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## **Shalom on the Impermissibility of Self-Defense against the Tactical Bomber**

### *Abstract*

A standard example of a justified aggressor is the tactical bomber who is about to destroy an ammunition factory in a proportionate, justified military attack, full well knowing that an innocent civilian bystander will also be killed by his attack (“collateral damage”). Intuitively it seems hard to believe that the innocent bystander threatened by the tactical bomber is morally prohibited from killing him in self-defense. Yet, Stephen R. Shalom indeed endorses such a prohibition. I shall argue that all the examples Shalom offers in support of his view are disanalogous to the case in question, and provide examples that are analogous and strongly suggest that Shalom’s claim leads to counter-intuitive implications. Moreover, I will provide a clear-cut case that demonstrates that Shalom cannot rely on a general principle prohibiting lethal violence against permissible violence. Thus, I conclude that Shalom has failed to provide a convincing argument in support of his case.

### *Key words:*

justified attacker; rights infringement; Shalom, Stephen R.; symmetrical self-defense; tactical bomber

Justified aggressors are responsible agents who have a moral justification for posing a threat to innocent and initially non-threatening persons. A standard example of a justified aggressor, in a one-to-one situation, would be the tactical bomber who is about to destroy an ammunition factory in a proportionate, justified military attack, full well knowing that an innocent civilian bystander will also be killed by his attack (“collateral damage”).

Intuitively it seems “hard to believe” that the innocent bystander threatened by the tactical bomber is morally prohibited from killing him in self-defense.<sup>1</sup> Yet, a small group of philosophers do believe exactly this. One of them is Stephen R. Shalom, whose argument in defense of this belief I shall critically examine here.

Shalom criticizes in particular Jeff McMahan, who indeed once claimed that the civilian may defend himself (although the tactical bomber is allegedly not liable to attack).<sup>2</sup> At some point Shalom criticizes an analogy with which McMahan tries to bolster his case and asks: “But why did McMahan use an example that is so non-

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<sup>1</sup> Jeff McMahan, “Self-Defense and the Problem of the Innocent Attacker,” *Ethics* 104 (1994), pp. 252-90, at 275; see also “The Basis of Moral Liability to Defensive Killing,” *Philosophical Issues* 15 (2005), pp. 386-405, at 388-89.

<sup>2</sup> See the previous note. McMahan has since changed his mind, see his “Self-Defense Against Justified Threateners” (Draft of Feb. 2013), unpublished ms., on file with author, and available at jeffersonmcmahan.com. Shalom actually attributes to McMahan the view that the civilians have a “right” to shoot down the bomber, but McMahan does not use this terminology.

analogous to the bomber case? ... It may be that good analogies supporting McMahan's point are hard to come by."<sup>3</sup> This remark can be turned against Shalom himself: his own examples are disanalogous to the tactical bomber case. To wit, the tactical bomber case is a case where a justified attacker, namely the bomber, a) violates (or "infringes," as McMahan and Shalom prefer to say) the right to *life* (or the right not to be subjected to *deadly* force) of innocent people, and b) does so not by diverting an already existing threat, for example a runaway trolley, but by creating completely new ones, namely by dropping bombs. Moreover, by shooting the bomber down, the civilians c) do not directly kill innocent bystanders, namely the people the bomber is trying to save with his mission, rather, they only – and, moreover, not intentionally, but only as a side-effect of saving themselves – prevent them from being saved, and allow them to die at the hands of the aggressors; and d) the causal chain from their shooting down the bomber to the death of the innocent is not a causal chain uninterrupted by intervening action, rather, it is interrupted by the intervening action of precisely the aggressors against whom the bomber's mission was directed in the first place. *None* of the "analogies" Shalom adduces share these four features with the tactical bomber case; some of his examples lack at least three of these features; and still other examples introduce entirely new features that completely distort the picture.<sup>4</sup> Thus, we should not allow our firm intuitions in the tactical bomber case (apart from Shalom and Tadros<sup>5</sup> – and also McMahan of late<sup>6</sup> – pretty much every just war theorist seems to agree that the civilians may fight back) to be undermined by examples that are not pertinent in the first place.

