The Unconstitutionality of America's 85% Law

by Ronald Marshall

The Federal Violent Crime Control and Law Enforcement Act of 1994, as amended, provided for the Violent Offender Incarceration and Truth in Sentencing (VOI/TIS) incentive grants for states and U.S. terrorities. These grants were to be used to increase the bed space of state prisons to confine serious and violent offenders.

Congress authorized $10 billion for the VOI/TIS program from the years of 1995 to 2000, but appropriations have only been $2.7 billion. The national evaluation of VOI/TIS deemed it a big "mistake" in 2000. Although it was President Clinton who initially signed off, approving VOI/TIS program, Congress, however, prevailed in keeping the program in operation at that time.

VOI/TIS funds were designed to be equally divided between the two programs: the VOI portion of the grant only required a state assure its violent offenders serve a "substantial portion" of their sentence. (See, appendix 1, page-8).

The TIS portion of the VOI/TIS grants required a state to insure violent offenders serve at least 85 percent of their sentences. Some states report they would have passed TIS laws without the federal incentive grant. Only four states, including Louisiana, reported the grant was its "key" reason for passing (i.e. 85%) laws.

Now that the original $10 billion expected in VOI/TIS funds are no longer available, **should Louisiana return to 30 days for 30days serve for those convicted of a first time crime of violence?** Or should Louisiana maintain the current 85% law under **La.R.S.15:571.3 B(2)(a)** which states, an inmate convicted of a first time crime of violence as defined in **R.S. 14:2(B),** shall earn diminution of sentence at a rate of three days for every seventeen days in actual custody.

VOI/TIS were a delayed reaction to violent crime rates that had been increasing at alarming rates for three decades. In 1991, violent crime rates had already begun falling and the need for more prison space was not as critical as thought.

Many analysts attribute the drop in crime, not to VOI/TIS laws, but the emergence of technology in the form of camera use for crime mapping and traffic control, new techniques like community outreach programs, community policing, the expansion of police presence in high crime areas and changes in laws.

When crimes begin to fall, elected official hail tougher sentences as the cause; when the rate rises, tougher sentences are demanded to arrest it. In reality, VOI/TIS and other "tough-on- crime" legislations had less than 10 percent to do with reduced crime rates. Experts say merely extending the amount of punishment imposed adds little to any deterrent effect because most offenders don't believe they will be apprehended.

The new legislative era calls for two approaches: Increasing the prospects of apprehension through the new community policing techniques and secondly, undoing the mistakes of "tough-on-crime" legislation and returning to the rehabilitation era.

Secretary James LeBlanc of Louisiana's Department of Corrections and the whole reentry movement are undermined, as long as we have VOI/TIS laws. Instead of rehabilitation, VOI/TIS laws represent incapacitation. After 20 years of focusing on incapacitation, its failure has become evident. Secretary Leblanc, on the other hand, may be the strongest component of rehabilitation in the nation.

In Louisiana, legislators are reluctant to admit it, but many of their constituents are yearning to reduce the incarceration rate and improve public safety—simply like other states have done. VOI/TIS and other get-tough laws did not prove to deter individuals from engaging in crime.

Since Louisiana leads the Nation in incarceration with 881 per 100,000 locked-up, you would assume logically that Louisiana is the safest state in the world. The state's overall crime rate, however, remains embarrassingly high among the country.

The VOI/TIS law in Louisiana which requires those convicted of a first time crime of violence serve 85% should be abolished. Offenders currently serving 85 percent sentences, who can demonstrate their rehabilitation through meeting certain criteria, should be released after serving 50% of their sentences just as everyone else sentence under the old law.

Cash strapped Governments across the nation are looking for ways to cut costs in their prison system without compromising public safety. While all states accepted VOI grant money for tiers 1 and 2 to house violent offenders, some states opted not to accept TIS half of the grant. Truth-in-sentencing laws would bring along too big of a financial commitment.

A preliminary report was issued by the RAND Corporation in 2000. The evaluation was used by Janet Reno, Attorney General to report to Congress on the activities between July 1, 1999 and June

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2000. The report boasted that as a result of changes in sentencing and VOI/TIS, the state prison population had more than doubled since 1985.

On October 17, 2001, the RAND Corporation submitted a 233 page final report and outright condemned the VOI/TIS program in its "Concluding Observations."

