



Home Confinement: An Evolving Sanction in the Federal Criminal Justice System



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1520 H Street, N.W.
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**HOME CONFINEMENT:
AN EVOLVING SANCTION IN THE
FEDERAL CRIMINAL JUSTICE SYSTEM**

**Paul J. Hofer and Barbara S. Meierhoefer
Federal Judicial Center**

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FOREWORD

Concern with crime is both intense and widespread. The public is deeply disturbed by the perceived inability of the law, and more specifically the judicial process and the corrections system, to deter crime. One result has been increased interest in sentencing policy and purposes. The Congress, in the effort to be responsive, established the United States Sentencing Commission, whose guidelines currently await congressional consideration. Understandably, they have generated considerable controversy. In the view of many, the answer lies in greater severity of punishment. Current projections of prison population in the federal system warn us to expect increases of major proportions. The Sentencing Commission itself, ascribing much of the cause to recently enacted legislation designed to curb drug abuse, predicts dramatic increases in prison population within a relatively short period of time.

The fact is, however, that it is simply not possible sharply to increase the number of prisoners without substantial increases in the funds necessary to provide for them. Prisons and beds for prisoners do not come cheap. Institutions must be staffed and guards must be paid. Yet, it is far from clear that in these days of budgetary constraint our society is willing to pay for increased imprisonment. In this climate, and for other reasons more closely related to sentencing goals, there has been substantial interest in home confinement as a viable alternative to institutional incarceration.

Some experimentation with home confinement is already taking place in the federal system; pilot programs are in place from the Western District of Virginia to the District of Arizona. Under the leadership of Judge Warren K. Urbom, the District of Nebraska has been in the forefront of such experimentation. At last count, that court was responsible for over half the federal cases in which home confinement was imposed as a condition of probation.

What is needed at the present time is a sharing of information, a clear statement of the policy issues that must be considered, and a careful canvas of the practicalities—the specific terms and conditions that ultimately make for success or failure of any such inno-

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vation. The present study, suggested to us by Judge Urbom, is intended to help meet those needs.

A. Leo Levin

I. INTRODUCTION

Of the many responsibilities that fall to judges, the sentencing of criminal offenders is among the most challenging, controversial, and troubling. Few issues cut so deeply to the foundations of the criminal law—the meaning of responsibility and the protection of society. Tensions between individualized versus uniform sanctions for criminal behavior, and between intuitive versus explicit reasoning in justifying sanctions, guarantee that the search for consensus in sentencing will be a formidable task.

This is an especially important time for the development of sentencing policy. The United States Sentencing Commission has developed guidelines that will significantly structure judicial discretion and may dramatically alter sentencing policy in the federal courts. Sentences have always reflected a combination of multiple, in some cases contradictory, purposes. The new guidelines do not eliminate the conflicts among retributive, rehabilitative, and social control theories of criminal sanctions, but they do alter the mix of these purposes in the rationale underlying federal sentences.

This report seeks to place the evolving sentencing option of home confinement—also known as house arrest or home detention, and closely related to intensive supervision on probation—within the larger framework of sentencing policy. The emphasis is on description and evaluation, based on the currently available research and literature, and on our own interviews with those who have developed and implemented home confinement in the federal system. Many of the choices that confront probation officers and judges in designing home confinement programs or imposing individual sentences are reviewed.

Technological developments independent of the law—such as electronic-monitoring devices—are making their own contribution to sentencing policy, especially with regard to the use of home confinement. They have excited considerable public and commercial interest. Companies now offer a variety of monitoring tools: from automatic dialers and voice verification systems that periodically call offenders' homes to confirm they are there, to miniature radio transmitters worn by offenders that emit a signal over a 200-foot radius which can be detected by receivers placed in offenders' homes. One company offers a video phone that transmits a still pic-

ture of whoever answers the intermittent checkup calls.¹ We need a careful and discriminating evaluation of how these devices comport with the purposes of sentencing. Without such an evaluation, judicial practice, like medical or financial practice, could become increasingly driven by technological advances outside its control.

We begin this analysis by defining three terms used throughout the report to differentiate among the types of home confinement. We then review the current status of home confinement in the state and federal systems and present an overview of why such sentences are becoming more prevalent. Next we describe a number of programs now in place, focusing on the variations to consider in developing a home confinement program. We also look at how home confinement fits within traditional sentencing models and examine its success at accomplishing various sentencing goals. We propose research into a number of critical empirical issues. Finally, we review the impact of the proposed federal sentencing guidelines on the availability of home confinement as an option in the federal system.

Many of the issues surrounding home confinement do not turn on questions of empirical facts but on questions of moral and political values. The most common public image of "house arrest"—as a form of political oppression found in totalitarian regimes—illustrates the importance of the values and the intensity of the emotions that home confinement can engender (as well as the importance of defining terms and choosing words carefully).² Fears that

1. So far radio devices are capable only of detecting if offenders leave home; they cannot be used to track all their movements. They do not tell us where offenders go, only whether they remain within the approximately 150-foot radius of the receivers. One company does offer a portable receiver that can be placed in a probation officer's car. It can detect the offender's presence within an approximately one-block radius of wherever the receiver is transported. Transmitters that emit signals over a larger area, permitting offenders to be tracked throughout a city, are under development. We do not yet confront the questions of privacy and dignity raised by such devices, though many have voiced concern that the current generation of monitors is opening the door to later generations of more intrusive devices.

2. Some program developers have attempted to dissociate their programs from this repressive image by avoiding certain terminology. For example, the U.S. District Court for the District of the District of Columbia calls its program RIPS, for residential intensive probation supervision. Florida's state program is known as "community control." We dislike the term "house arrest" not only because it is impolitic but also because it is inaccurate. "Arrest" generally refers to a form of police action without judicial process. Almost all offenders confined to their homes in the United States today have received due process and have been convicted of crimes. (The exceptions are the few pretrial detainees.) Nor is home confinement used for political repression in the United States. (Unfortunately, one of the first and most widely reported sentences of home confinement was imposed in a "political" trial—that of draft resister and nonregistrant David Wayte, who was sentenced to six months in the home of his grandmother.)

the criminal justice system will fail to use home confinement responsibly may be exaggerated, and recent cries of "Orwellian nightmare" raised by the growth of electronic monitoring only add to the heat. But there can be no doubt that important values and rights are implicated by this sentencing option. And although empirical research can describe the effects of house arrest, the fundamental decisions concerning its proper place within a sentencing system are essentially ethical choices. We seek to inform those choices with the best analysis and empirical findings available.

II. WHAT IS HOME CONFINEMENT?

Introduction

Throughout this report, we use the general term *home confinement* to apply to any judicially or administratively imposed condition requiring an offender to remain in his or her residence for any portion of the day. Although home confinement is commonly conceived as part of a judicially imposed initial sentence, it can also be a condition of pretrial release, a condition of parole or other supervised early release from prison, or a sanction for probation or parole violators.

Home confinement can range from nighttime curfew conditions, to detention during all nonworking hours, to continuous twenty-four-hour-a-day incarceration. Enforcement techniques can range from random, intermittent contacts by a supervising officer to continuous electronic monitoring. There are obvious differences in the control of the offender afforded along this range of options, as well as in the punitiveness of the sentence. These differences should be captured in the terminology one uses to describe the types of home confinement.³ As there is no clear consensus among jurists and scholars on the definition of terms, we propose the following typology.⁴ This nomenclature is used throughout the report.

3. The new sentencing guidelines of the U.S. Sentencing Commission, *infra* note 92, at commentary following sec. SF5.2, define the term *home detention* to mean "a program of confinement and supervision that restricts the defendant to his place of residence *continuously or during specified hours*, enforced by appropriate means of surveillance by the probation office. . . . If the confinement is only during specified hours, the defendant shall engage exclusively in gainful employment, community service or treatment during non-residential hours." (Emphasis added.) The commission's use of the term *home detention* includes both off-work confinement and twenty-four-hour-a-day incarceration. We prefer to use *home confinement* as a broader term including both restriction during specified hours and continuous confinement. The latter we call *home incarceration*. Using *home detention* for the broader term leaves us no concise way to make the substantive distinction between continuous confinement and limited confinement during specified hours.

4. Lilly and Ball, early advocates of home confinement programs, have recently proposed the same distinctions among confinement, curfew, detention, and incarceration that we develop below. See Lilly & Ball, *A Brief History of Home Confinement and House Arrest*, 13 N. Ky. L. Rev. 343-74 (1987).

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Curfew

Curfew is a type of home confinement that requires offenders to be at their residence during limited, specified hours, generally at night. Such a condition is a common component of intensive supervision programs. It is the heart of the curfew release program recently implemented by the U.S. Parole Commission and the Federal Bureau of Prisons, in cooperation with the federal probation system. Programs including curfew vary widely in the strictness of supervision, though most call for more officer-client contacts than required under normal probation. Many require participation in treatment, training, or drug testing; payment of fees, fines, or restitution; and community service.

Home Detention

More severe than curfew, home detention requires that offenders remain at home at all times, except for employment, education, treatment, or other times specified for the purchase of food or for medical emergencies.⁵ The offenders' freedom to go where they please is completely restricted, though they may remain employed, go to treatment programs, and continue to support their families and pay fees or restitution. Free time must be spent at home. Home detention, if strictly enforced, is more punishing than curfew and affords greater control over an offender's activities.

Home Incarceration

Incarceration at home is the most severe form of home confinement; the home substitutes for prison. Offenders are to remain there at all times with very limited exceptions (e.g., religious services or medical treatment). Under this condition, offenders are precluded from shopping, from working, or from having visitors outside prescribed hours. In some cases offenders may not even be allowed to go outside into their yards. The goal is to punish and maintain control over the offender. In the words of the developer of an early home incarceration program, "We're not sending them home to have a good time."⁶

5. See *United States v. Murphy*, 108 F.R.D. 437 (1985), for an early example of a home detention sentence in the federal system.

6. Carl Hopkins, Contra Costa County, Calif., probation officer, quoted in *No Place Like Home*, 14 *Crim. Just. Newsl.* 3 (1983).

Origins of Home Confinement

Home confinement is not an entirely new criminal sanction. Curfews have long been imposed on juveniles and, to a lesser extent, on adult probationers and parolees. Other restrictions on mobility—such as restrictions on place of residence and prohibitions against frequenting undesirable locations or leaving the jurisdiction—are well-established options available to judges for tailoring community-based sentences to the offender. The traditional purposes to be served by these restrictions have been the same as those for community supervision in general: facilitate supervision of the offender and increase the chances for successful rehabilitation by encouraging good behavior.

The new interest in home confinement has been kindled because it is seen as a distinct sentencing alternative, different from both incarceration in prison and “straight” probation, and capable of promoting additional penal goals. Although the need for alternative sentences has long been recognized, a convergence of recent concerns and developments has increased the demand for new options. There has been mounting public pressure to get tough with crime. Recent reports suggesting that traditional probation does not afford sufficient protection to the community have disturbed the criminal justice community.⁷ Prison overcrowding confronts correctional officials at the same time that fiscal restraint is demanded. Prison is now commonly recognized as failing as a rehabilitative sanction. Victims’ rights organizations have encouraged the reemergence of victim restitution as an important sentencing objective.

The appeal of home confinement is that it seems to meet many of these pressing concerns. It brings community placement—long thought to be an aspect of rehabilitation—within the framework of justice and punishment models of sentencing.⁸ Home confinement may substitute as a cost-effective alternative to imprisonment for punishment and deterrence. If supervision or monitoring of offenders sentenced to home confinement is greater than that of regular probationers or parolees, then home confinement may afford greater protection of the community. Improvements in the technology of monitoring lead many to believe that restrictions on offend-

7. See J. Petersilia, *Granting Felons Probation: Public Risks and Alternatives* (Rand Corp. 1985). This study found that two-thirds of a sample of 1,700 granted probation in California were rearrested in the three years following sentencing.

8. See generally Thomson, *Prospects for Justice Model Probation*, in P. D. McAnany et al. (eds.), *Probation and Justice: Reconsideration of Mission* (Oelgeschlager, Gunn & Hain 1984).

ers' movement in the community could now be given real punch. If the level of confinement is short of home incarceration (i.e., offenders are permitted to leave home to work), offenders can be productive, tax-paying members of society (and perhaps pay for their own supervision). They can also perform community service and earn money to pay restitution. There is less disruption of the family, and the offender can support dependents and/or provide child care. The drain on welfare and foster child systems is thereby reduced. In addition, community educational and treatment resources are available to help rehabilitate the offender.

For these reasons, home confinement appeals to many as an intermediate sentencing alternative. Sentences of home confinement can be tailored to satisfy simultaneously many of the multiple goals of criminal sanctions. A combination of strictly enforced confinement and the imposition of fines, restitution, and community service can be fashioned to punish and deter in proportion to the seriousness of the crime. Careful monitoring can significantly incapacitate the offender and protect the public. Mandatory training, treatment, and testing can help change the life-styles that lead to further crime. We return to an analysis of how various sentencing purposes can be advanced by home confinement in a later section. Before we hail home confinement as a panacea, we must take a hard look at what we know about it and what we still need to find out.

Status of Home Confinement Programs

State Programs

The state courts have taken the lead in exploring home confinement. At least forty-two states had or were planning programs as of fall 1985.⁹ Florida has the largest program, with almost eighteen thousand people confined to their homes over the past three years.¹⁰ Georgia was the first to impose significant curfews on offenders in its large intensive supervision program, begun in 1982. More than half of the thirty-one state intensive supervision programs surveyed in 1986 included curfew as a component, requiring

9. Petersilia, *Exploring the Option of House Arrest*, 50 Fed. Probation 50 (1986) (reporting the results of a Rand Corp. mail survey).

10. *Community Control "House Arrest": A Three-Year Longitudinal Report* (Florida Department of Corrections, Probation and Parole Services, January 1987) [hereinafter Florida Report].

offenders to be home during specified times of the day, typically 10:00 p.m. to 6:00 a.m.¹¹

Most of the state programs, though still relatively new, are considered successful by their developers. Empirical evaluation studies are under way in several states, but for now we must rely on the opinions of those with firsthand experience with the programs. By and large, home confinement has created a very favorable impression; the number of programs continues to expand dramatically, as does the size of existing ones. Programs have often accomplished important sentencing goals.

But the success has not been universal. Contra Costa County, California, has discontinued its program even though most observers felt it showed encouraging results in its first year. The problem was one increasingly typical of home confinement programs: They are not as large as initially projected. Judges remain reluctant to take risks with an innovative sentence. Probation officers are concerned that failures will irreparably damage the reputation of the home confinement option. They are extremely cautious in recommending people for the sentence. Offenders decline to apply to programs that may keep them under surveillance for more time than they would serve in prison. Many offenders do not have a suitable home or a job, typical prerequisites.

There is widespread agreement that a home confinement sentence is most successful when it is given within the framework of a well-defined program developed by probation and law enforcement officers, along with the judiciary. Florida's program resulted from intensive preparation and training of judges, law enforcement personnel, and the public. Policy manuals for probation officers, catalogs of community service and treatment resources for judges, and press releases for the public were all prepared as part of a highly coordinated effort to win acceptance of the program. New Jersey's success in winning acceptance for its large-scale intensive supervision program resulted from early and continuing participation by the judiciary and by prison and law enforcement officials.

Since the costs of creating full-scale home confinement policies and procedures can be substantial, sophisticated program development will pay only if there is significant use of the option once it is in place. In Contra Costa County, the program attained only 15 percent of the originally anticipated beds-per-day reduction in the local jail. With such low utilization, the program—though considered successful for the offenders supervised—was judged to be more

11. Byrne, *The Control Controversy: A Preliminary Examination of Intensive Probation Supervision Programs in the United States*, 50 *Fed. Probation* 4 (1986).

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costly during its initial year than imprisonment of the offenders would have been.¹²

Federal Programs

The largest home confinement program in the federal system is curfew parole, a cooperative arrangement among the Bureau of Prisons, the Parole Commission, and the federal probation system. Under the program, in effect since March 1986, parolees are supervised under a curfew in lieu of serving the last sixty days of their sentence in a community treatment center. As of February 20, 1987, 1,108 parolees had been released on curfew parole.

