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Preventive Deprivations of Liberty: Asset Freezes and Travel Bans

Hadassa Noorda

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Abstract This article examines preventive constraints on suspected terrorists that can lead to restrictions on liberty similar to imprisonment and disrespect the target's autonomy. In particular, it focuses on two examples: travel bans and asset freezes. It seeks to develop guidelines for setting appropriate limits on their future use. Preventive constraints do not generate legal protections as constraints in response to conduct do. In addition, these constraints are often seen as a permissible alternative to imprisonment. Still, preventive de facto detentions, or what I term “exprisonments”, imperil the free and autonomous life of the targeted person. With the recognition that such constraints can infringe on one's ability to lead a free and autonomous life, this article argues that some of these constraints require similar protections as their counterparts that put persons under lock and key.

Keywords Blacklisting · Terrorism · Prevention · War · Human rights · Individual liberty · Individual autonomy · Exprisonment

Mon désir n'est pas d'apporter la liberté, mais simplement de rendre la prison visible.
Paul Claudel, *Conversations dans le Loir-et-Cher* (1929).

Introduction

Preventive constraints against persons blacklisted by the EU or UN on the basis of suspicion that they are engaged in the facilitation or financing of terrorism are part of our current legal landscape. The United Nations Security Council 1267 sanctions list, the United States Office of Foreign Asset Control list, and the EU sanctions list are the most important blacklists in operation today. A common feature of these lists is that constraints

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are imposed on targeted persons before a potential crime has been committed. The sanctions include asset freezes and travel bans. The usages of these preventive constraints will likely increase as present technologies make it easier to control individuals without putting them behind bars.

The increased possibility of controlling individuals without sending them to prison calls for legal guidelines on setting appropriate limitations on the future use of these methods. While preventive imprisonment has been widely discussed, other preventive constraints are often seen as acceptable alternatives. However, as the debate regarding these constraints among human rights lawyers indicates, the impact on the target can be enormous.¹ These preventive constraints may curtail the freedom of the target in two ways. First, the constraints may harm the negative freedom (which is the absence of constraints on action) of the targeted person because she is, for instance, not allowed to travel or prevented from using her own money. Therefore, some have expressed concerns about these constraints, as they deem that these constraints are punitive.² Moreover, although these constraints do not actually lock someone up, restraining a person in such a way may deprive the target of her liberty, in a way similar to actual imprisonment.³ In this article, I address these concerns and argue that some preventive constraints are similar to illegitimate imprisonment because these constraints unjustifiably infringe on the free life of the target. Second, the preventive nature of these kinds of constraints may disrespect the target's autonomy by presuming that she will commit a terrorist act.⁴

In this article, the entitlement to individual liberty and autonomy is embedded in the normative framework of positive human rights law. Given that constraints other than imprisonment can similarly infringe on leading a free and autonomous life, in this article, I argue that those subjected to some of these constraints require protections similar to those afforded to people facing actual imprisonment.⁵ Thus, I do not argue that such constraints are prohibited but, instead, that they should be properly regulated. Conversely, I do not argue that these constraints should be embedded in the war paradigm.⁶ Instead, it presupposes the non-combatant status of these individuals and treats them under the peacetime

¹ Many human rights lawyers argue that these constraints infringe on individual rights guaranteed in the European legal order. See, among other works, Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights* (Oxford: Oxford University Press, 2009); Iain Cameron, "European Union Anti-Terrorist Blacklisting," *Human Rights Law Review* 3(2) (2004): pp. 225–256.

² The General Court of the European Union in *Kadi* has raised the question of the punitive nature of blacklisting. Based on the duration of the measure, the General Court has held that "the objectives of the recommended asset freezing measures are not only preventative but also punitive." General Court of the European Union, *Kadi versus Commission*, case T-85/09, 30 September 2010, par. 163.

³ As Lord David Hope—Judge of the United Kingdom Supreme Court—puts it: "It is no exaggeration to say ... that designated persons are effectively prisoners of the state." UKSC 2, *Ahmed and others versus HM Treasury*, 2010 (cited in Gavin Sullivan en Ben Hayes, "Blacklisted: Targeted Sanctions, Preemptive Security and Human Rights" (Berlin: European Center for Constitutional and Human Rights, 2010) p. 92).

⁴ As I will explain in the last section of this paper, I do not intend to argue that every constraint is problematic with respect to individual autonomy.

⁵ Travel bans and asset freezes are just examples of the many preventive liberty constraints that do not actually imprison the target, such as house arrest. There are important parallels between these measures, and a more detailed comparative analysis is needed, but in this article, I will mainly focus on travel bans and asset freezes compared to imprisonment because imprisonment is the exemplary deprivation of liberty.

⁶ Note that I do not contest the view that some non-state actors ought to be treated under the war paradigm. See, Hadassa A. Noorda, "Sovereign Equality of States in Wars with Non-State Actors," *Philosophia* 41(2) (2013), pp. 337–347.

paradigm because blacklists are not restricted to state-like collectives⁷ and at least some blacklisted individuals will not meet the requirements for being treated as a (non-state) combatant. In this light, I argue that comprehensive forms of preventive constraints that do not actually put the target under lock and key are similar to actual imprisonment and ought to be treated as such. The targeted sanction regimes of asset freezes and travel bans are taken as examples of such preventive measures.