After his reproach of McMahan's analogies, Shalom states: "Here's what a satisfactory analogy must do. It must provide an instance of an act that is morally permissible from an impartial viewpoint that would harm an innocent person who is then morally entitled to use lethal force to prevent the harm." He then provides the example of someone who wants "to kill you in order to harvest your organs to save the lives of several good people. You are indeed permitted to thwart this 'humanitarian' killer with lethal force, but ... almost everyone will agree that it is *impermissible* to kill someone for their organs."<sup>7</sup> Yet, he then invites us to consider still another case:

Say your blood type is extremely rare and that by your donating a pint of it you could save the lives of a dozen people who have no other hope of surviving. You refuse to donate the blood, insisting on your right to bodily autonomy. Many might conclude that society is permitted to overrule your objection and infringe your right, compelling you to give the blood. Are you then permitted to use force to prevent your blood from being taken against your will? It seems clear that in

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<sup>3</sup> Stephen R. Shalom, "Killing in War and Moral Equality," *Journal of Moral Philosophy* 8 (2011), pp. 495-512, at 508.

<sup>4</sup> There is no reason to go in detail through all of Shalom's examples here. I invite the reader to check my claim that these examples are disanalogous to the case in question for him- or herself.

<sup>5</sup> Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 202-213. For a criticism of Tadros, see Uwe Steinhoff, "Why We Shouldn't Reject Conflicts: A Critique of Tadros," unpublished ms.

<sup>6</sup> See n. 2.

<sup>7</sup> Shalom, "Killing in War and Moral Equality," p. 509.

deciding that society has the right to compel you, we are necessarily concluding that you have no right to thwart society's effort. To put it another way, if there's anyone who believes that you have the right to shoot society's agents as they come to collect your blood, such a person cannot also believe that society is acting justly in trying to compel your donation.<sup>8</sup>

The terminology of this example is confused or at least confusing (and question-begging, for that matter), and certainly does not match McMahan's own terminology.<sup>9</sup> If the society *infringes* my *right* to bodily integrity, it cannot act *justly* in trying to compel my donation, it at best acts *justifiably*. Thus, the actual question is whether a person who believes that you are *permitted* (not: "have the *right*," at least not if that is supposed to be a claim-right) to use defensive force against society's agents as they come to collect your blood can also believe that society is acting *justifiably* in trying to compel your donation. And of course many so-called political anarchists indeed do believe that a society's *justification* to make and enforce laws comes *without* the citizen's *obligation* to actually obey them and to not resist their enforcement (and hence without the state's claim-right to the citizen's obedience).<sup>10</sup> Thus, the answer to the actually relevant question is a clear "Yes." (That does not, incidentally, compel philosophical anarchists to believe that they can simply *shoot* the state's agents in this case: that might be disproportionate. However, the bystander in the tactical bomber example has *ex exemplo* no other way of saving his life than by fighting back.)

As regards the organ example, it seems that harvesting them does become permissible if we do not talk about "several" people but about thousands or millions. Most ethicists writing today seem to be "threshold deontologists" – that is, they hold that rights can be justifiably violated ("infringed") when the stakes are high enough. However, it seems counter-intuitive to claim that once that point has been reached in the organ harvesting example it becomes impermissible for you to fight back. Although it might be justified to harvest your organs, you are under no obligation to allow others to slaughter and disembowel you like a sheep.

Some people, however, might not share this intuition and indeed think that persons have to sacrifice themselves when the stakes are high enough. So, let us presume for the sake of argument that the tactical bomber's mission is justified if he saves ten times more innocent people than he kills in his attack. Maybe he destroys a tank that would otherwise have escaped him and then killed ten innocent persons before being stopped for good. In the light of this background assumption, let us consider a further example. Suppose that there is a billionaire who every month spends a certain amount of money for philanthropic purposes, normally for poverty relief (or for private military companies that

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<sup>8</sup> Ibid.

<sup>9</sup> For McMahan's terminology, see *Killing in War* (Oxford: Oxford University Press, 2009), pp. 8-10; and "A Response to Michael Neu," *Ethical Perspectives* 19(2) (2012), pp. 257-276.

