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CRIMINAL LAW—JUDICIAL RESENTENCING OF OFFENDERS AFTER SERVICE HAS COMMENCED—State v. Hunter, 447 A.2d 797 (Maine 1982)

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CRIMINAL LAW—JUDICIAL RESENTENCING OF OFFENDERS AFTER SERVICE HAS COMMENCED—*State v. Hunter*, 447 A.2d 797 (Maine 1982).

I. INTRODUCTION

In 1975, the criminal code of Maine was rewritten in an effort to update and reclassify its provisions.[1] As part of this revision, parole was abolished[2] and section 1255 of Title 17-A of the Maine Revised Statutes Annotated was enacted as an alternative means of reviewing sentences.[3] Under this statute, all sentences exceeding one year were

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1. *See generally* ME. REV. STAT. ANN. tit. 17-A, Introduction to the Proposed Code (1983).

2. ME. REV. STAT. ANN. tit. 34, §§ 1671-1679 (1964) (*repealed by* Act of June 16, 1975, ch. 499, § 71, 1975 Me. Laws 1273, 1370).

3. Act of June 6, 1975, ch. 499, § 1, 1975 Me. Laws 1273, 1352 (current version at ME. REV. STAT. ANN. tit. 17-A, § 1255 (1983).

This statute was originally enacted as section 1154. *Id.* (repealed and re-enacted as ME. REV. STAT. ANN. tit. 17-A, § 1255 (1983)). Section 1255 is identical to the former section 1154. It reads:

> 1. When a person has been sentenced to imprisonment for a term in excess of one year and such imprisonment has not been suspended, the sentence is deemed tentative, to the extent provided in this section.
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> 2. If, as a result of the department's evaluation of such person's progress toward a noncriminal way of life, the department is satisfied that the sentence of the court may have been based upon a misapprehension as to the history, character or physical or mental condition of the offender, or as to the amount of time that would be necessary to provide for protection of the public from such offender, the department may file in the sentencing court a petition to resentence the offender. The petition shall set forth the information as to the offender that is deemed to warrant his resentence and shall include a recommendation as to the sentence that should be imposed.
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> 3. The court may, in its discretion, dismiss a petition filed under subsection 2 without a hearing if it deems the information set forth insufficient to warrant reconsideration of the sentence. If the court finds the petition warrants such reconsideration, it shall cause a copy of the petition to be served on the offender, the district attorney, the Attorney General and the victim of the crime or, in the case of a criminal homicide, on the victim's next of kin, all of whom shall have the right to be heard on the issue.
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> 4. If the court grants a petition filed under subsection 2, it shall resentence the offender and may impose any sentence not exceeding the original sentence that was imposed. The period of his being in the custody of the department prior to resentence shall be applied in satisfaction of the revised sentence.
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> 5. For all purposes other than this section, a sentence of imprisonment has the same finality when it is imposed that it would have if this section were

deemed tentative.[4] The statute empowered the sentencing court to resentence an offender upon petition by the Department of Corrections.[5] Such a petition could be filed if the department believed, as a result of the offender's progress toward a noncriminal way of life, "that the sentence of the court may have been based upon a misapprehension as to the history, character, or physical or mental condition of the offender, or as to the amount of time that would be necessary to [protect] the public from such offender."[6] The court could dismiss the petition without a hearing, or grant the petition and impose any lesser sentence.[7]

In *State v. Hunter*,[8] the Supreme Judicial Court of Maine declared section 1255 unconstitutional because it empowered the judiciary to exercise powers properly belonging to the executive, thereby violating the separation of powers clauses[9] of the Maine Constitution.[10] On March 14, 1978, Gary Hunter was convicted of fourth degree homicide and sentenced to eight years imprisonment.[11] Three years later, the Department of Corrections filed a petition in the superior court urging that Hunter be resentenced pursuant to sec-

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not in force. Nothing in this section shall alter the remedies provided by law for appealing a sentence, or for vacating or correcting an illegal sentence. As used in this section, "court" means the judge who imposed the original sentence, unless he is disabled or otherwise unavailable, in which case it means any judge exercising similar jurisdiction.

ME. REV. STAT. ANN. tit. 17-A, § 1255 (1983).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. 447 A.2d 797 (Me. 1982).

9. ME. CONST. art. III, §§ 1, 2; *see infra* text accompanying notes 35, 36.

10. 447 A.2d at 798.

The constitutionality of section 1255 had been previously questioned, but not decided in State v. O'Brikis, 426 A.2d 893 (Me. 1981). There, the Department of Corrections, pursuant to section 1154 (now section 1255) petitioned the superior court to resentence O'Brikis, who had been convicted of burglary and theft and sentenced to two consecutive five year terms of imprisonment. *Id.* at 894. The petition stated that O'Brikis had made significant progress toward a noncriminal way of life and that, as a result, "the sentencing judge may have mistakenly forcast the length of time O'Brikis should be confined to protect the public." *Id.* The lower court judge expressed concern that the statute, in empowering the court to reduce a sentence after execution thereof had commenced, might violate the separation of powers clauses of the Maine Constitution by authorizing the judiciary to exercise the pardoning power, given exclusively to the executive. *Id.* Having heard evidence on the offender's behavior and attitude while in prison, however, the judge determined that O'Brikis should be resentenced. *Id.* at 895 n.4. The supreme judicial court dismissed the state's appeal on procedural grounds, leaving the question of the statute's constitutionality undecided until *Hunter*. *Id.* at 896.

11. 447 A.2d at 798.

tion 1255.[12] The petition stated that since his imprisonment, Hunter had made substantial progress toward a noncriminal way of life.[13] It further stated that the bases for this conclusion were that Hunter had an exemplary criminal record, that he had participated in alcohol counseling, and that he was a full-time student at the Bangor Theological Seminary.[14] As a result of these factors, the department believed that "the sentencing judge may have misapprehended the amount of time necessary to protect the public from him."[15] The department recommended that the court resentence Hunter, and place him on probation for the remainder of his term.[16]

The superior court dismissed the petition, holding that the statute, in empowering the court to "modify a sentence after it [had] been imposed on the ground of changes in the attitude or behavior of the offender," encroached upon the power of the executive to commute sentences.[17] On appeal, the supreme judicial court, over a strong dissent, affirmed the lower court's decision,[18] holding section 1255 unconstitutional as a violation of the separation of powers clauses of the Maine Constitution.[19]

This note will examine the limitations which the Maine Constitution places on the sentencing court's power to reduce a sentence after the offender has begun serving the sentence. The starting point for this discussion will be the background of section 1255, which will be followed by a presentation of the supreme judicial court's analysis in *Hunter*. Next, the traditional power of the executive to commute sentences and the inherent power of the judiciary to modify sentences will be analyzed in an effort to evaluate the soundness of the court's decision in *Hunter*. Finally, the effects of the *Hunter* decision on the revisions of the criminal code and the abolition of parole will be discussed.

