

ARTICLE

Distributive Justice in National Security Law

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Abstract

When collecting information about possible terrorist attacks, national security agencies may have to choose between competing systems of implementation, all infringing individual rights. Should they collect information by indiscriminately wiretapping communications in the population at large or by implementing harsher means, such as investigations under arrest, against individuals known to be involved in terrorist activities? Assuming that both policy options, at least in certain cases, are equally effective, this question highlights the fact that many national security decisions entail distributive implications. This Article analyzes the centrality of distributive justice considerations for the understanding of national security law at a time that policy decisions on anti-terrorism measures can either take the form of indiscriminate large-scale infringements of individual rights, such as body-scans, or much more targeted forms, which place additional burdens on suspects. This choice, which had so far been overlooked, becomes more and more relevant as new technologies make it easier to apply methods of surveillance indiscriminately.

The focus on the choice between policies with different distributive implications cuts against the traditional understanding of national security law as based on two choices: allowing national security threats to continue unabated, which may result in a catastrophe ensuing from a terrorist attack, or violating rights through the government's use of preventive measures

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designed to confront the threat. This pattern of analysis has obscured a fundamental question to the implementation of measures for preventing anti-terrorism: what is a just distribution of the resulting burdens?

This Article examines the hidden side of national security law by focusing on the choice between using harsh anti-terrorism measures on a selective basis, or using anti-terrorism measures that entail less harmful infringements of individual rights but affect much larger segments of the general population.

Introduction: The Many Faces of Distribution in National Security Law

Faced with an ever-pressing need for collecting information about possible terrorist attacks, what course should national security agencies prioritize? Should they collect information by indiscriminately wiretapping communications in the population at large, or concentrate their energies on investigating those known to be involved in terrorist activities, using harsher means such as investigations under arrest? Each of these alternatives allocates the cost of national security to a different group. Assuming that both policies are (at least sometimes) equally effective, this choice and others described in this Article highlight the fact that national security decisions often entail distributive implications that need to be taken into consideration. Even the decision to refrain from anti-terrorism measures is laden with hidden distributive consequences: it allocates the costs of being hurt to individuals more likely to be attacked, such as residents of large metropolitan areas, and prioritizes the interests of those who may have suffered from anti-terrorism measures.¹ In the service of promoting security, governments constantly choose how to allocate their costs among different groups. Given that these hidden decisions underlie the national security policies of almost every government in the world, the significance of recognizing the role that distributive justice concerns should play in the formulation of these policies can hardly be exaggerated.

The choices available in the area of national security become more pressing due to the development of new technologies. These technologies have opened up new possibilities for the use of large-scale anti-terrorism measures. One controversial example is the use of body-scans in airports on a universal basis as an alternative to the more selective procedures used in

¹ For a comparison of the costs of action and inaction in the context of preventive anti-terrorism measures, see ALAN M. DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* 245 (2006).

the past.² In light of these developments, the need to consider the distributive implications of each governmental choice in this area becomes even timelier.

Attempts to analyze the distributive aspects of national security law seem antithetical to the conventional wisdom that views national security policies as the ultimate example of a “public good,” that is, something that all individuals in society enjoy and share the costs of equally (in the typical case, through taxation).³ This conventional wisdom has obscured the fact that national security decisions, especially in modern times, have multi-dimensional distributive consequences. Theories of distributive justice attempt to define the correct balance of the burdens borne and the benefits received by particular citizens or groups of people. So far, they have been used to analyze basic concepts in several areas of law—such as tort liability,⁴ taxation,⁵ and contracts,⁶ but have never been central to the discourse on national security law and policy. This Article seeks to broaden the perspectives used to understand national security law by highlighting the centrality of distributive justice in every decision fitting under the rubric of “national security.”

² For this controversy, see, e.g., Charles Krauthammer, *Don't Touch My Junk*, WASH. POST (Nov. 19, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/18/AR2010111804494.html>; Jeffrey Rosen, *Why the Pat-Downs and Body Scans are Unconstitutional*, WASH. POST (Nov. 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/24/AR2010112404510.html>.

³ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 14 (1965) (“The basic and most elementary goods or services provided by government, like defense and police protection, and the system of law and order generally, are such that they go to everyone or practically everyone in the nation. It would obviously not be feasible, if indeed it were possible, to deny the protection provided by the military services, the police and the courts to those who did not voluntarily pay their share of the costs of government.”); Ann R. Markusen, *The Case Against Privatizing National Security* 16 GOVERNANCE 471, 473 (2003) (“The nature of national security as a public good has been understood for decades and is noncontroversial. The basic argument is that national defense is both nonexcludable and nondepletable. There is no way of providing it in a decentralized, ‘fee for service’ manner—everyone would have an incentive to take a ‘free ride’ on their neighbors, as, indeed, some countries do.”).

⁴ See, e.g., Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193 (2000).

⁵ See, e.g., Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 FORDHAM L. REV. 1991 (2004).

⁶ See, e.g., Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

In the national security realm, distributive justice theory considers the allocation of both the benefits and the burdens of measures applied invoking security. The benefits of such measures include the protection and sanctity of life, while the burdens, in addition to monetary costs, include infringements of individual rights such as privacy, liberty, and, at times, life. These benefits and burdens, however, do not fall equally on all parts of the population. For example, although protection from terrorist attacks in airports and central public sites are perceived as necessary for ensuring the security of the state and the public at large, pilots and frequent air travelers *directly* benefit more than others from anti-terrorism measures that aim to lessen such risks. Similarly, those who are subject to profiling in airports carry an additional burden in the name of the promotion of a good that is enjoyed not mainly by them, but rather by others in the public at large.

So far, the literature has acknowledged the distributive justice aspects of national security decisions in a relatively marginal manner. Ronald Dworkin focused on the price paid for security and argued that the balancing approach to security and civil rights was problematic since anti-terrorism measures do not diminish civil liberties for everyone. His argument focused on the uneven allocation of the cost of security, stating that “[m]ost of us pay almost nothing in personal freedom when such measures are used against those the President suspects of terrorism.”⁷ Looking at the other side of the balance between security and rights—the side of the benefit of national security policies—Jeremy Waldron discussed the uneven distribution of security as a “good.”⁸ He pointed out that “people may be differently situated with regard to a given threat,”⁹ and described how government decisions to promote the security of one group often jeopardize the security of another.¹⁰

The distributive aspects of national security policies have left significant marks, mainly on the analysis of policies that have uneven effects for different ethnic groups. Ethnic profiling has occasionally been addressed from the perspective of distributive justice, pointing that this practice

⁷ Ronald Dworkin, *The Threat to Patriotism*, N.Y. REV. BOOKS, Feb. 28, 2002, at 44, 48.