<sup>10</sup> One of the clearest statements of this view has been given by Robert Ladenson, "In Defense of a Hobbesian Conception of Law," *Philosophy & Public Affairs* 9(2) (1980), pp. 134-159. But see also A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), esp. ch. VIII.; and *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001), esp. chs. 6 and 7.

protect innocent refugees from the genocidal intentions of warlords). This money is enough to save 10,000 people each month. However, he recently inherited a derelict skyscraper from his late uncle, and for sentimental reasons he now invests said amount of money into this skyscraper each month instead of spending it on the poor or persecuted. He would, however, start spending on the poor and persecuted again if the skyscraper were gone. One of his first measures will be to implement certain security routines and devices that will be able to protect the skyscraper from attack and sabotage once and for all. Therefore, the only possibility to destroy the skyscraper (and to free the money for the poor and persecuted) is to do it right now and without warning, namely by flying a private plane with explosives into it, killing all the thousand inhabitants in the skyscraper as a side-effect of the destruction of the building.

If the action of the tactical bomber is permissible, then the action of this tactical pilot is permissible too: after all, destroying the building would save 10,000 lives *per month* for the price of only one thousand lives *once*. If Shalom denies the permissibility of this action, it would be his task to explain what the morally relevant difference is supposed to be.

However, even if flying the plane into the skyscraper were permissible, it would indeed be “hard to believe” that the tenants in the skyscraper are prohibited from fighting back with their anti-aircraft gun. It is also “hard to believe” that the military has to simply allow the passenger plane to cross their border,<sup>11</sup> so that the plane can destroy the skyscraper on its mission to save 10,000 people each month while collaterally killing only 1,000 once. (And it is indeed collateral: the presence of the tenants is of no use to the attackers at all, nor is killing them a means to achieve success. However, if you believe that their being *in* the building poses a problem, change the example to one where they are living in the surrounding buildings that would be squashed by the crumbling skyscraper.)

Admittedly, again, some people (probably very few) might still think that even in this example the civilians in the skyscraper (and the soldiers who have sworn to protect them) are not allowed to fight back. Yet, if one thinks that people have to sacrifice themselves for the significantly greater good, then the obligation to sacrifice one’s life is only the tip of the iceberg (leaving the obligation to not resist people who want to slowly torture you to death for the greater good aside). One would also have to sacrifice one’s *property*. Thus, if people from a poor country (or people acting on their behalf) break into your house to steal some of your valuables in order to give them to the poor and to thereby save lives, you would not be allowed to resist. But then, on Shalom’s account, the police would not be allowed to resist them either.<sup>12</sup> Consequently, if thousands, ten thousands, millions of poor people or people acting on their behalf came into the rich countries to steal some of the property of the people living there, sell it, and make the money available to save the poor, we would not be allowed to resist them, as long as the harm they inflict is proportionate in relation to the good they achieve (which is, given the property vs. life comparison, not a high hurdle). Thus, Shalom’s theory (and McMahan’s

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<sup>11</sup> Since the bystander in the tactical bomber case is not allowed to defend himself, the soldiers on his side, according to Shalom, are also not allowed to defend him. Shalom, “Killing in War and Moral Equality,” p. 511.

<sup>12</sup> Ibid.

new stance, for that matter) obviously has very radical implications: if taken seriously and acted upon, it leads to the complete collapse of property systems as we know them (in fact: it leads to the abolition of property until such a time when basic needs are met for all) and would certainly revolutionize all jurisdictions and penal systems on this planet. Shalom (and McMahan) should at least tell their readers whether they are fine with these implications or not.

Of course, one might try to block this argument by denying that stealing money to save the lives of innocent people can be permissible in the first place. However, how one can deny this (I certainly don't, I only insist that the people stolen from are wronged) while simultaneously holding that *killing* people collaterally to save the lives of the innocent is justifiable is mysterious.

But could one not say that by using a person's property against her will one uses the person as a means?<sup>13</sup> I doubt that this is a particularly convincing stance to take, but even if one adopted this terminology, this would nevertheless not change the moral facts. It would only mean that some forms of using persons as a means are morally preferable to some forms of not using them as a means. To wit, it is certainly less bad to be stolen from than to be killed, and morally more problematic to kill innocent people than to steal from them. Our preferences, moral intuitions, and penal systems show this quite clearly. If, for instance, the tactical bomber can destroy the tank either by targeting it directly and thereby foreseeably killing the innocent bystander, or by targeting the innocent bystander's huge crane so that the tank is crushed beneath it *without* harming the bystander, then the tactical bomber ought to choose the latter method (and it is safe to assume that the bystander will prefer it to the alternative). Thus, the revolutionary implications of Shalom's view that one must not resist permissible action cannot be staved by making the claim that stealing from people is worse than killing them, nor by making the claim that stealing money to save the lives of innocent people cannot be permissible in the first place while *killing* people collaterally to save the lives of innocent people can. Both claims lack credibility, and would thus be in dire need of argument.

