

Pre-Crime Restraints: The Explosion of Targeted, Non-Custodial Prevention

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Abstract. This Article exposes the ways in which non-custodial, pre-crime restraints have proliferated over the past decade, focusing in particular on three notable examples – terrorism-related financial sanctions, the No Fly List, and the array of residential, employment, and related restrictions imposed on sex offenders. Because such restraints do not involve physical incapacitation, they are rarely deemed to infringe core liberty interests. Because they are preventive, not punitive, none of the criminal law procedural protections apply. They have exploded largely unchecked – subject to little more than bare rationality review and negligible procedural protections – and without any coherent theory as to their appropriate limits.

The Article fills a gap in the literature, looking at this category of preventive, non-custodial restraints as a whole and developing a framework for evaluating, limiting, and legitimizing their use. It accepts the preventive frame in which they operate, but argues that in some instances non-custodial restraints can so thoroughly constrain an individual’s functioning that they are equivalent to de facto imprisonment and ought to be treated as such. Even in the more common case of partial restraints, enhanced substantive and procedural safeguards are needed to preserve the respect for individuals’ equal dignity, freedom of choice and moral autonomy at the heart of the liberty interest that the Constitution and a just society protect.

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INTRODUCTION

Most of us intuitively think it makes sense to deny someone an opportunity to board a plane if there are reasonable grounds to believe that he will try to blow it up once on board. We also think it is reasonable to freeze an entity’s assets if it would otherwise spirit money to al Qaeda’s coffers. And we tend to agree that it is sound policy to prohibit someone with a history of sexually abusing children from working in an elementary school.

But there is a grave danger that what starts out as a reasonable sounding security measure operates as a one-way ratchet – increasing in scope and severity over time. We have, for example, seen the lists of suspected terrorists who are prohibited from flying, opening a bank account, or entering the country swell over the last decade. Similarly, the array of offenses that trigger the label of dangerous sex offender has ballooned, and the severity of the associated residential and employment restrictions increased as well. Meanwhile, getting oneself off such a list involves establishing a near impossible-to-establish fact about the future – that one will not do whatever bad act the restriction is designed to prevent.

These types of restrictions – what I call targeted, non-custodial, pre-crime restraints¹ – have proliferated over the past decade. The restraints are justified by asserted security needs, based on an assessment that a particular individual or entity is likely to commit a future bad act. They are deemed preventive, not punitive, and therefore are not subject to the array of procedural protections that apply to criminal law sanctions. And because they do not involve custodial restraint or discriminate (at least overtly) based on race or gender, they are subject to minimal substantive scrutiny and minimal procedural safeguards. While most prevalent in the national security realm, they also arise in the efforts to prevent presumptively dangerous sex offenders, aliens, and spousal abusers from striking. In some cases, the restrictions are so severe that they amount to a near-total deprivation of the ability to participate in society or live anything close to a meaningful or free life. In other cases, the restrictions are not so extensive, but affirmatively restrain their targets’ liberty and stamp them as a presumptively dangerous underclass.

Under the rubric of preventing terrorism financing, for example, the Secretaries of State and Treasury have far-reaching authority to designate entities and individuals “specially designated global terrorists,” freeze their assets, and prohibit all transactions with the designated groups or people.² For the dozen U.S.-based entities that have been listed, such a designation is an effective death knell. For U.S. residents, it is the equivalent of labeling the individual with a radioactive Scarlet A. Designated individuals cannot buy groceries, pay their rent, or receive medical care without a license from the government. Providers of goods or services to such entities or organizations are themselves subject to listing as specially designated global terrorists, as well as civil and criminal penalties. Reviewing courts in the U.S. have emphasized process rights if they have exercised review at all, while continuing to defer to the executive’s determination as to the criteria for and fact of designation.³ A list that started out designating twenty-seven individuals and entities when first announced by President George W. Bush in the wake of the September 11, 2001, terrorist attacks has grown to more than 700 (mostly non-U.S. persons) as of June 2013.⁴

¹ The term “pre-crime” was coined in Phillip K. Dick’s short story, *The Minority Report* (1987), made into a hit movie in 2002. While both the story and movie focus on what is often labeled “pre-punishment,” I focus on the broader category of pre-crime; that is, non-punitive measures that take place outside and on the margins of the criminal justice system and are designed to prevent future bad acts without any explicit retributive purpose.

² Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001). See discussion *infra*, at

³ See discussion *infra*, at __.

⁴ See U.S. DEP’T OF TREASURY, OFFICE OF FOREIGN ASSET CONTROL, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST SEARCH, <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (last

The effort to control sex offenders has resulted in a combination of restrictions so pervasive that it has led to banishment from a number of towns and cities.⁵ Some have been subject to forced homelessness – living on the street or under bridges because there is no other place for them to go.⁶ Others can no longer take their children to play in local parks or other public places, even if they qualify for the “sex offender” label because of statutory rape as a teenager or a single indecent exposure conviction decades ago.⁷

Many pre-crime restrictions are less comprehensive, but impose significant and often underappreciated costs on the targeted individual nonetheless. The No Fly List is one such example. An FBI-managed

visited June 15, 2013). As of this writing, nine are U.S.-based entities and one is a U.S. citizen – although other U.S.-based entities and persons were previously listed, in many cases for several years. U.S. residents and citizens also face criminal prosecution and possible designation if they provide any support to any of the designated entities and individuals and are, according to reviewing courts, prohibited from collaterally attacking the underlying designation. *See, e.g.,* Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury, 686 F.3d 965, 977 (9th Cir. 2012); United States v. Al-Arian, 308 F. Supp. 2d 1322, 1343–46 (M.D. Fla. 2004). Foreign nationals on the list are also often subject to additional sanctions and travel bans imposed by the U.N. Security Council, their home countries, and/or other countries where they do reside or business — although aspects of this scheme have been successfully challenged in court. *See, e.g.,* Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council of the European Union and EC Commission, 3 C.M.L.R. 41 (2008) (finding due process violations in the U.N. listing scheme); Nada v. Switzerland, Judgment, ECHR, No. 10593/08 (Sept. 12, 2012) (finding that travel ban violated right to respect for privacy and family life, given particular circumstances); UN S/Res/1904 (17 Dec. 2009) Pars. 20-27 (responding to court challenges by, among other things, creating Office of the Ombudsperson to deal with delisting requests).

⁵ *See, e.g.,* Doe v. Miller, 405 F.3d 700, 724-25 (8th Cir. 2005) (Melloy, J., dissenting) (describing onerous residential restrictions that effectively bar sex offenders from living in a number of Iowa’s small towns and cities). For interesting analyses of the ways in which civil restraints effectively turn classes of individuals into outlaws, see Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012) (discussing how the collateral consequences of conviction amount to a substantial loss of civil rights); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1995) (discussing restrictions imposed on illegal aliens).

⁶ *See, e.g.,* Jill Levenson, *Sex Offender Residence Restrictions*, in SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS 267, 279-280 (Richard G. Wright ed., 2009) (describing lack of housing options for sex offenders and resulting homelessness); Greg Allen, *Sex Offenders Forced to Live Under Miami Bridge*, NPR.ORG (May 20, 2009), <http://www.npr.org/templates/story/story.php?storyId=104150499>. Some jurisdictions have made it difficult even to be homeless, prohibiting sex offenders from staying in regulated homeless encampments or otherwise placing limits on their movements. *See, e.g.,* Jordan Talge, *No Direction Home: Constitutional Limitations on Washington’s Homeless Encampment Ordinances*, 85 WASH. L. REV. 781, 789 n. 55 (2010) (listing prohibitions on sex offenders entering homeless encampments in the state of Washington).

⁷ *See, e.g.,* Ian Lovett, *Public-Place Laws Tighten Rein on Sex Offenders*, N.Y. TIMES, May 30, 2012, at A15.

database is used to deny boarding to suspected terrorists. In some cases, U.S. citizens and residents have been barred from returning by plane to the United States, and told to take a ship instead.⁸ Meanwhile, the government refuses to acknowledge who is included or to specify the standards it uses to place individuals on the list. Even those who have been turned away at the airport with a ticket in hand are told that the government can neither confirm nor deny whether they are listed individuals.⁹ Recent reporting suggests that there are approximately 21,000 people on the No Fly List, including an estimated 500 citizens.¹⁰ The government justifies these restrictions on the grounds that there is “no right to the most convenient means of travel,”¹¹ and no court has yet disagreed.¹²

All of these restrictions share common features: They are targeted at particular individuals, entities, or categories of individuals; they impose non-custodial restrictions; and they are preventive in both purpose and effect. Because of these latter two features – namely their non-custodial, non-punitive nature – they have been subject to significantly less scrutiny by both courts and scholars than other forms of governmental sanction.¹³

⁸ See, e.g., Peter Finn, *Detained V.a. Teen Set to Return to U.S.*, WASH. POST, Jan. 21, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/20/AR2011012005882.html>; Defendant Memorandum of Law in Support of Motion to Dismiss or for Summary Judgment, *Latif v. Holder*, No. 3:10-CV-00750 (D. Or. June 30, 2010) [hereinafter *Def. Mot. to Dismiss, Latif v. Holder*] (emphasizing that it “may be less convenient or more expensive to take a ship or bus, but this factor does not impinge on the constitutional right to travel.”).

⁹ *Def. Mot. to Dismiss, Latif v. Holder*, *supra* note 8, at 7 (explaining that the government does not “confirm or deny whether particular individuals now or ever have been [included on the No Fly List] because to do so would in effect disclose that the individuals in question are currently or once were the subjects of counterterrorism intelligence-gathering or investigative activity by the government”).

¹⁰ Eileen Sullivan, *U.S. Secret No-Fly List Doubles in One Year*, ASSOCIATED PRESS, Feb. 2, 2012, available at www.sltrib.com/sltrib/world/53432678-68/list-government-fly-watch.html.csp; Carol Cratty, *21,000 People Now on No Fly List*, CNN.COM (Feb. 2, 2012, 06:28 PM ET), <http://security.blogs.cnn.com/2012/02/02/21000-people-now-on-u-s-no-fly-list/>. The United States does not officially disclose the numbers of people on the list, which is regularly updated.

¹¹ See Reply Memorandum of Law in Support of Defendant’s Motion for Partial Summary Judgment, *Latif v. Holder*, No. 3:10-CV-00750 (D. Or. April 26, 2103) at 6; *Def. Mot. to Dismiss, Latif v. Holder*, *supra* note 8, at 24.

¹² To date, litigation on the issue has bounced back and forth from district to circuit court, without any court yet ruling on the merits. See, e.g., *Latif v. Holder*, 686 F.3d 1122, 1126–27 (9th Cir. 2012) (discussing procedural history to No Fly List challenge); *Ibrahim v. Dep’t. of Homeland Sec.*, 669 F.3d 983, 991–92 (9th Cir. 2012) (same). That said, cross summary judgment motions in *Latif v. Holder* were argued in district court on June 21, 2013, and a decision is expected soon.

¹³ A notable exception is Professor Erin Murphy’s excellent work, *Paradigms of Restraint*, 57 DUKE L. REV. 1321, 1326 (2008). Murphy’s focus, however, differs from mine, in that she is primarily concerned with the links between surveillance technology and the increased tracking and monitoring of targeted individuals. I, by contrast, focus

Detention and other forms of physical restraint are understood to infringe entrenched liberty interests, and government-imposed punishment triggers an array of procedural protections and is subject to clear red lines (such as prohibitions on ex post facto laws, bills of attainder, and cruel and unusual punishment). By contrast, liberty interests that do not involve physical incapacitation or bodily intrusions are rarely considered “core,” and tend to be both undervalued and under-theorized.¹⁴ Meanwhile, the boundaries of the preventive state are ill defined and unsettled, with no clear limits as to whether, when, and how the state can engage in targeted sanctions in the name of stopping a future bad act.¹⁵

This paper fills an important gap in the literature, looking at the category of targeted, non-custodial, pre-crime sanctions as a whole and offering a framework for courts and legislators to evaluate such restrictions going forward.¹⁶ In Part I, I detail examples of targeted, non-custodial and pre-crime sanctions that operate in a number of different contexts. Specifically, I focus on targeted financial sanctions, the No Fly List, and residential and other restrictions placed on presumptively dangerous sex offenders.

In Part II, I examine why all of these measures raise particular concerns about the nature of the state’s intervention and why they have evaded sufficient scrutiny to date – reasons related to their non-custodial and preventive nature. In some, albeit limited, instances, non-custodial

exclusively on those government-imposed restraints that cross over from tracking and monitoring to imposing affirmative restrictions on what individuals can do and where they can go.

¹⁴ *Id.* at 1326 (“[W]hereas a rich debate explores the potential for abuse of physical incapacitation, whether as a matter of criminal sanction or ‘regulatory’ control, a corresponding dialogue surrounding the risks posed by nonphysical . . . means of control is conspicuously lacking.”); *cf.* *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (describing freedom from physical incapacitation as a “core” liberty interest protected by the Due Process Clause).

¹⁵ As Professor Carol Steiker warned well over a decade ago, the near-exclusive focus on the limits of permissible punishment left “the mistaken presumption that if the state wasn’t punishing it wasn’t doing anything at all.” Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 784 (1998).

¹⁶ A word on scope: The paper focuses on those targeted, preventive, and non-custodial measures that are both coercive and predicated on a particularized assessment of the individual or organization’s likelihood to commit a crime or other bad act – what I call *pre-crime restraints*. There is an array of other preventive, targeted and non-custodial measures that are pre-crime but not restrictive. One expects, for example, that the FBI will make pre-crime judgments about who to target for investigations; an investigatory agency that failed to do so would not be particularly effective. My focus is on those measures that cross from tracking and monitoring to restricting and sanctioning. There also exist a number of restrictive, preventive (and at times targeted) measures that I do not consider pre-crime because they are not based on a particular individual’s or entity’s propensity to commit a particular bad act. Examples include most health and safety requirements, such as environmental regulations, general licensing requirements, and mandatory vaccination laws.

restraints can so fully prevent the target from living a free and meaningful life that they should be considered a form of de facto imprisonment. In most cases, the restraints are partial rather than total, but still significantly diminish the capacity to make choices central to a meaningful life and stamp their targets as second-class.¹⁷ Permanent restrictions on the ability to fly, for example, deny targeted individuals a central mode of transport in modern life, thereby impeding liberty interests in travel,¹⁸ choice of employment,¹⁹ and maintenance of familial and other intimate connections.²⁰

This section also highlights a set of concerns common to all pre-crime restraints, whether custodial or non-custodial – namely the risk of error and abuse; the inexorable incentives for expansion; the way in which they single out individuals and groups for second-class treatment; and the failure to respect individuals’ moral autonomy.

In Part III, I argue that while targeted, non-custodial, pre-crime restraints can serve a valid governmental purpose, there must be effective limits on their use. Comprehensive restraints that result in near-total control over an individuals’ movement and activities, such as the financial sanctions as applied to U.S. residents and the most restrictive limits placed on sex offenders, ought to trigger the same substantive limits and procedural protections that would apply if the state were seeking to physically detain –*i.e.*, designed to deal with a discrete threat as a gap-filler (as is allowed with pre-trial detention)²¹ or applied narrowly to those who

¹⁷ This terminology is borrowed from Professor Martha Nussbaum’s work, in which she talks about the ways in which a state action can lead to total or “partial” imprisonment of its citizens. Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 6 (2007).

¹⁸ See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958) (“Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. . . Freedom of movement also has large social values.”). See also *Shapiro v. Thompson*, 394 US 618, 630-31 (1969) (describing fundamental right to interstate travel).

¹⁹ See, e.g., *Greene v. McElroy*, 360 U.S. 474, 475–76 (1959) (describing liberty and property consequences of plaintiff’s chosen field of endeavor being “closed to him”). But see *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 894 (1961) (finding no due process violation where employee of government contractor was not permitted to access her place of employment). The difference in the two cases turns, in part, on the availability (or lack thereof) of other possible employment in the field of one’s choosing.

²⁰ See, e.g., *Moore v. East Cleveland*, 431 U.S. 494, 506 (1977) (holding that a city ordinance making it a crime for certain family members to live in the same household violated substantive due process).

²¹ This picks up on the argument made by Professor Stephen J. Schulhofer in *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 85 (1996) (describing civil deprivation of liberty is permissible only as a “gap-filler, to solve problems that the criminal justice system cannot address”).

pose a danger *and* have an additional impairment making it difficult, if not, impossible to control one’s behavior (as is required for civil commitment of sex offenders).²² One need not agree with these specific recommendations, however, to accept the general premise – that certain types of non-custodial, targeted, and preventive restrictions so dramatically restrict the ability to lead a meaningful life that they ought to trigger the same substantive scrutiny and procedural protections as apply to physical incapacitation or other bodily restraints.

Other less extreme (and more common) restraints also warrant enhanced substantive scrutiny and procedural safeguards, given the often significant liberty interest at stake, the targeted nature and stigmatizing effect of the restraints, and the risks of error. The specifics will depend on the degree of intrusion on individual liberty and governmental interest at stake. Tailored and adjudicatory restraints, rather than rule-based restraints, ought to be the norm.

In contrast to the extensive and important literature on various forms of preventive detention,²³ there has been only limited attention to the various forms of affirmative, preventive, and non-custodial restraints that have cropped up in multiple contexts and with minimal oversight.²⁴ The scholarship that exists tends to look at each regime in isolation, with

²² See, e.g., *Kansas v. Crane*, 534 U.S. 407 (2002) (emphasizing “the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings”) (citation omitted); *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (“A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment.”); *Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992) (rejecting an approach to civil commitment that would permit the indefinite confinement “of any convicted criminal” after completion of a prison term).

²³ For a sampling of the literature on various forms of preventive detention, see Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693 (2009); Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. REV. 77 (2005); Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319 (2003); Schulhofer, *supra* note 22; Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010); see also Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SEC. J. 85 (2011) (cataloguing various forms of preventive detention).

²⁴ This is starting to change. There is an increasingly extensive body of literature on the sex offender restrictions, see, e.g., Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071 (2012), and a number of scholars have started to pay attention to the various non-custodial, preventive restrictions in the national security field. See, e.g., Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WIS. L. REV. 1203 (2010) (focusing on the No Fly List); Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613 (2009) (addressing terrorism financial sanction regime); David Zaring, *Administration by Treasury*, 95 MIN. L. REV. 187, 215–224 (2010) (also addressing terrorism financial sanction regime).

the predominant argument being that such restraints should be channeled through the criminal law or categorically prohibited.²⁵ This Article rejects that approach, which ultimately disserves both the punitive and preventive functions of the law and does little to set substantive, prospective limits on the use of such restraints. Accepting the need for and legitimacy of certain preventive measures, it develops a framework for setting appropriate substantive and procedural limits on their future use.