⁸ See Jeremy Waldron, *Safety and Security* 85 N.E.B. L. REV. 454, 460 (2006).

⁹ *Id.* at 484; see also Rafael Di Tella & Ernesto Schargrotsky, *Do Police Reduce Crime? Estimates Using the Allocation of Police Forces After a Terrorist Attack*, AM. ECON. REV. Mar. 2004, at 115 (discussing the benefits that accrued to residents of areas neighboring Jewish institutions, which enjoyed additional police presence following the bombing attack on the main Jewish Center in Buenos Aires in 1994).

¹⁰ Waldron, *supra* note 8, at 485–89.

allocates an additional cost to a certain group in society. Some proposals have even sought to compensate individuals who have been subjected to questioning or other related burdens.¹¹

This Article aspires to focus on the distributive implications of decisions in the realm of national security in a more comprehensive manner. First, it argues that the distributive aspects of such decisions should be recognized as a major theme rather than a marginal aspect of national security law. Second, it looks into new questions that have not yet been exposed and discussed—mainly into the need to choose between harsh anti-terrorism measures on a selective basis and anti-terrorism measures that entail less harmful infringements of human rights but affect large populations of innocent individuals. Third, it moves from criticism of the traditional balancing approach to the mapping of the substantive and institutional considerations that should guide the analysis of choices made in the area of national security law.

Following the Introduction, Part I describes in greater detail the distributive choices entailed by almost every national security decision. Part II presents national security measures as regulatory decisions and describes their distinctive characteristics (e.g., the need to compare between different kinds of harms, the significance attached to the moral responsibility of those targeted by the government and their political “otherness”). Part III examines the challenge of distributive justice in the area of national security by looking at specific case studies. Part IV broadens the perspective of the analysis by highlighting the relevance of institutional considerations, such as the relative disadvantages of the courts in dealing with considerations of distributive justice. Part V builds on the analysis in the previous sections and offers an initial scheme for thinking about distributive justice in the area of national security by addressing the relative advantages and disadvantages of targeted anti-terrorism measures vis-à-vis anti-terrorism measures applied on a universal basis. Accordingly, the conclusions stress the importance of informing national security decisions with their distributive implications, and shed additional light on the relevant considerations in this regard.

¹¹ Tomer Blumkin & Yoram Margalioth, *On Terror, Drugs and Racial Profiling*, 8 INT’L REV. OF L. & ECONOMICS 194, 200 (2008). For an analysis of racial profiling, see also *infra* text accompanying notes 50–52.

I. The Distributive Choices Hidden in National Security Law

How should societies allocate the burdens of providing national security? Assuming that all possible methods are equal in aspects such as effectiveness, financial cost, and efficiency, what should be the principle guiding the choice of method? This classic distributive justice question of “holding all else equal” so common in other areas of public policy has rarely been studied in the context of national security. Traditionally, national security law has been understood only as a choice between allowing a threat to national security to continue unabated (e.g. the catastrophe that may result from a terrorist attack) and infringing human rights via the government’s use of preventive measures when confronting a threat. In the context of this classic discourse, anti-terrorism measures are considered justified, despite their effect on human rights, if they are likely to prevent a greater evil to society. An illuminating instance of this thinking is the opening of Michael Ignatieff’s book, *The Lesser Evil*: “What lesser evils may a society commit when it believes it faces the greater evil of its own destruction? This is one of the oldest questions in politics and one of the hardest to answer.”¹² Similarly, Eric Posner and Adrian Vermeule base their discussion of national security law on a binary choice between “security” and “liberty,” which they describe as a “tradeoff.”¹³

As indicated, Dworkin had already criticized this approach as overlooking distributive considerations.¹⁴ Moving from criticism to implementation, this Article poses the following question: how should the burdens necessary to attain the benefit of preventing anti-terrorism be distributed among individuals and groups in society? Typically, there are many options for ensuring prevention. Generally, anti-terrorism measures can be grouped into measures that target only those suspected of

¹² MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 1 (2004). Gabriella Blum asks this question in the area of humanitarian law. See Gabriella Blum, *The Laws of War and the ‘Lesser Evil’* 35 *YALE J. INT’L L.* 1 (2010). It may indeed be the case that, in some contexts, it is possible to take anti-terrorism measures that do not affect human rights (what Kent Roach calls “smart” strategies), and even that, in other contexts, measures that infringe human rights are not necessarily effective (what Roach calls “harsh” measures). See Kent Roach, *Must We Trade Rights for Security? The Choice between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 *CARDOZO L. REV.* 2151, 2152–54 (2006). However, even when we disregard these examples, we retain the dilemma that necessitates a trade-off between human rights and security.

¹³ ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 21 (2007).

¹⁴ Dworkin, *supra* note 7, at 48.

participating in terrorist activity (be it through harsh interrogations, detentions, or control orders) and measures that affect the general public (be it through the use of biometric identification tools, limitations on the distribution of ideas advocating terrorism, random surveillance of telephone conversations and other forms of communication, or restricting access to sights that may serve as targets). Consider the example of collecting intelligence information on the activities of terrorist organizations, which can be attained through harsh means of interrogation directed at members of such organizations, or through the relatively large-scale use of random surveillance of phone conversations of the general population. Let us assume that both measures will lead to similar results in terms of effectiveness—which one is better? This dilemma may bring to mind earlier challenges to national security. In the 1950s, for example, should the U.S. government have abstained from hiring people associated with the Communist party, thereby imposing a significant burden on this group, or should it have opted for the close monitoring of all government employees?¹⁵

Addressing the question of distributive justice in this way raises two pragmatic concerns: first, the effectiveness of the two alternatives compared may not be identical in real life scenarios, and second, a large cloud of uncertainty surrounds the effectiveness assessment of national security measures. But although these concerns are real, they do not undermine the question posed. Normative concerns remain even when measures differ in their effectiveness, the only difference being that they will then have to be considered vis-à-vis the additional variable of relative effectiveness. The overall skepticism concerning the ability to assess the effectiveness of government initiatives in the area of national security is also important, but not unique to the dilemma at hand. This concern, if overstated, may undermine the legitimacy of any national security initiative, not only when it is compared to another alternative. Developing techniques for assessing the effectiveness of national security measures is indeed essential. This additional challenge, however, exceeds the scope of this discussion.

