

HOME CONFINEMENT AS A CONDITION OF PROBATION: A PROPOSAL FOR VERMONT

OVERVIEW

American prisons are in a state of crisis.¹ Despite court orders to release prisoners to relieve overcrowding,² prisons remain filled beyond capacity, are unsafe and hostile environments, and fail in large part to meet any rehabilitative objective.³ Although relatively safe, clean, and humane, Vermont correctional institutions share many of the disturbing characteristics of prison facilities nationwide.⁴ Insufficient funding for expansion and new facilities,⁵ combined with an increase in the correctional population⁶ forces Vermont prisons to operate at or above capacity.⁷ The cost of housing an individual in prison, in addition to the shortage of facility space and the rehabilitative deficiencies of the prison environment, necessitates alternatives to incarceration in Vermont.

One response to the overcrowding and rehabilitative deficiencies of Vermont's prisons is Intensive Probation Supervision.⁸ Under intensive supervision, courts or the parole board release individuals, who might otherwise remain incarcerated, to the close supervision of the probation department.⁹ Although intensive supervision is a positive alternative to incarceration, it too has disturbing shortcomings. Insufficient funding,¹⁰ shortage of person-

1. See generally, *Our Crowded Prisons*, 478 ANNALS 1 (1985) (collecting essays addressing shortcomings in American correctional institutions).

2. See, e.g., *Badgley v. Varelas*, 729 F.2d 894 (2d Cir. 1984); *Lareau v. Manson*, 651 F.2d 96 (2d Cir. 1981); *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980). According to the New York Times, 32 states are presently under court orders to reduce prison overcrowding and 10 more states are involved in litigation. N.Y. Times, Jan. 17, 1987, at A8, col. 1.

3. See, e.g., *Pierce, Rehabilitation in Corrections: A Reassessment*, CORRECTIONS AND ADMINISTRATION 160 (1976); A. CAMPBELL, LAW OF SENTENCING 34-41 (1978).

4. See generally VERMONT DEPARTMENT OF CORRECTIONS, A STATUS REPORT TO THE VERMONT GENERAL ASSEMBLY (1984) (assessing Vermont prisons) [hereinafter STATUS REPORT].

5. *Id.* at 57-62.

6. VERMONT DEPARTMENT OF CORRECTIONS, 1987 LEGISLATIVE PRESENTATION 14 (1987) [hereinafter LEGISLATIVE PRESENTATION]. The term "correctional population" includes individuals who are incarcerated, on probation, or on parole. The correctional population, totaling 6,225 at the end of 1987, has risen in every year since 1975. *Id.* In 1986, 687 people were incarcerated in Vermont—the most in the state's history. *Id.* at 7.

7. *Id.* at 10.

8. STATUS REPORT, *supra* note 4, at 19-20.

9. *Id.*

10. *Id.* at 62.

nel,¹¹ and excessive caseloads¹² have overburdened probation officers. These inadequacies undermine the effectiveness of intensive supervision.¹³ This note proposes that the State of Vermont adopt a program of home confinement, imposed as a condition of probation to enhance the effectiveness of probation supervision, alleviate prison overcrowding and expense, and more adequately address the rehabilitative needs of Vermont probationers.

At the outset, it is necessary to define "home confinement" as used in this note.¹⁴ Unlike the images of home confinement as a method of political repression,¹⁵ home confinement here refers to a court order requiring a convicted offender to remain in his or her home during specified periods of the day rather than spending that time in prison. Although a court could impose home confinement directly as a sentence,¹⁶ this note explores home confinement as a condition of probation or parole.¹⁷ Given the cost, overcrowding, and lack of effective rehabilitation found in conventional correc-

11. Telephone interview with Thomas Perras, Deputy Commissioner, Vermont Department of Probation and Parole (Feb. 7, 1986). According to Mr. Perras, the probation department would need to hire 35-40 new officers to achieve maximum effectiveness. *Id.*

12. VERMONT DEPARTMENT OF CORRECTIONS, A STATUS REPORT TO THE VERMONT GENERAL ASSEMBLY, EXECUTIVE SUMMARY 6 (1984) [hereinafter EXECUTIVE SUMMARY]. In 1986, the probation population totaled 5,287, an increase of over 600 people from 1985. This increase represents one of the largest in Vermont history. See LEGISLATIVE PRESENTATION, *supra* note 6, at 11.

13. Interview, *supra* note 11.

14. Commentators have referred to "home confinement" as "home detention," "domicile restriction," or "house arrest." See, e.g., Ball and Lilly, *A Theoretical Examination of Home Incarceration*, FED. PROBATION, Mar. 1986, at 17. The term "house arrest" is really a misnomer because the individuals affected are not under arrest but have already been convicted of a criminal offense.

15. *United States v. Murphy*, 108 F.R.D. 437, 437 (E.D.N.Y. 1985).

16. Although beyond the scope of this note, the judicial imposition of a punishment not sanctioned by the legislature raises the issue of separation of powers. Although judges have wide discretion in sentencing, their discretion is limited by the confines of legislatively approved punishments. At least one state has enacted home confinement legislation and efforts are underway in other states to introduce home confinement bills. See, e.g., UTAH CODE ANN. § 77-18-1(6)(f) (Supp. 1986). See also Ford & Schmidt, *Electronically Monitored Home Confinement*, NIJ REPORTS, Nov. 1985, at 2, 4-6 (discussing state legislative efforts to pass home confinement bills).

17. The primary difference between home confinement as a condition of probation as opposed to parole is that on probation, the underlying sentence is suspended, while on parole the sentence is still in effect. Compare VT. STAT. ANN. tit. 28, § 201 (1986) with VT. STAT. ANN. tit. 28, § 402 (1986). Probationers who violate home confinement would still be subject to their entire prison term, while parolees who violate home confinement would get credit against their term for the time on home confinement parole. See *Minor v. Chater*, 137 Vt. 330, 403 A.2d 274 (1979). Apart from these distinctions, the legal issues raised by this note are the same for both probationers and parolees.

tional facilities, home confinement could provide a valid, cost-effective, and rehabilitatively sound alternative to prison.

Section I of this note examines the Vermont Department of Corrections with an emphasis on the department of probation and its present supervisory techniques. Section II outlines various methods of home confinement, discusses the new and developing home confinement technologies, and briefly describes home confinement programs currently operating in other jurisdictions. Section III addresses the legal ramifications of a home confinement program in Vermont, with an emphasis on the intrusiveness of confining and monitoring an individual in the home. This section raises and resolves three principal issues of home confinement: (1) a case-specific challenge to home confinement on the grounds that as a condition of probation, home confinement is not reasonably related to the rehabilitative needs of the probationer and the protective needs of society; (2) a challenge to home confinement probation as an unreasonable search under the United States and Vermont Constitutions; and (3) a challenge to home confinement as a *per se* violation of an individual's right to privacy. Section IV outlines a pilot program of home confinement for Vermont, specifically proposing home confinement as a sanction for persons convicted of driving under the influence (DUI). The note concludes with an overall assessment of the suitability of home confinement as a condition of probation in Vermont.

I. VERMONT'S CORRECTIONAL SYSTEM

A review of the general principles of operation of the Vermont Department of Corrections and the specific goals for the department of probation reveals that both could be furthered by a program of home confinement. Monitoring an individual at home furthers the statutory mandate for the department of corrections and supports the department of probation's philosophy toward supervision and rehabilitation.

A. *The Department of Corrections*

Vermont's Department of Corrections is governed by title 28.¹⁸ The statute mandates dual missions for the department: to protect persons and property against criminal offenders and to treat of-

18. VT. STAT. ANN. tit. 28, §§ 1-1601 (1986).

fenders with the goal of successfully reintegrating them into society.¹⁹ The Vermont General Assembly, in adopting title 28, recognized that most traditional prison facilities "fail to reform or rehabilitate" offenders but rather increase the risk of aberrant behavior.²⁰

In light of its statutory mandate, the department has adopted seven principles of operation: (1) The offender will be housed in the least restrictive environment necessary to provide for public safety; (2) there will be a continuum of interaction and control, allowing offenders to earn greater freedom as their behavior warrants; (3) offenders will be held accountable for their actions; (4) the department will seek to rehabilitate the offender in areas of greatest need; (5) offenders will be housed in small units to allow for effective intervention; (6) offenders will be incarcerated as near their homes as possible to begin the transition back to society; and (7) the department will seek to involve the community in the "shared responsibility" of reintegrating offenders into society.²¹

Vermont correctional facilities presently include two central correctional sites with multiple security levels for long-term offenders, four regional locations with multiple security levels for shorter sentences, and twelve local probation and parole offices.²² The approximate annual costs of housing offenders are \$22,000-25,000 for maximum security,²³ \$18,000-22,000 for close custody, \$16,000-18,000 for medium security, \$12,000-16,000 for minimum security, and \$10,000-12,000 for community supervision.²⁴

In addition to the high costs of incarceration, a phenomenon known as "bumping up" plagues the Vermont Department of Corrections.²⁵ Ideally, inmates are detained at a security level appropriate for the risk they pose to society and to other inmates.²⁶ However, because of the shortage of community facilities for low-risk offenders, courts are forced to sentence these offenders to

19. *Id.* § 1(a).

