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Imprisonment

Hadassa Noorda¹ 

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Abstract

Criminal law theorists have for the most part neglected the question of why imprisonment requires special legal safeguards for those targeted. The few scholars who have addressed this question have focused on how prison facilities restrict freedom of movement, control over one's daily life, and access to particular human functioning, but they have ignored state measures that do not include confining individuals behind bars. I defend an alternative account: I argue that the use of prison facilities is part of a raft of state measures, which includes measures that have a relatively minor impact on individuals and others that are more severe. What matters, in deciding what legal safeguards individuals should have against what kinds of state imposition, is how severely a measure impacts on the normal life of those subjected to it. This impact-based approach enables us to decouple the concept of imprisonment from walls, locks, and political and social barriers, thereby highlighting atypical forms of imprisonment, such as open prisons, as well as potential forms of imprisonment to be employed outside of prison, including house arrest. For instance, a person confined to a prison facility can, to a certain extent, be free to take part in society, or a person subject to other state measures can reside at home but be constrained from carrying out a major part of her activities. The account I defend enables us to identify imprisoned individuals as well as those subjected to measures similar to imprisonment, which has potential consequences for their legal rights.

Keywords Imprisonment · Prison · Alternative measures · Legal protections and safeguards · Exprisonment

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1 Introduction

Theorists of criminal law widely agree that the state is required to apply special legal safeguards and rights for individuals facing imprisonment, yet they have for the most part neglected the question of why the focal point of the application of these legal protections is imprisonment. The few scholars addressing the question of why imprisonment requires special legal safeguards and rights for those targeted have focused on particular worrying features of imprisonment, including how prison facilities restrict freedom of movement and access to social and political functioning. However, as I seek to show in this article, such features are not always features of imprisonment, and they are also features of other state measures.

The broader landscape of state measures, including non-carceral measures, has received considerable attention from legal scholars, philosophers, and sociologists who emphasize the scale of the use of such measures and the negative ramifications thereof.¹ For instance, restrictions on individual liberty outside of prison or jail have been described as ‘exprisonment’; this concept reveals that “even without using a prison cell, persons can be so restricted that they are in fact prisoners.”² Although some scholars have noted that non-carceral measures potentially affect the lives of those subjected to them in ways that are similar to the potential impact of imprisonment on the lives of inmates, they typically conceptualize measures beyond the prison facility in terms of alternatives to imprisonment, collateral consequences of it, or as having a less drastic impact on subjected individuals than imprisonment behind bars.³

In this article, I adopt an alternative account: I argue that the use of prison facilities is not *sui generis* but part of a raft of state measures that impinge on individuals’ interests in taking part in daily life, which include state practices that do not involve incarceration behind actual bars and locks. This continuum of state measures involves measures that have a relatively minor impact on individuals such as a ban on entering a particular neighborhood, stricter measures like house arrest, and severe measures such as solitary confinement.

The account I defend in this article enables us to decouple the concept of imprisonment from walls and locks, thereby highlighting potential forms of imprisonment,

¹ For a classic study, see Stanley Cohen, *Visions of Social Control: Crime, Punishment and Classification*, Polity Press, 1985; more recent studies include Kevin R. Reitz, Edward Rhine, “Parole Release and Supervision: Critical Drivers of American Prison Policy,” *Annual Review of Criminology* 3, 2020, 281–298; David Garland, “Penal Controls and Social Controls: Toward a Theory of American Penal Exceptionalism,” *Punishment and Society* 22(3), 2020, 321–352.

² I coined the concept of ‘exprisonment’ in: Hadassa Noorda, “Preventive Deprivations of Liberty: Asset Freezes and Travel Bans,” *Criminal Law and Philosophy*, 9 (3), 2015, 521–535, p. 529.; see also Hadassa Noorda, “Criminal Trials for Preventive Deprivations of Liberty,” in: Z. Hoskins and J. Robson (eds.), *The Social Epistemology of Legal Trials*, Routledge, 2021; Hadassa Noorda, “Exprisonment: Deprivation of Liberty on the Street and at Home” (forthcoming).

³ E.g. Norval Morris, Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*, Oxford University Press, 1990; Gabriel J. Chin, “The New Civil Death: Rethinking Punishment in the Era of Mass Conviction,” *University of Pennsylvania Law Review*, 160, 2012, 1789–1833; Zachary Hoskins, *Beyond Punishment?: A Normative Account of the Collateral Legal Consequences of Conviction*, Oxford University Press, 2019.

including the mandatory wearing of electronic tagging devices and house arrest, as well as atypical forms of imprisonment, such as open prisons and periodic imprisonment. For instance, a person confined to a prison facility can be free to pursue a job and to meet with family and friends, or a person subject to a combination of state measures can reside at home but be constrained from taking part in a number of activities (such as leaving the prescribed premises without permission, having in-person contact with others, banking, engaging in commercial transactions, pursuing a job outside the home). It also enables us to count as people to whom the most stringent legal safeguards should apply both those who are locked in prison facilities and those who are subjected to measures whose effects are similarly grave as the effects of being locked up.

The main rationale for breaking down the distinction between what, according to current theories, is understood to be imprisonment and other state measures is to include individuals subjected to the latter in our discussion of the impact and justification of the kinds of state measures that severely affect the daily life of those subjected. Many of the harmful aspects of traditional imprisonment are shared by different sites of confinement, and, in some cases, alternative measures have a more severe impact on targeted individuals. What we gain from accepting my account is the application of legal protections against the use of arbitrary and disproportional restrictions on individual liberty outside prison facilities. This is important, primarily, in the case that such a measure has a severe impact on the targeted individual's life. I therefore broaden my scope of inquiry to include other restrictions on liberty or deprivations thereof.⁴

I begin by examining a non-definitive list of features that theorists have taken to be worrying features of imprisonment, namely that imprisonment: deprives individuals of liberty behind physical barriers; subjects them to further control over their lives; affects social functioning; disables political participation; and removes or excludes individuals from their communities.⁵ Some of these features—particularly physical barriers, and the impact of such barriers on social functioning—have been put forward as features that distinguish imprisonment from other kinds of measures. However, I point out that (a) these features are not always features of imprisonment, and (b) they are also features of other state measures. Subsequently, I take a first step in embarking on the task of developing an impact-based understanding of what kinds of legal safeguards individuals should have against what kinds of state imposition. I believe my understanding to be more plausible and better adapted to contemporary practices than existing theories that address imprisonment as a practice with unique features: specifically, 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

⁴ 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.

