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Ohio's Return to Indefinite Sentencing: Why Minor Changes Make a Major Difference

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Ohio's Return to Indefinite Sentencing: Why Minor Changes Make a Major Difference

Cover Page Footnote

I would like to thank my family and friends for supporting my efforts throughout law school. I would also like to specifically thank Marcella McHenry and Professor Erica Goldberg for their helpful thoughts and comments throughout the editorial process, as well as the various attorneys who provided their personal insight to Senate Bill 201. I would further express my condolences to the Tokes family and friends and thank them for their efforts in the adoption of Senate Bill 201, the Reagan Tokes Law.

OHIO’S RETURN TO INDEFINITE SENTENCING: WHY MINOR CHANGES MAKE A MAJOR DIFFERENCE

*Zachary R. Kennedy**

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INTRODUCTION

Senate Bill 201, commonly referred to as the “Reagan Tokes Law,” calling for indefinite sentencings of “qualifying felonies,” does not run afoul of principled constitutional standards despite consistent challenges to the law. Reagan Tokes was a twenty-one-year-old college student at Ohio State University in Columbus, Ohio.¹ On Wednesday, February 8, 2017, Reagan was leaving her job as a server when she went missing.² Her body was found the next day in a park in Grove City.³ Her killer, the then twenty-seven-year-

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¹ Brianna Bennet, *The Cruel and Vindictive Murder of Reagan Tokes*, MEDIUM (December 9, 2020), <https://medium.com/crimebeat/the-cruel-and-vindictive-murder-of-reagan-tokes-63340a6b83f8>.

² *Id.*

³ *Id.*

old Brian Golsby, had just been released from the Ohio State Penal System in November of 2016, after serving a six-year sentence for robbery and attempted rape.⁴ Golsby was released at the end of his term with more than fifty institutional write-ups for infractions he committed.⁵ Despite these numerous infractions while incarcerated, Golsby was allowed to walk free due in large part to the sentence structure used at the time, which only allowed for a definite amount of time that cannot be extended absent a post-release control violation.

Reagan's family fought continuously for legislative reform so that another person would not suffer the same fate Reagan did.⁶ As a result, the Ohio General Assembly enacted Senate Bill 201 in 2019, commonly known as the "Reagan Tokes Law." Part of this law created indefinite sentencing guidelines for "qualifying felonies."⁷ Had this law been enacted at the time Golsby was incarcerated, his poor behavior in prison would have resulted in him being incarcerated past November of 2016 and Reagan Tokes would not have faced the fate she did.⁸ The Reagan Tokes Law has been in practice for just over two years and has created a divide within the legal community regarding the constitutional implications of the sentencing structures—specifically the separations of powers doctrine and procedural due process. The constitutionality of the Reagan Tokes Act has been at the forefront of legal discourse in recent years.

There has been a plethora of litigation surrounding the Reagan Tokes Law. Since the enactment of Senate Bill 201 in March of 2019, there have been more than one hundred Ohio District Court of Appeals cases revolving around the sentencing implications.⁹ These cases have resulted in various decisions: with some courts upholding the law's constitutionality, with other courts deeming it unconstitutional, and some have determined the matter is not ripe for appeal.¹⁰ As of November 2021, there were additionally twenty-two cases pending in front of the Ohio Supreme Court, all of which were being withheld, pending a decision on a twenty-third case.¹¹

Despite consistent challenges, the sentencing provisions of Senate Bill 201, or the "Reagan Tokes Law," do not violate the separation of powers

⁴ *Id.*

⁵ *Id.*

⁶ *Reagan Tokes case spurs Ohio legislation to change incarceration guidelines*, TRUE CRIME DAILY (May 14, 2018, 5:38 p.m.), <https://truecrimedaily.com/2018/05/14/reagan-tokes-case-spurs-ohio-legislation-to-change-incarceration-guidelines/>.

⁷ *Id.*; see also OHIO REV. CODE ANN. § 2967.271 (2020).

⁸ § 2967.271

⁹ See generally Mem. for Crim. Just. Counsel Scott Shumaker to Ohio Crim. Sent'g Comm'n (on file with the Supreme Court of Ohio) (last visited Nov. 11, 2021), <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/SB201/appealTracking.pdf> [hereinafter Ohio Appellate Decision Tracker].

¹⁰ See generally *Id.*

¹¹ See generally *Id.*

doctrine or procedural due process and should not be revoked. First, the differences between the Reagan Tokes Law and Ohio Revised Code § 2967.11, the former “Bad Time Law,” while minimal, are sufficient to abide by constitutional requirements. Second, the constitutional challenges to the sentencing legislation are ripe for adjudication after the defendant enters a plea in the common pleas court as the defendant is subject to the sentencing guidelines at the moment. Additionally, the defendant’s actions while incarcerated implicate the potential effects of the Reagan Tokes Law. Third, the Reagan Tokes Law does not violate procedural due process because the offender is afforded both a hearing and notice of that hearing. Additionally, the Department of Rehabilitation and Corrections (“DRC”) is not provided with unfettered discretion when determining whether or not to implement any time beyond the prescribed mandatory minimum term imposed by the sentencing court.¹² Fourth, the Reagan Tokes Law does not violate separation of powers as the DRC, an executive agency, is not implementing any additional period of incarceration beyond what was prescribed by the sentencing court, a judicial body, and has limited discretion as outlined by the legislature.¹³ Finally, Ohio is not the only state to implement indefinite sentencing into their criminal justice system; the majority of the country imposes indefinite sentencing structures in some form in their criminal sentencing system.¹⁴

A notable portion of the argument against the constitutionality is based on a comparison of the Reagan Tokes Law and the Bad Time Law. This was Ohio’s previous indefinite sentencing legislation that provided the Adult Parole Authority (“APA”) unfettered discretion in extending inmate sentences.¹⁵ The Bad Time Law was struck down by the Ohio Supreme Court in 2000.¹⁶ The Bad Time Law was determined to be unconstitutional based on a finding that the law violated the separation of powers doctrine.¹⁷ The Bad Time Law also implemented indefinite sentencing guidelines with power vested to the DRC.¹⁸ The major distinction between the Reagan Tokes Law and the Bad Time Law is what happens at the initial sentencing hearing in the common pleas court.¹⁹ The Reagan Tokes Law provides a formula for a maximum sentence the defendant can receive, whereas the courts did not provide for a maximum under the Bad Time Law.²⁰

¹² § 2967.271.

¹³ *Id.*

¹⁴ National Council on Crime and Delinquency, *National Assessment of Structured Sentencing*, U.S. DEPT. OF JUSTICE, <https://www.ojp.gov/pdffiles/strsent.pdf>.

¹⁵ § 2967.11 (1994).

¹⁶ *State ex rel Bray v. Russell*, 729 N.E.2d 359 (Ohio 2000).

¹⁷ *Id.* at 136

¹⁸ *State v. Maddox*, No. 2020-1266, slip op.

¹⁹ (Ohio March 16, 2022).

²⁰ *Id.* at

14—15.

²⁰ Compare OHIO REV. CODE ANN. § 2967.11 (1994), with OHIO REV. CODE ANN. § 2967.271 (2020).

The Reagan Tokes Law implemented significant modifications to felony sentencing and post-release control in Ohio. While these changes may be practically challenging due to the complex sentencing calculations implemented by the law for qualifying felonies, they do not run afoul of either the separation of powers doctrine or the due process rights of criminal defendants. The law provides adequate due process safeguards because defendants are promptly given notice, afforded a hearing, and a presumption in favor of their release.²¹ Arguably, the Reagan Tokes Law comes incredibly close to violating the separation of powers doctrine as the new structure is so similar to the previous Bad Time Law. However, the power vested in the DRC does not infringe upon the power of the judiciary to impose sentences upon criminal defendants.

This Comment will address the constitutional concerns surrounding the indefinite sentencing structures implemented by the Reagan Tokes Law. Section I will provide a background of how the law came to be, an overview of the sentencing guidelines, and processes post-sentencing. Section II focuses on current litigation surrounding the law that has flooded Ohio's appellate courts as well as the Supreme Court of Ohio. Section III will provide further insight as to Ohio's previous indefinite felony sentencing structure, how it differs from the Reagan Tokes Law, and why these seemingly minor differences are so substantial. Section IV will delve into the constitutional issues surrounding the Reagan Tokes Law such as ripeness, procedural due process, separation of powers, and other states' approaches to indefinite sentencing. In conclusion, this Comment will reiterate the value that indefinite sentences structures present and the harm they can prevent, while also echoing why the minor changes made in the Reagan Tokes Law make major differences in the constitutionality of the structure.

