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From the Field:
"BAD TIME": THE RISE AND FALL OF PENAL POLICY IN OHIO

By: Jefferson E. Holcomb, Marian R. Williams

Abstract:

Correctional administrators have traditionally had a number of disciplinary tools at their discretion to maintain institutional control. Following the virtual elimination parole and good time credits, the State of Ohio created a unique penal policy to strengthen prison authorities' ability to respond to prison violations. This paper reviews the passage of the bad time statute and its eventual demise at the hands of the state's Supreme Court. The study illustrates how correctional discretion is often manipulated to serve perceived political and institutional needs and the consequences of altering that discretion.

Perhaps the most familiar story to scholars in the field of American corrections is the tremendous change in sentencing systems and policies throughout the United States over the previous 25 years (see Reitz, 1998; Petersilia, 1999; Clear, 1994; Tonry, 1999a, b; Walker, 1993). In general, these changes have been described as a shift away from rehabilitation-oriented indeterminate sentencing systems to policies emphasizing determinate, mandatory, or structured sentencing. Furthermore, these changes are thought to be one aspect of a larger movement among criminal justice systems to create and implement more punitive and retributive strategies in dealing with problems of crime and deviance (Beckett, 1997; Clear, 1994; Donziger, 1996; Irwin and Austin, 1994; Walker, 2001). The State of Ohio has generally followed this trend by creating lenmer sentences, dramatically increasing prison construction, and limiting discretionary avenues that had previously been used to reduce prison sentences (see Holcomb, 2000; "Sentencing Overhaul is Responsibly Tough", 1994). The following article examines how the social context in which new legislation was passed resulted in a particularly unique penal statute. While the law was eventually ruled unconstitutional, the rise and fall of "bad time" in Ohio's correctional system is a story of how social and political circumstances impact legislative action and the consequences of altering correctional discretion.

This study is not an empirical review of the use of correctional discretion in Ohio or the effectiveness of the bad time statutes. Instead, the article follows a tradition of research that explores how criminal justice discretion is changed, the social context of such changes, and the consequences of altering correctional discretion. The article begins with a discussion of the types and functions of good time within correctional institutions and a description of Ohio's good time policies prior to major legislative changes, particularly Senate Bill 2.[1] Senate Bill 2 became effective in 1996 and represented a major overhaul of Ohio's felony sentencing laws. Consistent with national changes in criminal justice policy, Senate Bill 2 emphasized punitive responses to crime such as increasing the time served for the majority of offenses, mandatory penalties, and hting judicial and correctional authority to reduce sentence length. Next, the Lucasville prison riot is discussed and its relationship to Ohio's overhaul of its sentencing model and penal policy is examined. A description of the new sentencing laws is followed by an analysis of the bad time provisions of the new legislation and the Ohio Supreme Court ruling on the constitutionality of that policy. The paper concludes by analyzing the role of bad time as a form of correctional discretion to enforce discipline violations. It is argued that bad time is another example of how changes to correctional discretion create the need for "creative" solutions for perceived political and organizational problems.

Good Time

While the development and contemporary use of parole is well documented (e.g. Bottomley, 1990; Walker, 1993), the issue of good time has generally not received the same attention as parole in the academic literature (for exceptions see Chayet, 1997; Jacobs, 1982; Parisi and Zillo, 1983). Generally, good time refers to those policies designed to reduce a prisoner's sentence upon some assessment of their behavior while incarcerated. Good time decisions are distinct from parole in that parole is a form of discretionary reZease while good time credits are usually reductions in the length of an inmate's incarceration or in the time the inmate must serve before becoming eligible for parole.[2] Good time policies may exist in jurisdictions that also use indeterminate sentences (such as pre-Senate Bill 2 Ohio), creating an environment in which offenders may have their actual length of incarceration affected by discretionary parole release and good time decisions (Chayet, 1997; Jacobs, 1982).

As examples of what Walker (1993) describes as "downstream" decisions in the criminal justice process, the discretionary release of inmates on parole and awarding of good time credits have the potential to greatly unpact the length of an inmate's actual incarceration[3] While proponents have historically touted good time's potential for improving prisoner rehabilitation and productivity, as Jacobs (1982: at note 8) noted, "[w]hatever its origins, good time became popular in the United States because of its presumed disciplinary value" (see also Chayet, 1997). Thus, similar to parole, good time has historically been used as a mechanism to maintain prison discipline and to control the size of the prison population (Walker, 1993; see also Bottomley, 1990; Chayet, 1997; Clear, Hewitt, and Reglio, 1978; Jacobs, 1982).

