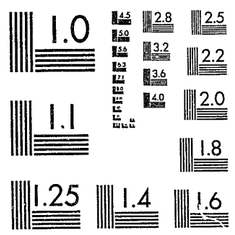

UNIVERSITY OF SOUTHERN MAINE
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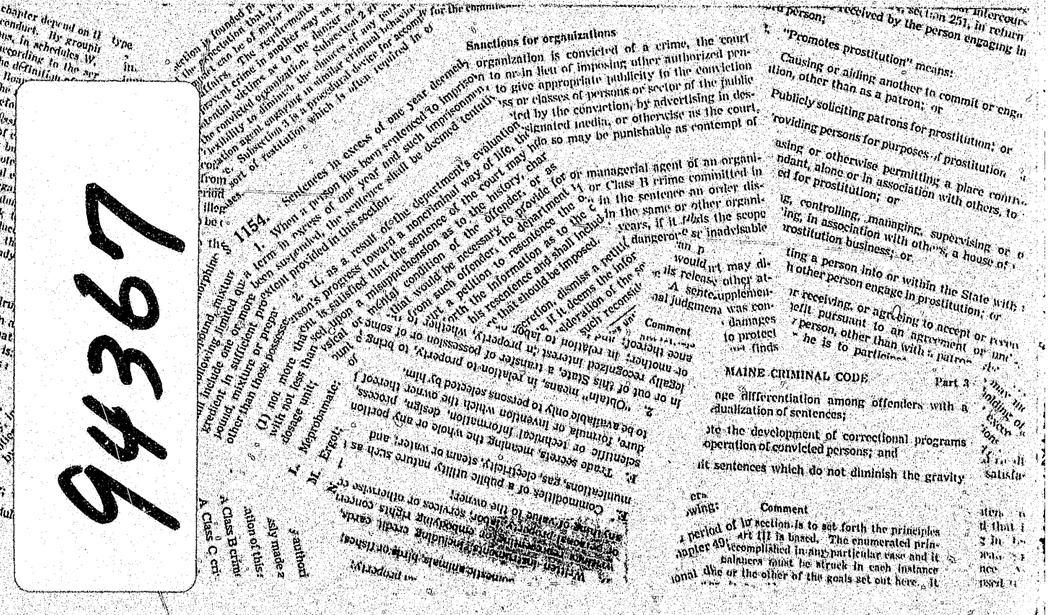
MAINE REJECTS INDETERMINACY:

A CASE STUDY OF FLAT SENTENCING AND PAROLE ABOLITION

DONALD F. ANSPACH
PETER M. LEHMAN
JOHN H. KRAMER



Maine Rejects Indeterminacy: A Case Study of Flat Sentencing and Parole Abolition

Final Report

Donald F. Anspach

Peter M. Lehman

John H. Kramer

University of Southern Maine

February, 1983

This project was supported by the U.S. Department of Justice, National Institute of Justice, Contract number 80-IJ-CX-0063. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice or the National Institute of Justice.

ACKNOWLEDGEMENTS

Many people and organizations have assisted us. Special thanks are due to Vincent McKusik, Chief Justice of Maine's Supreme Court, Donald Allen, Commissioner of Corrections, and Peter Tilton, Director of Probation and Parole ,for granting access to the required data. Thanks are also due to James Farr, Bartlett Stoodley, John Walker, and Keith Peaco, District Supervisors of Probation and Parole, Warden Paul Vestal of Maine State Prison, and Superintendent Edward Hansen of the Maine Correctional Center and their respective staffs who gave of their time and themselves and access to the information to conduct this investigation.

We are grateful to our Advisory Board, who kept us on track as to the direction and purpose of the study, besides providing excellent reviews of the documents produced by the research. Members of the Advisory Board were Kathleen Hanrahan and Professor Andrew von Hirsch, both of Rutgers University, Professor Susette Talarico, University of Georgia, Professor Melvyn Zarr of the University of Maine School of Law, and Professor Marvin Zalman of Wayne State University. Our Project Monitor, Dr. Phyllis Jo Banauch of the National Institute of Justice, deserves our warm thanks. Her enthusiasm kept us going when the going was rough.

Staff who assisted in the project and made the daily activities of the project possible and enjoyable deserve special attention. Ms. Alison J. Moore, Project Co-ordinator, has our deepest gratitude for her patience and diligence in working under often pressured circumstances. The list of students who have provided time, energy, and insight is too extensive to include. It will have to suffice to say that without their involvement the project would not have been possible. Special thanks go to Dennis MacDonald, Rolf Diamon, Monique Michaud, John Bouchard, Kathy McGuire, Jocelyn Young and Jill Kendall for their excellent and invaluable work. And a very special thanks goes to Michelle whose gift was large enough to meet the need.

Finally, we must express our appreciation for the extensive and financial support of the University of Southern Maine. This has been one of those projects which ended up being far more extensive and complex than originally envisioned. The active support of the University, which provided resources for additional data collection, analysis and report preparation, made it possible to finish what we set out to do.

PREFACE

This report grows out of an interest in penal policy. Over half a decade has passed since the beginning of a movement to reform and rationalize sentencing systems in the United States. The ways in which these new sentencing policies have been implemented has varied tremendously. Studies purporting to assess the implementation of determinate sentencing systems do not have common measures of outcomes, nor common definitions of key concepts. As a result, a clear picture of impact cannot be formed.

Thus, it happens that controversies rage about matters as diverse as the meaning of determinacy and indeterminacy; the proper justification for punishment; how sentencing authority should be apportioned; who should make sentencing decisions; how much time a person should be confined; and the extent to which that discretion should be limited. It appears that one source of difficulty in arriving at a clear direction for the future is lack of agreement about certain fundamental, normative issues--a dissensus which has led to competing agendas for sentencing reform on a wide range of issues.

In 1976, Maine changed its sentencing policy from an indeterminate sentencing system with parole to a flat sentencing system without parole. This change preceded much of the national "move to determinacy" and the flurry of reforms in a variety of states. One disadvantage of being the pioneer state in rejecting indeterminacy has been that Maine's reform has attracted a good deal of national criticism. One advantage is that enough time has passed for a realistic, overall assessment to be made of the reform and its consequences. This case study is intended to make such an assessment. It is aimed at a national audience of scholars, policy makers and practitioners. In so doing, we hope we have produced information upon which sound policy changes can be introduced to rationalize that system known as criminal justice.

The first chapter provides a context for Maine's reform by examining changes in sentencing policy throughout the nation and the variety of reform models which have been developed. Focusing on Maine, the next chapter presents a detailed analysis of the changes in the sentencing statutes, including a sketch of the history, process and context of the changes, and examines the national criticisms of Maine's reform. Chapter Three frames the empirical research contained in the remainder of the report, describes the data and methodology employed, and discusses the methodological problems encountered.

Chapters Four through Eight present the analysis of changes in type of sentence, changes in sentence length, changes in certainty, changes in sentence consistency and predictability, and changes in the load on correctional facilities in the state. The final chapter brings together the results of these analyses in terms of an overall assessment of the impact of the reform and confronts several additional theoretical and policy issues about sentencing reform.

This study is focused on the middle of a complex process. We have been primarily concerned with sentencing decisions and their outcomes. This decision-making, of course, takes place in the context of prosecutorial decision-making and is followed by corrections and/or parole board decision-making about inmate release. We hope to use the present research as a base to look at these other elements in further projects.

CONTENTS

ACKNOWLEDGEMENTS ii

PREFACE iii

Chapter page

I. SENTENCING REFORM IN THE 1970'S 1

Attack on Indeterminacy: Efficacy 1
Attack on Indeterminacy: Foundations 4
Recent Reforms 7
Presumptive Sentencing With Parole 8
Presumptive Sentencing Without Parole 10
Minnesota: A Special Case 11
Mandatory Sentences 13
Flat Sentencing 15
Conclusion 15

II. MAINE'S SENTENCING REFORM 17

A Brief Historical Sketch 18
The First Model: Rehabilitation Revisited . . . 21
The Final Model: Rehabilitiation Rejected . . . 23
Maine's New Sentencing System: An Analysis 26
Offense Seriousness Classification 27
Culpability 28
Sentencing Standards 29
Aims or Purposes of Punishment 30
Flexibility Mechanisms 31
The Criticism of Maine's Reform 34

III. RESEARCH ISSUES, DATA AND METHODOLOGY 38

Overview of Data 41
Collection of Court Data 43
Sentencing Decision as the Unit of Analysis 44
Primary Offense 45
Collection of Corrections and Probation Data . . . 48
Time-Served Information 48
Criminal and Social History Information 48
Collection Instrument and Outcome 49
Problems of Analysis 50
Outline of the Analysis 54

IV. CHANGES IN SENTENCE TYPE 55

Type of Sentence 57
Sentence Severity and Offense Seriousness 60
Conclusion 65

V. CHANGES IN SENTENCE LENGTH 67

Sentence Length 69
Offense Seriousness 70
Split Sentences 73
Offense Types 76
Prior Record of Offenders 80
Conclusion 81

VI. CHANGES IN THE CERTAINTY OF INCARCERATION LENGTH . . . 82

Background 82
Research Issues and Methodology 83
Findings 87
Conclusion 91

VII. CONSISTENCY AND PREDICTABILTITY OF SENTENCING 92

Type of Sentence 99
Sentence Length 104
Conclusion 109

VIII. IMPACT ON CORRECTIONS 111

Organizational Impact 111
Impact on Overcrowding 113
Conclusion 119

IX. CONCLUSION 120

Overview of Findings 120
The Politics of Reform 122
Moral Panic and the Appropriation of Reform . . 123
The Naivete of Determinacy 125
"Safe Streets" in Maine and the Nation 126
Evaluating Maine's Reform 128
Commission Goals 128
National Goals 130
Workability 130
Policy Implications 132

BIBLIOGRAPHY 136

LIST OF TABLES

Table		page
2.1.	Proposed Maine Maximum Release Standards	23
2.2.	Penalties Available Under the Revised Code, 1976 . . .	28
3.1.	Summary of Data Elements and Data Collection Location by Research Question	42
3.2.	Summary of Data Collection by Sentencing Category . . .	50
4.1.	Distribution of Sentence Types, Before and After Reform	58
5.1.	Time Served, Before and After Reform	69
5.2.	Mean Time Served by Offense Seriousness and Sentence Type, Before and After Reform	75
5.2.	Mean Time Served by Offense Seriousness and Sentence Type, Before and After Reform	75
5.3.	Time Served for Felony offenses by Offense Category, Before and After Reform	77
5.4.	Time Served for Felony Offenders With No Prior Record, Before and After Reform	80
6.1.	Proportion of "Certain" Sentences Before and After Reform	87
6.2.	Proportion of "Certain" Sentences by Correctional Institution, Before and After Reform	88
7.1.	Independent Variables Used In the Analysis of the Basis of Sentencing Decisions	96
7.2.	Summary of Sentences, Before and After Reform, for Selected Offenses	98
7.3.	Summary of Discriminant Analysis on Type of Sentence for Four Offenses, Before and After Reform	101

7.4. Effect of County and Judge on Discriminant Analysis of Type of Sentence 104

7.5. Regression on Sentence Length for Four Offenses, Before and After Reform 107

8.1. Summary of Changes in Incarceration Length and Admissions 117

9.1. Incarceration Rates (per 100,000 population) In New England States, 1971-1979 127

LIST OF FIGURES

Figure — page

4.1. Distribution of Sentence Types by Year Sentenced . . . 59

4.2. Distribution of Seriousness of Offense By Year Sentenced 61

4.3. Comparison of Proportion of Felony Cases and Proportion of Incarceration Sentences by Year Sentenced 62

4.4. Distribution of Sentence Types for Felony Offense Cases by Year Sentenced 63

4.5. Distribution of Sentence Types for Misdemeanor Offense Cases by Year Sentenced 64

5.1. Mean Time Served by Offense Seriousness and Year Sentenced 71

5.2. Mean Time Served For Felony Offenses by Type of Sentence and Year Sentenced 74

6.1. Proportion of "Certain" Sentences by Correctional Institution by Year Sentenced 90

8.1. Number of Admissions to State Facilities by Year Sentenced 115

8.2. Average and Median Time Served by Year of Sentencing . 116

8.3. Correctional System Intake Load, 1971-1979 118

Chapter I

SENTENCING REFORM IN THE 1970'S

In 1870, the first prison congress adopted a "Declaration of Principles" calling for correctional treatment programs, probation services, incentive systems for inmates, and professionalization of staff.(1) These principles reflected a mounting faith during the mid-1800's in the ability to rehabilitate offenders. To put the principles into effective force, prison officials needed extensive latitude over the conditions of confinement, and, most importantly, over the length of confinement. The indeterminate sentence was the vehicle to deliver this latitude. By 1944, every American jurisdiction had adopted the indeterminate sentence.

A century later the ethics and effectiveness of the indeterminate sentence were being seriously questioned. By the mid-1970's the advocates of reform resoundingly rejected the indeterminate sentence in favor of principles centering on fairness. "Fairness" did not mean individualized sentencing, but almost the very opposite--equitable, proportionate sentencing with early notice of how much punishment the offender was to receive.

This chapter examines why the indeterminate model of sentencing came into disrepute, what changes in penal policy were advocated, and what changes in sentencing occurred as a result in the United States during the 1970's.

ATTACK ON INDETERMINACY: EFFICACY

The discretion created by the indeterminate sentence and the authority thereby vested in the parole board rests on two basic assumptions. First, the assumption that treatment works(2) and second, the assumption that there are factors identifiable by a parole authority which permit prediction of future behavior.(3)

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(1) National Congress on Penitentiary and Reformatory Discipline, Statement of Principles, 1871, pp. 541-543.

(2) Lawrence F. Travis,III and Vincent O'Leary. Changes in Sentencing and Parole Decision Making: 1976-78, p.7.

(3) Ibid. p.7.

These assumptions came under serious attack during the 1970's.

The indeterminate sentence and its reliance on institutional programs and parole board discretion have not been justified by a demonstrated ability to reduce recidivism. Bailey(4) and Martinson(5) carefully reviewed research evaluating the impact of correctional programs on recidivism. Their conclusions were not encouraging. Bailey concludes:

> Therefore, it seems quite clear that, on the basis of this sample of outcome reports with all of its limitations, evidence supporting the efficacy of correctional treatment is slight, inconsistent, and of questionable reliability.(6)

It was the work of Robert Martinson, however, that most critically evaluated correctional programming. A thorough review of the research led to the conclusion that:

> with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.(7)

Although there have been attempts to refute Martinson's conclusions as premature or as inaccurate, the refutations have not carried much weight.(8) The reason for this may lie not so much in the nature of Martinson's findings as in the building of a constituency who believed that the practice of indeterminacy was unethical.

At the heart of the indeterminate sentence lies the the belief that human behavior--criminal behavior in particular--is predictable. Particularly crucial to the predictive assumption is the ability to identify the time during the indeterminate term when the offender is optimally release-ready and therefore presents the "least threat to society."(9)

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(4) Walter C. Bailey, "An Evaluation of 100 Studies of Correctional Outcome," 1970, pp. 733-742

(5) Robert Martinson. "What Works?--Questions and Answers about Prison Reform," 1974, pp 22-54.

(6) Bailey, "An Evaluation," p. 738.

(7) Martinson, "What Works?" p. 25.

(8) Ted Palmer, Correctional Intervention and Research, 1978.

(9) Serious questioning of the parole board's ability to predict future criminality in the early 1970's and the interesting, albeit strange, union of conservatives and liberals on this

The ability to predict criminal behavior has been seriously challenged on the basis that such predictability is fraught with error and necessarily risks incarcerating some prisoners longer than necessary and others not long enough. These two types of errors are referred to as false positives and false negatives respectively. Andrew von Hirsch and the Committee for the Study of Incarceration strongly attacked the ethics of false positives and argued that a sentencing scheme principled on "just desert" is needed to replace indeterminacy.(10) Although the false positive issue seems to be of more concern to academic proponents of change,(11) the false negative issue was of more concern to the popular press and, subsequently, the political process.(12)

Encouraging participation in prison programming, ostensibly for treatment and predictive purposes, may have served as the rationale for the indeterminate sentencing system and discretionary power of parole boards, but there were other purposes served as well.

Prisons must manage large numbers of convicted offenders. It is generally believed that prison managers need some strong structure of sanctions in order to control behavior. The indeterminate sentence provides such sanctions, allowing prison managers to reward "appropriate" behavior with early release, and to punish "inappropriate" behavior with extended confinement. Thus, one latent function of the indeterminate system is to establish a system of sanctions which can reward participation in programs and conformity to institutional rules. On the other hand, failure to participate in prison programs and/or conform can be interpreted as anti-social and, therefore, as an indication that the offender is not yet rehabilitated.

From a management perspective, the indeterminate sentencing model provides a stimulus for participation in prison programs and for conformity to prison rules. The tenuous control of prison guards over large numbers of inmates is enhanced (psychologically, at least) by the threat of extending an offender's term of confinement if s/he misbehaves. Although valuable, this control

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> issue set the stage for serious questioning of parole boards and the indeterminate system within which they operated. Travis, et al, Changes in Sentencing, pp. 7-8.

(10) Andrew von Hirsch, Doing Justice, 1976.

(11) See, for example, Andrew von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," 1974, pp. 717-758.

(12) See, for example, James L. Simmons, "Public Stereotypes of Deviants," 1965, pp. 223-52; and Drew Humphries, "Serious Crime, News Coverage, and Ideology, " 1981, pp. 191-212.

function of parole is hardly compatible with rehabilitative goals or effective treatment.

ATTACK ON INDETERMINACY: FOUNDATIONS

The 1970's were a time of serious review of the basic foundations of the rehabilitative model and, consequently, the indeterminate sentence itself. The most significant attack on rehabilitation came from the American Friends Service Committee's Struggle for Justice. (13) The Committee's concern arose from

> ...compelling evidence that the individualized treatment model, the ideal toward which reformers have been urging us for at least a century, is theoretically faulty, systematically discriminatory in administration, and inconsistent with some of our most basic concepts of justice.(14)

The Committee concluded that the impact of such a system for those caught in it was devastating.

> Instead of encouraging initiative, it compels submissiveness. Instead of strengthening belief in the legitimacy of authority, it generates cynicism and bitterness. Instead of stimulating a creative means of changing the intolerable realities of their existence, it encourages "adjustment" to those realities. This is the keystone of the "rehabilitative" process. Instead of building pride and self-confidence, it tries to pursuade its subjects (all too successfully) that they are sick. Criminal justice, which should strengthen cohesion through a reaffirmation of shared basic values, is serving instead as a conduit for increasingly dangerous polarization of conflict.(15)

These were strong indictments of the rehabilitative model and the indeterminate sentence that it spawned. Based on these perspectives, the Committee concluded that discretion in criminal justice, and in sentencing in particular, was contradictory to "justice." Therefore, the Committee called for the abolition of the indeterminate sentence. In its place, the Committee suggested that sentences be fixed by law with no judicial discretion in setting sentences and that parole release and supervision be abolished. Many of the changes suggested by the Committee can be

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(13) American Friends Service Committee, 1971.

(14) Ibid., p. 12.

(15) Ibid.,pp.9-10

seen in the recent legislative enactments across the country.

Struggle for Justice set the tone for a concern with sentencing. An even more fundamental indictment came in Judge Marvin Frankel's Criminal Sentences. The purpose of this work was

> ...to seek the attention of literate citizens--not primarily lawyers and judges, but not excluding them--for gross evils and defaults in what is probably the most critical point in our system of administering criminal justice, the imposition of sentence.(16)

Commenting on individualized justice, Judge Frankel noted:

> ...we ought to recall that individualized justice is prima facie at war with such concepts, at least as fundamental, as equality, objectivity, and consistency in the law.(17)

Judge Frankel raises serious questions about a system which individualizes sentences by giving "unfettered discretion" to individuals neither trained for sentencing nor selected for any particular ability to sentence.(18) He proposes numerous changes in the sentencing process. His basic argument is that "we in this country send far too many people to prison for terms that are far too long.(19) He concludes that "the problem has been too little law, not too much."(20) Judge Frankel is an advocate of principled sentencing.

In 1976, Doing Justice, the report of the Committee for the Study of Incarceration, authored by Andrew von Hirsch, proposed that judicial and parole discretion be constrained and replaced by a sentencing system founded on the principle of "just deserts."(21) The report suggested that the factors considered in sentencing should be limited to the severity of the offense and, to a lesser degree, the offender's prior record. Commensurate punishments should be assigned, based on the offender's standing on all possible combinations of offense seriousness and prior record, so that offenders with similar convictions and similar prior records would receive similar punishments. The sentence

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(16) Marvin E. Frankel, Criminal Sentences, 1974, p. x.

(17) Ibid.

(18) Ibid., p. 9.

(19) Ibid., p. 58.

(20) Ibid., p. 23.

(21) von Hirsch, Doing Justice, 1976.

should be definite rather than indeterminate, although the judge should be able to adjust the sentence if particular aggravating or mitigating factors are present. These aggravating and mitigating factors must bear on the severity of the current conviction offense; otherwise, they would undermine the just deserts concept. Basically, the Committee proposed a presumptive sentencing model with flat sentences and with as little discretion as possible.

Similarly, the Twentieth Century Fund Task Force on Criminal Sentencing located the major problem in criminal justice in the

> ...capricious and arbitrary nature of criminal sentencing. By failing to administer either equitable or sure punishment, the sentencing system--if anything permitting such wide latitude for the individual discretion of various authorities can be so dignified--undermines the entire criminal justice structure. (22)

The Task Force proposed reducing disparities in sentences in ways similar to Doing Justice. It proposed a presumptive sentencing structure with limited adjustments for aggravating or mitigating circumstances. However, the Task Force's report was more conservative than Doing Justice in that it recommended that more offenders should be incarcerated (rather than being given non-custodial alternatives), and it recommended retaining parole, albeit with explicit guidelines to limit discretion. The report proposed the additional constraint that the length of incarceration should not exceed the "current average time served."(23) Thus, the report proposed short, certain sentences which, it argued, would increase fairness and deterrence.

Despite these variations in concrete recommendations, both the attacks on the efficacy of the rehabilitative model and the attacks on the philosophical legitimacy of individualized sentencing created strong pressures to reject indeterminacy. The attacks on both the effectiveness and the fairness of the rehabilitative model were joined by more conservative forces agitating to "get tough" on crime. These forces attacked parole boards for their liberal leniency.

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(22) Twentieth Century Fund, Fair and Certain Punishment, 1976, p. 3,

(23) "Current average" was not defined. The Task Force assumed that this is a reasonable constraint. However, it fails to consider that between-state differences in sentences would be maintained and, that if all the criticisms of past sentencing are accepted, there is no particular reason to assume that "current averages" are "fair."

Apparently as a result of these combined attacks on indeterminacy and the rehabilitative ideal, a large number of states have revised their sentencing systems and rejected indeterminacy since 1976. This has been called a "move to determinacy."

RECENT REFORMS

Andrew von Hirsch and Kathleen Hanrahan argue that a determinate sentencing system has three principal characteristics: 1) "explicit and detailed standards" for determining the amount of punishment; 2) explicit procedures to inform the offender early in the confinement period of the expected date of release; and, 3) a coherent philosophy of punishment emphasizing retribution in the form of commensurate deserts. (24) Cullen and Gilbert have further clarified the meaning of "determinacy." They identify eight core parameters that are important to keep in mind as we discuss some of the reforms that have occurred across the country. (25) These are:

1. The purpose of punishment is retribution. The offender's culpability and the seriousness of the offense are determinative of the amount of punishment.

2. The range of sentence length available to the court for each offense or category of offense should be narrow; aggravating and mitigating circumstances should be defined and reflect desert; the acceptable amount of time for departure should be limited; and sentence length is set at sentencing-i.e. parole boards do not effect duration of sentence.

3. Short prison sentences should be limited to the most serious offenses, with non-incarceration sentences for less serious offenses.

4. "Similar punishments should be given for similar offenses" (i.e., non-disparate sentences).

5. Discretion should be reduced at all levels.

6. Reward and punishment in prison should not be contingent on participation or non-participation in rehabilitation programs.

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(24) von Hirsch, et al, "Determinate Sentencing Systems in America: An Overview," 1981, p.294.

(25) Cullen and Gilbert, 1982.

7. Vested good time is within the concept of determinacy.

8. Inmate rights are to be protected in prison.

These parameters provide a general classification of the types of reform that have occurred and provide a context for discussing the reform in Maine, the focus of this study.

All of the recent sentencing reforms have limited and/or focused discretion and moved away from indeterminacy. "Presumptive" sentencing systems provide some guidance to the court in making sentencing decisions. Some presumptive systems have retained parole boards which can modify the court's sentence. "Mandatory" systems eliminate judicial discretion by imposing legislatively defined sentences. To date, no state has adopted a mandatory system, but some states have developed mandatory sentences for a limited number of offenses. Finally, "flat sentence" systems, such as adopted in Maine, focus discretion in the court by abolishing parole, but do not provide either presumptive or mandatory limitations on judicial discretion.

Presumptive Sentencing With Parole

Arizona, Colorado, and Pennsylvania have recently enacted into law presumptive sentences in which the parole board maintains some (or, as is the case in Pennsylvania, almost total) authority and discretion to release offenders.

The Arizona legislature established six classes of felonies for which they specified presumptive terms of imprisonment, ranging from one and a half years for a class six felony to seven years for a class two felony. (26) The code provides extensive authority for the court to increase or decrease--especially increase--the sentence length based on aggravating or mitigating circumstances. Although the code provides a specific list of these circumstances, it also includes a general provision which allows "any other factors which the court may deem appropriate to the ends of justice." (27)

The Arizona code provides for significant enhancements for repeat offenders, offenses involving serious physical injury and offenses involving the use of a deadly weapon. For example, serious offenders with a prior felony conviction may receive a sentence up to three times the normal prescriptive term. Similarly, two other enhancements, serious bodily injury and use of a deadly weapon, provide for considerable adjustment in the length of

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(26) Ariz. Rev. Stat. Ann. sec. 13-601 (1978)

(27) A.R.S.A. sec. 13-702 (D) and (E).

confinement. (28)

Arizona law establishes good-time for those who both abide by the rules of the institution and participate in work, educational, treatment, or training programs. However, for certain offenders identified as dangerous or repetitive, the law does not allow release until expiration of two-thirds of their sentence. The parole board determines the actual release. Offenders must be released at the expiration of their sentence, less any good-time earned.

Thus, sentence ranges are extremely wide under Arizona law and still allow for early parole, as well as good-time. The implication is that there is little actual movement toward establishing determinacy under Arizona's sentencing code, and that there is uncertainty as to sentence if confined.

On April 1, 1979, Colorado adopted a sentencing code similar to Arizona's. Colorado's reform replaced the traditional indeterminate sentence with a single presumptive sentence for each of five offense classes. The Colorado code permits the sentencing court to deviate from the presumptive term by as much as 20 percent below the presumptive term for mitigation and 20 percent above the presumptive term for aggravation. (29) The code does not limit the court in the factors it may consider for either aggravation or mitigation, but it requires the court to specify the circumstances under which it raises or lowers the sentence. For offenders with a prior felony conviction, the code allows the sentencing court to increase the presumptive term by as much as 50 percent of the presumptive sentence. (30)

Colorado law imposes few restrictions on a judge's power to impose a sentence of incarceration. In fact, only persons convicted of a class 1 felony or with two prior felony convictions are ineligible for probation. (31)

The actual length of incarceration is dependent on the awarding of good-time. The 1979 code revisions provide that incarcerated offenders are to be unconditionally released upon the expiration of sentence, less good-time. In addition to the above good-time, inmates may earn one month for each six months served

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(28) Stephen P. Lagoy and John H. Kramer. "The Second Generation of Sentencing Reform: A Comparative Assessment of Recent Sentencing Legislation," 1980, p. 4.

(29) Colo. Rev. Stat. secs. 18-1-105, 18-1-106 (1973 & Supp. 1982).

(30) C.R.S. secs. 18-1-105-107 (1978 & Supp. 1982).

(31) C.R.S. sec. 16-11-201 (1973).

for "special activities," such as participation in counseling and training programs, attitudinal changes, and special work assignments. This latter good-time is administered by the parole board, while the regular good-time is managed by the institution. Colorado also provides for a one-year period of parole supervision for felony offenders upon release. (32)

The Colorado law has an habitual offender provision requiring that a judge impose a sentence of three times the presumptive term for a felony offender with two prior felony convictions, and a sentence of life imprisonment on a felony offender with three prior felony convictions.

Presumptive Sentencing Without Parole

The parole release function has been the focus of much debate. Supporters of the abolition of the parole release mechanism have included Jessica Mitford (33) and David Fogel. (34) Andrew von Hirsch and Kate Hanrahan (35) have been the most prolific contributors to this debate. While rejecting the traditional use of parole, they concede that with "desert" centered constraints parole release can be consistent determinacy.

States adopting a determinate model of sentencing have generally reduced or abolished the parole release function but maintained the supervision component of parole. Among these states are Illinois, Minnesota, and Indiana. Although each of these states has enacted quite different sentencing codes, there are certain parallels that are worth noting. It is not necessary to review each of these states in detail, as that has been done elsewhere, (36) but a brief overview of each will provide some perspective on the variety of the forms that sentencing without parole have taken.

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(32) 17 C.R.S. secs. 101-102.

(33) Mitford, Kind and Usual Punishment, 1973.

(34) Fogel, We Are the Living Proof...:The Justice Model for Corrections, 1975.

(35) Andrew von Hirsch and Kathleen Hanrahan, The Question of Parole, 1979.

(36) Stephen P. Lagoy, Frederick A. Hussey, and John H. Kramer, "A Comparative Assessment of Determinate Sentencing in the Four Pioneer States," 1978, pp. 385-400.

Illinois was the first state after Maine to pass comprehensive sentencing reform. (37) Illinois' reform left to the court the decision as to whether to incarcerate, except for a special category of crimes referred to as Class X offenses for which incarceration is mandated. For all five classes of offenses Illinois established very wide presumptive ranges from which the court selects a flat-determinate sentence. Once the decision to incarcerate and the length of incarceration is established, then the time served is the sentence length minus good-time earned. In Illinois good-time may be earned at the rate of one day for each day served.

