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ANALYSIS OF ALTERNATIVES TO INCARCERATION FOR NON-VIOLENT OFFENDERS: A PROGRESSIVE APPROACH TO CORRECTIONAL PROCEDURE

CYNTHIA M. SCAGLIONE

Exile, restitution, and various forms of corporal and capital punishment once constituted the primary procedural methods for dealing with criminal offenders in the United States.¹ Today the standard American correctional procedure is incarceration.² When the prison system was first developed in the United States, its fundamental goal was rehabilitation.³ It was believed that institutionalization would separate the offender from injurious outside influences while providing a suitable atmosphere for learning concepts of right and wrong.⁴ Therefore, upon release the offender would be better able to conform to society's laws.⁵ As the twentieth century approached, policy motivations shifted and deterrence provided the main justification for imprisonment.⁶ Prisons gradually came to be regarded as indispensable to the achievement of correctional goals.⁷

The United States correctional system is now undergoing a trend away from institutionalization.⁸ This trend had its inception in the changing law

1. Corrections Task Force, National Advisory Commission on Criminal Justice Standards and Goals, *Major Institutions*, reprinted in C. DODGE, *A NATION WITHOUT PRISONS* 3, 3 (1975). Prisons were almost nonexistent in this country until the late 17th century. See *id.* at 4. See generally K. MENNINGER, *THE CRIME OF PUNISHMENT* 222 (1968); R. POUND, *CRIMINAL JUSTICE IN AMERICA* 159 (1972).

2. See Corrections Task Force, National Advisory Commission on Criminal Justice Standards and Goals, *Major Institutions*, reprinted in C. DODGE, *A NATION WITHOUT PRISONS* 3, 6 (1975).

3. See *id.* at 6. This change in correctional procedure was intended to bring relief from brutal forms of punishment previously used. See *id.* at 4-5.

4. *Id.* at 4-5.

5. See *id.* at 4-5.

6. See *id.* at 6. See generally K. MENNINGER, *THE CRIME OF PUNISHMENT* 222 (1968); R. POUND, *CRIMINAL JUSTICE IN AMERICA* 159 (1972).

7. Corrections Task Force, National Advisory Commission on Criminal Justice Standards and Goals, *Major Institutions*, reprinted in C. DODGE, *A NATION WITHOUT PRISONS* 3, 6 (1975). See generally K. MENNINGER, *THE CRIME OF PUNISHMENT* 222 (1968); R. POUND, *CRIMINAL JUSTICE IN AMERICA* 159 (1972).

8. National Advisory Commission on Criminal Justice Standards and Goals, *Report on Corrections* (1973), reprinted in G. KILLINGER & P. CROMWELL, *CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT* 140, 141 (1974) (referring to this trend as "the most dramatic development in corrections in the United States" in recent times); see Newton, *Alternatives to Imprisonment*, *CRIME AND DELINQUENCY LITERATURE* 109, 109-10 (1976); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections and the Community*, reprinted in R. CARTER, D. GLASER, & L. WILKINS, *CORRECTIONAL INSTITUTIONS* 394, 394 (2d ed. 1977).

of civil commitment.⁹ In *Lake v. Cameron*¹⁰ a federal court of appeals imposed on the state a duty to discover and use alternatives to institutionalization for mental patients undergoing civil commitment proceedings.¹¹ In the civil commitment case of *Covington v. Harris*¹² the court stated that institutionalization constituted an "extraordinary deprivation of liberty" justifiable only when the patient is likely to injure himself or others if allowed to remain in the community.¹³ Thus in *Covington* the principle of the least restrictive alternative consistent with the purposes of the commitment was upheld.¹⁴ The United States Supreme Court, as well as other federal courts, have applied "the least restrictive alternative" requirement not only in civil commitment proceedings, but in cases concerning confinement of sex offenders to mental institutions.¹⁵ In each case, the courts used the "dangerousness" test.¹⁶

The trend away from institutionalization was next extended into the area of juvenile detention in the landmark case of *Morales v. Turman*.¹⁷ *Morales* was a class action instituted by juveniles detained in the Texas Youth Council (TYC) reformatories, against the Director of the TYC.¹⁸ Plaintiffs alleged that conditions of confinement in the TYC detention facilities constituted cruel and unusual punishment proscribed by the

9. See *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969); *Rouse v. Cameron*, 373 F.2d 451, 459 (D.C. Cir. 1966); *Lake v. Cameron*, 364 F.2d 657, 660-61 (D.C. Cir. 1966); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091-93 (E.D. Wis. 1972), *vacated*, 421 U.S. 957 (1975).

10. 364 F.2d 657 (D.C. Cir. 1966).

11. *Lake v. Cameron*, 364 F.2d 657, 661 (D.C. Cir. 1966).

12. 419 F.2d 617 (D.C. Cir. 1969).

13. *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969).

14. See *id.* at 623; accord *Rouse v. Cameron*, 373 F.2d 451, 459 (D.C. Cir. 1966); *Lake v. Cameron*, 364 F.2d 657, 660-61 (D.C. Cir. 1966); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated*, 421 U.S. 957 (1975).

15. Compare *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (sexual psychopath case) and *Millard v. Harris*, 406 F.2d 964, 973 (D.C. Cir. 1968) (sexual psychopath case) with *Rouse v. Cameron*, 373 F.2d 451, 459 (D.C. Cir. 1966) (civil commitment) and *Lake v. Cameron*, 364 F.2d 657, 660-61 (D.C. Cir. 1966) (civil commitment) and *Lessard v. Schmidt*, 349 F. Supp. 1078, 1084-86, 1091-93 (E.D. Wis. 1972), *vacated*, 421 U.S. 957 (1975) (civil commitment).

16. See *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Millard v. Harris*, 406 F.2d 964, 973 (D.C. Cir. 1968); *Rouse v. Cameron*, 373 F.2d 451, 459 (D.C. Cir. 1966); *Lake v. Cameron*, 364 F.2d 657, 660-61 (D.C. Cir. 1966); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1085-86, 1093 (E.D. Wis. 1972), *vacated*, 421 U.S. 957 (1975). Persons are generally regarded as dangerous if they pose a "substantial threat of harm" to themselves or others. This is the same test used in earlier civil commitment cases. See *Humphrey v. Cady*, 405 U.S. 504, 510 (1972); *Rouse v. Cameron*, 373 F.2d 451, 459 (D.C. Cir. 1966); *Lake v. Cameron*, 364 F.2d 657, 659 (D.C. Cir. 1966).

17. 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977).

18. See *Morales v. Turman*, 383 F. Supp. 53, 58 (E.D. Tex. 1974), *rev'd*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977).

eighth amendment.¹⁹ The federal district court sustained this contention and mandated the immediate closing of two centers where conditions constituted cruel and unusual punishment.²⁰ Further, the *Morales* court in its emergency mandate ordered the TYC to create a system of community-based correctional alternatives to deal with those juveniles not proven by experts to be "exceptionally dangerous."²¹ It was held that the state's failure to provide alternatives to incarceration violated the Constitution²² and denied juvenile offenders an opportunity for treatment or rehabilitation.²³ Thus the standard established in civil commitment proceedings prohibiting detention when "less restrictive alternatives" are available and consistent with the purposes of the confinement, was extended to juvenile delinquency proceedings.²⁴ That same year, the Juvenile Justice and Delinquency Prevention Act of 1974²⁵ was passed to aid the states in developing programs to divert juveniles from institutions and to implement community-based alternatives to detention.²⁶ The move away from institutionalization has prompted legislation throughout the United States to provide for community-based alternatives to incarceration in the area of juvenile law²⁷ and is now being extended into adult corrections.²⁸

19. *See id.* at 70.

20. *See id.* at 121-25. Conditions constituting cruel and unusual punishment included lack of access to rehabilitative treatment and staff brutality. *See id.* at 121-25.

21. *Id.* at 84-85.

22. *See id.* at 124.

23. *See id.* at 87-88, 92. The court found that institutionalization impeded the rehabilitation of juveniles because it removed them from their ethnic cultures and family ties. *See id.* at 90. It also caused loss of identity. *Id.* at 98. The court noted that incarceration prevented opportunities for socialization. *See id.* at 99. Further, it provided no cohesive therapy program. *Id.* at 118.

24. *See id.* at 124. Plaintiffs urged, and the court recognized "the constitutional principle that government must always seek to accomplish its ends in the manner that is least inimical to the liberty of those whom it affects." *Id.* at 121; *see Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

25. 42 U.S.C. § 5601 (Supp. 1974).

26. *See id.* § 5633.

27. *See* ILL. ANN. STAT. ch. 37, § 706-5 to 7 (Smith-Hurd 1972); LA. CODE CRIM. PRO. ANN. § 1093 (West Supp. 1979); MINN. STAT. ANN. § 241.31-.32 (West Supp. 1979); OHIO REV. CODE ANN. § 5139.17-.27 (Baldwin 1974); UTAH CODE ANN. § 55-11a-4 (Supp. 1977).