20. *Id.* § 1(b).

21. STATUS REPORT, *supra* note 4, at 2-5.

22. EXECUTIVE SUMMARY, *supra* note 12, at 3-6.

23. Due to the 1975 closing of the state's only maximum security facility, maximum security inmates are incarcerated out-of-state. See C. MORRISSEY, THE CLOSING OF WINDSOR PRISON 3 (1980).

24. Interview with John Perry, Director of Research Vermont Department of Corrections, in Waterbury, Vermont (Nov. 20, 1985).

25. STATUS REPORT, *supra* note 4, at 26-27.

26. *Id.* at 2.

prison terms.²⁷ As the number of low-risk offenders sentenced to prison increases, individuals already in the facilities are "bumped up" to a higher security level to make room for the new arrivals.²⁸ This process effectively reduces the available space at all levels of the facility and undermines the concept that the department will control inmates at a level appropriate for the risk they pose.²⁹ Additionally, because costs increase as the security level increases, bumping up raises the costs for the entire prison system.³⁰

B. *The Department of Probation*

Sections 201 to 305 of title 28 provide for probation in Vermont.³¹ Probation is a procedure by which an offender found guilty of a crime is sentenced but released by the court with the sentence suspended, subject to conditions imposed by the court and to the supervision of the commissioner of corrections.³² Section 252 of title 28 provides for such probation conditions as sentencing judges, in their discretion, deem "reasonably necessary to ensure that the offender will lead a law-abiding life or to assist him to do so."³³ The statute mandates that upon the conviction of the probationer for another offense, a court may revoke probation.³⁴ In addition to this mandatory condition, a court may impose thirteen other conditions.³⁵

One of the thirteen conditions allows a court to require that a probationer "[s]atisfy any other conditions reasonably related to his rehabilitation."³⁶ In theory, a court could impose home confinement as a condition of probation under this provision assuming that the need for home confinement is reasonably related to the rehabilitative needs of the probationer. After implementation and refinement of a pilot home confinement program, the Vermont General Assembly should amend section 252 to include home confinement as a specific option of probation.³⁷

27. *Id.* at 27.

28. *Id.* at 26.

29. *Id.*

30. *Id.*

31. VT. STAT. ANN. tit. 28, §§ 201-305 (1986).

32. *Id.* § 201.

33. *Id.* § 252(a).

34. *Id.*

35. *Id.* § 252(b)(1)-(13).

36. *Id.* § 252(b)(13).

37. Although an amendment is not technically necessary in light of the catch-all provi-

After a judge or jury finds a defendant guilty of an offense, the department of corrections conducts a presentence investigation.³⁸ The department reviews the offender's past criminal record, financial stability, and any other factors relevant to effective sentencing.³⁹ At this stage, if the department determines that it can control an individual in the community, it recommends that the offender receive probation.⁴⁰ The sentencing judge has the discretion to accept the recommendation for probation, assign new conditions, or reject the recommendation and sentence the offender to prison.⁴¹ If new conditions are assigned, the offender has the option of refusing probation and serving the sentence in prison.⁴² If the sentencing judge decides that probation is appropriate, the judge, the department, and the offender sign a probation warrant that lists the specific terms of the probation.⁴³ The specific conditions of probation are explained to the offender once prior to signing the warrant and again, in more detail, after the court releases the offender to the control of the department.⁴⁴

Within the last three years, the department devised risk classification criteria to determine the appropriate level of supervision for each probationer.⁴⁵ The department now classifies each person at one of the following risk levels: administrative; low; medium; medium high; or high (intensive).⁴⁶ The number of required contacts between the probationer and the department increases with each ascending risk classification.⁴⁷ The number of contacts ranges from four per week for intensive supervision to no visits and only correspondence for probationers at the administrative-risk level.⁴⁸

Despite the significant increase in the probation population in recent years, the state did not add new probation officers to the

sion, an amendment would indicate a legislative acceptance of home confinement. Additionally, if home confinement is specifically listed as a possible condition of probation, the public is put on notice that home confinement may be an option for probationers. *See, e.g., UTAH CODE ANN. § 77-18-1(6)(f)* (Supp. 1986).

38. VT. R. CRIM. P. 32(c)(1) (1983).

39. VT. R. CRIM. P. 32(c)(2) (1983); *State v. Chambers*, 144 Vt. 377, 477 A.2d 974 (1984).

40. Interview, *supra* note 11.

41. *See, e.g., State v. Belanus*, 144 Vt. 166, 475 A.2d 227 (1984).

42. Interview, *supra* note 11.

43. VT. STAT. ANN. tit. 28, § 205 (1986).

44. Interview, *supra* note 11.

45. STATUS REPORT, *supra* note 4, at 49.

46. *Id.*

47. *Id.*

48. *Id.*

department between 1975 and 1983.⁴⁹ In 1984, the state and the department, recognizing the need to expand traditional probation techniques, added new probation officers to work on the Intensive Probation Supervision Program.⁵⁰

C. Intensive Probation Supervision

Nationally, twenty-eight states have formal intensive supervision programs, many of which are modeled after Georgia's program that began in 1982.⁵¹ The differences between intensive supervision and standard probation in Vermont include the greater frequency of contacts between the department of probation and the probationer, the more stringent conditions imposed upon the probationer, and the greater extent of community resources made available for the probationer's rehabilitation.⁵² The Vermont Department of Probation initiated the program in an effort to increase the department's ability to work effectively with high-risk offenders and to begin addressing the problem of prison overcrowding.⁵³ The department believed that with stricter community controls, courts or the parole board could release individuals from prison without posing an additional threat to society.⁵⁴ Intensive supervision furthers the department's philosophy of a continuum of control⁵⁵ by regulating the environment for individuals released from secured facilities. Home confinement would further enhance the ability to supervise the probationer and therefore would also further the philosophy of a continuum of control.

II. METHODS OF HOME CONFINEMENT

As of June 1986, roughly 10,000 individuals nationwide were involved in, or had previously been supervised under, some type of home confinement program.⁵⁶ The vast majority of these people reside in either Texas, Georgia, or Florida, although approximately

49. *Id.* at 49-50.

50. *Id.* at 50. There are presently sixteen probation officers who work specifically on intensive supervision. *Id.*

51. Petersilia, *Exploring the Option of House Arrest*, FED. PROBATION, June 1986, at 50, 51.

52. Interview, *supra* note 11.

53. *Id.*

54. *Id.*

55. See *supra* text accompanying note 21.

56. Petersilia, *supra* note 51, at 51.

thirty states have, or are in the process of implementing, home confinement programs.⁵⁷ Florida, where the first formal home confinement program was developed, has used home confinement for approximately 4,750 people.⁵⁸

Two primary methods of home confinement are currently in use in other jurisdictions. The conventional method begins with a court order requiring the probationer to remain at home at all times except as otherwise specified. The only means of supervision under this method is personal contact between the probation officers and the probationers. The more recently developed and controversial method of home confinement involves the use of electronic technologies to monitor probationers.⁵⁹ Both methods of home confinement allow probationers to leave home for work, essential shopping, and emergencies.

A. *Conventional Home Confinement*

Conventional home confinement is similar to a court-ordered curfew. However, curfews restrict freedom at specified times, while home confinement restricts freedom at all times except as otherwise approved by a court or probation department.⁶⁰ A recent case in New York exemplifies conventional home confinement.