Indiana followed Illinois in the adoption of sentencing reform. Like Illinois, Indiana abolished parole release and maintained parole supervision. Indiana established ten classes of crimes and set a presumptive length for mitigation. For example, a Class A felony carries a presumptive sentence length of thirty years, but the court may increase the sentence by up to twenty years for aggravating circumstances and decrease the sentence by ten years for mitigating circumstances. Thus, the total range provided the court for such offenses is from twenty to fifty years. (38)

Indiana provides correctional officials with considerable authority to influence the actual duration of confinement by assigning good-time. Depending upon the classification of the inmate, good-time may be earned at the rate of one day good-time for each day served, one day for each two days served, or one day for each three days served.

Minnesota: A Special Case

In 1978, Minnesota enacted legislation which permitted a broad-based sentencing commission to develop and monitor sentencing guidelines. The Commission included judges, attorneys, probation officers, corrections officials, law enforcement personnel and a variety of others. It was also authorized and funded to hire a research staff. Its overall task is outlined in the enabling statute:

> Subd. 5. The commission shall, on or before January 1, 1980, promulgate sentencing guidelines for the district court. The guidelines shall be based on reasonable offense and offender characteristics. The guidelines promulgated by the commission shall be advisory to the

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(37) Ill. Rev. Stat. Ch.38, sec. 1005-8-1 (1977).

(38) Ind. Code Ann. secs. 35-2-1-1 to 35-50-2-7 (Burns 1979 & Supp. 1982).

district court and shall establish:
(1) The circumstances under which imprisonment of an offender is proper; and
(2) A presumptive, fixed sentence for offenders for whom imprisonment is proper, based on each appropriate combination of reasonable offense and offender characteristics. The guidelines may provide for an increase or decrease of up to 15 percent in the presumptive, fixed sentence.

The sentencing guidelines promulgated by the commission may also establish appropriate sanctions for offenders for whom imprisonment is not proper. Any guidelines promulgated by the commission establishing sanctions for offenders for whom imprisonment is not proper shall make specific reference to noninstitutional sanctions, including but not limited to the following: payment of fines, day fines, restitution, community work orders, work release programs in local facilities, community based residential and nonresidential programs, incarceration in a local correctional facility, and probation and the conditions thereof. (39)

The result of this legislation was a presumptive sentencing system that established criteria for those who should be imprisoned, presumptive lengths of imprisonment, and presumptive rules on such factors as consecutive/concurrent sentencing, use of juvenile adjudications, and the relevance of prior adult convictions.

These comprehensive, presumptive guidelines and the accompanying good-time provision replaced the indeterminate sentence and the parole board release decision. In addition, the guidelines were written so as to maintain prision populations at their current levels.

It is interesting to note that the first empirical assessments of the Minnesota guidelines indicate that the Commission has been successful in reducing disparity, while also controlling prison populations. This is a singular achievement to date.

Illinois, Indiana and Minnesota all abolished parole release; however, the differences among them are considerable. Like Indiana, California provides a specific presumptive sentence for each of four offense classes. However, California provides much more limited ranges for aggravating or mitigating circumstances than Indiana. For example, although subsequently changed, the offense of rape was given a presumptive sentence length of four years, but could only be increased by one year for reasons of aggravation or reduced by one year for reasons of mitigation.

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(39) Minn. Stat. Ann. sec. 244.09 (1978).

Minnesota, on the other hand, allows the court to depart from the guidelines and sentence the defendant to whatever "extremes" the court deems appropriate.

All of the states discussed thus far have retained significant discretionary power. Only Minnesota has structured judicial authority regarding who should be incarcerated. In all the states, even when the parole release function has been eliminated, if the offender violates parole after release a parole agency retains some authority to decide whether the parole shall be revoked, and, if revoked, when the offender will be released. Thus, the actual time served can still be affected by a parole type agency. Finally, correctional authorities have retained extensive control over the time served and how time is served through their administration of good-time.

Only Minnesota has addressed such significant discretionary issues as the role of prior juvenile adjudications, the sentencing of multiple conviction offenders to concurrent or consecutive sentences, and the establishment of presumptive consecutive terms. None of the other states developed such explicit sentencing standards after abolishing parole. With the ongoing monitoring and revision process inherent in Minnesota's commission model it is anticipated that the presumptive guidelines will be even more clearly defined.

Mandatory Sentences

The most common form of legislative intrusion into sentencing policy has been through establishing mandatory minimum sentences. One recent survey reports that thirty-two of the thirty-five states responding have adopted mandatory sentencing provisions. (40) However, these are not system reforms, since they cover only a small number of offenses and offenders. As examples we shall discuss legislation recently adopted in Pennsylvania and the Bartley-Fox amendment adopted in Massachusetts. One of these states chose to establish mandatory minimums for a set of very serious, violent crimes, and the other state adopted mandatory minimums for much less serious but more frequent offenses.

Pennsylvania debated about various models of reform, including sentencing guidelines developed by a sentencing commission, prior to enacting legislation which included:

1. A mandatory minimum sentence of five years for persons convicted of a violent crime if a firearm was used;

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(40) Richard Morelli, Craig Edelman, and Roy Willoughby, "A Survey of Mandatory Sentencing in the U.S," 1981.

2. A mandatory minimum sentence of five years for persons convicted of a violent crime if they had a previous conviction for a violent crime;

3. A mandatory minimum sentence of five years for persons convicted of committing a violent crime on public transportation; and

4. A mandatory life sentence for persons convicted of a second or third degree murder. (41)

Under Pennsylvania statute, an offender receiving such a sentence is not eligible for release until the expiration of the minimum and can be held until the maximum, which must be at least double the minimum. (42) Mandatory sentences such as those in Pennsylvania , as opposed to the presumptive sentences established by California, Arizona and Illinois, allow the judiciary neither the flexibility to determine whether an offender should be incarcerated nor the latitude to mitigate the length of incarceration.

In 1975, Massachusetts adopted an amendment to its statute prohibiting the carrying of firearms without a permit, which required a minimum sentence of one year in prison without suspension, parole or furlough for violators. (43) The focus of this particular law is considerably different than Pennsylvania's mandatory sentences in terms of the types of offense to which it applies and the lengths imposed.

Referring to the the criteria for determinate sentencing proposed by von Hirsch and Hanrahan and Cullen and Gilbert, it is clear that neither the mandatory provisions in Pennsylvania nor those in Massachusetts are "determinate." This piecemeal legislation provides no comprehensive, consistent policy. In fact, narrowly focusing mandatory provisions so that a few offenders receive certain and harsh sanctions while others, convicted of more serious crimes, are treated more leniently, exacerbates unfairness. Such provisions neither reduce disparity nor increase proportionality.

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(41) 42 Pa. Cons. Stat. Ann. secs. 9712-9715 (Purdon 1982).

(42) 42 Pa. Cons. Stat. Ann. secs. 9755(b) and 9756(b).

(43) Mass. Gen. Laws Ann. ch. 269 sec. 10c (1970 & Supp. 1982-83).

Flat Sentencing

Two states, Maine and Connecticut, have taken a somewhat different approach to revising their sentencing procedures. We have labeled their approach "flat sentencing" because their reforms have resulted in definite sentences which involve neither presumptive sentences nor guidelines. In this discussion, we will provide a brief overview of the general model and then move on to a much more detailed account of the focus of this study-- the changes in Maine.

Both of these states have opted for what may be referred to as the "judicial model" of sentencing, because neither the legislature nor any other body has prescribed presumptive sentence lengths. The legislature established very general offense severity rankings and for each such ranking set a maximum above which the judge may not sentence. Neither Maine nor Connecticut generally set a minimum sentence for the court. Both states leave to the judge's discetion whether incarceration is appropriate. Thus, in terms of discretionary power, both states completely eliminated the parole board but traded its discretion for enhanced judicial and correctional discretion.

Consequently, "flat sentencing" as established by these two jurisdictions fails to meet the criteria of determinate sentencing suggested by von Hirsch and Hanrahan and by Cullen and Gilbert. Neither state provides either "explicit and detailed standards specifying how much convicted offenders should be punished" or sentence lengths for each class of offense which are narrow, with defined mitigating and aggravating circumstances. However, both states have implemented another characteristic of determinacy: an early time fix on release.

CONCLUSION

Determinacy has not been uniformly operationalized. Theoretically, Arizona and Colorado enacted determinate sentencing. However, they retained considerable judicial discretion as well as parole board discretion. Indiana and Illinois abolished the parole board and replaced indeterminate sentences with flat, judicially determined sentences within relatively broad parameters set by the legislature. Minnesota has abolished the parole board and replaced it with fairly narrow, commission-set sentence ranges.

The focus of this research is on the state of Maine and its sentencing reform of 1976. As pointed out earlier, Maine's reform is not determinate according to the criteria established by either von Hirsch and Hanrahan or by Cullen and Gilbert. Using their standards, which require "explicit and detailed standards" for punishment, Arizona and Colorado also would not be classi-

fied as determinate. In fact, with the amount of good-time controlled by correctional authorities, certainty as to time served (an early time fix) is difficult to impute to any present jurisdiction.

Although Maine has not established "clear and explicit standards" for determining the appropriate punishment, it has established early warning of the release date. In this way, Maine's reform may not be determinate, but it may have accomplished as much as any other state.

There has been a tendency for states to classify crimes into a relatively small number of seriousness categories. Illinois created five such categories, Colorado five, Arizona six, and Indiana ten. Establishing a limited range of sentencing choices, or a choice of whether to incarcerate or not, or a presumptive range or length when incarceration is chosen, places a strong burden on severity ranks. Although the ranking is designed to assess the severity of the crime, in reality it is an over-simplification in its own right. No state has yet heeded Allen Derschowitz's advice that, if we intend to establish presumptive sentences and to use severity ranks as the crucial determinant of the sentence, then we must carefully and clearly delineate crime definitions so as to specify various levels of crime seriousness.(44)

The moral may be that, although Maine has failed to develop "determinate" sentences, it has increased certainty and has not oversimplified crime seriousness by restricting judicial discretion. To oversimplify and restrict risks injustices worse than those the reforms are designed to correct.

The remainder of this report is an examination of Maine's flat sentencing model. The major focus of the inquiry is an empirical investigation of the impact of the implementation of this new policy on sentencing decisions of the court and on the correctional system. The report examines the outcomes of the new policy, assesses those outcomes against stated policy goals and past practices, and evaluates the extent to which the national criticisms of Maine's flat sentencing model were justified. In short, our concern is the extent to which goals have been met, the costs, and the unintended consequences.

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(44) Twentieth Century Fund, Fair and Certain Punishment, pp. 42-43.

Chapter II

MAINE'S SENTENCING REFORM

When fully implemented in May, 1976, Maine's criminal code had inter alia the following effects on sentencing:

1. Codification of the Criminal Law: The criminal law was simplified by codification. Substantive offenses defined in different titles and statutes enacted at different times were redefined, consolidated, and incorporated into one criminal code.

2. Introduction of Graded Classes of Offenses: Offenses were graded into five classes of offense seriousness with legislatively set maximum penalties attached to each grade or class.

3. Abolition of the Indeterminate Sentence: The indeterminate sentence was abolished. Now the sentencing judge selects the precise period of incarceration for a particular offender which is the actual period of confinement, less good-time.

4. Abolition of parole: The apportionment of sentencing authority between the court and executive agencies was changed by the abolition of parole. Judicial authority to determine actual sentence length was thus enhanced. The court's sentence can only be reduced by a petition from the Bureau of Corrections to the sentencing judge or through a pardon or commutation of sentence by the governor.

5. The Split Sentence was Expanded: The judge may impose a custodial penalty not to exceed the legislatively set maximum and suspend a portion of that penalty with the option of placing the offender on probation. There is no equivalent to parole release.

The new statutes established a judicial model of sentencing.(45) The change did not establish guidelines or presumptive sentences that might aid in the decision-making process. In fact, the changes were intended to provide the court with more flexible sentencing options, greater power to determine the

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(45) See Lagoy, et al, "A Comparative Assessment," p. 385.

length of incarceration, and at the same time, to increase certainty for both the offender and the public about the actual length of incarceration to be served. As originally enacted, the flat sentence could only be reduced by a petititon from the Bureau of Corrections to the sentencing judge, by a pardon or commutation of sentence by the Governor, or by appellate review.

The chapter is organized as follows: The next section presents a brief historical sketch which traces the changes in Maine's sentencing system, with particular attention to the context within which the 1976 reform was drafted and enacted. This is followed by detailed analysis of the changes introduced by the reform and subsequent revisions. We then turn to an examination of the criticisms of Maine's reform, and finally, to an identification of the critical issues posed for research.

A BRIEF HISTORICAL SKETCH

This history begins in 1913, when Maine's legislature enacted statutes to replace its definite sentencing system with the indeterminate system and created the parole board.(46) This transition was made by using existing definite terms on the statute books as the statutory maximum. Generally, the statutory minimum was established as one-half the maximum for sentences of two or more years, and a minimum of one year for sentences less than two years.(47) In convictions for more serious crimes--such as rape, robbery and burglary--which formerly were capital offenses and punishable by life imprisonment, the judge was authorized to impose a sentence of "any term of years."(48) With the exception of prisoners who had been convicted of two prior felonies, all inmates were eligible for parole release at the expiration of the minimum(49) and would remain under parole supervision until the expiration of the maximum sentence, but not more than four years.(50)

Maine's legislature included a unique innovation in its indeterminate sentencing system: it required that sentences to the Maine Correctional Center--an institution for adult offenders under the age of 27--be wholly indeterminate. No minimum sentence

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(46) 1913 Me. Laws c.60, secs. 5-19.

(47) 1913 Me. Laws c.60; 15 Me. Rev. Stat. Ann. Sec. 1743 (1964).

(48) Wade v. Warden of State Prison, 145 Me. 120; 73 A.2d 128 (Me. 1950).

(49) 1913 Me. Laws c. 60, sec. 6.

(50) 1913 Me. Laws c 60, sec. 12.

was imposed; only a maximum term of thirty-six months was authorized.(51)

Generally speaking, inmates confined at the State Prison were eligible for parole release and supervision at the expiration of the minimum term of imprisonment, less good-time. Inmates confined at the Correctional Center were eligible for parole release and supervision when two conditions were met: When it appeared to the Superintendent that the inmate had reformed, and when some suitable employment or situation had been secured for him in advance.(52)

In practice then, Maine's former indeterminate system operated like this:

1. The judge decided if incarceration was warranted and established the "baseline" by selecting a place of confinement, and a minimum and maximum term of confinement for people confined at the State Prison.

2. State Prison authorities reduced the "baseline" through good-time credits.

3. At the expiration of the minimum sentence less good-time, the parole board reviewed the case for possible release. At the Correctional Center, the Superintendent was authorized to recommend the release of offenders to the parole board. In practice, the Superintendent recommended the release of felons after serving nine months of confinement and misdemeanants after serving six months of confinement.(53)

In Maine's former indeterminate sentencing system, sentencing authority was highly diffused and imbued with a great deal of discretion. Moreover, the decisions affecting the actual duration of confinement were invisible to the public because they were made by executive agencies. It was this diffuse, three-tiered structure of indeterminancy that was the focus of public criticism in Maine. The underlying premises of this system, based on rehabilitation, were criticized by the Task Force on Corrections. This was the system that the Maine Criminal Code Revision Commission changed.

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(51) 34 Me. Rev. Stat. Ann. sec. 1672 (1964).

(52) 34 Me. Rev. Stat. Ann. sec. 1673 (Supp. 1973).

(53) See M. Zarr, supra., note. These practices changed over time. There is some debate between corrections and parole board members as to whether authority to release resided with the superintendent or the parole board.

In 1971, Maine's 104th Legislature created an "Act to Create a Commission to Prepare a Revision of the Criminal Laws." The first meeting of the Comission was on April 7, 1972. The Comission was chaired by Jon Lund, an attorney and a former member of a commission to study the possibility of codifying Maine's criminal laws. The Commission was largely comprised of practicing attorneys and employed Sanford Fox, a nationally recognized expert on criminal law and an experienced legislative draftsperson, as a consultant. The Commission met regularly with over 45 working sessions to prepare a new criminal code.

The Commission completed its work in 1975, at the initial phase of a nationwide reform movement advocating the adoption of determinate sentencing systems. The Commission did not have the benefit of the research and debates that informed enactment of determinate sentencing systems in Minnesota, Pennsylvania, Washington, and Oregon. Despite the absence of the variety of reform models available today, the Commissions's final recommendations were clearly intended to reduce the diffusion of sentencing authority and to increase the visibility and accountability of sentencing decisions.

The bulk of the Commission's work centered on the redefinition of offenses. By early 1972, the Subcommittee on Substantive Offenses had abolished the felony-misdemeanor distinction and predicated their work on a classification scheme which established at least four sentencing classes or grades of offense seriousness.(54) It was left to the Subcommittee on Sentencing to work out the specific sentencing structure.

The basic task of the Subcommittee on Substantive Offenses was to simplify the criminal law. This was accomplished in four basic ways. First, they provided definitions of key terms to allow for a straightforward description of the elements of particular offenses. Second, the Commission identified those offenses that were undesirable, but not of sufficient threat to the public order to require criminal laws against them. Those offenses were either decriminalized or depenalized. It is in this context that certain sexual acts between consenting adults and social gambling were decriminalized, while certain victimless crimes such as the possession of small amounts of marijuana and prostitution were depenalized.

The third way that offenses were simplified was to differentiate similar offenses from one another in terms of seriousness so that they could be placed in different sentencing classes or grades. The major effect of this effort was the classification of property offenses, such as theft, according to the value of property destroyed or taken, for sentencing purposes.

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(54) Memo from Sanford Fox to the commission, dated June 22, 1972.

Finally, and most importantly, the Commission consolidated what previously were separate offenses, enacted into different statutes at different times, into single offenses. For example, the new offense of forgery incorporated over sixteen different but related previous statutes. One major effect of offense consolidation was to change, and clarify, the elements of crimes and, thus, the evidence necessary for conviction.

While the work of the Subcommittee on Substantive Offenses can be characterized from the onset as directed toward a clear and concise goal, such is not the case for the Subcommittee on Sentencing. In fact, the only consistent theme in their effort was the commitment to some form of offense classification.

Two entirely different models of sentencing were developed by the Subcommittee. The first sentencing scheme was indeterminate and, essentially, a rationalization of the existing system. The second model, which rejected indeterminacy, was finally adopted. The only consistent strand of thinking between the two proposed sentencing provisions was the classification of offenses into classes or grades of seriousness. But this, after all, had been decided by the Subcommittee on Substantive Offenses and could not be abandoned.

In the first model, judicial sentencing authority was to be exercised within the context of new offense classifications and parole board discretion was to be reduced by introducing mandatory release and supervision guidelines. Nonetheless, the basic elements of indeterminacy would be retained.

The First Model: Rehabilitation Revisited

The underlying aim or purpose of punishment in the first model of sentencing was largely rehabilitative. These provisions were introduced to the Commission on June 22, 1972, by Chief Counsel Fox, and were prepared by his colleague, Professor Charles Fried of Harvard Law School.(55) As adopted by the Commission that August, the first model substantially revised the existing indeterminate sentencing system. It abolished the court's authority to decide a minimum period of confinement and established four classes or grades of offense seriousness with a maximum length of incarceration attached to each offense class. It was based on the sentencing scheme proposed in the Model Penal Code and drew also on the Federal Criminal Code SS3202(1). The first sentencing structure adopted by the Commission was:

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(55) Memorandum from Sanford Fox dated June 22, 1972.

A person who has been convicted of a crime may be committed for an indefinite period to the custody of the Department of Mental Health and Corrections as follows:

1. A. In the case of a Class A crime, the court shall set a maximum period of commitment not to exceed thirty years.

2. B. In the case of a Class B crime, the court shall set a maximum period not to exceed ten years.

3. C. In the case of a Class C crime, the court shall set a maximum period not to exceed five years.

4. D. In the case of a Class D crime, the court shall set a maximum period not to exceed one year. (56)

This model placed limitations on the court's discretion as it only allowed the judge to place the offender under legal custody of the Department of Mental Health and Corrections, as Fox clearly indicates in the August 21st memo:

> ...the sentence can only be that the offender be placed in the legal custody of the Department for an indefinite period not to exceed the time set by the court at the time of sentencing. As later sections of this chapter provide, the Department is given discretion to determine which institution is to be used, or whether the offender will be placed in some non-institutional program.

Moreover, this model abolished the prior practice of discretionary parole release and replaced it with a mandatory parole component. The underlying aim of mandatory parole release was explained by Fox in the following way:

> The policy of this section is based on the view that parole is not a reward for good behavior in the artificial atmosphere of a penal institution, but is rather a means for ensuring that all prisoners who must be returned to society are accorded the maximum assistance in establishing themselves in law-abiding ways of life. (57)

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(56) Memorandum from Sanford Fox to Subcommittee on Sentencing dated August 21, 1972.

(57) Memo of August 13, 1972, p. 19.

Offenders were eligible for parole supervision at any time, but maximum parole release dates were adopted. These maximum release standards are shown in Table 2.1 .

TABLE 2.1

Proposed Maine Maximum Release Standards

Sentence Length Set by Court	Maximum Time to Parole Release
15 years or more	5 years
9 to 15 years	3 years
Less than 9 years	1/3 of sentence

Thus, the intent of the first model was to locate both the incarceration and the release decisions with corrections officials and the parole board for their evaluation and determination of treatment. This was seen as "good sense" management, and embraced the treatment ethic which had dominated correctional decision-making for over a century.

Finally, this first model embraced the view that extremely long periods of incarceration were unnecessary. In fact, the actual duration of confinement proposed by this model could not exceed five years, even for a Class A felony conviction.

However, this sentencing scheme, which vested authority in corrections, was subsequently abandoned for an entirely different model, based in part on the Model Sentencing Act which vested authority over convicted people in the courts and abolished parole.

The Final Model: Rehabilitiation Rejected

The second sentencing scheme rejected the indeterminate features of the first model. It abolished the parole board and shifted complete authority for sentencing decisions to the judiciary. This second model was ultimately enacted into law. The effect was to adopt a sentencing structure which had relatively high maximum incarceration penalties, judicially fixed terms of imprisonment within those maximums, and the total abolition of parole.

This reversal by the Commission on the sentencing provisions had a crucial impact on the criminal justice system in Maine--particularly corrections. It represented an important ideological shift which reflected mounting lack of confidence in the treatment ethic and in corrections' ability to provide essential services to ensure rehabilitation.

The reversal is also important for theoretical reasons, since it is an example of the sensitivity of legislation in the area of sentencing and an example of how such legislation is especially subject to change by external factors--in this case a moral panic about crime and parolees.

This second model was provided to the Commmission on June 10, 1974 by Chief Counsel Fox. As the minutes of that now infamous meeting state:

> A lot of existing discretion is transferred from judges, lawyers and corrections officers to the legislature, partly because it is based on the diminished reliance on corrections and prisons, reflecting our belief that the public is not ready to accept the rehabilitative philosophy embodied in our first proposal.

A conjuncture of events in the twenty-four months between the first sentencing proposal and the second sentencing proposal led the Commission to abandon--in part--the basic rehabilitative underpinnings of the first model. First, the Director of the Bureau of Corrections testified that the department was incapable of assuming the responsibilities authorized under the new sentencing provisions of the bill, partly because the legislature would not provide the financial backing required to do the job. (58)

Second, in 1974 the Governor's Task Force on Corrections--a parallel group--published over 100 recommendations in their report, "In the Public Interest." Unlike the Commission, the Governor's Task Force was largely critical of corrections' failure to provide even the basic training and skills requisite for employment to inmates, and critical of the rehabilitative model as practiced. This is reflected in the Task Force recommendations:

> We recommend that sentencing legislation be enacted recognizing the legitimate state interests in dealing with criminal offenders, of 1) incapacitation, 2) punishment as a means to deter willful criminal behavior, and, 3) rehabilitation, and recognizing that while institutional confinement is an appropriate means to achieve the first and second objectives, it is totally

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(58) Interview with Commission member, 1980.

inappropriate for the third. (59)

The Task Force went on to say:

> ...we wish to state in the strongest possible language our belief in the myth of "rehabilitation" as it applies to the vast majority of institutional inmates in Maine... (60)

A third factor leading to the drastic change by the Commission was growing criticism of the parole board. While the Commission had assumed that the parole board knew when it was appropriate to release offenders, they were surprised at how early and quickly offenders were being released. (61) Criticism of the parole board's early release decisions also came from the judiciary. And, in March of 1973, the Portland Press Herald ran an editorial calling for an inquiry into the parole system, which was followed by a series of articles questioning the qualifications of the personnel in parole services.

The final element that affected the Commission's thinking was a grass roots "panic" about rural crime--especially theft of antiques and drug abuse--which led to pressure for mandatory sentences and restitutional alternatives.

Although no single factor was likely to have affected the Commission's thinking about sentencing so drastically, together they served to change the previous, rehabilitatively based beliefs of the Commission members into ones with different ideological underpinnings.

The basic premise of the new sentencing provisions was that decisions about offenders should be more visible. As one member of the Commission put it:

> No one saw the parole board and corrections administration in operation. They were out of the public eye and review. The aim was having it out and laying it on the line--the most visible branch of the criminal justice system is the court. (62)

The new sentencing provisions were intended to situate authority over the offender in the judiciary. It was believed that since judges were more visible to the public, they could be held

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(59) "In The Public Interest," 1974, p. 17.

(60) "In The Public Interest," p. 18.

(61) Interview with Commission member.

(62) Interview with Commission member, 1980.

accountable for decisions about punishment. Although the Commission never abandoned its inclination toward rehabilitation, such beliefs no longer were the central focus of their second and final recommendations about sentencing. The treatment-based notions embodied in the rehabilitative ideal steadily lost ground. The Commission had been out-flanked on two fronts: The socio-political environment called into question the myth of rehabilitation which shrouded parole, and thus the effectiveness of parole supervision; and, a more realistic assessment showed that the legislature was unwilling or unable to provide the correctional system with the resources for programs seen as requisites for achieving rehabilitative ends.

With the growing national criticism of the basic philosophical underpinnings and practices of the rehabilitative ideal and the criticism of the discretion vested in corrections officials reflected in the Governor's Task Force Report, the Commission had little to do but abandon their first sentencing proposal. The second sentencing proposal, then, was the product of disillusionment and a realistic assessment of political exigencies. In short, the new sentencing proposal was advanced in a moment of utilitarian pragmatism. This proposal was a means, and perhaps the only remaining one, of ensuring the passage of the entirety of the new code with as little legislative tinkering as possible. It is for this reason that Maine's new sentencing structure has been characterized as a "masterpiece of breathtaking ambiguity."

MAINE'S NEW SENTENCING SYSTEM: AN ANALYSIS

The basic objective of Maine's Criminal Code Revision Commission was three-fold:

1. To increase the visibility of decision-making over offenders by abolishing parole release;

2. To ensure that offenders and the public were 'certain' about the duration of confinement by firmly situating the regulation of incarceration length and, hence, release decisions in the court at the time of sentencing by introducing flat-time sentences; and

3. To legislatively control the severity of penalties by a graded structure of sentencing.

Five areas of statutory changes affecting changes in sentencing will be examined. They are elaborated in various sections of the criminal code and in one piece of "companion legislation." They are:

1. The five graded classes of offense seriousness;

2. Definitions of offender's culpability or blameworthiness;

3. Standards to assist the judge's sentencing decision as to whether or not to incarcerate;

4. Purposes or aims of punishment; and,

5. A number of provisions designed to ensure that the system was integrated and flexible.

Offense Seriousness Classification

One of the major products of the reform was the classification of offenses into five categories of offense seriousness. This system both rationalized the penalties available to the court at the time of sentencing, and permitted future legislatures to address the problem of seriousness in the enactment of new statutes. The five classes of offenses identify the seriousness or gravity of the crime and/or criminal state of mind. The Commission authorized maximum penalties within each class of seriousness.(63) The court is required to select a precise period within that maximum which is the period of incarceration, not including good-time. The sentencing structure as enacted is summarized in Table 2.2

As can be seen, maximum incarceration length, probation length, and fines are attached to each class or grade of offense seriousness. No minimum terms of imprisonment are set except for crimes committed against persons with a firearm or burglaries committed by offenders with prior burglary convictions.

This new sentencing structure was intended to constrain and limit the prior practice of *ad hoc* enactment of new offenses with penalties determined by the mood of the legislature at the time.(64)

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(63) Murder is excluded from the scheme.

(64) The legislature, however, can always create new offenses and grade them as it wishes, add mandatory minimums or otherwise alter existing penality legislation.

TABLE 2.2

Penalties Available Under the Revised Code, 1976

Class of Offense	Maximum Authorized Imprisonment	Maximum Authorized Probation	Maximum Authorized Fine	
			Natural Persons	Organizations
A	240 months	3 years	none	$50,000
B	120 months	3 years	$10,000	$20,000
C	60 months	2 years	$2500	$10,000
D	12 months	1 year	$1000	$5000
E	6 months	1 year	$500	$5000

Source: adapted from M. Zarr, "Sentencing," Maine Law Review, 28,1976, p. 120.

Culpability

The second area of reform identifies the offender's culpability. Unless contrary legislative intent appears, the criminal code requires that the degree of culpability be proven as an essential element of the crime. The four states of mind encompass one another, with "intent" being most culpable and "negligence" least culpable. Thus, the concept of 'states of mind' is clarified for those offenses where it is necessary for a conviction and/or used to rank the seriousness of offense class for sentencing.

The model of determinate sentencing discussed in Chapter One requires that decisions about whether to incarcerate and about the duration of incarceration be largely confined to assessments as to the seriousness of the conviction offense and culpability of the offender. While Maine's criminal code contains both of these elements, it continues to allow for a high degree of judicial discretion. The five graded offense classes do not confine judicial discretion, since only maximum penalties are specified for each offense class. Moreover, the "states of mind" are not scientific concepts, but jurisprudential ones which are hard to measure. The trial judge has broad discretion in deciding which state of mind is applicable, as well as in deciding the sentence. Thus, Maine's Criminal Code substantially falls outside this meaning of determinacy.

Sentencing Standards

The model of determinate sentencing discussed in Chapter One requires that sentencing decisions be limited by standards and that discretion be confined by guidelines. The third change was intended to affect the court's sentencing decisions; the introduction of three sentencing standards guide trial judges in making the critical decision of whether or not to incarcerate. These standards bear close scrutiny because they are intended to limit the trial judge's discretion.