II. BACKGROUND

Section 1255 was designed to supplement Rule 35 of the Maine Rules of Criminal Procedure,[20] which allows the sentencing judge to

12. *Id.*
13. *Id.* at 799.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 803.
19. *Id.* at 798.
20. ME. R. CRIM. P. 35.

revise a sentence at any time before the offender has begun to serve his sentence.[21] Rule 35 represents a "recognition that 'second thoughts' or supplementary information may arise which call for a change in the sentence originally imposed."[22] Frequently, however, such supplementary information does not come to light until after the offender has begun serving his sentence. Therefore, the legislature believed that section 1255 was a necessary vehicle for conveying that information to the judge who imposed the original sentence.[23]

The roots of section 1255 lie in chapter 264, section 5 of the Massachusetts Criminal Code.[24] That statute differed from section 1255 in a number of crucial aspects. Under the Massachusetts Code, the Department of Corrections was authorized for a period of one year after the imposition of the original sentence to petition the sentencing court to resentence an offender.[25] The statute empowered the department to petition "[i]f, as a result of examination and classification [of the offender] by the department . . . the commissioner of correction [was] satisfied that the sentence of the court may have been based upon a misapprehension as to the history, character, or physical or mental condition of the offender."[26] Section 1255 altered this format by removing the one year time restriction for petitioning, and by focusing the attention of the Department of Corrections on the offender's "progress toward a noncriminal way of life."[27] Section 1255 also added an additional basis for resentencing: the department's belief that the sentence of the court may have misapprehended "the amount of time that would be necessary to provide for protection of the public from such offender."[28]

Thus, the focus of the department's decision to petition for resentencing under the Massachusetts statute was on factors discovered by examination or classification of the offender shortly after his arrival in prison.[29] This indicates that the major concern of that statute was with the offender's behavior and personal attributes that were likely to be present at the time that the original sentence was imposed.[30] The focus of section 1255, however, appears to be on the

21. ME. REV. STAT. ANN. tit. 17-A, § 1154 comment-1975 (Supp. 1982).
22. *Id.*
23. *Id.*
24. Mass. Crim. Code, ch. 264, § 5 (1971).
25. *Id.*
26. *Id.*
27. *See* ME. REV. STAT. ANN. tit. 17-A, § 1255 (1983).
28. *Id.*
29. Mass. Crim. Code, ch. 264, § 5 (1971).
30. *See id.*

offender's progress toward a noncriminal way of life,[31] indicating that the major concern was with the behavior of the offender after imposition of the original sentence.[32]

III. ANALYSIS

A. *The* Hunter *Decision*

The *Hunter* court held that section 1255 violated the separation of powers clauses of the Maine Constitution because it authorized the judiciary to exercise a part of the executive power to commute sentences.[33] The court noted that the separation of powers provisions of the Maine Constitution were "explicit and restrictive."[34] The court stated that article III, section one divided the powers of government into three *distinct* departments,[35] and that section two mandated that "no persons or person, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted."[36] The *Hunter* court defined the separation of powers standard: "[If] the power in issue [has] been explicitly granted to one branch of state government, and to no other branch . . . article III, section 2 forbids another branch to exercise that power."[37] As a result, the determinative issue became whether the power to revise sentences, which section 1255 granted to the courts, fell within the powers that the Maine Constitution granted to the judiciary, or whether it fell within the exclusive power of the executive to commute sentences.[38]

The court determined that section 1255 provided two bases for judicial resentencing, with the motivating factor in each being the

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31. ME. REV. STAT. ANN. tit. 17-A, § 1255 (1983).

32. *Id.*

33. 447 A.2d at 798.

34. *Id.* at 799.

35. *Id.*; ME. CONST. art. III, § 1.

36. 447 A.2d at 798; ME. CONST. art III, § 2. The result of the separation of powers clauses is that each branch of government is independant and co-equal, and thus supreme within its legitimate sphere of action. *Ex parte* Davis, 41 Me. 38, 53 (1856). Each branch is authorized to utilize those powers necessary to accomplish the objects which fall within its sphere of action, when not expressly allocated to, or limited by the existance of a similar power in one of the other branches. Board of Overseers v. Lee, 422 A.2d 998, 1002 (Me. 1980). The *Hunter* court interpreted the separation of powers clauses to mean that if the constitution grants a power to one branch of government, no other branch may exercise that power unless the constitution so permits. 447 A.2d at 800.

37. 447 A.2d at 800.

38. *Id.*

offender's progress toward a noncriminal way of life.[39] The court interpreted the first basis as resting on the sentencing judge's misapprehension of the facts concerning the offender's history, character or physical or mental condition.[40] The court interpreted the second basis, which was the primary issue in *Hunter*, as "contemplat[ing] that the judge will change the sentence because he concludes, in view of the offender's good behavior while serving his sentence, that he no longer poses a threat to society."[41]

The Department of Corrections argued that the powers granted to the court under section 1255 fell within the realm of traditional judicial activity because the statute went no further than to authorize the sentencing court to correct a misapprehension or error concerning facts which were present at the time of sentencing.[42] The court, however, disagreed, stating that the decision as to how much time was necessary for protection of the public from a particular offender was a judgmental conclusion from facts, not an objective finding of fact.[43] Thus, the majority reasoned, resentencing an offender on the basis of a misapprehension of the time necessary to protect the public, was more than a mere correction of error concerning facts present at the time that the original sentence was imposed.[44]

The court was also troubled by the fact that the resentencing occurred after the offender had begun to serve his sentence.[45] While recognizing the sentencing court's inherent power to correct a sentence before the offender has begun to serve it, the court determined that this power ceased to exist after the sentence had been exe-

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39. *Id.*

40. *Id.* The court said that because the Department of Corrections was not seeking resentencing for Gary Hunter under the first basis, it would not rule on the constitutionality of that part of section 1255. *Id.* at 801 n.10. The court stated, however, that:

> [i]n any future case of resentencing sought under that first basis, two questions would have to be answered affirmatively before the constitutionality issue is even reached: (i) Is there any authorization in section 1255(2) for resentencing on the first basis when the misapprehension or mistake of fact comes to light otherwise than "as a result of the department's evaluation of [the inmate's] progress toward a noncriminal way of life"; and (ii) even if so, is the provision for resentencing on the first basis severable from the provision for resentencing on the second basis, which we in the instant case hold violates the Maine Constitution?

Id.

41. *Id.* at 800.

42. *Id.* at 801.

43. *Id.* at 801-02.

44. *Id.* at 802.

