

# When Probation Becomes More Dreaded Than Prison

BY JOAN PETERSILIA

*Director, Criminal Justice Program, The RAND Corporation*

AS PRISONS have become more and more crowded, pressure has increased to divert some serious offenders to community-based sanctions. In response, most jurisdictions have established, or are experimenting with, various kinds of intensive supervision programs (ISPs).<sup>1</sup> However, these alternatives to prison are themselves still on trial. It remains to be seen whether ISPs can punish and control serious offenders effectively enough to meet the dominant objectives of imprisonment: imposing "just deserts" and "incapacitating" criminals.<sup>2</sup>

A major obstacle in testing their effectiveness is getting sufficient numbers of truly "prison-bound" offenders into these programs. Judges seem hesitant to impose community-based sanctions because of their concern for public safety, and their belief that ISPs are not punitive enough for such offenders.

This article focuses on the second concern: Are community sanctions punitive enough to convince the public that the "punishment fit the crime"? Having studied the development of these intermediate sanctions, I have discovered that some serious offenders feel that ISPs are at least as punitive as imprisonment—if not more so. If this is true, then offenders' perceptions should be considered in structuring sanctions and in making sentencing decisions.

Why is this issue worth studying? The most pragmatic reason is that ISPs offer some hope of relieving prison overcrowding—without draining the public purse. If it can be shown that other—less expensive—sanctions also have punitive qualities, then perhaps the public might accept that community-based sanctions are appro-

priate and quite consistent with their demand to "get tough" and hold criminals accountable for their crimes. If this link were made, the criminal justice system could save money and operate a system with more rehabilitation potential.

More theoretical, but possibly more compelling, these hypotheses question some basic assumptions that underlie sentencing decisions, the structure of sanctions, and resource allocation in the criminal justice system. Consequently, those assumptions may be partly responsible for today's "crisis in corrections." It would probably have been salutary to question these assumptions long ago, but under present circumstances it is imperative to do so.

## *Punishment for Whom?*

This country bases assumptions about "what punishes" on the norms and living standards of society at large. This practice overlooks two salient facts: First, most serious offenders neither accept nor abide by those norms—otherwise they wouldn't be offenders. Second, most of the people who even "qualify" for imprisonment today come from communities where conditions fall far below the living standards most Americans would recognize. If their values and standards differ, why should their perceptions of punishment be the same? Nevertheless, criminal sanctions reflect society's values—negatively. The demand that serious criminals go to prison implies that prison imposes conditions that are intolerable and frightening to the law-abiding citizen. The belief that community sanctions are too lenient implies that no matter what conditions probation or parole impose, remaining in the community is categorically preferable to imprisonment.<sup>3</sup>

When crime rates were lower and minor crimes could land a person in prison, many offenders might have shared these perceptions. Apparently, feelings are different among offenders who face prison sentences today. In several states, *given the option of serving prison terms or participating in ISPs, many offenders have chosen prison.*

Pearson (1988) reports that about 15 percent of offenders who apply to New Jersey's ISP program retract their applications once they understand the conditions and requirements. Under the New Jersey structure, this means that they will re-

<sup>1</sup>ISPs place offenders in the community under much more stringent conditions than traditional probation and parole impose. In most of these programs, offenders are required to observe curfews, hold jobs, pay victim restitution, submit to random urine and alcohol testing, and pay part of the cost of their supervision. A growing number of programs also involve electronic monitoring of the offender's whereabouts. Latest estimates suggest that more than 50,000 adults are now serving intensive supervision sentences (Herrick, 1988).

<sup>2</sup>"Just deserts" refers to imposing punishments that are commensurate with the seriousness of the crime. Incapacitation refers to the effect of isolating an offender from the larger society, thereby preventing him/her from committing crimes in that society.

<sup>3</sup>Several studies have shown that the public views probation as lenient and that any term in prison is automatically judged more punitive than any term in the community (e.g., Erickson and Gibbs, 1979; McClelland and Alpert, 1985).

main in prison on their original sentences.

One of the more striking examples comes from Marion County, Oregon, which has been cooperating with researchers from The RAND Corporation in a randomized field experiment. Selected non-violent offenders were given the choice of serving a prison term or returning to the community to participate in ISP. These offenders have been convicted, and the judge has formally imposed a prison term. After conviction, they were asked if they would agree to return to the community and participate in ISP, rather than go to prison. During the 1-year study period, about a third of those eligible for the experiment have chosen prison instead of ISP.

What accounts for this seeming aberration? Why should anyone prefer imprisonment to remaining in the community—no matter what the conditions? Can we infer from this that prison conditions seem less “punishing” than ISP requirements to these offenders? To consider this possibility, we first need to understand why imprisonment may have lost some of its punitive sting.