As amended in 1977, section 1201 contained two standards, both of which preclude the judge from imposing a probationary sentence. It stated that any person convicted of an offense, other than aggravated murder, "may be sentenced to a suspended term of imprisonment with probation or to an unconditional discharge unless the court finds:

1. That there is undue risk that during the period of probation the convicted person would commit another crime; or,

2. that such a sentence would diminish the gravity of the crime for which he was convicted.(65)

This section is important because it provides standards to the trial court in the form of a decision rule: When in doubt, incarcerate! It requires the trial court to incarcerate offenders unless convinced that the offender will not commit another offense while on probation, and that the offense is not a serious one. Probation may not be granted when the court deems the offense to be a "serious" one, even if the court is convinced that there is no likelihood of further criminality. This biases the trial court's decision in the direction of imposing custodial, as opposed to non-custodial, penalties. That is, any judge attempting to apply the provisions of section 1201 must necessarily accept a strong bias in favor of incarceration.

Since the two sentencing standards introduced by this section of the criminal code are not binding, and since they increase, rather than decrease, the likelihood of incarceration on the basis of predicted future criminality, they clearly do not fall within the meaning of "determinacy."

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(65) 17-A Me. Rev. Stat. Ann. sec. 1201 (1)(A), (B) and (C).

Aims or Purposes of Punishment

The fourth change introduced by the new criminal code was the articulation of the aims or justifications for sentencing. Operationally, the code did not adopt a singular ideological purpose for sentencing. Rather, the code attempts to serve all purposes. This is made clear in the following statement of purposes included in the code.

1. To prevent crime through the deterrent effect of sentences, the rehabilitation of convicted persons, and the restraint of convicted persons when required in the interest of public safety;

2. To encourage restitution in all cases in which the victim can be compensated and other purposes of sentencing can be appropriately served;

3. To minimize correctional experiences which serve to promote further criminality;

4. To give fair warning of the nature of the sentences that may be imposed on the conviction of a crime;

5. To eliminate inequalities in sentences that are unrelated to legitimate criminological goals;

6. To encourage differentiation among offenders with a view to a just individualization of sentences;

7. To promote the development of correctional programs which elicit the cooperation of convicted persons; and,

8. To permit sentences which do not diminish the gravity of offense.

A close examination of these purposes reveals that they enshrine individualized sentencing and justify tailoring the sentence to fit the individual offender on a number of diverse and inconsistent penological grounds: deterrence, retribution, incapacitation, and rehabilitation. The model of determinate sentencing requires that the justification for punishment not be individualized. Moreover, the aims must be coherent and should be primarily based upon retribution-- "commensurate deserts."

These goals do have many of the elements of determinacy. The eighth goal introduces a retributive justification. The basic policy of reducing disparities in sentences is introduced in goal number five. Moreover, the third goal states that incarceration

should be used sparingly, and the second goal provides an alternative to incarceration--restitution. Regretably, the first and sixth goals contradict these coherent principles and undermine their retributive focus. The first goal asserts the importance of deterrence, rehabilitation, and predictive restraint or incapacitation.

The goal of individualized sentencing, goal number six, not only is incompatible with determinate sentencing, but it is the mechanism which enables this entire goals statement to be theoretically and logically consistent with the rest of the code. It allows the trial judge to impose incapacitative sentences on some offenders, rehabilitative sentences for others and retributive sentences for others. In other words, which goal dominates is entirely context dependent-- it is up to the judge. Individualized sentences are the sine qua non of unprincipled sentencing.

Flexibility Mechanisms

Three provisions introduced in the code were intended to ensure that the sentencing system was flexible. Having abolished parole and introduced flat sentencing, these provisions were injected into the system to serve as "checks and balances." They include the split sentence authorization, the resentencing option, and the transfer provision. The split sentence authorization has been amended several times since 1976. The resentencing option, authorizing corrections officials to petition the court for resentencing, has been struck down by the law court. The transfer provisions have also been revised. As will be seen, the changes enacted since the reform lend support to the view that the sentencing structure is less flexible than anticipated and, perhaps, has not sufficiently integrated various agencies concerned with processing offenders. For this reason, it is important that these changes be examined in some detail.

The split sentence provision is contained in 17-A M.R.S.A. Section 1203. It expanded the court's authority to impose a period of confinement at Maine State Prison followed by probation, to the authority to impose incarceration at any correctional facility or county jail followed by probation. Also, it introduced two types of split sentence. The first is a "shock sentence." Shock sentences are to provide a brief exposure to imprisonment followed by probation. The intent is to shock the offender into the recognition of the serious consequences of his or her actions. The second type of split sentence authorizes the court to decide which offenders may be in need of probationary supervision in the community during the critical period of "adjustment" following release from an institution. This split sentence is the functional equivalent of the old pre-reform parole system, except that: 1) release at the end of the fixed term of imprisonment is automatic, rather than at the discretion

of the parole board; and 2) any subsequent revocation of probation after release is administered by the court, rather than the parole board.

As originally enacted in 1976, Section 1203 contained two subsections. The first authorized the court to suspend any portion of the last 24 months of imprisonment and place the offender on probation for any portion of the suspended term. The second subsection was intended to introduce the "shock" sentence. It limited the period of confinement at the maximum security facility--Maine State Prison--to 90 days. Section 1203 was repealed and replaced in its entirety in 1977,(66) and amended in 1977 and 1979. As amended, the first section authorizes the court to commit the offender for a period not to exceed 120 days to any correctional institution or county jail when imposing a "shock" sentence. The second type of split sentence--probation after imprisonment--as amended,(67) is now limited to Class A or B convictions when the term of imprisonment is 48 months or more.(68) It now requires that the offender serve 12 months probation after release.

The second major innovation introduced to ensure system flexibility is contained in 17-A M.R.S.A. Section 1154. Subsection 1 provides "that sentences of imprisonment in excess of one year shall be deemed tentative." Subsection 2 allows the Department of Corrections to petition the sentencing court to resentence the offender if,

> as a result of the Department's evaluation of such person's progress toward a non-criminal way of life, 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 Commission's intent was to provide a mechanism through which the trial judge could reconsider his/her original sentence, given the abolition of parole.

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(66) 1977 Me. Laws c. 671, sec. 27.

(67) 1979 Me. Laws c. 701, sec. 27.

(68) The limitation for imposing probationary supervision on Class A and B offenders for 48 or more months appears somewhat arbitrary if community supervision following incarceration is an important goal.

However, in 1977, the decision and order of the Superior Court in Maine v. Abbott (York Docket No. CR 76-564) questions the constitutionality of Section 1154.

> This court concludes that Section 1154 did not intend to confer upon the court jurisdiction to modify a sentence after it had been imposed on the grounds of changes in the attitudes or behavior of the offender. This court further concludes that if the statute purports to confer that power it contains an unconstitutional delegation of executive power to the judiciary.(69)

In 1982, the appeals court upheld the lower court's decision in Maine v. Hunter. The court argued the resentencing provision "invests the judiciary with commutation power expressely and exclusively granted by the State Constitution to the Governor."

The argument of Judge Watham, in the only dissenting opinion in the case, bears close scrutiny. He focused on the unique character of incapacitative sentencing and argued that, in failing to specify the factual bases on which such sentences could be imposed, the legislature failed to deal effectively with the issue. As a result, a body of law dealing with incapacitative sentences, and principles of sentencing in general, do not exist. Consequently, he argues that incapacitative sentences (defined in excess of five years) form the basis for judicial authority in Section 1255. He argues that that authority exists, because when an incapacitative sentence is imposed the "inmate's progress towards a non-criminal way of life," as assessed by the Department of Corrections, is the only mechanism that exists to correct an error of judgment by the court.

A major goal of the Commission was to make sentencing decisions more certain through the abolition of parole and institution of flat sentences. However, the criminal code was accompanied by "companion legislation," such as transfer provisions, providing corrections officials broad discretionary authority to release offenders from institutions prior to the expiration of the "fixed" sentence. The companion legislation entitled, "Transfer," as amended in 1977, reads as follows:

> When it appears to the Director of the Bureau of Corrections, for reasons of availability of rehabilitative programs and the most efficient administration of correctional resources, that the requirements of any person sentenced or committed to a penal, correction or juvenile institution would be better met in a facility,

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(69) The court's decision in this matter is in accord with Maine Rules of Criminal Procedure Rule (35), but Section 1154 delegated that power to the court.

institution or program other than that to which such person was originally sentenced, the Director of the Bureau of Corrections, with the written consent of the person so sentenced, may transfer such person to another correctional institution, residential facility or program administered by or providing services to the Bureau of Corrections; provided that no juvenile shall be transferred to a facility or program for adult offenders.

Any person so transferred shall be subject to the general rules and regulations pertaining to persons at the institution or facility, or in the program to which he is transferred, except that the term of his original sentence or commitment shall remain the same, unless altered by the court, and that person shall become eligible for release and discharge as provided in Title 17-A, Section 1251.(70)

Under this section, the Director of the Bureau of Corrections has authority to transfer any prisoner to any "program administered by or providing services to the Bureau of Corrections." As Zarr(71) points out, the transfer power appears to embrace a variety of forms of community supervision such that a judicial sentence to a correctional facility may be overridden by a corrections' transfer to the community. This section of the companion legislation, particularly as amended in 1977, thus erodes the intent of the "fixed" judicial sentence to provide the offender and the public with certainty of incarceration lengths.

THE CRITICISM OF MAINE'S REFORM

Maine's model of sentencing reform drew international attention and immediate and ongoing criticism. Initially, the criticism centered on the extent to which indeterminacy remained in the system.(72) Subsequent criticism centered on the judicial sentencing model adopted in Maine.(73) These criticisms were later joined by a disclaimer that Maine was part of the movement that rejected indeterminacy.(74)

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(70) 34 Me. Rev. Stat. Ann. c. 62, Sec. 529.

(71) Melvyn Zarr, "Sentencing," 1976.

(72) Melvyn Zarr, "Sentencing," 1976.

(73) Andrew von Hirsch and Kathleen Hanrahan, "Determinate Penalty Systems in America: An Overview," 1981.

(74) Edgar May, "Prison Officials Fear Flat-Time is More Time,"

One of the earliest critics of Maine's reform was Melvyn Zarr, Professor of Law at the University of Southern Maine. Overall, Zarr argued that the new law made symbolic, but not substantive, changes in sentencing. In discussing the new sentencing statutes, Zarr objected to the indeterminacy of the new sentences, and in particular to the transfer provisions allowing Corrections officials to place inmates in community programs and to the provisions for petitions for resentencing which authorized the Bureau of Corrections to request the sentencing judge to reduce sentence length. Concerned with the indeterminacy allowed by these provisions, he states:

> ...one thing is reasonably clear, the indeterminate sentence having been banished by the front door, has returned through the rear.(75)

Professor Zarr's objections were subsequently joined by Sol Rubin, who viewed Maine's reform as principally directed at abolishing parole and resulting in little change. Objecting to the petitions for resentencing, Rubin argued:

> Thus, the former authority to discharge on parole is now in the hands of the prison administration and the judge, with parole supervision being eliminated...Thus here, as in California, the legislation does not improve the lot of prisoners, but is an accomodation to adminstrative factors.(76)

Similarly, Caleb Foote, Professor of Law at Berkeley, claimed that

> Some of the legislation, like that of Maine, under no stretch of the imagination can be called determinate sentencing. All of it ignores or glosses over critical problems which must be faced before determinate sentencing can be fair or even feasible.(77)

Specifically, Professor Foote objected to the fact that Maine's sentencing structure did not place constraints on the discretion of the judiciary.

1977.

(75) Zarr, "Sentencing," p. 144.

(76) Sol Rubin, "New Sentencing Proposals and Laws in 1970's," Federal Probation, 43, June. 1979. pp. 3-8.

(77) Caleb Foote, "Deceptive Determinate Sentencing," p. 133.

Andrew von Hirsch and Kathleen Hanrahan objected to the fact that Maine's sentencing structure lacked standards or guidelines for the imposition of sentences. For this reason they claimed that Maine's reform could not be characterized as determinate sentencing.

> Maine's system is sometimes spoken of as a determinate sentencing system, but it is clearly not because it lacks the essential element of determinacy: explicit standards.(78)

The lack of concern in Maine law for standards to guide the trial court's decision-making process, which led to the claim that Maine's reform stood outside the movement to determinate sentencing, was reiterated by Edgar May:

> The Maine statute is fundamentally a conservative political reaction against what was perceived as a lenient parole board, and had nothing to do with discussions in other parts of the country of determinate sentencing.(79)

These criticisms led to pessimism about the impact of sentencing reform in Maine. Observers did not believe that statutory changes in the sentencing structure, which merely reduced the diffusion of sentencing power and abolished indeterminate sentences, would result in a fairer system unless the underlying bases of the decision-making process were changed. But the basic objection was that Maine's reform vested unrestrained discretion in the judiciary.

Theoretically, a judicial model of sentencing as implemented in Maine can function according to fair, intelligible and evenly applied rules. It is a legalistic model wherein questions of relative seriousness of the offense and culpability of the offender can be used to allocate fair and certain levels of punishment for each offender. In practice, however, the judicial model of sentencing has been criticized because it places too much discretion in a diverse judiciary, who apply quite different sentencing standards to quite similar offenders.(80)

In sum, three basic criticisms have been leveled at Maine's reform. First, it was argued that in the absence of a clear direction from the legislature on sentencing, the processing of

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(78) Andrew von Hirsch and Kathleen Hanrahan, "Determinate Penalty Systems," p. 295.

(79) May, "Prison Officials Fear Flat-Time is More Time," p. 49.

(80) Marvin E. Frankel, Criminal Sentences: Law Without Order. New York: Hill and Wang. 1973.

offenders on a case-by-case basis would necessarily lead to unwarranted variations in sentences. That is, the elimination of parole and introduction of graded classes of offenses from which a judge selected a penalty was not believed to be capable of producing a fairer system. Second, the less diffused system of sentencing brought about by the abolition of parole was not seen as reducing the amount of discretion in the system, but rather as concentrating that discretion between judges and prosecutors.(81) Third, questions were raised as to how much discretion was retained by corrections officials. This criticism largely focused on the petitions for resentencing, but also on their increased authority over "good-time."

What is absent from the critique of Maine's judicial model of sentencing is any clear picture of what would be critical to the success of that reform. More importantly, though, the criticisms have provided few concrete criteria against which the reform can be evaluated or assessed.

The critical discussion of Maine's reform has not included a realistic assessment of what changes were feasible at the time. Rather, the reform has been judged against reform ideals and against very specific agendas of reform in other states. Instead of being evaluated in its own terms, Maine's reform has become embroiled in controversy reflecting serious ideological disagreements among various sectors of society as to what should constitute an appropriate sentencing policy. Perhaps for these reasons, debate has almost exclusively focused on the statutory law at the time of reform, not its subsequent revision, and not on the operation of the reform-- how it has worked.

The remainder of this report provides an empirical assessment of the outcome of Maine's reform measured against the goals of the Commission and goals of advocates of determinate sentencing.

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(81) Albert W. Alschuler, "Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for 'Fixed' and 'Presumptive' Sentencing," 1977.

Chapter III

RESEARCH ISSUES, DATA AND METHODOLOGY

The basic problem addressed by this research is "What are the changes in sentencing practices which resulted from the 1976 criminal code reform in Maine?" As discussed in the previous chapter, Maine's reform revised the structure and content of the criminal code, abolished parole, and instituted flat-time sentencing by the courts. The previous chapter has explored the content of these changes and their general effects on the structures and processes of various components of the criminal justice system. We now turn to a direct empirical examination of the impact of these reforms on sentencing decisions and outcomes.

Using data collected from courts, correctional institutions and probation offices on individual criminal sentencing decisions from 1971 through 1979, we examine what changes in sentencing, if any, have taken place as a result of the 1976 reform. These potential changes include changes in the type of sentence given, changes in the length of incarceration sentences, and changes in the basis of sentencing decisions. Consequently, the essential questions to be addressed are:

1. What are the changes in the court's choice of type of sentence?

2. What are the changes in the court's choice of length of sentence for those incarcerated?

3. What are the changes in the basis of the court's sentencing decisions?

The focus of all three of these questions is court's decision-making, in terms of both basis and outcome. Court decisions about criminal case dispositions involve several discrete and identifiable choices, including choice of type of disposition and choice of extent within the type.(82) Put another way, judges

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(82) Following Wilkins and others' formulation, researchers such as Sutton (1978, Federal Criminal Sentencing. Analytic Report 16. U.S. Department of Justice, pp.21-22) have conceived of sentencing as a "bifurcated or two-fold decision" encompassing "both type and length of sentence." This simple formulation is useful and the present analysis is organized around these two "stages." However, the reality of

first choose among various sentencing options, such as incarceration, probation, fines, and restitution, or combinations of these options, such as split sentences. Given the choice of type, judges also choose the length of incarceration or probation or the amount of the fine or restitution. The present research is concerned with the decision about type of sentence for all offenders, and with the decision about length for offenders given incarceration sentences.(83)

The first research question focuses on changes in type of sentence. The 1976 reform was intended to provide the court with more flexibility in sentencing and rationalized the "split sentence"--a combination of incarceration and probation--as a more specific, direct, and court controlled option. Consequently, one of the first questions to be addressed in assessing the impact of the sentencing reform is the extent to which these options have actually been used--the extent to which the type of sentences given by judges have actually changed.

Of course, these changes in sentencing options took place along with extensive legal code changes and the introduction of a full-time district attorney system in 1975. Both of these changes in the context of the court decision might result in changes in the charges and recommendations brought to the court. Because of this context, it is necessary to examine changes in the definition and distribution of cases brought to the court in order to distinguish those changes in type of sentence resulting from the changes in sentencing options from those changes which are a result of other reforms.

The second question, focusing on changes in incarceration length, directly addresses the impact of the change from an indeterminate to a flat-time sentencing structure for those incarcerated. It is clear that the sentences given by the courts under the new code are "different"--at least in form--since under the old code the court decided on a range of length and under the new code the court decides on a specific length. The critical question in assessing the impact of the sentencing reform, however, is whether this change in form has resulted in a change in outcome-- the actual time served by offenders.(84) Consequently,

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sentencing is more complex.

(83) "Most sentencing studies have been concerned exclusively with sentence length disregarding the equally important determination of whether a defendant will be imprisoned at all." (Sutton, Federal Criminal Sentencing, p. 13.)

(84) See A. Keith Bottomley (1979. Criminology in Focus. p. 150) for a discussion of outcome impact and also Stephen Wasby (1976. Small Town Police and the Supreme Court) for an excellent discussion of assessment of the impact of legal

our examination of changes in the length of sentences will be primarily concerned with changes in the actual length of incarceration. Actual incarceration length are a consequence not only of the court's decision but also of decisions by corrections officials, and under the old code, by parole boards. As a consequence, we must examine the relationship between the actual release date (actual time served) and the date of eligibility for release (minimum expected time served) in order to clearly distinguish changes in the court's decisions.

Finally, the third question focuses on changes in the basis of court decision making or changes in "who gets what?" before and after the sentencing reform. Specifically, this analysis examines changes in the impact of personal and legal characteristics, first on the court's type of sentence decision, and second, on the court's sentence length decision for incarcerated offenders. Although the new criminal code structured offenses into sentencing categories and identified a rather ambiguous set of "sentencing objectives," it did not directly attempt to increase consistency in sentencing or establish sentencing guidelines. Our concern is to examine the effect of the reform on changes in how judicial decisions are made and changes in the consistency of those decisions.

It is necessary, once again, to isolate the effects of the sentencing reform on judicial decision making. In our analysis of changes in the basis of sentencing, "minimum expected time served" is utilized as the measure of sentence length to directly compare the basis of sentencing before and after the sentencing reform for specific type of offenses.

Chapter Four examines the first research question--changes in type of sentence--and Chapter Five examines change in incarceration length. Chapter Six examines the relationship between sentence length and actual time served-- "certainty" of sentence--and Chapter Seven examines changes in the basis of sentencing decisions--consistency and predictability. Finally, Chapter Eight examines the impact of both changes in type of sentence and changes in incarceration length on correctional institutions in Maine. The conceptual and methodological issues involved in each of the research questions and briefly discussed above are more fully examined in these chapters.

The remainder of this chapter identifies the type of data necessary to address the research questions and then describes the process of collecting and the content of these data. In addition, this chapter examines the methodological issues involved in defining a unit of analysis--the sentencing decision--and definitions of offense. Finally, it further discusses some of the basic methodological problems involved in the analysis and

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change.

particularly the difficulties in isolating changes in court decision making and effects of sentencing reform from other decision making changes and the effects of other reforms and changes in Maine.

OVERVIEW OF DATA

To address the issues outlined above, data were collected from court docket records, correctional institution records and probation office records. Court data were collected on all criminal cases docketed in seven Superior Courts from January, 1971 through December, 1979. Corrections data, when available, were collected on all offenders identified from the court data who received sentences to the state correctional institutions. Probation data, when available, were collected on all offenders in the court sample who received probation sentences, or incarceration followed by probation sentences, and who were supervised in six of the seven Superior Court districts (counties) contained in the court data. Court data were available on 10,454 sentencing decisions and corrections or probation data were available and successfully linked with the court data for 5,541 cases. All data utilized in this analysis were collected by the present project.

Table 3.1 presents an outline of the data elements necessary to examine each of the three research questions and the location of collection of those elements. Investigation of changes in type of sentence draws on data elements available in court records. These records include basic information about both preliminary and final charges, disposition of the case, and whether the case was handled under the old or new code. These same elements also allow us to examine changes in the type of charges brought to the court, and other contextual changes such as increases in multiple charges.

Examination of changes in length and certainty of sentences requires the same basic information from the court data, together with corrections information about the institution of actual custody, the date of entry into the institution, date of release from the institution, and type of release. This corrections information is essential, since analysis of length of sentence requires knowing actual time served and minimum expected time served, which are not available from court records.

Analysis of changes in the basis of sentencing decisions requires all three type of data--court, corrections and probation. In addition to the court record information already discussed, this analysis requires court record information on processing characteristics including plea, type of counsel, type of trial, etc. In addition, information on the legal background of the offender, including number and type of previous convictions and previous dispositions, and information on the personal character-

TABLE 3.1

Summary of Data Elements and Data Collection Location by Research Question

	Research Question	Data Elements	Location of Data Collection
I.	Changes in Type of sentence	Charges, sentence, date of sentence code type	Court Docket Files
II.	Changes in Length of Sentence	Charges, sentence, date of sentence, code type, jail time credited	Court Docket Files
		Admission date, release date, type of release, institution of custody	Corrections Files
iii.	Changes in basis of sentencing decision	Charges, sentence, date of sentence, code type, plea and processing characteristics (type of trial, etc.)	Court Docket Files
		Admissions date, release date, type of release, insitution of custody	Corrections Files
		Criminal record, personal background characteristics, employment, marital status, education, etc.)	Probation and Corrections Files

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istics of the offenders, including employment status, education, and marital situation, are necessary but available only in corrections or probation files.

The following sections detail data collection, the conceptualization of "sentencing decisions" and "primary offense," and the process of linking court records to both probation and corrections data.

COLLECTION OF COURT DATA

Information about criminal convictions is contained in the court's docket files. The process of data collection involved examining these files in the sequence in which they were originally docketed in each of seven Superior Court districts (counties). For each of these seven counties, information was collected from each non-traffic related criminal docket from January, 1971 through December, 1979.

A sample of seven counties was selected from the sixteen counties in Maine. This sample represents a demographic cross-section of the state. The counties selected include the two most densely populated counties, the two counties containing metropolitan areas, two counties with medium sized cities, and two predominantly rural counties.

The bulk of counties not included are those comprising the coastal region known as "downeast Maine" and the sparsely populated counties in the northwestern part of the state. In most of these counties the Superior Courts handle very few criminal cases. The small number of cases and the long travel distances involved would have made extensive on-site data collection prohibitively difficult and expensive for relatively little gain. Thus, within the constraints of limited resources, the seven counties were selected to maximize the number of cases available for analysis while providing a representative picture of different demographic areas of the state. It is estimated that the present court data includes between seventy-five and eighty percent of all Superior Court criminal cases in Maine during the period of study.

The period of study includes cases docketed over nine years--five years prior to the implementation of the code in May, 1976, and approximately four years after that implementation. Since there is often a substantial time lag between docketing a case and sentencing, these data include sentencing decisions from 1971 through 1980, or five years before and five years after the sentencing reform. This time span provides a sufficient baseline for meaningful pre- to post-reform comparisons as well as valid time-series analysis. Moreover, since the time span extends beyond the period of imminent reform and immediate implementation, it allows us to assess the long-term impact of the reform.

The court data collection instrument contained sixty questions grouped in the following categories: information about each offense, such as legal section number and offense description for both the original and final charges; the number of original and final charges; the sentencing class of new code offenses; data concerning the processing of cases, such as whether or not there was court appointed counsel, sentencing judge and type of case; sentencing information, including both imposed and actual sentences, the length of incarceration or probation, the amount of

fines or restitution, and the location of incarceration. A copy of the court data collection instrument is in Appendix A.

Court docket files are full of ambiguities. A single case file may involve charges against more than one defendant. Some defendants are charged in more than one file but the different cases are all sentenced, and often adjudicated, on the same date. To avoid confusion, separate information was collected and a separate case created for each individual for each docket in which the individual appeared. Consequently, each case in the resulting data set represents one "individual docket record."(85)

The court data, in the form of these individual docket records, was collected from May, 1971 through December 1980. A total of 11,991 individual docket records were collected and coded to be used in the analysis of sentencing decisions.

SENTENCING DECISION AS THE UNIT OF ANALYSIS

The unit of analysis employed in the present study is the "sentencing decision." A sentencing decision is the imposition of a sentence on a single offender on one date by one judge. This sentence may be imposed for a single offense conviction arising from a single criminal episode, or it may be imposed for multiple offense convictions, arising either from multiple criminal episodes or from a single episode in which multiple crimes were committed.

For single offense events, the sentencing decision record is the same as the individual docket record. For multiple offense events, however, different offenses often appear within different dockets (and hence different individual docket records) even though the dockets were combined insofar as sentence was imposed for all of the charges at the same time. In these cases, the

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(85) When more than one person was named in a single docket, full information was collected on each individual. When the same person was named in more than one docket file, information was collected, and a case created, for each of the docket entries.

In order to locate offenders who appeared in more than one individual docket record, each offender was assigned a unique offender code. A master offender file, across counties, was created to ensure that the same offender code was recorded even though the offender appeared in more than one individual docket record. In order to ensure confidentiality this master file was maintained separately and linked to the individual docket information only through case records codes.

individual docket records were "collapsed" into a single sentencing decision record which reflected the legal processing of the offender. This was accomplished through the use of the unique offender identification codes previously discussed.

Conceptually, the use of the sentencing decision as the unit of analysis reflects an understanding of the sentencing process as one in which the judge looks at a "package" of offense convictions, along with a variety of factors about the offender and the offender's background, and arrives at an overall sentence for the person. This conception is in contrast to the view found in most sentencing research, which generally suggests that one can look at specific sentences for each of the specific offenses.(86) An empirical examination of our docket records suggests that, at least in Maine, sentences are arrived at for the offenses <u>together</u>, as a package. Our examination found that, generally, sentences are made concurrent, or suspended, in such a way as to make identification of specific sentences for specific offenses impossible.

Through the "collapsing" process the 11,991 individual docket cases were reduced to 10,661 sentencing decisions. Cases in which offenders were sentenced for new-code and old-code offenses within the same sentencing decision, and cases with clearly erroneous or internally inconsistent data were excluded. This process resulted in 10,421 sentencing decisions which are available for analysis. Of these, 79% are sentencing decisions with a single offense conviction and the remaining 21% are sentencing decisions with multiple offense convictions.

PRIMARY OFFENSE

Analysis of sentencing decisions is complicated by the difficulty in identifying and comparing the offenses for which offenders are sentenced. Offense, and seriousness of offense, are clearly critical variables in any analysis of sentencing. First, the extensive revision of the criminal code and the redefinition of criminal offenses in 1976 makes it difficult to compare offenses before and after the reform. Second, multiple offense sentencing decisions, each with a unique combination of offenses, make analysis extremely complex. These two methodological problems are addressed by the development of an "inter-code," based on the structure and sentencing classes of the revised criminal code, to make offenses comparable, and by the identification of the "primary offense" within each sentencing decision.

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(86) For example, see the recent study, <u>Felony Sentencing in Wisconsin</u> (S. Shane-Dubow, W. Smith and K. Burns-Haralson. Madison: Public Policy Press. 1979. Page 7.), which treats <u>each</u> charge conviction as a <u>separate case</u> for analysis.

As discussed in the first chapter, the new criminal code consolidated, refined and incorporated offenses into a single criminal code. Elements of offenses changed and offenses were graded into five classes of offense seriousness. These redefinitions pose a severe methodological problem in comparing pre- and post-reform offenses--in identifying which old code offense are comparable to which new code offenses.

Following an extensive legal analysis detailed in the Interim Report (Myths and Realities of Maine's Criminal Code Reform: A Case Study, 1981), an offense "inter-code" was created. The categories of the inter-code reflect the offense and class definitions in the new code. For old code cases, sufficient information was collected to identify the appropriate inter-code or, in other words, the offense and class which would have been assigned had the offender been processed under the revised code. A detailed breakdown of the inter-coding assignments, grouped within broad legal categories, is presented in Appendix B.

For the purpose of inter-coding, extensive and detailed offense information was collected on all cases. Both statutory titles and section numbers of offenses were collected. In addition, other relevant information, such as the value of property involved in old-code larceny offenses, was recorded. This kind of information is necessary since, for example, the new criminal code replaced the more general distinction between grand and simple larceny with four discrete grades of theft, classed according to the value of the property involved. This detailed information was then used to assign an inter-code to each offense.

The effect of the inter-coding process is to make new and old code offenses comparable for analysis. Throughout this analysis discussion of "offense" and "class of offense" for both old- and new-code cases refers to classifications made on the basis of the inter-code assigned. (87)

For single offense sentencing decisions, the use of the inter-code to characterize the event in terms of offense and class of offense is straightforward. However, for multiple offense decisions this characterization is more difficult. The difficulty is compounded because, to some extent, the presence of multiple offense decisions are related to the structure and definitions of the new code itself. In other words, some old code single offenses, most notably breaking, entering, and larceny, are inherently

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(87) For the purposes of clarity, the five offense classes are generally grouped into the categories of "felony" (classes A through C) and "misdemeanor" (classes D and E) in the analysis. These categories reflect more generally accessable definitions, useful to those outside Maine. When appropriate, such as in the analysis of consistency and predictability in Chapter Six, the five classes are retained.

multiple offenses within the new code. In the new code, burglary and theft are charged separately.

