Analysis of Alternatives to Incarceration for Non-Violent Offenders: A Progressive Approach to Correctional Procedure.

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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. Today the standard American correctional procedure is incarceration. When the prison system was first developed in the United States, its fundamental goal was rehabilitation. 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. Therefore, upon release the offender would be better able to conform to society's laws. As the twentieth century approached, policy motivations shifted and deterrence provided the main justification for imprisonment. Prisons gradually came to be regarded as indispensable to the achievement of correctional goals.

The United States correctional system is now undergoing a trend away from institutionalization. This trend had its inception in the changing law
of civil commitment. In Lake v. Cameron 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. In the civil commitment case of Covington v. Harris 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. Thus in Covington the principle of the least restrictive alternative consistent with the purposes of the commitment was upheld. 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. In each case, the courts used the "dangerousness" test.

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

12. 419 F.2d 617 (D.C. Cir. 1969).
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, 1086-89, 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).
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).
26. See id. § 5633.
This trend could substantially alter the traditional procedures most commonly used in sentencing adult offenders, and result in less confinement in state prisons. The trend toward alternatives to incarceration could have far-ranging consequences in Texas which currently faces a chronic prison overcrowding problem.

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

**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. The punishment goal includes the elements of deterrence, protection of society, and retribution in aid of deterrence. An increasingly accepted belief among mental health and
correctional authorities is that these objectives have not been adequately met by the traditional system of incarceration of non-violent offenders. Many feel that prison is actually debilitating and increases the convict’s propensities for crime. Whether adequate rehabilitation occurs in prison settings has been the subject of much inquiry.

Early sociological research of maximum security prisons in Illinois revealed severe negative effects of prison confinement on adult inmates. As inmates adapted to prison, they developed strong traits of apathy and dependency, and exhibited routine, inflexible responses. Prisoners also acquired more criminal attitudes through interaction solely with other criminals. 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. Incarceration, it stated, was likely to embitter inmates so that upon release they would present a greater threat to society than before incarceration. 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).


38. See materials cited note 37 supra.


41. See id. at 6.

42. See id. at 6.


44. Id. at 405.
operated by the state represented the least effective correctional method for rehabilitation and reintegration. 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. The American Bar Association Project on Standards for Criminal Justice also urged the implementation of community-based alternatives to incarceration. 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. Alternatives to incarceration would also reduce monetary costs and minimize the impact of conviction on innocent dependents of the convict.

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.

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 offenders and would be better achieved through community-based alternatives. Indeed, research reveals that parolees have a lower repeat offense rate than do

46. See id. at 17.
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,\textsuperscript{53} and that probation does not increase the risk to the community in terms of recidivism.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{59} The importance of continued community contact in some form

\begin{footnotesize}
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\item \textsuperscript{53} See D. LIPTON, R. MARTINSON, & J. WILKS, \textit{The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies} 88 (1975); \textit{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. \textit{Id.} at 481.
\item \textsuperscript{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. \textit{Id.} at 414.
\item \textsuperscript{57} See D. GLASER, \textit{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. \textit{Id.} at 273-74.
\item \textsuperscript{58} Fox, \textit{Michigan's Experiment on Minimum Security Penology}, 56 J. CRIM. L. C. & P. S. 2 (1965), cited in D. LIPTON, R. MARTINSON, & J. WILKS, \textit{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. \textit{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. \textit{Id.} at 85. It is important, however, that many offenders in this minimum custody group, though higher escape risks, were considered lower risk offenders. \textit{Id.} at 86.
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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


61. See V. Fox, Community-Based Corrections 281 (1977); D. Stanley, Prisoners Among Us: The Problem of Parole 179 (1976).


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. State correctional institutions have failed to demonstrate similar capabilities for the furtherance of society's correctional goals. 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. 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. According to one source, present facilities in Texas provide less than half the space required (work release program seven times less expensive than prison).