⁵ One can think of other features of traditional imprisonment, including that it imposes physical or mental suffering or a burden on the targeted person, but the state also inflicts burdens on targeted individuals when applying measures that do not amount to traditional imprisonment.

a measure impacts on the ability to lead a normal life of those subjected.⁶ To conclude, I defend my theory against the following objections: that I do not recognize levels of impact of state measures; that I leave aside questions about whether certain measures are intended as punishments; that erasing the distinction between prison behind walls and alternative measures implies a loss of rights for individuals subjected to the former; and that it is hard for legal practitioners and potential targets to understand what legal safeguards apply when my theory is applied in practice.

2 Walls, Guards, and Locks

The traditional understanding of imprisonment is the forcible physical detention of an individual in a confined space, such as a prison. Typically, such a confined space restricts the physical liberty of the targeted person. This is one of the features of imprisonment that theorists have taken to be a worrying feature of imprisonment. Consider a prominent example: imprisonment, as used in the work of Angela Y. Davis, the leading scholar in the abolitionist movement, refers to the forcible physical confinement of an individual in incarceration facilities, including local and county jails, juvenile detention centers, military prisons, and immigration detention centers.⁷ It is part of what she terms the *prison-industrial complex*, which addresses the relationships that comprise the criminal justice system, including policing and surveillance. Davis argues that states are not justified in physically confining individuals, and thus, she does not envision more humane prisons as alternatives to current practices. Instead, Davis proposes education and health care as alternatives to the use of prison facilities and practices of surveillance and policing. She argues for building a society that does not need to restrict individual liberty in a physically confined space.⁸ Davis' abolitionism is not discussed in this article, but it is important to bear in mind the impact of practices of imprisonment on the physical liberty of targeted persons.

Tommie Shelby addresses the work of Davis with the aim of thinking through whether to insist that the practice of imprisonment can and should be reformed or to commit to an abolitionist vision. He, too, writes about imprisonment as a type of incarceration, involving restriction in an enclosed space with physically secure perimeters that prevent escape and unauthorized entry, with no right to leave without permission from authorities. This practice, according to Shelby, results in the isolation of inmates from the general public.⁹ Those locked inside prison facilities are separated from the outside world and sometimes from other inmates, with highly restricted rights to communication and visitation.¹⁰ Locking people up, he concludes,

⁶ This approach was first introduced in Hadassa Noorda, "Preventive Deprivations of Liberty: Asset Freezes and Travel Bans," *Criminal Law and Philosophy*, 9 (3), 2015, 521–535.

⁷ Angela Y. Davis, *Are Prisons Obsolete?* Seven Stories Press, 2003, p. 106.

⁸ Angela Y. Davis, *Are Prisons Obsolete?* Seven Stories Press, 2003, p. 107.

⁹ Tommie Shelby, *The Idea of Prison Abolition*, Princeton University Press, 2022, introduction and Chap. 3.

¹⁰ Tommie Shelby, *The Idea of Prison Abolition*, Princeton University Press, 2022, introduction and Chap. 3.

should not be the primary method for preventing crime, but a last resort in dealing with criminal wrongdoing due to these negative impacts.¹¹

Other criminal law theorists have likewise drawn attention to physical confinement in prison facilities as the hallmark of imprisonment. Richard L. Lippke, articulating an argument for prison reform, addresses the curtailment of liberty in facilities with physically secure perimeters, such as walls, guards, and locks. What makes imprisonment in a confined space a harsh measure in Lippke's view is that it diminishes an individual's chance to live a "decent life" shaped by their own choices.¹² Lippke argues that prison conditions that curtail the freedom of movement, freedom of association, and privacy of prisoners in such facilities should still be consistent with ensuring the basic physical and psychological welfare of prisoners, and should provide them with access to paid labor, visits, entertainment, recreation, and civic and political rights.¹³ I agree with Lippke that conditions of imprisonment should provide inmates with the chance to live a decent life. However, as I address in the penultimate section of this paper, I also believe that this analysis should be extended to modes of restraint employed outside prison facilities, such as electronic monitoring, house arrest, and asset freezing.

The understanding of imprisonment as confinement behind a physically secure perimeter is in line with the juridical notion of the deprivation of liberty, which comes under the protection of Article 5, the right to liberty and security of the person, of the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) has stated that a person is deprived of liberty, with regard to Article 5 ECHR, when, among other requirements, that person is confined to a particularly restricted space.¹⁴ As decided by the ECtHR in *Austin v. The United Kingdom*, for example, police kettling is not a deprivation of liberty.¹⁵ Kettling is a police tactic for controlling crowds during demonstrations and protests. In *Austin v. The United Kingdom* the police blocked off a street and corralled people inside for seven hours.¹⁶ The ECtHR said that there was no violation of Article 5 ECHR, because the kettling of demonstrators is a non-paradigm interference with individual liberty and falls short of arrest and confinement in a prison cell.¹⁷ This decision is in line with the leading decision demonstrating the difference between deprivation of liberty and restriction upon movement in *Engel v. The Netherlands*. In this case, the ECtHR found that there

¹¹ Tommie Shelby, *The Idea of Prison Abolition*, Princeton University Press, 2022, introduction and Chap. 3.

¹² Richard L. Lippke, *Rethinking Imprisonment*, Oxford University Press, 2007, p. 65.

¹³ Richard L. Lippke, *Rethinking Imprisonment*, Oxford University Press, 2007, p. 243.

¹⁴ European Court of Human Rights, *Engel & Others v. The Netherlands*, App nos 5100/71, 5101/71, 5102/71, 5354/72, & 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 39,692/09, 40,713/09, & 41,008/09 (15 March 2012).

¹⁵ European Court of Human Rights, *Austin & Others v. The United Kingdom* (GC), App nos 39,692/09, 40,713/09, & 41,008/09 (15 March 2012), 42.

¹⁶ European Court of Human Rights, *Austin & Others v. The United Kingdom* (GC), App nos 39,692/09, 40,713/09, & 41,008/09 (15 March 2012), 10–24.

¹⁷ European Court of Human Rights, *Austin & Others v. The United Kingdom* (GC), App nos 39,692/09, 40,713/09, & 41,008/09 (15 March 2012), 60–66.

was no deprivation of liberty when ‘light arrest’ or ‘aggravated arrest’ was imposed. The applicants were soldiers serving in the Dutch armed forces and were disciplined for military offenses. There were three types of punishment. Soldiers punished with light arrest had to remain in their dwellings during off-duty hours, could receive visitors and use the phone. Soldiers punished with aggravated arrest had to remain in a specific, but unlocked, location, and could receive visitors and use the phone. The next type of punishment, strict arrest, meant that soldiers remained at home, or were locked in a cell for both on- and off-duty hours, and could neither receive visitors nor use the phone.¹⁸ Only the applicants who were subjected to strict arrest were deprived of their liberty under Article 5, according to the ECtHR.¹⁹ Thus, although a deprivation of liberty can occur in different ways other than through detention in a cell, such as on an island, as was the case in *Guzzardi v. Italy*, Article 5 ECHR is concerned with being physically detained.²⁰

A similar focus on the physically secure perimeters of prison facilities was present in early attempts to show the severely damaging impact of imprisonment on inmates. Gresham Sykes, in a now-classical, mid-twentieth-century study of New Jersey State Prison, addresses the restriction on liberty as the fundamental premise that characterizes the daily life of an inmate.²¹ More precisely, Sykes describes how inmates in New Jersey State Prison were restricted to the prison area itself, and subsequently, within the walls of the prison, inmates were subject to control measures that further limited their liberty, such as checkpoints, passes, and military-style formations when moving from one unit to another.²² Sykes explains how although life behind bars may seem less obviously painful than past penal practices of bodily suffering, inmates in prison facilities nevertheless experience severe pain as a consequence of the restriction or removal of liberty.