In order to meaningfully characterize and analyze sentencing decisions a "primary offense" is identified for each decision. This "primary offense" is defined as the conviction offense with the highest, most serious, sentencing class. For those decisions in which there are multiple offenses of the same class, the primary offense is the one first encountered--the offense appearing first on the earliest docket. (88)

In summmary, as a result of the use of inter-coding and the identification of primary offense on the basis of the inter-coding, each sentencing decision is characterized by offense, sentencing class, and number of offense charges. All three of these characteristics are directly comparable between pre-reform and post-reform sentencing decisions.

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(88) The exception is decisions in which a burglary offense, or burglary-theft combination, appear within a group of offenses of the same class. In these cases, the burglary offense was defined as the "primary offense."

This special handling of burglary cases is necessitated by the somewhat unique code changes in this area. As we have already discussed, the single breaking, entering, and larceny (BE&L) was redefined into a burglary category and a theft category. Both of these offenses are graded into a number of sentencing classes. In the inter-coding process, a single inter-code was assigned to BE&L cases so that its quality as a single offense charge was retained while the class assigned to the offense was the highest class which could have been assigned for either the burglary or theft component if processed under the new code. To ensure comparability, new code cases with a combination of a burglary and theft charge were assigned to a comparable inter-code and, when appropriate this combination is defined as the primary offense. However, the character of these cases as multiple offense sentencing events is retained.

COLLECTION OF CORRECTIONS AND PROBATION DATA

Information about the social history and criminal background of offenders and information about sentence outcome are contained in correctional institution files and in probation office files. The process of data collection involved examining individual records in each of the state's two correctional institutions and individual case files in each of six county probation offices. In each of these locations, the collection process involved searching for specific records on those offenders in the court sample whose sentencing event had resulted in incarceration in a state facility, a split sentence, or a probation sentence. Data were collected on 5,830 of these cases.

Time-Served Information

Examination of changes in time served requires corrections' information about the institution of actual custody, the date of entry into the institution, date of release from the institution, and type of release. These data were available only in the individual offender records located at the correctional institutions--the Maine Correctional Center and the Maine State Prison.

Once again utilizing the unique offender codes, identifying information was generated for each sentencing event which resulted in an incarceration only or a split sentence to either of these state facilities. This identifying information was then used to determine the appropriate inmate number, which in turn was used to locate the specific institutional file. Data were then collected, coded, and, through a process discussed below, linked to the appropriate sentencing event record. A total of 3,157 sentencing events resulted in dispositions to state facilities. Of these, 2,821 (89%) were successfully located and linked.

Criminal and Social History Information

In order to examine changes in the basis of sentencing decisions, data on the personal and criminal background of offenders is necessary. For those incarcerated in state facilities, these data are available in corrections' files and were collected along with sentence outcome information. For those sentenced to probation or to county jail terms followed by probation supervision, these data are available in county probation office files. For the 3,220 sentencing events which resulted in fines, restitution orders, unconditional discharges or county jail sentences, social and criminal history information was not available.

Tracing and collecting information from the files at the two state correctional facilities was more successful than tracing and collecting information from files at local probation offices. First, prison records are more systematically maintained and organized. Second, probation staff routinely forward files of offenders transferred to other counties and to out-of-state jurisdictions. Third, old records from cases sentenced between 1971 and 1973 were frequently missing from the probation files. Finally, funding constraints prohibited tracing and collecting offender information from the files of the probation office in Aroostook county. This county is the northernmost county in the state and its probation office is located over 250 miles from the project office.

Information on the social and criminal history of offenders was thus collected, when it could be located, for all offenders who were supervised in the county of sentencing for six of the seven counties represented in the court data. The collection process involved generating identifying information, locating the appropriate probation file (generally arranged in alphabetical order) collecting information, coding, and linking the data with the sentencing event record. Of the 4,044 sentencing events resulting in probationary supervision or county jail incarceration followed by probationary supervision, social and criminal history data were successfully obtained and linked for 77% of the sentencing events resulting in incarceration, split sentences, or probation sentences.

Collection Instrument and Outcome

The same data collection instrument was used to record information from corrections and probation files. This instrument contained 68 elements grouped into the following categories: court record linkage information, offender personal history information, prior criminal history information, and sentence completion and transfer information. A copy of th data collection instrument and further detailed discussion of the collection process appears in Appendix A.

Corrections and probation data were collected for <u>each</u> sentencing decision so that each record contains decision specific outcome information as well as social and criminal history information on the offender <u>at the time of</u> the particular event. These records were then linked and merged with the appropriate sentencing event record developed from court data. A total of 5,830 corrections and probations records were created. Of these, approximately 95% (5,541 records) were successfully linked and merged.

Table 3.2 summarizes the results of probation and corrections data collection broken down by sentencing categories. Careful

examination and analysis by project staff gives assurance that neither the difficulty in locating corrections or probation information on 23% of the eligible events nor the difficulty in linking and merging 5% of the collected information has resulted in significant bias in type of event, year of sentencing, or, with the obvious exception of data not collected from one probation office, in county of sentencing.

TABLE 3.2

Summary of Data Collection by Sentencing Category

Sentence Category	Number of Court Cases	Cases Linked to Corrections/ Probation Files	
		Number	Percent
Incarceration at State Facility	3157	2821	89%
Probation	3102	2120	68%
Incarceration at County Jail followed by Probation	942	600	67%
Totals	7201	5541	77%

PROBLEMS OF ANALYSIS

In May, 1976, a new and completely revised criminal code went into effect in Maine. Flat-time sentencing was instituted and parole was abolished. The new criminal code consolidated, redefined and incorporated offenses into one criminal code, substantially changing the nature and elements of offenses processed through the criminal justice system. Changes in the structure of sentencing shifted many decisions, such as the institution of incarceration, firmly into the courts. Both the changes in sentencing structure and the abolition of parole substantially altered the context within which the corrections systems operated and the nature of decisions made by corrections officials. Moreover, the courts were re-organized in 1974 and a regionalized full-time district attorney system was introduced in 1975. Potentially, at least, these other changes could significantly alter both the quantity and the substantive nature of cases processed by courts and corrections.

The present study is concerned with the impact of sentencing reform, and particularly with the impact of that reform on judicial decision making. The most serious and pervasive methodological problem confronted by the research is to clearly distinguish between the impact of sentencing reforms and the impact of other reforms, and, similarly, to distinguish changes in judicial decision making from changes in decision making of other actors in the criminal justice system. Given the scope of the reforms effected in 1975-76, attention to this methodological problem pervades the analysis presented in Chapters Four through Eight.

It is difficult to isolate the courts from pre-court processing. Courts act on the cases and the charges which are brought to them. Changes in the district attorney system can be expected to change choices about cases and charges and to change plea bargaining outcomes. In this case, court decisions could <u>appear</u> to have changed simply because the cases about which judges are deciding have changed.

In the present case research, the confounding effects of changes in the cases and charges brought to the court are compounded by the changes in the substantive definition of offenses and the structure of the criminal code. As already noted, changes in the code appear to create some changes in how offenders are charged, and particularly in the increased incidence of multiple charges. The substantive redefinition of offenses may result in changes in charges brought and legally supportable for similar criminal episodes. And, finally, the introduction of sentencing classes might be expected to result in bargaining for class reduction, rather than charge reduction, thus changing the overall pattern of offense charges brought to the court.

All of these pre-court processing factors can create an <u>appearance</u> of change in judicial decisions. For instance, if a higher proportion of offenders are charged and convicted for more serious offenses, then both the proportion of offenders sentenced to incarceration and the average length of incarceration might increase even if judicial decision-making has not changed. In the present research, it is likely that <u>both</u> the pattern of cases and charges brought to the court <u>and</u> judges' decisions about those cases have changed. The difficulty lies in distinguishing between the two.

In order to deal with this difficulty--the confounding effects of changes in legal definitions and pre-court processing--the analyses in the following chapters extensively examine the distribution of cases and charges brought to the courts. This examination allows us to identify some major pre-court processing changes, and, ultimately, to control for those changes. Some of the major components of this examination are changes in the legal category and seriousness of conviction charges and changes in the incidence of multiple offense charges. Although changes in these components are of substantive interest in their own right, our

primary concern lies in utilizing these components to isolate and analyze changes in judicial decision-making.

It is also difficult to isolate court corrections and parole board processing when offenders are sentenced to incarceration. The actual time which offenders serve is determined not only by the court's sentencing decision but also by corrections' decisions about, for instance, good time. In addition, prior to the 1976 reform, parole board decisions had a substantial effect on actual time served. Consequently, changes in incarceration length could appear to be a result of changes in sentencing but actually reflect changes in post-court processing and decison-making.(89)

The critical question in assessing the impact of the sentencing reform is whether the change in the form of sentencing has resulted in change of outcome--a change in the actual time served by offenders. Since post-court decision making by corrections and the parole board influenced the actual time served, it is difficult to isolate the outcome of the court's decision and the impact of changes im judicial decisions.(90)

In order to deal with these difficulties--the confounding effects of post-court decision-making--some of the analyses in the following chapters include examination of "minimum expected time served." This variable is utilized as an uncontaminated surrogate for sentence length--a version of sentence length not affected by post-court decision making about particular cases. Minimum expected time served reflects the length of incarceration which would be served on the court sentence given maximum good-time crediting allowable at the time of sentencing, and, under the old code, given favorable action by the parole board. In other words, minimum expected time served is the shortest actual

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(89) These "post-court" decisions are complex and their investigation is beyond the scope of the present research. For example, corrections officials also may grant "early release," such as "home release," or full or partial release for work. They also essentially controlled when an inmate's parole board hearing was scheduled at the Maine Correctional Center and their recommendation was clearly important in obtaining parole. Moreover, the criminal code reforms in 1976 increased the options available to corrections officials, including the option of petitioning the sentencing judge for early release. To minimize these effects, actual time served is computed to "discharge of sentence" rather than, for instance, home release.

(90) If one takes increased sentence certainty as one of the goals or expected outcomes of the combination of sentencing reforms and the abolition of parole, the situation becomes even more complex.

incarceration which should result from a particular sentence.(91)

Minimum expected time served is utilized in our analyses of changes in sentence length as a supplement to actual time served. It allows us to examine and analyze charges in post-court decision-making, and changes in sentence certainty, in order to isolate and assess changes in court decision-making about sentence length.

Finally, it is difficult to isolate the courts, and indeed the impact of all the reforms in Maine, from the general social climate in the United States through the 1970's. During this period there was a general national increase both in incarceration rates and in incarceration length. It would be unreasonable to assume that sentencing in Maine was unaffected by this general social climate, particularly since much of the 1976 reform can be understood as at least reflective of many of these national concerns. It does, however, make it difficult to isolate the specific effects of sentencing reform in Maine.

In order to deal with this difficulty, the analyses in the following chapters heavily utilize trend, or time series, analysis. This type of analysis allows us to examine patterns of sentencing, both in terms of type and length, through the period of study, rather than simply examining aggregates before and after reform. As a result, we are able to distinguish between trends which span the reform and changes which are precipitated by the reforms.(92)

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(91) Minimum expected time served is further discussed in Chapter Six where the relationship between minimum expected and actual time served is examined.

(92) In both these cases a simple before-after design would show significant change--spuriously in the caseof a trend spanning the reform. For an excellent discussion of the problems of inference from before-after designs, see Donald Campbell and H.L. Ross, 1968. "The Connecticut Speed Crackdown: Time Series Data in Quasi-Experimental Analysis." Law and Society Review.

Following Box and Jenkins (1976), Auto Regressive Integrated Moving Average (ARIMA) time-series models have been developed in the recent past. Although the present research made limited use of ARIMA models for exploratory purposes, the data to be analyzed is not appropriate for a legitimate application of these models. McCleary and Hay suggest a minimum of fifty time observations (1980, Applied Time Series Analysis, p. 20). Although 30-day or 60-day time periods could be utilized in the present research, thus creating a sufficient series, the volume of cases would be insufficient to provide any confidence in the individual time-se-

In addition to our use of trend analysis, the final chapter examines the relationship between sentencing trends in Maine and those in other jurisdictions during the same time period. This examination serves to further isolate and highlight, as well as summarize, the effects of sentencing reform in Maine.

OUTLINE OF THE ANALYSIS

The first research question, concerning changes in type of sentence, is addressed in Chapter Four. The analysis first examines overall trends in type of sentences from 1971 through 1979. Changes in charge patterns are then identified and trends in type of sentences are examined within relevant categories of offense and seriousness in order to isolate changes in judicial decisions from changes in pre-court processing.

Chapter Five examines changes in length of incarceration. Using actual time served, trends in overall incarceration length are examined, followed by an examination of these trends within relevant offense and seriousness categories. Tentative conclusions concerning changes in sentence length are then tested through an analysis of minimum expected time served. This analysis is extended through a comparison of actual and minimum expected time served in a rudimentary examination of changes in certainty of sentence in Chapter Six.

Chapter Seven examines changes in the consistency and predictability of sentencing decisions, primarily within specific offense categories. The basis of the type of sentence decision, before and after reform, is identified using discriminate analysis. Minimum expected time served is then employed in a regression analysis of the basis of the sentence length decision, before and after reform.

Combining the changes in type of sentence and the changes in length of sentence, Chapter Eight briefly addresses the consequences of these changes for correctional institutions in Maine. The two state correctional institutions in Maine are examined to assess the impact of sentencing reform and changes in sentencing decisions on institutional load.

The concluding chapter summarizes the findings and analysis and extends the analysis through examination of sentencing trends in other comparable jurisdictions.

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ries observations.

Chapter IV

CHANGES IN SENTENCE TYPE

In addition to abolishing parole and introducing flat-time sentencing, the 1976 reform was intended to provide the trial court with more flexible sentencing options. While retaining the court's discretion to decide when incarceration is appropriate, the reform increased the types of sentences the courts can impose. The basic innovation was to rationalize and expand the court's authority to impose split sentences. This chapter examines the impact of the reform on the court's choice of sentence types. Although primarily concerned with analyzing changes in type of sentence, it also examines how factors extraneous to the reform affected those decisions. Of particular concern is whether any changes in charging patterns occurred and, if so, whether they are related to any changes in type of sentence.

Prior to the reform, the courts were authorized to impose one type of split sentence--"shock" sentences. They were intended to provide offenders with a brief experience of imprisonment followed by community supervision. The 1976 reform expanded and rationalized the court's authority to impose such sentences and extended the maximum allowable period of confinement. Under the new split sentence statutes, the court is authorized to impose a sentence of imprisonment, suspend up to the last two years of that sentence of imprisonment, and impose probation. Thus, the new split sentence option authorized the court to provide probationary supervision for any offender committed to an institution for a lengthy period of confinement, as well as impose "shock" sentences of much shorter duration. Essentially, the reform created the potential for a functional equivalent for parole supervision by introducing a specific court- controlled option. This option authorizes the court to determine whether offenders it imprisons will experience community supervision upon release from a flat sentence of imprisonment.(93)

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(93) Provisions relating to the split sentence are contained in 17-A M.R.S.A., section 1203. In 1979, section 1203-A, which authorized the court to suspend any portion of a sentence, was repealed. It was replaced by section 1203-B, which greatly restricted the court's authority to use split sentences. Under this section, split sentences can be used only for Class A and B crimes where the initial sentence of incarceration is 48 months or less. However, the court is still authorized to impose split sentences when the period

Although this chapter addresses outcomes resulting from the sentencing reform in the choice of sentence types, it is crucial to underscore the fact that the 1976 reform was preceded by the reorganization of the courts and introduction of a full-time district attorney system in 1975. Those changes may have affected the overall pattern of sentencing even if court decisionmaking did not change. They may have changed the types of charges and recommended sentences brought to the court. For example, if a higher proportion of "serious" cases are being processed, it might appear that an outcome of the reform was an increase in the use of incarceration even if sentencing decisions about similar cases had not changed. Consequently, an examination of changes in sentence type must also examine and control for other changes affecting the processing of offenders--in particular changes in the seriousness of charging patterns--to more adequately determine whether any changes that are found are an outcome of the reform.

In addition to the fact that specific changes preceding the reform had the potential to affect sentencing, there were also changes in public opinion about crime and punishment. In part, those changes are reflected in the reform itself. Nevertheless, a general increase in punitiveness reflected in the increased use of incarceration might be confused with specific outcomes of Maine's reform. Therefore, our examination of changes in sentence types will also examine, through the use of time-series analysis, the possibility that any changes we find either occurred prior to the reform or span the reform.

The analysis in this chapter begins with an examination of sentence type, and changes in the type of sentence imposed by the courts before and after the reform. These changes are then examined as trends during the period of study. Changes in the seriousness of offense charging patterns are also examined. The data used in the chapter are the total sample of 6,028 pre-reform sentencing decisions and 4,393 post-reform sentencing decisions in Maine's Superior Courts.

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of confinement is 120 days or less.

TYPE OF SENTENCE

Following conviction, the court has a variety of sentencing options available, ranging from incarceration to fines and victim restitution. The court can choose from these options or choose combinations of these options, such as probation combined with victim restitution. Changes in four basic sentence types are examined: incarceration only, split sentences, probation, and "other" sentences including fines, victim restitution and unconditional discharge.(94)

Table 4.1 presents the overall distribution of type of sentence before and after the 1976 reform. Both before and after the reform, incarceration only is the single most frequently chosen type of sentence, followed by probationary sentences. In both time periods, split sentences are the least frequently imposed option, although there is a strong increase in the use of split sentences following the reform. Combining the incarceration only and split sentence categories, there has been a slight (4.9%) increase in the overall use of some form of incarceration, with the net result that over half of all offenders experience some form of incarceration in the post-reform period.

However, attributing even these slight changes to the 1976 reform may be misleading. Table 4.1 presents a before-after comparison which masks any changes spanning the reform or beginning prior to the reform. Thus, it is crucial to further explicate the types of sentences imposed by the courts by examining them as trends over the nine-year time frame of the study. As shown in Figure 4.1, the changes in sentence occurred <u>prior</u> to the reform. This figure is a time series representation of the distribution of type of sentence by year sentenced. Each of the trend lines in Figure 4.1 reflects use of a particular sentence type as a proportion of all sentences.

As shown in Figure 4.1, the use of sentences of incarceration only began to decline in 1975--before the reform--and the use of probation has slightly declined, at least since 1971. The use of fines and other sentences has decreased from a high in 1973 but has remained fairly constant since 1974. The most dramatic increase has been in the use of split sentences. This increase also began in 1975--prior to the reform-- although the increase has been reinforced and accelerated since 1976.

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(94) These four types can be considered ordered in terms of severity of sentence, with incarceration only being the most severe and "other" sentences being the most lenient. Cases with combined types are included in the category of most severity such that probation combined with victim restitution is shown as a probation sentence.

TABLE 4.1

Distribution of Sentence Types, Before and After Reform

Sentence Type	Before	After	Change
Incarceration only	36.7%	34.4%	-2.3%
Split-sentence	10.6	17.8	+7.2
Probation	31.6	27.2	-4.4
Other (Fines, etc.)	21.1	20.6	- .5
	100%	100%	
(Number of Cases)	(6028)	(4393)	

One of the most striking trends in Figure 4.1 is the court's reliance on incarceration sentences. With the exception of 1971, sentence of incarceration are the court's most frequently chosen sentencing option. Although there is some decrease in the proportion of cases receiving incarceration only sentences, this is more than offset by the strong increase in the use of split sentences. Split sentences account for less than 10 percent of sentences until 1974, but by 1979 they account for over 20 percent. By 1979, split sentences were chosen more often than fines, etc., and some form of incarceration (incarceration only or split sentence) was chosen for a majority of offenders sentenced. (95)

Overall, this analysis suggests that changes in the court's choice of sentence type occurring during the period of study were not precipitated by the 1976 sentencing reform. The changes occurred prior to the reform and continued after the reform was implemented. The 1976 reform clearly reinforced and facilitated the court's use of split sentences. However, even in this case,

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(95) In Figure 4.1, and in other time series presentations in this report, cases are categorized by the year sentenced, and, as a result, the total number of cases does not correspond to those presented in Table 1, above. Cases docketed in 1979 but sentenced in 1980 are excluded from Figure 1. In addition, some cases were docketed and processed under the pre-reform "old code" but sentenced after the reform. These cases are shown in the appropriate year of sentencing.

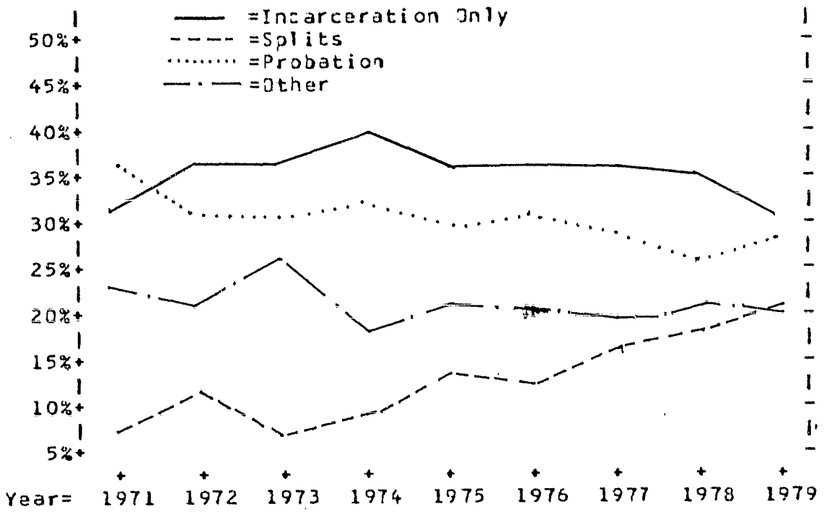

Figure 4.1: Distribution of Sentence Types by Year Sentenced

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the sentencing reform clearly did not "cause" significant changes in the types of sentences imposed.

SENTENCE SEVERITY AND OFFENSE SERIOUSNESS

The sentencing reform took place in the context of other reforms which might be expected to have changed the seriousness of the offenses processed and sentenced by the courts. A critical question is whether there was a change in the type of sentence given by the courts for cases of comparable seriousness.

A comparison of criminal charging patterns between the pre- and post-reform periods indicates a substantial increase in the proportion of more serious offense cases. Before the reform, 49 percent of the convictions were for more serious Class A, B or C, or felony, offenses. Following the reform, 58 percent of offenses were felony offenses. Once again, however, as shown in Figure 4.2, the increase in the proportion of more serious offense charging pre-dates 1976.(96)

Figure 4.2 portrays the changing composition of court cases from 1971 through 1979, showing the proportion of more serious, felony offense charges and the proportion of misdemeanor offense charges for each year. Prior to 1974, more misdemeanor cases were processed than felony cases. This trend was reversed in 1974; by 1979 nearly 60 percent of all cases were felony charges. Clearly, this overall increase in felony convictions is a long-term trend and <u>not</u> a result of the 1976 reform.(97)

Given the strong increase in the seriousness of offenses, it is somewhat surprising that the overall rate of incarceration has increased very little. One would expect that an increase in serious offenses might be accompanied by a proportionate increase in more severe sentences. As graphically portrayed in Figure

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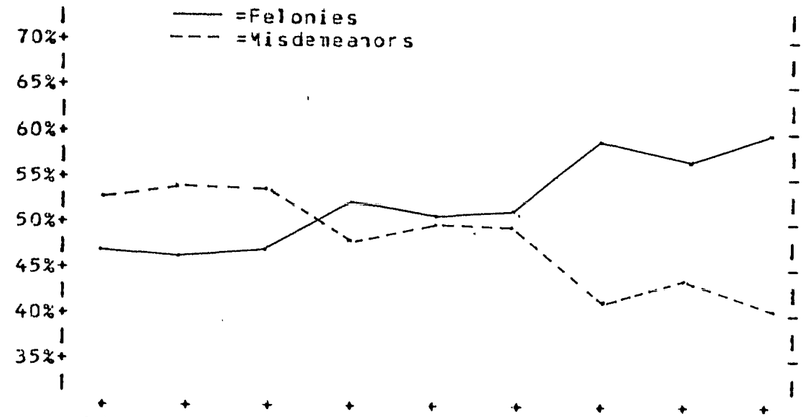
(96) As discussed in Chapter Three, pre-reform cases were assigned comparable seriousness classes. Since some pre-reform cases (428) could not be assigned offense classes, they are deleted from the present analysis. Most of these cases (351) are possession of marijuana cases and must be deleted since this offense was decriminalized and there is no comparable post-reform offense. Class A-C offenses roughly correspond to the more typical pre-reform designation of "felony" offense. As discussed above, this more general usage of "felony" for Class A-C and "misdemeanor" for Class D and E offenses will be used in the analysis.

(97) In fact, the trend even pre-dates the institution of full-time prosecutors. In part, the increased seriousness of cases is apparently related to the changing structure of prosecution in the state and, possibly, an increase in the incidence of serious criminal behavior. Regardless of why these changes have taken place, the critical point is that the composition of cases sentenced by the courts significantly changed during the period of study.



Year=	1971	1972	1973	1974	1975	1976	1977	1978	1979
%Fel=	47.3	46.1	47.0	52.2	50.8	51.2	58.7	56.6	59.2
%Mis=	52.7	53.9	53.0	47.8	49.2	48.8	41.3	43.4	40.8
Cases=	617	967	831	925	1232	1293	1219	1333	1219

Figure 4.2: Distribution of Seriousness of Offense By Year Sentenced

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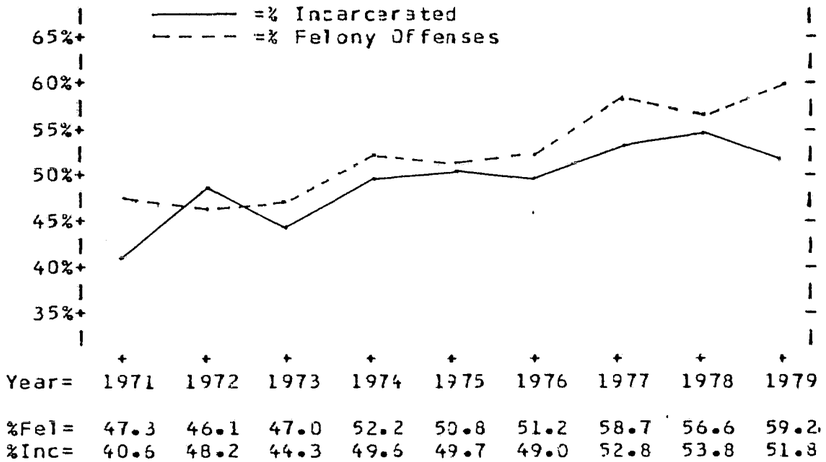
this proportionate increase has not occurred. Although the proportion of offenders sentenced for more serious felony offenses has increased, the proportion of offenders given incarceration sentences has remained fairly stable.

In fact, there has been almost no change in the overall use of incarceration for felony cases. Figure 4.4 shows the distribution of sentence types for felony cases through the period of study. The greatest change has been the increased use of split sentences. This increase began in 1975, but the trend is clearly accelerated and reinforced by the 1976 reform. The use of probation has remained fairly stable since 1972. The dotted line in Figure 4.4 shows the combined use of incarceration only and split sentences--the overall, fairly consistent, use of some form of incarceration sentence. Thus, although the 1976 reform seems to

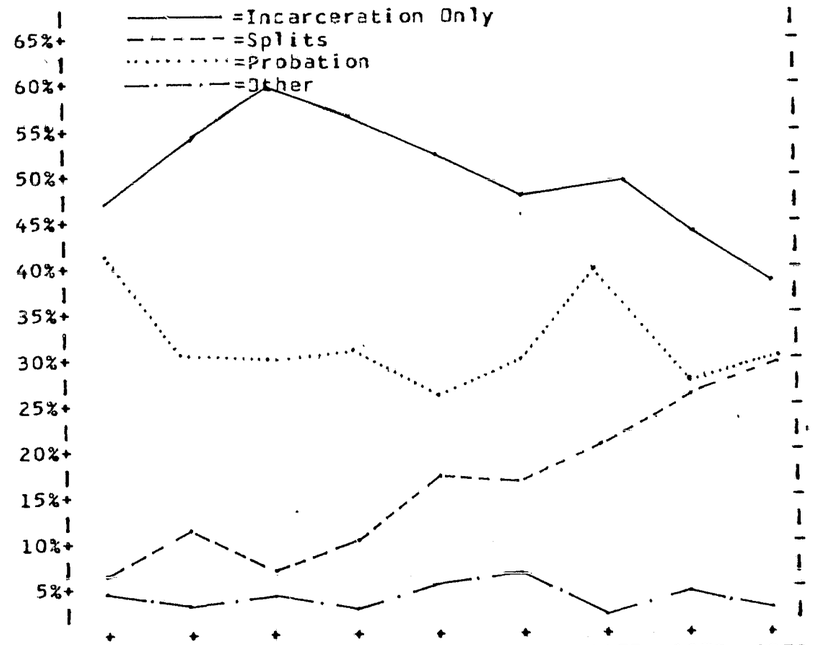


Year=	1971	1972	1973	1974	1975	1976	1977	1978	1979
%Fel=	47.3	46.1	47.0	52.2	50.8	51.2	58.7	56.6	59.2
%Inc=	40.6	48.2	44.3	49.6	49.7	49.0	52.8	53.8	51.8

Figure 4.3: Comparison of Proportion of Felony Cases and Proportion of Incarceration Sentences by Year Sentenced

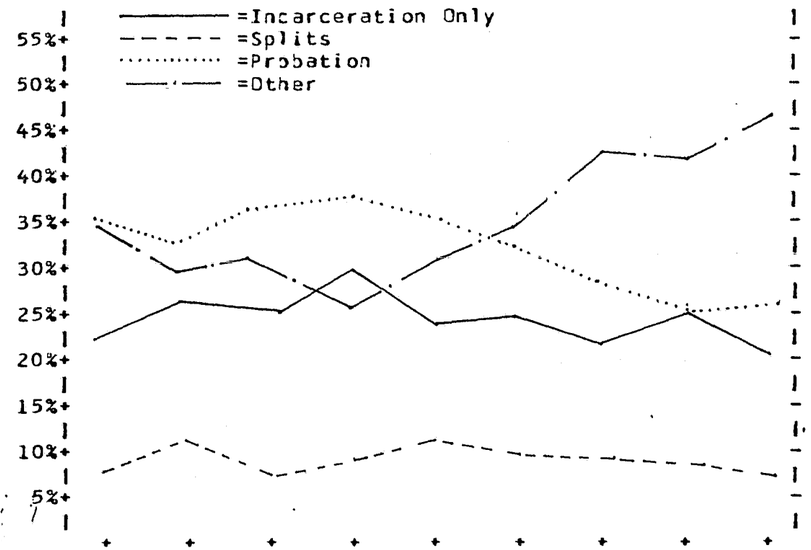
have influenced a change in sentence types from incarceration only to split sentence incarcerations, there has been no significant change in the overall use of incarceration for felony offenders.

