‘I KNOW WHERE YOU LIVE!’: ELECTRONIC MONITORING AND PENAL POLICY IN ENGLAND AND WALES 1999 - 2003

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Abstract

Electronic monitoring (EM) in England and Wales remains surprisingly understudied and undertheorised. Given the strength of New Labour’s commitment to it, heightened in the recent Correctional Services Review, coupled with moves towards the increased use of surveillance in criminal justice, it is not unreasonable to think that EM technologies will one day become a normal and dominant feature of community supervision. This paper reviews recent policy developments regarding EM and seeks to clarify its exact nature as a penalty, scotching the idea that it is incapacitative in the way that both its supporters and critics have claimed. It explores the increasingly ambivalent place of EM on the tariff and develops a typology of compliance, so as to better understand the difference EM might make to community supervision.

Introduction

‘Friends, Romans and countrymen ..... I know where you live!’. Politician in Alan Bleasdale’s ‘GBH’. Channel 4, 1991

This paper will argue that the emerging EM technologies being used with offenders in England and Wales constitute the beginnings of a significant transformation of the way in which community supervision will be understood and undertaken in the early decades of the 21st century. It will do so by examining both the expectations and intentions of policy makers in regard to EM (as far as these can be ascertained), and also its operational impact. There is, at present, a discrepancy between the two - EM has not thus far developed on quite the scale, or at quite the pace, which policy makers seem to have anticipated and desired but its operational impact can no longer be regarded as negligible. At the end of November 2003 131,847 people had experienced EM since the two main schemes - adult curfew orders and Home Detention Curfew (early release from prison) were rolled out nationally in 1999; on that same day 8618 people per day were
subject to it (www.probation.homeoffice.gov.uk). England and Wales are also Europe’s largest EM scheme - in March 2003 77% of all offenders tagged in Europe were here, with the Netherlands, at 8.3% (n=770), coming next (Toon, 2003). Scotland, ranked fifth with 3.3% (n=300), will not be covered here, although the dynamics of EM’s development there yield insights which support the paper’s general argument, insofar as EM was implemented nationally despite research into three pilot schemes which suggested that Scotland did not need this measure (Lobley and Smith, 2000, Smith, 2001).

At the present time, the Home Office manages eight EM programmes:

Table 1: Total number of new starts on Electronic Monitoring by each financial year -

<table>
<thead>
<tr>
<th>Programme</th>
<th>Total number of new starts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>98/99</td>
</tr>
<tr>
<td>Home Detention Curfew</td>
<td>3028</td>
</tr>
<tr>
<td>Adult Curfew Order</td>
<td>415</td>
</tr>
<tr>
<td>Juvenile Curfew Order</td>
<td>8</td>
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<tr>
<td>Adult Bail</td>
<td>51</td>
</tr>
<tr>
<td>Juvenile Bail</td>
<td>0</td>
</tr>
<tr>
<td>Detention &amp; Training Order</td>
<td>0</td>
</tr>
<tr>
<td>Release on Parole Licence</td>
<td>1</td>
</tr>
<tr>
<td>Voice Verification</td>
<td>0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>3503</td>
</tr>
</tbody>
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28th January 1999 – 30th November 2003
From: www.probation.homeoffice.gov.uk

Some of these programmes are available nationally, some are still only used in a number of experimental sites. What this listing obscures is the very variable ways and contexts in which EM can be used. An EM-based curfew can be a stand-alone measure, or it can be used in conjunction with a variety of other measures. It can be used for varied periods of time (although there are legal maxima) and it can be customised to suit individual circumstances. There are 17 legal and administrative permutations of EM available for young offenders (which reflect an abject failure of legal draughtsmanship). Among them, the Intensive Surveillance and Supervision Programme - a sentencing package which includes education, reparation, offending behaviour work and electronic monitoring - is the most intensive penalty with which EM is associated. A near identical version for young adults, the Intensive Control and Change Programme is also being experimented with.
This paper will focus on the two largest EM programmes - the early release Home Detention Curfew (HDC) scheme and the adult curfew scheme, and appraise the imminent development of tracking. These alone provide evidence of the underestimated importance of EM; and although EM developments in youth justice have been a little different, any appraisal of these or other programmes would merely strengthen the general argument. The early history of EM in England, covered elsewhere (Nellis, 1991; 2000; Fay, 1993; Whitfield, 1997), does not warrant repetition; the only reminder required here is that journalist Tom Stacey, who originated the idea of EM in Britain and who set up the Offenders’ Tag Association in 1981 to promote it, hoped it would help reduce the use of unnecessary imprisonment. Insofar as EM-based curfew orders could have contributed usefully to the intensive community penalties desired by government at that time, this was not an unreasonable belief (Lilly and Nellis 2000). The HDC scheme keeps approximately 3000 people out of prison at any given time (Toon, 2003), but neither it nor curfew orders have helped significantly to reduce or stabilise the use of imprisonment, which stands at 74,000 and is projected to rise further. EM-based measures constitute a transformative development in penal policy nonetheless, because they create the possibility of making the surveillance of an offender’s location and schedules integral to the very idea of community supervision, in a way that has not been practicable in the past.

**The Home Detention Curfew Scheme**

The Home Detention Curfew (HDC) scheme was introduced by the New Labour government in the Crime and Disorder Act, in July 1998, to help manage the 62,000 (and rising) prison population it had inherited on taking office in May 1997. No such scheme had figured in its election manifesto, and the idea may have originated with the probation service. Drawing on international developments in EM, and particularly Holland, the Association of Chief Officers of Probation (Association of Chief Officers of Probation, 1997), had suggested using EM, four months before New Labour was elected, ‘to reduce prison pressures by using tagging for phased release schemes prior to current prison licences’. In September 1997 Graham Smith, a Chief Inspector of Probation much respected and highly influential in Whitehall, commended EM’s use in releasing prisoners to a Council of Europe conference. The scheme was announced to the press in November (Benetto, 1997).

Electronic monitoring can also offer a resource for pre-release work. It is now technologically efficient and can provide temporary or early release into a community under conditions of security and public protection. Its increasing sophistication merits a significant growth in its use. (Smith, 1999:119)

The HDC scheme was crisis-managed into existence, without localised trials, and became operational nation-wide on 28th January 1999. This absurdly short lead-in time entailed massive preparatory work from prison staff, area probation services and the newly contracted EM providers. The scheme enabled short sentence prisoners over age 18 - those serving under four years and over three months - to be released up to 60 days early,
the exact amount of time being determined by the length of the original sentence. Release and precise curfew specifications were at the discretion of the governor, based on risk assessments by prison and field probation staff. Certain exemption criteria were specified from the outset, relating mostly to violent and sexual offenders, those sentenced under mental health legislation and those who had violated previous release conditions. Return to prison was the penalty for serious or sustained non-compliance. The government anticipated 30,000 releases in the first year (out of 60,000 considered) (National Probation Service, 1998), although in reality, only 14,000 were released (out of 45,000 considered). The proportionately lower release rate (31% rather than 50%) was attributed to the caution of prison governors. (Dodgson and Mortimer, 2000), many of whom resented making risky, individualised decisions, creating the appearance of a sophisticated, personalised approach to prisoner resettlement when in reality HDC was primarily a mechanism for managing prison numbers.