Correctional administrators have traditionally used several different types of good time credits. "Statutory/administrative good time" is an "automatic" reduction in an inmate's incarceration that can be taken away for misbehavior. Such a credit system is often found in jurisdictions with overcrowding problems and may be used to reduce time to parole eligibility or in jurisdictions with a determinate-type sentencing model where good time is used to control inmate behavior and overcrowding (e.g. Clear et al. 1978; Bales and Dees, 1992). "Earned credit" is granted for productive or successful participation in approved program and activities. Finally, "meritorious credit" is typically granted only for an exceptional act on the part of the inmate that protects a person or property from harm (Jacobs, 1982; Chayet, 1997):[4]

Good time in Ohio

Prior to major changes associated with Senate Bill 2, Ohio utilized several types of good time credits and allowed for considerable diminution of the actual time prisoners were incarcerated. Under then existing laws, inmates could potentially receive up to a combined total of a one-third reduction in either their determinate sentence length or to the minimum length necessary for parole eligibility from the various types of credits (O.R.C. 2967.19 and 2967.193 [1987]; O.R.C. 2967.19, 2967.192, and 2967.193 [1994]). First, eligible inmates were "entitled to a deduction from his minimum or definite sentence of thirty per cent of the sentence, prorated for each month of the sentence during which he faithfully has observed the rules of institution" (O.R.C. 2967.19 [a], 1994). This statutory reduction was distinct from the two days per month of "earned credit" that inmates were eligible to receive for "productively" participating in either academic or vocational education, prison industries, or alcohol and drug abuse rehabilitation (O.R.C. 2967.193 [A][13, 1994). In addition, inmates "earned" three days of credit for "each full month during which the prisoner remains at minimum security status" (2967.193 [A][2], 1994). Finally, the director of the director of the Department of Rehabilitation and Correction had the discretion to award up to one hundred and twenty days of credit for meritorious credit involved in the protection of persons or property while incarcerated (ORC 2967.193 [B]). As a result, Ohio correctional administrators had a variety of mechanisms to dramatically reduce the amount of time inmates had to serve before becoming parole eligible or in reducing the length of their determinate incarceration. Given the continuous problem of prison overcrowding (see Reichert, 1983; Holcomb, 2000) these mechanisms were a useful, if not necessary, tool in maintaining some degree of control on the prison population.

LUCASVILLE AND SENATE BILL 2

Prior to the passage of Senate Bill 2, Ohio had an unusual mixture of both indeterminate and determinate sentencing laws for felony offenders. Depending on the type of offense and when the offense was committed, inmates could be held under either indeterminate or determinate sentences. With a few notable exceptions such as those serving a shock incarceration sentence or on electronically monitored release (Ohio Revised Code [O.R.C.] 2967.19[F], 1994) and those required to serve full sentences (e.g. 10 full years) prior to parole eligibility (ORC 2967.193[E][2], 1994), nearly all inmates were eligible to receive good time credit that could result in considerable reductions in their length of incarceration.

To understand why Ohio policy makers altered the ability of correctional officials to affect sentence length, it is important to know the context in which those decisions were made. Beginning in the early 1980% Ohio began passing a number of criminal justice reforms and statutes that reflected an increasingly "tough on crime" approach to crime and criminal offenders. As a result, prison construction increased and Ohio experienced a fourfold increase in the incarceration rate between the 1970s and 1996 (Holcomb, 2000). By the early 1990s, Ohio sentencing laws were a complex mixture of indeterminate and determinate statutes and the correctional system was continuously over capacity (see generally, Ohio Department of Rehabilitation and Correction Annual Report [O.D.R.C.], especially years 1990-1994). These circumstances created a situation in which Ohio was ripe for major changes to its sentencing

laws but lacked the spark often necessary to generate sufficient political and public support needed for such efforts to be successful.

The event that appears to have been central to the passage of Senate Bill 2 began on Easter Sunday in 1993, when prisoners at Ohio's highest security correctional institution, the Southern Ohio Correctional Facility in Lucasville, took control of a prison block and several hostages. The riot lasted eleven days and claimed the lives of one correctional officer and nine inmates (Wilkinson and Strickrath, 1997; Wilkinson, 1993). Eventually, forty-seven inmates were convicted for offenses committed during the riots and five received the death penalty for their actions (O.D.R.C., 1994). The extended duration of the riot and the considerable property and human loss resulted in extensive media coverage and publicity. These factors, combined with the psychological impact of the riot occurring at the state's highest security facility, intensified legislative and departmental policy responses after the riot was contained (see Wilkinson, 1994). Included in this response was an increase in staff and prison bed construction (O.D.R.C., 1993). There were also criticisms of existing sentencing laws and the perceived leniency of parole and good time credit policies (Hannah Report, 1994).