In *United States v. Murphy*,⁶¹ a federal district court judge in New York City imposed home confinement in an unusual and innovative sentence. The defendant was found guilty of a Racketeer Influenced and Corrupt Organizations Act violation, mail fraud, and obstruction of justice charges for assisting an attorney in defrauding insurance companies.⁶² The defendant had no prior criminal record and was "by all accounts, an excellent and bright worker who [was] always steadily employed."⁶³ The maximum allowable sentence for the defendant's offense was a fine of \$56,000 and fifty years in prison.⁶⁴

Prior to sentencing, Chief Judge Weinstein stated:

57. *Id.* at 50.

58. *Id.*

59. *See*, *New York Times*, Feb. 15, 1985 at A16, col. 1.

60. *Petersilia*, *supra* note 51, at 51.

61. 108 F.R.D. 437 (E.D.N.Y. 1985).

62. *Id.* at 438.

63. *Id.* at 439.

64. *Id.*

The prison population in this country is approaching one-half million. Cost estimates of \$30,000 a year and upward per prisoner are common. The direct costs are thus in the order of \$15 billion a year.

All agree that longer prison terms, and imprisonment for more and more persons cannot be borne indefinitely. Other controls to prevent crime, social policies to avoid criminality and alternative punishment are essential.⁶⁵

In sentencing the defendant, Chief Judge Weinstein acknowledged that the defendant could never pay the maximum fine and that the prison term would "undoubtedly help to destroy her."⁶⁶ Additionally, the judge acknowledged that rehabilitation "takes place more effectively outside prison walls."⁶⁷ The judge fined her \$5,000 payable over five years and sentenced her to a suspended five-year prison term. In lieu of prison, the judge imposed home detention as a condition of probation.⁶⁸ Under the probation conditions, the defendant could only leave home to work, to shop, and to attend to medical emergencies.⁶⁹ At all times the defendant would be subject to strict supervision, surprise visits, and strict probation control.⁷⁰ Noncompliance with the sentence could result in the imposition of the prison term.⁷¹ In closing, Chief Judge Weinstein noted:

There will be some who will believe that this sentence is much too lenient. Others will believe it too humiliating. Public humiliation is a part of the punishment. Obviously there is a serious danger of depression and worse in the case of home detention. Probation will arrange for suitable psychiatric and other appropriate services for defendant to forestall such problems.

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. How it can be accomplished is not clear.

65. *Id.* at 438.

66. *Id.* at 435.

67. *Id.* at 438.

68. *Id.* at 439.

69. *Id.*

70. *Id.*

71. *Id.* at 440.

Obviously we will not tolerate branding and the carrying of signs. The matter is a difficult one and will require experimentation and modification of procedures in the light of experience.⁷²

Chief Judge Weinstein noted that he had consulted with the department of probation prior to sentencing.⁷³ As the Chief Judge recognized, a successful use of home confinement depends upon cooperation between the judiciary and the department of probation. Judicial imposition of home confinement, absent the probation department's ability to supervise the probationers, will undermine the effectiveness of the sanction.

Conventional home confinement, like curfews, suffers the drawback of large blocks of unsupervised time. The effectiveness of home confinement is defeated if the probationer can leave the premises without detection by the department of probation. Additionally, under conventional home confinement, as with intensive supervision, limited human and financial resources could seriously restrict the frequency of contact with probationers.⁷⁴

B. *Home Confinement Technology*

In an effort to address the deficiencies inherent in traditional supervisory methods, a number of companies have developed electronic monitoring devices to supervise probationers more consistently. Electronic supervision systems fall into two categories: programmed contact devices and continuously monitoring devices.⁷⁵ The programmed contact devices use a computerized telephone to call the homes of probationers. The continuously monitoring system combines a computerized phone with a device worn by the probationer that regularly emits a signal indicating the probationer's location.

1. *Programmed Contact Devices*

There are three primary programmed monitoring devices for home confinement. The first is a programmable computerized

72. *Id.*

73. Sentencing Memorandum at 7, *United States v. Murphy*, 108 F.R.D. 437 (E.D.N.Y. 1985).

74. See *supra* notes 10-12 and accompanying text.

75. Schmidt, *Electronic Monitors*, *FED. PROBATION*, June 1986, at 56, 59.

phone system that can call the homes of probationers at scheduled or random times.⁷⁶ A tape recorder indicates whether the probationer was in fact the person who answered the phone. The phone system can also replay taped messages from the department to remind the probationer of restitution payment dates or other obligations.⁷⁷

An identification wristlet worn by the probationer can now enhance the telephone system.⁷⁸ The wristlet contains an information cube that upon insertion into a decoding box indicates that the probationer has in fact answered the phone.⁷⁹ The advantage of combining the phone system with the wristlet is that anyone can now monitor the system regardless of whether he or she knows the probationer's voice, thereby allowing probation officers time for more meaningful field contacts.⁸⁰

The department of probation in Clackamas County, Oregon, uses the phone system and wristlet in conjunction with continuously monitoring devices.⁸¹ The program, which began in 1985, uses home confinement for misdemeanants, felons, pre-trial releasees, and offenders on furlough from residential centers.⁸²

The most recently developed of the programmed devices is a fingerprint scanning device called a Personal Identification Verification Terminal (PVT).⁸³ The PVT connects to the probationer's phone, "reads" the individual's fingerprint, and matches it against the same print stored in the base computer template.⁸⁴ The device was originally designed to protect access to high security technological facilities.⁸⁵ The department of probation in Alameda County, California, uses the PVT to help monitor county prisoners on work release.⁸⁶

The advantages of the PVT over the wristlet device are that

76. A leading manufacturer of the computerized phone system is Telso: On Guard System, distributed by Digital Products Corp., Ft. Lauderdale, Fl.

77. DIGITAL PRODUCTS CORP., BROCHURE 1 (1985).

78. *Id.* at 4.

79. *Id.*

80. *Id.*

81. Ford & Schmidt, *supra* note 16, at 5.

82. *Id.*

83. N.Y. Times, Oct. 28, 1985 at A10, col. 1. The PVT is manufactured by Identix Corporation, Palo Alto, Ca. *Id.*

84. IDENTIX CORP., BROCHURE 3 (1985).

85. N.Y. Times, Oct. 28, 1985 at A10, col. 1.

86. *Id.*

the probationer need not wear the potentially stigmatizing wristlet and, more important, there is significantly less possibility of false identification. Whereas a probationer could cut the wristlet and have an accomplice insert it into the decoder, there does not appear to be any way to falsify a fingerprint. The principal disadvantage of the PVT is its cost, with one terminal costing approximately \$7,500.⁸⁷

2. *Continuously Monitoring Supervisors*

Despite some variations, the principal design of all continuously monitoring technologies is the same.⁸⁸ A receiver is first attached to the probationer's home telephone and the probationer then wears a transponder (commonly referred to as a "beeper") strapped to the leg or arm. If the probationer travels more than 150 to 200 feet from the receiver, a message is sent over the phone to the probation office. If the probationer returns within the appropriate range, the receiver indicates the return.⁸⁹ The system can be programmed to only "search" for the probationer at specified times, for example between 6:00 p.m. and 7:00 a.m., thereby allowing the individual to leave to go to work without signaling a probation violation.

The primary advantage of the continuously monitoring system, and the reason it is the most popular technology among jurisdictions that use home confinement, is that the device constantly monitors the probationer in his or her home.⁹⁰ Unlike the programmed contact systems that only indicate the probationer's location at the time of the calls, the continuously monitoring systems regularly emit a signal indicating the probationer's location. Anyone can monitor the base computer at the department and then relay information to a probation officer if a violation occurs.⁹¹

The department of probation in Palm Beach County, Florida, uses continuously monitoring technology to supervise misdemeanants and traffic offenders, including drunk driving offenders.⁹² A

87. BROCHURE, *supra* note 84, at 11.

88. Schmidt, *supra* note 75, at 59 (listing manufacturers of home confinement technology).

89. Ford & Schmidt, *supra* note 16, at 2.

90. Friel & Vaughn, *A Consumer's Guide to the Electronic Monitoring of Probationers*, FED. PROBATION, Sept. 1986, at 3, 10.

91. *Id.* at 4.