28. *See Pugh v. Locke*, 406 F. Supp. 318, 330, 335 (M.D. Ala. 1976), *aff'd as modified sub nom*, *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978) (court held State of Alabama must furnish alternatives to incarceration or be forced to close prisons); COLO. REV. STAT. § 17-27-103 to 17-28-106 (1978); GA. CODE ANN. § 77-312 (Supp. 1978); ME. REV. STAT. tit. 34, § 528-29 (1964); MO. ANN. CODE art. 27 § 706 (Supp. 1978); TEX. REV. CIV. STAT. ANN. art. 6166x-3 (Vernon Supp. 1978-1979) (work furloughs); TEX. CODE CRIM. PRO. ANN. art. 42.12, § 6 (j) (Vernon 1979) (probation statute allowing community-based corrections); WASH. REV. CODE ANN. § 9.95A.010-9.95A.090 (1977). Community-based corrections, such as those allowed by recent statutes, include all correctional activities taking place in the community and providing an alternative to incarceration at any point in the correctional process. *See* National Advisory Commission on Criminal

This trend could substantially alter the traditional procedures most commonly used in sentencing adult offenders, and result in less confinement in state prisons.²⁹ The trend toward alternatives to incarceration could have far-ranging consequences in Texas which currently faces a chronic prison overcrowding problem.³⁰

The Texas Legislature has perceived a need for alternatives to incarceration in adult corrections and has responded by enacting a liberal work release statute³¹ as well as a statute allowing for community-based alternatives through the probation department.³² Because of ineffective implementation,³³ however, unresolved problems remain.³⁴

JUSTIFICATIONS FOR ALTERNATIVE APPROACHES

Failures of the Old System—Policy Arguments

The major goals of correctional systems in the United States and Texas are rehabilitation and punishment.³⁵ The punishment goal includes the elements of deterrence, protection of society, and retribution in aid of deterrence.³⁶ An increasingly accepted belief among mental health and

Justice Standards and Goals, *Corrections and the Community*, reprinted in R. CARTER, D. GLASER, & L. WILKINS, *CORRECTIONAL INSTITUTIONS* 394, 395 (2d ed. 1977). Some alternatives are restitution, fines, probation, parole, post release residential facilities, halfway houses, educational programs, and furlough and work release programs. See generally COUNCIL OF STATE GOVERNMENTS, *STATE SUBSIDIES TO LOCAL CORRECTIONS: A SUMMARY OF PROGRAMS 1-55* (1977); Newton, *Alternatives to Imprisonment*, *CRIME AND DELINQUENCY LITERATURE* 109, 109-10 (1976).

29. See Newton, *Alternatives to Imprisonment*, *CRIME AND DELINQUENCY LITERATURE* 109, 109 (1976).

30. See Rocawich, *Texas Prisons on Trial*, 70 *TEXAS OBSERVER* 2, 4 (Sept. 22, 1978). See also Cardwell, *Politics and Prisons*, 64 *TEXAS OBSERVER* 30, 32 (Feb. 25, 1977).

31. See TEX. REV. CIV. STAT. ANN. art. 6166x-3 (Vernon Supp. 1978-1979).

32. See TEX. CODE CRIM. PRO. ANN. art. 42.12, § 6 (j) (Vernon 1979).

33. See Rocawich, *Texas Prisons On Trial*, 70 *TEXAS OBSERVER* 2, 4 (Sept. 22, 1978). Almost no use is being made of work release. See also C.U.R.E. NEWSLETTER 1, 4 (Fall 1978). Little use is being made of parole. *Id.* at 4.

34. See Cardwell, *Politics and Prisons*, 64 *TEXAS OBSERVER* 30, 32 (Feb. 25, 1977); Rocawich, *Texas Prisons on Trial*, 70 *TEXAS OBSERVER* 2, 2, 4 (Sept. 22, 1978); *Solidarity for Ruiz*, 1 *PRISON L. MONITOR* 122, 122 (1978).

35. See *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974); TEX. REV. CIV. STAT. ANN. art. 6166a (Vernon 1970) (Texas Department of Corrections objectives); TEX. PENAL CODE ANN. § 1.02(1) (Vernon 1974) (objectives of Texas Penal Code sanctions). See generally Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 *J. CRIM. L. & CRIMINOLOGY* 405, 405 (1974). Contradictions are inherent in a system which attempts both to rehabilitate, a task requiring more guidance and treatment than that normally available to the average citizen, and to punish by confining the offender to maximum security detention where he is denied many of these opportunities. *Id.* at 405.

36. Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 *J. CRIM. L. & CRIMINOLOGY* 405, 405

correctional authorities is that these objectives have not been adequately met by the traditional system of incarceration of non-violent offenders.³⁷ Many feel that prison is actually debilitating and increases the convict's propensities for crime.³⁸ Whether adequate rehabilitation occurs in prison settings has been the subject of much inquiry.³⁹

Early sociological research of maximum security prisons in Illinois revealed severe negative effects of prison confinement on adult inmates.⁴⁰ As inmates adapted to prison, they developed strong traits of apathy and dependency, and exhibited routine, inflexible responses.⁴¹ Prisoners also acquired more criminal attitudes through interaction solely with other criminals.⁴² Noting the degenerative effects of confinement, the San Francisco Crime Commission reported that imprisonment is not only an ineffective tool for rehabilitation, but also a hindrance to the future adjustment of some offenders.⁴³ Incarceration, it stated, was likely to embitter inmates so that upon release they would present a greater threat to society than before incarceration.⁴⁴ The National Advisory Committee on Criminal Justice Standards and Goals similarly found that the major adult institutions

(1974); see TEX. PENAL CODE ANN. § 1.02(1) (Vernon 1974).

37. See V. FOX, *COMMUNITY-BASED CORRECTIONS* 2-4 (1977). The authoritarian quality of "a maximum security prison reduces people to a state of irresponsibility and dependency" and makes rehabilitation almost impossible. *Id.* at 3; K. MENNINGER, *THE CRIME OF PUNISHMENT* 220 (1968). Psychiatrist Menninger states that reformation of offenders is still not the purpose of our system. *Id.* at 220; see D. STANLEY, *PRISONERS AMONG US: THE PROBLEM OF PAROLE* 14-19 (1976). Experts in criminology doubt that rehabilitation occurs in prisons. *Id.* at 14-15; Banay, *Should Prisons Be Abolished?*, reprinted in D. CRESSEY, *CRIME AND CRIMINAL JUSTICE* 271-77 (1971). The present system of incarceration is a constant threat to public security. *Id.* at 271; Jeffery & Woolpert, *Work Furlough As An Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, reprinted in R. CARTER, D. GLASER, & L. WILKINS, *CORRECTIONAL INSTITUTIONS* 442, 443 (2d ed. 1977). Many experts agree that traditional incarceration practices are counter productive. *Id.* at 443; Rector, *The Extravagance of Imprisonment*, 21 *CRIME AND DELINQUENCY* 323, 323-30 (1975), cited in A. NEWTON, *NATIONAL COUNCIL ON CRIME AND DELINQUENCY, ALTERNATIVES TO IMPRISONMENT* n.1 (1st ed. 1975). The American Foundation concluded that prison seems to actually degenerate rather than rehabilitate, and that prisons are productive of crime. *Id.* at 109; P. WILSON, *MY SIX CONVICTS: A PSYCHOLOGIST'S THREE YEARS IN FORT LEAVENWORTH* (1st ed. 1951), cited in V. FOX, *COMMUNITY-BASED CORRECTIONS* 2 (1st ed. 1977).

38. See materials cited note 37 *supra*.

39. See H. JONES, P. CORNES, & R. STOCKFORD, *OPEN PRISONS* 6 (1977); Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 *J. CRIM. L. & CRIMINOLOGY* 405, 405 (1974); McCorkle & Korn, *Resocialization Within Walls*, 293 *ANNALS* 88 (1954).

40. See H. JONES, P. CORNES, & R. STOCKFORD, *OPEN PRISONS* 6 (1977).

41. See *id.* at 6.

42. See *id.* at 6.

43. Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 *J. CRIM. L. & CRIMINOLOGY* 405, 405 (1974).

44. *Id.* at 405.

operated by the state represented the least effective correctional method for rehabilitation and reintegration.⁴⁵ The Committee recommended that as many offenders as possible be diverted from such institutions into community-based alternatives and stated that only unsalvageable offenders not amenable to any form of rehabilitation should continue to be confined.⁴⁶ The American Bar Association Project on Standards for Criminal Justice also urged the implementation of community-based alternatives to incarceration.⁴⁷ The ABA Project reported that these correctional alternatives would enhance rehabilitation by avoiding the degenerative effects of confinement, while effectively vindicating the law and protecting society.⁴⁸ Alternatives to incarceration would also reduce monetary costs and minimize the impact of conviction on innocent dependents of the convict.⁴⁹ Supporting this conclusion, psychological studies have revealed a higher level of personal and social adjustment among offenders treated in the community than among those convicted of the same offenses who were incarcerated.⁵⁰

Proponents of alternatives to incarceration also contend that the punishment objectives of deterrence, protection of society, and retribution are not met by wide-spread use of incarceration of non-violent offenders⁵¹ and would be better achieved through community-based alternatives.⁵² Indeed, research reveals that parolees have a lower repeat offense rate than do

45. Corrections Task Force, National Advisory Commission on Criminal Justice Standards and Goals, *Major Institutions*, reprinted in C. DODGE, *A NATION WITHOUT PRISONS* 3, 17 (1975).

46. *See id.* at 17.

47. *See* ABA Project on Standards for Criminal Justice, *Approved Draft* (1970), reprinted in G. KILLINGER & P. CROMWELL, *CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT* 387, 388 (1974).

48. *See id.* at 388.

49. *Id.* at 389.