I. PRE-CRIME RESTRAINTS IN OPERATION

The federal government has long had far-reaching authority to both revoke a security clearance in response to a perceived threat and to demand extensive conditions of pre-trial release. States, too, have longstanding and wide-ranging power to expel a student from school for behavioral reasons; rescind employment based on an alleged security breach; or to impose stay away orders in domestic violence cases. These are all forms of non-custodial, pre-crime restraints. Over the past decade, the number and scope of such restraints has exploded – mostly in the national security arena, but also on the margins of the criminal justice system.²⁶ This section provides background on three such regimes – terrorism-related financial sanctions, the No Fly List, and restrictions imposed on sex offenders – examining their purpose and evolution over time. Primarily descriptive, these examples provide important background for the analysis and recommendations made in Parts II and III.²⁷

²⁵ For a sampling of the literature arguing that pre-crime prevention is actually punishment in disguise, see Caplan, *supra* note 29, at 1212 (describing No Fly List as equivalent of singling out individuals for punishment); Carpenter & Beverlin, *supra* note 29 at 1076; Wayne A. Logan, *Populism and Punishment: Sex Offender Registration and Community Notification in the Courts*, 26 CRIM. JUST. 37 (2011); Eric Sandberg-Zakian, *Counterterrorism, the Constitution, and the Civil-Criminal Divide: Evaluating the Designation of U.S. Persons Under the International Emergency Economic Powers Act*, 48 HARV. J. ON LEGIS. 95 (2011).

²⁶ The obvious historical antecedent is the Jim Crow era, in which a series of non-custodial but pervasive restrictions relegated African-Americans to an ostracized underclass. The myth of “separate but equal” was eventually chipped away through a series of Supreme Court rulings based on the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments. For a powerful argument that the racial caste system is re-emerging in a new form, see MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010) (describing the combined effect of a series of non-custodial restraints imposed on convicted felons).

²⁷ This Article focuses on U.S. constitutional-based limits to the explosion of non-custodial pre-crime restraints. There are important parallels to a range of other non-custodial, targeted restraints imposed by other nations and international bodies, including, for example, the control orders in the United Kingdom (replaced in 2011 by “Terrorism Prevention and Investigation Measures”) and United Nations-imposed terrorism-related financial sanctions. See, e.g., *A v. United Kingdom*, App. No. 3455/05, 301 Eur. Ct. H.R. (2009) (addressing control orders and use of classified evidence); *supra*,

A. Specially Designated Global Terrorists

Within weeks of the September 11, 2001, terrorist attacks, President George W. Bush announced a plan to “starve” terrorists of funding.²⁸ Citing the “continuing and immediate threat” of further terrorist acts, he invoked the International Emergency Economic Powers Act of 1977²⁹ and issued an Executive Order (“the Order”) that blocked the property of 27 named individuals and organizations.³⁰ Assets of these “Specially Designated Global Terrorists,” or “SDGTs” as they have come to be known, were immediately frozen.

Because money is fungible, both the scope of restrictions and categories of persons and entities subject to such restrictions are intentionally broad. The Order prohibits “U.S. persons” – a term that covers U.S.-based entities, citizens, and residents – from providing any financial or in-kind support to the designated entities, irrespective of the purpose of the support. Financial support intended for the purchase of bomb-making tools and donations earmarked for humanitarian relief projects are equally banned. Violators are subject to civil and criminal penalties, and themselves qualify for inclusion on the list due to their support of listed SDGTs.³¹

The Order also gives the Secretaries of State and Treasury broad authority to add additional persons and entities to the list. Persons who are deemed to “pose a significant risk” of committing acts of terrorism,³² to provide financial or other material support or services to listed persons or entities, or who are “otherwise associated with”³³ such listed persons

note __ (briefly discussing international terrorism-sanction regimes). A comparative analysis is something I intend to pursue in future work.

²⁸ *Fact Sheet on Terrorist Financing Executive Order*, THE WHITE HOUSE (Sept. 24, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010924-2.html> (This is historical material, “frozen in time.” The web site is no longer updated and links to external web sites and some internal pages will not work).

²⁹ 50 U.S.C. §§ 1701-1707 (2006).

³⁰ Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

³¹ *Id.*; 50 U.S.C. §§ 1702, 1705.

³² Exec. Order No. 13,224, § 1(b).

³³ The term “otherwise associated with” was not defined by regulations until January 25, 2007, after a district court in California ruled that the term was unconstitutionally vague and overbroad. *See Humanitarian Law Project v. U.S. Dep’t of Treasury*, 463 F. Supp. 2d 1049, 1070 (C.D. Cal. 2006). The regulation defines “otherwise associated with” as “(a) To own or control; or (b) To attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to,” 31 C.F.R. § 594.316 (2007), and was deemed to cure the vagueness and overbreadth problem, *Humanitarian Law Project v. U.S. Dep’t of Treasury*, 484 F. Supp. 2d 1099, 1104–07 (C.D. Cal. 2007).

meet the criteria for inclusion.³⁴ Within a year, the SDGT list included more than one hundred entities and individuals. By 2006, 375 entities and individuals were so designated,³⁵ and as of December 2012, 731 entities and individuals were on the list.³⁶ Many of these individuals and entities are also subject to separate United Nations-imposed sanctions and associated travel bans – often at the behest of the United States.³⁷

The use of the International Emergency Economic Powers Act as a counterterrorism tool is not new: It has its roots in 1995 when President Clinton issued an Executive Order blocking the assets of twelve named persons who were said to “threaten the Middle East Peace process” and giving the Secretary of Treasury and State the authority to list additional individuals or entities.³⁸ The post-September 11, 2001, use of the Act, however, has exploded in terms of numbers and scope.³⁹ First, in a break from the Clinton-era orders, the Bush-era SDGT Order makes provision of material support or services to listed persons a ground for designation, without any requirement that the specific support or services are aimed at

³⁴ Exec. Order No. 13,224, § 1(d); *id.* at § 1(c) (listing additional criteria for designation).

³⁵ *Humanitarian Law Project*, 463 F. Supp. 2d at 1069 (citing First Suppl. Hammerle Decl. ¶¶ 6, 7) (filed with Supp. Br.).

³⁶ See U.S. DEP’T OF TREASURY, OFFICE OF FOREIGN ASSET CONTROL, TERROR ASSET REPORTS, CALENDAR YEAR 2013, available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/tar2012.pdf>, at 5.

³⁷ See, e.g., Vanessa Baehr-Jones, *Mission Possible: How Intelligence Evidence Rules Can Save UN Terrorist Sanctions*, 2 HARV. NAT’L SEC. J. 447 (2011) (describing interplay between U.S. and UN terrorism financial sanction regime). As the Treasury Department describes it:

Designati[on] . . . exposes and isolates these individuals and organizations, denies them access to the U.S. financial system, and, in the case of a UN designation, the global financial system as well. Furthermore, banks and other private institutions around the world frequently consult OFAC’s SDN list and report denying listed persons access to their institutions.

TERRORIST ASSETS REPORT, *supra* note 36, at 6. See also, *supra*, note 4.

³⁸ Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995). Up until 1995, the International Emergency Economics Act (IEEPA), 50 U.S.C. §§ 1701–1707, had been used to impose sanctions on specific states and their nationals. In EO 12,947, Clinton for the first time targeted named individuals and entities, based not on their nationality, but on their specific history of committing and propensity to commit specified bad acts. Later that year, he did the same with respect to certain “significant foreign narcotics traffickers centered in Columbia.” Exec. Order No. 12,978, 60 Fed. Reg. 54,577 (Oct. 24, 1995). For an excellent description of IEEPA’s history, as well as an argument that the application of IEEPA to focus on individuals and non-state actors is *ultra vires*, see Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 681–84 (2008). *But see* *Humanitarian Law Project v. U.S. Dep’t of Treasury*, 578 F.3d 1133, 1151 (9th Cir. 2009) (rejecting the *ultra vires* argument).

³⁹ As of December 2012, 38 individuals and entities were designated as “Specially Designated Terrorists” under the Clinton-era terrorism-related orders, as compared to the over 700 individuals and entities designated as SDGTs pursuant to the 2001 designation process. See U.S. DEP’T OF TREASURY, OFFICE OF FOREIGN ASSET CONTROL, TERRORIST ASSETS REPORT, *supra* note 36, at 5.

violence or terrorism. A person or entity could be designated for supporting a listed organization, even if the support was given for an innocent purpose.⁴⁰ Second, within weeks of the 2001 Order’s issuance, Congress amended the underlying statute to allow the asset freeze and other restrictions to be instituted during the investigatory stage (a “block pending investigation”), even before there had been any designation determination, without specifying how long the freeze could remain in place.⁴¹ In at least one case, the Treasury Department maintained a block pending investigation for twenty months before a federal district court stepped in and enjoined the government from taking further action.⁴² Third, Congress amended the underlying statute to approve the use of classified information as a basis for the designation determination and to protect its use from disclosure in any subsequent judicial proceeding.⁴³

While the vast majority of the 700-plus listed entities and individuals is foreign, at least 12 U.S.-based entities and four U.S. citizens have been included.⁴⁴ For a domestic organization, a blocking order leads

⁴⁰ Intentional provision of support to a SDGT is a criminal law violation, even if support is in the form of humanitarian aid. *See* 8 U.S.C. § 1189 (2006). The same is true of support to foreign terrorist organizations designated under the parallel State Department-led designation process. *See* 18 U.S.C.A. § 2339B (2009); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2731 (2010) (rejecting First and Fifth Amendment challenges to the criminal prohibitions on provision of training, services, expert advice, and personnel to designated terrorist organizations). Criminal defendants and derivative listees are prohibited from collaterally attacking the underlying designation. *See, supra*, n. 3. *But see* *United States v. Afshari*, 446 F.3d 915, 920–21 (9th Cir. 2006) (denial of rehearing en banc) (Kozinski, J., dissenting) (vociferously contesting the notion that defendants can be lawfully prohibited from challenging an underlying designation). *See also* David Cole, *The First Amendment’s Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL’Y REV. 147 (2012), for an excellent analysis of the *Humanitarian Law Project* case and its broader implications.

⁴¹ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of U.S.C.); *see also* JOHN ROTH ET. AL, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING 99, 112 (2004) (describing a block pending investigation as requiring just a “single” piece of paper signed by the Director of OFAC, but noting that the decision was usually discussed and agreed to in an inter-agency process).

⁴² *See KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 870 n.6 (N.D. Ohio 2009) [hereinafter “KindHearts I”]. The assets of al-Haramain, Benevolence International, and Global Relief Fund were blocked pending investigation for seven, ten and eleven months, respectively.

⁴³ 50 U.S.C. § 1702(c), *amended by* Pub. L. No. 107-56, Title I, § 106, 115 Stat. 277 (“In any judicial review of a determination made under this section, if the determination was based on classified information . . . such information may be submitted to the reviewing court ex parte and in camera.”).

⁴⁴ This tally counts both the SGDT and the related Specially Designated Terrorist (SDT) list, and includes three entities and three individuals no longer included on the list: Salah Mohammad Salah (delisted on Nov. 5, 2012 after having been labeled a SDT for 17 years); KindHearts (dissolved in 2012 pursuant to a settlement agreement), Anwar al-

to the effective shuttering of its operations.⁴⁵ Assets and property of the entity are immediately frozen; the entity cannot engage in any transactions; and U.S. persons and residents are prohibited from providing the entity any goods or services. As the U.S. Court of Appeals for the Ninth Circuit summarized in a 2012 decision, “designation is not a mere inconvenience or burden on certain property interests; designation indefinitely renders a domestic organization financially defunct.”⁴⁶ Moreover, even if an organization or eventually delisted or a block pending investigation lifted, it can be difficult for the targeted entity to their own frozen assets.⁴⁷

For listed individuals residing in the U.S., the effect is draconian. They are effectively barred from participating in the society in which they live, but for the beneficial and discretionary modifications by the federal government. Listed individuals cannot buy groceries, receive medical care, or engage in a single financial transaction without a license from the Treasury Department. They cannot even accept gifts in lieu of payment.⁴⁸ They are subject to near-total, albeit indirect, government control over their daily activities.⁴⁹

Despite these dramatic consequences, the restrictions are deemed preventive rather than punitive, civil rather than criminal. As a result,

Aulaqi (reportedly killed by drone strike in Yemen in September 2011), Garad Nor (individual, delisted August 27, 2002), Global Services International, Inc. (entity, delisted August 27, 2002), and Aaron Money Wire Service, Inc. (same). See Office of Foreign Asset Control, U.S. Dep’t of Treas., Anti-Terrorism Designations, Nov. 5, 2012, <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20121105.aspx>; Aaron Money Wire Serv. v. United States, No. 02-CV-789, 2003 WL 22143735, *3 (D. Minn. Aug. 21, 2003)).

⁴⁵ See e.g., *Al-Haramain Islamic Found., Inc.*, 686 F.3d at 979 (designation “completely shuts all domestic operations”); *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748, 751 (7th Cir. 2002) (describing blocking order as forcing entity to “effectively shut down its operations across the globe”); *KindHearts I*, 647 F. Supp. 2d at 867 (blocking order “effectively shut the organization down”).

⁴⁶ *Al-Haramain Islamic Found., Inc.*, 686 F.3d at 980.

⁴⁷ See, e.g., Status Report, *Kindhearts v. Geithner*, 3:08-CV- 2400 (N.D. Ohio Feb. 15, 2013) (describing difficulties in obtaining disbursement of previously blocked funds).

⁴⁸ See 31 C.F.R. § 594 (2012) (regulations implementing SDGT sanction regime).

⁴⁹ See, e.g., ROTH, *supra* note __, at 81 (describing U.S. citizen subject to a blocking order who was placed for five months in the “unenviable choice of starving or being in criminal violation of the OFAC blocking order” until a lawsuit prompted the United States to issued him a license “to allow him to get sufficient money to live”); Complaint at 8-9, *Salah v. U.S. Dep’t of Treasury*, 1:12-CV-07067 (N.D. Ill. Sep. 5, 2012) (describing how discretionary government relief can come with so many strings attached to make it non-effective; Mohammad Salah, a ten-designated SDT, was granted a license to work and pay for “normal living expenses,” but the license required income be deposited in a bank account and imposed such onerous reporting requirements that the only bank willing to open such an account closed it after three years); While the impact on foreign-based entities and individuals is less extreme, such entities and individuals often find themselves subject to United Nations-based and other foreign partner-imposed sanction regimes and travel bans as well, usually at the United States’ behest. See, *supra*, note 4.

criminal law procedural protections do not apply. There is no independent adjudicator, no arraignment where the individual or entity is formally informed of the charges, no requirement of proof beyond a reasonable doubt, no opportunity to cross-examine one’s accusers, and no chance to obtain and respond to all of the evidence presented to the fact-finder.⁵⁰ Even the less onerous procedural rights in a civil forfeiture case (including the right to conduct discovery, an independent adjudicator, and requirement of proof based on a preponderance of the evidence) are not deemed applicable on the theory that property is not formally divested from its owner, but merely subject to a temporary, albeit indefinite, freeze.⁵¹ And because a freeze of assets does not involve physical incapacitation, none of the procedural protections (including a clear and convincing evidence standard and hearings before an independent adjudicator) that apply to civil commitment are triggered.

Rather, designation determinations are made solely within the executive branch, with Treasury and State Department officials acting as the functional prosecutor, fact-finder, and review board. In some cases, entities and individuals have been notified via publication on the Office of Foreign Asset Control (OFAC) website or press release. While U.S.-based entities are, due to two court rulings, entitled to an opportunity to review the unclassified record,⁵² there is no right to any sort of administrative hearing at which the entity or individual may cross-examine its accusers. Entities and individuals must apply for licenses just to obtain the services of an attorney.⁵³

Court review is post hoc, based solely on a record compiled by the executive branch, and extremely deferential. Little more than a “reasonable relation” between the facts in the record and the designation determination is required,⁵⁴ and even probative information that has come

⁵⁰ For an argument that these restrictions should be deemed punitive, at least when applied to U.S. persons, see Eric Sandberg-Zakian, *supra* note 26, at 97.

⁵¹ See ROTH, *supra* note 42, at 50-51 (“[W]hen a freeze separates the owner from his or her money for dozens of years, [the difference between an IEEPA freeze and civil forfeiture order] is a distinction without a difference.”)

⁵² *Al-Haramain Islamic Found., Inc.*, 686 F.3d at 983-84, 1001; *KindHearts I*, 647 F. Supp. 2d 857, 905 (N.D. Ohio 2009).

⁵³ 31 C.F.R. § 595.506 (2010). See also *KindHearts I*, 647 F. Supp. 2d at 912 (finding that OFAC’s refusal to allow entity to use blocked funds to pay attorney fees was arbitrary and capricious).

⁵⁴ Two courts have also ruled that probable cause is required to support the initial designation decision. *Al-Haramain Islamic Found., Inc.*, 686 F.3d at 993; *KindHearts I*, 647 F. Supp. 2d at 881-82. These rulings also suggest – but do not conclusively require – that the government either provide the designated entity or individual unclassified summaries of any classified evidence relied upon or allow cleared counsel to review it. That said, at least one district court has since concluded that “OFAC has no obligation to offer unclassified summaries or access to cleared counsel,” and that alternative “mitigation measures” could suffice. *Al-Haramain Islamic Found. Inc. v. Dep’t of Treas.*, 2012 WL 6203136, *10 (D. Or. Dec. 12, 2012); see also *Holy Land Found. for Relief and Dev. v.*

to light after the record has been closed generally will not be considered.⁵⁵ Reviewing courts have repeatedly emphasized the “extreme deference” due the executive branch, given that the terrorist finance designations operate at the “intersection of foreign relations, administrative law, and national security.”⁵⁶ The deference extends to both the specific fact-finding and the nature and scope of the designation scheme itself. It is what I call an executive branch-imposed, individualized restraint, with comprehensive effect.