I. DEVELOPMENT OF THE REAGAN TOKES LAW

A. The Murder of Reagan Tokes

Reagan Tokes was a twenty-one-year-old college student at Ohio State University.²² She excelled as a student and was in her last year as a psychology major, preparing for graduation, and anticipating beginning her career at the Cleveland Clinic, with the ultimate goal of running her own psychiatry practice.²³ Reagan worked part time as a server at Bodega, a restaurant in Columbus, and lived off campus with three of her friends.²⁴ Reagan was born in Ohio and lived with her family, consisting of Toby, her

²¹ OHIO REV. CODE ANN. § 2967.271 (2020).

²² Brianna Bennet, *The Cruel and Vindictive Murder of Reagan Tokes*, MEDIUM (Dec. 9, 2020), <https://medium.com/crimebeat/the-cruel-and-vindictive-murder-of-reagan-tokes-63340a6b83f8>.

²³ *Id.*

²⁴ *Id.*

father, Lisa, her mother, and Makenzie, her sister. When she began college at Ohio State, her family moved to Florida.²⁵

On the night of February 8, 2017, Reagan worked a shift at Bodega, where she was seen on camera leaving the restaurant at 9:45 p.m.²⁶ Her family had not heard from her and began to worry when she did not answer her phone.²⁷ A roommate and friend, Kirsten, noticed her room empty the next morning but assumed she had left for class early; however, after her friends did not hear from her by midday, they also became concerned.²⁸ Her friends attempted to retrace her steps from Bodega the night before, but they were unable to find anything, and eventually a missing persons report was filed with the police.²⁹

Initially, Reagan's friends believed she went out of town and her phone had died, while Reagan's family was worried she was in a car accident.³⁰ However, none of them expected the tragedy that actually occurred on the night of February 8. After Reagan had left Bodega, she was attacked by an assailant who forced her to drive around the city to numerous ATMs in an effort to withdraw cash.³¹ After several failed attempts, the assailant forced Reagan to return to the first ATM where he was able to retrieve sixty dollars.³² Security footage from the night shows Reagan and the assailant at the ATMs and two gas stations.³³ During this terrifying series of events, the assailant forced Reagan to pull the car into an alley, where he raped her.³⁴ The assailant then forced Reagan to drive to Scioto Grove Metro Park.³⁵ Once there, he forced Reagan out of the car and into a field.³⁶ The assailant then made Reagan remove her clothes and shot her twice in the head, leaving Reagan in the field and driving away in her car.³⁷

The assailant was a man named Brian Golsby.³⁸ Golsby was previously convicted for an attempted rape and robbery in 2011 and had just been released in November of 2016.³⁹ While Golsby was incarcerated, he received fifty-two write-ups for infractions he committed, was moved amongst five separate prisons, and forced to register as a sex offender.⁴⁰

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

Despite his concerning behavior while serving his sentence, he was still released on time due to felony sentencing structures in place at the time, which only allowed finite sentences that could not be extended absent additional prosecution.⁴¹ Golsby was under post-release control under the supervision of the APA and wearing an ankle monitor, but this was not enough to prevent him from committing these heinous crimes against Reagan.⁴²

Golsby was ultimately identified from a camera on a passing garbage truck showing both him and Reagan in her vehicle.⁴³ Police eventually found Reagan's car that appeared to have been partially burned, and they located a cigarette butt with Golsby's DNA on it inside the car.⁴⁴ Golsby was ultimately charged and convicted of aggravated murder, rape, kidnapping, and robbery and was sentenced to three life sentences without the possibility of parole at Ohio's maximum security penitentiary in Youngstown, Ohio.⁴⁵ After Golsby was convicted for those crimes, he separately pled guilty to numerous unrelated robberies that were committed in the surrounding area prior to Reagan's murder.⁴⁶

B. Legislation and Aftermath

After Reagan's murder, her family immediately began working with Ohio legislators in an effort to ensure that another family's child would not suffer the same fate that Reagan did.⁴⁷ The Ohio State Legislature then drafted and passed Senate Bill 201, commonly known as the Reagan Tokes Law.⁴⁸ The main impact of this law was the creation of indefinite sentencing guidelines for certain felonies.⁴⁹ The law also brought changes to post-release control and GPS monitoring.⁵⁰ The family filed a lawsuit against the Ohio DRC, arguing they were negligent in their supervision of Golsby while he was on post-release control; the case was ultimately dismissed by the Court of Common Pleas and affirmed on appeal.⁵¹ The Tokes family also created the Reagan Tokes Foundation, and there have been two memorials

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Olivia Fecteau, *Brian Golsby Sentenced to Additional 66 Years for German Village Robberies*, NBC4 (April 3, 2018, 2:53 PM EDT), <https://medium.com/crimebeat/the-cruel-and-vindictive-murder-of-reagan-tokes-63340a6b83f8>.

⁴⁷ *Reagan Tokes case spurs Ohio legislation to change incarceration guidelines*, *supra* note 6.

⁴⁸ *Senate Bill Supporting Boggs' Reagan Tokes Act Passes Ohio House*, THE OHIO H.R. (December 14, 2018), <https://ohiohouse.gov/news/democrat/senate-bill-supporting-boggs-reagan-tokes-act-passes-ohio-house-98877>.

⁴⁹ *Id.*

⁵⁰ *Reagan Tokes case spurs Ohio legislation to change incarceration guidelines*, *supra* note 6.

⁵¹ Bennet Haeberle, *Family of Reagan Tokes trns to state Supreme Court for ruling on lawsuit*, WBNS (May 31, 2019, 6:10 PM EDT), <https://www.10tv.com/article/news/investigations/10-investigates/family-reagan-tokes-turns-state-supreme-court-ruling-lawsuit-2019-may/>.

constructed at Ohio State and Scioto Grove Metro Park.⁵²

The Reagan Tokes Law is codified throughout various statutes and can be very complicated. The sentencing portions of the bill effectively create indefinite sentences for “qualifying felonies.”⁵³ Ohio Revised Code (“O. R. C.”) § 2929.14 states that a qualifying felony is either a first or second-degree felony that does not carry a possible life term.⁵⁴ Felonies of the third, fourth, or fifth degrees do not count as qualifying felonies and are not subject to the indefinite sentencing guidelines.⁵⁵ There are three different manners in which an indefinite sentence for a qualifying felony can be calculated that are outlined in O. R. C. § 2929.144.⁵⁶ Before explaining how these sentences are calculated, it is important to understand the terminology that goes into the calculation. The “minimum term” is “[t]he term of imprisonment imposed by the sentencing judge from the range of terms available for that offense for a particular qualifying offense. The defendant is presumed to be released at the expiration of the expiration of the minimum term”⁵⁷ The “maximum term” is “[t]he maximum prison term defendant could be ordered to serve through ‘rebuttal of presumption of release’ by DRC[.]”⁵⁸ The defendant’s “stated prison term” is “[t]he actual minimum sentence defendant will serve before consideration for release and the potential maximum amount of time they could serve.”⁵⁹

The first manner is the simplest. When a defendant is convicted and being sentenced for a single qualifying felony, the maximum term is “equal to the minimum term imposed on the offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code plus fifty per cent of that term.”⁶⁰ For example, if the defendant is being sentenced for felonious assault, a felony of the second degree that is subject to a prison term of two to eight years—and the judge plans on imposing a four year sentence, then the offender’s maximum term is six years.⁶¹ This results in a total stated prison term of a minimum of four years to a maximum of six years.

The second method becomes more complicated. This method is used

⁵² Karyssa D’Agostino, *Rally for Reagan Event Returns, Raising Money for Foundation in Tokes’ Honor*, NBC4 (Sep. 18, 2022, 6:28 PM EDT), <https://www.nbc4i.com/news/local-news/columbus/rally-for-reagan-event-returns-raising-money-for-foundation-in-tokes-honor/>; see also Ceili Doyle, *Scioto Grove Metro Park Garden Dedicated in Memory of Reagan Tokes*, THE COLUMBUS DAILY (Jun. 5, 2019, 6:32 PM ET), <https://www.dispatch.com/story/news/crime/2019/06/05/scioto-grove-metro-park-garden/4972428007/>.

