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Alicia Grace

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HOME INCARCERATION UNDER ELECTRONIC MONITORING: A STATUTORY REVIEW

As a result of the social changes of the 1960's, American society viewed the purpose of the criminal justice system as one of rehabilitation of the criminal, rather than one focused exclusively on punishment.\(^1\) With the increase in crime in the 1970's, and the resulting fear, society's attitude became more conservative toward the criminal justice system.\(^2\) As prisons become increasingly overcrowded, society must find alternatives to incarceration.\(^3\) Ample statistics support the need for solutions.\(^4\) Localities faced with the prospect of spending millions of dollars on new jails which offer little hope of rehabilitating prisoners are responding to the public demand for better criminal punishment with a focus towards cost and program effectiveness.\(^5\)

Home incarceration with electronic monitoring offers an interesting alternative.\(^6\) Since its inception, home incarceration

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1. Friel, Vaughn & Carmen, *Electronic Monitoring and Correctional Policy: The Technology and Its Application*, National Institute of Justice Research Report 1 (June 1987). The authors summarize the key characteristics of this period as viewing long-term incarceration as counterproductive, with less of a need for incarceration for many, and a belief that "community-based corrections are less expensive and at least as effective." *Id.*

2. *Id.* During this time, there was a desire to increase the probability of incarceration as well as the duration of jail/prison time and an effort to prevent the incarcerated from receiving early release. *Id.*


6. Home incarceration alternatively is called home detention, house arrest, home confinement, residential confinement, or home release. Lilly & Ball, *A Brief History of House Arrest and Electronic Monitoring*, 13 N. KY. L. REV. 343, 343 (1987). These terms refer to the process of keeping someone in their place of residence with permission to leave only for specific predefined and approved purposes. *Id.*
has been viewed by corrections officials as a means of reducing the prison population and thereby creating jail space for more serious offenders.

However, this is not a simple "solution." Home incarceration raises many questions. Opponents of home incarceration assert that as soon as jail space becomes available, those who are then under "house arrest" will be imprisoned, regardless of whether they should have been incarcerated initially. Also, a question is raised as to whether punishment is being given in a manner consistent with their crimes. Some criminologists fear that in the process the goal of punishment shifts from one of rehabilitation to one of surveillance and increased social control. A related issue is the anticipated intrusion into the sanctity of the home. The concern for the defendant's privacy is an important factor in the various State Codes addressing home incarceration.

Other critics stress that placing convicted defendants under "house arrest" does not guarantee that they will not commit another crime. According to these critics, punishment requires a strictly enforced isolation in order to keep the malevolent components of society apart. Groups such as Mothers Against Drunk Driving (MADD) assert that house arrest results in a trivializing of the seriousness of the crimes by imposing an inappropriately light sentence. Reciprocity is defeated if some offenders benefit from crimes, while

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7. The first person was put on house arrest in 1984 in West Palm Beach, Florida. Schmidt, supra note 5, at 2.
13. Id.
Advocates of home confinement stress other factors in assessing its validity. It is thought that electronically monitored home confinement achieves the goal of incapacitating and controlling the home detainee. Second, electronically monitored home confinement qualifies as retribution, because it inflicts more pain than simple probation yet less than institutional incarceration. As restitution, home incarceration allows the offender to earn the income that can serve to pay the victim for the harm caused by the defendant. As a simply humanistic result, the stigma of going to jail is avoided. The offender is able to retain his employment and support his family. The pursuance of his familial role potentially contributes to his rehabilitation.

The viability and interest in house arrest was greatly enhanced by the advent of electronic monitoring equipment that allowed for easier surveillance with greater control. Electronic monitoring allows judges, probation departments, and the public at large to be more comfortable with home confinement. The number of offenders under electronic house arrest in February 1989 was 6,490. In 1990, it is estimated that at least 12,000 people will go under house arrest in the United States.

As more states enact legislative caps on prison populations to prevent severe overcrowding conditions, and as judges mandate solutions be found, the need for alternatives

16. Id.
17. Schmidt & Curtis, Electronic Monitors, in INTERMEDIATE PUNISHMENTS, supra note 9, at 139.
18. Vaughn, supra note 9, at 159.
19. Lilly & Ball, supra note 6, at 363.
22. Id.
such as home confinement will expand.\textsuperscript{23} Other more traditional alternatives include parole, probation, community service, work release, half-way houses, and fines.\textsuperscript{24} House arrest can be used in lieu of jail, as a split sentence, in conjunction with work-release or as a condition of probation and parole.\textsuperscript{25} The manner in which home incarceration has been implemented varies considerably from state to state, and differences exist even within a particular state. One of the variables that determines the character of a home incarceration program with electronic monitoring is the type of electronic equipment selected for the program.\textsuperscript{26}

Electronic equipment is generally of two types: either passive or active.\textsuperscript{27} An active system refers to equipment that provides continuous information as to whether an individual is within range, generally 150 to 200 feet of the transmitter located within their residence.\textsuperscript{28} This is commonly referred to as a continuously signaling device because the computer monitor constantly receives signals allowing the probation department or other facility to record an individual's presence by use of conjunction with a computer printout.\textsuperscript{29}

The offender wears a transmitter on his body, usually around the wrist, ankle, waist, or neck. The transmitter, when within range of the receiver-dialer connected to the telephone, signals the central office computer.\textsuperscript{30}

A passive system confirms the individual's presence in

\textsuperscript{23} See Friel, Vaughn & Carmen, supra note 1, at 2 (noting that courts have mandated solutions in 39 states).

\textsuperscript{24} Pennell & Curtis, Electronic Surveillance: An Assessment of an Alternative to Incarceration 5 (1986).

\textsuperscript{25} Petersilia, supra note 10, at 2.