To the extent courts have pushed back, they have focused primarily on procedural rights, and thus have left the overall scheme intact. In *al-Haramain Islamic Foundation v. Treasury*, for example, the Ninth Circuit concluded that the government violated an Oregon-based entity’s due process rights by failing to provide over a span of four years the reasons for its designation.⁵⁷ It also ruled that the government violated the entity’s Fourth Amendment rights by failing to obtain a warrant before seizing its assets, but ultimately the courts found both errors harmless.⁵⁸ Going forward, the court’s ruling obliges the government to obtain a warrant before seizing an entity’s assets; to provide a “terse and complete statement of the reasons” for designation, absent a showing of undue burden;⁵⁹ and to either make available unclassified summaries of the classified information relied upon, provide a mechanism by which cleared counsel could review the classified information, or adequately defend their failure to do so (presumably on national security grounds).⁶⁰ As long as

Ascroft, 333 F.3d 156, 164 (D.C. Cir. 2003) (rejecting argument that government should be prohibited from relying on classified evidence and failing to impose any disclosure obligations).

⁵⁵ See, e.g., *Kadi v. Geithner*, __ F. Supp. 2d __, 2012 WL 898778 at *11 (D.D.C. Mar. 19, 2012) (refusing to consider a corrected document since the correction post-dated the agency’s decision and was therefore not part of the record).

⁵⁶ *Al-Haramain Islamic Found., Inc.*, 686 F.3d at 978 (citing *Islamic American Relief Agency v. Gonzalez*, 477 F.3d 728, 734 (D.C. Cir. 2007)); see also *Kadi*, 2012 WL 898779, at *6.

⁵⁷ The court found that, “[i]n the entire four-year period, only one document could be viewed as supplying some reasons for OFAC’s investigation and designation decision.” *Al-Haramain Islamic Found., Inc.*, 686 F.3d at 985. As a result, Al-Haramain was forced to guess at the reason for designation: “Some of those guesses ended up being correct . . . and some of those guesses ended up being incorrect.” *Id.*

⁵⁸ *Id.* at 995 (concluding that “no exception applies to OFAC’s warrantless seizure of AHIF–Oregon’s assets and the seizure is not justified under a ‘general reasonableness’ test”). The Ninth Circuit ultimately concluded, however, that the due process error was harmless and remanded to determine what, “if any,” remedy was required in response to the Fourth Amendment violation. *Id.* at 1001. On remand, al-Haramain conceded that the Fourth Amendment violation was harmless given the Ninth Circuit’s ruling that the administrative record supported designation. *Al-Haramain*, 2012 WL 6203136, *6-7. The Ninth Court also separately concluded that the prohibition on coordinated advocacy with Al-Haramain violated the First Amendment. *Id.* at 995.

⁵⁹ *Id.* at 986.

⁶⁰ *Id.* at 983 (recognizing that “disclosure may not always be possible,” but emphasizing that “[i]n many cases . . . some information could be summarized or presented to a

these basic procedural requirements are met, the deferential standard of review applies.⁶¹ Thus, the broad designation criteria, expansive set of restrictions, and administrative fact-finding process are left largely unchecked. Entities and individuals can still be effectively shut down based merely on a probable cause or reasonable basis finding by the executive branch, without any independent, de novo court review.⁶²

For scholars like Professors Eric Posner and Adrian Vermeule, such deference – particularly in the immediate wake of the September 11 attacks – is both inevitable and beneficial.⁶³ In a 2009 article, Posner and Vermeule described the executive asserting broad power to respond to a crisis and the legislature and courts invariably acquiescing to a significant degree.⁶⁴ They further posit that once the crisis passes, “legality and legitimacy will once again pull in tandem; courts then have more freedom to invalidate emergency measures, but it is less important whether or not they do so, as the emergency measure will in large part have already worked, or not.”⁶⁵

But this descriptive analysis ignores the long-lasting effects of such emergency measures, and the normative implications are troubling. Once the immediate crisis has passed, courts are, as Posner and Vermeule

lawyer with a security clearance without implicating national security and putting burden on the government to “defend[]” the failure to do so.)

⁶¹ *Id.* at 979 (reiterating “that our review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential”) (citation omitted).

⁶² As of this writing, I am aware of only one other case in which the court has found that the designation process violated an entity’s constitutional rights. In *KindHearts I*, as in *Al-Haramain*, a district court found a due process and Fourth Amendment violation, but rejected other challenges to the designation scheme itself. *KindHearts I*, 647 F. Supp. 2d 857, 904 (N.D. Ohio 2009). The case ultimately settled in November 2011, but in many ways it was a Pyrrhic victory: KindHearts agreed to dissolve itself in exchange for being permitted to spend its frozen assets and for being delisted. See Settlement Agreement, *KindHearts I*, available at www.aclu.org/files/assets/kindhearts_v_geithner_-_settlement.pdf

⁶³ Eric Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown at 2008*, 76 U. CHI. L. REV. 1613 (2009).

⁶⁴ *Id.* at 1558-1660. Others have made a similar point about the tendency of the executive to amass power in the wake of an emergency, albeit applying a very different normative lens. See, e.g., GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 12–13, 527–30 (2004) (describing leaders as exploiting public fears in times of crisis, resulting in excessive sacrifice of civil liberties); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1032–37 (2004) (describing Americans as succumbing to the “paranoid style of political leadership” after 9/11). For an argument that courts do in fact push back to protect liberties, even during times of crisis, see David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003).

⁶⁵ Posner & Vermeule, *supra* note __, at 1660.

suggest, more likely to engage. But, with some notable exceptions,⁶⁶ they tend to push on the edges only, emphasizing process-based rights while leaving broad policies in place. Thus, what starts out as emergency lawmaking often becomes normalized. This is a disturbing state of affairs. Once the crisis passes, it is critically important that courts, as well as legislators, take a hard look at emergency measures – particularly those that impose targeted, affirmative restraints.⁶⁷ With respect to the financial sanction regime, review has focused almost exclusively on procedural issues, with little in the way of substantive limit setting.

B. No Fly List

The No Fly List has the purpose of preventing would-be terrorists from using airplanes as weapons or otherwise threatening the safety of other passengers on board. Persons on the No Fly List are prohibited from boarding a U.S.-based air carrier or any plane transiting through the U.S. or over U.S. airspace.

⁶⁶ A quadruplet of Supreme Court post 9/11 cases – *Hamdi v. Rumsfeld*, 542 US 507 (2004) (requiring that citizen-detainees be provided a “meaningful opportunity” to challenge the basis of detention and concluding that had not taken place in petitioner’s case); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that statutory writ of habeas corpus applied to Guantanamo Bay detainees); *Hamdan v. Bush*, 548 US 557 (2006) (declaring unlawful the military commissions created by Executive Order); and *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that denial of habeas corpus to Guantanamo Bay violated the Suspension Clause) – comprise a note-worthy repudiation of the Executive’s “emergency” detention and trial policies. But as Posner and Vermeule point out, even these cases focused primarily on process rights, failed to actually order any one released, and, at least in the case of *Hamdi*, broadly affirmed the Executive-branch asserted authority to detain pursuant to the 2001 Authorization to Use Military Force. Posner & Vermeule, *supra* note __, at 1618-19.

⁶⁷ Posner and Vermeule’s equanimity may stem from the way in which they approach the problem. In describing the executive response to the 2009 financial meltdown and the 2001 attacks as part of the same phenomenon, they gloss over the key distinction between the two: In 2009, the executive responded with a targeted infusion of government assistance, whereas in 2001, the executive responded by targeting individual and entities for sanction. While it may be both appropriate and advantageous that courts defer to the executive’s assessment of how best to allocate discretionary financing – and in fact Posner and Vermeule point to the destabilizing market effect of having courts second-guess those determinations, *id.* at 1658 -- government interventions that impose targeted, affirmative restraints can have long-standing consequences for individual liberty and warrant enhanced scrutiny as a result. See, e.g., David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 242 (2010) (describing and lauding Treasury’s ability to bypass ossifying constraints of administrative law, but warning that “sort of independence is problematic when civil liberties are at stake,” as exemplified by the IEEPA sanction regime).

At the time of the September 11 attacks, the precursor to the No Fly List had just 12 names on it.⁶⁸ As of February 2012, the list reportedly included 21,000 names, including approximately 500 U.S. citizens.⁶⁹ In several instances, U.S. citizens and long-time U.S. residents have been prohibited from flying home to the United States, presumably because of their inclusion on the list.⁷⁰ Others are barred from traveling by plane to go on a business trip or visit relatives or loved ones far away. Like the financial sanction regime, it is an executive branch-imposed, particularized restraint, notable because of the extreme level of secrecy.

The United States refuses to confirm or deny whether or not specific individuals are on the No Fly List, even to those who show up at an airport with a ticket in hand and are told that they cannot board their scheduled flight.⁷¹ The Deputy Director of Operations of the Terrorist Screening Center, which maintains the No Fly List, warned in a 2010 court filing that disclosure could result in targeted individuals and associated terrorist groups taking steps to “avoid future detection, destroy

⁶⁸ NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT 83 (2004) (“[A]s of 9/11, the FAA’s ‘no fly’ list contained the names of just 12 terrorist suspects.”).

⁶⁹ See Eileen Sullivan, *U.S. Secret No-Fly List Doubles in One Year*, ASSOCIATED PRESS, Feb. 2, 2012, available at <http://www.sltrib.com/sltrib/world/53432678-68/list-government-fly-watch.html.csp>; Carol Cratty, *21,000 People Now on No Fly List*, CNN.COM (Feb. 2, 2012), <http://security.blogs.cnn.com/2012/02/02/21000-people-now-on-u-s-no-fly-list/>. According to a 2012 GAO report, the number of U.S. persons – defined as citizens and legal permanent residents – “more than doubled” after the December 2009 attempted attack on an airliner headed toward Minneapolis. U.S. Gov’t Accountability Office, GAO-12-476, *Terrorist Watchlist: Routinely Assessing Impacts of Agency Actions since the December 25, 2009, Attempted Attack Could Help Inform Future Efforts* (2012), available at <http://www.gao.gov/assets/600/591312.pdf>, at 15. An earlier DOJ Inspector General Report describes the list as having over 71,000 “records” in July 2006, although a review led to a reduction to approximately 34,000 by the end of 2007; it is unclear as whether there is a one-to-one correlation between “records” and individuals on the list, or whether a single individual might have been described in several “records.” See U.S. Dep’t of Justice, Office of the Inspector General, Audit Division, *Audit Report 07-41, Follow-Up Audit of the Terrorist Screening Center* iii (2007), available at <http://www.justice.gov/oig/reports/FBI/a0741/final.pdf>, at xiii [hereinafter DOJ 2007 Audit].

The United States does not officially disclose the numbers of people on the list.

⁷⁰ See, e.g., Second Amended Complaint, *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012) (No. 11-35407); *Mohamed v. Holder*, No. 1:11-cv-00050, 2011 WL 3820711 (E.D. Va. Aug. 26, 2011); Peter Finn, *supra* note 8.

⁷¹ While the maintenance of No Fly List, or its functional equivalent, is mandated by Congress, the specifics in terms of design and implementation are a matter of executive discretion. See, e.g., 49 U.S.C. Sec. 114 (h) (requiring that the Transportation Security Administration, a subset of the Department of Transportation, identify individuals who “who may be a threat to civil aviation or national security” and “prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual,” but failing to define the threat standard or any other specifics about the initiative).

evidence, coerce witnesses, change plans from what is known by law enforcement or intelligence agencies, . . . recruit new members . . . or circumvent enhanced airline or border screening procedures.”⁷² This is claimed to hold true even if the individual already has attempted to board a plane and been prohibited from doing so. To date, no court has ordered disclosure.⁷³

Even the criteria for placement on the No Fly List are deemed “sensitive security information” – meaning that the criteria cannot be publicly disclosed, including to those who have been prohibited from boarding a plane.⁷⁴ In publicly released documents, government officials describe the No Fly List as a subset of the government’s broader database of “known or suspected terrorists,”⁷⁵ but do not state what constitutes a “known or suspected terrorist” let alone the additional criteria required for inclusion on the No Fly List. Whatever the criteria, a “reasonable suspicion” standard applies.⁷⁶

⁷² Declaration of Christopher Piehota, Mem. in Support of Def. Mot. to Dismiss, *Latif*, 686 F.3d 1122 (No. 11-35407). The website of the Terrorism Screening Center, which maintains the No Fly List, similarly asserts that “[d]isclosure of [No Fly List] information would tip off known or suspected terrorists, who could then change their habits or identities to escape government scrutiny.” It also fails to differentiate those persons who have no reason to believe that they are on the list and those who have shown up at an airport and told they cannot board their flight. *See Terrorist Screening Center, Frequently Asked Questions*, FBI, https://www.fbi.gov/about-us/nsb/tsc/tsc_faqs (last visited Aug. 21, 2012).

⁷³ *See, e.g.*, Scherfen v. U.S. Dep’t Homeland Sec., No. 3:CV-08-1554, 2010 WL 456784, at *8 n.5 (M.D. Pa. Feb. 2, 2010) (accepting without analysis the government’s assertion that plaintiffs’ watch-list status—of which the No Fly List is a subset—cannot be disclosed, and offering to write a separate opinion “that will be unavailable for inspection by the public or by Plaintiffs or their counsel” to address the underlying factual issues).

⁷⁴ *See, e.g.*, Def. Mot. to Dismiss at 11, *Latif*, 686 F.3d 1122 (No. 11-35407) (asserting that the No Fly and Selectee criteria are “sensitive security information” and are therefore protected from public release); 49 C.F.R. § 1520.5 (2009) (defining sensitive security information).

⁷⁵ *See, e.g.*, Declaration of Christopher Piehota, Mem. in Support of Def. Mot. to Dismiss, *Latif*, 686 F.3d 1122 (No. 11-35407); Declaration of Mark Giuliano, Mem. in Support of Def. Mot. to Dismiss, Attach. 2, ¶ 6, *Latif*, 686 F.3d 1122 (No. 11-35407).

⁷⁶ *Latif*, 686 F.3d at 1125 n.2. Internal audits also have revealed a number of quality control problems, both with the No Fly List and the underlying database of known or suspected terrorists. *See, e.g.*, U.S. Dep’t of Justice, Office of the Inspector General, Audit Division, Audit Report 09-25, The Federal Bureau of Investigation’s Terrorist Watchlist Nomination Practices (2009), available at <http://www.justice.gov/oig/reports/FBI/a0925/final.pdf>, at 36, 41 (finding that the FBI improperly failed to remove individuals from the underlying database of known or suspected terrorists in 8% of cases and untimely removals of others); DOJ 2007 Audit, *supra* note __, at 31, 34-35 (finding high rate of errors and inconsistencies in underlying databases of known or suspected terrorists); *id.* at 33, n. 50 (describing database management difficulties as leading to individuals inappropriately being included on the No Fly List for up to 9 months); Ibrahim v. Dep’t of Homeland Sec., 669 F. 3d 983, 990 (9th Cir. 2012) (describing errors and misidentifications associated with the No Fly list and underlying databases).

An individual who has been denied boarding is told to fill out a complaint through the Department of Homeland Security’s Travel Redress Inquiry Program. But he must guess as to whether he is in fact on a No Fly List, what the criteria are for inclusion, and what the factual basis is for determining that he meets those criteria. An internal review then follows. At the conclusion of the process, the individual is issued a letter telling him that “we have made any corrections to records that our records determined were necessary”⁷⁷ or that “no changes or corrections are warranted,”⁷⁸ and that he can appeal to the U.S. for the District of Columbia Circuit or the circuit where he resides.⁷⁹ By design, the letters do not reveal whether the individual is or was ever on the No Fly List.

No court has reached the substantive merits of a No Fly List challenge, due in part to an unclear statutory scheme that has resulted in confusion over the appropriate forum. Cases have bounced back and forth between the federal district and appellate court, with litigants arguing about what court the case belongs in and whether individuals have standing to sue.⁸⁰ That said, a district court in Oregon heard arguments in June 2013 on procedural due process claims associated with the No Fly List, and is expected to rule in the near future.⁸¹ In Part III, I outline the approach that reviewing courts ought to apply.

⁷⁷ See, e.g., Second Amended Complaint, Attach. A, *Latif*, 686 F.3d 1122 (No. 11-35407) (letter to Salah Ali Ahmed dated Nov. 4, 2010). According to a Department of Justice Inspector General report, 163 out of 310 records reviewed pursuant to redress procedures between 2005 and 2007 were either modified or removed entirely from the no fly and related selectee lists. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT REP. 07-41, at 52.

⁷⁸ See, e.g., Second Amended Complaint, Attachment A, *Latif*, 686 F.3d 1122 (No. 11-35407) (letter to Abdul Hakeim Thabet Ahmed dated Oct. 28, 2010).

⁷⁹ Citing 49 U.S.C. § 46110 (2006), the government has argued that litigants are obliged to bring substantive and procedural due process challenges to the No Fly List in either the D.C. Court of Appeals or the Court of Appeals where they reside. See, e.g., *Latif*, 686 F.3d at 1126 (quoting federal agency’s letter to plaintiffs indicating that “[f]inal determinations are reviewable by the United States Court of Appeals pursuant to 49 U.S.C. § 46110”). Two Ninth Circuit panels have rejected that claim, allowing suits to proceed in district court. *Id.* at 1127; *Ibrahim v. Dep’t. of Homeland Sec.*, 538 F.3d 1250, 1255 (9th Cir. 2008). Other courts, however, have mandated that challenges to the No Fly List and related selectee list be brought exclusively in the Courts of Appeals. See, e.g., *Mohamed v. Holder*, No. 1:11-cv-00050, 2011 WL 3820711, at *5 (E.D. Va. Aug. 26, 2011) (concluding that the Court of Appeals has exclusive jurisdiction over TSA letters under 49 U.S.C. § 46110); *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1123 (W.D. Wash. 2005) (same).

⁸⁰ See, e.g., *Latif*, 686 F.3d at 1126–27 (discussing procedural history to No Fly List challenge); *Ibrahim v. Dep’t. of Homeland Sec.*, 669 F.3d 983, 991–92 (9th Cir. 2012) (same).

⁸¹ See Def. Mem. of Law in Support of Mot. for Partial Summary Judgment, *Latif v. Holder*, 3:10-CV-00750-BR (filed Feb. 13, 2013); Plaintiff’s Am. Mem. of Points and Authorities in Support of Cross-Motion for Partial Summary Judgment, 3:10-CV-00750 (April 5, 2013). Oral arguments took place on June 21, 2013.