50. *See* Klapmuts, *Community Alternatives to Prison*, *CRIME AND DELINQUENCY LITERATURE* 305 (1973). Also lasting effects were found. Two years after release only forty-three percent of those treated in community-based corrections, as compared with sixty-three percent of those institutionalized, had violated parole. *Id.* at 323.

51. *See* V. FOX, *COMMUNITY-BASED CORRECTIONS* 271-72 (1977); D. STANLEY, *PRISONERS AMONG US: THE PROBLEM OF PAROLE* 179 (1976).

52. *See, e.g.*, V. FOX, *COMMUNITY-BASED CORRECTIONS* 281 (1977); D. STANLEY, *PRISONERS AMONG US: THE PROBLEM OF PAROLE* 179 (1976) (seventy-four percent of offenders placed on parole committed no new violations, whereas only fifty-three percent of those not paroled who served a full prison term committed no new offenses); Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 *J. CRIM. L. & CRIMINOLOGY* 405, 405 (1974) (successful work furlough participants). *But cf.* R. MARTINSON, T. PALMER, & S. ADAMS, *REHABILITATION, RECIDIVISM, AND RESEARCH* 32-33 (1976). These researchers stated they were unable to determine if treatment in the community made offenders better, but noted that it produced recidivism results at least as good as those produced by imprisonment. *See id.* at 33.

nonparolees,⁵³ and that probation does not increase the risk to the community in terms of recidivism.⁵⁴ Research also indicates a much lower rate of recidivism among convicts allowed to participate in work furlough than among those incarcerated and denied such participation.⁵⁵ In fact, work furlough has been found to be most effective for the class of offenders normally having the highest risk of failure after release.⁵⁶ Studies have also revealed that prison conditions that allow very minimal levels of outside contact result in much higher recidivism rates than do conditions that allow participation in work training, education, or post release job programs.⁵⁷ Also various data reveals a higher recidivism rate for both youthful and adult offenders who are confined in maximum security institutions than for those who committed the same offense but are sentenced to minimum security facilities.⁵⁸ Significantly, minimum security incarceration facilities place more emphasis upon education, vocational training, and other programs to aid reintegration into society than do maximum security prisons.⁵⁹ The importance of continued community contact in some form

53. See D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 88 (1975); *Corrections*, 63 A.B.A.J. 481, 481 (1977). Research by the Center for Knowledge in Criminal Justice Planning found twenty-five percent of parolees repeated offenses, whereas thirty-two percent of those not allowed parole did. *Id.* at 481.

54. National Advisory Committee on Criminal Justice Standards and Goals, *Report on Corrections* (1973), reprinted in G. KILLINGER & P. CROMWELL, *CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT* 168, 168 (1974); see D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 91 (1975). Only forty-six percent of those on probation became recidivists, whereas sixty-six percent of those institutionalized did. *Id.* at 91.

55. Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*. 65 J. CRIM. L. & CRIMINOLOGY 405, 409 (1974).

56. *Id.* at 413. "Therapeutic effects" were noted. There were forty-four percent fewer convictions among the participants in the work furlough program than among their incarcerated counterparts over the four year period after release. *Id.* at 414.

57. See D. GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* 273-74 (1964). One study revealed twice the success rate among prisoners participating in such programs. Another showed a parole failure rate of thirty-one percent for non-students and only a sixteen percent failure rate for those who participated in education while in prison. *Id.* at 273-74.

58. Fox, *Michigan's Experiment on Minimum Security Penology*, 56 J. CRIM. L. C. & P. S. 2 (1965), cited in D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 93 (1st ed. 1975). In one study, of the youthful offenders from maximum security institutions, 73.6% recidivated, whereas only 71.5% from minimum security institutions committed another offense. *Id.* at 93. Another study revealed both young adults and juveniles recidivated less often when incarcerated under conditions which placed fewer restrictions on their liberty. *Id.* at 85. It is important, however, that many offenders in this minimum custody group, though higher escape risks, were considered lower risk offenders. *Id.* at 86.

59. See Fox, *Michigan's Experiment in Minimum Security Penology*, 56 J. CRIM. L. C. & P. S. 2 (1965), cited in D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 93 (1st. ed. 1975).

to the achievement of correctional goals is indicated by these findings.⁶⁰

This evidence demonstrates that the punishment goals of deterrence, protection of society, and retribution are not adequately met by widespread use of incarceration.⁶¹ Rather than aiding the deterrence goal, prisons yield a higher recidivism rate than do community-based correctional alternatives.⁶² It is obvious that the goal of protection is not met through the use of a penal system which produces a greater number of repeat offenders.⁶³ Neither is society's interest in the goal of retribution adequately furthered by a system of widespread incarceration which, while punishing the offender, penalizes society with a higher recidivism rate than that produced by less restrictive alternatives.⁶⁴ Methods of retribution better suited to society's interests are available through community-based alternatives that allow offenders to work toward repayment of their victims and society⁶⁵ rather than to drain the economy.⁶⁶

60. See Gordon, *They Go to Prison on Purpose*, reprinted in C. DODGE, *A NATION WITHOUT PRISONS*, 171, 193 (1975). Community contact includes education, parole, work release and other reintegration programs. See D. GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* 274 (1964); D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 88 (1975); National Advisory Committee on Criminal Justice Standards and Goals, *Report on Corrections* (1973), reprinted in G. KILLINGER & P. CROMWELL, *CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT* 168, 168 (1974); *Corrections*, 63 A.B.A.J. 481, 481 (1977).

61. See V. FOX, *COMMUNITY-BASED CORRECTIONS* 281 (1977); D. STANLEY, *PRISONERS AMONG US: THE PROBLEM OF PAROLE* 179 (1976).

62. See D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 88 (1975); Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 J. CRIM. L. & CRIMINOLOGY 405, 409 (1974); National Advisory Committee on Criminal Justice Standards and Goals, *Report on Corrections* (1973), reprinted in G. KILLINGER & P. CROMWELL, *CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT* 168, 168 (1974). See also R. MARTINSON, T. PALMER, & S. ADAMS, *REHABILITATION, RECIDIVISM, AND RESEARCH* 32 (1976) (noting the deterrent effect of intensive supervision in community-based corrections).

63. See Banay, *Should Prisons Be Abolished?*, reprinted in D. CRESSEY, *CRIME AND CRIMINAL JUSTICE* 271, 271 (1971); See generally K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968); Corrections Task Force, National Advisory Committee on Criminal Justice Standards and Goals, *Major Institutions*, reprinted in C. DODGE, *A NATION WITHOUT PRISONS* 3, 17 (1975); Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 J. CRIM. L. & CRIMINOLOGY 405, 405 (1974).

64. See Banay, *Should Prisons Be Abolished?*, reprinted in D. CRESSEY, *CRIME AND CRIMINAL JUSTICE* 271, 271 (1971). See generally Corrections Task Force, National Advisory Committee on Criminal Justice Standards and Goals, *Major Institutions*, reprinted in C. DODGE, *A NATION WITHOUT PRISONS* 3, 17 (1975).

65. See TEX. REV. CIV. STAT. ANN. art. 6166x-3 (Vernon Supp. 1978-1979) (allowing victim compensation); TEX. CODE CRIM. PRO. ANN. art. 42.12, § 6 (m) (Vernon 1979) (victim compensation). See also COLO. REV. STAT. § 17-28-101 (1978) (reimbursement to victim); Newton, *Alternatives to Imprisonment*, *CRIME AND DELINQUENCY LITERATURE* 109, 117, 120 (1976); *Corrections*, A.B.A.J. 481, 481 (1977) (victim restitution program).

66. See A. Smith & L. Berlin, *Probation and Parole* 180 (1976) (prison six times as

Statistical research indicates that the public policy considerations present in the correctional goals of rehabilitation and punishment are better served through community-based corrections.⁶⁷ State correctional institutions have failed to demonstrate similar capabilities for the furtherance of society's correctional goals.⁶⁸ Thus, public policy justifications for alternatives to incarceration are apparent.

Prison Overcrowding

Prisons throughout America are filled beyond capacity and the national recidivism rate averages eighty percent.⁶⁹ As prison populations escalate more rapidly than new prisons can be built, federal courts are increasingly petitioned for injunctions against gross overcrowding, which is frequently found to constitute cruel and unusual punishment.⁷⁰ According to one source, present facilities in Texas provide less than half the space required by the latest standards of the American Correctional Association.⁷¹ Cur-

expensive as probation or parole). See also C.U.R.E. NEWSLETTER 1, 1 (Summer 1978) (work release program seven times less expensive than prison).

67. See C. DODGE, A NATION WITHOUT PRISONS, 114, 117-20 (1975); H. JONES, P. CORNES, & R. STOCKFORD, OPEN PRISONS 6 (1977); D. LIPTON, R. MARTINSON, & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 88 (1975); ABA Project on Standards for Criminal Justice, *Approved Draft* (1970); reprinted in G. KILLINGER & P. CROMWELL, CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT 387, 388-89 (1974); Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 J. CRIM. L. & CRIMINOLOGY 405, 413 (1974); Klapmuts, *Community Alternatives to Prison*, CRIME AND DELINQUENCY LITERATURE 305, 335-37 (1973); National Advisory Committee on Criminal Justice Standards and Goals, *Report on Corrections* (1973), reprinted in G. KILLINGER & P. CROMWELL, CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT 168, 168 (1974). But see L. WILKINS, EVALUATION OF PENAL MEASURES 14 (1969) (reliability of correctional data on recidivism is lessened by difficulties arising from definitions and descriptions used, and from lack of training in sampling technique and statistics among researchers).