\textsuperscript{26} See Schmidt & Curtis, supra note 17, at 145 (discussing the different types of electronic monitoring equipment).

\textsuperscript{27} There are at least 16 vendors of electronic monitoring equipment currently on the market. Vendors appear to be split fairly evenly between active and passive systems. See Whittington, 2 OFFENDER MONITORING, Spring 1989, at 30.

\textsuperscript{28} Jolin, Electronic Surveillance Program, Clackamus County, Oregon Community Corrections Evaluation 4-5 (June 16, 1987) (unpublished manuscript).

\textsuperscript{29} Id. at 5

\textsuperscript{30} Vaughn, supra note 9, at 155.
his house only at the time that the computer randomly contacts him.\textsuperscript{31} This is alternatively labeled a "programmed contact system."\textsuperscript{32} In this system, an encoder device is also worn on the body of the offender. Once contact is made over the telephone, the encoder is inserted into a verifier box to confirm that it is the specific offender who is present and responding.\textsuperscript{33} Except in a few systems, a telephone is required to transmit the signal.\textsuperscript{34} Some devices, though, send signals via radio or transmitter to a local area monitor or to a portable receiver in a police officer's car.\textsuperscript{35}

Different legal or correctional problems arise depending upon the type of system used. Generally, a passive system is less costly to operate and has less technical difficulties than an active system.\textsuperscript{36} The major disadvantage to the passive system is its feature of programmed random contact with the offender. Depending upon its programmed frequency, it may begin to intrude upon the offender and the offender's family to such an extent that it could be considered an invasion of privacy.

The analysis of privacy protected by the Fourth Amendment has led to the drawing of a parallel between home detainees and prisoners. If home detainee's rights are considered to be co-extensive with that of prisoners, then their constitutional protection is significantly diminished compared to that of other citizens. The Fourth Amendment right of people "to be secure in their persons, houses . . . against unreasonable searches"\textsuperscript{37} has been linked to their "reasonable
expectation of privacy." Further, "it is this distinction, monitoring in a private versus a public place, which constitutes a violation of the right to privacy." Thus, speculation as to whether there could be a Fourth Amendment violation depends on whether or not electronic surveillance reveals the same information that could not be discovered visually. With monitoring, this would depend in part on whether an officer of the monitoring department could be there all the time and whether he would have the right to remain there.

States have implemented various means of adapting home detention with electronic monitoring. A survey of states with electronic monitoring programs reveals that most have instituted programs without specific authorizing legislation. Instead these states implement programs through administrative agencies or judicial discretion. At this time, it is estimated that ten states, Kentucky, Nevada, California, Louisiana, Indiana, New York, Florida, Kansas, Illinois, and Texas, have some form of direct legislation authorizing house arrest with electronic monitoring. A basic difference among these legislative acts is whether they simply authorize home confinement with electronic monitoring or whether, in addition, they mandate how it will be implemented.

Kentucky was the first state to enact legislation authorizing home detention and electronic monitoring in April 1986. One of the principal motivations behind the legislation was the desire to keep drunken drivers from experiencing the criminogenic effects of prison life, such as association with career criminals and the possibility of physical or sexual assaults. The Kentucky legislation authorizes discretionary

39. See id.
40. Id. at 63.
41. Lilly, supra note 6, at 372. This allows for the possibility of inconsistent treatment stemming from the idiosyncrasies of different judges. Id.
43. Petersilia, supra note 10, at 2.
home incarceration for all or a portion of a sentence of imprisonment.\textsuperscript{44} An offender of a misdemeanor may petition the sentencing court for home confinement and the sentencing court may rule upon the petition prior to the term or, at any time throughout the term.\textsuperscript{45} The maximum that a defendant can be sentenced to home incarceration is six months.\textsuperscript{46} All home incarcerates must sign a written agreement containing the incarceration conditions.\textsuperscript{47} If a detainee violates a condition, the judge will conduct a hearing and, if a violation is proven, order incarceration.\textsuperscript{48} Any time spent in home incarceration is specifically authorized to be credited toward the maximum term of imprisonment.\textsuperscript{49} As a condition of home incarceration, a telephone or other approved monitoring device must be maintained in the residence.\textsuperscript{50}

While the Kentucky act specifically refers to the petition of an offender of a misdemeanor to the court, a later condition states that "no person convicted of a violent felony offense shall be eligible for home incarceration." This creates the impression that a non-violent felony offender is also eligible for the program and it emphasizes the importance of excluding violent felons.\textsuperscript{51} In making a decision to place a particular misdemeanant in the program, a judge may consider information supplied by the Misdemeanant Supervision Department or county jailer; however, the judge makes the final decision regarding a defendant.\textsuperscript{52}

An evaluation of a program for home detention in Kenton County, Kentucky, revealed some of the problems that

\textsuperscript{45} Id. at § 532.210(1).
\textsuperscript{46} Id. at § 532.210(1)(d).
\textsuperscript{47} Id. at § 532.210(f)(3).
\textsuperscript{48} Id. at § 532.210(e).
\textsuperscript{49} Id. at § 532.210(4).
\textsuperscript{50} Id. at § 532.220(6).
\textsuperscript{51} Id. at § 532.230.
\textsuperscript{52} Id. at § 532.210(1)(2).
are encountered in instituting a program. First, it is usually the judge’s receptivity to a program that determines whether home incarceration will be used as a sentencing alternative. In the Kenton County program, in the words of the jailer,

[h]ome incarceration was not used enough in the front end . . . as an initial sentence to depopulate the jail . . . neither was home incarceration used enough as a condition of work release out of jail, which also depends on the approval of the District Judge . . . the jailer liked home incarceration and wished to use it as a condition of work release without the approval of a judge.