Both the media and penal reform groups perceived the latent strategic purpose of HDC although in the Home Office, this ‘could never be openly acknowledged’ (Faulkner, 2001:196) - as had also been the case with parole. Instead, ministers and officials presented HDC as a means by which short-term prisoners nearing the end of the sentences experienced

a disciplined return to the community. .... HDC offers to help prisoners reintegrate more effectively into society. It will deprive them of their liberty for a major part of the day, but also provide some structure and order into (sic) their lives (National Probation Service, 1998: para 2.1-2 emphasis added)

Despite recognition of a problem of post-release offending (Home Office, 2001: 47), this emphasis on ‘disciplined resettlement’ was largely disingenuous: there had been no evidence-based argument that surveilled curfews - as opposed, say, to better support services - would be a solution to it. Such rhetoric was nonetheless consistent with New Labour’s tough-on-crime stance, and in fact proved helpful in defending the HDC scheme from early outbursts of ‘populist punitiveness’ (Bottoms, 1995) in the media4, and indeed in parliament. The Conservative opposition did make political capital out of early release (albeit without mentioning the tag), publicising the fact that 200 offences, including two rapes, were committed by the first 14,000 released offenders, even using this in their first party political broadcast in the 2001 election (Collings and Seldon, 2001:68), despite Tom Stacey having earlier written to the Daily Telegraph to point out that HDC successes far outweighed failures.

The Home Office weathered these storms, and extended HDC at the first opportunity. A joint thematic review by the Prison and Probation Inspectorates (Her Majesty’s Inspectorate of Prisons/Her Majesty’s Inspectorate of Probation, 2001) had strongly supported the scheme, noting nonetheless that there were unacceptable variations in its use among prisons of the same functional type, and insisting that some could use it more.
In November 2001 new Home Secretary David Blunkett encouraged prison governors to be bolder. Prison Service Director Martin Narey berated them for 'deliberately obstructing the process' (Stone, 2002: 951). A compromise resulted: governors had some risk assessment pressures taken off them by the creation of 'presumptive HDC' (near-automatic early release for those serving under 12 months), while the scheme itself was expanded from 60 to 90 days (catalysing the immediate release of 600 prisoners).

HDC was further extended in mid-2003. For offenders serving over 12 months (but not those serving less) the maximum curfew period was increased to 135 days. This brought forward the release dates of all eligible prisoners (some new exemptions were added, including prostitution, brothel keeping, living off immoral earnings, indecent exposure, possession of an offensive weapon) by between approximately 1 day and 6 weeks. The intention was to make 1000 more prisoners eligible for immediate release on the 14th July, subject to passing a risk assessment. The releases were, however, to be phased over July and August, to avoid flooding the Probation Service and the electronic monitoring companies with more work (risk assessments and supervision for the former, tightly scheduled home visits to fit tags for the latter).

The new scheme did not, in fact, expand on quite the scale intended. Using a range of probation contacts, Fletcher (2003) estimated that only 400 more people - not 1000 - were actually brought forward for release; many more, although eligible in terms of the time criteria, were excluded because their offence now placed them in the expanded exemption categories. Furthermore, in a separate and uncoordinated development the police cracked down on bail jumpers and fine defaulters, leading some prisons to anticipate an increase in population over the summer rather than a decrease. In addition, extending the HDC maximum to a more onerous 135 days may, paradoxically, have discouraged some prisoners from considering early release.

In its own terms, HDC has been a major success - clear evidence of what can be achieved quickly when sufficient political will exists to override the inevitable resistance. It met its implicit objective of making prison numbers more manageable, and its explicit objective of intensifying discipline in the prison release process. It has had the incidental effect of winning greater support for EM from probation officers - more of them were exposed to it than to curfew orders, and it was, after all, ensuring that offenders spent less time in prison (Nellis and Lilly, 2000). But the overall penal rationale of HDC remains dubious. Perhaps the best that can be said for it is that it has been a rational response to the irrational situation of an inexorably rising prison population, as two senior prison service officials recognised early on:

While any relief to the prisons is obviously welcome, this proposal is self-evidently a safety valve that demonstrates just how out of balance the criminal justice system has become. There is something badly wrong in a situation in which more and more offenders are shoved into prison at one end, while the government exercises every ingenuity to invent cumbersome
The Halliday Review of the Sentencing Framework (Halliday, 2001) later took a similar view and, against the grain of government policy (Home Office, 2001: 44) proposed terminating the HDC scheme (although not the use of tagging after prison), on the grounds that discretionary early release undermined transparency in sentencing. The HDC scheme, however, had proved itself too useful as a means of managing prison numbers for government to abandon it. The White Paper, 'Justice for All' (Home Office, 2002b) reflected the Prison and Probation Inspectorates' pragmatism regarding HDC rather than Halliday's ostensibly more principled position, arguing that a 2% reoffending rate (among 44,000 releases) indicated that the scheme:

struck a good balance between resettlement of prisoners and providing protection for the public. ... HDC is a key resettlement tool which gives authorities the opportunity to keep an offender under close supervision while managing their transition back to the community. (Home Office, 2002b: para 6.26)

Arguably, however, the anomalies in the HDC scheme have only been accentuated by its extension to 135 days. One consequence of this has been the arrival in prison of offenders who, having spent time remanded in custody, are eligible for early release within days of arriving in prison (something which the original version of the scheme sought to avoid). Complex, time-consuming risk assessments must then be undertaken by prison and probation staff. As a probation officer administering HDC in a large city prison told me, it would make more sense to put the offender straight onto an EM-curfew order (Bob Marsh, personal communication October 2003). Obliquely, this then raises the bigger question of why EM-curfew orders have been less used than expected, and why, in general, they have proved to be a less successful measure than HDC.

Curfew Orders with Electronic Monitoring

A putative 'curfew order' in the form of a 'night restriction requirement' in a supervision order was introduced for juvenile offenders in the Criminal Justice Act 1982, but was rarely used. Various professional associations in probation, youth justice and local government had judged it too intrusive and unenforceable without risking staff safety during late night check-ups at offenders' homes. Magistrates (who had introduced curfews into the Act) reluctantly accepted this. The Green Paper which launched the 'punishment in the community' initiative (Home Office, 1988) resurrected the idea of a free standing curfew order for adult offenders, but recognised that it could only become a viable penalty if the enforcement problem were solved by electronic means. As such, curfew orders, (and also combination orders) were intended by the Criminal Justice Act 1991 to set a new standard in the continuing search by government for 'the ultimate community penalty (or penalties)' that had begun in the late 1970s - the tough, intensive,
high-tariff, ‘credible’ measures which would enable sentencers to use prison less but still satisfy public demands for punishment and public protection.

EM-based curfews could be used as a stand-alone order, jointly with another community penalty, or alongside a pre-existing sentence, and seemingly offered a greater degree of control over offenders than probation or community service orders. It was the opposition of the probation service to EM-based penalties that had originally prompted government to use private security organisations to deliver the original EM/bail curfew experiment in 1989/90 (in Nottingham, Westminster and Newcastle) (Mair, 2000). By the time three areas (Manchester, Norfolk and Reading) had been identified in which to trial curfew orders in 1996, the commitment to private sector contributions to penal practice was stronger. The penal climate had itself changed from 1991; community penalties were still to be ‘strengthened’ (Home Office, 1995) but prison reduction was no longer on the government’s agenda, and the work of the probation service was openly denigrated by ministers.

It is mostly from research into the original trial areas (which steadily expanded) that our basic knowledge of EM-based curfews derives. Numbers of orders did increase over the first and second years, from 83 to 375 but the researchers still concluded that ‘compared with other disposals, the curfew order remained a rarely used sentence’ (Mortimer and Mair, 1997: 2). Magistrates seemingly used curfew orders as high tariff measures, on offenders predominantly guilty of theft, burglary, driving while disqualified and drugs offences who would otherwise have been at risk of custody, or had already experienced it. Four out of five orders were successfully completed, ‘the main reasons for breaches ... [being] persistent absences or interference with the monitoring equipment’ (Mortimer and Mair 1997: 1). That the cost of administering a curfew order was less than probation, but more than community service, together with clear evidence that EM technology was reliable cannot but have been helpful to the Home Office. The finding that many tagged offenders, ‘need[ed] support to cope with the demands of the sentence’ and that the relatively untrained private sector staff ‘coped well with these unforeseen difficulties’ (Mortimer and Mair 1997:4) was one of several that the probation service found uncongenial.