45. *Id.*

cuted.[46] This factor, coupled with the court's determination that the resentencing permitted by section 1255 involved more than mere correction of error concerning facts existing at the time of the original imposition of sentence, led the court to conclude that the power granted to the sentencing court by section 1255 did not fall within the realm of traditional judicial activity.[47] Instead, the court decided that this power fell within the exclusive power of the executive to commute sentences.[48] Therefore, because section 1255 empowered the judicial branch to exercise this power, the court declared that it violated the separation of powers clauses of the Maine Constitution.[49]

Justice Wathen authored a spirited dissent in which he asserted that the majority misconstrued section 1255 "to create, rather than avoid, [a] constitutional confrontation."[50] He noted that the court had a duty to uphold legislative enactments if they were susceptible "to a reasonable interpretation which would satisfy constitutional requirements."[51] This, he claimed, was possible here.[52]

Justice Wathen asserted that because the new code, for the first time, identified protection of the public as one of the goals of sentencing, a new type of sentence was created, which he labeled the "protective sentence."[53] This protective sentence, he maintained,

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46. *Id.*

47. *Id.* at 801-03. The court stated:

> A trial judge's decision as to what sentence is necessary to protect the public from an offender is not a finding of fact, but a judgmental conclusion from facts. It is a prediction, the judge's best guess at the time, of the appropriate sentence in all the circumstances. Unlike the foundational or evidentiary facts on which the judge's conclusion rests, his sentencing decision cannot be said to be an objective "fact" having an existance independant of judicial proceeding. Correction of error in the foundational facts found at the time of sentencing is qualitatively different from altering the sentence years later on the basis of the offender's subsequent behavior. In the latter situation, "misapprehension" means no more than misprediction; it has little or nothing to do with the traditional concept of the correction of judicial error.

Id. at 801-02.

48. *Id.* at 802.

49. *Id.* at 803.

50. *Id.* (Wathen, J., dissenting).

51. *Id.*; *see also* Portland Pipeline Corp. v. Environmental Improvement Comm'n, 307 A.2d 1, 15 (Me. 1973); State v. Phillips, 107 Me. 249, 253, 78 A. 283, 284-85 (1910).

52. 447 A.2d at 803 (Wathen, J., dissenting).

53. *Id.* at 804. Justice Wathen asserted that a protective sentence is different from other types of sentences in that the protective sentence serves the aim of incapacitation. *Id.*

> To the extent that the intent of the sentence is purely incapacitative, "attention is not focused on the reduction of the offender's propensity for future criminal

was the basis for the court's authority to resentence under section 1255.[54] He also asserted that because the legislature authorized the court to resentence an offender only if the sentencing judge determined that he misapprehended the amount of time necessary to protect the public from the offender, the only sentences which would be subject to resentencing under section 1255 would be those which were protective in nature.[55] Justice Wathen argued that, seen in this light, section 1255 did no more than permit the court to correct preexisting factual errors.[56] This, he asserted, the majority acknowledged that the legislature may authorize a court to do.[57] He claimed that the majority over-emphasized the phrase "[i]f, *as a result of the department's evaluation of such person's progress toward a noncriminal way of life*, the department is satisfied that the sentence of the court may have been based upon a misapprehension, it may file a petition."[58] According to his view, the court does not consider the offender's progress toward a noncriminal way of life in its decision to resentence.[59] Instead, only the Department of Corrections utilizes this information in its decision of whether to petition for resentenc-

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> acts; rather the offender is controlled so as to preclude his opportunity for such behavior at least while under the authority of the state."

Id. (quoting M. GOTTFREDSON, D. GOTTFREDSON, DECISIONMAKING IN CRIMINAL JUSTICE 174 (1980)).

54. 447 A.2d at 804 (Wathen, J., dissenting).

55. *Id.* at 805. Justice Wathen asserted that even though the Maine legislature has not specified the factual basis upon which a protective sentence should rest, there are some guidelines available for determining whether a protective sentence has been imposed. *Id.*

> The offender is one who is deemed to be incorrigible or at least unlikely to respond to ordinary penal measures. His sentence is longer in duration than would be necessary to serve the purposes of deterrence, rehabilitation or punishment. The sentencing judge, to some extent, ignores the needs of the individual defendant and measures the need of society to be protected. The resulting sentence is for a substantial number of years, usually in excess of five. . . .

Id. Since the decision to impose a protective sentence is within the discretion of the sentencing judge, and because the judge is not required to specify his reasons for imposing a sentence, only the judge who imposed the original sentence knows whether the sentence is protective. *Id.*

56. *Id.* at 805-06. Justice Wathen agreed with the majority in saying that the decision to impose a protective sentence "is not in itself a finding of fact, but rather a judgmental conclusion based upon facts." *Id.* at 806. He asserted, however, that the misapprehension at which section 1255 is aimed lies in the foundational facts upon which the protective sentence is based. *Id.* Thus, if the judge misapprehended these facts, the sentence imposed was, in effect, erroneous and should be open to correction, even if the offender has begun to serve it. *See id.*

57. *Id.*

58. *Id.* at 805-06 (quoting ME. REV. STAT. ANN. tit. 17-A, § 1255(2) (1983)) (emphasis added).

59. *Id.* at 806.

ing.[60] The judge, he asserted, only reconsiders those factors which led him to impose the protective sentence in the first instance.[61] Thus, Justice Wathen concluded, because section 1255 only authorized the court to exercise those powers that were within the boundaries of traditional judicial activity, it was not unconstitutional.[62]

In order to properly examine the propriety of the court's decision in *Hunter*, it is necessary to examine both the traditional power of the executive to commute sentences, and the inherent power of the trial court over executed sentences. Having done this, it will be possible to determine the propriety of the time limits placed upon the court's ability to modify sentences. In addition, it will be possible to examine legitimacy of limiting the sentence-modification decision to a consideration of facts which existed at the time that the original sentence was imposed.