#### *Has the Punitive Power of Imprisonment Diminished?*

Zimring and Hawkins (1973:190) note that sanctions are most likely to deter if they meet two conditions: “the social standing is injured by the punishment,” and “the individual feels a danger of being excluded from the group.” It is hard to imagine that prison terms have either of these attributes for repeat criminals.

Possessing a prison record is not as stigmatizing as in the past, because so many of the offender's peers (and other family members) also have “done time.” A recent survey shows that 40 percent of youths in state training schools have parents who have also been incarcerated (Beck et al., 1988). Further, about a quarter of all U.S. black males will be incarcerated during their lives, so the stigma attached to having a prison record is not as great as it was when it was relatively uncommon (Bureau of Justice Statistics, 1985).

In fact, far from stigmatizing, imprisonment evidently confers status in some neighborhoods. Particularly for gang-affiliated and career criminals, a prison sentence enhances status when the offender returns to his neighborhood, especially in the inner cities. California's Task Force on Gangs and Drugs (1989) reported that during public testimony, gang members themselves “repeatedly stated that incarceration was not a threat because they knew their sentences would be minimal. Further, some gang members considered the

short period of detention as a “badge of courage,” something to brag about when they return to the streets.” (1989:29). And according to the California Youth Authority, inmates steal state-issued prison clothing for the same reason. Wearing it when they return to the community lets everyone know they have “done hard time.”

As for employment opportunities, imprisonment has had increasingly less effect for the people in question. As William Julius Wilson (1987) makes painfully clear in *The Truly Disadvantaged*, employment opportunities have been shrinking for people of lower economic status, especially in urban areas, so the effect of a prison record may not be as dramatic as it was when jobs were more plentiful.

Some have argued that for poor people, prison may be preferred, but few scholars take such discussions seriously. It is undoubtedly true, however, that the quality of a person's lifestyle when free certainly has some bearing on the extent to which imprisonment is considered undesirable. The grim fact—and national shame—is that for most people who go to prison, the conditions inside are not all that different from the conditions outside. The prison environment may be far below the ordinary standards of society, but so is the environment they come from. As the quality of life that people can expect when free declines, the relative deprivation suffered while in prison declines.

Social isolation is another presumably punitive aspect of imprisonment. Again, the values of society surface in the belief that when a person goes to prison he is “among aliens.” In prison, he is isolated from the kinds of people he would customarily (and by preference) be among. For today's inmates, that is less likely to be true. The newly admitted inmate will probably find friends, if not family already there.

The warden of Pontiac Penitentiary described it thus:

When a new guy comes up here it's almost a homecoming—undoubtedly there are people from his neighborhood and people who know him. . . (as quoted in Jacobs, 1984:33).

He goes on to recall how a ranking gang member, upon entry to prison, received a “letter from the ranking chief welcoming him into the family.” As for real family, the warden in a Washington, DC, jail recently noted that his facility currently contained three generations of a particular family at once. He remarked that, “It was like a family reunion for these guys.”

Some even suggest that prison serves as a buffer for offenders who find the outside world

particularly difficult. One man, just released from a Massachusetts prison, said:

I have literally seen guys who have been released walk out the door and stand on the corner and not know which direction to go. And they eventually go back to prison. As horrible as it is, prison provides some sort of community.

And, finally, the length of time an offender can be expected to actually serve in prison has decreased—from 18 months in 1984 to 12 months in 1987. But more to the point, for marginal offenders (those targeted for prison alternatives), the expected time served can be much less. In California, Texas, and Illinois, 2- to 3-year prison sentences often translate into less than 6 months actually served. In Oregon, prison crowding has created a situation in which a 5-year sentence can translate into 3 to 4 months of actual time served (Clear and Hardyman, 1990). Particularly when the prison system is the subject of a court order and offenders are released because of a "cap," prison terms can be quite short. Offenders on the street seem to be aware of this, even more so with the extensive media coverage such issues are receiving.

For the above reasons, then, it seems at least plausible that prison terms (on average) are not perceived as being as severe as they were historically. No one has ever surveyed prisoners or ex-convicts to find out how punitive they think imprisonment is. However, one could say their actions answer that question implicitly: More than 50 percent of today's prison inmates have served a prior prison term. Add prior jail sentences, and the percentage rises to 80 percent (Innes, 1988). Knowing what it's like, 80 percent of them evidently still think that the "benefits" of committing a new crime outweigh the "costs" of being in prison.

This implies a lot about how punitive prison is for these offenders. However, it does not explain why they would choose imprisonment over intensive probation.

#### *Why Would Offenders Choose Prison Over ISPs?*

For many offenders, it may seem preferable to get that short stay in prison over rather than spend five times as long in an ISP. But what about the relative conditions? If the speculations above have any validity, better a short time in conditions that differ little from your accustomed life than a long time in conditions that are very different from the "ordinary standards" of your

community.

