

HOUSE ARREST: A CRITICAL ANALYSIS OF AN INTERMEDIATE-LEVEL PENAL SANCTION

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INTRODUCTION

This Comment addresses several of the major legal and policy questions concerning house arrest, a new, increasingly employed criminal sanction. Part I summarizes the current uses and conditions of house arrest in the United States. It is not, nor does it pretend to be, a comprehensive examination of all instances of house arrest. Much information is unavailable, because probation departments are either unwilling or unable to report on their use of this sanction. Also, because new house arrest programs continue to unfold, an inclusive report concerning the most recent episodes of home confinement would require constant monitoring and revision. Part I instead examines existing programs, focusing discussion on the difficulties encountered with house arrest regimes thus far. Even at this early stage of implementation, problems have arisen regarding cost, supervision, reduction of prison overcrowding, and the general purposes of home confinement. Part II offers a prognosis of the sanction's success or failure based on the above factors, as well as indices of recidivism and revocation. Part II also notes that court challenges may arise where courts lack statutory authority to impose house arrest.

Part III discusses the constitutional implications of house arrest. First, it describes the nature of the state's power to impose probationary regimes such as house arrest and the degree to which probationers retain constitutionally protected rights. In view of the standards that courts have announced in the ordinary probation context, house arrest is not per se unconstitutional. Nevertheless, limitations must attach to the restrictions imposed on the confinee. Finally, the specific impact on the detainee's first amendment rights of freedom of religion and association are addressed to show the need to structure conditions of home confinement carefully.

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I. THE CURRENT PRACTICE OF HOUSE ARREST IN THE UNITED STATES

A. Definition

House arrest is a form of intensive law enforcement supervision characterized by confinement to the offender's place of residence with permission to leave only for explicit, pre-authorized purposes.¹ Generally, it is imposed as a penal sanction in lieu of incarceration and mandated by the sentencing judge as a condition of probation.² In Florida, however, house arrest is considered a criminal sanction entirely separate from probation.³ In addition, at least one jurisdiction has reported using house arrest for individuals who have been released on their own

¹ See *United States v. Murphy*, 108 F.R.D. 437, 439 (E.D.N.Y. 1985); House Detention Guidelines for the Eastern District of New York at 3 (unpublished memorandum) (on file with the *University of Pennsylvania Law Review*), reprinted in *Murphy*, 108 F.R.D. 440 app. at 441-42 [hereinafter EDNY Guidelines]; Corbett & Fersch, *Home as Prison: The Use of House Arrest*, FED. PROBATION, Mar. 1985, at 13, 15-16; *Home Detention Gaining Support*, CRIM. JUST. NEWSL., Nov. 21, 1983, at 3; L.A. Daily J., Mar. 13, 1985, at 1, reprinted in Contra Costa County Adult Home Detention Program, End of Project Report attachment 5 (unpublished manuscript) (on file with the *University of Pennsylvania Law Review*) [hereinafter Contra Costa County Report].

² See *Murphy*, 108 F.R.D. at 439; see also ILL. ANN. STAT. ch. 38, para. 1005-6-3(b)(10) (Smith-Hurd Supp. 1986) (allowing imposition of home confinement imposed as an elective condition of probation).

In the United States, house arrest has been employed only after the offender has been afforded due process of law. Other countries with differing political regimes have used house arrest to stifle dissent. See Corbett & Fersch, *supra* note 1, at 15; see also N.Y. Times, Feb. 25, 1986, at A1, col. 5 (reporting that the South Korean government placed nearly 300 members of opposition parties under house arrest).

Probation "is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty but before or in lieu of incarceration which allows the offender to serve his sanction under supervision in the community." G. KILLINGER, H. KERPER & P. CROMWELL, PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM 14 (1976).

³ See FLA. STAT. ANN. §§ 948.001, 948.01 (West 1985); Robinson, *Community Control: "In Lieu of Incarceration,"* FLA. B.J., July/Aug. 1985, at 45. Community controllees are drawn from a pool of felony offenders, excluding only those who have committed capital felonies. See FLA. STAT. ANN. § 948.01(8) (West 1985).

The Florida courts have held that for sentencing purposes, probation and community control are to be viewed as two distinct concepts. See *Mitchell v. State*, 463 So. 2d 416, 417-18 (Fla. Dist. Ct. App. 1985). Community control is portrayed as a more severe sanction than ordinary probation. See *Stranigan v. State*, 457 So. 2d 546, 547 (Fla. Dist. Ct. App. 1984). In other critical respects, however, Florida's community control order resembles probation. Both impose a community-based supervision status on the offender, and share the ultimate objectives of community protection and rehabilitation of the offender. See FLA. STAT. ANN. § 948.01(4)(b) (West 1985); *infra* text accompanying notes 172-82. While recognizing that home detention is more punitive than traditional probation, this Comment treats house arrest primarily as a probationary sanction.

recognizance while awaiting trial.⁴

Regardless of the form and scope of home confinement, the implementation of residential detention programs should not be viewed apart from other innovative strategies currently being developed with respect to probation and community corrections.⁵ Rather, house arrest is part of a spectrum of sanctions that has arisen in response to the critical overcrowding⁶ in the nation's prisons and the perceived failure of rehabilitation as a goal of criminal justice.⁷ For example, a number of states and counties have recently added intensive supervision to probation programs in order to provide an intermediate punishment in lieu of incarceration for selected offenders.⁸ Many of the reported conditions of intensive supervision strategies are similar or even identical to those imposed as part of the house arrest sanction. For example, multiple weekly contacts between offenders and probation officers, as well as mandatory employment, may be common to both control techniques.⁹

The unique restriction on the offender's freedom to leave home is the distinguishing feature of the house arrest sanction. Although other heightened surveillance sanctions generally include strict curfews, house arrest allows the offender to leave her residence only for specific purposes; unless time spent away from home is used for pre-authorized ends, the offender risks detention and incarceration.¹⁰

⁴ Telephone interview with Deputy Director of Lake County Court Services, Lake County, Ill. (Feb. 17, 1986); see also *People v. Willer*, 132 Ill. App. 3d 63, 476 N.E.2d 1385, 1389 (1985) (releasing defendant from county jail to "total home confinement" as bond condition).

House arrest has also been employed in juvenile detention for those awaiting hearings in juvenile court. See Swank, *Home Supervision: Probation Really Works*, FED. PROBATION, Dec. 1979, at 50. House arrest, however, has generally been designed for those already convicted of a criminal act; thus, this Comment focuses primarily on the home confinement of convicts. See FLA. STAT. ANN. § 948.01(4) (West 1985).

⁵ See Petersilia, *Community Supervision: Trends and Critical Issues*, 31 CRIME & DELINQ. 339 (1985); *Hard Times for Probation, but "Intensive Supervision" Praised*, CRIM. JUST. NEWSL., Aug. 15, 1985, at 1 [hereinafter *Hard Times*].

⁶ See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PRISONERS IN 1983 (1984) (stating that, in 1983, state and federal prison systems were populated, on average, at 110% of capacity).

⁷ See O'Leary, *Reshaping Community Corrections*, 31 CRIME & DELINQ. 349, 352 (1985); Bainbridge, *The Return of Retribution*, A.B.A. J., May 1985, at 61.

⁸ See *Probationers a Serious Threat to the Public, Study Finds*, CRIM. JUST. NEWSL., Mar. 1, 1985, at 5 [hereinafter *Probationers*].

⁹ See Pearson, *New Jersey's Intensive Supervision Program: A Progress Report*, 31 CRIME & DELINQ. 393, 394 (1985).

¹⁰ See, e.g., *Contra Costa County Report*, *supra* note 1, at 3 (noting that seven offenders were detected and arrested while away from their homes without supervision).

B. *The Conditions of House Arrest*

Whereas all reported incidents of home detention involve residential confinement and heightened surveillance, the terms and conditions of such detention vary. In 1976, the San Diego County Probation Department reported one of the earliest programs of house arrest, in which home supervision was offered to juveniles awaiting trial as an alternative to detention.¹¹ The program included restrictions typical of more recent house arrest strategies, imposing almost constant supervision with the right to travel for limited purposes.¹² In 1979, an Illinois statute instituted home confinement as an authorized, elective condition of probation, requiring the sentencing court to order the detainee to "remain within the interior premises of the place designated for his confinement during the hours designated by the court."¹³

The Florida Community Control statute mandates that the court impose "intensive supervision and surveillance for an offender placed into community control, which may include . . . [c]onfinement to an agreed-upon residence during hours away from employment and public service activities."¹⁴ The Florida law has classified three tiers of permissible travel, ranked according to the purposes for spending time away from the site of confinement. "Essential travel" includes travel for work, religious expression, vocational or educational training, self-improvement programming, public service, and scheduled appointments with the supervising officer.¹⁵ Movement from the home oriented toward "the fulfillment of the basic needs of the community controllee" is considered "acceptable travel."¹⁶ Examples include travel for shopping, banking, financial business, medical needs, and family emergencies.¹⁷ The third category combines essential and acceptable travel.¹⁸ All three

¹¹ See Swank, *supra* note 4, at 50.

¹² See *id.* at 50, 52.

¹³ ILL. ANN. STAT. ch. 38, para. 1005-6-3(b)(10)(i), (Smith-Hurd Supp. 1986). In practice, offenders are allowed to leave only for pre-authorized purposes. Telephone interview with Adult Probation Officer of Lee County, Illinois (Feb. 17, 1986). Of course, if a court ordered a home detainee to remain at home during certain enumerated hours, the sanction would resemble a traditional curfew.

¹⁴ FLA. STAT. ANN. § 948.03(2)(b) (West 1985). The term "residence" includes the grounds of the controllee's apartment or house. See Florida Department of Corrections, Florida Implementation Manual for Community Control supplement at 11 (1985) (unpublished manuscript) (on file with the *University of Pennsylvania Law Review*) [hereinafter Florida Implementation Manual].

¹⁵ See Florida Implementation Manual, *supra* note 14, supplement at 11.

¹⁶ *Id.*

¹⁷ See *id.*

¹⁸ Shopping while on the way home from work is an example of such travel. Arrangements included in this category assist the supervising probation officer "to spotcheck the whereabouts of the community controllee [sic]." *Id.* at 11-12.

types of travel must be approved in advance, although movements for family emergencies may occur without pre-authorization, provided that they are reported no later than the following day.¹⁹

Under the Florida program, surveillance of controllees is total; they are subject to unannounced field visits at any time during the day or night. No exceptions are made for holidays or weekends.²⁰ The program's conditions instruct the confinee that the community control sentence is "like being in prison in [your] own house."²¹ To further the perception of imprisonment, the program treats the controllee's working site as a place of incarceration.²² In addition, the detainee is required to perform up to 140 hours of public service work as restitution and reparation to society.²³

Two federal courts have recently imposed house arrest on convicted offenders. In *United States v. Murphy*,²⁴ the defendant was convicted of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO")²⁵ on charges of mail fraud and obstruction of justice.²⁶ Ms. Murphy, a lawyer's confidential secretary, had assisted in committing fraud against insurance companies and had encouraged key witnesses before a grand jury to change their testimony. For those crimes, she faced a potential penalty of fifty years in prison and \$56,000 in fines.²⁷ As an alternative to incarceration, the defendant was placed on house arrest for two years as a condition of probation.²⁸ As with other

¹⁹ See *id.* at 23. Travel for religious purposes, even though it is classified as "essential" movement, must still be authorized in advance.

²⁰ See *id.* at 5.

²¹ *Id.* at 9.

²² See *id.*

²³ See FLA. STAT. ANN. § 948.03(2)(c) (West 1985); Florida Implementation Manual, *supra* note 14, supplement at 8.

²⁴ 108 F.R.D. 437 (E.D.N.Y. 1985).

²⁵ 18 U.S.C. §§ 1961-1968 (1982 & Supp. III 1985).

²⁶ See *Murphy*, 108 F.R.D. at 438.

²⁷ See *id.* at 439.

²⁸ See *id.* Ms. Murphy was also fined \$5000. See *id.*

Technically, the judge suspended execution on three of the counts and placed the defendant on probationary house arrest. On one count, however, Ms. Murphy was actually sentenced to a two year term of house arrest instead of imprisonment. Hence, she is complying with her house arrest order both as a condition of probation and as a separate sentence.

This Comment, however, treats Ms. Murphy's house arrest primarily as a condition of probation. The judge was uncertain if a sentence of house arrest distinct from probation was permissible. See *id.* Nor is the issue resolved under the recently enacted Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 2007 (1984) (codified as amended at 18 U.S.C. §§ 3621-3625 (1982 & Supp. III 1985)). Ms. Murphy's attorney believes that a federal judge lacks authority to impose a sentence of house arrest, and that her confinement may therefore violate the federal post-conviction habeas corpus statute, 28 U.S.C. § 2255 (1982). Telephone interview with Steve Kimelman, Attorney for Ms. Murphy (Jan. 31, 1986); see also N.Y. Times, Sept. 24,

house arrest regimes, Ms. Murphy is subject to intensive community control, including unannounced daily phone checks and frequent unscheduled home visits, both of which may occur twenty-four hours a day throughout the week.²⁹ She may leave her home for only four enumerated, pre-authorized purposes: to travel to work, to obtain medical or dental care, to attend religious services, and, if no one else can do so, to shop for food necessities.³⁰ Unusual needs, such as deathbed visits, wakes, and funerals are considered on an individual basis and only when for immediate family members.³¹ Ms. Murphy may not change jobs or place of residence without permission of the probation department, although she is allowed to have visitors without its permission.³²

While the conditions of house arrest imposed in *Murphy* are highly restrictive, another federally imposed home confinement program establishes even greater control. In *United States v. Wayte*,³³ the defendant was convicted for failure to register with the Selective Service System.³⁴ The imposition of sentence was suspended and the defendant was placed on probation for six months. The court ordered that the entire probationary period be spent under house arrest at the residence of Wayte's grandmother, and that Wayte be allowed to leave his site of confinement only for "emergency purposes with the permission of the probation officer."³⁵

The house arrest regime in *Wayte* is the most restrictive yet reported. Because Wayte is unable to leave home at all, he is precluded from obtaining outside employment. All travel from his site of confinement must be only in response to a life threatening crisis; apparently, even movement for religious expression must be approved by the proba-

1985, at 1, col. 1, B5, col. 1 (reporting Mr. Kimelman's grounds for appeal).