68. See Banay, *Should Prisons Be Abolished?*, reprinted in D. CRESSEY, CRIME AND CRIMINAL JUSTICE 271, 271 (1971); Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 J. CRIM. L. & CRIMINOLOGY 405, 405 (1974).

69. *About the Failure of Rehabilitation Programs*, 1 PRISON L. MONITOR 101, 101 (1978). But see D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 13-16 (1st ed. 1974) (questioning methods used to arrive at this figure).

70. See *Johnson v. Levine*, 23 CRIM. L. REP. (BNA) 2317 (D. Md. May 17, 1978); *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978); *Martinez Rodriguez v. Jimenez*, 409 F. Supp. 582, 585, 594-95 (D.P.R. 1976); *Jones v. Wittenberg*, 330 F. Supp. 707, 716 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972).

71. See Rocawich, *Texas Prisons on Trial*, TEXAS OBSERVER, (Sept. 22, 1978), at 4. The ACA minimum standards, recently published in five volumes, cover every facet of adult corrections and are expected to have a great impact on judicial intervention. These standards have been accepted by the National Sheriff's Association and the Law Enforcement Assistance Administration. 23 CRIM. L. REP. (BNA) 3, 10-11 (Supp. 1978). But see *Krajick, Profile—Texas*, CORRECTIONS, (Mar. 1978), at 4 (Texas system has accommodated prison population).

rently the Texas prison system houses the largest inmate population in the United States⁷² and is, according to a recent investigation by the Justice Department, the most overcrowded in the nation.⁷³ The Texas correctional system is currently a defendant in a federal civil rights suit in which inmates allege that they have sustained substantial mental and physical injury from severely overcrowded prison conditions.⁷⁴ The overcrowding problem may be partially attributed to the current Texas practice which, in proportion to population, incarcerates more felons than forty-two other states.⁷⁵ Furthermore, Texas judges generally hand down some of the longest sentences in the country.⁷⁶ The magnitude of the Texas problem has been increased by the current procedure which makes virtually no use of the community-based alternatives authorized by statute.⁷⁷ It was reported in 1977 that less than one percent of Texas prisoners were allowed to participate in the work release program,⁷⁸ and almost all felons in Texas are confined to maximum security institutions.⁷⁹ In addition, the Texas Parole Board is paroling progressively fewer prisoners, and less than one third of eligible inmates are currently being paroled.⁸⁰ Texas judges also make less use of probation as a sentencing alternative than do judges in most other states.⁸¹ This practice is partially attributable to inadequate county probation services.⁸²

One apparent solution is to build more prisons. But since maximum security incarceration generally yields high recidivism rates, increased construction would probably fail to remedy the overcrowding,⁸³ as fifty years

72. See 23 CRIM. L. REP. (BNA) 3, 10-11 (Supp. 1978).

73. See *id.* at 4. (data furnished by National Institute of Law Enforcement and Criminal Justice, a branch of Justice Department).

74. Rocawich, *Texas Prisons On Trial*, TEXAS OBSERVER, (Sept. 22, 1978), at 2. The pending case of *Ruiz v. Estelle* is the largest civil rights suit to date by inmates against a prison. Texas inmates have charged the Texas Department of Corrections with eighth amendment violations, alleging severe overcrowding, unsafe working conditions, and grossly inadequate medical care. *Id.* at 2. Texas now houses 24,000 inmates in prisons built to accommodate 19,000. *Id.* at 4.

75. Rocawich, *Texas Prisons On Trial*, 70 TEXAS OBSERVER 2, 4 (Sept. 22, 1978).

76. *Id.* at 4.

77. *Id.* at 4. See TEX. REV. CIV. STAT. ANN. art. 6166x-3 (Vernon Supp. 1978-1979) (authorizing work release and victim restitution); TEX. CODE CRIM. PRO. ANN. art. 42.12, § 6 (j) (Vernon 1979) (authorizing community-based corrections and victim restitution as sentencing alternatives under probation statute).

78. Cardwell, *Politics and Prisons*, TEXAS OBSERVER, (Feb. 25, 1977), at 32.

79. Rocawich, *Texas Prisons On Trial*, TEXAS OBSERVER, (Sept. 22, 1978), at 4.

80. Cardwell, *Politics and Prisons*, TEXAS OBSERVER, (Feb. 25, 1977), at 32.

81. Rocawich, *Texas Prisons On Trial*, TEXAS OBSERVER, (Sept. 22, 1978), at 4.

82. *Id.* at 4.

83. See Gordon, *They Go To Prison on Purpose*, reprinted in C. DODGE, A NATION WITHOUT PRISONS 171, 193 (1975); Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 J. CRIM. L. & CRIMINOLOGY 405, 407 (1974) (the greater the restriction of liberty, the higher the recidivism rate).

of experience with the federal prison system has demonstrated.⁸⁴ The unattractiveness of further prison construction as a solution increases when monetary factors are considered.⁸⁵ Recent research reveals that correctional goals can be achieved at a much lower monetary cost without increasing the incidence of crime through the use of community-based alternatives.⁸⁶ Finally, if the current expansion in prisoner population is not reversed, federal civil rights suits by prisoners will continue to proliferate as new prisons also become overcrowded, requiring the state to pay monetary penalties for infringements of inmates' rights and necessitating continued judicial intervention at the state's expense.⁸⁷

Texas Legislative Intent

The Texas Legislature has passed two statutes allowing for community-based alternatives to incarceration, and the duty of the courts and parole

84. *Fighting Federal Prisons*, 1 JERICHO 6, 6 (Feb.-June 1978).

85. From 1969 to 1977, the budget of the Federal Bureau of Prisons grew five hundred percent and an additional 353 million dollars has recently been appropriated by Congress for new prison construction. A new cell costs between \$25,000 and \$50,000. Hall & Kroll, *A Moratorium On Prison Construction*, 1 PRISON L. MONITOR 65, 66 (Aug. 1978). Eighty-nine percent of the offenders in federal prisons have been convicted of non-violent crimes. *Id.* at 66. Many feel that these offenders could be dealt with in community-based corrections without increasing dangers to society. *See id.* at 66. *But see* Fenton, *The Process of Reception in the Adult Correctional System*, 293 ANNALS 51, 54, 58 (1954). Reception centers which could be used for screening convicts before institutionalization to determine fitness for alternatives could be quite expensive. *Id.* at 58.

86. A. SMITH & L. BERLIN, *PROBATION AND PAROLE* 180 (1976). Confining a prisoner in a maximum security institution costs six times as much as probation or parole supervision (\$11,000 per year versus \$365 per year). *Id.* at 180. Halfway houses and intensive counseling have been used in other states lowering costs to taxpayers and recidivism rates. Cardwell, *Politics and Prisons*, TEXAS OBSERVER, (Feb. 25, 1977), at 30. A work release program in Texas would reduce recidivism and save the state millions of dollars currently spent on welfare payments to support inmates' families. *Id.* at 30. Also, the need for new prison construction would be curtailed. *Id.* at 32. Hall & Kroll, *A Moratorium On Prison Construction*, 1 PRISON L. MONITOR. 65, 67 (1978). The Congressional Budget Office reports that it costs less than half as much annually to confine an offender in a halfway house than in a prison—\$7,000 vs. \$17,000. *Id.* at 67. Other community-based alternatives to incarceration less expensive than imprisonment are community service orders and restitution whereby the offenders compensate their victims, the state, and support their dependents. *See* Newton, *Alternatives to Imprisonment*, CRIME AND DELINQUENT LITERATURE 109, 117, 120 (1976). Thirteen people can be supervised in the community for the amount of money required to maintain one offender in prison. V. FOX, *COMMUNITY-BASED CORRECTIONS* 281 (1977); Alexander, *Do Our Prisons Cost Too Much?*, 293 ANNALS 35, 36-37 (1954); *But cf.* Bennett, *Evaluating a Prison*, 293 ANNALS 10, 12 (1954); Fenton, *The Process of Reception in the Adult Correctional System*, 293 ANNALS 51, 58 (1954). Some forms of incarceration which allow less restriction than maximum security prisons and which offer educational, vocational, and other clinical programs can present a substantial expense. *Id.* at 58.

87. *See generally* 23 CRIM. L. REP. (BNA) 3,7 (Supp. 1978).

boards to cooperate with the intent reflected in them is manifest.⁸⁸ Policy considerations underlying legislative enactment must be reflected in judicial interpretation when, as in the case of these statutes, the legislature's intent can be determined by reasonable inference.⁸⁹ The current Texas practice of sentencing nearly all felons to the state penitentiary, and virtually none to community-based facilities,⁹⁰ fails to adequately carry out the policy considerations underlying the Texas community-based corrections statutes.⁹¹ Compliance with legislative intent demands that adequate community-based correctional facilities be provided to allow a change in sentencing practices in Texas and an implementation of the Texas statutes allowing alternatives to incarceration.

Legal Remedies Now Available in Texas for Substandard Prison Conditions

As previously discussed, because of the worsening of prison conditions, federal courts are increasingly besieged with civil actions brought by inmates challenging confinement conditions.⁹² As prisons become more overcrowded, the risk of transmission of disease among prisoners increases⁹³ and psychological as well as physical harm results.⁹⁴ Currently, Texas prisoners have access to redress against the state under two statutes, the federal Civil Rights Act⁹⁵ and the Texas Tort Claims Act.⁹⁶

Under the Civil Rights Act the state may be required to respond in money damages to inmates,⁹⁷ and a federal court may issue an injunction to remedy the poor prison conditions.⁹⁸ Frequently litigated issues in prison

88. See TEX. REV. CIV. STAT. ANN. art. 6166x-3 (Vernon Supp. 1978-1979); TEX. CODE CRIM. PRO. ANN. art. 42.12, § 6 (j) (Vernon 1979).

