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**DOI**

[10.1080/0731129X.2023.2174722](https://doi.org/10.1080/0731129X.2023.2174722)

**Publication date**

2023

**Document Version**

Final published version

**Published in**

Criminal Justice Ethics

**License**

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**Citation for published version (APA):**

Noorda, H. (2023). Exprisonment: deprivation of liberty on the street and at home. *Criminal Justice Ethics*, 42(1), 1-19. <https://doi.org/10.1080/0731129X.2023.2174722>

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ARTICLE



# Exprisonment: Deprivation of Liberty on the Street and at Home

HADASSA NOORDA 

*Scholars have addressed restrictions on individual liberty, or deprivations thereof, that do not entail prison or jail—including area restrictions, revoking driver’s licenses, and GPS bracelets. In all legal domains, the effects of these measures on the lives of targeted individuals can be significant, primarily with respect to their capability to guide their own behavior. Some are applied categorically rather than individually, do not involve a fair trial or hearing, or are applied preventively or after the targeted individual has completed a prison sentence. My aim in this article is to extend our view from prison as the quintessential method of depriving individuals of their liberty to control of individuals without locking them up. I address degrees of individual liberty and inquire into legal protections for individuals who are partially free but deprived of liberty in some areas of life.*

**Keywords:** imprisonment, individual liberty, alternative sanction, rule of law, electronic monitoring, area restriction, revocation of driver’s licenses

## I. Introduction

Area restrictions, revocation of driver’s licenses, and GPS bracelets are examples of individual constraints employed by governments that do not entail prison or jail. States use such constraints to limit people’s liberty without putting them behind bars, and they do so with criminal laws, but also with, among other measures,

administrative laws and bankruptcy laws.<sup>1</sup> These methods of restricting individuals in their liberty or depriving them of liberty are often deemed to be less burdensome than imprisonment, and many of these measures generate less legal protections for targeted individuals than jail sentences do.

However, as I will argue in this article, the effects of some of these measures on the lives of targeted individuals can be significant. In some cases, individuals can be *de facto* imprisoned. This means that

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even though they may not be in an actual prison cell, individuals can be so restricted in their liberty or deprived thereof that they are like prisoners in all or some areas of their lives.<sup>2</sup> The impact of these measures on individual liberty raises the question: what justificatory framework is required for governments to subject individuals to restrictions on liberty that constrain them with means other than the prison cell? This question gives voice to what I call “exprisonment,” meaning restriction on individual liberty outside of prison or jail.<sup>3</sup>

Scholars have addressed specific restrictions on liberty imposed by the state that do not entail physically imprisoning individuals.<sup>4</sup> In this article, I do not study one specific non-custodial measure or way to restrict individual liberty. Instead, I address the power of the state to restrict individuals in their liberty on the street and at home and inquire into legal protections for individuals subjected to such state measures.<sup>5</sup> My aim in this article is twofold: first, I seek to extend our view from prison as the quintessential method of depriving individuals of their liberty to control of individuals without locking them up. Exprisonment as such conceptualizes the restriction of core liberty interests that does not involve physical incarceration behind bars. As part of this argument, I address degrees of individual liberty and broaden the scope of inquiry to individuals who are partially free but exprisoned to a certain extent because they are constrained in some areas of life. Conceptualizing restrictions on individual liberty as non-binary—a person can be exprisoned to a particular degree instead

of being either incarcerated or free—reflects actual practices and invites a rethinking of the safeguards applied to targeted individuals.

Second, I argue that the application of measures that exprison targeted individuals may be warranted by a need for safety and security, but when imposed, exprisonment should be in accord with the rule of law. This means that my argument fits in a classical liberal framework and that I aim to contribute to the debate among liberal theorists of law. More specifically, I adopt a formal understanding of the rule of law aimed at furthering individual self-guidance by allowing people to plan their activities with advance knowledge of its potential legal consequences.<sup>6</sup>

I proceed in the following steps: in section II, I define exprisonment as a general concept and discuss various types of exprisonment. This typological study will help me to narrow the focus of this article to coercive forms of targeted exprisonment by the state that raise concerns with respect to the rule of law.<sup>7</sup> I do not address the reasons why states restrict liberty, but seek to take cognizance of phenomena with an exprisoning impact. This impact-based approach gives a wider analysis of state measures than an analysis focused on restrictions on liberty imposed by states deliberately as a punishment. I employ this approach to give voice to the exprisoning impact of strategies that are imposed as measures functioning outside, or in the shadow of, criminal law. In section III, I refer to studies on the effects of traditional imprisonment. This will serve as a tool for understanding the impact of exprisonment

on the liberty of targeted individuals and illustrates similarities between both practices. In section IV, I build on scholarship on formal understandings of the rule of law and address the question of how the state can coerce individuals through law without disrespecting their ability to guide their own behavior. Furthermore, in section V, I discuss what is at stake when states are not bound by the rule of law when imprisoning individuals and address the question of how imprisonment can be compatible with the aim of the rule of law to further individual

self-guidance. Sections IV and V form the basis for my recommendations on how states can use imprisonment according to the rule of law. I argue for the use of imprisonment without disrespecting the ability of individuals to guide their conduct. The use of imprisonment provides an opportunity for the abuse of power for those who carry out the restrictive measures. This implies the application of suitable legal safeguards to protect targeted individuals against such abuses of power, as I discuss in section VI.