Less than a year after the Lucasville riot, there were several competing crime bills proposed in the Ohio legislature (Hannah Report, 1994). A common feature of these proposals was the emphasis on more punitive responses to crime and changes in judicial and correctional discretion that affect offender sentences (Hannah Report, 1994). Eventually, the Ohio Criminal Sentencing Commission was asked to make policy recommendations for new felony sentencing laws and to develop a plan that considered "public safety, proportionality, uniformity, fairness, certainty, judicial discretion, prison and jail crowding, cost-effectiveness, and simplicity" (Ohio Criminal Sentencing Commission [O.C.S.C.], 1996: 3). The Commission's recommendations were largely incorporated into the final version of the new sentencing laws that were passed in 1995. After several minor revisions, Senate Bill 2, Ohio's new felony sentencing laws, became effective in July 1997 (O.C.S.C., 1996). While it is likely that there were other influential factors in the development of Senate Bill 2, the nature of the changes to the criminal law, the increased severity in sentence length, and changes to judicial and correctional discretion suggest that Lucasville was more than a spurious event in efforts to change Ohio's criminal statutes.

To reflect a "truth-in-sentencing" model, Senate Bill 2 incorporated determinate sentencing for all felony offenders except those sentenced to life sentences with parole eligibility (O.C.S.C., 1996). According to Senate Bill 2, the overriding purpose of sentencing that should guide a judge's decision concerning the specific sentence are 'punishing the offender and protecting the public from future crimes by the offender" (O.R.C. 2929.1 1 [A]; emphasis added). With this goal in mind, lawmakers crafted legislation directed primarily at increasing the severity of punishments, particularly for violent and felony drug offenses, and curtailed the ability of criminal justice actors to use their discretion to reduce the severity of a given punishment. Specifically, the creation of mandatory sentencing provisions, the elimination of parole for nearly all offenders, and reductions in availability of good time were designed to add a degree of certainty and structure to sentences served by offenders (O.C.S.C., 1996).

Senate Bill 2 greatly reduced the availability of good time credits by eliminating automatic or statutory credits as well as meritorious good time. Inmates under indeterminate life sentences are no longer eligible for earned credit reductions even after they become parole eligible (O.R.C. 2967.13). Those sentenced to prison with sentence enhancements are also generally not eligible for earned credit reduction (O.R.C. 2929.14) and inmates who are eligible can

receive a maximum of one day of credit for each full month of productive participation in approved programs (O.R.C. 2967.193). This was a dramatic reduction compared to the previous policies that could result in a sentence reduction of up to one-third of their total sentence exclusively through the use of various good time options.

BAD-TIME PROVISIONS

A consequence of the combination of eliminating parole for most offenders and virtually eliminating the use of good time was that Ohio correctional administrators felt they were left with relatively weak mechanisms to maintain prison discipline. Given the recent prison riot, correctional officials and policy makers wanted sufficient tools to maintain institutional control. Politically, correctional administrators believed they needed a mechanism to influence inmate behavior without resorting to the historical (and perceived "liberal") practice of reducing prison sentence in exchange for positive behavior.[5]

The policy known as "bad time" (O.R.C. 2967.1 1 , 1996) passed within Senate Bill 2 gave correctional officials the authority to extend prison sentences for inmates found guilty of violating criminal statutes while incarcerated without referring the matter to a criminal court. Rather than rewarding inmates for good behavior by reducing their length of stay, correctional officials were granted the authority to investigate, prosecute, and sentence inmates to additional prison time for criminal behaviors committed while incarcerated. Specifically, bad time allowed the Oh0 Parole Board the authority to "punish a violation committed by the prisoner by extending the prisoner's stated prison term for a period of 15, 30, 60, or 90 days" (O.R.C. 2967.11Pl). A violation is defined as any criminal offense under Ohio or federal law regardless of whether the prisoner is criminally prosecuted for the offense (ORC 2967.11[A]). This policy did not preclude the Department from also referring the matter to local prosecutors or handling the offense by other disciplinary actions used by the institution (ORC 2967.11[G]). For rule violations that do not involve criminal violations, corrections1 administrators could continue to rely on traditional disciplinary actions such as denying privileges, requiring treatment or counseling services, changing the inmate's classification status, moving the inmate to another institution, segregation or solitary confinement, and denying an inmate any earned credits for a given period of time (Ohio Administrative Code [O.A.C.] 5120-9-07[E] and [K], 1999). Prison officials were not required to seek bad time extensions and continued to have the discretion to use other disciplinary responses to criminal violations instead of referring the matter for criminal prosecution or seeking bad time extensions.

Per statute (O.R.C. 2976.11[C]), each institution was required to establish a rule infraction board (R.I.B.). After a violation allegedly occurred, a designated investigating staff member was to submit a report to the R.I.B., which held a meeting to evaluate the evidence. The accused prisoner had the right to testify and be assisted by a member of the institutional staff to present a defense. The R.I.B. was required to submit a report to the warden or head of the institution with ten days of the hearing and if the RIB found "any evidence of a violation" (O.R.C. 2967.illCl) it was to recommend a specific sentence extension as part of its report.[6]

The warden reviewed the R.I.B. report and determined whether there was clear and convincing evidence that the prisoner committed the violation. If the warden agreed that the prisoner committed the violation and recommends a sentence extension, the warden submitted a report

to the parole board with his or her recommendation. The parole board was then required to review the warden's report and determine whether the evidence existed by a clear and convincing standard that the prisoner committed the violation and if so what the sentence extension should be: 15,30, 60, or 90 days. Prisoners could have their original sentence extended up to an additional one-half of their original sentence length for all violations (O.R.C. 2967.11 [C], [D], and [El). If the violation occurred within sixty days of the end of a prisoner's stated prison term, the institution had the authority to hold the prisoner for an additional ten days to allow for an investigation of the incident (O.R.C. 2967.1 l[F]).