The trials themselves proved that EM-curfew orders worked adequately to reduce re-offending during the period of curfew, but never allayed all magistrates’ and probation officers’ uncertainties about exactly who to use them with. It was, nonetheless, always likely that such orders would be rolled-out nationally, with or without a change of government. As it was, New Labour developed bold ambitions for EM, and from the outset looked beyond the existing curfews: Home Secretary Jack Straw saw EM as integral to ‘the future of community punishment’ indicating that it may ‘be used to monitor offenders wherever they are in the community; [or] to track their movements, and make sure, for example, they stay away from certain areas’ (Home Office, 1997: 1).
Debates about enforcing community penalties actually gave New Labour its rationale, and its moral authority, for expanding EM-based penalties. These arose because, as Faulkner (2001: 193) notes, the government considered 'that standards of compliance with the conditions of community sentences - and of their enforcement - were sometimes so low that community sentences could be seen as neither effective nor credible' (see also Hedderman, 2003). Thus, under New Labour, what I will call the enforcement potential of community penalties came at least to equal - and arguably surpass - in political importance their substantive features, and EM-based penalties scored notably better on this than more traditional non-custodial measures.

But the use on the ground of EM-based curfews still remained less than expected in the first year of national roll-out. Walter, Sugg and Moore (2001) confirmed continuing sentence and probation officer ambivalence about them. The then Prisons and Probation Minister acknowledged that 'although numbers of orders are rising, the use of curfews is patchy', writing in December 2001 that much depends:

on individual probation officers recommending monitoring in pre-sentence reports and in magistrates passing sentences that include EM. It is my strong hope that this may occur in response to the Communications Strategy [currently being developed] (Hughes, 2001)

Perhaps the ‘Communication Strategy’ played its part. Certainly magistrates and probation officers were separately encouraged to make more use of curfew orders - and more were imposed. In 2002, 5628 were made on adults and 1272 on juveniles. In 2003, the equivalent figures were 9264 and 2078. They were not, however, used consistently as high tariff measures: the Home Office itself estimated (in 2002) that 20% displaced a custodial sentence, 5% displaced other community sentences and 43% displaced fines (Toon, 2003). This was hardly ‘success’ in the terms usually envisaged for curfew orders, but in the Criminal Justice and Court Services Act 2000, the Home Office had already committed itself to the more general use of EM technologies to improve the enforcement of community penalties. And yet even as this legislation was being enacted, the Home Office-steered Halliday Review of the Sentencing Framework, was presaging even more change, questioning time-honoured forms of community supervision and bringing the search for the ultimate community penalty - as it had hitherto been understood - to an end.

The Criminal Justice and Court Services Act 2000: Normalising EM

Although Faulkner (2001: 193) rightly observed that the Criminal Justice and Court Services Act 2000 (along with new National Standards) ‘between them demand much higher standards of compliance and much more rigorous processes of enforcement’ the Act’s significance for EM has largely gone unremarked (but see Jason-Lloyd, 2001). This is possibly because its other significant features, such as the creation of a National Probation Service, and the hugely symbolic renaming of the probation order have eclipsed its
ostensibly ‘lesser’ implications - but more than any previous legislation it embodied New Labour’s modernising enthusiasm for EM technology, and its determination to transform community penalties. The Act introduced seven new legal uses of EM and two new EM technologies. The latter were tracking (monitoring an offender’s movement in real-time) and voice verification (monitoring an offender’s presence at a sequence of multiple locations), Apart from tracking, the other new legal forms included curfews as part of the Intensive Supervision and Surveillance Programmes, which could then be used either as an alternative to custody package in its own right, as bail support, or as part of the post-release element of a Detention and Training order. It introduced a curfew as a condition for ordinary prisoners released on licence and for dangerous offenders released under the early warning scheme (see Home Office Circular 34/01). All three of these release programmes could use either conventional tagging technology, or voice verification technology, or both. Most significantly - because of the potential scale on which this might be used - it introduced the possibility of including a curfew order in a Community Rehabilitation Order or a Community Punishment and Rehabilitation order, and the use of voice verification to monitor any conditions in these orders. The government ministers who piloted the Bill though Parliament made clear that the intention behind this was to enhance the potential for enforcement in conventional community penalties:

The Bill will allow for electronic monitoring of a range of community sentences and electronic monitoring of conditions of release on licence. These new uses of electronic monitoring will make compliance with community sentences far easier to monitor (Lord Bassam, Hansard, House of Lords, 3rd July 2000 emphasis added).

The evaluation of the trials found that curfew orders were more strictly enforced than other community penalties, a fact that places greater value on completion. The primary reason for this is the fact that the electronic monitoring contracts leave little discretion in the enforcement of breaches. The monitoring equipment ensures that violations of curfew are detected immediately, and offenders in breach of their order are very quickly returned to court by the contractors. (Paul Boateng, Hansard, House of Commons 19th July 2000 emphasis added)

What was being envisaged here was the normalisation of EM - making the monitoring of location and schedules and, indirectly, the activities undertaken at or within them, into a routine and commonplace feature of supervision in the community for both adult and young offenders, both before or instead of, and after, prison. Discursively, this was being presented as a solution to the enforcement problem inherent in existing community penalties.

The Act also introduced a new measure - the EM-monitored exclusion order, which could prohibit an offender’s entry to a place or area for two years in the case of an adult, and three months in the case of a juvenile. An exclusion requirement could be incorporated in
community sentences and parole licences. Although, like tracking, these were to be trialled later, the government spokesmen placed great presentational emphasis on this measure, portraying it as a major new development in the fight against crime. All the new measures in the Act were said ‘to build on the success of the HDC scheme and curfew as a community sentence’ (Home Office, 2001b: 1) and while there was evidence of continuity and development, the step change entailed by making EM integral to the very conception of community supervision was not spelled out.

Pilot projects for using curfews in Community Rehabilitation (and Punishment) Orders, and in licences, and for voice verification (which had already been used experimentally in some youth offending teams) were announced in July 2001. The trial areas were West Yorkshire, Nottingham and Hampshire. By December 2001 the then Home Office prisons minister was confident that this initiative had been launched well:

It has taken some time for the Probation and Court services to inform and train their staff/magistrates in the new sentencing options and they are only now in a position to begin applying them. Measures have been taken, however, to raise awareness of the provisions and to encourage their use. Officials have had regular meetings in the pilot areas to develop good working relationships between the Probation and Court services and the contractors. It is being emphasised that EM can be very flexible and used to work around domestic arrangements and childcare considerations that are particular to women (Hughes, 2002).

