

Home Confinement in the United States: The Evolution of Progressive Criminal Justice Reform

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Abstract: Home confinement, also known as house arrest or home detention, first appeared in the United States in the 1970s as a form of pretrial release issued after a defendant's indictment. Today, this alternative sentencing scheme possesses several additional purposes. Home confinement is impossible as a form of supervised release from incarceration and as a term of parole. More importantly, it has evolved into a condition of probation and an autonomous criminal sanction that serves in a capacity independent of probation. This article aims to show that although historically spurred in large part by the practical deficiencies of the American prison system (namely its overcrowding and excessive costs), the study of home confinement actuation promulgates a broader understanding of its effectiveness in the promotion of rehabilitation and the prevention of recidivism. Psychological and fiscal aspects will be analyzed with domestic and international (New Zealand) considerations. Concurrently, this paper draws attention to the margin of judicial discretion afforded in shaping individual home confinement implementations, and discusses its advantages and related concerns.

Keywords: Home confinement; house arrest; criminal law; recidivism; prison.

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1. Introduction

Home confinement, also known as house arrest or home detention, is a criminal sanction that consists of confining a person to their place of residence. Travel is forbidden or restricted to departures of specific and pre-authorized purposes, such as employment. If the confined individual violates the terms of their home confinement, they may incur the imposition of further detention and the possibility of incarceration. The threat of further sanctions ensures that persons under home confinement impositions are incentivized to abide by the protocols set forth upon them¹.

While home confinement as a government-imposed sanction has existed throughout history², it first appeared in the United States as a form of supervised pretrial release. An offender was placed under temporary terms and conditions of confinement, whose violation would result in an additional punishment³. Today, home confinement serves several purposes: it is imposable upon sentencing as a condition of probation, whereby the sentence of confinement is suspended so

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1. See *United States v. Murphy*, 108 F.R.D. 437, 439 (E.D.N.Y. 1985).

2. See Randy R. Gainey, *House Arrest*, in David Levinson (ed), 2 *Encyclopedia of Crime and Punishment* 859 (SAGE 2002).

3. See *id.*

long as the offender does not violate their terms of probation; as an autonomous criminal sanction that serves an alternative to incarceration and independent of probation; and, lastly, as a term of parole⁴.

This evolution connects with the growing popularity of home confinement. One cause for the trend is the growing concern surrounding the overcrowding and the growing cost of the American prison system. The increasing popularity of its imposition also reflects a widely-held view that home confinement is favorable in the prevention of recidivism and promotion of rehabilitation. This goal is facilitated not only by preventing the detrimental psychological impacts that stem from incarceration, but also because the judiciary is required to tailor the terms of home confinement to the underlying facts of every case through a process known as judicial discretion.

This article considers these key aspects of the history and the role of home confinement in the United States. It aims to show how this measure, while historically spurred in large part by practical deficiencies of the prison system, responds today to a broader understanding of the dimensions of rehabilitation and non-recidivism. Moreover, this paper draws attention to the margin of judicial discretion afforded in shaping home confinement in particular cases by discussing its advantages and related concerns.

The structure of this paper is as follows. Section 2 recounts the historical development of home confinement in the United States. It describes the first experimental implementations of pretrial home confinement, the rise of home confinement as a probationary measure, its evolution into a separate criminal sanction that served as an alternative to incarceration, and statistics on its prevalence today. Section 3 analyzes what and how key goals are served by home confinement schemes. Section 4 discusses judicial discretion and the risks associated with sentencing disparity, illustrated by two exemplifying cases introduced in Section 2 and by California's home confinement statute.

4. See Jody Klein-Saffran, *Electronically Monitored Home Confinement – Not a Panacea for Corrections, but a Useful Tool*, 4 IARCA Journal 30 (1991), available at https://www.bop.gov/resources/research_projects/published_reports/gen_program_eval/oreprelectronicmon.pdf (last visited April 26, 2020).

2. *Historical Development of Home Confinement in the United States*

2.1. *Early Experiences at the State Level*

Home confinement was originally introduced in the United States as a form of supervised pretrial release. One of the first known instances of home confinement dates back to 1976; the San Diego County Probation Department directed supervision of juvenile delinquents awaiting trial as an alternative to incarceration⁵. The program was implemented as a means of ensuring that the children were able to attend school while facing punishment for their crimes⁶. Home confinement, as opposed to traditional incarceration, was found a healthier alternative for the children's psyche and rehabilitation⁷. Today, this finding is also supported by studies that show that juveniles placed into prisons are five times more likely to commit suicide⁸. Accordingly, these studies illustrate that home- and community-based interventions are more effective in preventing recidivism than incarceration for young persons charged with various kinds of offenses; the causation is linked to their not fully developed psyche⁹.

Although its early implementation began with children, home confinement was soon adopted by state legislatures as a form of probation. Probation has a long history in the United States. It first appeared in 1841¹⁰ because of the pioneering efforts of boot maker John Augustus, later known as the "father of probation"¹¹. Augustus persuaded a Boston judge to entrust him the custody of a common

5. See United States Bureau of Justice Statistics, *Prisoners in 1983* (1984), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=3500> (last visited April 26, 2020).

6. See *id.*

7. See *id.*

8. See Wendy Sawyer, *Youth Confinement: The Whole Pie 2019* (Prison Policy Initiative, December 19, 2019), available at <https://www.prisonpolicy.org/reports/youth2019.html> (last visited April 26, 2020).

9. See *id.*

10. See County of San Mateo Probation Department, *The History of Probation*, available at <https://probation.smcgov.org/history-probation> (last visited April 26, 2020).

