

Refuting Otsuka's Moral Equivalence Thesis

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Introduction

This paper will explain and evaluate Michael Otsuka's theory of the impermissibility of killing the innocent in self-defence, arguing the positive justifications for the Moral Equivalence Thesis (MET) fail. In the first section, I introduce Otsuka's overall argument and situate the MET within it. In the second section, I evaluate the Doctrine of Double Effect (DDE) argument for the MET, concluding it fails because using a *person* as a means is less permissible than using *their death* as a means. In the third section, I evaluate the trolley argument for the MET, contending it fails as it is too easy for proponents of killing in case 3 to accept that killing in cases 1 and 2 is also permissible. Moreover, both Otsuka's and Jeff McMahan's alternatives to case 2 are dissatisfactory.

It should be noted that Otsuka understands 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".¹ An innocent threat is someone whose presence threatens your life, yet, as this presence is involuntary, they are not morally responsible for it.² An innocent aggressor, finally, is understood as someone who intentionally threatens your life, yet is not morally responsible for this intention, as it is caused by factors beyond the aggressor's control,³ e.g. mental illness.

¹ Michael Otsuka, "Killing the Innocent in Self-Defense", *Philosophy & Public Affairs* 23, no. 1 (1994): 75.

² Otsuka, "Killing the Innocent in Self-Defense," 75.

³ *Ibid.*, 74.

Section 1: Introducing Otsuka's Argument

This section outlines Otsuka's argument for the impermissibility of killing the innocent in self-defence. I then situate the MET within it and outline Otsuka's positive justifications for it. I reconstruct Otsuka's overall argument as follows:⁴

- 1) Killing bystanders in self-defence is morally impermissible
 - 2) Bystanders and innocent threats are morally equivalent (i.e. MET)
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- ∴ 3) Killing innocent threats in self-defence is morally impermissible
- 4) Innocent aggressors and innocent threats are morally equivalent
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- ∴ 5) Killing innocent aggressors in self-defence is morally impermissible

I will focus on the first section of the argument (i.e. 1 to 3) as we must first establish that killing innocent threats in self-defence is impermissible before extending the argument to innocent aggressors. I further concentrate on premise 2 (the MET) as both the literature and Otsuka himself focus on it over premise 1 suggesting it is more contentious. Otsuka justifies premise 2 in two ways; by giving a positive justification and by responding to objections, providing a negative justification. This paper will focus on the positive argument, as the negative argument builds on it. Thus, it does not make sense to evaluate the negative argument unless we can show that the positive argument stands.

Otsuka's positive argument is two-pronged. Firstly, the trolley argument presents three thought experiments. In case 1, a run-away trolley is coming towards you and will kill you unless you hurl a bomb at it destroying it and killing a nearby bystander.⁵ Given premise 1, it

⁴ Ibid., 75.

⁵ Ibid., 85.

is impermissible to hurl the bomb at the trolley in self-defence. In case 2, a run-away trolley will run you over unless you hurl a bomb at it, destroying it and killing the bystander *inside* of the trolley.⁶ If we find case 1 impermissible, then case 2 must also be impermissible, as “the location of the person should not make any moral difference”.⁷ In case 3, an innocent person is pushed off a tall building and is falling towards you. The ‘falling threat’ will crush you to death while surviving themselves unless you vaporise them using your ray gun.⁸ Otsuka claims the only difference between cases 2 and 3 is whether the trolley or the person’s body kills you.⁹ However, since the falling threat does not intend to kill you and does not have control over their body, they are a bystander relative to their body in the same way the person in case 2 is a bystander relative to the trolley. Thus, if case 2 is impermissible, so is case 3. This argument is evaluated in section 3.

The second prong of the positive justification is the DDE argument. Building on the trolley cases, Otsuka contends case 3 is morally worse than cases 1 and 2 since you use the falling threat as a means.¹⁰ In other words, in case 3, your goal is to kill the falling threat, as that is the only way you will survive. In cases 1 and 2, however, your goal is to destroy the trolley – the bystander’s death is a foreseen but unintended consequence. Otsuka concludes this makes killing the falling threat “analogous to ... kill[ing] a bystander in order to eat her body to prevent yourself from starving”.¹¹ As this is obviously impermissible, so is using the falling threat as a means. This argument is evaluated in section 2.