C. Sex Offender Residential, Employment, and Related Restrictions

All fifty states have in place some form of what are commonly referred to as Megan’s Laws – laws that impose a variety of reporting, residential, employment and other related restrictions on persons convicted of a wide array of sex and other related offenses.⁸² The specifics vary from state to state but the general impetus and trend are consistent: They are intended to protect children and other innocent victims from dangerous sexual predators, and they have grown more onerous and all-encompassing over time. What started out as registration requirements for small classes of sex offenders have expanded to include a vast category of qualifying offenses, including consensual sex between teenagers (defined as statutory rape), a range of other offenses committed by juveniles, and offenses that do not involve sexual activity or motivation, such as public urination.⁸³ Federal law now requires, as a condition of receiving certain funding, that states gather and make public detailed information about a wide category of offenders, and conduct in-person verifications of all such offenders, with the frequency depending on the offense level.⁸⁴

Over the past several years, a growing number states and municipalities have implemented a dizzying array of residential,

⁸² The name is based on the registration law first passed by New Jersey, passed in response to the 1994 murder, sexual assault and abduction of a girl named Megan Kanka by a convicted sex offender.

⁸³ See Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US* (2013) at 15-20, 37-38, 62-63 (describing incorporation of juveniles into the registries and detailing stories of juveniles compelled to register because of, among other things, consensual sex engaged in as minors); Carpenter & Beverlin, *supra* note 29 (describing evolution of sex offender laws over time); CHRYANTHI S. LEON, *SEX FIENDS, PERVERTS, AND PEDOPHILES* 117 (2011) (same);. For a description of a typical evolution in state law, see *Wallace v. State*, 905 N.E. 2d 371, 374-77 (Ind. 2009) (describing the imposition of residential restrictions in Indiana, and the ways in which the number of triggering offenses, duration, and notification requirements have increased over time).

⁸⁴ In-person verification is required every three, six, or twelve months depending on the offense level. See The Sex Offender Registration and Notification Act (SORNA) (part of the Adam Walsh Child Protection and Safety Act), Pub. L. No. 109-248, 120 Stat. 590, (codified in scattered sections of 42 U.S.C. and 18 U.S.C); 42 U.S.C. § 16916 (2006); see also *id.* at § 16911 (defining class of individuals subject to reporting requirements to include certain juveniles and those convicted of kidnapping and false imprisonment of minors, even if there was no sexual abuse or sexual motivation); *id.* at § 16915 (establishing duration of reporting period as lasting 15 years to life, depending on the offense level); The National Guidelines for Sex Offender Registration and Notification, Final Guidelines, 73 Fed. Reg. 38,030, 38,030–70 (July 2, 2008) (obliging states to post extensive information about sex offenders). See also *United States v. Kebodeaux*, 570 U.S. __ (2013) (upholding application of SORNA to members of the military, including those who had completed their sentence prior to SORNA’s enactment).

employment, and other restrictions on offenders’ activities as well.⁸⁵ In Oklahoma, for example, registered sex offenders – a class that ranges from persons convicted of violent sexual assaults of strangers to those convicted of indecent exposure⁸⁶ – are prohibited from living with a minor child; living within 2000 feet of any school, childcare center, playground, or park;⁸⁷ loitering within 500 feet of any school, childcare center or park;⁸⁸ working in any capacity with children;⁸⁹ engaging in ice cream truck vending;⁹⁰ or living in a residence with another convicted sex offender.⁹¹ In July 2012, a change in the definition of “residence” meant that seventy men who had been living in a mobile home community in Oklahoma City, where they received church-provided rehabilitation and other services, were forced to leave their residence.⁹² When the church responded by replacing the trailers with single-person tents, the city asserted a zoning violation and forced the men off the property.⁹³ Many reportedly had no place to go.⁹⁴

These restraints differ in important ways from the terrorism-related financial sanctions and No Fly List in that they are imposed after a criminal conviction, in which the fact triggering the issuance of the restraint has been proven beyond a reasonable doubt before an independent adjudicator. They also differ from the terrorism-related financial sanctions and No Fly List in that they are undifferentiated, imposed on broad classes of convicted persons, without any individualized assessment of risk. But while they are distinguishable in design and implementation, they share the same, key preventive purpose as the executive branch-imposed, national security-related restraints. They are – with a few, limited exceptions – imposed as a regulatory matter, separate and apart from the criminal sentence, with the sole purpose of preventing, or at least minimizing, the risk of future bad acts. Like the

⁸⁵ This is a rapidly evolving area of law, with both new initiatives being proposed across the country and court challenges to such restrictions pending in many jurisdictions. This section is not meant to provide an authoritative description of each and every development, but instead illustrates the general trends and highlights some of the notable initiatives and court rulings.

⁸⁶ OKLA. STAT. TIT. 57 § 582 (2012) (listed offenses subject to registration includes indecent exposure, as defined by OKLA. STAT. TIT. 21 § 1021).

⁸⁷ *Id.* at 57 § 590 (West 2012).

⁸⁸ *Id.* at 21 § 1125 (West 2012).

⁸⁹ *Id.* at 57 § 589 (West 2012).

⁹⁰ *Id.* at 21 § 23001.1 (West 2012).

⁹¹ *Id.* at 57 § 590.1 (West 2012).

⁹² See Juliana Keeping, *Dozens of Sex Offenders May Have to Leave Trailer Park Ministry*, NEWSOK, July 2, 2012, <http://newsok.com/dozens-of-sex-offenders-may-have-to-leave-trailer-park-ministry/article/3688988>.

⁹³ See Juliana Keeping, *Oklahoma Says Sex Offenders Can’t Live in Tents at Trailer Park*, NEWSOK, July 30, 2012, <http://newsok.com/oklahoma-city-says-sex-offenders-cant-live-in-tents-at-trailer-park/article/3696607>.

⁹⁴ See Keeping, *supra* note 92.

terrorism-related financial sanctions and No Fly List, they single out particular individuals for enhanced restrictions on what they can do and where they can go based on an assessment of future dangerousness. They are a court-adjudicated, rule-based (undifferentiated) form of pre-crime restraint.

Moreover, while the restraints are motivated by a legitimate concern about the safety of innocent children, they are generally imposed without any clear assessment of their efficacy or need – often with severe consequences. While designed to keep children safe from sexual stranger-perverts, they fail to address the most prevalent form of sexual harm to children – namely abuse by family members of other adults already known to their victims.⁹⁵ Several studies suggest that the laws may not even be effective at reducing recidivism, and may, in some cases, even exacerbate recidivism by creating a sense of nothing to lose.⁹⁶

Meanwhile, sex offenders have been forced out of jobs, evicted from their homes, and prevented from taking their kids to a park.⁹⁷ In 2008, for example, the North Carolina Supreme Court upheld a municipal ordinance prohibiting registered sex offenders from entering any public park. The plaintiff was a disabled stroke victim who wanted to continue his regular outings with his mother to the local park.⁹⁸ Several cities in Orange County, California, have banned convicted sex offenders from entering public parks, beaches, harbors or other public spaces – ordinances that are now the subject of ongoing litigation. One plaintiff completed his sentence over fifteen years ago, subsequently married, and is now raising a family, yet is barred from going with them to public parks and beaches.⁹⁹ While at least one city has repealed the laws in response to the litigation, others continue to defend them or make moderate

⁹⁵ According to statistics compiled by the Department of Justice, less than 7% of sex crimes against juveniles are committed by strangers. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT.

⁹⁶ *See, e.g.* J.J. Prescott and Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, J. LAW AND ECON. 54:1(2012); Amanda Y. Agan, *Sex Offender Registries: Fear without Function?* J. LAW AND ECON 54:1; Kristen Zgoba, et al., New Jersey Department of Corrections, Office of Policy & Planning, The Research & Evaluation Unit, “Megan’s Law: Assessing the practical and monetary efficacy,” 2008, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf>. *See also* Maria Svalavitz, *Registries Don’t Keep Sex Offenders Away from Restricted Areas*, TIME, Feb. 1, 2013 (describing enforcement difficulty given numbers subject to the restrictions and scale of the restrictions).

⁹⁷ Georgia, for example, makes it a felony for a sex offender to loiter in “any . . . area where children congregate.” GA. CODE ANN. § 42-1-15(d), (g) (2010). *See also* Carpenter & Beverlin, *supra* note __ (collecting cases); HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. (2007).

⁹⁸ *Standley v. Town of Woodfin*, 661 S.E. 728, 729 (N.C. 2008).

⁹⁹ *See* Complaint, *John Doe v. City of Costa Mesa*, 8:12-CV1665-AG-RNBsex (D.C. C. Ca. Oct. 1, 2013).

adjustments to allow for case-by-case exemptions.¹⁰⁰

The scope of the restrictions also has become increasingly onerous over time.¹⁰¹ What started out as buffer zones of 1,000 feet or less have expanded to 2,000 feet or more in several states.¹⁰² Prohibited areas have grown from “school” and “child care zones” to include set distances from swimming pools, skating rinks, parks, bus stops, and video arcades.¹⁰³ In many municipalities, these buffer zones are coupled with so-called “dispersion” statutes that seek to control the spatial density of offenders, by, for example, limiting the number of offenders that can live within a particular residential structure.¹⁰⁴ Entire towns and municipalities have been placed off-limits to registered offenders as result. In other areas, designated offenders are relegated a small sliver of a city where they are permitted to live.¹⁰⁵ Offenders have been kicked out of their homes or

¹⁰⁰ See Jaimee Lynn Fletcher, *H.B. Changes Sex Offender Ordinance After Lawsuit*, Orange County Register, Jan. 23, 2013, available at <http://www.ocregister.com/articles/ordinance-408906-sex-beach.html>. Moreover, exemptions previously offered by Orange County appear to be stingily guarded, with fourteen out of fifteen requests turned down as of May 2012. Those whose applications were rejected reportedly included a commercial fisherman who required access to the harbor to work; a locksmith who worked by the harbor and claimed to have had a clear record for twenty-eight years; and someone who wanted to attend a memorial service for his Alcoholics Anonymous sponsor. See Ian Lovett, *Public-Place Laws Tighten Rein on Sex Offenders*, N.Y. TIMES, May 29, 2012, <http://www.nytimes.com/2012/05/30/us/sex-offenders-face-growing-restrictions-on-public-places.html?pagewanted=all>.

¹⁰¹ Kansas provides a notable exception. After considering a report of the Kansas Sex Offender Policy Board, the Kansas State Legislator not chose not to impose residential restrictions on offenders and explicitly prohibited municipalities from doing so as well. See KAN. STAT. ANN. § 22-4913 (2011).

¹⁰² See, ALA. CODE § 15-20A-11(a) (2011) (2,000 foot zone around school or child care zone); CAL. PENAL CODE § 3003.5(b) (2006) (2000 foot zone around any public or private school, or park “where children regularly gather”); IOWA CODE § 692A.114 (2009) (2,000 foot buffer zone around school or child care facility).

¹⁰³ See, e.g., LA. REV. STAT. ANN. § 14:91.1(2) (2009); GA. CODE ANN. § 42-1-16 (2010); S.C. CODE ANN. § 23-3-535 (2011); MO. ANN. STAT. § 566.150 (2012) (prohibiting certain offenders from being within 500 feet of a park or swimming pool).

¹⁰⁴ See Tony H. Grubestic, Allan T. Murray, & Elizabeth A. Mack, *Sex Offenders, Residential Restrictions, and Urban Morphology: A Review and Synthesis*, 13 CITYSCAPE: A JOURNAL OF POLICY DEV. AND RESEARCH 3 (2011) at 11-12 (discussing efforts to manage the spatial distribution of registered sex offenders).

¹⁰⁵ See *Doe*, 405 F.3d at 706 (“[T]he restricted areas in many cities encompass the majority of the available housing in the city, thus leaving only limited areas within city limits available for sex offenders to establish a residence.”); *In re E.J.*, 223 P.3d 31, 37 (Cal. 2010) (describing how after initially being told that San Francisco was completely off limits, petitioner was informed of a “small area” where he could live, but housing prices were prohibitively high); *In re Taylor*, 147 Cal. Repr. 3d 64, 83 (Cal. App. 2012) (finding that residential restriction “eliminates nearly all existing affordable housing [as applied] in San Diego County”); *Commw. v. Baker*, 295 S.W.3d 437, 445 (Ky. 2009) (describing the “constant threat of eviction”); *Berlin v. Evans*, 923 N.Y.S.2d 828, 835 (N.Y. Sup. Ct. 2011) (detailing residential restrictions that “effectively banished” parolees from Manhattan).

rendered homeless as a result.¹⁰⁶

Lists of prohibited employment similarly have expanded to include bans not only on working directly with children, but also on working in certain geographic areas where children might congregate.¹⁰⁷ In another relatively recent development, several states now require certain offenders to wear GPS devices, which impose restrictions on movement and establish de facto curfews, given the need to be home at certain hours in order to recharge the devices.¹⁰⁸ Sometimes the decision to require the use of a GPS is made on an individualized basis, but often it is imposed without any particularized assessment of the threat posed.¹⁰⁹

The Supreme Court has not yet considered whether, and under what circumstances, such residential, employment, and other related restrictions are constitutionally permitted. While the Court’s twin 2003 rulings in *Connecticut Department of Public Safety v. Doe*¹¹⁰ and *Smith v. Doe*¹¹¹ have been widely credited with paving the way for such restrictions, both cases involved registration and dissemination schemes only. In *Smith*, the Court explicitly emphasized that “offenders . . . are free to move where they wish and to live and work as other citizens, with no supervision,” as relevant to its finding that Alaska’s registration and verification scheme was non-punitive and therefore did not violate the ex post facto clause.¹¹² And in *Connecticut*, the Court addressed procedural due process issues only -- explicitly leaving open the possibility of future substantive due process

¹⁰⁶ *In re Taylor*, 147 Ca. Repr. 3d at 70, 73 (describing petitioner, who was prohibited from living with her sister-in-law or in any women shelters, as living in alley with 15-20 other homeless registered sex offender; finding that as of February 2011, 165 out of 482 registered sex offenders on parole in San Diego were homeless or with “no residence”); *In re E.J.*, 223 P.3d at 46 (describing petitioners’ claim that housing restrictions rendered them homeless, although also noting that many others found compliant housing); Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 HARV. C.R.-C.L. L. REV. 531, 534–35 (2007) (describing difficulty sex offenders have finding housing).

¹⁰⁷ *See, e.g.*, GA. CODE ANN. § 42-1-16 (prohibition on certain offenders from working within 1000 feet of area where minors congregate); MASS. GEN. LAWS ch. 265, § 48 (2012) (explicit prohibition on ice cream vending).

¹⁰⁸ *See, e.g.*, *State v. Bowditch*, 700 S.E.2d 1, 4–6 (N.C. 2010) (describing the ways the GPS device limited movement, yet upholding lifetime GPS monitoring for persons convicted of certain offenses).

¹⁰⁹ *Id.* *See also* Murphy, *supra*, note 13, at 1333 (2008) (describing use of GPS devices to track sex offenders and others).

¹¹⁰ 538 U.S. 1, 8 (2003) (rejecting procedural due process claim to Connecticut’s sex offender registry).

¹¹¹ 538 U.S. 84, 102 (2003) (rejecting ex post facto claim to Alaska’s sex offender registry).

¹¹² *Id.* at 101. *See also id.* at 100 (emphasizing that the Act “does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences”); *id.* at 101 (emphasizing that, unlike probation or parole requirements, Alaska did not require in-person verifications for sex offenders).

claims.¹¹³

A small handful of state courts has since concluded that increasingly restrictive aspects of the registration scheme, as well as associated residential and employment restrictions, are in fact punitive and violate the ex post facto clause on both state and federal law grounds.¹¹⁴ But federal appellate courts and other state courts have disagreed.¹¹⁵ Meanwhile successful ex post claims only preclude the retroactive application of such restrictions; they do not restrict their prospective use.

Most other appeals courts have – in the limited circumstances where the issue has been raised – rejected broader claims that the restrictions violate the Equal Protection Clause, substantive due process rights, or the Eighth Amendment.¹¹⁶ That said, a California appellate court recently issued a notable ruling struck down blanket residential

¹¹³ 538 U.S. at 8 (“Because the question is not properly before us, we express no opinion as to whether Connecticut’s Megan’s Law violates principles of substantive due process.”). *See also id.* at 9-10 (Souter, J. and Ginsburg, J., concurring) (emphasizing that the ruling did not foreclose substantive due process or equal protection claims).

¹¹⁴ *See* *Wallace v. State*, 905 N.E. 2d 371, 384 (Ind. 2009) (finding ex post facto violation under state constitution); *Commw. v. Baker*, 295 S.W.3d 437, 447 (Ky. 2009) (finding ex post facto violation under both state and federal constitutions); *State v. Letalien*, 985 A.2d 4, 26 (finding an ex post facto violation under both the state and federal constitutions) (Me. 2009); *F.R. v. St. Charles Cnty. Sheriff’s Dep’t*, 301 S.W.3d 56 (Mo. 2010) (finding laws punitive and in violation of ex post facto clause of state constitution); *State v. Williams*, 952 N.E. 2d 1108, 1113 (Ohio 2011) (holding that retroactive application of registration requirements on persons who committed sex offenses prior to enactment of the statute violated the state constitution).

¹¹⁵ *See, e.g., Weems v. Little Rock Police Dep’t*, 453 F.3d 1010, 1019–20 (8th Cir. 2006) (upholding Arkansas law); *Doe v. Miller*, 405 F. 3d 700, 723 (8th Cir. 2005) (upholding Iowa law); *In re E.J.*, 223 P.3d 31, 47 (Cal. 2010) (rejecting ex post facto challenges); *State v. Seering*, 701 N.W.2d 655, 670 (Iowa 2005) (same); *Boyd v. State*, 960 So. 2d 717, 719–20 (Ala. Crim. App. 2006) (rejecting claim that application of statute was excessively punitive such as to constitute an ex post facto violation).