11. See New York City Department of Probation, *History of Probation*, available at <https://www1.nyc.gov/site/probation/about/history-of-probation.page> (last visited April 26, 2020).

drunkard for a brief period¹². The drunkard appeared in court sober three weeks later, and to the surprise of all in attendance, composed himself well¹³. Thus, the very first form that probation took in the United States was an unconventional decision by a progressive judge. Despite the absence of statutory provisions, this probationary scheme was soon widely implemented by judges as a form of alternative sentencing. In response, the United States Supreme Court found in 1916 that the lower-level judiciary did not possess the authority to impose such decisions and sanctions¹⁴. This holding led to President Calvin Coolidge's signing of the National Probation Act in 1925. The Act provided the judiciary the power to suspend the execution of traditional sentences, and to use their discretion in determining the terms and conditions of probation that they deemed most suitable to the case in question¹⁵. With the passage of this congressional act, impositions of probation gained legal recognition. It later developed into a multifaceted tool; home confinement serves as one of the facets.

In 1979 an Illinois statute codified home confinement as an acceptable condition of probation; requiring the defendant in question to remain inside a location of the court's choosing¹⁶. This codification reflected the success of existing juvenile programs, made apparent the growing concerns with the effectiveness of traditional incarceration for light offenders, and was influenced by the changes of societal attitudes¹⁷. Empowering the judiciary to impose home confinement by means of state legislation preempted the Supreme Court from questioning the legitimacy of this power, impeding what previously transpired at the federal level¹⁸. Therefore, a judge was finally statutorily authorized to decide that a defendant could serve a sentence under home confinement rather than traditional incarceration. The

12. See *id.*

13. See *id.*

14. See *Ex parte United States*, 242 U.S. 27 (1916); Administrative Office of the United States Courts, *Probation and Pretrial Services History*, available at <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history> (last visited April 26, 2020).

15. *Id.*

16. See Ill. Ann. Stat. ch. 38 §1005-6-3b(10)(i).

17. See J. Robert Lilly and Richard A. Ball, *A Brief History of House Arrest and Electronic Monitoring*, 13 Northern Kentucky Law Review 343, 356–366 (1987).

18. See *id.*

Illinois statute provided that the defendant's home was to serve as the location of confinement¹⁹. Under this statute, a judge is able to impose curfews under certain circumstances: a defendant is able to ask for authorization to leave their confinement premises for certain events²⁰. Therefore, these initial implementations were consistent with contemporary impositions in regard to constant supervision with the right to travel for limited purposes. It essentially strayed from modern implementations because of technological limitations, in that electronic monitoring was not yet available.

2.2. *The Influence of Prison Population Growth in the 1970s and 1980s*

United States prisons have become increasingly overpopulated. In 2018, America registered the highest rate of incarcerated citizens in the world: 655 per 100,000 Americans were incarcerated²¹. Although the United States represents only 4.5 percent of the world's population, it houses about 25 percent of the world's prisoners²². The United States Bureau of Justice Statistics estimated that the prison industry in the United States was worth about \$74 billion in 2007; this estimated value has since increased²³.

Since the 1980s, the increased use of home confinement has been part of a wider effort to combat overcrowding in prisons and the high cost of its upkeep²⁴. In the United States, increases in violent crime rates during the 1960s promulgated the prevalence of conservative political movements dedicated to decreasing crime rates and

19. See Ill. Ann. Stat. ch. 38 §1005-6-3b(10)(i).

20. See *id.*

21. See Roy Walmsley, *World Prison Population List* (Institute for Crime & Justice Policy Research 2018), available at https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf (last visited April 26, 2020).

22. See *id.*

23. See Tracey Kycklhahn, *Justice Expenditures and Employment, FY 1982–2007 – Statistical Tables* (United States Bureau of Justice Statistics, 2011), available at https://www.prisonlegalnews.org/media/publications/bjs_justice_fy_1982-1007_expenditures_and_employment_statistics_2011.pdf (last visited April 26, 2020); Shelley S. Hyland, *Justice Expenditure And Employment Extracts, 2016 – Preliminary* (United States Bureau of Justice Statistics, November 7, 2019), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=6728> (last visited April 26, 2020).

24. See *id.*

drove the criminal justice system to harshen the severity of criminal sanctions as an attempt to prevent recidivism²⁵. In this context, the prison population increased while fewer convicts were released on parole for reasons such as good behavior²⁶, resulting in a 40 percent increase in the population of incarcerated Americans during the 1970s²⁷. Soon enough, overcrowding in prisons developed into a major issue and thus societal pressures to reform increased²⁸. In 1984, when – as discussed below – states began to implement home confinement as a form of alternative sentencing, the state and federal prison systems were populated at 110 percent of their capacity; this level has since stayed relatively stagnant²⁹, despite violent crime rates plateauing in 1993³⁰.

There emerged two general philosophies on how to best address the problem of growing prison populations. The first approach, usually upheld by conservative policy-makers, suggested allocating more funds for the construction of prisons; the second, commonly pursued by liberal politicians, proposed reform through alternative sentencing³¹. Conservative President Ronald Reagan increased the federal budget during his second term by 40 percent, with the goal – among others – of repairing the American prison system³². However, while additional budgeting was allocated by President Reagan's administration, sociologists noted that constructing a new prison would cost \$80,000 per prison cell, and the cost of holding each inmate would amount to \$20,000 per year³³. The high cost of incarceration forced

25. See Patrick A. Langan, *The Prevalence of Imprisonment* (United States Bureau of Justice Statistics, 1985), available at <https://www.bjs.gov/content/pub/pdf/pi.pdf> (last visited April 26, 2020).

26. See *id.*

27. See *id.*

28. See *id.*

29. See United States Bureau of Justice Statistics, *Prisoners in 1983* (cited in note 5).

30. See Lauren-Brooke Eisen and Oliver Roeder, *America's Faulty Perception of Crime Rates* (Brennan Center for Justice, March 16, 2015), available at <https://www.brennancenter.org/our-work/analysis-opinion/americas-faulty-perception-crime-rates> (last visited April 26, 2020).

31. See *id.*

32. See *id.*

33. See Joseph W. Lipchitz, *Back to the Future: An Historical View of Intensive Probation Supervision*, 49 *Federal Probation* 78, 78 (1985); Wendell Rawls Jr, *Crises and Cutbacks Stir Fresh Concerns on Nation's Prisons* (The New York Times, January 5,

politicians to consider cost-effective alternatives. This drew increased attention to new forms of alternative sentencing schemes such as home confinement, which started gaining traction with an increasing awareness of its benefits³⁴.