The argument in this article proceeds in four steps. In the first section, I detail targeted sanctions against supposed terrorists as examples of preventive constraints that control without putting the targeted person behind bars. In the second section, I examine why preventive constraints can raise particular concerns. Subsequently, in the last section, I recommend ways to limit preventive constraints that control without putting the targeted person behind bars. Some of the constraints ought to be treated in the same way as their counterparts that actually imprison the target because these constraints similarly infringe on individual liberty and autonomy. In concluding this article, I defend this claim against two objections.

Preventive Constraints in Practice

Over the last decade, the number and scope of preventive constraints that restrict people's freedom in ways other than actual imprisonment have exploded. It is increasingly easy to constrain people without making use of a prison cell. A variety of technologies, such as GPS bracelets, biometric scanners, and DNA databanks, enable the possibility of controlling persons without locking them up. The increased number of alternatives that are available has led to an increase in the use of these methods.⁸ This development goes hand-in-hand with a shift to prevention. Criminal law systems increasingly tend to emphasize risk instead of completed crimes.⁹ Preventively blacklisting individuals and subsequently restraining them from travelling and freezing their assets is illustrative of the usage of preventive constraints that do not actually imprison the targeted person. The UN, the EU, and some states keep lists of individuals and groups that they suspect of supporting terrorism. These subjects are then targeted with preventive constraints that usually do not actually imprison them. In this section, I provide background information on two such regimes—travel bans and asset freezes—studying the rationale and application of these regimes. Mainly descriptive, these examples offer background for the analysis in the next part and the recommendations made in the last section of this paper.

Sanctions against individuals adopted under EU law reflect UN sanction regimes: the first sanction regime consists of Resolutions 1267, 1333, and 1390, targeting individuals related to Al Qaeda and the Taliban. Under this regime, the EU adopts measures against those on UN lists. The second regime follows Resolution 1373, calling for a fight against

⁷ In the past, blacklisting was restricted to state-like collectives such as the Taliban. See Iain Cameron, "European Union Anti Terrorist Blacklisting," *Human Rights Law Review* 3(2) (2004): pp. 225–256, p. 227.

⁸ Erin Murphy, "Paradigms of Restraint," *Duke Law Review* 57 (2008).

⁹ See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001); Richard V. Ericson, *Crime in an Insecure World* (Cambridge: Polity Press, 2007); Lucia Zedner, "Fixing the Future? The Pre-emptive Turn in Criminal Justice," in S. Bronniti, B. McSherry, and A. Norrie (eds.), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Oxford: Hart Publishing, 2009); Klaus Günther, "Responsibility to Protect and Preventive Justice," in: Andrew Ashworth, Lucia Zedner, Patrick Tomlin, *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013).

terrorism and—in particular—for a fight against the financing of terrorism by freezing assets. In Resolution 1373 (2001), the Security Council decided that all states should ensure that any person who participates in the financing, planning, or perpetration of terrorist acts or in support of terrorist acts is brought to justice and that domestic laws and regulations define such terrorist acts as serious criminal offences. Under this second regime, the EU developed its own blacklist. Blacklisted individuals can be subjected to preventive constraints.¹⁰

Targeted sanctions against supposed terrorists are examples of a tendency to subject individuals or classes of individuals to targeted preventive constraints that control them without actually imprisoning them, based on a propensity to commit a wrong in the future. Other examples are restrictions imposed on mentally ill persons who are a danger to themselves or to others (these restrictions enable individuals to receive treatment and prevent them from harming themselves or others); the detention of enemy combatants during wartime to prevent them from returning to hostilities; the quarantine of persons with dangerous diseases; and in some countries, restrictions on persons convicted of sex offenses to protect future victims from sexual abuse.

The details vary from constraint to constraint, but I distinguish two opposing models postulated on two different views of the nature of human beings and on a balance between security and individual liberty: the autonomy respecting model and the security protecting model. This is an analytical distinction, useful for heuristic purposes. Below, I will illustrate how actual practices can be described in terms of (combinations of) these models. Before describing the two models, I make note of the following: as prevention is the concern of this article, both models are future-oriented in the sense that the purpose is to prevent future wrongdoing.

The first model allows security-based preventive measures only so long as they are suitably constrained by demands of respect for autonomy and freedom. This model is based on a view of human beings as having the capability to change and requires an individualized assessment of risk. It recognizes that the subject can change her mind and that changing circumstances and rehabilitation of the targeted person can eliminate or reduce the risk that the targeted person will commit a crime.¹¹ Therefore, it is ideally based on an individualized and fact-specific assessment of risk, subject to court oversight and/or to periodic reviews. This model of prevention is often defended on retributive grounds. To retributivists, the question is whether the actor's conduct is itself blameworthy, not whether it is somehow dangerous. However, although the aim of the preventive restraints is to prevent certain wrongdoing, these restraints do not necessarily look forward instead of backward because a substantial step can serve as the *actus reus* as it does for attempts. Alternatively, communication of an intention can serve as the *actus reus* for these threats.¹²

¹⁰ The counterterrorism policy of the EU is a complex system because methods are imposed from different procedures in which the institutes of the EU play different roles. See, for an overview of EU sanctions against individuals, Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights* (Oxford: Oxford University Press, 2009).

¹¹ Rehabilitation conflicts with respect for autonomy regarding certain actors, such as the politically extreme (I thank Alec Walen for pointing this out).

