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Prophylactic Legislation Defined

My subject is the morality of prophylactic legislation. What do I mean by 'prophylactic' legislation? Let me illustrate the concept by drawing a contrast with the most famous hypothetical case in the scholarly literature of Anglo-American jurisprudence. During the course of their debate over the relation between law and morality, Lon Fuller and H. L. A. Hart disagreed about what tools are needed to discern the meaning and scope of a rule barring vehicles from a public park.[1] Hart and Fuller clashed over whether legislative purpose and considerations of morality enter into the process of discerning what Hart famously called the 'core of settled meaning'.[2] They themselves did not disagree about the fact that there will be cases at the margin of this and every rule, but the example has since come to illustrate the various positions one can take on marginal applications, especially the following question: when, if ever, should ambiguous statutory language be construed to reach circumstances that were not specifically contemplated by the legislature?

My topic concerns the relation between law and morality, but in a somewhat different sense from the way in which Hart, Fuller, and others have mooted these issues. For one thing, I am interested in the question of whether a legislature ought to *enact* a law, not in how judges should

* The author thanks Sherry Colb and Elizabeth Emens for very helpful conversations, and Jessica Karp for excellent research assistance.

[1] Compare L. L. Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart' (1958) 71 *Harvard Law Review,* 663 with H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review,* 607–8.

[2] Hart, ibid, 607.

construe laws once they are enacted. For another, I am setting aside the difficulty of unforeseen circumstances and focusing on problems to which the legislature accurately foresees the range of applications of its legislation, although not the identities of the individuals to whom it will apply. 'Prophylactic legislation', as I shall use the term, refers to laws that the legislature deliberately writes so as to cover not only cases presenting the mischief it targets, but also some cases in which the legislature knows that the law's background justification fails.

Why would a rational legislature deliberately write a law that applies to circumstances in which the law is unjustified? A legislature might rationally decide to over-extend its reach for a number of reasons. It might fear that a more narrowly targeted law would be under-inclusive, and that the dangers from under-inclusion outweigh those from over-inclusion. Or, as I shall elaborate in greater detail shortly, the legislature might choose an over-inclusive *rule* rather than a potentially better targeted *standard,* because the legislature worries that the standard would confer too much discretion on those who execute and interpret it.

Thus, prophylactic legislation will often be rational but, I shall argue, it nonetheless raises profound moral questions whenever it jeopardizes fundamental interests for, by definition, it does so without sufficient justification in the circumstances to which the legislation's background purpose does not apply. Whether the moral questions can be answered, I shall argue further, depends in large part on whether reasonable people behind a veil of ignorance could be expected to assent to the prophylactic legislation. I shall explore these questions using four principal examples: speed limits; assisted suicide; torture; and detention without trial.

Speed Limits and the Ubiquity of Prophylactic Legislation[3]

Nearly all laws, and especially those that take the form of rules rather than standards, are prophylactic. Speed limits are a well-known example. When Parliament specifies the motorway speed limit of 70 miles per hour, it understands that some drivers are capable of driving safely at higher speeds. Nonetheless, a law requiring all drivers to drive at 'no greater than the maximum speed at which each individual driver can drive safely, taking account of all the relevant conditions', would be nearly impossible

[3] See D. A. Strauss, 'The Ubiquity of Prophylactic Rules' (Winter 1998) 55 *University of Chicago Law Review,* 190–209.

to enforce because of its ambiguity. Furthermore, even apart from ambiguity as perceived by the police, regulating motorway speed via a flexible standard rather than a rigid rule would sacrifice the coordination advantages that rules can confer. Even allowing for different degrees of compliance among the driving population, a 70-mile-per-hour *rule* will do a better job of moving the traffic along at roughly the same speed than will an open-ended 'drive at a safe speed' *standard.*

Thus, in the speed limit example, as in much of law, the optimal rule is sub-optimal with respect to some individuals; but the rule as a whole may still be optimal among the set of all possible rules or standards because no rule or standard can be perfect. After all, legislative goals routinely conflict with one another. A speed limit balances motorists' interest in safety against their interest in arriving at their destinations quickly. Regulating speed via a rule rather than a standard has the virtues of precision and enforceability but the corresponding vices of over- and under-inclusion with respect to very skilled and unskilled drivers respectively; meanwhile, a standard has the opposite virtues and vices.[4]

The prophylactic nature of speed limits—that is, the fact that they require some people to drive more slowly than necessary for safety—does not by itself make speed limits morally objectionable. To be sure, someone could raise a plausible moral objection against a speed limit on the ground that it is *too high.* Reducing the speed limit from 70 miles per hour to 55 miles per hour would save lives and would mitigate harm to the environment. Slower speed limits mean fewer and less severe collisions, while (within the range of speeds at which people typically drive), fuel efficiency increases as speed decreases.[5] Burning fuel more efficiently means pumping less carbon dioxide and other pollutants into the atmosphere.[6] Thus, one could argue that reducing speed limits is a moral imperative, insofar as human lives and the health of the planet should trump the convenience that results from faster driving.

I am not now interested in whether the moral arguments for reducing the motorway speed limit from 70 to 55 miles per hour (or some other figure) are *persuasive.* I only mean to concede that they are comprehensible

[4] The literature on rules and standards is enormous. For two works by American scholars that nicely capture the core issues, see K. M. Sullivan, 'The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards' (1992) 106 *Harvard Law Review,* 66–9; and F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (New York: Oxford University Press, 1991).

[5] See Committee on the Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards, *et al, Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards* (Washington, DC: National Academy Press, 2002), 77.

[6] Ibid, 63.

and plausible as moral arguments. Such arguments, however, do not take aim at the prophylactic nature of speed limits. The claim that the speed limit should be reduced is a claim that the law as it now stands is under-inclusive, not a claim that it is over-inclusive.

By contrast, claims that the speed limit is too low do genuinely target the prophylactic nature of speed limits. Yet these arguments probably should not qualify as moral arguments, and even if they do, I imagine they will strike most people as very unpersuasive moral arguments. To argue for increasing the speed limit (or against decreasing it) in moral terms, notwithstanding the cost in human lives and to the environment, requires one to stake out a very strongly libertarian position. In the United States, some libertarians object to laws requiring motorists to wear seatbelts or motorcyclists to wear helmets on the ground that individuals should be permitted to choose for themselves how to evaluate the costs and benefits of beltless or helmetless driving.[7] Yet even strong libertarians recognize that harm to others counts as a reason for limiting freedom.[8] Speed limits do not merely protect you against yourself; they benefit everyone through their pollution-reducing effect and they protect innocent third parties—other drivers, passengers, and pedestrians—against unsafe driving.[9]

It would take not just a libertarian but a full-fledged anarchist to insist upon a moral right to drive as fast as one believes one can safely operate one's vehicle, when the cost of affording people that right will be measured in serious injuries, lost lives, and harm to the environment. In setting the speed limit at 70 rather than 55 or at 55 rather than 45, the legislature can choose to give some weight to interests in shorter driving times, but in doing so, it is not responding to moral concerns as such.