In addition to this nationwide program, an experimental program featuring electronic monitoring of prison releasees in lieu of placement in community treatment centers is in the planning stages in two pilot districts, the Southern District of Florida and the Central District of California. In California, parolees will be placed in home detention for the final four months of their imprisonment. All will be required to work full-time and to participate in drug treatment and testing, vocational training, and counseling when deemed appropriate.¹³

The use of home confinement as an "up-front" sentencing option in the federal system is much less common. In early 1986, within one month of each other, judges in the Central District of California and the Eastern District of New York imposed it as a condition of probation. In New York, the sentence was the first in an explicit program developed by the probation office. Seven other districts have followed with explicit home confinement programs: the Southern District of Florida, Western District of Virginia, District of Arizona, District of Nebraska, District of the District of Columbia, Western District of Missouri, and Eastern District of Wisconsin. At least one other, the Northern District of California, will soon inaugurate a program. In addition, the condition is being imposed on a case-by-case basis in at least two other courts: the Northern District of West Virginia and Southern District of Texas. With the exception of one district's program, all of the federal programs are designed to use home confinement in lieu of prison. The programs are meant to divert offenders from prison, not to widen the net of surveillance and control for people who would otherwise get probation. Only the Eastern District of Wisconsin explicitly designed its program to apply both to those who would ordinarily receive short

12. End of Project Report, Contra Costa County Adult Home Detention Program (April 1985).

13. R. M. Latta, Statement of Work: Home Detention Project (Mar. 6, 1987).

terms in prison and to those who would ordinarily get long terms of probation. Most of the federal programs fall into the category of home detention. Three districts, however, have had offenders serving more restrictive terms of home incarceration.¹⁴

The Eastern District of Wisconsin has a two-stage program. The first stage consists of home detention, while the second is a less restrictive curfew program that applies to curfew parolees as well as to probationers. Successful adjustment to stage 1 for six months is a requirement for probationers to progress to stage 2. The regular six-month case review process is the administrative vehicle used to determine whether a modification to stage 2 is appropriate.

Federal judges have used home confinement as a condition of probation sparingly. At last systematic count, there were only sixty-five cases in the entire federal system.¹⁵ More than half of these were in a single district—the District of Nebraska. Aside from a few sentence innovators, judges remain largely unfamiliar with the rationale and potential of this new sanction. Some may also be uncomfortable with its repressive implications or leery of its ability to control offenders. Probation officers in a handful of districts have taken the initiative and approached judges with recommendations of programs or home confinement sentences for particular offenders. But probation office staffing levels have not been adjusted to take account of this option, and general policies and procedures have not yet been promulgated. One probation officer, reviewing evidence of the growing use of home confinement, has asked, "Are we ready?"¹⁶

To understand better the potential of home confinement, a description of the decisions that arise and program elements available in developing home confinement as a federal sanction may be helpful. Developers must decide on procedures and criteria for selecting offenders, the type of monitoring desired, the method of enforcement, and other conditions to be combined with home confinement. They must find ways to pay for the intensive offender supervision required to enforce home confinement. The next chapters describe approaches found in existent programs or proposed in the literature.

14. They are the Middle District of Florida, District of the District of Columbia, and Northern District of West Virginia.

15. Fitzsimons, *Home Detention in the U.S. Probation System*, News & Views, Feb. 23, 1987, at 8. These numbers do not reflect home confinement sentences imposed outside of the officially established programs. It is not possible to determine the actual total because the Administrative Office of the U.S. Courts has only recently begun to collect data on imposition of these sentences.

16. Muttart, *House Arrest: Are We Ready?*, News & Views, Jan. 12, 1987, at 4.

III. PROGRAM ELEMENTS

The three types of home confinement represent a range of punishment severity and offender control. Within each type, however, program developers have wide latitude to mix elements promoting different sentencing goals. For example, a sentence including a curfew condition, though the least severe in terms of the hours the offender is required to be at home, can still be made highly punishing if the curfew is strictly enforced by electronic monitoring for many months and if the sentence includes random mandatory drug testing, community service, fees and fines, and victim restitution.

The important point is for judges, probation officers, and others working in criminal justice to have a shared understanding of what sentences mean and what programs can accomplish. Probation officers must understand the purpose and intended severity of a particular sentence so that they know how to use their discretion to request, for example, a revocation hearing after a violation of program rules. Judges must understand the nature of any program available in the district so that they have confidence, for example, that the offender will be adequately controlled.

Together these authorities must decide what elements of home confinement they wish to have available as sentencing options in their district. They may decide, for example, to establish a single home detention program with a single set of procedures, monitoring policies, and rules for offenders. Or they may decide to establish a three-level program—curfew, detention, incarceration—with different procedures and program elements for each. This way a program level would be appropriate and available for a wider range of offenders; the judge would be able to match the severity and control afforded by various types of home confinement to the specific person. A multileveled program makes it easy for judges to communicate clearly their expectations about the degree of monitoring and the severity of enforcement. Alternatively, some judges might wish to specify these elements as conditions in each individual sentence.¹⁷

17. See A. Partridge, *The Sentencing Options of Federal District Judges* (Federal Judicial Center rev. ed. 1985), for a description of the types of conditions and alternatives available to federal judges under existing authority.

Selection Procedures

The decision to use home confinement can be made at several stages in the processing of an offender and by several different authorities. Here we review the five most noteworthy decision points and briefly discuss some of the pros and cons of making the assignment to home confinement at each.

Judicially Imposed Conditions of Pretrial Release

The Bail Reform Act of 1984¹⁸ requires that defendants be released on personal recognizance or unsecured personal bond unless the judicial officer determines "that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."¹⁹ If the defendant is not released as above, the court must impose the least restrictive condition or combination of conditions to assure appearance and protect others. Although there is little experience with this requirement, it appears that home confinement may often qualify as the least restrictive method of accomplishing the purposes of pretrial release conditions. The Bail Reform Act explicitly endorses conditions on release that require offenders to "(iv) abide by specified restrictions on personal associations, place of abode, or travel; . . . (vii) comply with a specified curfew; . . . (xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes."²⁰ These conditions suggest that curfew and detention, including home detention, are permissible forms of pretrial release. The Third Circuit has approved even fuller home incarceration if needed to protect the public.²¹

18. 18 U.S.C. §§ 3141-3150.

19. 18 U.S.C. § 3142(b). See D. Golash, *The Bail Reform Act of 1984* (Federal Judicial Center 1987), for an introduction to and discussion of the factors to be considered when making pretrial release decisions.

20. 18 U.S.C. § 3142(c)(1)(B).

21. *United States v. Traitz*, 807 F.2d 322 (3d Cir. 1986) (2 to 1 decision). The question of whether different forms of home confinement constitute pretrial *detention* under the Bail Reform Act (or merely release conditions), and consequently of whether a hearing and findings of risk of flight or dangerousness are required, is not yet clear. The statutory language cited above suggests that curfew and home detention are release conditions, not the type of detention invoking the full procedural safeguards of the act. The *Traitz* decision held that home incarceration was a release condition as well, though in that case defendants had first been imprisoned after a full hearing, so the later home incarceration was a less restrictive alternative than the original disposition. A defendant "released" to full home incarceration might argue that it is a form of detention requiring a hearing and relevant findings of risk of flight or dangerousness.

Given the requirement that the least restrictive alternative available for protecting the public be used before trial, it seems that home confinement would be appropriate as an alternative to imprisonment, but should not be used where release on recognizance, unsecured bond, or other less restrictive conditions would satisfy the purposes of the act. At present we have discovered only four cases of pretrial home confinement in the federal system; states have experimented with its use more extensively.²²

Judicially Imposed Conditions of Probation

At present, judges have the power to impose probation "upon such terms and conditions as the court deems best."²³ They are explicitly authorized to impose discretionary conditions of probation, including various types of community confinement. The statute is silent on home confinement, though it authorizes "such other conditions as the court may impose" so long as those conditions are reasonably related to the purposes of sentencing and "involve only such deprivations of liberty or property as are reasonably necessary" to meet sentencing goals.²⁴ It seems likely that home confinement would be upheld against any claim that it is an abuse of judicial sentencing discretion.²⁵

Concerns that home confinement, especially if monitored with electronics, may violate constitutional rights of privacy, travel, or association, or protections against unreasonable searches and seizures or self-incrimination, are generally thought to be unfounded. Current opinion is that home confinement, at least in the case of

22. Telephone interview with Dan Ryan, pretrial services specialist with the Probation Division of the Administrative Office of the U.S. Courts (May 5, 1987). A notice has been placed in the probation newsletter *News & Views*, soliciting information about other use of home confinement as a pretrial disposition.

23. 18 U.S.C. § 3651.

24. See 18 U.S.C. § 3563(b), providing that the court may require that the defendant "(11) remain in the custody of the Bureau of Prisons during the nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense in section 3581(b), during the first year of the term of probation; (12) reside at, or participate in the program of, a community corrections facility for all or part of the term of probation."

25. But see Hurwitz, *House Arrest: A Critical Analysis of an Intermediate-Level Penal Sanction*, 135 U. Pa. L. Rev. 771, 789 (1987), for citations to state court cases invalidating jail as a condition of probation in the absence of explicit statutory authorization. Home confinement, particularly full home incarceration, blurs the distinction between imprisonment and probation with conditions. It is not yet clear whether home incarceration sentences are limited by the rules governing imprisonment or probation. There could well be challenges to sentences of home incarceration for periods exceeding the maximum term of imprisonment, even if within the five-year maximum term for probation. Similarly, probation served under home confinement does not seem to be mere "street time" and should perhaps be given some credit toward time served if probation is revoked.

postconviction probation conditions, is not unconstitutional per se.²⁶ Legal challenges to the constitutionality of probation conditions rarely succeed so long as the condition is reasonably related to a legitimate purpose of sentencing and the offender clearly understands the condition (most jurisdictions have written rules, which offenders sign at the beginning of supervision). If offenders agree to the conditions, they may waive their right to claim a constitutional violation. A cautious approach requires adequate provision for attendance at religious services. Home confinement conditions, together with broad visitation restrictions, must be carefully written to avoid infringing on the associational rights of offenders, or of family members who live with them.²⁷ Offenders should be provided with a written statement of the conditions and rules of supervision.²⁸

The sentencing discretion afforded judges within traditional statutory frameworks has been quite broad. However, with the recent trend toward mandatory minimum sentences, and presumptive or guideline sentencing schemes, legislatures and guideline commissions are becoming more active partners in the sentencing process, with accompanying limits on judicial discretion. We review the impact of the new federal sentencing law and accompanying sentencing guidelines in the last chapter.

Another partner in the process is the probation system. In practice, the exercise of judicial discretion to impose conditions of community release is informed by the probation office. Judges have the greater legal expertise, but they do not have the time to investigate the many facts about an offender that are relevant to sentencing. Nor are they as intimately familiar with the programs offered by prisons and the probation system as are probation officers. Judges generally give weight to the recommendations provided by probation officers as part of their presentence investigation report. This report takes into account factors concerning the offender such as

26. A full analysis of the constitutional and legal issues surrounding home confinement and electronic monitoring is beyond the scope of this report. Here we simply note that scholars do not generally foresee any invalidation of home confinement conditions or the use of electronic monitors. See Hurwitz, *supra* note 25; del Carmen & Vaughn, *Legal Issues in the Use of Electronic Surveillance in Probation*, 50 Fed. Probation 60 (1986); Christensen, Informal Opinion No. 83-81, Electronic Surveillance, State of Utah, Attorney General's Office. Other legal analyses are provided by Berry, *Electronic Jails: A New Criminal Justice Concern*, 2 Just. Q. 1 (February 1985); and Houk, *Electronic Monitoring of Probationers: A Step Toward Big Brother?*, 14 Golden Gate L. Rev. 431 (1984). Issues raised by charging offenders for the cost of their supervision are discussed in the section on fee assessments at the end of this chapter.

27. Hurwitz, *supra* note 25, at 807.

28. 18 U.S.C. § 3563(d) requires that written statements of conditions be provided to defendants.

employment, home life, risk of recidivism, and other considerations. It evaluates the appropriateness of the offender for local treatment or community service, and it is the typical vehicle through which the probation officer recommends a sentence of home confinement.

Judges can also delegate to the probation office much of their authority to impose conditions of community release by leaving unspecified many of the elements of a probationer's supervision.

Administratively Imposed Conditions of Probation Supervision

Often judges' conditions of probation grant probation officers the power and discretion to visit offenders in their home or place of employment, to require offenders to submit to drug testing, and generally to question and instruct offenders. In addition, once the offender has been sentenced to probation, the probation officer may assign him or her to different levels of supervision. Judicially imposed conditions may limit this discretion somewhat, but in the absence of explicit prohibitions or requirements to the contrary, the officer may implement daily, weekly, or even less frequent contacts or curfew checks. This discretion may even permit the probation officer to initiate, for example, a curfew or electronic monitoring, even though the judge did not stipulate such a condition at sentencing.

Conditions of Postincarceration Release

Parole officials have always had the authority to impose conditions of supervision on those released under their jurisdiction. As illustrated by the curfew parole program, home confinement can be a condition of parole. Prison and parole authorities have used this discretion to save expenses and reduce crowding in the prisons. The federal picture will be different after implementation of the new sentencing guidelines because parole will be abolished. The discretion to impose postrelease supervision conditions will be transferred to either the courts or prison authorities.

Conditions of Imprisonment

Prison authorities also have some release discretion while an offender is under their jurisdiction, based primarily on their authority to designate place of service of a term of imprisonment and grant furloughs. One common use of this authority has been assigning offenders to serve the last portion of their prison term in community treatment centers. Prison authorities have their own criteria for release, based on the seriousness of the crime, the risk

posed by the offender, and his or her progress through the prison's programs. They are sensitive to the limits in bed space and the conditions of confinement created by overcrowding.

Prison officials may set curfews as a condition of furlough and may contract for electronic-monitoring services. The limits of this authority apparently have not been tested. While the responsibility for supervising offenders on furlough has been unclear in the past, the Sentencing Reform Act specifies this as a duty of federal probation officers when requested by the attorney general or his or her designee.²⁹ The elimination of the Parole Commission and the effects of the sentencing guidelines may accentuate the role of prison officials in controlling prison populations and regulating place of service, simply because there will be no other mechanism to reduce overcrowding. If the flow of offenders cannot be controlled at other points in the criminal justice process, the pressure will likely build on prison authorities to control populations using whatever discretionary powers they can find.

Selection Criteria

Jurisdictions with home confinement programs have generally established basic criteria for program eligibility. But along with these general criteria, other factors come into play when deciding upon a particular case. In principle, the selection criteria should relate explicitly and rationally to the purposes sentences are to serve. To the extent that just punishment is the goal, offense seriousness is primary. The goal of incapacitation makes risk of recidivism most salient. Where rehabilitation is important, still other factors are relevant. In practice, the decision to impose home confinement is generally based on factors relevant to diverse and often implicit goals. The decision is often the result of an intuitive sense of what punishment offenders deserve, how great a risk they would pose, and how damaged they would be by prison.

We describe below the selection criteria typical of existing programs. The dominant considerations are ensuring adequate punishment, protecting the community, and meeting special offender needs. The overreaching concern in several state programs has been to reduce prison populations safely.

29. 18 U.S.C. § 3603(f), as modified by the Sentencing Reform Act of 1984 (ch. II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, enacted Oct. 12, 1984).