¹² See Alec Walen, "A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists," *Maryland Law Review* 70(4) (2010). Walen's approach could be problematic from a retributive point of view because our future choices are subject to our will—we may choose not to commit the crime. See Kimberley Kessler Ferzan's critique on Walen. Kimberley Kessler Ferzan, "Inchoate Crimes at the Prevention/Punishment Divide," *San Diego Law Review* 48 (2011), pp. 1273–1298, p. 1290 (providing an alternative to broadening of the criminal law: a liability based prevention system).

In addition, the constraints must also be proportionate in their stringency to the seriousness of the expressed intention to commit a future crime or of the wrong committed. To check these conditions and to uphold the opportunity for targeted persons to make a choice regarding conforming or non-conforming behavior, with respect to the prediction that she will commit a future crime, this model requires that preventive constraints are temporarily imposed and subject to periodic review.

The second model allows security to be given more weight against the goods of individual freedom and autonomy. Typically, it is imposed on a category of persons defined by certain characteristics, premised on the probability that a member of this category will behave in a certain way irrespective of individual risk assessments. Under this model, the likelihood that a number of persons with certain features will commit a future crime is a justification for restraining all persons with similar features. There is minimal judicial oversight and there are no periodic reviews because the question of whether a particular individual might change is irrelevant.

Some preventive constraints that do not actually put the target behind bars reflect one of these models. In general, restrictions on the mentally ill take as their starting point the need to protect individual freedom and autonomy. As a consequence, these restrictions are usually based on an individualized determination of risk, impose constraints solely on that person, and are subject to court oversight.¹³ However, most preventive constraints concern both security and individual liberty and autonomy, showing some features of both models.

The first model treats autonomy as a capacity that must be respected, while the second treats autonomy merely as one more good to be put in balance with security.¹⁴ As discussed in more detail in below in the section on the impact on individual liberty and autonomy, approaching autonomy as one more good in a balance with security is inconsistent with respect for autonomy. Therefore, I agree with the retributivists in relying on the first model.

Preventive Targeted Sanctions Against Supposed Terrorists

Travel bans are a form of preventive constraint to which blacklisted persons may be subjected. They actually work as bans on the ability to enter a particular country or as a general ban on a certain individual that prevents her from transiting through or entering any other country. Thus, a travel ban requires that states not admit the targeted persons into their territory. As a consequence, the targeted person is usually enclosed and only free to move within the borders of her enclosure.

Asset freezes are another form of preventive constraint to which blacklisted persons may be subject. This is a prioritized method in the fight against terrorism by the EU because, like travel bans, asset freezes are deemed to be less violent than killing, imprisoning, or waging war.¹⁵ Hence, the EU has been active in freezing the assets of supposed terrorists. The Third Money Laundering Directive, under which the EU tries to prevent terrorism by requiring, among others, banks to investigate and report the usage of cash in excess of a certain amount starts from the premise that tracking the financing of

¹³ See, for example, the Dutch Act on Compulsory Admission to Psychiatric Hospitals (BOPZ).

¹⁴ See F.M. Kamm, “Non-Consequentialism, the Person as an End-in-Itself, and the Significance of Status,” *Philosophy & Public Affairs* 21 (1992), pp. 354–389, p. 382–383.

¹⁵ Anthony Dworkin, “Beyond the ‘War on Terror’: Towards a New Transatlantic Framework for Counterterrorism,” *European Council on Foreign Relations Policy Brief* (May 2009). More violent forms of countering terrorism include, for example, targeted killings.

terrorism can have a preventive effect.¹⁶ The goal of these constraints is to cut off money flows to supposed (potential) terrorists to enable preventive intervention. Designed to protect against future acts and not only to pursue those responsible for acts that have already occurred, these constraints look forward instead of backward to criminal acts. Thus, the timeframe in which these sanctions can be applied is broadened.

I will briefly describe some cases to illustrate what is at issue when applying travel bans and asset freezes. The first case describes an exceptional situation—it illustrates how such measures can affect a person's liberty. Youssef Nada was placed on the UN Security Council 1267 terror list by the United States without disclosure of evidence of his guilt.¹⁷ The procedure of listing does not require publishing details of the reasons that led to a blacklisting. State parties to the UN nominate entities or persons based on intelligence reports, and the person or entity will be blacklisted if no state sitting on the UN Sanctions Committee challenges the nomination.¹⁸ The targeted sanctions by the UN Security Council that followed the blacklisting of Nada prevented him from leaving the 1.6 km² town of Campione d'Italia, an Italian exclave within Swiss territory. Because the Security Council sanctions required states to prevent Nada from crossing borders, 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 where the targeted person was unable to travel at all—he was unable to receive health care and to maintain family and other intimate relationships, it affected his employment, and he was prevented from worshipping at a mosque. The judgment of the European Court of Human Rights (ECtHR) of September 12, 2012 set out Nada's rights under the current legal framework. In short, the ECtHR found that Switzerland could have done more to alleviate the applicant's situation *even within* the scope of the relevant United Nations Security Council (UNSC) resolutions, but regarding his right to liberty, the ECtHR found that the applicant's restriction on leaving the 1.6 km² of Campione did not constitute a deprivation of liberty under Article 5 of the European Convention on Human Rights (ECHR) because the applicant was not prevented from freely living and moving within Campione, which is the territory of his voluntary residence.¹⁹ Blacklisting and subsequently banning the target from travelling is, in most cases, less controversial than Nada's case because he lives in an enclave, but travel bans always deprive the targeted person of freedom of movement and usually without accusing the target of criminal acts. The aim of targeting individuals is to protect security interests by coercing the subjects into changing their behavior in light of the preservation of international peace and security.²⁰ Thus, the aim of travel bans is not to pursue those responsible for acts that have already occurred but to enable preventive intervention

¹⁶ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, available at: [Eur-lex.europa.eu](http://eur-lex.europa.eu) (Accessed: 2 January 2013).