Recently, there has been a revived awareness of the importance of limiting the negative effects of the restriction of liberty in a prison facility on inmates, on their lives after prison, and, also, on their families and society. Megan Comfort, among other authors, examines the secondary ramifications of prison sentences on inmates’ partners. She shows how partners of offenders are turned into “quasi inmates” as they communicate with and visit incarcerated partners.²³ Sociologists who study the

¹⁸ European Court of Human Rights, *Engel & Others v. The Netherlands*, App nos 5100/71, 5101/71, 5102/71, 5354/72, & 5370/72 (8 June 1976), 18–21.

¹⁹ European Court of Human Rights, *Engel & Others v. The Netherlands*, App nos 5100/71, 5101/71, 5102/71, 5354/72, & 5370/72 (8 June 1976), 61–62.

²⁰ European Court of Human Rights, *Guzzardi v. Italy*, App no 7367/76 (6 November 1980), par. 95 (“Deprivation of liberty may, however, take numerous other forms.”) See also Neil Allen, “Restricting Movement or Depriving Liberty?” *Journal of Mental Health Law*, Spring 2009, 19–32, p. 28; Donna Cline, “Deprivation of Liberty: Has the European Court of Human Rights Recognised a ‘Public Safety’ Exception?” *Merkourios: International and European Law*, 29 (76), 2013, 23–38, p. 28.

²¹ Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison*, Princeton University Press, 1958.

²² Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison*, Princeton University Press, 1958, p. 286. Other deprivations that Sykes describes as characterizing daily life inside a prison facility are the loss of desirable goods and services, heterosexual relationships, autonomy, and security.

²³ Megan Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison*, University of Chicago Press, 2007; See also, on the spillover effects to the family members of targeted individuals, Alice

society-wide ramifications of confinement in a prison facility have argued that poor neighborhoods are further disadvantaged because large fractions of their populations are in prison facilities or have prison records and are thus less able to contribute to their families and communities.²⁴

Furthermore, in another recent stream of literature, scholars examine the impact of the collateral consequences of conviction on subjected individuals, including the effects of sex offender registration and notification, and the outcomes of alternatives to criminal law, such as regulatory measures that prohibit individuals from visiting particular places.²⁵ Although it has been argued that the potential impact of the use of such measures on targeted individuals is in some cases similar to the effect of the use of prison facilities to confine individuals, the traditional idea that imprisonment takes place behind bars is so deeply entrenched that we typically use alternative terms for measures that set limits on individual liberty but that do not take place behind the walls of an institution as well as for the wider implications of traditional imprisonment; such terms include alternative sanctions, collateral consequences of conviction, intermediate sanctions, exprisonment, and secondary pains of imprisonment.

However, the traditional understanding of imprisonment as a practice that places individuals behind walls and locks is vulnerable to objections. Contemporary society has significantly altered the forms of state power over individuals by making less use of prison facilities, in favor of a system that allows the state to restrict individuals in society without the use of walls, bars, and locks. This is not to say that alternatives to imprisonment are new. House arrest, area restrictions, and other state measures that limit individual liberty outside of prison have always been part of the apparatus of the state, but new technologies, including electronic tagging devices, have expanded their use.²⁶ Erin Murphy, among other authors, recognizes the rise of technological restraints and compares them with their physical counterparts. Murphy argues that new technological restraints “enable the regulation of greater numbers of persons under less stringent conditions for a longer period of time and to a greater degree than an equivalent physical intrusion.”²⁷

One may argue that such alternatives are less restrictive than imprisonment, but in many cases the manner and location of the use of power employed by the state has merely shifted but left unaltered the impact of such measures on targeted individuals. Measures that fail to restrict the liberty of the target behind bars can still impact the individual’s ability to lead a normal life, especially when combined with other mea-

Goffman, *On the Run: Fugitive Life in an American City*, University of Chicago Press, 2014; Bruce Western, *Punishment and Inequality in America*, Russel Sage Foundation, 2006.

²⁴ For example, John Hagan, Ronit Dinovitzer, “Collateral Consequences of Imprisonment for Children, Communities, and Prisoners,” *Crime and Justice: A Review of Research*, 26, 1999, 121–162. On criminal records, see also James B. Jacobs, *The Eternal Criminal Record*, Harvard University Press, 2015.

²⁵ E.g. Zachary Hoskins, *Beyond Punishment?: A Normative Account of the Collateral Legal Consequences of Conviction*, Oxford University Press, 2019; Hadassa Noorda, “Preventive Deprivations of Liberty: Asset Freezes and Travel Bans”, *Criminal Law and Philosophy*, 9 (3), 2015, 521–535.

²⁶ On contemporary forms of imprisonment by private entities, see e.g. Jeevan Hariharan, Hadassa Noorda, “Employee Monitoring as a Form of Imprisonment,” *UK Labour Law Blog*, 19 May 2021, available at <https://uklabourlawblog.com/>.

²⁷ Erin Murphy, “Paradigms of Restraint,” *Duke Law Journal*, 57, 2008, 1321–1411, pp. 1367–1368.

asures. The mandatory wearing of electronic tagging devices can, for example, have a major impact on those targeted, especially when combined with area restrictions, house arrest, or other measures intended to restrict the individual's liberty. Some of these kinds of measures restrict liberty normatively, i.e. by requiring the person to obey certain limits, while traditional prisons restrict liberty physically by locks and walls. But that difference is undermined by the fact that those normative requirements are backed by the threat of force against those who disobey.²⁸ A tagged person subjected to house arrest can be checked to see if she is where she is meant to be. The tagging device will send an alert to a monitoring center if the tagged person is not in the designated location and force can be used against her.

