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Jeffrey R. Nickerson

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PRISONERS' GAIN TIME: INCENTIVE, DETERRENT, OR RITUAL
RESPONSE ?

Prison officials exercise great discretion in making decisions affecting the conditions of confinement in their institutions.¹ In the face of this discretion there is also discernable a growing judicial willingness to intervene in prison administrative processes on behalf of petitioning inmates.² This confrontation of wide administrative discretion with judicial intervention continues to produce controversial decisions.³

Assertions that judicial intervention is harmful meddling may sometimes be facile, but cannot always be dismissed without injury. It is, for example, relevant in assessing the validity of such an assertion to ask whether such discretion on the part of prison officials is a necessary tool for controlling and inducing order in a prison population. In short, is administrative discretion necessary to maintain prison discipline?

Discipline, from one view, is the arrest and deterrence of intolerable inmate behavior and is concerned with procuring conformity to ordered patterns required for smooth functioning of the correctional institution.⁴ From another vantage point, discipline is the foundation for rehabilitation.⁵ Without it there can be no treatment program: individual psychiatric work with an inmate can be destroyed by throwing the patient into a hostile, chaotic, "unsympathetic" community.⁶ Beyond these concerns, discipline seeks to inculcate standards that an inmate will maintain upon release and to stimulate his desire to conform to those standards.⁷

The aims of order and rehabilitation conflict. Promotion of order demands uniform penalties to satisfy the expectations of inmates regarding the response of authority to infractions.⁸ However, the goals of character rehabilitation and resocialization require that response to nonconforming behavior be measured and administered in accordance with the individual offender. Thus, an administrator may need room within an institutional program to

1. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 84 (1967).

2. *Id.*

3. *E.g.*, Brooks v. Florida, — U.S. —, 88 S. Ct. 541 (1967) (conditions of solitary confinement termed barbaric); Coonts v. Wainwright, 282 F. Supp. 893 (M.D. Fla. 1968) (restriction of "jail-house lawyers" invalid).

4. D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 172 (1964) [hereinafter cited as GLASER].

5. Gates, *Impulsive Behavior and the Therapeutic Community*, in PROCEEDINGS: NINTH ANNUAL SOUTHERN CONFERENCE ON CORRECTIONS 79 (1964) (conducted by Dep't of Criminology & Corrections, School of Social Welfare, Fla. State University).

6. Fox, *Remarks*, in PROCEEDINGS: TENTH ANNUAL SOUTHERN CONFERENCE ON CORRECTIONS 152 (1965) (conducted by Dep't of Criminology & Corrections, School of Social Welfare, Fla. State University).

7. AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 347 (1954).

8. "[E]ffectively motivating all inmates to conformity with institution rules requires that similar penalties be imposed on all who commit similar rule infractions." GLASER at 173.

be firm with one man, but permissive with another under similar circumstances.⁹

Regardless of which goals shape discipline, the establishment of any sort of social equilibrium in a prison milieu is an incredibly intricate and difficult process: "The most desirable motivation for group order lies in good morale, good food, a challenging and interesting program, and *excellent spontaneous communication and relations between all individuals and sub groups* of which the total group is comprised."¹⁰ Therefore, when an inmate petitions for relief from disciplinary action that allegedly is an unconstitutional invasion of his rights, the court should ascertain the purpose of the action, its value as a tool for accomplishing institutional goals of order and rehabilitation, and the extent to which a decision curbing the administrator's freedom to take such action will impair his ability to achieve those goals.

Information available to courts on these issues is scarce. Statistical inquiries into the impact of a judicial decision have just begun to appear in traditional legal publications.¹¹ When published, they are by nature after the fact. Before its decision a court should have available objective information from which the potential effects of a decision can be analyzed. And where data is available, the tool of statistical analysis can provide penetrating insights.¹² This note will examine "time off for good behavior" or "gain time," in hope of providing a small amount of such information. It will suggest one method of ascertaining the exercise of discretion, assessing its utility, and forecasting the impact of a decision limiting its exercise.