⁶ Ibid., 85.

⁷ Ibid., 85.

⁸ Ibid., 85.

⁹ Ibid., 85.

¹⁰ Ibid., 87.

¹¹ Ibid., 87.

Section 2: Evaluating the DDE Argument

This section presents Helen Frowe's objection to Otsuka's DDE argument. I then consider two counters to Frowe's criticism, arguing both can be adequately responded to, refuting Otsuka's DDE argument.

Frowe contends Otsuka wrongly assumes that killing as a means is a uniform category.¹² Instead, she distinguishes between using someone's *body* as a means and using someone's *death* as a means.¹³ When killing a bystander to eat them, their death is not of use to you. If you could eat their arm without the bystander dying, you would still achieve your goal of preventing starvation. Thus, you use the bystander's *body*, not their death as a means. In the case of the falling threat, however, they must disappear, i.e., die, for you to survive. Hence, you use their *death*, not their body, as a means. Frowe finds this distinction morally relevant because by using someone's body as a means, you profit from them.¹⁴ The cannibal is glad the bystander is there, as they would otherwise starve to death. You do not profit from the falling threat, though, as you would not be in danger in the first place if they were not there. Therefore, you disrespect a person more by utilising their body and profiting from them than by using their death as a means. Consequently, killing the falling threat is *more permissible* than killing bystanders to eat them, refuting the MET. Note Frowe does not conclude that killing the falling threat is morally permissible, only that it is *less impermissible* than killing a bystander.

Otsuka anticipates this objection and counters that "the relation between [the threat's] body and [the threat] is sufficiently intimate that one could not intend to destroy her body as a

¹² Helen Frowe, "Equating Innocent Bystanders and Threats", *Journal of Applied Philosophy* 25, no. 4 (Nov. 2008): 280.

¹³ Frowe, "Equating Innocent Bystanders and Threats," 280.

¹⁴ *Ibid.*, 281.

means to save one's life without intending to destroy her as well".¹⁵ In other words, when utilising someone's death, you use the person as a means, firstly because their death is part of them and secondly, since killing someone's body is equivalent to killing *them*. As this is an intuitive proposition Otsuka does not justify, I will respond with evidence suggesting intuition points in the opposite direction.

Firstly, Otsuka assumes the soul's non-existence. If the soul exists and is considered the crux of a person, however, you can kill someone's body without killing *them*. 65 per cent of Western European adults believe in the existence of the soul,¹⁶ suggesting our intuition is that it is possible to destroy someone's body without destroying *them*.

Secondly, there is cultural evidence indicating people view themselves as separate from their deaths. Many intuitively feel death is something external that happens to you, but not a part of you, as seen in the long tradition of personifying death, e.g., the Grim Reaper. Additionally, we can point to Epicurus' argument that one should not fear death, because you and death will never be present simultaneously.¹⁷ Therefore, evidence suggests it is intuitively possible to use someone's death as means without using the person *themselves* as a means. Hence, intuition ostensibly conflicts with Otsuka's claim, meaning the burden of proof lies on Otsuka.

Secondly, you can try refuting Frowe's distinction with a counterexample, such as 'Alcove'. Suppose a subway is headed towards you and to survive you must hide in an alcove. Unfortunately, there is already someone in there, and by entering you will crush the 'obstructor' to death.¹⁸ This challenges Frowe's distinction, by presenting the obstructor in the same light

¹⁵ Otsuka, "Killing the Innocent in Self-Defense", 87.

¹⁶ "Attitudes Towards Spirituality and Religion", *Pew Research Center*, May 31, 2020, accessed Oct 25, 2022, <https://www.pewresearch.org/religion/2018/05/29/attitudes-toward-spirituality-and-religion/>.

¹⁷ David Konstan, "Epicurus", *Stanford Encyclopedia of Philosophy*, July 7 2022, accessed Oct 27, 2022, <https://plato.stanford.edu/entries/epicurus/>.