"WE RAISE SOME QUESTIONS about the future of VOI/TIS. The VOI/TIS incentive has only been tested in good times, in an era of declining crime and budget surpluses. What will happen when things start to change, as they appear to be, at least in terms of the slowing of the overall economy? Perhaps more immediate, what will happen when crime goes up and TIS starts costing the states large amounts of money, especially for prisons operating cost (that cannot be paid for with VOI/TIS funds)?

The national report evaluation went even further to say:

"VOI/TIS legislation embodies a one size fit all approach to the very complicated issues of criminal sentencing....

"VOI/TIS, like many other pieces of "get tough" legislation, passed in recent year, were based on a few simple hypotheses or beliefs, and not a great deal of serious analysis. The law promotes tougher sentences for violent offenders (no matter how tough they are now), and requires that all violent offenders serve 85 percent of their sentences. Analyses on the expected returns for increasingly longer sentences were not conducted. The 85 percent criterion for funding ignores efforts by some states that have been in the spirits of VOI/TIS.... For example, in Texas, the public supports what they believe to be their states tough sentencing policies, under which inmates convicted of aggravated violent offenses must serve 50 percent of their terms...We suggest that future efforts be subject to more detailed scrutiny and analysis...before being passed...." RAND National Evaluation of the Violent Offender Incarceration/Truth-in-Sentencing incentive Grant Program, Final Report 2001.

Viewed from the lens of equal protection, consider this scenario in Louisiana: Two individuals, both with identical violent cases, housed in the same prison and both sentenced to 40 years. One was arrested and convicted in 1996 before the enactment of the 85% law and the other arrested and convicted in 1997 after the effective date of the 85% law. The one convicted in 1996 "under the old law" has to serve only 50 percent of his sentence but the other, who was convicted in 1997 or later, has to serve 85 percent.

The above scenario illustrates how the 85% law violates an offender's right to Equal Protection of the law.

In the Louisiana, the 85% Truth-in-Sentencing law became effective January 1,s1997 and requires violent offenders whose crimes occurred after the effective date to serve 85% of the imposed sentence, while similarly situated violent offenders whose crimes occurred on or before December 31st 1996 are required to serve only 50% on average, due to good time behavioral credits.

In Louisiana or any state, the Department of Correction's application of the 85% law creates a subclass within a class of violent offenders; it treats violent offenders in January 1997 window differently from other similarly situated violent offenders of the 1996 window based on the date of commission of the crime, and the different treatment bears no rational basis to a legitimate state interest.

The federal constitution mandates equal protection of the laws. **U.S. Const. Amend. XVI;** The guarantee of equal protection requires that state laws affect alike persons and interests similarly situated. (Citation omitted). In **Turner v. Safley,** the U.S. Supreme Court has identified four factors that are relevant to determine whether a regulation is reasonable:

(1) There must be a "valid rational connection" between the prison regulation and the legitimate governmental interest put forth to justify it.

While Louisiana's Department of Corrections (LDOC) undoubtedly has a legitimate interest in protecting society from violent offenders, avoiding a budgetary crisis and managing taxpayer's dollars, the 85% law is a major reason for the exorbitantly high and costly incarceration rate, a waste of taxpayer's money. Additionally, the 85% law has done nothing to reduce Louisiana's violent crime rate.

In 2012, for the second consecutive year, violent and property crime rates increased, according to the Bureau of Justice Statistics National Crime Victimization Survey. The rate of violent victimization increased from 22.6 victimizations per 1000 persons age 12 or older in 2011 to 26.1 in 2012.

A survey was conducted by the RAND Corporation. Judges were asked their opinion on the 85% Truth-in-Sentencing law. Judges were less convinced that 'get tough' approaches effectively deter violent crimes.

According to Louisiana State Representative Joe Lopinto, who introduced the Sentencing Commission's reforms to the legislature, "The bottom line is, if locking everybody up and throwing away the key works, then we should have the lowest crime rate in the United States; however, we don't." Expert based evidence and opinion convincingly

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discredit any direct relationship between longer prison sentences and crime reduction.

The LDOC has unreasonably and arbitrarily discriminated between violent offenders of 1997 and similarly situated violent offenders of 1996 through the application of the 85% Truth-in-Sentencing law. Offenders in Louisiana are serving 85% percent of the imposed sentence only because they were arrested after January 1st 1997 for a violent crime, whereas violent offenders of the same character who committed the exact same crime or a more heinous violent crime before December 31, 1996 are serving only 50% of the imposed sentence.

There is absolutely no rational basis for distinguishing between two identical inherently violent offenses with similar characteristics based solely on the date on which the offenses were committed. As the Louisiana Supreme Court has noted, it is "a tenet of our legal philosophy" that "criminal sanctions imposed for socially unacceptable conduct should be applied equally throughout the state to all citizens within the same class or set of circumstances." (Citation omitted).