⁵³ *Indefinite Sentencing Quick Reference Guide*, OHIO CRIM. SENT’G COMM’N (July 2019), <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/SB201/SB201QRG.pdf>.

⁵⁴ OHIO REV. CODE ANN. §§ 2929.14, 2929.144(A)(B).

⁵⁵ See *id.* § 2929.14.

⁵⁶ *Id.* § 2929.144(B)(1-3).

⁵⁷ OHIO CRIM. SENT’G COMM’N, *supra* note 53.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ § 2929.144(B)(1).

⁶¹ See *id.* §§ 2903.11, 2929.14, 2929.144.

when a defendant has been convicted of multiple offenses and the judge imposes “concurrent sentences,” or sentences that will be served at the same time. In this method, the maximum term is “equal to the longest of the minimum terms imposed on the offender under . . . section 2929.14 of the Revised Code for a qualifying felony . . . plus fifty per cent of the longest minimum term for the most serious qualifying felony being sentenced.”⁶² For instance, if the defendant has been convicted of rape, a felony of the first degree, and burglary, a felony of the second degree, this method would be used by a judge who imposes concurrent sentences. Felonies of the first degree are subject to a sentence ranging from three to eleven years, and a felony of the second degree still ranges from two to eight years.⁶³ The judge then decides to impose an eight-year sentence for the rape, a three-year sentence for the burglary, and orders them to be served concurrently. The maximum term is then calculated based off the sentence for the more serious felony, here the rape charge.⁶⁴ Consequently, this leaves the stated prison term to be a minimum of eight years to a maximum of twelve years.

The third calculation is the most complex. This involves when a defendant again has multiple convictions, but instead of concurrent sentences, the judge wants to impose consecutive sentences. In this instance,

the court shall add all of the minimum terms imposed on the offender . . . for a qualifying felony of the first or second degree that are to be served consecutively and all of the definite terms of the felonies that are not qualifying felonies of the first or second degree that are to be served consecutively, and the maximum term shall be equal to the total of those terms so added by the court plus fifty per cent of the longest minimum term or definite term for the most serious felony being sentenced.⁶⁵

For example, if a defendant is convicted of the felonies of first-degree aggravated robbery, two counts of second-degree burglary, and third-degree grand theft, the defendant would be subject to the indefinite sentencing guidelines.⁶⁶ The felony of the first degree is still subject to a three to eleven year term, the felonies of the second degree are both subject to a two to eight year term, and the felony of the third degree is subject to an eighteen to thirty-six month term.⁶⁷ The judge then imposes six years for the aggravated robbery, four years for both burglaries, and one year for the grand theft, all to run consecutively to one another. This leaves a minimum term of fifteen years. The maximum term is once again calculated off the most serious

⁶² *Id.* § 2929.144(B)(3).

⁶³ *See id.* §§ 2907.02, 2911.12, 2929.14.

⁶⁴ *Id.* § 2929.144(B)(2).

⁶⁵ *Id.*

⁶⁶ *See id.* §§ 2911.01, 2911.12, 2913.02.

⁶⁷ *See id.* § 2929.14.

qualifying felony, here the aggravated robbery.⁶⁸ This leaves a stated prison term of a minimum of fifteen years to a maximum of eighteen years.

Defendants that are sentenced according to one of these three calculations are presumed to be released at the end of the minimum term imposed by the sentencing judge.⁶⁹ Prior to the expiration of the defendant's minimum term, the DRC must hold a hearing to determine if the defendant is to be held beyond their stated minimum term.⁷⁰ In rebutting this presumption of release, the DRC looks to three factors:

1. Regardless of the offender's security level, the offender violated institutional rules that compromised prison security, or the safety of staff or inmates, or that involved physical harm or threat of physical harm to staff or inmates and that those infractions demonstrate a lack of rehabilitation AND the offender's behavior demonstrates they continue to pose a threat to society.
2. The offender was place[d] in extended restrictive housing at any time during the year preceding the hearing.
3. The offender is classified at security level 3 or higher.⁷¹

If the DRC is successful in rebutting the presumption of release, then the DRC is able to hold the defendant for a reasonable period of time beyond the minimum term, but not to exceed the maximum term that was imposed by the trial judge.⁷² This same process must happen again if the DRC does not initially impose the maximum term after the first hearing.⁷³ If the defendant is held for the entire duration of his or her stated prison term, the defendant will be released at the expiration of the maximum term, subject to post-release control.⁷⁴

This sentencing structure can be incredibly complicated. While the indefinite sentencing is beneficial in helping prevent the premature release of convicted criminals who remain a potential threat to society, thus preventing similar tragedies to the fate of Reagan Tokes, these sentencing guidelines are not easily implemented.⁷⁵ Judges, prosecutors, and defense attorneys all find these sentencing guidelines to be quite difficult to understand and explain.⁷⁶

⁶⁸ *Id.* § 2929.14 (B)(2).

⁶⁹ *Id.* § 2967.271(B).

⁷⁰ *Id.* § 2967.271(C).

⁷¹ S.B. 201- The Reagan Tokes Law Indefinite Sentencing Quick Reference Guide, Ohio Criminal Sentencing Commission (July 2019)..

⁷² § 2967.271(D)(1).

⁷³ *See id.* § 2967.271(D)(2).

⁷⁴ *Id.*

⁷⁵ Memorandum from Sara Andrews, Director, Ohio Crim. Sent'g. Comm'n., to Sponsors of SB133 and HB215 (May 17, 2019) (on file with the Supreme Court of Ohio).

⁷⁶ Through my own experiences at a previous internship, I was defending clients who were charged and convicted of qualifying felonies and saw first-hand the challenges from all three sides in implementing the indefinite sentencing guidelines. *See also id.*

On top of being practically challenging, the Reagan Tokes Law has resulted in a plethora of litigation surrounding the constitutionality of the sentencing practices.

II. LITIGATION SURROUNDING THE REAGAN TOKES LAW

In just a few short years, Ohio appellate courts have issued over 100 decisions revolving around the Reagan Tokes Law.⁷⁷ These cases have ultimately resulted in three main outcomes. The first and most common result has been a determination that the issue is not yet ripe for review and the defendant must wait until the DRC imposes a term beyond the minimum sentence to challenge the constitutionality of the act.⁷⁸ Another second most common result has been the court upholding the constitutionality of the act, finding that it conforms with the separation of powers doctrine and due process.⁷⁹ The final outcome, which has only come out of the Hamilton County Court of Common Pleas in the First District and the Cuyahoga County Court of Common Pleas in the Eighth District, has found the Reagan Tokes Law to violate the separation of powers doctrine for the same reason by which the previous Bad Time Law was struck down, namely, it places adjudication powers prescribed to the judicial branch in the hands of the DRC, an executive branch.⁸⁰

The Supreme Court of Ohio has yet to rule on either the separation of powers or due process issues. However, as of November 1, 2021 there were twenty-two cases pending before the court revolving around the Reagan Tokes Law.⁸¹ All of those cases were being held pending the decision of a twenty-third case, *State v. Maddox*, that was argued on June 29, 2021 and decided March 16, 2022.⁸² However, the issue presented in *Maddox* is focused on the ripeness of the constitutional issues.⁸³ The court did not issue a ruling on the merits of the conditional issues in deciding *Maddox*.⁸⁴

III. OHIO'S PREVIOUS "BAD TIME LAW."

The Reagan Tokes Law is not the first time Ohio has had indefinite sentencing built into its criminal justice system. Ohio's previous indefinite

⁷⁷ See generally Ohio Appellate Decision Tracker, *supra* note 9

⁷⁸ See *State v. Manion*, 2020-Ohio-4230, 11 (Ct. App. 5th Dist.)

⁷⁹ See *State v. Ferguson*, 2020-Ohio-4153, 23–24, 27 (Ct. App. 2nd Dist.); see also *State v. Hacker*, 2020-Ohio-5048, 1, 18, 23 (Ct. App. 3rd Dist.); *State v. Simmons*, 2021-Ohio-939, 23 (Ct. App. 8th Dist.); *State v. Rogers*, 2021-Ohio-3282, 10, 20 (Ct. App. 12th Dist.).

⁸⁰ *State v. Oneal*, No. B 1903562, 2019 WL 7670061, *1, *5 (Ohio Com. Pl.); see also Appellant's Merit Brief at 10, *State v. Maddox*, 2022-Ohio-764 (Jan. 26, 2021).