Gain time reduces the length of time required to be served on a sentence. Deductions from the total sentence are made for each specified period during which the inmate conforms to the appropriate standards of good conduct.¹³ In American prison customs the idea dates from 1843, when the warden of the Massachusetts State Prison suggested allowing one or two days for each month of good conduct.¹⁴ Although slow to be adopted, the suggestion is widely employed today.¹⁵ Commonly there are two types of gain time: (1) "statutory" gain time for good behavior, awarded as a matter of routine¹⁶ and (2) "extra gain time," granted for "meritorious conduct or exceptional industry."¹⁷

9. Fox, *supra* note 6, at 153. The immediate response of the legal mind to this theory is to note that it exposes the harsher disciplinary action to attack on equal protection grounds.

10. Fox, *Analysis of Prison Disciplinary Problems*, 49 J. CRIM. L. C. & P. S. 321, 322 (1958) (emphasis added).

11. See, e.g., Nagel, *Testing Empirical Generalizations in Legal Research*, 15 J. LEGAL ED. 365 (1963).

12. *Id.*

13. GLASER at 175.

14. J. GILLIN, *CRIMINOLOGY AND PENOLOGY* 361 (rev. ed. 1935).

15. *Id.*

16. FLA. STAT. §944.27 (1967).

17. FLA. STAT. §944.29 (1967).

GAIN TIME STATUTES

In Florida, statutory and extra gain both were originally granted by the same statute,¹⁸ which required the prison superintendent to credit deductions to the record of one who had "well and truly performed the labor allotted to him" and had not violated any prison rules.¹⁹ It gave the Board of Commissioners of State Institutions power to review the records and allow the deductions credited by the superintendent.²⁰ The first forfeiture provisions stipulated loss of one current month's gain time for any misconduct or violation of prison rules and of all earned gain time for attempted or successful escape.²¹

The 1957 legislature enacted Florida's modern statutory pattern of gain time allowances: Florida Statutes, section 944.27,²² (allowance of statutory gain time) and Florida Statutes, section 944.29,²³ (extra gain time). These provisions closely resembled the statute now applicable to county prisoners.²⁴ After minor revision in 1961,²⁵ the present wording of the eligibility provision became law in 1963.²⁶ To be eligible for statutory gain time a state prisoner must have broken no state laws, rules of the Board of Commissioners of State Institutions or the Division of Corrections, and must have performed his work in a diligent, industrious manner²⁷ — requirements that under Florida's original gain time statute²⁸ entitled a prisoner to both statutory and extra gain time. Today, extra gain time for state prisoners is awarded at the discretion of the director of the Division of Corrections or his delegate for extraordinary, meritorious service.²⁹

The 1957 legislature also enacted the immediate predecessor of today's forfeiture provisions. Florida Statutes, section 944.28,³⁰ empowered the Board of Commissioners of State Institutions, after recommendation by the Department (now Division) of Corrections and upon due proof and notice to the

18. Fla. Laws 1889, ch. 3883, §23 (now FLA. STAT. §951.21 (1967) (gain time for county prisoners)).

19. *Id.*

20. *Id.*

21. Fla. Laws 1911, ch. 6177, §1 (now FLA. STAT. §951.21 (1967) (gain time for county prisoners)).

22. Fla. Laws 1957, ch. 57-121, §25.

23. Fla. Laws 1957, ch. 57-121, §27.

24. FLA. STAT. §951.21 (1967). Fla. Laws 1957, ch. 57-121, purports to repeal Fla. Stat. §954.06 (1955). OP. ATTY GEN. FLA. 057-274 (1957) held that the 1955 statute, formerly applicable to state and county prisoners, remained applicable to county prisoners. The 1955 statute was simply moved to the chapter of Florida Statutes dealing with county prisoners.

25. "Department" or "Department of Corrections" was changed to "Division of Corrections." Fla. Laws 1961, ch. 61-530, §18.

26. Fla. Laws 1963, ch. 63-243, §1 (now FLA. STAT. §944.27 (1967)).

27. FLA. STAT. §944.27 (1967).

28. Fla. Laws 1889, ch. 3883, §1 (now FLA. STAT. §951.21 (1967) (gain time for county prisoners)).

29. FLA. STAT. §944.29 (1967); FLA. ADMIN. CODE ch. 190A-6 (1967).

30. Fla. Laws 1957, ch. 57-121, §26.

prisoner, to declare a forfeiture of any or all earned gain time for any of the following infractions:

- (a) assaulting any guard, foreman, officer, or other person;
- (b) threatening or endangering anyone's person or life;
- (c) violating any Departmental or institutional rule or regulation;
- (d) neglecting or refusing to work;
- (e) escaping or attempting to escape;
- (f) any misconduct.