²⁹ See EDNY Guidelines, *supra* note 1, at 5, reprinted in *Murphy*, 108 F.R.D. app. at 443.

³⁰ See *Murphy*, 108 F.R.D. at 439; EDNY Guidelines, *supra* note 1, at 5, reprinted in *Murphy*, 108 F.R.D. app. at 443. Ms. Murphy may also leave her home in a life threatening emergency, such as a fire in the building. See *id.*

³¹ See EDNY Guidelines, *supra* note 1, at 3 n.3, reprinted in *Murphy*, 108 F.R.D. app. at 442 n.3. Only the probation department may make exceptions for such needs. See *id.*

³² See *id.* at 5, reprinted in *Murphy*, 108 F.R.D. app. at 443. Whether Ms. Murphy can have a lover living with her, or overnight guests, is unclear. A ban on overnight visitors would be difficult to enforce and may compromise the offender's rights to privacy and autonomy. See *infra* note 261 and accompanying text.

³³ 549 F. Supp. 1376 (C.D. Cal. 1982), *rev'd*, 710 F.2d 1385 (9th Cir. 1983), *aff'd*, 470 U.S. 598 (1986).

³⁴ Punishment for failure to register is "imprisonment for not more than five years or a fine of not more than 10,000 dollars, or both." 50 U.S.C. § 462(a) (1982).

³⁵ Judgment and Probation/Commitment Order No. CR-82-630-TJH (C.D. Cal. Sept. 10, 1985).

tion officer as an "emergency."³⁶ He is functionally isolated and removed from the outside world, as if he were incarcerated; his wife acts as his intermediary with the community.³⁷

Hence, current home detention programs³⁸ encompass a range of intrusiveness and state control, with various levels of deprivation of liberty. The severity of restrictions is not necessarily related to a calculated risk assessment of the offender's propensity to commit a new offense, nor does it reflect the seriousness of the crime for which the detainee is convicted.³⁹ In the California Contra Costa County Adult Home Detention Program (Contra Costa County program), for example, assault with a deadly weapon could result in the imposition of home detention with the right, and perhaps the encouragement, to work.⁴⁰ In contrast, David Wayte's failure to register for the draft, a far less dangerous or violent crime than assault with a deadly weapon, triggered almost total residential imprisonment. The degree of coerciveness determines the extent to which each program infringes on constitutionally protected rights. For example, the restrictions imposed on Wayte's ability to attend religious services may violate his first amendment rights.

³⁶ Wayte could request that the court modify the term of probation to permit religious travel. Telephone interview with Deputy Chief Probation Officer of the Central District of California (Jan. 21, 1986).

³⁷ Presumably, if Wayte lived alone and had no family support, prior authorization to shop for food essentials would have been granted.

³⁸ For other reported incidents of house arrest, see Alpert & DeFoor, *Florida's Invisible Jails*, JUDGES J., Fall 1984, at 33 (Misdemeanant sentenced to two days of electronically monitored home detention.); Scott, *Comic Strip Spurs Invention of Inmate Monitoring Device*, CRIM. JUST. NEWSL., Mar. 15, 1984, at 4 (New Mexico judge imposed house arrest utilizing an electronic monitoring device.); *Let the Punishment Fit the Crime*, A.B.A. J., Aug. 1985, at 26 (California landlord placed under a 30 day home arrest sentence to be spent in one of his own blighted buildings). A discussion of the use of electronic devices to enforce a term of house arrest is beyond the scope of this Comment, and none of the programs examined herein employs such devices. See, e.g., Contra Costa County Report, *supra* note 1, at 8 (stating that electronic devices were not used because of "tremendous cost."). For a general discussion of electronic surveillance of criminal offenders, see Comment, *Electronic Monitoring of Probationers: A Step Toward Big Brother?*, 14 GOLDEN GATE U.L. REV. 431 (1984) [hereinafter *Electronic Monitoring*]; see also Phila. Inquirer, Feb. 2, 1987, at A5, col. 1 (noting rise in use of electronic devices for various purposes, including house arrest).

³⁹ See O'Leary, *supra* note 7, at 354. O'Leary argues that different levels of supervisory community control must incorporate assessment of both danger to the community and proportionality between the sanction and the crime. See *id.*; see also ABA STANDARDS FOR CRIMINAL JUSTICE standard 18-2.3 commentary at 18.94 (2d ed. 1980) [hereinafter ABA STANDARDS] ("[T]he standard of proportionality . . . is the cornerstone of [probation] standards.").

⁴⁰ See Contra Costa County Report, *supra* note 1, attachment 1, at 3 (noting that six percent of home detainees were originally convicted of assault with a deadly weapon).

C. *The Goals of House Arrest*

Historically, probation has been perceived primarily as a rehabilitative and reformatory alternative to incarceration.⁴¹ Yet house arrest, generally imposed as a special condition of probation, includes a distinctly retributive component.⁴² The sentencing court in *Murphy* describes the incorporation of retribution, humiliation, and deterrence into the traditionally palliative scheme of probation:

There will be some people who will believe that this sentence is much too lenient. Others will believe it too humiliating. Public humiliation is a part of the punishment

In many respects the colonial use of stocks and the equivalent punishment in other societies served a useful goal in providing swift social disapproval as a deterrent. It is obvious that some form of this disapproval is required under modern conditions.⁴³

The court implies that house arrest, as a visible symbol of public disapproval, may provide the nexus between earlier, seemingly antiquated and crude methods of social stigmatization and modern criminological

⁴¹ See *United States v. Murray*, 275 U.S. 347 (1928); N. COHEN & J. GOBERT, *THE LAW OF PROBATION AND PAROLE* 8-10 (1983); G. KILLINGER, H. KERPER & P. CROMWELL, *supra* note 2, at 22-25; see also ABA STANDARDS, *supra* note 39, standard 18-2.3(e) ("Conditions imposed by the court should be reasonably related to the purposes of sentencing, including the goal of rehabilitation.").

A number of jurisdictions authorize imprisonment as a condition of probation by statute. See, e.g., CAL. PENAL CODE § 1203.1 (West Supp. 1986) ("The court . . . in the order granting probation and as a condition thereof may imprison the defendant in the county jail for a period not exceeding the maximum time fixed by law in the case"). Even this form of imprisonment, however, is considered rehabilitative in nature. See, e.g., *United States v. Merchant*, 760 F.2d 963, 965 n.2 (9th Cir. 1985) (citations omitted) (stating that jail detention imposed as a condition of probation is part of a "supervised effort towards rehabilitation"); *Kennick v. Superior Court of California*, 736 F.2d 1277, 1283 (9th Cir. 1984) (requiring period of confinement as a condition of probation in order to facilitate rehabilitation). See generally Parisi, *Combining Incarceration and Probation*, FED. PROBATION, June 1980, at 3 (discussing the historical development of conditions of probation authorized by legislatures).

Probation does have an "incidental punitive effect, in that any restriction of liberty is in a sense 'punishment.'" *Higdon v. United States*, 627 F.2d 893, 898 n.8 (9th Cir. 1980) (emphasis added). Indeed, legal scholars traditionally recognize rehabilitation or reform as one of the major purposes of punishment. See W. LAFAVE & A. SCOTT, *CRIMINAL LAW* § 1.5, at 22-29 (2d ed. 1986).

⁴² See FLA. STAT. ANN. § 948.10 (West 1985 & Supp. 1986); Swank, *supra* note 4, at 52; see also L.A. Daily J., Mar. 13, 1985, at 1, 21, reprinted in *Contra Costa County Report*, *supra* note 1, attachment 5 (quoting a Los Angeles probation officer as stating that "[h]ouse arrest fits with the model of probation as punishment.").

⁴³ *Murphy*, 108 F.R.D. at 440.

precepts of deterrence, retribution, and proportionality between crime and punishment.

Other characterizations of house arrest de-emphasize its punitive consequences. The *Murphy* court, for example, notes that the imposition of a prison sentence would probably have a destructive impact on the defendant and that the imposition of the maximum fine would create a substantial impediment to rehabilitation. Thus, the court intimates that house arrest would be more likely to induce reform than would either of these punishments.⁴⁴ Florida's community control statute specifically mentions rehabilitation of the offender and encouragement of "non-criminal, functional behavior" as principal aims of home confinement,⁴⁵ although it construes the sanction as a "community-based method to punish an offender in lieu of incarceration."⁴⁶ The Contra Costa County program also includes rehabilitation and prevention of recidivism as enumerated goals of community confinement, stating that home detention should be marked by "a return to custody rate of no more than ten percent of program participants . . . [and an] effective transition of in-custody probationers to non-custody supervision status."⁴⁷ In addition, commentators cite the ability to structure conditions of home confinement to prevent further criminal activity as an advantage of the house arrest sanction.⁴⁸ Finally, the fact that the detainee will continue to have contact with family and friends in a community-based setting may prove beneficial to the detainee's well-being.⁴⁹

In view of its diverse purposes, house arrest is most accurately described as a sanction occupying a level of punishment between reformative "ordinary" probation and retributive incarceration.⁵⁰ Pre-

⁴⁴ See *id.*

⁴⁵ FLA. STAT. ANN. § 948.01(4)(b) (West 1985).

⁴⁶ *Id.* § 948.10(1) (West 1985 & Supp. 1986); see Robinson, *supra* note 3, at 45.

⁴⁷ Contra Costa County Report, *supra* note 1, at 4; see also *No Place Like Home*, CRIM. JUST. NEWSL., Oct. 10, 1983, at 3 (The Contra Costa County program "should actually 'enhance community protection' by easing the transition of inmates back into the mainstream.").

⁴⁸ See Corbett & Fersch, *supra* note 1, at 16-17.

⁴⁹ See EDNY Guidelines, *supra* note 1, at 2, reprinted in *Murphy*, 108 F.R.D. app. at 441; Contra Costa County Report, *supra* note 1, attachment 4, at 2; Corbett & Fersch, *supra* note 1, at 16.

⁵⁰ Throughout much of this century, many perceived rehabilitation as the primary goal of nearly all criminal sanctions. For example, the United States Supreme Court once stated: "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Williams v. New York*, 337 U.S. 241, 248 (1949).

In the early 1970's, however, the notion of rehabilitation as the underlying rationale of sentencing began to erode, triggering the enactment of determinate and presumptive sentencing codes aimed at punishing the offender in proportion to the crime com-

cisely where home confinement is located along an imagined scale of severity, with ordinary probation at one end and imprisonment on the other, is unclear. From the confinee's perspective, assessment of the sanction's harshness will reflect both the specific restrictions imposed on otherwise protected liberty interests, and the sanction that would have been employed had house arrest not been an available alternative. The conditions of David Wayte's house arrest, for example, are far more intrusive than those established for Maureen Murphy, even though the potential punishment for failure to register for the draft is less severe than for a violation of RICO.⁵¹ Because failure to register for the Selective Service is an expression of political commitment, David Wayte may have the subjective impression that house arrest is a highly punitive sanction akin to incarceration.

The house detention guidelines formulated by the probation office of the Eastern District of New York reflect an awareness that the offender will weigh the alternative prison sentence in assessing the severity of a house arrest order. Specifically authorizing a short period of confinement prior to the start of house arrest probation, the guidelines note: "It is our feeling that the short period of confinement is necessary to impart a shock effect on the individual and will forestall a great deal of later testing of limits on the probationer's part which would result in the Probation Department involving the court's time again."⁵² The subjective, perceived degree of punishment associated with house arrest is thus considered to be critical to the incidence of recidivism; brief exposure to jail may well lessen the probationer's willingness to test the limits of home confinement, for the offender knows that incarceration awaits her should the conditions of home detention be violated.

Whereas the transformation of an offender's home into a prison cell is unique, experimentation with other community-based, intermediate-level sanctions is becoming more common.⁵³ These sanctions are "more restrictive than routine probation but not as severe . . . as

mitted, such that the criminal receives "just desert." See Bainbridge, *The Return of Retribution*, A.B.A. J., May 1985, at 61-63; Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29, 29-37 (1978). The Federal Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3586 (Supp. III 1985), which became effective in 1986, endorses retribution, in addition to deterrence, incapacitation, and rehabilitation, as one of the goals of sentencing. See 18 U.S.C. § 3553(a)(2)(A)-(D) (Supp. III 1985).

⁵¹ Compare text accompanying note 27 (noting that a 50 year prison sentence may be imposed for a RICO violation) with note 34 (noting that a prison sentence of no more than five years may be imposed for failure to register for the draft).

⁵² EDNY Guidelines, *supra* note 1, at 2, reprinted in *Murphy*, 108 F.R.D. app. at 441.

⁵³ See Petersilia, *supra* note 5, at 344-47 (1985).

prison."⁵⁴ New Jersey,⁵⁵ Georgia,⁵⁶ Alabama,⁵⁷ New York,⁵⁸ Texas,⁵⁹ and Wisconsin⁶⁰ have all instituted intensive surveillance probationary strategies for monitoring convicts who are either diverted from an existing prison population⁶¹ or directly placed into a high-scrutiny community corrections program.⁶² These strategies seem to endorse an intermediate level of punishment.⁶³ The adoption of such strategies is part of a shift in the orientation of probationary objectives from treatment and rehabilitation to surveillance and supervision.⁶⁴ Intermediate-level punishment programs are the response by probation departments and legislatures to the need to alleviate prison overcrowding,⁶⁵ the danger posed by a more violent probation population,⁶⁶ and the perceived failure of rehabilitation on the part of both the public and the criminal

⁵⁴ *Id.* at 344.