⁸¹ Ohio Appellate Division Tracker, *supra* note 9.

⁸² *State v. Maddox*, No. 2020-1266, slip op. at 1 (Ohio March 16, 2022).

⁸³ *Id.*

⁸⁴ *Id.* at 22.

sentencing structure was codified under O. R. C. § 2967.11, commonly referred to as the Bad Time Law, which could add time to the end of prison sentences based on “violations” made by the offender while incarcerated.⁸⁵ A “violation” was defined as “an act that is a criminal offense under the law of this state or the United States, whether or not a person is prosecuted for the commission of that offense.”⁸⁶ If an inmate were to commit a “violation” then, “the parole board may punish . . . the prisoner by extending the prisoner’s stated term for a period of fifteen, thirty, sixty, or ninety days . . . the time by which it is so extended shall be referred to as ‘bad time.’”⁸⁷

The Supreme Court of Ohio struck down the Bad Time Law in 2000 in a seven-to-two decision.⁸⁸ The court determined that the APA, an executive branch, was performing judiciary functions as O.R.C. 2967.11 gave the APA the power “to prosecute an inmate for a crime, to determine whether a crime has been committed, and to impose sentence for that crime.”⁸⁹ The APA was functionally acting as the prosecutor, judge, and jury. The trial court was only imposing a flat term of imprisonment while the APA had virtually unfettered discretion in performing judiciary functions, outside of the limits listed in the statute by the legislature.⁹⁰ The court noted that “[p]rison discipline is an exercise of executive power. . . . However, trying, convicting, and sentencing inmates for crimes committed while in prison is not an exercise of executive power.”⁹¹ The court did not reach issues raised regarding due process because it found the separation of powers issue to be dispositive.⁹²

The language from the Bad Time Law varies tremendously from the current language in the Reagan Tokes Law.⁹³ Most notably, the sentencing court now sets a limit on the time an offender can be held beyond the state minimum term.⁹⁴ Also, there is a specific set of guidelines to be followed and factors to be analyzed in determining whether the DRC has rebutted the presumption of release.⁹⁵ The DRC must also afford the offender a hearing, rather than arbitrarily making decisions on their own accord.⁹⁶ These minute differences remove the issue of an executive agency acting as the prosecutor, judge, and jury, as the agency can no longer independently determine that an offender has committed a violation. Now, the DRC carries the burden to prove one of the three conditions listed under O.R.C. 2967.271 to overcome a

⁸⁵ See OHIO REV. CODE ANN. § 2967.11(A) (1994).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ State ex rel. Bray v. Russell, 89 Ohio St. 3d 132, 135 (2000).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Compare OHIO REV. CODE ANN. § 2967.11 (2006) with OHIO REV. CODE § 2967.271 (2020).

⁹⁴ OHIO REV. CODE § 2967.271 (2020).

⁹⁵ *Id.*

⁹⁶ *Id.*

presumption of release possessed by the offender.⁹⁷ Even if DRC does overcome this presumption, they are not entitled to the discretion the APA possessed under the Bad Time Law as they are limited to a cap imposed by the sentencing court.⁹⁸

The new factors are also not as broad as the previous “violations” which encompassed any infraction, however minor, the APA determined to be a criminal offense.⁹⁹ Under the Reagan Tokes Law, the analysis is more focused on violations of institutional rules that “demonstrate that the offender has not been rehabilitated” and compromise security or safety or involve physical harm.¹⁰⁰ The behavior must further “demonstrate that the offender continues to pose a threat to society.”¹⁰¹ The law also takes into account restrictive housing and the level of security of the offender.¹⁰²

Additionally, the Supreme Court of Ohio has also distinguished the former Bad Time Law with the Reagan Tokes Law.¹⁰³ The court’s majority opinion in determining the ripeness of a challenge to the Reagan Tokes Law points to the differences in the DRC’s role in the process as well as the finality of the sentence.¹⁰⁴ The changes made by the legislature aimed to fix the constitutional violations contained in the Bad Time Law and its processes, but the same issues have arose once again.

IV. CONSTITUTIONAL ISSUES

A. Ripeness

Before delving into the concerns rooted in due process and the separation of powers doctrine, the claim must first be determined to be ripe for review. Before the separations of powers and due process issues are even addressed by the court, some courts have dismissed cases based on a finding

⁹⁷ *Id.* In order to rebut the presumption of release, the DRC must show one of three conditions: “1) Regardless of the offender’s security level, the offender violated institutional rules that compromised prison security, or the safety of staff or inmates, or that involved physical harm or threat of physical harm to staff or inmates and that those infractions demonstrate a lack of rehabilitation AND the offender’s behavior demonstrates they continue to pose a threat to society. 2) The offender was placed in extended restrictive housing at any time during the year preceding the hearing. 3) The offender is classified at security level 3 or higher.” *Id.*

⁹⁸ *Id.*

⁹⁹ § 2967.11.

¹⁰⁰ *Id.* § 2967.271.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *State v. Maddox*, No. 2020-1266, slip op. at 15—16 (Ohio March 16, 2022).

¹⁰⁴ *Id.* at 15 (citing *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 134—135, 729 N.E.2d 359 (2000)). “But *Bray* is distinguishable from this case, because it involved prisoners’ challenges to former R.C. 2967.11, Ohio’s ‘bad time’ statute, which authorized DRC to unilaterally extend an inmate’s sentence beyond the sentence imposed by the trial court if the prisoner committed certain violations while in prison.” *Id.* at 16 “In contrast, *Maddox* and other defendants who have been sentenced under the Reagan Tokes Law have received the entirety of their sentences and the sentences have been journalized.” *Id.*

that the claims have not been ripe.¹⁰⁵ Ripeness is in itself, “peculiarly a question of timing”¹⁰⁶ This doctrine has found justification in part of an effort “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies”¹⁰⁷ The Supreme Court of Ohio has determined that, in order for a claim to be ripe, it must not “rest[] on contingent events that may never occur at all.”¹⁰⁸ However, the court also noted that criminal sentences are immediately appealable even if the ultimate effects may be contingent upon future events.¹⁰⁹

Despite the holdings from various appellate districts within the state, the conditionality claims are ripe for review once the defendant is subjected to the sentencing structure of the Reagan Tokes Law.¹¹⁰ The majority of the argument that the issues are not yet ripe for review rests on one major premise: the offender has not been subjected to the extension under the law until they have completed their minimum term and have been subjected to an extension imposed by the DRC.¹¹¹ This argument seemingly coexists perfectly with the notion that claims may not rest upon contingent events that may or may not occur as an offender, so long as they do not fall under the criteria listed in O.R.C. § 2967.271.¹¹² Offenders are not required to have their sentences extended and could be released without having to serve any portion of that time.

The argument that such constitutional issues are ripe is more extensive. Primarily, offenders note that they are subject to the terms of felony sentencing—the Reagan Tokes Law—the second they plea to, or are found guilty of, a qualifying felony.¹¹³ The offenders are then sentenced in accordance with the law and have their immediate right of appeal as to the felony sentence.¹¹⁴ These ranges can also be used as leverage by the state

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Reg'l. Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

¹⁰⁷ *Abbott Lab's. v. Gardner*, 87 S.Ct. 1507 (1967).

¹⁰⁸ *State ex rel. Jones v. Husted*, 73 N.E.3d 463 (2016).

¹⁰⁹ *See State v. Smith*, 964 N.E.2d 423 (2012) (“A sentencing court’s failure to inform an offender, as required by R.C. 2947.23(A)(1), that community service could be imposed if the offender fails to pay the costs of prosecution or court costs presents an issue ripe for review even though the record does not show that the offender has failed to pay such costs or that the trial court has ordered the offender to perform community service as a result of failure to pay.”).

¹¹⁰ *See State v. Maddox*, No. 2020-1266, slip op. at 18, 21 (Ohio March 16, 2022).

¹¹¹ *See Brief for Appellee at 2, State v. Maddox*, No. 2020-1266 (Ohio March 17, 2021).