For less serious, misdemeanor cases, there have been more dramatic changes, although these changes span the reform. As shown in Figure 4.5, there has been a dramatic increase in the use of "other" sentences--particularly fines and victim restitution--and a marked decrease in the use of probation. During the same period there was a steady decrease in the use of some form of incarceration for misdemeanor cases so that by 1979 less than one-third of these offenders were incarcerated. Overall, it is clear that sentencing for misdemeanor offense cases has become less severe, but that this change is not related to the 1976 reform.



Year=	1971	1972	1973	1974	1975	1976	1977	1978	1979
%Inc=	47.4	54.5	59.2	58.7	52.2	47.6	48.1	44.2	38.1
%Split=	6.8	11.2	6.9	9.9	17.6	16.7	20.9	25.5	29.8
%Prob=	41.0	30.3	29.5	30.2	29.3	29.8	38.7	25.9	28.9
Cases=	292	445	390	483	625	662	715	755	721

Figure 4.4: Distribution of Sentence Types for Felony Offense Cases by Year Sentenced



Year=	1971	1972	1973	1974	1975	1976	1977	1978	1979
%Inc=	22.2	26.1	25.1	29.3	22.9	24.6	20.8	24.7	20.1
%Split=	7.6	11.6	7.5	8.6	11.2	9.6	9.5	8.5	8.3
%Prob=	35.6	32.6	35.8	37.0	35.0	32.0	27.7	24.9	25.2
Cases=	326	521	439	442	605	630	504	578	496

Figure 4.5: Distribution of Sentence Types for Misdemeanor Offense Cases by Year Sentenced

CONCLUSION

The 1976 sentencing reform had little impact on the type of sentences or the severity of sentence types given to offenders in Maine. For more serious felony offenders, split sentences increasingly replaced incarceration only sentences. However, since incarceration only sentences before 1976 were generally followed by parole supervision, it would be difficult to argue that post-reform split sentences (incarceration followed by probationary supervision) are significantly less severe.

In essence, the increased use of split sentences, accelerated and reinforced by the reform, represents the development of a structured, judicially imposed, functional equivalent to parole. The split sentence is a mechanism for judges to ensure that incarceration is followed by supervision in the community--eliminating the parole decision but retaining its supervisory structure. This innovation can be termed "judicial parole." It differs from the former parole system in three basic ways: First, the judiciary rather than an executive agency controls the actual length of incarceration. That is, Maine's split sentence retains the concept of community supervision upon release, but no parole board exists to release offenders prior to the expiration of the court's sentence. Second, the judiciary rather than the parole board determines the conditions and length of the post-incarceration period of community supervision. Finally, the judiciary has the revocation authority and thus determines whether the conditions of community supervision have been violated, and, if violated, whether the offender is to be reincarcerated.

The emergence of the split sentence as a functional equivalent to parole is underlined by the fact that split sentences have increasingly replaced sentences of incarceration only. The use of split sentences has primarily increased for felony offenders, but both the overall use of incarceration and the overall use of probation have remained fairly constant. Thus, the increased use of split sentences does not represent increased severity for offenders who might previously have been placed on probation, but a different type of incarceration for offenders who would otherwise have received flat sentences of incarceration only.

Overall, the severity of the type of sentence imposed on offenders in Maine has not increased. In fact, sentence severity has decreased for offenders convicted of misdemeanors. It has become increasingly less likely that misdemeanor offenders will receive a sentence of incarceration or probation. However, these changes do not appear to be related to the 1976 reform.

Quite apart from the reform, the lack of change in the overall severity of sentences may appear surprising. General perceptions of public attitudes and sentencing trends nationally suggest an increase in sentencing severity and, particularly, an increase in the use of incarceration. Certainly Maine was not immune to

these pressures. Nonetheless, the findings in this chapter suggest that this public foment had little impact on sentencing in Maine, at least in terms of type of sentence.

However, type of sentence is only one part of the sentencing decision and one dimension of severity. It is extremely misleading to look at the extent to which offenders are incarcerated without examining the length of their confinement. We now turn to that examination.

Chapter V

CHANGES IN SENTENCE LENGTH

Has the severity of incarceration sentences increased? Our examination in the previous chapter shows that the severity of sentence types has not generally changed. For felony offenses, the incarceration rate has remained fairly stable, although an increasing proportion of incarceration sentences have been split sentences. For misdemeanor offenses, the incarceration rate has steadily declined.

This chapter focuses on the length of incarceration by examining whether those offenders sentenced to incarceration are serving more or less time in prison. Specifically, we will examine the impact of the 1976 reform on time served in confinement.

As noted in our earlier discussions of the reform, there is little reason to expect that the reform itself would change sentence lengths. The reform did not mandate increases in incarceration, although it did increase the judiciary's responsibility to establish sentence lengths. However, with the criticism of the parole board which accompanied, if not stimulated, the reform, the judiciary were given a clear message: to bear the responsibility for sentencing, and, implicitly, be accountable if sentences are too lenient. Thus, although not inherent in the reform, it is likely that sentence length would be increased without any restrictions on the courts--prohibitions about exceeding current correctional capacity or guidelines to restrict sentencing severity.

Prior to the reform, sentences to the state correctional facilities were indeterminate. The legislature established statutory maximum sentence lengths for each offense. The court was authorized to impose both minimum and maximum terms of imprisonment. The court's maximum sentence was not to exceed the penalty established by statute for the offense and the court's minimum was not to exceed half of its imposed maximum. In addition, the legislature authorized the court to sentence adult offenders under the age of 27 to the state's medium security facility for wholly indeterminate sentences of one day to thirty-six months. Thus, the sentencing judge decided where offenders would be incarcerated and decided minimum and maximum sentence lengths.

The basic goal of the drafters of Maine's sentencing reform was to change the locus of decisionmaking concerning the amount of time offenders were to be incarcerated. The reform did not

address, nor did it have a significant direct impact upon, decisionmaking about who would be incarcerated and who would remain in the community. Rather, the objective was to increase the visibility and accountability of decisionmaking about the time offenders would be confined. To achieve this end, the three-tiered indeterminate sentencing structure was abolished and replaced with a flat-time sentencing structure which clearly located responsiblity in the courts. The question is whether this change from an indeterminate sentencing system to a flat sentencing system changed the length of offender's sentences.

Methodologically, this change in the form of incarceration sentences from minimum-maximum to flat-time creates a serious problem for analysis. As discussed in Chapter Three, it is difficult to compare sentence length before and after the reform. Comparing the post-reform flat-sentences to either the pre-reform minimum or maximum sentences would introduce a systematic bias. As a result, the measure of sentence length used in this analysis is the actual time served in confinement by offenders. This measure allows direct comparison and focuses the analysis on the impact or effect of reform--the policy issue of most concern to national audiences.

The analysis utilizes data on 2,507 state incarceration sentences--1,534 before the reform and 973 after the reform. These data include all cases receiving incarceration sentences to state facilities for whom corrections information was obtained and linked, as discussed in Chapter Three. Time served is calculated by when the offender was first paroled or released from the sentence. It includes pre-conviction county jail time credited to the sentence and excludes any time served by the offender for other charges arising from different sentencing decisions or from reincarcerations for parole violations.(98)

Drawing on these data, we first turn to an overall analysis of changes in sentence length during the period of study. Following our previous discussion of changes in offense seriousness, we then turn to an examination of sentence length for felony and misdemeanor offenses. Expanding this discussion, we examine the changing patterns of sentence length for split sentences, and

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(98) Sentences to county jails are excluded because of the inability to obtain time served information for such sentences. For 247 inmates who had not completed their sentences, release dates were projected using the Department of Correction's minimum release eligibility date. This date is the court's sentence less all possible good-time crediting..pp A total of 301 cases were eliminated from the analysis for a variety of reasons: 22 died prior to release, 51 were transferred out of state, 9 received life sentences under the new code, 110 had incomplete file information, and 119 had internally inconsistent file information

their impact on overall sentence length. Finally, we examine sentence length for a variety of specific offense types and for offenders with similar criminal records.

SENTENCE LENGTH

The research question is to assess whether the change from an indeterminate sentencing system with parole release to a flat sentencing system with no parole release has resulted in different outcomes--changes in the actual amount of time served by offenders.

The overall finding is that a major outcome of the 1976 sentencing reform is a substantial increase in the amount of time served by offenders and, hence, sentence length.

TABLE 5.1

Time Served, Before and After Reform

Sentence Type	Before	After	Change
Incarceration Only			
Mean	14.9	22.4	+7.5 months
Standard Deviation	13.0	23.0	
Median	9.0	16.0	+7 months
Split Sentences			
Mean	1.5	6.2	+4.7 months
Standard Deviation	.8	5.3	
Median	1.0	4.0	+3 months
Overall			
Mean	13.9	19.6	+5.8 months
Standard Deviation	13.0	21.9	
Median	9.0	13.0	+4 months
(Number of Cases)	(1534)	(973)	

As shown in Table 5.1, the overall mean time served has increased by almost 6 months and the median time served has increased by 4 months. In other words, before the reform 50 percent of the offenders served sentences of nine months (the median) or less. After the reform, half of the offenders served 13 months or more--a post-reform increase of four months. Put another way, a comparison of median time served shows that one-half of the post reform offenders are serving at least forty-four percent (44%) more time in state correctional facilities than offenders processed under the previous indeterminate sentencing system with parole release.

In addition, there has been an increase in the proportion of offenders serving lengthier sentences. Prior to the reform, only twelve percent (12%) of offenders served twenty-four months or more in confinement. After the reform, this proportion nearly doubled, with twenty-three percent (23%) of the offenders serving 24 months or more. (99)

However, attributing these changes to the 1976 reforms may be misleading. Our analysis in Chapter Four shows the difficulties of before-after comparison. We found that changes in type of sentence preceded and spanned the reform. Moreover, we found that there has been a significant change in the seriousness of offenses, also spanning the reform, which could be expected to have an impact on sentence length.

Offense Seriousness

To examine the possibilities that the changes spanned the reform or that the changes reflect the higher proportion of felony offenders, Figure 5.1 presents the average incarceration for each of the years studied for felony and misdemeanor offense decisions. As shown, the 1976 reform had a substantial impact on incarceration length, particularly for felony offenses. Moreover, it is clear that the increased incarceration length is not a result of the increased proportion of serious offenders. (100)

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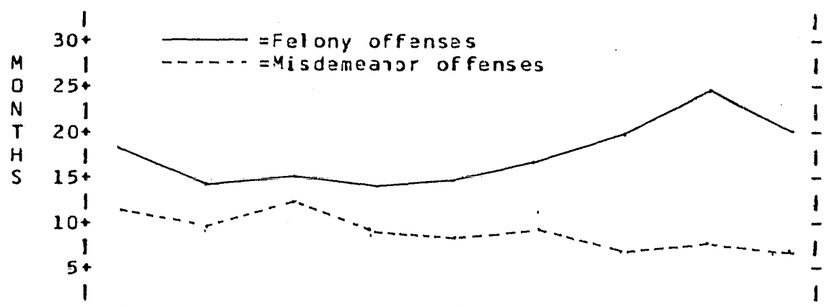
(99) The finding of an overall-post reform increase in incarceration length is based upon all sentences of imprisonment to state correctional facilities, exclusive of convictions for murder and homicide.

(100) As discussed in Chapter Four, cases in time series presentations are categorized by the year sentenced, and as a result, the total number of cases does not correspond to those presented in Table 5.1 above.



Year=	1971	1972	1973	1974	1975	1976	1977	1978	1979
Felony									
Mean=	18.3	14.9	15.1	14.2	14.9	16.4	19.1	24.4	19.9
Median=	12	9	9	9	9	12	12.5	18	15
Misdemeanor									
Mean=	11.0	9.7	11.2	9.5	8.3	8.6	6.5	6.7	6.5
Median=	9	9	9	8	7	8	6	7	6

Figure 5.1: Mean Time Served by Offense Seriousness and Year Sentenced

As might be expected, there is a direct positive relationship between offense seriousness and sentencing severity. Time served for felony offenses is greater than time served for misdemeanor offenses. However, major changes have occurred in that relationship. The amount of time served has increased for felony offenses and decreased for misdemeanor offenses. In other words, following the reform, offenders convicted of more serious crimes are serving significantly more time than their pre-reform counterparts, and offenders convicted of less serious offenses are serving less time than their pre-reform counterparts.

The overall increase in incarceration length is primarily a consequence of substantial increases in time served for felonies. This increase is clearly precipitated by the reform. An examination of the median number of months incarcerated for each year, shown at the bottom of Figure 5.1, reinforces this finding. Although a more conservative measure, the median number of months served for a felony conviction is larger for each year since 1976 than it is for any pre-reform year.

The findings in Figure 5.1 further support the previous findings that incarceration length has changed as a consequence of the sentencing reform. For the more serious offenses, there was a decrease in time served in 1972, followed by a period of relative stability. This trend was sharply reversed with the reform in 1976. For less serious offenses, the trend in time served has decreased over the nine-year time frame. However, this trend was significantly affected by the reform. Mean time served each year since the reform for misdemeanor offenses is less than any pre-reform year.

The basic findings revealed by our analysis in Figure 5.1 are: First, the post-reform increase in time served is specified by the felony/misdemeanor distinction such that time served increased for felony convictions but decreased for misdemeanor convictions. Second, these changes in sentencing severity are not short-term effects of implementation, because each year since the reform time served is greater for felony offenses than any pre-reform year and less for misdemeanor offenses than any preceding year. These changes appear to be lasting effects of the reform. Third, historical factors unrelated to the reform do not appear to explain these changes in time served. Thus, the time series analysis confirms that the substantial increase in sentence length for serious offenses and somewhat slighter decrease in sentence length for less serious offenses is a direct result of the change from an indeterminate system with parole release to a flat sentencing system without parole release. (101)

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(101) It should also be noted that the number of offenders incarcerated has increased. The number of persons confined is shown at the bottom of Figure 5.1 These indicate that the number confined for more serious offenses increased, and the number confined for less serious offenses decreased over the time frame of the study. Those changes are not related to the reform. They began in 1973, but with the implementation of the reform in 1976, the overall effect was that more time is being served in confinement by more offenders. The impact of this change is further examined in Chapter Eight.

SPLIT SENTENCES

The substantial increase in incarceration length for serious offenders is somewhat surprising, given that an increasing proportion of serious offenders received split sentences, rather than incarceration-only sentences, following the reform. The analysis in Chapter Four. indicates that split sentences became increasingly popular among the judiciary from 1975 and steadily increased as a sentencing option after the reform, particularly for felonies. By 1979, nearly half of all incarceration sentences for felony offenders were split sentences.

Since split sentences generally call for a shorter period of incarceration, their increased use might be expected to substantially decrease the overall time served by offenders. As we have seen, this is not the case. Nonetheless, split sentences may have mitigated the overall effects of the increase in sentencing severity for a substantial proportion of offenders. In this case, we might find an essentially bimodal distribution of sentencing lengths after the reform.

Certainly, variation in incarceration length has substantially increased. Referring to Table 5.1, we see that variation in time served, as indicated by the standard deviations, is much greater after the reform. In part, this may be due to the increasing proportion of split sentences. (102)

Figure 5.2 presents average incarceration length for incarceration-only and split sentences through the period of study for felony offenses. (103) As shown, incarceration length has substantially increased for both incarceration-only sentences and split sentences. For each of these sentence types, incarceration length has increased since the 1976 reform.

Split sentences have mitigated the effects of the overall increase in sentencing severity. Time served for split sentences is substantially shorter than for incarceration-only sentences. The increasing proportion of offenders given this shorter type of sentence, followed by community supervision, suggests the emergence of a bifurcated sentencing policy in Maine wherein some

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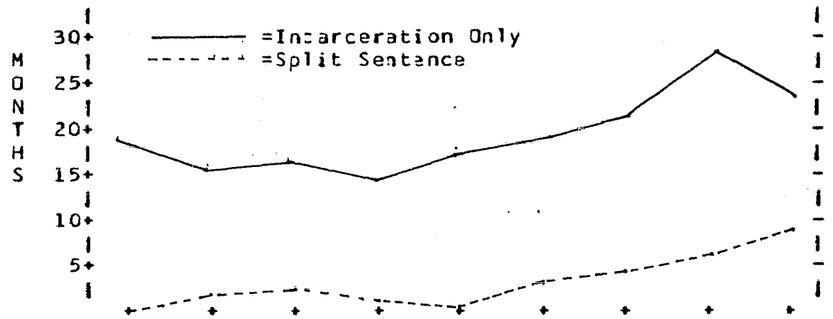
(102) This increase in variation is particularly striking since the use of split sentences had substantially increased before the reform. Thus, the summary figures in Table 5.1 may actually underestimate variations.

(103) Recall that an increasing proportion of cases are for felony offenses, and that an increasing proportion of sentences for these offenses are split sentences. We have already found that the substantial increase in incarceration length is primarily due to increases in time served for felony offenders.



Year=	1971	1972	1973	1974	1975	1976	1977	1978	1979
Incarceration Only									
Mean=	18.6	15.4	15.7	14.9	15.9	18.1	21.6	28.1	23.3
Median=	13	9	9	9	10	13	15.5	19	18
Split Sentence									
Mean=	1.0	1.7	1.8	1.2	1.1	2.2	4.1	6.2	8.9
Median=	1	2	1	1	1	2	3	6	7

Figure 5.2: Mean Time Served For Felony Offenses by Type of Sentence and Year Sentenced

offenders convicted of serious offenses serve short periods of confinement, while others serve much lengthier sentences.

However, this finding specifies, rather than changes, our basic finding that there has been a substantial increase in incarceration length for most felony offenders, and that this increase occurred concomitantly with the 1976 reform. Since these basic changes occurred at the time of the reform, rather than spanning the reform, a basic before-after comparison, as shown in Table 5.2, is appropriate to summarize the increases in incarceration length.

Overall, the data summarized in Table 5.2 indicate that the increase in incarceration length is primarily due to increased length for felony offenders and that, for these offenders, there has been substantial increase in time served for both incarceration-only sentences and split sentences. Overall, it appears that felony offenders served less time when the parole board made release decisions than when sentences were controlled by the ju-

TABLE 5.2

Mean Time Served by Offense Seriousness and Sentence Type, Before and After Reform

TABLE 5.2

Mean Time Served by Offense Seriousness and Sentence Type, Before and After Reform

Mean and (Standard Deviation)

Sentence Type	Before	After	Change
Incarceration Only			
Felonies	16.1 (14.1)	23.9 (23.7)	+7.8
Misdemeanors	10.8 (6.8)	7.0 (2.3)	-3.8
Split Sentences			
Felonies	1.6 (.9)	6.5 (5.4)	+4.9
Misdemeanors	1.3 (.5)	2.1 (.8)	+0.8

diciary. The reverse is true for less serious, misdemeanor offenders.

At the same time, however, there was less variation in incarceration length under the parole board. In almost every category of Table 5.2, the standard deviations are greater after the 1976 reform. This would appear to be a consequence of abolishing parole and the absence of policies to ensure consistency in decisions among a diverse judiciary. That is, the broader post-reform variations in incarceration length indicate Maine's former parole board's decisionmaking practices were more consistent than currently exists among Maine's judiciary. This is to be expected. Inherent in any centralized decisionmaking body is the potential to ensure a reasonable degree of consistency in decisions. This potential does not currently exist for Maine's fourteen superior court justices because no explicit policies exist to ensure that their decisions result in consistent outcomes.

Of course, the categories in Table 5.2 are rather broad. The felony classification incorporates heterogeneous offense types. For example, a felony conviction could result from a charge under theft, rape, or robbery. The analysis presented thus far masks

any changes occurring in the prosecution of different, but nonetheless serious, crimes. That is, we do not know whether incarceration length has consistently increased for particular offense types.

OFFENSE TYPES

During the period of study, there was a significant change in the composition and seriousness of superior court cases. There were also significant national and local concerns about particular types of offenses and offenders. In this context, it is possible that the overall increase in incarceration length for felony offenses does not reflect consistent increases in sentencing severity for all felony offenses. In other words, it is plausible that incarceration length has substantially increased for some specific offense types and remained constant, or even declined, for others.

Addressing this possibility requires before-after comparisons of incarceration length for different crimes, as shown in Table 5.3 Table 5.3 shows incarceration length, before and after reform for seven basic statutory offense catagories which reflect the felony offense types most frequently prosecuted in the Superior Courts. These categories allow us to examine basic changes in sentencing within the broader felony classification. For each offense type the mean and median time served, before and after reform, is shown. In addition, the change in mean and median months served (when significant) is shown for each category.

The summary comparisons shown in column three indicate significant changes occurring in time served for four of the seven comparisons. Time served has significantly increased for robbery, burglary, theft and murder. There have been minor changes in average time served for trafficking or furnishing drugs, rape convictions and aggravated assault. With the exception of rape, the direction of each change is an increase in time served post-reform.

A difference of means test (t-test) computed on each of the seven offense categories indicates statistically significant differences in time served ($p < .05$) for robbery, burglary, theft and murder. There was no statistically significant difference in means for rape, trafficking or aggravated assault.

There are substantial differences among the seven offense categories in terms of the magnitude of the post-reform increase in time served. The post-reform change for murder and homicide represents a major substantive change in the law, as well as a tremendous increase in time served. Caution must be exercised when interpreting these data because of the small numbers. However, the increases are so substantial as to represent a major impact

TABLE 5.3

Time Served for Felony offenses by Offense Category, Before and After Reform

Offense Type	Before	After	Change
Robbery			
Mean	21.5	28.6	+7.1 months
Stnd. Deviation	16.3	23.5	
Median	16	23.5	+7.5 months
Rape			
Mean	28.7	26.6	(n.s)
Stnd. Deviation	24.1	20.0	
Median	22	22.5	
Burglary			
Mean	11.8	17.6	+5.8 months
Stnd. Deviation	8.5	16.8	
Median	9	13	+4 months
Aggravated Assault			
Mean	14.1	17.3	(n.s.)
Stnd. Deviation	9.5	14.7	
Median	10	14	
Theft			
Mean	8.9	16.5	+7.6 months
Stnd. Deviation	5.7	11.0	
Median	8.5	15	+6.5 months
Trafficking			
Mean	10.5	10.7	(n.s.)
Stnd. Deviation	7.9	8.0	
Median	9	8	
Murder and Homicide (Life Sentences)			
Mean	135.0	Life	
Stnd. Deviation	70.7		
Median	121	Life	
Murder and Homicide (Other Sentences)			
Mean	20.5	156	+135.5 months
Stnd. Deviation	5.0	92.8	
Median	20.5	142	+121.5 months

Note: Changes are shown when t-test for difference of means is significant at the .05 level.

on the correctional system if they are to continue over time. The first entry for murder and homicide shows time served for life sentences. The second entry shows time served for court imposed non-life sentences for murder convictions.

Pre-reform life sentences served an average of eleven years and two months before parole (seven cases). Post-reform, the life sentence means life -- unless the Governor commutes the sentence or pardons the offender, or the sentence is reduced by the Appellate Court. This represents a considerable change. It is difficult to discern what the time served will actually be, but states which require a pardon or commutation (such as Pennsylvania) have a much longer time served than Maine's pre-reform length for life sentences. In addition, life sentences only reducible by commutation are highly susceptible to variation, depending on the political context of the Governor's decisions.

Murder and homicide non-life sentences, although few in number, represent a tremendous change in time(104) served. It is clear that sentences for murder and homicide are considerably longer post-reform. If this continues over a long period,sentences for homicide and murder will come to represent a larger and larger proportion of the inmate population. The net result of these very long sentences may seem minimal because of the small number of cases, however, because of of the very long time served, they become very significant to the correctional system.

Time served for offenses other than homicide and murder also increased post-reform. Of particular importance are changes in incarceration length for burglary and theft, the offense catagories most frequently encountered by the courts in Maine. These property offenses account for forty percent (40%) of all sentencing decisions studied. With the court's choice of incarceration for approximately sixty percent (60%) of all burglary convictions and approximately forty percent (40%) of all theft convictions, an increase in incarceration length of the magnitude shown in Table 5.3 clearly demonstrates the impact of increasing sentence lengthon the correctional system.

The mean amount of time served for post-reform burglary convictions increased by 5.8 months. The median amount of time served has increased by 4 months, or an increase of 44 percent. In addition, the proportion of burglars serving lengthier

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(104) Note that these cases are not included in the overall analyses above. Thus, our analysis actually understates the effective increases in time served.

sentences has increased. Prior to the reform six percent of the offenders convicted of burglary served 24 or more months in confinement. Post-reform this percentage tripled, with twenty percent serving 24 months or more in confinement. The post-reform increase in time served for the cluster of crimes prosecuted under the theft statutes is of the same magnitude. The mean amount of time served for post-reform felony theft convictions is 16.5 months, or a 7.6 month increase. The median amount of time served for theft has increased by 6.5 months, or a 77 percent increase.(105)

Convictions for robbery are less frequent than burglary or theft. Since over ninety percent (90%) of all robbery convictions result in incarceration, any changes in incarceration length that do occur bear close scrutiny. As shown in Table 5.3, time served for robbery substantially increased. There is a post-reform mean increase of 7.1 months, and the median has increased by 7.5 months. Over 20% of these post-reform offenders are confined for 39 months or more. This represents a substantial increase in the percentage serving lengthy sentences. Only three percent (3%) of the pre-reform sample served sentences of 39 months or more for robbery.

Table 5.3 also compares time served for convictions of rape, trafficking and/or furnishing scheduled drugs, and aggravated assault. There are no statistically significant differences in mean time served. However, with the exception of rape, the direction of the changes is an increase in time served. The percent serving lengthier sentences has also increased. Whereas twenty percent (20%) of post-reform offenders are serving 16 months or more in confinement for aggravated assault or trafficking, only twelve percent (12%) of their pre-reform counterparts served such lengthy sentences.

This analysis indicates two basic changes in decisionmaking practices when the authority to decide the amount of time offenders serve in confinement shifted from the Parole Board to Maine's fourteen Superior Court Justices. The first change has been thoroughly discussed: an overall increase in sentencing severity for most offenders convicted of serious offenses. The increased mean and median time served is <u>not</u> a result of giving a few offenders lengthier sentences, because the proportion serving much

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(105) The relatively small number of theft cases shown in Table 5.3 merely reflects the fact that most theft convictions are for class D and E offenses. The mean time served for all theft confinements after the reform is 13.5 months. This represents an increase of 4.3 months over the pre-reform mean. The proportion serving lengthier sentences also increased from 2% serving 22 months to 20% of the post-reform offenders convicted of theft serving 22 or more months in confinement.

lengthier sentences has also substantially increased.

PRIOR RECORD OF OFFENDERS

So far, we have seen that increases in sentence length are fairly consistent; sentence lengths have increased for felony offenses and have increased for most specific offense types. This suggests that the increases should be directly attributed to the reform, and not to changes in the seriousness or type of offense sentenced. Also these changes in the seriousness and type of offense sentenced do not appear to account for the increased variation in sentence length after the reform.

TABLE 5.4

Time Served for Felony Offenders With No Prior Record, Before and After Reform

	Before	After	Change
Mean	13.1	20.9	+7.8 months
Standard Deviation	16.8	29.8	
Number of cases	355	188	

The issues of variation in sentence type and length, particularly as related to offender characteristics, will be more systematically explored in Chapter Eight. However, Table 5.4 clearly implies that neither the increases in sentence length nor the variations in sentence length can be readily explained by changes in the offenders sentenced.

As shown in Table 5.4, both time served and variations in time served have substantially increased, even for those offenders with no prior record. Once again, this suggests that the increased length and increased variations in length should be directly attributed to the reform.

CONCLUSION

A major objective of the reform was to reduce the diffusion of sentencing power by concentrating responsibility and authority for sentencing decisions in the judiciary. Theoretically, the abolition of parole release resolved the conflict of function and authority between the executive and judicial branches of government. As Zalman(106) points out, when such conflicts surface, they pose a "logically intolerable situation" requiring a rationalization of the sentencing system.

The preceding analysis clearly indicates that Maine's reform has resulted in a substantial increase in sentencing severity for an increasingly larger proportion of offenders. This change was an unintended consequence of the reform. Is an increase in incarceration length a necessary consequence of the abolition of parole release? Do sentencing systems require some mechanism that diffuses sentencing power to stabilize the severity of punishments? We think not.

The actual increase in sentencing severity that occurred must be assessed in terms of whether the reform introduced any policies to stabilize the level of severity. The diffusion of sentencing power does not inherently stabilize the amount of punishment in the system. Other characteristics of Maine's sentencing structure provide more relevant explanations. We previously noted that the system lacks a coherent objective or philosophy of punishment. The absence of explicit rules or standards to confine and regulate judicial sentencing power means that the overall severity of the system partially depends on the unarticulated philosophy of the sentencing judge.

The reform did introduce five offense rankings. They were intended to allow the court to address the issue of offense seriousness, but the offense types within each class proved to be too heterogeneous, and the maximum allowable incarceration lengths have proved to be too broad. In addition, no explicit policies exist that allow the court to systematically address characteristics of the offense and offender to be employed in making sentencing decisions. With no internal mechanisms to protect the court, both prosecutors and judges become particularly susceptible to public demands for harsher penalties. An increase in sentencing severity is a likely outcome of such an open system.

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(106) Zalman, 1980, p. 82.

Chapter VI

CHANGES IN THE CERTAINTY OF INCARCERATION LENGTH

An essential characteristic of indeterminate sentencing systems is that actual release decisions are made after the inmate has been confined. This system providing de jure authority to executive agencies --parole boards and prison authorities--to make "real" sentencing decisions has been criticized as unfair. A major criticism is that indeterminacy is unfair because it leaves the inmate in suspense and uncertain about the length of confinement.