Alternatively, if you prefer, we might say that the moral concerns raised by the driver who wishes to travel very fast are easily outweighed by the

[7] See, e.g., T. Balaker, 'Strapped. Unbuckling Seat Belt Laws' (27 May 2004) *Reason Magazine Online,* at <http://www.reason.com/news/show/32805.html> (on file with author).

[8] See, e.g., J. Sullum, 'An Epidemic of Meddling, The Totalitarian Implications of Public Health' (May 2007) 39 *Reason Magazine,* 23–32 (quoting J. S. Mill's *On Liberty:* 'The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others').

[9] I take no position on the question whether a strong libertarian could also support seatbelt laws and helmet laws on the ground that persons who suffer more severe injuries as a result of beltless and helmetless driving in fact impose a cost on others through the diversion of medical care and the loss of their productivity. I am not a strong libertarian, and thus I accept paternalistic justifications for seatbelt and helmet laws.

countervailing considerations of safety and environmental protection. All constraints on liberty, we might say, raise prima facie moral concerns. In this view, just as a conscientious doctor attempts to 'first do no harm', so a conscientious legislator ought to 'first infringe no liberty'. Of course, good doctors do harm all the time, in the sense that they expose patients to serious risks, but they do so only where they calculate that the expected benefits of the course of treatment outweigh those risks. Likewise, if we take seriously the strong libertarian's moral objection to any speed limits, we might say that a good legislator votes for legislation only when its benefits outweigh the resulting sacrifice of liberty. 'First infringe no liberty' would thus mean only 'do not infringe liberty gratuitously'. One can readily accept such a dictum—and thus accept that all liberty-infringing legislation poses a prima facie moral issue—without thereby accepting that all liberty-infringing legislation poses a serious moral issue.

Assisted Suicide

The picture looks very different, however, where the liberty at stake is fundamental in some sense. In American constitutional law, the term 'fundamental rights' has a technical meaning, but I do not mean anything technical here.[10] A fundamental liberty, as I use the term, means only a liberty that a particular legislator is willing to regard as very important. The liberty to drive at 80 rather than 70 (or 70 rather than 55) miles per hour will count as fundamental for almost no-one. The liberty to which I turn now, however, will rank as fundamental for many legislators and others.

Consider laws that impose criminal punishment on anyone who voluntarily hastens another person's death—even where the dying person is competent, in the late stages of a terminal illness, and experiencing physical discomfort that cannot be relieved by palliative care. Some

[10] The term refers to those rights, whether specifically enumerated in the Bill of Rights or inferred from the general protection of the Due Process Clauses, that receive special substantive protection. See, e.g., *Moore v City of E. Cleveland* 431 US 494, 499, 506, 97 SC 1932, 1935, 1939 (1977) (recognizing a right to family definition). See also M. R. Konvitz, *Fundamental Rights: History of a Constitutional Doctrine* (New Brunswick, NJ: Transaction Publishers/Rutgers University, 2001), 43–58 (detailing the development of fundamental rights jurisprudence). In recent years, the Supreme Court has tended not to use the language of fundamental rights: see, e.g., *Lawrence v Texas* 539 US 558, 123 SC 2472 (2003); but since I am not using the term in its technical sense, that is of no concern here.

democracies, including Belgium,[11] the Netherlands,[12] Switzerland,[13] and one state in the United States—Oregon[14]—permit physician-assisted suicide under such circumstances, but many countries, including the United Kingdom and the United States outside Oregon, prohibit the practice.[15] As with all laws, no doubt the legislators who voted for current prohibitions (or voted against repealing them), did so for a variety of complicated reasons.

Some such reasons may be non-consequentialist: a legislator or the constituents she represents may believe that life is a precious gift from God that only God can rightfully withdraw; or the legislator or his constituents may think that suicide is always wrong for secular reasons. I have little doubt that this sort of reason figures in the decisions of some actual lawmakers who favour criminal prohibition of assisted suicide. And to the extent that one finds this sort of reason persuasive, it overcomes any moral objections that an individual who wishes for assistance in dying may have: if such assistance is itself wrong, then there can be no fundamental right to receive it.

I shall bracket non-consequentialist objections to physician-assisted suicide, both because such objections, if religiously based, raise another set of questions about the proper relation between religious motivation and legislation, and because, as we have just seen, there is no dilemma at all if we admit non-consequentialist reasons.[16] I shall focus instead on consequentialist reasons for favouring criminal penalties for assisted suicide.

[11] Euthanasia Law (*Loi relative à l'euthanasie*) 28 May 2002. For a brief description of the law, see P. Meller, 'Euthanasia Ban Ends' *New York Times,* 24 September 2002, A13.

[12] Termination of Life on Request and Assisted Suicide (Review Procedures) Act (*Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding*) 2002. An English translation of the Act is available on the Netherlands Ministry of Foreign Affairs website, at <http://www.minbuza.nl/binaries/minbuza_core_pictures/pdf/c/c_55024.pdf>.

[13] Swiss Penal Code 1942, Art. 115 criminalizes assisted suicide only where the motive is selfish. For an overview of Swiss assisted suicide law and practice, see S. A. Hurst and A. Mauron, 'Assisted Suicide and Euthanasia in Switzerland: Allowing a Role for Non-Physicians' (1 February 2003) 326 *British Medical Journal,* 271–3.

[14] Death with Dignity Act 1997.

[15] *Washington v Glucksberg,* 521 US 702, 710, 117 SC 2258, 2263 (1997) ('[i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide'). See also R. Cohen-Almagor, 'Euthanasia and Physician-Assisted Suicide in the Democratic World: A Legal Overview' (Winter 2003) 16 *New York International Law Review,* 1–41. For a comparative overview of euthanasia policy that includes Asia, South America, and the Middle East, see J. M. Scherer and R. J. Simon, *Euthanasia and the Right to Die: A Comparative View* (Lanham, Md: Rowman & Littlefield, 1999).

[16] I should add in the interest of full disclosure that I do not find the deontological objection to all instances of assisted suicide persuasive, even though I do find some deontological arguments persuasive.

Consequentialist reasons for regarding legal assisted suicide with disfavour may include any or all of the following concerns:

(i) that adequate palliative care will not be made available because suicide will come to be seen as an acceptable and substantially less expensive alternative;

(ii) that family members or doctors will exert pressure on patients to hasten their deaths;

(iii) that such pressure will be most acute for women, minorities, and especially the disabled;

(iv) that society more generally will place less value on the lives of the severely disabled; and

(v) that the medical profession will lose its focus on the preservation of health and life.