Taking Marion County, Oregon, as an example, consider the alternatives facing convicted offenders:<sup>4</sup>

**ISP.** The offender will serve 2 years under this sanction. During that time, the offender will be visited by a probation officer two or three times per week, who will phone on the other days. The offender will be subject to unannounced searches of his home for drugs and have his urine tested regularly for alcohol and drugs. He must strictly abide by other conditions set by the court—not carrying a weapon, not socializing with certain persons—and he will have to perform community service and be employed or participate in training or education. In addition, he will be strongly encouraged to attend counseling and/or other treatment, particularly if he is a drug offender.

#### OR

**PRISON.** A sentence of 2 to 4 years will require that the offender serve about 3 to 6 months. During his term, he is not required to work nor will he be required to participate in any training or treatment, but may do so if he wishes. Once released, he will be placed on 2 years routine parole supervision, where he sees his parole officer about once a month.

For these offenders, as for any of us, freedom is probably preferable to imprisonment. However, the ISP does not represent freedom. In fact, it may stress and isolate repeat offenders more than imprisonment does. It seems reasonable that when offenders return to their communities, they expect to return to their old lives. The ISP transforms those lives radically.

Their homes can be searched and they must submit regularly to urine testing. Offenders may well consider such invasions of their homes and lives more intrusive and unbearable than the lack of privacy in prisons—where it is an expected condition of life. The same is true of discipline and social isolation. By definition, imprisonment limits freedom of movement and activity, but once a person is in his own community, curfew and other restrictions may seem harder to take. Ironically, he may be less socially isolated from his peers in prison than in ISP.

#### *Why Do Offenders' Perceptions Matter?*

Having established the counter-intuitive fact that some serious offenders prefer imprisonment to ISPs, what are we to make of it? Whatever else, it does argue for reconsidering the range of sanctions this country has and the assumptions they reflect. The point is not to insist that on any absolute scale ISP is "worse" than prison. Rather, it is to suggest that the scale we currently use needs reexamining.

For the people who are likely to come under either sanction, how society at large views those sanctions is largely irrelevant. How offenders view punishment ought at least to be considered.

<sup>4</sup>This information was compiled from ISP brochures and information from the Oregon Department of Corrections.

This is implied in Jack Gibbs statement: "No legal action can deter if it is not perceived as punitive by those who are subject to it, and whether or not sanctions deter depends in part on the extent to which they are perceived as severe" (1975:119).

If, as this article has argued, today's serious offenders have different views from most of us about what punishes, those views should at least be identified and considered in structuring sanctions.

In fact it is our perspective, and not necessarily theirs, that must bear much of the blame for the current "crisis in corrections." From the public's perspective, imprisonment is horrible and should, thus, punish and deter. Even a cursory look at crime rates and time served shows that this has become a dangerous illusion.

Because the public wants the courts to "get tough on crime," the prison population has doubled over the past 10 years. Yet, the rate at which violent crime is committed is also substantially higher. The United States continues to have not only the highest rate of incarceration for street crimes in the world, but also the highest level of violent crime (Kalish, 1988).

It is clear that prison is not effectively deterring offenders. But what other sanctions might? ISPs provide a potentially feasible means to this end. However, they need to be tested more effectively. This requires putting more truly "prison-bound" offenders in these programs and analyzing the outcomes. As noted earlier, one obstacle to such testing has been judges' apparent belief that the ISPs do not impose sufficient punishment for inveterate repeaters. If that perception can be changed, the ISPs could get thorough, systematic testing. One way to change that perception is to document what the early results mentioned above indicate—that some offenders see ISPs as more punitive than short prison terms.

### *Studying Offenders' Perceptions of Sanctions*

How completely we have based our sanctions on the perceptions of the law-abiding is borne out by a review of the literature. Very few studies have attempted to rank sentence severity, and *those studies have not included offender populations in their samples.*<sup>5</sup> If we want sanctions to be punitive for today's offenders, we need to sample of

offenders and analyze their responses. Outlined below is a tentative strategy for beginning such research.

To test these ideas, one would begin by having different populations (including offenders and non-offenders) rate the perceived severity of a wide range of currently administered sanctions, including jail, regular probation, intensive probation, house arrest, electronic monitoring, etc.

The exact details of the rating task would need to be worked out, but one would begin by presenting pairs of sanctions and asking each respondent to select the more severe of the alternatives. In addition to collecting information on sanctions, one would also collect respondent characteristics such as status (e.g., free or incarcerated), age, race, and sex, and prior record and whether the offender had experienced the specific sanction types being measured.

Once the perceptions of severity were obtained, one would compute scale scores for the various sanctions using paired-comparison scaling techniques. From this stage, one could build multiple regression equations containing the desired sanctions as independent variables and the scale values as the dependent variables. In this way, the coefficients would represent the sanction severity for each component sanction. Additional analyses could also be performed to take into account the influence of demographic characteristics and other variables (such as experience with a sanction) on perceived severity of sanctions. These would be incorporated in additional regression models. It seems that such a research effort would be policy relevant, particularly as the move towards sentencing guidelines gains momentum.