The core of my argument is that national security law should not be understood as a choice between two-dimensional extremes: less anti-terrorism measures and a higher probability of an attack or more anti-

¹⁵ Needless to say, the focus on the comparison between broadly used measures and narrowly used measures is important, because when the narrowly used measures are of the same severity, a choice that prioritizes the use of the narrowly used measures seems easy as long as the narrow group is not selected on a discriminatory basis.

terrorism measures and a lower probability of an attack. Rather, it involves three-dimensional choices—which have to consider the damages entailed by potential terrorist attacks, the relatively serious infringements of the rights of a relatively small group of suspects when targeted anti-terrorism are applied, and the relatively milder infringements of the rights of much larger segments of the general population when large scale measures are applied. Assuming that the greater evil of terrorism should be prevented, and that its prevention is a benefit demanded by and for society and hence an obligation of the government and of policy makers, the challenge is how to choose between these options. Anti-terrorism law thus evolves into an area that posits questions of distributive justice: who should bear its burdens and receive its benefits, and how much of each?

The analysis below does not pretend to solve this dilemma but rather to point out the need for assessing the considerations that should be involved when such decisions are contemplated. In many ways, as Calabresi and Bobbitt have noted, these decisions have the characteristics of a “tragic choice” in that they inevitably allocate agony, suffering, and even death.¹⁶

II. A Regulatory Challenge: The Special Nature of Distributive Justice Considerations in a National Security Context

The use of distributive justice for the purpose of allocating social burdens in a national security context deviates significantly from this theory’s original setting. Traditionally, distributive justice concepts were analyzed in the context of allocating goods and benefits,¹⁷ and not for the

¹⁶ GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 15 (1978). Calabresi and Bobbitt study examples in which society is faced with the need to allocate essential scarce resources. The need to allocate the burden of national security has the same features.

¹⁷ Aristotle, who was the first to define distributive justice (and distinguish it from corrective justice), stated that it is “manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution.” ARISTOTLE, *V NICOMACHEAN ETHICS* ¶ 2 (W.D. Ross, trans.) (350 B.C.), *available at* <http://classics.mit.edu/Aristotle/nicomachaen.5.v.html>. The relatively modern notion of distributive justice began to receive attention with the works of Adam Smith at the start of the industrial revolution in eighteenth-century England. Factory workers lived in abject poverty and disease with minimal standards of living and confronted a stringent social hierarchy that made mobility near impossible, while their productivity made possible an unprecedented surplus of goods. The application of concepts of justice to the condition of poverty produced the modern theories of distributive justice. Authors and philosophers were charged with the task of determining how these goods should be distributed in society,

purpose of allocating costs and burdens.¹⁸ But benefits and burdens are almost inherently interconnected, and distributive justice concepts have long been discussed in the context of allocating burdens in several other areas of law.¹⁹ Moreover, distributive justice concerns have also been used when considering the moral justification of self-defense, a moral query clearly relevant to the area of national security law. One argument adduced in this area has been that self-defense shifts the burden of the potential injury from innocent persons to their attackers and, therefore, from a distributive perspective, implies a better allocation of the burden.²⁰

An analysis of the distributive justice implications of national security decisions must be based on understanding them as regulatory decisions. Decision makers are expected to regulate the risks to national security in a manner that will address the need for choosing between the allocation of heavy burdens to a small group of people and the allocation of lesser burdens to larger numbers of people. This is not entirely unique, and regulatory choices involving distributive components are likely to exist in other contexts of regulation.²¹ I will argue, however, that they have some special features in the area of national security.

The considerations characterizing regulatory choices in the area of national security law can be summarized in the following four points: First, the burdens to be balanced in a national security context differ in kind, comprising, for example, on the one hand, the deprivation of liberty of suspects in terrorist activity and, on the other, the inconvenience of people checked at airports. Second, a moral responsibility factor is often present in

from the lowest employee to the highest manager. See SAMUEL FLEISHACKER, A SHORT HISTORY OF DISTRIBUTIVE JUSTICE 62 (2004).

¹⁸ See JOHN RAWLS, A THEORY OF JUSTICE 25 (1971).

¹⁹ See *supra* notes 4–6.

²⁰ Phillip Montague, *Self-Defense and Choosing Among Lives*, 40 PHIL. STUD. 207, 215–16 (1981); Michael Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 283–86 (1989). For a criticism of these views, see Whitley Kaufman, *Torture and the ‘Distributive Justice’ Theory of Self-Defense: An Assessment*, 22 ETHICS AND INT’L AFF. 93, 100–12 (2008). For distinctions in self-defense law between attackers who are culpable actors and innocent people who constitute threats to others, see Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Circumstances*, 91 VA. L. REV. 999, 1001–02 (2005).

²¹ See, e.g., CASS SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 82 (2002) (“In addition to knowing the benefits and costs of regulation, it is necessary to know *who* bears those costs and enjoys those benefits, and also the particular *nature* of those costs and benefits”) (emphasis in original).

the sense that the people targeted for harm by decision makers may, in certain cases, also be those responsible for the threat to national security. Third, decisions in the area of national security quite regularly involve considerations of political affiliation and participation because attackers are often foreigners or members of distinct communities who do not participate fully in the life of general society or are poorly represented in its politics and institutions. These communities are therefore less likely to be harmed by terrorist attacks on the one hand, but have a greater chance of being targeted for harm by decision-makers who shape anti-terrorism policies on the other. Fourth, the burdens allocated by decision-makers are generally costs that cannot be easily spread to others and, therefore, the government's initial choice of evils will probably not allow for cost sharing. The relevance of these unique features of distributive justice and their effect on national security decisions are discussed below in greater detail.