92. Ford & Schmidt, *supra* note 16, at 4.

common characteristic of both the Florida and Oregon programs⁹³ is that the probationer on home confinement must pay for the technological equipment, thereby helping to minimize costs of the confinement program.⁹⁴

There are some serious drawbacks to the continuously monitoring system. The beeper is fairly bulky, potentially stigmatizing the wearer. Wearing the beeper might be analogized to a scarlet letter or "branding and the carrying of signs."⁹⁵ However, developments in the field will likely lead to smaller, less intrusive transponders.⁹⁶ The beepers can also erroneously indicate the departure of the probationer. Metal tends to disrupt the beeper signal⁹⁷ as can inclement weather, radio signals, and even the body mass of a sleeping probationer.⁹⁸ Some probationers have complained about allergic reactions to the transponder and the straps.⁹⁹ The continuous monitors are significantly more expensive than the programmed contact devices, costing approximately \$1,000 excluding the cost of the central computer.¹⁰⁰ An obvious limitation to all the technological systems is that the probationer must have a telephone or be willing to have one installed. Without a telephone, the probation department could only supervise a probationer under the conventional home confinement method.

III. LEGAL CHALLENGES TO HOME CONFINEMENT

At the time of this writing, no probationer has contested the imposition of home confinement as a condition of probation.¹⁰¹ Nevertheless, the requirement that an individual remain at home as part of a court-ordered punishment implicates a number of public policy and legal issues. From a broad range of possible legal challenges to home confinement,¹⁰² this section will address three

93. See *supra* text accompanying notes 81-82.

94. See Petersilia, *supra* note 51, at 50.

95. *United States v. Murphy*, 108 F.R.D. 437, 440 (E.D.N.Y. 1985). See *supra* text accompanying note 72.

96. Ford & Schmidt, *supra* note 16, at 4.

97. *Id.*

98. Del Carmen & Vaughn, *Legal Issues in the Use of Electronic Surveillance in Probation*, FED. PROBATION, June 1986, at 60, 61.

99. Ford & Schmidt, *supra* note 16, at 4.

100. See CONTROL ACTIVITY CORP., BROCHURE (1985) (price list).

101. See Schmidt, *supra* note 75, at 57.

102. For an excellent analysis of home confinement legal issues including a discussion of the first, fourth, eighth, and fourteenth amendments and the right to privacy, due process and equal protection, see *Electronic Surveillance*, Inf. Op. Att'y Gen. No. 83-81 (Utah 1985).

potential challenges that a Vermont probationer might pursue. For analytical purposes, this section assumes the use of the most intrusive method of supervision—the continuously monitoring electronic device. First, a probationer could challenge home confinement as a condition of probation not reasonably related to any individual rehabilitative need or to the protective needs of society. Second, a probationer could challenge electronic information gathering as an unconstitutional search in violation of the fourth amendment to the United States Constitution¹⁰³ and chapter 1, article 11 of the Vermont Constitution.¹⁰⁴ Finally, a probationer could challenge home confinement as an unconstitutional invasion of privacy.

The status of probationers in society provides an analytical backdrop for all legal challenges to home confinement as a condition of probation. Case law reveals that while probationers do retain some measure of liberty and privacy interests,¹⁰⁵ they are not entitled to the full protections guaranteed ordinary citizens.¹⁰⁶ The diminished protections afforded probationers creates significant obstacles to legal challenges to home confinement.

In *Morrissey v. Brewer*,¹⁰⁷ the United States Supreme Court articulated the status of parolees in society. In *Morrissey*, the petitioner was arrested for violating parole. One week after the arrest, and without a hearing, the parole board revoked his parole.¹⁰⁸ The

See also Del Carmen & Vaughn, *supra* note 98, at 61-69 (discussing legal issues raised by home confinement).

103. The fourth amendment to the United States Constitution reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

104. Chapter I, article 11 of the Vermont Constitution reads:

That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not be granted.

VT. CONST. ch. 1, art. 11.

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

106. *Id.* at 782.

107. 408 U.S. 471 (1972).

108. *Id.* at 472-73.

petitioner, after exhausting his state remedies, filed a *habeas corpus* petition alleging that the revocation of parole without a hearing violated his due process rights.¹⁰⁹

While recognizing that parolees do retain due process rights sufficient to warrant a hearing before revoking parole, the Court also recognized that parolees do not have the same rights as ordinary citizens:

Parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.¹¹⁰

The Court acknowledged that the conditions imposed on parolees may "restrict activity substantially beyond the ordinary restrictions imposed by law on an individual citizen."¹¹¹ *Morrissey and Gagnon v. Scarpelli*,¹¹² a United States Supreme Court case that applied the *Morrissey* holding to probationers, reflect the diminished legal status of parolees and probationers in society and indicate that this diminished status impacts their legal claims.

A. *The Reasonableness of Home Confinement as a Condition of Probation*

A basis for a challenge to home confinement exists in the statutory and common-law requirements that probation conditions be valid, not void as against public policy,¹¹³ and reasonably related to the rehabilitative needs of the probationer and the protective needs of society.¹¹⁴ Even though probationers must "agree" to the probationary conditions at the time of their imposition, a probationer could later challenge the conditions as unreasonable.¹¹⁵ Al-

109. *Id.* at 474.

110. *Id.* at 477 (footnote omitted).

111. *Id.* at 478.

112. 411 U.S. 778, 782 (1973).

113. *See, e.g.*, *State v. Barnett*, 110 Vt. 221, 3 A.2d 521 (1939).

114. *United States v. Tolla*, 781 F.2d 29, 33 (2d Cir. 1986).

115. VT. STAT. ANN. tit. 28, § 253 (1986).

though the determination whether home confinement is reasonably related to the rehabilitative needs of the probationer is a fact-specific inquiry, it is possible to ascertain general guidelines on the permissible conditions of probation.

The Vermont Supreme Court discussed the general standard for permissible terms of probation in *State v. Barnett*.¹¹⁶ In *Barnett*, the defendant, charged with leaving the scene of an accident, pleaded *nolo contendere* and was sentenced to a fine and imprisonment for eighteen months to two years. The judge suspended the sentence and placed the defendant on probation with a condition that he pay the injured party \$10 per week.¹¹⁷ The judge arrived at the condition pursuant to a recommendation from the injured party, although the amount the judge required the defendant to pay was not related to the injured party's actual damages.¹¹⁸ After the probationer stopped making payments, the court found him in violation of probation and reinstated his original sentence. He then challenged the validity of the probation terms, arguing that the court acted as a private collection agency.¹¹⁹

Lacking precedent for determining the legality of specific terms of probation, the Vermont Supreme Court analogized probation to the issuance of a conditional pardon. "It is generally held that a conditional pardon can be granted upon any terms or conditions provided the same are not illegal, immoral or impossible of performance."¹²⁰ The court elaborated by casting probation in contract terms, finding that probation conditions would not be void "as against public policy unless it could be said that they were injurious to the interests of the public or contravened some established interests of society."¹²¹ The court concluded that the repayment term did not amount to restitution payments, but did in effect use the state as a private collection agency and was therefore illegal and void as against public policy.¹²²

Barnett indicates that unless a condition of probation is illegal or violates an established public policy, it will probably withstand a *prima facie* challenge. Home confinement, though implicating a

116. 110 Vt. 221, 3 A.2d 521 (1939).

117. *Id.* at 225, 3 A.2d at 522.

118. *Id.* at 232, 3 A.2d at 526.

119. *Id.* at 227, 3 A.2d at 523.

120. *Id.* at 228, 3 A.2d at 524.

121. *Id.* at 232, 3 A.2d at 526.

122. *Id.* at 233, 3 A.2d at 526.

number of constitutional concerns, does not appear to violate any established public policy.¹²³ In fact, because home confinement would ease prison overcrowding, reduce overall costs to the state, and allow for more efficient and effective rehabilitation of probationers, it would actually further public policy. Accordingly, a court would not likely find home confinement to be illegal or void as against public policy *per se*.

The broad parameters for conditions of probation outlined in *Barnett* are complemented by the further requirements that conditions of probation must be reasonably related to the rehabilitative needs of the probationer and the protective needs of the general public.¹²⁴ Courts will invalidate unreasonable or arbitrary conditions. Furthermore, a probationer's agreement to the conditions of probation or a sentencing judge's belief that the terms are appropriate does not dispose of the inquiry into the reasonableness of the terms.¹²⁵

The United States Court of Appeals for the Second Circuit recently addressed the "reasonableness" requirement for conditions of probation. In *United States v. Tolla*,¹²⁶ the defendant, a teacher of religious studies, pleaded no contest to income tax evasion. The defendant received a three-year suspended sentence with three years probation and 300 hours of community service.¹²⁷ The court required, as a condition of probation, that the defendant refrain from teaching young people.¹²⁸ Upon the initial challenge to the probation terms, the court modified the sentence to one-year probation with 200 hours of community service. However, the court refused to amend the teaching restriction. The defendant appealed, contesting the reasonableness of the restriction.¹²⁹

In finding that the sentencing judge had not abused his discretion, the appellate court outlined the parameters for conditions of

123. The development of a home confinement program may begin to change societal attitudes about the sanctity of the home—shifting the view of the home as castle to the home as prison—but the necessity for penal reform requires that society reconsider traditional notions of incarceration. See Ball & Lilly, *supra* note 14, at 22-23.

