Travel Bans, Asset Freezes and other Targeted Preventions of Terrorist Acts at the Interface of War and Peace

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Abstract

This paper examines preventive restraints on suspected terrorists that can lead to de facto (partial) detention and develops a framework for setting appropriate substantive and procedural limits on their future use. More in particular, it focuses on two examples – travel bans and asset freezes. Preventive restraints do not call into effect the same protections as restraints in response to conduct do. In addition, these restraints are often seen as a permissible alternative to imprisonment. Still, preventive de facto (partial) detentions imperil the freedom of the target in two ways. First of all, in some instances these restraints can so thoroughly constrain an individual’s functioning that they lead to de facto (partial) imprisonment. Second, the preventive nature of these kinds of targeted restraints affects the autonomy of the targeted person by precluding her from taking steps to defeat the prediction that she will blow up a plane or finance terrorism and make the “right” moral choice.

Targeted preventions of terrorist acts can be categorized under two regimes: crime and war. This paper accepts the peacetime paradigm of crime and the preventive frame in which these restraints are used, but it argues for enhanced substantive and procedural safeguards. Seeing that preventive restraints can infringe on leading a free and autonomous life, this paper argues that some of these restraints require the same protection as their counterpart that puts persons under lock and key.

Key words: blacklisting, terrorism, prevention, criminal law, war, human rights, liberty, autonomy

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Introduction

Preventive restraints that can lead to de facto detention against persons blacklisted by the EU or UN on the basis of suspicion that they are involved in the facilitation or financing of terrorism are part of our current legal landscape.1 The United Nation Security Council 1267 sanctions list, the United States Office of Foreign Asset Control list and the European Union sanctions list are the most important blacklists that are in operation now. A common feature of these lists is that restraints are imposed on the targeted persons in advance of a potential crime. The sanctions include asset freezes and travel bans. The usage of these preventive restraints are likely to grow, as technological progress makes it increasingly easy to control individuals without putting them behind bars.

The increased possibility to detain without sending the target to jail asks for a legal framework that sets appropriate substantive and procedural limitations on their future use.2 While preventive imprisonment has been widely discussed, other preventive restraints are often seen as a permissible alternative.3 However, as the debate regarding these restraints among human rights lawyers indicates, the impact on the target can be enormous.4 These preventive detentions imperil the freedom of the target in two ways. First of all, these restraints may harm the negative freedom of the targeted person, because her life is interfered by the government. Therefore, some have conveyed concerns about these restraints, as they deem these restraints rather as punishments than as sanctions.5 Moreover, although these restraints do no actually lock someone up, restraining a person in such a way may deprive the

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2 Were substantive limitations dictate who can be punished, for what reasons and for how long the subject may be detained, procedural limitations govern the process that must be followed before punishing an individual.


5 See, The General Court of the European Union in Kadi raises the question of the punitive nature of blacklisting and holds that “the objectives of the recommended asset freezing measures are not only preventative but also punitive.” EGC, Kadi versus Commission, case T-85/09, 30 September 2010, par. 163.
target of her liberty as actual imprisonment does. This paper takes up these concerns and argues that some preventive restraints can be put on par with (partial) imprisonment, because these restraints infringe on the free life of the target. Second, the preventive nature of these kinds of restraints may imperil on the target’s autonomy by precluding her from taking steps to defeat the prediction that she will commit a terrorist act and conform to the law.

In this paper, the entitlement to leading a free life in the sense of the absence of restraints from action and in the sense of the capacity to control one’s own behavior have their normative foundations in positive human rights law. Seeing that restraints other than imprisonment can equally infringe on the capacity to lead a free life, this paper argues that some of these restraints require the same protection as their counterpart that leads to actual imprisonment. Thus, this paper does not argue that such restraints are prohibited but, instead, that they should be regulated. Conversely, this paper does not argue that these restraints should be embedded in the war paradigm. Instead, it assumes the non-combatant status of these individuals and treats them under the crime paradigm, because blacklists are not restricted to state-like collectives and at least some blacklisted individuals will not meet the requirements for being a (non-state) combatant. In this light, the paper argues that preventive restraints that do not actually put the target under lock and key are in par with actual (partial) imprisonment and ought to be treated as such.