⁵⁵ See Pearson, *supra* note 9, at 393-401.

⁵⁶ See Conrad, *The Penal Dilemma and Its Emerging Solution*, 31 CRIME & DELINQ. 411, 413-14 (1985).

⁵⁷ See *id.* at 420-21.

⁵⁸ See *Hard Times*, *supra* note 5, at 2.

⁵⁹ See *id.*

⁶⁰ See Petersilia, Turner, Kahan & Peterson, *Executive Summary of Rand's Study, "Granting Felons Probation: Public Risks and Alternatives,"* 31 CRIME & DELINQ. 379, 384 (1985) [hereinafter *Executive Summary of Rand's Study*].

⁶¹ See *Hard Times*, *supra* note 5, at 2 (noting that the Georgia program draws heavily from persons already in prison).

⁶² In New York State's intensive supervision program, only 20% of the probationers are diverted from prison. See *id.*

⁶³ See Pearson, *supra* note 9, at 394 (stating that the purpose of New Jersey's program is "to provide alternative, appropriate, intermediate punishment in the community" in lieu of a prison sentence) (citation omitted).

⁶⁴ See *Executive Summary of Rand's Study*, *supra* note 60, at 390-91. In addition to community-based sanctions, there has been "a substantial legislative trend toward the use of intermittent confinement," including felony work release programs. ABA STANDARDS, *supra* note 39, standard 18-2.4, commentary at 18.104-.05. Intermittent confinement requires that weekends or nights be spent in a correctional facility. Only a minority of jurisdictions, however, currently authorize jail as a condition of probation. See *id.* standard 18-2.4 commentary at 18.105 & n.15. There are multiple procedures by which a court may impose a period of intermittent confinement and community-based probation, but a detailed discussion of the technicalities involved is beyond the scope of this Comment. See generally Parisi, *supra* note 41, at 3 (describing the considerations relevant to imposing a sentence that combines incarceration and probation).

⁶⁵ One commentator has described the conditions in prisons as verging "on a Hobbesian anarchy in which a state of combat exists among prisoners." Conrad, *supra* note 56, at 412; see Nacci & Kane, *The Incidence of Sex and Sexual Aggression in Federal Prisons*, FED. PROBATION, Dec. 1983, at 31.

⁶⁶ See *Executive Summary of Rand's Study*, *supra* note 60, at 380 ("The sentencing of adults convicted of felony crimes to probation has become so widespread that a new term has emerged in criminal justice circles: felony probation."). The Rand study of felony probationers in California concluded that "felons placed on routine probation supervision do constitute a serious threat to the public." Petersilia, *supra* note 5, at 343.

justice system establishment.⁶⁷

House arrest, then, is not anomalous in incorporating a strong punitive component into a probationary sanction. Nevertheless, probation does not serve exclusively punitive goals: "The criminal justice system has not explicitly recognized the broadening of probation's mission from primarily rehabilitation to the inclusion of restrictive supervision. Nor has it implicitly recognized this change by altering the responsibilities and structure of probation agencies."⁶⁸ The large body of case law that portrays rehabilitation and community protection as two of the primary goals of probation and community-based sentencing remains intact as valid precedent.⁶⁹ Moreover, as already shown, in addition to inflicting retribution, house arrest promotes deterrence, rehabilitation, and the prevention of recidivism.

Sentencing courts should therefore be cautious in imposing overly punitive conditions of home confinement. In view of decisions that interpret controlling probation statutes as having a rehabilitative component,⁷⁰ some restrictions may not withstand challenge in court.⁷¹ Further, unnecessarily intrusive infringements on liberty may breed resentment and frustration, encouraging the offender to resort to deceptive tactics aimed at circumventing the terms of probation:

[T]he conditions of supervision should be restricted to those that are meant to be enforced and are necessary to the maintenance of the supervision relationship. Failure to do the first undermines the credibility of community supervision, and ignoring the second represents an unjustified extension of power of the state into offenders' lives.⁷²

To ensure that superfluous restrictions are excluded, the conditions of house arrest must be tailored to reflect the mixed goals of the sanction, without placing undue emphasis on its punitive component.⁷³ To guarantee that similarly situated defendants receive equal treatment, the decision to impose home confinement should be based on an actuarial risk assessment model that incorporates both predictions of future criminal-

⁶⁷ See *Executive Summary of Rand's Study*, *supra* note 60, at 388-91.

⁶⁸ *Id.* at 389.

⁶⁹ See N. COHEN & J. GOBERT, *supra* note 41, at 182-84 & n.3 (citing cases).

⁷⁰ See *id.* at 182 & n.3 (citing cases).

⁷¹ See, e.g., *People v. Beach*, 147 Cal. App. 3d 612, 622-23, 195 Cal. Rptr. 381, 387 (1983) (invalidating banishment as a condition of probation); *In re White*, 97 Cal. App. 3d 141, 147, 158 Cal. Rptr. 562, 566 (1979) (invalidating a blanket prohibition against being in a certain area).

⁷² O'Leary, *supra* note 7, at 359.

⁷³ See *id.* at 359-60.

ity and proportionality between crime and punishment.⁷⁴

Finally, the implementation of house arrest programs has been spurred by a number of administrative and economic concerns. For example, while the Contra Costa County program emphasizes rehabilitation, community protection, and the prevention of recidivism, its objectives also include a reduction of the in-custody care days of the county jail facilities and a decrease in the correctional costs per convict.⁷⁵ Reduction of costs and alleviation of overcrowding are universal goals of house detention programs.⁷⁶ Such objectives are not unique; the same considerations figure prominently in other community-based, strict supervision programs.⁷⁷ Part II examines the administrative success of home confinement programs in achieving these enumerated goals, as well as the statutory limitations on a sentencing court's authority to impose certain conditions on house arrest.

II. PROBLEMS AND PROGNOSIS

House arrest is a far too recent penal innovation to allow conclusive assessment of its success or failure.⁷⁸ Nor is it clear precisely which indicators are most critical in deciding whether to continue or forego a given home detention program. While rates of recidivism, for example,

⁷⁴ See Glaser, *Who Gets Probation and Parole: Case Study Versus Actuarial Decision Making*, 31 CRIME & DELINQ. 367, 370-73 (1985).

⁷⁵ See Contra Costa County Report, *supra* note 1, at 3-4. The full text of the program objectives states:

The project proposal had five objectives:

1. To reduce the in-custody care days of the Contra Costa County jail facilities in a range of between 23,725 days and 27,357 days per year. (based on a staff of three teams of two persons).
2. To reduce the correctional cost for each program participant by 75% of the in-custody cost during the Home Detention period.
3. To maximize program participants remaining in their homes and to have a return to custody rate of no more than 10% of program participants.
4. To provide a correctional program which is an alternative to incarceration and which maximizes community protection.
5. To provide a more effective transition of in-custody probationers to non-custody supervision status.

Id.

⁷⁶ See EDNY Guidelines, *supra* note 1, at 1-2, reprinted in *Murphy*, 108 F.R.D. app. at 441; Corbett & Fersch, *supra* note 1, at 15; Robinson, *supra* note 3, at 46; *A House Is Not a Home; It's a Jail*, CRIM. JUST. NEWSL., Feb. 28, 1983, at 5; *Home Detention Gaining Support*, *supra* note 1, at 3; *No Place Like Home*, *supra* note 47, at 3.

⁷⁷ See, e.g., Pearson, *supra* note 9, at 394-98 (outlining both "cost savings" and "improved use-of-prison-space" goals).

⁷⁸ See, e.g., Robinson, *supra* note 3, at 46 ("Lacking a complete statistical study, it is still unknown whether community control is or will be a success.").

may be lower in house arrest programs than in less intensively supervised probation, administrative costs may not be substantially reduced. Nevertheless, even at an early stage of development and implementation, some appraisal of the difficulties and successes of the house confinement sentence is possible.

A. *Cost Savings and Alleviation of Overcrowding*

House detention programs advance significant cost savings as an integral policy objective. Probationary and judicial guidelines for house arrest portray a reduction in expenditures as an inevitable result of the cost differential between housing an offender in a correctional facility and confining that person to her home.⁷⁹ Some jurisdictions have, in fact, reported dollar savings.⁸⁰ Indirect savings are also a factor in considering the costs of home detention. A controllee who has preauthorization to leave home for employment may be self-supporting and able to pay taxes and thus prevent family dependency on public subsidies.⁸¹ Additionally, at least one house arrest program exacts a supervision fee from each controllee to offset some of the costs of administration and monitoring.⁸²

Predictions of inevitable cost savings, however, fail to take into account the high costs of home detention programs and the complex design imperatives of a supervisory scheme that must draw from a pool of offenders destined for prison but who simultaneously present a manageable threat to the community.⁸³ Moreover,

although ISP's [intensive supervision programs] would cost much less than new prisons, they would cost much more

⁷⁹ See EDNY Guidelines, *supra* note 1, at 1, reprinted in *Murphy*, 108 F.R.D. app. at 441 ("[I]t is obvious that [use of home detention] as a general option in federal criminal cases would result in savings of several million dollars yearly.").

⁸⁰ The Rock Island County program in Illinois has demonstrated "substantial savings" resulting from lower jail costs. *Home Detention Gaining Support*, *supra* note 1, at 3.

⁸¹ See EDNY Guidelines, *supra* note 1, at 2, reprinted in *Murphy*, 108 F.R.D. app. at 441.

⁸² See, e.g., Florida Form for Judgment of Guilt Placing Defendant in Community Control, Community Control Condition No. 5 (requiring the controllee to pay a \$30 fee every month) (on file with the *University of Pennsylvania Law Review*). The policy of probationer contributions to program costs, or "user fees," is a feature of other intensive supervision programs. See, e.g., Conrad, *supra* note 56, at 417 (noting that intensive supervision probationers in Georgia pay a fee of between \$10 and \$30 per month).

⁸³ To be a genuine alternative to incarceration, an intensive supervision plan must draw on a prison-bound population of convicts. See Harland & Harris, *Developing and Implementing Alternatives to Incarceration: A Problem of Planned Change in Criminal Justice*, 1984 U. ILL. L. REV. 319, 323-25.

than traditional probation programs, so that if a substantial proportion of the felons who are now on probation were put into ISP's, the total costs to the criminal justice system would rise precipitously.⁸⁴

For example, initial cost estimates for the Contra Costa County program envisioned significant savings in "taxpayer dollars."⁸⁵ In practice, however, the program actually resulted in greater expenditures.⁸⁶

In the case of Contra Costa County, the failure to meet projected cost savings was a direct result of a lack of eligible participants for the program.⁸⁷ The initial estimate of in-custody care days to be saved per year by the implementation of a home detention program was grossly overestimated:

[W]ith 82% of the program participants (i.e., 86 of the total 105) showing 3,517 bed days saved at the end of 12 months, it is quite evident the project did not save between 23 and 27 thousand bed days. This, of course, also impacts [sic] the savings (or non-savings) in correctional costs.⁸⁸

Hence, the potential financial benefit of a house arrest program is intimately related to the reservoir of appropriate participants. A paucity of eligible candidates will result in a level of monetary savings inadequate to offset the increased cost of establishing and maintaining a complex probationary scheme of intensive surveillance.⁸⁹

A program that demonstrates a negative cost savings result can be expected to have insubstantial impact on prison or jail overcrowding. The Contra Costa County program presented such a case: the proba-

⁸⁴ *Executive Summary of Rand's Study*, *supra* note 60, at 387; see also Haynes & Larsen, *Financial Consequences of Incarceration and Alternatives: Burglary*, 30 CRIME & DELINQ. 529, 542-43 (1985) (suggesting that extensive use of community-based corrections may actually increase dollar costs compared to incarceration).

⁸⁵ *No Place Like Home*, *supra* note 47, at 3.

⁸⁶ In the first 12 months of a 17 month program, the cost of case screening was \$168,000, while cost savings arising from the release of 86 inmates from detention facilities was only \$72,273, resulting in a total cost increase of \$95,827. See Contra Costa County Report, *supra* note 1, at 2.

⁸⁷ See *id.* at 5-6.

⁸⁸ *Id.* at 4.

⁸⁹ One commentary notes that, in general, intensive supervision probation will present "staggering logistical problems." See *Executive Summary of Rand's Study*, *supra* note 60, at 387. Even if adequate numbers of offenders were available, any intensive supervision program could initially accommodate only a fraction of their population and would not relieve overcrowding for "quite some time." *Id.* If this conclusion is correct, then all house arrest and intensive supervision programs will report initial losses, because the initial number of offenders included in the program will generate cost savings that are insufficient to offset the relatively high start-up costs of increased surveillance.

tion department was simply unable to find a sufficient number of persons in jail who were suitable for home detention.⁹⁰ An accurate assessment of the number of potential candidates apparently was not possible prior to the implementation of the screening process for home confinement.⁹¹ Some eligible candidates refused to abide by the rules; others could not assure cooperation from roommates or family members, and still others had lost their residences after incarceration.⁹² As a result, "jail overcrowding was not necessarily relieved by the program, and the Sheriff's department was unable to reduce its staff."⁹³

At least one house arrest program, however, has reported a reduction in the number of individuals being incarcerated. In Florida, 72.5% of community controllees were diverted from prison; compared to the last year prior to the start of a home detention program, there were 180 fewer commitments to prison per month during the first year of community control, resulting in a 16% reduction in prison intake.⁹⁴ The Rock County program in Illinois has been reported as having lowered jail costs, and presumably has mitigated overcrowding.⁹⁵ Other intensive supervision programs have also alleviated prison overcrowding.⁹⁶ In summary, house arrest, combined with other community-based, intermediate-level punishments, may result in cost savings and prison population reductions; however, house arrest programs must be structured to ensure the availability of an adequate pool of eligible offenders.