BAD TIME CHALLENGED

Given the dramatic changes initiated by the bad time policy and the consequences of those changes for prisoners, it was inevitable that the policy would be challenged in the courts. A number of appellate courts heard challenges to the bad time provision in 1997 and 1998 and most of those courts felt that the constitutionality of the provision at that time was not ready for review. State v. Spikes (1997), involved inmate Terrell Spikes who had been sentenced to a sixth-month prison term for failure to comply with an order or signal of a police officer. Upon being sentenced, the trial court informed the defendant that bad time could be imposed by the Parole Board for criminal violations that were committed while in prison under Ohio Revised Code. On appeal, Spikes challenged the constitutionality of the provision on due process, double jeopardy, separation of powers, and equal protection grounds. An Ohio court of appeals rejected Spikes' appeal on two grounds. First, the appeals court ruled that Spikes lacked standing to challenge the statute. Because Spikes had not yet been given a bad time sentence (he only had the potential to be subjected to the penalty), the court ruled that Spikes could not challenge the provision. Second, the appeals court ruled that the constitutional issues raised by Spikes were not "ripe for review." The court noted that, "...it is...well established that constitutional questions are not ripe for review until the necessity for a decision arises on the record before the court" (4, see Christensen v. Bd. of Commissioners on Grievances and Discipline [1991]). In effect, until an inmate had been charged, an incident investigated, and a hearing undertaken, the issue of constitutionality of the provision was not ready for consideration. Several challenges to the bad time provision were initiated by defendants in situations similar to Spikes. In State v. Davis (1997), State v. Reeves (1998), and State v. Kutnur (1999) the courts of appeal reaffirmed the Spikes decision, declaring that inmates who have not been subject to bad-time provisions lack standing to challenge the constitutionality of the bad time provision.

In 1999, three cases came before the Ohio Supreme Court that effectively challenged the bad time provision. Consolidated into State ex rel. Bray v. Russell (2000), these cases involved inmates who had been assessed a bad time penalty in prison. The first case involved Gary Bray, who was convicted of drug possession in 1997 and sentenced to 8 months in prison. Before his scheduled release date, Bray assaulted a prison guard and the Ohio Parole Board issued a 90-day bad time penalty that began after Bray's original sentence expired, Bray filed a writ of habeas corpus to an Ohio court of appeals claiming violations of due process, equal protection, and separation of powers. The court of appeals rejected Bray's constitutional challenges and Bray appealed to the Ohio Supreme Court. The second case involved Samuel White, who was convicted of receiving stolen property in 1997 and sentenced to a 16-month

prison term. While incarcerated, White committed an assault and was given a 30-day bad time penalty. He committed a second assault several months later and was assessed a 90-day bad time penalty. In February 1999, White filed a writ of habeas corpus with the court of appeals, which ruled that bad time was unconstitutional because it violated due process and separation of powers. The state of Ohio appealed the White ruling to the Ohio Supreme Court. The third case involved Richard Haddad, who committed an assault in prison and was assessed a 90-day bad time penalty. In February 1999, Haddad filed a writ of habeas corpus in the Ohio Supreme Court. In these cases, the Ohio Supreme Court was forced to address contradictory rulings from two separate courts of appeal and another appeal filed directly with the Supreme Court. The court was asked to rule on the constitutionality of bad time with regard to due process, equal protection, and separation of powers. What was different about these cases, however, was that the prisoners involved had actually been subject to bad time extensions and, according to the rationale in Spikes, their cases were "ripe for review."

On June 14, 2000, the "bad time" provision of the Ohio sentencing laws (O.R.C. 2967.1 1) was ruled unconstitutional in a 5-2 decision by the Ohio Supreme Court in State ex rel. Bray v. Russell (2000). While the majority opinion reaffirmed the authority of the executive branch (via the correctional department) to exercise prison discipline, the court considered bad time a clear violation of the separation of powers doctrine embedded in the Ohio Constitution. Justice Pfeifer noted that bad time enabled, the executive branch to prosecute an inmate for a crime, to determine whether a crime has been committed, and to impose a sentence for that crime. This is no less than the executive branch's acting as judge, prosecutor, and jury. R.C. 2967.1 1 intrudes well beyond the defined role of the executive branch as set forth in our Constitution (State ex rel.Bray v. Russell, 2000).

