FOREWORD

SENTENCING CLIMATE CHANGE AND THE INFRASTRUCTURE OF FINALITY

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In this symposium issue of the *Wake Forest Journal of Law & Policy*, the authors all address some aspect of "finality" in the law of sentencing. These doctrines determine how sentencing choices can both *begin* just and *remain* just, while accounting for the changing circumstances of offenders, victims, and communities. In these introductory comments, I will suggest why questions of finality in sentencing law are especially acute for legal systems today because of remarkable things happening in the environment.

During this second decade of the twenty-first century, it is possible that we have entered a phase of long-term climate change in sentencing practices in the United States. Global climate change—the literal phenomenon of atmospheric science, rather than the figurative one I discuss here—is now well documented, based on data collected over many years.[1] "Sentencing climate change," on the other hand, remains much less certain. If this type of climate change does exist, it began recently; there is no doubt that human activity causes it.

I. SENTENCING CLIMATE CHANGE VERSUS SENTENCING WEATHER

Climate is not weather. That is, a few unusually hot or cold days do not establish anything about climate trends. Even the

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1. *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS (2013), *available at* http://www.climatechange2013.org/images/report/WG1AR5_ALL_FINAL.pdf (presenting scientific data, analyses, and conclusions regarding global climate change).

average temperature data from an entire year or decade can only be understood in the context of longer trends. Similarly, a few unusually short prison terms in high-visibility cases would tell us nothing about sentencing climate change. The annual sentencing statistics should be interpreted over long periods of time.

Within that cautious frame of reference, punishment trends in recent years have indeed become interesting. The rate of imprisonment in the United States—that is, the number of people living in the country divided by the number of people incarcerated in state or federal prisons—skyrocketed between 1970 and 2010. That rate went from 93 per 100,000 in 1972 to 500 in 2010.[2] Since 2010, the number of prisoners in state confinement decreased three years in a row, the first such decreases since the 1970s.[3] New admissions to prison and jail also have declined recently.[4]

Average sentence lengths started moving down in some contexts several years ago. For instance, drug sentences in the federal system have trended down since the mid-1990s.[5] But the *number of offenders* arriving in the prison system each year is probably more important than the length of sentences that those prisoners serve for those who want to explain the American incarceration rate.[6] As for the source of those extra offenders entering the prisons and jails since the 1970s, higher crime rates or arrests do not account for the increase. While multiple factors have contributed to mass incarceration, the charging and disposition choices of prosecutors in the state courts is probably

2. BUREAU OF JUSTICE STATISTICS, PRISONERS 1925–81, at 3 (1982), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/85861NCJRS.pdf; PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010, at 2 (2012), *available at* http://www.bjs.gov/content/pub/pdf/p10.pdf. These rates do not include inmates in jails or other persons under the control of correctional authorities.

3. *See* E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012—ADVANCE COUNTS 1–2 (2013), *available at* http://www.bjs.gov/Index.cfm?ty= pbdetail&iid=4737.

4. E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012, at 1 (2013), *available at* http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf.

5. Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1065 (2001); Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 483–86 (2002).

6. *See* John Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1243–44 (2012).

the most important among those causes. Prosecutors charge a greater percentage of arrestees with crimes serious enough to result in a prison or jail term, and those prosecutor decisions drive up the incarceration rate.[7]

Thus, if sentencing climate change is happening, a shift in prosecutor behavior probably contributes to it. This is subtle and decentralized activity, more a product of local prosecutorial office culture than legal constraints. Nevertheless, there are a few visible signs of broad-based changes in prosecutor priorities recently. For instance, Attorney General Eric Holder announced in August 2013 several new policies designed to de-emphasize certain drug prosecutions in federal court.[8]

In the physical sciences, experts avoid the term "global warming." They prefer instead to say, "climate change," because a rise in average temperatures does not result in higher temperatures for every place on the planet. It produces instead what opinion journalist Thomas Friedman calls "global weirding," with some hot spots and some cold spots, along with more droughts, storms, and other signs of volatility.[9]

Similarly, a potential change in the sentencing climate does not happen evenly in all places. State prosecutors sometimes conduct studies or simply assert that they already use scarce prison resources wisely, and hope to use them even more frequently in the future.[10] Reduced reliance on prison might not always lead to more offender-friendly outcomes, since fees and supervision might

7. *See* John Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program*, 13 AM. L. & ECON. REV. 491 (2011) (arguing mass incarceration has been driven primarily by changes in admission patterns).

8. *See* OFFICE OF THE ATTORNEY GEN., DEPARTMENT POLICY ON CHARGING MANDATORY MINIMUM SENTENCES AND RECIDIVIST ENHANCEMENTS IN CERTAIN DRUG CASES (Aug. 12, 2013), *available at* http://www.justice.gov/oip/docs/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-incertain-drugcases.pdf.