B. *The Traditional Powers of the Executive to Commute Sentences*

A pardon is an act of grace which releases the offender from the consequences of his offense.[63] It erases the offender's guilt, leaving him innocent in the eyes of the law.[64] The grant of the pardoning power to the chief executive is exclusive of all other branches of government.[65] Thus, "the Legislature cannot, directly or indirectly, take it from his control, and vest it in others, or authorize or require it to be exercised by any other officer or authority."[66]

The commutation of a sentence is the substitution of a lesser punishment for a greater punishment.[67] It is a "part of the pardoning power, and may be exercised under a general grant of that power."[68] A commutation leaves the judgment of guilt intact, while changing the sentence imposed by law.[69] After a commutation has been granted, the commuted sentence is the only one in existence,

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60. *Id.*
61. *Id.*
62. *See id.* at 805-06.
63. Knote v. United States, 95 U.S. 149, 153 (1877).
64. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866).
65. State v. Dalton, 109 Tenn. 544, 547, 72 S.W. 456, 457 (1903).
66. *Id.*
67. *E.g.*, *Hunter*, 447 A.2d at 802; Commonwealth v. Arsenault, 361 Mass. 287, 291-92, 280 N.E.2d 129, 132 (1972); Murphy v. Wolfer, 127 Minn. 102, 103, 148 N.W. 896, 897 (1914); *Ex parte* Giles, 502 S.W.2d 774, 783 (Tex. Crim. App. 1974).
68. *E.g.*, Chapman v. Scott, 10 F.2d 156, 159 (D. Conn. 1925).
69. *Hunter*, 447 A.2d at 802; Commonwealth v. Arsenault, 361 Mass. 287, 292, 280 N.E.2d 129, 132 (1972) (quoting Rittenberg v. Smith, 214 Mass. 343, 347, 101 N.E. 989, 990 (1913). In this respect a commutation is extremely similar to the judicial resentencing provided for by section 1255. *See* ME. REV. STAT. ANN. tit. 17-A, § 1255 (1983).

and the only one considered.[70]

Generally, the power to commute sentences is viewed as "a sovereign power inherent in the state."[71] Thus, the executive may exercise it "for whatever reason he deems appropriate and it is not for the courts to inquire into the rationale of his decision."[72] Most jurisdictions, including Maine, hold that the commutation power is exclusively vested in the Governor, and may not be interfered with, or exercised by either of the other branches of government.[73] Accordingly, the legislature cannot delegate to the judiciary the power to commute sentences, as this would usurp the power of the executive and would be in direct violation of the separation of powers clauses.[74]

The power to resentence an offender after execution of the sentence has commenced, which was the subject of section 1255, is similar to the executive's power to commute sentences. Both leave the judgment of guilt intact while changing the sentence originally imposed.[75] Neither power has a time limit placed upon when it may be exercised.[76] Essentially, the only difference between the two is that, under section 1255, before the sentencing judge can resentence an offender, he must first find that the judge who imposed the original sentence misapprehended either the history, character or physical or mental condition of the offender, or the amount of time necessary to protect the public from the offender.[77] With the exercise of an executive pardon, however, the executive may commute a sentence for

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70. Murphy v. Wolfer, 127 Minn. 102, 103, 148 N.W. 896, 897 (1914). A commutation, in effect, eliminates the sentence originally imposed, leaving the commuted sentence the only one considered by law. *Id.*

71. Whittington v. Stevens, 221 Miss. 598, 604, 73 So. 2d 137, 139-40 (1954).

72. Hoffa v. Saxbe, 378 F. Supp. 1221, 1225 (D.D.C. 1974).

73. *E.g.*, *Ex parte* United States, 242 U.S. 27, 29 (1916); Hoffa v. Saxbe, 378 F. Supp. 1221, 1226 (D.D.C. 1974); Singleton v. State, 38 Fla. 297, 301, 21 So. 21, 22 (1896); Neal v. State, 104 Ga. 509, 511, 30 S.E. 858, 858-59 (1898); Doyon v. State, 158 Me. 190, 198-99, 181 A.2d 586, 590, *cert. denied*, 371 U.S. 849 (1962); Whittington v. Stevens, 221 Miss. 598, 604, 73 So. 2d 137, 140 (1954); Territory v. Richardson, 9 Okla. 579, 584-85, 60 P.2d 244, 246 (1900); State v. Dalton, 109 Tenn. 544, 547, 72 S.W. 456, 457 (1903); *Ex parte* Giles, 502 S.W.2d 774, 783 (Tex. Crim. App. 1974). *Contra* Ware v. Sanders, 146 Iowa 233, 246, 124 N.W. 1081, 1086 (1910); Whittington v. Stevens, 221 Miss. 598, 607, 73 So. 2d 137, 141 (1954) (Ethridge, J., dissenting).

74. *Ex parte* Giles, 502 S.W.2d 774, 786 (Tex. Crim. App. 1974).

75. *See* ME. REV. STAT. ANN. tit. 17-A, § 1255 (1983); *see supra* note 69 and accompanying text.

76. *See* ME. REV. STAT. ANN. tit. 17-A, § 1255 (1983); Hoffa v. Saxbe, 378 F. Supp. 1221, 1226 (D.D.C. 1974).

77. ME. REV. STAT. ANN. tit. 17-A, § 1255 (1983).

whatever reason he deems appropriate.[78]

It is necessary, however, to examine the inherent powers of the sentencing court in order to determine whether the power to resentence an offender[79] after he has commenced service of his original sentence, and the power to consider the offender's post-sentencing behavior in the resentencing decision, fall within the realm of traditional judicial activity,[80] or whether section 1255 represents an improper delegation of the executive's power to commute sentences.

C. *The Inherent Powers of the Sentencing Court*

Most constitutions do not grant many explicit substantive powers to the judiciary.[81] Exactly which powers are inherent to the judicial branch are open to considerable controversy, as the guidelines for pinpointing them are ambiguous. It is commonly said that "[t]he inherent powers of a court are such as result from the very nature of its organization, and are essential to its existence and protection, and to the due administration of justice."[82] Thus, a discussion of those powers which have been recognized as inherent to the courts is necessary in order to determine whether the powers granted to the courts under section 1255 were inherent to the judiciary.

There is much disagreement over what inherent powers the sentencing courts possess in the area of sentence modification.[83] The overwhelming weight of authority holds that the sentencing court has the inherent power to modify a sentence it has imposed for some period of time after imposition.[84] The original revision period ap-

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78. Hoffa v. Saxbe, 378 F. Supp. 1221, 1225 (D.D.C. 1974).

79. For the purposes of this discussion, the power to resentence an offender, which is the subject of section 1255, will be considered synonymous to the power to modify a sentence. In substance, any difference between the two terms is negligible.

80. If the power to resentence an offender is an inherent judicial power, section 1255 would not violate the separation of powers clauses because article VI, section 1 of the Maine Constitution explicitly vests the judicial branch with the judicial power, ME. CONST. art. VI, § 1, and article I, section 2 states that no person belonging to one department "shall exercise any of the powers properly belonging to either of the others, *except in the cases herein expressly directed or permitted.*" *Id.* art. I, § 2 (emphasis added).

81. *E.g.*, ARK. CONST. art. VII, §§ 1-11; COLO CONST. art. VI, §§ 1-25; CONN. CONST. art. V, §§ 1-7; ME. CONST. art. VI, §§ 1-6; N.H. CONST. Pt. 2, art. 73-81; N.J. CONST. art. VI, §§ 1-7; WIS. CONST. art. VII, §§ 1-24.

Typically, constitutions merely establish that "[t]he judicial power of this state shall be vested in a Supreme Judicial Court, and such other courts as the Legislature shall from time to time establish." ME. CONST. art. VI, § 1. Exactly what powers are encompassed by this vague grant of judicial power is ambiguous.