If prison is losing its "punitiveness," it is interesting from a number of research and policy perspectives. For example, if researchers scale sanctions to reflect seriousness—which they do in every sentencing and deterrence study—they may not be correct. Probation is always weighed as "out" and prison as "in." But there are now different levels of "out" that need to be taken into account. Sentencing commissions (e.g., the United States Sentencing Commission) have attempted to recommend sentences commensurate with the seriousness of the crime, but have been unsure how to weight these new "intermediate sanctions."<sup>6</sup> A number of states (e.g. Delaware) have wrestled with how to move past the in/out line of the Minnesota guidelines to include a more graduated approach, but have made little progress.

If community-based punishments can be designed so that they are seen as punitive by offenders, then perhaps policymakers—who say

<sup>5</sup>(E.g., McClelland and Alpert, 1985; Buchner, 1979; Erickson and Gibbs, 1979).

<sup>6</sup>See von Hirsch et al. (1989) for a good discussion of how such sanctions might be weighted.

they are imprisoning such a large number of offenders because of the public's desire to get tough with crime—might be convinced that there are other means besides prison to extract punishment.<sup>7</sup> As the report by Fogel (1975) said, "One reason for preferring incarceration is simply that we have not found another satisfactory severe punishment." Perhaps, if we can show that other sanctions can be equally severe, then the United States will begin to get over its preoccupation with imprisonment as the only suitable sanction for serious offenses. If this occurs, corrections costs could be reduced. But more importantly, since these programs require the offender to work and participate in treatment, rehabilitation is more likely.

## REFERENCES

- Beck, Allen, Susan Kline, and Lawrence Greenfeld. *Survey of Youth in Custody, 1987*, Bureau of Justice Statistics, U.S. Department of Justice, Washington DC, 1988.
- Buchner, Deborah. "Scale of Sentence Severity." *The Journal of Criminal Law and Criminology*, 70 (2), 1979, pp. 182-187.
- Bureau of Justice Statistics. "The Prevalence of Imprisonment." Washington, DC: U.S. Department of Justice, 1985.
- California Council on Criminal Justice. *California State Task Force on Gangs and Drugs: Final Report*. Sacramento, California, January 1989.
- Clear, Todd and Patricia Hardyman. "The New Intensive Supervision Movement." *Crime and Delinquency*, 31, January 1990, p. 1.
- Erickson, Maynard L. and Jack P. Gibbs. "On the Perceived Severity of Legal Penalties." *The Journal of Criminal Law and Criminology*, 70 (1), 1979, pp. 102-116.
- Fogel, David. ". . . We Are the Living Proof. . .": *The Justice Model for Corrections*. Cincinnati: The W. H. Anderson Co., 1975.
- Gibbs, Jack P. *Crime, Punishment, and Deterrence*. New York: Elsevier, 1975.
- Herrick, Emily. "Intensive Probation Supervision." *Corrections Compendium*, 12 (12), 1988, pp. 4-14.
- Innes, Christopher. *Profile of State Prison Inmates, 1986*, Bureau of Justice Statistics, U.S. Department of Justice, Washington DC, 1987.
- Jacobs, James B. "Street Gangs Behind Bars." In Gordon Hawkins and Franklin E. Zimring, *The Pursuit of Criminal Justice*. Chicago: University of Chicago Press, 1984.
- Kalish, Carol B. "International Crime Rates." Bureau of Justice Statistics, U.S. Department of Justice, Washington D.C., 1988.
- McClelland, Kent A. and Geoffrey P. Alpert. "Factor Analysis Applied to Magnitude Estimates of Punishment Seriousness: Patterns of Individual Differences." *Journal of Quantitative Criminology*, 1 (3), 1985, pp. 307-318.
- Pearson, Frank S. "Evaluation of New Jersey's Intensive Supervision Program." *Crime and Delinquency*, 34 (4), 1988, pp. 437-448.
- von Hirsch, Andrew, Martin Wasik, and Judith Greene. "Punishments in the Community and the Principles of Desert." *Rutgers Law Journal*, 20 (3), 1989, pp. 595-618.
- Wilson, William J. *The Truly Disadvantaged*. Chicago: The University of Chicago Press, 1987.
- Zimring, Franklin E., and Gordon J. Hawkins. *Deterrence: The Legal Threat in Crime Control*. Chicago: University of Chicago Press, 1973.

<sup>7</sup>Obviously, prisons serve purposes other than deterrence. In particular, modern prisons are thought to incapacitate violent offenders. In that sense, prisons remove from the free community offenders who may recidivate.