Minimizing Risk

All of the programs that include home confinement screen offenders with some method of risk assessment.³⁰ Sometimes only first-time offenders are eligible, or certain categories of repeat or serious offenders are excluded. Candidates for the program—or even spouses, housemates, or parents—may be interviewed to gauge their willingness to abide by program rules.³¹ Occasionally a more formal, objective risk-scoring system is used. No one we interviewed used an explicit cutoff score on a risk scale to determine program eligibility, but others have reported that offenders are sometimes excluded for “unacceptably high” scores on risk classification instruments.³²

Home detention may simply be ineffective for preventing a return to certain types of criminal activity. For example, many of our interviewees mentioned that drug dealers might continue to sell out of their home. Similar considerations might apply to racketeering, organized crime, conspiracy, or other offenses. Offenders who commit domestic violence or other crimes against the family are not good candidates for home confinement if the victims remain at home as well.

The selection criteria for the new pilot program in the federal District of Arizona are typical.³³ Offenders are disqualified if they have—

1. a history of violence,
2. chronic drug or alcohol problems,
3. unstable interpersonal relationships at home,
4. immigration problems,
5. a prior criminal history, including a history of failure to appear, or
6. an unstable employment history.

In general, probation officers and judges seem to look at the whole picture of prior record, age, health, substance abuse, circumstances of the current offense, home life, employment, and the attitude of the offender to decide if home confinement is a “good bet.”

30. Byrne, *supra* note 11.

31. This screening procedure is described in End of Project Report, *supra* note 12. Difficulty in finding cooperative candidates and home support was cited as a primary reason why the Contra Costa County home detention program was only 15 percent as large as originally projected.

32. T. Armstrong, G. Reiner & J. Phillips, *Electronic Monitoring Programs: An Overview 18* (ATAP Resource Paper No. 001 (EMT Group Inc., Sacramento, Cal., April 1987)).

33. These criteria are from the guidelines for the Pilot House Arrest Program (Apr. 30, 1987), provided by Phyllis A. Mugno, supervising U.S. probation officer, District of Arizona.

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Some believe they can tell if an offender has "changed course." Probation officers are often especially attentive to the respect for authority displayed by the offender.

Punishment

Even a good risk may deserve to go to prison. Statutory and sentencing guideline restrictions on the availability of probation as a sentence do much to ensure that the most serious offenders are imprisoned. Some programs have additional informal rules excluding classes of serious offenders. The federal program in the District of the District of Columbia, for example, is restricted to those committing offenses that would fall into offense category 1 or 2 of the U.S. Parole Commission guidelines. Those convicted of crimes of violence or those who used a weapon are often excluded, both because their offenses are serious ones deserving of punishment and because of the special type of risk a propensity toward violence represents.

Probation officers and judges often informally assess offenders' acceptance of responsibility and remorse when deciding how much punishment is deserved. Offenders may be excluded if they display a "bad attitude." One probation officer commented that if an offender lied to him he would "bust him back to jail in a minute."

Offender Needs

An oft-cited advantage of home confinement is its ability to provide a form of incarceration for persons who deserve imprisonment but who are unsuitable for the prison environment because of illness, handicap, pregnancy, or other condition. Probation officers and judges often consider the offender's need for community-based medical treatment.

Other special considerations are also taken into account, such as the inability to pay restitution absent ongoing employment, whether the offender is the sole caretaker of minor children, and permanent effects on an offender's career should he or she be imprisoned. The focus here is not so much on "giving the offender a break" as on what he or she could give back to the community or what hardships incarceration would impose on others. For example, one offender was placed in home detention because he took care of an elderly couple who testified that being deprived of his services would constitute a hardship on them.

Another consideration is the availability of other community placement options. Instances have been reported in which the judge believed that residence in a community treatment center was

a necessary condition of probation, but no such center was available in the community. This is most likely to occur in small towns and rural settings, and also where the offender is female, as fewer facilities are available for women generally.

The Need for Explicit Criteria

Judges and probation officers naturally vary in the emphasis they place on minimizing risk, on punishment, and on offender needs. They may have differing perceptions of whether an offender has "turned over a new leaf." A consideration of offender needs, for example, can be justified as part of a rational sentencing philosophy. But there is a danger that special sympathy toward an offender who is charming, is a manipulator, or "strikes a chord" in the officer or judge could lead to unfair disparity. Conversely, an offender who has personality conflicts with a probation officer may be treated more harshly than a more agreeable offender. Sentencing guidelines are developed to eliminate unjustified disparate treatment. Explicit criteria for program eligibility established in advance can help to reduce the effect of illegitimate factors in the decision to sentence an offender to home confinement. Jurisdictions would do well to decide what purposes they want home confinement to accomplish, and then develop explicit guidelines, based as much as possible on objective factors, that select the proper population of offenders for the program.

Four Examples of Selection Methods

Reducing prison crowding has been a primary goal of many existing programs, especially at the state level.³⁴ Yet many observers

34. In the federal system, too, there is concern about prison crowding. As of May 1, 1987, the federal prison system was operating at 55 percent over the rated capacity and 22 percent over the operational capacity. (Current figures are available from the Public Information Office of the Bureau of Prisons. Rated capacity represents the originally designed amount of bed space; operational capacity represents bed space created through later modifications, "double-celling," etc.) The Sentencing Reform Act of 1984 (ch. II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, enacted Oct. 12, 1984) contains a resolution expressing the nonbinding sense of the Senate about sentencing practices that should be followed until the new guidelines become binding. It encourages judges to treat prison beds as a scarce resource and urges them to consider "the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant has not been convicted of a crime of violence or otherwise serious offense." It encourages the use of "restitution, community service, and other alternative sentences."

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have predicted that the availability of a sentence more severe than probation will result in a "widening of the net" of probation rather than in a diversion of offenders from prison. Because of the many, sometimes competing, authorities with discretion to release offenders from prison, some states have gone to extraordinary lengths to ensure that their home confinement program is used to accomplish its primary goal—reduction of prison populations. Although it is often difficult to determine what sentence a home detainee might have received in lieu of the program, it appears that these states have been successful. The data from Florida and New Jersey, reviewed below, indicate that with a concerted effort, home confinement can reduce prison populations.

There is no inherent reason, however, why home confinement should be used only for the types of offenders who would be imprisoned under current practices. Indeed, if judges have lacked an adequate middle-range sentence, we would expect home detainees to come from both populations—those now given straight probation and those now sent to prison. The systems described below must be considered successes not just for accomplishing their primary goal of reducing prison populations but also for implementing a highly coordinated criminal justice innovation—an innovation with potential we have only begun to explore.

New Jersey

New Jersey's intensive supervision program, which includes curfew, has developed an inventive approach to ensure that its clients are real diversions from prison. Authorities in all three branches of government were motivated to reduce prison populations. They called on the state Administrative Office of the Courts, which had previously provided only coordinative and administrative functions for county offices, to direct a statewide program.

With this coordinated effort, officials were able to fashion a selection procedure that restricts the program to offenders already sentenced to imprisonment. Judges do not have the option of sentencing an offender directly to intensive supervision. The probation department has administratively established a screening process for removing offenders from prison and placing them in the program. Prisoners voluntarily apply to the program after they reach prison. Most serve about four months of their sentence before release. Offenders convicted of certain types of crimes—for example, homicide, organized crimes, robbery, or sex crimes—are automatically excluded, as are offenders whose sentences explicitly include a minimum term of incarceration. Criminal history—such as multiple prior felonies or prior crimes of violence—and the seriousness

of the instant offense are considered. An apparent unwillingness to abide by the curfew condition can also disqualify an applicant.

Once approval is given by the administrative office, the final decision to assign an offender to intensive supervision is made by a "resentencing panel" consisting of three superior court judges. This permanent forum is knowledgeable about the program's operations and philosophy, and closely monitors its progress. It conducts revocation hearings if there are program violations and regular reassessment hearings for each offender three and six months after release from prison. The panel decides when the offender can be safely removed from the intensive supervision program. This judicial involvement is important for maintaining the coordination of the effort and ensuring that it is accomplishing its intended objectives.

After two and one-half years of operation, and after 2,400 applications had been processed, about 25 percent of the applicants to the New Jersey program were admitted, 60 percent were rejected, and 15 percent withdrew their application. Interestingly, a common reason for withdrawal was that the offender felt the program was too lengthy or too punitive compared with serving out the remainder of the sentence in prison. An early analysis of the types of offenders admitted into the program revealed that the screening process was keeping out the worst risks.³⁵ The program included many minor felons, those convicted of conspiracy and "attempt to commit" crimes, and those convicted of minor user and seller drug offenses. The program participants also had fewer prior felonies than did average parolees, though almost 70 percent had one previous conviction and almost 50 percent had two. Those in the program were also more likely to have full-time jobs, to be better educated, and to be white. Although results are still tentative, the recidivism rates of program participants compare favorably with those of parolees released without benefit of the program.

Florida

In Florida, the Department of Corrections' Probation and Parole Services was authorized by statute to develop "community control." It became effective at the same time that new sentencing guidelines were established by the state. In the first twenty-seven months, more than 9,300 "controllees" were placed in the program.

Most offenders are sentenced directly to the program upon the recommendation of the probation department in the presentence

35. Pearson & Bibel, *New Jersey's Intensive Supervision Program: What Is It Like? How Is It Working?*, 50 Fed. Probation 25 (1986).

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report. The general criteria for selection are not very specific: "Individuals found guilty of any noncapital felony offense who are deemed appropriate by the sentencing judge due to the seriousness of the crime and/or criminal background and who would not be placed on regular probation."³⁶ Judges are given wide discretion, but are directed to use the program only for people otherwise bound for prison. Judges may give a sentence of community control without the benefit of a presentence investigation, either upon conviction or at a probation revocation hearing. The state Parole Commission may also place parole violators in the program following a final revocation hearing.

In addition to selection at formal sentencing or revocation hearings, each parole and probation office has staff assigned to review sentences for offenders who did not have a presentence report prepared and who received sentences of short-term incarceration. If a case seems appropriate for the program, the officer can recommend that the sentence be changed within the sixty days that the court has for reconsideration of sentences under state law. This review is done immediately after sentencing, preferably before the offender is transported to the state prison reception center. If identification of a potential program participant comes too late for intervention before transfer, a classification officer at the reception center can refer the offender to the probation or parole officer in the county of commitment. These multiple entry points have surely contributed to the program's success at identifying a large pool of eligible offenders.

Data analysis of the types of persons assigned to the program suggests that around 70 percent of the offenders in the program represent real diversions from state prisons, 15 percent are diversions from county jails, and the remaining 15 percent are probation cases that were believed to need more intensive supervision.³⁷ In the first year after implementation of the program and new sentencing guidelines, the number of commitments to prison decreased by an average of 180 per month.

To control the number of offenders in the program—a crucial consideration, since there is a statutorily defined limit of twenty

36. Florida Department of Corrections, Probation and Parole Services, Implementation Manual for Community Control (1987) (L. L. Wainwright, secretary). Much of the information we present concerning the Florida program is from this manual.

37. See Flynn, *House Arrest: Florida's Alternative Eases Crowding and Tight Budgets*, 1986 *Corrections Today* 64. Mr. Flynn, director of Florida's Probation and Parole Services, used the state sentencing guideline score sheets to determine what proportion of persons assigned to the program would have gone to prison instead. See also *Community Control "House Arrest"*. . . *A Cooperative Effort Effectively Implemented*, 9 *Am. Probation & Parole Ass'n Persp.* 1 (1985).

cases assigned to each community control officer—Probation and Parole Services can advise the courts and Parole Commission that the program has reached its limit. Other options must then be used until there is an opening in the program. The state correctional probation administrator can recommend cases in the program that seem suited to lower levels of supervision. The courts can then reassign those cases to regular probation, thus creating more openings in the program for those who need it the most. Clearly, close coordination between the courts and the probation department has helped ensure that the program runs smoothly.

Federal Curfew Parole

The Federal Bureau of Prisons has been faced with both increasing fiscal restraints and crowded prisons. One avenue that has been used to ease crowding and smooth offenders' transition to the community upon release has been to transfer prisoners to privately operated community treatment centers to serve the last 120 days of their sentences. But contracting for the services of these facilities is expensive, costing approximately \$30 to \$35 a day per offender. Discussions between the bureau and the U.S. Parole Commission resulted in the development of the experimental curfew parole program as an alternative program.

Selected offenders, with the approval of the parole commissioner of the region in which they are detained, are released approximately sixty days early from a community treatment center on the condition that they abide by a 9:00 p.m. to 6:00 a.m. curfew. The current nationwide average daily population in the program is approximately 150 parolees.

To qualify for curfew parole, offenders must—

1. have a parole date,
2. have been designated to serve the last 120 days of their prison sentence in a community treatment center,
3. have done well in the center for the first 60 days,
4. have a job,
5. have a place to live, and
6. apply for acceptance.

The tables in appendix A display some characteristics of parolees released to the program during May and June of 1986.³⁸ Since this

38. The Parole Commission provided us with the names and prison register numbers of offenders who participated in the curfew parole program from May 1986 forward. We matched these records with those in the latest available Federal Probation Supervision and Sentencing Information System data base to obtain descriptive offense and offender information. The records in the two systems overlapped for only two months—May and June of 1986.

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is a parole, rather than a probation, program, its participants are felons who have served significant periods of incarceration. Many do not fit the pattern of low-risk offender and insignificant offenses typical of many state programs. The parolees were sentenced to a median term of five years on the current offense, with only 10 percent sentenced to two years or less. The offenses that led to conviction mirror those of the general prison population, with more than one-third convicted of drug trafficking and approximately one-quarter involved in robbery, extortion, or racketeering.

Offenders also had significant criminal records. Sixty-two percent had at least one prior conviction, and one-quarter had more than two. One-quarter had been convicted of a past offense similar to the current offense. Thirty-eight percent had suffered at least one prior incarceration of thirty days or more, and more than one-quarter had served time on a prior sentence of more than one year. In addition to their criminal records, a number of the curfew parolees had other problems, as indicated by their conditions of parole. Almost one-quarter had some type of aftercare requirement, most commonly for drug abuse.

The savings realized from the program to date have been substantial: The Bureau of Prisons reports that as of February 20, 1987, \$1,121,968 had been saved. And although precise figures are currently unavailable, the Parole Commission reports that to date only two or three of these offenders have had their parole revoked. It is difficult to know how closely the parolees are supervised and how regularly violations are reported, so comparing curfew parole performance with what would have happened had the offenders remained in the community treatment center is impossible. And it is important to note that these offenders had already served significant periods of incarceration. But it seems that the curfew parole program has maintained adequate control over these offenders. Home confinement may protect the public, even from serious and repeat offenders, at significantly less cost than imprisonment.

Federal District of Nebraska

In the District of Nebraska, the federal court with the largest number of home detainees on probation, offenders take an active role in their enlistment in the program.³⁹ Upon conviction, the

³⁹. Judge Warren Urbom is the district's main proponent of community or home confinement and at last count had approved more than forty offender-created alternative sentence plans.

probation office provides offenders with a memorandum encouraging them to "take the initiative in presenting the court with information the court can use in arriving at an appropriate sentence."⁴⁰ Offenders are asked for their version of the circumstances surrounding the offense. They are advised to seek an evaluation for chemical dependency or mental health problems and to make recommendations for a course of treatment. Offenders provide a financial statement and are encouraged to submit a "proposal in regard to monthly payments or services you could perform for the victim(s)."

Offenders are advised of two special alternatives to imprisonment available in Nebraska: "confined community service" and "house arrest." The former is a term of community service with a state agency or charitable organization. Offenders generally meet with agency personnel to discuss the form and length of service the agency could make use of. If the agency is agreeable, offenders are housed at the site of their service, paying for their meals and bed space. The agency supervises the offender with the help of the probation office. The other alternative, "house arrest," is generally home detention accompanied by restitution, community service, or both.

With the help of their attorneys or the Nebraska Center on Sentencing Alternatives (NCSA),⁴¹ a nonprofit clearinghouse for information and advice concerning the creation of sentence plans, offenders develop a proposal for the court. Those who do not use this opportunity are excluded from consideration for an alternative sentence. The court feels strongly that offender initiative is requisite to the successful completion of an alternative sentence.