Interestingly, by focusing on a separation of powers argument, the court did not need to address more technical questions involving due process and equal protection concerns with the statute.[7] In dissent, Justice Cook reflected on Wolff v. McDonnell (1974), which stated that "prison disciplinary proceedings are not part of a criminal prosecution" (Cook in dissent, State ex rel. Bray V. Russell, 2000). Justice Cook agreed with the state's contention that because the sentencing judge is required to notify the defendant at sentencing that bad time extensions could be imposed for prison violations, that any extension of the stated prison term was merely part of the offender's original sentence. In such a situation, the parole board would merely be implementing a judicially imposed sentence and not engaging in actions that are beyond the scope of its power. The majority was not persuaded by this argument and ruled that despite the state's attempt to define bad time as part of the original sentence, granting correctional personnel the authority to investigate, try, and punish inmates for new criminal offenses extended beyond the executive branch's power as conceived in the Ohio Constitution.[8] The court ruling mandates that until new legislation is passed, institutions will be required to either refer violations to local prosecutors or use traditional institutional disciplinary mechanisms ("Prison 'bad time' was bad idea", 2000). To date, the state has yet to pass new legislation addressing the issue of bad time and appears to be analyzing various options before submitting them as formal proposals.[9]

DISCUSSION

Previous research (e.g. Chayet, 1997; Clear et al., 1978; Goodstein and Hepburn, 1985; Griset, 1994; Holcomb, 2000; Walker, 1993) has reported that jurisdictions have often used a number of administrative and procedural tools to circumvent substantive changes to their sentencing system and the problems such changes create. For example, Clear et al. (1978) found that when Indiana eliminated parole, correctional administrators increasingly relied on good time for maintaining discipline within institutions. Scholars have noted that in a determinate sentencing system, good time could become an increasingly important disciplinary tool due to the elimination of parole as a motivator for good conduct (Clear et al., 1978; Morris, 1974; Parisi and Zillo, 1983). However, Ohio's simultaneous abolition of parole and dramatic reductions in available good time resulted in real changes to correctional administrators' ability to affect the len@ of an inmate's incarceration. Recognizing the consequences of this change, representatives of the corrections department worked with the Ohio Criminal Sentencing Commission (O.D.R.C., 1994) to ensure that they had the means to "maintain order in prisons," which is specifically why bad time was created (O.C.S.C.. 1996 3).[10] Thus, the necessity of a %ad time" provision appears to have been primarily due to the perceived consequences of Senate Bill 2's dramatic reduction in correctional administrators' discretion to affect prison sentences through parole and good time.

Good Time, Bad Time, and the Use of Correctional Discretion

The following discussion focuses on the apparent failure of policy makers to adequately consider either the potential effectiveness or necessity of a bad time policy. In their study on the impact of good time policies, Emshoff and Davidson (1987) noted the difficulty in measuring whether good time affects inmate behavior. As previously noted, states such as pre- Senate Bill 2 Ohio typically used good time as a negative behavior reinforcement by removing "automatic" credits as a form of punishment rather than rewarding positive behavior (Jacobs, 1982; Chayet, 1997). Emshoff and Davidson (1987) stated, "It is likely that a deterrent- punishment policy is not the most effective use of good time credit." Learning theory and behavior modification research suggests that positive reinforcement is more effective than punishment in producing lasting positive behavior (Emshoff and Davidson, 1987:348)

Without questioning the validity of deterrence in general, we would suggest that good time, bad time, and perhaps even parole are distinct from traditional institutional responses to rule infractions because of the latter's immediate impact on a prisoner's daily life.[11] Clearly, the impact different disciplinary tools have on inmate behavior is subjective and will vary depending on the specific inmate and context. However, as Goodstein and Hepburn (1985) found, inmates appear to be most concerned about actions that will directly and immediately affect their daily life within the institution. While the actual length of incarceration does appear to affect the perceived fairness of a punishment and reduce stress among prisoners (Goodstein and Hepburn, 1985), the deterrent value of threatening an extension to a prisoner's sentence that would not affect them until the distant future is less clear (Emshoff and Davidson, 1987; Goodstein and Hepburn, 1985).[12] It is reasonable, therefore, to question the ability of bad time to have achieved its stated goal of decreasing criminal violations among prisoners.[13]

It is impossible to accurately gauge the impact bad time had on the behavior of inmates in Ohio. Actual bad time extensions were imposed relatively infrequently. During the four years that the

policy was in place, only 262 bad time extensions had been imposed in a penal system of over 40,000 inmates (Johnson, 2000).[14] This figure may reflect an infrequent occurrence of observed criminal violations within the state's prison system or prison personnel's reluctance to initiate bad time proceedings. Whether or not the policy was properly implemented and utilized would certainly affect any evaluation of its effectiveness. Even assuming that the policy was implemented and utilized appropriately, however, it is unclear whether the existence or application of the policy would have had the desired effect(s) that policy makers hoped.