B. *Revocation, Recidivism, and Supervision*

An examination of house arrest revocation and recidivism statistics

⁹⁰ See Contra Costa County Report, *supra* note 1, at 5.

⁹¹ See *id.*

⁹² See *id.* Other factors contributing to a smaller pool of eligibles than anticipated included violations while in custody, outstanding warrants, and residence outside the county. See *id.* at 6. Finding adequate numbers of eligible candidates may be a problem for intensive supervision programs in general. See, e.g., EDNY Guidelines, *supra* note 1, at 1, reprinted in *Murphy*, 108 F.R.D. app. at 440 ("5% or less of the 45% of defendants [within the Eastern District of New York] destined for jail terms might be considered for house detention sentences."); Pearson, *supra* note 9, at 398 ("The vast majority of applicants do not meet the basic screening requirements.").

⁹³ Contra Costa County Report, *supra* note 1, attachment 5, reported in *San Francisco Chron.*, Mar. 6, 1985, at 37.

⁹⁴ See Robinson, *supra* note 3, at 45.

⁹⁵ See *Home Detention Gaining Support*, *supra* note 1, at 3. There are no reported statistics on cost savings in Florida.

⁹⁶ See Conrad, *supra* note 56, at 420. A decrease in incarceration due to implementation of new probation schemes may be nullified by increases in imprisonment due to other factors, such as the authorization of mandatory sentencing. See Finn, *Prison Crowding: The Response of Probation and Parole*, 30 CRIME & DELINQ. 141, 144 (1984).

establishes that home confinement is a viable alternative to incarceration.⁹⁷ During the first year of house arrest in Florida, the revocation rate among community controllees was only slightly higher than among persons placed on ordinary probation.⁹⁸ Recidivism statistics also suggest a hopeful future for house arrest.⁹⁹ The Contra Costa County program was marked by low recidivism rates.¹⁰⁰ Comments of probation officers evidence the belief of some field officers that home detention provides an effective transition from incarceration to regular probation.¹⁰¹

Intensive supervision programs other than house arrest programs also report relatively low failure rates. After one year of operation, the New Jersey intensive supervision program reported twenty-nine expulsions out of 226 participants, for a reincarceration rate of 13%.¹⁰² Technical violations such as curfew breaking were the most common reasons for revocation, with use of controlled substances ranking second; only one offender was reincarcerated for an indictable offense.¹⁰³ Surveys of participants in Georgia's intensive probation supervision program after six, twelve, and eighteen months revealed violation rates of 9.5%, 23% and 27.8%, respectively.¹⁰⁴ Only three of the violations were "crimes against the person," and none of those crimes was serious.¹⁰⁵

Revocation and recidivism statistics for intensive supervision and house arrest programs present a stark contrast to the statistics for programs utilizing only minimal surveillance of felony probationers. A 1985 Rand Corporation study of nearly 1700 adult felony probationers

⁹⁷ Those persons whose probation status has been revoked may either have committed a new crime or have violated some technical guideline of the probationary regime.

"Recidivism" as used in this Comment refers to controllees who have committed new criminal offenses either during the term of probation or within a measurable time period after intensive supervision has terminated. Hence, there is some overlap between recidivism and revocation.

⁹⁸ See Robinson, *supra* note 3, at 45 (noting that 14% of detainees and 10% of ordinary probationers violated a condition imposed on them).

⁹⁹ See *id.* at 47.

¹⁰⁰ See Contra Costa County Report, *supra* note 1, at 3. Seventeen months after the project's initiation, only nine detainees (8.5%) had had their programs terminate unsuccessfully and only two (2%) were arrested. See *id.* Of the two persons arrested while on home detention, one had shoplifted a \$1.98 cosmetic item, and the other was driving while intoxicated. See *id.* at 3. A survey of 76 probationers who had been out of home detention between one and eleven months revealed that 69 (91%) had not committed a new offense. See *id.* at 4.

¹⁰¹ See *id.* attachment 3.

¹⁰² Pearson, *supra* note 9, at 398-99, 401.

¹⁰³ See *id.* at 401.

¹⁰⁴ Conrad, *supra* note 56, at 419.

¹⁰⁵ See *id.*

in two California counties revealed that "65% of the probationers . . . were rearrested, 51% were reconvicted, 18% were reconvicted of serious violent crimes, and 34% were reincarcerated."¹⁰⁶ The researchers recommended consideration of intensive supervision probation programs as a potentially effective means of providing a greater degree of community protection from nonincarcerated serious offenders.¹⁰⁷

Community protection, however, can be facilitated only by maintaining a pool of well trained probation officers operating at a low detainee-to-supervisor ratio. In the Florida community control program, the maximum case load for a team of one surveillance officer and one supervising officer is forty offenders.¹⁰⁸ The Contra Costa County program initially envisioned a team of two officials, consisting of a deputy probation officer and a probation assistant, to be assigned to as many as twenty-five home confinees; in practice, however, supervising even seven to ten persons proved to be a full time endeavor.¹⁰⁹ Accordingly, some estimates of case load size per supervisor may be too large. The Lake County, Illinois pre-trial home detention program may apportion case loads more realistically; one officer handles only fifteen detainees.¹¹⁰ If staff reductions are incorporated into estimated future savings, expectations of higher case loads may exaggerate the economic efficiency of house arrest programs.¹¹¹

Even if house arrest programs have enough supervisory personnel, training presents another potential obstacle. House arrest surveillance

¹⁰⁶ *Executive Summary of Rand's Study*, *supra* note 60, at 381. The study notes, however, that the two counties, Los Angeles and Alameda, may be atypical in that they have experienced severe budgetary restraints and growing case loads. *See id.* In general, comparisons of probationary schemes in different jurisdictions may fail to account for key variables. In the Contra Costa County house arrest program, for example, between 6% and 8% percent of the 86 participants admitted into the program by Nov. 30, 1984, had committed violent crimes, such as assault with a deadly weapon or aggravated assault, *see* Contra Costa County Report, *supra* note 1, attachment 1, at 3, while 11% of Georgia's intensive supervision probationers during 1983 had been convicted of violent crimes, *see* Conrad, *supra* note 56, at 419.

¹⁰⁷ *See Probationers*, *supra* note 8, at 6.

¹⁰⁸ *See* Robinson, *supra* note 3, at 45-46 (noting that the Florida program mandates a minimum of 28 contacts per month, but also noting that there is no complete statistical study evaluating the program's success).

¹⁰⁹ *See* Contra Costa County Report, *supra* note 1, at 6. Case load size in ordinary probation programs can be staggering. Florida reports a staff officer to probationer ratio of 1 to 81. *See* Robinson, *supra* note 3, at 45. Some California probation officers have responsibility for more than 300 offenders. *See Probationers*, *supra* note 8, at 5.

¹¹⁰ Telephone interview with Deputy Director of Lake County Court Services (Feb. 17, 1986).

¹¹¹ *See, e.g.*, EDNY Guidelines, *supra* note 1, at 1-2, *reprinted in* Murphy, 108 F.R.D. app. at 441 (evaluating cost effectiveness by comparing the cost of imprisonment to the cost of a probation officer's salary).

involves assuring strict compliance with severe limitations on the offender's freedom of movement; hence, supervising probation officers will have to assume a greater policing function than those assigned to ordinary probation duty.¹¹² Whether or not probation departments have the financial and human resources to train and maintain staffs for home confinement programs on a broad scale remains to be seen.¹¹³

C. Statutory Authority

Where there is no explicit statutory authority to impose house arrest, either as a condition of probation or as a sentence independent of a probationary sanction, appellate courts may find that its imposition constitutes an abuse of judicial discretion.¹¹⁴ Judges have broad power to formulate conditions of probation, but that power is not unlimited.¹¹⁵ It is useful to draw an analogy to cases invalidating jail as a condition of probation in jurisdictions where incarceration is not authorized by statute.¹¹⁶ Lacking the inherent power to impose probation,¹¹⁷ some jurisdictions have been reluctant to apply harsh, unauthorized restrictions on probationers: "[J]urisdictions holding that imprisonment is not a valid condition of probation generally rely on the lack of express statutory authority permitting such action."¹¹⁸

¹¹² See *Executive Summary of Rand's Study*, *supra* note 60, at 389.

¹¹³ Many probation departments have suffered budget cuts, see *Probationers*, *supra* note 8, at 5, while the number of people on probation has increased, see BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PROBATION AND PAROLE IN 1983, table 2, at 2 (1984).

¹¹⁴ See, e.g., N.Y. Times, Sept. 24, 1985, at A1, col. 1, B5, col. 1 (noting that home detainee's lawyer may "appeal the sentence on the ground that the judge had no authority to impose it").

¹¹⁵ See N. COHEN & J. GOBERT, *supra* note 41, at 188-93 (1983).

¹¹⁶ See *State v. Harris*, 251 N.W.2d 483 (Iowa 1977); *State v. Cobb*, 450 So. 2d 59 (La. Ct. App. 1984); *Stone v. State*, 43 Md. App. 329, 405 A.2d 345 (1979); *People v. Wilson*, 97 Mich. App. 579, 246 N.W.2d 110 (1980); *Milligan v. State*, 465 S.W.2d 157 (Tex. 1971); *Spencer v. Whyte*, 280 S.E.2d 591 (W. Va. 1981). See generally Annotation, *Propriety of Conditioning Probation on Defendant's Serving Part of Probationary Period in Jail or Prison*, 6 A.L.R.4TH 446-80 (1981) (citing sources discussing the propriety and validity of granting probation subject to various conditions and requirements).

¹¹⁷ See, e.g., *Ex parte United States*, 242 U.S. 27 (1916) (holding that federal courts may not order probation) (superseded by the Federal Probation Act, Pub. L. No. 68-596, 43 Stat. 1259 (1925) (codified as amended at 18 U.S.C. §§ 3651-3656 (1982 & Supp. III 1985))) (repealed and revised by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-3586 (Supp. III 1985))) (amended to return to original language by Pub. L. No. 98-596, 98 Stat. 3139 (1984)); see also G. KILLINGER, H. KERPER & P. CROMWELL, *supra* note 2, at 18-20 (observing that at common law, most state courts other than those of New York did not possess the power to suspend sentences).

¹¹⁸ *Stone*, 43 Md. App. at 332, 405 A.2d at 347.

In *Spencer v. Whyte*,¹¹⁹ for example, in response to a habeas corpus proceeding instituted by an incarcerated probationer, the appellate court refused to approve any condition "not plainly suggested" by the flexible statutory framework and invalidated the jail assignment as a restriction that the trial court had no authority to impose.¹²⁰ Additionally, the appellate court viewed incarceration as inconsistent with the underlying policies of probation, "which are to encourage further rehabilitative efforts and to provide a less costly means of supervising an offender."¹²¹ Other courts have found that a probationary jail condition is permissible absent statutory authorization. In *Creps v. State*,¹²² for example, the court declared that "'probation' has come to signify less a necessary and immediate release from custody than a carefully tailored program of rehabilitation, potentially involving a short term of incarceration, judicially fashioned to suit the needs and character of a particular convicted person."¹²³

Although house arrest is a less severe and less punitive restriction than probationary detention in a prison setting, it remains a unique and controversial deprivation of liberty. By its very nature, the house arrest sanction imposes a regime of intrusive confinement. Unless a broader view of probation becomes widespread, the implementation of this novel sanction will be facilitated by the enhanced credibility and recognition that may derive from explicit statutory endorsement.¹²⁴

III. CONSTITUTIONAL IMPLICATIONS OF HOUSE ARREST

A. *The Nature of Probation*

Because house arrest is a community-based probationary sanction, an examination of a sentencing court's discretion in structuring conditions of probation is crucial to an understanding of the permissible range of restrictions that may be imposed on the home detainee's constitutionally protected liberty interests. Although the wording of probation statutes varies, all probation systems include restrictions and rules by

¹¹⁹ 280 S.E.2d 591 (W. Va. 1981).

¹²⁰ See *id.* at 594.

¹²¹ *Id.*; see also *Stone*, 43 Md. App. at 336, 405 A.2d at 340 ("Probation by its very nature implies the absence of incarceration.").

¹²² 94 Nev. 351, 581 P.2d 842, *cert. denied*, 439 U.S. 981 (1978).

¹²³ *Id.* at 363, 581 P.2d at 850.

¹²⁴ See *Executive Summary of Rand's Study*, *supra* note 60, at 388-89; see also N.Y. Times, *supra* note 114, at B5, col. 2 (Ms. Murphy's lawyer felt that house arrest was an "innovative idea that someday might be widely used as an alternative to jail." In the interim, however, Ms. Murphy was being used as a "guinea pig" and should have been placed under regular probation.").

which the offender must abide during supervision. Certain restrictions may be mandated statutorily, while others are merely optional. In addition, the court may impose ancillary "reasonable conditions" that it determines to be important.¹²⁵ Hence, although the power to suspend sentence and to place convicts on probation arises from statute, trial judges have broad discretion in the formulation and imposition of probation conditions.¹²⁶ In the past, such conditions have had significant impact on the probationer's constitutional rights,¹²⁷ including reproductive freedom¹²⁸ and freedom of association,¹²⁹ newly developed probation conditions, such as those allowing for electronic surveillance, may further compromise constitutional rights.¹³⁰

Historically, a number of theories have been posited as rationales for the total denial of probationers' liberty interests. Probation was initially viewed as an act of grace or a privilege accorded to the offender by the legislature and courts. In *Escoe v. Zerbst*,¹³¹ the Supreme Court suggested that a probationer's right to a hearing before revocation of probation was grounded in a privilege bestowed by statute, and not in a constitutional right:

[W]e do not accept the petitioner's contention that the [opportunity for a hearing] has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as

¹²⁵ See, e.g., 18 U.S.C. § 3651 (1982 & Supp. III 1985) (authorizing probation "for such period and upon such terms and conditions as the court deems best"); CAL. PENAL CODE § 1203.1 (West 1982 & Supp. 1986) (authorizing courts to exercise discretion in granting probation subject to various terms and conditions); ILL. ANN. STAT. ch. 38, para. 1005-6-3(b) (Smith-Hurd 1985 & Supp. 1986) (outlining conditions for probation and conditional discharge).