¹⁸ Judith Jarvis Thomson, "Self-Defense", *Journal of Applied Philosophy* 20, no. 4 (1991): 291.

as the threat; you would rather the obstructor not be there, suggesting that killing the obstructor is more permissible than killing bystanders. Yet most intuitively think that killing a bystander and killing an obstructor are at the same level of permissibility.¹⁹ Thus, Frowe must either accept that, if killing the falling threat is permissible, so is killing the obstructor, or explain why ‘Alcove’ and ‘Falling Threat’ are not morally equivalent. I will take the latter approach. Drawing on Jonathan Quong, I contend people not only have a right to their bodies, but also the space their body occupies.²⁰ This is why we feel disrespected when someone bumps into us and why we expect them to apologise. Hence, I argue that killing the obstructor is less permissible than killing the threat, as there is a violation of the obstructor’s right to the space their body occupies.

Otsuka fundamentally disagrees, asserting “even though you got there second, you have a legitimate claim to ... refuge in the alcove”.²¹ Since Otsuka appeals to intuition, I will counter by giving two examples suggesting intuition favours Quong. Firstly, in *Parker v. British Airways Board*, Parker found a gold bracelet at Heathrow Airport. He handed it to British Airways on the condition that, if the owner was not found, it would be his. When British Airways could not find the owner, they sold the bracelet for £850, leading Parker to sue them. He won the case with LJ Donaldson ruling “as the true owner has never come forward, it is a case of finders keepers”.²² Secondly, ‘finders keepers’ dates back to Ancient Roman law, as seen by Classical jurist Gaius’ claim that unowned property becomes “the property of the first taker”.²³ Note these examples are not perfectly analogous to ‘Alcove’ as they address private

¹⁹ Jason Hanna, “The Moral Status of Non-Responsible Threats”, *Journal of Applied Philosophy* 29, no. 1 (Nov. 2011): 21.

²⁰ Jonathan Quong, “Killing in Self-Defense”, *Ethics* 119, no. 3 (2009): 528.

²¹ Michael Otsuka, “The Moral-Responsibility Account of Liability to Defensive Killing”, in *The Ethics of Self-Defense*, ed. Christian Coons and Michael Weber (Oxford: Oxford University Press, 2016), 60.

²² *Parker v. British Airways Board*, Court of Appeals, 21 Dec. 1981, <https://sterlinglawqld.com/sterlii/parker-v-british-airways-board-1982-q-b-1004/>. Accessed Oct. 2022.

²³ Arinze Vivian Chinelo, “The Legal Rights of a Finder: Challenges and Prospects”, *Journal of Commercial and Property Law* 8, no. 5 (2021): 2.

property, whereas subways are usually public property. Moreover, whether law tracks morality is hotly contested within the philosophy of law. However, as Otsuka appeals to intuition, I believe these examples – two millennia apart – suffice to illustrate that intuition aligns more with Quong than Otsuka. Namely, it seems intuitively right that the person who entered the alcove first has a more legitimate claim to it. Thus, the burden of proof again lies on Otsuka.

Overall, Frowe's distinction between using someone's *body* and someone's *death* as a means can be defended against Otsuka's pre-emptive objection and the alcove counterexample. Hence, Otsuka's DDE argument fails.

Section 3: Evaluating the Trolley Argument

This section draws on McMahan to contend Otsuka's trolley cases fail as it is too easy to grant that killing in cases 1 and 2 is permissible. I then evaluate two alternatives for case 2 arguing both fail, refuting the trolley argument.

While McMahan accepts the MET, he finds the trolley argument unpersuasive. He worries it is too easy for those arguing it is permissible to kill the falling threat to grant that killing in cases 1 and 2 is also permissible.²⁴ This is because, even if you agree with Frowe's clarification, most find killing as a means worse than killing as a side-effect, suggesting killing the falling threat is less permissible than killing in cases 1 and 2. Therefore, we must find an alternative to case 2 where the bystander is killed as a means.²⁵

In McMahan's alternative case 2, a run-away trolley is coming towards you. The bystander is tied to the front of the trolley in such a way that if their heart stops, the trolley

²⁴ Jeff McMahan, *The Ethics of Killing: Killing at the Margins of Life* (Oxford: Oxford University Press, 2002), 407.