Upon revocation of conditional pardon or parole, all gain time was automatically forfeited, but the Board of Commissioners of State Institutions could restore, partially or wholly, any gain time forfeited for any reason.³¹

In 1963, the forfeiture provisions were extensively revised. Escape, or revocation of conditional pardon or parole required summary forfeiture, without notice or hearing, of all statutory gain time earned or extra gain time awarded, neither of which were restorable.³² Additionally, both types of gain time were subject to forfeiture for:³³

- (1) attempting to escape;
- (2) assaulting any person;
- (3) threatening or knowingly endangering another's life or person;
- (4) refusing to carry out a duly given instruction;
- (5) refusing or neglecting to perform work, duties, or tasks faithfully, diligently, industriously, orderly, and peacefully;
- (6) violating any State law, or any rule or regulation of the Board of Commissioners of State Institutions, Division of Corrections or institution.

The Board's regulations extend *required* forfeiture to assault on institutional personnel,³⁴ but for all other breaches of prison discipline – including “general misconduct”³⁵ unspecified by statute or regulation – gain time is *subject to* forfeiture.

The 1963 legislature also detailed procedural requirements for declaring a forfeiture:³⁶

31. *Id.* In *Nicholas v. Wainwright*, 152 So. 2d 458 (Fla. 1963), the Florida supreme court ruled that the power to allow gain time or declare its forfeiture had to remain with the *board*, which could, however, delegate to the director of the Division of Corrections or his deputy authority to make recommendations. Two years later, the legislature overruled *Nicholas*. Fla. Laws 1967, ch. 65-197, §1 conferred power to *declare* forfeiture of gain time upon the director (FLA. STAT. §944.28 (3) (1967)), and authorized him to delegate that power to his deputy (FLA. STAT. §944.28 (5) (1967)).

32. Fla. Laws 1963, ch. 63-243, §2 (now FLA. STAT. §944.28 (1967)).

33. *Id.*

34. FLA. ADMIN. CODE §§190A-5.02, .021 (1967).

35. FLA. ADMIN. CODE §190A-5.024 (1967).

36. Fla. Laws 1963, ch. 63-243, §2 (now FLA. STAT. §944.28 (2) (b) (1967)).

- (1) a written charge, specifying the misconduct and approximate date thereof, delivered to the prisoner;³⁷
- (2) notification of a hearing before the institution's disciplinary committee;
- (3) hearing, at which the prisoner must be present;
- (4) a determination of guilt from proof presented at the hearing;
- (5) a recommendation of forfeiture from the disciplinary committee;
- (6) review by the superintendent of the institution, who must report his approval (or disapproval) of the committee recommendation to the Division of Corrections;
- (7) declaration of forfeiture by the Director of the Division or his deputy.³⁸

Finally, the 1963 legislature introduced a new concept, forfeiture of the right to earn future gain time.³⁹ If a single instance of misconduct or an accumulation of several such instances is deemed sufficiently serious, a forfeiture of the right to earn future gain time may be declared.⁴⁰ The same procedure as that outlined above must be followed, with two exceptions. First, although the statute implies the prisoner will be at the disciplinary committee hearing, his presence is not explicitly required. Second, the committee must make both a determination of guilt and a finding of sufficient seriousness.⁴¹

A prisoner released early⁴² because of gain time deductions from his original sentence was formerly deemed completely free.⁴³ The 1967 legislature declared that henceforth prisoners released after deduction of gain time will

37. Each violation must be written up by an employee who either saw it or has knowledge of it. FLA. ADMIN. CODE §190A-3.045 (4) (1967).

38. Fla. Laws 1963, ch. 63-243, §2 (now FLA. STAT. §944.28 (5) (1967)).

39. Fla. Laws 1963, ch. 63-243, §2 (now FLA. STAT. §944.28 (3) (1967)).

40. *Id.*

41. *Id.* Under the 1963 law, only the Board of Commissioners of State Institutions could declare a forfeiture of the right to earn gain time. Fla. Laws 1965, ch. 65-197, §1 delegated that power to the director of the Division of Corrections, (FLA. STAT. §944.28 (3) (b) (1967)) and authorized him to delegate the power to his deputy (FLA. STAT. §944.28 (5) (1967)).

