which constitutes the lethal threat to the Victim.²⁶

I am persuaded by Lang’s idea of a composite object, which enables us to differentiate killing the innocent person inside the trolley in (2) from killing the innocent person next to the tracks in (1). And I think that anyone who defends a permission to kill Falling Person in *Ray Gun* must also be able to account for a permission to kill the innocent person in (2).

Imagine that Falling Person is wearing a suit of armour, and it is the weight of her armour that will kill Victim. It would indeed be an odd state of affairs if we could vaporise Falling Person when she falls alone, but not vaporise what is essentially a heavy box in which Falling Person is trapped, where the box is the ‘real’ threat to Victim. There is no discernable moral difference between the innocent person who is in the trolley, and the innocent person who is in the suit of armour. As Otsuka points out, there is something ‘intuitively bizarre’ about a view that permits the killing of Falling Person, but holds it, ‘impermissible to kill a falling person if it were only the mass of the enormous ski boots attached to her feet that would kill you’.²⁷

I really see no plausible way for a defender of the claim that Victim can kill Falling Person in self-defence to deny that Victim can kill a person attached to an object that

will kill Victim. She forms part of an object that will kill Victim, and is a legitimate target of self-defence. We must treat such Attached Shields as we treat Falling Person, lest we fall prey to Otsuka's *reductio* that Victim can kill Falling Person, but only if it is her, and not her ski boots, that will cause Victim's death.

This suggests that we must revise our perception of those characters normally described as innocent shields of threats. I suggest that Victim is permitted to kill characters who will kill him, or who are physically attached to an object that will kill him, even if those characters are innocent. Otsuka is right to think that we cannot distinguish shields from threats. Where he is wrong is to think that this in itself demonstrates the impermissibility of killing threats. What it really suggests is that shields are not bystanders.

(ii) *Why Shields are Threats*

My account of threats holds that a threat is anyone who makes Victim worse off for her movements or presence. This account is much broader than conventional conceptions of threats, and includes characters that are normally described as innocent bystanders. I will not defend this account here, but merely try to forestall the obvious objection that such an account is far too permissive.²⁸

I take the question of what it is to be a threat to be different to the question of what it is to be a legitimate target of preventative force. Thus, even though all kinds of people (job rivals, rival suitors, the person above me on the kidney transplant list) count as threats on my account, this doesn't translate into a permission to kill off my colleagues in order to prevent their getting a promotion I want.

I distinguish between direct threats, and indirect threats. Our interest here is, of course, in lethal threats. I define a direct (lethal) threat as a person who will kill, or who is attached to an object that will kill, Victim. Direct threats can be permissibly killed irrespective of their innocence if doing so is necessary to save Victim's life.

Other people might make Victim worse off for their presence, but not be on course to kill Victim. I class these characters as indirect threats. A typical example of an indirect threat is Mafia Boss, who hires Assassin to kill Victim. Mafia Boss makes Victim worse off, but he will not *kill* Victim: that is Assassin's task. Whether or not an indirect threat can be permissibly killed depends upon whether the threat is responsible for the threat that she poses, where responsibility is an intentional failure to avail oneself of an opportunity to avoid exposing Victim to harm. In Mafia Boss's case, his responsibility would render him a permissible target of lethal force, if his death would prevent Assassin from killing Victim.

The innocent person in Otsuka's case (2) is what I call an Attached Shield. An Attached Shield is a character who is physically connected to an object that will kill Victim. Such shields pose a direct threat to Victim's life, since they are part of the object that will kill Victim.

But we can also have Obstructing Shields, like that depicted in *Shootout*.

Shootout: Gunman is shooting at innocent Victim. As Victim begins to return fire in self-defence, Gunman positions himself behind Girlfriend. Girlfriend now obstructs Victim's line of fire.

Obstructing Shields like Girlfriend are indirect threats to Victim's life. Girlfriend clearly makes Victim worse off for her presence. But Girlfriend will not kill Victim. It is Gunman who is the direct cause of Victim's death.²⁹

On my view, there is no ambiguity about whether Girlfriend is a threat. But this doesn't commit us to the claim that Girlfriend can be permissibly killed. Since she is an indirect threat to Victim, the *further* question of whether she can be permissibly killed will depend on whether or not Girlfriend had a reasonable opportunity to avoid posing a threat to Victim.

This leads us to something that it is hard to account for on alternative accounts of threats and bystanders. A person might act as an Obstructing Shield *responsibly*. Girlfriend might *try* to block Victim's access to Gunman. It's difficult to see how this type of Obstructing Shield can be a bystander, and plausibly be thought to pose no threat to Victim. But it seems that those who classify shields as bystanders are indeed committed to this view.