89. See *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908) (Holmes on legislative intent).

90. See Cardwell, *Politics and Prisons*, TEXAS OBSERVER, (Feb. 25, 1977), at 32; Rocawich, *Texas Prisons on Trial*, TEXAS OBSERVER, (Sept. 22, 1978), at 4.

91. See TEX. REV. CIV. STAT. ANN. art. 6166x-3 (Vernon Supp. 1978-1979); TEX. CODE CRIM. PRO. ANN. art. 42.12, § 6 (j) (Vernon 1979).

92. See 23 CRIM. L. REP. (BNA) 3, 3 (Supp. 1978). One in seven federal suits is this type of case. *Id.* at 3; see, e.g., *Costello v. Wainwright*, 539 F.2d 547, 548 (5th Cir. 1976); *Laaman v. Helgemoe*, 437 F. Supp. 269, 275 (D.N.H. 1977); *Anderson v. Redman*, 429 F. Supp. 1105, 1107 (D. Del. 1977).

93. See D'Atri & Ostfeld, *Crowding: Its Effects on the Elevation of Blood Pressure in a Prison Setting*, 4 PREVENTATIVE MEDICINE 550 (1975), cited in 1 PRISON L. MONITOR 64 (1978).

94. See Cain, *The Relationship Between Illness Complaints and Degree of Crowding in a Prison*, 8 ENVIRONMENT AND BEHAVIOR 2, 10 (1976), cited in 1 PRISON L. MONITOR 64 (1978).

95. 42 U.S.C. § 1983 (1970).

96. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3 (Vernon Supp. 1978-1979); see *Jenkins v. State*, 570 S.W. 2d 175, 175 (Tex. Civ. App.—Houston [14th Dist.] 178, no writ).

97. See 42 U.S.C. § 1983 (1970). See generally U. S. COMMISSION ON CIVIL RIGHTS, OHIO ADVISORY COMMITTEE, *PROTECTING INMATE RIGHTS: PRISON REFORM OR PRISON REPLACEMENT?* iii (summary ed. 1976).

98. 42 U.S.C. § 1983 (1970); see *Pugh v. Locke*, 406 F. Supp. 318, 331 (M.D. Ala. 1976),

suits filed under the Civil Rights Act, include allegations that confinement conditions constitute cruel and unusual punishment because of severe overcrowding, inadequate medical care, constant threat of violence, and lack of any reasonable relationship between confinement conditions and legitimate institutional goals.⁹⁹ To some extent the threat of suits may provide an incentive for the state to improve conditions, but obviously money damages to prisoners will not directly improve present conditions.¹⁰⁰ Similarly, injunctive relief is frequently inadequate because of slow implementation,¹⁰¹ and judges can not be expected to be experts in the area of "social engineering" and prison administration.¹⁰²

In the recent case of *Jenkins v. State*,¹⁰³ for the first time a Texas prisoner was awarded money damages under the Texas Tort Claims Act for personal injuries received because of improper and negligent medical treatment while in prison.¹⁰⁴ The plaintiff alleged that because of the prison officials' negligent use and nonuse of tangible property¹⁰⁵ he sustained severe injuries as a result of an epileptic seizure and was thus entitled to recover under the Texas Tort Claims Act.¹⁰⁶ As the court held, the state's

aff'd as modified sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978).

99. See Pugh v. Locke, 406 F. Supp. 318, 321-22 (M.D. Ala. 1976), *aff'd as modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978).

100. See generally 23 CRIM. L. REP. (BNA) 3-14 (Supp. 1978). See also Pugh v. Locke, 406 F. Supp. 318, 331 (M.D. Ala. 1976), *aff'd as modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978); U.S. COMMISSION ON CIVIL RIGHTS, OHIO ADVISORY COMMITTEE, PROTECTING INMATE RIGHTS: PRISON REFORM OR PRISON REPLACEMENT? iii (summary ed. 1976). The Ohio Civil Rights Advisory Committee stated "We strongly feel that prisons may be inherently incapable of operating constitutionally." *Id.* at iii. The Committee further reported, that the very institutional structure of prisons is a major cause of inmates' rights violations, and recommended a movement toward community-based alternatives. *Id.* at iii.

101. See Pugh v. Locke, 406 F. Supp. 318, 331 (M.D. Ala. 1976), *aff'd as modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978). The court felt compelled to appoint the Human Rights Committee for the Alabama Prison System to supervise the implementation of its new injunction against the state because a similar injunction issued by the court in 1974 was still unimplemented in 1976. *Id.* at 331; see Report to National Institute of Law Enforcement and Criminal Justice by M. Harris and D. Spiller, *After Decision: Implementation of Judicial Decrees in Correctional Settings* (Oct. 1977).

102. See 23 CRIM. L. REP. (BNA) 3, 7 (Supp. 1978); Comment, *Confronting the Conditions of Confinement: An Expanded Role of the Courts in Prison Reform*, 12 HARV. C.R.-C.L.L. REV. 367, 388 (1977) (courts reluctant to intervene because they lack expertise in prison administration); Comment, *Overcrowding in Prisons and Jails: Maryland Faces a Correctional Crisis*, 36 MD. L. REV. 182, 186-87 (1976) (judiciary avoided intervention because of lack of expertise in penology).

103. 570 S.W.2d 175 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

104. 570 S.W.2d 175, 179 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

105. 570 S.W.2d 175, 177 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ). Negligent use and nonuse of medical records and medications were alleged. *Id.* at 178.

106. See *id.* at 176.

abolition of its own immunity from liability for personal injuries created a new method of recovery for Texas prisoners.¹⁰⁷ Monetary compensation, however, as under the Civil Rights Act, seems an inadequate remedy for an inmate remaining in the same institution, subject to the same conditions. If more adequate remedies exist, they should be implemented.¹⁰⁸ The broader use of community-based correctional alternatives could constitute such a remedy in Texas by allowing eligible offenders to avoid the degenerative effects of confinement and experience maximum liberty while vindicating society's laws and effectively protecting the public.¹⁰⁹

COMPELLING STATE INTEREST—DO CRIMINALS HAVE A RIGHT TO THE LEAST RESTRICTIVE ALTERNATIVE?

One test used by the United States Supreme Court to determine the constitutional propriety of state action has been the "compelling governmental interest" test.¹¹⁰ Unless some compelling state interest is present, an infringement on personal liberties is not justified.¹¹¹ As a corollary, the Supreme Court has further held that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."¹¹² "[L]ess drastic means for achieving the same basis purpose" must be used.¹¹³

107. *Id.* at 178. See TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3 (Vernon Supp. 1978-1979).

108. See ABA Project on Standards for Criminal Justice, *Approved Draft* (1970), reprinted in G. KILLINGER & P. CROMWELL, CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT 387, 388 (1974); Corrections Task Force, National Advisory Committee on Criminal Justice Standards and Goals, *Major Institutions*, reprinted in C. DODGE, A NATION WITHOUT PRISONS 3, 17 (1975).

109. See ABA Project on Standards for Criminal Justice, *Approved Draft* (1970), reprinted in G. KILLINGER & P. CROMWELL, CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT 387, 388 (1974). Under the Texas community-based alternatives probation statute offenders of violent crimes are excluded. See TEX. CODE CRIM. PRO. ANN. art 42.12, § 6 (Vernon 1979).

110. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Camara v. Municipal Court*, 387 U.S. 523, 525 (1967); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

111. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (state regulation unconstitutional because no compelling state interest in restricting appellee's right to move from one state to another); *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967) (administrative search by government unconstitutional because public interest not sufficient to justify the intrusion on rights of private citizens); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (regulation unconstitutional because no compelling interest justified infringement on first amendment rights).

112. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (free speech case); see *Pugh v. Locke*, 406 F. Supp. 318, 328 *aff'd as modified sub nom.* *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978) (restriction that does not support valid correctional goals and arbitrarily denies participation in prison work programs unconstitutional).

113. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

Recently a federal district court in the case of *Pugh v. Locke*¹¹⁴ applied this "compelling interest" rationale to determine whether the eighth and fourteenth amendment rights of Alabama prisoners had been violated by the state.¹¹⁵ The *Pugh* court found governmental interests insufficient to justify the denial to these inmates of less restrictive alternatives, which would better afford them the opportunity for rehabilitation.¹¹⁶ Thus when the restriction of an inmate's liberties supports no valid purpose such as rehabilitation, deterrence, or institutional security, the restriction cannot stand.¹¹⁷ In *Pugh* the court found that an overcrowded prison, which denied medical care, inmate safety, and an opportunity for educational and work experience created an atmosphere unconstitutionally denying prisoners the opportunity to seek a purposeful future.¹¹⁸ Significantly it was stated that though "courts have thus far declined to elevate a positive rehabilitation program to the level of a constitutional right, . . . [clearly] a penal system cannot be operated in such a manner that it impedes an inmate's ability to attempt rehabilitation, or simply avoid physical, mental or social deterioration."¹¹⁹ Without a positive rehabilitation program conditions exist which actually militate against rehabilitation and reform.¹²⁰

The court in *Pugh* held that the arbitrary denial to inmates of an opportunity for less restrictive forms of treatment such as vocational and educational training violated their fourteenth amendment due process rights.¹²¹ The court stated that because this denial made "dehabilitation inevitable,"¹²² and increased the probability of future confinement,¹²³ mere confinement under these conditions also contravened the eighth amendment.¹²⁴ The likelihood of successful rehabilitation or the chances of escaping mental and physical degeneration after incarceration are further dim-

114. 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd as modified sub nom.* *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978).