In sum, accepting the peacetime paradigm of crime and the preventive use of force, the purpose of this paper is to examine preventive restraints that control targeted persons without locking them up and to develop a framework for setting appropriate substantive and

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7 Martha Nussbaum uses the term (partial) imprisonment when she writes about how state action can promote or impede people's abilities to function in some central areas of human life. For Nussbaum, the baseline standard of human life centers around ten “central capabilities” deemed essential to full human functioning. In this paper liberty and autonomy refer to positive human rights rather than to the capabilities as formulated by Nussbaum. See, Martha C. Nussbaum, “Foreword: Constitutions and Capabilities: “Perception” against Lofty Formalism”, Harvard Law Review 121 (4) (2007): pp. 5-97.

8 A Scholar who endorses the view that terrorism should be regulated under the war paradigm is, among others, Philip Bobbitt, Terror and Consent – The War for the Twenty-First Century – (New York: Knopf, 2008); 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 (forthcoming 2013) (Accepting the war paradigm for wars between states and non-state actors).

9 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.

10 This does not imply that all individuals that are not part of a state army ought to be treated as civilians.
procedural limits on their future use. The targeted sanction regime of asset freezes and travel bans are taken as illustrations of a broader set of questions about the limits of such preventions.

The argument in this paper proceeds in four steps. In Part I, two examples of a typology that differentiates two models of preventive restraints that control without putting the targeted person behind bars are detailed: travel bans, and asset freezes. The first model starts from the protection of individual liberty and autonomy and views human beings as subjects to rehabilitation. The second model starts from the security interests of society not taking the changes to human nature into regard. These models are the two extremes on a sliding scale. Part II examines why these restraints raise particular concerns. First, this section explores the ways such restraints can infringe on a person’s ability to lead a free life analogous to the ways actual imprisonment does. A definition of the capacity to lead a free life will be given by reference to the interests that have been recognized by human rights law. In some instances, preventive restraints that do not actually send the target to prison can so fully prevent the target from leading a free life that they should be deemed as de facto imprisonment. In other instances, the restraints lead to de facto partial imprisonment. Travel bans, for example, usually only impede interests in travel, choice of employment and maintaining familial and other intimate connections. Second, this section explores how the preventive nature of these restraints imperils the autonomy of the targeted person by denying her the opportunity to behave otherwise than predicted. Part III recommends ways to limit preventive restraints that control without putting the targeted person behind bars. Some of the restraints ought to be treated as their counterpart that actually imprisons the target, because these restraints similarly infringe on leading a free and autonomous life. Part IV defends this claim against two objections.

I Preventive De Facto (Partial) Detentions in Practice: Asset Freezes and Travel Bans

Over the last decade, the number and scope of preventive restraints that restrict people’s freedom in other ways than actual imprisonment has exploded. The United Nations, the European Union and some states keep lists of individuals and groups that they suspect to support terrorism. These subjects are then sanctioned in the form of preventive restraints that usually not actually imprisons them. This section provides background on two such regimes – travel bans and asset freezes – examining their purpose and application particularly in Europe.
Primarily descriptive, these examples provide background for the analysis in Part II and the recommendations made in Part III.

Sanctions against individuals adopted under European Law reflect UN sanctions regimes: the first sanction regime consists of Resolution 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 terrorism and – in particular – for a fight against the financing of terrorism by freezing assets. The Security Council in resolution 1373 (2001) 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 such terrorist acts are established as serious criminal offences in domestic laws and regulations. Under this second regime the EU developed its own blacklist. Blacklisted individuals can be subjected to preventive restraints.  