The probation office and the NCSA use informal guidelines to select appropriate offenders for community or home confinement. They generally exclude violent offenders. However, the NCSA reports that some manslaughter cases, for example, might be appropriate, and one firearm offender has been assigned to home confinement. So as not to endanger the public, candidates for the program must be considered "good risks." The total picture of the seriousness of the current offense, prior record, employment, history of responsibility, and the need for structure—all figure into the decision.

40. The information and quotations in this section are from materials provided by the probation office in the District of Nebraska, whose chief probation officer is Burton L. Matthies. In addition, an interview was conducted with William Beach, the probation officer who monitors the home confinement program.

41. An interview was conducted with Kathy Shada, director of the NCSA.

The probation office in Nebraska prepares a presentence investigation report for each offender. Although attorneys or individuals at the NCSA often coordinate informally with the probation office so they can reach a consensus on the appropriate sentence, sometimes the judge is presented with competing proposals.

The district reports that the program is working well. There have been no escapes or instances of absconding, though five of the thirty-six program participants have had their community confinement revoked or have pending hearings for rule violations—typically for alcohol use or a positive drug test. The one concern raised about the system, aside from the complaint that judges have not used it enough, is that cost is an obstacle for many offenders. Paying for restitution in addition to meals and bedding (for those residing at community agencies) or, in some cases, paying \$100 to \$200 a month for monitoring (of home detainees) can be a significant burden. We return to the Nebraska program in the later section on methods of monitoring and enforcement.

Hours and Duration of Home Confinement

Two questions face any judge considering home confinement as part of a sentence: What times of day should I require the offender to be at home? And how long should the sentence last? The two are obviously related; the fewer the hours of confinement each day, the more days the offender can be expected to tolerate the restriction. Even a weekly afternoon off may be enough to transform for some offenders an otherwise unbearable six months of home incarceration into a difficult but endurable sentence. In addition, the fewer the hours of confinement each day, the more days are required to equate the punishment of the sentence with twenty-four-hour-a-day incarceration. The proper length and duration of the two conditions depend, of course, on the purposes of the sentence, an issue we explore in depth in a later chapter. Here we describe the experience current programs have had with various curfew times and sentence durations.

Although some sentences of home confinement have lasted up to two years, most have been for six months or less. Especially if electronic monitoring is used, long sentences can lead to "cabin fever." Officials at one of the largest and oldest monitoring services, Pride, Inc., of West Palm Beach, Florida, believe that 90 to 120 days is the most reasonable duration for electronically enforced confinement.⁴² Probation officers we interviewed generally agree with the

42. See Schmidt, *Electronic Monitors*, 50 Fed. Probation 56 (1986).

six-month limit on the duration of home incarceration. Some feel that this is ordinarily the maximum tolerable length even for home detention. They note that the difficulty of serving such a sentence is underestimated when the isolation is not taken into account. Remaining at home for long periods can be excruciatingly boring—a form of solitary confinement. Interestingly, one officer noted that many home detainees report that they look forward to the visits by probation officers just to know that they have not been forgotten.

On the other hand, living with others creates problems of its own. Probation officers described many instances of family conflicts bred by having the offender home all day—or even all evening. Offenders' jealousy of family members who can move around freely appears to be common. In determining the appropriate duration of confinement, the unique circumstances of each offender's home situation must be taken into account, and careful and continuous monitoring of the situation by the supervising officer is necessary.

Common sense suggests that in some cases ordering an offender to stay at home for long periods, and requiring the offender to act as his or her own warden, may involve unreasonable expectations. In prison, it is simply not possible to act on an impulse to go to a movie or celebrate at a party with friends. Prisoners learn to put these temptations out of their minds. At home, with no guards or prison bars and with enticements all around, the self-control required is beyond the capacity even of many law-abiding citizens—and is much more difficult for often-impulsive criminals. Having unrealistic expectations for offenders sets them up for failure. It may also decrease the therapeutic value of the program and—because of the need to chase down violators, conduct revocation hearings, or reprocess offenders into prison—may ultimately result in more time and expense than a standard sentence behind bars.

There remains disagreement about the duration of long home confinement sentences. Since there is little experience with long sentences and no empirical research describing optimal sentence lengths, much of the disagreement is based not on facts but on differences of opinion about the purposes and rationale of home confinement programs. In federal probation programs, the six-month period of confinement has been the norm, although there have been sentences of up to two years.⁴³ In a number of cases, the sen-

43. The length of curfew parole is considerably shorter, with two months being the longest period unless extended by the Parole Commission.

tence imposed initially included confinement for more than six months, in the expectation that the restrictions would be lifted or lessened after six months of satisfactory performance. Such a practice gives the offender a reward to work toward.

Where the home confinement is in the form of detention or curfew, setting the specific times for the offender to be at home is done through development of a supervision plan. Probation officers with whom we spoke believe that setting highly specific schedules is critical; if they are too vague or ambiguous the offender is unsure of what is expected and is tempted to test the limits of the constraint. The probation office may then find it difficult to prove that the offender violated a clear condition. Specific schedules also set the range of times and places for random contacts by the probation officer.⁴⁴ Some officers prefer developing supervision plans on a month-to-month basis. Such regular planning enables probation officers to review offenders' progress in school, in treatment, or in other elements of their program of rehabilitation.

An individualized supervision plan can accommodate various needs and life-styles—for example, the particular hours of a work shift, attendance at religious services, and the need to be out of the home to perform community service or obtain aftercare treatment. In one case in the Western District of Missouri, the offender was a musician who performed at night in clubs across the state. The conditions of his detention required that he be home when not performing, but allowed him to continue his career. An additional requirement of his probation conditions was that he make an anti-drug announcement during his act. A special form to be signed by the bartender after each performance was developed to verify that he had appeared and made the announcement.

A number of federal districts have developed special "conditions of probation" forms for home detainees. These set forth the general activities for which the offender may be excused from his or her home, along with any other rules and conditions. Within these constraints, a supervision plan is then tailored to the individual offender, usually at a meeting between the offender and the officer at the beginning of supervision. For example, in the Eastern District of New York the offender and the officer construct a schedule of where the offender will be at specific times each day, which the

44. Setting such schedules may also indicate where the planned method of supervision has to be modified. For example, it might be impossible for a computer to call an offender's place of business if there is no line on which the offender can take calls (e.g., in a factory). The officer could then supplement computerized telephone surveillance with collateral contacts with the employer or require submission of pay stubs to verify work attendance.

offender must sign. Offenders are given a twenty-four-hour telephone number and required to contact the probation officer immediately if they must deviate from this plan in any way.⁴⁵ In addition, each offender must sign a copy of the district's "Guidelines for Home Detainees." The court feels that this structure ensures that there will be no misunderstanding about the program's rules and what would constitute a violation.

Types of Monitoring and Enforcement

To determine how controlling, punitive, or therapeutic home confinement will be—in short, to decide what the sentence actually means—we must know if the offender will really stay at home. This depends on the type of monitoring used and on the sanctions imposed for violations of confinement. Electronic monitoring has received the most attention, but is by no means the only or even the predominant monitoring method. Probation officer checks, of various frequencies and schedules, both by phone and in person, are more common. Some jurisdictions have experimented with community volunteers, paid private monitors, or college students. Local police have occasionally been enlisted in the effort.

Role of Probation Officers

The work of probation officers has long included checking on offenders to ensure they were at work, at school, or at home if they were so required. But this has usually been in the context of a helping relationship; the officer is a counselor, not a constable. Monitoring compliance with home confinement is widely seen as a different role for probation officers. One put it this way: "Our role as probation officers tends to go through cycles of being social workers and cops; successful Home Supervision officers tend to have more cop traits."⁴⁶ Some departments faced with this role conflict have created separate staff positions for monitoring and counseling. Some have hired new staff especially for monitoring duty, often choosing former law enforcement officers for the job. Training in self-defense has been part of the preparation of officers in some jurisdictions. There have been a few calls for the arming of surveillance officers, or at least for providing them with radios.

45. The number given is one in the probation office that is set to forward any call after working hours to the officer's home.

46. Swank, *Home Supervision: Probation Really Works*, 43 Fed. Probation 50 (1979).

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Yet in some cases the intensive contacts between officer and offender under home confinement programs can foster a helping relationship of greater depth than is possible under normal probation supervision. If officers have reduced caseloads so they have the time for short (though frequent) counseling, if they work with the offender to develop plans for self-improvement as well as schedules of confinement, and if they adopt a firm but concerned attitude toward the offender, great strides toward rehabilitation are possible. If they are given discretion to grant occasional time off, or reduce the level of supervision, the rewards at their disposal to encourage good behavior are much greater than in normal probation.

Monitoring involves more phone calls, more travel, and more investigation than does ordinary probation work. The extra time needed just to watch each offender requires that caseloads be dramatically reduced. A limit of twenty cases per officer is common, though much depends on the geographical dispersion of the caseload, the frequency of violations, the speed of response to violations desired in the jurisdiction, and other factors.

Checks and Contacts

The scheduling of checks must be given careful consideration. Since evenings and weekends are the most typical times mandated for home confinement, checks must be made all week, day or night. Ensuring that checks follow no predictable pattern is widely recognized as an effective way of guaranteeing that offenders cannot anticipate periods of low monitoring. Officers must be available outside traditional office hours to make the checks and investigate absences. Computerized calling systems can be programmed for essentially random checks throughout the day and week, but even with an automated system an officer is generally needed to be on call to respond to problems. In some jurisdictions officers are equipped with beepers so they can be contacted if the computer notes a violation.

Offenders recognize that the odds of evading monitoring are directly related to the frequency of checks. Psychological theory suggests an optimal schedule of checks: Supervision should begin with frequent random calls. Several immediate follow-ups—in which the officer calls again soon after a routine check—are necessary to establish that there is no “safe time” right after a call. These are effective early in the confinement for confirming the continuity and rigor of monitoring. The frequency of both the checks and the follow-ups can then taper down if the offender complies with the conditions of confinement. Occasional bursts of higher frequency checking throughout the period of supervision would keep the of-

fender from developing clear expectations of the rate of checks for any given day. In the words of one officer, "Keeping our clients guessing has proven to be highly therapeutic."⁴⁷

There is wide variation in the frequency of checks required under current programs, ranging from one per month to multiple daily contacts. With electronic dialers and verifiers, of course, checks can be programmed for virtually any frequency. In some federal districts, determining the rate and type of contacts is left to the officer's discretion. Other districts have detailed instructions, such as those in place in the Eastern District of Wisconsin. They provide that in the first stage of confinement—home detention—officers are to make no fewer than an average of seven contacts per week over no fewer than five days. Two of these must be face to face in the community; office visits by the offender do not count. Further, a minimum of two contacts per month with a spouse, lover, or family member is required. For the second stage—curfew—the contact level is set at three personal (either face to face or telephone) contacts per week.

In addition to the frequency of checks and contacts, the degree of control maintained over an offender depends on what action is taken if the offender is found absent. The greatest deterrent would be a strict and widely publicized policy of swift and certain revocation and imprisonment following the first violation. But in practice, such a policy is generally unworkable and unnecessary. Monitoring officers have come to expect offenders to test limits, especially early in the supervision. Swift and certain *detection* of violations is critical, but the *sanctions* for violations can reasonably be calibrated along a graduated scale. For example, the first absence might elicit a warning, the second a warning and an increase in contacts, the third a court appearance, and the fourth a revocation. Some jurisdictions may be able to experiment with brief incarcerations or cancellations of free time. Florida has decided to establish statewide guidelines concerning response to technical violations in order to provide more guidance to officers and improve consistency across the state.⁴⁸

Enforcement of confinement conditions is only partly a function of contacts and sanctions. Much also depends on how the supervision is organized and on whether any type of technology is used for monitoring. The next sections review ways of structuring home confinement caseloads and describe the various types of electronic monitors.

47. *Id.* at 52.

48. Florida Report, *supra* note 10, at 17.

Structuring Caseloads

Each probation office must consider the pros and cons of different ways of dividing the responsibility for supervising home detainees. Several distinct alternatives have already emerged, as described below.

1. **Shared officer responsibility for the caseload.** The Eastern District of Wisconsin has spread responsibility for home detainees among its officers. This approach helps combat burnout by giving each officer a variety of types of supervision. Each officer becomes generally familiar with the program and very familiar with the cases assigned to him or her. Wisconsin has the most detailed and formalized set of instructions concerning probation officer duties under the program—a wise decision for districts using this approach of dividing responsibility, since officers who have not specialized in home confinement may need a policy manual for reference.

This option is probably the only feasible one where the offenders to be supervised reside in a wide geographic area, sections of which are assigned to particular officers. The Northern District of West Virginia and the Southern District of Texas, where geographic dispersion is great, use this method. Both of these districts also enlist the assistance of local law enforcement officials to spot detainees who are not where they are supposed to be. Said one probation officer about a home confinement client, "The town he lives in is so small that everyone knows what everyone else is doing. If he's out, we'll hear about it."⁴⁹

2. **Shared officer responsibility for an offender.** In Contra Costa County, California, each offender is assigned two supervision officers. This approach lets officers split the burden and hours of coverage, while remaining familiar with the cases they are supervising. It also helps to provide continuity in the event of personnel changes. It may be somewhat more costly, however, to double the coverage at sentence-planning conferences with the offender.

3. **Designated program probation officers.** In the Eastern District of New York and the District of the District of Columbia, a specific probation officer handles all home confinement cases. These officers have been quite dedicated to the program and are experts on its purposes and requirements. They have also become very familiar with the offenders and their families. Some have expressed concern over possible burnout, but most officers who take on responsibility for the home confinement program in their dis-

49. Telephone interview with James F. Ancell, chief probation officer for the Northern District of West Virginia (April 1987).

trict have become champions of what they see as an exciting innovation in supervision. It should be noted, however, that to date the home confinement caseloads in these two districts are very small.⁵⁰

4. **Voluntary monitoring officers.** The federal courts have the authority to appoint probation officers with or without compensation. Unpaid officers take the same oath, may perform many of the same duties, and are considered employees of the government for purposes of legal representation and liability under the Federal Tort Claims Act.⁵¹ With adequate training in the purposes, procedures, and rules of the program, uncompensated officers could be a very cost-effective alternative. It seems likely, however, that ensuring the quality of supervision would be difficult if supervising officers were not part of the regular probation staff. Although a few state programs have experimented with community volunteers to help with some aspects of monitoring, we know of no federal programs that rely on unpaid volunteers.

5. **Contract monitoring officers.** The District of Nebraska has developed a unique supervision system that combines elements of voluntary probation officers and private contract monitors. A retired law enforcement officer who has the confidence of both the probation office and the court has been named a voluntary probation officer, and he undertakes the supervision of almost all home detainees. Although he is not compensated by the government, the offenders pay him to monitor their compliance with the program. If an offender cannot pay, the probation office will supervise his or her detention. The probation office feels, however, that understaffing prevents it from doing a completely adequate job. The supervisor in Nebraska is given high marks for diligence and effectiveness; some report that he is a father figure to many offenders. His close, almost daily, contacts with the probation office help to ensure that the office stays abreast of each offender's progress.

50. Telephone interviews with Elaine Terrenzi and Aaron J. Lucas III, probation officers in the Eastern District of New York and District of the District of Columbia, respectively (April 1987).

51. This legal opinion is from a letter of Oct. 1, 1986, to Ronald D. Lahners, U.S. attorney, Omaha, Neb., from Richard K. Willard, assistant attorney general, Civil Division, U.S. Department of Justice, in reply to a request for clarification of whether uncompensated probation officers are deemed federal employees for purposes of the Federal Tort Claims Act. A copy of the letter, which is on file with the general counsel to the Administrative Office of the U.S. Courts, was provided by the probation office for the District of Nebraska.

Electronic Monitoring

Although the idea of using electronics to replace prisons was first suggested more than twenty years ago,⁵² it is only recently that electronic monitoring of home detainees has proliferated. The rapid growth of this innovation has been remarkable; the first use was in December 1984, but by the beginning of 1987, twenty states had forty-five programs in operation. And the number continues to mushroom as electronic-equipment manufacturers and monitoring firms aggressively market their goods and services. Some companies arrange to lease equipment on a trial basis, or even provide demonstration units free, in an effort to convince jurisdictions of the advantages of the new technology. Only one federal district, Southern Florida, currently uses electronic monitoring. Several others—Central and Northern California and Arizona—have plans to implement it.