115. *See Pugh v. Locke*, 406 F. Supp. 318, 328, (M.D. Ala. 1976), *aff'd as modified sub nom.* *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978); U.S. CONST. amend. VIII (prohibition against cruel and unusual punishment), XIV (due process and equal protection). *See also Pell v. Procunier*, 417 U.S. 817, 822-23 (1974).

116. *See Pugh v. Locke*, 406 F. Supp. 318, 326-28, *aff'd as modified sub nom.* *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978).

117. *Id.* at 328.

118. *See id.* at 329.

119. *Id.* at 330. *See also Holt v. Sarver*, 309 F. Supp. 362, 379 (E.D. Ark. 1970).

120. *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd as modified sub nom.* *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978).

121. *See id.* at 326, 329. *See also Wolff v. McDonnell*, 418 U.S. 539, 550-51 (1974).

122. *Pugh v. Locke*, 406 F. Supp. 315, 332, 325-26 (M.D. Ala. 1976), *aff'd as modified sub nom.* *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978). The denial of opportunities for rehabilitation was coupled with a major overcrowding problem. *See id.* at 332.

123. *Id.* at 330.

124. *Id.* at 329. Without the ability to participate in work, education, or other less restrictive activities, the inmates could only remain idle in the crowded dorms. *Id.* at 326.

inished, the court noted, by the existence of vast differences between the prison environment and the social environment to which the inmates must eventually return.¹²⁵ Holding that these restrictions on liberty imposed by the state failed to further any legitimate correctional goal, the court ordered the state to provide educational and work opportunities to each inmate.¹²⁶ Further, the court mandated that the state afford each inmate the opportunity to participate in some pre-release transitional program designed to aid re-entry into society.¹²⁷ Analogous to the decree issued in the juvenile case of *Morales v. Turman*,¹²⁸ the court in *Pugh* ordered the defendants to create work-release, pre-release, and other community-based facilities to accommodate prisoners for whom such programs are deemed appropriate.¹²⁹ Inadequate funding by the legislature could not justify failure to comply, the court asserted.¹³⁰ Similar holdings with respect to the incarceration of sexual psychopath offenders illustrate other instances in which the courts have recognized that the "compelling governmental interest" test requires the application of the least restrictive alternative standard to the field of adult corrections.¹³¹

The implication of these holdings is that a sufficiently compelling state interest may no longer justify the widespread incarceration which currently occurs in Texas.¹³² Implicit in the extension of the least restrictive alternative rationale is the recognition, shared by many authorities, that due to prison's degenerative effect on inmates it is ultimately in society's best interests to keep most non-violent offenders out of prison.¹³³ The valid-

125. *Id.* at 327.

126. *See id.* at 335.

127. *See id.* at 335.

128. *Morales v. Turman*, 383 F. Supp. 53, 125-26 (E.D. Tex. 1974), *rev'd*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977).

129. *See Pugh v. Locke*, 406 F. Supp. 318, 335 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978).

130. *See id.* at 330.

131. *See Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Millard v. Harris*, 406 F.2d 964, 973 (D.C. Cir. 1968).

132. *See Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Millard v. Harris*, 406 F.2d 964, 973 (D.C. Cir. 1968); *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978). *See also Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

133. *See Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978); ABA Project on Standards for Criminal Justice, *Approved Draft* (1970), *reprinted in G. KILLINGER & P. CROMWELL, CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT* 387, 388 (1974); Corrections Task Force, National Advisory Committee on Criminal Justice Standards and Goals, *Major Institutions*, *reprinted in C. DODGE, A NATION WITHOUT PRISONS* 3, 17 (1975); Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 J. CRIM. L. & CRIMINOLOGY 405, 405 (1974).

ity of this assertion is apparent through an analysis of recidivism rates and other data, which indicate that rehabilitation occurs more successfully and with greater frequency when community-based alternatives are used.¹³⁴ As research has demonstrated, society's correctional aims can be "more narrowly achieved" through alternatives to incarceration.¹³⁵ Thus, under the least restrictive alternative standard,¹³⁶ necessitated by the constitutional tests which require both a compelling governmental interest¹³⁷ and use of the least drastic means to achieve any state purpose,¹³⁸ the current Texas practice of incarcerating many non-violent offenders is questionable on Constitutional grounds. Since society's goals can be achieved through methods that require less drastic curtailment of liberty than does incarceration,¹³⁹ the state has a duty to impose the least restrictive alternative

134. See V. Fox, *COMMUNITY-BASED CORRECTIONS* 281 (1977); H. JONES, P. CORNES, & R. STOCKFORD, *OPEN PRISONS* 6 (1977); D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 91 (1975); D. STANLEY, *PRISONERS AMONG US: THE PROBLEM OF PAROLE* 179 (1976); Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 *J. CRIM. L. & CRIMINOLOGY* 405, 413 (1974); Klappmuts, *Community Alternatives to Prison*, *CRIME AND DELINQUENCY LITERATURE* (1973); McCorkle & Korn, *Resocialization Within Walls*, 293 *ANNALS* 88 (1954) (Social Science Research). See generally National Advisory Committee on Criminal Justice Standards and Goals, *Report on Corrections*, (1973), reprinted in G. KILLINGER & P. CROMWELL, *CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT* 168, 168 (1974). See also *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978).

135. See V. Fox, *COMMUNITY-BASED CORRECTIONS* 281 (1977); H. JONES, P. CORNES, & R. STOCKFORD, *OPEN PRISONS* 6 (1977); D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 91 (1975); D. STANLEY, *PRISONERS AMONG US: THE PROBLEM OF PAROLE* 179 (1976); Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 *J. CRIM. L. & CRIMINOLOGY* 405, 413 (1974); Klappmuts, *Community Alternatives to Prison*, *CRIME AND DELINQUENCY LITERATURE* (1973); McCorkle & Korn, *Resocialization Within Walls*, 293 *ANNALS* 88 (1954). See also *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (constitutional test); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978).

136. See *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969); *Lake v. Cameron*, 364 F.2d 657, 660-61 (D.C. Cir. 1966); *Morales v. Turman*, 383 F. Supp. 53, 84-85, 121-26 (E.D. Tex. 1974), *rev'd*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated*, 421 U.S. 957 (1975).

137. See *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

138. See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (requiring least restrictive method of furthering state interest). See generally *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978); ABA Project on Standards for Criminal Justice, *Approved Draft* (1970), reprinted in G. KILLINGER & P. CROMWELL, *CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT* 387, 388 (1974).

139. See note 135 *supra* and accompanying text (evidence of less drastic means capable of furthering state interest). See also *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

consistent with the purposes of the confinement.¹⁴⁰ This duty necessarily requires the implementation of the Texas community-based alternative statutes.

ELIGIBILITY STANDARDS: DO THE TEXAS STATUTES PRESENT A VIABLE TEST?

The Texas probation statute provides a practical method for determining which offenders should participate in community-based alternatives.¹⁴¹ This statute excludes from candidacy for community-based corrections all offenders convicted of any one of five violent felonies or any offense committed with a deadly weapon.¹⁴² Research that found lower recidivism rates among offenders sentenced to community-based alternative programs than among those incarcerated, used non-violent offenders in the experimental community groups.¹⁴³ As the lower rates of recidivism indicate, the eligibility standard of non-violent offenders proved reliable in these experiments both in terms of protecting society against repeated offenses, and in assuring a high probability of success among participants.¹⁴⁴ Thus the Texas probation statute excluding from consideration those who have committed the above mentioned violent crimes should yield similar results.

A comparison with other methods that have been used for determining eligibility for alternatives to incarceration further illustrates the viability of the Texas method.¹⁴⁵ One standard used in civil commitment cases and in juvenile and adult correctional law has been that of "dangerousness."¹⁴⁶

140. See *Pugh v. Locke*, 406 F. Supp. 318, 330, 335 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978). See also *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969); *Lake v. Cameron*, 364 F.2d 657, 660-61 (D.C. Cir. 1966).

141. See TEX. CODE CRIM. PRO. ANN. art. 42.12, § 3(f), 6(j) (Vernon 1979).

142. See *id.* § 3(f). The felonies are capital murder, aggravated rape, aggravated kidnapping, aggravated sexual abuse, and aggravated robbery. *Id.*

143. See D. GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* 293-94 (1964); D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 91 (1975); Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects On Recidivism and Social Cost*, 65 J. CRIM. L. & CRIMINOLOGY 405, 407 (1974).

144. See materials cited note 143 *supra*.

145. Compare *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969) ("dangerousness") and *State v. Leonardis*, 363 A.2d 321, 328-30 (N.J. 1976) ("amenability to rehabilitation") and WASH. REV. CODE ANN. § 9.95A.020 (1977) ("dangerousness") with TEX. CODE CRIM. PRO. ANN. art. 42.12, § 3(f) (Vernon 1979).