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## II. Exprisonment

I define imprisonment as targeted coercive state-measures that restrict individuals in their liberty to live a free life and focus on forms of imprisonment that raise concerns with respect to the rule of law. In this section, I establish and demarcate the boundaries of the concept of imprisonment along the lines of actor, addressee, mode, and impact, and provide examples of its use.

I address measures applied by states. This means that I do not address measures that restrict individuals in their liberty applied by private entities. Private entities can restrict individual liberty in various ways, for example by applying internet policies and monitoring internet access, but I do not address these practices here.<sup>8</sup> I also do not address measures applied by individuals to individuals, such as a parent sending their child to their room, depriving the child of the ability to move freely for some time. Furthermore, I do not discuss cases in

which individuals decide to deprive themselves of some aspects of their free lives, such as a person who voluntarily serves as a crewmember of a submarine and spends a couple of months in isolation without contact with relatives.<sup>9</sup>

The addressees of imprisonment are specific individuals.<sup>10</sup> Unlike generalized constraints directed towards the general population, individual measures can raise particular concerns with respect to the rule of law. Individuals subjected to preventive travel bans for example are assumed to be less likely to follow the law than others. Once the state subjects individuals to such preventive measures, targeted individuals do not have the chance to be guided by law and to decide to do what is right, because the state has deprived them of (parts of) their liberty and physically manipulates or incapacitates their future action.<sup>11</sup> Generalized measures do not raise this concern, because they are directed

toward risky activities that might be engaged in by the general population.

Exprisonment deprives individuals of (some of) their liberty interests. It is a measure or a combination of measures that subjects targeted persons to government control over their activities and may prevent them from doing what others can freely do, or from particular aspects of a free life. There exists a vast body of literature on liberty and freedom. In this article, I understand freedom as the absence of constraints on a variety of aspects of a free life, including the interest to move freely, to establish and maintain family and other intimate relationships, to participate in society, to enjoy possessions, to fulfill one's employment or studies, and to manifest one's religion.<sup>12</sup>

Not all people enjoy all aspects of a free life. Some people who are not subjected to governmental measures live in poverty or are lonely and lack the ability to establish or maintain relationships with others. This can be a serious problem with regard to the liberty of those people, but I do not address it here. I focus on the impact of exprisonment by the state on individual liberty interests.

Some measures generate collateral consequences that exprison targeted individuals. The revocation or suspension of driver's licenses is an example of a state measure that creates collateral consequences that restrict individuals in their freedom to move and, in some cases, of their employment, which may have serious consequences for their financial situation, subsequently resulting in other restrictions on their free lives. Driver's licenses may be

suspended or revoked under the United States' criminal or bankruptcy law for a variety of reasons, including for failing to pay parking tickets, being unable to pay for damages in a car accident, failing to appear in court, or failing to pay child support. The effects of such a measure on targeted individuals will depend in part on the targets' reliance on cars for commuting and on the length of commute to work.<sup>13</sup> People who are more dependent upon cars for commuting to work may lose their jobs and experience severe financial problems as a result of the revocation or suspension of their driver's license. Such a measure may exprison the targeted individual at least partly.

As the case of revocation or suspension of driver's licenses shows, exprisonment can affect individual liberty to varying degrees. It can be total, extending across all of an individual's liberty interests, or partial, affecting only some aspects of individual liberty. The scope of the restriction depends on the method, such as the revocation or suspension of a driver's license, and on the circumstances in which the method is applied, such as the target's dependence on a car for their commute to work.

An implication of conceiving exprisonment as gradual with respect to its impact is its non-binary character. I do not focus on whether a given measure constitutes "imprisonment."<sup>14</sup> Instead, I seek to address how severely a measure impacts the liberties and lives of those subjected to it.<sup>15</sup> This also means that in some cases, exprisonment refers to what is generally considered a deprivation of liberty,

while in other cases it refers to a mere restriction on liberty.

Disenfranchisement from voting may also have a severe impact on an individual's ability to participate in society. In the United States, individual states have wide-ranging autonomy to strip convicted defendants of their voting rights. Many ex-offenders remain disenfranchised after completing their sentences because courts withhold voting rights until all restitution, fees, and fines are paid.<sup>16</sup> Denying ex-offenders the fundamental democratic right to vote prevents them from participating in society as others can freely do and, thus, affects their individual liberty as citizens of a democratic society.

Many contemporary examples of exprisonment can be found in the context of countering terrorism, including area restrictions, travel bans, asset freezes, and revocation of passports. Governments have applied these measures to individuals suspected of terrorism with domestic criminal and administrative laws, and, at the international level, the United Nations Security Council and the European Union have employed similar measures. The exceptional case of Youssef Nada shows how such measures may impact a variety of aspects of a free life and, in particular cases, lead to a near-total limit on an individual's liberty: Nada was placed on the UN Security Council 1,267 terrorist list by the United States. The UN Security Council applied a travel ban, which prevented him from leaving the 1.6 km<sup>2</sup> town of Campione d'Italia, an Italian exclave within Swiss territory. This required states to prevent Nada from crossing borders and, since he could not

enter Switzerland, he was unable to travel to any other part of Italy, either. In this case, the prohibition on crossing borders led to a situation in which the targeted individual's freedom of movement was curtailed and, on top of that, he was unable to receive health care, to maintain family and other intimate relationships, his employment was affected, and he was prevented from practicing his religion.<sup>17</sup> In most cases, banning individuals from traveling is less controversial than in Nada's because he lived in an enclave, but travel bans always restrict targeted individuals in their freedom of movement to some extent.<sup>18</sup>