2.3. *Federal Reform: United States v. Murphy and United States v. Wayte*

Against this historical and social background, two federal cases in the 1980s set the stage for alternative sentencing in the form of house arrest. They served as a guide for years to come and are often studied because of their practicality in understanding the mechanisms and objectives of home confinement. In *United States v. Murphy*, the defendant was found guilty of mail fraud charges and obstruction of justice. Defendant Murphy aided her employer in committing fraud and convinced several witnesses to withhold the truth in their testimony. She faced a prison sentence of 50 years and \$56,000 in fines³⁵. She accepted an offer to plead guilty and thus settled for a more lenient punishment³⁶. Murphy was in fact provided with an alternative to incarceration: a groundbreaking form of punishment called house arrest³⁷. The sentencing judge, observing that "[i]t [was] unclear at [that] time whether a penalty of house arrest may be imposed without probation as a substitute for incarceration"³⁸, imposed home detention nonetheless for a period of two years. Murphy was also forced to comply with community service requirements³⁹. Her progress was monitored with daily phone calls and constant, unannounced in-person check-ins at her home⁴⁰. She was to remain on-call and to expect these check-ins at any hour of the day⁴¹. As addressed in the previous paragraphs, home detention schemes contemplate and incorporate exceptions. In

1982), available at <https://www.nytimes.com/1982/01/05/us/crises-and-cutbacks-stir-fresh-concerns-on-nation-s-prisons.html> (last visited April 26, 2020).

34. See *Back to the Future* at 79 (cited in note 33).

35. See *Murphy*, 108 F.R.D. at 439 (cited in note 1).

36. See *id.*

37. See *id.*

38. *Id.*

39. See *id.*

40. See *id.*

41. See *id.*

Murphy's case, the defendant was given four basic excuses for vacating her residence: commuting to work (community service included), medical appointments, religious events, and grocery shopping⁴². The four exceptions required pre-authorization from Murphy's probation officer⁴³. Murphy was further allowed typical unusual-need exceptions: deathbed visits and funerals. This particular kind of exception was only reserved for her immediate family⁴⁴. There was no other exception for Murphy to exit her residence while serving the two-year period of home detention⁴⁵. If she was to find employment or change her place of residence, she was required to request authorization to do so from her probation officer⁴⁶. Lastly, authorization was not required for visitors to frequent her home⁴⁷.

The conditions in *Murphy* were less restrictive than in *United States v. Wayte*⁴⁸. The defendant in *Wayte* had not properly registered for the Selective Service System⁴⁹. He was found guilty, but his sentence was suspended and he was placed on probation for six months⁵⁰. The terms of probation stated that Mr. Wayte was to be placed under home confinement in his grandmother's residence, only to vacate the premises for emergency purposes "with the [explicit authorization] of his probationary officer"⁵¹. Wayte was precluded from leaving his home under any non-exigent circumstance⁵². This particular condition completely prevented Wayte from obtaining employment.

The difference in severity between the two impositions is made evident by the fact that if Wayte had left his home for employment purposes, he would have violated his conditions. This imposition was not only significantly stricter than those in *Murphy*, but is also

42. See *id.* at 442.

43. See *id.*

44. See *id.* at 444.

45. See *id.*

46. See *id.* at 439.

47. See *id.*

48. See *United States v. Wayte*. 549 F. Supp. 1376 (C.D. Cal. 1982).

49. See *id.* The Selective Service System is a United States government agency in the realm of military conscription.

50. See *Judgment and Probation/Commitment Order No. CR-82-630-TJH* (C.D. Cal. 1985).

51. *Id.*

52. *Id.*

considered strict by modern standards. The imposition of forbidding a defendant to leave their residence for employment will often be negotiated away if defendants are not wealthy enough to financially sustain themselves⁵³. Wayte's conditions only allowed him to leave his residence without pre-screened authorization from his probation officer if facing a life-threatening, exigent circumstance⁵⁴. Any of the other general exceptions discussed above, such as grocery shopping and religious events, required explicit approval by his probation officer. Wayte's situation was in theory not significantly different from actual imprisonment. If considered for its constitutionality, Wayte's situation may even stimulate debate about possible violations of his right to the freedom of religious expression⁵⁵.

The two parties successfully rehabilitated during their confinement and so illustrate the intended results of home confinement sentencing schemes. Moreover, the two cases outline different possible results of judicial discretion. Different judges decided the terms of the parties' confinements, and exercised their discretion by carefully evaluating the two situations and their surrounding facts as statutorily indicated and dictated. They determined in their discretion that the parties deserved different terms of confinement. Just as there exists no blanket holding in American jurisprudence, neither exists a blanket, binding rule of home confinement impositions because every situation will present the presiding judge different factual circumstances that require different terms of confinement. As discussed in the following paragraph, the need for governing the exercise of judicial discretion was promptly addressed by State legislation.

2.4. *Developments in State Legislation: The Case of Florida*

Florida is an example of an early pioneer of house arrest. The State created landmark distinctions through legislation in 1985⁵⁶. Florida's home confinement statute specifies in explicit detail the conditions of

53. See Jeffrey N. Hurwitz, *House Arrest: A Critical Analysis of an Intermediate-Level Penal Sanction*, 135 *University of Pennsylvania Law Review* 771, 794 (1987).