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 States\textsuperscript{72} and is, according to a recent investigation by the Justice Department, the most overcrowded in the nation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{75} Furthermore, Texas judges generally hand down some of the longest sentences in the country.\textsuperscript{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.\textsuperscript{77} It was reported in 1977 that less than one percent of Texas prisoners were allowed to participate in the work release program,\textsuperscript{78} and almost all felons in Texas are confined to maximum security institutions.\textsuperscript{79} In addition, the Texas Parole Board is paroling progressively fewer prisoners, and less than one third of eligible inmates are currently being paroled.\textsuperscript{80} Texas judges also make less use of probation as a sentencing alternative than do judges in most other states.\textsuperscript{81} This practice is partially attributable to inadequate county probation services.\textsuperscript{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,\textsuperscript{83} as fifty years

\footnotesize{\textsuperscript{72} See 23 CRIM. L. REP. (BNA) 3, 10-11 (Supp. 1978).}
\footnotesize{\textsuperscript{73} See id. at 4. (data furnished by National Institute of Law Enforcement and Criminal Justice, a branch of Justice Department).}
\footnotesize{\textsuperscript{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.}
\footnotesize{\textsuperscript{75} Rocawich, Texas Prisons On Trial, 70 TEXAS OBSERVER 2, 4 (Sept. 22, 1978).}
\footnotesize{\textsuperscript{76} Id. at 4.}
\footnotesize{\textsuperscript{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).}
\footnotesize{\textsuperscript{78} Cardwell, Politics and Prisons, TEXAS OBSERVER, (Feb. 25, 1977), at 32.}
\footnotesize{\textsuperscript{79} Rocawich, Texas Prisons On Trial, TEXAS OBSERVER, (Sept. 22, 1978), at 4.}
\footnotesize{\textsuperscript{80} Cardwell, Politics and Prisons, TEXAS OBSERVER, (Feb. 25, 1977), at 32.}
\footnotesize{\textsuperscript{81} Rocawich, Texas Prisons On Trial, TEXAS OBSERVER, (Sept. 22, 1978), at 4.}
\footnotesize{\textsuperscript{82} Id. at 4.}
\footnotesize{\textsuperscript{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. The unattrativeness of further prison construction as a solution increases when monetary factors are considered. 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. 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.

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. The 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. The current Texas practice of sentencing nearly all felons to the state penitentiary, and virtually none to community-based facilities, fails to adequately carry out the policy considerations underlying the Texas community-based corrections statutes. 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. As prisons become more overcrowded, the risk of transmission of disease among prisoners increases and psychological as well as physical harm results. Currently, Texas prisoners have access to redress against the state under two statutes, the federal Civil Rights Act and the Texas Tort Claims Act.

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

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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; Roca-
suits filed under the Civil Rights Act, include allegations that confinement conditions constitute cruel and unusual punishment because of severe over-crowding, 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


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.


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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{110} Unless some compelling state interest is present, an infringement on personal liberties is not justified.\textsuperscript{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."\textsuperscript{112} "[L]ess drastic means for achieving the same basis purpose" must be used.\textsuperscript{113}

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\textsuperscript{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).
Recently a federal district court in the case of *Pugh v. Locke* applied this "compelling interest" rationale to determine whether the eighth and fourteenth amendment rights of Alabama prisoners had been violated by the state. 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. Thus when the restriction of an inmate's liberties supports no valid purpose such as rehabilitation, deterrence, or institutional security, the restriction cannot stand. 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. 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." Without a positive rehabilitation program conditions exist which actually militate against rehabilitation and reform.

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. The court stated that because this denial made "dehabilitation inevitable," and increased the probability of future confinement, mere confinement under these conditions also contravened the eighth amendment. The likelihood of successful rehabilitation or the chances of escaping mental and physical degeneration after incarceration are further dim-

117. Id. at 328.
118. See id. at 329.
123. Id. at 329.
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.
finished, the court noted, by the existence of vast differences between the prison environment and the social environment to which the inmates must eventually return. 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. 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. Analogous to the decree issued in the juvenile case of Morales v. Turman, 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. Inadequate funding by the legislature could not justify failure to comply, the court asserted. 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.