Furthermore, in some jurisdictions, such measures are formulated as an implementation of a prison sentence. For example, in Swedish law, electronic tagging is applied as an alternative *way* of serving a prison sentence rather than an alternative *sentence*. Those sentenced to a prison term of no longer than 6 months might apply for the possibility to serve their sentence in their homes under electronic monitoring. The convicted individual is still sentenced to a prison sentence, but the prison term is served outside of the prison facility, rather than being transformed into another sentence.²⁹

Furthermore, even restrictions that do not restrict an individual's physical liberty, such as asset freezing, can have a major impact on those targeted. In this case, the state controls an individual's assets without actually locking that person up and without restricting her liberty to move about, yet she is subjected to a far-reaching form of liberty deprivation. She cannot, for example, buy her own groceries or engage in the society in which she lives in the same way as others.³⁰ Some measures that restrain individuals without relying on the exertion of physical control share particular aspects with the restriction of liberty behind actual prison bars, and other alternative measures are akin to traditional imprisonment. If imprisonment is reduced to the forcible physical confinement of an individual in, or as if in, an institution, such as a prison, the impact of the modes of restraint employed outside such facilities and the ways in which they resemble physical confinement is easily overlooked.

²⁸ As William Bülow points out, the prison figures in such sentences already, because, if the tagged person disobeys their requirements, she might get sent to prison. See William Bülow, "Retributivism and the Use of Imprisonment as the Ultimate Back-up Sanction," *Canadian Journal of Law & Jurisprudence*, 32 (2), 2019, 285–303. However, one may argue that telling persons what and why they must do a particular thing does more to treat them as responsible agents than if they are prevented from leaving an area by locks and walls (I thank Antony Duff for pointing this out).

²⁹ Law on intensive supervision by means of electronic monitoring [Lag (1994:451) om intensivövervakning med elektronisk kontroll], available at 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).

³⁰ For example, see European Court of Human Rights, *Nada v. Switzerland*, App No 10,593/08 (Judgment, 12 September 2012).

3 Restrictions and Control Measures in Prison Facilities

Further restrictions and control imposed within prison facilities, including control over the daily rhythms of life, the property, and the work opportunities, of inmates, are other aspects that theorists have taken to be a worrying feature of imprisonment. Sykes provides a noteworthy description of how imprisonment behind bars can subject individuals to an all-embracing control over almost every element of their lives. He describes how prisoners may lose the ability to make even the most basic decisions about their daily lives, such as when and what food they eat, and when and how they move within the prison facility.³¹ Prisoners behind bars may also be forced to give up goods and services and, as Sykes notes, most inmates will experience material scarcity. Some experience this through a lack of varied foods, tobacco, individual clothing, etc., and others experience it in a more extreme way, such as in facilities where only the most basic level of goods and services is provided to inmates.³²

When prisoners work, they are excluded from protection of labor and social security rights, including the right to a minimum wage. As Virginia Mantouvalou points out, “they are often already in a position of disadvantage and are made vulnerable to exploitation through concrete legal rules.”³³ This is also true for those who are sentenced to community work, as well as those who work while in immigration detention.³⁴ On top of that, studies show that sentences served in prison and in the community (e.g. unpaid work requirements and electronic monitoring) may also affect the offenders’ ability to make future plans and to organize their lives after having served their sentences.³⁵ It has therefore been argued that “certain community sentences should be viewed on a continuum with imprisonment because of the negative impact on individual freedom, employment conditions and employment prospects of ex-offenders.”³⁶

The degree and type of control depends on how the prison is organized. Many penal systems permit inmates to take furloughs, which allows them to get out of prison and visit family and friends, and in some jurisdictions there are “open pris-

³¹ Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison*, Princeton University Press, 1958, p. 73.

³² Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison*, Princeton University Press, 1958, p. 67.

³³ Virginia Mantouvalou, *Structures of Injustice, Workers’ Rights and Human Rights*, Oxford University Press, 2023, ch. 4.

³⁴ Virginia Mantouvalou, *Structures of Injustice, Workers’ Rights and Human Rights*, Oxford University Press, 2023, ch. 4.

³⁵ Rachel Elise Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, Harvard University Press, 2019, p. 63–65; Jenna Pandeli, Michael Marinetto, Jean Jenkins, “Captive in Cycles of Invisibility? Prisoners’ Work for the Private Sector,” *Work, Employment and Society* 33 (4), 2019, 596–612; Virginia Mantouvalou, *Structures of Injustice, Workers’ Rights and Human Rights*, Oxford University Press, 2023, ch. 4; Virginia Mantouvalou, Hadassa Noorda, “Community Sentences on a Continuum with Imprisonment: Electronic Monitoring and Unpaid Work Requirements,” *Criminal Justice Theory Blog*, June 17, 2022 (<https://criminaljusticetheoryblog.wordpress.com>).

³⁶ Virginia Mantouvalou, Hadassa Noorda, “Community Sentences on a Continuum with Imprisonment: Electronic Monitoring and Unpaid Work Requirements,” *Criminal Justice Theory Blog*, June 17, 2022 (<https://criminaljusticetheoryblog.wordpress.com>).

ons,” which lack physically secure perimeters that prevent escape.³⁷ For instance, inmates in some prisons in Norway are paid for the work that they do in prison, are free to go to the library and cook their own food, and are permitted to go out of prison for a period of time.³⁸ The governance strategy in these facilities is described as “responsibilization.”³⁹ Inmates in these facilities may not experience the deprivation of control over their lives as severely as inmates subject to more total prison regimes, but they are expected to strive for self-improvement, which can be equally demanding. They are required to fill their days with rehabilitation programs, cognitive interventions, and daily life routines that mimic routines in the outside world.⁴⁰

Furthermore, control is also a feature of other state measures. Individuals subject to house arrest, for instance, may experience a 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 lives difficult and may even result in unemployment. And asset freezing can affect the right of ownership in much the same way that imprisonment restricts individuals in that right. For example, if all a person’s funds are frozen, they cannot buy groceries, receive social security, or engage in financial transactions.⁴¹ These measures may also affect the target’s ability to organize their lives once they are lifted. For instance, it has been argued that community measures have implications for the employment prospects of ex-offenders, similar to the way in which prison sentences affect employment.⁴² On top of that, Chaz Arnett describes how electronic monitoring of released offenders can lead to social marginalization, as those monitored tend to avoid social institutions that are necessary for reintegration into society, including the labor market, schools, and hospitals.⁴³

One could argue that if understanding practices of restraint requires more than can be delivered by a focus upon physical control or further restrictions and control measures that may be imposed on targeted individuals, then particular burdens imposed on targeted individuals could serve as a point of reference for identifying imprisonment. Next, I address the feature that imprisonment limits social functioning.

³⁷ See Dirk van Zyl Smit, Frieder Dönkel (eds.), *Imprisonment Today and Tomorrow: International Perspectives on Prisoners’ Rights and Prison Conditions*, 2nd edition, Kluwer Law International, 2001.

³⁸ Victor Lund Shammas, “The Pains of Freedom: Assessing the Ambiguity of Scandinavian Penal Exceptionalism on Norway’s Prison Island,” *Punishment and Society* 16(1), 2014, 104–123.