A number of penologists have advocated an early decision on the duration of confinement so that those who are punished know the exact nature of their sentence and its duration. Maine was the first jurisdiction to adopt an early time-fix by abolishing parole release. A major policy goal espoused by drafters of the reform was to increase the certainty of incarceration length to create this early time-fix on the duration of confinement.

This chapter assesses the extent to which the certainty of sentence length changed as a result of the reform. Certainty means that the offender and the public have sufficient knowledge, at the time of sentencing, to determine when the offender will be released--the "real" length of confinement.

BACKGROUND

In Chapter One, we discussed Andrew von Hirsch and Kate Hanrahan's definition of a determinate sentencing system. They suggest that decision-making in processing offenders be based on standards or guidelines that check discretion, and that those decisions be made early so that those who are punished know the exact nature of their sentence. The goal is to narrow the discretion of decision makers by adopting explicit policies to ensure that the processing of offenders occurs within a structure of fairness and certainty.

Maine's reform addressed only one of these components--the early decision about incarceration length. As von Hirsch and Hanrahan point out in criticism of the early time-fix incorporated into Maine's reform:

> ... early time-fix is a useful reform only when durational standards are also adopted. To accelerate the time-fix without limiting the time fixer's discretion will perpetuate the disparities and confusion that characterize so much of today's parole release decision-making. The recent Maine statute is a case in point. By law that took effect in 1976 Maine moved to an early fix by eliminating the parole board and requiring judges to specify the duration of confinement. Yet the statutes set virtually no standards to guide judges' decisions. (107)

It may thus seem paradoxical to examine whether the certainty of sentence length changed in Maine. The drafters of the reform did not seek to limit the discretion of judges that von Hirsch and Hanrahan argue perpetuate disparities. (108) On a theoretical plane, disparity and certainty are separate issues. Increased certainty for a particular offender is not logically related to an overall reduction in disparity.

It is possible that Maine's reform successfully increased the certainty of sentences through an early time-fix despite the fact that existing disparities in those sentence lengths remained unchanged. The abolition of discretionary parole release and the introduction of flat-sentencing have the potential to increase certainty. A major policy question centers on the extent to which this goal has been achieved.

RESEARCH ISSUES AND METHODOLOGY

Increased certainty in Maine occurs insofar as the offender and the public have better knowledge at the time of sentencing as to when the offender will be released. The basic research issue is to assess what change occurred in the relationship between the court's sentence and actual time served. This requires a comparison of the release outcomes of the parole board and release outcomes of flat sentences not subject to parole release. THe assessment of whether the certainty of Maine's sentencing system changed necessitates pre- and post-reform comparisons of the actual amount of time served and the minimal amount of time necessarily served to be eligible for release.

A person is defined as eligible for release upon serving the court's sentence less all possible good-time credits earned and unearned. This period of time is a theoretical minimum-- not a

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(107) Andrew von Hirsch and Kathleen Hanrahan, 1979, op.cit.

(108) The issue of disparity, or variation in sentencing, is discussed in Chapter Seven.

legal one. Many offenders are released at the expiration of this theoretical minimum. Others have their stay extended. Some offenders are released in less time than their theoretical minimum. Such offenders are not illegally released; rather, decision-making practices by the parole board and/or corrections officials or others result in an earlier than expected release. This can occur under both the indeterminate system, when decisions of the parole board and corrections officials result in paroling the individual earlier than expected, and under the new flat-time system, when corrections officials use their transfer authority to place offenders in the community earlier than expected, through such mechanisms as home-work release or home-study release.

The amount of certainty in a sentencing system is, of course, related to statutory laws and policies, but cannot be wholly assessed or evaluated by them. What is decisive is how those policies and laws are articulated into concrete decision-making practices. This analytic concern requires separating the effects of the court's decision as to sentence length from release decisions. The certainty issue requires separating court decision-making from other post-conviction decision making practices.

To assess how much certainty exists in a sentencing system requires the comparison of two entities that can be or are known to the offender: the necessary minimum amount of time to be served before eligible for release, and the actual amount of time served in imprisonment. The relationship between the two is defined as the extent of certainty for this offender--that which s/he could ideally expect to serve versus what s/he actually served. How much certainty exists in any one system is, then, the aggregate of what can be expected and is served by offenders. Changes occurring in the relationship between the theoretical minimum length of confinement and the actual time served for all offenders indicates that the certainty of the system has changed. There can be changes in certainty without changes in sentence length and vice versa. Certainty can only change when actual time served changes in relation to the minimum possible length of incarceration.

To measure these two variables requires data on actual time served, the court's decision as to sentence length, and the good-time crediting system(s). The minimum length of incarceration is computed by subtracting all good-time credits available to an inmate during imprisonment from the court's decision as to sentence length. Under Maine's new flat-sentencing system, this minimum is obtained by deducting all possible good-time credits allowable by statute from the court's selection of a flat-sentence. As previously discussed, the good-time crediting system changed in 1978, and good-time crediting for offenders with flat-sentences of six months or less is different. (109)

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(109) From May 1, 1976, to December 31, 1977, flat sentences in excess of six months were credited with 10 days good-time and 2 days gain time. This figure was computed at the beginning of the sentence. Beginning in January 1978, this system changed. Good-time credits are computed at the end of each month. Flat sentences of six months or less receive 3 days good-time for each month served. These differences are incorporated into the post-reform computations of minimum sentence length for flat sentences. (Source: Interviews and discussions with corrections officials.)

These changes are incorporated into the measure of minimum incarceration lengths for flat-sentences.

A different computation of minimum incarceration length is required for indeterminate sentences imposed in the pre-reform period. (110) Essentially, the minimum incarceration length was the time until the offender was first eligible for parole release. The good-time crediting system was different, and differences existed between the two correctional facilities in establishing a minimum release date. Offenders confined at the State Prison were eligible for parole release at the expiration of their minimum sentence, less good-time. The parole board was required by statute to review the offender's case prior to that date.

However, this was not the policy or practice at the Correctional Center for offenders serving wholly indeterminate sentences of one day to thirty-six months. The parole board was only authorized to review a case upon the request of the warden. The warden was authorized to request the parole board to review any case at any time prior to the expiration of the inmate's maximum thirty-six-month sentence less good-time. The institution's stated policy was to request parole review for offenders convicted of a felony upon expiration of twelve months of sentence, less good-time, and for offenders convicted of a misdemeanor upon expiration of six months of the sentence, less good-time. (111) According to this policy, felons could be eligible for parole release in nine months and misdemeanants in four and a half months.

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(110) Prior to May 1, 1976, good-time was earned at the rate of seven days a month. This figure was computed on each inmate's minimum and maximum sentence. Maine's new code required the recomputation of minimum sentences for inmates who were still incarcerated. Offenders sentenced under the old code and incarcerated in state facilities when the new criminal code was implemented received the new good-time credits. These computations are incorporated into calculations of pre-reform minimum eligibility lengths.

(111) This material was obtained through interviews and extensive discussion with corrections authorities and former members of the parole board.

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1 OF 2

However, the practice changed over time, and was not applied to all offenders.(112)

Any measure of the amount of certainty existing in a sentencing system necessitates the imposition of standards and ranges defining certainty. On a conceptual level certainty exists only for the cluster of offenders released from prison on their minimum eligibility date. However, such a standard fails to account for situational exigencies and limitations of data. Under an absolute standard, any inmate released prior to the expiration of the minimum eligibility date so as to ensure his/her obtaining a steady job, or who was released later because of medical problems would be defined as "uncertain." Limitations of data and analysis also introduce some distortion into the measure of certainty. In the present study, this occurs as a result of rounding days into months particularly for shorter sentences. Thus, it is necessary to establish a range defining the parameters of certainty. For the purpose of this analysis an actual time served which is within ten percent (10%) of the minimum time required is defined as falling into the range of certainty. This range prevents situational factors and limitations of data from seriously affecting the validity of the measure.

The cluster of release practices resulting in certainty consists of the aggregate of offenders actually released between 90% and 110% of this minimum expected time served. Uncertainty is the cluster of release practices for the aggregate of offenders whose actual time served is less than 90% and more than 110% of their minimum eligibility. It is crucial to understand that under Maine's old indeterminate system and its new flat-time system offenders can be released from imprisonment prior to the

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(112) An examination of actual release practices at this institution for the pre-reform period indicates this distinction actually was employed from 1971 to 1972. Subsequently, it was replaced by a different practice. Interviews and discussions with corrections authorities and former members of the parole board confirm these changes. From 1973 to 1976, the felony/misdemeanor distinction became less relevant as most inmates were released in about seven months.

As noted above, the computation of the pre-reform minimum incarceration length for confinements at the State Prison is the court's minimum sentence, less good-time. This computation was not possible for confinements at the Correctional Center. A conservative minimum length was computed. Using the nine-month and four-and-a-half- month distinction as a base line, the computation of the minimum length incorporated an empirical measure of modal release practices. It is conservative because these modifications result in the allocation of more pre-reform certainty to sentences at the Correctional Center than actually existed.

expiration of their sentences.

The analysis which follows is based on those offenders who have been paroled from their pre-reform indeterminate sentences (N=1,403) and offenders released from their post-reform flat-sentences (N=636). Cases where time served was estimated and cases with split sentences are excluded from this analysis.

FINDINGS

A major goal of the drafters of Maine's reform was to increase the amount of certainty in the sentencing system. Our findings indicate certainty has increased after the reform.

Table 6.1 arrays the percentage of pre-reform and post-reform offenders whose sentence length is certain and uncertain. Three figures are shown for pre- and post-reform offenders: 1) the percent released prior to the expiration date of their theoretical minimum; 2) the percent released after serving 110% of their minimum; and 3) the percent whose actual time served falls between 90% and 110% of their theoretical minimum. This latter figure represents the percent of offenders whose sentences are "certain." The first column presents these figures for pre-reform offenders. The second shows the post-reform distribution. The third column shows the change in percent.

TABLE 6.1

Proportion of "Certain" Sentences Before and After Reform

Certainty Catagory	Before	After	Change
Time served less than 90% of minimum length	11.3%	4.1%	-7.2%
Time served between 90% and 110% of minimum length	65.4	89.2	+23.8
Time served more than 110% of minimum length	23.3	6.7	-16.1
	100%	100%	
(Number of cases)	(1403)	(636)	

The findings in Table 6.1 indicate certainty has changed. It has increased under the new flat-time system. More post-reform offenders (+23.8%) are being released within 90%-110% of their theoretical minimum. There is a post-reform decrease in both the percent of offenders released prior to the expiration of 90% of their minimum and the percent released after serving 110% of their minimum.

The overall post-reform increase in the certainty of time served in confinement may largely result from pre-reform indeterminate sentences of one day to thirty-six months. That is, pre-reform indeterminate sentences at one of the two correctional facilities may account for the overall pre-reform uncertainty of sentence length and therefore explain the post-reform increase in certainty.

To control for these differential pre-reform practices and more closely examine what changes have occurred requires an examination of pre- and post-reform differences in certainty at the two state facilities. These data are presented in Table 6.2 .

TABLE 6.2

Proportion of "Certain" Sentences by Correctional Institution, Before and After Reform

	State Prison			Correctional Center		
Certainty Category	Before	After	Change	Before	After	Change
Time served less than 90% of minimum length	7.9%	5.3%	-2.6%	17.7%	3.2%	-14.5%
Time served between 90% and 110% of minimum length	73.4	92.0	+20.5	49.9	87.1	+37.2
Time served more than 110% of minimum length	18.5	2.7	-15.8	32.4	9.7	-22.7
	100%	100%		100%	100%	
(Number of cases)	(922)	(263)		(481)	(373)	

The findings presented in Table 6.2 indicate that post-reform certainty has increased at both state facilities. However, there

are differences between the two prisons in the extent of this change. As could be anticipated, the percent of post-reform offenders for whom sentences have become more certain has increased more dramatically at the Correctional Center. Pre-reform offenders assigned to this facility served wholly indeterminate sentences. Note that theoretical minimum incarceration lengths at this facility were established empirically by coupling stated pre-reform policies with observed changes in release practices over time. Nevertheless, the data in Table 6.2 indicate actual time served is highly scattered in the pre-reform period at the Correctional Center. This does not mean release practices at this facility were random; rather, it suggests that a more complex interplay between decision-making practices of corrections authorities and the parole board occurred. To examine this issue would require an intensive analysis of those decision making practices.

Figure 6.1 summarizes pre- and post-reform changes in the certainty of sentence lengths. This bar graph graphically summarizes the findings presented in Tables 6.1 and 6.2 . It shows the percent of pre- and post-reform offenders whose actual time served in imprisonment is certain as measured by the percent of offenders whose actual time served fell between 90% and 110% of their minimum sentence length. It shows that post-reform certainty has increased at both state facilities and for the new flat-time system as a whole. It indicates the largest change in certainty has occurred at the Correctional Center. Those changes in the certainty of sentences indicate that this facility is a special case. The pre-reform absence of certainty at the Correctional Center reflects its rehabilitative mission and what such a mission meant to offenders confined at this facility. It seems highly unlikely that offenders confined there would be able to obtain the necessary knowledge to figure out when they would be paroled.

A major factor accounting for the abolition of parole in Maine was the widespread belief that the parole board was too liberal. It was believed that offenders were released upon their first appearance before the parole board. The findings presented here do not support the validity of such criticisms. In fact, the data in this section suggest the opposite may be true. The data examined in Tables 6.1 and 6.2 show a much larger percent of offenders serving more than their minimum sentence than less. That is, the overall effects of release practices in the pre-reform period was much less "liberal" than expected.

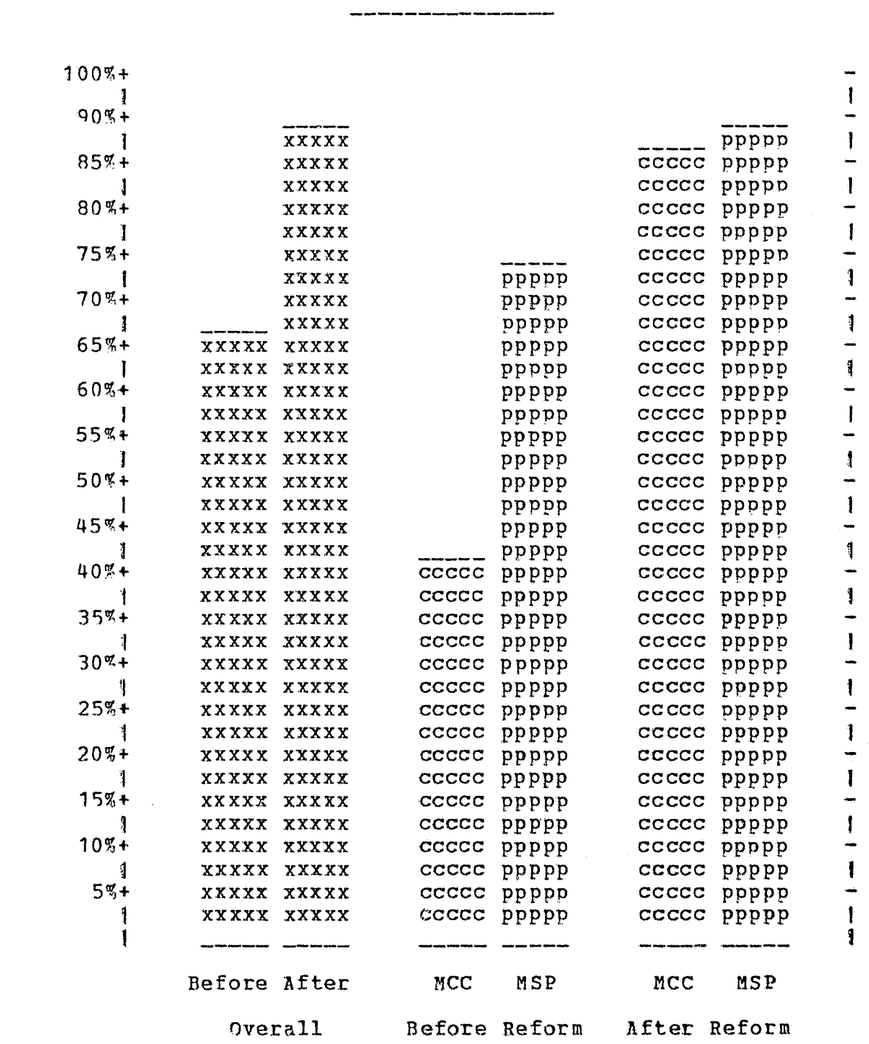

Figure 6.1: Proportion of "Certain" Sentences by Correctional Institution by Year Sentenced

CONCLUSION

This analysis indicates that the goal of increasing the certainty of the actual duration of confinement was successfully implemented in Maine. Offenders are no longer held in suspense about when they will be released, and the public knows at the time of sentencing the duration of an offender's period of confinement.

Early criticism of Maine's reform questioned whether certainty would increase. That criticism centered on the extent to which indeterminacy remained in the system. At issue were broad powers granted corrections officials to transfer inmates to community-based programs and correction's authority to petition the sentencing judge for resentencing. The analysis in this chapter confirms that these policies did not undermine the goal of increasing the amount of certainty in the system. Petitions for resentencing were found unconstitutional by a Superior Court justice in 1977. The justice was upheld by the Law Court in 1982.(113) Also, corrections officials have not utilized their community transfer authority as extensively as was anticipated. Consequently, the reform increased the certainty of the system.

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(113) Maine v. Hunter, 447A. 797-803 (Me. 1982).

Chapter VII

CONSISTENCY AND PREDICTABILTITY OF SENTENCING

Maine's sentencing reform has been roundly criticized nationally for failing to address issues of disparity and inequity in sentencing. Critics argue that the absence in Maine of a coherent philosophy of sentencing and lack of explicit sentencing standards has perpetuated illegitimate and inconsistent decision-making. As a result, critics argue, similar offenders sentenced for similar offenses are likely to receive dissimilar sentences.

Many advocates of sentencing reform have been concerned with limiting judicial discretion to solve this problem. They argue that explicit standards are necessary. These standards or guidelines prescribe fairly defined sentences and/or sentencing ranges for particular offenses, specify which characteristics of the offense and offender are relevant and legitimate in sentencing decisions, and ensure that these characteristics are consistently applied. Since Maine did not adopt such a system, critics such as von Hirsch and Hanrahan argue that Maine's reform did not introduce determinacy and did not meaningfully increase fairness and equity.(114)

The drafters of Maine's reform intended to reduce disparities in sentences. One of the eight objectives contained in Maine's revised code was "to eliminate inequities in sentences that are unrelated to legitimate criminological goals." Two sentencing standards were introduced in 17A-M.R.S.A. Section 1201, requiring the court to imprison an offender unless convinced that s/he would not commit another offense and that the conviction offense is not a "serious" one. In addition, the structure created by the five offense seriousness classes somewhat clarified relative severity. Finally, these changes were coupled with provisions for the appellate review of sentences.

The exact effect of these changes in unclear. However, critics have argued that the impact could only be limited and indirect because the reform Commission neither specified how "inequities" might be eliminated nor defined what "inequities" meant. Standards specifying who should or should not be incarcerated were not introduced. Moreover, judges retained nearly total

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(114) "Maine's system. . . lacks the essential element of determinacy: explicit standards." A. von Hirsch and K. Hanrahan, "Determinate Penalty Sytems," 1981, p. 295.

discretion in choosing type of sentence, and were limited only by the legislatively prescribed maximum terms in choosing length of confinement. Duration standards are absent. Thus, the explicit offense rankings do not ensure either consistency or predictability, and the two sentencing "standards" can readily be construed to provide a rationale for the exercize of judicial discretion rather than a limit on such discretion. As a result, arguments between national critics and Maine advocates continue unresolved.

One major problem is that discussions of the impact of Maine's reform on the propriety, equity, and consistency of sentencing decisions have proceeded without empirical knowledge about actual sentencing practices in Maine. The relevant issues are: 1) What characteristics are used in sentencing decisions? 2) Is there consistency in the characteristics employed? 3) Are the sentences actually imposed by the courts predictable? The purpose of this chapter is to provide information about these issues and about the impact of the 1976 reform on consistency and predictability of sentencing decisions. The goal is to provide a base for philosophical and ethical debates about propriety, equity, and consistency in sentencing decisions by empirically identifying the criteria which are used in making those decisions.

The analysis compares the basis of sentencing decisions under two criminal codes in one jurisdiction at two different times. It examines the extent of overall consistency and predictability of the outcomes of these decisions--the extent to which variations in sentence type and sentence length can be explained by characteristics of the cases. The goal is to identify those characteristics most strongly associated with sentencing decisions and to determine whether changes occurred in the predictability of those decisions.

The chapter is not an analysis of sentencing disparity. Any definition of disparity involves value decisions about which characteristics ought to be relevant in making sentencing decisions. Andrew von Hirsch argues that age, educational level, and marital status as factors in sentencing are unfair and irrelevant, and that variations in sentencing based on these characteristics constitutes disparity.(115) Others, judges in particular, argue that age, educational level and marital status are critical factors which must be reflected in sentencing. The continuing debate leaves researchers with the question "What criteria are to be used to assess disparity?" Without a clear policy indication of which factors ought to be used, it is difficult to evaluate disparity. Indeed, given the current situation in Maine, it would be difficult to argue that variations in sentencing among judges are inappropriate, illegitimate, or constitute disparity. It is certainly not the role of the researcher to impose such normative definitions.

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(115) Andrew von Hirsch, Doing Justice, 1976.

The current research problem is to identify how much variation in the court's case decisions can be accounted for and to identify the factors affecting those decisions. The analysis which follows examines the variables associated with the court's choice of type of sentence and length of incarceration. The goal is to assess whether any changes occurred in the variables associated with each of these two decisions as a consequence of the 1976 reform.(116)

Specifically, the current analysis is limited to comparing factors associated with sentencing decisions before and after the reform. The research goal is to identify the operant policies of the court's dispositional decisions prior to the reform and to determine whether these policies changed after the reform.

The analysis addresses two distinct, although related, issues. The first is the basis of sentencing decisions--the operant factors or criteria which the court uses in making decisions. When the same criteria are used in different cases and by different judges there is consistency in bases of sentencing decisions. Similarly, if different factors are used before and after the reform, there is a change in the basis of sentencing decisions.

The second, related issue is the predictability of sentencing outcomes--the extent to which the factors used as a basis of sentencing explain the courts decisions. Sentences are predictable when knowing the relevant characteristics of a particular case allows one to accurately predict what type of sentence or sentence length will be imposed.

The two dependent variables are: The court's choice of sentence type (probation only, split sentence, or incarceration only) and its choice of incarceration length. Over eighteen variables were examined to determine whether they affected these court choices. These independent variables include: offense characteristics (such as class of offense), offender "rap sheet" characteristics (such as prior convictions), court processing characteristics (such as plea), and offender background characteristics (such as education). These variables and their coding are shown in Table 7.1(117) Those characteristics which best

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(116) These two dependent variables, type of sentence and length of incarceration, are often confused in the literature. This confusion, its implications, and some of the analytic methods utilized in the current research are discussed in S. Talarico, "An Application of Discriminant Analysis in Criminal Justice Research," 1977, pp. 46-54.

(117) In order to utilize multivariate techniques, nominal variables were either "dummy coded" or reduced to dichotomies. Although detailed information was available on many characteristics, such as employment and marital status, some of these were reduced to dichotomies on the basis of initial examinations of the data. For example, for employment status, a small proportion of offenders were employed part-time, employed part-time and in school, seasonably employed, etc. Both because of the small numbers of cases in these miscellaneous categories, and because preliminary analysis showed that the critical distinction was between those who were employed full-time and those who were not, the variable was reduced to a dichotomy.

Most of the variables in Table 7.1 are self-explanatory or have been discussed earlier. In addition to the variables in Table 7.1, a set of interaction terms showing class of offense within legal category, or, when appropriate, showing class of offense within the specific offense category, were included in the analysis. Further, the identity of the sentencing judge and the county of sentencing, as sets of dummy coded variables, were included in some of the analyses.

predict sentencing decisions can be seen as the basis of the sentencing decision. Operationally, these characteristics define who gets what sentence, both in terms of type and length.

The analysis presented in this chapter focuses on four specific offenses: burglary, theft, robbery and aggravated assault. These are the offenses most frequently encountered in the jurisdiction understudy. These selected offenses also represent and include a broad range of seriousness of behaviors.

Previous research,(118) commonsense, and our interviews with judges and prosecutors would lead us to expect that sentencing decisions are offense-specific. One dimension of this might be that particular types of sentences would be more likely to be imposed for some offenses than others, even when the offense is in the same class. A second and critical dimension is that the criteria used by judges making sentencing decisions may be different for different offenses. Each of these dimensions has been found to be a significant source of variation in other research. Moreover, extensive analysis of the data at hand confirms the importance of specific offense, both in predicting sentencing decisions and in predicting which characteristics will be most important in making the decisions.

Table 7.2 presents the distribution of sentences for each of the four offenses, before and after the reform. The offenses represent a range of types of behavior and seriousness. They also represent considerable variation in type of sentence

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(118) For example, Sutton, Variations in Federal Criminal Sentencing, 1978 and Pope, "Sentencing of California Felony Offenders," 1975.

TABLE 7.1

Independent Variables Used In the Analysis of the Basis of Sentencing Decisions

Characteristic	Type of Variable/Coding	Coding
Offense		
Class of Offense		
Class A	Dummy	0=no 1=yes
Class B	"	" "
Class C	"	" "
Class D	"	" "
Class E	"	" "
Multiple Charges	Dichotomous	0=yes 1=no
Legal Background		
Prior Convictions	Interval	Number of: 3= 3 or more
Prior Incarcerations	Dichotomous	0=none 1=yes
Relation to CJ system at Sentencing	dichotomous	0=none 1=under supervision (parole, prob, etc)
Present burglary with prior burglary	Dichotomous	0=no 1=yes
Court Context		
Plea	Dichotomous	0=guilty 1=not guilty
Court appointed counsel	"	0=no 1=yes
Jury Trial	"	" "
Indictment Case	"	0=yes 1=no
Reason for charge reduction	"	0=none or other 1=for guilty plea
Personal Background		
Dependents	Dichotomous	0=none 1=yes
Income level	"	0=over $5000 1=under $5000
Employment	"	0=not full time 1=full time
Sex	"	0=male 1=female
Marital Status	"	0=single 1=not single
Education		
9 years or less	Dummy	0=no 1=yes
10-11 years	"	" "
High school or more	"	" "
Age	Interval	At sentencing

imposed. For instance, the proportion incarcerated ranges from 91.9 percent for robbery after the reform to 19.9 percent for theft before the reform. Similarly, the average incarceration only sentence length ranges from 9.8 months to 30.7 months(119)

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(119) Data utilized for analysis of sentence type represent the total sample having these dispositions for which court records were successfully linked with corrections or probation information on offender background characteristics.

The "minimum expected time served" estimate, discussed in the previous chapter, is utilized in the analysis of sentence length. Cases are those receiving incarceration only sentences. For further discussion of the data and methodology used in the analysis of sentence length see below.

TABLE 7.2

Summary of Sentences, Before and After Reform, for Selected Offenses

Sentence Type	Before Reform: Burglary	Theft	Robbery	Aggravated Assault
Probation	33.6	59.1	18.2	33.5
Split	12.9	10.9	18.2	10.7
Incarceration	53.5	30.0	63.6	55.8
	100%	100%	100%	100%
(N=)	794	320	55	206
Sentence Length*				
Mean	11.5	9.8	22.7	13.9
Stand. Dev.	7.1	6.6	17.2	9.6

Sentence Type	After Reform: Burglary	Theft	Robbery	Aggravated Assault
Probation	34.1	50.4	8.1	31.9
Split	24.3	26.2	10.6	29.2
Incarceration	41.6	23.4	81.3	38.9
	100%	100%	100%	100%
(N=)	(721)	(252)	(123)	(72)
Sentence Length*				
Mean	19.5	15.4	30.7	21.0
Stand. Dev.	17.7	10.2	23.8	14.3

*In months, for incarceration only sentences--splits excluded. Length is minimum expected time served.

TYPE OF SENTENCE

Sentencing is often seen as a bifurcated decision-making process; the first decision determines the type of sentence and the second decision further specifies the sentence type by establishing an amount for fines and restitution or a length of probation or incarceration. This section is concerned with the first decision--the type of sentence to impose. Following this section, we will turn to an examination of the incarceration length decision.

Analyses of both the type of sentence decision and the incarceration length decision will be primarily concerned with identifying and comparing the bases of these decisions before and after the 1976 reform. Our analysis of the type of sentence decision is concerned with identifying the factors or characteristics (independent variables) which best predict the type of sentence actually imposed. In order to accomplish this, we utilize stepwise discriminant analysis. This multivariate statistical technique is a method of selecting the characteristics, or set of characteristics, which most effectively distinguish among groups of offenders who receive different types of sentences. Essentially, in the stepwise mode discriminant analysis selects the characteristics which maximize the statistical "distance" among groups or best "distinguish" the groups. Put another way, discriminant analysis identifies the specific variables which best predict the type of sentence an offender receives.

This technique is particularly useful for the present analysis since it allows us to take advantage of a multivariate technique which retains the nominal character of the dependent variable, type of sentence. This technique also provides us with a ready comparison of which criteria best predict sentencing decisions before and after the reform, the relative importance of each of these factors, and the overall predictability of the sentencing decisions, given the characteristics at hand.(120)

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(120) More technically, discriminant analysis is a linear, additive, least- square multivariate technique which extracts clusters of variables--factors--which maximize the distance between or among catagories of the dependent or criterion variable. Factors may be extracted up to the number of catagories minus one, but the change in variance explained produced by successive factors may or may not be significant. Factors were not utilized if the significance of their added contribution, tested against the chi-square distribution, was less than .05. The second factor was not significant in any of the analyses which follow.

The method used in the analysis was to maximize the generalized distance as measured by Rao's V. The criteria for entry of variables into the equation was a partial F ratio of .05 and a minimum increase in Rao's V of .05. Propor-

Operationally, the set of variables identified as best predicting sentence type are understood as the basis of sentencing. This basis of sentencing, and the proportion of variation in the type of sentence explained, can then be compared before and after the reform.