¹¹² *See Maddox*, slip op. at 33, 36. Offenders’ sentences may be extended based on “1. Regardless of the offender’s security level, the offender violated institutional rules that compromised prison security, or the safety of staff or inmates, or that involved physical harm or threat of physical harm to staff or inmates and that those infractions demonstrate a lack of rehabilitation AND the offender’s behavior demonstrates they continue to pose a threat to society. 2. The offender was placed in extended restrictive housing at any time during the year preceding the hearing. 3. The offender is classified at security level 3 or higher.” S.B. 201- The Reagan Tokes Law Indefinite Sentencing Quick Reference Guide, Ohio Criminal Sentencing Commission (July 2019).

¹¹³ *See OHIO REV. CODE ANN.* § 2967.271 (2020).

¹¹⁴ *See State v. Arnoff*, 2020-Ohio-3520, 8 (Ct. App. 9th Dist.); § 2953.08(A) (2020).

during plea negotiations, influence strategy of defense attorneys, and factor into judges' considerations when choosing a sentence to impose.¹¹⁵ Additionally, Ohio Criminal Rule 12 allows a defendant to challenge the constitutionality of a statute prior to the commencement of trial.¹¹⁶ Therefore, in the instance that being sentenced under the guidelines does not provide for a sufficient injury, Criminal Rule 12 unequivocally carves out an exception to the general notion of ripeness that a claim must not be speculative. If the offender was forced to wait to challenge the Reagan Tokes Law until additional time has been imposed, their remedy would be *habeas corpus* review.¹¹⁷ Such review could then bring in additional constitutional questions outside the scope of the Reagan Tokes Law such as the right to counsel, right to counsel on appeal, and the right to effective counsel.¹¹⁸ Finally, there is not a lack of record that could prevent judges from reviewing the sentence.

On March 16, 2022, the Supreme Court of Ohio adopted the latter reasoning in determining that the issue of conditionality in relation to the Reagan Tokes Law is ripe for review on direct appeal.¹¹⁹ In a six-to-three decision, the court determined the issue to be ripe for review.¹²⁰ The court noted that "defendants who have been sentenced under the Reagan Tokes Law have received the entirety of their sentences and the sentences have been journalized. Therefore, a direct appeal is the appropriate way to challenge the constitutionality of the provisions at issue."¹²¹ The court additionally agreed that forcing offenders to wait until additional time was imposed before they can appeal their sentence would result in "duplicative and piecemeal litigation"¹²²

Three separate dissenting opinions were filed, all of which were joined solely by the authoring justice.¹²³ Justice Kennedy's misplaced dissent wrongfully asserts that the case should have never been accepted due to there being no appellate conflict.¹²⁴ Justice Kennedy takes this stance based on an argument that the Sixth District Court of Appeals never made an explicit finding that the issue was ripe when they ruled on the merits.¹²⁵ However, a court issuing a decision on the merits is unequivocally a clear, implicit

¹¹⁵ See Reply Brief for Appellant at 4–7, *State v. Maddox* No. 2020-1266 (Ohio March 16, 2022).

¹¹⁶ See OHIO CRIM. R. 12.

¹¹⁷ Merit Brief for Appellant at 2, *State v. Maddox*, No. 2020-1266 (Ohio March 16, 2022). A writ of *Habeas Corpus* is used to determine whether or not the detention of a prisoner is valid. *Habeas Corpus*, CORNELL L. SCH., https://www.law.cornell.edu/wex/habeas_corpus (last visited Oct 30, 2022).

¹¹⁸ See *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (right to appointed trial counsel); *Douglas v. California*, 372 U.S. 353, 355 (1963) (right to counsel on direct appeal); *Evitts v. Lucey*, 469 U.S. 387, 395 (1985) (right to appointed counsel includes right to *effective* counsel).

¹¹⁹ *Maddox*, slip op. at 1, 11, 21.

¹²⁰ *Id.* at 11.

¹²¹ *Id.* at 16.

¹²² *Id.* at 17.

¹²³ See generally *id.*

¹²⁴ *Id.* at 26 (Kennedy, J., dissenting).

¹²⁵ *Id.* at 26–27 (Kennedy, J., dissenting).

determination that the issue before that court is indeed ripe for review. Justice Fischer shares Justice Kennedy's concern, however, does not join in Justice Kennedy's decision because, in his view, the issue of constitutionality of the Reagan Tokes Law was never raised in the trial court, thus the appellant forfeited such argument.¹²⁶ Justice DeWine filed a third dissenting opinion actually addressing the merits.¹²⁷ Justice DeWine's argument rests exclusively on the premise that appellant had yet to suffer any injury based on the statute and would not do so unless his sentence was extended by the DRC.¹²⁸ This viewpoint is once again incorrect in that it completely ignores the entire process in which the sentence comes about and is imposed as noted above.¹²⁹

B. Due Process

The claim that the law violates procedural due process can be found persuasive based on the notion that the hearings are not done in an impartial fashion; however, this argument is ultimately fruitless as it views the sentencing structure in a microcosm, not in place with the rest of the legal system. When the process is looked at in context with other processes it coincides with, such as parole, it passes constitutional muster. Procedural due process is a right under both the Fifth and Fourteenth Amendments to the United States Constitution.¹³⁰ This guarantees a right to notice and a hearing whenever the government is depriving a criminal defendant of their liberty.¹³¹ The presence of a deprivation of liberty under the Reagan Tokes Law is clearly present as a period of incarceration is a prototypical example of a deprivation of an individual's liberty. Ohio's constitution also provides such due process protections under Article I, Section 16.¹³² The administration of such a hearing is to be conducted by an impartial decision maker.¹³³ In addition to an individual's general liberty interest against being incarcerated, the Reagan Tokes Law creates a protected liberty interest in its concept of presumptive release at the expiration of the minimum term.¹³⁴ Ohio courts also provide a great deal of deference to its legislature in reviewing laws for conformance with constitutional standards.¹³⁵ For example, "[i]t is well settled that 'before a court may declare [a statute] unconstitutional, it must

¹²⁶ *Id.* at 30–31 (Fischer, J., dissenting).

¹²⁷ *Id.* at 34 (DeWine, J., dissenting).

¹²⁸ *Id.* at 46 (DeWine, J., dissenting).

¹²⁹ See *supra* notes 110–118 and accompanying text.

¹³⁰ See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

¹³¹ *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972).

¹³² OHIO CONST. art. I, § 16.

¹³³ *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (citing *In re Murchison*, 349 U.S. 133) (an impartial decision maker is essential).

¹³⁴ *State v. O'Neal*, Hamilton C.P. No. B 1903562, 2019 WL 7670061 (Nov. 20, 2019).

¹³⁵ See *Haight v. Minchak*, 146 Ohio St.3d 481, 2016-Ohio-1053, 58 N.E.3d 1135, at 11.

appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.”¹³⁶

Common pleas courts within the state have determined the Regan Tokes Law violates such due process protections.¹³⁷ Without question, the sentencing guidelines provide an adequate notice and hearing that conform to constitutional standards.¹³⁸ Thus, the question then turns on whether or not the hearing is conducted in an impartial fashion. One of the factors to be considered during the hearing is whether or not the individual has committed any infractions during his incarceration.¹³⁹ This infraction could potentially include acts that could be deemed criminal. Courts that have found due process to be violated did so in part on the rationale that “this determination should take place before the sentencing judge, as ‘[i]t is a fundamental tenet of due process that the decision to restrict an individual’s freedom can only be made by a neutral magistrate, not by law enforcement officials whose primary purpose is to place offenders in jail.’”¹⁴⁰ These common pleas judges have come to this determination by seeing the process as an administrative body acting as both prosecutor and judge, a similar situation as the Bad Time Law.¹⁴¹

These courts have also come to have issue with the amount of discretion held by the DRC under the factors. This is rooted in the broadness as to what could constitute a write up while an offender is incarcerated. The court in *State v. O’Neal* stated,

Inmate Rules of Conduct lists 61 rules for issues concerning situations like assault, unauthorized relationships, and even “being out of place.” However, neither O.A.C. 5120-9-06, nor S.B. 201 provide a hierarchy of misconduct to determine which infractions should be reasonably considered in deciding whether to extend an offender’s prison sentence. Without some sort of hierarchy or ranking, the parole board holds unfettered discretion to consider minor infractions when deciding to extend an offender’s sentence.¹⁴²

This discretion could be construed to make the DRC partial in its analysis, which would violate due process. The language could also be stretched to a “void for vagueness” argument for not being clear enough to put a man of reasonable intelligence on notice. However, this argument is quite attenuated, and the analysis would be the same whether it was the DRC making the

¹³⁶ *Id.* (quoting *State ex rel. Dickman v. Defenbacher*, 128 N.E.2d 59, 59 (Ohio 1955)).