¹⁷ United Nations Security Council Resolution S-RES-1267 (1999).

¹⁸ Guidelines to the Committee for the Conduct of its Work, par. 6b, available at: http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf (accessed: 18 February 2014); Iain Cameron, "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights" (2003) 72 *Nordic Journal of International Law* 159, 166, 168.

¹⁹ European Court of Human Rights, *Nada versus Switzerland*, App. No. 10593/08, Judgment, 12 September 2012, par. 227–234.

²⁰ Basic Principles on the Use of Restrictive Measures (Sanctions), Council of the European Union, 7 June 2004, par 6, available at: <http://register.consilium.europa.eu/pdf/en/04/st10/st10198-re01.en04.pdf> (Accessed: December 2012).

against future acts of blacklisted individuals by reducing access to international contacts for these persons.

Moreover, Nada's liberty was affected because his assets were frozen. His situation can be best described in his own words:

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.²¹

Nada is subjected to full funds freezing. He is a wealthy businessperson, but he does not have access to his money. His family cannot give him any money, only food. Subjected to full funds freezing actions, Nada cannot buy his own groceries, receive social security, or engage in any financial transaction whatsoever. The freezing of his assets cumulated with a ban on traveling, preventing him from living a normal life by freely engaging in the society in which he lives. However, the ECtHR does not consider asset freezes and travel bans as deprivations of liberty.²²

A second example sheds light on the procedural problems regarding blacklisting and subsequently subjecting listed individuals to liberty-depriving methods such as asset freezes and travel bans. Yassin Abdullah Kadi was blacklisted first in the United States, after which his name was transposed to the UN list and then to the EU list. What exactly he was accused of, the reason for Kadi's listing, and the evidence against him, was classified information. At that time, the UN Security Council Sanctions Committee did not foresee a procedure for targeted persons to apply directly for removal from the list or for information about their cases. Kadi turned to the Court of First Instance to deny his involvement with terrorism and argue that his human rights were being violated.²³ The Court of First Instance rejected Kadi's plea and upheld the legitimacy of the sanctions. However, the ECJ overruled the Court of First Instance and Kadi won the right to be notified of his listing and to be provided with a statement of reasons for his listing.²⁴ However, the ECJ did not, nor does it now, have the competence to examine the evidence against Kadi. Thus, the EU courts cannot review whether the allegation is well founded. Neither the EU courts nor the affected individuals are provided with the necessary information, because the information made known to the courts and the parties remains insufficient.²⁵

The third case questions the duration of the measures to which listed individuals are subjected. The *Hofstadgroep*—a group of Dutch individuals affiliated with Mouhammed Bouyeri, the murderer of the Dutch filmmaker Theo van Gogh—is another example of a group of individuals who are blacklisted and subject to asset freezing. One of the affected persons contested his blacklisting at the ECJ on the grounds that his presumption of innocence was violated because a definitive conviction was lacking, but the ECJ's judgment held that blacklisting does not violate the presumption of innocence because it is a temporary measure that does not entail a criminal accusation and does not lead to

²¹ See interview with Nada by Mark Hosenball & Mike Isikoff, 19 November 2006; available at <http://www.youssefnada.ch> (accessed: 27 June 2013) (cited in Marieke de Goede, *Speculative Security: The Politics of Pursuing Terrorist Monies* (Minneapolis and London: University of Minnesota Press, 2012)).

²² See, European Court of Human Rights, *Nada versus Switzerland*, App. No. 10593/08, Judgment, 12 September 2012.

²³ Court of First Instance, Judgment of the Court of First Instance in Case T-315/01, *Yassin Abdullah Kadi versus Council of the European Union and Commission of European Communities*, September 21, 2005.

²⁴ European Court of Justice, *Kadi & Al Barakaat International Foundation versus Council of the EU & Commission of the European Communities*, T-315/01.

²⁵ Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights* (Oxford: Oxford University Press, 2009), Ch. 6, 7.

imprisonment.²⁶ This is contestable because the temporary nature is arguable, as some assets are frozen for decades.²⁷ Moreover, usually, periodic reviews are lacking.

Blacklisted individuals are usually not accused of criminal acts, nor can they look forward to a criminal trial in which their rights are respected, but their lives can be controlled for a long time by, for example, the freezing of their assets mainly taking the security interests of society as the starting point. Therefore, such constraints bring forth concerns regarding the rights of the targeted person—discussed in more detail in the next section.

The Impact on Individual Liberty and Autonomy

It is often assumed that constraints that control without locking the target up are a permissible alternative to actual imprisonment. However, preferring such constraints above the alternative of putting one behind bars hides the liberty interests at stake. Moreover, the preventive nature of these measures may bring dangers related to imposing constraints on a person before the commission of a criminal act.