124. *United States v. Tolla*, 781 F.2d 29, 33 (2d Cir. 1986).

125. See VT. STAT. ANN. tit. 28, § 253 (1986) (allowing a probationer to seek a modification of probation conditions).

126. 781 F.2d 29 (2d Cir. 1986).

127. *Id.* at 31.

128. *Id.*

129. *Id.* at 32.

probation.¹³⁰ The court noted that probation conditions are constrained by the dictates of the Federal Probation Act and by the requirement that the conditions be "designed, in light of the crime committed, to promote the probationer's rehabilitation and to ensure the protection of the public."¹³¹ The court recognized that restrictions on a probationer's freedom must be carefully tailored because such restrictions implicate the probationer's liberty interests.¹³² The court concluded that in light of the deception in the underlying offense, the defendant could not serve as an appropriate role model for young people and therefore the teaching restriction was a reasonable condition of probation under the circumstances.¹³³

Although home confinement was not at issue in *Tolla*, the court's reasoning indicates that home confinement can not be indiscriminately applied. Rather, courts and the department of probation must carefully select individuals who will benefit from the "controlled" freedom of home confinement without posing an uncontrollable risk to society.

The determination of whether home confinement is reasonably related to the rehabilitative needs of the probationer is a case-specific inquiry. The reasonableness requirement, however, should help curtail overuse and abuse of the home confinement sanction by requiring sentencing judges to limit the imposition of home confinement to carefully tailored situations. Because of widespread dissatisfaction with conventional sentences, there is the risk that home confinement could become an overused alternative to prison.¹³⁴ The "reasonable relation" requirement should effectively check the judiciary and the department of probation, forcing both to make sure that a home confinement condition is appropriate for an individual offender. Additionally, the safety of the public must always be considered before imposing home confinement. The relative freedom of the sanction necessitates careful selection of home confinement candidates to ensure that public safety is not jeopardized.

130. *Id.*

131. *Id.* at 32-34.

132. *Id.* at 34.

133. *Id.* at 35.

134. See Comment, *Electronic Monitoring of Probationers: A Step Towards Big Brother?*, 14 GOLDEN GATE U. L. REV. 431, 445 (1984).

B. *A Challenge to Home Confinement as an Unconstitutional Search*

The following is a scenario that could give rise to a fourth amendment challenge to home confinement. A probationer, after accepting home confinement as a condition of probation, is confined to her home every evening from 6:00 p.m. to 6:00 a.m. Ordinarily, under intensive probation supervision, the probationer could be fairly confident that during the late evening and early morning hours, a probation officer would not visit her.¹³⁵ However, because the probationer is wearing the transponder, the department is monitoring her at all times while she is at home. If the probationer leaves her home, transmitting a signal of departure to the central office, a probation officer could arrest her and charge her with a violation of probation.¹³⁶ In a revocation hearing, the probationer might claim that the ongoing surveillance in the home constitutes an unreasonable search in violation of the Vermont¹³⁷ and United States Constitutions.¹³⁸

Cases discussing electronic monitoring in other areas of law enforcement provide an analytical framework for an unreasonable search challenge to home confinement. Although the transponder technology used in home confinement is similar to other electronic surveillance devices, home confinement constitutionally differs from other situations where law enforcement officials use electronic devices to gather information. The primary distinctions between home confinement monitoring and other electronic information gathering is that in home confinement the monitored individual has already been convicted of an offense and has consented to be-

135. See VT. STAT. ANN. tit. 28, § 252(b)(10) (1986) (limiting visits to reasonable times).

136. The department will need to prove a violation of probation by a preponderance of the evidence. VT. STAT. ANN. tit. 28, § 302(a)(4) (1986). There is no way to tell at this time what evidentiary weight a reviewing court would give to the transponder signal. Because the transponder technology is still developing, a reviewing court may require more than just the transponder signal as evidence of a probation violation. As the technology advances, reviewing courts will likely place greater weight on the beeper signals.

137. VT. CONST. ch. I, art. 11. The Vermont Supreme Court has held that chapter I, article 11 of the Vermont Constitution, like the fourth amendment, prohibits unreasonable searches and seizures. *State v. Badger*, 141 Vt. 430, 450 A.2d 336 (1982) (citing *Lincoln v. Smith*, 27 Vt. 328 (1855)). In *State v. Jewett*, the Vermont Supreme Court admonished Vermont attorneys for failing to brief Vermont constitutional arguments. 146 Vt. 221, 222, 500 A.2d 233, 234 (1985). Although the Vermont Supreme Court has not yet articulated an independent analysis under chapter I, article 11, a Vermont probationer should nevertheless make claims under both the Vermont and United States Constitutions.

138. U.S. CONST. amend. IV.

ing monitored.

The leading case discussing the permissible use of electronic transmitters is *Katz v. United States*.¹³⁹ In *Katz*, the petitioner was convicted of transmitting wagering information by phone in violation of federal statutes.¹⁴⁰ Police gathered evidence against the petitioner by placing a listening device in a public telephone booth used by the petitioner.¹⁴¹ In reversing the petitioner's conviction, the United States Supreme Court extended the protections of the fourth amendment to cover a public telephone booth, stating that "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."¹⁴²

In his concurring opinion, Justice Harlan developed a two-pronged test for determining when an individual is entitled to fourth amendment protection.¹⁴³ To implicate the fourth amendment, a person must have "exhibited an actual (subjective) expectation of privacy" and the expectation must be "one that society is prepared to recognize as 'reasonable.'"¹⁴⁴ Unlike the majority opinion, Justice Harlan's test focuses on the individual, not the area of surveillance. Justice Harlan's test in *Katz* has become the standard for subsequent cases involving the use of electronic tracking devices.¹⁴⁵

A probationer's fourth amendment challenge to home confinement would likely fail Justice Harlan's test. A probationer would not have a subjective expectation of privacy because she would know of the constant monitoring. In addition to not having a subjective expectation of privacy—thereby failing the Harlan test—a probationer's consent to supervision further undermines a fourth amendment claim. A recent United States Supreme Court decision indicates that consent searches are not covered by the fourth amendment.

In *United States v. Karo*,¹⁴⁶ government agents learned from an informer that the defendant planned to buy ether in order to extract cocaine diluted in clothing imported to the United

139. 389 U.S. 347 (1967).

140. *Id.* at 348-49.

141. *Id.*

142. *Id.* at 359.

143. *Id.* at 361 (Harlan, J., concurring).

144. *Id.*

145. *See, e.g., United States v. Karo*, 468 U.S. 705, 714 (1984).

146. 468 U.S. 705 (1984).

States.¹⁴⁷ After obtaining a court order authorizing the installation of a transponder, the government, with the permission of the informer, installed the beeper in a can of ether.¹⁴⁸ Through visual and electronic surveillance, the government traced the ether to the defendant's house and subsequently to a storage facility locker. The defendant then moved the ether to a residence, at which time the agents obtained a search warrant, arrested the defendant, and seized cocaine and laboratory equipment.¹⁴⁹

The United States Supreme Court granted certiorari to address the issue of "whether the monitoring in a private residence, a location not open to visual surveillance, violates the fourth amendment rights of those who have a justifiable interest in the privacy of the residence."¹⁵⁰ The Court concluded that warrantless searches of private residences by use of a beeper would violate the fourth amendment "absent exigent circumstances"¹⁵¹ or unless the search falls within a fourth amendment exception.¹⁵² The Court noted among the exceptions searches conducted with the consent of the individual searched.¹⁵³

A fourth amendment challenge to the use of an electronic monitoring device will likely fail because probationers must voluntarily agree to probation and its terms.¹⁵⁴ Accordingly, the monitoring of probationers falls within the consent exception to the fourth amendment noted in *Karo*.