In other states, this authority is sometimes delegated to the probation department by the judge. A tangential issue is whether offenders are placed on the program as an alternative to jail or whether the program simply provides a means to "spread the criminal justice net." Kenton County tentatively concluded that net-widening did not take place because 96% of the home incarcerees had prior convictions in Kentucky. As an important part of any such analysis, it is necessary to determine whether, if an offender could have been sent to jail, would he necessarily would have been?

The question often arises of whether an offender is being sanctioned who ordinarily would not have been if the newly available alternative of home detention did not exist. Another part of this problem is not only that possibly more

54. Id. at 8-9.
55. Id. at 8.
56. Id. at 13. Net-widening refers to expanding the criminal justice system’s control over a greater number of people than would be possible under preexisting law under the pretext that it is an alternative to incarceration. Id.
57. Lilly, supra note 53, at 13.
58. Schmidt & Curtis, supra note 17, at 146.
offenders are being penalized than would have been otherwise, but also that the sanction may be stiffer for the offense than it would have been. Hence, it is a two-fold question of absolute numbers of offenders and degree of severity.

A different view suggests that while the sanction might be more severe than ordinary probation, the community gains the benefit of increased protection.69 Due to the chronic prison overcrowding situation, some offenders who have committed serious offenses and who are released on probation are often found to have committed additional crimes while on probation.60 In examining whether home incarceration is voluntary, the fact that the misdemeanant petitions the court to request participation in the program61 and that there is a requirement for a written agreement is important.62

In defining "home," Kentucky does not exclude the residence of a close friend or other non-family member. "Home" is the "temporary or permanent residence of a defendant consisting of the actual living area."63 Further, the legislation explicitly allows that a hospital, nursing care facility, hospice, half-way house, group home, residential treatment facility or boarding house may serve as a home.64 This flexible definition of home greatly increases a defendant's opportunity to qualify for home incarceration. In particular, it increases the chances for the indigent, elderly, or those requiring medical treatment to qualify for home incarceration.

Another significant aspect of the Kentucky legislation is the definition of an approved monitoring device. It must be "minimally intrusive" and only provide information as to the "prisoner's presence or non-presence in the home."65

59. Id.
60. Greacen, supra note 20, at 3, 8.
62. Id. at § 532.210(1)(3).
63. Id. at § 532.200.
64. Id.
65. Id. at § 532.200(5).
Furthermore, it must not be "capable of recording or transmitting: a) Visual images b) Oral or wire communications or any auditory sound; or c) Information as to the prisoner's activities while inside the home." This limitation becomes increasingly significant as technology advances and equipment is marketed that exhibits these prohibited characteristics. At present, such language would prevent the use of at least three variations of monitoring equipment: the Hitek wristlet, the Luma telephone, and any voice verification system.\textsuperscript{67}

While this language restricts some vendor's access to the market as well as limiting a supervising department's selection in equipment, it represents the strongest guarantee against an invasion of privacy that exists in any current legislation. One reason for such a privacy concern would come from the recording of a home detainee's voice. In a program in Clackamas County, Oregon, a "telesol" wristlet (now Hitek) was used as a monitoring device.\textsuperscript{68} This device features a computer with a prerecorded message identifying the caller through questions and recording the call for later review.\textsuperscript{69} In this instance, the probation officer was tipped off to the offender's altered state from hearing the recording, which aided in discovering grounds for a subsequent revocation.\textsuperscript{70}

Similar legislation authorizing "residential confinement" has been enacted in Nevada.\textsuperscript{71} There, language virtually identical to Kentucky's statute bans the use of similar types of

\begin{itemize}
\item \textsuperscript{66} Id.
\item \textsuperscript{67} In the Hitek wristlet system, a robot caller asks questions and the answers are taped for voice verification. The Luma Interactive Monitoring system consists of a visual phone display that sends images that are digitalized and printed for record-keeping. Different images combined with gestures are required to positively identify the individual. See generally Lilly, Nevada's Law Reconsidered, I OFFENDER MONITORING, Feb./March 1988, at 18 (discussing the pros and cons of the law and the type of prohibited equipment).
\item \textsuperscript{68} Jolin, supra note 28, at 9.
\item \textsuperscript{69} Id. at 6.
\item \textsuperscript{70} Id. at 9.
\item \textsuperscript{71} NEV. REV. STAT. § 4.440 (1987).
\end{itemize}
electronic equipment.\textsuperscript{72} It is unclear whether this was purposefully chosen to insure the same degree of protection is unclear. However, because the Nevada legislation is patterned after Kentucky's,\textsuperscript{73} it is believed that it will reinforce the original Kentucky legislation.

Nevada's statute differs from Kentucky's statute in the category of offender it prescribes for residential confinement. Probationers who violate their conditions may be placed in residential confinement in lieu of being sent to jail or prison.\textsuperscript{74} In addition, a judge may sentence a misdemeanant to residential confinement "in lieu of imposing any punishment other than a minimum sentence mandated by statute."\textsuperscript{75} Unlike Kentucky's law, which does not refer to minimum statutory sentence time, the Nevada law requires that residential confinement for a misdemeanant only replace other forms of punishment when a minimum sentence is not required or, perhaps, following such a sentence.\textsuperscript{76} Because a minimum sentence cannot be replaced with a sentence of residential confinement, it would appear that it is less of an alternative to incarceration for misdemeanants. For probationers and parolees who are placed on the program after a violation has occurred, it would seem to be a true diversion from incarceration.

\textsuperscript{72} \textit{Id.} at § 4.440(3). This section provides that:

An electronic device approved by the department of parole and probation may be used to supervise a convicted person sentenced to a term of residential confinement if it is limited in capability to recording or transmitting information concerning the person's presence at his residence and is minimally intrusive. A device which is capable of recording or transmitting:

\begin{itemize}
  \item a) Visual images;
  \item b) Oral or wire communications or any auditory sound; or
  \item c) Information concerning the person's activities while inside his residence
\end{itemize}

must not be used.