³⁹ Kelly Hannah-Moffat, “Prisons that Empower” *British Journal of Criminology* 40(3), 2000, 510–531.

⁴⁰ Victor Lund Shammas, “The Pains of Freedom: Assessing the Ambiguity of Scandinavian Penal Exceptionalism on Norway’s Prison Island,” *Punishment and Society*, 16 (1), 2014, 104–123, p. 117–118. On the pains of open prisons, see also Cecilie Basberg-Neumann, “Imprisoning the Soul” in: T. Ugelvik, and J. Dullum (eds.), *Penal Exceptionalism? Nordic Prison Policy and Practice*, Routledge, 2012, 39–55.

⁴¹ For example, see European Court of Human Rights, *Nada v. Switzerland*, App No 10,593/08 (Judgment, 12 September 2012).

⁴² Virginia Mantouvalou, Hadassa Noorda, “Community Sentences on a Continuum with Imprisonment: Electronic Monitoring and Unpaid Work Requirements,” *Criminal Justice Theory Blog*, June 17, 2022 (<https://criminaljusticetheoryblog.wordpress.com>).

⁴³ Chaz Arnett, “From Decarceration to e-Carceration,” *Cardozo Law Review*, 41 (2), 2019, 641–720, primarily p. 675–680.

4 Limits on Social Functioning

Stephen D. Soble, when tracing the history of contemporary prisons, discusses how many of the nineteenth-century reformers who were responsible for the creation of the prison regime believed that rehabilitation could only work by isolating criminals from society.⁴⁴ As a result, Soble describes prison as “a space outside of society.”⁴⁵ Although, as Soble argues, contemporary prisons largely proclaim purposes other than rehabilitation, most prisons still “incapacitate and isolate criminal offenders,” which affects their social functioning.⁴⁶

Some have argued that the removal of targeted individuals from broader society, resulting in the denial of their freedom to associate with others, embodies the essence of imprisonment. For example, Jacob Bronsther argues that a state measure that failed to entail this deprivation would not qualify as imprisonment: Bronsther addresses a wide range of possible deprivations that imprisonment entails but claims that there is “one deprivation inherent to all carceral institutions: inmates will be unable to freely associate with other citizens in society.”⁴⁷ This, he argues, is the “deprivational essence and minimum of incarceration.”⁴⁸

I agree that it is difficult for inmates to realize social contacts, but this is not unique to imprisonment behind walls. Other measures, such as house arrest and travel bans, may similarly restrict individuals in their social functioning. House arrest prevents individuals from leaving a particular area, leading to a situation where they are, to some degree, deprived of their ability to establish and maintain relationships.⁴⁹ This supports the argument that there is no clear delineation between prison and other state measures.

In addition, I believe that a measure that fails to restrict, or entails a minor restriction on, social life can still qualify as imprisonment. This is not only true for restrictive measures that are less commonly referred to as imprisonment, such as electronic tagging devices, but also for weekend prison, which is also referred to as an intermittent sentence or periodic detention. In some jurisdictions, such as New Zealand, those convicted of certain crimes are put behind bars on weekends while they are free to participate in society during the week. This practice allows targeted individuals to return to their jobs and partners when the measure is lifted. The problem with Bron-

⁴⁴ Stephen D. Soble, “A Regime of Social Death: Criminal Punishment in the Age of Prisons,” *New York University Review on Law & Social Change*, 21 (3), 1994–1995, 497–566, p. 527. For an account of the English experience during the same period, see Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850*, Pantheon Books, 1978.

⁴⁵ Stephen D. Soble, “A Regime of Social Death: Criminal Punishment in the Age of Prisons,” *New York University Review on Law & Social Change*, 21 (3), 1994–1995, 497–566, p. 501.

⁴⁶ Stephen D. Soble, “A Regime of Social Death: Criminal Punishment in the Age of Prisons,” *New York University Review on Law & Social Change*, 21 (3), 1994–1995, 497–566, p. 541.

⁴⁷ Jacob Bronsther, “Long-Term Incarceration and the Moral Limits of Punishment,” *Cardozo Law Review*, 41 (6), 2020, 2369–2433, pp. 2373–2374.

⁴⁸ Jacob Bronsther, “Long-Term Incarceration and the Moral Limits of Punishment,” *Cardozo Law Review*, 41 (6), 2020, 2369–2433, p. 2400.

⁴⁹ See Hadassa Noorda, “Preventive Deprivations of Liberty: Asset Freezes and Travel Bans,” *Criminal Law and Philosophy*, 9 (3), 2015, 521–535; Hadassa Noorda, “Exprisonment: Deprivation of Liberty on the Street and at Home” (forthcoming).

sther's approach is that it seems to rule out categorizing such types of imprisonment that allow individuals to participate in society as imprisonment.

On top of that, research on “open prisons” shows that social immiseration is relative. Inmates in these facilities “regard aspects of open prison life as painful because they measure their experiences against their immediate surroundings, not a (worse, higher-security) past.”⁵⁰ Similarly, individuals under house arrest, electronic tagging, and so on, may experience deprivations of social functioning relative to the people they meet and communicate with.

Instead of addressing the impact of prison *facilities* on the social functioning of individuals, I seek to address a raft of state measures that set limits on the ability of individuals to live their life, which includes measures that involve physically secure perimeters (such as walls and locks), open prisons, and measures that are typically conceptualized in terms of alternatives to imprisonment. As I argue in Sect. 7, I believe that these practices should be seen as part of a continuum that includes the use of prison facilities.

5 Limits on Political Functioning

In addition to personal associational functioning, like maintaining a relationship and job, prison may limit one's access to political functioning, like taking part in public debates and voting.⁵¹ Peter Ramsay argues that while imprisonment does not necessarily deprive prisoners of their right to vote, it prevents them from participating in the political process on equal terms with other citizens. Imprisonment, according to Ramsay's understanding, is “the loss of the independence of government necessary to exercise the political rights of democratic citizenship.”⁵² Even if a prisoner exercises some free speech, some association with others, is allowed to vote, and so on, she does not enjoy civil liberties because prisoners are not independent of government. Their liberty is controlled by the executive, and, as a result, they are unable to deliberate with others. “They are, therefore, unable freely to influence the preferences of others and expose their own preferences to the influence of others, except in ways controlled by executive agents.”⁵³

I recognize that imprisonment limits targeted individuals' freedom of association, assembly, and free speech and that, as a result, it is difficult for inmates to participate in the political process on equal terms with other citizens. This consideration is a matter of degree: if inmates had voting rights in facilities where people are held in solitary confinement, political participation would likely still be much more difficult

⁵⁰ Victor Lund Shammas, “The Pains of Freedom: Assessing the Ambiguity of Scandinavian Penal Exceptionalism on Norway's Prison Island,” *Punishment and Society*, 16 (1), 2014, 104–123, p. 115.