9. *See* Thomas Friedman, Op-Ed., *Global Weirding is Here*, N.Y. TIMES, Feb. 17, 2010, at A23.

10. *See* Mike Cason, *Alabama Prosecutors Oppose New Guidelines That Will Send Fewer Nonviolent Offenders to Prison*, AL.COM (Aug. 9, 2013, 3:50 PM), http://www.blog.al.com/wire/2013/08/crime_victims_group_vocal_oppo_1.html; Patrick McNamara, *Most State Inmates Committed Violent Offenses*, THE EXPLORER (Apr. 13, 2010, 11:00 PM), http://www.explorernews.com/news/pima_pinal/article_b410cbd5-8124-5c23-9dd1-1d257024b9e6.html.

become heavier for large numbers of defendants.[11] It may be prudent to expect some sentence weirding to happen as the climate changes.

II. CLIMATE ADAPTATION

In the context of global climate change in the literal sense, a good deal of thought goes into adaptations—ways of responding *after* average temperatures continue to climb.[12] Similarly, we need to ask about the adaptability of our sentencing laws in times of climate change.

If the law of sentencing is to be seen as legitimate and effective, it should track social attitudes about proper punishments.[13] State criminal law can claim only limited success on this score during the past few decades of exploding prison usage. Some expansions in the use of prison received public support, while other expansions happened despite a lack of public support. The gap between public opinion and sentencing practice seems to be growing lately.[14]

During those times when public priorities shift away from prison punishments, we should expect sentencing laws to give prosecutors and judges the legal tools necessary to carry out those public choices prospectively. Can legal doctrine take a step further and bring *past* sentences into line with current expectations about prison usage? Can it do so at a reasonable cost, consistent with other legal values?

11. *See* Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. (forthcoming 2014).

12. *See, e.g.*, EXEC. OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS & ADAPTATION ADVISORY COMMITTEE, MASSACHUSETTS CLIMATE CHANGE ADAPTATION REPORT (Sept. 2011), *available at* http://www.mass.gov/eea/docs/eea/energy/cca/eea-climate-adaptation-report.pdf.

13. *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 264 (2012); Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139, 143 (2001).

14. *See* MIKE HOUGH & JULIAN ROBERTS, UNDERSTANDING PUBLIC ATTITUDES TO CRIMINAL JUSTICE 68–87 (2005); JAN VAN DIJK ET AL., CRIMINAL VICTIMISATION IN INTERNATIONAL PERSPECTIVE: KEY FINDINGS FROM THE 2004–2005 ICVS AND EU ICS 150–51 (2007), *available at* http://www.unicri.it/services/library_documentation/publications/icvs/publications/ICVS2004 _05report.pdf; Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (And a Critique of the Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1017–25 (2004).

The authors in this symposium approach this question at different levels of generality. Some operate inductively, using a particular decision point to shed light on general trends. Others use a deductive method, starting with general principles before tracing the implications of those principles into specific doctrines and practices.

Frank Bowman pursues an inductive strategy by examining one procedural device: discretionary release mechanisms like parole. From that starting point, he addresses the connection between finality doctrines and overall levels of prison usage in the United States.[15] Bowman notes that a discretionary back-end release method such as parole could address the overall size of the prisons, or it could have more modest goals such as reducing sentences for categories of offenders or for individual offenders who present unusual changes in circumstance. Bowman endorses the use of discretionary back-end release to serve the most ambitious systemic goals, but only for relatively long sentences. Given the importance of frequent prosecutor choices to ask for shorter and medium-term prison sentences as a source of growth in the system, Bowman's strategy would take years to reduce the footprint of prisons. It took us decades to put ourselves in this situation, and it could take decades to back away.

Lea Johnston also uses a single procedural device—a proposed Model Penal Code ("MPC") release mechanism—as her starting point to think about sentence finality.[16] One MPC provision authorizes a judge to release offenders at any time on the basis of "compelling circumstances" consistent with the purposes of sentencing. While Johnston approves of the provision as far as it goes, she notes that its linkage to traditional "compassionate release" provisions under state law would limit its application to seriously ill or elderly prisoners. It would likely not be available for prisoners with mental illness, those who demonstrate their rehabilitation, or those serving punishments that society now considers to be disproportionate to their crimes. A mechanism better scaled to the massive needs of the current environment, she argues, would instead resemble the statutes that

15. *See* Frank O. Bowman, III, *Freeing Morgan Freeman: Expanding Back-End Release Authority in American Prisons*, 4 WAKE FOREST J.L. & POL'Y 9 (2014).