¹³⁷ See *State v. O’Neal*, Hamilton C.P. No. B 1903562, 2019 WL 7670061, at *3 (Nov. 20, 2019); *State v. Simmons*, 2021-Ohio-939, 169 N.E.3d 728,

3; see also Appellant’s Merit Brief at 9–10, *State v. Maddox*, 2022-Ohio-764 (Jan. 26, 2021).

¹³⁸ See OHIO REV. CODE ANN. § 2967.271 (2020).

¹³⁹ *Id.*

¹⁴⁰ *O’Neill*, 2019 WL 7670061, at *6.

¹⁴¹ *Id.* at *5.

¹⁴² *Id.* at *7.

determination or a judge. The final note these courts have made in addressing due process is that courts should not have to submit to actions of a parole authority and the presence of a sentencing judge should be an expectation at these hearings.¹⁴³

Courts on the other side of this argument, mostly district courts of appeals, have found due process to be satisfied. Their reasoning for coming to this conclusion rests on the process of granting or denying parole, as well as the limitations on the discretion of the DRC in extending a sentence beyond the presumptive minimum term.¹⁴⁴ In analogizing the term extension to the grant or denial of parole, the Eighth District Court of Appeals stated that, “[r]equiring a defendant to remain in prison beyond the presumptive minimum term is akin to the decision to grant or deny parole”¹⁴⁵ The decision of whether to grant or deny parole for an inmate is made by a non-judicial body and also involves the deprivation of liberty by the state.¹⁴⁶ The Supreme Court of the United States has upheld such parole proceedings to be adequate in light of due process so long as the offender is made aware of why parole was denied.¹⁴⁷

These courts have also noted that the DRC does not have the unfettered discretion that was awarded from the Bad Time Law.¹⁴⁸ The Eighth District determined that the DRC is actually constrained in its ability to extend the offender’s term in two ways.¹⁴⁹ The first of which is by having to show “very specific factors” in determining whether or not to hold an offender beyond their presumptive release date.¹⁵⁰ They also state that the broadness noted by the Hamilton County Court of Common Pleas in *Oneal* is without merit:

[i]nmates are given adequate notice of the conduct that will lead to rule infractions or restrictive housing assignments, factors that trigger the DRC to extend an inmate's minimum term of incarceration. Ohio Adm. Code 5120-9-06 sets forth inmate rules of conduct. Ohio Adm. Code 5120-9-08 provides detailed disciplinary procedures for inmate rule violations, with a hearing before the Rules Infraction Board and notice to the inmate of the hearing and an opportunity to appeal the decision of the board. Ohio Adm. Code 5120-9-10 sets forth the

¹⁴³ *Id.*

¹⁴⁴ *State v. Simmons*, 2021-Ohio-939, 169 N.E.3d 728, 19 (8th Dist.); *State v. Ferguson*, 2d Dist. Montgomery No. 28644, 2020-Ohio-4153, 20, 25; *State v. Wilburn*, 2021-Ohio-578, 168 N.E.3d 873, 30, 35.

¹⁴⁵ *Simmons* at 19 (quoting *Wilburn* at 30).

¹⁴⁶ *Id.* at 18—19.

¹⁴⁷ *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979)).

¹⁴⁸ *See State v. Simmons*, 2021-Ohio-939, 10 (Ct. App. 8th Dist.); *State v. Ferguson*, 2020-Ohio-4153, 23 (Ct. App. 2d Dist.); *State v. Wilburn*, 2021-Ohio-578, 26 (Ct. App. 8th Dist.).

¹⁴⁹ *Simmons*, 2021-Ohio-939 at 21.

¹⁵⁰ *Id.*

procedures for when and under what circumstances an inmate may be placed in and/or transferred to a restrictive housing assignment.¹⁵¹

The opinion from *Simmons* directly rejected the reasoning outlined in O'Neal in addressing the limited discretion possessed by the DRC.¹⁵² The final bit to note with the DRC's lack of discretion is that they are constrained by the sentence imposed by the sentencing court.¹⁵³ The DRC, no matter what factors are met, cannot hold an offender beyond the maximum term imposed at sentencing.¹⁵⁴

The Reagan Tokes Law provides what due process protections are required by both the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 16 of the Ohio Constitution. These safeguards that provide notice, hearing, and impartiality are clear within the process, and the arguable shortcoming of the statute is surely not enough to show the legislation to be unconstitutional beyond a reasonable doubt. This is a high bar to reach, especially given the present safeguard required by the statute. The Supreme Court of Ohio calls for the same level of certainty required to convict an offender of the most serious crimes in the state.¹⁵⁵ Certainly, the argument that the hearing is conducted in a biased fashion is not so convincing as to render the alternative unreasonable.

C. Separation of Powers

The separation of powers doctrine "recognizes that the executive, legislative, and judicial branches of our government have their own unique powers and duties that are separate and apart from the others."¹⁵⁶ This doctrine plays a central role into the criminal justice system in the United States. With regards to determining sentencing structures and guidelines, this power falls into the hands of the legislature.¹⁵⁷ The Supreme Court of Ohio has stated,

it is among the admitted legislative powers to define crimes; to prescribe the mode of procedure for their punishment; to fix by law the kind and manner of punishment, and to provide such disciplinary regulations for prisoners, not in conflict with the fundamental law, as the legislature deems best.¹⁵⁸

The process is then shifted to the judiciary where the sentence is imposed.¹⁵⁹ The sentencing judge has what discretion is bestowed to him or her when

¹⁵¹ *Id.* (citing *Wilburn*, 2021-Ohio-578 at 36).

¹⁵² *Id.* at 22.

¹⁵³ OHIO REV. CODE ANN. § 2967.271 (2020).

¹⁵⁴ *Id.*

¹⁵⁵ *See Simmons*, 2021-Ohio-939 at 18—23.

¹⁵⁶ *State v. Thompson*, 92 Ohio St. 3d 584, 586 (2001).

¹⁵⁷ *Simmons*, 2021-Ohio-939 at 11.

¹⁵⁸ *State ex rel. Att'y Gen. v. Peters*, 43 Ohio St. 629, 647 (1885).

¹⁵⁹ *Id.* at 648.

adjudicating a criminal case and sentencing a defendant for a qualifying felony. Once the judge imposes such a sentence, the function of the judiciary has been completed.¹⁶⁰ Once the sentence is imposed, the DRC is vested with absolute power over the state's penal system.¹⁶¹ The Supreme Court of Ohio has specifically held that, "[t]he administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers."¹⁶²

The common pleas courts that have found the Reagan Tokes Law to violate the separation of powers doctrine has done so by stating that the DRC, an agency part of the executive branch, is performing a judicial function in extending offenders' sentences.¹⁶³ The Hamilton County Court of Common Pleas specifically noted that, "[a]llowing the DRC to conduct a hearing to determine the guilt of an alleged criminal offense, and then give an additional sentence based on that frail determination clearly violates the separation of powers doctrine."¹⁶⁴ This conclusion appears to be in direct conflict with the Ohio Supreme Court's determination in *Taulbee* that the judicial branch is responsible for the administration of justice.¹⁶⁵ Again, this reasoning is in line with Ohio's previous Bad Time Law that was stricken by the Ohio Supreme Court.¹⁶⁶ The *O'Neal* court further reasoned "that this indeterminate statutory scheme is a second attempt to 'depriv[e] the judiciary of its exclusive authority to prosecute criminal offense[s]'"¹⁶⁷ However, this line of reasoning has not gained much traction in district courts of appeals.

Both the Eighth and Second District Courts of Appeals have determined the Reagan Tokes Law to conform to the requirements of the separation of powers doctrine. Again, these courts have related the situation to where offenders are sentenced to prison with just the possibility of post-release control upon release, rather than mandatory post-release control.¹⁶⁸ Under the Reagan Tokes guidelines, the sentencing court imposes the presumptive minimum term, but they also impose a maximum to the term that constrains the DRC.¹⁶⁹ Therefore, even if the DRC makes a determination that

¹⁶⁰ *Simmons*, 2021-Ohio-939 at 12.

¹⁶¹ *Woods v. Telb*, 89 Ohio St. 3d 504, 512 (2000).