In reality, there was much less uptake than expected of the new measures, for women or anyone else. Normalisation was impeded. The impediments warrant investigation. The researchers involved in evaluating the new uses of EM will doubtless tell their own story, but what I still want to highlight here is not the limited developments on the ground, but the scale of the Home Office’s ambition for EM. It was willing to infuse EM into a wide swathe of community supervision, willing to legislate in anticipation of new technologies and thereby - the inevitable corollary of this - to strengthen the private sector contribution in community penalties. The Criminal Justice and Court Services Act 2000 sought to intensify the ‘enforcement potential’ of community penalties (and licences), and to reconfigure the nature of compliance with them. This can be understood as move away from traditional ‘trust-’ or ‘threat-based compliance’ towards ‘surveillance-based compliance’. Some parliamentary debate on EM gave the impression that with technology a professional’s trust and an offender’s cooperation no longer mattered in enforcement. This is mistaken, but there can be no doubt that ‘surveillance-based compliance’ devalues measures which are merely ‘trust-based’, and which have only ‘low enforcement potential’. Taken in conjunction with a variety of other changes in penal policy (see Scheerer, 2000), the Criminal Justice and Court Services Act 2000 can be understood as emblematic of the emerging shift from a humanistic-rehabilitative paradigm of offender supervision, to a surveillant-
managerial paradigm, whose significance I have tentatively explored elsewhere (Nellis, 2003a; 2003b)

**The Halliday Review: Misunderstanding EM**

Such is the pace of change in penal policy that even as the Criminal Justice and Court Services Act was being debated and enacted, longer term plans were being developed which would, at the very least, complicate the kind of future it envisaged. The Halliday Review of the Sentencing Framework was an ambitious ‘overhaul of law, practice and institutional arrangements for dealing with convicted offenders in Britain’ (Rex and Tonry, 2000: ix), albeit one which was substantially steered by pre-determined New Labour policy (Home Office, 2001). Inter alia, it provided the first official opportunity to explore the implications of EM for sentencing since its advent in the CJA 1991, and given that EM had been ‘one of the most innovative developments of the decade’ (Windelsham, 2001:292), with significant implications for the enforcement of certain types of penalty, one might have expected it to do so. The opportunity was not taken - the Halliday Report contained nothing distinctive or original about EM as such, although because the report broke with the way in which community penalties had traditionally been conceived, it nonetheless had implications for the future frameworks in which EM would be used. Halliday effectively abandoned the search for the ultimate community penalty - a measure tough and credible enough to enable the reduced use of imprisonment, but falling short of imprisonment itself - and substituted instead the government’s idea of the ‘seamless sentence’ (Home Office, 2001), in which intensive community supervision was to be preceded or entwined with short periods of imprisonment.

Halliday’s overarching typology of sentencing was too crude to capture what is distinctive about EM. The Report characterised sentences broadly as having punitive, reparative and crime reductive aims, the latter being subdivided into rehabilitative, deterrent and incapacitative elements. It is unclear where ‘surveillance’ might fit in this. Halliday’s reference to EM-based curfews as ‘protective measures’ (Home Office, 2001: 23) implies that he saw them as incapacitative (a penal strategy of which he was otherwise unenamoured). This implication is misleading, and it is indicative of the shallowness of Halliday’s thought on EM that it accepted uncritically the rhetoric (used by both EM’s supporters and opponents) to characterise it as an intrinsically tough, indubitably high-end penalty. Cavadino, Crow and Dignan (1999: 119), for example, despite recognising its limitations, still called it ‘non-custodial incapacitation’. Faulkner (2001: 193) anticipates ‘forms of electronic monitoring [which] will be able to restrict a person’s liberty to a degree which is virtually equivalent to the loss of liberty which is caused by imprisonment’. Hudson (2003: 180) believes they have already arrived: ‘electronically monitored home confinement would certainly seem to be turning homes into prisons, rather than keeping people out of ‘prison’ at ‘home’. Perhaps compared to other community penalties, EM-based penalties are more readily characterisable as incapacitative and prison-like - phrases like ‘detention’, ‘jailspace’, ‘turning the home into a prison’, ‘virtual prison’ and ‘electronic ball and chain’ (see Aungle, 1994, Gibbs

and King, 2002), are intended to convey just such an impression. But such metaphors obscure the kind of control which EM imposes, which, although it may well be onerous, falls some way short of the incapacitation entailed by walls, bars and razor wire. Even for offenders who admit to finding EM-based penalties burdensome, compliance with them remains as dependent on their consent, co-operation and goodwill - their readiness to act responsibly - as probation or community service. It is quite true that non-compliance will be registered (and probably acted upon) much more quickly than with other community penalties - this is precisely the difference that surveillance technology introduces - and this may have a deterrent, prudential effect that merely trust- or threat-based penalties do not have. But - even when offenders experience a curfew as confining - this is not incapacitation in the penal sense. Surveillance-based compliance requires self-discipline in a way that incapacitation-based compliance does not. With EM/surveillance trust still matters - offenders have a meaningful choice regarding compliance (which incapacitation, properly understood, denies them). Seen this way, EM-based penalties are not prison-like at all, and while surveillance-based compliance has greater enforcement potential than trust- or threat-based compliance, the space it leaves for trust and self-restraint ensures that it still resembles traditional community penalties.

The corollary of Halliday's mistaken belief that EM was incapacitative was the equally uncritical acceptance that it must intrinsically be a high-tariff penalty. This was most obvious in discussion of the proposed generic community punishment order. Only the highest tier included 'curfew/exclusion (with tag where appropriate)' as a possible component; neither of the two lower tiers contain anything as severe. It was the tariff-position of cognitive behavioural programmes which perplexed Halliday - the place of EM seemed obvious in comparison: 'The 'punitive weight' of the chosen ingredients [in the generic sentence] would be relatively easy to measure - such as compulsory work and curfew with tag - but more difficult in areas such as compulsory programmes' (Halliday 2001: 41). In reality, sentencers charged with making complex individual decisions about community penalties have not always found it easy to gauge the 'punitive weight' of EM-based penalties. (This may not have been entirely clear in the Home Office research available to Halliday, but it has become clear since).

Although Halliday aimed to find an alternative to short, less than 12 month, custodial sentences, the 'seamless sentence' cannot be understood as a community penalty in the traditional sense, because a foretaste of custody now became integral to it. Halliday took for granted that curfew and exclusion orders, monitored by EM, would be used in the non-custodial components of these sentences. Some of the seamless sentences were to be understood as 'intermediate sanctions', to be developed out of a new and more co-ordinated use of probation centres, prison and probation hostels and attendance centres, and involving 'serious loss of liberty, but some continuing freedom' (idem: 35) - later described as 'containment in the community' (idem:66). Halliday ruled out intermittent imprisonment as an intermediate sanction - it having been twice considered and found wanting in the recent past (see Shaw and Hutchinson (1984) for an earlier debate) - but argued that
the effects of intermittent imprisonment can be achieved in other ways. An offender receiving a community sentence can be required to reside at a named address, including a probation or prison hostel; to attend a designated centre at a designated time, to stay at home under curfew, electronically monitored, for designated periods; and to refrain from entering designated areas at any time (Shaw and Hutchinson, 1984: 35)

As was noted earlier, the Halliday Report argued that the HDC scheme should be ended, because early release undermined transparency in sentencing. This particular proposal - knowingly made against the grain of government policy (Home Office 2000:44) - proved politically unacceptable, but many of the Report’s other proposals duly found their way into the White Paper Justice for All, and thence into the Criminal Justice Act 2003. Its generic community punishment order, which replaces existing community sentences, including curfew orders, includes EM as one of a range of options that can be combined into a customised sentence for particular individuals. As a Prison Reform Trust researcher notes, ‘it is hoped that this new approach will ensure that tagging is more widely used by the courts’ (Solomon, 2003:47). The new Act has in fact introduced ‘intermittent custody’ despite Halliday’s reservations about its administrative complexity, but as offenders subject to it will also be eligible for HDC, making it more complex still, Halliday may yet be vindicated. Whatever the precise consequences of the Criminal Justice Act 2003 for EM its enactment means that many of the legal measures introduced in the Criminal Justice and Court Services Act 2000 will be rendered obsolete without ever being used - exclusion orders, for example, although the 2000 Act remains the touchstone of the government’s manifest enthusiasm for EM-based penalties, including tracking.