¹¹⁶ *See generally* Marjorie A. Shields, Annotation, *Validity of Statutes Imposing Residency Restrictions on Registered Sex Offenders*, 25 A.L.R. 6th 227 (2007) (collecting cases). A small number of cases have held restrictions imposed on sex offenders to be unlawful in their prospective use. *See, e.g., Doe v. Albuquerque*, 667 F.3d 1111, 1115 (10th Cir. 2012) (concluding that a ban on offenders entering the library violated their First amendment rights but paving the way for the imposition of such a ban in the future, noting that “[i]t is not difficult to imagine that the ban might have survived [on a different record], for we recognize the City’s significant interest in providing a safe environment for its library patrons, especially children”); *Mann v. Georgia Dep’t of Corrections*, 653 S.E.2d 740, 760–61 (Ga. 2007) (holding that a provision requiring the plaintiff to vacate his home after a child care center moved within the exclusion zone constituted an unlawful taking); *Santos v. State*, 668 S.E.2d 676 679 (Ga. 2008) (concluding that registration requirements were unconstitutionally vague as applied to the homeless); *Elwell v. Township of Lower*, 2006 WL 3797974, at * 15 (N.J. Super. Ct. Law Div. Dec. 22, 2006) (finding that the prohibitions, which prevented plaintiff from taking his children to the school bus or to school, “substantially intrude[d] on significant family matters involving private and personal choices about how to raise and care for children” and therefore violated petitioners substantive due process rights).

requirements as violating the right to travel.¹¹⁷ Emphasizing that the residential restrictions contributed to homelessness, prevented parolees from getting treatment services they needed, and separated families, the court concluded that the restrictions intruded on important liberty interests and were not narrowly tailored to the asserted government interest in protecting children from recidivist offenders.¹¹⁸ The ruling, which is on appeal to the California Supreme Court, allows parole officers to impose such restrictions on an individualized basis, but it prohibits their blanket application to all registered sex offenders, without a particularized evaluation of threat and need. This is an approach that I strongly endorse, as explained in more detail in Part III.

D. Other Examples – A Pre-Crime Typology

The financial sanction regime, No Fly List, and sex offender restrictions illustrate a broader trend in which legislators and executive branch officials increasingly target particular individuals or classes of individuals with preventive, and non-custodial restraints – all based on a presumed propensity to commit a future bad act. Other analogous examples include firearm restrictions imposed on convicted felons as well as other classes of presumptively dangerous individuals;¹¹⁹ no-contact orders issued in response to allegations of domestic violence;¹²⁰ supervised release conditions imposed on presumptively dangerous aliens;¹²¹ pilot license revocations based on a “suspected” security threat;¹²² and security

¹¹⁷ *In re Taylor*, 147 Cal. Rptr. 3d 64, 83 (Cal. App. 2012). While *In re Taylor* addressed the application of residential restrictions to parolees in San Diego, the underlying statute applies to all registered sex offenders throughout California, not just those on parole and in San Diego. See Cal. Penal Code § 3003.5 (b) (added by Ballot Initiative Measure (Prop 83 § 21, approved Nov. 7, 2006, eff. Nov. 8, 2006) (prohibiting all registered sex offenders from “resid[ing] within 2000 feet of any public or private school, or park where children regularly gather”).

¹¹⁸ *In re Taylor*, 147 Cal. Rptr. at 83.

¹¹⁹ 18 U.S.C. § 922(g) (2006). Often referred to as “felon-gun” restrictions, the restrictions actually cover a broader class of individuals. In *District of Columbia v. Heller*, Justice Scalia went out of his way to note that the Court’s striking down of a prohibition on handgun possession did not “cast doubt on longstanding prohibitions on the possession of firearms by felons.” 554 U.S. 570, 626 (2008).

¹²⁰ See, e.g., Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006) (describing and critiquing evolution of stay away orders in domestic violence cases).

¹²¹ See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

¹²² 49 C.F.R. § 1540.117(c) (2003) (describing threat assessment standards for aliens holding or applying for FAA certificates, ratings, or authorizations); 49 C.F.R. § 1540.115 (2003) (describing threat assessment standards for U.S. citizens). An initial threat finding leads to an immediate loss of license. Citizens are, by statute, entitled to a hearing before an administrative law judge of any final orders, at which they are entitled to unclassified summaries of any classified information relied upon. 49 U.S.C. § 46111 (2003). Aliens, by contrast, are not entitled to an administrative law judge hearing and need not be provided summaries of the classified information. Court review is concentrated in the

clearance revocations based on “a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.”¹²³

The details vary significantly from program to program and the specifics are important. Broadly speaking, there are two contrasting models of pre-crime restraints. One, which I call the tailored, adjudicatory model requires individualized assessments of risk, and is premised on a view of human nature as malleable and subject to rehabilitation and reform. It is based on a particularized assessment of risk, and recognizes – at least in theory -- that changed circumstances, including rehabilitation of the target, can eliminate or sufficiently reduce the risk the restraint is designed to address. Restraints are thus designed to last no longer than the risk posed; they are time-limited and subject to regular, periodic reviews. In its most rigorous (liberty-protecting) form, it is court-imposed, or at least subject to *de novo* court review as a means of protecting against bias, error or outright abuse. It is the approach I argue we should be moving toward, as I discuss in more detail in Part III, although the difficulty of predicting risk and costs to the target’s moral autonomy should give us pause even in the exercise of these types of restraints.

The other, what I call the rule-based model, is imposed on all persons with certain features, without individualized assessment of risk. Under the rule-based model, the fact that some percentage of individuals with certain characteristics is likely to commit a future bad act becomes a justification for imposing restraints on all people who possess the relevant characteristics. As the gravity of the future bad act increases, the acceptable ratio of innocent to bad actors increases, resulting in a greater proportion of persons who never would have committed any future harm being subject to extensive preventive restraints. Because rule-based restraints are imposed on all individuals who satisfy a particular, cognizable set of facts, judicial review is either non-existent or limited solely to the question as to whether or not the predicate facts are met, without any individualized assessment of risk. Sex offender restrictions, felon-gun restrictions, and certain no-contact orders (imposed on all accused of certain types of offenses) are a classic example of rule-based restraints.¹²⁴

Court of Appeals, with deference given to any agency finding supported by “substantial evidence.” 49 U.S.C. §46110 (2003).

¹²³ See 32 C.F.R. § 147.2(d) (describing criteria for granting and revoking security clearances).

¹²⁴ Several scholars have also noted the ways in which adjudicated, particularized restraints actually operate as rule-based restraints in disguise. See, e.g., *supra*, notes 155 & 157. Actuarial, prediction models, for example take a number of identified factors, feed them into an algorithm, and predict risk – essentially assuming that the dominant group characteristics translate onto a particular individual in a predictable way. If given conclusive weight, these seemingly individualized restraints can also operate as rule-based

Most pre-crime restraints encompass some features of both the rule-based model and tailored, adjudicatory model. Terrorism-related financial sanctions, the No Fly List, and security clearance revocations, for example are based on individualized assessments of a particular individual or entity’s propensity to commit a bad act, thus adopting a key feature of the adjudicatory model. But, at least with respect to the terrorism-related financial regime and No Fly List, the criteria for being subject to the restraint are (or appear to be) so broad as to defy any notion of narrow tailoring. Moreover, there is no independent adjudicator to help correct for error or abuse. The absence of any time limits or meaningful periodic review provisions further suggests a rule-based vision of targets as incapable or unlikely to change – or, at the very least, an unwillingness to give the targets an opportunity to act differently than predicted given a high level of risk-aversion.

II. THE LIBERTY INTERESTS AND RISKS OF EXPLOSION

Over the past decade, there has been extensive attention to various forms of preventive detention – including law-of-war detention,¹²⁵ the preventive tilt of the criminal justice system,¹²⁶ immigration detention,¹²⁷ and civil commitment regimes.¹²⁸ Meanwhile, it is often assumed, without much analysis, that non-custodial restraints are a permissible alternative to custodial restraints that are prohibited. In its 2001 decision in *Zadvydas v. Davis*,¹²⁹ for example, the Supreme Court ruled that aliens could not be detained pending deportation if such deportation was no longer

restraints – imposing certain preventive restraints on all persons with particular characteristics, without any individualized adjustments.

¹²⁵ See, e.g., Chesney & Goldsmith, *supra* note __; Cole, *supra* note __; Jonathan Hafetz, *Military Detention in the “War on Terrorism”: Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31 (2012).

¹²⁶ See, e.g., Chesney & Goldsmith, *supra* note __. The normative consequences of this move are the topic of an ongoing and debate. Compare Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1432 (2001) (arguing in favor of separating preventative and punishment functions), and Carol S. Steiker, Foreword, *Punishment and Procedure: Punishment Theory and the Criminal–Civil Procedural Divide*, 85 GEO. L.J. 775, 814 (1997) (arguing for a distinct role for punishment based on, among other things, its retrospective nature and blaming function), with Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 122 (2005) (arguing that “individual prevention should become the predominant goal of the criminal justice system”). See also Andrew Ashworth and Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 NEW CRIM. L. REV. __ (forthcoming 2012) (on file with author) (exploring these issues).

¹²⁷ See, e.g., David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003 (2002)

¹²⁸ See, e.g., Logan & Janus, *supra* note __; Schulhofer, *supra* note __. See also Klein & Wittes, *supra* note __ (cataloguing various forms of preventive detention).

¹²⁹ 533 U.S. 678 (2001).

reasonably foreseeable; at the same time, it explicitly mentioned, albeit in dicta, the availability of alternative forms of non-custodial restraint. In the Court’s words, the “alien’s release may and *should* be conditioned on any of the various forms of supervised release that are appropriate in the circumstances.”¹³⁰ The unambiguous message: Non-custodial restraints are permitted under circumstances where custodial ones are prohibited.¹³¹

But the favoring of non-custodial restraints as an alternative to custodial ones masks the important substantive and procedural liberty interests at stake and ignores the dangers associated with all pre-crime restraints, whether custodial or not. To some extent, this oversight is understandable: After all, who wouldn’t choose release with restrictions over incarceration, as the *Zadydas* court suggested? But the choice is rarely such an easy one-for-one. In part because non-custodial restraints are perceived as less invasive, they are imposed on a much broader swath of the population that would be – or could be – subject to physical incarceration, persist for protracted periods of time, and are imposed with much less process than carceral restraints. What if, for example, the question is five *months* in prison or five *years* subject to extensive restrictions on where one can go and what one can do? Then the choice is no longer so obvious.

In this section, I explore both the often under-appreciated liberty interests affected by non-custodial restraints as well as the general costs of all pre-crime restraints, thus offering a lens through which to better evaluate the interests at stake when the state engages in targeted, pre-crime prevention.

A. The Invasion of Liberty

Physical incarceration has, for good reason, long been understood as the quintessential deprivation of liberty. It removes the detainee from the polity, subjects him to control of others, and denies him the ability to live his own life in the manner he chooses. It is for this reason that the Supreme Court has repeatedly defined physical incarceration as the “paradigmatic affirmative disability or restraint,”¹³² freedom from which is at the “core of the liberty protected by the Due Process Clause.”¹³³ The

¹³⁰*Id.* at 700 (2001) (emphasis added).

¹³¹ The *Zadydas* court did emphasize that such non-custodial restraints need by “appropriate,” but did not define the term. *Id.*

¹³² *Smith v. Doe*, 538 U.S. 84, 100 (2003).

¹³³ *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). One explanation as to why this liberty interest is “core” is the often-cited historical and textual one—that “liberty” should be interpreted as it was in 1789 or possibly 1868, at which point it was understood as referring exclusively to “liberty of the person” or freedom from physical restraint. *See, e.g.*, Charles Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440 (1926). But even accepting the accuracy of the historical analysis, this approach fails to explain *why* freedom from physical restraint was deemed a core liberty interest

deprivation is so visceral and obvious that there is rarely any explanation as to why this is so.

In a few, limited cases, the Supreme Court has similarly recognized the devastating effect of targeted, non-custodial restraints – but this recognition is generally limited to the extreme situations in which the individual is formally stripped of legal status or physically removed from the polity.¹³⁴ As the Court explained in its 1958 decision in *Trop v. Dulles* in which it concluded the forced statelessness violates the Eighth Amendment: “There may be involved no physical mistreatment. . . . There is instead the total destruction of the individual’s status in organized society.”¹³⁵ Deportation has similarly been described as depriving individuals of “all that makes life worth living.”¹³⁶ An affected individual maintains his nationality and remains physically free, but is stripped from the polity of his choosing, family, friends, and employment. He is divested of the context that gives him and his life meaning and told to start again, in a place that he hasn’t been to in years and feels foreign to him, even if it is his legal home.

What the Court has failed to recognize is the ways in which non-custodial restraints can, and often do, deprive a target of the capacity to lead a meaningful and free life, treat him as second-class citizen, and deny his moral autonomy, even if they do not place him behind bars, formally strip him of legal status, or physically remove him from the polity. This section will address each of these deprivations in turn.

i. De Facto Incapacitation

and what underlying interests are at stake. *See* Tribe, *supra* note 131, at 1897 (forcefully rejecting the idea that “courts more or less passively identify a set of personal activities in which individuals may engage free of government regulation . . . derive[d] from American constitutional text and tradition”); *see also* *Rochin v. California* 342 U.S. 165, 171 (1952) (“To believe that this judicial exercise of judgment could be avoided by freezing ‘due process of law’ at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges”).

¹³⁴ By comparison, violations of bodily integrity are more readily recognized as intrusions on established rights, given the overt way in which they inflict pain or intrude in one’s physical space in a way that is easy to identify and measure. *See, e.g.,* *Winston v. Lee*, 470 U.S. 753, 755 (1985) (holding that forced surgical removal of a bullet for evidentiary purposes violates an individual’s interest in bodily integrity and therefore his Fourth Amendment rights); *Rochin*, 342 U.S. at 173 (concluding that forced stomach-pumping of a suspected drug user is “brutal conduct” that violates due process).

¹³⁵ 356 U.S. 86, 101 (1958). The Court went on to call it “a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development In short, the expatriate has lost the right to have rights.” *Id.* at 101-102; *see also* *Afroyim v. Rusk*, 387 U.S. 253 (1967) (holding that forced statelessness violates the Fourteenth Amendment).

¹³⁶ *Bridges v. Wixon*, 326 U.S. 135, 147 (1945); *see also* *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Deportation is less extreme than forced statelessness, as the affected individual retains some legal status.

In the words of Professor Martha Nussbaum, people can be so restricted from “select[ing] modes of activity that are central to a life worth living” that they are more “like prisoners” than “free people.”¹³⁷ The imprisonment can be near total, prohibiting a broad range of functioning, or partial, affecting discrete but central components of a meaningful life. Critically, physical incapacitation is not required.

This, of course, requires a theory of what makes a life worth living, and here Supreme Court jurisprudence provides the key guidance. At various points, with varying degrees of emphasis, and with various textual hooks, the Court has identified the capability to move freely,¹³⁸ travel,¹³⁹ maintain familial association free from state interference,¹⁴⁰ enter intimate relationships,¹⁴¹ pursue one’s chosen vocation,¹⁴² and raise one’s children without state interference,¹⁴³ as central liberties that the Constitution protects.¹⁴⁴ As Professor Laurence Tribe has cogently argued, what unites

¹³⁷ Nussbaum, *supra* note __, at 6. Nussbaum also makes a compelling argument as to how the central idea of equal dignity and equal entitlement is reflected in the Declaration of Independence. *Id.* at 50–51.

¹³⁸ *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 54 (1999) (“[A]n individual’s decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is a part of our heritage”) (citation omitted).

¹³⁹ *See, e.g.*, *Vartelas v. Holder*, 132 S. Ct. 1479, 1486–87 (2012) (describing restriction on international travel as a “new disability” and a “harsh penalty, made all the more devastating if it means ensuring separation from close family living abroad”); *Shapiro v. Thompson*, 394 US 618, 630–31 (1969) (describing a fundamental right to interstate travel, but declining to ascribe the source of the right to a particular constitutional provision); *id.* at 671 (Harlan, J., dissenting) (concluding “that the right to travel interstate is a ‘fundamental’ right which, for present purposes, should be regarded as having its source in the Due Process Clause of the Fifth Amendment”); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (“The right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.”).

¹⁴⁰ *See, e.g.*, *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (describing the “freedom of personal choice in matters of marriage and family life [as] one of the liberties protected by the Due Process Clause of the Fourteenth Amendment”).

¹⁴¹ *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁴² *See, e.g.*, *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (describing “the right to . . . follow a chosen profession free from unreasonable governmental interference [as] within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment”). *Cf.* *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 894 (1961) (holding that summarily-imposed restrictions which prevented plaintiff from accessing her place of employment did not violate plaintiff’s due process rights given the availability of other possible places of employment.”)

¹⁴³ *See, e.g.*, *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925) (describing the “liberty of parents and guardians to direct the upbringing and education of children under their control”); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

¹⁴⁴ *See generally* *Whalen v. Roe*, 429 U.S. 589, 599–600 & n. 26 (1977) (describing the liberty “interest in independence in making certain kinds of important decisions”); *Meyer*, 262 U.S. at 399 (1923) (Liberty “denotes not merely freedom from bodily restraint but

these various cases is larger than and conceptually different from the parts. What matters is the ability of the individual to participate in the polity and to self-govern – to be given the freedom to make the choices that are central to defining and expressing oneself and making life meaningful.¹⁴⁵

In some cases, pre-crime restraints can so thoroughly deprive an individual of the capacity to participate in the polity and define oneself free from state interference that they impose a form of near-total imprisonment. U.S. residents subject to the financial sanction regimes, for example, may be physically free, yet they are effectively barred from engaging in the society in which they live. They cannot partake in a single financial transaction without government approval. Even the ability to buy groceries, make rent payments, pay for gas or a bus ticket, or buy school uniforms is dependent on a government license, and thus becomes a matter of state control.

The combination of residential, employment, and other restrictions on movement imposed on presumptively dangerous sex offenders has a similarly pervasive impact – relegating them to small slivers of land where they can live, barring their movement, restricting their employment, limiting their choice of homes, and indirectly yet severely limiting their ability to participate in important ways in their children’s lives.

In other instances, non-custodial restrictions impose a form of partial imprisonment, impeding discrete components of a free and meaningful life. The effect of the no-fly list, for example, is not as restrictive as the most severe sex offender-related restrictions, but has a

also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”). This list also has obvious parallels with the list of protected rights under human rights law. *See, e.g.*, International Covenant on Civil and Political Rights, art. 12, 22, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (art. 2, freedom of movement); (art. 22, freedom of association); International Covenant on Economic, Social and Cultural Rights, art. 6, Dec. 19, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 (right to work, including the “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”). *See also* 42 U.S.C.A. § 12102(2)(A) (2006) (defining “major life activities” as that term is used in the Anti-Discrimination Act (ADA) to include “communicating, and working”); 29 C.F.R. §1630.2(i)(1) (2012) (adding “interacting with others” as among the “major life activities” protected by the ADA).