Asset freezes and travel bans are illustrative of a broader trend in which individuals or classes of individuals are subjected to targeted preventive restraints that control without actually imprisoning them, based on a presumed propensity to commit a future criminal act. Other examples include restrictions imposed on mentally ill who are a danger to themselves or to others to enable the individual to receive treatment and to prevent the individual from harming herself or others, detention of enemy combatants during wartime to prevent them from returning to hostilities, and in some countries restrictions on persons convicted of sex offenses to protect future victims from sexual abuse. The propensity to commit a future crime in these cases is based on the dangerousness of the person either because the individual has certain characteristics or because the person has a certain role such as being a combatant. The concomitant of the presumption of innocence that a defendant must be tried for what she did, not for who she is does therefore not apply to these individuals.

The details vary from restraint to restraint, but generally, there is a sliding scale between two opposing models postulated on two different views of the nature of human

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12 See, for example, the Dutch Act on Compulsory Admission to Psychiatric Hospitals (BOPZ).
beings, and on a balance of security and individual liberty. On one side of the scale, there is
the weight of the protection of individual freedom and autonomy. This model is based on a
view of human beings as subject to rehabilitation and requires individualized assessments of
risk. It recognizes that changing circumstances and rehabilitation of the targeted person can
eliminate or reduce the risk that the targeted person will commit a crime. As a consequence,
restraints last no longer than the risk posed. Therefore, it is ideally based on an individualized
and fact-specific assessment of risk; subject to court oversight and/or to periodic reviews.

On the other side of the scale is the weight of the security interests of society. It is
imposed on all persons with certain characteristics, irrespective of individualized assessment
of risk, and premised on a view of human nature as unlikely to change (or at least: changes to
the nature of the human being are deemed to be irrelevant). 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 no
periodic review because the actors in question are deemed not to change and therefore there is
no way to distinguish between who will commit the criminal act and who will not.

Some preventive restraints that do not actually put the target behind bars are on one
side of the scale. In general, the restrictions on mentally ill take as its main starting point the
need to protect individual freedom and autonomy. As a consequence, these restrictions are
usually based on individualized determination of risk, impose solely restraints on that person
and are subject to court oversight. However, most preventive restraints are placed
somewhere in the middle of the scale showing some features of both sides. In the United
States, for example, restrictions on possible sexual offenders are based on individualized
assessment of risk as seen in the first model, but impose restraints on everyone who meets the
criterion of being convicted of certain offenses. Regarding asset freezes and travel bans the
features vary from regime to regime. In general, these restraints are based on individualized
determination of risk as seen on one side of the sliding scale, but meaningful court oversight
as to the basis for the determination, time limits, or periodic reviews are minimal or absent –
as discussed in more detail in Part II.

Asset Freezes

16 See, for example, the Dutch Act on Compulsory Admission to Psychiatric Hospitals (BOPZ).
17 Eric S. Janus, Failure to Protect – America’s Sexual Predator Laws and the Rise of the Preventative State,
Shortly after September 11, 2001 the former United States President George W. Bush announced a plan to “starve” so-called terrorists of funding.18 Freezing assets is part of this plan. This way of fighting terrorism is prioritized by the European Union because it is deemed to be less violent than killing or imprisoning and less violent than waging war.19 Hence, the European Union has been active in freezing assets of so-called terrorists. The Third Money Laundering Directive under which the European Union tries to prevent terrorism by requiring, among others, banks to investigate and report usage of cash in excess of a certain amount of money starts from the premise that tracking the financing of terrorism can have a preventive effect.20

The goal of these restraints is rather to enable preventive intervention than to cut off money flows to (potential) terrorists, because it precludes certain persons from doing financial transactions that are not in themselves criminalized. Designed to protect against future acts and not only to pursue those responsible for acts that have already occurred, these restraints look forward instead of backward to criminal acts. This way, the timeframe in which these sanctions can be applied is broadened.