The implication of these holdings is that a sufficiently compelling state interest may no longer justify the widespread incarceration which currently occurs in Texas. 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. The valid-

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125. Id. at 327.
126. See id. at 335.
127. See id. at 335.
130. See id. at 330.
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The reality 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. As research has demonstrated, society's correctional aims can be "more narrowly achieved" through alternatives to incarceration. Thus, under the least restrictive alternative standard, necessitated by the constitutional tests which require both a compelling governmental interest and use of the least drastic means to achieve any state purpose, 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, the state has a duty to impose the least restrictive alternative...
consistent with the purposes of the confinement. 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. 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. 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. 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. 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. One standard used in civil commitment cases and in juvenile and adult correctional law has been that of “dangerousness.”


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


144. See materials cited note 143 supra.


Another standard used in adult correctional law has been amenability to rehabilitation. Unlike the Texas eligibility test, these methods for determining eligibility require a hearing and extensive expert testimony. Reliance on these standards also presupposes that "dangerousness" can be accurately determined through the methods used. Thus, these criteria may not constitute reliable standards for judicial determination of eligibility for alternatives to incarceration. 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.

POSSIBLE IMPEDIMENTS TO THE IMPLEMENTATION OF ALTERNATIVES TO INCARCERATION IN TEXAS

The implementation of the work release and community-based probation statutes in Texas depends not only on Texas judges' increased willingness to honor legislative intent but also on increased non-judicial cooperation. 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).


Texas and funds have not traditionally been appropriated for their development. 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, including alternatives to incarceration. 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. At the present time, the Texas probation and parole statutes are discretionary. Several state and federal probation and parole statutes have recently been made mandatory in order to assist in implementing alternatives to incarceration. 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. Many share the fear that the use of such alternatives will jeopardize public security. 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).
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.
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).
that incarceration is indispensible to protection against repeated offenses is widespread.\textsuperscript{164} Statistical evidence, however, now shows this fear to be unfounded,\textsuperscript{165} as the rate of repeated offenses is higher when alternatives to incarceration are not used.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{169}

Those harboring a desire for vengeance may oppose the use of alternatives to incarceration.\textsuperscript{170} The motive behind this vindictiveness, however, is not an expectation of eliminating crime.\textsuperscript{171} The most appropriate and effective correctional measures cannot be determined so long as the object is to inflict retaliatory pain.\textsuperscript{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.\textsuperscript{173} Vengeance, therefore, provides no justifiable obstacle to the implementation of the Texas community-based alternative statutes.

\textsuperscript{165} V. Fox, \textit{Community-Based Corrections} 281 (1977); D. Stanley, \textit{Prisoners Among Us: The Problem of Parole} 179 (1976).
\textsuperscript{168} See id. at 405.
\textsuperscript{169} See materials cited note 166 supra.
\textsuperscript{170} Cf. R. Pound, \textit{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." \textit{Id.} at 69.
\textsuperscript{172} \textit{Id.} at 218.
\textsuperscript{173} \textit{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

175. See Mottern, Prisoner Wins $518,000, 1 PRISON L. MONITOR 158, 158 (1979) (medical negligence in prison—largest award to date).
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. Each county through the receipt of state subsidies, could function as a financially independent correctional unit. Furthermore, an additional source of operating funds is contemplated by the Texas community-based corrections statute. This statute requires the offender to work in the community and to pay the county for his room and board in the correctional facility. The offender also must allocate his earnings to compensate his victim, his court-appointed attorney, and to support his dependents. 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. It is difficult to reconcile the current Texas correctional practice with these statutes, the implementation of which public policy justifies, and legislative intent and Constitutional principles demand. 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. A viable test is afforded by this legislation for judicial determination of offenders' eligibility for these sentencing alternatives. 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).
185. See id. § 6(k).
188. See notes 133-34 supra and accompanying text.
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.
correctional goals, and much empirical evidence supports the view that society's interests will be better served through the use of alternatives.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{195} The greatest savings to society through the use of alternatives to incarceration is derived from the decline in recidivism rates.\textsuperscript{196} Savings in

\textsuperscript{192} See generally V. Fox, \textit{Community-Based Corrections} 281 (1977); D. Lipton, R. Martinson, & J. Wilks, \textit{The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies} 91 (1975); Klapmuts, \textit{Community Alternatives to Prison, Crime and Delinquency Literature} 305 (1973).

\textsuperscript{193} See K. Menninger, \textit{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. \textit{Id.} at 28-29.


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.