¹²⁶ See *United States v. Tzakis*, 736 F.2d 867, 871 (2d Cir. 1984); *United States v. Lemire*, 720 F.2d 1327, 1352 (D.C. Cir. 1983); *United States v. Mitsubishi Corp.*, 677 F.2d 785, 787 (9th Cir. 1982); G. KILLINGER, H. KERPER & P. CROMWELL, *supra* note 2, at 69-72.

¹²⁷ See generally N. COHEN & J. GOBERT, *supra* note 41, at 218-343 (providing a broad overview of the constitutional and policy ramifications of various conditions of probation).

¹²⁸ See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); see also *People v. Blankenship*, 16 Cal. App. 2d 606, 610, 61 P.2d 352, 353-54 (1936) (upholding the conditioning of probation on defendant's sterilization in statutory rape case), *questioned* in *People v. Dominguez*, 256 Cal. App. 2d 623, 627, 64 Cal. Rptr. 290, 293 (1967).

¹²⁹ See *In re Peeler*, 266 Cal. App. 2d 483, 492-93, 72 Cal. Rptr. 254, 261 (1968) (upholding a condition of probation requiring a wife not to associate with alleged users of marijuana, including her husband).

¹³⁰ See generally *Electronic Monitoring*, *supra* note 38 (discussing the constitutionality of electronic surveillance).

¹³¹ 295 U.S. 490 (1935).

Congress may impose.¹³²

Three years earlier, in *Burns v. United States*,¹³³ the Court had articulated the same act of grace rationale as the underlying basis for probation, noting that probation was a privilege that offenders could not demand as a right.¹³⁴ In *Burns*, however, the Court placed limits on the conditions that could be attached to this privilege, warning that "while probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."¹³⁵ No such limiting language appeared in *Escoe*, implying an unbridled license, at least for Congress, in conditioning the grant of probation.

Other decisions have denied or curtailed the rights of the probationer under the theory that constitutional rights are waived in return for exemption from imprisonment.¹³⁶ Often this theory underlies language construing the probationer's waiver as part of a contract between the defendant and the state.¹³⁷ The underlying premise is that the probationer, by signing an agreement limiting her liberty, has participated in a transaction equivalent to a contractual exchange and is estopped from later complaining about the terms of the arrangement. In effect, this waiver of rights theory "affords a right of appeal only to the offender who has rejected the conditions and gone to jail. It makes possible a claim that the probationer, by agreeing to the condition, has waived any objections he might have."¹³⁸

Both the act of grace and waiver of rights theories have been largely undermined by a series of Supreme Court decisions rendered between 1967 and 1973 that include parole and probation revocation hearings within the coverage of the due process clause.¹³⁹ The rights of probationers have been expanded beyond the narrow statutory limits outlined in *Escoe*, and the probationer's liberty has been grounded in constitutionally protected guarantees.¹⁴⁰ In *Mempa v. Rhay*,¹⁴¹ the

¹³² *Id.* at 492-93.

¹³³ 287 U.S. 216 (1932).

¹³⁴ *See id.* at 220.

¹³⁵ *Id.* at 223.

¹³⁶ *See, e.g.,* *People v. King*, 267 Cal. App. 2d 814, 826, 73 Cal. Rptr. 440, 448 (1968) (upholding a condition of probation that prohibited the probationer from participating in demonstrations, noting that he "had the choice of accepting the benefits and restraints of a jail sentence or probation"), *cert. denied*, 396 U.S. 1028 (1970).

¹³⁷ *See, e.g.,* *State v. Smith*, 233 N.C. 68, 70, 62 S.E.2d 495 (1950) (observing that probation conditions form "an integral part of the treaty or covenant which the defendant voluntarily enter[s] into with the court").

¹³⁸ Comment, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 191 (1967) (footnote omitted).

¹³⁹ *See* G. KILLINGER, H. KERPER & P. CROMWELL, *supra* note 2, at 190-93.

¹⁴⁰ *See, e.g.,* *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973) ("It is clear . . . that a probationer can no longer be denied due process, in reliance on the dictum in

Court held that a probationer is entitled to representation by appointed counsel at a combined revocation and sentencing hearing.¹⁴² In a later decision it was determined that a parolee's liberty interests implicate values that are protected by the due process clause of the fourteenth amendment.¹⁴³ A parolee was therefore found to be entitled to both a preliminary and final revocation hearing.¹⁴⁴ Shortly thereafter, the same entitlement was extended to probationers.¹⁴⁵

The above decisions establish that probationers do in fact have constitutionally protected rights that can be neither bartered away to the state in exchange for greater leniency in sentencing nor compromised in accordance with a restrictive act of grace theory. Yet, in the recent past some lower courts and probation departments have announced standards that rely, at least superficially, on both act of grace and waiver of rights notions. As recently as 1983, a California court described probation as an "act of leniency."¹⁴⁶ One commentator observes that "though the [act of grace] doctrine is 'thoroughly discredited,' courts continue ritualistically to mouth it."¹⁴⁷ Another notes, "Regardless of whether the conditions of the order of probation constitute a valid contract, the term 'contract' is still the term most often used . . . to describe the order of probation."¹⁴⁸

The application of either the act of grace or contractual waiver rationale greatly hampers an offender's efforts to challenge a particular set of conditions attached to a probationary term. The same obstacles would be present if a house confinee attempted to challenge the condition of house arrest itself or requested that the court relax some particularly restrictive condition of home detention. House arrest is generally imposed on those who would otherwise have been sentenced to a period of incarceration or who would not have been eligible for ordinary pro-

Escoe v. Zerbst . . . that probation is an 'act of grace.'"(citation omitted).

¹⁴¹ 389 U.S. 128 (1967).

¹⁴² See *id.* at 134.

¹⁴³ See *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

¹⁴⁴ See *id.* at 485-89.

¹⁴⁵ See *Gagnon v. Scarpelli*, 411 U.S. 778, 792 (1973). The Court did not find a constitutional right to counsel but held that the reviewing judge should determine in each instance whether due process requires that an indigent probationer or parolee be represented by counsel. See *id.* at 790-91.

¹⁴⁶ *People v. Beach*, 147 Cal. App. 3d 612, 623, 195 Cal. Rptr. 381, 387 (1983); see also *State v. Donovan*, 116 Ariz. 209, 212, 568 P.2d 1107, 1110 (1977) (describing probation as a "matter of legislative grace").

¹⁴⁷ Comment, *Probation Conditions and the First Amendment: When Reasonableness is Not Enough*, 17 COLUM. J.L. & SOC. PROBS. 45, 56 (1981).

¹⁴⁸ Comment, *Rights of the Maryland Probationer: A Primer for the Probationer*, 11 U. BALT. L. REV. 272, 274 n.14 (1982).

bation at all,¹⁴⁹ thereby fortifying the impression in the probationer's mind that the court is indeed bestowing the house arrest sentence as an act of grace. Thus, the probationer might be less likely to challenge some onerous aspect of home confinement.

When the conditions of house arrest are viewed as the provisions of a contract between the detainee and her family on the one hand, and law enforcement agencies on the other, the detainee's negotiating posture is weaker than that of the ordinary probationer. Although those who are eligible for ordinary probation are often threatened with incarceration in lieu of community supervision and generally lack the bargaining power that parties to a contract normally possess, home detainees are in an even more precarious position: they generally have committed graver crimes and face longer periods of incarceration should they refuse house arrest. The state's coercive power to impose incarceration eliminates the detainee's power to bargain, making it more likely that she will assent to illegal intrusions upon otherwise constitutionally protected liberties.¹⁵⁰

Advance waiver of constitutional rights as a justification for the imposition of restrictive conditions has also been criticized by court decisions and commentators.¹⁵¹ This criticism derives from a number of logical inconsistencies inherent in the notion that one can relinquish constitutional rights. One commentator observes that although the doctrine appears to expand individual choices by allowing a person to forego a given right in exchange for some benefit, waiver of rights often occurs in situations where the individual has, in fact, no real choice at

¹⁴⁹ See *United States v. Murphy*, 108 F.R.D. 437, 439 (E.D.N.Y. 1985) (sentencing a house confinee to a prison term of 50 years and imposing a fine of \$56,000); FLA. STAT. ANN. § 948.01(4) (West 1985) (authorizing recruitment of community controllers from felony offenders for whom "probation is an unsuitable dispositional alternative to imprisonment"); *Contra Costa County Report*, *supra* note 1, at 1 (noting that home detainees are selected from persons sentenced to prison as a condition of probation).

¹⁵⁰ The notion that a probation agreement is equivalent to a contract has been criticized precisely because of the limited range of choices facing the probationer and the obvious inequality in the position of the two parties to the bargain. See, e.g., *Hahn v. Burke*, 430 F.2d 100, 104 (7th Cir. 1970) ("Probation is in fact not a contract. The probationer does not enter into the agreement on an equal status with the state."), *cert. denied*, 402 U.S. 933 (1971).

¹⁵¹ See *In re Mannino*, 14 Cal. App. 3d 953, 966-68, 92 Cal. Rptr. 880, 888-89 (1971); *Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977); *Spritzer, Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473 (1978); see also ABA STANDARDS, *supra* note 39, standard 18-2.3 commentary at 18.93 (stating that "advance waivers of constitutional rights by the probationer appear no longer to be enforced against the probationer."). *But see State v. Heath*, 343 So. 2d 13, 16 (Fla. Dist. Ct. App. 1977) (finding that agreement to accept the terms of probation effectively waives the fifth amendment privilege against self-incrimination).

all.¹⁵² Courts have held, too, that certain rights are not waivable.¹⁵³ Even if waivable, such rights may not be alienable; that is, "the power not to exercise the right [may not] be transferrable to another party in exchange for the proffered benefit."¹⁵⁴ Finally, even if certain rights are both waivable and alienable, important considerations arise when the state seeks a waiver or transfer of such rights in an effort to complete an exchange with an individual.¹⁵⁵

As with the act of grace theory, any use of the waiver of rights doctrine to justify the imposition of house arrest is misplaced. Agreement by the detainee to forego some constitutionally protected right might well be coerced or exacted in response to a threat imposed by the state.¹⁵⁶ Moreover, because of the particularly restrictive nature of home confinement, the implicated constitutional right might not be waivable. For example, if a confinee's housing is substandard, home confinement imposed by the state may violate the eighth amendment ban on cruel and unusual punishment. Similarly, it is likely that the offender might sacrifice a right that is not alienable to the state. If a regime of home confinement does not include access to a house of worship, the state will have coerced from the offender a waiver or transfer of the inalienable right to freedom of worship guaranteed by the free exercise clause of the first amendment.¹⁵⁷

The state may advance yet another rationale for the denial of certain constitutionally protected liberties: when the state imposes house arrest as a condition of probation or as a separate sanction, the state also has the power to incarcerate the offender. But once the offender has chosen the lesser penalty of house arrest, the state does not have the authority to condition this lesser sanction on the relinquishing of consti-

¹⁵² See Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1383-85 (1984).

¹⁵³ See, e.g., *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265-66 (9th Cir. 1975) (finding that status as a probationer does not abrogate the fourth amendment right to be free from unreasonable searches and seizures, although such status helps establish the parameters of what intrusions are "unreasonable"); *People v. Dominguez*, 256 Cal. App. 2d 623, 64 Cal. Rptr. 290, 294 (1967) (condemning the notion that the appellant waived her right to become pregnant as a condition of probation).

¹⁵⁴ Kreimer, *supra* note 152, at 1386 (footnote omitted). One may or may not exercise the right to vote, for example, but that right may not be sold or alienated to another individual. See *id.*

¹⁵⁵ See *id.* Kreimer offers the following example: "Uncle Felix may make his bequest conditional on the beneficiary attending church. Uncle Sam may not." *Id.*

¹⁵⁶ See, e.g., *United States v. Pierce*, 562 F.2d 735, 739 (9th Cir. 1977) (citation omitted) ("[A] defendant's consent to a probation condition is likely to be nominal where consent is given only to avoid imprisonment."), *cert. denied*, 435 U.S. 923 (1978).

¹⁵⁷ U.S. CONST. amend. I, cl. 1 ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

tutional rights that the state might have been able to abridge if the offender had been subjected to the greater penalty of imprisonment. Despite its intuitive appeal, the doctrine that the greater includes the lesser is highly suspect when used to justify a forced exchange of constitutional guarantees for mitigation of punishment.¹⁵⁸ As one court stated: "[T]he power of government to withhold benefits from its citizens does not encompass a 'lesser power' to grant such benefits upon an arbitrary deprivation of constitutional rights."¹⁵⁹

Probationers retain a broader range of protected liberty interests than persons who are incarcerated,¹⁶⁰ including elements of the following guarantees: the right to due process,¹⁶¹ the first amendment freedoms of expression¹⁶² and religion,¹⁶³ the fifth amendment privilege against self-incrimination,¹⁶⁴ the fourth amendment freedom from unreasonable search and seizure,¹⁶⁵ the right to family integrity,¹⁶⁶ and the right to sexual and reproductive autonomy.¹⁶⁷ Thus, even though the state may have the power to incarcerate an offender and thereby restrict her constitutional rights, the same restrictions may not be per-

¹⁵⁸ For a classic characterization of the doctrine of the greater and the lesser, see *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 52, 53 (1910) (Holmes, J., dissenting) ("Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way.").