**Tracking and its Prospects**

In debate about the future of EM it has been commonplace for some years to anticipate that tracking an offender’s movements rather than, as with a curfew order, merely restricting them to one place (at night), would be the next key development. It should not, however, be forgotten that the Offender’s Tag Association imagined and promoted tracking tagging simultaneously with curfew tagging in the early eighties, and, indeed that it was always their preferred form of electronic monitoring (Stacey, 1989). This thinking surfaced in the 1988 Green Paper: ‘the main justification for [EM’s] use in England and Wales would be to enforce tracking or an order requiring the offender to stay at home for a limited period, thereby making it possible to keep out of custody offenders who would otherwise be in prison’. (Home Office, 1988:4.2). Interestingly - and unlike the OTA - the Green Paper considered that its use for tracking would be ‘less restrictive’ than its use with a curfew (Home Office, 1998: 3.20). Even after curfew tagging was established, Tom Stacey (1993, 1995a, 1995b) remained ardent in his promotion of tracking tagging, and, as he envisaged, the technology - using global positioning satellites (GPS), although this is not the only way it can be done - has become available.

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and Michigan are now using this method, and that ‘one of the most important benefits of satellite tracking is the increased protection it offers crime victims’, in terms of specifying and monitoring exclusion zones, and being able to send a pager or text message to the victim (and indeed to the offender and his supervising officer the moment perimeters are broken). She quotes a Florida Judge who sees tracking as the ‘ultimate means of protecting society’ and notes a survey of Florida probation officers showing that they believed tracking to be an ‘ideal for violent (particularly domestic violence) offenders and sex offenders’.

Jack Straw’s early anticipation of tracking in 1997 notwithstanding, the Home Office first showed public interest in tracking after the murder of Sarah Payne by a known paedophile in 2000, and clearly presented it as a measure likely to improve public protection. It was legislated for in s62 of the Criminal Justice and Court Services Act 2000, with a view to implementation when reliable technology became available. The Shadow Home Secretary was quick to indicate when it was (Conservative Research Department, 2002), but the Home Office was cautious. A British company called Sky Guardian demonstrated its GPS technology at the Labour Party conference in October 2003 and only then did a government plan to tag between 100-500 paedophiles seem imminent. The technology, which had been devised in conjunction with experts on sex offending, would ‘allow probation services and police to pinpoint the wearer anywhere in the UK to within three metres’, and as crucially, will enable communication with an offender who has breached an exclusion zone so that he can be ‘talked down’ and prevented from reoffending (Doward, 2003: 1). The Director-General of the National Probation Service made clear that it might be used with other very serious offenders, apart from sex offenders, and ‘possibly [with] the heavily persistent as well’ (Wallis, 2003:6). As it was, the first tracking scheme to be formally announced was for asylum seekers9, although a scheme for offenders is still planned (personal communication, James Toon 19th December 2003). Both will start in 2004.

Tracking technology will likely be deployed in two legal forms. One, the perpetual surveillance of an offender’s movements in real-time (on electronic maps) - or, if periodic downloads are used, retrospectively - for a given period. Two, more narrowly, monitoring the perimeters of exclusion zones and warning when they are being breached. Indeed, without electronic tracking, exclusion orders are no different from contemporary restraining orders or Anti-Social Behaviour Orders, which also prohibit entry to particular places or areas, but which thus far have relied upon threat-based compliance - and are not well complied with (Hansen, Bill and Pease 2003). EM-versions may eventually displace them. Nonetheless, even surveillance-based compliance cannot guarantee victim protection - because it still relies on trust and self-restraint, and perhaps on unfeasibly rapid responses by the authorities to a perimeter-breach - and some victims’ groups in the USA have been sceptical of EM-based exclusion orders (Whitfield 2001:86). Bearing in mind that the 1988 Green Paper seemed intuitively to grasp that tracking tagging was in fact ‘less restrictive’ than curfew tagging this again raises the question of how controlling and censorious - and therefore how punitive - EM-based penalties are
perceived to be by the wider public and, indeed, what their ‘punitive weight’ - to use Halliday’s terminology - actually is. This hinges, in part, on the cultural meaning of locatability in real-time.

Drawing on Marx’s (1995) cultural analysis of contemporary surveillance imagery I have argued elsewhere that state/corporate capacity to remotely pinpoint and locate citizens and consumers - particularly offending citizens - is no longer perceived by people in general as the totalitarian practice, or the source of ‘Orwellian’ fears, that it might once have been (Nellis, 2003a). By the end of the 20th century the multiplicity of data trails routinely left by consumers, even more so the ubiquity of mobile phones, together with their underpinning digital infrastructure, had between them turned locatability into a commonplace fact of life. If not quite a civic good, it was something mostly experienced as enablement rather than as constraint or threat (Lyon, 2001). The ability to pinpoint the whereabouts of a tagged offender for part of the day - or in the case of tracking, all day - is only one use among many to which ubiquitous location-monitoring technology can be put (Bloomfield, 2001), and as such, hardly registers in public consciousness as ominous or draconian. Court-ordered surveillance may well constitute ‘censure’, but it manifestly still requires self-restraint on the offender’s part, and does not evoke the visceral, decisive sense of loss, pain or intrusion necessary for it to be perceived it as fearsome and severe. As a personally demanding, ‘responsibilising’ punishment, however - albeit rather less controlling and censorious than past Home Office rhetoric has implied - location-monitoring penalties may well become culturally acceptable ways of responding to lower risk offenders. Whether or not this tentative explanation of public scepticism about EM is valid, it is not without significance that a debate as to where on the tariff an EM-based curfew properly belongs has already begun.

**EM and the Tariff: An Emerging Debate**

Most of the early Home Office research into EM-curfew orders suggested that magistrates did indeed see them ‘as an alternative to custody and higher-end community penalties’ (Mortimer and May, 1998:3), as government has encouraged them to do. Nonetheless, the limited number of sites in which research was undertaken, and the large numbers of magistrates overall should make us cautious here - as should the fact that 43% of EM-based curfews displaced fines. In any case, not all the Home Office’s other programmes have been committed to the high tariff use of EM-based curfews. In the EM pilots for 10-15 year olds, for instance, magistrates were almost as likely to replace supervision orders with EM-curfews as to replace custodial sentences (Elliott, Airs, Easton and Lewis, 2000a: vii), which suggests that curfew orders were not universally seen as viable alternatives to custody. Regarding EM use with adult bailees, the evaluators were even more explicit:

There was no consistent evidence that a bail curfew provided a true alternative to custodial remand. There were strong indications that it had been used in place of custodial remand for some defendants, but there
were equally clear indications that bail curfew had been used as an additional bail condition for others. (Airs, Elliot and Conrad, 2000: vi)

On reflection, this uncertainty as to where EM-based penalties belong is not perhaps so surprising. The very fact that curfew orders can be used either as a stand-alone measure or, in some contexts, in conjunction with other supervisory measures, implies that there is a range of places - at least two points - on the tariff at which they might be used. Both official and professional rhetoric has underplayed this, and among probation officers and penal reformers, there has been much anxiety about the prospect of netwidening, a fear that without proper targeting EM would drift inexorably down tariff towards offenders not at risk of custody - as happened with earlier community penalties. In its first position paper on EM, ACOP (1997) insisted that it was used as a high tariff measure, and at operational level this is where most probation officers have probably been pitching it. The National Probation Service's (2003) revised guidelines on curfew orders still encourage this. Paradoxically, however, under Home Office pressure to develop ways of increasing the use of EM curfew orders, some local probation managers have entertained an explicitly lower tariff use of EM. The West Midlands Probation Area, for example, has mooted the use of a stand-alone EM-curfew order as an alternative to a fine, a penalty with notoriously low 'enforcement potential' (Skidmore, 2002). Given that 43% of curfews were already displacing fines in 2002 this cannot be regarded as implausible. Rod Morgan (2003: 18), when he was Chief Inspector of Probation, also saw 'stand-alone electronic monitoring orders [as] a clear option' for removing large numbers of low risk offenders who are sitting up probation caseloads, preventing key skills and resources from being deployed on the higher risk offenders for whom they were intended. There may well be practical and legal impediments to this - staffing costs in the monitoring organisations, loss of revenue from fines, and the fact that at present EM-curfew orders are already penalties for fine default (Elliot, Airs and Webb, 1999). Thus far, however, Morgan's suggestion has not met with the outrage that such an otherwise brazen proposal for netwidening might once have done, although for the time being the low tariff use of EM has specifically been curtailed by the National Probation Service, for purely financial reasons.