82. *E.g.*, Fuller v. State, 100 Miss. 811, 817, 57 So. 806, 807 (1912).

83. *See infra* notes 85-118 and accompanying text.

84. United States v. Benz, 282 U.S. 304, 307 (1931) (court may decrease a sentence

pears to have been the duration of the term of court[85] at which the original sentence was imposed, provided the offender had not yet begun to service the sentence.[86] The major reason for allowing this revision period is that the sentence "remains in the breast of the court"[87] during the term of court at which it was imposed, and thus remains modifiable until the term of court expires, or until the offender begins to serve the sentence.[88]

Another reason for allowing this revision period is the view that the power to reduce a sentence exists as an incident to the administration of criminal justice,[89] whereby the goals are to protect the public as well as to aid the offender in returning to society as a law-abiding citizen.[90] This view was adhered to by the United States Supreme Court in *United States v. Benz*.[91] There, the Court held that the sentencing court had the inherent power to modify a sen-

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as long as the term of the court has not expired); Thomas v. State, 566 P.2d 630, 636-38 (Alaska 1977) (court may reduce a sentence for up to 60 days after original sentence imposed); People v. Smith, 189 Colo. 50, 51, 536 P.2d 820, 822 (1975) (court may alter sentence for up to 120 days after imposition of original sentence); State v. Pallotti, 119 Conn. 70, 74, 174 A. 74, 76 (1934) (court may modify a sentence during term of court as long as the offender has not yet begun to serve it); Brown v. Rice, 57 Me. 55, 57 (1869) (court may modify a sentence as long as the term of court has not expired and the sentence has not been executed); Commonwealth v. Weymouth, 84 Mass. (2 Allen) 144, 147 (1861) (sentence subject to alteration as long as it remains unexecuted); State v. Thomson, 110 N.H. 190, 191, 263 A.2d 675, 676 (1970) (court may modify a sentence as long as the offender has not begun to serve it); State v. White, 71 N.M. 342, 346, 378 P.2d 379, 381 (1963) (court may modify a sentence as long as the term of court has not expired); *In re* Cedar, 240 A.D. 182, 186, 269 N.Y.S. 733, 737 (1934) (court may modify sentence during term of court at which originally imposed as long as offender has not begun to serve it); Hayes v. State, 46 Wis. 2d 93, 106, 175 N.W.2d 625, 628 (1970) (trial court may alter a sentence within 120 days of date original sentence imposed).

The discussion here is limited to modification of legal sentences whereby the original sentence is reduced. An increase in sentence after the offender has begun to serve it raises the additional problem of double jeopardy. For a discussion of this issue, see *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

85. "Term of court" refers to the "time prescribed by law during which a court holds session." BLACK'S LAW DICTIONARY 1318 (5th ed. 1979).

86. *E.g.*, United States v. Murray, 275 U.S. 347, 358 (1928); Tuttle v. Lang, 100 Me. 123, 125, 60 A. 892, 893 (1905); District Attorney v. Superior Court, 342 Mass. 119, 122, 172 N.E.2d 245, 247 (1961) (dicta); *In re* Cedar, 240 A.D. 182, 186, 269 N.Y.S. 733, 737 (1934).

87. As applied here, the phrase "breast of court" means that the sentence remains in the "conscience, discretion, or recollection of the judge." BLACK'S LAW DICTIONARY 172 (5th ed. 1979).

88. United States v. Benz, 282 U.S. 304, 306-07 (1931); State v. Dalton, 109 Tenn. 544, 546-47, 72 S.W. 456, 457 (1903).

89. State v. Thomson, 110 N.H. 190, 191-92, 263 A.2d 675, 677 (1970).

90. State v. Lemire, 116 N.H. 395, 397, 359 A.2d 644, 646 (1976).

91. 282 U.S. 304, 307 (1931).

tence during the term of court at which the original sentence was imposed because "[t]o reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance."[92]

The primary reason espoused for adding the restriction that the power to modify a sentence ceases to exist once the offender begins to serve the sentence, is that to modify a sentence after execution has commenced is a commutation of sentence, a power exclusively vested in the executive branch of government.[93] It is asserted, therefore, that an exercise of this power by the judiciary is an unconstitutional infringement upon the executive's power.[94] This view is based upon the belief that once the offender begins to serve his sentence, he is in the custody of the executive branch, which in turn assumes complete control over the sentence imposed by the judicial branch.[95] Accordingly, at that point in time, the judiciary loses jurisdiction over both the case and the offender, and is powerless to alter the sentence.[96]

Maine and a number of other jurisdictions have discarded the term of court time restriction[97] and have ruled that the sentencing court has the power to modify a sentence until the offender begins to serve, regardless of whether the term of the court has expired.[98] This view is the result of the decrease in the importance of the term of court in dictating the court's power to act.[99] These jurisdictions hold

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92. *Id.* at 311. The *Benz* court further held that the sentencing court's power to modify a sentence exists throughout the term of the court regardless of whether the offender has commenced service of the sentence. *Id.*; *see infra* notes 104-107 and accompanying text.

93. McClure v. District Court, 187 Colo. 359, 361, 532 P.2d 340, 341-42 (1975); People v. Herrera, 183 Colo. 155, 160-63, 516 P.2d 626, 627-28 (1973); State v. Hunter, 447 A.2d 797, 803 (Me. 1982); People v. Fox, 312 Mich. 577, 581-82, 20 N.W.2d 732, 733 (1945); State v. Dunn, 111 N.H. 320, 322, 282 A.2d 675, 677 (1971); State v. White, 71 N.M. 342, 344-45, 378 P.2d 379, 381 (1963) (dicta).

94. *See* cases cited *supra* note 93.

95. *See, e.g.*, Commonwealth v. Dascalakis, 246 Mass. 12, 20, 140 N.E. 470, 474 (1923).

96. Tuttle v. Lang, 100 Me. 123, 126, 60 A. 892, 894 (1905).

97. *See supra* notes 83-88 and accompanying text.

98. *E.g.*, State v. Gove, 379 A.2d 152, 154 (Me. 1977); State v. Thomson, 110 N.H. 190, 191, 263 A.2d 675, 676 (1970); State v. Harbaugh, 132 Vt. 569, 579-80, 326 A.2d 821 827-28 (1974); ME. R. CRIM. P. 35(a); *see* McClure v. District Court, 187 Colo. 359, 361, 532 P.2d 340, 342 (1975); *In re* Lankow, 134 Vt. 12, 13, 346 A.2d 216, 217 (1975).