42. If no statutory gain time is forfeited, the following examples illustrate the effect of statutory gain time deductions on actual length of confinement:

Length of Sentence (Years)	Total Gain Time		Net Time To Be Served		
	(Years)	(Days)	(Years)	(Months)	(Days)
1		60		10	6
2		120	1	8	3
3		240	2	4	6
5	1	175	3	6	8
10	3	345	6		21
15	6	150	8	7	3

FLA. ADMIN. CODE §190A-5.015 (1967).

43. *Cf. Brown v. Mayo*, 156 Fla. 144, 23 So. 2d 273 (1945), *petition for cert. dismissed*, 327 U.S. 768 (1946). Although the opinion cites FLA. STAT. §954.06 (1941), it may be inferred that the court's decision applies as well to FLA. STAT. §944.27 (1967).

be treated as parolees subject to the Probation and Parole Commission.⁴⁴ Although the commission may set a shorter time, normally parole will last until the original sentence expires.⁴⁵ Whether inclusion of "conditional release" in the Florida Corrections Code will further the aims of gain time⁴⁶ is open to serious question. One writer had earlier answered in the negative, suggesting that introduction of conditional release would lower prison morale.⁴⁷

UTILITY OF GAIN TIME IN PRISON DISCIPLINE

Loss of gain time is only one of several categories of forceful disciplinary action⁴⁸ available to the disciplinary committees of Florida's correctional institutions.⁴⁹ Although gain time was designed historically as a positive incentive to reward desirable behavior of prisoners who sought reward, the common significance of a gain time program today is the use of forfeiture to punish misconduct,⁵⁰ enforcing the demand for conforming behavior.⁵¹ One measure of the efficacy of forfeiture is the incidence of repetition:⁵² a pattern of repeated losses of gain time would indicate that forfeiture does not deter intolerable behavior in the repeating group and, if the group were large enough, in the general inmate population.

In the fiscal year July 1, 1966-June 30, 1967, Florida's inmates committed 2,540 infractions of rules and regulations resulting in disciplinary reports to

44. FLA. STAT. §944.291 (1967); 18 U.S.C. §4161 (1964). Gain time and parole are similarly interwoven in that revocation of parole results in forfeiture of all gain time previously earned or awarded. FLA. STAT. §944.28(1) (1967). However, accumulated gain time does not itself hasten eligibility for parole. See FLA. STAT. §947.16 (1967) (prisoners having served at least six months of their sentences and having a good record are eligible for parole). And eligibility for parole has no effect on gain time awards. See FLA. STAT. §944.27 (1967).

45. FLA. STAT. §944.291 (1967).

46. Gain time is provided by the state as a *positive* incentive to encourage orderly conduct and early rehabilitation, *Nicholas v. Wainwright*, 152 So. 2d 458 (Fla. 1963); *Dear v. Mayo*, 153 Fla. 164, 14 So. 2d 267 (1943).

47. Clark, *Curable Ills of the Criminal Law of Florida*, 16 U. FLA. L. REV. 258 (1963). Certainly introduction of conditional release removes gain time one more step from its original role as positive incentive.

48. Other punishments include solitary confinement, frequently with diet restrictions; confinement to the prisoner's own cell with loss of yard privileges; loss of visiting, correspondence, or other privileges; transfer to another, presumably higher security, institution; assignment to a hard-labor squad; downgrading in the classification system; formal or informal corporal punishment (prohibited by FLA. STAT. §944.35 (1967)). Fox, *supra* note 10.

49. FLA. ADMIN. CODE §190A-3.045 (1967). Section (2) gives the disciplinary committee a choice of (a) reprimand, (b) loss of mail or visiting privileges, (c) temporary or permanent loss of any other privileges, (d) isolation on either regular or restricted diet, (e) loss of gain time not to exceed ten days, (f) recommendation to the Division of Corrections of loss of gain time exceeding ten days.