It is by no means clear that any or all of these reasons in fact justify banning assisted suicide, even if we look only at aggregate effects. For example, there is good reason to think that assisted suicide bans themselves impede effective palliative care. Even in jurisdictions that accept the principle of 'double effect'—under which a doctor may prescribe whatever dose of narcotic is needed to ease pain, even if that dose kills the patient along with her pain—healthcare workers frequently under-medicate pain for fear that they will be unable to mount a successful double-effect defence if prosecuted.[17] Legalization of assisted suicide, under this reasoning, enhances rather than undermines the quality of palliative care.

Likewise with respect to the question of professional role, it is by no means clear that the appropriate stance for doctors should always be in favour of prolonging life. We might well worry that doctors who must categorically decline to assist their patients in taking so-called 'active' measures to end their lives will also be reluctant to 'let them die', a right that is typically safeguarded, even in jurisdictions in which assisted suicide is prohibited.[18] Accordingly, prohibitions on assisted suicide may have a deleterious impact on physician respect for patient autonomy.

[17] See J. K. Rogers, 'Punishing Assisted Suicide: Where Legislatures Should Fear to Tread' (1994) 20 *Ohio Northern University Law Review,* 657 (noting practice of under-medicating due to fear of litigation despite double-effect exception). See also B. A. Rich, 'The Politics of Pain: Rhetoric or Reform?' (2005) 8 *DePaul Journal of Health Care Law,* 519 ('The result of widespread and highly publicized disciplinary proceedings against physicians for purported "overprescribing" has been the encouragement of . . . underprescribing').

[18] I use scare quotes because I doubt that disconnecting a patient from artificial hydration or respiration can be accurately characterized as passively 'letting die'. The act of 'pulling the plug' is an act, not an omission, as we can readily see by imagining that an assassin

I could go on adducing reasons why one might conclude that, when one tallies the costs and benefits, assisted suicide ought to be legal. However, I shall assume for the sake of argument that, on balance and by whatever consequentialist calculus one uses to make these judgements, the mix of costs and benefits associated with prohibition of assisted suicide is preferable to the mix of costs and benefits associated with legalization of assisted suicide. Even so, prohibition raises moral questions because the conscientious legislator knows that, for some number of patients, the costs of prohibition clearly outweigh the benefits, with the result that such patients must undergo excruciating suffering without adequate justification as to their circumstances. Such patients raise a moral objection to the prophylactic nature of the assisted suicide ban.

To make the objection concrete, let us imagine a terminal patient whom I shall call James Poe.[19] Poe's suffering cannot be addressed by narcotic drugs. (Perhaps he suffers from nausea or respiratory distress.) Thus, he cannot take advantage of the double-effect loophole in most assisted-suicide prohibitions. Let us imagine further that Poe has sufficient wealth to pay any and all medical costs associated with his further treatment but no heirs who are pressuring him to die. Suppose that Poe is not a member of any socially disadvantaged group (other than the group of people suffering from excruciating and terminal medical conditions) and is adjudged by psychiatric experts to be of sound mind. Finally, let us suppose that Poe unequivocally and consistently expresses his desire for medication that will kill him painlessly and as soon as possible. Denying him assistance (from a doctor or anyone else) in obtaining such medication sacrifices his fundamental interest in avoiding suffering, for the benefit of others—those who would be at the receiving end of inappropriate pressure to end their lives were assisted suicide legal.

Is it a sufficient answer to Poe to tell him that, although the rule forbidding assisted suicide deprives him of his fundamental interest in avoiding suffering, that grave harm cannot be avoided without causing greater harm to others? Poe will no doubt object that *he* is not responsible for the unfortunate condition of those other people, so that it is unfair to require him to bear the costs of the deliberately over-inclusive—that

pulled the plug of his mortal enemy without the enemy's consent. The assassin would be guilty of the act of murder. The difference between this case of killing without consent and pulling the plug with consent is not the difference between an act and an omission but the difference between an act to which consent is withheld and one to which consent is given.

[19] See *Compassion in Dying v Washington,* 79 F.3d 790, 795 (9th Cir. 1996) (*en banc*), reversed by *Washington v Glucksberg,* note 15 above.

is, prophylactic—prohibition on assisted suicide, when the benefits go exclusively to others.

I can tell you how the American legal system would address this question were it presented as an issue of constitutional law. The US Supreme Court rejected this sort of claim in a pair of 1997 decisions, holding that the right to physician aid in dying is not a fundamental right in the technical sense of that term. Consequently, the Court did not demand a truly compelling justification from the legislatures of the states of Washington and New York.[20] But even if the Court had found that Poe had a fundamental right, that would not have ended the inquiry.[21] The Court would have faced the further question whether the states had advanced sufficiently strong justifications for the prohibitions.[22] In technical language, the Court would have asked whether the prohibitions were the 'least restrictive means' of advancing a 'compelling interest'.[23]

In some sense, that's just legalese for the proposition that when the government infringes on very important liberties, it must have very good reasons for doing so. Even if the putative right to assisted suicide does not lead courts to examine the reasons given for its prohibition—as it would not in either the United States[24] or the United Kingdom[25]—we would nonetheless expect *legislators* in any constitutional democracy to ask themselves whether they have very good reasons for enacting laws that infringe on very important liberties such as Poe's claimed right of assisted suicide. To borrow the doctrinal test described above, we would want legislators to ask whether there is a less restrictive means of accomplishing the obviously important ends of protecting patients against coercion, ensuring the availability of palliative care, and so forth.

[20] See *Washington v Glucksberg,* ibid, 728, 2271; *Vacco v Quill* 521 US 793, 799, 809, 117 SC 2293, 2297, 2302 (1997).

[21] For an outline of the steps in fundamental rights analysis, see E. Chemerinsky, *Constitutional Law* (New York: Aspen Law and Business, 2002), 764–8.

[22] See, e.g., *Roe v Wade* 410 US 113, 155, 93 SC 705, 728 (1973) ('Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest", and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake') (citations removed).

[23] See, e.g., *Sable Communications of California, Inc. v FCC,* 492 US 115, 126, 109 SC 2829, 2836 (1989) (permitting restriction of fundamental rights 'in order to promote a compelling interest if [the government] chooses the least restrictive means to further the articulated interest'); see also Chemerinsky, note 21 above, 767 ('[i]f a right is deemed fundamental, the government must present a compelling interest to justify an infringement').

[24] See *Washington v Glucksberg,* note 15 above; *Vacco v Quill,* note 20 above.

[25] See, e.g., *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2001] 3 WLR. 1598 (denying terminally ill woman's request to allow her husband to assist her suicide).

In other words, we would want the conscientious legislator to ask whether the burden on Poe is truly necessary to gain the benefits that accrue to others from a prohibition on assisted suicide. The answer appears to turn on a further, empirical question: would it be possible to gain the advantages of a ban on assisted suicide through means short of outright prohibition, for example via stringent regulation and expanded government funding for palliative care? Even though we have been assuming that the aggregate benefits of the assisted suicide ban outweigh its aggregate costs, the answer to this question might still be yes. That is to say, it is possible that the benefits of an outright ban on assisted suicide outweigh its costs, but that regulations falling short of an outright ban would provide the same benefits with fewer costs. In that case, it would appear to be impossible to justify the prophylactic ban on assisted suicide as applied to Poe (absent the sort of absolute deontological objections to assisted suicide that I have bracketed). For, in his case, the ban operates as pure cost.