54. See *Judgment and Probation/Commitment Order* (cited in note 50).

55. See U.S. Const. art. I § 1; see Hurwitz, *House Arrest* at 794–795 (cited in note 53).

56. See Fla. Stat. Ann. § 948.01.

confinement⁵⁷. The statute states that the court provides for "intensive supervision and surveillance for an offender placed into [home confinement]" and confines the defendant to "an agreed-upon residence during hours away from employment and public service activities"⁵⁸. Thus, the statute orders that the defendant is to remain in their home except for pre-authorized activities. Florida's *Implementation Manual for Community Control*⁵⁹ defines three categories of pre-authorized activities, which comprise employment and public service activities: essential travel, acceptable travel, and a hybrid form of travel. Essential travel pertains to religious events, one's education, public service, and regular appointments with a probation officer⁶⁰. Essential travel includes the types of travel necessary for the offender to function in society. Movements necessary for the basic needs of the defendant's existence in society, such as visiting a bank, medical needs, shopping, and family emergencies, are instead defined as acceptable travel⁶¹. These movements are not strictly necessary for survival, but are related to the offender's participation in society. The third form is a hybrid between the first and the second category⁶². All forms of travel require a formal request and are authorized in advance; however, travel for family emergencies is permissible as long as the defendant alerts their probation officer later in the same day⁶³. Conditions under the Florida program mimic a prison sentence. There exist no exemptions for holidays and weekends. The detainee is subject to visits for monitoring purposes at any time during the day or night, and the probation officer is not compelled to announce his inspections⁶⁴. If the detainee is allowed employment, the conditions are not attenuated⁶⁵.

Thus, the first instance of statutory provision of home confinement as an autonomous form of sentencing, alternative to imprisonment, came to fruition. Florida courts affirmed that for sentencing

57. See Fla. Stat. Ann. § 948.03(2)(b).

58. See Fla. Stat. Ann. § 948.101(1).

59. See Florida Department of Corrections, Probation and Parole Services, *Implementation Manual for Community Control*, part B, 11 (1987).

60. See *id.*

61. See *id.*

62. See *id.*

63. See *id.*

64. See *id.*

65. See *id.*

purposes "probation and [home confinement] are two separate [and] distinct concepts"⁶⁶.

2.5. *The Prevalence of Home Confinement Today*

Since its inception, home confinement has become more common for yet another, more practical reason: technological advances that have made electronic monitoring more affordable. Correctional authorities are now able to monitor it more effectively. The monitoring of offenders by means of electronic devices was approved by the pioneering Florida legislature in 1987⁶⁷. The first device used to electronically monitor those confined to their homes is known as an RF (radio frequency) system⁶⁸. This device alerts a probation officer when an offender moves beyond a predetermined distance from the base unit during specific times⁶⁹.

Starting in 1997, the Global Positioning System (GPS) was also used to monitor an offender's movements in real time⁷⁰. With these technological advances, the monitoring of defendants and offenders has been simplified. Probation officers are no longer required to physically enter the confined premises to ensure that the offender has not violated the terms of his or her probation. Furthermore, a single probation officer may supervise multiple offenders at the same time.

These technological advances in monitoring offenders contributed significantly to the use of house arrest in the United States⁷¹. In 1999, 3 percent of federal prisoners were placed in home confinement programs⁷². Fifteen years later, that percentage had risen to 20 per-

66. See *Mitchell v. State*, 463 So. 2d 416, 419 (Fla. Dist. Ct. App. 1985).

67. See William Bales, Karen Mann, Karla Dhungana, *A Quantitative and Qualitative Assessment of Electronic Monitoring* (National Institute of Justice, 2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/230530.pdf> (last visited April 26, 2020).

68. See *id.*

69. See *id.*

70. See *id.*

71. See James E. Fowler, *House Arrest* (Wiley Online Library, 2014), available at <https://onlinelibrary.wiley.com/doi/full/10.1002/9781118517383.wbeccj437> (last visited April 26, 2020).

72. See Ann E. Carson, *Prisoners in 2014* (U.S. Department of Justice, Bureau of Justice Statistics, September 2015), available at <https://www.bjs.gov/content/pub/>

cent⁷³. In 1999, the percentage of state prisoners in home confinement was 5 percent, but only increased to about 8 percent during the same time frame⁷⁴. The disparity between federal- and state-level impositions is partly due to the fact that every American state has adopted its own unique set of criminal codes, while the federal system is uniform throughout the nation. The disparity also lends itself to differences in political stances on criminal justice reform⁷⁵.

As discussed below, the convenience and cost savings associated with these technological advances are only part of the perceived benefits of home confinement vis-à-vis traditional incarceration. Increased awareness of its effectiveness in preventing recidivism and promoting the rehabilitation of offenders also plays a role in encouraging the use of home confinement.

3. *Goals and Benefits: A Theorization of Home Confinement with an Eye to Recent Experiences*

Important touchstones of the benefits of house arrest, as opposed to traditional incarceration, are the prevention of prison overcrowding, cost savings, and an effectiveness in promoting rehabilitation and preventing recidivism. The goals of reducing prison overpopulation and its costliness concern the objective aspects of prison systems. Home confinement's aptitude to rehabilitate offenders and prevent recidivism concerns the subjective aspects of the offender. The two sets of goals are interconnected because the prevention of recidivism and successful rehabilitation of offenders helps to limit prison overpopulation and, consequently, generates cost savings.

pdf/p14.pdf (last visited April 26, 2020).

73. See *id.*

74. See *id.*

75. See *Overcrowding* (Penal Reform International, 2020), available at <https://www.penalreform.org/issues/prison-conditions/key-facts/overcrowding> (last visited April 26, 2020).

3.1. *Prison Overcrowding*

In 2018, there were a total of 2.3 million inmates incarcerated in the United States⁷⁶. The American prison system is currently overcrowded at about 110 percent of its capacity⁷⁷.

The Florida home confinement statute specifically mentions that its goal is to reduce the rate of re-offense and incarceration to 10 percent⁷⁸. Due to the state home confinement program, from its inception until 1987, 72.5 percent of Florida's probationers were pulled from the prison population, which resulted in a 16 percent reduction in the number of individuals traditionally incarcerated⁷⁹. This illustrates how a greater number of enrollees in home confinement schemes would result in a deduction in the rate of overcrowding in American prisons at a significantly smaller cost than through the construction of new prisons⁸⁰.