But, again, some people (at least as long as they are not the ones stolen from) might find the implication that middle class Americans or Europeans must not resist burglars who steal for the poor very attractive. So let me offer one final example. Suppose that the evil aliens from outer space credibly threaten to destroy Earth and wipe out humanity unless Bill tries his best to kill Jane and her five kids. The aliens are quite capable of detecting whether Bill tries his best or not, and they don't care whether Bill actually succeeds: all they care about is that he tries his best. Under these circumstances, given what is at stake (Jane and her family would also die if Bill did not try to kill them), it is hard to deny that it is permissible for Bill to try his best to kill Jane and her family. If trying his best involves actually killing two members of her family, then he is permitted to do so. However, it is obvious that Jill, in turn, is permitted to resist Bill's attempt to kill her and her family. After all, if she succeeds, then not only will the rest of humanity be saved (as long as Bill tries his best), but in addition also some members of her own family. In other words, Bill is permitted to try to kill Jill in order to avoid the death of humanity, and Jill is permitted to kill Bill in order to include her own family in that part

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<sup>13</sup> This position is taken by Jonathan Quong, "Killing in Self-Defense," *Ethics* 119 (2009), pp. 507-537.

of humanity that will be saved by Bill's action.

Of course, this is a very special case, but it is a case that squarely meets Shalom's challenge to "provide an instance of an act that is morally permissible from an impartial viewpoint that would harm an innocent person who is then morally entitled to use lethal force to prevent the harm."<sup>14</sup> Thus, Shalom cannot rely on a general principle stating that there cannot be such acts. And therefore he would have to provide a positive argument demonstrating that in the particular case of the tactical bomber the bystander is not allowed to fight back. Shalom does not provide such an argument, as all his examples are disanalogous to the case in question.

A further reason worth noting why Shalom's account remains unconvincing is that it seems not to take the "separateness of persons," to use Rawls's term, seriously enough. German law, for example, holds that innocent people cannot reasonably be expected to sacrifice their own lives or bodily integrity for the survival of strangers, and therefore denies a necessity defense when it comes to killing or maiming innocent people.<sup>15</sup> However, while I think that the first part is absolutely correct, the conclusion does not follow. If the stakes are high enough, killing innocent people can be justified, but given that they cannot reasonably be expected to sacrifice themselves for strangers, they cannot reasonably be expected not to fight back. This, incidentally, seems to be precisely the position taken by those US states that have adopted the Model Penal Code's account of the necessity justification. It is, I submit, a quite reasonable position.<sup>16</sup>

Thus, in sum, Shalom's account is counter-intuitive, remains unsupported by relevant arguments (since all his examples are disanalogous to the case at issue), can be refuted by actual analogies, and defies pertinent – and, it would seem, quite reasonable – regulations in law.

Of course, Shalom and those very few philosophers who think that the bystander in the tactical bomber case must not fight back may just insist on their own intuitions (to the extent that even their own intuitions support their view – as noted, this is dubious in McMahan's case). However, this still does not amount to an argument, and therefore there is no reason to change one's own view concerning the permissibility of the bystander's defense against the tactical bomber.<sup>17</sup>

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<sup>14</sup> Shalom, "Killing in War and Moral Equality," p. 509.

<sup>15</sup> Volker Erb, "Rechtfertigender Notstand," in Wolfgang Joecks and Klaus Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Vol. 1* (Munich: C. H. Beck, 2003), pp. 1346-1416, at 1350-1 and 1387.

<sup>16</sup> See on this Steinhoff, "Rights, Liability, and the Moral Equality of Combatants," Sect. 4.4.

<sup>17</sup> I thank Jeff McMahan, James Pattison, Jonathan Quong, and Stephen R. Shalom for very helpful written comments on a first draft of this paper.