¹⁶² *State ex rel. Johnston v. Taulbee*, 66 Ohio St. 2d 417, 421 (1981).

¹⁶³ See *State v. Oneal*, No. B 1903562, 2019 WL 7670061 *1 (Hamilton Cnty. Ct. Com. Pl. Nov. 20, 2019), *rev'd*, No. C-190736, 2022 WL 3908763 (Ct. App. Aug. 31, 2022), *appeal accepted for review*, 2022-1090, 2022 WL 14388588 (Ohio Oct. 25, 2022); *Hamilton Co. C.P. No. B 1903562*, 2019 WL 7670061 (Nov. 20, 2019); *State v. Simmons*, Cuyahoga Co. C.P. No. CR-638591 (Jan. 30, 2021); *State v. Tupper*, Cuyahoga Co. C.P. No. CR-19-645523 (Jan. 28, 2020); *State v. Sealey*, Cuyahoga Co. C.P. No. CR-19-644811 (Feb. 12, 2020).

¹⁶⁴ *Oneal*, 2019 WL 7670061, at *5

¹⁶⁵ *State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 421 (1981).

¹⁶⁶ *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 136 (2000).

¹⁶⁷ *Oneal*, 2019 WL 7670061, at *5

¹⁶⁸ See *Simmons*, 2021-Ohio-939 at 23; *Ferguson*, 2020-Ohio-4153 at 23; *Wilburn*, 2021-Ohio-578 at 26.

¹⁶⁹ OHIO REV. CODE ANN. § 2967.271 (2020).

the offender should be held beyond the presumptive minimum term, the sentence being carried out is still the one imposed by the sentencing judge of the common pleas court, not just the DRC going beyond that sentence as they would under the previous Bad Time Law.¹⁷⁰ This is precisely what is done when the DRC elects to place an offender on post-release control that was optional.¹⁷¹ The executive agency is simply opting to carry out part of a sentence imposed by the trial court that was optional. The Second District specifically articulated that the optional time is a term that is “part of the actual sentence, unlike bad time, where a crime committed while incarcerated resulted in an additional sentence not imposed by the court. In other words, the court imposes the full sentence and the [DRC] determines whether violations merited its imposition.”¹⁷²

Finally, and as noted above, the Supreme Court of Ohio has distinguished the role played by the DRC under the Bad Time Law and the role of the DRC under the Reagan Tokes Law.¹⁷³ The Court specifically held that

Bray is distinguishable from this case, because it involved prisoners’ challenges to former R.C. 2967.11, Ohio’s “bad time” statute, which authorized DRC to unilaterally extend an inmate’s sentence beyond the sentence imposed by the trial court if the prisoner committed certain violations while in prison. This court held that former R.C. 2967.11 violated the separation-of-powers doctrine, because it stripped the trial courts of their authority to impose final sentences on defendants.¹⁷⁴

In the very next paragraph of that opinion, the court implicitly determines that final sentence is imposed by the sentencing court under the Reagan Tokes Law in stating “defendants who have been sentenced under the Reagan Tokes Law have received the entirety of their sentences and the sentences have been journalized.”¹⁷⁵ This set of quotes indirectly agrees that the DRC is not imposing sentence, but rather executing a sentence, an act which does not violate the separation of powers doctrine.

V. INDEFINITE SENTENCING STRUCTURES IN OTHER STATES

Indefinite sentencing structures are common across the United States. Ohio is far from the only state to implement this concept into their criminal justice systems. As of 2019, not including Ohio, there were thirty-four states

¹⁷⁰ *Simmons*, 2021-Ohio-939, at 10.

¹⁷¹ *Id.*; see also *State v. Ferguson*, 2020-Ohio-4153 23 (Ct. App. 2nd Dist.).

¹⁷² *Ferguson*, 2020-Ohio-4153 at 23 (quoting *Woods*, 89 Ohio St.3d 504).

¹⁷³ *Maddox*, No. 2022-1266, slip op. at 15–16.

¹⁷⁴ *Id.* at 15 (citations omitted).

¹⁷⁵ *Id.* at 16.

using indefinite sentencing structures.¹⁷⁶ Many of these states, including Michigan, Tennessee, and Utah, implement structures that are substantially similar to the Reagan Tokes Law.¹⁷⁷ These states occupy different regions across the United States and have been highlighted to show the spread of indefinite sentencing.¹⁷⁸ This Comment has selected Michigan as an intra-Midwest comparison, Tennessee as a comparison from the South, and Utah from the West.

A. Michigan (Midwest)

Michigan's indefinite sentencing structure operates in a similar manner to Ohio's Reagan Tokes Law. Michigan also limits the application of its indefinite structures to specifically listed felonies.¹⁷⁹ Offenders sentenced under the guidelines are given a minimum term and a maximum term that are both determined by the sentencing court.¹⁸⁰ After the offender has served time up to his minimum term, jurisdiction over the offender's sentence is obtained by the Parole Board.¹⁸¹ The Parole Board is then in charge of the decision of terminating the offender's sentence or continuing to hold the offender.¹⁸² The Parole Board's decision is based on if the board "has a reasonable assurance the prisoner no longer poses a risk to the public."¹⁸³ If the offender is not paroled by the time their maximum term is served, they are released.¹⁸⁴ The Parole Board can make the determination to release the offender at any time between the expiration of the minimum term and the expiration of the maximum term.¹⁸⁵

Michigan's structure has also been the subject of attacks on a constitutional basis.¹⁸⁶ These challenges have not directly mirrored the same challenges made against the Reagan Tokes Law, which in part seems to be the result of prior precedent from the Supreme Court of Michigan. Michigan has seen a similar separation of powers argument that is present in Ohio and upheld indeterminate sentencing under such a challenge.¹⁸⁷ In a decision that has lasted over a century, the Supreme Court of Michigan noted that:

¹⁷⁶ Ken LaMance, *Indeterminate Sentencing Laws*, LEGALMATCH (Feb. 13, 2019), <https://www.legalmatch.com/law-library/article/indeterminate-sentencing-laws.html>.

¹⁷⁷ See MICH. COMP. LAWS ANN. § 769.12 (2006); TENN. CODE ANN. § 40-28-115 (2017); UTAH CODE ANN. § 76-3-202 (2017).

¹⁷⁸ Many states use the term "indeterminate" rather than "indefinite" when describing their structure. Though the terminology is slightly different, the principle behind the sentencing structure is the same.

¹⁷⁹ MICH. SENT'G GUIDELINES MANUAL (MICH. JUD. INST. 2022).

¹⁸⁰ *Family Information Packet: Prisoner Release Date Information*, MICH. DEP'T OF CORR. (last visited Oct. 31, 2022).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See *Manaca v. Ionia Circuit Judge*, 146 Mich. 698, 702, 704 (1906); *People v. Tanner*, 387 Mich. 686, 694–95 (1972); *People v. Moore*, 433 Mich. 311, 322 (1989).

¹⁸⁷ See *Manaca*, 146 Mich. at 699; see also *Moore*, 433 Mich. at 327.

[w]hen we speak, . . . of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.¹⁸⁸

The court determined that this line of reasoning allowed for such overlap between the executive branch to carry out a sentence determined by the judicial branch.¹⁸⁹ The same line of reasoning justifies a determination that the Reagan Tokes Law does not violate the separation of powers doctrine. The overlap under the law is permissible as the doctrine does not call for absolute distinct functions and is not an impermissible overlap. This argument was represented to the Supreme Court of Michigan once more, where the court refused to reconsider its position.¹⁹⁰

Michigan's structure has also been challenged under the Eighth Amendment's prohibition on cruel and unusual punishment, but the Supreme Court of Michigan again upheld the structure.¹⁹¹ This is a challenge not seen in Ohio's prominent Reagan Tokes case law, but it is worth noting that the court has found the challenge to have merit, but not as to the structure, just the imposition as to as specific offender.¹⁹² The court held that "a 'term of years' must be an indeterminate sentence less than life. It must be something that is reasonably possible for a defendant to actually serve."¹⁹³ The court has, however, refused to strike the structure as a whole.¹⁹⁴

B. Tennessee (South)

Tennessee's indefinite sentencing structure is also similar to the Reagan Tokes Law. The structure is once again a sentence with a minimum and maximum term imposed by the trial court, that is then transferred to the parole board.¹⁹⁵ The law even goes a step further than Ohio's structure in stating that, "[t]he action of the board in releasing prisoners shall be deemed

¹⁸⁸ *Manaca*, 146 Mich. at 703–04 (quoting *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902)).