In this section, I explore the dangers associated with preventive constraints that do not actually lock the target up with respect to the individual freedom and autonomy of the targeted person. I explore both the liberty interests on which such constraints impinge, and the dangers of preventive measures in general. Thus, the effects discussed here are twofold: first, I discuss the effects with regard to constraints that control without locking up the target because—as I argue—even when a person is not literally put behind bars, her liberty can be restricted in a way similar to imprisonment. Second, I show that the preventive aspect of these kinds of targeted constraint puts respect for the target’s autonomy at stake.

Before going into the issue of how and the extent to which preventive constraints that do not put the target behind bars infringe on the person’s liberty interests, it is useful to reflect on why deprivations of liberty demand justification. The answer is intuitive and has implications for the topic discussed in this article: in criminal law, it is assumed that people are and should remain *free* in principle. This presumption, that we are all free, is part of the traditional setting within which questions of a state’s political authority to exercise power over its subjects have been asked. There exists a vast body of philosophical literature on the precise meaning of the terms “liberty” and “freedom”.²⁸ In this article, liberty (or freedom) is understood as civil liberty: liberty within a community in which people are subject to laws. Liberty in this sense can be distinguished from autonomy understood as self-government. These are two uses of the word “freedom” that differ from each other. A prisoner is constrained from moving freely, yet she might be imprisoned because she governed herself and made her own decision to commit a criminal act, and even in prison, her autonomy still might be respected while she is constrained in her actions. Thus, the assumption is that we are and should remain able to act without constraint and that we

²⁶ European Court of Justice, *Mohamed el Morabit*, T-37/07 en T-323/07 September 2, 2009, par 42-43; in contrast, the Supreme Court of the US keeps the possibility open to apply the restrictions of the criminal law system if not explicitly labeled as punishment beforehand; see US Supreme Court, *Kennedy versus Mendoza-Martinez*, 327 US 144, 168–169 (1963). (I thank Meir Dan-Cohen for pointing this out).

²⁷ Marieke de Goede analyses this case and argues that asset freezes are often non-temporary. See Marieke de Goede, *Speculative Security: The Politics of Pursuing Terrorist Monies* (Minneapolis and London: University of Minnesota Press, 2012), p. 157.

²⁸ See, for an overview of the various views on autonomy, Beate Roessler, “Autonomy. Problems and Limits: Introduction,” *Philosophical Explorations* 5(3) (2002), pp. 162–166.

should be able to act autonomously unless sufficient justification is given to limit these abilities.

Punishment by its nature involves those who carry out punitive acts having dominion over those being punished. The infliction of punishment is usually intended to cause a kind of constraint on freedom for the person being punished and provides an opportunity for the abuse of power for those who carry out the punitive acts. To distinguish legitimate punishments from such abuses of power and from draconian punishments, one must rely on how punishments are connected to the justification of the punishment.²⁹ There is a large body of literature devoted to the issue of justification for limiting freedom, and I have set out some of the arguments above. Procedural rights function as a check on this justification for the deprivation of freedom.

The constraints discussed in this article affect the liberty, understood as the absence of constraints on action (negative freedom), of the targeted person. The preventive aspect affects the ability to control one's behavior. The next two sections will discuss both interests.

Individual Liberty

Human rights law identifies, among other things, rights to liberty [article 5 ECHR), to respect for private and family life (article 8 ECHR), to liberty of movement (article 2 ECHR), to the peaceful enjoyment of possessions (article 1 ECHR), and to freedom to manifest one's religion (article 9 ECHR) as central rights that ought to be protected.³⁰ What unites these rights is that they protect negative freedom—freedom from interference by others. Constraints that do not literally put the target behind bars can imperil the negative freedom of the targeted person. In this section, liberty is treated as it is covered by these human rights to fundamental freedoms.

Particularly with respect to supposed terrorists, preventive constraints such as travel bans and asset freezes are often seen as permissible. The argument in favor of preventive constraints with respect to these actors is that persons who cannot be prosecuted for crimes but are likely to commit terrorist acts ought not to be free. Therefore, these people must be either preventively detained or policed. However, although it occurs outside a prison cell, policing can amount to something similar to imprisonment.

Imprisonment is the exemplary deprivation of liberty. It subjects the targeted person to the control of others and infringes on individual liberty. It is for this reason that criminal law systems grant subjects procedural rights such as the right to be heard, so that the legitimacy of these constraints can be checked and abuse of power can be limited. However, putting someone behind bars is not required to deprive a person of her liberty. Other constraints can deprive the target of her liberty even if she is not put in prison.

I claim that—with the current techniques of controlling without locking someone up—individuals can be *de facto* imprisoned, or what I term “*exprisoned*”. This means that, even without using a prison cell, persons can be so restricted that they are in fact prisoners. The methods of liberty deprivation vary from actual imprisonment to, for example, forbidding a person from travelling outside her country of residence. In prison, the target cannot move

²⁹ See Warren Quinn, “The Right to Threaten and the Right to Punish,” *Philosophy & Public Affairs* 14(4), pp. 327–373.