Eithne Wallis, when she was Director of the National Probation Service may well have been ahead of Morgan here, concurring with the low risk problem, but already looking beyond the present forms of electronic monitoring to resolve it.

We want to extend the use of electronics, both at the no- or low-risk end of the spectrum and at the heavy end. We believe that there is roughly 25% of our current caseload which at the low risk end, and we want to find more cost-effective ways of working with them. We think we can probably consider the use of biometrics, for example, as one way of actually managing the low risk more cheaply but more successfully. (Wallis, 2003: 6 emphasis added)
The reappraisal of the position of stand-alone EM-curfew orders is also a consequence of other penal developments. It has arguably been aided by the development of multicomponent sentencing packages for young and young adult offenders, namely, the nationally available Intensive Supervision and Surveillance Programme for young offenders, and the still experimental Intensive Change and Control Programme for young adults. These each contain elements of education, offending behaviour work, reparation, intelligence-led policing and curfews with EM, and make substantial demands on offenders’ time. The question then arises, if these packages are now being promoted as the uppermost measure on the community penalty tariff, what would be the standing of the various components if used - as some legally can be - on their own? The obvious implication is that they would be lower tariff. It is partly against the background of these emerging multicomponent sentencing packages that Morgan (2003) and Wallis’s (2003) reappraisal of the ‘punitive weight’ of EM-based penalties can be seen to possess a certain prima facie logic.

England, in any case, is not the only jurisdiction in which this is occurring. In Australia, Bagaric (2000) has openly doubted the deterrent value of EM-based penalties: ‘it is simply not obvious that [home detention] will be viewed as a sufficiently unpleasant disposition to cause people to seek to avoid it’. Echoing the distinction I have drawn between surveillance-based and incapacitation-based compliance Bagaric concedes that such penalties are undoubtedly constraining, but remain nonetheless ‘a significantly lighter sentence than imprisonment’ (Bagaric, 2000: 439), even when the time in detention is relatively long. A jurist in the New South Wales Court of Criminal Appeal had recently spelled this out:

I accept that the standard conditions of a home detention order are burdensome; but it seems to me that they are burdensome in the sense of being, by and large, inconvenient in their disruption of what would be the normal pattern and rhythm of the offender’s life in his normal domestic and vocational environment. Any suggestion that such inconvenient limitations upon unfettered liberty equate in any way at all to being locked up full-time in the sort of prison cell and within the sort of gaol that are normal in New South Wales could not be accepted, in my respectful view, by anybody who has had the opportunity of going behind the walls of any one of those prison establishments; and of seeing, even from the limited point of view of a casual visitor, what is really entailed by a full-time custodial sentence (Sully J quoted in Bagaric 2000: 439).

This seems to accord with the emerging public view of EM in England. It does not mean that EM-based penalties are lenient per se, just that even at their most onerous they are not easily comparable to the experience of imprisonment, and they are not incapacitative. According to offenders themselves, even as a stand-alone measure they are experienced as a restriction of liberty and autonomy, and as offering useful time to reflect. Some of their ‘pains’ are distinctive to them - including resisting the temptations
occasioned by being among ‘free’ people, and the stigma of wearing the tag (Payne and Gainey, 1998; Gainey and Payne, 2000). Mair and Mortimer, (1996:24) noted that some offenders cited ‘the feeling of being watched’ as a disadvantage of being tagged, but in the main the surveillant dimension of EM remains ignored in the offender perspective literature - Richardson (1999; 2002) is the one exception - as indeed it is in the EM literature more generally 15.

Conclusion

There is no doubt that corrections technology will accelerate in coming years and will allow community corrections the option of becoming more surveillance oriented. (Petersilia, 2003: 91-2)

More than a decade ago Morris and Tonry (1990: 179) suggested that EM was merely ‘a means to the enforcement of nonincarcerative sanctions’ rather than a penal sanction in its own right. This insight - which nonetheless underplays the extent to which surveillance can be a form of punishment - has also been neglected. I have argued here that EM-based penalties are contributing to the transformation of community supervision before, instead of and after prison by altering - augmenting and possibly displacing - the traditional means of enforcement. Even allowing for an implementation gap, there have still been significant operational developments. But it is on the apparent intentions of government, the manifest ambition it has for EM - as expressed most comprehensively in the Criminal Justice and Court Services Act 2000 - that I am mostly basing my case. Even without full knowledge of the thinking which has underpinned Home Office initiatives on EM, it seems clear that a significant element of electronic surveillance - the real-time regulation of offenders’ whereabouts and schedules - is now being seen as a desirable ingredient of community supervision, as a stand-alone measure and in conjunction with behaviour-change programmes. These programmes themselves are more coercive, prescriptive and managerial than the traditional humanistic forms of probation and it is at least arguable that the shift from trust- to threat-based compliance and from low-intensity to high-intensity enforcement measures has already ushered in a post-humanistic phase in community supervision. Even if it were not yet so, the shift towards surveillance-based compliance is taking us closer to it.

In order to draw out what is at issue here I want to propose the following typology of compliance, whose starting point is a similar typology developed by Bottoms (2000; 2002) but which refines his notion of ‘constraint-based compliance’ (distinguishing different types of constraint) and restricts itself to compliance with community supervision, rather than law-abidingness in general. The types are not all mutually exclusive and the first four all require greater or lesser degrees of cooperation by the offender, who retains a choice whether to comply or not. The first three typify the approaches which predominated in the Probation Service in the past; the emerging fourth - to whose implementation private organisations have been crucial - was symbolically, if not yet actually, strengthened by the Criminal Justice and Court Services Act 2000. The fifth - an incapacitative community penalty - is more easily imagined than made real, akin
perhaps to the excruciating, immobilising pain programmed into an offender whose aggression level rises too high, as envisaged by Anthony Burgess (1962). Increasing duration - thus far a favoured way of making EM-based curfews more burdensome - is not per se to make them incapacitative 16. Even the custodial element of seamless sentences in the Criminal Justice Act 2003 seems to be justified more in retributive and deterrent terms than in incapacitative ones, although the taint of gratuitous confinement pervades them.

Incentive-based compliance - offering some desirable state or good at the end of the process: ‘I will give you this/you will gain this’

Trust-based compliance - creating a sense of obligation by seeking the offender’s consent: taking the offender at his/her word, accepting their ‘promise’ to do what is required. ‘Be good/I believe in you’

Threat-based compliance - instilling a fear of future consequences, threatening or administering a sanction at whatever point compliance fails: ‘Co-operate or else’

Surveillance-based compliance - instilling an awareness of immediate regulation, as a result of being perpetually or intermittently watched; imposing the real-time monitoring of whereabouts and schedules, and storing ‘incontestable’ details on databases: ‘I am keeping my eye on you’.

Incapacitation-based compliance - going beyond the mere restriction to the actual deprivation of an offender’s liberty of action, usually, but not necessarily, by removing the offender to a place of confinement; inhibiting, not just prohibiting a particular action: ‘I’ll stop you in your tracks’.