The Hofstadgroep – a group of individuals affiliated with Mouhammed Bouyeri the murderer of the Dutch filmmaker Theo van Gogh – is an example of a group of individuals who are blacklisted and subject to assets freezing.21 The blacklisting of the members of the Hofstadgroep was not as controversial as some other blacklisting cases, because this group was blacklisted after sentencing of the Hofstadgroep members. In other cases, one of the main elements of controversy has been that persons have been blacklisted in advance of criminal trial. However, the thresholds of evidence were not uncontroversial in the case of the Hofstadgroep, because the members were blacklisted before their appeal hearing. One of the affected persons contested his blacklisting at the European Court of Justice (ECJ) in Strasbourg 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 for the reason that it is a temporary measure that does

21 After initial sentencing of the Hofstadgroep members in 2006, but before their appeal hearing in 2008, then this group was putted on the Dutch national blacklist and subsequently on the European list.
not entail a criminal accusation and that does not lead to imprisonment.\textsuperscript{22} This is contestable. First of all, the temporary nature is arguable, because some assets will not melt for decades.\textsuperscript{23} Second, the aim of the listing cannot have been the prevention of financing of terrorism, because the persons whose assets were frozen were not wealthy.\textsuperscript{24}

Blacklisted individuals are usually not accused of criminal acts, nor can they look forward to a criminal trial, but their lives can be controlled by, for example, the freezing of their assets mainly taking the security interests of society as a starting point. For targeted individuals, the effect of comprehensive asset freezes is devastating. Listed individuals that are subject to full funds freezing actions cannot buy groceries, receive medical care, receive social security or engage in any financial transaction whatsoever. This result in families without any money – all the resources of such a family are frozen and giving them money is not allowed.\textsuperscript{25} They are subject to near-total, although indirect, government control over their daily activities and prevented from freely engaging in the society in which they live.

\textit{Travel Bans}

Travel bans are another form of preventive restraints to which blacklisted persons may be subject. It actually works as a ban on the ability to enter a particular country or as general bans on certain individuals that prevent them from transiting or entering any country. Thus, a travel ban requires states not to admit the targeted persons into their territory.

An example of a person affected by this measure is Youssef Nada. Mr. Nada was placed - with no evidence of guilt - on the UN Security Council 1267 terror list\textsuperscript{26} by the United States. The targeted sanctions by the UN Security Council that followed this blacklisting prevented him from leaving the 1.6 sq meter Italian town of Campione d’Italia, which is an Italian exclave within Swiss territory. Because the Security Council sanctions

\textsuperscript{25} See, for example the case of Yusuf, a Swedish national resident in Sweden, who was subject to a full funds freezing by the Swedish Government. ECI, Ahmed Ali Yusuf and Al Barakaat International Foundation versus Council of the European Union and Commission of the European Communities, Case T-306/01 R. 21 September 2005.
required states to prevent Mr. Nada from crossing borders and thus, for the reason that he could not enter Switzerland, he could not travel to any other part of Italy, either. The judgment of the European Court of Human Rights (ECHR) of September 12, 2012 exposed the rights of Mr. Nada under the current legal framework. In short, the ECHR found that Switzerland could have done more to alleviate the applicant’s situation even within the scope of the relevant UNSC resolutions, but regarding his right to liberty, while the ECHR acknowledged that the travel restrictions lasted several years, the ECHR found that the applicant’s confinement to the 1.6 sq km of Campione d’Italia did not constitute a deprivation of liberty under Article 5 ECHR, because the applicant was not prevented from freely living and moving within the territory of his voluntary residence.27

In this case, the prevention to cross borders led to a situation were the targeted person was not able to travel at all – he was not able to receive health care, to maintain family and other intimate relationships, it affected his employment, and he was prevented from worshipping at a mosque. If Mr. Nada would not have lived in a small enclave these problems would have been less severe but nonetheless most of them would be apparent.

Blacklisting and subsequently banning the target from travelling is in most cases less controversial than in the case of Mr. Nada, for the reason that he lives in an enclave, but travel bans always deprive the targeted person from freedom of movement and usually without accusing the target of criminal acts. The aim of targeting individuals is to protect security interests, to coerce the subjects and eventually future subjects into changing their behavior in light of the preservation of international peace and security.28 Thus, the aim of travel bans is not to pursue those responsible for acts that already occurred but to enable preventive intervention against future acts of blacklisted individuals by reducing the access to international contacts for these persons. Like asset freezes and other restraints mainly following the model that take the security interests of society as a starting point, travel bans bring forth concerns regarding the substantive and procedural rights of the targeted person – discussed in more detail in Part II.