Measures applied to restrict individuals in their liberty outside prison have always been part of the apparatus of states, but new technologies, including electronic monitoring, online indexing, and biometric scanning, have enhanced states' ability to monitor and control individuals. These technologies operate in a way that seems to entail minimal impact on individual liberty, and they seem similar to widely accepted practices. Biometric scanning, for example, can be performed without the targeted individual being informed and without any interference in her life, and wearing a GPS bracelet can be put on a par with being subjected to a twenty-four-hour surveillance team. However, the state uses these new methods to control and restrict individuals in their daily lives outside prison, constituting new forms of exprisonment. As Erin Murphy shows, in the United States, electronic monitoring requires individuals to submit regular updates to the government and to notify



authorities if they change their appearance in any way, use cars not registered in their name, or relocate.<sup>19</sup> Online databases of sex offenders and, in some jurisdictions, gun offenders, include biographical information and conviction charges and most of them publicly display their addresses, physical characteristics, and other identifying information. Authorities require targeted individuals to update such information every couple of months.<sup>20</sup> There are also websites that show listed offenders near particular addresses, and, in some states, authorities require real estate agents to provide information on sex offender registries to clients.<sup>21</sup> Many jurisdictions place detailed criminal records online, which may facilitate restrictions of liberty, e.g. when an employer will not hire the person.<sup>22</sup> Biometric scanning techniques (such as facial recognition software, fingerprinting, and [long-range] iris scanning) and DNA databases are other methods of state control that are beginning to be widely used in the United States and elsewhere.<sup>23</sup>

Other examples of exprisonment include house searches and community service orders. Some of these measures have been described as alternative or intermediate sanctions functioning under, or in the shadow of, criminal law. These measures can affect the liberty of targeted individuals to a certain degree.<sup>24</sup> A house search is only a minor constraint on individual liberty, and, as a single measure, it may result in a less severe form of liberty deprivation. However, if it coincides with other measures, the combination of measures may prevent targeted individuals from freely engaging in the society in which they live.

Furthermore, in some cases, the impact of a constraint is disproportional, or a person is subjected to a minor constraint on a daily basis. Issa Kolher-Hausmann describes how between 1980 and 2010, police stops and searches increased and focused on specific groups of individuals in New York City, with the typical arrestee being a young black man from a poor neighborhood.<sup>25</sup> Such racially disproportional practices may lead to more comprehensive forms of exprisonment for targeted individuals.

Exprisonment comes in many forms, and this is not an exhaustive list, but it gives an indication of the variety of methods applied to restrict individuals in their liberty outside prison. It shows that authorities do not need to build physical walls to restrict the liberty of individuals. One may argue that some forms of exprisonment are regular and widely accepted measures, or that they are similar to conventional measures, such as pre-trial detention and house and body searches. I do not contest this view, but I do aim to conceptualize these and other constraints as exprisonment and develop a justificatory framework covering a variety of measures in different legal domains.

Some may argue that the variety of measures I address in this article is too broad. I agree with them that a restriction on, e.g. voting or driving is generally not akin to the deprivation of liberty that occurs in a traditional prison. However, I also believe that exprisonment can have impacts as severe as or more severe than imprisonment behind bars, primarily when one is subject to a combination of measures. The mandatory wearing of an electronic tagging

device combined with house arrest can, for example, strongly constrain an individual's liberty. The ways in which such measures or combinations of measures resemble imprisonment should not be overlooked.

The concept of exprisonment embraces measures that can affect individual liberty to various degrees and can have an impact on all or some aspects of free life, as I address in the next section.

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### III. Impact on Individual Liberty

All these measures seem, at first sight, less intrusive than imprisonment. Yet, if being banned from one's hometown or not being able to visit family and friends for the rest of one's life is compared to spending a year in jail, or if routinely being considered a suspect based on biometric data in a government database is compared to the possibility of being confronted by the police based on an individualized suspicion, preferences might shift to imprisonment. Living one's life without frequent or lengthy interruptions by the state is of great significance for individuals. Some forms of exprisonment may be less intrusive than others, but, as I will argue below, they impinge upon particular aspects of a free life.

Studies on the impact of imprisonment on inmates illustrate similarities with exprisonment. In a classic study of a New Jersey state prison, Gresham Sykes describes the effect of imprisonment on the prisoner's social life, right to property, the organization of their daily life, and employment.<sup>26</sup> The inmate's social and intimate relationships are affected by their isolation from others. Over time, according to Sykes, they lose their connection to society outside prison.<sup>27</sup> Furthermore, the stigma attached to having been in prison is difficult to overcome socially.<sup>28</sup> Similarly, exprisonment may deprive

individuals of (parts of) their social life. First of all, restrictions on movement may affect the social life of targeted individuals. For example, in the case of Nada, a travel ban prevented him from leaving his town, leading to a situation where he was, to a major degree, deprived of the ability to establish and maintain in-person relationships.

