



The Pit and the Pendulum

How to Halt the Perpetual Motion Machine of Louisiana's Ever-Changing Sentencing Laws

By Christopher S. Bowman

In Edgar Allan Poe's short story "The Pit and the Pendulum," an unnamed narrator describes the torture he experiences during the Spanish Inquisition.¹ While restrained, the narrator watches a sharp pendulum swinging above him as it inches towards dismembering him.

Anyone who has navigated the Louisiana criminal justice system has felt like Poe's narrator. The pendulum they face, however, is Louisiana's sentencing laws in criminal proceedings. These laws are unpredictable, lack transparency, and swing wildly back and forth between tough-on-crime and progressive criminal justice reform orientations. Consequently, the laws are nearly impossible for attorneys, much less normal citizens, to decipher.

The Pendulum Begins Swinging – How Did We Get Here:

From the mid- to late 19th century, through to the 1970s, incarceration rates ("rates") in the United States remained fairly stable.² In Louisiana, rates were stable (from 1972 until 1976) with a dramatic increase in the late 1970s³ through 2000. In the following decade, the prison population in Louisiana continued to grow, but at a slower rate, before peaking in 2009.⁴ In 2012, rates began to decline, in line with national trends.⁵

The increase in rates from mid- to late 1970s was a response to increased crime. From 1960 to 1980, violent crime increased nationally by 250%.⁶ In Louisiana,

violent crime also grew, by more than 460%, before slowing in the early 1980s.⁷ By the mid 1980s violent crime began to increase, peaking in 1993, at more than 800% greater than 1960.⁸ Thereafter, violent crime slowly decreased, stabilizing in 2010.⁹ As of 2019, violent crime numbers remain similar to that of the late 1970s.¹⁰

How did this cause a lack of transparency in the sentencing laws in Louisiana? While violent crime peaked in 1993, rates continued to increase for 16 years, before peaking in 2009. To combat this, elected officials manipulated back-end sentencing measures (*i.e.* parole eligibility and good time diminution) to regulate and/or reduce rates. From 1993 to 2017 (when Louisiana passed the Justice Re-Investment Act), La. R.S. 15:574.4 (governing parole eligibility) was amended 46 times and La. R.S.

15:571.3 (governing good time diminution) was amended 21 times, resulting in an indecipherable maze of time calculation.

By 2015, Louisiana led the nation in *per capita* incarceration, with the state on the brink of financial ruin. In early 2008, with a recession, a criminal justice reform movement moved across the country.¹¹ In 2008, George Soros (“Soros”), a name synonymous with criminal justice reform and frequently vilified in conservative circles,¹² was supported in reform by the Koch brothers.¹³ As a result, reform packages obtained bipartisan support and passed overwhelmingly.¹⁴ By 2015, it was clear that Louisiana was next for reform.

In July of 2015, I authored a column arguing against the use of more lenient good time diminution and parole eligibility as a means of reducing the state’s prison population.¹⁵ I warned that, “when a crime victim sees a defendant receive a lengthy prison sentence only to learn that he was released after serving a small fraction of it, such victims are outraged and lose faith in the system.”¹⁶ In 2017, the governor and a legislative bipartisan majority ignored such warnings and passed the Justice Re-Investment Act (JRI).

To avoid a politically costly debate, regarding substantive sentencing reform, legislators focused on expanded access to good time diminution and parole eligibility to reduce rates in the JRI legislation. To make matters worse, many provisions were applied retroactively. As such, defendants convicted before the JRI were eligible for immediate release. Prosecutors and crime victims were powerless to prevent this. As to the lack of transparency, discussed *supra*, lawmakers poured gasoline on a brush fire. One year later, the public started distrusting the JRI, exacerbating an already unacceptable variance between the length of a defendant’s sentence and the time that was actually served. In a second column, I predicted the decision, to place expediency over transparency, in the JRI legislation would cause the reform pendulum to swing wildly back in the opposite direction.¹⁷

The Pendulum Swings Back – The Return of Transparency:

In 2023, a new Louisiana Governor was elected, with conservative super-majorities

in both houses of the legislature. Gov. Jeff Landry ran on a tough-on-crime platform. In his first 100 days in office, during a special session, the JRI was repealed, but a level of transparency was also added to Louisiana’s sentencing law that has not existed in decades.