50. AMERICAN CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS 355 (1954); GLASER at 175.

51. Fox, *supra* note 10, at 326.

52. Dr. Fox estimates only 3% of the prison population of the United States is involved in disciplinary reports in any one year, indicating a high incidence of repeating. *Id.* at 324.

the central office of the Division of Corrections.⁵³ Of these infractions, 1,647 (sixty-five per cent) were punished in part or wholly by forfeiture of at least some gain time.⁵⁴ The infractions resulting in forfeiture were committed by 1,226 individuals, seventeen per cent of the inmate population.⁵⁵ Table 1 shows the number of prisoners subjected to forfeiture more than once in the fiscal year. That data is correlated with the anticipated year of release, computed as of the date of the infraction. Thus, 116 individuals due to be released between 1968 and 1970 forfeited gain time twice in fiscal year 1966-1967.

TABLE 1

Number of Forfeitures (July 1, 1966-June 30, 1967): Years of Prisoners' Release	(2)	(3)	(4)			(5)	(6)
			Prisoners				
1967-1968	18	5	2	2	0		
1968-1970	116	25	11	3	1		
1970-1972	40	16	4	1	0		
1972-1974	10	4	1	0	0		
1974-1976	8	1	1	0	0		
1976-1978	8	4	1	0	0		
1978-1980	4	1	0	0	0		
1980-1982	2	0	1	0	0		
1982-1990	3	1	0	0	0		
Total	209	57	21	6	1		

Eighteen per cent of all breaches of discipline resulting in gain time forfeiture were committed by individuals who had already lost gain time one, two, or three times in the same fiscal year. The incidence of repetition among prisoners soon to be released must be qualified by the fact that over seventy-five per cent of the 5,520 admissions between 1964 and 1966 involved inmates sentenced to less than five years imprisonment.⁵⁶ Although prisoners subjected to multiple forfeitures constituted only four per cent of the entire Florida inmate census,⁵⁷ they comprise twenty-four per cent of those prisoners who lost *any* gain time in fiscal year 1966-1967. The number of inmates repeatedly losing gain time would be higher but for the fact that usually only gain time already earned may be forfeited. When all of an inmate's gain time has been removed, the forfeiture sanction may not be invoked again until he has accumulated more. His repeated violations would thus bring other forms of disciplinary action.

53. The following statistics, unless otherwise noted, were compiled at the University of Florida Computing Center by this writer from data furnished by the Florida Division of Corrections. The full cooperation of the division and its staff members is greatly appreciated.

54. In few instances is gain time the sole discipline invoked for rule infractions. *Infra* note 60.

55. As of June 30, 1966, 7,074 persons were incarcerated in Florida correctional institutions. FLORIDA DIVISION OF CORRECTIONS, 5TH BIENNIAL REPORT: JULY 1, 1964-JUNE 30, 1966, at 69 (1966).

56. *Id.* at 76-77.

57. Extrapolation to an additional year would raise the percentage. However, the number of admissions and releases each year is sufficiently high to indicate that the increase might be minimal. *Id.* at 70-71 (1964-1966 major admissions, 6,824; major releases 6,251).

These statistics compare surprisingly well with available figures for multiple offenders in general: 61.9 per cent of the persons committed to United States Bureau of Prisons institutions in 1966 had been committed to penal institutions elsewhere at least once before.⁵⁸ Of the 3,337 admissions to Florida prisons from Florida courts in 1965-1966, the Division of Corrections reports that 51.61 per cent involved men who had previously committed felonies, and 57.24 per cent involved men who had previously committed misdemeanors.⁵⁹ It must, however, be repeated that any inference that the gain time sanction inhibits repetition of infractions must be qualified by the fact that gain time is seldom, if ever, the sole disciplinary action taken in response to inmate misbehavior.⁶⁰

EXERCISE OF DISCRETION

The statutory and regulatory categories of infractions that require or authorize forfeiture of gain time⁶¹ are overly broad. Within such categories prison officials have room to exercise great discretion, for Florida courts have not construed the substantive forfeiture provisions. Furthermore, the infraction with which a prisoner is charged need not correspond with or refer to any statutory or regulatory authority. The discipline report need only describe the offending activity.⁶² In a sampling of discipline reports received by the central office of the Florida Division of Corrections between October 1, 1967, and January 10, 1968, forty-nine categories of offending acts were observed.⁶³ Since the acts in several categories possibly are heterogeneous, the number of categories listed here may be considered low.