The moral prohibition on killing Girlfriend evaporates when she culpably shields Gunman. Yet on most accounts, given the insistence that Girlfriend is not a threat, we seem to have no grounds for permitting Victim to kill Girlfriend. What is it that Girlfriend *does*, culpably, that permits Victim to kill Girlfriend, but that does not entail that she poses a threat? But Victim surely *is* permitted to kill Girlfriend when she *intentionally* tries to obstruct his access to Gunman, who is trying to kill Victim. The problem for conventional accounts is that what Girlfriend does in this case is no different to what she does in the original *Shootout* example. It is only her responsibility, and not her role in the threat to Victim's life, that has changed.

This problem is, perhaps surprisingly, particularly pressing for the most influential account of a *permission* to kill innocent threats, rather than for accounts that deny such a permission. Judith Thomson's classic defence of Victim's right to vaporise Falling Person rests upon the claim that one doesn't need agency to violate a right.³⁰ Victim's permission to kill Falling Person is explained by the fact that Falling Person will violate Victim's right not to be killed when she lands on him, just as a person who *intentionally* jumps down the well towards Victim would violate Victim's rights by killing him.

It looks, then, as if a permission to kill intentionally-obstructing Girlfriend must similarly rest upon the claim that she violates some right of Victim's in frustrating Victim's attempts at self-defence. But if Girlfriend can violate this right (whatever right it is) when she acts *intentionally*, Thomson's account holds that she can also violate it when she is not acting at all. If it is to be consistent, Thomson's account must yield a permission to kill agency-lacking, innocent Girlfriend. After all, neither intention nor agency is necessary for Girlfriend to violate a right.

For Thomson, these cases must stand or fall together. But our intuitions dictate that what Victim is permitted to do to Girlfriend depends on how Girlfriend came to be shielding Gunman. Only if she intentionally tries to make Victim worse off does Girlfriend become a legitimate target of preventative force. The mistake lies in thinking that the impermissibility of killing innocent Girlfriend stems from the fact that she is a bystander. Rather, it stems from the fact that indirect threats must be responsible for the threat that they pose if Victim is to be permitted to kill them.

(iii) *Killing qua Object*

What about an Obstructing Shield who is attached to the object that kills Victim? If Gunman grabs hold of Girlfriend, rather than merely positioning himself behind her,

she seems to be attached to him in the same way that an Attached Shield might be tied to a trolley. Isn't Girlfriend part of the object that kills Victim, and thus a direct threat to Victim?

Well, I think that we can distinguish between cases in which an object kills Victim *qua* object, and cases in which a human object kills via some other means, e.g. a gun. This is what Lang is getting at when he says that,

The composite analysis seems adequate for *crushing* cases — cases in which the Victim is in danger of being crushed by an entity. . .³¹

Gunman is the object that kills Victim, but he doesn't kill him in his capacity *as* an object — he doesn't, for example, crush Victim to death. So in being attached to Gunman *qua* object, Girlfriend does not become a direct threat, but remains an indirect threat. It is only when one is physically attached to an object that kills *as an object* that one becomes a direct that.

A difficult case might be that of *Shielded Tank*.

Shielded Tank: Tank Shield is tied to a tank that is trying to kill Victim. However, the tank is not trying to crush Victim, but is firing at Victim. Only by blowing up the tank, along with Tank Shield, can Victim survive.

Despite the initial similarity between Tank Shield and Attached Shield, I think the fact that the tank will not kill Victim *qua* object is significant. If we tie an innocent person to a tank that will try to kill Victim not by flattening him, but rather by firing at him, we should describe this innocent person as an Obstructing Shield. She is morally identical to Girlfriend, grabbed by Gunman to discourage Victim's defensive fire.

Although Tank Shield is connected to the object that will kill Victim, the tank does not kill Victim *qua* object. In *Shielded Trolley*, Attached Shield and the trolley do the same sort of thing to Victim. As Lang points out, the nature of the threat posed by an Obstructing Shield is entirely different to the nature of the threat posed by a person who forms part of an object that will kill Victim *qua* object.

[the] contribution of the [Attached Shield] to the danger posed to the Victim is similar in kind to the nature of the danger posed by the numerically distinct object or agent that has been picked out as the threat itself.³²

That the tank and Tank Shield are a composite object is not relevant in cases where the tank does not kill in its capacity as an object. Tank Shield can play the exactly same role in the threat to Victim's life whether or not she is physically attached to the tank. She might simply be within the blast radius of Victim's grenade. She would still pose an indirect threat to Victim, and if she is innocent, Victim would still not be permitted to kill her. Tank Shield doesn't need to be attached to the thing that kills Victim to pose the kind of threat that she does. But the same doesn't seem to be true of Attached Shield. Attached Shield is part of what kills Victim, and she can play this role *only* if she is attached to the trolley.