Part II The Interests at Stake: Liberty and Autonomy

It is often assumed that restraints that control without locking the target up are a permissible alternative to actual imprisonments that are prohibited. However, the favoring of such ‘detentions’ above the alternative of putting one physically behind bars hides the liberty interests at stake. On top of that, the preventive nature of these restraints ignores the dangers associated with imposing restraints on a person before the conduct of a criminal act.

This section explores the dangers associated with preventive restraints that do not actually lock the target up with respect to the individual freedom and autonomy of the targeted person. It explores both the liberty interests of such ‘detentions’ as well as the dangers of preventive restraints in general, offering a framework through which to evaluate the individual interests at stake. Thus, the effects discussed here are twofold: first of all, this section discusses the affects with regard to restraints that control without locking up the target, because even when a person is not physically put behind bars she can be (partially) imprisoned. Second, the preventive aspect of these kinds of targeted restraints sets the target’s autonomy at stake.

Before going into the issue of in what way and to what extent preventive restraints that do not physically put the target behind bars infringe on the liberty interests of a person it is useful to reflect why custodial restraints demand a justification. The answer is visceral but has implications for the topic discussed in this paper: it is assumed that people are, and should remain, free in principle. This presumption that we are all ‘born free’ is part of the traditional setting within which questions of state’s political authority to exercise power over its subjects have been asked.30 There exists a vast philosophical literature on the precise meaning of the terms ‘liberty’ and ‘freedom’.31 Liberty can be described as the absence of restraints on action and as “self-rule” or “self-government” as a form of autonomy.32 These are two uses of the word freedom that differ from each other. A prisoner is constrained in 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 she still might be autonomous while being constrained in her actions.33 Thus, the assumption is that we are, and should remain,

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able to act without constraint and to govern ourselves, unless sufficient justification is given to limit this freedom.

Punishment by its nature involves those who carry out punitive acts having dominion over those being punished. The infliction of punishment usually intends to cause a kind of restraint on freedom for the person being punished, and provides an opportunity for 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 the way punishments are connected to the justification of the punishment. 34 There is a large body of literature devoted to the issue of justification for limiting freedom. Deprivation of liberty can be legitimized on consequentialist and on deontological grounds. 35 The pure type of the former viewing punishment as justified to the extent that its practice achieves the specified aim; the latter viewing punishment either as a good in itself or as a practice required by justice. Both views require a justification for punishment, for the reason that the freedom of those being punished is restrained. Subsequently, procedural rights function as a check on the justification for deprivation of freedom.

The restraints that are discussed in this paper affect the liberty of the targeted person understood as the absence of restraints from action. The preventive aspect affects the ability to control one’s behavior.

Liberty

Human rights law identifies, among others, the right to liberty (article 5, European Convention on Human Rights (ECHR)), the right to respect for private and family life (Article 8 ECHR), the liberty of movement (Article 2 ECHR), entitlement to peaceful enjoyment of possessions (Article 1 ECHR), and the freedom to manifest one’s religion (Article 9 ECHR) as central liberties that ought to be protected. 36 What unites these liberties is that they protect the core of negative freedom – freedom from interference by others.

36 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 are rather addressing positive liberty interests than negative liberty interests.
Detentions that do not physically put the target behind bars can imperil the negative freedom of the targeted person.

Physical imprisonment is the exemplary deprivation of liberty. It subjects the targeted person to control of others, and infringes – among others – on the ability to move freely, to visit family and friends, and it may infringe on the ability to manifest one’s religion. It is for this reason that criminal law systems grant subjects procedural rights such as the right to appeal a conviction, so the legitimacy of these restraints can be checked.