Suppose, however, that the complete ban on assisted suicide truly is optimal with respect to aggregate costs and benefits, so that the legislature cannot make exceptions for people like Poe without opening the door to the sorts of pressures on others that it finds unacceptable. By whatever measure a legislator uses to determine such things—aggregate pleasures minus pains, say, or 'utiles'—the harms from permitting any exceptions outweigh the benefits. Even so, presumably Poe would still object in exactly the terms I stated above: why should he have to endure excruciating pain to prevent third parties over whom he has no influence from harming other third parties with whom he has no relationship? Anglo-American law traditionally imposes no duty to rescue strangers,[26] and even in those jurisdictions that depart from the traditional rule, there is no duty to rescue strangers where doing so would entail excruciating pain.[27] Both the traditional rule and the limited nature of the departures

[26] See Keeton *et al*, *Prosser and Keeton on the Law of Torts* (St. Paul, Minnn: West, 1984), 374 ('the law has persistently refused to impose on a stranger the moral obligation . . . to go to the aid of another').

[27] See, e.g., Vermont Stat. Ann. tit. 12 s 519(a) (1973) ('[a] person who knows that another is exposed to grave physical harm shall, *to the extent that the same can be rendered without danger or peril to himself* . . . give reasonable assistance') (emphasis added); Rhode Island Gen. Laws ss. 11–56–1 (1956) ('[a]ny person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, *to the extent that he or she can do so without danger or peril to himself or herself or to others,* give reasonable assistance') (emphasis added).

in those jurisdictions that depart, indicate that such sacrifices are, in the language of moral philosophy, supererogatory.

Torture

Answering Poe's objection would seem to be an urgent matter, because the inability to justify prophylactic legislation would undermine much of what the state does—and much of what I think most sensible people would want it to do.

So, can the state give a persuasive answer to Poe? That may depend on how we understand the nature of the prohibition on assisted suicide. We might put Poe's objection in its strongest form with an analogy to torture. Suppose that John Doe is a perfectly healthy, completely innocent person who has the misfortune to be the son of a kidnapper threatening to kill another group of completely innocent people that she is holding captive. Could the state torture Doe in order to induce his mother to free her captives? The standard answer in moral philosophy—and one that certainly comports with my own moral intuition—is no.

Poe can claim that his situation is indistinguishable from Doe's. By threatening doctors with criminal liability if they assist him in hastening his death, the state prolongs Poe's agony—in effect tortures him—in order to prolong the lives of other people, those who do not desire aid in dying but would be pressured to end their lives prematurely under a regime of legal assisted suicide. The state can no more torture the innocent Poe through its criminal laws, he says, than it can torture the innocent Doe by hiring a Torquemada.

Not everyone will find this analogy persuasive, and it is tempting simply to dismiss it by relying on something like the act/omission distinction. When the state hires Torquemada actually to torture Doe, the state is taking action. By contrast, even if a law forbidding assisted suicide is not exactly an omission, the state may appear to us to be less responsible for Poe's suffering than for Doe's. After all, the state does not inflict Poe's suffering; his underlying medical condition does. The state does forbid Poe from obtaining assistance in taking the one measure, suicide, that would relieve his suffering but, unlike in Doe's case, Poe's suffering is merely the unfortunate by-product of the state's cost-justified policy. By contrast, the state acting through Torquemada affirmatively sets out to cause Doe's excruciating pain. One could plausibly think that there is a

moral distinction between deliberately causing suffering to achieve otherwise laudable state objectives—rescuing Doe's mother's hostages—and incidentally preventing the cessation of suffering to achieve otherwise laudable state objectives—avoiding coerced deaths, making palliative care available, and so forth.[28]

But even if it is morally worse for the state to aim at causing great suffering to innocents in order to rescue more innocents than it is for the state to cause suffering to innocents as the incidental cost of other action, does it follow that it is morally permissible for the state to take deliberate actions that cause innocents to suffer incidentally? Perhaps a better analogy than torture is what we euphemistically call 'collateral damage' in wartime. The law of war forbids belligerent nations from targeting civilians[29] and requires that strikes against combatants minimize civilian casualties,[30] but minimization is not prohibition. In war, high-value enemy forces can be targeted even though some civilians will be injured or killed as a collateral consequence.[31]

Does the same principle apply in civilian life? It would seem to. In the United States, for example, police carry and use firearms against suspected criminals, with the predictable consequence that sometimes they inadvertently injure or kill innocent bystanders.[32] Similarly, throughout the world vaccines against various deadly diseases predictably cause a small number of the people vaccinated to contract the disease itself (or suffer other ill effects); yet that fact should not prevent the state from mandating vaccination so as to greatly reduce the number of people who would otherwise contract the disease by other means.[33] The person who contracts the disease from the vaccine would appear to be at least as well

[28] See S. F. Colb, 'Why is Torture "Different" and How "Different" is it?' (forthcoming in Volume 30 of *Cardozo L. Rev.* (2009)). In most of Colb's examples, the state tortures people who are not innocent.

[29] See Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) 1979, Arts. 48, 51 ('The civilian population . . . shall not be the object of attack.').

[30] Ibid, Art. 57(2) ('[T]hose who plan . . . an attack shall . . . take all feasible precautions . . . to avoid[], and in any event to minimiz[e], incidental loss of civilian life, injury to civilians and damage to civilian objects').

[31] Ibid: (combatants 'shall refrain from . . . any attack which may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated').

[32] For a history of accidental killings of one officer by another in New York, see A. O'Connor and S. Pacifici, 'A Fatal Wound From a Colleague's Weapon Is Rare, but Always a Risk' *New York Times*, 28 April, 2007, B5.

[33] See K. M. Malone and A. R. Hinman, 'Vaccination Mandates: The Public Health Imperative and Individual Rights' in R. A. Goodman *et al* (eds.), *Law in Public Health Practices* (New York: Oxford University Press, 2003), 264.

positioned as James Poe to complain about the harm inflicted on him by the state: for the benefit of others, she, an innocent, has been required to suffer and perhaps to die.

The Veil of Ignorance

To be sure, as a matter of public health, it may not make a great deal of sense for the state to mandate full vaccination. So-called 'herd immunity' will work well enough to prevent the spread of most diseases, even with vaccination rates falling somewhat short of 100 per cent.[34] Moreover, imprisoning the parents of minor children or others who resist vaccination might prove counter-productive, inspiring distrust of public health authorities. These are legitimate practical objections that I shall simply set aside; I will assume that, for some particular disease, mandatory vaccination is essential for public health. In these circumstances, what justification can the state give to the vaccine's victim?