So, these Shields may look the same, but closer inspection suggests a morally significant difference between them. Victim cannot permissibly kill Tank Shield if she threatens him innocently. This is true even if Victim is permitted to kill an Attached Shield who is tied to a tank that will crush him to death.

Conclusion

I have argued that Otsuka's equation of innocent threats with bystanders is incorrect. Otsuka conflates *killing* as a means with treating a *person* as a means, and thus mistakenly describes the killing of an innocent threat as equal to the most abhorrent sort of bystander killing, like that of using a person as a human shield. But this is to overlook the fact that it is the killing of an innocent threat that is a means, not the innocent threat herself. I suggest that neither of the two kinds of bystander killing that Otsuka discusses — killing as a side-effect, and treating as a means — apply to the killing of innocent threats. For a killing (rather than a person) to be useful in defending Victim's life, the person who is killed must be instrumental in the threat to Victim's life. So Otsuka cannot show the wrongness of killing innocent threats by considering killing as a means, or killing as a side-effect.

I further argued that we should not be persuaded by Otsuka's trolley cases, which aim to show that killing an innocent threat is morally indistinguishable from killing a bystander. I argued that a person inside a trolley heading towards Victim is a direct threat to Victim's life. She is part of the object that kills Victim, and can be permissibly killed in self-defence. Thus, I resisted Otsuka's suggestion that since killing the 'bystanders' in (1) and (2) is impermissible, killing the innocent threat in (3) is similarly impermissible. Killing the innocent person in (1) is impermissible since she is not going to kill Victim. The same cannot be said of the innocent person in (2) or (3).

A permission to kill innocent threats will not extend to permit the killing of bystanders, since shields of threats like that depicted in (2) are not bystanders. Otsuka's Moral Equivalence Thesis fails to demonstrate the impermissibility of killing innocent threats.³³

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NOTES

- 1 M. Otsuka, 'Killing the innocent in self-defense', *Philosophy and Public Affairs* 23, 1 (1994): 74–94. Reprinted in his (2003) *Libertarianism Without Inequality* (Oxford: Oxford University Press). References to Otsuka are to the original article.
- 2 See, for example, D. Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2003), Chapter Four, especially pp. 79–83. Rodin cites Otsuka as the prime opponent of the 'consensus' view that Victim is permitted to kill innocent threats (p. 80 n. 19). Rodin himself claims that, 'the consensus view is not correct: it is generally not justifiable to save oneself by killing an Innocent Aggressor or Innocent Threat' (p. 81). The primary reason Rodin offers for this claim is the topic of this (and Otsuka's) paper: that one cannot distinguish a falling innocent threat from a bystander whom one kills to save one's own life. Gerhard Øverland's recent work on self-defence (G. Øverland, 'Self-defence among innocent people', *Journal of Moral Philosophy* 2, 2 (2005): 127–146, p. 138, n. 13) takes Otsuka's paper to be the central defence of the position that Victim may not kill innocent threats. See also J. McMahan, *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford University Press, 2000), especially pp. 407–409, discussed in Section III of this paper.
- 3 Otsuka op. cit., p. 75.
- 4 Based on Robert Nozick's example in *Anarchy, State and Utopia* (Oxford: Basic Books, 1974), p. 34.
- 5 Otsuka op. cit., p. 85
- 6 Otsuka op. cit., p. 85