Second, exprisonment stigmatizes targeted individuals, which may also affect their relationships with others. After the attacks in Paris on 13 November 2015, the French government declared a state of emergency, allowing French authorities to impose a range of exprisonment measures that would normally require prior judicial authorization, including house searches, at their own discretion. Amnesty International's report on the impact of these measures quotes Orlando, who was subjected to a house search:

*I live in a village of 5000 people. I now feel like people see me as "the terrorist". Quite a few people supported me, but I think the search changed my neighbours' perceptions. Also, some local media covered the search. A journalist called my ex-wife at work and asked her what she thought about me, asked if she was worried about the kids, about how I practiced my religion ... that made me furious, they didn't have any right to do that.<sup>29</sup>*

The search of Orlando's house communicated to the public that he was



censured for being related to the attacks in Paris and stigmatized him and his family members as terrorists or terrorist sympathizers, which—as he worried—may have had a negative influence on his social life.<sup>30</sup>

Some forms of ex-prisonment, including asset freezing, can affect the right of ownership in much the same way that imprisonment restricts individuals in that right. Sykes reports that, in New Jersey state prison, prisoners' basic needs are met, but they are deprived of goods and services to a large extent.<sup>31</sup> Similarly, Nada's right of ownership was affected because all his funds were frozen. He explained:

*My children, my wife, they give me food. Money I don't have, food I have, they give me food. That is all. But money, I don't have any money.*<sup>32</sup>

Nada cannot buy his own groceries, receive social security, or engage in any financial transaction whatsoever, and his family can give him only food but no money.

Furthermore, both imprisoned and ex-prisoned individuals may lose the ability to organize (parts of) their daily life. As Sykes explains, prisoners cannot make choices with respect to when they eat, for instance, or when they sleep, or the work that they do.<sup>33</sup> Lack of opportunities for employment and education in prisons may also affect the inmates' ability to make future plans and to organize their lives after having served their sentences.<sup>34</sup> Individuals subject to house arrests may experience a similar loss of ability to make plans. They are not able to leave their home, and, often, they have to report to authorities daily, which

makes organizing their daily lives difficult and may result in unemployment.

Moreover, in many jurisdictions, people experience collateral consequences of punishment, which may result in ex-prisonment. They may, for example, be restricted in their employment after they have completed prison sentences, or their criminal record narrows their chances on the job market.<sup>35</sup>

In short, restrictions on liberty and deprivations thereof, not only in but also outside of prison, may impact the free life of targeted individuals to various degrees. Prison conditions differ, and not all individual experiences are the same. In some jurisdictions, prison facilities are designed to simulate life outside prison. For example, Halden prison in Norway has no conventional security devices, the staff is unarmed, and prisoners can play music and participate in sports. Spending time in Halden Prison surely has less impact on a prisoner's free life than spending time in a more stringent prison regime.<sup>36</sup>

Another example is the use of weekend-jail or periodic confinement, in which inmates are locked up for a few days a week and free to hold jobs or stay in school for the rest. This allows inmates to keep their jobs, build a career, and maintain relationships with family and friends, and deprives targeted individuals of their liberty in a less drastic way than full-time incarceration. Similarly, the ways in which states use ex-prisonment vary. Especially when combined, forms of ex-prisonment may severely impact the free lives of targeted individuals.

#### IV. Respectful Exprisonment

The state can subject individuals to constraints that control, restrict, and deprive their liberty not only in prison or jail but also on the street and in their own house, and it can do so with respect for the targeted individual if it accepts particular limits and rules by law. Philosophers have provided lists of principles concerning the form of the norms that are applied to individual conduct and principles that address procedural aspects of governance by law. The backbone idea of the version of the rule of law I employ in this article is that law should treat individuals as capable of self-guidance.<sup>37</sup>

Principles of form that have been insisted upon include the principle that, in order to guide people, laws should exist at the time of action, and for people to be able to determine what the law is, it should be public, clear, intelligible, and practical, and should not be vague, misleading, or confusing.<sup>38</sup> The law can be more or less vague, but the law should not be so vague that it does not provide a reliable basis for the organization of one's life.<sup>39</sup> Furthermore, laws should be stable because if laws are frequently changed, people will not be able to make short-term and long-term plans. Laws should also be general, not unpredictable, and congruent with official action.<sup>40</sup>

Likewise, when using force, the state should operate in a respectful way. Standards with respect to procedures include: an open and fair hearing by an impartial and independent tribunal; a right to representation

by counsel so that the targeted individual's side of the story can be explained; a right to confront and question evidence and witnesses and to present arguments regarding the relevant legal norms; and a right to hear reasons for the tribunal's decision, which respond to the evidence and arguments presented in trial.<sup>41</sup>

This is not to say that no one should be restricted in their liberty by the government except if these requirements are fulfilled. However, I believe that comprehensive restrictions on liberty, or deprivations thereof, outside of prison ought to trigger these safeguards. As I will argue in the next section, some minor forms of exprisonment, including baggage searches, constitute softer treatment and, thus, raise fewer concerns regarding the rule of law.

Obviously, not all states abide by the rule of law. Dictatorial regimes have been described as acting akin to robbers demanding a person hand over her wallet. The robber gives her victim a choice, "your money or your life," but the robber will take the wallet anyway, and the victim may be too terrorized to deliberate rationally.<sup>42</sup> Most states do not operate like robbers, but more subtle forms of diversion from the rule of law are part of our legal reality.

When governments engage in exprisoning individuals, they ought to comply with the formal rule of law standards, including the requirement of communicating a measure, and with the procedural standards, which require them to check

whether individuals have complied with the measure. The latter set of standards may include the application of checks that infringe on the free lives of individuals to a relatively minor degree, such as subjection to metal detectors and baggage searches, which are used by authorities to check whether an individual commits a wrong and to build a case. These relatively minor constraints may require particular safeguards for subjected individuals, but, in general, do not raise the same concerns with respect to the rule of law as more severe forms of restrictions on liberty.