146. See, e.g., *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969) (civil commitment); *Morales v. Turman*, 383 F. Supp. 53, 84-85 (E.D. Tex. 1974), *rev'd* 535 F.2d 864, *rev'd*, 430 U.S. 322 (1977) (juvenile correctional law); WASH. REV. CODE ANN. § 9.95A.020 (1977) (adult correctional law). Elements required to find dangerousness include recent overt acts indicating threats to do "substantial harm to oneself or another," *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated*, 421 U.S. 957 (1975), and a substantial likelihood of recurrence, *Cross v. Harris*, 418 F.2d 1095, 1100 (D.C. Cir. 1969).

Another standard used in adult correctional law has been amenability to rehabilitation.¹⁴⁷ Unlike the Texas eligibility test, these methods for determining eligibility require a hearing and extensive expert testimony.¹⁴⁸ Reliance on these standards also presupposes that "dangerousness" can be accurately determined through the methods used.¹⁴⁹ Many authorities believe otherwise.¹⁵⁰ Thus, these criteria may not constitute reliable standards for judicial determination of eligibility for alternatives to incarceration.¹⁵¹ The method contemplated by the Texas Legislature and reflected in the Texas probation statute provides the judiciary with a more objective and practical method for determining which offenders should be sentenced to community-based alternatives without increasing the threat to society.¹⁵²

POSSIBLE IMPEDIMENTS TO THE IMPLEMENTATION OF ALTERNATIVES TO
INCARCERATION IN TEXAS

The implementation of the work release and community-based probation statutes¹⁵³ in Texas depends not only on Texas judges' increased willingness to honor legislative intent but also on increased non-judicial cooperation.¹⁵⁴ Adequate community-based facilities do not currently exist to accommodate a massive movement toward community-based alternatives in

147. See *State v. Markt*, 384 A.2d 162, 166 (N.J. Super. Ct. App. Div. 1978); *State v. Leonardis*, 363 A.2d 321, 335 (N.J. 1976). This test requires that an offender not be excluded solely because he has committed a violent crime, but considers the defendant's willingness to avoid conviction, motivation behind the commission of his offense, age, past criminal record, and current rehabilitative efforts. See *State v. Leonardis*, 363 A.2d 321, 335 (N.J. 1976).

148. Compare TEX. CODE CRIM. PRO. ANN. art. 42.12, § 6 (Vernon 1979) (Texas eligibility test) with *Covington v. Harris*, 419 F.2d 617, 625-26 (D.C. Cir. 1969) and *Lake v. Cameron*, 364 F.2d 657, 660-61 (D.C. Cir. 1966) and *Morales v. Turman*, 383 F. Supp. 53, 84-85 (E.D. Tex. 1974), *rev'd*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977) and *State v. Leonardis*, 363 A.2d 321, 328-30 (N.J. 1976).

149. See, e.g., *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969); *Lake v. Cameron*, 364 F.2d 657, 660-62 (D.C. Cir. 1966); *Morales v. Turman*, 383 F. Supp. 53, 84-85 (E.D. Tex. 1974), *rev'd*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977).

150. See, e.g., *Diamond*, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 452 (1974); *Dix*, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEXAS L. REV. 1343, 1344-45 (1977); *Zander*, *Civil Commitment in Wisconsin: The Impact of Lessard v. Schmidt*, 1976 WIS. L. REV. 503, 547-48. See generally *Ginsberg & Klockars*, "The Dangerous Offender" and Legislative Reform, 10 WILLAMETTE L. REV. 167 (1974).

151. See *Dix*, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEXAS L. REV. 1343, 1344-46 (1977).

152. See generally TEX. CODE CRIM. PRO. ANN. art. 42.12, § 3(f), 6(j) (Vernon 1979).

153. TEX. REV. CIV. STAT. ANN. art. 6166x-3 (Vernon Supp. 1978-1979); TEX. CODE CRIM. PRO. ANN. art. 42.12, § 6(j) (Vernon 1979).

154. See *Rocawich*, *Texas Prisons On Trial*, TEXAS OBSERVER, (Sept. 22, 1978), at 4.

Texas¹⁵⁵ and funds have not traditionally been appropriated for their development.¹⁵⁶ As the federal court in *Pugh v. Locke* recently stated, lack of adequate funding is no excuse for failure of the state to provide conditions necessary for rehabilitation,¹⁵⁷ including alternatives to incarceration.¹⁵⁸ The State of Texas could finance construction of community-based facilities by diverting moneys allocated for additional prison construction to the development of community-based facilities.

Successful implementation of certain community-based alternatives in Texas will also require the Parole Board to more willingly parole non-violent offenders.¹⁵⁹ At the present time, the Texas probation and parole statutes are discretionary.¹⁶⁰ Several state and federal probation and parole statutes have recently been made mandatory in order to assist in implementing alternatives to incarceration.¹⁶¹ A similar change in the Texas statutes merits legislative consideration.

Opposition to the use of alternatives to incarceration can be expected from residents near new community facilities.¹⁶² Many share the fear that the use of such alternatives will jeopardize public security.¹⁶³ The belief

155. *See id.* at 4.

156. *See generally* C.U.R.E. NEWSLETTER 1, 4 (Fall 1978); C.U.R.E. NEWSLETTER 1, 1 (Summer 1978) (penal reform group urging diversion of moneys).

157. *See Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283, 335 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978).

158. Some community-based facilities such as probation, pretrial and presentence diversion programs are designed to completely divert convicted persons from incarceration, whereas others such as parole under supervision, certain work release, educational and residential and nonresidential prerelease community programs, are designed to aid the offenders' reintegration into society after serving prison sentences. *See V. FOX, COMMUNITY-BASED CORRECTIONS* 11 (1977); Klapmuts, *Community Alternatives to Prison*, *CRIME AND DELINQUENCY LITERATURE* 305, 308-09 (1973). Former inmates' reentry into society can be greatly facilitated through the use of the community-based alternatives of parole, halfway houses and other prerelease guidance centers preceding parole. *See V. FOX, COMMUNITY-BASED CORRECTIONS* 11 (1977).

159. *See* C.U.R.E. NEWSLETTER 1,1 (Summer 1978). In the spring of 1978, the Texas Parole Board was over 1,690 paroles behind the number it announced it would parole. *Id.* at 1.

160. *See* TEX. CODE CRIM. PRO. ANN. art 42.12 & art. 42.12C, 312 (Vernon 1979).

161. National Advisory Committee on Criminal Justice Standards and Goals, *Report on Corrections* (1973), *reprinted in* G. KILLINGER & P. CROMWELL, *CORRECTIONS IN THE COMMUNITY: ALTERNATIVES TO IMPRISONMENT* 140, 147 (1974). On behalf of mandatory parole, the committee stated, "Studies indicate that the first three months after the release of an institutionalized offender are the most critical in his avoidance of further criminal conduct." *Id.* at 147. "When it is clearly understood that toward the end of an offender's term the choice is between outright release without supervision and release on parole, a requirement that every offender spend some time on parole becomes manifest." *Id.* at 147.

162. *See* V. FOX, *COMMUNITY-BASED CORRECTIONS* 260 (1977).

163. *See* Comment, *Overcrowding in Prisons and Jails: Maryland Faces a Correctional Crisis*, 36 MD. L. REV. 182, 210-11 (1976).

that incarceration is indispensable to protection against repeated offenses is widespread.¹⁶⁴ Statistical evidence, however, now shows this fear to be unfounded,¹⁶⁵ as the rate of repeated offenses is higher when alternatives to incarceration are not used.¹⁶⁶ The current Texas practice of sentencing nearly all felons to penitentiaries, therefore poses a potentially greater threat to society's security than would the implementation of alternatives to incarceration.¹⁶⁷ This premise is further substantiated by data which reveals that those offenders who ordinarily pose the greatest risk to society in terms of repeat offenses benefit most from alternatives to imprisonment in terms of decreased recidivism rates.¹⁶⁸ Therefore, the use of such alternatives furnishes a better guarantee of public security than does long-term maximum security incarceration which eventually returns prisoners to society more likely to commit new offenses than if they had been allowed to participate in alternative programs.¹⁶⁹

Those harboring a desire for vengeance may oppose the use of alternatives to incarceration.¹⁷⁰ The motive behind this vindictiveness, however, is not an expectation of eliminating crime.¹⁷¹ The most appropriate and effective correctional measures cannot be determined so long as the object is to inflict retaliatory pain.¹⁷² The choice of correctional methods should arise from a determination of demonstrated effectiveness in achieving correctional goals and not from a motive for vengeance.¹⁷³ Vengeance, therefore, provides no justifiable obstacle to the implementation of the Texas community-based alternative statutes.

164. See V. FOX, *COMMUNITY-BASED CORRECTIONS* 260 (1977). See generally K. MENNINGER, *THE CRIME OF PUNISHMENT* 226-27 (1968).

165. V. FOX, *COMMUNITY-BASED CORRECTIONS* 281 (1977); D. STANLEY, *PRISONERS AMONG US: THE PROBLEM OF PAROLE* 179 (1976).

166. See D. GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* 13, 273-74 (1st ed. 1964); D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 88, 93 (1975); Gordon, *They Go to Prison on Purpose*, reprinted in C. DODGE, *A NATION WITHOUT PRISONS* 171, 193 (1975); Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects On Recidivism and Social Cost*, 65 J. CRIM. L. & CRIMINOLOGY 405, 405 (1974).