A second major issue is whether a policy such as bad time was even necessary. Scholars such as Morris (1974), Messinger and Johnson (1978), and Von Hirsch and Haurahan (1979) had generally considered (at times reluctantly) good time a necessary tool to maintain prison discipline. This was particularly the case when a jurisdiction limited or eliminated parole release. However, Jacobs' (1982) criticism of using good time policies to control inmate behavior is equally relevant to the use of a policy such as bad time. Jacobs (1982) questioned the necessity and validity of good time as a disciplinary tool largely because segregation - a readily available disciplinary action - is a potentially more punitive and effective sanction than denying a reduction in sentence. This would also seem to apply to the considerable range of other non-bad time sanctions that are at the disposal of Ohio correctional staff. Jacobs (1982) and others (e.g. Goodstein and Hepburn, 1985) maintain that sanctions that more immediately impact the daily life and routine of inmates are more effective. This also appears to be supported by the literature on coping that identifies the important impact that stability and routine in daily life can have on inmate experiences (e.g. Adams, 1992; Johnson, 2002).

Supporters of bad time would likely argue that the seriousness of the violations eligible for bad time extensions demanded a more punitive response than available options offer. However, Ohio prison officials continued to have the authority to refer criminal violations to local prosecutors. This raises the obvious question of why bad time was needed when it only involved violations of criminal laws. This very concern was raised by Jacobs (1982) who asked, if they [prison administrators] suspect a crime has been committed, why should they not be required to have the accusation tested in court? The reply usually given is that such cases are hard to prosecute and often end in acquittal. This puts the matter quite nicely. Good time [read "bad time"] revocation is considered a legitimate punishment because it is a way, in effect, to impose a criminal sentence which otherwise could not be imposed'' (emphasis added, 260). This seem to be central to bad time's raison d 'itre - a policy designed to accomplish actions within the existing institutional framewsrk without having to involve outside agencies and the potential problems such activities may incur.

Von Hirsch and Hanrahan (1979) recognized the possibility of correctional authorities extending sentences in a limited manner for prison violations. However, they also acknowledged that the sanction of additional imprisonment beyond that determined by the court would likely require a criminal prosecution and the greater procedural safeguards it provides (found in Jacobs, 1982: 243). Moms (1974) similarly noted that more serious violations should be handled through criminal prosecution rather than relying on good time or parole decisions.[15] The reason for these concerns is that despite efforts to ensure sufficient procedural protections, "prison discipline hearings are, in reality, a far cry from criminal trials. Prison personnel preside over disciplinary hearings and such persons are subject to the pressures of institutional security, staff morale, and bureaucratic expediency" (Jacobs, 1982: 238). This criticism seems to underlie the Ohlo Supreme Court's ruling. Bad time allowed correctional authorities (as an agency within the

executive branch) to engage in activities traditionally reserved for the judiciary and thus violated the separation of powers doctrine fundamental to Ohio's constitutional government and the United States in general. Furthermore, these activities did not adhere to the same procedural safeguards required in criminal prosecutions.[16]

LATENT FUNCTIONS OF CRIMINAL JUSTICE POLICY

Correctional institutions generally seek to achieve a diverse and often conflicting set of goals including security, treatment, incapacitation, and organizational maintenance (Gottfredson and Gottfredson, 1988). Even though parole and good time policies have been used primarily to affect security and organizational maintenance, the existence and use of both polices are consistent with a variety of correctional goals. Politically, however, good time and parole were perceived to be a remnant of more liberal criminal justice practices by Ohio politicians (see Hannah report, 1994; "Full, but fair sentences", 1997).[17] Within the social context of a recent riot at their most secure prison, Ohio legislators were keen to implement policies that could give correctional authorities the discretion to maintain prison discipline. It was determined that giving prison officials the ability to extend sentences was the best political solution to meet institutional needs. Thus, in an oft-repeated story, criminal justice policy was altered in reaction to social and political circumstances.

The preceding discussion, however, illustrated that Ohio correctional authorities already had at their disposal a variety of mechanisms to maintain prison discipline. Therefore, the bad time policy was not created to serve stated goals that were previously unobtainable.[18] This raises questions about how such a policy was able to make it through the legislative process. Some insight into the question may be provided by Tonry (1990), who noted that the latent functions of criminal justice policies are often as equally important to the creation and maintenance of new policies as their stated goals, From this perspective, bad time can be seen as serving a variety of latent, or less public, functions for several criminal justice actors including legislators, correctional administrators, and correctional officers.