¹⁴⁵ Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare not Speak its Name*, 117 HARV. L. REV. 1893, 1941–42 (2004). *See also* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 805 (1989) (describing the ways in which “state control over the quotidian, material aspects of individuals’ lives—even where the people have democratically imposed such control themselves—deprives them of th[e] freedom [to self-govern]”). While Rubenfeld is examining the right to privacy, his analysis can be extended to claims, such as those made in this Article, that largely sound in substantive due process.

significant and underappreciated impact on substantive liberty interests nonetheless. In prohibiting an important mode of transportation, it restricts and potentially eliminates the ability to “attend funerals and weddings of family members, tend to vital interests, or respond to family emergencies” in a timely manner.¹⁴⁶ It also significantly curtails the ability to pursue a profession of one’s choosing. Even if travel is not a regular part of one’s job responsibilities, occasional trips to conferences, trainings, or other professional gatherings may be required, and transport by car, bus, or boat may not be reasonably viable alternatives.

When evaluated in social and historical context, with an understanding of the central role plane travel has assumed in modern life, it becomes obvious that the prohibition on flying significantly intrudes on liberty interests that the Supreme Court has recognized as important, even if not fundamental, in a number of different contexts.¹⁴⁷ The ban on flying not only infringes on the right to travel, but also curtails the capacity to maintain familial connections, other associations, and employment of one’s choosing as well. Its effect is significantly greater than the government’s description of a “right to travel by the most convenient means of transport” suggests.¹⁴⁸

ii. Second-Class Treatment

Most targeted, pre-crime restraints also interfere with the important liberty interest in being treated with equal dignity.¹⁴⁹ While not the *principal* purpose of most targeted restraints, the *effect* is to single out particular individuals or classes of individuals, precluding them from engaging in activities that others can do freely and thereby stamping them

¹⁴⁶ *Vartelas*, 132 S. Ct. at 1487 (2012). See also *Kent v. Dulles*, 357 U.S. 116, 126 (1958) (noting that the freedom to travel internationally “can be as close to the heart of the individual as what he eats, wears, or reads.”).

¹⁴⁷ See, *supra*, notes 124-130 and accompanying text.

¹⁴⁸ Def. Mot. to Dismiss, *Latif v. Holder*, at 24.

¹⁴⁹ The Supreme Court’s recent opinion in *United States v. Windsor*, 570 U.S. __ (2013) (Slip. Op. at 18) provides additional support for the liberty interest in being treated with “equal dignity.” In *Windsor*, the Court declared the Defense of Marriage Act (DOMA) a violation of “basic due process and equal protection principles” given its purpose and effect of “impos[ing] inequality” and “demean[ing]” particular classes of individuals. *Id.* at 15-16, 18. See also *id.* at 18 (“While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.”). See also Larry Tribe, *DOMA, Prop 8, and Justice Scalia’s intemperate dissent*, SCOTUSblog (Jun. 26, 2013, 2:24 PM), <http://www.scotusblog.com/2013/06/doma-prop-8-and-justice-scalias-intemperate-dissent/> (describing *Windsor* as relying on “a combination of equal protection principles and precepts of federalism -- a combination textually at home in adjudication under the Due Process Clause of the Fifth Amendment”).

with a badge of inferiority.¹⁵⁰ As Professor Michael C. Dorf has persuasively argued, “the designation as a sex offender truly comes close to a designation of second class citizenship,” thereby raising equal protection concerns.¹⁵¹ The same can be said of designated “specially designated global terrorists” and other subjects of targeted prevention.¹⁵²

This is not to suggest that all targeted restraints operate in this way. When the state imposes criminal penalties, it (at least in theory) sanctions conduct, not personhood.¹⁵³ But the shift in focus from the past to future carries with it a shift in emphasis from conduct to character. In imposing such restraints, the state conveys its assessment that the targets are insufficiently trustworthy – and therefore less deserving – than the vast majority of the populace not subject to such limits on their activities or movements. The state signals an implicit, or at times explicit, finding of moral depravity or lack of control.

Moreover, this is not simply a case of expressive harm or stigma standing alone. The badge of dangerousness is coupled with affirmative restrictions that prevent the targets from engaging in activities that other members of society can freely do. The stamp of second-class citizenship carries with it concrete, affirmative limits, thereby implicating a combination of equal protection and due process principles.

iii. Respect for Moral Autonomy

The imposition of pre-crime restraints also undercuts a central aspect of individual liberty by failing to respect the moral autonomy of the targeted individual. This point is often made by retributionists and quasi-

¹⁵⁰ This is an obvious distinction between the pre-crime examples discussed here and the DOMA struck down in *Windsor*. In *Windsor*, the court emphasized that both the “principal purpose” and effect of DOMA was to “impose inequality.” *Windsor*, Slip. Op. at 16. Most pre-crime restraints have (at least overtly) a primary purpose of preventing crime or other bad acts – with a key effect being a denial of equal treatment and dignity.

¹⁵¹ Michael C. Dorf, *Same-Sex Marriage, Second Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1340 (2011). While Dorf was specifically focused on the registration requirements, his statement is even more apt when one considers the array of residential, employment, and other restrictions that accompany the designation. As Dorf goes on to argue, this does not mean that such designations ought to be categorically prohibited, but there needs to be a much more thorough means-ends inquiry, an issue I return to in Part III.

¹⁵² This concern about second-class treatment applies to those pre-crime restraints that prohibit individuals from doing what all other members of society do freely - *i.e.*, engaging in basic financial transactions or going to a public park; it does not apply to the denial or rescinding of a specially-granted license, such as a security clearance or pilot license revocation.

¹⁵³ *Id.* at 1311 (“Imprisoning persons for murder, rape, and robbery, and branding them as felons, no doubt expresses a view about the inferiority of the conduct in which murderers, rapists, and robbers engage, without thereby expressing a view about the inherent moral worth of the perpetrators.”)

retributionists, and is one to which consequentialists lack a persuasive response.¹⁵⁴ Even if one could imagine an idealized world with an extremely low rate of predictive error, the preventive nature of the restraint precludes the individual from taking steps to defeat the prediction and make the “right” moral choice. As the philosopher Saul Smilansky has argued, “there is categorically still time, a ‘window of moral opportunity’ for the would-be offender. This moral opportunity needs to be acknowledged.”¹⁵⁵

Unless the individual lacks the capacity to make autonomous choices, such as in the case of the truly mentally ill, preventive restraints violate their targets’ moral autonomy. They assume a fixed future and destroy the opportunity for individual self-determination – precluding the possibility that individuals can demonstrate their moral goodness and choose a course of action that differs from the prediction.¹⁵⁶ Such restraints can only be justified by a purely deterministic view of individual action, or a decision that respect for moral autonomy needs to give way to a different set of interests, such as protection of the nation’s or community’s safety. Such a decision must be made with an accurate weighing of the individual interest, risk of harm, and normative principle at stake. When dealing with unpopular groups, such as sex offenders or alleged terrorist financiers, however, there is a significant risk that the risk of harm will be over-valued and the individual interest under-valued.

* * *

In sum, non-custodial pre-crime restraints impinge on the target’s liberty interests in a number of important ways – imposing a form of *de facto* imprisonment (either partial or total) stamping the target as having less than equal worth, and denying the target respect for his moral autonomy. It is not the case – as current doctrine assumes – that there is an on-off switch, in which preventive detention impinges on an array of important substantive liberty interests, whereas restraints that fall short of incarceration are of only minimal constitutional significance at best. They

¹⁵⁴ See e.g., Slobogin, *supra* note __ (noting inaccuracies of predictive tools but evading questions about the ways in which a preventive model of criminal justice denies individual autonomy to act differently than predicted).

¹⁵⁵ Saul Smilansky, The Time to Punish, 54 ANALYSIS 50, 52 (1994). Although Smilansky was discussing preventive “punishment,” the observation applies to all preventive, targeted restrictions of liberty, even if they are ostensibly deemed non-punitive.

¹⁵⁶ Actuarial modeling, for example, as employed in the sex offender commitment context is implicitly based on a deterministic view of human behavior. Psychologists and psychiatrists evaluate a number of factors to determine an offenders’ likelihood of reoffending: If person A has X characteristics, he will do Y with a certain degree of certainty. See, e.g., Jill S. Levenson & John W. Morin, *Factors Predicting Selection of Sexually Violent Predators for Civil Commitment*, 50 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 609, 625-26 (2006). These models fail to account for the moral autonomy of individuals – the fact that they may act differently than predicted.

might nonetheless be permissible, but there ought to be a much more thorough means-ends inquiry than currently takes place. This is a point to which I return to in Part III.

B. The Risk of Error and the One-Way Ratchet

Even if the liberty intrusions of non-custodial restraints were properly calibrated, the targeted, preventive nature of the restraints present an independent set of concerns – concerns borne out by an examination of the financial sanction regime, No Fly List, and sex offender restrictions. This is so for three primary reasons: the risk of error and abuse; the inherent difficulty of disproving a propensity to do something bad;¹⁵⁷ and the incentives in favor of over-reach.

i. Predictive Errors

Pre-crime restraints are premised on predictions about the future – predictions that are rife with uncertainty and error. Even when the most sophisticated, actuarial or clinical assessment tools are employed, the ability to predict that a particular individual will commit some future bad act inherently involves guesswork and false positives.¹⁵⁸ Even the best risk assessment tools assume some percentage of false positives – meaning that they are designed with the knowledge that they will capture some individuals who would never engage in the activity designed to prevent.¹⁵⁹ The broad, subjective criteria employed in the application of national security-related, executive branch-imposed restraints exacerbate the risk of

¹⁵⁷ Whether or not this concern also applies to the restrictions imposed on entities, such as targeted financial sanctions, depends on whether one views an entity as a moral actor – a topic which is the subject of extensive philosophical debate, and which I do not wade into here. See generally *Collective Responsibility*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/collective-responsibility/#1> (describing the debate). The concerns about error and overreach, however, clearly apply to restraints imposed on entities and may be independently sufficient to justify heightened scrutiny of these restraints as well.

¹⁵⁸ There is a rich and thick body of literature on the difficulties of accurately predicting future dangerousness. See, e.g., Stephen J. Morse, *Protecting Liberty and Autonomy: Desert/Disease Jurisprudence*, 48 SAN DIEGO L. REV. 1077, 1081–82, 1125 (2011) (summarizing the literature and suggesting that risk assessments are improving in accuracy, but emphasizing the “limited” ability to predict accurately, the problems of applying group data to make individualized predictions, and the incentives in favor of false positives). For a powerful argument against the reliance of actuarial models to predict future risk, see BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2007).

¹⁵⁹ See, e.g., R.J. Tulley et al., 33 *Clinical Psychology Review* 287, 288 (2013) (describing “false positives” associated with risk assessments, including actuarial tools, and evaluating predictive accuracy of a range of actuarial and non-actuarial approaches to sex offender risk assessment).

error. Under the terrorist financial sanction regime, for example, individuals and entities can be defined as a “specially designated global terrorist list” based solely on an executive branch determination that the entity or individual “pose[s] a significant threat.” There are no actuarial models or empirically tested criteria for identifying who in fact might pose a security threat.¹⁶⁰ Determinations are purely a matter of executive discretion.

Moreover, even if targeting decisions are based on empirically sound criteria and made in good faith, the incentives push in favor of expansive application. Pre-crime restraints are put in place to protect public safety and implemented with that primary motivating principle in mind. In the case of doubt, the incentives are on the side of imposing the restraint. The Deputy Administrator of the Transportation Security Administration admitted as much in explaining a pilot revocation decision: “[B]ecause it would be very difficult to avert harm once a terrorist had control of an aircraft, I concluded that it was important to err on the side of caution in determining whether [the pilots] . . . pose a security threat.”¹⁶¹ This same fear of an un-averted harm haunts all security-related officials. Simply put, the preventive mindset turns the criminal law adage that “it is far worse to convict an innocent man than to let a guilty man go free” on its head.¹⁶²

A lack of any meaningful independent review further increases the likelihood of error or abuse. The mere fact, or likelihood, of independent review serves as a moderating influence, providing a strong incentive for the decision-makers to act in a way that can be justified to a court or analogous review board. Independent oversight also serves an important educative function, helping to ensure that officials learn about and take steps to correct error. In its absence, ineffective or unnecessary restraints are much more likely to persist. Blatant discrimination or other abuses are also left unchecked.¹⁶³ (Of course, the effectiveness and stringency of this review depends on the breadth of the substantive rules; if the substantive rules are excessively broad, review will do little to rein in executive overreaching and false positives, even if it might still uncover outright abuse.)

Undifferentiated, rule-based restraints, such as those employed on sex offenders, dispense with individualized predictions altogether, thereby

¹⁶⁰ This is not to say that an actuarial or empirically-tested method would in fact solve the problem of both false positives and false negatives. *See, supra*, notes 155 & 157.

¹⁶¹ *Jifry v. F.A.A.*, 370 F.3d 1174, 1181 (D.C. Cir. 2004) (quoting the Deputy Administrator of the Transportation Security Administration).

¹⁶² *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

¹⁶³ *See, e.g.*, Mariano-Florentino Cuellar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 261 (2006) (describing how lack of oversight exacerbates the risk of mistake, politically motivated self-dealing, and outright malfeasance in executive branch implementation of targeted restraints).

imposing restraints on a large number of individuals who never would have committed the bad act the restraints are designed to prevent. Research on sex offenders indicates, for example, that recidivism is fairly low, particularly as compared to other convicted offenders and that the majority of sexual assaults is committed against an intimate and known victim.¹⁶⁴ Assuming this data is even remotely accurate, most of those subjected to residential and employment restrictions pose no risk of re-offending at all, and even fewer pose a risk of stranger assault which is what the residential and employment controls are designed to prevent.¹⁶⁵

ii. Delisting Difficulties

It is incredibly difficult to disprove a propensity to do harm, even when there is a fair and transparent process that allows one to do so. The precautionary impulse that results in officials erring on the side of restraint in the initial designation decision is exacerbated in the delisting context. The ghost of Willie Horton haunts every public official.¹⁶⁶ What if the “freed” individual commits the bad act the restraint was designed to prevent? In such a situation, there is a failure not just of omission but also of commission. Except in the relatively rare cases of particularly sympathetic targets, executive branch officials have strong incentive to maintain restraints and few incentives to lift them.

Placing delisting decisions before a judge with life tenure or other independent adjudicators freed from the political process can minimize, but will not eliminate, the incentives in favor of maintaining the restraint. Just as it is impossible for the executive to prove that an individual will engage in whatever future bad act the restraint is designed to prevent, so too is it impossible for the individual to prove that he will not do so. Judges likewise do not want to be responsible for lifting a restraint on someone who commits a future bad act and, as a result, often defer to the

¹⁶⁴ See, e.g., PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 7 (2003) (study of nearly 10,000 sex offenders in 15 states, 5.3 percent of whom were re-arrested for a sex crime within three years); Francis M. Williams, *The Problem of Sexual Assault, in* SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS (Richard Wright, ed., 2009) 17, 40 (describing a range of studies showing recidivism in the 2.5 percent to 27 percent range). The studies vary significantly in how they define recidivism, the time period studied, and data sources used. The studies also do not distinguish between assaults by known assailants, such as friends or family, and assaults by strangers—the latter of which is the focus of most sex offender restrictions.

¹⁶⁵ Most of these studies took place before the introduction of residential, employment, and other restraints imposed on sex offenders. More robust and informative studies ought to control for whatever measures were in place.

¹⁶⁶ Horton was a convicted felon in Massachusetts who committed rape and a violent assault after being freed on a prison furlough program during Michael Dukakis’s tenure as governor. During the 1988 presidential election, George Bush used Horton’s case to attack Dukakis, Bush’s Democratic opponent, for being soft on crime.

executive branch determinations on matters of national and community security.¹⁶⁷

This is not to say that the executive branch and courts never take steps to winnow down lists of individuals and entities subject to pre-crime restraints.¹⁶⁸ But the general trend is one of dramatic growth. Since 2001, the total number of SDGTs has grown from 27 to over 700, with only a few dozen individuals and entities being delisted, as far as can be discerned from publicly available documents.¹⁶⁹ The number of individuals on the No Fly List reportedly has grown from 12 to 21,000¹⁷⁰ in that same time period, and the number of sex offenders registered nationally has grown to over 700,000.¹⁷¹

iii. Incentive to Overreach

Whereas adjudication of guilt with respect to a past act presents a binary choice – either the individual engaged in the conduct or did not – adjudication of risk presents adjudicators with a sliding scale, with no clear

¹⁶⁷ See, e.g., Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1380 (2009) (surveying a range of national security-related cases and describing courts as often being “loath to question the judgment of executive officials when push comes to shove”).

¹⁶⁸ Internal executive branch reviews and court orders have, for example, led to the release or transfer of over 600 Guantanamo Bay detainees, all of whom were being held for preventive purposes. But in recent years, Congress has imposed a number of restrictions on the transfers – making it politically difficult for the Obama administration to take steps to move out even those that have been cleared for transfer. This is a classic example of the political – and logistical – difficulties associated with undoing a restraint that has already been put in place.

¹⁶⁹ See U.S. DEP’T OF TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST SEARCH, *supra* note 3. Information about delisted individuals and entities is based on a review of the Federal Register. See, e.g., 77 Fed. Reg. 25234-01 (Apr. 27, 2012) (removing name from SDGT list). In some cases, individuals were delisted only after they were deceased. Other delistings were prompted by litigation. See, e.g., MONOGRAPH ON TERRORIST FINANCING, *supra* note __, at 84-85 (describing delisting of two Swedes, two U.S.-based entities and one U.S. citizen after filing of a lawsuit and international pressure was brought to bear). It is also possible that others were delisted without any corresponding report in the Federal Register.

¹⁷⁰ See, *supra* note __. A report from the Inspector General suggests that in 2006 the list skyrocketed to over 70,000 “records” before being cut in about half. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT REP. 07-41, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER iii, at 31–32. It is not clear, however, what is meant by “record.” It is possible, for example, that the review simply purged duplicative all targeting the same individual.