⁵¹ See Jeff Manza, Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy*, Oxford University Press, 2006; Peter Ramsay, “Voters Should Not Be in Prison! The Rights of Prisoners in a Democracy,” *Critical Review of International Social and Political Philosophy*, 16, 2013, 421–438.

⁵² Peter Ramsay, “Voters Should Not Be in Prison! The Rights of Prisoners in a Democracy,” *Critical Review of International Social and Political Philosophy*, 16, 2013, 421–438, p. 431.

⁵³ Peter Ramsay, “Voters Should Not Be in Prison! The Rights of Prisoners in a Democracy,” *Critical Review of International Social and Political Philosophy*, 16, 2013, 421–438, p. 429.

to realize in those facilities than for those confined solely on the weekend (to mention another extreme). The degree to which imprisonment deprives subjected individuals of their ability to participate in the political process on equal terms with other citizens varies, depending on how much contact the targeted individual has with other people, and how far that contact is subject to control by state officials.

This is, however, not unique to prison facilities. Other measures, such as electronic tagging devices, house arrest, and so on, may similarly impact an individual's ability to participate in the political process. For example, if leaving a permitted area or visiting public spaces is likely to expose the targeted person to arrest or physical enforcement then electronic tagging does restrict her ability to participate—e.g. to attend meetings or debates.⁵⁴ Additionally, if a person monitored with an electronic tagging device is not physically restricted from leaving a certain area or exposed to physical enforcement or arrest if she leaves the designated area, we would not expect her to be restricted in her ability to participate in the political process, but—even in those cases—she is at the same time subject to government control.

I address the practice of electronic monitoring to unveil similarities between this practice and traditional imprisonment. Two types of tags are used in many jurisdictions: location tags and curfew tags. A location tag records data about the tagged person's movements at all times. It checks if the tagged person is going to any areas she has been told not to go to by a court or prison order, or going to appointments or other programs that are part of the conditions. A curfew tag checks if the tagged person is where she is meant to be during curfew hours, for example the home. It will send an alert to a monitoring center if the tagged person is not there.

Individuals subjected to electronic monitoring can, in many ways, participate in society, but there could potentially be a basis on which to argue that the information-gathering techniques of electronic monitoring are similar to information-gathering techniques used in prison facilities. As a result of electronic tagging, individuals may lose independence from government and their political functioning may be limited, especially in very egregious cases of electronic monitoring.

6 Exclusion or Removal from the Community

Antony Duff has argued that continuous prison sentences cut a person off from “participation in the normal life of the community.”⁵⁵ Thus far I have addressed accounts of imprisonment that emphasize how prison facilities impact on freedom of movement, restrict control over daily life, and affect an individual's ability to form social relationships and to participate in the political process. However, imprisonment may not only restrict freedom of movement, control over daily life, and access to particular human functioning; in Duff's view, the most salient aspect of imprisonment is how it *excludes* and *removes* individuals from the normative community and from

⁵⁴ See A. von Hirsch, C.D. Shearing, “Exclusion From Public Space,” in A. Von Hirsch, D. Garland, A. Wakefield (eds.), *Ethical Perspectives in Situational Crime Prevention*, Hart Publishing, 2001, pp. 77–96; Chaz Amett, “From Decarceration to e-Carceration,” *Cardozo Law Review*, 41 (2) 2019.

⁵⁵ R.A. Duff, *Punishment, Communication, and Community*, Oxford University Press, 2001, p. 149.

normal life.⁵⁶ Duff argues that punishment in a community that respects the values of autonomy, privacy, and freedom should treat offenders as autonomous moral agents and as members of the community who, even though they have violated community values, can be reconciled with that community.⁵⁷

The punishment of imprisonment must therefore “not be *mere* exclusion. It must itself, even while excluding the offender from normal community, be a way of reconciling him with the community.”⁵⁸ By this Duff means that imprisonment itself must be a way to reconcile offenders with those they have wronged by seeing it as a form of “penance.” He argues that not all prison regimes are suitable to this purpose, because it should treat inmates as members of the community.⁵⁹ Furthermore, Duff argues that imprisonment must be reserved for a small group of criminal offenders; those who through a criminal act have “*broken*, the normative bonds of community.”⁶⁰

What is distinctive about Duff’s approach is that he describes continuous imprisonment as having a different meaning than other kinds of measures that are carried out *in* the community.⁶¹ He argues that modes of punishment other than continuous prison sentences allow offenders “to preserve their ordinary place in the community while being punished.” Imprisonment removes and excludes the targeted individual from the ordinary community, but other modes of punishment, Duff argues, are punishments “in the community.”⁶² He sees this as a reason for encouraging measures that are, in his view, more “inclusionary,” such as intermittent sentences and home curfews, and for disfavoring continuous imprisonment.⁶³ On Duff’s view, intermittent sentences and home curfews are unlike continuous imprisonment in that they do not involve removal or exclusion from ordinary life and community.⁶⁴ Intermittent sentences involve detention (for instance on the weekend), but do not cut targeted individuals off from normal life and participation in the community like continuous

⁵⁶ R.A. Duff, *Punishment, Communication, and Community*, Oxford University Press, 2001, p. 149.

⁵⁷ R.A. Duff, *Punishment, Communication, and Community*, Oxford University Press, 2001.

⁵⁸ R.A. Duff, *Punishment, Communication, and Community*, Oxford University Press, 2001, p. 149.

⁵⁹ R.A. Duff, *Punishment, Communication, and Community*, Oxford University Press, 2001, p. 150. For an interpretation of what kinds of prison regime are suitable to this purpose, see William Bülow, Netanel Dagan, “From Rehabilitation to Penal Communication: The Role of Furlough and Visitation within a Retributivist Framework,” *Punishment and Society*, 23 (3), 2021, 376–393.

⁶⁰ R.A. Duff, *Punishment, Communication, and Community*, Oxford University Press, 2001, p. 150.

⁶¹ Instead of addressing measures that are employed outside of prison facilities as more “inclusionary,” I have argued that “even without using a prison cell, persons can be so restricted that they are in fact prisoners.” Hadassa Noorda, “Preventive Deprivations of Liberty: Asset Freezes and Travel Bans,” *Criminal Law and Philosophy*, 9 (3), 2015, 521–535. See also Virginia Mantouvalou, Hadassa Noorda, “Community Sentences on a Continuum with Imprisonment: Electronic Monitoring and Unpaid Work Requirements,” *Criminal Justice Theory Blog*, June 17, 2022 (<https://criminaljusticetheoryblog.wordpress.com>).

⁶² R.A. Duff, *Punishment, Communication, and Community*, Oxford University Press, 2001, p. 150 (as Duff notes, the idea of punishments “in the community” informed penal policy aimed at reducing the use of traditional imprisonment).