By supporting bad time, legislators and correctional administrators demonstrated that they were responding to the perceived public support for more punitive criminal justice policies (see Beckett, 1997; Clear, 1994; Holcomb, 2000). The importance of appearing "tough on crime" for political survival during this time period is well documented (Beckett and Sasson, 2000; Bright, 1998) and bad time is clearly consistent with those interests. For correctional administrators, bad time was also symbolically important because it communicated to correctional officers (who had a colleague killed in the Lucasville riot) that administrators were sensitive to their needs and well-being. With bad time, correctional officers would have significant and meaningful authority at their disposal to insure prison discipline. The period following the riots was marked by co&ion and uncertainty and bad time was symbolically powerful to an organization looking for a new sense of purpose and commitment (see Tonry, 1990). By increasing officer authority, administrators communicate an increased degree of responsibility, trust and respect to line staff. The sense of correctional officer professionalism was likely enhanced by the increasing discretion granted under bad time procedures (Tonry, 1990). Thus, as Tonry (1990) notes, the latent institutional, professional, and political functions of criminal justice policy may drive the creation and continuation of policies despite evidence of their need or effectiveness.

CONCLUSION

This article described a unique penal policy created in a jurisdiction that had essentially eliminated two of its primary responses to maladaptive behavior in its prisons: parole and good time. Messinger and Johnson (1978) argued that the elimination of prison discretion such as parole or good time would require the creation of a new mechanism, "[i]f we have prisons, presumably we must supply those responsible for managing them with some disciplinary tools'' (found in Parisi and Zillo, 1983: 234). However, this article is sympathetic to Jacobs' (1982) position and has argued that previous research and Ohio policy makers overlooked the fact that correctional officials typically already have a number of legitimate and practical disciplinary mechanisms at their disposal. The need for a new policy such as good time to deal with criminal violations within Ohio's prisons appears to have been largely unnecessary because other, perhaps more effective, responses already existed. In the end, bad time seem to have been a flawed solution in search of a problem.

The future of bad time or a related policy is unclear at this time. A review of news media accounts and the lack of significant political outcries over the Ohio Supreme Court's ruling indicate a general public support or at least acquiescence to eliminating the bad time policy. In addition, several editorials have supported the court's interpretation of the constitutionality of the policy (e.g. "Prison 'bad time' was bad idea", 2000). The fact that the policy was used relatively infrequently may also make it less of a legislative and political priority.

This analysis revealed how the context in which legislation is formulated can influence the nature of changes to existing policy and the creation of new policy. The creation of bad time appears to be consistent with prior examples of policy makers and correctional administrators responding to changes in one form of correctional discretion by relying on other existing or new discretionary tools. Although it was eventually ruled unconstitutional, the fact that bad time was passed into law and implemented for several years suggests how strong the "law and order" agenda was in Ohio during the passage of Senate Bill 2. Many scholars have considered good time an important discretionary tool, especially in determinate sentencing jurisdictions such as Ohio. Similarly, the virtual elimination of good time and parole created the perception that prison order would be impossible to maintain without additional safeguards. This does not appear to be entirely justified. First, the very effectiveness of good time credits in influencing inmate behavior is questionable. Furthermore, a variety of established practices already existed to deal with criminal violations within prison without requiring a new disciplinary tool.

As a description of the rise and fall of a particularly unique penal policy, this study has several limitations. This article merely provided an overview of the process in which legislative and policy decisions were made. The goal of the paper was not to describe the decision making process but to illuminate the context in which those decisions were made and the relationship between that context and the passage of bad time. The article also omitted detailed information on the use of the policy and the various factors that may have influenced the decision to seek a bad time extensions in specific cases. Although this could perhaps provide insight into the use of correctional discretion, such data were unavailable to the researchers and were not central to the present inquiry. Finally, the theoretical implications of a policy such as bad time on the nature and use of correctional discretion has not been fully explored Changing policy to formally grant correctional administrators the authority to punish inmates appears to be a shift in the

perceived function of correctional discretion. While the end result may be essentially the same, giving prison officials the power to extend rather than reduce sentences is conceptually different and may reflect changing perceptions of the role and scope of correctional authority. This is certainly an issue that requires further elaboration and consideration.

It is recommended that future research pay close attention to the relationship between good time and other institutional responses to criminal and prison rule violations and changes in the use of correctional discretion. In particular, comparing practices in jurisdictions with determinate and indeterminate sentencing models could further illustrate how discretionary tools can be manipulated to serve institutional and political needs. Although they frequently result in relatively minor sanctions, discretionary correctional decision-making clearly affects prisoner quality of life and has the potential to have a considerable impact on the actual length of their incarceration. Perhaps most importantly, researchers should continue to be observant of how social and political context influence changes in criminal justice policy and correctional discretion in particular.