However, in some cases, states unjustly label more severe restrictions on liberty as minor constraints or impose harsh treatment without providing proper safeguards, such as when no trial or hearing is conducted to hold the targeted individual to account, or when a more comprehensive measure is applied preventively, or after the targeted individual has completed a prison sentence. For example, in the Netherlands, among other jurisdictions, the government can withdraw citizenship of individuals suspected of contributing to the armed forces of a terrorist organization (if they hold dual citizenship). This measure has comprehensive consequences for the life of the targeted individual, because it may deprive her of the right to enter Dutch territory and to travel to other countries party to the Schengen agreement. This may affect the target's ability to visit family and friends in the Netherlands and other EU countries because she has lost her legal residence. Therefore, the measure and its consequences may impact the targeted

individuals' private and family life.<sup>43</sup> Furthermore, as a result of the application of this measure, the targeted individual may lose her job and/or the state may stop the payment of welfare benefits to the targeted individual. Even so, this measure can be applied based on intelligence reports and without a conviction.

Some measures, including area restrictions, DNA collection, and electronic monitoring in the United States, are applied to individuals based on broad categorical classifications that are based on prior convictions. They can be applied without a formal criminal process, and some require registration and regular updating and may apply for life.<sup>44</sup> Restrictions that prohibit particular individuals or classes of individuals, e.g. sex offenders, from living or being in certain areas typically apply to individuals who are otherwise free of state supervision. Often, these measures are coupled with biometric scanning or GPS bracelets, enabling authorities to control such individuals. As Erin Murphy observes, in the United States, these measures typically carry little or no procedural safeguards and are applied categorically rather than individually.<sup>45</sup>

Another topical example of a measure that controls targeted individuals without regard for their ability to make decisions about their behavior is the preventive freezing of assets as a measure against terrorism. Restricting the freedom of an individual preventively is problematic for the following reasons: First, preventive measures are based on risk assessments that are likely to result in predictive errors. Second,

once individuals are subject to a preventive restraint, they are subject to a measure embedded in the characteristics of their person rather than in their conduct. This makes proving wrong the prediction that they will commit a crime impossible. Yet such measures can affect the lives of targeted individuals to a significant degree, as in the case of Nada described above.<sup>46</sup>

Bans on public housing, public assistance, various jobs, or the right to vote after individuals have completed a prison sentence raise similar concerns, because such constraints are aimed at preventing individuals from committing future crimes, which prohibits them from determining their own behavior.<sup>47</sup> For example, in the United States, the restoration of the right to vote after the completion of a prison sentence is, in many states, conditional on the payment of legal financial obligations, which include court costs, fines, and restitution to victims.<sup>48</sup> This practice imposes a major constraint on the liberty of people who are unable to pay, without providing them with suitable legal safeguards. As is pointed out in the literature, the United States' Supreme Court has set such a high bar for a legal challenge that it is almost impossible to overturn state policies with respect to disenfranchisement.<sup>49</sup>

Likewise, when a state deprives an individual of particular aspects of her liberty through an accumulation of minor constraints, or by frequently imposing such constraints on her, she might experience a relatively more severe form of exprisonment.<sup>50</sup> If someone is repeatedly subjected to a minor constraint, such as a

baggage search, this may be regarded as a form of exprisonment, which interferes with the individual's ability to freely engage in society. Such constraints seem minor, but they may restrict the targeted individual's liberty severely if applied repeatedly, and require similar procedural protections as their counterparts that are deemed to be more intrusive.

States ought not to impose harsh treatment without first complying with the principles of form on aspects such as communication, non-retroactivity, and clarity, and not without checking the compliance of individuals and conforming to procedural standards of the rule of law. Some measures addressed in this article affect particular aspects of a free life, while other measures are more comprehensive. I argue that exprisonment is a matter of degree, and the point to which a measure or a combination of measures imperils the targeted individual's life ought to form the basis for thinking about exprisonment according to the rule of law.

Exprisonment in this sense will still be burdensome for targeted individuals, but it will be different from robbery, or being subjected to the arbitrary will of a police state or a dictatorial regime. When a robber says, "your money or your life," and one fails to surrender one's wallet, there is no tribunal where one will be held to account. Exprisonment ought to operate through the law and the law ought to be organized in a way that is formally respectful of the ability of individuals to organize their lives.<sup>51</sup>

## V. Individual Self-guidance

I have sought to conceptualize various forms of restrictions on liberty and have argued that states can restrict individuals in their liberty in a respectful way, but I have not yet addressed the question of what exactly they should respect. In this section, my aim is to detail what is at stake when states do not respectfully exprison individuals.

The power of the state over individuals is asymmetric, and this places individual self-guidance at risk. Individual self-guidance, as addressed in this article, is the capability of people to guide their behavior, to make plans, and to live according to their plans. The value of the rule of law is that it requires states to protect this capability. As Jeremy Waldron has written, "In various ways, being ruled through law, means that power is less arbitrary, more predictable, more impersonal, less peremptory, less coercive even."<sup>52</sup> What this means with regard to exprisonment is that individuals may fear and be deterred by it. They may challenge the application of exprisonment; they may be deprived of the ability to do things others can freely do, or involuntarily have to do particular things, feel observed by the state, be forced to give up their property, or go to places against their will. But even when subjecting individuals to exprisonment, the state ought to respect individuals' capability to guide their own behavior. This means that the state may subject autonomous individuals to measures that restrict their liberty as a consequence of their own autonomous choosing.