⁶³ On Duff’s communicative theory of punishment and “inclusionary” measures, see William Bülow, Netanel Dagan, “From Rehabilitation to Penal Communication: The Role of Furlough and Visitation within a Retributivist Framework,” *Punishment and Society*, 23 (3), 2021, 376–393.

⁶⁴ R.A. Duff, *Punishment, Communication, and Community*, Oxford University Press, 2001, p. 151.

prison sentences do.⁶⁵ As for home curfews, Duff compares them with the restriction of someone convicted of football hooliganism to attend matches for a specified period of time. He argues that individuals subjected to home curfew are disqualified from a range of social activities but not removed from their ordinary community.⁶⁶

I agree with Duff that some forms of detention and home curfew do not remove or exclude individuals from society, or only to a minor degree, and resemble other, more limited kinds of restrictions on targeted individuals' ability to participate in society. However, I also believe that measures other than traditional imprisonment can have impacts as severe as, or more severe than, traditional imprisonment, especially when these measures accumulate.⁶⁷ House arrest combined with the mandatory wearing of an electronic tagging device can, for example, strongly limit a person's ability to lead a normal life. The ways in which such measures or combinations of measures resemble traditional imprisonment should not be overlooked.

In the next section, I seek to argue that in deciding what kinds of safeguards we should have against what kinds of state imposition, we should not focus on the question of what constitutes "imprisonment." We should instead ask how severely a measure impacts on an individual's ability to live a normal life.

7 A Continuum of Restrictions on Liberty

Situating the use of prison facilities as part of a continuum of state measures that set limits on the ability of individuals to live their lives is the core of what I believe to be the most plausible account of imprisonment. In this section, I take a first step in embarking on the task of developing this approach.⁶⁸

In the previous sections of this article, I addressed a non-definitive list of aspects of imprisonment and sought to argue that imprisonment behind bars can impinge on an individual's ability to live their life in much the same way as many measures that are traditionally not considered imprisonment can do so. This analysis of similarities opens up a new way of seeing imprisonment: first, imprisonment captures a wide range of practices, from incarceration in solitary confinement to spending time in an "open" prison. Second, the distinction between traditional imprisonment and other kinds of measures is not sharp, even though we may be able to distinguish measures that severely impact the ability to lead one's life from less restrictive measures imposed by the state. Confinement in Bastøy prison can have a similar impact on the life of the targeted person as house arrest. My aim is to acknowledge the diversity of measures with "imprisoning impact," and to recognize that the boundary between imprisonment and other kinds of measures is diffuse.

⁶⁵ R.A. Duff, *Punishment, Communication, and Community*, Oxford University Press, 2001, p. 151–152.

⁶⁶ R.A. Duff, *Punishment, Communication, and Community*, Oxford University Press, 2001, p. 151.

⁶⁷ See Hadassa Noorda, "Preventive Deprivations of Liberty: Asset Freezes and Travel Bans," *Criminal Law and Philosophy*, 9 (3), 2015, 521–535.

⁶⁸ For an application of this approach to restrictions on liberty employed outside prison facilities, see Hadassa Noorda, "Preventive Deprivations of Liberty: Asset Freezes and Travel Bans," *Criminal Law and Philosophy*, 9 (3), 2015, 521–535.

On my account, what matters in deciding what kinds of legal safeguards individuals should have against what kinds of state imposition is not whether a given measure constitutes “imprisonment.” I instead ask how severely a measure impacts on the target’s daily life. I recognize a spectrum of kinds of state imposition that vary in their harshness, intrusiveness, and liberty-limiting scope. I distinguish the kinds of measures that would be ranged along that spectrum by the kind of interest on which they impinge, which is the interest of individuals to live a normal life. The particular meaning of this interest will vary, depending on the circumstances. But to understand what a normal life of a particular individual involves, we should examine whether that person can work, meet with family and friends, engage in political debate, etc.⁶⁹ A measure can prohibit a broad range of activities, or affect only some components of life. For instance, in most circumstances, someone subjected to a travel ban is restricted from traveling but is free to participate in other activities that she generally considers part of her daily life.⁷⁰

An implication of describing non-traditional kinds of imprisonment as imprisonment could be that the application of relatively less severe measures would warrant the same protections as the application of measures traditionally seen as severe. Employing this approach in practice would, however, be highly undesirable, because it does not recognize the various levels of impact of state measures. It would, in other words, result in treating a ban on entering a neighborhood’s square analogously to confinement in a maximum-security prison while the latter is obviously more severe.

I recognize that imprisonment behind walls and doors can prevent inmates taking part in a range of activities they generally consider part of their daily lives. As a consequence, it may cause suffering of various kinds and degrees for targeted individuals. I believe that individuals should be protected against state interferences in their lives and that the employment of state measures that severely impact the lives of individuals ought to warrant more stringent checks than the use of state measures that interfere with an individual’s life to a minor degree.

In shifting the emphasis from the question of whether a given measure constitutes imprisonment to the question of how severe its impact is on the person’s normal life I leave aside questions about whether the state intends to punish when it applies a certain measure. The traditional understanding of punishment includes a motivational component. This means that for a measure to be categorized as punishment the measure in question is imposed for an offense against the law.⁷¹ I do not address questions about the intention of the state in this article because I seek to take cognizance of the

⁶⁹ The entitlement to these liberties is largely embedded in the framework of human rights law and does not involve illegal activities that some people would consider part of their daily life. See also Hadassa Noorda, “Preventive Deprivations of Liberty: Asset Freezes and Travel Bans,” *Criminal Law and Philosophy*, 9 (3), 2015, 521–535.

⁷⁰ See for an exceptional case of a travel ban, Hadassa Noorda, “Preventive Deprivations of Liberty: Asset Freezes and Travel Bans,” *Criminal Law and Philosophy*, 9 (3), 2015, 521–535.

⁷¹ H.L.A. Hart, “Prolegomenon to the Principles of Punishment,” *Proceedings of the Aristotelian Society*, 60, 1959–1960, 1–26, pp. 4–5. Others have argued that punishment must be inflicted “on those believed guilty of crimes, for their crimes.” For example, Zachary Hoskins, *Beyond Punishment? A Normative Account of the Collateral Legal Consequences of Conviction*, Oxford University Press, 2009, p. 48; John Gardner, Introduction to H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd edition, Oxford University Press, 2008.

extensiveness and variety of state measures that restrict or deprive liberty and their relationships with wider phenomena than just punishment.⁷²

In an impact-based account, an individual is entitled to particular legal safeguards insofar as that individual's life is affected by a particular state measure. This approach raises two main problems. First, it may be objected that by emphasizing impact, I risk a loss of rights for individuals targeted with traditional imprisonment. I share this worry. It is important to protect individuals against arbitrary and disproportional sentences in prison facilities. Yet, as I have argued, it is also important to protect individuals against the use of arbitrary and disproportional restrictions on their liberty outside such facilities and, primarily, in the case that such a measure has a severe impact on the targeted individual's life. As I argued above, some non-traditional imprisonment measures have impacts as severe as, or more severe than, some kinds of traditional imprisonment.