99. *See* ME. R. CRIM. P. 35(a), § 35.1. The earlier rule was that the expiration of the term of court ended the power of the court to act in a criminal case. *Id.* Thus, it was held that the sentencing court "had jurisdiction over its judgments during the term at which it was imposed, except when execution of the sentence had begun." *Id.*; *see* State v. Blanchard, 156 Me. 30, 52, 159 A.2d 304, 316 (1960). At present, however, the expira-

that the court's power to modify a sentence ceases to exist once the offender begins to serve the sentence.[100] This view is partially jurisdictional in nature with the rule being that once the offender begins to serve the sentence the executive branch assumes jurisdiction over his case.[101] Accordingly, a modification of the sentence, after service has commenced, is an executive function.[102] This rule is also based on constitutional notions, in that because the constitution vests the power to alter a sentence after it has been imposed in the executive branch, the separation of powers principle prohibits either of the other branches from exercising or interfering with that power.[103]

Other jurisdictions have chosen to retain the term of court restriction for judicial modification of sentence, and have ruled that the court may resentence an offender at any time within the term of the court regardless of whether the offender has begun to serve the sentence.[104] These jurisdictions reason that judicial modification of sentence after execution has commenced is not a usurpation of the pardoning power of the executive because the respective powers of each branch are distinguishable.[105] The United States Supreme Court, in *Benz*, reasoned that:

> To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of the executive power which abridges the *enforcement* of the judgment, but does not alter it [in its character as a] judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.[106]

Those jurisdictions which have followed the *Benz* rationale have interpreted it as laying the separation of powers contention to rest in

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tion of the term of court does not effect the power of the court to act in a criminal proceeding. *See* ME. R. CRIM. P. 45(c); ME. REV. STAT. ANN. tit. 15, § 1201 (1980). Therefore, that part of the limitation on the court's power to revise a sentence no longer applies and the court may modify a sentence until the offender begins to serve it. ME. R. CRIM. P. 35(a), § 35.1; State v. Gove, 379 A.2d 152, 154 (Me. 1977).

100. *See supra* note 98.

101. Tuttle v. Lang, 100 Me. 123, 125, 60 A. 892, 893 (1905); Commonwealth v. Dascalakis, 246 Mass. 12, 20, 140 N.E. 470, 474 (1923).

102. Doyon v. State, 158 Me. 190, 198-99, 181 A.2d 586, 590, *cert. denied*, 371 U.S. 849 (1962); State v. Sturgis, 110 Me. 96, 100-01 (1912); Tuttle v. Lang, 100 Me. 123, 125, 60 A. 892, 894 (1905); Brown v. Rice, 57 Me. 55, 57 (1869).

103. *See* cases cited *supra* note 102.

104. *Benz*, 282 U.S. at 307; District Attorney v. Superior Court, 342 Mass. 119, 128, 172 N.E.2d 245, 251 (1961); State v. White, 71 N.M. 342, 346, 378 P.2d 379, 381 (1962).

105. *E.g.*, 282 U.S. at 311.

106. *Id.* (emphasis in original).

situations in which the judicial modification of sentence occurs during the term of the court, even though the offender has begun to serve the sentence.[107]

Still other jurisdictions have discarded both the term of court and the "before execution" restrictions.[108] These jurisdictions have instituted time restrictions wholly unrelated to the term of the court and the beginning of execution.[109] In these states, the court is permitted to resentence an offender for a stated period of time, usually ranging from sixty days to one year from the date of imposition.[110] These rules are sustained by the view that for a certain period of time the sentence remains under the control of the court, and therefore may be modified.[111] It is held, in these jurisdictions, that the finality of the judgment and the sentence of the court is suspended during this period.[112] Accordingly, during this interval, the sentence

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107. District Attorney v. Superior Court, 342 Mass. 119, 127, 172 N.E.2d 245, 250 (1961); State v. White, 71 N.M. 342, 345, 378 P.2d 379, 381 (1962).

It could be argued that the Supreme Court's holding in *Benz* should be read in light of the less restrictive federal separation of powers principle. Indeed, the Federal Constitution has no explicit separation of powers clause. *Hunter*, 447 A.2d at 799; *see* U.S. CONST. Instead, the separation of powers principle is inferred from the constitution. Buckley v. Valoe, 424 U.S. 1, 120 (1976); Myers v. United States, 272 U.S. 52, 116 (1926); *Hunter*, 447 A.2d at 799. Therefore, the federal separation of powers principle is less restrictive than that mandated by the Maine Constitution and "by no means contemplates total separation of each of [the] three essential branches of Government." *Buckley*, 424 U.S. at 121. From this it could be argued that the rationale espoused by the *Benz* court for allowing judicial modification of sentence after the offender has begun to serve the sentence is inapplicable to cases arising in states, like Maine, which have strict separation of powers standards. This argument is not persuasive, however, because the *Benz* court explicitly held that a reduction of sentence during the term of court at which the original sentence was imposed is a judicial function. 282 U.S. at 311. Therefore, the strictness of the separation of powers clause appears to be irrelevant to this issue.

108. *See, e.g.*, Thomas v. State, 566 P.2d 630, 638 (Alaska 1977); People v. Smith, 189 Colo. 50, 51-52, 536 P.2d 820, 822 (1975); State v. Nardini, 187 Conn. 109, 119-27, 445 A.2d 304, 308-13 (1982); State v. Arambula, 97 Idaho 627, 631, 550 P.2d 130, 134 (1976); State v. Tumminello, 70 N.J. 187, 191, 358 A.2d 769, 771 (1976); Hayes v. State, 46 Wis. 2d 93, 102-07, 175 N.W.2d 625, 628-32 (1970).

109. *E.g.*, CONN. GEN. STAT. §§ 5-195, -196 (1983) (Sentence Review Division may resentence an offender within 30 days of original sentence); N.J. REV. STAT. § 30:21-10 (1982) (court may reduce sentence upon motion by the offender made within 60 days after date of original judgment, or at any time upon motion by both the offender and the prosecuting attorney showing good cause); ALASKA R. CRIM. P. 35(a) (court may reduce sentence within 60 days after it was imposed or within 60 days after final appeal of conviction); COLO R. CRIM. P. 35(b) (court may resentence offender within 120 days after original sentence imposed); IDAHO CRIM. R. 35 (same).

110. *See supra* notes 108-109.

111. *See, e.g.*, Thomas v. State, 566 P.2d 630, 637-38 (Alaska 1977); People v. Smith, 189 Colo. 50, 51-52, 536 P.2d 820, 822 (1975).