However, putting someone behind bars is not required to deprive her from her liberty. Other restraints can deprive the target of her liberty, even if she is not put in jail. People can be so restricted that they are less like free people, who can choose to act without restraints, than like prisoners, unable to act without interference. This happens when a regime curtails the free and autonomous life of a person without a criminal conviction. Sometimes, however, imprisonment is only partial. It does not for everyone extend across all rights that are related to individual freedom, and yet (some) persons are like prisoners in at least some areas of life – as, for example, when someone lives under a regime that gives her freedom with regard to certain matters, but curtails the freedom to manifest her religion.\(^{37}\) Thus, the imprisonment can be \textit{de facto} total, prohibiting a broad range of functioning, or partial, affecting some or more (but not all) components of individual liberty.

Persons subject to asset freezes, for example, may be physically free, yet they are effectively prohibited from engaging in the society in which they live. They cannot partake in a single financial transaction. Even buying groceries, paying the rent, paying for a train ticket or for fuel is prohibited. Hence, although being physically free, their entire daily life is a matter of state control.

In other cases, restraints that do not actually lock the target up but that nonetheless control them are a form of partial imprisonment. The effect of travel bans, for example, is usually not as restrictive as asset freezes, but has nonetheless a severe impact on the free life of the subject.\(^\text{38}\) In prohibiting travelling outside the country of residence, it limits not only the freedom of movement; it may also impact on employment possibilities. Even if travel is not a regular part of one’s job responsibilities, occasional trips outside the country of


\(^{38}\) In the case of Nada, who lived in a very small enclave, a travel ban can be more severe because he was also not able to travel within his country of residence and therefore the travel ban did not only affect his right to freedom of movement, he was, among others, also restricted in meeting his family and friends in his country of residence, and he was restricted to manifest his religion for the reason that he had to travel outside the enclave to visit a mosque.
residence to professional meetings may be required. Furthermore, a travel ban may infringe on maintaining familial and other intimate relationships. Thus, subjects that are controlled without actually been locked up may be physically free, yet they are often (partially) prohibited from engaging in the society in which they live and therefore, detained to a certain extent.

Autonomy

A concomitant of the presumption of innocence is that a defendant must be tried for what she did, not for who she is. The imposition of preventive restraints undercuts this, because the reallocation of the focus from the past to future carries with it a shift from conduct to the character of the targeted person. Preventive restraints are based on a finding of certain characteristics that makes the target more dangerous than others and that subsequently calls for their use. This label of dangerousness comes with restrictions that makes targeted persons subject to government control over their daily activities and prevents them from engaging in activities that others can freely do.

Restricting the freedom of an individual based on who she is rather than on what she has done is problematic for several reasons. First of all, there are no empirically recognized criteria for determining who meets the criteria of being a dangerous person who will commit a future crime. Therefore determinations are vulnerable to errors. Second, besides risks of error, it is difficult to disprove a propensity to commit a crime, even when there is a procedure that allows one to do so. It is impossible to prove that an individual will engage in a future crime, therefore, so too is it impossible for the listed individual to prove that she will not do so. Hence, only a very small number of individuals have been successful in their efforts to be delisted from terrorist blacklists.39

Once listed and subject to targeted prevention, the target is subject to a restraint that roots in the characteristics of her person rather than in her criminal conduct. Even if predictive error would not exist, the preventive nature of the restraint precludes the targeted person from taking steps to defeat the prediction that she – based on her characteristics – will commit a crime. The discourse of prevention rejects the moral opportunity of the would-be offender.40 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 transmit their capacity to make certain choices to another agent. But, in general, preventive restraints disregard the autonomy of the target based on individual characteristics. These restraints assume a predetermined future and tear down the opportunity for targeted persons to make a choice regarding behaving conform or non-conform the prediction that she will commit a future crime. Respect for autonomy is meant to rule out such interventions because they imply a judgment that the person is not able to make the right moral choice and to conform to the law. Autonomy is the ability to control one’s behavior, so prevention is short of respect for autonomy. This can only be justified by either a deterministic view on individual action or by taking security as the only starting point in these matters without weighing of the individual interests.42

In sum, preventive restraints that control without putting the target behind bars impinge on an array of liberty interests like 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 such restraints might nonetheless be permissible, but there ought to better procedural and substantive safeguards that take the individual interests into regard – an issue turned to in the next Part.