The first feature of national security decisions is that they require a comparison between alternatives that are not only quantitatively but also qualitatively different. This is the case, for example, when decision makers must choose between relatively harmful and more intrusive measures affecting a small group of people suspected of terrorist involvement, and relatively less intrusive, large-scale measures that affect the general population. This comparison is obviously very problematic. From a deontological perspective, it may even seem impossible, given the Kantian categorical imperative to avoid wrongdoing even when it appears to lead to good results.²² In fact, a choice between widely infringing the rights of a small group of suspected terrorists and slightly infringing the rights of a large group of people is not necessarily easy even from a utilitarian perspective. Indeed, utilitarians use the concept of aggregate harm, derived from the concept of aggregate happiness,²³ when considering regulatory alternatives

²² This approach is best exemplified in Kant's "on a Supposed Right to Lie from Philanthropy." See Jacob Weinrib, *The Juridical Significance of Kant's 'Supposed Right to Lie'*, 13 KANTIAN REVIEW 141, 141–42 (2008). It is worth noting, however, that some interpret Kant's view as applying to parties who are "autonomous and committed to reciprocity, at least in a minimal sense." Tamar Schapiro, *Kantian Rigorism and Mitigating Circumstances*, 117 ETHICS 32, 56 (2006). According to this view, some acts that are usually regarded as prohibited under Kantian law may therefore, given this caveat, be possible vis-à-vis terrorists who act in a manner that rejects any form of reciprocity or consideration of its victims' right to live.

²³ JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 121–23 (Batoche Books, 2000) (1781); see also BENJAMIN CONSTANT, PRINCIPLES OF POLITICS APPLICABLE TO ALL GOVERNMENTS (1815).

and seeking solutions that involve a lesser aggregation of harms and thus maximize aggregate happiness.²⁴ Even they, however, usually apply this form of argumentation when all the harms involved are equally or almost equally severe, implying only small inequalities in harm. A utilitarian response that incorporates the aggregation approach would therefore opt for harming a smaller group, but the analysis changes when the harms compared are not of equal severity. Under these circumstances, even harm to a very large group may be a lesser aggregation of harms when the harm is different in kind.²⁵ According to John Stuart Mill, the goal of society is indeed happiness, but what is morally right cannot be defined merely by what maximizes happiness. Rather, an act is morally right and hence obligatory if society can compel an individual to perform that act. Therefore, *who* derives happiness and pleasure from an act is of paramount importance to Mill, and the universal aggregate acquisition of happiness, possible in greater or smaller measure, is not necessarily the goal.²⁶

The second feature of national security decisions concerns the responsibility for the threat that the government chooses to face through the

²⁴ For an in depth analysis of the aggregation approach, see T. M. SCANLON, WHAT WE OWE TO EACH OTHER (1998); Sophia Reibetanz, *Contractualism and Aggregation*, 108 ETHICS 296 (1998).

²⁵ Scanlon writes

...contractualism supports a principle according to which, in situations in which aid is required and in which one must choose between aiding a larger or a smaller number of people all of whom face harms of comparable moral importance, one must aid the larger number. On the other hand, contractualism does not require, or even permit, one to save a larger number of people from minor harms rather than a smaller number who face much more serious injuries. This distinction, between one class of cases, in which the number of people who can be saved is morally relevant, and all others, in which it is not, is subject to at least two objections. The first concerns the way in which a distinction is drawn between the moral significance of different harms. It seems implausible that in one case, in which we must choose between saving one person and saving ten from harms of the same degree of seriousness, we are required to save the ten, but that in a case that was otherwise identical except for the fact that the harm faced by the one was *slightly* worse we would be required to save the one instead. The proper reply here, I believe, is that the distinctions on which the principles I have argued for rely are distinctions between broad categories of moral seriousness.

Scanlon, *supra* note 24, at 238.

²⁶ JOHN STUART MILL, UTILITARIANISM 72–75 (Univ. Chicago Press, 1906) (1861).

implementation of harmful measures. Here, then, the state confronts a threat posed by individuals who are autonomous actors and can be held responsible for their actions, in contrast to circumstances in which the threat is created by a natural disaster, for example.²⁷ Thus, the debate here is similar to the distributive justice rationale mentioned in the context of self-defense, which concerns the justice of re-allocating harm to the individual or individuals responsible for the attack.²⁸ This factor is highly relevant in the national security arena because individuals involved in terrorist activities are usually candidates for incurring the costs of the more burdensome anti-terrorism measures (leaving aside, for the time being, issues of false identification involving people mistakenly suspected of terrorist activity).²⁹ Therefore, using anti-terrorism measures aimed directly against them would appear fairer.³⁰ The concept of responsibility for the consequences of one's actions actually demands that those guilty of terrorist activity, or of any activity that helps to promote the aims and goals of terrorism, be subjected to the consequences of their actions. From this perspective, then, the extent of engagement in terrorism should translate into the extent of the national security burdens borne by individuals who are involved in it.³¹

²⁷ The analysis focuses on responsibility for autonomous choices, assuming that even people who have suffered disempowerment and deprivation are responsible for their choices when they decide to take part in violence against innocent civilians.

²⁸ See *supra* note 20. The focus on responsibility and choice was mentioned also by Scanlon, who wrote, "It at least seems that when a person could have avoided a certain result by choosing appropriately, this fact weakens her grounds for rejecting a principle that would make her bear the burden of that result." Scanlon, *supra* note 24, at 256.

²⁹ The assumption here is that it is possible to ascertain this aspect based on serious intelligence material, although this is not always the case.

³⁰ In fact, when such anti-terrorism measures are directed against individuals who are not directly involved in terrorism, this may serve as a basis for bringing a legal challenge against them. This was the case in HCJ 7052/03 Adalah Legal Center for the Rights of the Arab Minority in Israel v. Minister of Interior 61(2) IsrLR 202 [2006] (Isr.), which dealt with a sweeping policy against immigration to Israel of Palestinians from the occupied territories (based on a general assumption regarding the hostility of their population). The petitioners challenged this policy and asked the Court to limit the non-immigration rule only to people involved in anti-Israeli terrorist activity. The Israeli Supreme Court acknowledged the harsh implications of the policy on Arab Israeli citizens who have relatives in the territories, but the majority justices declined to intervene due to the temporary nature of the policy (presented as deriving from the security conditions and not reflecting a principle planned to apply on a long-term basis). See also Daphne Barak-Erez, *Citizenship and Immigration Law in the Vise of Security, Nationality, and Human Rights*, 6 INT'L J. CONST. L. 184 (2008). The Israeli Supreme Court was split in this matter again in a later decision. See HCJ 466/07 Galon v. The Attorney General (decision from 11 January 2012) (Isr.).