¹⁵⁹ *In re Mannino*, 14 Cal. App. 3d 953, 967, 92 Cal. Rptr. 880, 888 (1971) (citations omitted).

For a more detailed critique of the doctrine of the greater and the lesser, see generally Kreimer, *supra* note 152, at 1304-14 (discussing the influence of the "classical" version of the doctrine in modern cases). "Despite its distinguished lineage and superficial plausibility, the argument in defense of government's unbridled prerogative to condition allocations is deeply flawed. . . . [T]he argument that the greater includes the lesser does not work as a syllogism." *Id.* at 1310 (footnotes omitted).

¹⁶⁰ See *Inman v. State*, 124 Ga. App. 190, 194-95, 183 S.E.2d 413, 416 (1971).

Probationers, of course, are not entitled to the same degree of freedom as ordinary citizens. See *United States v. Tonry*, 605 F.2d 144, 151 (5th Cir. 1979); see also *State v. Heath*, 343 So. 2d 13, 15 (Fla. Dist. Ct. App. 1977) ("A probationer does not enjoy the same status as an ordinary citizen . . .").

Even prisoners retain a core of constitutionally protected rights. See, e.g., *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (discussing the guarantee of due process); *Estelle v. Gamble*, 429 U.S. 97, 101-03 (1976), *reh'g denied*, 429 U.S. 1066 (1977) (affirming the right to protection against cruel and unusual punishment); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (asserting the right to observe religious faith); *Lee v. Washington*, 263 F. Supp. 327, 333 (M.D. Ala. 1966) (asserting the right to be free from racial segregation in prisons), *aff'd*, 390 U.S. 333 (1968).

¹⁶¹ See *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973).

¹⁶² See *Inman*, 124 Ga. App. at 195, 183 S.E.2d at 416.

¹⁶³ See *Owens v. Kelley*, 681 F.2d 1362, 1365 (11th Cir. 1982), *reh'g denied*, 697 F.2d 1094 (11th Cir. 1983).

¹⁶⁴ See *United States v. Pierce*, 561 F.2d 735, 738-39 (9th Cir. 1977).

¹⁶⁵ See *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 262 (9th Cir. 1975).

¹⁶⁶ See *Drollinger v. Milligan*, 552 F.2d 1220, 1227 (7th Cir. 1977).

¹⁶⁷ See *People v. Dominguez*, 256 Cal. App. 2d 623, 629, 64 Cal. Rptr. 290, 294 (1967).

missible under a probationary regime. In *United States v. Pastore*,¹⁶⁸ the court struck a probation condition that the offender resign from the bar association, thereby forfeiting his law career:

Had the judge rejected probation and simply sent Pastore to jail for the full two years of his sentence . . . there could ordinarily have been no meaningful claim that Pastore had been improperly denied the right to practice law for the period. Imprisonment obviously takes away the means of livelihood, while providing minimum sustenance. Why then should the lesser penalty be objectionable if the greater is not? The answer must be that the judge was exercising his discretion and that this must be done lawfully whatever the penalty.¹⁶⁹

While noting that use of the term "lawfully" is a mere tautology, the court emphasized that the sentencing process must be carefully scrutinized to insure that the probationer will be protected from the injustice of "isolated eccentricity."¹⁷⁰ A defendant should be given a "meaningful opportunity to demonstrate why such a condition might be inappropriate"¹⁷¹ before being required to sacrifice rights as a condition of probation.

Like probationers, house detainees are not inmates and therefore cannot be denied their constitutional rights simply because the state wields the power to imprison them. Even those who are sentenced to house confinement under Florida's community control statute¹⁷² should enjoy the same range of constitutional protections as probationers, despite the fact that community control is viewed by that statute not as a form of probation, but as a separate and more severe sanction.¹⁷³ Several factors justify treating the Florida home detainee like a probationer rather than a prisoner. First, the conditions of community control are not equivalent to those of imprisonment, nor is community control regarded as incarceration.¹⁷⁴ Instead, "community control is a nonprison custodial alternative that was developed by the legislature to alleviate prison overcrowding."¹⁷⁵ Second, when community control is revoked

¹⁶⁸ 537 F.2d 675 (2d Cir. 1976).

¹⁶⁹ *Id.* at 681 (footnote omitted).

¹⁷⁰ *See id.*

¹⁷¹ *Id.* at 682.

¹⁷² FLA. STAT. ANN. §§ 948.001-948.90 (West 1985 & Supp. 1986).

¹⁷³ *See Mitchell v. State*, 463 So. 2d 416, 419 (Fla. Dist. Ct. App. 1985); *Stranigan v. State*, 457 So. 2d 546, 547 (Fla. Dist. Ct. App. 1984).

¹⁷⁴ *See Mitchell*, 463 So. 2d at 418.

¹⁷⁵ *Id.*

due to violation of its conditions, the offender is not given prison "credit" for time served in home confinement.¹⁷⁶ The sentencing court can therefore "impose any sentence which it might have originally imposed before placing the . . . offender into community control."¹⁷⁷ Third, the conditions of probation enumerated by statute may also be conditions of community control.¹⁷⁸ Such conditions would generally be inappropriate for a term of incarceration.¹⁷⁹ Finally, the Florida legislature portrays the community control sanction as primarily rehabilitative in nature,¹⁸⁰ while incarceration generally emphasizes punishment.¹⁸¹ Community control is fundamentally a supervised, community-based probationary sanction that cannot be equated with prison confinement. Accordingly, the rights of the community controllee should be greater than those of the inmate and at least as great as those of the person who is sentenced to house arrest as a condition of probation.¹⁸²

B. *Permissible Restrictions on the Rights of the Home Detainee*

1. Standards Pertaining to Probationers

One can establish a range of permissible restrictions on the house confinee by examining the judicial standards for reviewing challenges to strict or unusual probation conditions. Although the Supreme Court has determined that probationers cannot be denied due process rights,¹⁸³ lower courts have been forced to consider the validity of pro-

¹⁷⁶ See *Brooks v. State*, 478 So. 2d 1052, 1053 (Fla. 1985); *Johnson v. State*, 482 So. 2d 398, 399 (Fla. Dist. Ct. App. 1985); see also FLA. STAT. ANN. § 948.06(2) (West 1985) ("No part of the time that the defendant is on probation or in community control shall be considered a part of the time that he shall be sentenced to serve.")

¹⁷⁷ FLA. STAT. ANN. § 948.06(1) (West 1985).

¹⁷⁸ See FLA. STAT. ANN. § 948.03(1)-(2) (West 1985); *Robinson*, *supra* note 3, at 45.

¹⁷⁹ For example, conditions ordering the offender to report to her supervisor or support legal dependents would be inappropriate in a prison setting. The legislature intended for community controllees to have greater freedom and responsibility than prison inmates. See FLA. STAT. ANN. § 948.03(1)-(2) (West 1985).

¹⁸⁰ See FLA. STAT. ANN. § 984.01(4)(b) (West 1985) ("[A] plan of community control [should] promote the rehabilitation of the offender and the protection of the community."); see also *Robinson*, *supra* note 3, at 45 (stating that the purposes of community control are rehabilitation and community protection). The goals of house arrest, however, do include a punitive element. See FLA. STAT. ANN. § 948.10 (West 1985 & Supp. 1986) ("[Community control] shall offer the courts and the Parole and Probation Commission an alternative community-based method to *punish* an offender" (emphasis added)).

¹⁸¹ See *In re White*, 97 Cal. App. 3d 141, 150, 158 Cal. Rptr. 562, 568 (1979).

¹⁸² This Comment will henceforth assume that the rights of Florida's community controllees and other persons confined to their homes are identical.

¹⁸³ See *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

bation conditions that restrict other rights. While courts have reached disparate results in assessing the propriety of given restrictions, it is clear that a condition of probation that infringes on a constitutional right is not invalid per se.¹⁸⁴ The reviewing court typically engages in an implicit balancing process, weighing the state's interest in advancing a particular regime of probation against the impact of a specific condition on the offender's otherwise constitutionally protected rights.¹⁸⁵ But because the authority to impose probation is entirely statutory,¹⁸⁶ a court must consider both the constitutional and statutory legitimacy of a given condition.¹⁸⁷

In determining the constitutional validity of a condition of probation, courts generally examine whether the specific intrusion on an otherwise protected constitutional right is dictated by "legitimate governmental demands."¹⁸⁸ The primary difficulty lies in determining which government demands are legitimate. In 1967, the California Court of Appeals announced the following standard (the "Dominguez-Lent standard"):

A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality, does not serve the statutory ends of probation and is invalid.¹⁸⁹

Although the Dominguez-Lent standard permitted the reviewing court to determine the validity of a probationary condition without examining actual legislative intent, it often produced analytic results sensitive to the offender's rights.¹⁹⁰

¹⁸⁴ See *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979); *People v. Beach*, 147 Cal. App. 3d 612, 623, 195 Cal. Rptr. 381, 383 (1983); *Gilliam v. Los Angeles Mun. Court*, 97 Cal. App. 3d 704, 708, 159 Cal. Rptr. 74, 77 (1979), cert. denied, 445 U.S. 907 (1980); see also Weissman, *Constitutional Primer on Modern Probation Conditions*, 8 NEW ENG. J. PRISON L. 367, 373 (1982) (asserting that a state may condition probationary grants so as to compromise constitutional rights).

¹⁸⁵ See Weissman, *supra* note 184, at 372-73.

¹⁸⁶ See *Ex parte United States*, 242 U.S. 27, 42 (1916).

¹⁸⁷ See Legette, *An Introduction to Conditions of Probation in Ohio*, 9 CAP. U.L. REV. 639, 669 (1980).

¹⁸⁸ See *Beach*, 147 Cal. App. 3d at 622, 195 Cal. Rptr. at 387.

¹⁸⁹ *People v. Dominguez*, 256 Cal. App. 2d 623, 627, 64 Cal. Rptr. 290, 293 (1967), cited with approval in *People v. Lent*, 15 Cal. 3d 481, 486, 541 P.2d 545, 548, 124 Cal. Rptr. 905, 908 (1975); see also *Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979) (applying the Dominguez-Lent standard) (citations omitted).

¹⁹⁰ See Comment, *supra* note 147, at 63-77 (citing cases that apply the Dominguez-Lent standard).

Recently, however, the California courts have adopted a broader standard that directs the reviewing court to: (1) examine the relationship between the legislative purpose and the specific probation condition, (2) weigh the public interest in imposition of the condition against any impairment of constitutional rights, and (3) consider less restrictive alternatives "narrowly drawn so as to correlate with the purposes contemplated by conferring the benefit."¹⁹¹ Unlike the Dominguez-Lent standard, this standard fails to test the relationship between the probation condition and the specific offense for which the probationer has been convicted.

For offenders serving a probation term pursuant to the Federal Probation Act,¹⁹² courts generally consider two factors to determine whether a reasonable relationship exists between the offense and the conditions of probation:

First, we consider the purposes for which the judge imposed the conditions. If the purposes are permissible, the second step is to determine whether the conditions are reasonably related to the purposes. In conducting the latter inquiry, the court examines the impact which the conditions have on the probationer's rights. If the impact is substantially greater than is necessary to carry out the purposes, the conditions are impermissible.¹⁹³

This test (the "Consuelo-Gonzalez standard") utilizes a balancing process that weighs the practical needs of the probation system against the constitutionally protected guarantees of the Bill of Rights.¹⁹⁴

2. Application of Standards to the House Arrest Sanction

House arrest clearly imposes restrictions that implicate the probationer's constitutional rights. Yet, house detention is not unconstitutional per se, because the home confinee, as a convicted criminal, is no longer entitled to the full gamut of constitutional protections. Given the standards that courts have articulated, the validity of restrictions imposed on a particular house confinee will depend on the specific cir-

¹⁹¹ *People v. Beach*, 147 Cal. App. 3d 612, 622, 195 Cal. Rptr. 381, 387 (1983).

¹⁹² 18 U.S.C. §§ 3651-3656 (1982 & Supp. III 1985).

¹⁹³ *Higdon v. United States*, 627 F.2d 893, 897 (9th Cir. 1980) (citing *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975)). This standard also examines the extent to which the conditions serve the legitimate needs of law enforcement. *See id.* at 897 n.7 (citations omitted). The Fifth Circuit has adopted the same test. *See United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979).

¹⁹⁴ *See United States v. Pierce*, 561 F.2d 735, 739 (9th Cir. 1975) (citing *Consuelo-Gonzalez*, 521 F.2d at 264-65).

cumstances of her case.¹⁹⁵ House arrest arguably constitutes a severe and unusual probationary sanction, because the detainee's freedom is much more restricted than that of the ordinary probationer; thus, heightened judicial scrutiny is appropriate.¹⁹⁶ A court reviewing a challenge to a condition of house arrest should therefore adopt a test that carefully balances the state's interest in imposing home confinement against the liberty interests of the detainee.

The current standard by which the California courts review conditions of probation fails to provide an adequate framework for restricting the constitutional rights of an individual under house arrest; it offers no guidance for measuring the value to the public of the imposition of a given restriction. Furthermore, while the Dominguez-Lent standard is more analytically precise than the current test, it too is inappropriate in the house arrest context, because it fails to assess the impact of a given restriction on the offender's liberty interests. For example, while the court in *Gilliam v. Los Angeles Municipal Court*¹⁹⁷ acknowledged that prohibiting a probationer from frequenting places selling primarily alcoholic beverages might restrict the probationer's constitutional rights, it concluded: "[T]he issue is *not* the impact of the condition on the defendant's constitutional rights, but its ability to meet the Dominguez-Lent standard."¹⁹⁸ Although a strict application of the Dominguez-Lent standard could result in invalidation of an unconstitutional condition,¹⁹⁹ a better test would explicitly consider potential threats to the guarantees of the Bill of Rights.