Exprisonment measures like house arrest constitute, at least possibly, interferences with a person's liberty. An exprisoned person will only to a reduced degree be able to live a free life. However, a person may end up in exprisonment as a consequence of her own autonomous choosing. Someone subjected to exprisonment is constrained in her individual liberty, yet she may have made her own decision that led to her being in this situation. The state of exprisonment she finds herself in derives from her self-directing her life. In this sense, exprisonment can be compatible with respect for individual self-guidance to the extent that the state gives individuals the choice to conform to law, instead of interfering with autonomously willed actions arbitrarily.

The state may not restrict an individual in her liberty unless the reasons for doing so respect her status as an autonomous agent, as long as she is at least autonomous to a certain degree. People can be said to be autonomous if they have certain agential capacities, such as minimal rationality. In most jurisdictions, mentally ill individuals who cannot control their behavior or cannot understand the consequences of their actions are rendered irresponsible for their conduct and thereby considered dangerous to other persons.<sup>53</sup> This means that, in particular circumstances, they can be institutionalized preventively. But for individuals who are capable of deciding to comply with the law, this capability should be respected and, should they decide to do

wrong, they should be subjected to measures in accordance with rule of law standards that respect their self-guidance.

Respect for individual self-guidance ought to last through all stages of state actions, from the creation of laws to their application and the aftermath of that application.<sup>54</sup> This may be achieved, for example, by making laws public, by giving individuals an opportunity to challenge the application of liberty-restricting measures, and by lifting measures when an individual has completed a prison sentence or has succeeded in challenging its application.

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This does not mean that individuals should enjoy total freedom. The state does not know who will not respect the rights of others and should be allowed to check whether individuals comply with the law and to build a case. For example, the police should be allowed to search locations, property, and people in the course of a criminal investigation, as long as they are constrained by the requirement of search warrants or equivalent procedures. As detailed in the next section, I do not argue for a right to challenge every temporary constraint.

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## VI. Legal Safeguards

My aim in this section is to set out guidelines for the application of legal safeguards that apply to all forms of exprisonment in all areas of law.<sup>55</sup> Some may argue that this generalization is invalid because every legal regime has different rules and procedures. For example, preventive restraints or measures imposed on offenders after the completion of a prison sentence are not imposed on the grounds that the targeted individual is presumed to be guilty but on account of the fact that she might become guilty (again). Therefore, scholars present these practices as subject to other rules.<sup>56</sup> But I believe that practices of prevention, ex-offender restrictions, and punishment all raise the question of when a state may justifiably interfere with individual liberty.<sup>57</sup> In all legal regimes, the law aims to serve as a boundary or defense against the power of the state.

I seek to take into account the breadth and depth of the effects of particular measures on the target's life. On one side of the scale are comprehensive forms of exprisonment that restrict individuals from participating in almost all aspects of a free life similar to how many forms of traditional imprisonment affect individuals in their functioning. These include house arrest, if applied for a long period of time, the frequent application of a minor measure to a person, and the application of a range of less severe measures that cumulatively have a significant impact on the targeted person's free life, such as a GPS bracelet and an area restriction applied to the same person.<sup>58</sup>

I propose that the most comprehensive measures require an extensive check on the legitimization of the constraint. Such measures ought not to be applied unless the state has



followed regular trial procedures of the criminal law and checked whether the targeted individual has complied with a previously communicated norm. In addition, as is the case with criminal measures in most jurisdictions, a liberty-restricting constraint might be justifiably applied temporarily during investigations. Regular individualized reviews should be required to ensure that the conditions that justify the constraint still exist and remain proportionate to the security need. Furthermore, in relation to procedure, the fact-finding process should be subject to safeguards, including transparency regarding the criteria for being subjected to exprisonment, and an opportunity to challenge the application of exprisonment if it is not temporarily imposed.

Less comprehensive constraints require fewer checks on their legitimization but should still be subject to limits because of the risk of error and the danger that the state may not respect the subjected individual's capability to guide their behavior. Most measures such as baggage searches and house searches are justifiable if procedures similar to those that apply to a search warrant are followed and if the measures are not restraining individuals completely, or applied frequently to the same (category of) person(s). In most cases, such constraints have an impact on particular aspects of a

free life and/or temporarily restrain the targeted person.

On the other side of the scale are measures that exprison individuals only in some aspects of their lives or to a minimal degree. For example, being subject to metal detectors should, in most circumstances, be understood as part of the process of checking an individual's compliance with norms. These relatively minor constraints do not interfere with the targeted individual's ability to live a free life, or to a minimal degree. Individuals should accept proportional and necessary applications of such measures by the state. As for all restrictions on liberty, questions of whether exprisonment is proportionate must be answered, and less intrusive alternatives must be exhausted first.

Approving these recommendations is not needed to accept that all these measures restrict individuals in their liberty to some degree and require the application of the rule of law. In the anti-terrorism debate and in the debate about sex offenders, scholars and policy makers have argued for less procedural safeguards.<sup>59</sup> They deem such practices necessary in the interest of protecting individuals, but we should keep in mind that the state may also turn against people. The function of the rule of law, and the guidelines I sought to develop in this article, is to ensure that the state allows individuals to guide their own behavior.