3.2. *Cost Savings*

Home confinement implementations further the goal of cost savings. To place an individual in home confinement would generally result in the savings of governmental finances because of the high costs of conventional prison systems⁸¹. Multiple jurisdictions have reported an increase in resources in terms of dollars saved by implementing home confinement programs – for example, Rock Island County, a large metropolitan area of Illinois and Iowa⁸². Rock Island County's savings of \$72,000 during the 1980s⁸³ are noteworthy be-

76. See Wendy Sawyer and Peter Wagner, *Incarceration: The Whole Pie* (Prison Policy Initiative, 2020), available at <https://www.prisonpolicy.org/reports/pie2020.html> (last visited April 26, 2020).

77. See *id.*

78. See Hurwitz, *House Arrest* at 783 (cited in note 53).

79. See *id.* at 786.

80. See Linda Harrison, *Adult and Juvenile Correctional Populations Forecasts* (Colorado Division of Criminal Justice, February 2019), available at https://cdpsdocs.state.co.us/ors/data/PPP/2019_PPP.pdf (last visited April 26, 2020).

81. See Hurwitz, *House Arrest* at 784 (cited in note 53).

82. See *Home Detention Gaining Support* (Criminal Justice Newsletter, November 21, 1983).

83. See Hurwitz, *House Arrest* at 784 (cited in note 53).

cause the County found home confinement to be cost effective while implemented during an era of sub-par and inefficient technology and equipment. As mentioned above, the costliness may be more apparent today with new technologies that have enhanced the ability to monitor an offender.

Cost savings may accrue through the prevention of recidivism, contributed to by the use of home confinement⁸⁴. An analysis of costs through home confinement requires that arrests prevented by the program translate into fungible dollars to compare finances with the program's cost. The benefits of preventing recidivism include savings to criminal justice agencies and savings from the prevention of victimization of innocent Americans⁸⁵. An analysis from 2000 found that arrests prevented by the the decrease in the rate of recidivism obtained through home confinement programs may generate \$5,300 in benefits per participant⁸⁶.

3.3. *Rehabilitation and Recidivism*

Another purpose of home confinement is to rehabilitate the offender by encouraging them to live the life of a positively contributing member of society. The nation's earliest home detention statutes specifically mention the rehabilitation of the criminal⁸⁷. This, in turn, should contribute to the prevention of recidivism.

3.3.1. *Psychological Benefits*

Home confinement can help to counter some of the detrimental psychological effects connected with traditional incarceration, in turn promoting healthier behavior and decreasing the likelihood of

84. See John K. Roman, et al., *The Costs and Benefits of Electronic Monitoring for Washington, D.C.* 6–8 (District of Columbia Crime Policy Institute, September 2012), available at <https://www.urban.org/research/publication/costs-and-benefits-electronic-monitoring-washington-dc> (last visited April 26, 2020).

85. See James Bonta, Suzanne Wallace-Capretta and Jennifer Rooney, *A Quasi-Experimental Evaluation of an Intensive Rehabilitation Supervision Program*, 27 *Criminal Justice and Behavior* 312, 312–319 (2000).

86. See Roman, et al., *The Costs and Benefits* at 6–8 (cited in note 84).

87. See, for example, Fla. Stat. Ann. § 948.01(4)(b).

recidivism. Psychiatric research has demonstrated that incarceration can exacerbate or even give rise to an array of disorders such as anxiety, claustrophobia, clinical depression, delusions, obsessive-compulsive disorders, panic attacks, personality disorders, phobias, and psychoses⁸⁸. A survey of studies among jail inmates, state prisoners and federal prisoners found that, respectively, 64 percent, 54 percent and 45 percent of them reported mental health concerns; consistent reports of substance abuse are often co-occurring⁸⁹. While only 5 percent of Americans experience serious mental illness such as schizophrenia, about 25 percent of the prison population exhibits symptoms of mental illness, often without experiencing symptoms prior to their confinement⁹⁰.

As a result of the overcrowding of the prison system, mental health problems are difficult to deal with and many ill prisoners are left untreated. These problems are compounded by the fact that many prisoners spend their days in isolation, sometimes confined to their cell for twenty-four hours per day⁹¹. Psychologists and sociologists have further found that prison inmates are prone to interpersonal distrust, emotional alienation, diminished sense of self-worth, and distrust of authoritarian environments⁹². Parent inmates, particularly mothers, suffer from the additional emotional stress caused by being isolated from their children⁹³. In short, a general consensus exists that impris-

88. See Suzanne Yang, et al., *Doing Time: A Qualitative Study of Long-Term Incarceration and the Impact of Mental Illness*, 32 *International Journal of Law and Psychiatry* 294 (2009); Doris Layton MacKenzie and Fawn Ngo Mitchell, *Inmates' Experiences in Prisons*, 21 *Journal of Contemporary Criminal Justice* 309 (2005).

89. See Lorna Collier, *Incarceration Nation*, 45 *Monitor on Psychology* 56 (2014), available at <https://www.apa.org/monitor/2014/10/incarceration> (last visited April 26, 2020).

90. See *id.*

91. See *id.*

92. See, for example, Stanley Cohen and Laurie Taylor, *Psychological Survival: The Experience of Long-Term Imprisonment* (Penguin Books 1973); James Tosh, *The Pains of Imprisonment* (SAGE 1982); Craig Haney, *The Psychological Impact of Incarceration* (Urban Institute, 2002), available at <http://webarchive.urban.org/publications/410624.html> (last visited April 26, 2020); Craig Haney, Curtis Banks and Phil Zimbardo, *A Study of Prisoners and Guards in a Simulated Prison*, in Michael Balfour (ed), *Theatre in Prison: Theory and Practice* (Intellect Books 2004).

93. See Carol Anne Hooper, *Abuse, Interventions and Women in Prison: A Literature Review* (HM Prison Service 2003).

onment can produce negative and long-lasting damage in the inmates' psyche⁹⁴.

On the contrary, a driving consideration behind home detention is that, by confining a person to their usual living environment and possibly their circle of loved ones, the above-described psychological effects are mitigable without compromising the deprivation of freedom. Therefore, home confinement can increase the likelihood that the person is positively influenced away from further offense.