The Consuelo-Gonzalez standard would be appropriate in evaluating house confinement, because it specifically incorporates both the underlying judicial purpose in imposing a given condition of probation and the constitutional implications of that condition for the probationer's liberties. In the house arrest situation, the sentencing court should attempt to satisfy the purpose inquiry by announcing the reasons for the imposition of home detention. Each sentence of house arrest should therefore include a written opinion outlining the aims of the particular assignment to home detention. The opinion would offer

¹⁹⁵ See, e.g., *Burns v. United States*, 287 U.S. 216, 220 (1932) ("It is necessary to individualize each case . . .").

¹⁹⁶ Cf. *In Re White*, 97 Cal. App. 3d 143, 146, 158 Cal. Rptr. 562, 565 (1979) ("Careful scrutiny of an unusual and severe probation condition is appropriate.").

¹⁹⁷ 97 Cal. App. 3d 704, 159 Cal. Rptr. 74 (1979), *cert. denied*, 445 U.S. 907 (1980).

¹⁹⁸ *Id.* at 708, 159 Cal. Rptr. at 77 (emphasis added).

¹⁹⁹ See, e.g., *In re Mannino*, 14 Cal. App. 3d 953, 964-65, 92 Cal. Rptr. 880, 886-87 (1971) (striking down probation restrictions on freedom of expression as unrelated to the assault for which the probationer was convicted).

guidance to the police in enforcing the sentence and would enable the legal community and the public to better understand the innovative sanction of home confinement.

In applying the purpose prong of the Consuelo-Gonzalez standard, courts should also ensure that the severity of the terms of an assignment to house detention remains commensurate with the seriousness of the offense. As with conditions of ordinary probation, if the impact of the house arrest sanction is needlessly harsh, then regardless of its purpose, it should be invalidated.²⁰⁰

In *Walker v. State*,²⁰¹ for example, a Florida appellate court recently struck down a condition of probation requiring the defendant to purchase the same dollar value of merchandise as had been stolen from a retail store.²⁰² Taking into consideration the offender's financial status, the court held that the effect of the challenged condition was too punitive to be related to the rehabilitative purpose of the probation.²⁰³ Although *Walker* involved a condition of ordinary probation, the same skepticism regarding overly punitive conditions should apply to home confinement: the relevant Florida statute recognizes rehabilitation of the offender and protection of the public as the principal goals of house arrest.²⁰⁴ Moreover, in *United States v. Murphy*,²⁰⁵ the sentencing court stressed rehabilitation in imposing the house arrest sanction.²⁰⁶

Even without an examination of the specific impact on his rights, the home confinement of David Wayte probably would not satisfy the Consuelo-Gonzalez standard. In ordering the defendant to serve a probationary term of six months under the most stringent house arrest conditions yet reported,²⁰⁷ the court issued no accompanying opinion announcing the purposes of these conditions. Given the defendant's crime, failure to register for the draft, it would appear that Wayte's house arrest was imposed primarily as a punitive sanction. It is difficult to perceive how six months of forced home confinement could be reasonably related to the rehabilitation or reformation of a person convicted for failing to register with the Selective Service System. The fact that the crime was nonviolent and would have involved a relatively short period

²⁰⁰ See *Higdon v. United States*, 627 F.2d 893, 898 (9th Cir. 1980).

²⁰¹ 461 So. 2d 229 (Fla. Dist. Ct. App. 1984).

²⁰² See *id.* at 230-31.

²⁰³ See *id.* at 231.

²⁰⁴ See FLA. STAT. Ann. §§ 948.01(4)(b) (West 1985). Although few statutes specify the aims of probation, those that do emphasize rehabilitation. See N. COHEN & J. GOBERT, *supra* note 41, at 182 n.2.

²⁰⁵ 108 F.R.D. 437 (E.D.N.Y. 1985).

²⁰⁶ See *id.* at 438-39.

²⁰⁷ See *supra* notes 33-37 and accompanying text.

of incarceration had the defendant rejected the terms of probation²⁰⁸ further reinforces the conclusion that the purpose motivating the sentencing court was not rehabilitation, but punishment by means of a sanction disproportionate to the severity of the crime. General deterrence of others who might also disregard their duty to register for the draft may have been the court's objective; however, as was stated in *Murphy*, "general deterrence is a factor we know little about."²⁰⁹ If deterrence were the only nonretributive basis on which a highly restrictive order of house arrest were premised, the home confinement imposed on David Wayte, as opposed to ordinary or even heightened supervisory probation,²¹⁰ could be viewed as a publicly humiliating, punitive sanction for the commission of a politically unpopular act at a time of renewed patriotism.²¹¹

The Consuelo-Gonzalez standard also requires an examination of the specific impact of a given condition of probation on the offender's constitutional rights. If the infringement of liberty interests is "substantially greater" than necessary to achieve the purposes of sentencing, then the given regime of supervision is impermissible.²¹² To ensure respect for the inviolability of individual liberties, the same examination must be an integral part of the standard for evaluating the conditions of house arrest. The following section discusses possible abridgments of the rights of an offender serving a period of house arrest, including potential abrogation of first amendment protection and threats to family integrity and privacy.

C. *House Arrest and the First Amendment*

By its very nature, house arrest involves the restriction of first amendment rights, especially the free exercise of religion²¹³ and protected associational guarantees.²¹⁴ A regime of house arrest must there-

²⁰⁸ See *supra* note 34.

²⁰⁹ *Murphy*, 108 F.R.D. at 439.

²¹⁰ Wayte, for example, could have been ordered to serve a probationary period with heightened control akin to the intensive supervision programs of Georgia and New Jersey. The level of punishment under such programs would be more commensurate with the seriousness of Wayte's offense. See, e.g., Pearson, *supra* note 9 (detailing the first year of operation of New Jersey's intensive supervision program).

²¹¹ Cf. *United States v. Smith*, 414 F.2d 630, 636 (5th Cir. 1969) (upholding the condition that a probationer, convicted of wearing official United States Army apparel, not associate with the radical Students for a Democratic Society), *rev'd sub nom. Schacht v. United States*, 398 U.S. 58 (1970).

²¹² See *supra* text accompanying note 193.

²¹³ See U.S. CONST. amend. I ("Congress shall make no law prohibiting the free exercise of religion . . .").

²¹⁴ "Although the first amendment does not specifically mention freedom of asso-

fore be thoughtfully structured. If it is unduly restrictive of the confinee's first amendment rights, it should be terminated or modified.

1. Freedom of Religion

An individual sentenced to house arrest may leave her site of confinement only for specific, predetermined reasons. David Wayte, for example, was allowed to leave his home only for "emergency" purposes.²¹⁵ In order to be able to attend religious services away from home, Wayte would have to request permission from his probation officer to leave home for an "emergency," or request that the sentencing judge modify the terms of his probation.²¹⁶

The Contra Costa County program is more permissive, allowing all essential trips that receive advance approval by the supervising probation officer; the guidelines, however, fail to specifically mention travel for religious purposes.²¹⁷ Although the Florida community control program also permits only pre-authorized travel, it explicitly classifies religiously motivated travel as "essential travel."²¹⁸ Even essential travel, however, must receive prior authorization from the probation officer.²¹⁹ The conditions outlined in *Murphy* are more carefully attuned to the possible religious needs of the probationer; they specifically permit travel for religious purposes.²²⁰

Under the impact prong of the Consuelo-Gonzalez standard, the restriction on religious freedom in *United States v. Wayte*²²¹ should be modified at least to replicate the flexibility of the Florida community control program. A failure to include permission to travel for religious purposes inevitably curtails the offender's ability to exert her rights under the free exercise clause of the first amendment. Because abridgment of religious freedoms has not been tolerated in the probation context, all instances of house arrest should permit travel for religious pur-

ciation, the Supreme Court has frequently held that it is implicitly guaranteed in the freedoms of speech, assembly, and petition." See N. COHEN & J. GOBERT, *supra* note 41, at 252 n.191 (citations omitted).

²¹⁵ See Judgment and Probation/Commitment Order, *supra* note 35.

²¹⁶ Telephone interview with Deputy Chief Probation Officer of the Central District of California (Jan. 21, 1986).

²¹⁷ See L.A. Daily J., Mar. 13, 1985, at 1, reprinted in Contra Costa County Report, *supra* note 1, at attachment 5.

²¹⁸ See Florida Implementation Manual, *supra* note 14, at 11.

²¹⁹ See *id.* at 12.

²²⁰ See *United States v. Murphy*, 108 F.R.D. 437, 439 (E.D.N.Y. 1985); EDNY Guidelines, *supra* note 1, at 5, reprinted in *Murphy*, 108 F.R.D. app. at 443.

²²¹ 549 F. Supp. 1376 (C.D. Cal. 1982), *rev'd*, 710 F.2d 1385 (9th Cir. 1983), *aff'd*, 470 U.S. 598 (1986).

poses without strict pre-authorization.²²² In *Jones v. Commonwealth*,²²³ for example, the Supreme Court of Virginia voided a condition of probation that delinquent minors "attend Sunday School and Church each Sunday" for one year.²²⁴ The court found that the condition reflected an impermissible association between Church and State.²²⁵ Although the decision in *Jones* was based on the establishment clause of the first amendment,²²⁶ any probationary scheme regulating an offender's religious life is viewed with skepticism.²²⁷ In only one reported case has a court upheld a potential violation of a probationer's religious freedom.²²⁸ In *United States v. Malone*,²²⁹ the defendant was convicted of unlawful exportation of firearms to Ireland.²³⁰ As a condition of probation, the court ordered that the defendant "not belong or participate in any Irish Catholic organization or group."²³¹ Even though the condition limited the defendant's free exercise of religion, the court upheld the condition on the ground that it was reasonably related to the legitimate goals of preventing recidivism and securing public safety and order.²³²

The *Malone* decision permits an unnecessary and dangerous infringement on a probationer's freedom of religion.²³³ One commentator has suggested: "[C]ourts should not lightly draft conditions which expressly restrict religious freedom. This condition [of probation] provides a precedent which a court may later abuse. The *Malone* court should have discriminated among the conditions imposed and voided this one."²³⁴ A ban on association with Irish Catholic organizations certainly would not have survived under the Consuelo-Gonzalez standard.

²²² See *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (allowing restriction of freedom of religious expression only upon showing of a "compelling state interest" and an absence of less restrictive alternatives).

²²³ 185 Va. 335, 385 S.E.2d 444 (1946).

²²⁴ *Id.* at 343, 385 S.E.2d at 448.

²²⁵ See *id.*

²²⁶ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

²²⁷ See, e.g., N. COHEN & J. GOBERT, *supra* note 41, at 310 (noting that under mandatory educational probation or parole conditions, state statutes often specify that the course of study must be secular, "to avoid possible conflict with the first amendment's guarantee of free exercise of religion and its prohibition against the establishment of religion"); MODEL PENAL CODE § 301.2(1) (Proposed Official Draft 1962) (urging that probation not regulate an offender's religious life).

²²⁸ See Comment, *supra* note 147, at 94-96.

²²⁹ 502 F.2d 554 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975).

²³⁰ See *id.* at 555.

²³¹ *Id.*

²³² See *id.* at 556-57.

²³³ See Comment, *supra* note 147, at 65-66.

²³⁴ *Id.*

The sentencing court could have achieved the announced purposes of probation, rehabilitation and prevention of recidivism, by forbidding the probationer from belonging to any Irish organization, "cultural or otherwise."²³⁵ The ban on membership in a religious organization has a substantially greater impact on the probationer's constitutional rights than is necessary to fulfill the enumerated goals of the probationary regime. Therefore, courts should not deny a probationer's freedom of religion, either in a house arrest program or in a less restrictive program of community supervision, in reliance on the decision in *Malone*.

Finally, a house arrest regime that requires pre-authorization of religious travel may constitute an illegal prior restraint of first amendment rights, particularly in a situation such as that presented in *Wayte*, in which the confinee was obliged to request that religious travel be considered an emergency. In *Hyland v. Proconier*,²³⁶ the district court invalidated a condition of probation requiring the parolee to obtain permission from his supervising officer before giving any public speech.²³⁷ The court considered this condition to be a clear "prior restraint of [the parolee's] first amendment rights."²³⁸ The state, apparently relying on the "clear and present danger" justification for first amendment speech restrictions, was unable to justify its refusal to permit the offender to address a student rally on prison conditions, perhaps because its refusal rested on a constitutionally impermissible scrutiny of the content of the plaintiff's speech.²³⁹

In the house arrest context, prior restraint of a home confinee's right to travel for religious purposes should be examined with similar scrutiny.²⁴⁰ The state can advance no compelling reason to justify such restraint, especially when the confinee can obtain permission for religious travel only through a court order or an emergency exception. Nor

²³⁵ See *id.*, at 65.

²³⁶ 311 F. Supp. 749 (N.D. Cal. 1970).

²³⁷ See *id.* at 750. Although *Hyland* involved parole, rather than probation, the two sanctions have been construed as fundamentally the same with respect to unconstitutional conditions and revocational due process. See *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.3 (1972).

²³⁸ *Hyland*, 311 F. Supp. at 749.

²³⁹ See *id.* The court also based its holding on the conclusion that the state had failed to demonstrate that the condition was in "any way related to the valid ends of California's rehabilitation system." *Id.*; see also *Sobell v. Reed*, 327 F. Supp. 1294 (S.D.N.Y. 1971) (voiding the parole board's administration of a standard condition of parole prohibiting the offender from leaving a prescribed area without prior authorization, because the parole board discriminatorily denied the parolee's requests based upon the specific reasons for his travel).