(2) Whether there are alternative means of exercising the right that remains open to prison inmates?

LDOC could easily implement an alternative means to ensure that similarly situated violated offenders all benefit from equal protection of **Act 138**, which allows offenders, whose crimes occurred in 1996 to earn 50% for good time behavioral credits. Violent offenders, whose sentences are governed by **Act 138**, are released "as if on parole" after serving 50% of the imposed sentence.

The same right remains open to violent offenders currently serving 85% of the sentence imposed. The LDOC could allow all 85 percenters to earn 50% good time and then release 'as if on parole' all violent offenders, including 85 percenters, who have serve 50% of their imposed sentence under Act 138.

Before the panel, Judge Ronald Reinstein, an influential ex-prosecutor with 18 years on Arizona's Superior Court, testified he "found no magic in the state's 85-percent truth-in-sentencing law and believed that the percentage requirement could be safely reduced." **Arizona Prison Crisis, Final Report 2004.**

The reduction would resolve a number of privilege disparities created by the capricious distinction between violent offenders who are serving 50% of the imposed sentence and violent offenders serving 85%. For instance, violent offenders who are required to serve 85% are ineligible for 20/45 parole consideration until after serving 85%, despite that the offender may have already served 20 years and reached the age 45. Furthermore, 20/45 parole consideration for 85 percenters would be meaningless because after serving 85%, an offender would automatically discharge without the need for parole consideration.

On the other hand, violent offenders under the 50% law are parole eligible after serving 50% or meeting the 20/45 criteria, which ever comes first. In addition, violent offenders serving 50% of the imposed sentence are eligible much sooner than offenders serving 85% for all Departmental regulated rehabilitated programs: i.e., substance abuse, anger management, vocational training.

Thus, an alternative means of exercising the equal protection right would be to allow all 85% violent offenders to be release after serving 50% of the imposed sentence just as violent offenders sentenced under the old law, Act 138.

(3) The impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources; and

The impact accommodation of increasing good time credits to 50% for all violent offenders, including those offenders required to serve 85%, would reduce an over populated prison system in Louisiana; where security was once required to monitor 50 to 60 offenders prior to 1997, two decades later, that number has nearly tripled. One lone officer is now responsible to monitor any where from 80 to 180 offenders. Additionally, the increase of good time credits would include a decrease in offender on offender assaults and misconduct toward security and staff. Offenders would become more controllable and inclined to rehabilitative measures. Since good time credits are constrained to only 15% under the Truth-in Sentencing law, many violent offenders today are serving their sentences with an "I don't care. I don't have anything to lose," attitude.

While long-term incapacitation strategies have only achieved modest crime reductions, they have incurred huge financial costs for Louisiana's prison expansion: $321 million increase in correctional expenditures in Louisiana.

Moreover, under 85% law, the logic of incapacitation rapidly loses traction as prisoners are confined beyond their crime-prone years (between their late teens and early 30s) into the incapacities of old age – when the costs of incarceration skyrocketed due to their medical needs. Long term care (medical) could cost as much as $450.00 per day. In Louisiana, there is an estimate cost well over $80,000 a year to care for an aging ailing prisoner. At the close of 2009, a Louisiana Department of Corrections demographic profile of the state's geriatric population indicated that 14.8 percent—5,904 prisoners—qualified for that designation, age 50 years and older. More than

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17%--1,045—geriatric prisoners are sentenced to a fixed term longer than 20 years. Today, persons convicted of violent crimes topped the chart with 53.1 percent of the total geriatric population.

"The costs of caring for elderly offenders are a substantial burden on the taxpayers. The longer you keep offenders in the system, the more it costs the system," said Louisiana State Representative Patricia Smith.

"If they no longer pose a threat and can still work-we don't want them getting out and just being a further burden on the public-then, yes, it makes sense to parole them," said Senator Danny Martiny. Why not parole them after serving 50%?

In the face of budget deficits and spending limits, advocates for "justice reinvestment" argue that America's $54 billion prison system represents a wasteful sacrifice of public safety because it drains resources from other priorities – education, housing, and health care – that are vital to sustaining safe communities and healthy families.

The impact accommodation of increasing time credits to 50% for all violent offenders in Louisiana would alleviate some of the pressure placed on the state's budget due to the increase incarceration of 85% violent offenders.