167. See Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects On Recidivism and Social Cost*, 65 J. CRIM. L. & CRIMINOLOGY 405, 405 (1974).

168. See *id.* at 405.

169. See materials cited note 166 *supra*.

170. Cf. R. POUND, *CRIMINAL JUSTICE IN AMERICA* 69 (1972). "[The desire for vengeance] has its roots in deep seated tendencies of human behavior, and the administration of justice has always to reckon with it." *Id.* at 69.

171. See K. MENNINGER, *THE CRIME OF PUNISHMENT* 193 (1968).

172. *Id.* at 218.

173. *Id.* at 218.

IMPETUS FOR APPLICATION OF ALTERNATIVES IN TEXAS

The increased costs from prisoners' civil rights suits, as well as those from the Texas Tort Claims Act should provide an incentive for the implementation of alternatives to detention in Texas.¹⁷⁴ This is especially true as judges show an increased willingness to award substantial recoveries to inmate plaintiffs.¹⁷⁵ The cost of building more prisons offers another powerful monetary incentive for the increased use of alternatives to incarceration.¹⁷⁶ In addition, many states offer subsidies to their counties for each convict treated in the community, and impose penalties for each one sent to the state penitentiary.¹⁷⁷ Texas counties are currently offered a modest monetary incentive under the Texas probation statute.¹⁷⁸ The Texas subsidy could be enlarged and resulting funds used to improve and maintain community facilities, effectively relieving the present burden on the overcrowded Texas prison system. Monetary advantages would obviously provide no justification for alternatives to incarceration if they even remotely increased the threat to public security. Research indicates that recidivism will be lower if alternatives to incarceration for non-violent offenders are employed.¹⁷⁹ Therefore, the enjoyment of the monetary advantages of less restrictive alternatives need not be precluded by considerations of the strong public interest in security.

Currently, money to operate the Texas prison system is generated by a policy requiring inmates to work on Texas prison farms.¹⁸⁰ A statutory aim of the Texas prison system is that it remain financially self-sustaining and therefore impose no unnecessary tax burden on the public.¹⁸¹ The cost of

174. See generally *Jenkins v. State*, 570 S.W.2d 175, 178-79 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ); 23 CRIM. L. REP. (BNA) 3, 3 (Supp. 1978).

175. See Mottern, *Prisoner Wins \$518,000*, 1 PRISON L. MONITOR 158, 158 (1979) (medical negligence in prison—largest award to date).

176. Imprisonment is the most expensive correctional procedure in common use. McGee, *Saving Prison Waste*, 293 ANNALS 59, 59 (1954). But cf. Fenton, *The Process of Reception in the Adult Correctional System*, 293 ANNALS 51, 58 (1954) (reception centers which could be used for screening offenders for alternatives to incarceration also present considerable expense).

177. See, e.g., COLO. REV. STAT. § 17-27-105 (4) (1978) (subsidy incentive from state); GA. CODE ANN. § 77-312(c) (Supp. 1978) (state subsidy); MINN. STAT. ANN. § 401.13 (West Supp. 1979) (charges subtracted from subsidy for each juvenile committed to state institution and for each adult with sentence of five years or less committed to state penitentiary). The Minnesota statute is designed to induce counties to retain less serious offenders in the community while not penalizing counties for commitment of dangerous offenders to state penitentiaries. D. HOWARD & M. KANNENSOHN, *A STATE-SUPPORTED LOCAL CORRECTIONS SYSTEM: THE MINNESOTA EXPERIENCE* 10 (Feb. 1977).

178. See TEX. CODE CRIM. PRO. ANN. art. 42.12 § 6a(a), (b) (Vernon 1979) (probationer to pay county up to \$15 a month).

179. See materials cited notes 53-58 *supra*.

180. See TEX. REV. CIV. STAT. ANN. art. 6166a (Vernon 1970).

181. See *id.*

maintaining an offender in most types of community-based programs is far less than supporting an inmate in a maximum security prison.¹⁸² Each county through the receipt of state subsidies, could function as a financially independent correctional unit.¹⁸³ Furthermore, an additional source of operating funds is contemplated by the Texas community-based corrections statute.¹⁸⁴ This statute requires the offender to work in the community and to pay the county for his room and board in the correctional facility.¹⁸⁵ The offender also must allocate his earnings to compensate his victim, his court-appointed attorney, and to support his dependents.¹⁸⁶ The increased benefits available to the state through such a system of support are obvious.

CONCLUSION

The Texas Legislature has provided the state's correctional system with two presently unimplemented community-based corrections statutes that could effectively alleviate many of the problems confronting the Texas correctional system.¹⁸⁷ It is difficult to reconcile the current Texas correctional practice with these statutes, the implementation of which public policy justifies,¹⁸⁸ and legislative intent and Constitutional principles demand.¹⁸⁹ A chronic prison overcrowding problem faces the Texas correctional system, but this problem could be quickly and economically alleviated without increased threat to public security through the implementation of these statutes.¹⁹⁰ A viable test is afforded by this legislation for judicial determination of offenders' eligibility for these sentencing alternatives.¹⁹¹ No real evidence exists that the implementation of alternatives to incarceration for non-violent offenders will impede the achievement of

182. See note 86 *supra* and accompanying text.

183. See generally R. Marcelli, *State Subsidies To Local Corrections: A Summary Of Programs* 1-55 (1st ed. 1977).

184. See TEX. CODE CRIM. PRO. ANN. art. 42.12, § 6(j) (Vernon 1979).

185. See *id.* § 6(k).

186. See *id.* § 6(m), (j), (l). See also TEX. REV. CIV. STAT. ANN. art. 6166x-3 (Vernon Supp. 1978-1979) (work furlough allowing victim restitution).

187. See TEX. REV. CIV. STAT. ANN. art. 6166x-3 (Vernon Supp. 1978-1979); TEX. CODE CRIM. PRO. ANN. art. 42.12, § 6 (Vernon 1979).

188. See notes 133-34 *supra* and accompanying text.

189. See *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978).

190. See Rocawich, *Texas Prisons On Trial*, 70 TEXAS OBSERVER 2, 4 (Sept. 22, 1978); C.U.R.E. NEWSLETTER 1, 1 (Summer 1978). According to Texas Department of Corrections Director Estelle, forty percent of the inmates in Texas prisons could be released immediately if adequate community facilities existed, thus affording immediate relief from overcrowding. *Id.* at 1.

191. See TEX. REV. CIV. STAT. ANN. art. 6166x-3 (Vernon Supp. 1978-1979); TEX. CODE CRIM. PRO. ANN. art. 42.12, § 6 (Vernon 1979).

correctional goals, and much empirical evidence supports the view that society's interests will be better served through the use of alternatives.¹⁹²

In re-evaluating Texas correctional policy the costs and benefits inherent in both traditional and innovative correctional methods must be analyzed. The Texas correctional system is faced with the important question whether its traditional system of widespread incarceration is inadequate in practice in view of the correctional policies upon which it is based, despite over four decades of effort by the United States Supreme Court and others to modify and improve it.¹⁹³ The current Texas practice, which nearly excludes the use of community-based correctional procedures, is deeply rooted in tradition. Noting the need for scientific re-evaluation of correctional measures, Justice Holmes eloquently stated:

An ideal system of law should draw its postulates and legislative justifications from science. As it is now, we rely upon tradition, or vague sentiment; or the fact that we never thought of any other way of doing things, as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom.¹⁹⁴

Scientific data should be used to answer the fundamental question whether imprisonment is the most beneficial way to deal with criminals. With the availability of scientific data, intelligent evaluation rather than tradition, should furnish the basis of Texas correctional decisions. These findings reveal that it is less expensive, more productive, and ultimately more beneficial to society to keep many non-violent offenders out of prison.¹⁹⁵ The greatest savings to society through the use of alternatives to incarceration is derived from the decline in recidivism rates.¹⁹⁶ Savings in

192. See generally V. FOX, *COMMUNITY-BASED CORRECTIONS* 281 (1977); D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 91 (1975); Klappmuts, *Community Alternatives to Prison*, *CRIME AND DELINQUENCY LITERATURE* 305 (1973).

193. See K. MENNINGER, *THE CRIME OF PUNISHMENT* 28 (1968). Dr. Menninger has stated that by clinging to tradition, society fails to make use of scientific methods of law enforcement that would provide more adequate protection against offenders. *Id.* at 28-29.

194. Holmes, *The Black Spearheads of Change* (1895), reprinted in M. LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 34, 35 (1943). See Holmes, *The Path of the Law* (1897), reprinted in M. LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 71, 84-85 (1st ed. 1943). Holmes stated that imprisonment degraded and plunged criminals further into crime while even more severely penalizing their dependents. *Id.* at 84.

195. See V. FOX, *COMMUNITY-BASED CORRECTIONS* 281 (1977); H. JONES, P. CORNES, & R. STOCKFORD, *OPEN PRISONS* 6 (1977); D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 91 (1975); Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects on Recidivism and Social Cost*, 65 *J. CRIM. L. & CRIMINOLOGY* 405, 413 (1974).

196. Jeffery & Woolpert, *Work Furlough as an Alternative to Incarceration: An Assessment of Its Effects On Recidivism and Social Cost*, 65 *J. CRIM. L. & CRIMINOLOGY* 405, 406 (1974).

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terms of police man-hours, pretrial detention, court costs, and other incidents of repeat offenses are available to Texas through the use of these alternatives.¹⁹⁷

197. *See id.* at 406.