The state can say that, *ex ante,* the person who turned out to be a victim of the vaccine was much more likely to be its beneficiary. A rational calculator, not knowing whether her child will be the 1 in 10,000 who contracts the disease or one of the 9,999 children who benefit from the vaccine's protection against it, would play the odds and have the vaccine administered. In this instance, John Rawls's metaphor of a veil of ignorance works especially well.[35] Prior to the vaccine's administration, no-one knows whether her child will be one of the many beneficiaries or one of the small number of victims.

Perhaps more importantly, *legislators* do not know *ex ante* which particular individuals or groups of individuals will end up among the vaccine's victims. Conscientious legislators who aim to adjust benefits and burdens fairly among their constituents will have no systematic reason to under-count or over-count the welfare of any individual or group. If it is rational for *any* parent to prefer the risks from the vaccine to the risks from the disease if the vaccination is not given, it is rational for *every* parent to prefer the former risks. Thus, on the assumption that mandatory vaccination truly serves public health better than voluntary vaccination, in mandating vaccination, the legislature does not in fact prefer the well-being of the 9,999 to that of the one: it calculates that all 10,000 would rationally prefer the smaller risk to the larger one.

[34] Ibid.

[35] See generally J. Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1999), 118–23.

Critics of Rawls have sometimes objected that the veil of ignorance is unrealistic.[36] How, they ask, could people living in the diverse circumstances in which persons in multicultural democracies find themselves, truly assess what the basic structure of their political institutions should look like without at least some account—even if unconscious—of their own particularity?[37] That is a sound objection to the Rawlsian veil of ignorance but not much of an objection to mandatory vaccination, for however differently individuals are situated with respect to other questions, they are nearly all in roughly the same position with respect to vaccines: nearly every rational actor would take the small risk of contracting the disease from the vaccine rather than the substantially larger risk of contracting the disease if unvaccinated.

I say 'nearly all' and 'nearly every' rather than 'all' and 'every' because a small number of people object to vaccination on religious grounds, and for them the calculus is quite different.[38] For someone who believes that vaccination will result in eternal damnation, even a substantial risk of contracting a deadly disease if unvaccinated—10, 50, or even 90 per cent, say—may be a risk worth running. In asking such religious persons to don the veil of ignorance, we do potentially run foul of the broader objection to the Rawlsian veil.

The treatment of religious objections to laws of general applicability is an important question for any constitutional democracy, but we can bracket it here. Within American constitutional law, religious objectors are never entitled to faith-based exemptions from truly neutral laws,[39] although many of our states do provide for some religious exemptions[40] and a federal statute requires the federal government to justify

[36] For a summary of and response to such criticism, see S. Mulhall and A. Swift, 'Rawls and Communitarianism' in S. Freeman (ed.), *Cambridge Companion to Rawls* (New York: Cambridge University Press, 2002), 460–87.

[37] Ibid.

[38] For two families' descriptions of their religious objections to vaccination, see *Sherr v Northport—E. Northport Union Free School District,* 672 F. Supp. 81, 92–4 (EDNY 1987).

[39] *Employment Div. v Smith,* 494 US 872, 882, 110 SC 1595, 1602 (1990) ('To make an individual's obligation to obey . . . a law [of general applicability] contingent upon the law's coincidence with his religious beliefs . . . contradicts both constitutional tradition and common sense').

[40] See, e.g., Florida Religious Freedom Restoration Act (RFRA) 1998 and Illinois Religious Freedom Restoration Act (RFRA) 1998. Both of these state RFRAs invalidate state laws that substantially burden religious exercise unless they are the least restrictive means of furthering compelling government interests. For a list of all state religious freedom restoration acts as of 2007, see M. G. Kramer, 'Humane Education, Dissection, and the Law' (2007) 13 *Animal Law,* 291 (citing state laws in Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas).

the application of general laws to religious objectors.[41] Even in jurisdictions that do provide some religious exemptions, however, the government is not completely disabled from applying its general laws where they happen to infringe on religious practices.[42] Rather, the government must simply meet a stricter standard of justification.[43] In our example, the health of minor children—assuming the vaccination provides significant protection against a deadly disease—would likely count as sufficient grounds for overcoming the religious scruples of parents,[44] although in actual practice all but two American states have chosen to exempt parents with such scruples from vaccination requirements.[45]

For my present purposes, it is not important to resolve the question whether the vaccination example is a case in which rational citizens have more or less homogeneous *ex ante* interests and wishes. My point is only that if we identify some such example of roughly homogeneous interests and wishes—whether it involves vaccination or something else—the particularity-based objection to the Rawlsian veil of ignorance lacks bite.

But what about cases in which we agree that people are not *ex ante* similarly situated? These cases fall into two broad categories: those in which persons objecting to having to bear the cost of prophylactic legislation are politically dominant and those in which the objectors are politically subordinate. I shall illustrate these cases with examples based, respectively, on torture and the detention of alleged terrorists.

A Moral Right to Demand Torture?

Suppose you are a conscientious legislator who does not believe on deontological grounds that torture is always wrong. Nonetheless, you

[41] Religious Freedom Restoration Act (RFRA) 1993. RFRA was found unconstitutional as applied to the states in *City of Boerne v Flores* 521 US 507, 511, 117 SC 2157, 2160 (1997), but still restrains the federal government: *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal* 546 US 418, 438, 126 SC 1211, 1225 (2006).

[42] See e.g. Florida RFRA; Illinois RFRA, note 40 above.

[43] Ibid.

[44] Interests the Supreme Court has found 'compelling' include national security—*Haig v Agee* 453 US 280, 307, 101 SC 2166, 2782 (1981)—and highway safety—*Mackey v Montrym* 443 US 1, 17–9, 99 SC 2612, 2620–1 (1979). To date, most cases upholding laws under state RFRA challenges have not reached the compelling interest test, instead finding no substantial burden. See B. Porto, Annotation, 'Validity, Construction, and Operation of State Religious Freedom Restoration Acts' (2004) 116 *American Law Reports,* 233.

[45] The most recent comprehensive data I have found are from 2004, and indicate that only Mississippi and West Virginia deny religious exemptions from vaccination requirements. See 'States with Religious and Philosophical Exemptions from Immunization School Requirements' (National Conference of State Legislatures, 2004), available at <http://www.ncsl.org/programs/health/2004exchart.htm>.

favour an absolute ban on torture (such as the one contained in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) on prophylactic grounds.[46] In principle, you believe that there are cases in which torture would be morally permissible or even required—for example, the well-known 'ticking bomb' scenario: the authorities believe to a high degree of certainty that they have in custody a person who knows but refuses to divulge the location of a ticking bomb that will cause catastrophic harm to the civilian population. Nonetheless, you favour the absolute ban on torture because you believe that, if the law makes any exceptions for ticking bombs, the authorities will start to hear bombs ticking everywhere, and an extremely limited exception will become the de facto rule.