Table 7.3 summarizes the discriminant function analysis for each of the four offenses before and after the reform. It identifies the most important factors affecting the court's choice of sentence types. At the bottom of Table 7.3, the squared canonical correlations and proportion of cases correctly classified indicate how much variation is explained by all variables entering the equation. They show the extent to which sentence types are predictable for each offense, before and after the reform. The overall consistency in the definition and use of a variety of characteristics for making decisions about sentence types, and the overall predictability of those decisions have not substantially changed since the reform.

Examining the characteristics used by the courts as the basis for decisions about sentence type, it is clear that some changes have occurred, but that they are not systematic. For each offense equation, a coefficient is shown for the four most significant variables for that equation. The absolute values of the coefficients is shown, and indicates the relative importance of the variable in explaining sentence type.(121) Thus, for burglary before reform, prior convictions is the most important characteristic, while number of dependents is the most important characteristic for theft before the reform.

The most striking aspect of the analysis in Table 7.3 is that variations in the characteristics used by the courts to make sentencing decisions is greater among offenses than are variations in the characteristics used before and after the reform. In other words, the courts employ different criteria to make decisions for different offenses. Pre-reform, we find that the most important characteristic--the variable which is most effective in distinguishing among types--is different for each of the offenses.

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tion of variance explained in the overall equation, when reported, is calculated as the sum of the squared canonical correlations for the discriminant function(s) used in the analysis.

(121) Only those variables which were significant in at least one of the equations are included in Table 7.3 . The discriminant function coefficient is presented for each of the four most "important" variables which entered each specific equation. These coefficients are standardized and, hence, allow us to compare the relative importance of the variables in each equation using the absolute values of the coefficients.

TABLE 7.3

Summary of Discriminant Analysis on Type of Sentence for Four Offenses, Before and After Reform

	Burglary		Theft		Robbery		Aggravated Assault	
Characteristics**	B	A	B	A	B	A	B	A
Offense								
Class of Offense				.52	.72			
Multiple charges	.29							
Legal Offender								
Prior convictions	.49	.42						
Prior incarcerations	.28	.47	.39	.72	.74	.65	.48	
On prob. or parole	.37	.24					.38	1.05
Court processing								
Jury trial				.24				.71
Appointed counsel						.50		
Personal Offender								
Employment		.32	.35	.33			.49	
Dependents			.51					
Marital Status			.45					
Sex						.59		
Summary statistics								
Squared Canonical Correlation =	.421	.457	.424	.534	.091	.358	.425	.346
Proportion of Cases Correctly Classified =	66.4	63.6	67.7	69.0	73.1	63.4	68.5	54.1

*The Four most influential characteristics, as measured by the absolute values of the standardized discriminate function coefficients, are reported for each equation (column).

**Only those characteristics which are noted for at least one equation (column) are included. A total of 24 variables were "eligible" for entry into the stepwise equation.

For aggravated assault, the most important characteristic is em-

ployment status; for burglary, it is prior convictions; for theft, dependents; and, for robbery, prior incarcerations. These are not even the same types of variables. Moreover, the second most important characteristics are also different for each offense.

The only real consistency is the importance of prior incarcerations. Prior incarcerations are among the four most important variables in all of the analyses except aggravated assault. After the reform, prior incarcerations is the most important for all the offenses except aggravated assault. Even for aggravated assault, a closely related variable--under supervision--is the most important. For all post-reform offenses, offenders who had previously been incarcerated were most likely to be sentenced to incarceration.(122)

This consistency, however, does not extend to other variables in the post-reform period. The second most important factor affecting sentencing decisions varies among the offenses. It is a contextual variable for aggravated assault (jury trial); a legal offender background variable for burglary and theft (prior convictions); and a personal background variable for robbery (sex).

One of the most interesting dimensions of the analysis shown in Table 7.3 is the role of class of offense. It has been suggested that the clear definition of class of offense would have a substantial impact on the sentencing decisions. This does not appear to be the case. After the reform, class of offense is a significant factor only for theft. Overall, the importance of class of offense seems to be greater before the reform, when these classifications were neither formal nor explicit.

Looking at the bottom of Table 7.3 we see that the overall predictability of sentence types has not increased. The squared canonical correlation shows how much variation is explained by the variables in the equation. The "proportion of cases correctly classified" shows the extent to which sentence type was actually able to be predicted by the analysis(123)

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(122) This means, of course, that present decisions are made on the basis of previous decisions--a highly discetionary decision in the offender's past is employed as the basis of the current decision.

(123) This measure answers the question: Using the discriminant functions derived, and the values of the significant characteristics, how accurately can one classify--predict which sentence will be given for--each case? Since the actual classification (sentence) is known, the proportion correctly classified can be known. With three categories (sentence types) the prior probability of guessing correctly can be considered 33.3 percent.

These measures show the overall extent to which sentence type is predictable for each offense, before and after reform. They indicate that the court's choice of sentence type is not substantially more predictable following the reform. This is most clearly shown by the proportion of cases correctly classified. For all the offenses except theft, this proportion is somewhat lower after the reform. For theft, there is a small and insignificant increase of 1.3 percent.

This means that the overall consistency in the definition and use of characteristics in making decisions about sentence types and the overall predictability of these decisions have not substantially changed following the 1976 reform.

Table 7.4 shows the results of adding information on the identity of the sentencing judge and county to the analysis. As shown, the additional proportion of variance explained is greater pre-reform for some offenses, and greater post-reform for others. In essence, this means that consistency among judges and counties (prosecutorial districts) does not appear to have been consistently changed by the reforms, nor is there any indication that variation among judges is consistently more or less critical than variation among counties. This suggests that pre-reform changes in the courts and prosecutors' offices had little impact on sentencing decisions.

Overall, there is little indication the reform had a substantial, systematic, or consistent effect on the criteria used in the decision as to the type of sentence to impose. Although there is clearly a great deal of variation in criteria used, there is no indication this variation is different either in magnitude or form before and after the reform. The reform has neither resulted in an overall increase in the consistency in the basis of decisions about sentence types, nor has it resulted in an overall increase in the predictability of sentence types.

Given the catagorical nature of the dependent variable in discriminant analysis, the "proportion of cases correctly classified" is extremely important as a confirmatory supplement to the variance measures. This is particularly true when comparing or assessing changes. Unless there is a substantial change in the ability to correctly classify, changes in variance explained cannot be considered substantive.

TABLE 7.4

Effect of County and Judge on Discriminant Analysis of Type of Sentence

Change in Squared Cannonical Correlation

	Burglary		Theft		Robbery		Aggravated Assault	
Characteristic	B	A	B	A	B	A	B	A
Judge	+.018	+.026	+.014	+.006	+.035	(ns)	(ns)	(ns)
County	+.013	+.044	+.061	+.040	+.057	(ns)	+.022	+.156
Both Judge and County	+.033	+.053	+.073	+.046	+.079	(ns)	+.022	+.156

Change in Proportion of Cases Correctly Classified

	Burglary		Theft		Robbery		Aggravated Assault	
Characteristic	B	A	B	A	B	A	B	A
Judge	+0.8%	+2.6%	0.0%	+0.4%	-29.3%	0.0%	0.0%	0.0%
County	+0.4	+2.3	+2.1	+2.2	-13.8	0.0	-0.9	+9.4
Both Judge and County	+1.2	+2.9	+2.4	+3.0	-15.0	0.0	-0.9	+9.4

SENTENCE LENGTH

For offenders given sentences of incarceration, the court must make a decision as to the duration of confinement. In Maine, statutory limits on the duration of confinement were specified by offense in the pre-reform period and offense class in the post-reform period. The courts are given broad discretion in selecting a period of confinement. This section examines variables affecting the court's decision as to incarceration length.

Referring back to Table 7.2, we see that judges have chosen longer lengths following the 1976 reform.(124) Average sentence

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(124) In order to compare minimum/maximum sentences before reform

length has substantially increased for all four offenses. These increases have been accompanied by broader variations in sentence length, as indicated by the larger standard deviations. By itself, however, this greater variation does not necessarily mean that consistency in the basis for the variations(125) decreased in the post-reform period.

Stepwise multiple regression techniques are used to analyze factors affecting the court's decision as to incarceration length. These techniques allow us to examine the combined effects of multiple independent variables on a continuous dependent variable (sentence length) in much the same manner as discriminant analysis allowed us to examine those relationships for sentence type. As with the previous analysis, the set of variables selected by the stepwise procedure are interpreted as those characteristics used by the courts to decide on the duration of confinement.(126)

Multiple regression analysis presumes a linear relationship between the dependent and independent variables--that the dependent variable is truly interval in relation to the independent variables. This means that, in respect to the independent variables, there is equal distance between values of the dependent variable. In the present situation, this means assuming that the distance between six months and twelve months is the same as the distance between thirty months and thirty-six months.

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with flat-time sentences after reform, we once again utilize the "minimum expected time served" estimate discussed above. This estimate is based on actual corrections and good-time crediting policies. Our previous analysis has shown that this version of sentence length is highly effective in predicting the actual time served for most offenders. It is the amount of time the judge could reasonably expect would be served given the imposed sentence.

An alternative stategy would be to use "actual time served." However, this would obscure rather than illuminate the judge's decision. Any difference between the length to eligibility and the length to actual release reflects decision-making by corrections authorities (and the parole board under the old code) rather than decisions by the court. Use of time to eligibility as the measure of sentence length focuses the analysis on the court's decision.

(125) The broader post-reform variation in actual time served implies that Maine's parole board's decision-making practices were more consistent, and hence more predictable, than currently exists among Maine's fourteen Superior Court justices. This is to be expected. Inherent in any centralized,

Conceptually, this is a difficult assumption to make. One might more readily expect that increments are proportionally meaningful. For example, we might suspect that the difference between a one-month and a two-month sentence would be regarded as substantial, and the difference between a thirty-five month and thirty-six month sentence as trivial. If this is true, the relationship would be curvilinear rather than linear.

An empirical investigation of this possibility through an analysis of residuals revealed this theoretical concern was well justified. It showed that increments in lower sentence lengths were systematically under-predicted and that increments in higher sentences were systematically over-predicted. In order to correct this situation and reestablish a linear relationship, we have employed a logarithmic transformation of the dependent variable, sentence length. The essential effect of this transformation is to reduce the intervals for lower sentence length and to increase the intervals for longer sentence length. (127)

Table 7.5 summarizes the results of regression analysis on sentence length, before and after reform, for the four offenses. There is an increased tendency after the reform for class of offense to be used as the basis of sentence length decisions, and less tendency to use personal background characteristics of offenders. However, the overall consistency and predictability of sentence length decisions has decreased. The amount of variation explained by the independent variables in post-reform period is

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decision-making body is the potential to ensure a reasonable degree of consistency in decisions. This potential does not currently exist for the judges because no policies exist to ensure consistency.

(126) A true stepwise technique was used, allowing both forward inclusion and backward elimination. Forward inclusion criterion was reduction in variance significant at the .05 level and backward elimination citerion was .01 level. In addition, variables unable to explain at least one percent of the overall variance (i.e. change in Multiple R squared of less than .01) were excluded from further analysis.

(127) The plot of residuals was an almost text-book example of an S curve, with residuals for shorter sentences falling above the line and residuals for longer sentences falling below the line. For a discussion of analysis of residuals see Draper and Smith, 1980. Examination of residuals following the log transformation shows a nearly straight line. The same patterns were found in examinations of various subsets of the data such as in the analysis of specific offenses. As a result, we are confident that the basic form of the curviliear relationship is a consistent factor in sentencing decisions.

less than the pre-reform period.

TABLE 7.5

Regression on Sentence Length for Four Offenses, Before and After Reform

	Standardized Regression Coefficients							
	Burglary		Theft		Robbery		Aggravated Assault	
Variables**	B	A	B	A	B	A	B	A
Offense								
Class B		-.65			-.25			
Class C		-.81						
Class D				-.52				
Class E				-.69				
Multiple charges	.14	.12			.16		.28	
Legal Offender								
Prior convictions		.16		.23				
Prior incarcerations						.23		
On Prob. or Parole	.14				.18			
Court Processing								
Jury Trial	.15				.28	.37		
Personal Offender								
Employed	.10							
Not Single	.15	.22	.37		.31			
Income over $5000	.38		.37		.20			
Older	-.11						.25	
Summary Statistics								
Multiple R	.588	.490	.629	.786	.664	.479	.322	.000
R squared	.346	.240	.396	.617	.441	.229	.103	.000

*Only those characteristics which are significant for at least one of the equations (columns) are included. A total of 24 variables were were "eligible" for entry into the stepwise equation.

Table 7.5 is similar in format to Table 7.3, which reported the analysis on sentence type. For each offense equation, a

coefficient (the standardized regression coefficient) is shown for each variable which was significant for that equation. The absolute value of the coefficient indicates the relative importance of the variable in explaining sentence type. Thus, for both theft and burglary before the reform, income of the offender is the most important factor in predicting sentence length.

After the reform, these personal background factors are much less important. For both burglary and theft, legal variables are the most critical. For robbery, a processing variable is most important, followed by prior incarcerations. Overall, there has been some systematic change in the basis of the sentence length decision after the reform. This change is an increase in the relevance of legal variables and decrease in personal variables to explain variations in sentence lengths.

However, this change has not brought about an increase in consistency and predictability. The multiple R squared shown for each equation (column) in Table 7.5 shows the proportion of variance explained--the predictability of the sentence length decision. Before-after comparison for specific offenses shows that the predictability has decreased for burglary and robbery. For aggravated assault, the lengths are so unpredicatable that not one variable is significant after the reform--no variable significantly explained any of the variation in sentence length after the reform.

The only offense for which there is an increase in predictability is theft, which accounts for ten percent of all sentences of incarceration. For this offense, however, both the characteristics used and the impact of those characterisitcs on decision outcomes have substantially changed. The extensive revision of the theft statutes and the explicit grading of theft into classes of offense seriousness in the new code have apparently had a significant impact on court decisions about length of incarceration.(128) The legal variables have been consistently used as the basis of decisions and the overall consistency and predictability of sentence length decisions have increased for this one offense.

Nonetheless, theft is clearly the exception, and accounts for a relatively small proportion of all incarcerations. For the other three offenses, the changes in the basis of sentencing have had little effect; the extent of consistency has actually declined.

Overall, the consistency and predictability of sentence length decisions have decreased under the new sentencing structure. For most offenders, sentence length is less explicable and less consistent after the reform, the bases of, or reasons for, the

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(128) But not on decisions about whether to incarcerate, as discussed above.

sentence length imposed are less clear and more inconsistent.(129)

CONCLUSION

The analysis presented in this chapter indicates that the reform has had no overall or systematic effect on criteria used by the courts in making decisions as to the type and length of sentences they impose. Different factors affect sentencing decisions for different offenses. Previously reported post-reform increases in variations in sentence length cannot be accounted for by the variables employed in this analysis. Pre-reform changes in the organization of the courts and prosecutors offices appear to have had little impact on sentencing decisions.

Although the reform provided no guidelines for the courts to make sentencing decisions, drafters anticipated the introduction of explicit offense classes would rationalize sentencing decisions. However, offense class has no overall relationship affecting sentencing decisions in a systematic manner after the reform. The grading of offenses decreased the likelihood of incarceration for Class D and E offenses in the post-reform period, but offense classes were a more significant factor in the pre-reform period when they were implicit. The graded offense classes affect post-reform court decisions as to incarceration length, but much of the variations in post-reform sentence length remains unexplained by any variables used in the analysis. This suggests the broad range of incarceration lengths available within each offense class and the heterogeneity of offenses within these classes has resulted in a situation where class of offense is not as important to judges as are other characteristics.

The absence of clear guidance ensuring that offenders with similar backgrounds convicted of similar crimes receive similar sentences has led judges to infer that disparity exists. "We do not have a lot of guidance," noted one judge in an interview, "and interchange among judges is limited. I think disparity exists among judges."

Does this mean disparity exists among judges? Do sentencing decisions lack standards to ensure consistency and equity? Andrew von Hirsch argues that such a situation exists in Maine because sentencing decisions are not primarily based on the

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(129) As in our analysis of sentence type, identity of judge and county were examined. We found little change. Judge is significant for burglary both before and after the reform; significant for robbery after the reform; and, not significant in any other equation. County is not significant for any offense, before or after reform.

seriousness of the charge and prior convictions. Others would argue that there is a "common law" of sentencing, appellate review to ensure equity, and sufficient guidance provided by key provisions introduced by the reform regarding the purposes of punishment. Although the debate will continue, the data analyzed in this chapter indicate little change has occurred. Consequently, current sentencing decisions can be seen as being as equitable or as disparate as decisions in the pre-reform period. The analysis clearly shows that Maine's reform increased neither the predictability nor the consistency of decisions as to whether to incarcerate or for how long. According to the data in this chapter and critics of Maine's reform, the failure to systematically address <u>how</u> sentencing decisions are to be made has an obvious consequence: no changes in the underlying bases of sentencing decisions have occurred. This is to be expected as judges and prosecutors make individual case decisions. Inherent in such a situation is the absence of a common referent, or common knowledge of the basis for similar decisions by their peers. Such a situation, already imbued with a great deal of uncertainty, inherently perpetuates inequities and inconsistencies. This does <u>not</u> mean that discretion is abused. Rather, discretion is unstructured, and without a structure within which to make decisions, broad variations that cannot be explained are perpetuated.

Chapter VIII

IMPACT ON CORRECTIONS

History will portray corrections as the forgotten stepchild in the nationwide movement toward sentencing reform. Jurisprudential debates about sentencing policy largely focus on the purposes of punishment, while legislators have been concerned with **<u>which</u>** sentences should be imposed and **<u>who</u>** should be making those decisions. Such debates largely ignore the impacts of proposed reform on correctional resources. Of all the states having enacted basic changes in sentencing, only the Minnesota legislation providing sentencing guidelines has directly addressed questions of prison population sizes. Elsewhere, potential impacts of enacted legislative changes on correctional facilities and resources have been neglected or ignored. Such is the case in Maine. Potential impacts of the reform on corrections were not assessed.

The purpose of this chapter is twofold. It assesses the effect of the 1976 reform on corrections as an organization and the impact of the reform on population levels.

<u>ORGANIZATIONAL IMPACT</u>

Corrections is only one component of a very loosely coordinated system of decision-making. The various agencies involved in the processing of offenders in Maine, as elsewhere, lack common goals, an overall policy, and coordinated activities. Nevertheless, policies and practices of one system component affect the operations of others. Conflicts of function and purpose arise between judicial and executive agencies when the resources of one are affected by the decision-making practices of the other. Pivotal decisions affecting corrections are made at the highly diffused front-end of the system. Actual control over the volume of correctional intake rests with the courts and prosecutors.

Since corrections officials have no control over the number of people admitted to their facilities, and only limited control over release, reforms in the area of sentencing must address organizational concerns of corrections. It was in this area that Maine's reform was least sensitive and where the most profound repercussions were felt. The reform affected the availability of space, resources and programs at the state's two correctional facilities.

Maine's former indeterminate sentencing structure and system of parole release provided the correctional system its operating rationale for over six decades. This system allowed corrections authorities to exercise control over prison populations at its two facilities. This control occurred through the influence of corrections authorities on the parole board, which made release decisions. The medium security institution housed inmates serving indeterminate sentences of one day to thirty-six months. In practice, almost all inmates were paroled within six to nine months. Corrections officials controlled the scheduling of parole hearings at this facility. At the maximum security facility, the parole board was required to review all inmates for release at the expiration of the court-imposed minimum sentence. The correctional system had adapted well to this context.

The 1976 reform changed the context and rationale in which the correctional system operated. It shifted virtually all formal decision making authority about incarceration length to the court. By abolishing parole, the potential for using the parole board's discretionary authority to release inmates as a mechanism to control the size of prison populations was eliminated.

The new statutory environment in which the corrections system operates is not simply a result of introducing flat-time sentencing and abolishing parole. Other key provisions in the new criminal code had as much, if not greater, impact. These included provisions redefining the role of the medium security facility, changing good-time crediting, increasing the maximum allowable sentence lengths, and authorizing the courts to impose non-parolable life sentences. The potential effect of all of these changes was to limit correctional control and to require increased correctional resources.

The most direct and immediate organizational effect was the redefinition of the role of the medium security facility. Essentially, it was changed from a short-term rehabilitation-oriented facility to a medium security facility for both long and short-term prisoners. Prior to the reform, individuals confined at this facility were required to be under 27 years of age and serving indeterminate sentences. Programs at this facility and its system of progressive housing were predicated upon the fact that inmates would be confined for less than a year. After the reform, the age requirement was abolished. Currently, any person sentenced for five years or less may be confined at this facility. The result has been a more heterogeneous inmate population, in the seriousness of offenses, the length of sentences, and in personal characteristics.

These changes had a direct impact on correctional resources. For example, changes in the institution's age composition affected medical expenditures. Those expenditures were about $23,000 for the pre-reform fiscal year of 1975-76. They increased to about $208,000 for the post-reform fiscal year of 1980-81. Moreover, the new code affected both prison programs and the progressive housing system. Unable to anticipate the role change, inmates sentenced to this institution for longer than a year found themselves repeating programs.(130) The situation largely undermined the progressive housing system, for although inmates in the same housing situation see themselves as relative equals, those sentenced for longer terms move more slowly though the system.

While these changes required corrections officials to reassess their programs and acquire additional resources, it was the abolition of parole and the increased sentence length that posed the major problem. Parole abolition reduced institutional control over population levels in a context of already exisiting overcrowding. It is to this issue that we now turn.

IMPACT ON OVERCROWDING

Maine is no exception to the national trend of increased prison populations. In virtually every state jurisdiction the size of prison populations has increased on a massive scale. Between 1972 and 1978 the number of inmates confined in state prisons for more than a year rose from 175,000 to 268,000--an increase of over fifty percent.(131) This increase has required corrections officials to confront fiscal and social problems resulting from unprecedented overcrowding. In Maine, substantial population pressures on its facilities have existed since 1974.

Maine's correctional system has a total rated and funded capacity of 847 inmates in state facilities: 627 bed-spaces at the two correctional facilities; 160 spaces in various pre-release centers across the state; and 60 spaces at a new minimum security facility. The total number of people confined in state facilities at the end of December, 1982 was 956-- 15 percent more inmates than space available. Also, 62 inmates are serving lengthy sentences: 16 inmates are serving non-parolable life sentences and 46 are serving flat sentences in excess of twenty years.

Sources of prison overcrowding are shrouded in popular myths about crime. No exact "science" of prison population projections exists. It is commonly assumed that overcrowded prisons are the inevitable and direct consequence of increased crime rates and other related variables. This misconception (and the obvious misdirected solution of increasing available bed-space through

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(130) Interview with corrections officials, August, 1981.

(131) American Prisons and Jails: Summary Findings and Policy Implications of a National Survey, p. 12.

capital construction) is no longer tenable. More recent research has shown that substantial changes in criminal behavior exert less influence in determining the number of offenders eventually imprisoned than commonly believed. This research indicates that localized decisions, and changes in the decisions made by judges, prosecutors, and corrections officials are the key ingredients in the recent upward movement of prison populations.(132)

In any event, any policy that changes the decision-making practices of the courts will have a substantial impact on prison resources and space. This suggests that critical attention must be focused on policy changes in the area of sentencing as a potential source of prison population problems. The construction of new prisons may represent a mistaken allocation of scarce fiscal resources as long as the true sources of overcrowding are not identified and addressed.

The sentencing reform in Maine was implemented at a time when prison populations were high and resources low. As discussed in Chapter 3, this was not a result of changes in the rate of incarceration, which has remained stable throughout the time frame of the study. Rather, the pre-reform population pressures on corrections were a result of the increase in the sheer volume of convictions. That is, while the rate of incarceration remained constant, the absolute number of confinements substantially increased. These early pre-reform problems of overcrowding may be tied to the reorganization of the courts and introduction of a full-time district attorney system which increased the efficiency of the system, together with the increased incidence of crime and more effective procedures of police detection and arrest.

As discussed in Chapter 4, the effect of introducing flat-time sentencing and abolishing parole was an overall increase in the length of confinement as measured by actual time served. This increase in incarceration length occurred for felony convictions. The pre-reform increase in the number of felony convictions continued throughout the period of study, along with the post-reform increase in the duration of confinement. The correctional system, already overcrowded, was ill-equipped and ill-prepared to deal with this unanticipated outcome. The analysis in this section will address the consequences of the abolition of parole and introduction of flat-time sentencing for prison overcrowding.

Prison populations are affected by changes in either the number of admissions or the length of confinement of those admissions. The combined effect of numbers admitted and their sentence length is the "load" on the correctional system. Load refers to the annual number of person-months to be served and reflects the additional resources required by the correctional

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(132) Joan Mullen, et al, American Prisons and Jails, 1980, p. 140.

system to confine inmates admitted in a given year. Since new admissions are added to an existing inmate population, changes in incoming numbers or sentence lengths have compound effects on the resources of a correctional system. The current intake load on a correctional system, as opposed to its current population, is the combination of annual admissions and their sentence lengths. As will be demonstrated in the analysis which follows, it was the combined impact of changes in "load" resulting from pre-reform increases in the number of admissions and post-reform increases in time served that had a profound impact that went largely unrecognized in the midst of the other policy changes occurring.

Figure 8.1 presents the number of annual admissions to state facilities from our sample for the time frame of the study. It shows that the number of offenders admitted steadily increased prior to the 1976 reform, and decreased after the reform to a level roughly comparable to 1973 and 1974. These changes cannot be attributed to the sentencing reform but are a result of previously discussed changes: the use of county jails, reorganization of courts, and the introduction of full-time prosecutors. Moreover, admissions have been somewhat constrained by the availability of bed space.

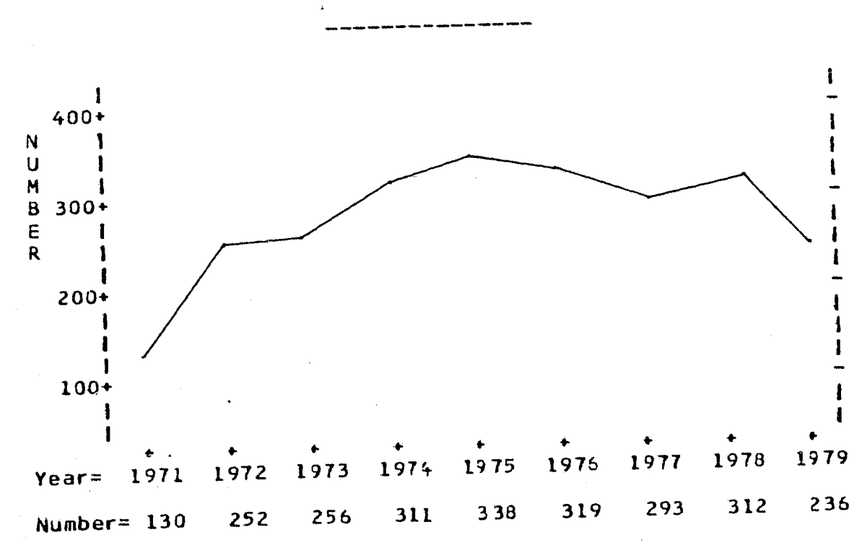

Figure 8.1: Number of Admissions to State Facilities by Year Sentenced

The incarceration length reported in Figure 8.2 show the opposite tendency. While the number of offenders steadily increased prior to the reform, actual time served decreased in 1972 and remained fairly constant until 1975. After the reform, incarceration length substantially increased. From 1971 through 1975, the average incarceration length was 13.9 months. From 1977 through 1979, the average incarceration length was 20.1 months--actual time served increased by over fifty percent.

The impact of this change in sentence length can scarcely be minimized. A comparision of median incarceration length concretely illustrates the problem of bed-space created by the increase in sentence length. The median is the mid-point--fifty percent of the offenders serve less and fifty percent serve more than the median. In each of the four years prior to the reform, 1972 through 1975, fifty percent of the inmates were paroled in nine months or less. Following the reform, median incarceration lengths ranged from 12 to 17 months. This means that in order to release half the inmate population requires an additional three to eight months. Concretely, the result is a substantial post-reform increase in the amount of time necessary to make space available for incoming inmates. In the post-reform period, a minimum of thirty to fifty percent more time is necessary to bring about the same turnover in bed space.

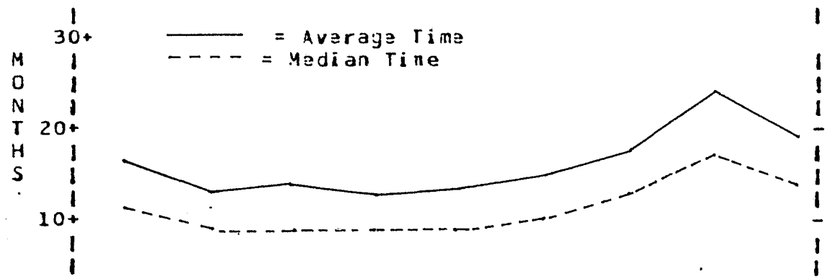

Figure 8.2: Average and Median Time Served by Year of Sentencing

Table 8.1 summarizes the findings presented in Figures 8.1 and 8.2 The transition year, 1976, is excluded. As shown, the overall mean incarceration length increased by more than six months and the median incarcerations length increased by five months following the reform. As measured by median incarceration length, fifty percent of the the inmates in the correctional facilities are serving fifty percent more time than their pre-reform counterparts.

TABLE 8.1

Summary of Changes in Incarceration Length and Admissions

	1971-75	1977-79	Change
Mean Incarceration Length (Months)	13.9	20.1	+6.2
Median Incarceration Length (Months)	9	14	+5
Average Number of Admissions per Year	269	280	+11
Average Intake Load per Year	3739	5628	+1889

However, focusing only on length and the time required to turnover a proportion of bed space understates the problem. The overall impact on corrections is the combination of numbers and length--the intake "load." This annual intake load from 1971 through 1979 is shown in figure 8.3 Essentially, Figure 8.3 shows the number of newly demanded person months to be served.

Overall, the load on correctional facilities has increased substantially since 1971. The effects of the pre-reform increase in the number of offenders admitted to correctional facilities is reflected in the increased load for the 1972-1975 period. The post-reform increase in incarceration length largely accounts for the substantial increase in load which peaked in 1978 with 7176 person-months to be served by admissions that year.

The decrease in 1979 is significant. Whether this is a system response to overcrowding is not known. However, it must be reiterated that the intake load has a compounded effect on bed space.