(4) The absence of alternatives is evidence of the reasonableness of a prison regulation.... But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis [minimal] cost to valid penological interest, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

The LDOC has a valid penological interest in not only protecting society but maintaining a throbbing correctional budget. An alternative that fully accommodates this interest at a minimum cost would be reducing the 85% law to 50% which would significantly relax the strain on the State's correctional expenditures. As discussed above, the 85% law has done nothing to deter crime or protect society.

Yet, after the enactment of the 85% law, Louisiana's prison population has more than doubled. This whopping increase in the prison population is partially responsible for $321 million increase in correctional expenditures. With incarceration come costs. Data from the Louisiana Department of Correction show that Louisiana spends approximately 757.4 million annually on Public Safety and Correction operations.

In Louisiana, the average daily cost for a prisoner is $54.00 (per day) and $1,620 (per month) with an annual rate at $19,440. With a massive induction of prisoners' yearly, the state purportedly stands at over forty thousand prisoners split between local jails, state prisons, and private facilities. If an offender is housed in a local jail or private facility, the base daily cost increase to $63.00 ($54 + $9.00 =$63.00). So, the monthly cost balloons to $1,890 and annual cost $22,680. ($63 x 30 = 1,890/$1,890 x 12 = $22,680).

In measuring the above numbers and its factors under the scope of a single cost for one (1) prisoner to be detained for ten years serving 85% will cost $22,680 yearly- or $192,780 for 85% of the ten years. Hence, if a person sentenced under 85% law were to serve fifty percent, the state would save $11,340 for one year and $96,390 in 8.5years.

For 100 prisoners released on parole after serving 50%, Louisiana saves $1,134,000 per year, cutting the cost from $1,927,000 for 100 prisoners serving 85%. The state spends approximately $1,000 for parole supervision and earns over $700.00 in parole fees. Where as, if an offender is paroled after serving 50% of their time, they would be required to pay $60.00 per month or approximately $720.00 per year.

CONCLUSION

The LDOC cannot justify the interest between the 85% law and protecting society from violent offenders because protecting society was not the actual motivation in requiring offenders to serve 85 percent of the imposed sentence.

The motivation behind Louisiana enacting the 85% law was the Federal Violent Crime Control and Law Enforcement Act, which provided for Violent Offender Incarceration (VOI) and Truth- in-Sentencing (TIS) incentive grants for states.

The TIS portion of the VOI/TIS grants required a state to insure violent offenders serve at least 85 percent of their sentence. Some states reported they would have passed TIS laws without the federal incentive grant. Four states however, including Louisiana reported the grant was the "key" reason for passing TIS (i.e. 85%) laws. Now that federal funding is no longer available, Louisiana should return to 30 days for every 30 days under (Act 138) for all violent offenders.

Thus, under **Turner,** the LDOC cannot sustain the 85 percent classification because it bears no rational relation to a legitimate objective.

Relief Desired

Wherefore 85%ers request the following relief:

A. Issue a declaratory judgment stating that:

1. Application of the 85% law violates Plaintiffs right to Equal Protection of the law.

B. Issue an injunction ordering the Defendants:

1. To recalculate Plaintiff's good time credits under the old law in place before the enactment of the 85% law, which in Louisiana, would be *30 days*

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for 30 days earned for good behavior and self improvement under **Act 138.**

2. Award all good time behavior and educational credits accrued from the start of the sentence under the old law.

3. That the LDOC immediately implements a procedure to increase my good time credits so that I am afforded the same opportunities as those violent offenders under the old law.

4. Grant me such other relief as equity and justice may require.

Respectively submitted:

About the Author: Ronald Marshall was wrongfully convicted for armed robbery and is serving a 50 year sentence in Louisiana's Department of Corrections. He has entered his seventeenth year of incarceration; he's a self-taught legal assistant and unpublished author of several urban novels. Upon his release, he plans to publish his books and launch his own paralegal service, specializing in criminal law, post conviction relief and federal habeas corpus practice. He hopes to create a relief generating engine for deserving prisoners and eliminate the practice of duplicitous attorneys who exalt financial gain over ethical obligations owed to the legal profession. He intends to partner with a licensed attorney whose passion and commitment for criminal justice is strong and determined as his own.

If you have any concerns, questions or comments, you may contact him directly at:

Ronald Marshall #336016
Rayburn Correctional Center
27268 Hwy 21, North
Angie, Louisiana 70426

Or, you can email him at www.Jpay.com. Open an account, add Ronald Marshall; DOC number:336016; Location: Rayburn Correctional Center (RCC)