The electronic-monitoring industry is developing so rapidly that reports of the available technology must regularly be revised. The National Institute of Justice (NIJ) has an ongoing project to survey developments in the field, and it publishes a frequently updated pamphlet⁵³ describing types of equipment and the latest information on manufacturers and distributors. The NIJ's typology has been adopted in the description of equipment that follows.⁵⁴

Programmed Contact

Several systems can eliminate the need for probation officers personally to phone offenders to check that they are home. Instead, a central computer is programmed to call during the hours of confinement, either randomly or at specified times. The computer allows for variation in the frequency of calls for different offenders. It records the results of the call and prepares reports on its findings for the probation officer. There are several innovative ways in which these systems confirm that the offender is home:

1. **Encoded verifier wristlet.** A wristlet that includes an encoded module is strapped to the offender. When the computer calls, the

52. See Schwitzgebel, Schwitzgebel, Pahnke & Hurd, *A Program of Research in Behavioral Electronics*, 9 Behav. Sci. 233 (1964). See also Ingraham & Smith, *The Use of Electronics in the Observation and Control of Human Behavior and Its Possible Use in Rehabilitation and Control*, in J. Susman (ed.), *Crime and Justice 1971-1972*, at 363-77.

53. *Electronic Monitoring Equipment* (NCJ-105268) (available from National Institute of Justice/NCJRS, Box 6000, Rockville, Md. 20850).

54. For reviews of the work at the NIJ, see Ford & Schmidt, *Monitoring Offenders at Work and at Home Through Electronics*, in NIJ Reports 2-6 (SNI 194, November 1985). See also Schmidt, *supra* note 42, at 56.

offender must insert the module into a verifier box connected to the phone. Only the correct module inserted into the box is accepted as confirmation that the offender is home. Removal of the wristlet, or even an attempt to do so, can be detected by the probation officer during a personal contact, though there is no way to detect removal without such a personal check.

2. Voice verification. Upon assignment to the program, offenders must produce a voice sample that is analyzed and stored by the central computer. When the computer calls to verify that the offender is at home, he or she is required to repeat certain phrases. Comparison of the original sample with the offender's voice may detect an impostor. No special equipment in the home is required, and nothing is worn by the offender.

3. Number code wristwatch. Offenders wear tamper-proof wristwatches with a band containing an electric circuit. The watches are programmed to provide a unique code number to each offender at any given time. When the central computer—which knows the code—calls offenders' homes, they must enter the time and code number via their touch-tone phones. Only the person wearing the watch can know the right code. If the electric circuit in the band is broken, the code number will no longer be correct, thus signaling that the offender has removed or tampered with the watch.

4. Visual verification. A visual telephone is installed in the offender's home. Three-inch, black-and-white still pictures of the person answering the phone, as well as of the caller, can be transmitted over the phone lines upon request. A monitoring officer, or a computer equipped with voice synthesizer (capable of up to nine calls in a twelve-hour period), calls the offender and requests that he or she transmit any of a variety of profile or frontal shots. By varying the views requested, offenders are prevented from using a head-and-shoulders photograph to fool the system. Someone familiar with the appearance of the offender must inspect the photos and confirm their veracity, though they can be stored in computer memory for later verification.

5. Pagers. Offenders carry a digital read-out pager. It periodically signals them to call a specified number to confirm their presence. The central computer then uses voice identification to confirm that the caller is the offender. It can also verify the location from which the call was made. Offenders need not have phones in their homes, since the pager does the "calling," but they must have close access to a phone so they can return the call immediately to verify their presence at a permitted location.

These programmed-contact systems have the advantages of simplicity, lower cost, and a reduction of false alarms. Some do not re-

quire the offender to bear the stigma of a visible transmitter or "electronic shackle." It is reported that the wristlet verifier can alert officers to offenders who are drinking, since they have trouble inserting the device into the verifier box.⁵⁵ Offenders, family members, and even neighbors of offenders under monitoring by these systems report, however, that the frequent and generally impersonal phone calls are annoying. And to be completely adequate, some calls must be placed in the middle of the night, which requires that offenders awaken to verify their presence. Although this may add to the punitiveness of the confinement, it is also likely to foster resentment.

Probation officers view these systems as affording less control than the continuous-signal devices described below, and they have most often been used with less serious offenders. They may not instill the same sense of uninterrupted monitoring as do the systems to which we now turn.

Continuous-Signal Devices

The other approach to electronic-monitoring systems involves a miniaturized transmitter worn by offenders. These devices send an encoded radio signal to a receiver-dialer, generally six to ten times a minute, which is usually located in the offender's home. The signal can be detected in a range of 100-200 feet. The receiver-dialer periodically calls a central computer over normal telephone lines to report whether it is detecting the signals. The central computer compares the data from the receiver-dialer with the offender's schedule and writes reports on the offender's activities. The computer systems vary in how they respond to a confinement violation. Some simply note the violation and its duration in a printout to be examined at the supervisor's leisure. Others can alert the probation officer immediately by means of a pager or phone call.

The receiver-dialers are plugged into the standard wall outlets typical of modern telephone equipment. Offenders can use their regular phone line for the monitoring calls, though the receiver-dialer will interrupt any voice transmission taking place during its periodic calls to the central computer. Offenders and their families have learned to avoid making calls during the times the line will be needed by the monitoring system. One type of receiver-dialer uses a long-range wireless repeater system instead of phone lines. Another is portable and can be carried in the car of the supervising officer. It detects the transmitter's signal within approximately a one-block radius.

55. Ford & Schmidt, *supra* note 54, at 6.

The transmitters, which are approximately the size of a cigarette package, are designed to be worn around the neck or ankle and are attached with a plastic strap. Tampering can be detected upon inspection. At least one device also detects if it is removed and alerts the central computer. Some offenders have complained of skin irritation around the ankle, but this can usually be prevented by wearing a sock. The transmitter is visible, and some offenders have refused to wear it because they feared it would attract unwanted attention and interfere with their work.

Although the range of signal detection is generally as advertised—100 to 200 feet—some rooms or buildings have obstacles that interfere with transmission. Cast-iron fixtures, appliances with motors creating an electromagnetic field, stucco houses or mobile homes, immersion in water, nearby broadcast transmitters, or airport landing beams operating in the same general frequency can attenuate the signal. Even body bulk between transmitter and signal, as can happen in certain sleeping postures, has interfered with the signal from some early transmitter models.⁵⁶ Weather conditions can cause power surges that may interfere with transmission, unless a surge protector is part of the system. Some companies provide battery backups to operate the system in case of a power outage. The quality of the phone lines in a particular community can also affect the reliability of the monitoring, and prospective buyers should therefore test proposed systems under local conditions.⁵⁷

Experience suggests that if an absence is registered at the central computer, it is helpful to place an immediate phone call to the offender's home to confirm the absence or establish that it was a false alarm. Without an immediate phone verification, offenders may claim that the detected absence was a false alarm. The supervising officer must then establish whether there is a possible transmission problem in the offender's home or some other legitimate explanation for the alarm. Concerns over the admissibility of computer records at revocation hearings have led some jurisdictions to require offenders to sign waivers relinquishing their right to contest the introduction of the records at such a hearing.

A very thorough check at the beginning of supervision may identify dead spots early and preclude offenders from claiming transmission problems. Simply moving appliances or the receiver is often enough to solve a problem. At least one company places signal repeater stations in the offender's home to avoid transmis-

56. Perrey & Bell, Evaluation of Electronic Monitoring Devices (NBSIR 86-3501) (National Bureau of Standards December 1986).

57. Schmidt, *supra* note 42, at 58.

sion blocks between the main receiver and the transmitter. Offenders may need to be prohibited from going to certain areas, even within the normal range of transmission, if their presence cannot reliably be established there because of transmission problems. One offender reportedly had to live with a relative during confinement because the transmission difficulties were too great at his home.

The procedure followed in a large program⁵⁸ using continuous-signal devices begins with offenders coming to the supervision office at the start of confinement to meet the supervising officer. The officer straps the transmitter to the ankle using a pop-riveter. Straps are checked at least weekly thereafter for tampering. The offender may be instructed in the installation of the receiver-dialer and given one to take home, or the officer may go to the home with the offender to install it. Installation consists simply of unplugging the phone jack from the wall, plugging the receiver-dialer in its place, and then plugging the phone into the receiver-dialer. Checks of the system are conducted to establish its range and any transmission dead spots. Back at the office, the officer programs the central computer with the offender's schedule. Once the transmitter is strapped on, the receiver-dialer plugged in, and the computer programmed, monitoring can begin.

Responsibility for Monitoring

Electronic-monitoring programs have developed different approaches to the maintenance of equipment and the auditing of reports. Some jurisdictions prefer to buy or lease the equipment, and then run the monitoring program "in house." This permits greater control over procedures and offers personnel a better chance to become familiar with the devices and their potential and limitations. It also requires more staff resources and a greater commitment on the part of probation officers to work evenings and weekends.

In some areas, private groups do some or all of the monitoring for the probation office under contract. They audit the transmission reports—twenty-four hours a day, seven days a week if desired—and report violations to the probation office. Arrangements can generally be made for immediate notification of violations or for more general reporting at specified times. Contractors may be given the duty of verifying reported absences by calling the offender's home; only if the absence was confirmed would the on-call probation officer be notified.

58. See, e.g., the account of Pride, Inc., in Ford & Schmidt, *supra* note 54, at 3.

Electronic monitoring can supplement and even supplant the routine and frequent checks required to ensure offenders are complying with confinement conditions. In some cases monitoring can be conducted from the office, with little need for officers to make field trips to offenders' homes or workplaces. But ordinarily, programs maintain some schedule of continued personal contact. Offenders may be required to come to the probation office, where straps and transmitters can be checked for tampering, fees collected, and progress with the self-improvement program reviewed. One survey of twenty programs⁵⁹ found that twelve maintained one personal contact per week, two required at least three, and one required five.

In summary, electronic monitoring is new. Research into its reliability and effectiveness, reviewed in the later chapter on empirical issues, has just begun. Results will not be available for several years. Media coverage has familiarized people with the basic devices, but more intensive education about this technology, for both criminal justice authorities and the public, is needed. Departments of probation and others who are considering using these devices should conduct careful feasibility studies and be thorough comparison shoppers.⁶⁰

Offender Fee Assessments

A program option that appeals to many is offender fee assessments to defray the costs of supervision. Eleven out of seventeen programs responding to a survey of electronic-monitor users reported charging offenders to help cover the expense of the program.⁶¹ In some jurisdictions fees are collected by the probation office; in others private contractors providing monitoring services charge and collect the fees.

59. T. Armstrong, G. Reiner & J. Phillips, *supra* note 32, at 18.

60. For a recent review of the administrative and policy considerations surrounding the implementation of an electronic-monitoring program, see C. Friel, J. Vaughn & R. del Carmen, *Electronic Monitoring and Correctional Policy: The Technology and Its Application* (NCJ-104817) (available from National Institute of Justice/NCJRS, Box 6000, Rockville, Md. 20850). The National Institute of Justice's pamphlet *Electronic Monitoring Equipment*, *supra* note 53, provides addresses and phone numbers of companies offering surveillance systems. Sales representatives in this highly competitive business are generally quite willing to provide brochures and demonstrations of their equipment and to answer questions. We know of at least one company that has provided equipment for use with offenders on a trial basis.

61. T. Armstrong, G. Reiner & J. Phillips, *supra* note 32, at 21.

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A wide range of fees is reported among the different programs, and even within single programs. Four of the surveyed programs charge \$7 a day; three charge \$9, \$6, or \$4; and four use a sliding scale ranging from \$6 to \$15 per day depending on the offender's ability to pay. Several charge an initial equipment-installation fee of \$25 to \$50. One developer suggested that programs should consider imposing a one-time fee of \$500 to minimize the paperwork and time consumed by periodic fee collection. Not only electronic-monitoring programs charge fees. The private supervision officer used in the federal District of Nebraska charges approximately \$150 a month to defray the costs of telephone calls and home visits. Florida's state-run community control program charges \$30 a month in supervision fees and reports a 97 percent collection rate.⁶²

Judges may have the authority to require offenders to pay for the cost of their supervision, though the basis for this authority is not perfectly clear.⁶³ Fee arrangements are often part of a voluntary alternative sentencing plan—not a mandatory requirement. Offenders accede to the fee assessment as part of the sentencing agreement. As described above, Nebraska offenders design their own alternative sentences and submit a proposal to the judge. The contract and fee arrangement with the private supervision officer is part of the plan. Program developers believe that offenders are prevented from arguing that they were "forced" to pay their own warden because they could have designed a different alternative or declined to participate in the program.

Closing home confinement programs to otherwise qualified offenders solely because they cannot pay for supervision raises ethical and legal concerns. Excluding indigents from consideration for

62. Florida Report, *supra* note 10, at 16.

63. State courts have upheld requirements that nonindigents pay for their probation supervision. See *Arizona v. Smith*, 576 P.2d 533 (Ariz. Ct. App. 1978). Several federal jurisdictions currently require offenders to bear the costs of meeting probation conditions of treatment or training and the costs of surveillance under home confinement. 18 U.S.C. § 3651 grants judges the authority to require offenders to pay the costs of residence in a community treatment center, but it is silent regarding the costs of other community supervision. Some may argue that home confinement is analogous to a community treatment center and that fee assessment is thus authorized. Others may argue that since the statute is explicit on the centers but silent on home confinement, fee assessment in the latter case is excluded. Probation conditions requiring payments to charitable or other groups not damaged by the crime have been precluded as beyond the authority of federal judges. See *United States v. John Scher Presents, Inc.*, 746 F.2d 959 (3d Cir. 1984). The general counsel to the Administrative Office of the U.S. Courts has not issued advice on the legality of these probation conditions and urges caution as well as experimentation. Telephone conversation with David N. Adair, Jr., assistant general counsel (May 14, 1987).

a sentence of home confinement may be unconstitutional. Commentators foresee a challenge to this practice under the Fourteenth Amendment's due process and equal protection clauses.⁶⁴ Once an offender has been given a sentence of probation, revoking home confinement and imprisoning the offender for failure to pay supervision costs are almost certainly violations of due process, absent findings that the offender was somehow responsible for the failure and that alternative forms of punishment are inadequate.⁶⁵

Many programs make provisions for indigent offenders, even if financially able offenders are required to pay. In Nebraska, a quarter of the program participants were supervised by the probation office and not by the private contractor. Some jurisdictions report that the majority of the offenders under their supervision are indigent. At present, caution and fairness require that some sliding-scale fee arrangement or a budget adequate to pay for the supervision of indigents is needed to ensure that programs are open to all qualified offenders, regardless of ability to pay.

64. See del Carmen & Vaughn, *supra* note 26, at 66.

65. In the case of *Bearden v. Georgia*, 461 U.S. 660 (1983), the U.S. Supreme Court invalidated under the due process clause a revocation of an indigent's probation for failure to pay fines and restitution, absent a finding of fault and inadequate alternatives. Yet in dicta in the same opinion, the Court stated that a "defendant's poverty in no way immunizes him from punishment. Thus, when determining initially whether the State's penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources." 461 U.S. at 669-70. Whether the state's legitimate penological interests include requiring offenders to pay for their own supervision remains unclear.

IV. HOME CONFINEMENT AND SENTENCING GOALS

An evaluation of home confinement must look at how well it accomplishes the goals of sentencing. Agreement on these goals, however, has never been unanimous.⁶⁶ To the extent that a particular sentence satisfies several goals, there is no conflict; but when goals conflict one must choose among them in fashioning appropriate sentences. Examples of these conflicts are well known: The nondangerous person who commits a serious crime under unique pressures—does one punish for the crime or take account of the probability that it will never happen again? The young offender who does not seem committed to a life of crime, but who could succumb to the criminogenic milieu of prison—does one imprison and risk creating a new career criminal, or release to the community at the expense of giving the punishment deserved?