³¹ An extreme version of this idea has been expressed by Herbert Spencer. See HERBERT SPENCER, 2 PRINCIPLES OF ETHICS § 454 (1891). Spencer's argument was raised in

The need to take responsibility into account in the distributive justice equation is not unique to national security decisions. It may also be a relevant factor in regulatory decisions that allocate the cost of environmental risks between polluters and the general public, or in decision making processes considering whether to burden tobacco and alcohol manufacturers with specific taxes, as well as in other contexts. For instance, an agency whose mandate is to lower the number of car accidents may have to choose between revoking the drivers' licenses of people with a history of dangerous driving or placing greater speed limits on all drivers. However, this "responsibility" factor is not always present in other regulatory contexts such as, for instance, the regulation of a risk of spread of an infectious disease, when decision makers have to choose between a large-scale vaccination campaign that will exact a price from every single individual and the imposition of a quarantine on individuals who are infected or suspected of being infected. Daniel Markovits argued for the preference of a large-scale vaccination policy relying, *inter alia*, on the lack of moral blame on the part of those who may be targeted for quarantine.³² By contrast, national security decisions are special in that responsibility is inherent in the events they handle.

The "responsibility" factor may be deemed problematic in the area of national security law because of the uncertainty attached to the suspicion regarding one's involvement in terrorist activity. Harsh measures against a terrorist who has admitted involvement in a planned attack differ from the use of such measures against someone suspected of wrongdoing on the basis of intelligence material but without certainty as to his involvement. This

conjunction with his objections to the poor laws in nineteenth-century England. Spencer's objections to the poor laws were that both the undeserving (those who did not work hard) and the deserving (those who worked hard) would receive the same benefit, and that this benefit would come at the unjust burden of the middle and upper classes. However, taking the responsibility factor into account does not necessarily mean that this is the only factor that should be given weight, neither does it mean accepting it without acknowledging the hardships confronted by individuals whose life opportunities were limited. It is clear that considerations of personal responsibility are not the only relevant ones. The dilemma of weighing individual responsibility vis-à-vis other values also arises in the context of other decisions with distributive justice implications, such as deciding on the parameters of medical insurance coverage for people responsible for neglecting their health. See Lisa Day, *Distributive Justice and Personal Responsibility for Choices about Health*, 15 AM. J. CRITICAL CARE 96, 97 (2006).

³² Daniel Markovits, *Quarantines and Distributive Justice*, J. L. MED. & ETHICS 323, 333–36 (2005).

factor should of course be taken into consideration, as explained below. Once national security is understood as a matter of regulating risks, however, an action based on the evidence gathered by the government is inevitable. In fact, this is the standard practice when agencies regulate environmental or health risks without knowing their causes for certain.

“Responsibility” is definitely a multifaceted and multilayered concept and there are different levels of involvement in terrorist activities. Anti-terrorism measures must take into consideration the extent of involvement that the individuals targeted by these measures are suspected of. People who finance terrorist organizations, for instance, may be subject to the freezing of their assets without recourse to the criminal law route, but not to detention.

The third feature of national security decisions touches on the characteristics of the people affected by anti-terrorism measures, who are often members of groups less likely to be harmed by terrorism on the one hand, and more likely to be targeted by government action on the other. Usually, terrorists are not members of the societies they attack. This is obviously the case if they are citizens of another state, but also when they live in closed and distinctive communities less likely to be active in sites targeted for attack. Burdening them with the costs of anti-terrorism may balance their initial inclination to refrain from interest in the effects of the attacks. The opposite is also true: victims of terrorism are often targeted because of their group affiliation, and the choice of victims is not wholly random. Accordingly, expecting governments to adhere to considerations of global justice³³ is less realistic when the initial threat is not equally allocated but rather affected by nationality.

This factor also points to the relative exclusion from the political process of those liable to be targeted by anti-terrorism policies, usually because they are foreigners or members of insular minority communities. These characteristics allow for an interesting juxtaposition with the analysis of public choice theory concerning the circumstances requiring governments to choose between allocating costs to a small group or to the public at large. According to standard public choice analysis, one should fear that when decision makers face a choice between inflicting harsh burdens on a small group and distributing the cost of regulation among all

³³ See Thomas W. Pogge, *Global Justice*, in GLOBAL JUSTICE 3–5 (Thomas W. Pogge, ed., 2001).

citizens, they will tend to prioritize the interests of the small interest group, which is usually better organized and more effective at promoting its own interests.³⁴ In contrast, in the typical national security scenario, we should be guided by the opposite fear—that the general public will succeed in shifting the burden of national security to “discrete and insular minorities,”³⁵ and even more so to people who, very often, are not represented in the political process because they are not citizens and, at times, are even illegal residents. Often, decisions in this area are not made behind a “veil of ignorance,” to use Rawls’ famous metaphor.³⁶ The public and its representatives can identify those who would bear the burden of various anti-terrorism measures. Accordingly, in the context of national security, the concern should be the opposite to the one stressed by standard public choice analysis—that moral panic and the lack of any “veil of ignorance” regarding those who may be made to bear the burdens of national security measures will disproportionately tilt the balance of decisions in the other direction.

The fourth feature of national security decisions is that the burdens attached to some of them (usually those causing irreversible harm) are difficult or even impossible to spread. In most regulatory contexts, considering the possibility of spreading costs is relevant when at stake is a policy choice in which a small group of actors is expected to carry a heavy burden. When the costs can be spread to others, the problem of allocating the burden to a limited group is less pressing. Yet, in contrast to polluters, for instance, who can spread the cost of the pollution taxes imposed on them to their contractors and consumers, suspected terrorists against whom harsher anti-terrorism measures are used are burdened by government acts that fall entirely on their shoulders. How can an individual subjected to administrative detention spread the costs of being deprived of liberty?

³⁴ See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12–37 (1991).

³⁵ This well-known phrase is taken from the opinion of Justice Stone in *United States v. Carolene Products Company*, 304 U.S. 144, 152 n.4 (1938).

³⁶ RAWLS, *supra* note 18, at 136 (“The idea of the original position is to set up a fair procedure so that any principle agreed to will be just. The aim is to use the notion of pure procedural justice as a basis of theory. Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations.”).