\textit{Id.}

\textsuperscript{73} \textit{See generally} \textsc{nev. rev. stat. ann.} § 4.440 (Michie 1986-87) (stating that the Nevada legislation was patterned after the Kentucky statute).

\textsuperscript{74} \textit{See id.} at § 176.2231.

\textsuperscript{75} \textit{Id.} at § 4.440(1).

\textsuperscript{76} \textit{Id.}
In either category, the legislation provides that an offender shall not be ordered to residential confinement unless he so agrees. The Board of Parole, not a judge, decides whether to order residential confinement in lieu of suspending parole for a parolee.

Unlike any other state with electronic monitoring legislation, Nevada specifically authorizes the court to "contract with a qualified person to administer a supervision program for persons who are sentenced to a term of residential confinement" who are in the misdemeanant category. Such authorization to contract with a non-state agency could protect a private company from liability. A problem might arise if an independent company were providing the state with electronic surveillance services when a home incarceree committed an offense during the confinement. Legal action might be based upon a claim of negligence resulting from either lack of supervision or lack of response after an observed violation or series of violations occurred. This scenario has been considered by critics and alluded to in comparison with the responsibility of a state run facility. A work release facility was found to have neglected its duty when an offender kidnapped a woman at random. The Nevada statute would not necessarily remove liability for demonstrated negligence, however, it might afford the independent contractor a similar degree of protection as that enjoyed by a state agency.

The California legislature has apparently reconsidered its position on types of permissible electronic monitoring. Originally, California enacted legislation to authorize and

77. Id. at § 176.2231(4).
80. Collins, Can Electronic Monitoring Create Liability by an Embarrassment of Riches? 1 OFFENDER MONITORING, May 1988, at 8. Mr. Collins sets forth a fact pattern whereby a monitoring agency has readily available capability to observe an infraction of home incarceration curfew hours and fails to take action, thereby incurring potential liability. Id.
81. Id. (discussing Doe v. United Social and Mental Health Services, Inc., 670 F. Supp. 1121 (D. Conn. 1987)).
implement a pilot project using electronic monitoring. This statute limited an electronic monitoring device to one capable only of "recording or transmitting information as to the prisoner's presence in his home." Later, Assembly Bill No. 3686, also known as the "Mojonnier-Ayala Electronic Home Detention Act of 1988," changed the type of equipment that could be used in later projects. This statute requires that the equipment must be for the "purpose of helping to verify his or her compliance" with the program and "shall not be used to eavesdrop or record any conversation, except a conversation between the participant and the person supervising the participant which is to be used solely for the purpose of voice identification." It is not clear whether this legislation would allow a computer to substitute for a "person" in order to permit the use of a passive, random contact voice verification system. However, it is evident that in the later California legislation an effort was made to address potential privacy and search and seizure concerns. The inclusion of "eavesdropping" and "record[ing] any conversation" manifests an intent to guard against some of the fears inspired by a potential 1984 Orwellian world.

Another noteworthy aspect of the California law is the adoption of a fee for monitoring services based upon ability to pay. Excluding some offenders from a home detention program due to their indigency, could provoke an Equal Protection challenge.

In a recent Pennsylvania Superior Court case, Commonwealth v. Melnyk, a violation of due process under

82. CAL. PENAL CODE § 1203.015(4)(d) (Deering Supp. 1988). However, this legislation was only operative until January 1, 1990.
83. Id.
84. Id. at § 1203.016.
85. Id. at § 1203.016(b)(3).
86. Id. at § 1203.016(g).
the 14th Amendment was found where a pretrial detainee was excluded from a pre-trial diversionary program because she was not deemed capable of paying user fees. Only California law states that "inability to pay shall not preclude participation in the program." An interesting twist touching upon the Equal Protection issue reportedly occurred in a pre-trial detainee program in Dade County, Florida, when a court attempted to order a defendant to use an electronic home detention system. Upon being informed that no monitoring units were available the court asked the defendant whether he would like to buy the units, which he agreed to. Therefore, the defendant’s affluence facilitated access to a special program that might not otherwise have been available to him.

Minimum security inmates, low-risk offenders and work-furloughees are eligible for home detention in California. At the time of sentencing, a judge may "restrict or deny a defendant’s participation in the home detention program." Thus, while a court retains some control as to the disposition of offenders in a program, it is the correctional administrator who must conclude that a person meets the criteria for release. This allows for greater input from the correctional administrator than in other states. Presumably, rather than simply have the court hear the recommendation of the correctional department, California requires that the correctional administrator must first conclude that the applicant has satisfactorily complied with "reasonable rules and regulations" while in custody.

89. See id.
92. Id. It was also noted that Dade County does not in fact charge for the use of their program and that the aforementioned equipment was later donated to the program. Id.
94. Id. at § 1203.016(f).
95. Id. at § 1203.016(d).
96. Id.
Indiana has recently adopted elaborate legislation authorizing home detention with electronic monitoring as a condition of probation imposed by the court. The "Community Corrections Home Detention Fund" established a home detention fund for each county containing a community corrections program issuing user fees and grants. At the end of the fiscal year, these funds will help assure the continuity of the program. Additionally, the Act specifies an elaborate reporting system whereby the individual probation departments detail the number of people on the program as well as their success and failure rates, subsequent dispositions, expenditures, and monies collected to the judicial conference of Indiana annually. The mandatory reporting of costs of home detention with and without electronic monitoring to the judicial conference also furthers cost effectiveness. The judicial committee compiles this information into usable statistical data. This is the only legislation specifically requiring such reporting and guaranteeing continued research into its effectiveness.