The leading case supporting the proposition that a consent search creates an exception to the fourth amendment is *Schneckloth v. Bustamonte*.¹⁵⁵ In *Schneckloth*, a police officer stopped the defendant because the defendant's car was missing a headlight and license-plate light.¹⁵⁶ The defendant, who was driving without a license, got out of the car at the officer's request. The officer asked if he could search the car and the defendant responded "[s]ure, go ahead."¹⁵⁷ The officer found three stolen

147. *Id.* at 708.

148. *Id.*

149. *Id.* at 709-10.

150. *Id.* at 714.

151. *Id.* at 714-15.

152. *Id.* at 717.

153. *Id.*

154. See *infra* text accompanying notes 165-68.

155. 412 U.S. 218 (1973).

156. *Id.* at 220.

157. *Id.*

checks and the defendant was later charged with possession of stolen checks with intent to defraud.¹⁵⁸ The defendant claimed that the search of the car and the seizure of the checks was unreasonable under the fourth amendment.¹⁵⁹

Affirming the conviction of the defendant, the United States Supreme Court reiterated that it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."¹⁶⁰ The burden of showing consent falls on the prosecutor who must establish that the consent was "freely and voluntarily given."¹⁶¹ The Court explained that a search after a coerced consent will not fall within the fourth amendment exceptions but rather is subject to the proscription against unreasonable searches and seizures.¹⁶²

The consent exception outlined in *Schneckloth* applies to home confinement because a court will not grant probation until an individual consents to abide by the imposed conditions. The convicted defendant who is unwilling to accept the probationary conditions may reject probation and serve a prison term.¹⁶³ The probationer's consent to monitoring would undermine a later challenge that the monitoring caused an unconstitutional search.

A probationer could claim that the "choice" between home confinement and prison, coerces consent to home confinement. Coerced consents do not fall within the fourth amendment exceptions.¹⁶⁴

The Vermont Supreme Court has addressed the issue of whether the "choice" of probation as opposed to prison constitutes coerced consent. In *Sherwin v. Hogan*,¹⁶⁵ the defendant contested his indefinite term of probation. The defendant claimed that because his underlying offense of simple assault carried a maximum one-year penalty, the indefinite term of probation amounted to

158. *Id.*

159. *Id.* at 221.

160. *Id.* at 219.

161. *Id.* at 222.

162. *Id.*

163. See *supra* text accompanying note 42.

164. See, e.g., *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Watson*, 423 U.S. 411 (1976).

165. 136 Vt. 606, 401 A.2d 895 (1979).

cruel and unusual punishment.¹⁶⁶ The court rejected the eighth amendment claim basing its decision upon a probationer's ongoing right to petition the court for a probation modification and the fact that a probationer consents to the terms of punishment.¹⁶⁷ The court recognized that the options to the offender are presented in a "constrained context," but do, nevertheless, present an option.¹⁶⁸

Applying the reasoning of *Sherwin* to home confinement, a probationer's challenge to the punishment will likely fail because the probationer must consent to the condition before it is imposed. Even though *Sherwin* involved an eighth amendment claim, it stands for the proposition that probation is chosen by the convicted defendant. By choosing probation, with its concomitant conditions, probationers consent to the restrictions imposed upon them by the sentencing court. To avoid a claim that the consent to home confinement was coerced, the department of probation must clearly explain the parameters and restrictions associated with the sanction. The validity of the probationer's consent will depend upon the sufficiency of the information provided to the probationer before the choice is made between prison or probation.

In summary, because a probationer under home confinement does not have a subjective expectation of privacy and must consent to home confinement terms, it is unlikely that a court would find that electronic monitoring constitutes an unreasonable search.

C. A Challenge to Home Confinement as an Unconstitutional Invasion of Privacy

A probationer could also challenge home confinement as an unconstitutional intrusion on the right to privacy.¹⁶⁹ Although the right to privacy overlaps with the protections of the fourth amendment, the United States Supreme Court has recognized it as an independent and fundamental right.¹⁷⁰ Within this right are the rights to personal autonomy,¹⁷¹ bodily integrity,¹⁷² and freedom of

166. *Id.* at 609, 401 A.2d at 896.

167. *Id.* at 610, 401 A.2d at 897.

168. *Id.* at 609, 401 A.2d at 896.

169. For a general overview of the right to privacy, see Annotation, *Supreme Court's View as to the Federal Legal Aspects of the Right to Privacy*, 43 L.Ed. 2d 871 (1976).

170. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1964).

171. *See, e.g., Roe v. Wade*, 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973).

172. *Id.*

thought¹⁷³ and association.¹⁷⁴ The electronic monitoring of probationers implicates all of these rights.

Although not textually rooted in the Constitution, the Supreme Court has found a constitutional guarantee of privacy emanating from the specific guarantees of the Bill of Rights.¹⁷⁵ In *Griswold v. Connecticut*, the appellants, a married couple and their physician, were found in violation of a Connecticut statute that prohibited the use and prescription of birth control.¹⁷⁶ Reversing the conviction, the Supreme Court found that the statute invaded a "zone of privacy" protected by the "penumbras" of the Bill of Rights.¹⁷⁷ The Court found this "zone," emanating from the first, third, fourth, fifth, and ninth amendments,¹⁷⁸ broad enough to protect the private choice of married couples to use contraceptives.¹⁷⁹

Expanding upon *Griswold*, the Court in *Roe v. Wade* found a woman's right to privacy broad enough, within certain limitations, to encompass the decision "whether or not to terminate a pregnancy."¹⁸⁰ While recognizing the numerous potential sources of the right to privacy, the Court based its decision on the "concept of personal liberty" found within the fourteenth amendment.¹⁸¹

Roe recognizes that there are certain personal decisions about the body with which the government may not interfere. The Court has also recognized this right to bodily integrity in *Rochin v. California*,¹⁸² where it held that the forced pumping of the petitioner's stomach violated his constitutional rights.¹⁸³ Although the Court decided *Rochin* on due process grounds,¹⁸⁴ the decision supports the proposition that individual control of the body is a protected constitutional right.¹⁸⁵

In addition to bodily privacy protections, the Supreme Court has indicated that it will scrupulously guard the constitutional

173. See, e.g., *United States v. Harris*, 331 U.S. 145, *reh'g denied*, 331 U.S. 867 (1947).

174. See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958).

175. *Griswold*, 381 U.S. at 484.

176. *Id.* at 480.

177. *Id.* at 484.

178. *Id.*

179. *Id.* at 485.

180. *Roe*, 410 U.S. 113, 153.

181. *Id.*

182. 342 U.S. 165 (1952).

183. *Id.* at 166.

184. *Id.*

185. *Id.* at 172-74.

guarantees of privacy in the home.¹⁸⁶ "The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as marriage, procreation, motherhood, child rearing, and education."¹⁸⁷

A probationer might claim that requiring the wearing of a transponder that monitors the probationer's movements in and around the home violates the right to privacy. However, a probationer's societal status¹⁸⁸ undermines the privacy objections. Courts have permissibly subjected probationers to conditions that would invade the right to privacy if applied to ordinary citizens.¹⁸⁹

Guided by the rehabilitative needs of probationers and the protective needs of society, sentencing courts have broad discretion in imposing conditions of probation. Many of these conditions intrude upon the privacy of probationers. Permissible restrictions upon probationers may include reasonable limits on associational rights,¹⁹⁰ the ability to travel to certain areas,¹⁹¹ and the participation in political activities.¹⁹² Also, probation may require a waiver of certain constitutional guarantees.¹⁹³ Additionally, a sentencing court may validly require that a probationer submit to psychological counseling as a condition of probation.¹⁹⁴ Permitting psychological counseling suggests that even the private functions of the mind may not be free from governmental intrusion.

In *United States v. Stine*,¹⁹⁵ the sentencing judge placed the appellant, who was convicted for illegally receiving a firearm, on

186. See, e.g., *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Orito*, 413 U.S. 139 (1973).

187. *Orito*, 413 U.S. at 142.

188. See *supra* text accompanying notes 105-12.

189. See, e.g., *United States v. Stine*, 675 F.2d 69 (3d Cir.), *cert. denied*, 458 U.S. 1110 (1982).

190. See, e.g., *United States v. Gracia*, 755 F.2d 984 (2d Cir. 1985); Annotation, *Propriety of Conditioning Probation on Defendant's not Associating with Particular Person*, 99 A.L.R. 3d 967 (1980).