Compensation does not seem to fully balance this burden (and even if allocated ex post, it cannot be considered a full ex ante justification for imposing burdens that have non-monetary consequences).³⁷

Indeed, as noted, some of the four factors discussed above are also found in other regulatory contexts. The uniqueness of the national security context is that it combines all four. When the government must choose between instituting a maximum driving age of sixty-five or reducing speed limits for all drivers, it must compare different types of regulatory burdens allocated to different groups. Aging drivers, however, cannot be considered to carry any moral blame, and they are also effectively represented in the domestic political process. Another oft-discussed example concerns regulation in environmental matters. When a government wishing to keep water resources clean is forced to choose between allocating costs to factories that operate in the area by creating a new tax imposed solely on them (given findings that they are at least partially responsible for water pollution) or implementing a tax that will affect the population at large (through the regular tax system), it chooses between “responsible” and “innocent” cost-bearers. The cost, however, is of a similar kind (monetary) and more significantly, if imposed on the factories, they can spread the costs to others. Factories, moreover, can voice their arguments and influence the political arena. The special nature of the distributive justice challenge in the context of national security has a further aspect. Contrary to other areas of regulation, government action for the promotion of national security usually involves the regulation of private parties as well as the provision of government services given that national security, as noted, is also a public good.³⁸

III. The Institutional Aspects of the Distributive Justice Challenge in National Security Law

Distributive justice, then, should be regarded a central consideration affecting regulatory choices made in the name of national security. Due to the institutional features of policy formulation in this area, however, the

³⁷ For an argument in support of awarding compensation to those subjected to detentions in the area of national security, see, *e.g.*, Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755 (2004).

³⁸ For example, security checks at airports can be performed either by private agents who follow policies and regulations promulgated by the government, or directly by government agents.

likelihood of addressing this aspect of national security law in the courts or in the public discourse is low.

When courts review the legality and reasonableness of anti-terrorism measures, their focus is limited to the issues placed before them. Whether these involve the use of physical measures in interrogations, control orders, or wiretapping, the courts assess each one on an individual basis and, as a structural matter, fail to compare the measures to other possible anti-terrorism options. This is also generally the case even in jurisdictions that use the “proportionality” doctrine, which mandates courts to question whether no alternative methods could have furthered the stated government goal with less infringement of human rights.³⁹ This result reflects both the extent of deference that is widespread in the context of national security and the limitations of the proportionality test that focuses on immediate alternatives to the decision at hand rather than on different policy approaches, such as preferring the use of large-scale surveillance over harsh interrogations.

But even if judges were willing to expand their review of national security decisions so as to include consideration of completely different alternative measures, they would probably face the hurdle of the government’s advantage of expertise in this area. This expertise may enable it to manipulate the evaluation of alternatives by arguing that they are not equally effective.

Similar obstacles erode the chances of robust public scrutiny of national security policies. Secrecy considerations keep most of the relevant information required to evaluate regulatory decisions in the area of national security out of the public domain. As a result, they bar effective discussion of whether the government should have approached security concerns in an entirely different manner and, for instance, not only use less harmful measures of interrogation but also abandon them altogether and shift its efforts to surveillance.

Note also that judicial and public review mechanisms are not likely to possess the full picture about the distributive implications of each decision they evaluate, and pressures may lead them to decide on changes that do not fully consider all these implications. For example, human rights

³⁹ Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 75–76 (2008).

lobbyists may succeed in shortening the time allowed for interrogating terrorist suspects, leading to the broader use of other surveillance measures that affect the privacy of the population at large. Similarly, litigation against security measures promoted by human rights organizations may not always lead to a better balance between human rights and security. Rather, it may shift the cost of national security to other individuals, who will incur the burden of the alternative measures adopted if the government is forced to abandon its previous policy. The judicial process is not well-adapted to deal with systemic changes brought about by litigation. At best, it leaves the door open to the future review of regulatory decisions shaped by earlier judicial precedents.

The importance of parliamentary review and of internal oversight mechanisms of national security agencies, therefore, can hardly be overestimated. Unlike the courts and the public at large, these institutions do enjoy broad access to relevant information. The emphasis on internal review for the purpose of evaluating the distributive effects of national security decisions goes hand in hand with a growing understanding that effective oversight of executive decisions must resort to these mechanisms in various areas of government action.⁴⁰

IV. The Distributive Justice Challenge of National Security Law in Real Life Case-Studies

The need for choosing between placing large burdens on the members of a small group as opposed to allocating lesser burdens to society at large has not been directly discussed in the literature on national security. Some of the analyses touching specifically on anti-terrorism dilemmas, however, do imply it, as the following discussion points out.

A classic example concerns the debate surrounding the use of particular methods in the interrogations of terrorism suspects. Some arguments against the use of such measures emphasize that their use is not vital given the availability of alternative methods, such as effective

⁴⁰ See, e.g., Neal K. Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2005) (discussing internal restraints on executive branch action). In the area of national security, the distributive justice implications of various policies must be part of the ongoing dialogue between the agencies that participate in the formulation of these policies. Details would obviously vary in different systems. Israel's National Security Council, for instance, is an advisory body to the Prime Minister and the government and, as such, is potentially well situated for the evaluation of these questions.

intelligence work, which may lead to the uncovering of the same information.⁴¹ But this alternative carries its own costs since it involves the large-scale use of wiretapping and other privacy infringements affecting large numbers of people. This particular example may also be considered problematic from a deontological perspective given the absolute prohibition of torture,⁴² but we can still study it inasmuch as it does not address torture but rather a choice between harsh interrogations that fall short of the use of torture and pervasive wiretapping. Another version of this dilemma, involving less severe measures, addresses the choice between issuing control orders against individuals involved to some extent in terrorist activities (in a manner that will enable the gathering of information about their activities more effectively and decrease their ability to engage in dangerous acts),⁴³ and the indiscriminate collection of information about the population at large (e.g., by placing cameras in public places and other measures). The latter entails more widespread privacy infringements, but is less harmful to any particular individual involved.

Another, more concrete, example of a similar regulatory choice taken from the Israeli context is the building of a security barrier to guard civilian areas vis-à-vis the targeted killing of key terrorists. The Israeli government has justified its building of the barrier on the grounds that a physical obstacle is necessary between Israel and the occupied territories so as to prevent the entry of suicide bombers into Israel. Without delving into the controversial discussion of whether the building of the barrier was also

⁴¹ For the need to concentrate on intelligence tools in the fight against terrorism, see PHILLIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* (2003). For an evaluation of Heymann's proposals and their risks, see Ronald D. Lee & Paul M. Schwartz, *Beyond the "War" on Terrorism: Towards the New Intelligence Network*, 103 MICH. L. REV. 1446 (2005). For additional discussion on the focus on intelligence as a central anti-terrorism measure, see also RICHARD A. POSNER, *COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS* (2007); RICHARD A. POSNER, *PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11* (2005); RICHARD A. POSNER, *UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM* (2006).