²⁴⁰ For example, when a statute has had the effect of interfering with religious activities, the Supreme Court has invoked strict scrutiny, decreeing that infringement of "religious autonomy must be the least restrictive means of achieving a compelling end." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 846 (1978).

do the legitimate needs of law enforcement, also considered under the Consuelo-Gonzalez standard,²⁴¹ license such restraints on a probationer's constitutional right to exercise religious freedoms. In Florida, for example, house detainees must account for time spent outside the home by completing diary entries and report logs.²⁴² Attendance at religious services and the location of such services must be recorded. An individual who suddenly became religious upon an order of house arrest would be suspect and subject to investigation. Violation of the applicable travel restrictions of home confinement would most probably be discovered.

While it is true that those who are incarcerated cannot travel for religious purposes, the greater power to deny the right to travel to the prisoner does not include the lesser power to deny the same right to the house confinee. Moreover, even prisoners have a right to observe their religious faiths; the state's failure to accommodate inmates' religious needs violates the first and fourteenth amendments.²⁴³ Similarly, in the house arrest setting, the state must provide the offender with reasonable access to places of worship. Requiring strict prior authorization for travel to religious services is inconsistent with this constitutionally mandated right.

2. Restrictions on Freedom of Association

Although the first amendment does not specifically guarantee freedom of association, the Supreme Court has held that this freedom derives from the explicitly guaranteed rights to petition, speech, press, and assembly.²⁴⁴ Courts often impose associational restrictions as conditions of probation,²⁴⁵ generally to promote the offender's rehabilitation and prevent future criminality.²⁴⁶ Direct associational restrictions bar

²⁴¹ See *infra* text accompanying note 192-94.

²⁴² See FLORIDA DEPARTMENT OF CORRECTIONS, COMMUNITY CONTROLEE [sic] HANDBOOK 3 (1984). Similar reporting is also generally required in intensive supervisory probation programs in which offenders are allowed to leave their premises only during certain hours. See, e.g., Conrad, *supra* note 56, at 414 (noting that an 8 P.M. nightly curfew is typically imposed on participants in Georgia's program).

²⁴³ See *Cruz v. Beto*, 405 U.S. 319 (1972). In *Cruz*, a Buddhist alleged that he was denied use of the prison chapel and was punished for sharing religious material with other prisoners. *Id.* at 319. The Supreme Court held that if the allegations were true, the prisoner had been denied a "reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners," *id.* at 322, and the state had therefore violated the first and fourteenth amendments. See *id.*

²⁴⁴ See L. TRIBE, *supra* note 240, at 700-10.

²⁴⁵ See Comment, *supra* note 147, at 90.

²⁴⁶ See *Porth v. Templar*, 453 F.2d 330, 334 (10th Cir. 1971); *State v. Allen*, 12 Or. App. 455, 457, 506 P.2d 528, 529 (1973).

contact with specific, identifiable persons or groups.²⁴⁷ For example, the probationer may be prohibited from associating with individuals known to have a criminal record.²⁴⁸ Direct associational bans can also forbid contact with an offender's accomplices,²⁴⁹ or with groups that may have helped to precipitate the initial criminal conduct or who might instigate such conduct in the future.²⁵⁰

In contrast, the associational restrictions of house arrest are indirect, arising as a natural consequence of the restrictive nature of home confinement.²⁵¹ An individual who can leave her home only for enumerated reasons may suffer a deprivation of association with family members, political or civic groups, and religious organizations. Thus, a term of home confinement may result in broad associational bans, even if the court does not proscribe specific individuals or groups. The potential danger of subtle, yet impermissible abridgments of the freedom of association is thus greater in a house arrest program than in a regime of ordinary or intensive supervision probation.

Courts will invalidate a condition of probation that forbids association if it is unrelated to rehabilitation or the prevention of recidivism.²⁵² In *United States v. Smith*,²⁵³ for example, the Fifth Circuit voided a parole condition requiring a federal income tax violator to "divorce [himself] from any organization advocating the willful disobedience of any local, state or federal law."²⁵⁴ The associational ban was too vague and too broad to be related to any permissible objective of parole, as it encompassed all dissident political and social groups. The court therefore modified the limitation, such that the defendant was prohibited from associating only with organizations advocating disobedience of the Internal Revenue Service laws.²⁵⁵

Although house arrest involves an indirect ban on associational rights, constitutional concerns of overbreadth and vagueness also arise.

²⁴⁷ See ABA STANDARDS, *supra* note 39, standard 18-2.3 commentary at 18.97-.98.

²⁴⁸ See, e.g., *United States v. Furukawa*, 596 F.2d 921, 922 (9th Cir. 1979) (permitting the offender to "associate only with law-abiding persons").

²⁴⁹ See, e.g., *id.* at 922 (forbidding association with "any person found guilty or pleading guilty" to charges in the same case in which the offender was convicted).

²⁵⁰ See, e.g., *United States v. Lawson*, 670 F.2d 923, 929-30 (10th Cir. 1982) (preventing a tax violator from associating with organizations advocating violation of tax laws).

²⁵¹ For a discussion of indirect associational restrictions, see N. COHEN & J. GOBERT, *supra* note 41, at 245 ("Indirect [associational] avenues involve conditions which address other issues but are actually designed to limit undesirable associations.").

²⁵² See Comment, *supra* note 147, at 86-90.

²⁵³ 618 F.2d 280 (5th Cir.), *cert. denied*, 449 U.S. 868 (1980).

²⁵⁴ *Id.* at 282.

²⁵⁵ See *id.*

The home confinement regime imposed on the offender must be flexible enough to protect the right to political and cultural association. This flexibility is particularly important in house confinement programs that omit visitation rights,²⁵⁶ because such programs isolate the confinee from political or cultural activity that may have been integral to the individual's sense of identity and autonomy. Although the state could conceivably advance a sufficiently compelling interest in restricting some associational rights,²⁵⁷ an absolute indirect ban may be invalidated as inconsistent with the permissible aims of house arrest and unrelated to the specific crime for which the offender was convicted.²⁵⁸

An inclusive ban on associational rights resulting from strict home confinement conditions would also not survive scrutiny under the impact analysis compelled by the Consuelo-Gonzalez standard. The impact on the offender's constitutional rights would be substantially greater than necessary to carry out the purposes of probationary confinement. While punishment may be a legitimate goal of the house arrest sanction,²⁵⁹ unnecessary abridgment of constitutional rights is not. In choosing among conditions of house arrest, sentencing courts must employ those which are least subversive of the offender's associational freedoms.²⁶⁰

Limitations on associational rights may also undermine the right to sexual privacy and autonomy²⁶¹ and compromise the inviolability of

²⁵⁶ See, e.g., L.A. Daily J., Mar. 13, 1985, at 1, *reprinted in* Contra Costa County Report, *supra* note 1, at attachment 5 (noting that in one instance of home detention the probationer agreed in writing not to entertain visitors).

²⁵⁷ See *United States v. Furukawa*, 596 F.2d 921, 922 (9th Cir. 1979) ("[P]reventing a probationer from associating with those apparently involved in criminal activities is 'reasonably related' to the probationer's rehabilitation and the protection of the public."); *United States v. Smith*, 414 F.2d 630, 636 (5th Cir. 1969), *rev'd on other grounds sub nom.* *Schacht v. United States*, 398 U.S. 58 (1970) (interpreting the federal probation statute to give courts discretion in imposing probation conditions for rehabilitative purposes). In these cases, restrictions on association were at least tentatively related to the crimes for which the offenders had been convicted and can therefore be viewed as rehabilitative. "In general terms the decisions hold that the first amendment is not violated by probation . . . conditions which reasonably restrict an offender's freedom of association in order to assist in rehabilitation and the prevention of future criminality." N. COHEN & J. GOBERT, *supra* note 41, at 253 (footnote omitted).

²⁵⁸ "The likelihood of appellate reversal appears greatest . . . where the restriction is unrelated to the prior crime . . ." ABA STANDARDS, *supra* note 39, standard 18-2.3 commentary at 18.92.

²⁵⁹ See *United States v. Murphy*, 108 F.R.D. 437, 440 (E.D.N.Y. 1985); FLA. STAT. ANN. § 948.10(1) (West 1985 & Supp. 1986); L.A. Daily J., Mar. 13, 1985, at 1, *reprinted in* Contra Costa County Report, *supra* note 1, at attachment 5.

²⁶⁰ See *People v. Beach*, 147 Cal. App. 3d 612, 623, 195 Cal. Rptr. 381, 387 (1983).

²⁶¹ See, e.g., *People v. Dominguez*, 256 Cal. App. 2d 623, 628, 64 Cal. Rptr. 290, 294 (1967) (rejecting the condition that probationer not become pregnant until mar-

the family unit.²⁶² A regime of strict home supervision that bars visitors could result in a forced separation from friends, lovers, or family members.²⁶³ In *Drollinger v. Milligan*,²⁶⁴ the sentencing court imposed conditions similar to those of house arrest. The offender, convicted of passing a forged check, was placed under a strict curfew with exceptions granted only for specifically enumerated purposes. She could live with no one other than her child,²⁶⁵ and was forbidden to associate with those who had been implicated in the initial crime, including her ex-husband. Critical to the current analysis, she was not allowed to associate with her former father-in-law, Nathan Drollinger, nor was his home to be used as a place where the offender's ex-husband could pick up or leave her child.²⁶⁶ Nathan Drollinger, the grandfather of the offender's daughter, challenged these conditions of probation as a deprivation of his constitutionally protected interest in nurturing his grandchild.²⁶⁷

Recognizing that Mr. Drollinger had standing to invoke federal jurisdiction pursuant to 42 U.S.C. § 1983, the appellate court considered the impact of the probation regulations on the integrity of the family unit.²⁶⁸ Noting that the state could restrict the exercise of an individual's freedom to care for a family member only if the

ried); *Wiggins v. State*, 386 So. 2d 46, 48 (Fla. Dist. Ct. App. 1980) (invalidating conditions that barred sexual intercourse with persons other than spouses). *But see* *People v. Blankenship*, 16 Cal. App. 2d 606, 609-10, 61 P.2d 352, 353-54 (1936) (upholding the condition that probationer, guilty of statutory rape, undergo a vasectomy).

²⁶² See, e.g., *State v. Martin*, 282 Or. 583, 589-90, 580 P.2d 536, 540 (1978) (rejecting the condition that probationer not associate with anyone convicted of a crime, including her husband). *But see In re Peeler*, 366 Cal. App. 2d 483, 492-93, 72 Cal. Rptr. 254, 261 (1968) (upholding the condition that defendant not associate with any known or reported user of marijuana, even though the condition necessitated a forced separation from her husband); *Isaacs v. State*, 373 So. 2d 911, 912 (Fla. 1979) (upholding the condition that probationer not associate with her brother).

²⁶³ See L.A. Daily J., Mar. 13, 1985, at 1, reprinted in *Contra Costa County Report*, *supra* note 1, at attachment 5. The ABA STANDARDS point out that associational and privacy restrictions may affect more than just the rights of the probationer; such restrictions "frequently" have consequences for friends, family, and bystanders. See ABA STANDARDS, *supra* note 39, standard 18-2.3 commentary at 18.92-94 n.64; see also *State v. Donovan*, 116 Ariz. 209, 568 P.2d 1107 (Ct. App. 1977) (upholding the condition that probationer not associate with former girlfriend).

²⁶⁴ 552 F.2d 1220 (7th Cir. 1977).

²⁶⁵ See *id.* at 1223 & n.1.

²⁶⁶ The sentencing court had arranged for the husband's visitation with his daughter, but "such visitation [was] to be arranged without the defendant seeing or contacting [her husband]." *Id.* at 1223 n.1.

²⁶⁷ See *id.* at 1226. Nathan Drollinger apparently was unconnected with his former daughter-in-law's criminal action and was not subject to the power of the court. See *id.* at 1227 n.5.

²⁶⁸ See *id.* at 1226-27.

“‘countervailing [interest is] . . . of overriding significance,’”²⁶⁹ the court enjoined the enforcement of those terms of probation that limited Mr. Drollinger’s right to associate with his granddaughter.²⁷⁰ In reaching this conclusion, the court stated that any separation of the probationer from other family members must be structured so as to ensure that family members whose privacy interests are affected but who were not themselves defendants in the criminal proceedings are entitled to hearings that afford them the “opportunity to respond to the state’s reasons for limiting their civil right[s].”²⁷¹

Because of the highly restrictive nature of home confinement, carelessly designed conditions may result in the type of constitutional violation addressed in *Drollinger*. If strict travel limitations are combined with a prohibition against visitation, the inviolability of the family unit is threatened. As with potential abridgments of the right to free exercise of religion, the terms of house arrest must be scrutinized with a keen sensitivity to the confinee’s associational freedoms.

CONCLUSION

The use of house arrest continues to expand, affecting a growing number of offenders. While revocation and recidivism statistics from these initial programs seem to confirm that home detention is a viable alternative to traditional incarceration, claims of dollar savings and administrative ease must be viewed with caution. Even if financial viability were guaranteed, cost efficiency should not be a substitute for justice. This Comment argues that the transformation of a citizen’s home into a site of confinement constitutes a uniquely restrictive probationary regime. Judges and probation departments must therefore carefully tailor the conditions of house arrest to ensure that the impact on the offender’s constitutional rights is minimally intrusive and serves both the rehabilitative and retributive goals of this intermediate-level penal sanction.

²⁶⁹ *Id.* at 1227 (citation omitted). The court noted the family’s “essential” interest in the custody and care of a child and its “paramount importance within our constitutional framework.” *Id.* at 1226-27 (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

²⁷⁰ *See id.* at 1227. Note that the court extended the traditional due process protection of the nuclear family to the relationship between a grandparent and a grandchild. *See id.* at 1227 n.6.

²⁷¹ *Id.* at 1227.