Home confinement, because of the wide range of options and conditions it makes possible, promises to reduce these conflicts. Especially when a variety of additional conditions and resources are available—such as community service, drug testing and treatment, or education and job training—judges can dispense both justice and rehabilitative treatment while significantly incapacitating the offender. Sentences can be tailored to each individual and each crime.⁶⁷ This chapter attempts to identify the issues that should be

66. See 18 U.S.C. § 3553(a)(2) for the factors and purposes to be considered in imposing criminal sentences. The list is exhaustive but not necessarily consistent. The approach of the U.S. Sentencing Commission is found on page 1.3 of the April 13 draft of its Sentencing Guidelines and Policy Statements for the Federal Courts. Instead of choosing among the competing "philosophies" of sentencing, the commission adopts an "empirical approach," basing its recommendations on data describing current sentencing practices. The commission writes that "[a]s a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result." *But see* Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission 3-4 (May 1, 1987).

67. Perhaps the most extreme examples of letting home confinement fit the crime are provided by two California cases. Milton Avol, a Los Angeles landlord, was found guilty of repeatedly failing to repair safety code violations and clean up five blighted apartment buildings. He was sentenced to thirty days in jail and another thirty days under home confinement in one of his own tenements. David Wayte, a conscientious objector convicted of failing to register for the draft, was sentenced to

addressed when fashioning a sentence of home confinement to satisfy various goals; it also reports the available information on how well home confinement is meeting these goals.

Home Confinement as Punishment and Deterrence

The sentencing model based on the "just deserts" of crime has recently been expanded to probation and other nonprison sanctions.⁶⁸ The principles of this model generally require that offenders be punished proportionately to the seriousness and harm of the crime. In this way justice will be done and future crimes will be deterred. The legislature is charged with determining the general gravity of crimes; refinements are made by the sentencing judge. Judges, especially when considering a novel sentence such as home confinement, face the difficult task of deciding how punishing the sentence will be perceived to be—both by the offender and by the public.

Many people remember being sent to their rooms or grounded by their parents for misbehavior. There was no doubt about the purpose of these measures—it was punishment. We can imagine being forced to stay at home; although it might not be too disagreeable for a while, for most people home confinement would at some point become unpleasant and, hence, punishing. Interviews with offenders under home confinement confirm that it can be a very punishing experience. Some have refused to participate in home confinement programs, once they learned of the strict rules, because they felt it would be easier to spend the time in jail.

Yet just *how* punishing home confinement would be would depend on the duration of the confinement (unlike prison, the second month could be much more punishing than the first), how much time one normally spent at home, what kind of house one had, and myriad other factors. Sentences to prison also differ in degree of punitiveness depending on the particular prison, the offender's quality of life outside prison, and other factors. But the problem of punitiveness seems even more significant for home confinement, where the variety of homes and life-styles is much greater than the variety of prisons. And if judges may sentence to

six months of home confinement, with an additional condition barring him from performing any community service during that period. The judge reasoned that community service was a pleasure for someone as morally sensitive as Mr. Wayte.

68. For the theory of sentences as "just deserts," see Singer, *Just Deserts: Sentencing Based on Equality Deserts* (Ballinger 1979); von Hirsch, *Doing Justice: The Report of the Committee for the Study of Incarceration* (Hill & Wang 1976). For its extension to nonprison sanctions, see Thomson, *supra* note 8, at 101-35.

either prison or home confinement, they have the additional problem of finding the home confinement sentence that is equal in punishment to the corresponding term of imprisonment. Methods for solving some of these equating problems are discussed in the next chapter.

Note that equating the punitiveness of home confinement and other sentences with that of imprisonment cannot be reconciled with making home confinement a voluntary program. Naturally, people will be ambivalent about volunteering for a program that they feel is just as harsh as going to prison. This is not a problem, however, if the sentence is mandatory.

Perception of the Offender and the Community

The offender's perception of the punitiveness of a sentence is central to any attempt to make the punishment fit the crime. The community's perception is critical as well, not only because it affects the appearance of justice but also because the effectiveness of the law as a deterrent depends on everyone's understanding that lawbreaking will lead to real punishment.

There is no empirical research documenting public opinion about home confinement. The literature contains anecdotal accounts both of favorable media coverage and widespread community satisfaction and of attempts to keep home confinement programs low-key to avoid negative public reactions. Much depends on the effectiveness of public education and on luck; a violent crime committed by a home detainee early in a program's history may be enough to spoil its reputation in some jurisdictions. Authorities need to be sensitive to the local climate. Members of Mothers Against Drunk Drivers (MADD) have been critics of home confinement in some jurisdictions, in part because driving-while-intoxicated offenders have been frequent participants in existing programs. Yet in other locales, organizations such as MADD have been supportive after efforts to educate the victims' rights groups and coordinate program development with them.

Equating Sentences

How is a judge to decide whether a sentence of home confinement will be adequate punishment? How long should the sentence be, and what conditions should it have? The issue has generally been approached by trying to equate days of home confinement with days in prison. Most state systems have settled on ratios of three to five days of home confinement for one day of imprison-

ment.⁶⁹ Generally, this represents three to five days of detention or curfew, not strict incarceration. Early drafts of proposed federal sentencing guidelines included various formulas for equating sentences: One version equated two weeks in prison with four weeks of home incarceration, with eighty hours of community service, or with fines equaling 15 percent of the average annual available income. A later draft allowed one month of home detention as a substitute for one month of imprisonment, up to a maximum of six months. As described in the final chapter, the new sentencing guidelines submitted to Congress do not permit any substitution of home confinement for required minimum terms of imprisonment, and offer no formula for equating home confinement with discretionary imprisonment.

Preliminary research recently completed suggests that public perception of the equivalence of home confinement with imprisonment does not follow a simple ratio such as three to one.⁷⁰ Nor can one evaluate the equivalence of home confinement with prison without a clear idea of the hours and durations involved and of the type of monitoring and enforcement. Nor does it seem fair to fix a ratio for all offenders without considering their particular homes (Does the home include an indoor pool, or is it rat-infested?) and life-styles (Does the offender live alone or with a large and loving family?). Though data have not yet been gathered, it seems likely that offenders who have previous incarcerations find prison less punitive than do those who have never been behind bars. Certainly the additional conditions of the sentence, such as fines and community service, also contribute to its total punitiveness.

Although perfect equating formulas applicable to all offenders and circumstances remain beyond our grasp, we can be sure that some home confinement programs are perceived to be equally or even more punishing than imprisonment. In New Jersey, 15 percent of prisoners withdrew their application to the program, usu-

69. J. Petersilia, *supra* note 7.

70. A pilot study, conducted by Eric Kane in the Department of Psychology at Johns Hopkins University, asked two hundred students how many months of home detention they would accept in lieu of various lengths of imprisonment. The average ratio was six months of detention for the first month of prison and four and one-half additional months for the second month of prison. The curve then flattened, with four additional months of detention for each additional month of prison. This preliminary finding suggests that constant ratios do not adequately reflect the perceived punishment of home confinement. The relationship is curvilinear, with the first two months of prison being considered more punishing than later months. A report of this study is on file at the Research Division of the Federal Judicial Center. Interviews with offenders having experience in both prison and home confinement suggest that home confinement is much more punishing than the public realizes. Personal communication, Charles M. Friel (Dean, Criminal Justice Center, Sam Houston State University), Washington, D.C. (June 29, 1987).

ally because they discovered they would be paroled without curfew in just a few more months and therefore saw home confinement as more punitive than remaining in prison.⁷¹ Florida has also had offenders turn down community control in favor of prison.⁷²

Home Confinement as a Method of Protecting the Public

An alternative model of sentencing looks not at past behavior but at the chances of future crime.⁷³ If home confinement is to be used for reducing the probability of recidivism, considerations other than its punitiveness become relevant. The goal is to maintain control over offenders who are the most likely to commit new crimes, especially violent ones. Of course, we could maintain virtually complete control if we imprisoned all offenders for the maximum term possible, but at some point the costs of control outweigh its benefits.

The goal of selective incapacitation is to identify offenders with the greatest chance of recidivism and use expensive prison resources for them. Offenders with less risk can be adequately controlled by home confinement; the best risks are candidates for relatively inexpensive probation. Decisions about the necessary level of control should be based on a valid assessment of offender risk. To date, no empirical methods have been developed specifically for evaluating the risk of escape or criminal activity by offenders while in home confinement, an issue that is addressed in the next chapter.⁷⁴

Obviously, a sentence to home incarceration, enforced by continuous electronic monitoring and immediate follow-up of all noted absences, contains more elements of control than a nighttime curfew checked two or three times a week. To assess how incapacitating home confinement is in their jurisdiction, judges must communicate with probation officers to gain an understanding of the local department's monitoring and enforcement policies.

Data on how well home confinement programs control offenders are sparse. Florida reports a revocation rate of 20.6 percent and an

71. Pearson & Bibel, *supra* note 35, at 26.

72. Flynn, *supra* note 37, at 68.

73. See T. Clear & V. O'Leary, *Controlling the Offender in the Community* (Lexington Books 1984); V. O'Leary & T. Clear, *Directions for Community Corrections in the 1990's* (U.S. Department of Justice, National Institute of Corrections, 1984).

74. Telephone interview with Stephen Gottfredson, Temple University, Philadelphia, Pa. (March 1987). Dr. Gottfredson is an expert in risk assessment.

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escape rate of 5.9 percent among the 17,952 offenders placed in the state's program between October 1983 and April 1987.⁷⁵ Of the revocations, 12.9 percent were for technical violations, and 7.8 percent were for new misdemeanors or felonies.⁷⁶ About 30 percent of the offenders in New Jersey's intensive supervision program are expelled in the first eighteen months of supervision (most for curfew violation or drug use detected through urinalysis); 10 percent commit new crimes while in the program (most are misdemeanors such as possession of marijuana). The EMT survey of twenty electronic-monitoring programs found that 96 percent of 973 offenders completed program requirements without incident.⁷⁷ Only 1.3 percent escaped, and 2.8 percent were given technical violations for breaking curfew, drug/treatment violations, or attempting to fool the monitoring equipment.

If offenders go to prison, their recidivism rate for the period of incarceration presumably approaches zero. If recidivism during incapacitation is the primary consideration, then the only advantage of home confinement is its relatively low price. But if home confinement better prepares offenders for postsentence life by allowing them to maintain employment, get off drugs, or stay in school, then the more appropriate comparison is recidivism in the long term, after the completion of the sentence. Such data are not yet available. Furthermore, if home confinement is used for people who would have received less intensive supervision under probation, rates for these two levels of supervision must be compared to see if the increased control is worth the price. More research is needed to establish the degree of control provided by home confinement. A discussion of the methodological problems raised by such research is found in the next chapter.

75. Florida Report, *supra* note 10, at 1 (Apr. 27, 1987, update).

76. In the past nine months, fourteen offenders in the community control program have committed homicides or manslaughter. Telephone interview with Richard Nimar, Florida Department of Corrections (June 23, 1987). This is considered a reasonably good record, given that Florida's program, by far the nation's largest, has included many repeat and serious offenders. An analysis of the offenses leading to placement in the program for a sample of 2,727 offenders revealed that 1.4 percent were guilty of murder or manslaughter, 4.4 percent of sexual offenses, 3.9 percent of robbery, and 3 percent of weapons offenses. Florida Report, *supra* note 10, at 29. Florida has now increased its use of electronic monitoring and presentence investigations in a further effort to identify and control dangerous offenders.

77. T. Armstrong, G. Reiner & J. Phillips, *supra* note 32, at 23.

Home Confinement as Training and Treatment

Beyond mere incapacitation, many believe that sentences can and should help offenders become productive citizens.⁷⁸ Home confinement is widely regarded as holding great promise as a rehabilitative tool, but its therapeutic use has just begun to be explored. At a minimum, keeping offenders at home shields them from the sometimes criminogenic conditions of prison life. When disruptions to family life and employment are reduced, the offender is less likely to develop a criminal outlook and life-style. There are anecdotal reports that offenders can learn to structure their time, budget their money, and generally make significant changes in their habits under the enforced regime of home confinement. They sometimes stop taking their spouses for granted, make improvements around the house, and find time to study.

The home does not in itself offer any systematic treatment or training. Community mental health, counseling, and educational services must be relied on to provide the needed professional assistance. In some jurisdictions, notably Florida, organizations offering treatment or willing to participate in overseeing offenders in public service are catalogued for the use of judges and probation officers when fashioning individualized sentences. Judges can thus order participation in such programs as part of the sentence. The success of these efforts depends to a great extent on the quality and variety of available community resources.

Ideally, each offender develops a self-improvement plan with the supervising officer. The plan incorporates the offender's unique needs, problems, and capabilities, and includes specific objectives and completion times. Some jurisdictions require offenders to keep daily activity logs. Supervising officers are authorized to inspect these logs at will. Logs can help offenders learn to structure their time and learn new habits, as well as provide a further check that they are complying with the plan. The primary responsibility for implementing the plan is shared by the offender and the supervising officer, though it may be therapeutic for a judge periodically to admonish or commend the offender from the bench. Time away from home or reductions in frequency of checks might be used as a

78. For the classic argument for treating instead of punishing criminals, see K. Menninger, *The Crime of Punishment* (1966). J. Smykla, *Probation and Parole: Crime Control in the Community* (1984) provides the traditional rehabilitation model of probation.

reward for successful completion of curricula or other good behavior.⁷⁹

To provide a sense of the rehabilitative potential of home confinement combined with additional sentencing options, a brief survey of the most common additional program elements is presented below.

Drug Testing and Alcohol Monitoring

Research has demonstrated a link between the use of narcotics or other hard drugs and criminal behavior.⁸⁰ The frequency of crimes committed by given individuals is related to their current drug habits; the more they use, the more likely they are to commit crimes. The identification, monitoring, and control of drug and alcohol use appear likely to help protect society and rehabilitate many offenders. New testing technologies enable the detection of drug use at a speed and reliability only recently possible. Devices currently under development, for example, will permit the breathalyzer monitoring of alcohol consumption through telephone contact.

All but six of the thirty-one states with intensive supervision programs include drug testing as a routine or optional component, and all of the programs including home confinement require it.⁸¹ In the case of postconviction probation, evidence of drug use constitutes a violation of probation and could result in revocation. Testing thus minimizes the possibility that the offender, though staying at home, is nonetheless continuing a life-style leading to future crime.

Preliminary research suggests that testing for use of hard drugs as an additional condition of home confinement may reduce the risk of recidivism. For more than three years, the District of Columbia has experimented with prearrestment drug screening of arrestees and mandatory regular drug testing as a condition of pretrial release.⁸² Upon arrest, more than half the defendants in the

79. See Gable, *Application of Personal Telemonitoring to Current Problems in Corrections*, 14 J. Crim. Just. 167, 174 (1986), for additional suggestions on the use of electronic monitors for rehabilitation.

80. Gropper, *Probing the Links Between Drugs and Crime*, in *Research in Brief* (National Institute of Justice February 1985).

81. Byrne, *supra* note 11.

82. M. Toborg, Remarks at a seminar at the Federal Judicial Center, Washington, D.C. (December 1986). An evaluation of the pretrial screening and testing of juveniles will not be completed for several years. The as-yet-unpublished data discussed in this section were distributed at the seminar.

program test positive for heroin, cocaine, methadone, PCP, or amphetamine. The judge is given the test results and has the option of making mandatory drug testing a condition of release. Pretrial rearrest and failure-to-appear rates are uniformly higher for drug users than for non-drug users. Rearrest rates for June 1985–June 1986 were 21 percent and 14 percent for users and nonusers, respectively.⁸³ There is some preliminary evidence that regular testing can lower rearrest rates; 33 percent of users given no follow-up testing, 30 percent given one to three follow-up tests, and 14 percent given four or more tests were rearrested.