¹⁸⁹ *Id.* at 704.

¹⁹⁰ *Moore*, 433 Mich. at 327.

¹⁹¹ See *Manaca*, 146 Mich. at 700; *Tanner*, 387 Mich. at 687; *Moore*, 433 Mich. at 328.

¹⁹² *Moore*, 433 Mich. at 329.

¹⁹³ *Id.* at 329.

¹⁹⁴ *People v. Tanner*, 387 Mich. 686, 687 (1972) ("We likewise hold that our present indeterminate sentence act is not constitutionally infirm as providing cruel or unusual punishment. . . .").

¹⁹⁵ See generally TENN. CODE ANN. § 40-28-115 (2017).

a judicial function and shall not be reviewable if done according to law.”¹⁹⁶ The statute also adds factors that the board should consider, similar to that of the Reagan Tokes Law.¹⁹⁷ The calculation is also done in nearly identical terms.¹⁹⁸

Yet again, offenders have challenged their indefinite sentences in Tennessee.¹⁹⁹ However, just as the case in Michigan, this issue in Tennessee has been settled for over a century.²⁰⁰ The law was argued to be unconstitutional for violating both due process and the separation of powers doctrine.²⁰¹ The court swiftly dismissed the due process argument.²⁰² The Supreme Court of Tennessee agreed that there was a clear deprivation of liberty, but determined that an indefinite sentencing structure, as it relates to due process, produces no different of a result than a definite sentencing structure.²⁰³ The court reasoned that:

[i]t is therefore true in a very real sense that by such verdict he is deprived of his liberty. The result is not different from what occurred under the former practice, under which the verdict ascertained a definite period of service. That could not become operative until sentence was pronounced by the judge, but it was the duty of the judge to pronounce sentence if he permitted the verdict to stand. The only distinction under the present statute is in the extent of the imprisonment, or deprivation of liberty. The sentence, though indeterminate, not less than the minimum nor more than the maximum, is in effect for the maximum, subject to reduction in the manner stated, after the minimum time shall have been served.²⁰⁴

The court also determined the structure to be compliant with the separation of powers doctrine, holding that the acts of the parole board were not judicial in nature—this aspect has been superseded by statute as noted above—but further noted that “the act does not purport to confer power whereby any one may be deprived of any legal right, or whereby property or any right claimed can be taken from one person and delivered to or devolved on another.”²⁰⁵

Again, this reasoning can be imputed from Tennessee law and mesh with the Reagan Tokes Law. The processes are nearly identical, and the Supreme Court of Tennessee has determined there to be no issue of due

¹⁹⁶ *Id.* § 40-28-115(c).

¹⁹⁷ *Id.* § 40-28-115(d). *Compare with* OHIO REV. CODE ANN. § 2967.271 (2020).

¹⁹⁸ TENN. CODE ANN. § 40-28-115(b)(1). *Compare with* OHIO REV. CODE ANN. § 2967.271 (2020)..

¹⁹⁹ *Woods v. State*, 130 Tenn. 100, 103–04 (Tenn. 1914).

²⁰⁰ *Id.* at 119.

²⁰¹ *Id.* at 103–04.

²⁰² *Id.* at 107.

²⁰³ *Id.* at 108.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 111.

process.²⁰⁶ Additionally, the court, along with the state legislature in the part of the statute that superseded the *Woods* opinion, found the authority possessed by the parole authority to be a power within their branch.²⁰⁷

C. Utah (West)

Utah's indefinite sentencing structure is similar to that of the three previously discussed, but it is actually applied the most broadly. Every offender sentenced to a prison term is subject to an indefinite prison term, whereas the Reagan Tokes Law is only applied to a limited amount of felonies.²⁰⁸ However, once again, the determination of whether or not to terminate an offender's sentence after the expiration of the minimum term is delegated to the parole authority.²⁰⁹

As we have now seen, these laws do not exist without being challenged on a constitutional basis.²¹⁰ The main issues raised in Utah have focused on due process and the separation of powers doctrine.²¹¹ However, the Supreme Court of Utah has upheld the law under both arguments.²¹² The court acknowledged that the power invested in the parole board in determining whether to terminate or extend a sentence does implicate the offender's liberty interest but determined that the decision-making process that is used in making such determination can meet due process safeguards.²¹³ In doing so, the court determined that the process in place at the time of the decision fell short of those safeguards, but found the process could be reformed to meet the standards without striking the entire sentencing structure.²¹⁴ Three years later, the court would uphold the structure while analyzing it in the scope of the separation of powers doctrine.²¹⁵ The court determined that the power held by the parole board does not run afoul of the doctrine.²¹⁶ The court reasoned that "the fact that the Board has been given this power does not mean that the Board exercises a 'sentencing' power. Rather, the Board merely exercises its constitutional authority to commute or terminate an indeterminate sentence that, but for the Board's discretion, would run until the maximum period is reached."²¹⁷

The due process analysis can be pulled directly from the Supreme

²⁰⁶ *Id.* at 107.

²⁰⁷ *Id.* at 111.

²⁰⁸ UTAH CODE ANN. § 76-3-202 (2017)

²⁰⁹ *Id.* § 77-27-05.

²¹⁰ See *supra* text accompanying notes 176-209.

²¹¹ See generally *Neel v. Holden*, 886 P.2d 1097 (Utah 1994); *Padilla v. Utah Bd. of Pardons & Parole*, 947 P.2d 664 (Utah 1997).

²¹² See *Neel*, 886 P.2d at 1104-05; *Padilla*, 947 P.2d at 669.

²¹³ *Neel*, 886 P.2d at 1101.

²¹⁴ *Id.* at 1103-04.

²¹⁵ *Padilla*, 947 P.2d at 669.

²¹⁶ *Id.*

²¹⁷ *Id.*

Court of Utah and implemented in Ohio. The separation of powers analysis, however, is slightly different, but functionally the same. The court stated that the sentence “would run until the maximum period is reached” if the board did not terminate the sentence.²¹⁸ However, before doing so they state that this is not “‘sentencing’ power.”²¹⁹ The implied backdrop to this is that the sentence had already been determined by the trial court, and the board is now executing that sentence based on its own guidelines produced by the legislature. This aspect is identical to the Reagan Tokes Law. In reality, the Reagan Tokes Law provides more protection for the offender as the offender has a presumption of release at the expiration of the minimum term. Whereas neither Utah, Tennessee, nor Michigan carries such presumption.

CONCLUSION

The constitutional issues raised by offenders in challenging the Reagan Tokes Law are not entirely frivolous and can be found persuasive. The issues raised are well-worth analyzing under a legal microscope to ensure these structures serve their purpose without running afoul of constitutional standards. However, after such analysis is completed, the conclusion is clear and has widespread support: indeterminate sentencing does not unlawfully deprive the offender of due process safeguards, nor does it place such judicial powers within the hands of the executive branch to the point that it disturbs the separation of powers doctrine. The structures provide sufficient due process safeguards in providing a consistent process that delivers notice and presents a hearing for the offender in front of a neutral decision maker. Additionally, the power vested in the executive authorities making the determination relating to the termination or extension of the offender's sentence is not impermissible as the sentence is determined by the judicial branch and the executive is constrained in its authority.

A review of structures across various states yields the same conclusion even when analyzing structures that provide less protection for the offender. Michigan, Tennessee, and Utah each appear to leave the parole authority with greater discretion than the DRC in Ohio.²²⁰ Not only is the Ohio DRC more limited than the other reviewed boards, but they also must overcome the presumption of release required by the Reagan Tokes Law.²²¹

Ohio's return to indefinite sentencing came about in a truly unfortunate fashion. Ohio went nearly two decades without such a structure and was swiftly pulled back into the majority of states which do impose indefinite sentences. This was only after Reagan Tokes' life was tragically taken by an offender who should not have been free from the state penal

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See *supra* notes 96, 181–85, 207, 209 and accompanying text.

²²¹ OHIO REV. CODE ANN. § 2967.11 (1994).

system, and more than likely would have still been incarcerated had such a structure been in place. The Reagan Tokes Law is not substantially different from the previous Bad Time Law. The changes were minor, but the difference is not just in the outcome in relation to the constitutionality. The major difference lies in the lives that may be saved by the presence of an indefinite sentencing structure.