NOTES

1. Though the new felony laws were passed as Amended Senate Bill 2, it is commonly referred to as sqly Senate Bill 2 among policy makers and academics within the state.
2. * This is not to say that there is no relationship between good time and parole decisions, simply that the mechanisms and structures in place to make such decisions are typically made at different times and are procedurally different.
3. Good time credit is presently referred to as “earned credit reductions” under Ohio laws. For the purposes of this article, the term “good time” will be used to describe various policies in which an inmate’s sentence is reduced by prison administrators independent of any parole release decisions or emergency release provisions.
4. Chayet (1997) considers policies of “emergency credit” as a type cf good time credit as well. Emergency credits are typically only used during periods of severe overcrowding to release large numbers of eligible inmates who have only a short tm of incarceration remaining. In Ohio, emergency release provisions have historically been a distinct category of correctional discretion that is quite restricted and requires considerable effort to enact. Therefore, at least in Ohio, emergency release credits are perhaps not best thought of as good time in the traditional meaning of the word.
5. As will be discussed later, this is a critical point. The view that negative reinforcements are effective tools for maintaining order and that additional disciplinary mechanisms were even necessary was essential for bad time to have been considered a legitimate option.
6. If the R.I.B. found no evidence of a violation, the R.I.B. was to terminate the matter. Similarly, if my subsequent reviewers did not find sufficient evidence to proceed, the matter was terminated.
7. It is unclear whether the due process protections associated with bad time proceedings are sufficient to meet the safeguards required by relevant United State Supreme Court rulings. It seems that the liberty interest involved in penalties for bad time violations and Ohio’s creation of an interest by establishing formal procedures would require more stringent than those outlined for the removal of good time credits (Wolff v.

McDonnell(l974)) or placement in solitary confinement (Sandin v. Conner (1995)). Rather, due process in the implementation of bad time would likely rise to the level of those protections outlined for parole revocation (Morrisey v Brewer (1972)) and probation revocation (Gagnon v. Scarpelli (1973)).

8. Twenty years ago, Jacobs (1982) foresaw this very problem when considering the boundaries of correctional discretion in sanctioning prisoners though he did not specifically identify the issue as a separation of powers concern.
9. As an interesting side note, an undergraduate student intern from our program indicated that the judges in the county where he is interning continue to advise defendants that bad time may be imposed despite the court's ruling presumably because the policy may come back in some form. It is unclear why judges believe such instructions could be considered valid given the Ohio Supreme Court's ruling on the policy and potential ex post fact0 problems.
10. A major state newspaper described the policy in the following way: "TO ensure that the 1996 'truth-in-sentencing' law didn't prevent wardens from keeping inmates in line, officials were granted the right to extend sentences" ("Prison 'bad time' was bad idea", 2000).
11. This is not the appropriate format tc discuss the deterrent impact of criminal sanctions. It should be noted, however, that a considerable body of research questions the deterrent value of a variety of criminal punishments (e.g. Lynch, 1999; Peterson and Bailey, 1998; Marvell and Moody, 2001).
12. While the existing "earned credit" provision of Ohio's remaining good time policy (ORC 2967.193) represents a positive reinforcement model, bad time was clearly based on a punishment model of behavioral reinforcement.
13. It could be argued that bad time was never really intended to be utilitarian in nature but a deserts-based form of punishment to be exacted by prison officials. This, however, would be contrary to the official justification that focused on maintaining prison discipline and without further evidence would simply be conjecture at this point.
14. Department of Rehabilitation and Corrections records indicate that in 1999 there were 153 bad time hearings. No assessment was made in 23 cases, 15 day extensions were imposed in 6 cases, 30 day extensions in 7 cases, 60 day extensions in 44 cases, and 90 day extensions were imposed in 73 cases (Steve Van Dine, Director of Research, O.D.R.C., personal communication, April 4,2000).
15. Of course, what constitutes a "serious" violation is a discretionary matter and likely variable on the particular context in which that violation occurs. See Chayet (1997) and Jacobs (1982) for a discussion on factors influencing decisions to affect good time credits.
16. Although the court did not address the due process issue, it is clear that the bad time statute did not provide the same degree of protections afforded defendants in criminal prosecutions. An additional concern is that discretionary tools such as parole and good time decisions used by prison administrators are usually out of the public's view (Atkins and Pogrebin, 1987).
17. It should be acknowledged that several policy makers challenged the characterization of Senate Bill 2 as tough on crime, presumably because of its additional support of community based sanctions and its punitive focus on violent, repeat, and serious drug offenders rather than crime in general (see "Truth in sentencing: Major rewrite of criminal law still debated", 1996). However, a review of the legislation in general and statutes

dealing with restricting “lenient” correctional discretion clearly indicates that the new criminal code had a considerable punitive component. Further, such arguments belie the consistent theme of punitively oriented changes to Ohio criminal justice policy in Ohio during the past 20 years (see Holcomb, 2000).

18. As previously noted, this article does not address whether “bad the’’ achieved its stated goals. In fact, one of the suggestions made here is that such stated goals may actually be less significant to understanding the policy than the circumstances in which they were proposed. The short lifespan of the policy and its relatively Sequent usage would also raise serious validity concerns on any impact assessment of bad time.

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