191. See Annotation, *Propriety of Conditioning Probation on Defendant's not Entering Specified Geographical Area*, 28 A.L.R. 4th 725 (1984).

192. See Annotation, *Propriety of Conditioning Probation or Suspended Sentence on Defendant's Refraining From Political Activity, Protest, or the Like*, 45 A.L.R. 3d 1022 (1972).

193. See Annotation, *Validity of Requirement That, as Condition of Probation, Defendant Submit to Warrantless Searches*, 79 A.L.R. 3d 1083 (1977); Annotation, *Validity Under Fourth Amendment, of Warrantless Search of Parolee or his Property by Parole Officer*, 32 A.L.R. Fed. 155 (1977).

194. *Stine*, 675 F.2d at 69.

195. *Id.*

five years probation with the condition, among others, that he participate in psychological counseling.¹⁹⁶ Although the appellant generally complied with the terms of probation, he "cooperated only briefly" with the counseling.¹⁹⁷ The United States District Court for the Eastern District of Pennsylvania, upon a petition by a probation officer, revoked the probation and ordered a one-year period of incarceration.¹⁹⁸ The appellant challenged the counseling condition as an unconstitutional intrusion on his right to privacy.¹⁹⁹

Rejecting the appellant's claims and upholding the counseling condition, the United States Court of Appeals for the Third Circuit acknowledged that "courts may impose on a probationer limitations from which other persons are free if the limitations are reasonably related to rehabilitation and public safety, the ends of probation."²⁰⁰ Although the appellate court consciously avoided a broad ruling on the permissibility of psychological counseling, it did hold that required counseling is permissible if reasonably related to the purposes of probation.²⁰¹

Synthesizing the preceding discussion, it is apparent that a sentencing court may impose a broad range of intrusive conditions upon probationers. Although probationers do retain some constitutionally protected rights, their privacy rights are far more limited than those of ordinary citizens.

Further undercutting a privacy objection is the fact that electronic monitoring actually provides no more information than a probation officer can gather from a personal visit or visual surveillance of the probationer's home.²⁰² The transponder cannot record conversations and, therefore, it would not curtail a probationer's speech rights. The beeper cannot record the particular movements and activities within a house, thereby preserving a large measure of privacy. The beeper transmits no information about other people in the probationer's home and thus protects the right of association. The transponder in no way directly interferes with a probationer's thought processes (although it serves as a constant reminder of the probationer's special status), thereby protecting the

196. *Id.* at 70.

197. *Id.*

198. *Id.*

199. *Id.* at 71.

200. *Id.*

201. *Id.* at 72.

202. Del Carmen & Vaughn, *supra* note 98, at 63.

probationer's right to mentation. Apart from the requirement of wearing the beeper, the only additional intrusion caused by the transponder is that the department of probation would know when the probationer passes beyond a 150-200 foot range of the telephone. Because visual surveillance of the probationer's home would similarly reveal the probationer's departure, the electronic device simply acts as a substitute for personal surveillance. Ideally, increased budgets for probation departments and decreases in the number of probationers would allow for personal supervision. In reality, however, scarce financial resources and human limitations require a more efficient method of probation supervision.

Electronic monitoring of ordinary citizens violates the right to privacy.²⁰³ Monitoring probationers after their consent does not create a similar constitutional violation. Despite concerns that advances in the use of electronic tracking devices will lead to the tracking of ordinary citizens,²⁰⁴ there is no reason why the courts and probation departments cannot establish parameters to limit the use of electronic devices in home confinement. A probationer's claim to a right to privacy will not likely stand as a bar to the imposition of home confinement as a condition of probation.

IV. A PILOT HOME CONFINEMENT PROGRAM IN VERMONT

Home confinement, when used as a reasonable condition of probation, could provide significant benefits to probationers, the department of corrections and the State of Vermont.²⁰⁵ Home confinement would further the department of corrections' principles of operations,²⁰⁶ and is consistent with the goals of the department of probation's Intensive Probation Supervision Program.²⁰⁷ The advantages of home confinement include: (1) a reduction in the number of people incarcerated in Vermont;²⁰⁸ (2) a reduction in the

203. See, e.g., *Dalia v. United States*, 441 U.S. 238 (1979).

204. Comment, *supra* note 134, at 435.

205. The Vermont Department of Probation has indicated a desire to develop a home confinement program. The details of their proposal are not yet available. LEGISLATIVE PRESENTATION, *supra* note 6, at 10; Times Argus, Feb. 4, 1987, at 1, col. 1.

206. See *supra* text accompanying note 21.

207. See *supra* text accompanying notes 51-55.

208. A pilot home confinement program will not significantly reduce the number of people incarcerated in Vermont. Additionally, for home confinement to impact the overall prison population, courts and the probation department must target individuals who would otherwise be incarcerated. Placing existing probationers on home confinement will have no impact on the size of the prison population. See Schmidt, *supra* note 75, at 57.

overall cost to the state for controlling offenders;²⁰⁹ (3) a more effective method for rehabilitating offenders; (4) a greater flexibility in sentencing options for judges; (5) a continued opportunity for offenders to work and maintain familial ties; and (6) an increase in the degree of supervisory control over probationers, which could, in theory, lead to a decrease in repeat offenses. Weighed against these advantages are the intrusiveness of the program and the potential for overuse and abuse. Although the sentencing judge ultimately sets the conditions of probation,²¹⁰ it is imperative that the department of probation develop a pilot home confinement program because the department, not the courts, must implement the program.²¹¹

As one of the most rural states in the country, Vermont is ideally suited for a home confinement program. The distances that probation officers must travel to supervise probationers restricts the frequency of contacts.²¹² With the home confinement technology currently available,²¹³ probation officers can spend more time with probationers in need of personal contact without concern that others on their caseload are violating probation. Home confinement, however, is not a panacea for the department of probation. Without appropriate rehabilitative treatment, home confinement will not fully serve its useful purpose.²¹⁴

A pilot program in Vermont should use one of the programmed contact devices with the identification wristlet.²¹⁵ Although this device does not provide continuous supervision, it does have numerous advantages. The wristlet is relatively small and unobtrusive and should not unduly stigmatize the wearer.²¹⁶ The programmed devices are significantly less expensive than the continuously

209. Because the department should require a probationer to pay a fee to participate in home confinement, the program could ideally become self-sustaining. See, e.g., Petersilia, *supra* note 51, at 52. It should be noted that a simple monetary comparison of home confinement costs versus prison costs does not accurately indicate the true savings to the state. An accurate calculation must include, for example, figures on recidivists, monies paid in tax dollars, and figures on state welfare aid to families whose principal earner is imprisoned. See Petersilia, *supra* note 51, at 52.

210. *State v. Arbeitman*, 131 Vt. 596, 599, 313 A.2d 17, 19 (1973).

211. Interview, *supra* note 11.

212. *Id.*

213. See *supra* text accompanying notes 75-100.

214. Comment, *supra* note 134, at 444.

215. See *supra* text accompanying notes 76-81.

216. See *United States v. Murphy*, 108 F.R.D. 437, 438 (E.D.N.Y. 1985); *supra* text accompanying note 72.

monitoring system, costing approximately \$2,000 less per year for each probationer.²¹⁷ Additionally, because the wristlet does not rely on electronic transmissions, it has less chance of erroneously signaling a probation violation.

The wristlet does not continuously track probationers, and consequently is less intrusive than the transponder. Because the transponder would likely withstand legal challenges,²¹⁸ the less intrusive wristlet should similarly withstand any challenge.

A potential drawback to the programmed devices is that the probationer could cut the wristlet and have an accomplice insert it into the decoding box. However, this risk is no greater than the chance that a probationer could remove a transponder and simply place it next to the receiver.²¹⁹ In either case, personal contact with the probationer would reveal the removal of the device.

The potential for abuse with the programmed device indicates that traditional probation techniques must be continued even after the introduction of a home confinement program. Monitoring should supplement intensive probation supervision—it should never replace personal contact.

The punitive aspects of home confinement must not be underestimated. Requiring individuals to remain in their homes is a serious and potentially debilitating punishment.²²⁰ A compelling argument can be made that home confinement is a more intrusive and more difficult sentence than a prison term.²²¹ In prison, many of the needs of the individual are met. Under home confinement, the probationer must still earn a living, maintain his or her home, and constantly confront the temptation to leave the home in violation of probation.²²² However, the intrinsic difficulty of home confinement is also its strength as a rehabilitative technique. The probationer who learns to overcome the temptation to violate the restriction will arguably have gained a measure of self-control necessary for a successful reintegration into society.