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## VII. Conclusion

My aim was to extend our view from prison as the quintessential method of depriving individuals of their

liberty to control of individuals without locking them up. I addressed how severely particular forms of

exprisonment impact the liberty of individuals and found that, in some cases, individuals can be so restricted that they are like prisoners in all or some areas of their lives. In other, less comprehensive cases, state measures with an exprisoning impact affect particular aspects of a free life.

I have conceptualized a broad variety of liberty-restricting measures that do not involve physical incarceration behind bars as exprisonment: measures that affect particular aspects of a free life and more comprehensive measures. I argued that the point to which a measure or a combination of measures that constitutes exprisonment imperils the targeted individual's life ought to form the basis for

thinking about what kinds of legal safeguards individuals should have against what kinds and degrees of exprisonment. This means that in deciding what kinds of legal safeguards individuals should have against what kinds of state measures, we should not focus on whether a given measure involves actual prison bars, but how severe its impact is on the person's liberty. Conceptualizing restrictions on liberty and deprivations thereof as such, reflects actual practices and recognizes that some non-imprisonment measures can have a severe effect on the targeted individual's life and warrant stringent legal safeguards for these individuals.

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## Notes

[Parts of this research were conducted during a Global Hauser Postdoctoral Fellowship at New York University School of Law, a Research Fellowship at Columbia Law School, and a research visit at Rutgers Institute for Law and Philosophy, to which I am thankful for providing outstanding research environments. I also would like to thank Denis Abels, Helen Brown Coverdale, Qian Cao, Alexander Edlich, Conor Gearty, David Greenberg, Jeevan Hariharan, Douglas Husak, Patryk Labuda, Nicola Lacey, Liam Murphy, Joseph Raz, Mariana Veras, Jeremy Waldron, the participants in the Crime, Law and Deviance Workshop at NYU's Sociology Department, the participants in the Global Fellows Forum at NYU Law School, the participants in the European Junior Faculty Forum for Public Law and Jurisprudence at LSE Law, and the participants in the Oxford Jurisprudence Discussion Group for valuable comments on drafts of this paper and for discussing this research with me.]

[**Disclosure Statement:** No potential conflict of interest was reported by the author(s).]

[This work was supported by the Netherlands Organization for Scientific Research [NWO Rubicon grant number 019.173SG.021]].

1 On the broad context of surveillance and control mechanisms, see, among other works, Cohen, *Visions of Social Control*; Garland, "Penal Controls and Social Controls."

2 As I address in section II, the difference between restrictions on individual liberty

and deprivations of individual liberty is one of degree. I use both terms to address state measures that impose limits on individual liberty.

3 I first introduce the concept of exprisonment in Noorda, "Preventive Deprivations of Liberty."

4 See e.g. Murphy, "Paradigms of Restraint"; Morris and Tonry, *Between Prison and Probation*; Mayson, "Collateral Consequences"; Manza and Uggen, *Locked Out*; Jacobs, *Eternal Criminal Record*; Hoskins, *Beyond Punishment?*; Gearty, *Liberty and Security*; Noorda, "Preventive Deprivations of Liberty"; Roach, "Be Careful What You Wish For?"

5 See also, Noorda, "Imprisonment." In this article, "I argue that imprisonment is part of the same continuum with other restrictive measures and that what matters in deciding what kinds of legal safeguards should apply to what kinds of state imposition is the question of how severely a measure impacts on the ability to lead a normal life of those subjected."

6 This version of the rule of law is developed by, among other scholars, Joseph Raz. See Raz "Rule of Law," primarily 214. See also Waldron, "Rule of Law."

7 Exprisonment may also raise practical concerns with respect to access to justice, or moral concerns with respect to stigmatization of targeted individuals. On stigmatization, see Noorda, "Regulation as Punishment."

8 On exprisonment employed by private entities in the context of work, see Hariharan and Noorda "Employee Monitoring." The distinction between state and private measures is not always sharp, e.g., when private entities apply restrictions by the state or the state uses data collected by a private entity.

9 The distinction between voluntary restrictions on liberty and coercive measures is not always clear. For example, medical quarantine is in most jurisdictions not legally enforced on individuals with a contagious disease. See Walen, "Unified Theory of Detention," 920–2.

10 On spillover effects to family members of targeted individuals see e.g. Goffman, *On the Run*.

11 See Smilansky, "The Time to Punish," 52; Mayson, "Collateral Consequences," primarily 321–2.

12 The notion of negative liberty is developed by, among other scholars, Isaiah Berlin. See Berlin, "Two Concepts of Liberty."

13 See Morrison, Pang, and Uettwiller, "Race and Bankruptcy."

14 Imprisonment is generally described as confinement to a particular restricted space. See European Court of Human Rights, *Engel & Others v. The Netherlands*, 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72 (8 June 1976); European Court of Human Rights, *Guzzardi v. Italy*, (1980) 3 EHRR 333, par. 93; European Court of Human Rights, *Austin & Others v. The United Kingdom* (GC), App nos 39692/09, 40713/09, and 41008/09 (15 March 2012).

15 For an impact-based approach, see also Noorda, "Imprisonment."

16 See Meredith and Morse, "Discretionary Disenfranchisement," 310, 334. On the right to vote in prison see Poama and Theuns, "Making Offenders Vote."