Part III Setting Some Limits to Preventive De Facto Detentions

Substantive and procedural protections function as a check on the legitimization of interventions in the free and autonomous life of individuals. Likewise, the legitimization of interventions with a preventive nature should be controlled by the same safeguards. This would enable governments to answer the pressing question for security without violating individual liberty and autonomy. In what follows, this paper sets out some of such protections.

persuasive response to this is based in the deterministic view that individuals do not have the capacity to make moral choices. However, even if determinism is true, a criminal law that endorses the notion that individual actors can control their fate might be valuable when ‘reactive attitudes’ of individuals towards each other and themselves, such attitudes as gratitude, anger, sympathy and resentment, are natural and irrevocable. P.F. Strawson, “Freedom and Resentment”, reprinted in: Freedom and Resentment and Other Essays (London: Methuen, 1974).

41 This is based on the presumption that individuals have a choice to conform their conduct to the law. John Christman, Autonomy in Moral and Political Philosophy, Stanford Encyclopedia of Philosophy, available at: http://plato.stanford.edu/entries/autonomy-moral/ (accessed: December 2012).

42 A scholar who endorses this view is, for example, Philip Bobbitt, Terror and Consent – The War for the Twenty-First Century – (New York: Knopf, 2008).
The most comprehensive forms of preventive restraints that lead to near total limits on the individual’s free and autonomous life should be seen as *de facto* imprisonment and should be treated in the same way as other forms of preventive detention. Some preventive restraints may lie outside the crime paradigm, but it seems wrong to maintain that deprivation of liberty is not a criminal matter. Just as imprisonment based on the finding of dangerousness alone is prohibited, so too should comprehensive forms of *de facto* detention based on that the individual poses a future risk be prohibited. By contrast, such restraints could be permitted if proved beyond reasonable doubt that the subjects were the intended targets of the criminal offense.43 It is important to strike a balance between the rights of the individual and the community, if there is a pressing security need, but both the targeted individual and the community are not served by a criminal conviction on an insecure epistemic basis.44 Therefore, in cases of comprehensive restraints, it has to be proved beyond reasonable doubt that the subjects were the intended targets of the criminal offense as is the case with actual imprisonment.

Furthermore, preventive detentions are permitted when time-limited (such as pre-trial detentions), and subject to court oversight. Likewise, analogous to actual detention, preventive restraints that lead to *de facto* detention should be subject to the same limits as their counterpart that physically puts the target behind bars. To satisfy the question for security, such restraints could – as a last resort – be applied as pre-trial detentions, but only for so long as and subject to the same procedural requirements as would apply to pre-trial detention.

On top of that, to the extent preventions that amount to *de facto* imprisonment are permissible, such restraints need to be based on an individualized assessment of risk to rule-out group restraints that are imposed on classes of persons.

Under this approach, the all-inclusive restraints 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 the same limits that apply to their counterpart that actually imprisons the target. Thus, these restraints ought to be prohibited unless proved beyond reasonable doubt that the subjects were the intended targets of the criminal offense, or unless they are only temporarily imposed. Such a restriction might be used to prevent the targeted person from financing terrorism during investigations, but a criminal conviction should be brought or the restraints have to be lifted. At some point, the target should be

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sentenced or acquitted. As is the case with seizure under most jurisdictions, these restraints ought not to confiscate what a person needs to live, such as some money to buy groceries, and a bed to sleep in. Moreover, regular reviews to ensure that the conditions that justify the preventive restraint persist are required due to the severity of the restraints.