217. Petersilia, *supra* note 51, at 52.

218. See *supra* text accompanying notes 101-204.

219. Friel & Vaughn, *A Consumer Guide to the Electronic Monitoring of Probationers*, FED. PROBATION, Sept. 1986, at 3, 6.

220. See *United States v. Murphy*, 108 F.R.D. 437, 438 (E.D.N.Y. 1985); *supra* text accompanying note 72.

221. See Petersilia, *supra* note 51, at 55.

222. *Id.*

The first probationers placed on home confinement should pose a clearly controllable risk. Home confinement will never gain community acceptance if offenders take advantage of their relative freedom, violate the condition of probation, and commit other offenses. Accordingly, participants in a pilot program should have no prior criminal record and should demonstrate a high commitment to abiding by the home confinement condition.

A pilot home confinement program should concentrate on a class of offenders who generally can benefit from the new supervisory techniques. Although there are numerous classes of offenders appropriate for home confinement,²²³ this note proposes that a pilot program in Vermont begin with individuals convicted of driving under the influence (DUI).²²⁴

Individuals who drink and drive present a difficult problem in terms of appropriate punishment. When intoxicated, drunk drivers pose a severe threat to the public. However, when sober, the same individuals may be steady workers, loving parents, and productive members of society. Society will no longer tolerate the traditional passive acceptance of drunken driving,²²⁵ but, at the other extreme, there is some reluctance to sentence drunk drivers to jail terms.²²⁶

In January of 1986, Vermont's Governor Kunin proposed increasing the penalties for a first DUI offense to the same level as a second offense.²²⁷ Under her proposal, first offenders would either spend a minimum of 48 hours in jail or perform 80 hours of community service.²²⁸ Although strict measures are called for, the Gov-

223. Classes of offenders appropriate for home confinement include: certain non-violent sex offenders; individuals on furlough from prison; pre-trial detainees; juvenile offenders; offenders with special medical needs or communicable diseases; pregnant women; and mentally or terminally ill offenders. See generally Ball & Lilly, *supra* note 14, at 52 (listing potential classes of individuals suitable for home confinement). According to Thomas Perras from the Vermont Department of Probation, people should be selected for home confinement by "matching [their] M.O. with the means necessary to control [them]." Interview with Thomas Perras, Deputy Commissioner Vermont Department of Probation and Parole, in Waterbury, Vt. (Oct. 29, 1985).

224. VT. STAT. ANN. tit. 23, § 1210 (Supp. 1986) (providing penalties for driving under the influence of alcohol).

225. A Gallup poll indicated that in 1982, 92% of people in the East favored stricter drunk driving laws. U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 267 (1984).

226. *Id.* (indicating that in 1982, only 76% of people in the East favored a mandatory two-day jail term for a first offense).

227. Address by Governor Madeleine Kunin, Joint Session of the Vermont General Assembly (Jan. 9, 1986).

228. Burlington Free Press, Jan. 6, 1986, at 10A, col. 1.

ernor's proposed punishment would not meet the desired ends. A 48-hour jail term may shock offenders into reforming their behavior,²²⁹ however, incarcerating DUI offenders suffers the same rehabilitative shortcomings as incarcerating any other class of offender.²³⁰ Furthermore, stricter sentences for DUI offenders would exacerbate the shortage of low-risk offender prison space and would increase overall costs of the department of corrections.²³¹ As an alternative to the 48-hour jail sentence, sentencing judges, in cooperation with the department of probation, should give drunken driver offenders the opportunity to serve their punishment under home confinement.²³²

Under a home confinement program, courts could require DUI offenders to work or seek employment, to pay a fee for the programmed contact device,²³³ to abide by any other reasonable terms of probation, and most importantly, to remain at home during the hours they are most likely to drink and drive. Rather than becoming an increased burden on the state, DUI offenders would continue to provide their own support while the department could control the threat they posed. Judges could sentence individuals who drink to excess in the evenings to night time home confinement. Individuals who pose a threat on the weekends could be confined at those times. Obviously, some individuals follow no drinking pattern and for them, home confinement may not be an option.

From the broad class of DUI offenders, the department will need to carefully screen individuals for their particular suitability for home confinement.²³⁴ A primary consideration before recom-

229. See Comment, *Shock Probation: An Alternative to Traditional Forms of Sentencing*, 12 TEX. TECH. L. REV. 697 (1981).

230. *United States v. Murphy*, 108 F.R.D. 437, 438 (E.D.N.Y. 1985) (rehabilitation "takes place more effectively outside prison walls.").

231. See *supra* text accompanying notes 25-30.

232. Courts, in consultation with the department of probation, would determine the appropriate duration of home confinement. Most jurisdictions that use home confinement use the ratio of three to five days of home confinement for every one day that would have been spent in prison. Petersillia, *supra* note 51, at 55.

233. Although payment of a fee limits overall costs, the inability to pay a fee should not eliminate an otherwise appropriate candidate for home confinement. Requiring payment of a fee as a prerequisite to participation raises the possibility of an equal protection challenge brought by an indigent probationer denied home confinement. Del Carmen & Vaughn, *supra* note 98, at 66-67.

234. Screening questions used by the Clackamas County Community Corrections Department's home confinement program include:

- a. is client a safe risk/nondangerous?
- b. is client employed?

mending an individual for home confinement is the offender's willingness to be confined at home rather than in a facility. The probationer's personal stake in compliance with the condition will largely control the success of the program.

After selecting the appropriate probationers for the pilot program, the department should assign one or two probation officers to supervise all of the participants. Ideally, the participants in the pilot program would live in close proximity to each other to ease the travel time for the probation officer. For practical simplicity, a pilot program should begin in a more urban setting such as Chittenden County.

The department will need to carefully evaluate the home confinement program. The department should include five factors in its evaluation: (1) the rate of compliance with home confinement conditions; (2) the psychological reactions of probationers to their confinement; (3) the ability of probationers to resume normal work and familial relations; (4) the community's reaction to home confinement; and (5) the recidivist rate for individuals formerly on home confinement.

With home confinement, Vermont has the ability to address the increasingly serious problem of drunk driving. Overwhelming community sentiment indicates the need for tougher penalties for DUI offenders. However, in an effort to impose tough penalties, the state should not undermine its existing operations. Home confinement provides the option to impress DUI offenders with the seriousness of their offense. In addition, home confinement would provide adequate control over probationers without excessively burdening already strained resources.

CONCLUSION

Home confinement as a condition of probation in Vermont

- c. does client have phone or is willing to install one?
- d. does client have stable residence for period of home confinement?
- e. what does client have to lose/gain by being on home incarceration?
- f. will client normally receive a jail sentence on this charge?
- g. what is client's attitude towards home confinement?
- h. is client volunteering for the program?

Electronic Surveillance Program Criteria, Clackamas County Community Corrections (obtainable from Clackamas County Community Corrections, 501 Pleasant Avenue, Oregon City, OR 97045).

could provide a cost effective and rehabilitatively sound alternative to conventional methods of probation and incarceration. When applied after closely screening offenders to determine their suitability, home confinement would further the rehabilitative and protective goals of the department of probation. Despite the negative connotations of home confinement as a means of political repression, it does represent a positive, legally permissible sentencing alternative.

One class of offenders suitable for home confinement are individuals convicted of driving under the influence. Although DUI offenders pose a serious threat to society, the department can control the offenders by limiting their access to vehicles and alcohol through the imposition of home confinement conditions. Given Vermont citizens' increasing desire to enhance the punishment for DUI offenders, home confinement represents an appropriate intermediate step between incarceration and the present penalty.

Home confinement is not a panacea for prison overcrowding or for rehabilitating offenders. However, it is one way to ease the burden on the department of corrections, reduce overall correctional costs, and provide probation officers time for more meaningful contacts with offenders. The department must combine home confinement with present probation techniques, like intensive supervision, to achieve maximum effectiveness. Home confinement can inform the department of the probationer's location; it cannot teach the probationer how to reform underlying behavior. Home confinement would help provide the control; the department, the offender and the community would then need to work together to change the behavior.

Robert L. Sand