17 See European Court of Human Rights, *Nada v. Switzerland*, App. No. 10593/08, Judgment, 12 September 2012, par. 227–34. The European Court of Human Rights found that the travel ban did not constitute a deprivation of liberty under the European Convention on Human Rights because Nada was not prevented from freely living and moving within the territory of his voluntary residence. This case is addressed in Noorda, "Preventive Deprivations of Liberty."

18 See Noorda, "Preventive Deprivations of Liberty," 526.

19 See Murphy, "Paradigms of Restraint," 1337.

20 See *Ibid.*, 1336.

21 See *Ibid.*, 1337–8.

22 See *Ibid.*, 1339.

23 See Murphy, *Inside the Cell*.

24 Local courts in the United States have been criticized for physically incarcerating individuals not able to pay a fine. See the Supreme Court of the United States in the case of *Bearden v. Georgia* 461 U.S. 660 (1983). See, also Shaer, "How Cities Make Money."

25 See Kohler-Hausmann, *Misdemeanorland*, chapter 1.

26 Sykes, *Society of Captives*. Sykes' description of this particular prison continues to influence the way scholars conceptualize the lives of inmates. See e.g. Reisig, "Champion, Contender, and Challenger."

27 Sykes, *Society of Captives*, 70, 79. In many jurisdictions, individuals are locked away far from their homes, which makes it difficult to visit. This may have collateral consequences for the targeted individual's ability to reintegrate into society once released from prison. See Barkow, *Prisoners of Politics*, 69.

28 See Lippke, *Rethinking Imprisonment*, 108.

29 Amnesty International, *Upturned Lives*.

30 This stigma may influence other aspects of a free life, like employment possibilities.

31 Sykes, *Society of Captives*, 67.

32 See interview with Nada by Mark Hosenball and Mike Isikoff, 19 November 2006: <http://www.youssefnada.ch> Cited in Goede, *Speculative Security*, 161.

33 Sykes, *The Society of Captives*, 73.

34 See Barkow, *Prisoners of Politics*, 63–5.

35 See Hoskins, "Ex-Offender Restrictions," 40–1.

36 However, as Victor Lund Shammass shows, inmates in these facilities are expected to strive for self-improvement, which can be demanding. Shammass, "Pains of freedom."

37 For a formal conception of the rule of law, see Raz "Rule of Law," 212–13.

38 See Fuller, *Morality of Law*, chapter 2; Finnis, *Natural Law and Natural Rights*, 2070–1; Raz, "Rule of Law," 214–18; Rawls, *Theory of Justice*, 208–10. Some of these principles have been embodied in constitutional norms, e.g. Article 1 of the United States' Constitution prohibits *ex post facto* criminal laws.

39 See Waldron, "Vagueness and Guidance of Action."

40 See Raz "Rule of Law," 291–3, 296.

41 See Tashima, "War on Terror," 264.

42 The example of robbery is used in e.g. Waldron, *Torture, Terror, and Trade-Offs*, 54.

43 See Barry and Ferracioli, "Can Withdrawing Citizenship Be Justified?" 1059–60.

44 See Murphy, "Paradigms of Restraint," 1337.

45 *Ibid.*, 1344.

46 See Noorda, "Preventive Deprivations of Liberty," 531.

47 See Hoskins, "Ex-Offender Restrictions," 40–1.

48 See Harris, *A Pound of Flesh*, 49.

49 See Meredith and Morse, "Discretionary Disenfranchisement," 310, 332. The American Bar Association's database "National Inventory of the Collateral Consequences of Conviction" is meant to make the accused aware of the consequences a conviction will entail: <https://niccc.csgjusticecenter.org/about/>.

50 On racially disproportional applications of police stops and searches see Kohler-Hausmann, *Misdemeanorland*, chapter 1.

51 On criminal trials for preventive deprivations of liberty see Noorda, "Criminal Trials."

52 Waldron, "The Rule of Law."

53 See e.g., Supreme Court of the United States, *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 272 (1940). On this case, see Walen, "Unified Theory of Detention," 916.

54 On guidelines for law reform processes to account for the challenges that terrorism may pose to the rule of law and democracy, see Noorda, "Law Reform."

55 For recommendations on how to implement preventive travel bans and asset freezes, see Noorda, "Preventive Deprivations of Liberty," 532–5.

56 Kimberly Kessler Ferzan points this out in "Beyond Crime and Commitment," 145.

57 A broad conception of the presumption of innocence is defended by, among other scholars, Antony Duff. See Duff, "Who Must Presume?"

58 This is broadly in line with Swedish law: in Swedish law, house arrest combined with electronic tagging is formulated as an

implementation of a prison sentence. Those sentenced to a prison term of no longer than six months may serve their sentence in their homes under electronic monitoring. See Law on Intensive Supervision by Means of Electronic Monitoring [Lag (1994:451) om intensivövervakning med elektronisk kontroll]. [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1994451-om-intensivovervakning-med\\_sfs-1994-451](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1994451-om-intensivovervakning-med_sfs-1994-451). I

thank William Bülow for making me aware of this law.

<sup>59</sup> See e.g. Ackerman, "Emergency Constitution," 1043. For an opposing argument see Dyzenhaus, *Constitution of Law*. On the control of sex crime, see Sample and Kadleck, "Sex Offender Laws"; Picket, Mancini, and Mears, "Unmanageable Risk." For an opposing argument see Janus, "The Preventive State."

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