Community-Based Treatment and Training

With creativity on the part of judges and probation officers, and with adequate resources available in the community, home confinement and the close supervision it entails afford an opportunity to fashion truly comprehensive self-improvement plans. Completion of adult literacy courses staffed by volunteers or of high-school equivalency studies, for example, can often be accomplished at home or with short trips to school. With judicial permission, special rewards for attaining treatment goals, such as Saturday nights out, can be used as inducements. In some jurisdictions, probation offices offer group therapy for home detainees, giving them a chance to get out of the house while still under close control. Other treatment resources can surely be identified or developed in most jurisdictions.

Cost-Effectiveness of Home Confinement

One of the appeals of home confinement is that it promises to accomplish sentencing goals in a cost-effective way. In a period of government austerity, decision makers must ask whether the savings or expenses of home confinement justify its risks and benefits. If home confinement is used to divert offenders from jail, we must consider: How much of an increase in the risk of new crimes are we willing to accept to save money and prison space? When increasing the level of probation, we must ask: How much gain in protection for society do we need to justify the cost of increased probation supervision? It is not always clear from what point of view one should approach the cost/benefit analysis—that of the courts, the prisons, the government in general, or society as a

⁸³. Carver, *Drugs and Crime: Controlling Use and Reducing Risk Through Testing*, in National Institute of Justice Reports (September/October 1986).

whole? The problem can get complex indeed when one tries to consider the cost of prisons, the cost of probation monitoring, injuries to victims of crimes, the expense of supporting incarcerated offenders' families with public assistance, and so on.

Exact calculations are further complicated by many factors specific to each jurisdiction. If home confinement programs divert substantial numbers from prison, they could relieve pressure for new prison construction. We know of no programs, however, that have enabled a jurisdiction to close prisons or lay off prison employees because of the savings created by home confinement. Most savings have been limited to reduction of minor expenses such as food costs, although the curfew parole program has significantly reduced the Bureau of Prisons' community confinement expenditures.

Another cost consideration if a program is to include electronic monitoring is the initial expense of purchasing equipment. Although this can be considerable, the longer the equipment is used, the greater the jurisdiction's return on the initial investment. Some companies lease the equipment. For example, visual verification monitoring equipment can be leased for thirty-six-month periods, at a cost that reportedly averages approximately \$1.35 a day per offender—assuming the equipment is fully utilized for the period of the lease. Leasing permits programs to take advantage of new technological developments, instead of wedding them to a particular type of equipment.

The Rand Corporation has computed rough comparisons of the cost of alternative sentences in its "Innovations in Probation" survey. Each type of sentence has a wide range of costs, depending on local programs and conditions. Rand's estimates of annual costs per offender are as follows:⁸⁴

Routine probation	\$300-\$2,000
Intensive probation	\$2,000-\$7,000
Home confinement	
Without electronics	\$2,000-\$7,000
With telephone callback	\$2,500-\$5,500
With passive monitoring	\$2,500-\$6,500
With active monitoring	\$4,500-\$8,500
Local jail	\$8,000-\$12,000
Local detention center	\$5,000-\$15,000
State prison	\$9,000-\$20,000

The EMT Group surveyed twenty electronic-monitoring programs and requested cost comparisons of jail/work release with

84. These figures come from J. Petersilia, *supra* note 7.

electronic monitoring. Annual cost estimates for jail/work release ranged from \$10,220 to \$20,075 compared with \$1,460 to \$7,300 for electronic monitoring.⁸⁵ The EMT report cites difficulties, however, in finding cost-accounting methods that adequately reflect staffing costs, overhead rates, and start-up costs. The director of Florida's Probation and Parole Services estimates annual costs of \$1,044 without electronics and \$3,234 to \$3,599 with electronics, as compared with \$10,089 for imprisonment.⁸⁶ These are clearly rough estimates, and any jurisdiction considering home confinement should do its own projections.

The business of electronic monitoring is in flux; as companies recoup their development costs and compete more, prices are likely to fall. Moreover, jurisdictions can offset some of their costs through fees. Florida collected \$9.2 million in such fees, though its large program cost more than that. The expense of Georgia's intensive supervision program was completely offset by the \$650,000 in fees it collected. The cost of monitoring offenders in Nebraska's program has been borne almost completely by the offenders themselves. But the Contra Costa, California, home detention program was cancelled after a year because its \$95,827 price tag was estimated to be greater than the cost of confining the eighty-six participating offenders in jail—even though no electronics were used.

85. T. Armstrong, G. Reiner & J. Phillips, *supra* note 32, at 23. These annual rates were obtained by multiplying the reported daily rates by 365.

86. Flynn, *supra* note 37, at 68. These figures were obtained by multiplying by 365 the reported daily estimates of \$2.86 without electronics, an additional \$6 to \$7 with electronics, and \$27.64 for imprisonment.

V. EMPIRICAL QUESTIONS

Many of the decisions to be made in implementing home confinement programs are policy decisions appropriately made by judges, legislatures, and other officials. Behavioral and social scientists can contribute their skills in research and statistics to help inform these decision makers. But home confinement is a recent innovation—studies of its cost-effectiveness, its community acceptance, and the risk it introduces of escape or recidivism are only now appearing. At this point we are largely restricted to reporting work in progress and to recommending studies that should be launched.

Several projects—funded and monitored by the National Institute of Justice (NIJ), the Bureau of Prisons, federal probation officials, or private investigators—are under way. One NIJ study has enlisted college students to wear electronic monitors while logging their activities. By comparing the logs with the electronic records investigators can determine how unreliable the devices are—both in falsely reporting absences and in missing them. The students are to try to foil the systems, just as offenders might. Other controlled experiments, also by the NIJ, are designed to compare the behavior of offenders wearing electronic devices with the behavior of similar persons under conventional probation and community placement. The bulk of results from these studies will not be available for several years, however.⁸⁷ In the next sections we propose several studies that are needed to effectively implement and evaluate home confinement programs under the traditional models of sentencing.

How Punishing Is Home Confinement Relative to Imprisonment and Other Sanctions?

The question of how much punishment is needed to retribute for a crime is an ethical question that cannot be answered with scientific methods. But the problem of equating the perceived punishment of imprisonment to the perceived punishment of home con-

⁸⁷ Telephone interview with Annesley Schmidt (March 1987). Ms. Schmidt is the coordinator of these projects for the NIJ and a nationally recognized expert in electronic monitoring.

finement can be approached empirically using methods developed for the study of choices and decision making. The perceptions of both offenders and the public are important, since only if home confinement is perceived as punishing can one expect it to deter crime. Offenders who have experienced both prison and home confinement could be asked to choose between prison and home sentences of various hours and durations. The point at which the average person was indifferent to a choice between the two would be one possible definition of an equivalent sentence. To obtain the perception of the community, members of the public could be asked to make similar judgments. Any mismatch between the perceptions of offenders and the perceptions of the public would represent a gap in public understanding of prisons, home confinement, or both.

Who Can Be Controlled by Home Confinement? Predictions of Risk and Success

For the purpose of protecting the public, it becomes critical to identify offenders with a low risk of committing recidivist crimes while under confinement. There may be offenders who would be poor risks for probation without home confinement but who could succeed with it, especially if it included close monitoring. Some system for making predictions specific to home confinement, or to electronic monitoring, seems desirable.

Empirically derived, statistical methods of prediction could help inform decisions about the level of control needed by an offender. Such methods often improve prediction, at least compared with random release of offenders or with unaided "armchair" predictions by probation officers or judges. The latter are often unreliable and can be contaminated by extralegal factors, errors of induction, personal biases, and manipulation by canny offenders. Attempts to predict risk empirically have often identified many of the same factors: prior criminal record, drug addiction, employment, age, sex, and other demographic variables. It is likely that an empirically based system for identifying the risk associated with home confinement would have only marginally greater utility than existing methods for selecting candidates for parole or release on bail. But this cannot be known without research.

There may be factors that predict problems specific to complying with conditions of home confinement. Psychological tests that measure impulsiveness, for example, might help identify persons who are incapable of acting as their own wardens. Offender characteristics used by experienced probation officers to assess risk could

be identified using "think aloud" protocols. Expert officers could be asked to read a sample of case files and indicate which information they considered important for assessing risk. Data on these factors, to the extent they could be made objective and quantifiable, could then be collected for a sample of offenders sentenced to home confinement and the validity of the factors for predicting risk evaluated.

Research to identify risk factors for home confinement would have some major advantages over traditional recidivism-prediction studies. The outcome variable in traditional research often is rearrest as recorded on FBI rap sheets—a rather coarse measure of success. Home confinement generally involves daily contact with the offender, including careful recording of absences from the home, as well as detailed records of employment, training, and treatment. Research to identify success in home confinement thus has a much richer data base from which to develop outcome measures. Absences from the home are often recorded immediately and automatically, so useful results could be obtained in a shorter amount of time. These measures of outcome would be in addition to the more serious indices of failure, such as formal reprimands by the court, probation revocation, rearrest, or reimprisonment.

A prediction study should be conducted in a district with a large and liberal program so that there is considerable variability in the types of offenders given the home confinement sentence. By correlating the number of absences from home and other outcome data with offender characteristics, predictors of risk and success could be identified. A screening device could then be developed that would allow probation officers empirically to predict the likelihood of success or failure for an offender displaying a given constellation of characteristics.

Evaluation of Home Confinement's Effects on Crime Control and Rehabilitation

A full evaluation of the costs and benefits of home confinement programs, in light of the diverse goals of sentencing, requires that one assess multiple effects of the programs both during the period of confinement and in the long term. It is necessary to discover how successfully the public is protected as well as the programs' long-term effects on recidivism, employment, and other measures of rehabilitation. There are a number of research designs that could be used to evaluate home confinement programs, but they raise methodological issues that must be addressed.

A problem one faces when evaluating how well home confinement protects the public is the definition of protection. One could examine how often offenders are not at home when checked, or how often they abscond and are never found, or the frequency of revocation and recidivism. Further, these rates depend not only on the actual behavior of the offender but also on the rigidity of a probation department's monitoring and enforcement. The strictest supervision may actually result in rates that make a program look the least successful. Compare the program that reimprisons an offender the first time he or she is not at home with the program that gives second, or tenth, chances. When interpreting outcome measures, researchers must carefully define *success* and take into account the type of supervision and the quality of the data.

The mere finding that a group of home detainees has a low recidivism rate, without a comparison group of similar offenders not in home confinement programs, does not allow one to infer that it was the *program* that caused the low recidivism. Since programs are likely to screen applicants and accept only good risks in the first place, high success rates alone do not necessarily mean that a program is effective. From a purely research perspective, the ideal procedure for creating a comparison group is random assignment. Offenders from a pool of those eligible for home confinement would be randomly assigned to home confinement, imprisonment, or probation. Although such a design would isolate the effects of the program from the effects of selection, the ethical concerns stemming from the unequal treatment of similar offenders might preclude its use. Ethical concerns might be attenuated if the random assignment was to equally punitive sanctions, as determined by an equating study.

If randomization is not feasible, several alternative designs are available. One possibility would be to form a matched control group by identifying similar past cases.⁸⁸ It is unlikely, however, that complete outcome information would be available for cases not originally identified as part of the study. One could also evaluate the a priori probabilities of recidivism for the type of offenders given home confinement by using the existing salient factor score and RPS-80 risk assessments routinely done for probationers and comparing these with the actual recidivism of the group. These scores could also be used as a matching variable or as a covariate in an analysis of covariance comparing home detainees with offenders who received other sentences.

88. See Pearson & Bibel, *supra* note 35, for a similar design employed to evaluate the New Jersey intensive supervision program.

None of these quasi-experimental designs would provide the certainty of a randomized design. But many of the most potent threats to the validity of a causal inference, such as the claim that the program's success was due to its selection of "good risk" offenders, could be ruled out. If, for example, a home confinement program was restricted to first-time offenders, one could compare outcomes of program participants with those of first-time offenders given routine probation or sent to prison. It might be difficult to find cases that matched all salient characteristics of the program group, however, and nonrandom designs always leave open the question of whether there are some unknown or unmeasured differences between groups that account for the results.

What Are the Economic Effects of Home Confinement Compared With Those of Other Sentences?

The savings and costs to the courts, probation offices, prisons, and society as a whole resulting from use of home confinement depend on which alternatives it replaces and the costs of those alternatives. The Bureau of Prisons estimates the costs of incarceration. The federal probation system estimates the costs of various levels of probation supervision. We can estimate the costs of different types of confinement and monitoring, and of additional conditions typically used with home confinement. Given these estimates and projections of the likely disposition of home detainees if the programs did not exist—that is, prison or probation—we can estimate the savings or expenses created by the programs. For example, if home confinement was used with 20 percent of federal criminal offenders—of which 5 percent would have gone to prison and 15 percent would have been placed on high-supervision probation—we could use the cost estimates to calculate the savings, or in this example the extra expense, generated by the program.

This methodology could be applied to assess the impact of various criteria for selecting offenders for home confinement. Based on recent statistics on the frequency of different types of crime and offender histories, one could estimate how many offenders would be eligible for a sentence of home confinement under different criteria. One could compare the new sentencing guidelines, previous drafts of the guidelines, or other criteria currently used in various programs. A description of the changes in selection criteria under the guidelines, and rough estimates of what they mean for home confinement, are presented in the next chapter.

VI. IMPACT OF THE SENTENCING REFORM ACT

Status of the Sentencing Guidelines

The Sentencing Reform Act was signed into law on October 12, 1984.⁸⁹ Among its provisions was the creation of the United States Sentencing Commission, a judicial branch agency given the task of developing sentencing guidelines. The mandatory guidelines were to establish narrow ranges of sentences for all federal offenses. After circulating for comment and holding hearings on two early guideline drafts,⁹⁰ the Sentencing Commission transmitted its proposed guidelines to Congress on April 13, 1987. Absent the enactment of new legislation, the sentencing guidelines, as well as most of the other provisions of the act, will go into effect November 1, 1987.⁹¹ This chapter describes the availability of the home confinement option under the proposed (April 1987) guidelines and the statutory provisions that will accompany guideline implementation.

Home Confinement Under the Guidelines

The proposed sentencing guidelines allow for the imposition of home confinement only as an alternative to routine forms of probation and supervised release. They explicitly reject home confinement as an alternative to imprisonment.⁹² The guidelines treat home confinement as an option for "widening the net"—meting out more serious punishment and ensuring greater control over offend-

89. Ch. II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473.

90. The first draft was made available in September 1986 and the second in January 1987.

91. The commission, in its transmittal letter to Congress, requested that legislation be enacted to stay implementation of the guidelines until August 1, 1988, to allow for field-testing and training.

92. U.S. Sentencing Commission, Sentencing Guidelines and Policy Statements for the Federal Courts, at sec. 5C2.1 and para. 7 of accompanying commentary (Apr. 13, 1987).

ers than regular probation. To understand clearly what this means, it is necessary to describe in brief the structure of the guidelines.

Offenses are assigned a severity level ranging from 1 (least serious) to 43 (most serious). Offenders are placed into one of six criminal history categories on the basis of the extent and recency of their criminal record. The guideline grid then assigns a range of months to be served in prison for each offense level/offender category combination. In addition to these imprisonment guidelines, other sections govern the length and conditions of sentences to probation and supervised release and other sentencing options such as fines and restitution.

The availability of certain sentencing options, including home confinement, is tied to the lower limit of the imprisonment guideline range.⁹³ In general, this lower limit must be satisfied by imprisonment. If, for example, the guideline range is forty-one to fifty-one months, the offender must be sentenced to at least forty-one months in prison. When the lower limit is zero, the offender may (but need not) be sentenced to probation. There are two exceptions to this general rule that determine the availability of alternatives to imprisonment. First, where the lower limit of the guideline range is from one to six months, the court may impose probation if, and only if, one of the conditions of the sentence is intermittent confinement (e.g., weekends in jail) and/or residence in a community facility (e.g., a community treatment center) for a total time at least equal to the lower limit. Second, where the lower limit of the guideline range is from one to ten months, the court may impose a sentence to imprisonment that is as short as one-half of the lower limit if it is followed by a period of supervised release that includes a condition of residence in a community facility for at least the remaining half of the minimum time specified.