³⁰ This list has parallels with the list of protected rights under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. However, some of the corresponding articles address positive liberty interests rather than negative liberty interests.

freely and is usually unable to keep her job, maintaining familial and other intimate relationships is difficult, and starting relationships is even harder. In these ways, imprisonment curtails the individual liberty of the targeted person. The limited freedom of blacklisted persons in the context of counterterrorism policies is similar to the lives of prisoners because asset freezes and travel bans prevent them from freely engaging in society. Persons subject to these constraints may live outside a prison cell, yet they are in fact prohibited from engaging in society and, thus, they cannot live normal lives.

Sometimes, the impact on liberty of constraints that do not literally imprison the target is only partial. It does not extend across all rights that are related to individual freedom, and yet a person can be like a prisoner in at least some areas of life—such as, for example, when someone lives under a regime that gives her freedom with regard to certain matters but curtails the freedom to visit family or friends. In general, the negative impact on liberty is not as severe as imprisonment of equal duration, but in some cases, imprisonment can be compared to imprisonment. Thus, the imprisonment can be *de facto* total, affecting an expansive variety of functioning, or partial, prohibiting some or many uses of individual liberty. Forms of detention other than actual imprisonment are usually less comprehensive, such as a ban on travelling outside a large country of residence. However, *de facto* imprisonment can also entail more or the same constraints on individual freedom, such as a ban on travelling outside a small territory and the freezing of all a person's assets. I will briefly illustrate the different degrees of *de facto* imprisonment.

The aforementioned case of Nada is an exemplary illustration of a travel ban that curtailed the freedom of the targeted person in a comprehensive way. Although the ECtHR did not acknowledge that the applicant's confinement to the 1.6 square kilometer of Campione constituted a deprivation of liberty under article 5 ECHR, I would like to argue that prohibiting a person from traveling outside such a small territory is comparable with imprisonment because such a ban deprives that targeted person of the ability to engage in society as others can do and, as a consequence, curtails individual liberty. This does not mean that every travel ban is similar to actual imprisonment. In this case, the travel ban was a comprehensive constraint. Nada's case amounted to a severe form of *de facto* imprisonment, i.e., imprisonment. It shows us that liberty can be infringed without making use of a prison cell. Liberty deprivation through a travel ban can also be less comprehensive. Forbidding me, as a citizen of the Netherlands, to travel outside my country of residence does not restrict my ability to visit a hospital, and my ability to start and maintain intimate relationships will be less restricted than in the case of Nada, but a ban on traveling outside my country of residence would prevent me from being successful in academia because it would prohibit me from presenting at international conferences and from becoming a visiting scholar at a foreign university. A travel ban would restrict my individual liberty, but not to the same degree that Nada's individual liberty is restricted. This means that travel bans can be total, prohibiting a broad range of functioning, or partial, affecting some components of individual liberty. The scope of the deprivation depends on the method—in this case a travel ban—and on the influence of the method on the life of the targeted person. The decision of the ECtHR in the case of Nada is not in line with this reasoning. The ECtHR restricts the status of prisoners under article 5 ECHR and the corresponding rights to those who are put behind bars. As with travel bans, asset freezes can affect individual liberty to various degrees. If all assets are frozen and the targeted person is prevented from engaging in any financial transactions, she is subject to a comprehensive form of state control and prohibited from living a normal life because she cannot engage in the society in which she lives. The freezing of all of an individual's assets is a far-reaching form of liberty deprivation, but one can also be subject to a freezing of

some assets. Moreover, single measures result in less severe forms of liberty deprivation than accumulated ones. These less severe forms of liberty deprivations need to be subjected to appropriate safeguards as well—as addressed in the last section.

In short, liberty can be constrained in different ways, whether it is in prison, on the street, or in a house. Deprivation of liberty can have various forms and degrees. Subjects who are controlled without actually being locked up may be physically free, yet they are often detained to a certain extent because they cannot engage in the society in which they live.

Individual Autonomy

A concomitant premise of the presumption of innocence is that a defendant must be tried for what she did, not for who she is and for what she has not (yet) done. This is a safeguard to prevent the state from disrespecting individual autonomy. Before discussing this safeguard, I would like to note that the person subjected to preventive restraints is not presumed to be guilty; the ground for these restrictions is that she might become guilty. Therefore, the concept of prevention seems to be conceptually distinct from the concept of punishment. However, both practices raise the question of when a state may justifiably interfere with individual liberty, and both practices can “result in significant injustices—the punishment of the innocent or the detention of someone who would not harm others”.³¹ A broader understanding of the presumption of innocence protects against these injustices.³² The imposition of preventive constraints undercuts this protection because the reallocation of the focus from past to future carries with it a shift from conduct to the features of the targeted person. This is not to argue that all constraints operate in this way. When the state sanctions conduct by imposing criminal penalties, it does not sanction personhood.

Preventive constraints that follow the security-protecting model are based on a finding of certain characteristics that make the target more dangerous than others and subsequently call for their use.³³ This label of dangerousness comes with restrictions that makes targeted persons subject to government control over their daily activities and prevents them from doing what others can freely do.

Restricting the freedom of an individual preventively is problematic with regard to the autonomy of the affected individual because such restrictions are based on risk assessments that are likely to result in predictive error. Moreover, once listed and subject to targeted prevention, the target is subject to a constraint that is rooted in the characteristics of her person rather than in her criminal conduct. Even if predictive error did not exist, the preventive nature of the constraint makes defeating the prediction that the targeted person—based on her characteristics—will commit a crime impossible. The discourse of

³¹ Kimberly Kessler Ferzan, “Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible,” *Minnesota Law review* 96:141 2012, pp. 141–193, p. 145.