¹⁷¹ See, e.g., *Map of Registered Sex Offenders*, NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1545 (last visited February 7, 2013). Only a portion, however, are subject to the residential, employment, and other restrictions that are the subject of this paper.

definition of what characteristics are deemed risky or limits as to how much risk is too much. In the words of John Stuart Mill: “There is hardly any part of the legitimate freedom of action of a human being that would not admit of being represented, and fairly too, as increasing the facilities for some form or other of delinquency.”¹⁷²

This problem is exacerbated in the case of unknown, but potentially grave or catastrophic, harm. In such a situation, the precautionary principle justifies the application of increasingly broad measures designed to pre-empt an expanding number of potential risky actors.¹⁷³ For undifferentiated rule-based restraints, this means an increasingly loose fit between the risk and the restraint. Thus, even if only a small fraction of sex offenders is likely to offend in the future, the risk posed by the few – coupled with the difficulties of accurately predicting who will offend in the future – is deemed to justify the imposition of broad restraints on significant numbers of persons who pose no such risk. For individualized, adjudicatory-type restraints, it means increasingly broad – and often malleable and poorly tailored – criteria for concluding that a specific individual poses a risk. Moreover, as potential targets figure out ways or are perceived to have figured out ways of evading existing restraints, as occurs every time a previously convicted sex offender reoffends or a threat to aviation security is revealed, the natural governmental response is to increase the scope and intensity of the restraints so as to encompass other would-be evaders.

The post-2009 growth in the No Fly List, the broad restrictions imposed on would-be financiers of terrorism, and the expanding list of triggering offenses and restrictions imposed on sex offenders are all examples of the precautionary principle in practice. The result is an expansive and expanding set of pre-crime restraints.¹⁷⁴

¹⁷² John Stuart Mill, ON LIBERTY, at 106.

¹⁷³ See Lucia Zedner, *Fixing the Future? The Pre-emptive Turn in Criminal Justice*, in REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURES OF CRIMINAL LAW 35, 44-47 (Bernadette McSherry, Alan Norrie, and Simon Bronitt, eds. 2009) (describing relationship between risk analysis and uncertainty).

¹⁷⁴ See generally David Cole & Jules Lobel, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 30 (2009) (detailing the increasingly preventive tilt of the law).

III. PRE-CRIME RESTRAINTS: UNDERSTANDING AND SETTING SOME LIMITS

Given the important liberty interests at stake, as well as the risks of error and overreach, this section suggests a set of limits that ought to apply to the government’s use of targeted, pre-crime restraints. As an initial matter, this paper recognizes the government’s legitimate interest in – and courts’ prior approval of – certain targeted preventive actions outside of or on the margins of the criminal justice system. At the same time, however, it calls on courts and legislators to require a much more narrow tailoring of restraint to perceived need than has generally taken place to date.

Having just highlighted the many incentives that operate in favor of expansion, I acknowledge that effective limit setting will not come easy. That said, courts can, and already have, provided critical oversight with respect to analogous forms of preventive detention – limits that can readily be transposed onto comprehensive, non-custodial restraints. Responsible legislators and executive branch officials also have an important role to play. The following is directed at both.

A. Punishment of Prevention?

There is a growing body of literature arguing that what I call pre-crime restraint is actually “punitive prevention” and ought to either be channeled through the criminal law or categorically prohibited.¹⁷⁵ While these arguments have merit, they fail to squarely grapple with the pressing question of what forms of preventive state action are, and should be, permitted.

As applied to undifferentiated restraints imposed after a criminal adjudication – the case for most sex offender-related restraints – the reclassification of preventive restraints as punitive would prohibit their retroactive application, without imposing any meaningful limits on their prospective use.¹⁷⁶ It also has the negative consequence of further

¹⁷⁵ See, e.g., Bernard Harcourt, *Punitive Preventive Justice: A Critique*, in Andrew Ashworth, Lucia Zedner, and Patrick Tomlin, eds., PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 252, 258 (2013) (“To dispense with the adjudicated crime destabilizes. It is what makes ‘punitive preventive measures’ seem so dangerous.”); Eric S. Janus, *The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*, 40 CRIM. L. BULL. 6 (2004) (warning against what he calls “radical prevention”); For a sampling of the literature arguing that pre-crime prevention is actually punishment in disguise, see *supra* note __.

¹⁷⁶ See, e.g., *Smith v. Doe*, 538 U.S. 84, 113–14 (2003) (Stevens, J., dissenting) (arguing that Alaska’s sex offender registration and notification scheme is punitive but suggesting it was a permissible punishment going forward). While there is a possibility that some narrow subset of restrictions, such as those imposed on juveniles, might be deemed to violate the prohibition against cruel and unusual punishment, the vast majority of the

blurring the preventive and punitive functions of the law, yielding an almost inevitable mismatch between the preventive and punitive functions.¹⁷⁷ Absent a reform of criminal law to fully embrace the preventive purpose, criminal punishments will persist either too long or not long enough to achieve the preventive goals.

As applied to national security, immigration-related, and other executive branch-imposed restraints, a punishment frame would provide prospective, procedural benefits – resulting in enhanced criminal law procedural protections and increased transparency as to the nature of the triggering action or offense. Such procedural safeguards likely would no doubt yield some concrete effects: helping to catch outright errors, such as misidentification of a target, and presumably leading to a lower incidence of such restraints. That said, many of these same preventive measures likely would be redefined as punishment – imposed in response to a range of inchoate and broadly defined crimes.¹⁷⁸ This could ultimately put targets in a worse-off position, subjecting them to the long-term grip of the criminal justice system, when a temporary, short-lived preventive restraint might have addressed the state’s underlying security concern.¹⁷⁹

Such a shift also threatens to unduly tie the state’s hands, leaving critical threats unchecked. While this Article focuses on the overlooked

restraints likely would survive court challenge. *See, e.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (emphasizing that the Eighth Amendment “does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (“Outside the context of capital punishment, successful challenges to the proportionality of particular sentences [are] exceedingly rare.”).

¹⁷⁷ As many scholars have noted, the increasingly utilitarian-minded, preventive focus of the criminal justice system has undermined the blaming and censoring function of punishment and thereby diluted one of its most important purposes. *See, e.g.*, Steiker, *supra* note 118; Robinson, *supra* note 118, at 1432 (warning that the preventive shift of the criminal justice system “perverts the justice process and undercuts the criminal justice system’s long-term effectiveness in controlling crime”); Larry Alexander & Kimberly Kessler Ferzan, *Danger: The Ethics of Preemptive Action*, 9 OHIO ST. J. OF CRIM. L. 637 (2012) (arguing that the criminal law should only punish culpable acts, but that other preventive restraints on liberty may be justified to deal with what they label “culpable aggressors”). *But see* Slobogin, *supra* note 118 (making an argument that the preventive tilt of the criminal justice system should be embraced).

¹⁷⁸ *See, e.g.*, William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006) (highlighting the ways in which the Supreme Court’s focus on policing and trial procedure has left substantive criminal law and noncapital sentencing largely unchecked); *cf.* Carol Steiker, *Proportionality as a Limit on Preventive Detention*, in Andrew Ashworth, Lucia Zedner, and Patrick Tomlin, eds., PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 194, 211-212 (2013) (“[T]he only way for a proportionality constraint on preventive confinement to serve as a constraint on government power is to have some similarly robust constraint against disproportionate *criminal* sentencing”) (emphasis in the original). As an example of the potentially broad reach of the criminal law, *see* *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

¹⁷⁹ *See, e.g.*, Chin, *supra* note 181, and Alexander, *supra* note 182 (describing pervasive and invasive collateral consequences imposed on convicted criminals).

liberty interests, risks of error, and pressures for expansion associated with targeted, preventive restraints, it does not deny the state's important interest in, and arguable obligation to, minimize risk posed by dangerous individuals to other innocent bystanders – including in situations where criminal prosecution is not immediately feasible. Imagine, for example, a foreign partner provides the intelligence community credible reports that a particular individual plans to detonate a commercial airliner. In such a case, the government should be able to prevent him from boarding a plane, or at least subject him to extensive and potentially time-consuming pre-boarding screening, even if the Department of Justice had not yet gathered enough usable evidence to build a criminal case.

In what follows, I assume that targeted, non-custodial, preventive restraints can serve a legitimate government interest in community safety and national security, but argue that there ought to be much more meaningful limits on their use and procedural protections in place than currently exist.

B. To the Courts

i. Near-Total Restraints

A searching inquiry into the liberty interests at stake should lead court to recognize the way in which comprehensive, non-custodial restraints can impose a form of de facto imprisonment. The terrorism-related financial sanctions as applied to U.S. residents and most extreme restrictions imposed on sex offenders fall into this category. They should be treated as analogous to – and subject to the same limits as – preventive detention. Just as the state is, outside the context of wartime detention,¹⁸⁰ prohibited from subjecting individuals to indefinite physical commitment based on a finding of dangerousness alone, so, too, should the state be prohibited from imposing comprehensive and indefinite non-custodial restraints solely on a theory that the individual or entity poses a future risk.¹⁸¹

Implicit in the Supreme Court's approach to preventive detention is an appreciation of the significant liberty interests at stake, the ways in which preventive restraints fail to respect the moral autonomy of individuals, and the need for strict limits on their use.¹⁸² The Supreme

¹⁸⁰ Of course, even wartime detention is limited in time by the duration of the actual armed conflict.

¹⁸¹ See *Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (“A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment.”).

¹⁸² To be clear, I do not mean to suggest that the limits placed on preventive detention are in practice as effective as they are in theory, or even ideal as a matter of theory. See, e.g., Steiker, *Foreword: The Limits of the Preventive State*, *supra* note __ (offering a powerful critique of the Court's reasoning in *Hendricks*); see also Eric S. Janus, *THE FAILURE TO*

Court has, for example, concluded that a prior conviction alone cannot justify indefinite, preventive detention.¹⁸³ Preventive detention based on dangerousness alone is permitted in limited situations: when time-limited (such as material witness or pre-trial detentions), based on an individualized assessment, subject to court oversight, and based on a narrow tailoring of the government interest and preventive restraint.¹⁸⁴

Comprehensive, non-custodial restraints should be subject to these same limits. Such restraints would be permissible in two circumstances. First, they could be applied as an alternative to otherwise sanctioned forms of preventive detention, such as civil commitment, detention of presumptively dangerous aliens, or pre-trial detention, but only for so long as necessary and subject to the same procedural requirements as would apply to the equivalent form of preventive detention. Second, they could be permitted in additional, limited situations if narrowly tailored to a discrete and compelling government need, time-limited, subject to court oversight and regular reviews, based on an individualized assessment, and premised on a finding that less restrictive alternatives are not reasonably feasible.

Under this approach, the most onerous residential, employment and other related restrictions on sex offenders would be subject to the same substantive and procedural limits that apply to the civil commitment of sex offenders. Consistent with the Supreme Court holdings in *Kansas v. Hendricks*¹⁸⁵ and *Kansas v. Crane*,¹⁸⁶ these restrictions could be upheld only if based on an individualized assessment of dangerousness *and* mental abnormality making it seriously difficult for the individual to control his

PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTATIVE STATE 27 (2006) (arguing that the “judicial promised of principled limitations [with respect to civil commitment for sex offenders] are belied in application”). But these limits do at least establish a set of substantive constraints, even if excessively elastic, as to when preventive detention can be applied—limits that are lacking with respect to targeted, preventive measures that fall short of physical incapacitation.

¹⁸³ *Id.* See also *Zadvydas v. Davis*, 533 U.S. 678 (2001) (holding that status as a deportable alien alone is a constitutionally suspect justification for indefinite detention).

¹⁸⁴ Although the Supreme Court has never in a majority opinion claimed to apply “strict scrutiny” to the review of preventive detention, it has in practice required a narrow tailoring of the government interest and preventive, custodial restraint. See, e.g., *United States v. Salerno*, 481 U.S. 739, 755 (1987) (“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (describing detention scheme as lacking a “reasonable relation” to the government purpose, but in practice engaging in a much more searching inquiry than bare rationality review generally employs); see also Klein & Witte, *supra* note __, at 88 (describing the ways in which preventive detention is countenanced, but “only to the extent necessary to prevent [grave public] harms.”).

¹⁸⁵ 521 U.S. at 346.

¹⁸⁶ 534 U.S. at 407.

behavior.¹⁸⁷ Adjudications would take place before an independent adjudicator; the burden placed on the government to prove that the criteria are met by clear and convincing evidence; and the targeted individual entitled to counsel, present evidence, and cross-examine the government’s witnesses.¹⁸⁸ Regular reviews would help to ensure that the conditions justifying the restraints persist. (Other less restrictive conditions imposed on sex offenders that do not amount to near-total control could continue to be imposed without meeting all of these requirements, but there would need to be a much more nuanced means-ends tailoring than currently takes place, as discussed in subsection ii, below.)

The comprehensive and indefinite prohibitions on working or engaging in any financial transaction imposed on U.S. residents who have been labeled “specially designated global terrorists” similarly should be subject to the same limits that apply to preventive detention. Thus, they would be upheld only if the government were able to establish that the prohibitions are narrowly tailored to a compelling government interest and that less restrictive means are unavailable. Given expansive terrorism statutes that permit prosecution and pre-trial incapacitation of persons who provide material support to terrorists or terrorist groups and allow for civil injunctions to be issued pending investigation, it is hard to imagine how the current regime could be justified.¹⁸⁹ While some such sanctions might be permissible as a gap-filler (*i.e.*, used to prevent a suspect group or individual from financing terrorism during the early investigatory stages of a case), it is hard to explain a legitimate government need beyond such limited measures. At some point, the government should be required either to bring a criminal case or to lift the restriction – as is the case with pre-trial detention and material witness warrants.

One need not agree, however, with the specifics to accept the basic insight: certain pre-crime, non-custodial restraints impose such pervasive restrictions on the ability to lead a free and meaningful life that courts should treat them as a form of de facto imprisonment, triggering the same

¹⁸⁷ To reiterate, I do not suggest that these systems of preventive, civil commitment are ideal – particularly as a matter of practice. But they do impose important limits on who can be subject to these restraints, and, at least in theory, take into account the moral autonomy of their targets. *See, supra*, note 180.

¹⁸⁸ *See, e.g.*, *Addington v. Texas*, 441 U.S. 418 (1979).

¹⁸⁹ *See, e.g.*, 18 U.S.C. §§ 2339A (2006) (providing material support to terrorism); 2339B (2006) (providing material support or resources to designated terrorist organizations); 2339C (2006) (prohibition against the financing of terrorism). 18 U.S.C. § 2339B(c) also explicitly authorizes the Attorney General to seek a civil injunction whenever it “appears” that an individual is engaging in or “about to” engage in a violation of the prohibition against providing material support to a designated terrorist organization, and subsection (f) includes protections against the disclosure of classified evidence.

substantive and procedural rights as apply to preventive detention.¹⁹⁰ The debate then shifts to an argument as to the appropriate substantive and procedural limits that apply to such core deprivations of liberty, whether brought about through *de jure* or *de facto* preventive detention. The outcome of that debate controls – setting the limits for preventive detention *and* the equivalent forms of non-custodial restraint. Pervasive non-custodial restraints can no longer be left unregulated or subject to “bare rationality review” simply because they do not physically place an individual behind bars.¹⁹¹

ii. Partial Incapacitation

Most non-custodial pre-crime restraints are not so comprehensive that they can be fairly analogized to *de facto* imprisonment. But they too should be subject to heightened substantive scrutiny and procedural limits. Absent compelling reasons to the contrary, courts should demand a well-tailored, adjudicatory model, which will help to reduce the risk of error and better reflect the moral autonomy of its targets, even if it cannot fully cure the problem of false positives. Such an approach concededly may also increase the number of false negatives in some cases, given the near-impossibility of total accuracy in the prediction of risk. But some degree of risk assumption is both necessary – and inherent – in any society that remotely calls itself free; efforts to fully eliminate all risk will tend to move us closer and closer to a totalitarian society in which the government controls everything we do and everywhere we go.¹⁹²

Substantive Limits

¹⁹⁰ Analogous claims have been made in the context of habeas litigation, with registered sex offenders asserting constructive custody given based on onerous registration and reporting requirements. Although such claims have been rejected, *see, e.g.*, *Wilson v. Flaherty*, 689 F.3d 332, 337-38 (4th Cir. 2012) (citing cases), courts have not yet adjudicated a case in which the petitioner was subject to pervasive residential restrictions and limitations on his movements in addition to registration requirements. *See also id.* at 345-349 (Wynn, J., dissenting) (offering powerful argument as to why registered sex offender should be deemed “in custody” for purposes of habeas jurisdiction).

¹⁹¹ *See, e.g.*, Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1121 (describing “arbitrary and capricious review whose intensity has been dialed down to a minimum”).

¹⁹² That said, there are an array of risk-prevention initiatives that are not coercive and targeted – ranging from the simple self-protection measures like installation of alarm systems to traffic control measures to early childhood education. *See, e.g.*, James J. Heckman and Dimitriy V. Masterov, *The Productivity Argument for Investing in Young Children*, Working Paper No. 5, Invest in Kids Working Group, Oct. 2004, available at: http://jenni.uchicago.edu/Invest/FILES/dugger_2004-12-02_dvm.pdf at 12 (describing as “one of the best-established empirical regularities in economics is that education reduces crime” and preventing evidence that investment in early childhood education can reduce crime)

As described in detail in Part II, partial, targeted restraints deny their targets respect for their moral autonomy and equal treatment – treating them as less worthy than those not subject to the restraint, stamping them as dangerous, and failing to give them an opportunity to make the “right” choice and thereby prove their moral worthiness. This, in and of itself, should prompt additional scrutiny by courts. A more searching inquiry will also reveal the way in which many such restraints infringe specific, substantive liberty interests that the Supreme Court has declared worthy of protection – thus raising due process concerns.¹⁹³

Given these costs, courts should thus demand more than a mere rational relationship between the government’s stated interest and the restraint being imposed. They should instead engage in a searching assessment of how the scheme furthers the governmental interest, how it burdens liberty interests, and whether there are practical and less burdensome ways of furthering the relevant government interest.¹⁹⁴ Unless the burden is proportional to the government interest, it should not survive. If there are other reasonably available and less intrusive alternatives, they should be applied.¹⁹⁵

A searching inquiry into the No Fly List, for example, reveals the way it burdens, albeit without extinguishing, long-recognized interests in interstate travel, association, and pursuit of employment of one’s choosing. Among the many questions that the courts should ask: Is there a sound basis for concluding that individuals who meet the (still secret)

¹⁹³ See, *supra*, notes 124-130 and accompanying text. In *Paradigms of Restraint*, *supra* note __, at 1404-05, Murphy also discusses equal protection analysis as a possible doctrinal hook for evaluating these types of restraints, highlighting the ways in which targeted, preventive measures should be understood as impacting discrete and insular minorities. While I consider equal protection principles as relevant to an analysis of the liberty consequences of targeted, non-custodial restraints, see Part II.A.ii, *infra*, I am skeptical that equal protection analysis will do much work without a separate and independent determination that the scheme also infringes certain fundamental liberty interests. See also Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 961 n. 35 (2002) (offering an interesting analysis of the interaction between equal protection, fundamental rights, and substantive due process).