16. *See* E. Lea Johnston, *Smoke and Mirrors: Model Penal Code § 305.7 and Compassionate Release*, 4 WAKE FOREST J.L. & POL'Y 49 (2014).

allow judicial "reconsideration" of sentences, based on a wider range of reasons.

Lucian Dervan measures the costs of finality doctrine through an explicitly inductive method; instead of starting with a particular decision point, he concentrates on a single category of crime.[17] Using five case studies from the white-collar crime context, Dervan notes how finality competes with accuracy, particularly in a system (federal court) that relies so heavily on negotiated guilty pleas and extreme trial penalties to obtain these final results. Dervan also raises the unsettling possibility that prosecutors who put a high value on finality in the white-collar context could be more prone to misconduct. If the public becomes more aware of prosecutorial misconduct over time, a weaker commitment to sentencing finality might result.

Other authors in this symposium do not begin their analysis with concrete finality mechanisms; instead, they work deductively, more in the tradition of European legal scholars. After analyzing a legal principle related to sentencing finality, they explore the logical consequences of that concept for particular sentencing doctrines.

For example, Meghan Ryan begins with a conceptual distinction between finality of the sentencing *outcome* and finality of the sentenced *offender*.[18] The latter concept, she argues, is a better expression of the historic understanding of rehabilitation. Where growth in the offender's character is possible, reconsideration of the sentence could make sense. Such recalibrated sentences would not be based on present-day arrogance about our greater ability to make accurate findings of historic fact, or on any delusions about our present-day immunity to the fear and vengeance of earlier eras. They would be based instead on judgments about the character of offenders.

In a climate shifting away from prison, however, one might ask whether the power to judge individual character is possible on a large scale. In a system of mass justice, Ryan's character-based concept of finality might operate better as a presumption, a

17. *See* Lucian E. Dervan, *The Quest for Finality: Five Stories of White-Collar Criminal Prosecution*, 4 WAKE FOREST J.L. & POL'Y 91 (2014).

18. *See* Meghan J. Ryan, *Finality and Rehabilitation*, 4 WAKE FOREST J.L. & POL'Y 121 (2014).

categorical judgment based on an axiom of human worth rather than a prediction of individual behavior.

Doug Berman offers another example of the deductive method at work.[19] He traces the history of the sentencing finality concept, noting that it was not highly relevant before the advent of penitentiaries, and not highly valued during the era when parole and rehabilitation dominated sentencing. It became important only during the last few decades of astonishing prison growth. Berman then develops the differences between finality of *convictions* and finality of *sentences*. Because sentencing involves a more complex predictive judgment, he argues, finality is less compelling in that context. Without drilling down to particular procedural devices, Berman argues that legislatures, commissions, and judges should strike a new balance that places less weight on finality in various sentencing contexts.

Ryan Scott argues against the Berman position, but he pursues an inductive strategy by concentrating on one procedural device: the retroactive application of new sentencing law in federal habeas corpus proceedings.[20] Scott points to the high costs of re-litigation of sentencing issues, because there are so many more sentencing hearings than trials. Further, sentencing decisions rest on some factual findings about discrete historic events, just like a conviction. In short, according to Scott, the traditional case for finality remains essentially unchanged in the sentencing context; as a result, he does not endorse a two-tiered system of finality, with one set of rules for conviction and another set for sentencing.

Scott also disfavors specialized sentencing finality rules for particular cases or issues where reconsideration of the sentence would involve the lowest costs, because of the uncertainty involved in identifying those special low-cost areas. It might be possible, in his view, to thread the needle by creating specialized finality rules for a few large categories of sentencing issues. He also leaves the door cracked open for other judicial devices, such as motions for reconsideration of sentences, so long as they are limited to their historic function of responding to new information about a particular offender. But the only device that receives Scott's

19. *See* Douglas A. Berman, *Balancing Fitness, Fairness, and Finality in Sentencing*, 4 WAKE FOREST J.L. & POL'Y 151 (2014).

20. *See* Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL'Y 179 (2014).

unreserved approval is new legislation that instructs a judge how to apply new legal rules to old cases. He leaves one institution, the legislature, with the power to remedy a situation that many institutions—including police, prosecutors, and judges—created over the decades.

If sentencing climate change has truly arrived, every legal actor will get involved in climate adaptation. Legislators cannot be the only innovators. Both the inductive and deductive methods have something to contribute in adapting old finality doctrines to current social needs, because the necessary changes will rearrange both the conceptual infrastructure and the procedural devices that produced regrettable results for the last four decades. Legal adaptation to new sentencing needs will take forms that we cannot predict, but in this symposium we look ahead as best we can.