³² This broader conception is defended by, among other scholars, Antony Duff, who argues in favor of a plural understanding of the presumptions of innocence. See Antony Duff, “Who Must Presume Whom to Be Innocent of What?,” *Netherlands Journal of Legal Philosophy* 42 (3) 2013; In earlier work, I applied a broad conception of the presumption of innocence, see, Hadassa Noorda, “Commentary on Provisional Release,” in: André Klip and Göran Sluiter, *Annotated Leading Cases of International Criminal Tribunals: The Special Court for Sierra Leone 2004–2006*, Intersentia, Mortsel: 2010, p. 89–114.

³³ An alternative approach would be to argue that conduct is the basis for blacklisting and subsequently restraining individuals but that the conduct cannot be proved in court because the evidence is legally impermissible. However, this too violates the rights of targeted individuals.

prevention rejects the “moral opportunity for the would-be offender”.³⁴ Therefore, prevention shows a lack of respect for individual autonomy. In some cases, such as in the case of the truly mentally ill, individuals lack the capability to make autonomous choices. In other cases, such as in the case of combatants in times of war, individuals in the role of combatants are detained because policing them would not suffice and combatants are too dangerous to be released. Thus, although combatants might not be individually responsible for their actions during hostilities, they can be detained until the war has come to an end. However, in general, preventive constraints disregard the autonomy of the target based on individual characteristics, because these constraints presume that the person might not make the right moral choice and denies her responsibility. Autonomy is the ability to control one’s behavior,³⁵ so prevention can show a lack of respect for autonomy. The state must seek to respect this autonomy if the individual is at least autonomous to a certain degree.

In sum, preventive constraints that control without putting the target behind bars may impinge on liberty interests just as preventive imprisonment does—restricting aspects of a free life and denying targets respect for their autonomy. However, as it is sometimes permissible to put someone behind bars, so too might such constraints nonetheless be permissible, but there ought to be better safeguards that take due account of the individual’s interests—an issue addressed in the next section.

Proposing Limits for Preventive Imprisonment

Procedural protections function as a check on the legitimization of interventions in the free and autonomous lives of individuals. Likewise, such safeguards should control the legitimization of interventions with a preventive nature. This would enable governments to answer the pressing question of security without violating individual liberty and autonomy. In what follows, I seek to describe some of these protections.

The most comprehensive forms of preventive constraint that lead to a near-total limit on an individual’s free and autonomous life should be seen as similar to imprisonment and should be treated as a form of preventive detention. Some preventive constraints may lie outside the crime paradigm, but it seems wrong to maintain that comprehensive forms of non-temporary deprivation of liberty should not be subject to the same constraints as imprisonment. Just as imprisonment based on the finding of dangerousness alone is normally prohibited, so too should comprehensive forms of *de facto* detention based on the notion that the individual is likely to commit a wrong in the future be prohibited. In contrast, such constraints could be permitted if the subjects had committed criminal offenses. It is important to strike a balance between the rights of the individual and the community if there is a pressing security need, but neither the targeted individual nor the community is served by a criminal conviction on an insecure epistemic basis.³⁶ Therefore, in cases of comprehensive constraints, it has to be proved that the subjects committed criminal offenses, as is the case with, for instance, imprisonment. The crime of planning a

³⁴ Saul Smilansky, “The Time to Punish,” *Analysis* 54(1) (1994): pp. 50–53, p. 52.

³⁵ This is based on the presumption that individuals have a choice to conform their conduct to the law.

³⁶ See Victor Tadros, “Rethinking the Presumption of Innocence,” *Criminal Law and Philosophy* 1(2) (2007): pp. 193–213, p. 212 (arguing that the community has no interest in conviction on an insecure epistemic basis).

terrorist act as formulated in many domestic criminal law systems could offer guidance on this matter.

Pretrial detention is permitted under most criminal law systems, but the debate among criminal law scholars indicates that this practice is problematic, because defending pretrial detention in terms of balancing individual interests against public security undermines individual autonomy. Answering the question of whether pretrial detentions as applied today are justified on retributive grounds is beyond the scope of this article.³⁷ In this article, I argue that if pretrial detention is justified under certain conditions, pretrial detentions outside the prison cell should be regulated by similar standards. This would imply that short-term exprisonments could be applied as a last resort, but only for so long as investigations reasonably require. At some point, a criminal charge should be brought or the constraints must be lifted.³⁸ Thus, these constraints need to be subject to court oversight. Moreover, to the extent that preventions that amount to exprisonment are permissible, such constraints must be based on an individualized assessment of risk to rule out group constraints that are imposed on classes of persons.

Under this approach, the all-inclusive constraints on engaging in financial transactions should be understood as near-totally restraining the free and autonomous life of an individual and should therefore be prohibited or subject to appropriate limits. Thus, these constraints ought to be prohibited unless it has been proven that the subjects committed criminal offenses. Moreover, in a way analogous to provisions in most criminal law systems, such a restriction might be justifiably imposed temporarily to prevent the targeted person from financing terrorism during investigations, but a criminal charge should be brought or the constraints must be lifted. At some point, the target should be convicted and sentenced, or acquitted. As is the case with seizure in most jurisdictions, these constraints ought not to confiscate what a person needs to live, such as some money to buy groceries and a bed in which to sleep.³⁹ In addition, regular reviews to ensure that the conditions that justify the preventive constraint continue to exist should be required due to the severity of the constraints.