Indiana's home detention program provides a true alternative to incarceration. Either the probation department or a community corrections program can supervise home detention. First-time suspendable class C and D felons are eligible candidates for their entire sentence. Class D felons with prior unrelated class C or D felonies can, within some time parameters, have their normally nonsuspendable minimum sentence suspended to participate in home detention. This is also true for class D felons with nonsuspendable sentences because of prior juvenile

98. Id. at §§ 11-12-7-1 - 11-12-7-2 (Burns 1988).
99. Id. at § 11-12-7-4.
100. Id. at § 11-13-1-4.
101. Id. at § 11-13-1-4(7)(8).
102. Id. at § 35-38-2-5(c).
103. Id. at § 35-38-3-5(4)(a).
104. Id. at § 35-38-3-5(2).
Because home detention is designed for felons, and normally nonsuspendable minimum sentences can be suspended if home detention is ordered, the statute should create a true alternative to incarceration and not merely act as an add-on condition of probation.

First time class C and D felons can serve their entire sentence, if so ordered, under home detention. Unlike the Kentucky statute, which specifies a maximum of six months, the Indiana statute requires a minimum period of sixty days of home incarceration and a maximum not to exceed the minimum time of imprisonment for the crime committed. One of the conditions required in the statute is for detainees to undergo medical, psychiatric, or treatment programs if so ordered by the court, thereby solving the problem of habitual substance abusers. Currently, the offender must pay a home detention fee as set by the court and have a telephone. There is no provision expressly allowing for the inclusion of indigents as there is in the California statute.

Other noteworthy terms of the Indiana statute include the specification of the type of monitoring device to be used in the "home." "Home" does not include "the residence of another person who is not part of the social unit formed by the offender's immediate family." The monitoring equipment

105. Id. at § 35-38-3-5(3).
106. Class C and D felons can be sentenced up to two years. Id. at § 35-38-2.5-5(a)(b).
108. Ind. Code Ann. § 35-38-2.5-5(a)(b) (Burns 1988). A study commenced in July 1986 involving offenders of non-violent class C and D felonies (such as forgery, burglary, prostitution, and driving while intoxicated) in Marion County, Indiana should be completed shortly and provide interesting information on the felon program. At the time of the study proposal, criteria for eligibility varied somewhat from the current legislation. The program was not available to class D felons with nonsuspendable sentences; the offender could not be a habitual substance abuser, and employment or school attendance was required for the program. The Indiana statute does not expressly exclude these conditions, although presumably they could be included as other conditions of probation.
109. Id. at § 35.38.2.5-6(1)(c).
110. Id. at § 35-38-2.5-6(6)(7).
111. Cal. Penal Code § 1203.016(g) (Deering 1988).
affords some protection for the privacy rights of the offender. It must be limited to the recording or transmitting of information regarding an offender’s presence or absence; it must be "minimally intrusive" upon the privacy of the offender or "other persons residing in the offender’s home." This is the first legislation to address the possible privacy and search or seize rights of the offender’s family.

Another unusual point in the Indiana law is the necessity of obtaining the written consent of both the offender and the other persons residing in the home at the time an order for home detention is entered. It is unusual for the written consent of the offender’s co-habitants to be required, and it is also unusual that once obtained, the monitoring conditions can be dramatically altered. Once written consent of all parties is given, a monitoring device’s role may be expanded to that of recording or transmitting the following: a) visual images, b) oral or wire communication or any auditory sound, or c) information regarding the offender’s activities while inside his home. This is the only statute which permits the monitoring under any condition of activities inside the home. It is important to bring the offender’s family into the decision making process in order to facilitate a successful period of home detention. However to allow an expanded form of monitoring would appear to create a greater potential for abuse to the innocent family members. In addition to the potential for an intrusion on the offender’s privacy, there is the possibility that it is an unreasonable condition of probation.

An additional notification requirement for electronic monitoring was imposed perhaps in anticipation of a challenge

113. Id. at § 35-38-2.5-3(1)(2).
114. Id. at § 35-38-2.5-3(3).
115. Id. at § 35-38-2.5-3(3)(a)(b)(c).
116. See generally Del Carmen & Vaughn, supra note 38, at 64. Four general elements have emerged from case law which validate a condition of probation. In order for a condition to be acceptable, it must be clear, reasonable, constitutional, and protective of society and/or rehabilitative of the probationer. Id.
to the monitoring process. Prior to the entering of a court order, the offender and persons residing in the house must be informed of the "nature and extent of electronic surveillance provided." By securing additional consent the privacy of the offender is addressed.

Louisiana recently adopted a new code of criminal procedure authorizing home incarceration and electronic monitoring. This law is unique because it authorizes home incarceration as a direct sentencing option, rather than as a condition of probation. It specifically states that a person can be sentenced to home incarceration "in lieu of imprisonment." A defendant is a candidate if eligible for probation or if convicted of a misdemeanor or a felony punishable "with or without hard labor." Apparently, the clause "with or without hard labor" was inserted in order to include first time offenders who would not have been eligible for a term of incarceration normally and, yet, are subject to home incarceration. This may create a risk of enlarging the criminal justice net, however, it is too early to predict the practical effect of this law due to the recent adoption of the code by Louisiana.