- 7 Otsuka op. cit., p. 76
- 8 I will not address question of large numbers / disaster aversion here, particularly since Otsuka makes it clear that his argument 'does not extend to cases in which such killing [of an innocent threat] is necessary to save a large number of lives rather than simply one's own life' (Otsuka op. cit., p. 75).
- 9 *Lethal Gas* is based on Philippa Foot's case in, P. Foot, 'Killing and letting die', in B. Steinbock and A. Norcross (eds) *Killing and Letting Die* (New York: Fordham University Press, 1994), p. 276.
- 10 A Kantian might argue that even though Bystander is *killed* as a side-effect, Victim *treats* Bystander as a mere means. Victim behaves in exactly the same way that he would have behaved in the absence of Bystander, or if the adjacent room contained only a mere means, like an unconscious robot. He does not accord Bystander the value appropriate to a rational agent. I am grateful to Philip Stratton-Lake and Andréas Lind for pointing this out to me. However, we can still distinguish this type of treatment from using a person, where one profits from a person's presence. Derek Parfit makes a similar distinction between *harming* a person as means versus treating a *person* as a means in *Climbing The Mountain*, (Unpublished Manuscript, 2007) Chapter 8, Section 26. I explore the notion of profiting in detail below.
- 11 Otsuka op. cit., p. 78.
- 12 Otsuka op. cit., p. 87.
- 13 Otsuka op. cit., p. 78.
- 14 Otsuka op. cit., p. 87.
- 15 Otsuka op. cit., p. 87.
- 16 Some people who are particularly committed to the Doctrine of Double Effect might insist that Victim can intentionally vaporise Falling Person, and have her death as a mere side-effect. I find this implausible. More importantly, Otsuka explicitly rejects this line of argument, and thus cannot appeal to it to refute my claims ('the relation between her body and her is sufficiently intimate that one could not intend to destroy her body as a means to save one's own life without intending to destroy her as well' Otsuka op. cit., p. 87).
- 17 As I understand regret, it involves an element of wishing that things had gone differently. This is why I have said that it is the *presence* of Bystander and Falling Person that is regretted in *Lethal Gas* and *Ray Gun* respectively, rather than the *death* of Bystander and Falling Person. If we assume that in each case Victim defends himself in a way which he knows will result in Bystander's / Falling Person's death, there is a sense in which he does *not* regret that they have been killed, since he would wish this to be different only if it were possible that neither he *nor* Bystander / Falling Person be killed. When it comes to a choice between Victim's life and Bystander's / Falling Person's life, by defending himself as he does Victim reveals his desire that Bystander / Falling Person die rather than Victim. However, in *Lethal Gas* and *Ray Gun*, the *presence* of Bystander / Falling Person can be regretted, since neither contributes to the saving of Victim's life. Given a choice between Bystander's / Falling Person's presence and Bystander's / Falling Person's absence, Victim has no reason to prefer their presence, and good reason to prefer their absence. This is not true in *Human Shield* case. Here, Victim may regret that Shield's death results from Victim's employment of Shield, since he does not need Shield to die but merely to physically shield him. But given a choice between Shield's presence and Shield's absence, Victim would opt for her presence.
- 18 In theory, of course, Victim could be indifferent to the presence of Bystander in *Lethal Gas*. There is some argument that indifference is as morally objectionable as the use of a person: '... one behaves as if the person one kills were not there at all — surely no less a display of lack of respect for persons' (J. J. Thomson, 'Self-Defence', *Philosophy and Public Affairs* 20, 4 (1991): 283–310, at p. 291). I concur with Otsuka in departing from Thomson's view that such cases are morally indistinguishable from cases in which one uses Bystander. Intentional use seems to me to be generally worse than killing as a side-effect.
- 19 Otsuka op. cit., p. 84.
- 20 Otsuka op. cit., p. 85.
- 21 Otsuka op. cit., p. 85.
- 22 McMahan op. cit., p. 407.
- 23 McMahan op. cit., p. 409.
- 24 McMahan op. cit., p. 409.
- 25 McMahan op. cit., p. 409. I think these are actually cases of self-defence, but this difference should not matter here.
- 26 G. Lang (2007) 'The Limits of Self-Defence', Unpublished Manuscript, (2007): 21–22.
- 27 Otsuka op. cit., p. 86.
- 28 See H. Frowe, 'Threats, bystanders and obstructors', *Proceedings of the Aristotelian Society* 108: 2008, forthcoming.

- 29 It might be worth noting here that we can perhaps explain the conventional assumption that shields are bystanders by remembering that, of course, characters like Girlfriend *are* bystanders to characters like Gunman. When Gunman uses Girlfriend to shield himself, he makes himself better off for her presence, impermissibly placing her before a risk of harm to protect himself. He uses a bystander as a means. But Girlfriend is not a bystander to Victim. Gunman's actions turn her into a threat to Victim. This oddity could well be a source of the reluctance to label Girlfriend a threat, but we should not be misled by this. People are threats and bystanders relative to their situations. Girlfriend is a bystander relative to Gunman, but not relative to Victim.
- 30 Thomson op. cit., throughout, but especially, p. 302.
- 31 Lang op. cit., p. 23.
- 32 Lang op. cit., p. 23.
- 33 I am grateful to the AHRC for financial assistance received during the writing of this paper. A draft of this paper was presented at a research seminar at the University of Reading, and I thank the audience for their helpful comments. I owe special thanks to Brad Hooker, Andrew Williams, John Cottingham and Gerald Lang for extensive comments, and to Jules Coleman and Jeff McMahan for helpful discussions.