⁴² This approach was adopted by the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85, available at <http://www2.ohchr.org/english/law/cat.htm>.

⁴³ This measure, which involves significant infringement of liberty but falls short of detention, has been used in British law since 2005. See Clive Walker, *Keeping Control of Terrorists Without Losing Control of Constitutionalism*, 59 STAN. L. REV. 1395, 1402 (2007).

motivated by political purposes,⁴⁴ the decision to build the barrier may be compared to other anti-terrorism measures directed only against individuals claimed to be involved in terrorism, of which targeted killings are the most extreme example.⁴⁵ For the purposes of this Article, the important connection is the following: the security barrier and the targeted killings are two measures that contribute to the safety of Israeli citizens and should be understood as responses to the same problem. Whereas one entails a large-scale infringement of rights, the other is a far more harmful act directed at a much smaller group of people. In some circumstances, at least theoretically, the same level of security might be achieved through the building of physical barriers affecting large populations or through the deadly targeting of active terrorists.⁴⁶

Besides these relatively detailed examples, note that other legal initiatives in the area of national security also have similar features in that they require a choice between preventive measures that are universally applicable and others that are more focused. For instance, in the context of laws on terror financing, some measures such as mandates to disclose the sources of money transfers are aimed at the population at large, while other, more severe, legal actions, such as the freezing of personal bank accounts, only target individuals suspected of supporting terrorism.⁴⁷ Although these regulatory schemes often complement one another, they may also involve choices, such as whether to broaden universally applicable regulation or place additional burdens only on suspects. Even targeted measures, such as wiretapping the Internet communications of suspected terrorists, can have implications for the population at large because surveillance is made possible by laws mandating the use of certain computer technologies.⁴⁸

⁴⁴ See generally Daphne Barak-Erez, *The Security Barrier: Between International Law, Constitutional Law and Domestic Judicial Review*, 4 INT'L J. CONST. L. 540 (2006).

⁴⁵ See HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel 62(1) IsrSC 507 [2006] (Isr.).

⁴⁶ In practice, Israel has used both measures, but in principle, it is plausible that the use of targeted killings may be narrowed or broadened according to the use of other preventive measures such as the security barrier.

⁴⁷ See Joined Cases C-402P & C-415/05P, *Yassin Abdullah Kadi & Al Barakaat Int'l Foundation v Council of the European Union & Comm'n of the European Communities*, 2008 E.C.R. I-6351.

⁴⁸ See Charlie Savage, *U.S. Tries to Make It Easier to Wiretap the Internet*, N.Y. TIMES, Sept. 27, 2010, at A1, available at <http://www.nytimes.com/2010/09/27/us/27wiretap.html?pagewanted=all>.

These examples should be distinguished from others that may involve distributive choices but do not involve all the features of the more difficult cases this discussion focuses on. When facing the decision of whether to use racial profiling as an anti-terrorism measure, a government must choose between allocating the costs to a small group (such as all people with certain ethnic features) or to the general public (or an unidentified large segment of it, such as all those who visit airports).⁴⁹ In this example, however, those who belong to the small group are morally no more blameworthy than the population at large.⁵⁰ This example, therefore, exceeds the scope of the current analysis, which does not promote the allocation of burdens on the basis of immutable or arbitrary individual traits.⁵¹ For similar reasons, the examples discussed above are also different from the moral problem known as the “Sheriff’s Dilemma,” which involves the saving of the innocent majority through the sacrifice of innocent individuals by turning them over to a murderous mob.⁵²

⁴⁹ See FREDERICK F. SCHAUER, *PROFILES, PROBABILITIES AND STEREOTYPES* 190 (2003) (discussing the possibility that profiling may be avoided by screening all air-travellers).

⁵⁰ Even in the classic cases discussed above, as noted, there could be varying degrees of evidential uncertainty around the responsibility of individuals targeted for the application of selective anti-terrorism measures. In racial profiling, however, the individuals subjected to additional burdens are, by definition, innocent.

⁵¹ See RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 287 (2000) (“individuals should be relieved of consequential responsibility for those unfortunate features of their situation that are brute bad luck, but not from those that should be seen as flowing from their own choices”). Note, however, that renewed support for various forms of profiling is emerging with the relatively new recourse to universal uses of body-scans in airports. See, e.g., Eugene Robinson, *TSA Outcry is Really a Call for Profiling*, WASH. POST (Nov. 23, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/22/AR2010112204387.html>; Susan Stellin, *Support Grows for Tiered Risk System at Airports*, N.Y. TIMES, Feb. 7 2011, at B6, available at <http://www.nytimes.com/2011/02/08/business/08security.html>.

⁵² “In a frontier town three children have been abducted, sexually assaulted, tortured and murdered. There is an enormous public demand that the local sheriff find the murderer. As time goes on and no one is arrested, public fear increases, unrest grows and confidence in the forces of law and order diminishes. A man is arrested, and such is the circumstantial evidence against him that it is widely believed that the real murderer has been found. It becomes clear to the sheriff that the man he has arrested is innocent and ought to be released, but a lynch mob has gathered and is threatening to tear down the jailhouse unless the suspect is tried and executed or handed over. There is no immediate possibility of a fair trial, but it looks to the sheriff as though serious public disorder and considerable damage and injury are likely if he tries to resist the demands of the lynch mob. Should he execute or hand over to the mob a man he knows to be innocent?” GORDON GRAHAM, *EIGHT THEORIES OF ETHICS* 145 (2004). As in the example of ethnic profiling, the arrested man is not more blameworthy than the rest of the town people.

V. Thinking about Distributive Justice in National Security Law

The discussion so far has described how distributive concerns affect national security decisions. Understanding these connections can now serve as a basis for discussing the relative advantages and disadvantages of each of the following alternatives: taking measures that may involve significant human rights infringements but affect only select individuals vis-à-vis taking measures that involve lesser harms which are universally applied.