112. People v. Smith, 189 Colo. 50, 51-52, 536 P.2d 820, 822 (1975).

remains in the contemplation of the law and may be modified by the court.[113] Jurisdictions adhering to this view dispose of the separation of powers argument by relying on the *Benz* rationale.[114]

A survey of the applicable case law indicates that the sentencing court does possess the inherent power to modify a sentence for some period of time after imposition.[115] There is much disagreement, however, over what factors the sentencing court may consider in making the decision of whether to modify a sentence. Maine's position appears to be that the court may only consider those factors that existed at the time the original sentence was imposed and either played a part, or if had been known, would have played a part, in the original sentencing decision.[116] This position is based on the view that "the power to reduce an offender's sentence on the basis of his post-conviction behavior is not part of the traditional judicial power [to modify a sentence]; rather, it is encompassed within the executive's commutation power."[117] Thus, the court may not consider the extent to which the offender may have been rehabilitated since his confinement in prison.[118]

The position of the Maine courts finds support in other jurisdictions. In the New Hampshire case of *State v. Dunn*,[119] the offender, having served almost four years of a seven to fifteen year sentence, filed a motion for reduction of his sentence.[120] The superior court judge, believing that he did not have authority to reduce the sentence, denied the motion.[121] On appeal, the Supreme Court of New Hampshire affirmed the lower court's decision, and held that the trial court had no authority to revise a sentence after the term of court had expired or after the offender had begun to serve the sen-

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113. 282 U.S. at 307-08; Thomas v. State, 566 P.2d 630, 637 (Alaska 1977). Mr. Justice Sutherland, for the majority in *Benz*, wrote:

> The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. They are then deemed to be "in the breast of the court" making them, and subject to be amended, modified, or vacated by that court. . . . The rule is not confined to civil cases, but applies in criminal cases as well, provided the punishment be not augmented.

282 U.S. at 306-07 (citations omitted).

114. Thomas v. State, 566 P.2d 630, 637 (Alaska 1977); Hayes v. State, 46 Wis. 2d 93, 101-02, 175 N.W.2d 625, 629 (1970); *see supra* notes 104-107 and accompanying text.

115. *See supra* notes 84-114 and accompanying text.

116. *See Hunter*, 447 A.2d at 802-03.

117. *Id.* at 803.

118. *Id.*

119. 111 N.H. 320, 282 A.2d 675 (1971).

120. *Id.* at 320, 282 A.2d at 676.

121. *Id.*

tence.[122] The court emphasized the fact that the motion for reduction that the offender sought, was based, not on factors which existed at the time the original sentence was imposed, but upon events that took place after the sentence was imposed, while the offender was serving his sentence.[123] These matters, the court ruled, were within the realm of executive power, and not that of the judiciary.[124]

A few jurisdictions have held that the sentencing court may consider whether, and to what extent, an offender has rehabilitated himself since the original sentence was imposed.[125] This view appears to be based upon an extension of the rationale that for a stated period after imposition, the sentence remains in the breast of the court and may be modified for whatever reason the court determines is in the interests of justice.[126]

IV. CRITIQUE

Having discussed the applicable case law in the area of sentence modification, it is now possible to examine the propriety of *Hunter* decision. The court ruled that the power to resentence an offender based upon post-conviction behavior, after he has begun to serve his original sentence was not a power inherent in the judicial branch.[127] Instead, the court viewed the power as being essentially the power to commute sentences, which article V, section two of the Maine Constitution grants to the executive branch of government.[128] Thus, the court held that section 1255 violated the separation of powers clauses of the Maine Constitution.[129]

The *Hunter* court's decision was primarily based on the view that the sentencing court's power to modify, or resentence an offender, ceased to exist once the offender began to serve his sentence.[130] This view is well supported by Maine case law.[131] Maine

122. *Id.* at 321-22, 282 A.2d at 676-77.

123. *Id.* at 322, 282 A.2d at 677.

124. *Id.*; *see also* People v. Fox, 312 Mich. 577, 581-82, 20 N.W.2d 732, 733 (1945); State v. Harbaugh, 132 Vt. 569, 579-80, 326 A.2d 821, 827-28 (1974).

125. United States v. McIlwain, 427 F. Supp. 358, 358-59 (D.D.C. 1977); Davis v. State, 566 P.2d 640, 643 (Alaska 1977).

126. *See* United States v. McIlwain, 427 F. Supp. 358, 358-59 (D.D.C. 1977); Thomas v. State, 566 P.2d 630, 638-39 (Alaska 1977).

127. 447 A.2d at 802-03.

128. *Id.* at 803.

129. *Id.*

130. *Id.* at 802.

131. State v. Blanchard, 156 Me. 30, 52-54, 159 A.2d 304, 316 (1960); Brown v. Rice, 57 Me. 55, 57 (1869); *see* State v. Gove, 379 A.2d 152, 154 (Me. 1977); ME. R. CRIM. P. 35(a); *see also* Doyon v. State, 158 Me. 190, 198-99, 181 A.2d 586, 590, *cert.*

courts have consistently held that the sentencing court has no power to modify a sentence once service of that sentence commenced.[132] It is reasoned that as soon as the offender begins to serve his sentence he is under the control of the executive branch, which in turn assumes complete jurisdiction over the case at that point.[133] This view also serves to provide a clear line between the powers of the executive and judicial branches in the area of post-conviction relief, and provides for a definite end to the sentencing process.

Even if Maine courts were to adhere to the view held by other jurisdictions, that the beginning of service of sentence does not end the court's power to alter the sentence, there would still be substantial doubt as to the constitutionality of section 1255. Section 1255 authorizes the sentencing court to resentence an offender *at any time* if the court determines that, based on the offender's progress toward a noncriminal way of life, the sentencing judge misapprehended the amount of time necessary to protect the public from the offender.[134] Even those jurisdictions that allow the court to alter a sentence after the offender has begun to serve it, hold that the power to modify a sentence ceases to exist at some point in time.[135] Usually the power exists only for thirty to sixty days after the imposition of the original sentence or until the term of court expires.[136] Thus, it is clear that the sentencing court does not possess the inherent power to resentence an offender years after the offender has begun to serve the sentence. The rationale for this rule is sound. The sentencing court should not retain perpetual jurisdiction over the sentences which it imposes. At some point there must be an end to the sentencing process. The most logical time for curtailing the sentencing court's jurisdiction is when the offender begins to serve the sentence. It is at this moment that the executive assumes physical control over the offender and it is at this time that the judiciary's role in the matter should be completed.

Another factor which casts doubt upon the constitutionality of section 1255, is that it allows the court to consider the offender's post conviction behavior in making a resentencing decision.[137] Most ju-

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denied, 371 U.S. 849 (1962); State v. Sturgis, 110 Me. 96, 100-01, 85 A. 474, 476-77 (1912); Tuttle v. Lang, 100 Me. 123, 125, 60 A. 892, 893 (1905).

132. *See* cases cited *supra* note 131.

133. *See* Tuttle v. Lang, 100 Me. 123, 125, 60 A. 892, 893 (1905).