¹⁹⁴ This approach tracks the careful interest balancing suggested by Justice Stephen Breyer in, among other places, his dissenting opinion in *District of Columbia v. Heller*, 554 U.S. 570, 693 (2008) (Breyer, J., dissenting); see also Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA. L. REV. 1267, 1336-37 (suggesting that even strict scrutiny has in many instances collapsed into such a proportionality test, in which courts balance interests and assess marginal risks).

¹⁹⁵ I do not intend to suggest that such balancing and proportionality analysis will fully counter the incentives toward overreach and expansion discussed in Part II. See, e.g., Steiker, *Proportionality as a Limit on Preventive Justice*, *supra* note __ for an incredibly thoughtful analysis of the promises and many limits on proportionality’s ability to constrain in the context of preventive justice. But it does provide a way, consistent with current doctrine, to begin to set some outer limits as to what is constitutionally permissible when the state seeks to preventively restrain.

criteria pose a threat to aviation security? Is the restriction on travel – and all of the related intrusions on individual liberty – proportionate to the interest in aviation security? Are there reasonably available alternatives – such as extensive body and luggage searches or deployment of air marshals – of protecting against the threat? In doing so, the courts should be pushing the executive toward a narrow tailoring of restraint to need.

Courts should examine how these answers change over time. While it might be legitimate, for example, to prevent a suspected terrorist from boarding a plane soon after learning of his involvement in a nascent terrorist plot, is it legitimate for the restraint to last months or years, even in the absence of sufficient evidence to bring a criminal charge for an inchoate conspiracy or attempt crime? What might be permissible as a stop-gap measure might not still be justified months or years later.

At least one recent ruling has demonstrated, courts are well positioned to engage in this type of searching inquiry and analysis. As discussed in Part I.C, in *In re Taylor*, a California appellate court examined in detail the practical effect of residential restrictions imposed on sex offenders in San Diego. Drawing on a well-developed lower-court record, the court highlighted the ways the restrictions relegated such offenders to less than three percent of the city’s residences, prohibited offenders from living with family members, and effectively rendered many offenders homeless. It concluded that the restrictions significantly burdened the right to travel, were not narrowly tailored to a compelling government need, and were therefore unconstitutional.¹⁹⁶ While the court concluded that such restrictions can still be imposed based on an individualized assessment of threat and need, it ruled that they can no longer be applied to all registered sex offenders, without a particularized assessment of the risk posed. The case, which is as of this writing on appeal to the California Supreme Court, offers precisely the approach I suggest here.

Procedural Limits

In addition to ensuring that the substantive criteria for being subject to a particular restraint are appropriately tailored to need, courts should also demand heightened procedural protections in the application of such restraints. Applying the prevailing *Mathews v. Eldridge* balancing test,¹⁹⁷ procedural requirements will vary depending on three key factors: the extent of the deprivation and individual interest affected; the risk of erroneous deprivation and probable value of additional procedural safeguards; and the governmental interests at stake, including the fiscal and administrative burdens of additional procedural safeguards. Given

¹⁹⁶ See *In re Taylor*, 147 Cal. Rptr. 3d 64 (Cal. App. 2012); see also discussion, *supra*, Part II.C.

¹⁹⁷ 424 U.S. 319, 335 (1976).

the preventive nature of these restraints and the obvious difficulties in predicting the future, the risk of error ought to be understood as high. A proper calibration of the liberty interest further weighs the scale in favor of increased procedural requirements.

Such a recalibrated *Mathews v. Eldridge* balancing test should yield a set of minimal procedural safeguards in the imposition of preventive restraints, including transparency as to the criteria for being subjected to the pre-crime restraint, post-deprivation notice, a meaningful opportunity to challenge the restraint before an independent adjudicator, and individualized, periodic reviews of any restraint that imposes an ongoing deprivation¹⁹⁸ – consistent with a tailored, adjudicatory model of pre-crime restraints. Where applicable, the executive should provide an unclassified summary of classified information relied on in making the underlying designation decision or cleared counsel access to the classified information – something that courts have already begun to demand in the context of the terrorism-related financial sanction regime.¹⁹⁹

Absent a compelling justification otherwise, restraints should be presumptively time-limited. At a minimum, there ought to be an effective mechanism by which targets may rebut a presumption of continuing dangerousness, or apply for some sort of exemption.²⁰⁰

To be clear, such safeguards can hardly be expected to offer an equal counterweight to the risk aversion of adjudicators and legislators and many other incentives in favor of overbreadth and overreach.²⁰¹ They can, however, provide important protections on the margins, minimizing cases of misidentification and providing relief for those who would not or could not possibly commit the types of crimes the restraints are designed to protect against – *i.e.*, physically disabled sex offenders.

iii. The Cumulative Effect

In some cases, a series of partial restraints might each individually pass constitutional muster, yet together operate as a comprehensive set of

¹⁹⁸ This final qualification is meant to distinguish restraints, such as stops and frisks, that are relatively fleeting, from restraints like the No Fly List or revocation of an employment license that have ongoing and significant impacts on where one can go and what they can do. I do not argue that every stop and frisk should to be subject to judicial review. If, however, a particular individual were designated a presumptively dangerous individual and subject to a stop and frisk on a daily basis as a result, that would be a case for which independent oversight is warranted.

¹⁹⁹ See, *infra*, Part I.A.

²⁰⁰ This will undoubtedly add to the costs of administering such restraints. In some limited instances the state may be able to demonstrate that the administrative burden of regular reviews or delisting mechanisms is excessively high relative to the individual interest at stake. But in most cases regular reviews and delisting mechanisms should be understood as essential moderating influences on the state's impulse to manage risk through targeted restraint.

²⁰¹ See discussion *supra* note 195,

restraints akin to total imprisonment. Professor Gabriel Chin, for example, has persuasively argued that the combination of collateral consequences imposed on convicted criminals is akin to the imposition of civil death.²⁰² Professor Michelle Alexander has made a similar point, describing the combination of collateral consequences as the new Jim Crow.²⁰³ The combination of non-punitive restraints imposed on persons who have not even been convicted of a crime can have a similarly dramatic effect.

Because each regime operates in isolation, often with specific and discrete means of implementation and review, individuals lack an effective mechanism to challenge the combined effect of such restraints, even in cases amounting to de facto imprisonment. This should change. Courts could begin to recognize a cause of action in the form of an Administrative Procedure Act claim or a petition for a writ of habeas corpus based on claims of constructive imprisonment. Named defendants would include those responsible for each discrete restraint as well as the Attorney General of the implementing sovereign.²⁰⁴ The attorneys general should have the responsibility of defending – or mitigating – the combined operation of the restraints within their jurisdiction.

B. To Legislatures and the Executive Branch

In Part II.B, I described in detail the ways in which legislatures and executive branch officials are pushed to manage risk, err on the side of caution, and expand restraints in response to real or perceived security threats, even if the expansions provide only a false sense of security. At some point, however, the restraints become so expansive that they are no longer limited to the “other” and become a concern of “us.” At this point, there is the room for – and necessity of – self-reflection by both the politicians and the people they represent.

This happened in Georgia, for example, when Wendy Whittaker, a white woman who was subject to onerous registration requirements and residential limits based on a consensual act of oral sex engaged in as a teenager, became a poster child for the excessive restrictions imposed on sex offenders. Her story promoted the Georgia legislature to pass a law allowing certain offenders to petition the court for removal from the

²⁰² Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, *supra* note

²⁰³ MICHELLE ALEXANDER, *THE NEW JIM CROW* (2009).

²⁰⁴ Such causes of action can only work if a single sovereign is implementing all relevant restraints. In many cases, however, this will not be the case. *See, e.g.*, Murphy, *Paradigms of Restraint*, at 1378-1379 (raising concerns about the ways in which multiple jurisdictions may impose cumulative restraints).

registry – a change she ultimately benefited from.²⁰⁵ Similarly, when former Senator Edward M. Kennedy asserted in 2004 that he was on a No Fly List, based on several instances in which he had been stopped and questioned before flying, Congress suddenly became interested, at least briefly, in reviewing alleged errors associated with the No Fly List.²⁰⁶ In other instances budgetary concerns might yield the impetus for change. Lake Forest, California, for example, lifted restrictions on sex offenders entering public parks and beaches in order to avoid the costs of defending legal challenges.²⁰⁷

These moments provide important opportunities for legislatures and executive branch officials to take steps to rein in otherwise overbroad statutes, regulations, and practices. They also point to the need for more responsible dialogue and analysis to accurately match the risk and restraint from the outset. Certain key principles ought to guide the decision-making.

First, executive branch officials and legislatures should engage in a more thorough accounting of the liberty consequences of proposed restraints, tailor the restraint to the need, and consider less restrictive means of achieving the same goals. While the incentives often push in favor of expanding targeted prevention, a combination of budgetary pressures, commitment to responsible governance, and pressure from civil society can help promote this type of searching inquiry.

Second, undifferentiated, rule-based restraints imposed by the executive branch alone should be categorically avoided. The executive branch should not be able to conclude, for example, that some percentage of men and women from East Asia between the ages of 18 and 30 pose a risk to aviation security and therefore anyone who fits that profile can be permanently barred from flying.²⁰⁸ To the extent that executive-branch imposed restraints are permitted, they should be based on an individualized fact-finding process, with a well-developed administrative record, consistent with an adjudicatory model of pre-crime restraints. There should also be transparency as to the criteria for imposing the

²⁰⁵ See, e.g., Bill Rankin, *Restricted by Registry No More*, ATL. J.-CONST., Sept. 18, 2010. Her lawsuit also prompted several other changes in the law, most of which are designed to alleviate the retroactive consequences of the restrictions. See H.B. 571(Ga. 2010).

²⁰⁶ See, e.g., Sara Kelohuani Goo, *Sen. Kennedy Flagged by No Fly List*, WASH. POST, Aug. 20, 2004.

²⁰⁷ See, e.g., Sarah de Crescendo, *Backpedal on Sex Offender Ban Gets Officials' Attention*, Orange County Register, Dec. 7, 2012, available at: <http://www.ocregister.com/articles/city-379823-sex-cities.html>; Sarah de Crescendo, *Lake Forest Moves to Overturn Sex Offender Ban*, Orange County Register, Dec. 5, 2012, available at <http://www.ocregister.com/articles/sex-379693-county-city.html>.

²⁰⁸ Such a policy would obviously trigger significant equal protection concerns. The same principle ought also protect against the imposition of the No Fly list on all persons who have blue eyes and a dimple, based on statistical evidence suggesting that persons with blue eyes and a dimple are more likely to pose a threat to aviation security.

restraint, post-deprivation notice, and an opportunity for meaningful review. Additional means of circumscribing executive discretion should also be considered, including executive audits of the type suggested by Professor Mariano-Florentino Cuellar²⁰⁹ and vigorous oversight by Inspectors General.

Third, undifferentiated, rule-based restraints following a criminal law adjudication of guilt should be imposed only if the following criteria are met: there is a sound, empirical basis for the legislature to conclude that individuals who have been adjudicated guilty of a particular offense are likely to commit whatever future bad act the restraint is designed to prevent; the restraint is effective in reducing the risk posed; and individualized assessments would either be ineffective (because of difficulties in predicting) or excessively burdensome (because of the administrative costs) relative to the liberty interests at stake.

Fourth, restrictions on seemingly innocuous activity – such as going to the park or buying groceries – should demand a heightened showing of need than restraints on access to inherently dangerous items or knowledge – such as access to guns, the piloting of planes, or security clearances.

Fifth, given their future-oriented nature and associated risks of error, *all* such restraints ought to be subject to regular reviews. At a minimum, there ought to be a meaningful opportunity for a targeted individual to seek an exemption or otherwise establish that he or she does not pose the type of risk the restraint is intended to protect against.

* * *

Some will object that these proposed limits will be overly burdensome, preventing the state from taking needed steps to deal with dangerous individuals. But this framework does not prohibit the use of needed restraints. Rather, the restraints must be tailored and proportionate to a compelling government objective, implemented in a manner consistent with the preventive purpose, and subject to meaningful external oversight. Procedural requirements will no doubt increase the administrative burden on the government, but they are essential to ensure that deprivations of liberty based on a targeted assessment of dangerousness do not persist longer than necessary to serve the preventive purpose. There is, in fact, a persuasive argument that such measures may in fact increase public safety by forcing legislators and executive branch officials to define and pinpoint perceived threats with more accuracy, and by eliminating the false security associated with pervasive, but often ineffective, overbroad restraints.

²⁰⁹ See Cuellar, *Auditing Executive Discretion*, *supra* note __.

Conversely, some will argue that these recommendations are unduly permissive, allowing “punitive”²¹⁰ or “radical”²¹¹ prevention to persist when it should be prohibited altogether. This is a reasonable objection; however, it fails to grapple with the pervasive use, acceptance of, and legitimate government interest in both physical and non-physical forms of prevention. Once one accepts that narrowly targeted and time-limited preventive detention is permissible in limited situations – a view that I hold²¹² – then analogous non-custodial, pre-crime restraints must similarly be permitted. It follows logically that less restrictive, partial restraints are permissible as well. The question remains one of setting the appropriate limits.

A more compelling critique focuses on the limits of either court review or legislative or executive branch restraint. This Article’s proposed framework rests on the assumption that one of two things will happen: Targeted individuals will challenge the restraints, cases will be heard on the merits, courts will engage in a searching and thorough analysis of the individual interest at stake, and they will set meaningful and appropriate limits. Or legislatures and executives will independently rein in the use of such restraints on their own.

There is ample room for skepticism that either will occur.²¹³ But likely imperfection in implementation is not a reason to abandon the project. If taken seriously, the proposed framework should provide litigants with persuasive arguments as to why their cases should be heard and courts better set of tools to evaluate them. Notably, this framework does not demand a reform of existing doctrine, but instead provides courts and litigants with the analytic tools to understand, evaluate, and limit this expanding set of pre-crime restraints applying the governing doctrinal framework.

Meanwhile, civil society can play an important role in raising the profile of the otherwise invisible targets of such measures, by highlighting any excesses or abuses, and by promoting a more responsible debate. If

²¹⁰ Harcourt, *Punitive Preventive Justice: A Critique*, *supra* note __.

²¹¹ Janus, *The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*, *supra* note __.

²¹² See, e.g., Jennifer Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone*, 161 U. PA. L. REV. __ (forthcoming 2013) (accepting the use of law of war detention, but offering a framework for limiting its use).

²¹³ A related, but different critique is premised on concerns about activist courts second-guessing legislative judgments. This, of course, raises a much broader debate about the proper role of the judiciary. As is apparent from this Article, I adopt a view of the judiciary as playing an important counter-majoritarian role, even if only a modest one. See, e.g., Michael Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision-Making*, 13 U. PENN. J. CONST. L. 283, 303 (2010) (describing a third legislative-chamber theory of judicial review that functions by “nudg[ing] the legal system off of a rights-under-protective point and onto a somewhat less under-protective or slightly overprotective point.”)

asked whether the government should be able to keep dangerous terrorists off airplanes, most people would answer yes. If, however, the question is whether the executive should have unreviewable discretion to label someone a suspected terrorist and permanently bar him from flying, the unanimity fades. In reframing the questions to better reflect the liberty interests and risks of error associated with pre-crime restraints, civil society can help to rein in the incentives for overreach and expansion.²¹⁴

Legislators and executive branch officials also should take note of the ways in which overreach can ultimately yield to judicial invalidation or political backlash, divert limited resources from where they are needed most, and, if excessively broad, be so inconsistently enforced that serious threats may fall through the gaps. Having done so, they should exercise self-discipline in both the design and implementation of such restraints.

It is also critical that legislator and executive branch officials avoid assuming a false choice between more or less targeted, coercive prevention as the only means of managing risk. There are an array of other risk-management tools available that do not target particular individuals or classes of individuals with affirmative restraints that may be equally, if not more, effective in reducing risk – including, for example, public education campaigns, investment in childhood education, and mental health treatment. In any event, legislators and executive branch officials should not assume a static world in which targeted, coercive prevention is the only means of enhancing community safety; supplementary, and alternative, forms of managing risk are both available – and needed.²¹⁵

CONCLUSION

Non-custodial, pre-crime restraints are a pervasive part of our legal landscape. They have ballooned over the last two decades and are likely to grow, particularly as technological advances and other innovations make it increasingly easy to monitor and control without resorting to the prison cell. But while there is an extensive literature on both punishment and preventive detention, there has been insufficient attention to the array

²¹⁴ See, e.g., David Cole, *Where Liberty Lies: Civil Society and Individual Rights after 9/11*, 4 WAYNE L. REV. __ (forthcoming 2013) (on file with author) (arguing that nongovernmental organizations played a critically important – and effective – role in curtailing government overreach in response to the September 11, 2001, attacks).

²¹⁵ See supra note 192; see also Allegra McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives* 13 HARV. J. OF THE LEGAL LEFT: UNBOUND __ (forthcoming 2013) (describing the possibility of alternative order-maintaining functions that do not involve coercive restraints) (on file with author).

of non-custodial, non-punitive restraints designed to prevent future bad acts.

This Article highlights three such regimes – the No Fly List, targeted sanction regime, and restrictions imposed on purportedly dangerous sex offenders – as illustrative of a broader set of questions about the limits of the preventive state. It demonstrates how certain non-custodial restraints so fully restrict the capacity to lead a free and meaningful life that they ought to be treated as a form of de facto imprisonment. It also exposes the ways in which all pre-crime restraints create inherent risks of error, abuse, and overreach; stamp their targets with a badge of inferiority; and fail to respect their targets’ moral autonomy. The Article calls on courts, legislatures and the executive branch to meaningfully and reasonably limit their use.