Although some of these "offenses" are easily classified, others elude the statutory or regulatory categories. For example, work offenses clearly fall within statutory guidelines,⁶⁴ but "creating a disturbance" and "abusive and hostile to an officer" do not. It is thus apparent that only one thoroughly familiar with disciplinary practices could exercise a reasoned judgment as to the fairness of punishment imposed for a particular offense. Requiring discipline reports to describe the offending conduct *and* categorize it in terms of the statutory or regulatory authority might aid the outsider, should judicial review be taken.

It seems likely that charges describing the offensive conduct are more meaningful for prisoners than language taken from a regulation or statute.

58. FEDERAL BUREAU OF PRISONS, STATISTICAL REPORT, FISCAL YEAR 1966, at 43. figure climbs to 80% for individuals committed to federal *penitentiaries*. *Id.*

59. FLORIDA DIVISION OF CORRECTIONS, 5TH BIENNIAL REPORT: JULY 1, 1964-JUNE 30, 1966, at 80-81. This report makes it clear, however, that a number of those admissions were of men committed several times in the same year. *Id.* at 70.

60. Of the 550 infractions collected in the Appendix, in only five was loss of gain time the sole sanction invoked.

61. *See* text at *supra* notes 30-35.

62. Study conducted by the writer (Appendix) and conversation with David D. Bachman, Deputy Director for Inmate Treatment, Florida Division of Corrections, Nov. 21, 1967.

63. *See* Appendix.

64. FLA. STAT. §944.28 (2) (a) (1967).

Deliberately patterned responses by prison authorities to infractions, developed in practice over a period of time, would additionally narrow the range of administrative discretion and apprise prisoners of the likely penalty for particular violations.⁶⁵ Initially, the debate between uniform penalties on the one hand, and discipline attuned to the individual on the other,⁶⁶ raises the question of whether developing such patterns is desirable. But even if it were possible to resolve that debate, Florida's gain time program precludes thoroughly patterned forfeitures. Only gain time already earned or awarded may be forfeited,⁶⁷ unless misconduct is sufficiently serious to justify forfeiture of the right to earn gain time in the future.⁶⁸ Therefore, prisoners often have fewer days of gain time left to remove than the number warranted by the severity of the offense.

Examination of forfeitures for given offenses reveal existing patterns in Florida's practices. In addition, the statistics may constitute a quantitative verification of the exercise of discretion and a scale for measuring breadth. From a computer printout of all offenses recorded by the Division of Corrections for the fiscal year 1966-1967, the following table was prepared:

TABLE 2
Gain Time Lost in Offenses Between July 1, 1966 and June 30, 1967

Days Lost	Number of Offenses	Days lost	Number of Offenses
1-4	40	21-29	37
5	91	30	240
6-9	65	31-59	42
10	590	60	34
11-14	25	61-90	18
15	365	91-180	19
16-19	16	181-	6
20	59	Total	1,647

Although, as shown in Table 2, administrators do recommend forfeitures in multiples of five days (thirty-six per cent of the 1,647 offenses resulted in forfeitures of ten days, twenty-two per cent in loss of fifteen days, and fifteen per cent in loss of thirty days), a study of individual offenses reveals the above pattern is more likely coincidental than deliberate.

Of 553 discipline reports received at the central office of the Division of Corrections between October 1, 1967, and January 10, 1968, 362 (sixty-five per cent) recommended forfeiture of gain time as a sanction. All the reports were categorized by the offenses described therein. The following categories contained a sufficient number of offenses to be statistically meaningful.

65. FLA. ADMIN. CODE §190A-3.041 (1967) requires that upon admission each prisoner be informed of the rules and regulations of (1) the Board of Commissioners of State Institutions, (2) the director of the Division of Corrections, and (3) the particular institution. Each new prisoner must also be apprised of the consequences of violation.