The second objection to the attempt to ground the decision on kinds of legal safeguards against various kinds of state imposition in impact is that this approach implies that the question of whether an individual is entitled to particular rights is circumstantial. It is circumstantial because not all people's living conditions are affected by a particular measure in the same way. By this I do not mean to assess the severity of state measures in subjective terms.⁷³ Even though people vary in their experiences of spending time in a prison facility, I do not argue that our laws should be based on such differences. I instead argue for an approach that recognizes particular circumstances of targeted individuals. For example, people who depend on a car for their commute to work may experience a severe effect on their lives when the state suspends their driver's licenses while others may be less affected by the application of this measure.⁷⁴ In extreme cases, the combination of this generally mild restriction on liberty with the application of other measures that impact on the person's life may warrant stringent legal safeguards. On my account, of two people who receive the same formal sentence, one might count as being "imprisoned" while the other does not, depending on the impact of that sentence on their lives. As a consequence, it will be hard for legal practitioners and potential targets to understand when someone is entitled to particular rights.

I recognize that the formulation of the laws of imprisonment needs to specify the criteria by which to determine which state measures are severe and require the application of particular legal safeguards. To give some guidance on how to make this work in practice, I suggest that the laws of imprisonment will be based on the kind of impact that certain measures typically have, whilst leaving room for individuals to argue that, based on their circumstances, theirs is a special case. For example, a travel

⁷² Some theorists argue that punishment requires more stringent safeguards for targeted individuals because it desigendly stigmatizes targeted individuals, but certain other measures can also be used to stigmatize individuals in ways that are similar to how criminal punishment affects individuals. See Hadassa Noorda, "Regulation as Punishment," *Criminal Justice Ethics*, 40 (2), 2021, pp. 108–123.

⁷³ Cf. Adam Kolber, "The Subjective Experience of Punishment," *Columbia Law Review*, 109 (1), 2009, pp. 182–236.

⁷⁴ See for empirical analyses, Edward R. Morrison, Belisa Pang, Antoine Uettwiller, "Race and Bankruptcy: Explaining Racial Disparities in Consumer Bankruptcy," *Journal of Law and Economics*, 63, 2020, 269–295.

ban typically does not completely deprive individuals of their ability to lead their life. This means that when an individual who meets particular criteria poses a threat to security, the question of whether the travel ban is proportionate to the security interests has to be answered and less intrusive alternatives must be exhausted first.⁷⁵

However, suppose that an individual is forbidden to travel outside her country of residence, but that the only way to visit relatives, work, go to the hospital, and practice religion would involve leaving the country of residence. This was the case for Youssef Nada Nada, who was placed on the UN Security Council 1267 terrorist list. Targeted sanctions by the UN Security Council prevented Nada from leaving the 1.6 km² town of Campione d'Italia, an Italian enclave within Swiss territory.⁷⁶ In this particular case, banning Nada from traveling should be understood as near-totally restraining his normal life, and more so because the travel ban accumulated with asset freezing.⁷⁷ Therefore, in the case of Nada, the travel ban should be prohibited unless it has been proven that Nada committed criminal offenses that warrant a measure that deprives him of the ability to lead a normal life. Moreover, in a way analogous to preventive detention in most criminal law systems, a ban on traveling might be justifiably imposed temporarily to prevent the targeted person from committing crime during investigations, but at some point, the target should be acquitted, or sentenced. Furthermore, regular reviews to ensure that the conditions that justify the constraint continue to exist should be required.⁷⁸

The example of Nada illustrates what kind of legal safeguards could be applied, and how they could be individualized based on the circumstances. I do not, however, aim to detail the laws of imprisonment in this article. The account I present is intended primarily to provide a basis for the reevaluation of existing laws and practices of restrictions and deprivations of liberty by the state. Ideally, such laws and practices should be suited to protect individuals against arbitrary and disproportional state measures, including those practices that do not take place behind the walls of an incarceration facility.

8 Conclusion

Scholars have drawn attention to particular worrying features of imprisonment: physical and normative limits, restrictions on social and political functioning, and exclusion from community. I sought to address these features and to examine what kinds of legal safeguards individuals should have against what kinds of state interferences. I conclude that emphasizing the essence of imprisonment, whether it be the place

⁷⁵ See Hadassa Noorda, "Preventive Deprivations of Liberty: Asset Freezes and Travel Bans," *Criminal Law and Philosophy*, 9 (3), 2015, 521–535, p. 533–534.

⁷⁶ See Hadassa Noorda, "Preventive Deprivations of Liberty: Asset Freezes and Travel Bans," *Criminal Law and Philosophy*, 9 (3), 2015, 521–535, p. 528–529.

⁷⁷ See Hadassa Noorda, "Preventive Deprivations of Liberty: Asset Freezes and Travel Bans," *Criminal Law and Philosophy*, 9 (3), 2015, 521–535, p. 527.

⁷⁸ See Hadassa Noorda, "Preventive Deprivations of Liberty: Asset Freezes and Travel Bans," *Criminal Law and Philosophy*, 9 (3), 2015, 521–535, p. 533–534.

where imprisonment takes place or the effects of the measure on the target's life, ignores the extensiveness and variety of ways in which the state limits individuals in the ability to lead a normal life.

Rather than carrying out a forced analysis of the essence of imprisonment and its relation to the diversity of measures abounding in our legal landscape, I offer a different approach: the main purpose of this article has been to disentangle imprisonment from walls, locks, normative control, restrictions on political and social functioning, and exclusion or removal from the community as necessary or sufficient features of imprisonment. I seek to shift the emphasis from the essence of imprisonment to a continuum of state measures that restrict individuals in their liberty. Imprisonment, on this understanding, consists in a continuum with periodic confinement in a prison facility, the mandatory wearing of electronic tagging devices, house arrest, and so on. To understand imprisonment as such, we should address the impact of state measures on the lives of targeted individuals. When we ask how severely a measure impacts on the lives of those subjected to it, we will find that some measures that do not involve a physically secure perimeter, have impacts as severe as, or more severe than, some kinds of traditional imprisonment.

I argue that an individual ought to be entitled to particular legal safeguards insofar as the individual's life is affected by a particular state measure. One of the practical implications of this approach is that it uncovers state measures whose effects are similarly grave as the effects of being locked up but that are not considered to be traditional imprisonment. This implies consequences for the legal rights of individuals targeted with these measures.

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