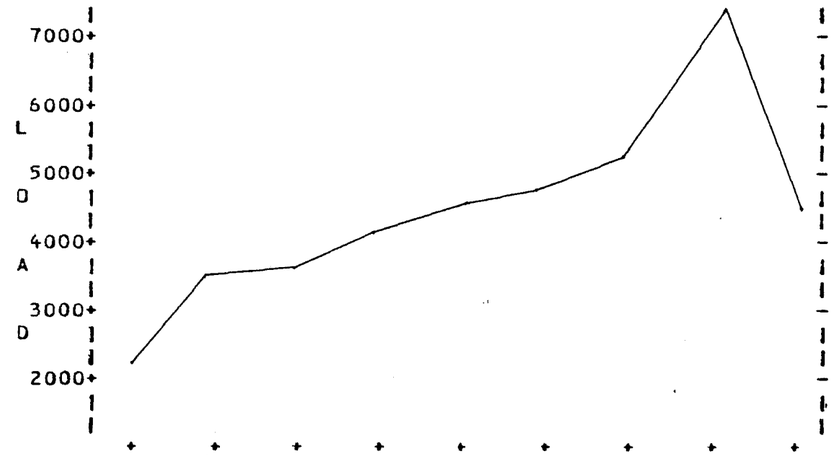

Figure 8.3: Correctional System Intake Load, 1971-1979

As summarized in Table 8.1, in the pre-reform period of 1973 to 1975, an average of 3739 person-months were to be served each year. The corresponding figure for the post-reform period of 1977 to 1979 is 5628 person-months, or a fifty percent increase. As of this writing, many of these person-months are yet to be served.

The load on Maine's correctional system has continued to increase. Since 1979, the number of admissions per year has risen. Although no data exist on the length of these sentences, there is also no indication that sentence length has decreased. Thus, the load on the correctional system continues to grow.

CONCLUSION

To be effective, a sentencing reform must address resources of the existing correctional system. Failure to do so is an invitation to undermine the objectives of the reform. In Maine, the potential impact of abolishing parole and introducing flat-time sentencing on correctional resources was not assessed. It was in this area that the reform was least sensitive and where the most profound unanticipated consequences occurred.

Corrections authorities operate within parameters of court decision making and processing. At a system level, they have no control over other agencies involved in sentencing decisions. Changes occurring in the processing of offenders by these agencies have direct impact on any correctional system by affecting population levels. Such changes result from either increases in the number of confinements or increases in the length of confinements, or both. In this jurisdiction both occurred. The number of confinements increased prior to the reform, and the increase in sentence length occurred after the reform was implemented. The combined effect has been to increase the load on the system, thereby taxing available prison resources and inviting a nullification of the objectives and goals of the reform itself.

A correctional system cannot effectively function when new policies remove its control over prison populations and institute no other controls, nor additional resources. The reform transferred control over population levels to the diffuse "front end" of the system--to courts and prosecutors--without any principles guiding the use of incarceration. Without principled sentencing and articulated criteria, it is difficult, if not impossible, to build a rational and humane prison system. (133)

Although judges and prosecutors may not be concerned with prison overcrowding, correctional authorities are compelled to be concerned. Maine's Department of Corrections is seeking fiscal resources for capital construction and added discretionary releasing authority through the reintroduction of parole. Should parole be reinstated, the goals of Maine's reform to increase the certainty of sentence length and centralize sentencing decisions in the courts will be undermined. Does this mean Maine's reform failed? Is some diffusion of sentencing power necessary for the criminal justice system to operate effectively? It is to these issues we now turn.

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(133) See Norval Morris, The Future of Imprisonment, 1974, for an extended discussion of this issue.

Chapter IX

CONCLUSION

OVERVIEW OF FINDINGS

In 1976, Maine abolished its parole board, introduced flat sentencing, graded most offenses into five catagories of seriousness, and redefined substantive offenses. Prior to these reforms, sentencing decisions about incarceration length were shared between the judiciary, which imposed minimum and maximum terms of confinement, and an executive agency, the parole board, which made actual release decisions. This diffused sentencing system embraced the rehabilitative ethic which had dominated penal policy since the turn of the century.

The abolition of the parole board and the introduction of flat sentencing was a major change. Along with Connecticut, Maine's reform was one of the most radical forms of parole abolition in the nation. The effect of this change on imprisonment and its implications for corrections are of crucial importance for states which have already redefined the role of parole, as well as for states which are contemplating similar reforms.

Maine's reform did not create "determinacy" as it is usually understood. It did, however, focus sentencing in the courts, develop increased certainty, and avoid oversimplification of crime seriousness. At the same time, the reform attempted to increase sentencing flexibility by expanding the options available to courts. In addition, the reorganization and redefinition of offenses, introduction of culpable "states of mind," and the introduction of seriousness categories attempted to increase structure and clarity.

Maine's revised criminal code was not intended to substantially change the use of incarceration, or the length of incarceration. However, by 1979, corrections officials reported overcrowded prison conditions which they attributed directly to the sentencing reform, and particularly to the abolition of parole. These overcrowded conditions were seen as a result of increased numbers of offenders incarcerated and longer sentence length--both attributed to the new code. In 1981, the perception of overcrowding led to a move, supported by corrections officials, to reinstate the parole board. This attempt failed in Maine's 110th Legislature.

The present research is primarily concerned with court decision-making and the changes in sentencing practices which resulted from the 1976 reform. Changes in sentence type, in incarceration length, and in the basis of both type and length decisions were examined utilizing data on Superior Court criminal convictions from 1971 through 1979. Overall, the analysis examined the impact of the sentencing reform, attempted to isolate this change from other reforms and historical changes on court decision making,and, in turn, on Maine's correctional system.

Maine's sentencing reform has not substantially changed the rate of incarceration. The proportion of those convicted receiving some form of incarceration has remained fairly constant at approximately 38 percent, although increased convictions in the courts has led to an increase in the absolute number of offenders incarcerated. Following the reform, there has been a steady increase in a particular type of incarceration sentence--"judicial parole" or split sentences--and a concomitant decrease of sentences of incarceration only. Thus, a functional equivalent to parole supervision has emerged but differs from the previous system as it is court controlled.

Although the proportion of offenders sentenced to incarceration has not increased, offenders sentenced after the reform are serving more time. Since parole was abolished, the average incarceration length has increased by more than five months, a fifty percent increase. This increase is not a result of either changes in the court's case load or in corrections decision- making; the increase is a direct result of changes in the sentencing system. This is a fundamental, direct, unanticipated and largely unwanted outcome.

The combined effect of the increase in sentence length and the increase in the number of offenders incarcerated has been to substantially increase the "load" on the correctional system in Maine. The sentencing reform has had a profound impact on existing problems of overcrowding in state facilities, and has compounded those problems. In addition, the sentencing reform has substantially altered the composition of the inmate population, particularly at the Maine Correctional Center, creating further difficulties for corrections.

Nevertheless, Maine's sentencing system successfully implemented one characteristic of determinacy--an overall increase in certainty. Although inmates and the public now know when they will be released at the time of sentencing, the change is meaningless to the advocates of sentencing reform, as there are no durational standards or guidelines to limit judicial discretion.

Neither the clarity nor the consistency of court decision-making about either type or length of sentence has substantially increased following reform. Changes in the types of sentence given offenders and changes in the length of incarceration apparently

do not reflect a systematic change in the characteristics used as a basis for sentencing or in the relative importance of these characteristics.

Overall, to summarize the research findings, the effect of the 1976 sentencing reform has been to change the type of incarceration sentences but not the overall rate of incarceration; to substantially increase incarceration length; to increase sentence length certainty; and, to increase the load on corrections facilities and overtax those facilities. Despite other consistent effects, the 1976 sentencing reform has not had a substantial impact on the basis for sentencing decisions or on the consistency of those decisions.

THE POLITICS OF REFORM

Reform is a difficult and frustrating enterprise. It is always imperfect; it always falls short of its promise, and sometimes even has unforseen consequences which subvert its intent.(134) Reformers encounter the intransigence of agencies when reforms are not compatible with organizational goals. Any new policy is subject to administrative delays, diversion and dissipation.(135)

Explanations of the failure of new policies are often framed in terms of this administrative intransigence or in terms of lack of resources for implimentation.

> The commonest explanations are in terms of shortages of resources-- staff, finance or buildings. Or alternatively, failure is explained in terms of the weakness of policies which were basically sound in conception but had technical failings, or which faltered in execution because of "administrative weaknesses."(136)

As appealing as such explainations are, partly because they tend to place "fault" in some administrative, bureaucratic limbo, they lack credibility when applied to the systematic failure of major policies to attain their central objectives. This is the

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(134) See, for instance, T. Blomberg, "Widening the Net: An Anomoly in the Evaluation of Diversion Programs."

(135) See, for instance, H.E. Freeman, "The Present State of Evaluation Research," 1977; Richard Elmore, "Organizational Models For Social Program Implementation," 1978; and Steven Vargo, Law and Society, 1981, pp 260ff for general discussions of implementation and recent social programs.

(136) V. George and P. Wilding, Ideology and Social Welfare, 1976, p. 117.

case with sentencing reform and the "move to determinacy." Despite a variety of strategies and institutional arrangements, not one state can be said to have achieved determinacy. Only Minnesota has even come close.

The challenge for reformers in the area of sentencing has been to develop a rational sentencing system, with clearly defined authority and a clearly articulated incarceration policy. Reformers as diverse as Andrew von Hirsch and David Fogel have called for clarity, consistency and justice.(137) They have little reason to be pleased about the new sentencing policies that have been adopted in Maine and elsewhere. But it is difficult to believe that this sytematic failure can be rectified by additional resources and institutional "tinkering."

Moral Panic and the Appropriation of Reform

Public policy reform takes place in a socio-political context, not just a bureaucratic one. In an area as sensitive as criminal sentencing and sanctioning, it would be foolhardy to try to understand the systematic failure of reform without examining the broader political and social context. Our examination leads us to suggest that the failure of sentencing reform in Maine, and elsewhere, was precipitated by a "moral panic" and, as a result, the reform was appropriated by the Right.

In Chapter Two, we discussed the context of Maine's reform and the changing agenda "forced" upon the reform Commission in the area of sentencing. This happened at a time when public concern about crime, criminals, parolees, parole release and the efficacy of parole supervision approached a level which can reasonably be characterized as "panic." This was an era of "safe streets," of "law and order," and of a Presidential campaign by both Nixon and Wallace, although epitomized by the rhetoric of Spiro Agnew, decrying the moral degeneracy of American society.

Stanley Cohen's analysis of a moral panic in Britain suggests that such panics are both "normal" and a force to be reckoned with. He summarizes the phenomenon as follows:

> Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by

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(137) Andrew von Hirsch, "Constructing Guidelines for Sentencing: The Crital Choice for the Minnesota Sentencing Guidelines Commission", 1982; and David Fogel, We Are the Living Proof, 1975.

> the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic is passed over and forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way society conceives of itself. (138)

Parole boards, and the liberal "coddling" better known as rehabilitation, became the target of a panicked citizenry. (139) This citizenry, and its vocal leadership, found unwitting allies in liberal critics of the rehabilitative ideal and the liberal proponents of determinate sentencing. For Maine's reform Commission, once the rehabilitative underpinnings of the first proposal collapsed, a "logically intolerable situation of conflict between the judiciary and parole board became a visible social issue calling for rationalization of the sentencing structure." The organizational response, in Maine as elsewhere, was to accommodate "ad hoc" interest groups in the area of sentencing. (140)

The Commission did not concede to the demand for mandatory sentences. It compromised with high maximum penalties and parole abolition. There was little or no concern about reducing the occasion for incarceration or reducing the duration of confinement. But the idea of focusing sentencing authority and discretion in the more visible court (guided by even more visible and elected prosecutors) worked extremely well. The outcomes have shown little to reflect the wishes of liberal reformers: use of incarceration has not decreased and incarceration sentences have become longer. These outcomes reflect the ideological demands of the vocal Right.

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(138) Stanley Cohen, Folk Devils and Moral Panics: The Creation of Mods and Rockers, 1972, p. 9.

(139) Although, as we have noted in our examination of certainty, the image of the parole board as releasing inmates as soon as they were eligible may have been a misperception.

(140) See Marvin Zalman, "The Distribution of Power in Sentencing," 1979.

The British penologist, A.E. Bottoms, has aptly summarized the process:

> Thus, the reform movement which sought to reduce uncertainties about incarceration and incarceration lengths has launched the potential for a new form of repression where "desert" is appropriated by the Right who have no difficulty with "deserved and equal" punishment but insist on long fixed sentences. (141)

Our discussions of the context of reform, the implementation, history and revisions of the reform, and the empirical impact of the reform all support Bottoms' observations. Looked at this way, Maine's reform is as much a product of the new right as of the old liberal left.

The Naivete of Determinacy

In retrospect, the changes that have occurred in sentencing statutes in numerous states can be seen as attempting to fulfill an unrealistic set of expectations. The promise was that formal equality in sentencing, with penalties proportionate to social harm, would reduce prison populations, reconstitute those populations, and transform the prison itself from a lawless to a lawful institution. In short, the reformers' promise was to create a system which was truly just.

It is clear that advocates of determinacy underestimated the potential for their reform ideas to be appropriated by those with quite different outcomes in mind. However, they also have failed to recognize that sentencing reform (and criminal justice reform in general) is inextricably tied to broader social issues.

The new reforms have not even made a marginal gesture toward the issues of social injustice and social inequality which were seen as a major rationale for reform by the American Friends Service Committee in Struggle for Justice:

> To the extent then, that equal justice is correlated with inequality of status, influence, and economic power, the construction of a just system of criminal justice is a contradiction in terms. Criminal justice is inextricably interwoven with, and largely derivative from a broader social justice. (142)

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(141) A. E. Bottoms, "The Coming Crisis in British Penology," 1978, p. 13.

(142) A.F.S.C., Struggle for Justice, 1977, p. 16.

This is not to say, of course, that advocates of sentencing reform have not been concerned with these issues. However, it should have been evident that the solution to social inequalities was not going to be found by the manipulation of legal punishments and that, in many respects, the liberal arguments for sentencing reform had come to resemble their more conservative counterparts. (143) In short, the new sentencing policies have not carefully confronted the question of what punishments are justifiable in a society full of social inequities and injustices. Thus, the achievement of formal equality in sentencing does not prevent them from having substantive consequences which are anything but equal and, in fact, may be repressive. For the systematic application of an equal scale of punishments to systematically unequal people tends to reinforce systemic inequalities. (144)

Failing to confront these critical issues and failing to confront the broader political agendas implicit in their reforms, liberal advocates of the "move to determinacy" have left themselves open to appropriation. (145)

"Safe Streets" in Maine and the Nation

During the 1970's, Maine's prison population increased and, following the reform, the sentence length for incarcerated offenders increased. Although there was some increase in sentence certainty for incarcerated offenders, the major result of the reform was that they were more certain to be incarcerated longer. We have argued that this general increase in severity of sentencing is expressive of the socio-political climate which has placed pressure on judges and prosecutors to "get tough on crime." In this sense, the reform successfully facilitated the general increase in severity by placing sentencing authority where it was more susceptible to public panic.

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(143) See Ronald Bayer, "Crime, Punishment, and the Decline of Liberal Optimism," 1981.

(144) Jock Young, "Left Idealism, Reformism and Beyond: From New Criminology to Marxism," 1979.

(145) It is to be noted that much of the reform agenda, in Maine and elsewhere, incorporates an ideology embracing utilitarian aims for punishing that emerged in the 19th century. It should also be noted that both the utilitarian ideal and the rehabilitative ideal emerged, at least in part, out of concerns about broader issues of social justice and progressive liberal concerns about prison conditions.

It would be misleading to suggest that this general trend toward increased severity was confined to Maine or a result of liberal sentencing reformers. The United States has been undergoing a significant increase in prison populations. In states which have adopted "determinate" sentencing, there is a tendency to "blame" the increases on the sentencing reforms, but the increases have occurred in in almost every jurisdiction, whether or not they have adopted reforms.

Examining data from the the neighboring states of Vermont, New Hampshire, and the entire northeast, we can see that the changes in Maine are not isolated. The overall incarceration rate (per 100,000 population) has increased in all the states and, consequently, prison populations have increased over the nine-year period from 1971 through 1979 (the last year for our data). Table 9.1 reports these data and reveals some interesting trends. First, Maine, New Hampshire, Vermont and the entire northeast increased their incarceration rate over the nine-year time frame. Second, the proportionate increase from 1971 to 1979 was the highest for Vermont, with a 84.9 percent increase followed by Maine, with a 57.4 percent increase.

TABLE 9.1

Incarceration Rates (per 100,000 population) In New England States, 1971-1979

	Rate per 100,000 civilian population (Dec. 31)								
State	1971	1972	1973	1974	1975	1976	1977	1978	1979
Maine	45.1	46.3	43.8	50.4	60	57	61	53	71
New Hampshire	28.0	30.8	34.6	27.1	31	30	26	32	35
Vermont	46.5	30.0	40.3	51.5	51	64	57	76	88
Total Northeast	56.4	56.8	60.4	63.4	70	73	77	82	90

Source: Sentenced prisoners in State and Federal instutitons on Dec. 31, by region and jurisdiction, in Flanagan, et al, Sourcebook of Criminal Statistics--1981, U.S. Department of Justice, 1982.

Looking at the changes in incarceration rates since 1976, the year of Maine's reform, we find that Vermont shows the greatest change, with a 34.4 percent increase in rate of incarceration. Maine is second, with a 24.6 percent increase, and New Hampshire third, with a 16.7 percent increase.

Although these data are difficult to interpret because they do not tell us about sentence length, it is clear that the trend toward increased sentence severity is not unique to Maine and is not linked to sentencing reform.

EVALUATING MAINE'S REFORM

What do these findings mean? Has Maine's sentencing reform been a "success" or a "failure?" These are extremely difficult questions to answer, since different commentators suggest different goals or ideals for reform and, hence, different criteria for evaluation. Participants in the change, and the authors of the new sentencing system, suggest that the only meaningful criteria are the goals of the reformers themselves. Others suggest that the goals of the national "move to determinacy" are critical, particularly insofar as such an evaluation would have implications for other jurisidictions. Finally, in a somewhat more mundane but equally important vein, others argue that any reform must ultimately be judged on its workability-- whether the reform results in a coherent and manageable system. All three evaluation modes are important for an overall assessment of Maine's reform. Nor are these three strategies distinct. For instance, reform goals may be modified by workability concerns, and often are undermined by them. Thus, any meaningful overall assessment must attend to all of these concerns, and the inter-relationships among them.

Commission Goals

In the end, the objectives of Maine's Criminal Code Commission were limited: 1) to increase the visibility of decision-making about the release of prisoners by abolishing the parole board; 2) to increase "certainty" of sentence length by firmly situating the regulation of incarceration length in the court at the time of sentencing by requiring judges to impose flat, non-parolable sentences of incarceration; and, 3) to ensure that the system is flexible.

As judged by the objectives of the Commission, the reform was at best a qualified success. Compared to the indeterminate system it replaced, the new legislation has resulted in more visible and certain sentences. As discussed in Chapter Seven, the "certainty" of sentences has increased. However, serious questions

must be raised as to whether the other objectives of the Commission have been met.

The Commission's attempt to integrate various agencies by introducing flexible "checks and balances" has not met with success. The "split sentence" or "judicial parole" component has been changed and limited by the legislature. The community transfer provisions and the resentencing provisions, intended to increase flexibility as well as to serve as a "check" on sentencing, have not worked.

The sentencing policy as implemented in 1976 authorized corrections authorities to petition the judge for resentencing and authorized corrections to transfer inmates to community-based programs. The original authority to petition for resentencing has been declared unconstitutional and is not operant. The authority of corrections to transfer inmates remains, but it has been seen by corrections officials as undermining legislative intent. Consequently, transfer authority has been used very little.

In short, an overall evaluation of the Commission's goals suggests that it failed. The Commission sought to develop an integrated sentencing system with checks and balances as a context for certainty of sentence length. This has not been accomplished. Court decisions and policies adopted by corrections regarding community transfers have had the indirect outcome of undermining these goals. (146)

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(146) Of course, appellate review of sentencing remains a part of the checks and balances, but this review process, always limited, has been further eroded. As discussed in Chapter Two, the scope of principles developed by the appeals court is limited. Refining principles for minor infractions seldomly occur, as no opportunity exists for the Appellate Court to deal with the critical distinction between non-custodial penalties, such as probation, and custodial penalties. The Appellate Court does have the opportunity to develop principles of sentencing determining the duration of confinement, but it is mostly limited to those appeals concerned with severe sentences, not lenient ones. Consequently, the Appellate Court is not adequate to meaningfully check the discretion of the sentencing judge.

National Goals

Evaluating the "success" of Maine's reform necessarily involves value choices. The preceding discussion treated the need for more clarity and consistency in sentencing decisions as an important goal. This may not be the most important criterion of success for a goal in this jurisdiction.

Maine and Connecticut are the only jurisdictions to date to have abolished the parole board and concomittantly vested virtually all sentencing power in the courts. This unique innovation was not accompanied by any attempt to regulate case decisions of the court. In both states, the decision as to whether to incarcerate and for how long are matters left entirely to the discretion of the sentencing judge. With no standards or explicit policies to make either of these two sentencing decisions, one could not expect the new system adopted in Maine to result in more predictable sentencing outcomes than the system it replaced. It is this issue which is central to the criticism of Maine's new legislation by advocates of determinate sentencing.

Essentially, our examination of changes in the basis of sentencing in Chapter Seven neither supports nor refutes the contention of advocates of determinate sentencing that Maine's new sentencing system has built-in disparity. However, it is clear that the operant policy of the court is not one that addresses disparity in any meaningful way. This is reflected by great variation in the factors which effect sentencing decisions.

If the legislative goal was to require the courts to punish people for what they have done (offense and offense seriousness only), some basic policy changes are required. For instance, the number of offense classes could be increased, with a narrower range of penalties for each class. Under the present system, some offenders convicted of Class A burglaries have been given probationary sentences while others have been given the maximum allowable sentence--240 months of imprisonment. This same range of choices is available, and has been imposed, for Class A rape convictions. A refinement of both the number of offense classes and available sentences would further increase the clarity and consistency of court decisions.

Workability

The final basis for assessing Maine's reform is the strategic question of whether the new system works. Has the reform resulted in an administratively workable system? As Ohlin and Remington point out, the adminstration of criminal justice is a single

process with a common objective of processing offenders. (147) Changing one aspect of the system has systematic impacts on others, requiring reorganization of the entire system. Here, the basic question is whether Maine's new system accommodated those needs and avoided distortion and unanticipated outcomes.

The basic finding is that the new system has not met with the success intended. The underlying reason for the lack of success is the increase in sentence length. Maine's reform as implemented has resulted in prison overcrowding because sentence length has sharply increased. The abolition of parole release resolved the basic conflict of function and authority between the parole board and the judiciary, but this change in sentencing power also impacted on the control and influence of the correctional system over population sizes at the two state correctional facilities. Corrections officials lack any legitimate mechanism to control the size of their prison population.

The abolition of parole and the changes in good time crediting have made it increasingly difficult for corrections to deal with these problems. Prison management requires some control over allocation of resources, size and composition of prison populations, and internal discipline. The release of inmates through the parole mechanism facilitates the maintenance of prison discipline, provides a lid for overcrowded conditions, and creates an opportunity for corrections' input into release decisions while diminishing their responsibility for those decisions. AS a result, it is easy to understand why the Maine Department of Corrections vigorously campaigned, albeit unsuccessfully, for the reintroduction of parole.

The new corrections facility at Charleston is largely a testimony to the unintended consequences of the 1976 sentencing reform. This is not to say the reform is the cause of Maine's overcrowded conditions. As indicated in previous chapters, those conditions would have emerged even if no change in sentencing had occurred. However, reform certainly contributed to and aggravated overcrowding, while limiting the solutions available to corrections.

Thus, it does not appear that Maine's reform has resulted in a more workable system. The focus of administrative problems is the correctional system, which has apparently not been able to effectively deal with the consequences of the 1976 reforms.

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(147) L. Ohlin and F. Remington. "Sentencing and Its Effect on the System of the Administration of Justice," Law and Contemporary Problems 23, 1959.

POLICY IMPLICATIONS

Maine's new Department of Corrections is at a crossroads. Policy decisions made in the near future will affect the overall justice of the system and will either succeed or fail to address the overall rationality and coherence of the sentencing system.

A recent analysis of American prisons and jails indicates that the most important issues to be faced by corrections in the decade of the 1980's are a result of overcrowding.(148) Maine is no exception; it has not escaped the problem. What is needed is a clear and practical discussion of the policy options available and their practical consequences.

Mullen, et al, suggest that three broad policy alternatives are available to deal with current overcrowding problems in corrections:

1. Expand the supply of prison space;

2. Reduce demand for prison space through diversion programs;

3. Regulate demand for prison space through regulatory action requiring explicit policies to control both intake and release.(149)

The first alternative is the only one which deals with supply of space. The others focus attention on system policies which affect demand, such as use of alternatives to incarceration, sentencing guidelines and parole release.

In Maine, thus far, the alternative pursued has been the first--increasing the supply of prison space. The Department of Corrections has opened a new facility, a converted Air Force base with virtually unlimited potential bed space. The creation of more space, a "bricks and mortar response," essentially accomodates current judicial sentencing practices. It increases expenditures without reducing demand, and is therefore not cost effective. It would be difficult to argue that no expansion of facilities is necessary. But, expanded facilities cannot "solve" the problem. In fact, expansion may compound the problems by increasing demand.

There is some indication that increased space creates increased demand, through something akin to a Parkinson's Law : prison populations expand to fill the space available. This

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(148) From Joan Mullen, et al. American Prisons and Jails-Volume 1: Summary Findings and Policy Implications of a National Survey, 1980, p. 115.

(149) Ibid, p. 115, esp.

means that a decision to expand facilities is, in effect, a decision to add more prisoners. William Nagel, a national expert on corrections, argues that the availability of additional prison space is responsible for increasing the number of persons confined, despite the lack of clear evidence of any deterrent or rehabilitative effect.(150) This view is largely supported by Mullen et al.(151) Essentially, their argument is that judges feel constrained by lack of incarceration space, the anguished cries of corrections officials, and concern about the adverse effects of overcrowded prisons on offender recidivism. This, in turn, results in demands for increased space, and especially new "quality" space, which will be filled as soon as judges no longer feel constrained.

This vicious circle, with increased supply increasing demand, appears directly relevant to Maine. At least since 1975, corrections officials have repeatedly requested that the judiciary limit the use of incarceration, and litigation by inmates in Federal Court has called into question the quality of available space at the prison. Court admissions to Maine's correctional facilities increased through 1979. Recently, the trend of increased admissions has escalated, possibly as a result of a judicial perception of increased overall space.

In any event, the creation of more prison space only addresses the "end" or "result" of increased demand, not the source. Effective measures to control demand are necessary either as an alternative or as a supplement to expanding correctional facilities.

The basic issue to be resolved in choosing which policy or policies to pursue is which decision-making body or agency should be empowered to make "real" sentencing decisions: a parole board, corrections officials, or the judiciary. In other words, "Are real sentencing decisions properly a judicial or executive function?" Once this political issue is resolved, a sound and rational sentencing policy can be implemented.

The reintroduction of parole would be an effective device for managing prison population levels. If the parole board were required to adopt explicit guidelines defining the bases for making release decisions, it could increase the consistency of the sentence length imposed by Maine's judiciary. In essence, this approach creates a sentencing review board.

There are four disadvantages to the reintroduction of parole:

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(150) William Nagel, The New Red Barn: A Critical Look at the Modern American Prison, 1973.

(151) Mullen et al, 1980.

1. A parole board cannot ensure that all sentencing decisions are equitable. Its decisions would only increase the equity of sentences for those who are incarcerated (this critical question would be left to the trial court).

2. This approach could undermine the goals of both the national move to determinacy and the goals of the drafters of Maine's reform by reducing the certainty of sentences.

3. To the extent that release decisions would necessarily be predicated on inmate behavior while in prison, sentence length would not be based solely on the offender's crime.

4. Moving actual sentencing authority from the courts to the parole board would undermine the intent of the reform, which was to firmly locate sentencing authority in the judiciary.

Increasing the authority of corrections officials to transfer inmates to community-based programs would have the same advantage and disadvantages. Thus, both parole reintroduction and the increased use of transfers would assist in dealing with prison overcrowding, but their common disadvantage is that they deal with the symptoms rather than the sources of overcrowding. The source of overcrowding and the source of inconsistencies lies in the sentencing practices of the courts.

Pursuing policy options focused on changing the court's sentencing practices has the advantage of extending the 1976 reform rather than reversing it. Unlike reform in some other states, Maine's reform was not aimed at reducing variations in sentencing. Nor was much attention paid to limiting and focusing the use of incarceration. However, addressing these issues is compatible with the 1976 reform and would solve many current problems.

Structuring sentencing decisions so as to improve equity and fairness, as well as regulating intake into the correctional system would require:

1. The development of a coherent philosophy of punishment from which standards could be established;

2. The development of sentencing guidelines, either by judges themselves, by a sentencing commission or by the legislature; and,

3. The effective implementation of these guidelines.

The development of sentencing guidelines would reduce, though not eliminate, the individual discretion of judges and would increase consistency among judges in sentencing all offenders. At the same time, guidelines would retain the visibility, early time fix, and court focused sentencing effected by the 1976 reform.

Of course, sentencing guidelines would not necessarily alleviate, or even palliate, overcrowding. It is necessary for standards and guidelines to treat imprisonment as the use of a scarce and valuable resource. One possible model is the Minnesota guideline system, which directly addresses, structures and limits the use of incarceration.

The major policy suggested is to extend the reform. The 1976 sentencing reform could be extended by introducing a coherent philosophy for making sentencing decisions and by developing guidelines based on that philosophy to increase the consistency of sentencing decisions made by a diverse judiciary. The five ranks of offense seriousness could be extended and clarified. Such a system would increase consistency among judges in making sentecing decisions, and retain the visibility, certainty, and court-focused sentencing power implemented by the 1976 reform. The result of this alternative would be that Maine, the pioneer state in sentencing reform, would become the first state to fully implement a complete determinate sentencing system.

The future direction of Maine's criminal justice system depends on present policy decisions. In this sense, Maine is at the crossroads of justice, making decisions which will shape the future contours of justice in the state.

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