134. ME. REV. STAT. ANN. tit. 17-A, § 1255 (1983).

135. *See supra* notes 84-114 and accompanying text.

136. *Id.*

137. *See* ME. REV. STAT. ANN. tit. 17-A, § 1255 (1983).

risdictions hold that the power to reduce a sentence on the basis of the offender's post-conviction behavior is not traditionally a judicial function.[138] Instead, it is deemed a power held by the executive.[139] The executive is charged with carrying out, or executing punishment;[140] therefore, anything that occurs after the offender is imprisoned should be within the exclusive control of the executive branch. "The sentencing court is not a parole board"[141] and should not concern itself with matters that are not truly judicial, such as the extent to which an offender has been rehabilitated since his incarceration,[142] or whether, on the basis of this rehabilitative progress, the offender deserves to be released from the remainder of his prison term. Decisions such as these should be left to the executive branch in the form of the power to pardon or parole an offender. The executive branch, through the Department of Corrections, is better able to decide such matters because it deals with each offender extensively and more readily can determine whether a particular offender has been rehabilitated to such a degree that he no longer poses a threat to society.

Judge Wathen asserted that section 1255 did not violate the separation of powers clauses because it did no more than permit the court to correct factual errors that existed at the time the original sentence was imposed.[143] The foundation for this assertion is his belief that the revised criminal code created a new type of sentence, which he labeled the "protective" sentence.[144] He asserted that the only sentences that could be modified pursuant to section 1255 were those that were protective.[145] This view, while theoretically plausible, would be extremely difficult to implement. Judge Wathen himself admitted that it would be extremely difficult to determine which sentences were protective because there is no statutory definition of a protective sentence and there is limited case law regarding protective sentences.[146] In addition it seems likely that, had the legislature intended section 1255 to apply only to those sentences that were protective in nature, it would have so specified.

The immediate effects of the court's decision in *Hunter* are

138. *See supra* notes 116-124 and accompanying text.
139. *Id.*
140. People v. Capo, 393 Ill. 342, 345, 65 N.E.2d 777, 778 (1946).
141. State v. Harbaugh, 132 Vt. 569, 580, 326 A.2d 821, 828 (1974).
142. *See id.* at 579-80, 326 A.2d at 827-28.
143. 447 A.2d at 805-06 (Wathen, J., dissenting).
144. *Id.* at 804.
145. *Id.* at 805.
146. *Id.* at 804-05.

likely to be negligible. Since section 1255 became effective in 1976, only one offender has successfully been resentenced under its provisions.[147] Therefore, at first glance, it does not appear that this statute has, up until this point in time,[148] played an essential part in the operation of the revised criminal code. It is possible, however, that section 1255 may have been intended to fulfill the function of providing a "safety-value" in the system, so that any repercussions from the abolition of parole, such as prison overcrowding and prisoner unrest, could be easily remedied. With the court's decision in *Hunter*, this safety-value is no longer available. The long term effect of this decision could be that the prison system will become overcrowded, causing the costs of the system to rise and causing unrest within the prison community. Unless the executive can find the time and the methods to fill this gap, the legislature will be left with the choice of either building more prisons, or reinstating parole.

Section 1255 and the court's decision in *Hunter* will be a useful guideline to jurisdictions attempting to replace traditional forms of parole with innovative alternatives. If nothing more, they will make legislatures aware of the problem of encroaching upon the powers of another branch of government while creating these alternatives.

V. CONCLUSION

In *State v. Hunter*,[149] the Supreme Judicial Court of Maine held that section 1255 of the Maine Revised Statutes Annotated violated the separation of powers clauses of the Maine Constitution.[150] Section 1255 authorized the sentencing court to resentence offenders if, as a result of the offender's progress toward a noncriminal way of life, the court was satisfied that the sentencing judge misapprehended the history, character or physical or mental condition of the offender, or misapprehended the amount of time necessary to protect the public from the offender.[151] In *Hunter*, the court ruled that the power to resentence an offender after he has begun to serve the sen-

147. *See* State v. O'Brikis, 426 A.2d 893 (Me. 1981).

148. It is possible that the need for section 1255's resentencing provisions has not yet materialized because the adverse effects of the abolition of parole (overcrowding of prisons and prisoner unrest) have not reached severe proportions in the seven years since the system has been operating without parole. As time progresses, however, and the number of people in prison who were sentenced before parole was abolished and are eligible for parole decreases, these effects may become more pronounced, thereby creating a greater need for a mechanism of releasing prisoners, such as section 1255.

149. 447 A.2d 797 (Me. 1982).

150. *Id.* at 798.

151. ME. REV. STAT. ANN. tit. 17-A, § 1255 (1983).

tence originally imposed was not a power inherent in the judiciary, but rather was a power belonging exclusively to the executive.[152] Therefore, the court held that section 1255 was unconstitutional.[153]

A survey of the relevant case law indicates that the sentencing court does have an inherent power to modify a sentence for some period of time after imposition. While jurisdictions have disagreed over the duration of this period, they have agreed that it must be limited.[154] The reason for this limitation is that, at some point in time, the executive branch of government assumes complete control over the offender and the execution of his sentence. Thus, for the judiciary to interfere with or usurp any of this control is violative of the separation of powers principle.

Many jurisdictions also have agreed that the sentencing court may not consider the offender's post-conviction behavior in making the decision to modify a sentence.[155] This rule is based upon the view that consideration of such factors is not within the realm of traditional judicial activity, but is instead encompassed by the pardoning power of the executive.[156] Therefore, the separation of powers doctrine mandates that the judicial branch refrain from consideration of these factors.

The foregoing analysis indicates that the *Hunter* decision was a sound one. While in the long run this decision could cause substantial problems, they may be easily remedied by the reinstatement of the traditional parole system or some other constitutionally permissible substitute for parole. Whether a system of imprisonment can function efficiently without parole remains to be seen. As was stated by the chairman of the United States Parole Board:

> To those who say 'let's abolish parole,' I say that as long as we use imprisonment in this country, we will have to have someone, somewhere with the authority to release people from imprisonment. Call it parole—call it what you will. It is one of those jobs that has to be done.[157]

Barring any action by the legislature, or the executive, the result of the court's decision in *Hunter* is that Maine will have first-hand opportunity to determine whether a system of imprisonment can in fact

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152. 447 A.2d at 803.

153. *Id.*

154. *See supra* notes 84-114 and accompanying text.

155. *See supra* notes 115-126 and accompanying text.

156. *Dunn*, 111 N.H. at 322, 282 A.2d at 677.

157. M. Zarr, *Sentencing*, 28 ME. L. REV. 117, 147 (1976) (quoting Sigler, *Abolish Parole?*, 39 FEDERAL PROBATION 42, 48 (1975)).

function without a mechanism for releasing people from imprisonment.

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