I have not, simply for reasons of space, dwelt here on the private sector dimension of EM service delivery, but the increasing use of ‘contracting-out’ in the community supervision field is a further aspect of the transformation with which this paper has been concerned (Nathan, 2003). Suffice to say that the increasing involvement of commercial organisations - who have ‘a more risk-infused approach to crime management’ (Kemshall, 2003: 120, see also Marquis, 2003) - in the administration of criminal justice is likely to give increased momentum to surveillant approaches, and to further displace humanistic ones. The organisations likely to be involved - mostly drawn from the security and ICT industries, some with involvement in private prisons - have no prior or primary commitment to humanism (as the Probation Service had), and while that does not preclude an ethical standpoint, are almost wholly profit-driven. The current contracts for Securicor, Reliance and Premier expire in 2005 - the retendering process began in autumn 2003 and is open to new bidders - but there is little chance that state agencies will take on the management of EM (as they have done from the outset in mainland Europe). The Correctional Services Review17 - the basis on which the next wave of transformation in
penal policy in England and Wales will occur - encourages more contracting-out of 'correctional services' (conceived in the Review as a unified prison and probation service, with at least oversight of the Youth Justice Board) and 'will be very important for EM' (Toon, 2003). While the difficulties of accomplishing change on the ground - the multiplicity of new initiatives and competing priorities and deadlines demanded by central government combine with local cultures of resistance to constitute a significant impediment - should not be underestimated, we should be equally clear that in the past five years we have seen the emergence, in the community supervision field, of what Norris (2003), following Lianos and Douglas (2000) calls automated socio-technical environments, in which the use of EM technologies seem certain to become more prominent.

**Addendum**

The Correctional Services Review (Carter, 2004), together with the Home Office (2004) response to it, appeared on January 6th 2004, after this paper was completed. They open up a new era in penal policy, whose larger aspects – a National Offender Management Service, more contracting out to private and voluntary organizations - cannot be explored here. But Toon (above) was right about the Review’s favourable disposition towards EM. It noted ‘a significant opportunity to extend the use of electronic monitoring’, particularly but not only as part of the third, most intensive tier of the new community punishment order. Whilst envisaging ‘greater use of curfews and house arrest’ it was extraordinarily enthusiastic about the use of satellite tracking for persistent offenders, which is the centrepiece of its proposals on EM, and indeed integral to its overall penal vision. It commits itself to this largely on the basis of the 20,000 offenders who have been satellite tracked in the USA, and while recognizing the dangers of ‘over-hyping the technology’ (which improves on present technology but still ‘does not provide complete control’) (Carter, 2002: 28-29) it seems oblivious to the possibility that trials may question its efficacy. The Home Office largely accepts Carter’s strategy, and its commitment to EM could not be plainer, or stronger.

Electronic monitoring has proved very successful and its use has been expanding rapidly ……. The use of new technology to provide a means of monitoring the location of offenders under supervision in the community will be an increasing feature of correctional services in the future. We are already developing a pilot of satellite tracking technology which could enable offenders to be continuously and accurately tracked (Home Office, 2004:13 emphasis added)

**Notes**

1. An earlier version of this paper was presented at the British Society of Criminology conference ‘Too Many Prisoners: reducing and managing the prison population’ on 7th November 2003, in London. I am grateful to James Toon, Head of Electronic Monitoring in the National Probation Directorate, who also spoke at this conference, for some of the statistics used in this paper, and for subsequent advice.
2. It is reasonable to argue that non-electronically monitored curfews, and tracking - highly intensive and frequent one-to-one contact - which were used in England on a small scale in the 1970s and 1980s, were the precursors of electronic monitoring, but with one caveat. ‘Punishment, Custody and the Community’ (Home Office, 1988) certainly treats them as precursors. They undoubtedly raised the prospect of monitoring locatability and schedules in community supervision but when, under intense criticism, both ‘failed’ - curfews because of enforcement difficulties, tracking by mutating into more welfare-oriented mentoring - no-one within the existing penal reform network consciously sought a new or better means of fulfilling these functions. Electronic monitoring, of course, originated outside the traditional penal reform network, in the Offender’s Tag Association, but inter alia fulfilled these functions more effectively. Underlying both developments, at a deeper cultural level, were the ideological changes wrought by managerialism, which accustomed politicians (and some professionals) to expect, demand and promise an ever-more meticulous regulation of human behaviour, possibly because traditional/informal community controls were perceived as fraying. The one direct, ‘personal’, link between curfews, tracking and EM was Nicholas Stacey, Director of Kent Social Services, brother of Tom Stacey and member of the Offenders’ Tag Association board, who pioneered a close support unit for young offenders, which used curfews, and who helped import tracking to England from Massachusetts. (see Ely, Swift and Sutherland, 1987; Nellis, 2004)

3. Even six months after New Labour’s election victory Home Office Minister Alan Michael (1997) made no mention of an early release scheme in his speech to the Howard League conference (September 1997). He promised only to extend the existing curfew order pilots, and to establish new EM pilots for those on bail, petty persistent offenders, juveniles and fine defaulters.

4. The electronically monitored early release of offenders who have acquired some degree of notoriety is usually exploited by populist punitive sections of the press. Thus the release (three months early, six months into an eighteen month sentence for racially abusing a black police officer) of David Norris and Neil Acourt was denounced on the front page of The Daily Mail (25th January 2003) under the headline ‘Lawrence duo freed because jails are too full’. Some years before they had been among those accused of Stephen Lawrence’s murder and the tabloid media had persistently proclaimed their ‘badness’. The lead article cursorily explained the HDC scheme, and quoted the Prison Service’s defence of it. The Mayor of London, the Metropolitan Police, and the head of a unit monitoring racial attacks were then cited as opposing the early release of ‘violent racists’. A spokesperson for the National Black Police Association was also quoted as saying ‘This sends out completely the wrong message, that people who perpetrate such crimes can walk free with a tag’. (emphasis added). Similarly, the early release on HDC of Brendon Fearon, notorious as the injured victim of a farmer, Tony Martin, whose house he had tried to burgle was criticised both in principle, and for its particular insensitivity - it occurred within days of Martin himself - who had served his full prison sentence for killing Fearon’s accomplice while protecting his property - being released.

5. It is fact unclear what the Communications Strategy is in this context, other than whatever circulars, memoranda and letters are sent out from the prison and probation service headquarters, and whatever material appears on Home Office (and specific agency) websites. A phone call to the Prison Service public relations desk (December 2003) elicited bafflement as to what the Communication Strategy was. Senior officials in the Howard League for Penal Reform and the Prison Reform Trust (January 2004) doubted if such a ‘strategy’ existed, although communication flows outward all the time.

6. Prof. Keith Bottomley, Prof. George Mair and Dr. Anthea Hucklesby won the Home Office contract to research the new uses of electronic monitoring in summer 2000. The National Probation Directorate, into which the Home Office’s once free-standing Electronic Monitoring Unit had moved in early 2003, terminated the project six months ahead of schedule. At the time of writing (December 2003) the researchers’ final report had been submitted to the NPD, but not published.
The exact origin of the term ‘seamless sentence’ is unclear. It was used in New Labour’s announcement of its ‘way ahead’ (Home Office, 2001) but it seems to predate this. Chief Probation Inspector Graham Smith (1999: 110-111) used the concept of ‘seamless prison sentence’ at a Council of Europe conference in 1997 to refer to the way in which the Crime Sentences Act 1997 had stressed the concept of a prison sentence as being served, partly in custody and partly in the community when they [the prisoners] are released on various forms of licence and supervision.

According to the official guidance on the two intermittent custody pilots (starting January 2004) ‘offenders will be on licence only on those days where they would otherwise have been serving custodial days. Such offenders will remain tagged but the curfew will only be monitored on the relevant days’ (Home Office 2003: para 16). And rather extraordinarily, given that the Crime Sentences Act 1997 dispensed with the offender’s consent to probation and community service orders, intermittent custody is a sentence which requires consent. (Home Office 2003: para 8). The question of consent to community supervision, seemingly settled once the Crime Sentences Act 1997 abolished it for probation and community service, needs to be opened up again because of a de facto recognition that an offender’s active cooperation - ongoing consent - is necessary to secure compliance, even surveillance-based compliance.