Preventive constraints that are less comprehensive and cannot be analogized to imprisonment should still be subject to limits because of the risk of error and the fact that these future-oriented constraints do not respect the person's autonomy. With respect to travel bans that do not completely deprive the target of her liberty, this means that, when there is a basis for concluding that the individual who meets the criteria poses a threat to security, the question of whether the intrusions are proportionate to the security interests has to be answered. Furthermore, as with all these constraints, less intrusive alternatives must be exhausted first. Depending on the aim of the constraint, available and less intrusive alternatives to travel bans include, for example, luggage and body searches.

Regarding relatively minor constraints such as, for example, stops and frisks, justifications in terms of balancing interests should be permitted because minor constraints do

³⁷ This issue is discussed in, among other works, Antony Duff, "Pre-Trial Detention and the Presumption of Innocence," in: Andrew Ashworth, Lucia Zedner, Patrick Tomlin, *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013); Antony Duff, "Who Must Presume Whom to Be Innocent of What?," *Netherlands Journal of Legal Philosophy* 42 (3) 2013; Contra, Thomas Weigend, "There is Only One Presumption of Innocence," *Netherlands Journal of Legal Philosophy* 42 (3) 2013.

³⁸ Note that I am not arguing in favor of applying the same time limits as in criminal procedures in which the sentence is imprisonment. A longer investigation period might be needed, but there needs to be a limit at which point the targeted person should be sentenced or released.

³⁹ Dutch criminal law allows seizure but does not allow for the confiscation of what is essential for a person to live her life.

not interfere with the individual's capability to engage in society. Thus, I do not intend to give individuals the opportunity to challenge every temporary constraint. If, however, an individual was subjected to a minor constraint on a daily basis, and/or the impact of the constraint was discriminatory, the targeted person should be given an opportunity to challenge the application.

As to the procedure, the fact-finding process should be subject to protections, including transparency regarding the criteria for being targeted, post-targeting notice, an opportunity to challenge the application of the constraint if non-temporarily imposed, and regular individualized reviews to ensure that the constraint remains proportionate to the security need.⁴⁰

In sum, in this article I propose that the most comprehensive constraints that lead to near-total limits on the free and autonomous life of targeted persons require an expansive check on the legitimization of the constraint. The starting point for these constraints ought to be individual liberty and autonomy. Less comprehensive constraints require fewer checks on their legitimization and relatively minor constraints may take the security interests of society as their starting point, because these constraints do not interfere with the targeted person's ability to live a normal life and to engage in society.⁴¹

In this last section, I have recommended some specific limits to preventive imprisonment. Assenting to these recommendations is not needed to accept the foundation for suggesting them: preventive constraints can impose such far-reaching restrictions on living a normal life that they ought to be treated in the way we treat actual imprisonment. Such constraints ought to be regulated by safeguards similar to those applied to what the current criminal law system understands to be preventive imprisonment, and less comprehensive preventions ought to be treated in a way similar to their equivalents.

Conclusion

The number and scope of preventive constraints that do not put the targeted person behind bars have increased recently. As they are likely to grow and it is easier to control the lives of people without sending them to prison, it is worth looking at the effects of these constraints. As I argued in this article, the effects of these constraints call for limits on their future use.

In this article, I examined travel bans and asset freezes as illustrative of preventive constraints in practice. I explained two models: one model premised on a view of human nature as subject to change, taking the individual interests of liberty and autonomy as starting points, the other premised on the security interests of society without considering changes in human nature. Based on this analytical distinction, I illustrated how preventive constraints fail to respect their targets' autonomy, and I argued that some constraints so comprehensively infringe on the free life of the targeted person that they ought to be treated as similar to imprisonment. Therefore, I proposed a set of limits on use of constraints that lead to (partial) imprisonment.

⁴⁰ These requirements will make responding to threats more difficult, but they guarantee that deprivations of liberty respect individual autonomy and do not illegitimately infringe on individual liberty.

⁴¹ The argument that the more total the control is the more intensive the justification required should be is practiced in the courts—an example is the concept of anxious scrutiny as applied by the UK House of Lords: *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 (I thank Gavin Sullivan for this reference).

Disagreements with my proposal as presented in this article come from two sides in the debate on preventive constraints: some argue that preventive constraints should be banned; others argue that the proposed limits are too restrictive. Those who argue that preventive constraints should be banned do not pay enough attentions to the importance of preventing threats to security within society. Additionally, those who argue that these recommendations prevent the state from dealing with dangerous individuals should note that this proposal aims to set limits to imprisonment, instead of prohibiting the use of needed constraints. Applying the proposed requirements will certainly slow down the process of responding to security threats and it will make it harder for governments to respond to threats, but they are crucial in guaranteeing that deprivations of liberty based on an assessment of risk do not illegitimately infringe on the free lives of individuals and respect their autonomy.

This middle way does not give the state *carte blanche* when there is a threat to security, and it does not unnecessarily obstruct the state in acting in favor of security interests. As the state is not allowed to lock people up without a proper trial, so too should preventive constraints, such as travel bans and asset freezes, be subject to safeguards.

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