These are reasonable grounds for favouring a blanket ban on torture but suppose that a potential victim of the ticking bomb, whom I'll call Joe Blow, comes along and raises the following moral objection: in the particular case in which your torture ban prevents the authorities from finding and defusing the bomb that will kill or maim me, you are imposing on me, an innocent, a duty to rescue—or what amounts to the same thing, a duty to sacrifice life or limb for—likely terrorists. Blow claims a moral right to have the state engage in torture for his benefit.

How might you respond to Blow's objection? To begin, you can point out that you are not demanding his sacrifice for the benefit of the terrorist. If you favoured the torture ban on deontological grounds—if you thought torture were inconsistent with human dignity, say—then you would need to explain to Blow why your squeamishness about inflicting awful suffering on a suspected terrorist outweighs the suffering and death of Blow and many of his fellow innocent citizens. (You would likely rely on the act/omission distinction or something similar.) However, by hypothesis, that is not the basis for your support of an absolute torture ban. Instead, you worry that allowing any exceptions will lead to the torture of innocent people or people from whom information could be obtained by other means. If the risks are as you calculate, then this shift to the *ex ante* perspective is, once again, an effective response to the moral objection to prophylactic legislation.

[46] The United Kingdom and the United States are both signatories, although the United States has made a number of important reservations. See US Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17486–01 (27 October 1990). For a list of ratifications online, see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp> and <http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm> (including text of reservation).

However, even if the aggregate risks are indeed as you calculate, they will not be distributed evenly. If Blow is a member of an ethnic, national, or racial group whose members are responsible—or simply believed by the authorities to be responsible—for a disproportionate share of terrorist acts, Blow may indeed benefit from the torture ban. But if he were in that group, then *ex ante* at least, he would be quite unlikely to demand that the legislature rescind the torture ban. Someone demanding that the state be prepared to engage in torture in the ticking bomb scenario is much more likely to be a member of a group that envisages the state torturing people other than—and different from—himself.

Thus, in this case, the veil of ignorance appears to succumb to the standard objection that people are situated differently. A large number of people believe that they will never be tortured, and thus some of them want the state to use torture, at least in extreme cases. (Based on the popularity of the American television show '24', in which hero Jack Bauer routinely tortures bad guys, 'some' may actually be 'a great many'.)[47] A smaller number of people believe that, if the state uses torture, it will be against people with their own characteristics. *Ex ante,* the calculation of whether torture is justified will be different for the two groups. Majority group members may rationally conclude that it is worth increasing the risk of torturing innocents in order to preserve the safety of the larger innocent population because members of the majority group will not be among the additional innocents risking torture. Minority group members are more likely to make the opposite calculation.

The conscientious legislator who believes that, all things considered, the absolute torture ban is justified, need not give ground to the purportedly *moral* objection of Joe Blow and others like him. What they demand is that the state shift the balance of risks and benefits from torture away from the majority and onto an ethnic, national, or religious minority. This is not a demand in the name of morality addressed to the *conscience* of the legislator but a demand in the name of self-interest addressed to the legislator's own interest in re-election. Legislators have sufficiently ample incentives to sacrifice minority interests for majority ones that we need not worry much when it is claimed that a law sacrifices majority interests for minority ones.

Indeed, the legislature's incentive to favour—or at least not to disadvantage—the majority is so great that one is tempted to look for other

[47] For a discussion of torture on '24' and the show's growing popularity, see A. Stanley, 'Suicide Bombers Strike, and America Is in Turmoil. It's Just Another Day in the Life of Jack Bauer' *New York Times,* 12 January 2007, E1.

explanations for laws, like the absolute torture ban, that seem to benefit the minority at the majority's expense. Again putting aside the deontological objections to torture—which will also tend to benefit the minority—we can see at least one reason why the legislature might conclude that, even from the perspective of the majority alone, an absolute torture ban is cost-justified: the legislature might conclude that officially permitting any torture will actually increase the net risk of terrorism, because it will inspire additional hatred for the state. In one of his few commendable displays of good sense, former US Defense Secretary Donald Rumsfeld asked in a 2003 'snowflake' whether US and allied forces were 'capturing, killing or deterring and dissuading more terrorists every day than the *madrassas* and the radical clerics are recruiting, training and deploying against' the United States, thereby acknowledging that overly aggressive actions can be counterproductive.[48]

Another explanation for the torture ban could be that the legislature does not in fact believe it will work. That may sound like a cynical view, and some versions of this approach are cynical. For example, President Bush made a great show of signing into law the Detainee Treatment Act of 2005, including a blanket prohibition on torture, only to issue an accompanying 'signing statement' that appears to reserve the power to engage in torture anyway.[49]

There is also, however, a less cynical basis on which a legislator could support a torture ban despite knowing that it will not be fully effective. Suppose a legislator thinks that the state should sometimes torture, but only in the very extreme version of the ticking bomb scenario. Any formal exception in the law would have the unintended effect of authorizing more torture, but in sufficiently extreme circumstances, the authorities can be expected to break the law and engage in torture. Thus, the very fact that police will be tempted to ignore an absolute torture ban when the stakes are sufficiently high could make the absolute ban the optimal rule. In other words, if the conscientious legislator believes that the right answer to the question 'how often should the state torture?' is not 'never'

[48] *See* W. Shapiro, 'Rumsfeld memo offers honest display of doubts about war' *USA Today,* 24 October 2003, 5A. The full memorandum can be found at <http://media.hoover.org/documents/0817945423_xxv.pdf>.

[49] See Statement by President George W. Bush upon signing Public Law 109–149, 2005 *United States Code, Congressional and Administrative News,* S54, in which Bush reserves the right to construe the Detainee Treatment Act 'in a manner [that is] consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief . . . [and] which will assist in . . . protecting the American people from further terrorist attacks'. See also C. Savage, 'Bush Could Bypass New Torture Ban' *Boston Globe,* 4 January 2006, A1, noting legal specialists' opinions that the 'president's signing statement . . . raises serious questions about whether he intends to follow the law'.

but 'very very rarely', then an absolute ban might come closer to achieving that outcome than any other rule. A legislative 'never' would mean 'hardly ever' in practice.

I cannot say with any confidence whether these or other reasons explain why we see complete bans on torture. I can say that, whether the torture ban is optimal or not in the aggregate, Joe Blow's purportedly moral objection to the state's refusal to engage in torture rings hollow, even if we set aside deontological justifications for a complete torture ban. The objection rings hollow because the legislative process is well designed to take account of the interests of people like Blow.