3.3.2. *Economic Benefits*

A focus of liberal criminal justice reform is to improve the system in which recidivism and disenfranchisement generate lifestyles of crime motivated by a lack of economic opportunities. The *Murphy* case stresses that crime is often committed as a result of a necessity of finances and a lack of economic opportunity⁹⁵. In instances where a lack of economic opportunity lies, individuals may resort to crime because they have no possible avenue of income to sustain their livelihood. While in traditional incarceration, offenders are unable to financially provide an income for themselves and their families; in the case of home confinement, they are usually encouraged to obtain or retain employment as a condition of probation.

3.3.3. *Statistics*

Statistics support the claim that offenders under home confinement programs reoffend at lower rates than incarcerated offenders. During the first year of the Florida home confinement program, rates of reoffending were almost identical between those placed under home confinement and ordinary probation⁹⁶. Of the total percentage of enrollees in the home confinement program, 14 percent of the participants violated a condition imposed unto their confinement, while 10 percent of those under ordinary probation violated their

94. See Susan Greene, Craig Haney and Aida Hurtado, *Cycles of Pain: Risk Factors in the Lives of Incarcerated Women and Their Children*, 80 *Prison Journal* 3 (2000).

95. See *Murphy*, 108 F.R.D. at 440 (cited in note 1).

96. See Hurwitz, *House Arrest* at 787 (cited in note 53).

respective conditions⁹⁷. Of the 14 percent whose programs terminated prematurely, 2 percent were re-arrested⁹⁸. Although it was the first large scale implementation of the program, the statistics were favorable. The early Floridian program illustrated that offenders are able to follow their conditions successfully. Aside from the low rate of violating the conditions of probation, the program's home confinement implementation also had a significantly low rate of re-offense amongst the probationers. Of the seventy-six probationers surveyed eleven months after the completion of their program, sixty-nine had not committed a new offense⁹⁹. In other words, 91 percent of the probationers had not reoffended.

In New Jersey, where a similar home confinement scheme was implemented shortly after Florida, the state's board of probation reported that, after one year of operation, 29 (13 percent) of the 226 participants had been re-incarcerated¹⁰⁰. Of these twenty-nine individuals, only one was incarcerated for the violation of a criminal statute¹⁰¹. The most frequently occurring cause of recidivism was curfew violations¹⁰².

Home confinement was also suggested to have a mitigating effect on recidivism rates in California¹⁰³. While the Public Policy Institute of California (PPIC), a non-profit and non-partisan think tank, found that the state's various boards of supervisors are reluctant in providing information regarding the matter¹⁰⁴, the information they provide indicates that recidivism rates in California decrease when court systems are more willing to afford alternative sentencing¹⁰⁵.

In 1999, after criminologists from New Zealand observed American implementations achieve success in the electronic monitoring

97. See *id.*

98. *Id.*

99. *Id.*

100. See Frank S. Pearson, *New Jersey's Intensive Supervision Program: A Progress Report*, 31 *Crime & Delinquency* 393, 398–399 (1985).

101. See *id.* at 401.

102. See *id.*

103. *Id.*

104. See *California's Changing Corrections Landscape: Electronic Monitoring* (Public Policy Institute of California), available at <https://www.ppic.org/blog/tag/electronic-monitoring/#fn-19> (last visited April 26, 2020).

105. See *id.*

of criminal defendants, home detention as a form of sentencing was enacted in New Zealand¹⁰⁶. Between 2000 and 2005, the total number of implementations in New Zealand quadrupled¹⁰⁷. In 2003, 87 percent of all home detention orders were successfully completed by the defendants that were subject to the implementation¹⁰⁸. However, far from all of the remaining 13 percent of defendants did in fact breach their conditions of probation. About 9 percent of them did not complete their condition of probation because they were recalled to prison, while about 4 percent voluntarily returned to prison or successfully appealed their original sentence¹⁰⁹. Only 0.3 percent of defendants actually violated their home confinement sentences¹¹⁰. More importantly, when analyzing for reoffending statistics, the New Zealand Parole Board found that while 29.10 percent of criminals in a traditional incarceration sentence reoffended only 11.90 percent of criminals subjected to home confinement reoffended¹¹¹.

Therefore, whether one observes statistics on the earliest conception of home confinement, or contemporary statistics in American as well as international jurisdictions, home confinement suggests itself to be a more effective tool in the prevention of recidivism in comparison to traditional incarceration.

106. See A. Church and S. Dunstan, *Home Detention, The Evaluation of the Home Detention Pilot Programme, 1995–1997* (New Zealand Ministry of Justice 1997).

107. See New Zealand Parole Board, *Annual Report 2004–2005* (2005), available at https://www.paroleboard.govt.nz/about_us/publications (last visited April 26, 2020).

108. See *id.*

109. See *id.*

110. See *id.*

111. See *id.*

4. *Home Confinement and Judicial Discretion*

4.1. *Sentencing Disparity in Murphy and Wayte*

Terms of home confinement are ordered through the judiciary's and a probation officer's discretion, in terms of the strictness of the imposition and the degrees of exceptions allotted¹¹². With respect to the *Wayte* and *Murphy* cases, an observer of law can notate the succinct differences in implementation firsthand. The sentencing in *Murphy's* confinement acted as more of a probationary system to monitor the defendant after her conviction to remind her that she was being surveilled. *Wayte's* confinement, however, was a direct substitute for a prison sentence. As noted, *Wayte* was only allowed to leave his residence in the event of an emergency.

These differences are explained by the different underlying facts of the cases in question and by differing judicial philosophies in regard to avoiding recidivism. In particular, a defendant's criminal history is a driving force in determining the severity of criminal sanctions. If a uniform punishment was ordered for similar offenses, the judiciary would lose its ability to factor in circumstances such as criminal history and various other details that factor in a judge's calculus in imposing a criminal sanction. As discussed in the following paragraph – which considers the example of California – the described judicial discretion is a key concern for both legislation and case law.