Under this structure, home confinement is authorized only as a condition of regular probation (which is available only for imprisonment ranges with a lower limit of zero) or of supervised release following a term of imprisonment within the guideline range. This represents a change from the January 1987 draft guidelines, in which home confinement was an explicit alternative to imprisonment. Under the current proposal, the only ways home confinement could be used as an alternative to imprisonment would be when the guideline range would also permit regular probation or in connection with a probation sentence *outside* the guidelines.⁹⁴

93. *Id.*

94. Judges may depart from the guidelines if the court finds "that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b).

For example, commentary accompanying the guidelines suggests that probation with home detention or home incarceration may be an appropriate outside-the-guidelines decision for disabled, elderly, or extremely ill defendants "who would otherwise be imprisoned."⁹⁵

The guidelines include a specific section on "home detention" in the chapter on sentencing options, noting only that it may be imposed as a condition of probation or supervised release.⁹⁶ The commentary accompanying the guidelines defines home detention to include what we have referred to as both home detention and home incarceration. The less restrictive curfew, although certainly allowable as a condition of probation, is not included in the guidelines' definition of home detention and would presumably not be covered by the commentary applicable to the section.

This commentary states that a term of home detention should generally last no longer than six months.⁹⁷ Note that the length of a term does not appear to be restricted by the upper limit of the imprisonment guideline ranges. Therefore, a sentence to probation with six months of home detention as a special condition would be considered a decision within an imprisonment guideline range of zero to one months. Similarly, an offender sentenced to serve a period of imprisonment equal to the upper limit of the guideline range could be sentenced to six more months of home detention as a condition of the supervised release to follow imprisonment. In fact, given the nonbinding status of the commentary, the court could impose home detention for the maximum prescribed period of supervision without exceeding the guidelines.

Sentences above the guideline ranges may be appealed by the defendant, and upon approval of the attorney general or the solicitor general, those below the guideline ranges may be appealed by the government, except where the sentence is not beyond that agreed to as part of a plea bargain. See 18 U.S.C. § 3742, as modified by the Sentencing Reform Act of 1984.

95. U.S. Sentencing Commission, *supra* note 92, at para. 2 of commentary accompanying sec. 5F5.2. The subject is raised in the context of imposing home detention for longer than six months. Use of the phrase "who would otherwise be imprisoned," however, indicates that these factors would also be appropriate reasons to go outside of a guideline that called for some imprisonment. Further, the guidelines, at sec. 5H1.4, note "extraordinary physical impairment" as a reason to impose a sentence other than imprisonment.

96. *Id.* at sec. 5F5.2.

97. *Id.* at para. 2 of commentary accompanying sec. 5F5.2.

Home Confinement as a Condition of Probation

Judges may impose home confinement as a condition of probation under both current law and the new guidelines. What will change is the latitude afforded the court in imposing probation. Traditionally, the statutory bounds constraining judges' sentencing decisions have been extremely broad. Under the Sentencing Reform Act of 1984, however, there will be fewer offenses for which probation is an allowable sanction. Under the act, probation is a sentence in its own right rather than the result of suspended imposition or execution of a sentence to imprisonment. In addition to offenses for which it is expressly precluded, probation may not be imposed for class A or class B felonies, that is, any offense with a maximum term of twenty years or more, or death.⁹⁸

The sentencing guidelines narrow judicial discretion still further by reducing the range of offense level/offender category combinations for which probation is deemed appropriate. Regular probation is allowed under the guidelines only where the lower guideline limit is zero. This occurs in 21 of the 258 guideline cells (i.e., the matrix of forty-three offense levels and six offender categories, shown in appendix B). The "probation-eligible" cells span offense levels 1 through 6 for offenders in criminal history category I (those with either no prior convictions or one prior conviction, but no sentence to incarceration for sixty days or more). As criminal history becomes more extensive, the number of offense levels for which probation is available decreases; offenders in the highest criminal history category (i.e., those with more than four prior sentences to a period of incarceration exceeding thirteen months) may receive probation only if they committed a level 1 offense.

To gauge the restrictiveness of these boundaries, one must understand how offense level is determined. First, the offense of conviction is assigned a "base level." For example, all thefts are assigned a base level of 4. This level is then adjusted for various aggravating or mitigating offense behavior factors that are either specific to the offense (e.g., for thefts, the dollar amount involved) or generally applicable to all offenses (e.g., whether the offense involved vulnerable victims or obstruction of justice). Adjustments are also made if the offender's role in the offense was either aggravating or mitigating, or if the offender was convicted of multiple counts. In addition, there is a 2-level reduction if it is determined that an offender "accepts responsibility."

98. 18 U.S.C. § 3561(a), as modified by the Sentencing Reform Act of 1984.

We reviewed the base levels for a few relatively common offenses for offenders in the lowest criminal history category to determine which would be eligible for probation and, therefore, home confinement. Although the highest probation-eligible offense level for these offenders is 6, we used as a cutoff a base level of 8, assuming that the 2-level reduction for acceptance of responsibility will be a common adjustment. The results of this quick and general review indicate that probation would be available for property offenses (theft, embezzlement, forgery, fraud, tax violations) involving \$10,000 or less. Where the offense involves a breach of trust or "more than minimal planning," the dollar-level cutoff is reduced to \$2,000. Counterfeiting of U.S. obligations is not eligible regardless of amount. The only drug offenses assigned base levels of 8 or below are possession, and trafficking in less than one kilogram of marijuana or relatively small amounts of schedule IV or V controlled substances.

It seems clear that the pool of offenders for whom home confinement may be used as an option under the guidelines will be significantly reduced from current practice. Probation officers have reported that according to their calculations of the guideline sentences for offenders currently under home confinement, the guidelines would curtail the use of home confinement for many of the types of offenders on whom it is now imposed. The judges and probation officers with whom we spoke described a current selection process that evaluates many more offender variables than those used in the guidelines to categorize offenders. Further, many of the variables now used by the courts to assess suitability for home confinement are explicitly deemed inappropriate considerations for rendering sentences below the guideline range. For example, instructions accompanying the guidelines note that, ordinarily, age and educational and vocational skills are not relevant in determining whether a sentence should be outside the guidelines, or the type of sentence when the guidelines provide for sentencing options (i.e., when choosing between imprisonment and residence in a community facility or intermittent confinement).⁹⁹ Employment is not ordinarily relevant in determining whether a sentence should be outside the guidelines, but may be relevant when choosing options. Further, family ties and responsibilities are ordinarily deemed irrelevant to any decision outside the guidelines.¹⁰⁰

99. U.S. Sentencing Commission, *supra* note 92, at sec. 5H1.5.

100. *Id.* at sec. 5H1.6. Judge William Wilkins, the chairman of the U.S. Sentencing Commission, has stated that the term *ordinarily* was chosen carefully in these provisions to afford probation officers and judges flexibility in taking into account offender characteristics. For example, a young offender with a good work record

Home Confinement as a Condition of Postrelease Supervision

The Sentencing Reform Act of 1984 abolishes parole release and restricts the earning of "good time," the two methods that provide for a period of postrelease supervision under the current system.¹⁰¹ It creates a new sentencing option, called "supervised release," to provide for community supervision after an offender leaves prison. The change from the current situation is both in the locus and in the timing of the decision. Now, the U.S. Parole Commission determines the date of release and imposes the conditions of supervision near that date. Under the act, it will be the judge, at the time of sentencing, who determines both the need for a term of supervised release following incarceration and its conditions.

The guidelines governing supervised release require that such a term be imposed to accompany any imprisonment sentence of more than one year or when required by statute (e.g., for drug offenses). In any other case, imposition of supervised release is discretionary.¹⁰² If the statute of conviction requires imposition of supervised release, the guidelines specify that the term imposed is to be no less than three years, and no more than the greater of five years or the minimum required. In any other case in which supervised release is imposed, the guidelines call for a term equal to the maximum authorized by the act: one, two, or three years depending on the class of the offense.¹⁰³ These restrictions should have no impact on the pool of offenders eligible for home confinement as a condition of postrelease supervision. What will change is the timing of their release. Under the curfew parole program, offenders are released approximately two months early on parole with a curfew condition. No such early release will be permissible under

might be given a sentence of probation even if the guidelines required imprisonment. Panel Discussion on Sentencing Guidelines, National Conference for Chief and Deputy Chief U.S. Probation and Pretrial Services Officers, Federal Judicial Center, Washington, D.C. (June 29, 1987).

101. Parole is repealed by section 218(5) of the Sentencing Reform Act of 1984. The new good-time provisions are found at 18 U.S.C. § 3624, as amended by the act. Currently, most offenders are released to some type of supervision. If they are not paroled, they are still usually released prior to the expiration of their full sentence through the earning of good time and "extra" good time. They are then supervised as "mandatory releasees" until they reach their sentence expiration date, minus six months.

102. U.S. Sentencing Commission, *supra* note 92, at sec. 5D3.1.

103. *Id.* at sec. 5D3.2. 18 U.S.C. § 3583, as modified by the Sentencing Reform Act of 1984, sets forth maximum terms of supervised release as follows: three years for class A or B felonies (offenses with maximum terms of twenty years or more); two years for class C or D felonies (five to twenty years); and one year otherwise.

the new guidelines. While this is a small difference in time served for each offender, the cumulative effect on prison resources could be considerable.

Recommendation to the Commission

It appears to us that the Sentencing Commission has prematurely restricted the use of home confinement. The commission is projecting a 71 percent increase in prison population over the next five years, from the current 1987 population of 42,000 to 72,000 in 1992.¹⁰⁴ The only options available as alternatives to imprisonment under the guidelines are "community confinement"—residence in a community facility coupled with community service, gainful employment, or treatment during nonresidential hours—and "intermittent confinement"—custody in prison or jail for weekends or holidays. Although both of these could save space in federal prisons, they are both quite expensive and may exacerbate existing crowding in community treatment centers and local facilities. The commission forecasts a rise in the population of community corrections facilities of between 25 percent and 87 percent (to 4,000–6,000 from a current level of approximately 3,200).¹⁰⁵

We suggest that the commission consider reintroducing home confinement as an alternative to imprisonment. This could be done in several possible ways. The commission could return to the model proposed in the January 1987 draft guidelines, where home detention or incarceration could substitute for up to six months of imprisonment. The definition of community confinement might be changed to include home detention or home incarceration. The commission may wish to consider some new method for substituting different levels of home confinement for terms of imprisonment, using equating formulas to ensure fair punishment. Curfew might be added as a possible substitute for the last few months of a sentence, as currently implemented in the curfew parole program. Guidelines and commentary might be written to allow offender risk factors to be considered when deciding if home confinement would adequately protect the public.

104. U.S. Sentencing Commission, Supplementary Report to the Sentencing Guidelines and Policy Statements, at ch. 7, table 4. This projection is based on a low-growth forecast for convictions, application of the 1986 drug law, and the onset of the guidelines (including their implementation of congressional guidance as to the treatment of career offenders).

105. *Id.* at sec. G4.

Chapter VI

We believe that experimentation, rather than restriction, is the prudent course of action at the current stage of this evolving sanction in the criminal justice system. We would be happy to join the commission in the empirical research needed to address critical questions about the use of this sanction. Unless we experiment, we will never know the full potential of home confinement programs.

APPENDIX A

Parolees Released on Federal Curfew Parole in May and June 1986 (N = 120)

Characteristic	Number of Parolees	Percentage of Parolees
Current Offense		
Robbery	22	18.3
Theft	9	7.5
Fraud	11	9.2
Marijuana	6	5.0
Heroin	26	21.7
Other drugs	11	9.2
Extortion/ racketeering	11	9.2
Other	24	20.0
Current Sentence in Months		
24 or less	12	10.0
24 to 36	17	14.3
36 to 48	13	10.7
48 to 60	19	14.9
60 to 72	15	12.5
72 to 96	19	15.9
96 to 120	12	10.0
120 or more	13	10.8
Conditions of Supervision		
None	63	52.5
Drug aftercare	21	17.5
Urine monitoring	2	1.7
Mental health	1	0.8
Alcohol	5	4.2
Number of Prior Convictions		
0	46	38.3
1	36	30.0
2	9	7.5
3	8	6.7
4	7	5.8
5	3	2.5
6	2	1.7
7	1	0.8
8	2	1.7
9	5	4.2
10	1	0.8
Prior Convictions for Similar Offense?		
Yes	23	19.2
No	67	55.8
Unknown	30	25.0

(continued)

APPENDIX A (continued)

Characteristic	Number of Parolees	Percentage of Parolees
Number of Prior Incarcerations of More Than 30 Days		
0	74	61.7
1	29	24.2
2	6	5.0
3	4	3.3
4	1	0.8
5	4	3.3
6	1	0.8
10	1	0.8
Length of Longest Prior Sentence of Incarceration		
None/30 days or less	74	61.7
One year or less	14	11.7
More than one year	19	15.8
Five years or more	13	10.8
Marital Status		
Married	44	36.7
Single	34	28.3
Divorced	23	19.2
Cohabiting	10	8.3
Separated	9	7.5
Educational Level		
Postgraduate	2	1.7
College graduate	7	5.8
Some college	18	15.0
High school graduate	27	22.5
G.E.D.	10	8.3
Vocational school	2	1.7
Some high school	31	25.8
Eighth grade	16	13.3
Less than eighth grade	6	5.0
Unknown	1	0.8

APPENDIX B

Sentencing Table

Offense Level	Criminal History Category					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0- 1	0- 2	0- 3	0- 4	0- 5	0- 6
2	0- 2	0- 3	0- 4	0- 5	0- 6	0- 7
3	0- 3	0- 4	0- 5	0- 6	2- 8	3- 9
4	0- 4	0- 5	0- 6	2- 8	4- 10	6- 12
5	0- 5	0- 6	1- 7	4- 10	6- 12	9- 15
6	0- 6	1- 7	2- 8	6- 12	9- 15	12- 18
7	1- 7	2- 8	4- 10	8- 14	12- 18	15- 21
8	2- 8	4- 10	6- 12	10- 16	15- 21	18- 24
9	4- 10	6- 12	8- 14	12- 18	18- 24	21- 27
10	6- 12	8- 14	10- 16	15- 21	21- 27	24- 30
11	8- 14	10- 16	12- 18	18- 24	24- 30	27- 33
12	10- 16	12- 18	15- 21	21- 27	27- 33	30- 37
13	12- 18	15- 21	18- 24	24- 30	30- 37	33- 41
14	15- 21	18- 24	21- 27	27- 33	33- 41	37- 46
15	18- 24	21- 27	24- 30	30- 37	37- 46	41- 51
16	21- 27	24- 30	27- 33	33- 41	41- 51	46- 57
17	24- 30	27- 33	30- 37	37- 46	46- 57	51- 63
18	27- 33	30- 37	33- 41	41- 51	51- 63	57- 71
19	30- 37	33- 41	37- 46	46- 57	57- 71	63- 78
20	33- 41	37- 46	41- 51	51- 63	63- 78	70- 87
21	37- 46	41- 51	46- 57	57- 71	70- 87	77- 96
22	41- 51	46- 57	51- 63	63- 78	77- 96	84-105
23	46- 57	51- 63	57- 71	70- 87	84-105	92-115
24	51- 63	57- 71	63- 78	77- 96	92-115	100-125
25	57- 71	63- 78	70- 87	84-105	100-125	110-137
26	63- 78	70- 87	78- 97	92-115	110-137	120-150
27	70- 87	78- 97	87-108	100-125	120-150	130-162
28	78- 97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

SOURCE: U.S. Sentencing Commission, Sentencing Guidelines and Policy Statements for the Federal Courts (Apr. 13, 1987).

NOTE: Entries in the table are months of imprisonment. The numbers in parentheses in the column headings refer to criminal history scores.

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Federal Judicial Center

Dolley Madison House
1520 H Street, N.W.
Washington, D.C. 20005
202/633-6011