The Asylum and Immigration Bill 2003 contained a package of contentious measures apparently designed to deter asylum seekers from entering Britain. Electronic tracking is to be applied to failed applicants awaiting deportation, or as a tabloid newspaper, The Sun (28th November 2003) put it: ‘bogus asylum seekers will be monitored by satellite to ensure they do not just vanish into the community before being booted out’. This is being presented by the Home Office as an improvement on incarcerating deportees in much criticised detention centres, such as Dungavel in Scotland (run by Premier Prisons) and Yarl’s Wood in England (run by Group 4, but partly destroyed by fire during a riot in 2002) and may solve the longstanding difficulty of finding new sites for such centres, which are invariably resisted by local residents on a ‘not-in-my-back-yard’ basis. While the announcement that asylum seekers were to be subject to EM was unexpected, we should note that some of the publicity issued by the monitoring companies readily admits their interest in the immigration as well as the criminal justice market. There are precedents for such usage in the USA, in Alaska and Florida. (Goodchild and Bloomfield, 2003)

The media coverage of EM provides one way of exploring cultural attitudes towards surveillance practices, and even a cursory survey in England and Wales shows a marked reluctance to take curfews with EM seriously as a high tariff, prison-like penalty (Nellis, 2003a). In contrast to penal reformers who initially portrayed tagging as something different from and at odds with probation, the press have persistently treated it as similar to probation rather than similar to prison, a community penalty which, whilst patently constraining, requires the willing compliance of the offender if it is to function as a means of crime reduction. Being able to ‘serve time’ in the presumed comfort of one’s own home has not, by and large, been regarded as onerous or draconian. Portrayals of EM in film and TV drama have often been explicitly disparaging, highlighting limitations more than advantages, and building stories around atypical events. In one recent television drama, for example, (which attracted an audience of 4 million) a newly released prisoner initially abides by his curfew, but then storms angrily from his flat intending to murder two people whom he believes have betrayed him (The Canterbury Tales, BBC1, 25th September 2003).

In the Magistrates’ Association (2000: 72) Sentencing Guidelines ‘the electronic monitoring of curfews’ is given special prominence in the two-page section on using community penalties. Magistrates’ actual use of EM warrants further investigation. Although judges were favourably disposed to the concept of the curfew, Hough, Jacobson and Millie’s (2003: 48) research on sentencers’ decision-making showed magistrates to be quite sceptical of it. A recent meeting with twelve magistrates from a bench in an impoverished area of the West Midlands (12th December 2003) supported this. I was told that no EM-based curfew order had ever been made
in their court, over the past three years. Some recalled a training event on the subject three years previously, None recalled a probation officer ever recommending such an order. One magistrate felt that a penalty which allowed an individual ‘to stay at home all day watching television’ would hardly amount to a punishment, given the lifestyles of those appearing before the courts. Another, on reflection, felt they could use it more with women, and another with juveniles, for whom enforced staying in at night would be a ‘real’ punishment. None knew, until I told them, that EM-based curfews could be used as an alternative to fine default. Several, upon hearing about it, welcomed Rod Morgan’s (2003) idea of using a stand-alone curfew as an alternative to a fine.

12. Biometric surveillance - based on voice, iris or fingerprint recognition, or a combination of all three - can be used to create kiosk-style reporting systems, which dispense with, or at least minimise, the need for personal contact (Fairhurst, 2003). Wallis’s willingness to consider using new technologies with even ‘no-risk’ offenders is indicative of how precarious humanistic practices are becoming in community supervision. Expensively trained staff, perhaps with personal or professional commitments that run deeper than managerial objectives, and which may even conflict with them, may well become dispensable if adequate public protection can be achieved in other ways. Furthermore, if the community supervision of offenders comes to be regarded as distasteful and ‘low status work’ ‘dirtywork’ - unattractive to people who aspire to middle class careers and lifestyles, the automation of social control processes, tended by technicians with basic people-skills, is likely to increase. Interviewed on ‘Law in Action’ about tracking (BBC Radio 4, 25th October 2003), Wallis, faced with a question that gave her the opportunity to affirm the overarching importance of humanistic values, emphasised instead the Probation Service’s increasing reliance on ‘the technological’ as evidence of its modernity, presenting it as a necessary next phase of the Service’s development as a public protection agency.

13. Wallis made her remarks in Criminal Justice Management, a journal whose existence has barely registered in the academic community, yet which is probably more widely read by criminal justice managers than academic journals, even those with a policy and practice orientation. It reflects, celebrates and encourages the increasing use of new technology in criminal justice, the necessity of which was affirmed by Home Secretary David Blunkett in the Police Foundation’s John Harris’s Memorial Lecture. A large proportion of Criminal Justice Management’s (short) articles and advertisements extol the use of computerised technology in policing, court administration and corrections. It is emblematic of important trends in British criminal justice in Britain, and criminologists should pay more attention to it.

14. There is, admittedly, a difficulty with simply contrasting experiences of EM-based penalties with ‘imprisonment’ for there are, after all ‘qualitative variations in imprisonment’ which Dingwall and Harding (2002) argue are neglected on contemporary accounts of retributive sentencing. The ‘penal severity’ of local, training, dispersal, closed and open prisons, let alone experiences like cell sharing or solitary confinement cannot be measured by the conventional quantitative criteria - sentence length - alone. Perhaps the experience of EM is more comparable to being in an open prison? Interestingly, although Dingwall and Harding place ‘curfew and house arrest’ as point-2 on their 7-point ‘continuum of incarceration’ they neglect issues of consent, compliance and enforceability as means of distinguishing degrees of severity, and rely too much, in my view, on ‘censure’ and on variations in ‘the denial of lifestyle opportunity’ as the basis for the distinctions.

15. Lilly’s (1990) insistence that EM be studied as much as a form of surveillance as a community penalty largely went unheeded. Modern surveillance theory, developed more in sociology than criminology, exemplified by David Lyon (2001) has been little used to analyse EM. This is partly why EM’s significance for criminal justice has been underplayed - traditional analysts of community penalties tend not to grasp how fully realised the ‘surveillance society’ has become, and have been insufficiently sensitive to the manner in which various modalities of surveillance are spreading into ‘their’ territory. Clive Norris (2003) has been a pivotal figure in bringing surveillance theory to bear on crime policy. The
emergence of insightful summaries of surveillance theory within criminology textbooks (eg Innes, 2003) will hopefully encourage further developments.

16. Contemporary changes in the duration, tempo and immediacy of punishment and control have largely been neglected by criminology (Nellis, 2002). Extending the length of time to which an offender may be subject to EM is one of the ways in which the penalty can be made more onerous, but should be understood as increasing the period in which s/he is subject to real-time control. Approximations to real-time control - driven by efficiency considerations - are emerging as a new ideal in community supervision which mirrors, but does not exactly emulate, the real-time control achieved by imprisonment. In respect of EM, how long might it eventually be feasible or ethical to monitor someone, especially if the alternatives were always markedly more severe? A few months? Life? The present short periods are surely not sacrosanct. The curfew period has twice been increased on the HDC scheme. The Anti-Social Behaviour Act 2003 increases the length of time a 10-15 year old can be subject to a curfew from the original three months to six months. We have probably not seen the end of extensions to the duration of EM-based penalties.

17. The two-phase Correctional Services Review was announced in Justice for All (Home Office, 2002) in July 2002. The first phase concentrated on short term needs, the second undertaken for the Cabinet Office by Patrick Carter, a management consultant, sought to develop correctional strategy for the 2005-2008 period.

References


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