4.2. *Room for Judicial Discretion in California's Home Confinement Statute*

In 1988, California adopted its home confinement statute¹¹³. Because Californian prisons were overcrowded, legislators were eager to implement alternative sentencing provisions to alleviate the situation created by California's attempt to decrease crime rates. Different methods of alternative sentencing were implemented. This section

112. See Mark Jones and John J. Kerbs, *Probation and Parole Officers Discretionary Decision-Making: Response to Technical and Criminal Violations*, 71 *Federal Probation: A Journal of Correctional Philosophy and Practice* 1 (2007).

113. See California Penal Code §1203.

will focus on "supervised electronic confinement", as named in California's statute.

4.2.1. *Statutory Language*

California's statute on home confinement was enacted through the State's home detention program. The statute states that a county's board of supervisors may allow a correctional administrator to "offer a program under which inmates committed to a county jail or other correctional facility or granted probation" may voluntarily participate or be placed under house arrest during their sentence in lieu of traditional confinement. The program also allows inmates participating in a work furlough program to opt in¹¹⁴. This introductory passage of the statute gives judges the authority to sentence a criminal defendant to home confinement under the supervision of a probation officer. The probation officer ensures that the defendant is complying with the terms of the sentence.

The statute states that the board of supervisors, "in consultation with the correctional administrator", may prescribe "reasonable rules and regulations" for the defendant to oblige and follow as terms of their sentence. The second clause of the statute provides that the administrators of the home confinement are the deciders of the terms of the defendant's conditions, but that they must decide so reasonably. The statute describes a crucial requirement for participation in the home confinement program: the defendant must agree in writing to comply with the terms; or, in the case of mandated implementation, must be provided with the explicit terms¹¹⁵. The parties thus indirectly agree to the terms prescribed through contractual obligations, the breach of which will result in traditional incarceration. Therefore, the explicit nature of the agreement is crucial to the enforcement of the implementation. The above-mentioned writing outlines the rules and regulations of the program's mandatory-enforced rules, and are to be reviewed annually¹¹⁶.

114. See *id.*

115. See *id.*

116. See *id.*

The minimum requirements of a home confinement program are stated as follows:

[T]he participant shall remain within the interior premises of his or her residence during the hours designated by the correctional administrator, ... the participant shall admit any person or agent designated by the correctional administrator into his or her residence at any time for purposes of verifying the participant's compliance with the conditions [of detention;] the participant shall agree to the use of electronic monitoring ... for the purposes of helping to verify compliance with the rules ... of the home detention program. The devices shall not be used to eavesdrop ... except a conversation between the participant and the [supervisor] to be used ... for ... voice identification; ... the participant shall agree that the correctional administrator in charge of the county correctional facility from which [they] were released may, without further order of the court, immediately retake the person into custody to serve the balance of [their] sentence if the [devices] are unable to ... perform their function, the person fails to pay fees to the provider ... or if the person for any other reason no longer meets the established criteria under this section¹¹⁷.

The defendant must remain inside of their home during the incarceration and is subject to random screenings of cooperation from their supervisor throughout the sentence. Also, the defendant agrees to the electronical monitoring of their movement. The supervisor reserves the right to imprison the defendant if they tamper with the device, do not pay the fees associated with administering the device, or fail to meet any of the other explicit requirements. The statute requires a reasonable cause for the supervising officer to doubt whether the participant has been complying with the terms of confinement. If this doubt exists, the supervisor provides authorization to a peace officer to arrest the offender or retake them into custody for completion of their sentence through traditional incarceration. An arrest warrant

117. *Id.*

is not required, but notification of removal from the program must be given in writing¹¹⁸.

The statute defines the eligibility requirements of the sentence. Also, there is no requirement for a correctional administrator to allow an individual to participate into the program, but it calls for a review of the defendant's record before such a determination is to be made¹¹⁹. The legislators were of the opinion that if a criminal defendant possesses a history of avoiding court dates, they show themselves to be a flight risk and therefore not eligible for a home confinement sentence. A flight risk cannot be trusted with the liberty provided by home detention – there will exist no barrier from this defendant finding a route of overstepping their requirements and evading their court-ordered compliance.

The judge in a sentencing determination provides recommendations of home confinement if they deem it fit for the defendant. If the court recommends home confinement for a defendant, it is to be given great weight – usually implying that the condition of release or a form of alternative sentencing sanction is the most effective course of action. However, the court possesses the authority to reject the imposition of house arrest¹²⁰. A judge is given wide discretion for the implementation of house arrest sanctions because the factors that determine whether the defendant is a eligible candidate vary on a case-by-case basis.

The judge is given discretion also in regard to the supplementary conditions of probation, and thus decides how strict of a confinement is to be sanctioned onto the offender¹²¹. For instance, a judge may encourage applicants to "seek and retain" employment in the community, or in some instances disallow it (as noted in the contrasts between the two, above-mentioned landmark home confinement cases)¹²². Another possible required condition is the possibility of the defendant to attend psychological counseling sessions¹²³. This condition is also deemed part of the rehabilitation process to prevent further offenses.

118. See *id.*

119. See *id.*

120. See *id.*

121. See *id.*

122. See *id.*

123. See *id.*

In order to promote the rehabilitation of the defendant, the court may also allow the defendant to attend educational or vocational training classes¹²⁴. Lastly, an offender is always allowed to obtain medical and dental health assistance¹²⁵. It would be impractical to require a defendant to obtain these treatments in their home, therefore routine doctor's visits are almost always granted to a defendant. Violations of these conditions are punishable by potential reinstatement of traditional incarceration as described above¹²⁶.

A court is further allowed to enforce fees to be paid by the defendant in return for entering the program¹²⁷. The fee is used to soothe the costs of implementation. The statute does not allow the court to charge defendants under the age of twenty-one these fees¹²⁸. Also, the assessment of the fees (in terms of amounts to be charged and frequency of payments) are determined by the court through collaboration with the defendant's probation officer¹²⁹.