66. See text at *supra* notes 6, 7.

67. FLA. STAT. §944.28 (1) (1967).

68. FLA. STAT. §944.28 (3) (1967).

Possession of Contraband

Although this offense includes possession of weapons and of any other unauthorized articles,⁶⁹ the gravity of possession of a weapon warrants treating it separately where the discipline report allowed. There were ten reported instances of possession of a knife, but only one was punished by forfeiture of gain time. The other sanctions imposed for having a knife were not severe (solitary confinement and extra duties, or the latter only). Either possession of a knife is not so serious as one might think, or the descriptive words are misleading.⁷⁰ The remaining offenses in the category of contraband spread over the range shown below. Forty-two of the fifty-seven violations (seventy-four per cent) resulted in losses of zero, ten or fifteen days. Thus, a disciplinary committee could probably recommend removal of any number of days below thirty without serious challenge from the Division of Corrections.⁷¹

Possession of Contraband Other Than Weapons

<u>Gain Time Lost (Days)</u>	<u>Number of Offenses</u>
none	19
10	12
15	11
25	1
30	7
35	1
55	1
60	2
65	1
120	2

Work Offenses

These include insufficient work, unsatisfactory work, refusal to work, and sleeping on the job. Although *refusal* approaches the separate category of disobedience, the statutory and regulatory classification of work offenses⁷² suggests the inclusion of refusal to work here.

69. FLA. ADMIN. CODE §190A-3.044 (1967).

70. The offense may cover theft of utensils from the dining hall, with the intent of fashioning a weapon.

71. Some of the discipline reports had not yet been reviewed at the Central Office of the Division of Corrections. Forfeitures far "out of line" will not be allowed to stand. The criteria for review, however, are vested in the good judgment of the deputy director for inmate treatment. Conversation with David D. Bachman, Deputy Director for Inmate Treatment, Florida Division of Corrections, Oct. 26, 1967.

72. FLA. STAT. §944.28 (2) (a) (1967); FLA. ADMIN. CODE §190A-3.045 (11) (1967).

Work Offenses

<u>Gain Time Lost (Days)</u>	<u>Number of Offenses</u>
none	32
5	3
9	1
10	17
15	12
16	1
20	2
30	5
40	2

The range of discretion with respect to this offense appears to be zero to thirty days, meaning that recommended forfeitures within those limits would probably be approved by the Division of Corrections.

Fighting

In most instances this was the only term used to describe offenses of this category, which could include anything from a scuffle to a serious struggle. It is therefore impossible to determine the extent to which the ferocity of the fight determined the amount of gain time lost, a fact reducing statistical reliability. The range of discretion here reaches from zero to fifteen days.

Fighting

<u>Gain Time Lost (Days)</u>	<u>Number of Offenses</u>
none	31
1-5	11
10	7
15	16
16-20	2
25	1
27	1
30	4
All (unspecified)	2

Disobedience

This offense usually results in loss of zero to twenty days of gain time. Disobedience, as an offense, often appears in combination with others, such as fighting, insufficient work, and threatening an officer. Since all such double offenses were excluded from these studies following Table 2, the number of simple disobedience cases remaining is low.

Disobedience

<u>Gain Time Lost (Days)</u>	<u>Number of Offenses</u>
none	15
3	1
10	15
15	3
20	2
30	1
All gain time (unspecified)	1

Apparently a disciplinary committee recommending forfeiture of more than twenty days for simple disobedience would have to show reasons for the severity, before the Division of Corrections would approve the recommendation.

Multiple Offenses

One way to show cause for harsh punishment is to categorize misconduct as a breach of several rules or regulations. But a pattern of more severe discipline is difficult to discern in the following statistics:⁷³

<u>Gain Time Lost (Days)</u>	<u>Number of Offenses</u>
none	14
5	4
10	11
15	12
20	0
26	1
28	1
30	8
60	2
65	1
All gain time (unspecified)	2

The number of thirty-day losses, and scattered forfeitures of sixty and sixty-five might set this category apart. A study of the reports themselves, however, leaves the impression that classification of conduct as a double violation is, at best, haphazard. There were many occasions when a relatively minor offense, such as lying to an officer, had been added to the primary offense in a makeweight fashion by the prison officials, apparently to make certain the penalties imposed would not be questioned at the divisional level.⁷⁴

Considering all the above offenses, it is apparent that prison officials have a thirty-day range of discretion in imposing gain time forfeitures. It is not, however, possible to ascertain whether such discretion is abused without an extensive individual case study of discipline reports in the light of records at each institution involved.