Since October 1988, the Baton Rouge City Court has been placing misdemeanants in its house arrest system. The program utilizes monitoring equipment that sends computer-generated visual images over telephone lines to the probation department. There is no prohibition against the use of this

118. Id.
120. Id. at art. 894.2(a).
121. Id. at art. 894.2(1).
122. This interpretation of the clause in the legislation was suggested in conversation with Dr. Archimbauld of Louisiana State University in January 1989. He serves on the Pardon and Parole Board.
123. LA. CODE CRIM PROC. ANN. art. 894.2 (West Supp. 1989).
125. Id. Currently, the program is using visual equipment made by Visatel. Id.
equipment because the home incarceration article does not define what types of monitoring devices are permitted. Unlike the Indiana statute, the Louisiana code specifies that any condition of home incarceration shall be "reasonably related to implementing or monitoring a sentence of home incarceration, including curfew, electronic or telephone monitoring." The Baton Rouge house arrest program also requires that the offender maintain a telephone and retain employment. For an offender to be placed on home incarceration, the "court determines that home incarceration of the defendant is more suitable than imprisonment or supervised probation without home incarceration." This clearly indicates that home incarceration would be considered apart from probation as a sentencing alternative. The code, however, draws a parallel between home incarceration and probation when a violation occurs. "In the event of revocation and sentence to imprisonment, the defendant shall not receive credit for time served under home incarceration." The requirement that the defendant agree in writing to the conditions of home incarceration negates the possibility of an involuntary sentence.

Also, Louisiana has started a test of electronic monitoring in the Community Control Program. This is a joint effort by the United States Bureau of Prisons, the United States Parole Commission, and the United States Probation Service. The Middle District of Louisiana Probation Office in conjunction with four other district offices of the United States Probation Service is experimenting with the granting of early releases from prison of periods between sixty and ninety

127. LA. CODE CRIM. PROC. ANN. art. 894.2(C) (West Supp. 1989).
128. Id. at art. 842.2.
129. Id. at art. 894.2(a)(3).
130. Id. at art. 894.2(l).
131. Id. at art. 894.2(D).
days. The release is directly into home monitoring programs. In order to be placed in the program, releasees must sign an agreement. This agreement stipulates that alcohol or drugs are prohibited unless for medical purposes. The intent behind the program is to relieve prison overcrowding and determine whether home electronic monitoring will be a viable alternative to the currently used method of releasing inmates through the Community Treatment Centers. If this type of a program is implemented on the federal level, it may have a significant impact on prison overcrowding.

In order to significantly alleviate their prison overcrowding, Florida has had legislation to develop a "Community Control" program since 1983. This act allows for the withholding of sentence and imposition of probation where appropriate. If a felony is involved the offender may be placed in a community control program if probation is an inappropriate alternative. When this law was amended in 1985, it clarified that no defendant placed on probation for a misdemeanor may be placed under supervision of a community control program unless there is a specific finding that it is necessary to protect the community or to rehabilitate the offender is established. This appears to reflect a direct attempt to prevent superfluous social control or net-widening.

In Mitchell v. State of Florida, the Florida District

134. Id.
135. United States Parole Commission, supra note 132, at 2 (in conjunction with a conversation with Robert Sibille, Chief United States Probation Officer, Middle District of Louisiana.)
137. FLA. STAT. ANN. § 948 (West 1985). This section was enacted through session laws of 1983, c.83-131, § 11. Id.
138. Id. at § 948.01(3). Specifically, the court considers the likelihood of a recidivist act, the ends of justice, and the welfare of society, to determine whether to impose the law penalty or to place the offender on probation. Id.
139. Id. at § 948.01(4).
140. Id. at § 948.01(3) (West Supp. 1989). This section was amended by Laws 1985, c. 85-288, § 14.
Court of Appeals reiterated that the intent of the Florida Legislature was to provide an alternative to incarceration through community control. Also, the Florida court held that probation and community control are two distinct concepts, not to be used interchangeably with each other.\footnote{142}

Another point raised by the Florida legislation is the maximum time period that an offender can be placed in a Community Control program. In Florida, this has been restricted to two years.\footnote{143} This raises questions of what goals are trying to be achieved; those of retribution or merely those of fulfilling a sentence requirement.\footnote{144} In a Palm Beach County program, time spent in jail compared to time spent in "community control," has been established on a one to three ratio.\footnote{145} According to the results of a study in Kentucky, judges have invoked the same one to three ratio for ordering home incarceration.\footnote{146} This suggests that on a program by program basis, a proportionality between the jail sentence and the home incarceration sentence is being formed. Beyond the proportionality issue, a humanitarian concern has been raised that excessively long periods of confinement might have a detrimental effect on the individual. This could be true not only in total number of months but also in number of hours per day; 24 hours could be counterproductive.\footnote{147} It is perhaps in response to this type of concern that maximum time periods have been set legislatively.

Florida's limitation of a two year period was examined in \textit{Davis v. State of Florida}.\footnote{148} In this case, the defendant was originally sentenced to five years of "community control," but

\begin{itemize}
\item \footnote{142}{Id. at 419.}
\item \footnote{143}{FLA. STAT. ANN. § 948.01(5) (West Supp. 1989).}
\item \footnote{144}{Schmidt & Curtis, supra note 17, at 146.}
\item \footnote{145}{Id. Thus, three days of monitoring is equivalent to one day in jail.}
\item \footnote{146}{Vaughn, supra note 9, at 166.}
\item \footnote{147}{Lilly, Ball, & Wright, \textit{Home Incarceration with Electronic Monitoring in Kenton County, Kentucky: An Evaluation}, in \textit{INTERMEDIATE PUNISHMENTS: ELECTRONIC SURVEILLANCE AND INTENSIVE SUPERVISION} 16 (1986).}
\item \footnote{148}{Davis v. State of Florida, 461 So. 2d 1003 (Fla. App. 1 Dist. 1984).}
\end{itemize}
the Florida District Court of Appeals subsequently reversed and remanded the case for sentencing according to the legislative maximum two year period. However, in Mick v. State of Florida, the Florida District Court of Appeals interpreted this act to apply only to individual sentences and, thus, affirmed the imposition of two consecutive two-year sentences for separate offenses.

Only offenders convicted of forcible felonies or those with past records of forcible felonies are ineligible for the Florida program. An exception is made for offenders with convictions of drunk driving, manslaughter or burglary. The conditions of "community control" indicate that treatment is available for offenders found guilty of sexual battery against a child, exploitation of a child, or a lewd or lascivious assault or act upon a child. This includes offenders that some other programs hesitated to include. Other conditions include the submission to random testing for alcohol or controlled substances.