4.2.2. *Judicial Interpretation in People v. Superior (Hubbard)*

An appeal held in 1991 was the landmark case and first instance of home confinement in California as a criminal sanction: *People v. Superior (Hubbard)*¹³⁰. This case set the precedent for the state of California's home confinement program in that the court found that the California home confinement statute provided for the establishment of a home detention program in lieu of county jail detention¹³¹. In this case, the prosecution sought to vacate the sentencing order of the Superior Court of Los Angeles County¹³². The Los Angeles Court sentenced the defendant to six months of probation served in her residence under the electronic home detention program discussed above¹³³. The

124. See *id.*

125. See *id.*

126. See *id.*

127. See *id.*

128. See *id.*

129. See *id.*

130. *People v. Superior (Hubbard)*, 230 Cal. App. 3d. 287 (1991).

131. See *id.*

132. See *id.*

133. See *id.*

defendant was subject to a mandatory jail sentence in response to her third conviction for driving under the influence¹³⁴.

The appeals court decided that the imposition of home confinement as a work furlough program exceeded the discretionary authority of the judiciary because the judiciary on the trial level stepped into the bounds of authority that was statutorily handed to the Chief Probation Officer (CPO)¹³⁵. The appropriate CPO is the decider of whether a defendant is allowed to enter a work furlough program (defined as a program in which a defendant is allowed to seek full-time employment during a probationary period or incarceration)¹³⁶. The defendant in this case was unemployed at the time of question, therefore the question of whether the defendant was an eligible candidate for the program was completely out of the boundaries of the judiciary's authority¹³⁷.

However, although the actual home confinement sentence was overturned, this case set the standard of future cases. The idea of a "minimum security inmate" as stated in the statute was defined in this case as an inmate eligible for "type IV local detention facility as described in Title 15 of the California Code of Regulations" or for placement into the community for work or school activities, or those considered a minimum-security risk "under a classification plan developed pursuant to section 1050 of title 15 of the California Code of Regulations"¹³⁸. The judges in the appeal explicitly defined a "low-risk offender" as an individual who, "based on an objective scoring analysis relating to the offender's risk of reoffending", is deemed worthy of the home confinement program¹³⁹. Moreover, other factors admitted into this calculus include academic/vocational skills, employment, financial management, alcohol and drug usage, emotional stability, prior convictions, and prior probation records and revocations¹⁴⁰. In regard to the work furlough program, the appeals court decided that a judge may only place the defendant into a worker's furlough program

134. See *id.*

135. See *id.*

136. See *id.*

137. See *id.*

138. *Id.*

139. *Id.*

140. See *id.*

once they've been previously admitted into it by the appropriate body¹⁴¹. However, the judiciary is allowed to retain the right to reject an applicant previously accepted into the program¹⁴².

The prosecution argued that non-traditional incarceration would have been an inappropriate sentence to impose onto the defendant¹⁴³. Although jail time was explicitly prescribed for the crime committed by the defendant, the court decided to weigh more value onto the fact that the home confinement statute did not exclude alternative sentencing in such cases¹⁴⁴. The court justified this determination by observing that the defendant qualified as a "minimum risk offender", as defined above, and that the crime of driving under the influence was explicitly defined in the statute as an example of a possible crime deserving of alternative sentencing rather than incarceration¹⁴⁵.

According to the appeals court, once the above-mentioned requirements are met, the appropriate body (a county's board of supervisors) decides the matter via recommendation of probation for a defendant¹⁴⁶. The driving force behind this idea is to curb the power of judicial authority for the sanctity of the separation of powers¹⁴⁷. In terms of efficiency, the judiciary and probation office should work together with regard to these decisions for the implementation of a uniform standard of home confinement for first-time, non-violent offenders in order to ensure that discrepancies such as the one that initiated this appeal do not transpire. If the judiciary and board of supervisors were operating more succinctly and in a unified manner, there would be a more cohesive determination and standard of application that is necessary for such a widespread implementation to be effective.

4.3. *Comment*

Judicial discretion in home detention sentencing is necessary for the assurance of more tailored and humane sentencing. However,

141. See *id.*

142. See *id.*

143. See *id.*

144. See *id.*

145. See California Penal Code § 1203.016.

146. See *People*, 230 Cal. App. 3d. (cited in note 130).

147. See *id.*

the judiciary must work hand in hand with the board of probation to find the most practical and just confinement terms¹⁴⁸. In terms of its relation to the court, a probation officer serves as a counselor, advisor, director and authority figure¹⁴⁹. Most courts divide their probation officers into groups that work towards either pre-sentencing or post-sentencing goals¹⁵⁰. After noting the presiding prosecutor's sentencing recommendation, the judiciary will consider the presiding probation officer's sentencing recommendation as well¹⁵¹. The judiciary values the opinion and recommendation of a probation officer because, unlike a prosecutor or defense attorney, the probation officer will provide an impartial perspective¹⁵². The fact that a felon is statistically more likely to undergo probation rather than a prison sentence suggests that these branches of the criminal justice system seem to frequently collaborate efficiently¹⁵³.

5. Conclusion

In the United States, home confinement has developed into a versatile form of alternative sentencing. The evolution of home confinement sentencing schemes is owed in part to shortcomings of the American criminal justice system, namely the overcrowding and growing cost of prisons. This trending favorability is also strongly encouraged by the significant potential benefits that home confinement schemes possess in promoting rehabilitation and preventing recidivism. The objective and subjective dimensions of its goals are strongly interconnected. The prevention of recidivism brings forth cost savings because it counters the overcrowding of prisons and the associated costs. With a decrease in the prison population, more resources

148. See Scott MacDonald and Cynthia Baroody-Hart, *Communication Between Probation Officers and Judges: An Innovative Model* (U.S. Courts 1999), available at https://www.uscourts.gov/sites/default/files/63_1_7_0.pdf (last visited April 26, 2020).

149. See *id.*

150. See *id.*

151. See *id.*

152. See *id.*

153. See *id.*

can be untapped for the successful rehabilitation of imprisoned offenders. Concurrently, the attainment of said benefits is dependent on the correct use of judicial discretion, particularly in regard to the collaboration between the judiciary and relevant boards of probation. Legislation, however comprehensive, cannot be the only guiding light in determining an individual's terms of confinement and incarceration. Ultimately, an understanding of the subjective dimensions of every individual case is necessary for the success of this alternative to incarceration.