In the 2024 special session, the legislature essentially abolished parole for all defendants except where constitutionally mandated (*i.e.* juveniles who are tried as adults and receive a life sentence).¹⁸ While most changes were prospective to crimes committed on or after Aug. 1, 2024, a new law was signed by the governor mandating a unanimous agreement by the parole board for all parole decisions; a procedural amendment applicable to all future parole hearings, regardless of the date of offense.¹⁹ This law effectively abolished parole for all Department of Corrections (“DOC”) inmates, but for the clearest of cases, regardless of when the crime was committed.

Additionally, Gov. Landry signed a new law that greatly simplified good time diminution.²⁰ Under this law, a defendant convicted of any crime besides a sex offense must serve not less than 85% of his sentence.²¹ Sex offenders are required to serve 100%.²² In so doing, Louisiana law regarding good time diminution is now almost identical to Federal law.

Rep. Debbie Villio, R-Kenner, chair of the House Committee on the Administration of Criminal Justice Committee, authored the 2024 bill that simplified good time diminution, stating that her bill would not increase (incarceration) rates because judges would reduce the sentences they impose, based on this legislation.²³ As evidenced by the near-universal opposition of the criminal defense bar, at numerous legislative hearings in which they stated that these changes would cause the DOC population to uncontrollably swell, it is evident that most criminal defense attorneys disagree with Rep. Villio on this point. While I have a great deal of respect for Rep. Villio, I too cannot agree with her for two reasons.

In January 2024, before new laws went into effect, I prosecuted a defendant convicted of a violation of La. R. S. 14:95.1 (Felon in Possession of a Firearm) and the court imposed a 10-year sentence. Under the old law, that defendant would be eligible for release on good time after serving

42 months of his sentence. In December, I prosecuted a different defendant convicted of the same offense, but under the new law when that defendant returns for sentencing, even if the court imposes the minimum sentence of five years mandated under Louisiana law, he will be required to serve 51 months before he is eligible for release on good time.

According to some estimates, inmates in Louisiana served on average 40% of their sentences before the recent legislative changes.²⁴ Since they are now required to serve 85%, judges and prosecutors would have to more than cut in half the sentences and pleas that they had previously imposed or offered. Given the Governor’s tough-on-crime rhetoric in his previous campaign, it is, needless to say, an unusual request that could be politically risky for a judge or District Attorney to accommodate.

In placing the burden on judges to recalculate the sentences they impose and on prosecutors to adjust the plea deals they offer; our elected leaders are not accounting for the lingering effects of the 2017 JRI legislation. As discussed above, that legislation retroactively reduced the time defendants would have to serve. Accordingly, they are asking judges and prosecutors like me, to bear the risk that some future legislature or Governor will not again retroactively reduce sentences.

It is unquestionable that these recent changes will increase Louisiana’s rate. If the present administration plans ahead, I believe they can avoid the “Hobson’s choice” faced by the prior administration. If they do not, we may see this entire cycle repeat itself in a decade or two.

Finishing the Job – How to Permanently Arrest the Swinging of the Pendulum:

With two additional changes, the Governor could add consistency and permanency to Louisiana’s criminal justice system. These changes would help achieve the stated objectives of the present administration and forever arrest the swinging of the pendulum. I believe that even the opponents of the Governor and his new policies should support these changes.

First, the Department of Corrections needs to conduct more detailed

presentence investigations. I would recommend that these investigations include a scoring sheet, which takes into account aggravating and mitigating factors such as criminal history. This could be used in conjunction with sentencing guidelines promulgated by the executive branch. Judges and attorneys in the Federal system have these tools at their disposal. Since Louisiana's new sentencing model mimics the Federal system, it should include the tools that make the system function well. Furthermore, this would foster a level of consistency in criminal sentences across all 64 parishes, and the guidelines could be adjusted in response to rising or falling crime and/or incarceration rates. Since these guidelines would be advisory – the same as they are in the Federal system, this could be implemented without molesting the constitutionally mandated autonomy of the judiciary or District Attorneys.²⁵

Second, the recent changes regarding parole eligibility and good time diminution should be enshrined in the Louisiana constitution. In so doing, our elected leaders would provide an air of permanency to these changes, giving judges and prosecutors more assurance that they can alter their sentencing habits based upon them. It would also prohibit future elected leaders from using less transparent back-end measures to regulate (incarceration) rates, a point which has both fueled the pendulum and doomed the JRI legislation to failure from the very beginning.