Interestingly, Florida has experienced a recent decline in the number of people on house arrest. Inmates, considering the proportionality issue in conjunction with the intense surveillance, have elected to remain in prison, rather than transfer to house arrest. With a "good time reduction," the shorter the sentence is more palatable to that of house arrest.

The Florida Act does not place specific limitations on

150. Id. at 1122.
151. FLA. STAT. ANN. § 948.01(12) (West 1989).
152. Id.
153. Id. at § 948.03(6).
154. For example, the Nassau County Probation Department does not put sexual offenders in its home detention program. Interview with Beatrice Soman, Public Information Officer, Probation Department, Mineola, New York (December 1988).
155. FLA. STAT. ANN. §948.03(j) (West Supp. 1989).
156. Supra note 21, at 30.
157. Id.
158. Id.
the range of monitoring capabilities of the electronic monitoring equipment. As a condition of "community control," the court may require supervision through an electronic monitoring device.\textsuperscript{159} It is the court, not the Department of Corrections, that determines who shall wear a monitoring device. Unlike other legislation focusing on privacy concerns, Florida's legislation looks to certain technological standards, such as water-resistance, which must be met before the use of a device.\textsuperscript{160}

The Kansas legislature passed a bill authorizing a house arrest program using either a passive or active monitoring device.\textsuperscript{161} However, other than authorizing electronic monitoring, this legislation has no distinctive provisions.

Texas has authorizing and enabling legislation which establishes funding for electronic home detention programs.\textsuperscript{162} Home detention may be used for parolees or probationers.

The Texas code provides that in order to divert defendants from confinement and to provide intensive probation, programs for probation may be funded.\textsuperscript{163} Hence, in some instances, the judge must first make a finding that the sentence is in fact an alternative to jail before sentencing to home detention and electronic monitoring. This provides a means for the Texas program to act as a diversion to incarceration in the department of corrections.

Another potential area for the implementation of home detention and electronic monitoring involves pre-trial detainees. As of this time, only Illinois has made legislative provision for this category of defendant on a state-wide basis.\textsuperscript{164}

\textsuperscript{159} Id. at § 948.03(2)(d).

\textsuperscript{160} Id. at § 948.03 9 (a)(b)(c). These include: 1) capability of full operation on a back-up power source for 8 hours 2) a tamper-resistant strap guarding against removal and an antenna system which prevents interruption of the transmitter signal from body shielding, 3) the transmitter must not weigh more than 6 ounces; it must be water-resistant, sealed, and shockproof. Id.

\textsuperscript{161} 1988 KAN. SESS. LAWS 115.

\textsuperscript{162} TEX. CRIM. PROC. CODE ANN. § 42.18 28(a) (Vernon Supp. 1989).

\textsuperscript{163} Id. at § 42.121 (3.11).

\textsuperscript{164} ILL. ANN. STAT. ch. 38, para. 110-10, 14 (Smith-Hurd Supp. 1989).
The Illinois legislation, which became effective January 1, 1989, also authorizes home confinement for certain offenders as a condition of probation and conditional discharge with or without an electronic monitoring device. In both instances, the use of an electronic monitoring device must be minimally intrusive and is "primarily intended" to provide information as to the defendant's presence or non-presence in the home.

The same restrictions on monitoring equipment capabilities found in the Kentucky and Nevada statutes are present in Illinois. In addition, like the Indiana statute, unless the defendant and all other co-habitants give written consent, information about the defendant's activities inside the house is prohibited.

In Lake County, Illinois, Pre-trial Services, a branch of the probation department, has been operating a pre-trial program for three years. According to the department, electronic monitoring aids the supervision program and allows for the placement of more serious offenders. The program is designed for felony offenders who have been unable to post bond. The program uses a steady signal monitoring device that provides continuous information as to the defendant's presence in his house. The department staff checks a computer printout during normal working hours from seven a.m. to nine p.m. Otherwise, the readout is checked in the morning for possible violations that have occurred during the previous night.

166. Id. at para. 1005-6-3, 10.
169. Information about the program was provided by Judy Kirby of Pre-trial Services, Lake County, Illinois.
170. Id.
171. Id.
172. Id.
173. Id.
174. Id.
A pre-trial detainee may successfully prove that home detention is a violation of the Eighth Amendment right against cruel and unusual punishment or Fourth Amendment protection against search and seizure. It has been alleged that there is no relevant parallel between the status of prisoners and that of monitored individuals. Therefore, a simple transfer of recognized rights from one category to the other cannot be made.\textsuperscript{175} Because the primary purpose of a bond is to insure the appearance of the defendant in court, there should be no punitive aspect to the confinement.\textsuperscript{176} A similar Eighth Amendment challenge could be raised to the net-widening issue. Because punishments are to be proportional to crimes, if a statistical analysis revealed that a greater number of offenders were being incarcerated in the home who had previously received no similar punitive sanction, then it might be considered disproportionate to the offense.

The gravamen of any challenge is the view of home incarceration as an additional sentencing option, an add-on condition to probation, or as an alternative to incarceration. The character applied to the confinement would determine the outcome of these questions. In one of the few cases brought concerning home confinement, \textit{People v. Thompson},\textsuperscript{177} a pre-trial detainee in Lake County, Illinois, sought to receive sentence credit for the time he spent in home incarceration pursuant to the Unified Code of Corrections as it gives credit for time spent in custody. The Illinois Appellate Court acted in accordance with an Illinois Supreme Court decision of \textit{People ex. rel. Morrison v. Sieloff}\textsuperscript{178} determining that "custody" is equivalent to confinement. The \textit{Thompson}\textsuperscript{179} court established what confinement meant.\textsuperscript{180} While the \textit{Thompson}
court did not define exactly what type of confinement or facility could substitute for jail, it reaffirmed a previous decision which set a bottom threshold level of what would not be confinement.181

The Thompson Court agreed with the findings of fact considered by the trial court pointing out that on eighteen occasions, the defendant was not at home when checked.182 This leaves a doubt as to what their conclusion might have been had the defendant been home each time he was checked. Rather than addressing the general nature of home confinement, the court looked to the specific facts of the situation.