CONCLUSION

Although forfeiture of gain time is frequently employed to discipline prison inmates, it is rarely used alone and is linked in most cases with solitary confinement, extra duty, or some other form of punishment that has imme-

73. This data was not included in the Appendix or the preceding studies of offenses following Table 2.

74. At the Division of Corrections, David D. Bachman, Deputy Director for Inmate Treatment, reviews the forfeitures and recommendations from the correctional institutions. When a recommendation is "out of line," Mr. Bachman reduces the number of days before the forfeiture is recorded. Conversation with David D. Bachman, Florida Division of Corrections, Nov. 21, 1967.

diate impact upon the offending prisoner. It is thus apparent that prison administrators do not rely primarily on loss of gain time to impress inmates that their misconduct is intolerable.

Absence of forfeiture patterns differentiating one offense from another, and disjointed repetition of ten-, fifteen-, and thirty-day forfeitures — in light of the extent to which actual loss is governed by the number of earned days an inmate has not yet forfeited — suggest that available discretion is not being exercised in a conscious design to effect order or rehabilitation. On the contrary, a study of these factors indicates that forfeiture of gain time approaches a reflex response to infractions of rules and regulations.

Certainly without sophisticated motivational research one cannot determine whether the seventy-three per cent of Florida's inmate population that did not lose gain time in 1966-1967 were deterred by potential forfeiture. Such inmate study might disclose results different from, or even contrary to, those set out here because it would primarily examine inmates' attitudes, while the data presented here reflects more especially the attitudes of administrators. Nevertheless, from the absence of primary reliance on gain time forfeiture, and the apparent lack of design in exercising discretion, it follows that legislation requiring establishment of standards of gain time forfeiture, or judicial restrictions limiting or prohibiting forfeiture in specific situations would not unduly hamper the efforts of prison officials to maintain order in the institution or effect rehabilitation of the individual.

JEFFREY R. NICKERSON

APPENDIX

Breaches of Prison Discipline Reported to the Florida Division of
Corrections Between October 1, 1967 and January 10, 1968*

Offenses	Number of Offenses	Number of Forfeitures	Percentage For- feiting Some Gain Time
Possession of a knife	9	1	1
Contraband	57	38	67
Insufficient work	38	21	55
Unsatisfactory work	8	6	75
Refusal to work	27	15	56
Sleeping on the job	2	1	50
Fighting	75	44	59
Disobedience	38	23	61
Refusal to obey a direct order	10	7	70
Failure to follow instructions	14	5	36
Attempted assault on an officer	1	1	100
Resisting arrest	1	1	100

Threatening an officer	3	2	67
Threatening a free man	1	1	100
Interfering with the duty of an officer	2	1	50
Abusive and hostile to an officer	31	19	61
Lying to an officer	7	2	29
Assault on an inmate	11	11	100
Sodomy or unnatural sex act	9	8	89
Threatening an inmate	2	2	100
Stealing	11	8	73
Attempted theft	1	1	100
Theft from an inmate	2	1	50
Possession of stolen property	10	7	70
Unauthorized presence in cell	14	13	93
Unauthorized presence in an otherwise proper area	23	13	57
Leaving assigned area	3	3	100
Missing duty squad	10	9	90
Feigning illness	13	9	69
Violations while in lines	5	1	20
Illegal trading and dealing	1	1	100
Unauthorized sales	2	0	-0-
Creating a disturbance	36	32	89
Horseplay	1	0	-0-
"Kiting" mail, to avoid censorship	12	10	83
Unauthorized visitor	1	0	-0-
Attempted escape	1	1	100
Tampering with security equipment	1	1	100
Destruction of state property	12	10	83
Suspected use and possession of drugs	5	4	80
Attempt to falsify records	6	6	100
Drinking alcoholic beverages	5	5	100
Gambling	8	8	100
Improper use of canteen book	3	1	34
Overdrew bank	2	0	-0-
Unauthorized use of telephone	1	1	100
Repeated offending	8	1	13
Bad attitude	1	0	-0-
Unspecified offenses	9	7	78
Total (49 categories)	553	362	

*This data was compiled in two segments, one by the writer, another by Division of Corrections' personnel, whose assistance is greatly appreciated. The offenses listed are drawn from the wording of institutional discipline reports and are not necessarily Division of Correction categories. Each institution may use different terminology to describe similar misconduct. Consequently, correlation frequently involved discretionary decisions, which were made by the writer in all cases. Thus, the judgments of only two individuals, the writer and the officer who completed the discipline report, enter as statistical variables.