We can say nearly the same thing about assisted suicide. Although I do not believe that, all things considered, assisted suicide bans are cost-justified, if one did think that they were cost-justified in the aggregate, the *ex ante* distribution of benefits and risks would sufficiently answer our hypothetical James Poe, who objects to the imposition on him of the costs needed to avoid harms that a regime of legal assisted suicide would supposedly inflict on others. By hypothesis, assisted suicide bans protect society's most vulnerable members, and so if Poe opposes the ban, he is unlikely to be such a person. Instead, like Joe Blow (who complains about the torture ban), Poe should be able to get a fair hearing in the legislature.[50]

More broadly, we can say that the heterogeneity of the distribution of risks does not render prophylactic legislation immoral where the dominant group bears the added risk of a law's overbreadth. This conclusion has obvious implications for other sorts of laws that protect minorities at the seeming expense of the majority, but I shall not address them here.[51]

Detention Without Full Trial

Members of minority groups who bear the brunt of prophylactic legislation present a much stronger moral objection, however. Let us

[50] Recall that I am assuming that religious opposition to assisted suicide is not the reason for the prohibition. If that assumption does not hold, then Poe may well count as a religious minority whose welfare the legislature should not be able to sacrifice for the welfare of others.

[51] American constitutionalists will see in my analysis a healthy dose of so-called 'representation-reinforcing' theory of the sort propounded most famously by the late John Hart Ely. See generally J. H. Ely, *Democracy & Distrust* (London: Harvard University Press, 1980). Ely argued for careful judicial scrutiny of laws that disadvantage politically disempowered groups such as racial minorities and other victims of prejudice, but maintained that the outputs of a reasonably well-functioning political process should not be second-guessed by courts when they disadvantage majority interests for minority ones. See Ely, *Democracy* at 135–79.

consider their objection in the context of detention without a full civilian trial.

A familiar maxim states that it is better for ten guilty men to go free than for one innocent to be unjustly convicted. Common-law legal systems institutionalize this maxim through a number of procedural mechanisms, including: trial by jury in serious criminal cases; the requirement of proof beyond a reasonable doubt; and the exclusion of evidence obtained through means that cast doubt on its reliability.[52] However, since 11 September 2001 in the US and 7 July 2005 in the UK, some commentators have argued that the ten-to-one ratio is inappropriate for persons suspected of terrorism.[53]

Two rationales might be thought to justify relaxing the procedural rules that implement the ten-to-one principle. First, terrorists who commit their crimes by suicide cannot be deterred by the threat of after-the-fact criminal punishment. Thus, authorities must intervene before they have completed their plans, but separating those with innocent intentions from those with guilty intentions will often prove more difficult than determining guilt for a completed act. Indeed, some of the persons the state may wish to detain will not have even committed an inchoate crime, but are nonetheless highly dangerous. The perceived need for early apprehension may create a concomitant perceived need for a lower threshold of certainty before the state apprehends and detains people.

Second, terrorists aim to produce destruction on a greater scale than other criminals. The cost of freeing ten ordinary murderers in order to avoid wrongly incarcerating one innocent person accused of murder is, according to the ten-to-one maxim, a high cost but one worth bearing. It does not follow that the cost is worth bearing when we have ten extraordinary murderers. In other words, to the extent that the ten-to-one maxim encapsulates a civil-libertarian-weighted cost-benefit analysis, the analysis may be different for terrorism.

In my country, these factors may partly explain why the Bush administration has generally sought to avoid trying terrorism suspects in civilian courts according to the usual rules of the criminal justice

[52] For an overview of US criminal law procedure and the ways in which it 'reflects a desire to minimize the chance of convicting an innocent person even at the price of increasing the chance that a guilty person may escape', see LaFave *et al, Criminal Procedure* (St. Paul, Minn: West 2004), 30.

[53] See e.g. J. Tyrangiel, 'The Jihadi Next Door?' 168 *Time,* 3 July 2006, 26 (arguing that 'when a handful of terrorists can trigger an exponentially larger tragedy . . . "[y]ou find a reversal of the general posit that it is sufficient that 100 guilty men go free so that one innocent man is not convicted" ') (quoting Ronald Susskind).

system.[54] Instead, the administration has relied on military tribunals for both determinations of combatant status and some criminal prosecutions.[55] Initially, military jurisdiction was asserted over US citizens as well as aliens, and our Supreme Court approved of that approach (even as it rejected the administration's claim of unreviewable authority).[56] However, the Military Commissions Act of 2006 made clear that henceforth only aliens would be subject to adjudication by military tribunals under looser rules than apply in civilian courts.[57]

If we take the ten-to-one ratio as the background operating assumption of common-law legal systems, then the use of any set of procedures that substitutes a higher ratio of false positives to false negatives can be understood as prophylactic legislation. Suppose, for example, a legislator believes that, given the need for early intervention and given the size of the harm perpetrated by terrorists, the proper maxim is 'better to imprison three innocent people at Guantánamo Bay than to mistakenly free one determined terrorist'. Based on this one-to-three rather than ten-to-one ratio (of false negatives to false positives), the government would use procedures that reduce the number of dangerous people released but at the cost of increasing the number of innocent and harmless people imprisoned or killed.

Now suppose that, when we apply the same discount factor as we apply in civilian life to produce the ten-to-one rule, we obtain the one-to-three rule for terrorism cases. In that case, the conscientious legislator could give our by-now-familiar answer to someone who objects to the increased risk of erroneous incarceration or execution for terrorism suspects: *ex ante,* the risk is justified because it applies the proper discount factor for balancing your risk of being improperly incarcerated by the state against your risk of being harmed or killed by a terrorist improperly released or never apprehended by the state.

[54] For a discussion of post-11 September use of military tribunals and immigration authorities to 'bypass the criminal process' in detaining terror suspects, see D. Cole, 'The New McCarthyism: Repeating History in the War on Terrorism' (2003) 38 *Harvard Civil Rights–Civil Liberties Law Review,* 22–7; R. B. Schmitt, 'Sidestepping Courts in the War on Terrorism' *Los Angeles Times,* 30 November 2005, A18. For a review of detentions and trials of suspected terrorists from 2001–2007, see J. T. Parry, 'Terrorism and the New Criminal Process' (2007) 15 *William and Mary Bill of Rights Journal,* 770–82.

[55] See Parry, ibid, 770–82. For a description of the military tribunal review process for enemy combatant status determination, see T. Golden, 'For Guantánamo Review Boards, Limits Abound' *New York Times,* 31 December 2006, 1.

[56] *Hamdi v Rumsfeld,* 542 US 507, 519, 124 SC 2633, 2640 (2004) ('There is no bar to this Nation's holding one of its own citizens as an enemy combatant').

[57] See Military Commissions Act (MCA) 2006 s. 948(c), defining '[p]ersons subject to military commissions' as '[a]ny alien unlawful enemy combatant'.