Even if you oppose the recent changes, you should not oppose making them more permanent if you truly wish to reform the criminal justice system. Opponents of the recent changes objected to the effect that the legislation would have on the growth of the DOC population (*i.e.* increased length of sentences), not to the elimination of the variance between the sentence imposed and the time actually served. Instead, opponents should advocate for substantive sentencing reform in the legislature. However, with good time diminution and parole eligibility, ebbing and flowing based upon political whims and legislative fiat, no one can have a true conversation about broader sentencing reform because they are aiming at a target that is

in perpetual motion. If these changes are enshrined in the Louisiana constitution and the predictions of the opponents are correct, then it will inevitably force our elected leaders to have a broader conversation regarding substantive sentencing reform when these changes drive the state to the brink of financial ruin. If the predictions are incorrect, then there is no harm in adding them to the constitution.

In early discussions regarding the JRI legislation, the criminal defense bar sought broader sentencing reform. It quickly became clear, however, that the political will for this did not exist. In making the recent changes more permanent, I believe it is highly likely that it will create a situation in which all the stakeholders are forced to come to the table for a broader conversation regarding substantive sentencing reform. I am equally mindful that it is a big risk for criminal defense attorneys to take on behalf of their clients. However, the failure to act will only ensure the continued swinging of the pendulum and the incremental erosion of the public's faith in the criminal justice system. If that erosion is left unchecked, then it will only cause more unpredictability in the system, which may end up being worse for criminal defendants.

I want to be clear that I am not advocating for sentencing reform. One of the things I enjoy the most about my job is training young prosecutors. When a young prosecutor complains to me about some shortcomings in the law, I quote Tom Skerritt's character (Viper – in *Top Gun*) and say, "We do not make the laws here, ladies and gentlemen. Elected officials do that. We are the instruments of those laws." When it comes to broader sentencing reform, I am agnostic. To have a legitimate conversation about it, however, the decision makers must have assurances that the defendant will serve the actual sentence that he receives.

With the JRI, Louisiana missed this opportunity to create a stable and transparent criminal justice policy. I encourage Gov. Landry and the legislature not to squander another opportunity and to build a more lasting criminal justice legacy than their predecessors.

FOOTNOTES

1. Edgar Allen Poe, "Pit and the Pendulum," in *The Gift: A Christmas and New Year's Present for 1843* (Carey & Hart 1842).
2. John F. Pfaff, *Locked In* 1 (2017).
3. Kevin R. Reitz, Allegra Lukac, Amy Cohen & Edward E. Rhine, *Prison-Release Discretion and Prison Population Size – State Report: Louisiana 2* (Robina Institute of Criminal Law and Criminal Justice 2023).
4. *Id.*
5. Pfaff, *supra* note 3, at 1-3.
6. *Id.* at 3.
7. Louisiana Crime Rates 1960-2019, <https://www.disastercenter.com/crime/lacrim.htm> (last visited Jan. 2, 2025).
8. *Id.*
9. *Id.*
10. *Id.*
11. Pfaff, *supra* note 3, at 4.
12. "Why is billionaire George Soros a bogeyman for the hard right?" BBC News (Sep. 6, 2019) <https://www.bbc.com/news/stories-49584157>.
13. Phillip Elliot, "The Koch Brothers Are Pushing for Criminal Justice Changes," *Time* (Jan. 29, 2018) <https://time.com/5123969/koch-brothers-criminal-justice-reform/>.
14. Pfaff, *supra* note 3, at 4.
15. Christopher S. Bowman, "For True Reform, Reduce Prisoner Recidivism" *The Advocate*, Jul. 22, 2015, at 7B.
16. *Id.*
17. Christopher S. Bowman, "Justice Reform Not Meeting Its Promises", *The Advocate*, Jul. 12, 2018, at 7B.
18. 2024 2nd Ext. Ses. La. Acts 6. *Miller v. Alabama*, 567 U.S. 460 (2012).
19. 2024 2nd Ext. Ses. La. Acts 11.
20. 2024 2nd Ext. Ses. La. Acts 7.
21. *Id.*
22. *Id.*
23. Richard A. Webster, "Everyone Will Die in Prison": How Louisiana's Plan to Lock People Up Longer Imperils Its Sickest Inmates, *ProPublica* (Mar. 28, 2024) <https://www.propublica.org/article/louisiana-plan-to-imprison-people-longer-imperils-sickest-inmates>.
24. *Id.*
25. La. Const. art. 5 § 1. La. Const. art. 5 § 26.

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