A. Responsibility Considerations vs. Public Choice Considerations

Analyzing the alternatives solely through a moral responsibility prism could lead to the conclusion that allocating national security burdens to those who engage in terrorist activities is a fair solution. Although each individual thereby incurs a relatively high cost, this solution is preferable to the allocation of risks, even if less burdensome ones, to innocent people. And yet, proposing answers in this area without considering the ramifications of political pressures ignores the danger of overusing harsh specifically targeted measures. When national security is concerned, the public can be expected to urge the use of harsh measures against terrorist suspects on the assumption that this will affect only “foreigners” and “others.” The participants in the debate therefore formulate their preferences without the “veil of ignorance” that should be used in evaluating policy decisions, which could result in the overuse of disproportionate measures aimed at those perceived as “others.” Given this bias, advocating the use of anti-terrorism measures that target the public more generally appears advisable because such measures will be debated much more seriously.⁵³ A further aspect of this consideration evoking grave concern is that the pressure of public panic could lead the government to err in the direction of over-inclusiveness when defining the specific group targeted for anti-terrorism measures so that, for instance, it will include not

⁵³ At the same time, note that even investigation and law enforcement measures practiced on a universal basis may entail hidden distributive consequences. For example, it has been argued that Fourth Amendment protections against searches tend to benefit more wealthy populations because they apply to houses and cars and much less, if at all, to people who conduct their daily activities in the streets. See William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1270 (1999).

only participants in terrorist-related activities but also their family members.⁵⁴

B. The Implications of Uncertainty and Possible Mistakes

Another concern evoked by the imposition of national security measures focusing on suspected terrorists rather than on the population at large touches on the factor of uncertainty. By definition, suspected terrorists are still only suspects, which implies a possibility of mistakes. Sensitivity to mistakes should increase proportionate to the severity of the anti-terrorism measure used, reaching a peak when targeted killings, detentions, harsh interrogations, and the like are involved. Therefore, the possibility of mistake is a significant consideration against the use of harsh measures targeting individuals on the basis of evidence collected through administrative means. Lack of certainty does not necessarily imply that such measures should be avoided altogether, but may lead to the prioritization of other means of prevention, if available.

C. Chances for Judicial Review

Another factor to consider when assessing alternative anti-terrorism measures is the probability that they will be subjected to judicial review, the assumption being that anti-terrorism measures that have a higher chance of being reviewed by courts should be considered better, in the sense that they will not go unnoticed and remain unbalanced. From this perspective, note that harsher measures directed at specific individuals are more likely to be reviewed by courts than more dispersed infringements, both because of lesser incentives for individuals to initiate proceedings and because of potential barriers in systems requiring individuals to be personally affected so as to establish standing.⁵⁵ The use of policing and investigation measures against large groups or against the population at large (such as roadblocks, cameras, and so forth) without a basis of suspicion have been litigated in

⁵⁴ An even more inclusive approach may lead to the application of certain policies to all the residents of an area in which terrorist activities take place. *See supra* note 30.

⁵⁵ This is the U.S. approach. For example, the challenge to the warrantless wiretapping program that began as part of the new anti-terrorism measures adopted after September 11 was not decided on its merits. The Sixth Circuit found that the plaintiffs, a collection of organizations and individuals who were involved in national security litigation, had failed to substantiate sufficient standing because they could not show with certainty that they had been or would be subject to any wiretapping under the policy. *Am. Civil Liberties Union v. Nat'l Sec. Admin.*, 493 F.3d 644 (2007), *cert denied*, 552 U.S. 1179 (2008).

U.S. courts relying on the Fourth Amendment to the U.S. Constitution, which states that “no warrants shall issue, but upon probable cause.”⁵⁶ In most cases, however, these challenges have been dismissed, with courts holding that these measures did not infringe the constitutional guarantee as long as they included relatively light burdens and were not applied in a discriminatory manner.⁵⁷

Beyond these considerations, and leaving aside the question of the better choice—shifting the burden of infringement to the few or to the many—the distributive justice perspective on national security policies is important as a platform for evaluating and criticizing current policies. When debating a national security policy, criticizing the extent to which it infringes human rights will not suffice. Another vital element is to evaluate it vis-à-vis alternatives that achieve the same national security goal by infringing on the rights of different people in different ways.

Conclusion

This Article argues that the regulation of national security matters is greatly influenced by distributive choices that have not yet been fully acknowledged. Recognizing the relevance of distributive justice to national security law has several consequences. First, it bears implications for the theory of distributive justice itself, which should increasingly turn its attention to the distribution of burdens in the formulation of policies. Second, distributive justice concerns bear significant implications for the institutional study of national security law. Given the relative inability of courts to consider alternatives beyond the immediate issue before them, the responsibility of executive and legislative decision makers in this area becomes even more significant. Third, and more concretely, the Article

⁵⁶ U.S. CONST. amend IV.

⁵⁷ For an assessment of the case law on these relatively-spread policing measures, see Christopher Slobogin, *Government Dragnets*, 73 L. & CONTEMP. PROB. 107 (2010). Tracey Meares and Dan Kahan have similarly advocated the possibility of enabling inner-city communities to compromise the rights of all their members in a manner that would enable searches and privacy infringements against everyone (with no specific cause) in the name of promoting the overall security of these communities and of all the individuals living in them. This analysis took into consideration “burden-sharing” by all community-members, in a way that did not single out a particular group. According to their argument, this burden-sharing relieves concerns of discrimination and singling-out, and should therefore be immune from judicial review. See Tracey L. Meares & Dan Kagan, *When Rights are Wrong: The Paradox of Unwanted Rights*, in URGENT TIMES: POLICING AND RIGHTS IN INNER-CITIES COMMUNITIES 23–24 (Joshua Cohen & Joel Rogers, eds., 1999).

begins to define the criteria to be taken into account when choosing between alternative measures that promote national security. From a moral perspective that highlights the responsibility of individuals for their choices, anti-terrorism measures focused on individuals who are involved (or partially involved) in terrorism-related activities appear to hold an advantage. Preference for policies that rely on harsh and targeted measures may also be inspired by the pragmatic consideration that such policies are more likely to come up for judicial review due to their relative severity. Other considerations, however, lean in the opposite direction. Since fault-related measures usually target individuals outside the polity or belonging to discrete and insular communities, over reliance on harsh measures against them becomes a real danger. From this perspective, a policy inspired by public choice understandings would see advantages in anti-terrorism measures applied on a universal basis. In addition, these measures have the advantage of being less likely to cause grave injustice due to mistakes in ascertaining the fault of specific individuals.