However, we also have our familiar rejoinder: the risk of being mistakenly imprisoned as a terrorist and the risk of being harmed or killed by a terrorist who was not detained because the authorities lacked sufficient evidence to hold him are heterogeneously distributed. People in certain national, ethnic, and religious minority groups—especially Muslims—will suffer a much higher risk of erroneous imprisonment than will the majority population.[58] Providing fewer procedural rights to aliens than to citizens—as under the Military Commissions Act in the United States—exacerbates the problem, because it subjects precisely those without political power to the increased risk.[59] However, the problem persists even if we envisage a special response to terrorism that applies equally to citizens and non-citizens, because, as a practical matter, the nominally inclusive programme will still expose Muslims (and some members of other minority groups) to greater false positive risk than the false positive risk borne by the balance of the population.

And that will be so even if we assume no bad faith or invidious prejudice on the part of the authorities. The fact—and I'll assume it is a fact for purposes of this example—that a Muslim is more likely to be a terrorist than a non-Muslim, even though the overwhelming majority of Muslims are perfectly innocent, will lead the authorities to concentrate their investigation on individuals who happen to be Muslim. That will be true even if the authorities specifically disavow religion as an element of a 'terrorist profile', because, by hypothesis, simply following specific clues will more frequently lead the authorities to Muslim suspects.

Thus we come to the hard question: can the conscientious legislator authorize counter-terrorism policies that, while cost-justified in the aggregate, expose innocent members of a religious minority group to a substantially greater risk of erroneous detention than the risk that the balance of the population faces? In my discussion of torture, I concluded that there is no strong moral objection of potential terrorism victims to a decision *not* to expose members of a minority group to a greater risk, and that answer should not change whether the risk is torture or unwarranted imprisonment. So the conscientious legislator can vote to provide full-dress civilian court criminal trials to all terrorism suspects; if she does so, she might pay a political price but she should be able to sleep at night.

However, suppose our conscientious legislator is either attentive to polls or an insomniac. Can she give a persuasive answer to the moral objection

[58] For discussion of the relationship between law enforcement and Muslim communities in the US after 11 September, see A. Elliot, 'After 9/11, Arab-Americans Fear Police Acts, Study Finds' *New York Times,* 12 June 2006, A15.

[59] See MCA ss 948(q), 949(a), 950(a).

of the minority victim of prophylactic legislation? Before addressing that question, I want to register a caveat concerning how we should measure costs and benefits.

The Caveat: Total Risk

First, the caveat. I have been talking as though the proper way for a legislator to assess the distribution of risk from a proposed law is to look at the distribution of risks and benefits from that law alone. Yet a better approach may be to tally up the distribution of risks and benefits from the entirety of government policy. If the optimal policy with respect to one phenomenon—vaccination against disease A, say—exposes one group to a disproportionately greater share of the risk than the general population faces, might that policy be justified by the fact that this group disproportionately benefits from some other policy—such as vaccination against disease B—or even something completely unrelated, such as trial by jury in criminal cases? I see no reason in principle why, from the *ex ante* perspective, a conscientious legislator could not take this approach. Doing so enables the legislature to pursue policies that are optimal in terms of their aggregate costs and benefits without succumbing to distributional objections, by balancing the distributional consequences across different policy domains. We might call this approach 'distributional arbitrage'.

There are, however, at least two substantial difficulties with distributional arbitrage. The first is availability. Across policy domains, the same people tend to get the short end of the stick. For example, the distributional arbitrageur looking for a policy to balance the disproportionate risk that the poor will bear from a decision to site a sewage plant in their neighbourhood will find that most of the other policies on offer also disproportionately expose the poor to risk.

To be sure, government programmes of redistribution, including entitlements and progressive taxation, do disproportionately benefit the poor, including the most disadvantaged members of disadvantaged minority groups. But this brings us to the second difficulty with distributional arbitrage: once we resolve to consider total benefits and burdens of government policy, there is no natural baseline from which to measure benefits and burdens.

Can the conscientious legislator vote for a regime of hyper-aggressive criminal law enforcement that will disproportionately expose poor minorities to the risk of erroneous imprisonment on the ground that most of these people disproportionately benefit from progressive taxation? If so,

how should the conscientious legislator take account of the fact that the wealthy disproportionately benefit from legal protection of private property? Policy arbitrage may make sense in principle but in practice it would be likely to license legislators to ignore distributional objections, because one can always find some policy that disproportionately benefits whatever group complains about the disproportionate burden a proposed law would impose on them.

Conclusion

In the end, I doubt that the legislature can give a persuasive response to the disadvantaged minority group member who is subject to prophylactic legislation which, even if optimal in the aggregate, fails of its background justification in his case—such as the law-abiding Muslims who are imprisoned or tortured in the mistaken belief that they pose a terrorist threat.

Indeed, I am not even very confident in the response I have outlined for cases of homogeneously distributed risks and risks that advantaged members of the society disproportionately bear. Recall that, in these cases, the conscientious legislator says to the unfortunate soul caught up by the overbroad law that he was an *ex ante* beneficiary. But can't he still complain?

Suppose that the five starving survivors of a shipwreck realize that they must kill and eat one of their number if the remaining four are to have a hope of surviving until they are rescued. The person who draws the short straw was an *ex ante* beneficiary of the procedure because a four-in-five chance of living another few days is better than the near-certainty of death in another few hours. Still, that hardly ensures the morality of the procedure once the procedurally fair decision has been made to sacrifice him for the benefit of the others—even in the case in which he consents to the lottery. It would take an extraordinary commitment to procedural fairness for the person drawing the short straw not to regard himself (in his last moments of life) as having been wronged.

Now note that, in the case of prophylactic legislation, the people who end up bearing the brunt of the law's deliberate overbreadth need not have actually agreed with the law, so long as, *ex ante,* our conscientious legislator believes that the law would be in their interest. James Poe, whose suffering is prolonged by the blanket prohibition on assisted suicide, can liken himself to the shipwreck survivor who does not consent to the drawing of straws, is outvoted by his fellow survivors, and then draws

the short straw. Perhaps in the case of the shipwreck and for all prophylactic legislation that impinges on fundamental interests, we expect that grim necessity will overwhelm considerations of morality. If so, we might say that prophylactic legislation, like the survivors' cannibalism lottery, is sometimes forgivable, not that it is moral. We cannot even say that much where the legislation imposes disproportionately greater risks on vulnerable groups than on others.

The conscientious legislator may thus be tempted simply to avoid prophylactic legislation whenever it would implicate fundamental interests. But even that path will often be unavailable because there will be no way to craft a legal principle that is not over-inclusive with respect to some people. A categorical rule forbidding torture will potentially deprive terrorism victims of their lives because the state fails to discover and defuse the ticking bomb; a rule permitting torture will result in the torture of innocents; and the state cannot simply do nothing.

Thus, finally, with moral objections in all directions, the legislator may feel liberated to do whatever he wishes to maximize utility or pursue whatever other policy aims he favours. In my view, that approach would also be inappropriate. The impossibility of overcoming moral objections is not a reason to fail to grapple with them. In the recent past, and especially in the halls of power in my own country, public officials have far too quickly set aside moral considerations in favour of short-sighted views of expediency. Morality may sometimes need to bow to expediency, but it should not go down without a fight.