²⁵ McMahan, *The Ethics of Killing*, 409.

explodes.²⁶ As you have a gun, the only way to save yourself is to shoot the person, causing their heart to stop thus making the trolley explode. This maintains the relevant parallels to case 1 as the person, in McMahan's eyes, remains a bystander because "it is not their heart that keeps the trolley going".²⁷ Yet the person is killed as a means, making it harder to concede as permissible. I see two problems with this.

Firstly, Frowe argues the parallels to case 1 become too weak²⁸ as you would rather the bystander in case 1 not be there. In McMahan's case 2, however, you could not save yourself without the person tied to the trolley, meaning killing them exploits them in a way that killing the person in case 1 does not. Hence, if we adopt McMahan's alternative case 2, Otsuka can no longer assert that if case 1 is impermissible, so is case 2.

Secondly, Frowe contends that the person in case 2 becomes a threat, not a bystander.²⁹ If you remove oxygen from a fire, the fire goes out, meaning you cannot have fire without oxygen.³⁰ In the same way, because the trolley explodes if the heart stops, the trolley requires the heart to continue to beat. Thus, the person tied to the trolley is an inherent part of the threat. This puts killing the threat in cases 2 and 3 on the same level of permissibility, meaning case 2 is now too different from case 1, making it possible to find killing in the former case permissible but not the latter. Therefore, while McMahan's case 2 makes it harder to view cases 1 and 2 as permissible, it fails because the parallels to 1 become too weak, while it is ostensibly at the same level of permissibility as case 3.

²⁶ Ibid., 409.

²⁷ Ibid., 409.

²⁸ Frowe, "Equating Innocent Threats and Bystanders," 283.

²⁹ Ibid., 284.

³⁰ Ibid., 283.

Otsuka agrees with McMahan's criticism of the trolley cases³¹ but rejects McMahan's alternative case 2 for similar reasons.³² Instead, he proposes 'Alcove', introduced in section 2, as an alternative case 2.³³ It maintains the necessary parallels to case 1, as the obstructor is a bystander. Yet we cannot as easily consider killing them permissible, as they are killed as a means.

I believe this alternative case 2 fails, as it is possible to find killing in case 2 impermissible while considering killing in case 3 permissible. This is because in case 2 you are not only using the person's death as a means but also disrespecting their right to the space their body occupies. This view was shown to have *prima facie* intuitive appeal in section 2. Thus, this breaks the argument's chain that, if case 1 is impermissible so is case 2, and if case 2 is impermissible so is case 3.

Overall, Otsuka's trolley argument fails as it is too easy to view killing in cases 1 and 2 as permissible. I then evaluated two alternatives to case 2, concluding both fail. Thus, the trolley argument can be refuted.

Conclusion

This essay has explained and evaluated Otsuka's argument for the impermissibility of killing the innocent in self-defence, concluding premise 2 fails. In the first section, I introduced Otsuka's argument, situated the MET within it, and outlined the positive justifications for it. In the second section, I evaluated the DDE argument, concluding it can be dismissed because of Frowe's distinction between using someone's *body* and someone's *death* as means. I then refuted Otsuka's pre-emptive objection and the alcove counterexample to Frowe's distinction.

³¹ Otsuka, "The Moral-Responsibility Account", 55.

³² *Ibid.*, 56.

³³ *Ibid.*, 57.

I rejected the former since evidence suggests intuition aligns with Frowe, and the latter as intuition ostensibly aligns with Quong, meaning the burden of proof is on Otsuka in both cases. In the third section, I refuted the trolley argument, rejecting the initial formulation as it is too easy for proponents of killing the falling threat to accept that killing in cases 1 and 2 is permissible. I then considered McMahan's alternative case 2 concluding it fails as its parallels to case 1 are too weak, while it is ostensibly at the same level of permissibility as case 3. Otsuka's alternative case 2 also failed since we can draw on Quong to argue that killing in case 2 is impermissible, while finding killing in case 3 permissible.

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