Preventive non-physical restraints that are less comprehensive and that cannot be analogized to imprisonment, should still be subject to limits given the risk of error, and the ways these restraints do not respect the person’s autonomy. With respect to travel bans that do not completely deprive the target of her liberty, questions of whether there is a basis for concluding that the individual who meets the (still secret) criteria poses a threat to security, and whether the intrusions are proportionate to the security interests have to be answered. Furthermore, as with all these restraints, less intrusive alternatives have to be exhausted first. Depending on the aim of the restraint, an available and less intrusive alternative to travel bans is, for example, extensive luggage and body searches. As to the procedure, the fact-finding process should be subject to protections, including transparency regarding the criteria for being targeted (as a minimum, a summary of the classified information is required), post-targeting notice, an opportunity to challenge the application of the restraint if non-temporarily imposed, and subject to regular individualized reviews to ensure that the restraint is not imposed disproportional to the security need.

In sum, this paper proposes that the most comprehensive restraints that lead to near total limits on the free and autonomous life of targeted persons require an expansive check on the legitimization of the punishment. The starting point for these restraints ought to be individual liberty and autonomy. Less comprehensive restraints require fewer checks on their legitimization and may be placed more on the side of the scale that take the security interests of society as its starting point.

One need not agree with these specific limits to accept the foundation for suggesting them: certain preventive restraints impose such far-reaching restrictions on living a free and autonomous life that they ought to be treated as actual imprisonment. Such restraints ought to trigger the same substantive and procedural rights as applied to what the current criminal law system understands to be pre-trial detention, and less comprehensive preventions ought to be treated similar to their equivalents.

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

Many will object that these limits will be overly permissive, allowing prevention to persist when it should be banned. This is a reasonable objection, but fails to grapple with the use, acceptance of, and legitimate government interest in preventing threats to security. Once one accepts that targeted and time-limited preventive detention such as pre-trial detention is permissible in limited situations – as many criminal law systems do – then analogous preventive *de facto* detention must similarly be permitted. *Ipso facto*, partial *de facto* detentions are permissible as well. The question remains one of setting proper limits.

Conversely, some may argue that these recommendations will be too burdensome, preventing the state from dealing with dangerous individuals. However, this proposal does not prohibit the use of needed restraints. Rather total *de facto* detention must be a last resort, proportional, subject to court oversight, and temporarily imposed. Partial *de facto* detention must be a last resort, the criteria for being targeted must be transparent, a post-targeting notice is required, individual reviews are required, and there must be an opportunity to challenge the application of the restraint if the restraint is non-temporarily.\footnote{This last qualification of partial detention is meant to distinguish restraints that last relatively for a short time from restraints like travel bans that have an ongoing impact on the individual’s liberty and autonomy. Thus, this paper does not intend to give individuals the opportunity to challenge every temporary restraint. If, however, a particular individual were subject to a restraint on a daily basis as a result, that would be a case for which the targeted person should be given opportunity to challenge the application.} Procedural requirements will certainly increase the administrative burden of the government and may slow down the process of responding to security threats but they are essential to guarantee that deprivations of liberty based on a targeted assessment of dangerousness do not infringe on the free and autonomous lives of individuals.

This middle way does not give the state carte blanche when there is a threat to security, but it also does not unduly tie the hands of the state to act in favor of security interests. As the state is not allowed to lock people up without a trial, so too, preventive restraints such as travel bans and asset freezes ought to be subject to similar substantive and procedural safeguards.

Conclusion

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

This paper highlighted two regimes – travel bans and asset freezes – as illustrative of a broader set of questions about the limits of the preventive state. It explained two sides of a sliding scale of such restraints. The one side postulated on a view of human nature as subject to rehabilitation taking the individual interests of liberty and autonomy as a starting point. The weight of the other side premised on the security interests of society not taking the changes to human nature into regard. This paper exposed the ways in which preventive restraints create inherent risks of error and fail to respect their targets’ autonomy. Certain restraints so comprehensively infringe on the free and autonomous life of the targeted person that they ought to be treated as a form of de facto imprisonment. Therefore, the paper proposed a set of substantive and procedural limits on use of restraints that lead to (partial) de facto imprisonment.