There has been scant legal consideration of exactly how electronic computer printouts can be used in obtaining a revocation of the home confinement sentence. In a Westchester County, New York program, the offender must sign a form which allows a computer printout to constitute prima facie evidence of a violation.183 It is unclear if this would be counted as prima facie evidence in court.

In the only case dealing with electronic monitoring and the requirements of evidence, People v. Ryan,184 the court indicated that "[m]ore in depth scientific and technical testimony may be necessary in a case where a defendant charged with a violation of the electronic home monitoring program has not made an admission or in an instance where there is an issue of credibility pertaining to a claimed admission."185 In this setting, the revocation was based on outside evidence from the probation officer and from the defendant himself. Thus, whether an inclusion in a consent form would be sufficient to allow a revocation based on a

182. Thompson, 174 Ill. App. 3d at 496, 528 N.E.2d at 1017.
185. Id. at 349, 510 N.Y.S.2d at 832.
An effort to determine the rights of those in home detention programs, particularly home detainees, is confused by legislation such as that passed in New York in July 1987. This bill authorized the placement of pre-trial detainees in home detention when the combined correctional facility population exceeds that capacity by one percent. The New York legislation requires through a consent agreement form stating that participation in the program is a "privilege," that random drug and alcohol tests may be performed, that unannounced searches are part of the program, and that electronic monitoring may be ordered. To date, this program has not been implemented. However, with strict conditions such as alcohol and drug testing imposed, one might expect higher risk defendants to be placed on the program. Current eligibility requirements exclude detainees charged with a class A or B felony or violent felony offense. Detainees may be terminated from the program at any time, regardless of any violations. This presents grounds for a due process challenge since the legislation specifically adds that no program "shall be subject to judicial review." Placement in the program is not through a judge but rather a three-member panel selected by the Correction Department, provoking political controversy. New York legislation provides that "while in a detainee program, the detainee shall be deemed to continue in the custody of the department." This would seem to be in accordance with sentence credit

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187. Id. at § 162.
188. Id. at § 163.6.
189. Id. at § 161.4.
190. Id. at § 164.2.
191. Id. at § 163.9.
193. Berry, supra note 172, at 366.
under a recent Illinois interpretation.\footnote{194}

Recently, the American Bar Association addressed the issue of electronically monitored home confinement as a sentencing option and invoked guidelines for its implementation.\footnote{195} These guidelines seek to ensure that the sanction is the least restrictive and most feasible. Also, they create "a rebuttable presumption that individuals who would have been placed on probation in the past should not be sentenced to electronically-monitored home confinement."\footnote{196} This addresses the concern that the degree of sanction will be increased needlessly because the technology is present. Further, "because the potential for economic bias is so great,"\footnote{197} ability to pay is foreclosed as a basis for determining sentencing eligibility.

Interestingly, with the exception of the foregoing concern of the American Bar Association ("ABA") the sentencing goals of the ABA are not expressly formulated in any current legislation. However, New York State has two experimental programs establishing guidelines effecting many of the same sentencing concerns.\footnote{198} These establish that offenders are to be selected for the program who would ordinarily serve at least twelve months in jail.\footnote{199} These criteria

\footnote{194. See People v. Thompson, 174 Ill. App. 3d 496, 528 N.E.2d at 1016 (1988).}
\footnote{195. Greacen, supra note 20, at 1.}
\footnote{196. Id. at 1-2.}
\footnote{197. Id. at 4.}
\footnote{198. See New York State Division of Probation and Correctional Alternatives Implementation Plan for Electronic Monitoring Demonstration Projects (Albany, New York 1988).}
\footnote{199. New York State Division of Probation and Correctional Alternatives, Guidelines for Home Confinement with Electronic Surveillance 1 (Albany, New York 1988).}
are to be met by statistically analyzing sentencing practices in the specific area. Further, it is set forth that it will be available only to felony offenders "for whom no other alternative, or combination of alternatives, would suffice as substitutes for the period of confinement." These guidelines, based on statistical sentencing patterns, most closely approximate the sentencing goals of the ABA and ensure at home confinement with electronic monitoring can be used as an alternative sentence.

Guidelines vary from state to state. States without legislation have even greater variables and less assurance that the rights of the offenders are being considered. Through legislation, greater uniformity is developed and potential problems are addressed. Compilation of the best elements of all current statutes would probably be the most effective means to enforce the law in this area. There are some areas, such as sentencing equivalents for home detention, that has not been examined by any state’s legislature. As part of the investigation into sentencing guidelines, whether home detention is a proportionate response to all the categories of offenders placed on the program should be examined more closely. Once this is determined, it is essential to insure that home incarceration is no more intrusive than necessary. The average sentences currently imposed in home incarceration appear reasonable, however attention should be given to insure that the home environment is not distorted by an excessively long sentence.

When properly employed, home incarceration is a humanitarian response to standard incarceration. As more studies are completed, evaluations of the effectiveness of programs in terms of cost, recidivism, and the lessening of overcrowding will be forthcoming. Perhaps, home detention could combine aspects of retribution with rehabilitation and

200. Id. at 5.
show a lower rate of recidivism. Also, if employed as an actual alternative to incarceration, home detention would reduce prison overcrowding and be an effective solution to the problem of prison overcrowding as long as it did not develop into incarceration generally.

Alicia M. Grace